



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

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1945
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JUDGES OF THE HIGH COURT

1945

1ST JANUARY TO 31ST DECEMBER

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The Hon'ble Mr. Justice J. A. BYERS, I.C.S., Barrister-at-Law (*on leave from 8th to 12th October*).

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- The Hon'ble Mr. Justice P. V. RAJAMANNAR, B.A., B.L.
(from 25th July).
- The Hon'ble Mr. Justice M. SHAHABUDDIN, I.C.S. (from
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1945

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THE INDIAN LAW REPORTS (MADRAS SERIES)

PRIVY COUNCIL.

THE MADRAS AND SOUTHERN MAHRATTA
RAILWAY Co., LTD., APPELLANTS,

*J.C.
1944,
March 30.

THE BEZWADA MUNICIPALITY, RESPONDENTS.

[APPEALS FROM THE HIGH COURT OF JUDICATURE
AT MADRAS.]

Madras District Municipalities Act (Act V of 1920 as amended by Madras Act X of 1930 and Madras Act XV of 1933), ss. 78, 80, 81, 82 and 84—Sch. IV, rr. 6 and 8, Indian Railways Act (IX of 1890) sec. 135—Vacant lands belonging to railway company within municipal limits—Levy of property tax—Ascertainment of annual value by adopting a percentage of capital value—Statutes, interpretation of—Proviso, function and legal effect of.

Section 82 (2) of the Madras District Municipalities Act applies generally to buildings or to lands, or to lands and buildings, and its generality is not affected by the proviso to the section. It applies equally to vacant lands.

The proviso to section 82 does not say that the method of arriving at the annual value by taking a percentage of capital value is to be utilized *only* in the case of the classes of buildings to which the proviso applies. It leaves the generality of the substantive enactment in the sub-section unqualified except in so far as concerns the particular subjects to which the proviso relates. The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. Where, as in the present case, the language of the main enactment is clear and unambiguous,

* Present: Lord MACMILLAN, Lord CLAUSON and Sir GEORGE RANKIN.

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a proviso can have no repercussion on the interpretation of the main enactment so as to exclude from it by implication what clearly falls within its express terms.

The proviso to section 82 does not impliedly prohibit resort to capital value as a means of ascertaining annual value in cases not covered by it.

CONSOLIDATED APPEALS (Nos. 7 and 8 of 1943) from two decrees of the High Court in its appellate jurisdiction (29th January 1941) which confirmed the decree of the Subordinate Judge of Bezwada (31st March 1937). The judgment of the High Court is reported in I.L.R. [1941] Mad. 897.

The appeals were in respect of the legality of levies of property tax under the Madras District Municipalities Act (Madras Act V of 1920 as amended by the Acts of 1930 and 1933). In both suits the appellant railway company challenged the validity of the tax levied, chiefly on the ground that in making the assessment the provisions of section 82 (2) of the Madras District Municipalities Act were applied, but that these provisions apply to certain classes of buildings only.

J. Millard Tucker K. C. and R. K. Handoo for appellants.—On the true construction of sections 81 and 82 of the Madras District Municipalities Act of 1920, as amended, the only basis of ascertaining the annual value of the said lands for purposes of assessment to property tax is the "rental basis," i.e., by taking such annual value as the gross annual rent at which such lands might reasonably be expected to let from month to month or from year to year and not by the capital value method adopted by the respondent. The sections, as amended, impliedly forbid the adoption of the "contractor's" or percentage of capital value basis in respect of vacant lands, except in the case of lands of the class described in section 81 (3) of the Act. It is a condition precedent to a municipality's right to assess the value of any lands under section 81 (3) of the Act, that the Provincial Government shall have prescribed the manner in which capital value of the lands in question shall be determined; and in the present cases no such manner has been so prescribed. If, contrary to the appellant's contentions, the lands in question could be valued

on the percentage of capital value basis instead of the rental basis, this could only be done on proof that, in the circumstances of the case, it was impossible to apply the rental basis. The onus of proof in such a case is on the municipality, and such onus has not been discharged by the respondent in the present cases. There was evidence showing that it was possible for the respondent to fix the annual value of the said lands by ascertaining the rents paid for similar lands in the vicinity and there was, therefore, no justification for the respondent to resort to the percentage on capital value basis.

Craig Henderson K.C. and S. P. Khambatta for respondent.

The JUDGMENT of their Lordships was delivered by Lord MACMILLAN.—The appellants, the Madras and Southern Mahratta Railway Company, Limited, own certain vacant lands within the municipality of Bezwada. These lands are admittedly subject to the property tax which the respondents, the Bezwada Municipality, are empowered to levy. The question for decision in these consolidated appeals is whether the respondents acted within their statutory powers in ascertaining the annual value of the lands for the purpose of imposing the tax.

The method which the respondents adopted in order to arrive at the annual value of the lands was first to ascertain their capital value, which they did by reckoning them at so much per square yard, and they then took 6 per cent of the capital value as representing the annual value. On the annual value so calculated they imposed property tax at the rate of 16½ per cent per annum. The appellants under protest paid the assessments made upon them in each of the four financial years ending on 31st March in 1932, 1933, 1934 and 1935. They now seek to have these payments refunded as having been illegally exacted. In this they have been unsuccessful in both the Courts in India.

Many points were raised and many topics were discussed in the course of the proceedings in India, but before their Lordships the appellants both in

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their printed case and in their arguments at the bar concentrated upon one main ground of attack, namely, that on a sound construction of the respondents' statutory powers the method adopted by the respondent of fixing the annual value of the lands in question was not permissible. If they failed to make good this point the appellants did not contend that they could otherwise succeed.

The taxing powers of the respondents are conferred upon them by the Madras District Municipalities Act, 1920, as amended by subsequent legislation. Their Lordships take the Act as it stood at the relevant period. By section 78 every municipal council is empowered to levy *inter alia* a property tax and any resolution of a municipal council determining to levy a tax is required to specify the rate at which and the date from which it shall be levied.

Sections 81 and 82 deal with the levying and assessment of property tax and the argument turned upon the interpretation of these sections. So far as material to the present question they read as follows:—

Section 81.—(1) If the council by a resolution determines that a property tax shall be levied, such tax shall be levied on all buildings and lands within municipal limits save those exempted by or under this Act or any other law. The property tax may comprise—

- (a) a tax for general purposes;
- (b) a water and drainage tax.

(2) Save as otherwise provided in this Act, these taxes shall be levied at such percentages of the annual value of lands or buildings or both as may be fixed by the municipal council, subject to the provisions of section 78.

(3) The municipal council may, in the case of lands which are not used exclusively for agricultural purposes and are not occupied by, or adjacent and appurtenant to, buildings, levy these taxes at such percentages of the capital value of such lands or at such rates with reference to the extent of such lands, as it may fix:

Provided that such percentages or rates shall not exceed the maxima, if any, fixed by the Local Government and

that the capital value of such lands shall be determined in such manner as may be prescribed.

(4) (a) The municipal council may, in the case of lands used exclusively for agricultural purposes, levy these taxes at such proportions as it may fix of the annual value of such lands as calculated in accordance with the provisions of section 79 of the Madras Local Boards Act, 1920.

Section 82.—(1) Every building shall be assessed together with its site and other adjacent premises occupied as an appurtenance thereto unless the owner of the building is a different person from the owner of such site or premises.

(2) The annual value of lands and buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year less a deduction, in the case of buildings only, of ten per centum of such annual rent and the said deduction shall be in lieu of all allowance for repairs or on any other account whatever:

Provided that—

(a) in the case of—

- (i) any Government or Railway building, or
- (ii) any building of a class not ordinarily let the gross annual rent of which cannot, in the opinion of the executive authority, be estimated,

the annual value of the premises shall be deemed to be six per cent of the total of the estimated value of the land and the estimated present cost of erecting the building after deducting for depreciation a reasonable amount which shall in no case be less than ten per centum of such cost."

By a resolution, dated 29th January 1932, the respondents resolved to levy property tax within their municipality at certain specified rates. The terms of this resolution give rise to some questions but the assessment on the appellants was not challenged by them before their Lordships on the ground that there had been no effective resolution to levy property tax.

It will be observed that under section 81 (2) the property tax, save as otherwise provided in the Act, is to be levied at a percentage of "the annual value of

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lands or buildings or both." Sub-section 3 otherwise provides inasmuch as it permits, but does not enjoin, the levying of the tax "in the case of lands which are not used exclusively for agricultural purposes and are not occupied by or adjacent and appurtenant to buildings" either at a percentage of the capital value of such lands or at such rates with reference to the extent of such lands as the municipal council may fix, subject to compliance with the proviso to the sub-section. If either of the alternative methods permitted by sub-section 3 is adopted the assessment is not on annual value. Appropriate as this sub-section was to the case of the appellants' lands the respondents did not in fact avail themselves of it in making the assessment complained of. In particular, they did not levy the tax at a percentage of the capital value of the appellant's lands; they levied it at a percentage on their annual value.

Section 82 (2) prescribes how the annual value of lands and buildings is to be ascertained. It is to be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year, less 10 per cent in the case of buildings. The spectre of the hypothetical tenant, so familiar an apparition in English rating law, is here invoked. The appellants did not dispute that, if this sub-section had not had a proviso appended to it, it would have been open to the respondents to resort to any of the recognized methods of arriving at the rent which a hypothetical tenant might reasonably be expected to pay for the lands in question, including the method of taking a percentage of their capital value. But the proviso, they say, makes all the difference. It expressly enjoins resort to this last-mentioned method of arriving at annual value in the case of two specified classes of buildings. Therefore, they say, resort to this method is by necessary implication prohibited in every other case, and in

particular in the case of their lands. The respondents contest this reading and maintain that the proviso does not impliedly prohibit resort to capital value as a means of getting at annual value in every case not covered by the proviso, and that the chief purpose of the proviso is to be found in the limitation to 6 per cent which it contains.

Their Lordships cannot accept the appellants' argument which in their opinion involves a misinterpretation of the effect of the proviso. The proviso does not say that the method of arriving at annual value by taking a percentage of capital value is to be utilized *only* in the case of the classes of buildings to which the proviso applies. It leaves the generality of the substantive enactment in the sub-section unqualified except in so far as concerns the particular subjects to which the proviso relates. The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. Where, as in the present case, the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms.

It follows that in their Lordships' opinion the respondents were not precluded from adopting a percentage of the capital value of the appellants' lands as a method of ascertaining their annual value for the purpose of the imposition of property tax merely by reason of the fact that this method is specifically enjoined in the particular instances mentioned in the proviso and that their lands are not included in these instances.

This is sufficient for the disposal of the case as presented before their Lordships. Before taking leave of it, however, they think it right to advert to certain matters which were incidentally brought to their notice. The resolution already referred to by which the

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respondents resolved to levy property tax consists of two paragraphs. The first imposes property tax in general under section 81 at a percentage of annual value for each component of the tax; the second imposes what it calls "land tax," presumably a species of property tax (i) on agricultural lands at 6 per cent per half year and (ii) "on other lands which fall under the category specified in section 81 (3) at $\frac{1}{2}$ per cent of the capital value per half year." From this it would appear that the respondents were originally minded to exercise the option conferred upon them by section 81 (3) and to assess lands such as those of the appellants not on annual value but on capital value. The Local Self-Government Department, however, took exception to this part of the resolution on the ground that the proviso to section 81 (3) required capital value to be "determined in such manner as may be prescribed"; that "prescribed" by section 3 (19) meant "prescribed by the Local Government by rules made under this Act"; that no such rules had been made; and that consequently the portion of the resolution in question was unwarranted and could not receive effect. Before their Lordships the appellants supported this view. The respondents on the other hand maintained that if no rules were made they were nevertheless entitled to avail themselves of the capital method of valuation under section 81 (3) unfettered as to the manner in which they might determine capital value. In this they have the support of the judgment of the High Court. It seems that rules have now been made but railway lands are expressly excluded from their operation.

The respondents do not appear to have rescinded the part of their resolution alleged by the Department to be incompetent or to have passed any amending resolution. So far as the appellants' lands are concerned they seem simply to have ignored it, and to have invoked instead section 82 (2). They

submitted an argument to the effect that the resolution did no more than fix the rates of the tax to be levied but did not commit the respondents to assessing any particular class of subjects in any particular way. The appellants not unnaturally do not seem to have objected to a departure from the capital value method under section 81 (3) for 1 per cent per annum on capital value is more than $16\frac{1}{2}$ per cent on annual value calculated at 6 per cent on capital value.

It is manifest that these topics are eminently debatable. As, however, the respondents did not in point of fact proceed under section 81 (3); as the appellants, so far from saying that they should have done so, maintained that the respondents could not lawfully have done so; and as the controversy before their Lordships was confined to the mode of ascertaining annual value under section 82 (2), their Lordships while mentioning those other topics do not feel called upon to make any pronouncement upon them and confine themselves to the matter which alone was directly raised before them and on which they have already expressed an opinion adverse to the appellants. There having been in their Lordships' view compliance in substance and effect with the provisions of the Act, within the meaning of section 354 (2), the appellants cannot recover the assessments which they have paid.

Their Lordships will accordingly humbly advise His Majesty that the consolidated appeals be dismissed. The appellants will pay the respondents' costs of the appeals.

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

Solicitor for respondents : *Harold Shephard.*

T.F.R.M.

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APPELLATE CIVIL—FULL BENCH.

*Before Sir Lionel Leach, Chief Justice, Mr. Justice
Lakshmana Rao and Mr. Justice Shahabuddin.*

1944,
March 13.

S. A. RM. A. VANDARGUZHAI ACHI AND THREE
OTHERS (RESPONDENTS 1, 5, 6 AND 7), APPELLANTS,

v.

THE SOUTH INDIA CORPORATION (MADRAS), LTD.,
AND FIVE OTHERS (PETITIONER AND RESPONDENTS 2 TO 4,
8 AND 9), RESPONDENTS. *

*Provincial Insolvency Act (V of 1920), ss. 4, 5 and 56—
Power of Court to order delivery of possession—Adjudica-
tion by Rangoon High Court of members of joint Hindu
family trading firm under Presidency-towns Insolvency
Act (III of 1909) prior to separation of Burma from India—
Official Receiver of Ramnad (Madras Presidency) acting
in aid of Official Assignee of Rangoon under order of
District Judge of Ramnad in pursuance of letter of request
of Rangoon High Court under sec. 126 of the Presidency-
towns Insolvency Act (III of 1909) and sec. 77 of the
Provincial Insolvency Act (V of 1920)—Official Receiver
taking possession of house belonging to joint family in
Ramnad District and letting it to insolvents' wives subject
to undertaking by them to deliver possession when called
upon to do so—Children of insolvents living in the house—
Official Receiver selling house free of all encumbrances, after
separation of Burma from India—Purchaser of house
applying for possession under ss. 4, 5 and 56 of Provincial
Insolvency Act (V of 1920)—Effect of separation of Burma
from India.*

A joint family composed of certain Nattukottai Chettians carried on a money-lending business in Burma. On 1st April 1933 the adult members of the family were adjudicated insolvents by the Rangoon High Court. On 31st August 1933 that Court acting under the provisions of section 126 of the Presidency-towns Insolvency Act and section 77 of the Provincial Insolvency Act sent a letter to the District Court of Ramnad requesting it to direct the Official Receiver of that place to render aid to the Official Assignee of Rangoon. Burma was then part of British India and remained part of British

India until 1st April 1937 when the Government of India Act, 1935, came into force. On receipt of that letter of request, the District Judge of Ramnad directed the Official Receiver to render assistance to the Official Assignee of Rangoon as required by section 77 of the Provincial Insolvency Act. Acting under this order the Official Receiver took possession of a house, among other properties, in Ramnad District which admittedly belonged to the family. On 19th September 1933 the Official Assignee had let the house to the wives of the insolvents on a monthly tenancy subject to an undertaking given by them to deliver up the property whenever called upon to do so. The wives of two of the insolvents had issue and the children also lived in the house, and some of them were minors. On 16th December 1938 the Official Assignee of Rangoon sold the house free of all encumbrances. On 5th November 1941 the purchaser applied to the District Court of Ramnad under sections 4, 5 and 56 of the Provincial Insolvency Act for an order directing the wives and children of the insolvents to deliver up possession of the house. The District Judge left open the question whether the sale was binding on the minors to be decided in separate proceedings if the claim was persisted in, and ordered delivery of possession to the purchaser. The appeal arose out of that order.

Held by the Full Bench : As the Presidency-towns Insolvency Act was in force when the order of adjudication was passed, the insolvents' power to sell their son's interests for the satisfaction of their debts devolved on the Official Assignee. Therefore the Official Assignee had the power of conveying a full title to the purchaser of the property, subject to any contention on behalf of the minors that the debts of their fathers had been contracted for illegal or immoral purposes, which however had not been suggested in the case. The Official Assignee had conveyed to the purchaser "all estate, right, title, interest, claim and demand of the joint family firm and the mortgagees".

Under sections 4, 5 and 56 of the Provincial Insolvency Act the District Court had power to order the delivery of possession of the house to the purchaser and the separation of Burma in 1937 did not make any difference.

Ramaswami Chettiar v. Ramaswami Iyengar(1) and *Singaravelu Mudaliar v. Swaminatha Pillai*(2) followed.

Venkatram v. Chokkier(3) overruled.

Venugopala Reddiar v. Krishnaswami Reddiar(4) followed.

(1) (1921) I.L.R. 45 Mad. 434.

(2) 1933 M.W.N. 1487.

(3) (1927) I.L.R. 51 Mad. 567.

(4) (1943) 2 M.L.J. 57 (F.C.).

* Appeal Against Order No. 451 of 1942.

VANDARGUZHAI
ACHI
v.
SOUTH INDIA
CORPORATION.

APPEAL against the order of the District Court of Ramnad at Madura, dated 28th March 1942, and made in Interlocutory Application No. 191 of 1941 in Insolvency Petition No. 86 of 1933 on the file of the High Court of Judicature at Rangoon.

The Appeal against Order first came on for hearing before MOCKETT and BELL JJ., and MOCKETT J. on behalf of the Court made the following

ORDER OF REFERENCE TO A FULL BENCH :—

The facts in this Civil Miscellaneous Appeal are as follows.

On 1st April 1933 three brothers, Annamalai, Muthia alias Ramasami, and Chandramouli Chettiar, who were partners in a joint and undivided Nattukottai Chettiar family firm carrying on business in Burma, were adjudicated insolvents by the High Court of Rangoon. On 28th August 1933 a letter of request was issued by the High Court of Rangoon to direct the Official Receiver, Ramnad, to obtain possession of the insolvents' assets. One of the assets is a house with which we are now concerned. On 25th September 1933 the Official Receiver proceeded to the house and found it occupied by Annamalai and Ramasami Chettiar. On 1st April 1937 the Government of India Act of 1935 came into force and Burma ceased to be part of British India. On 16th December 1938, after litigation in the Rangoon High Court, the Official Assignee of Rangoon sold the house to the present respondent, the South India Corporation. The deed of sale contained a covenant that the purchaser "can from the date of the purchase have possession of and enjoy the said property". On endeavouring to take possession of the house for which consideration had been paid to the Official Assignee, the corporation found the house occupied by the appellants, who are the wife and the minor sons of Annamalai. Interlocutory Application No. 191 of 1941 was filed by the South India Corporation seeking for an order of delivery of possession and possession has been ordered. The Official Receiver of Ramnad was made a party.

Apart from questions of fact, e.g., with regard to the tenancy, it has become apparent that the following points of law arise. The appellants rely on a decision of RAMESAM and JACKSON JJ. in *Venkatram v. Chokkier*(1) which lays down that when a family property including the son's shares has been sold to a third party by the Official Receiver it cannot

(1) (1927) I.L.R. 51 Mad. 567.

be recovered, in case of obstruction, by the purchaser by means of the machinery of the Provincial Insolvency Act but that the purchaser's remedy is by means of a suit. That decision appears to us to be in direct conflict with a decision of another Bench of this High Court (AYLING and VENKATASUBBA RAO JJ.) in *Ramaswami Chettiar v. Ramaswami Iyengar*(1). The head-note to that case is as follows :—

"Under sections 4, 5 and 56 of the Provincial Insolvency Act (V of 1920) a Court of Insolvency can inquire into disputed title and order delivery of an insolvent's property to a purchaser thereof from the Official Receiver, removing the obstruction of a third party".

In that case the third party concerned was the insolvent's son. This case was approved by BEASLEY C.J. in *Singaravelu Mudaliar v. Swaminatha Pillai*(2). It is desirable therefore that the difference between the two Benches to which we have referred should be settled by a decision of a Full Bench.

There is a further matter which makes the decision of a Full Bench desirable. It has been argued by the appellant that owing to the effect of the Government of India Act, 1935, the letter of request dated 28th August 1933 which related to a sale of property on 16th December 1938 and proceedings subsequent thereto, ceased to operate on April 1, 1937. This point is not directly covered by the decision of the Federal Court reported as *Venugopala Reddiar v. Krishnaswami Reddiar*(3), on appeal from the decision of a Bench of this High Court (MOCKETT and KUNHI RAMAN JJ.) reported as *Krishnaswami v. Venugopala*(4). We accordingly refer the whole case to a Full Bench for decision.

The Appeal against Order then came on for final hearing before the Full Bench constituted as above in pursuance of the Order of Reference to a Full Bench.

ON THE REFERENCE :

B. Sitarama Rao and G. N. Chari for appellants.—The insolvents were adjudicated by the High Court of Rangoon under the Presidency-towns Insolvency Act and the Official Receiver of Ramnad was functioning under the Provincial

(1) (1921) I.L.R. 45 Mad. 434.
(3) (1943) 2 M.L.J. 57 (F.C.).

(2) 1933 M.W.N. 1487.
(4) I.L.R. [1942] Mad. 376.

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Insolvency Act under orders of the District Judge of Ramnad in pursuance of a letter of request to him from the High Court of Rangoon. The provisions in the Provincial Insolvency Act relevant to the subject-matter are sections 4, 5, 46 and 77 and the corresponding provisions of the Presidency-towns Insolvency Act are sections 7, 90, 58 and 126. The properties of the insolvents vested in the Official Assignee of Rangoon under the Presidency-towns Insolvency Act. The Official Assignee had full rights in respect of one-third of the properties and in respect of two-thirds belonging to minor coparceners the right of their fathers to bring them to sale for certain kinds of debts vested in the Official Assignee. He had no right to sell the whole of any property as such. In effect his sale will have effect only with respect to one-third share of any property. As regards the remaining two-thirds his sale will be tantamount to a sale of his power of sale. Further, the subject-matter of the litigation was a residential house in Karaikudi in the Ramnad district. The other coparceners had a right to reside in the house in their own right. If the senior male members of the family had sold the house, they had no power to put the purchaser in possession in the teeth of the opposition on behalf of the minor coparceners without the purchaser filing a suit against them for possession. The Official Assignee who stepped into the shoes of the senior male members had no such right, much less the Official Receiver of Ramnad. The decision in *Venkatram v. Chokkier*(1) is correct and *Ramaswami Chettiar v. Ramaswami Iyengar*(2) and *Singaravelu Mudaliar v. Swaminatha Pillai*(3) require reconsideration. In *Singaravelu Mudaliar v. Swaminatha Pillai*(3) which merely follows *Ramaswami Chettiar v. Ramaswami Iyengar*(2) the Court was not concerned with the right of minor son of the insolvent. It merely dealt with the power to give possession to the purchaser in an ordinary case. Further the letter of request was prior to the separation of Burma from India on 1st April 1937. After that date the letter of request had no force. The possession of the house by the Official Receiver of Ramnad under such a letter of request cannot confer any right on the purchaser to start proceedings

(1) (1927) I.L.R. 51 Mad. 567.

(2) (1921) I.L.R. 45 Mad. 434.

(3) 1933 M.W.N. 1487.

under the Provincial Insolvency Act after 1st April 1937; see *Krishnaswami v. Venugopala*(1) and the judgment of the Federal Court on appeal in *Venugopala Reddiar v. Krishnaswami Reddiar*(2). *K. K. KM. Chettyar v. Sellami Achi*(3) which is referred to with approval by the Federal Court in *Venugopala Reddiar v. Krishnaswami Reddiar*(2) holds that an execution petition to execute the decree of an Indian Court cannot be filed in Burma after 1st April 1937 even though the decree had been transferred to Burma for execution before that date.

Advocate-General (Sir A. Krishnaswami Ayyar) with *K. Umamaheswaram* and *A. Kuppuswami* for first respondent was not called upon to reply.

Other respondents were not represented.

The OPINION of the Full Bench was delivered by LEACH C.J.—The first appellant is the wife of one Annamalai Chettiar. The second, third and the fourth appellants are their sons. Annamalai was joint with his brothers Muthiah alias Ramaswami and Chandramouli. They are Nattukottai Chettiars and as a joint family carried on a money lending business in Burma. On 1st April 1933 the adult members of the family were adjudicated insolvents by the Rangoon High Court. On 31st August 1933 that Court, acting under the provisions of section 126 of the Presidency-towns Insolvency Act and section 77 of the Provincial Insolvency Act, sent a letter to the District Court of Ramnad requesting it to direct the Official Receiver of that place to render aid to the Official Assignee of Rangoon. Burma was then a part of British India and remained a part of British India until 1st April 1937 when the Government of India Act, 1935, came into force. On receipt of the letter of request the District Judge directed the Official Receiver to render assistance to the Official Assignee of Rangoon as required by section 77 of the Provincial Insolvency Act. Acting under this order the Official Receiver took possession of the property

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(1) I.L.R. [1942] Mad. 376.

(2) (1943) 2 M.L.J. 57 (F.C.).

(3) I.L.R. [1938] Rang. 355.

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which is the subject-matter of this appeal. The property consists of a house at Kanadukathan. Admittedly it belonged to the family. On 16th December 1938 the Official Assignee of Rangoon sold the house to the first respondent for the sum of Rupees 42,500. The sale was free of a mortgage which had been created by the insolvents before their adjudication. On 19th September 1933 the Official Assignee had let the house to the wives of the insolvents on a monthly tenancy, subject to an undertaking given by them to deliver up the property whenever called upon to do so. The wives of two of the insolvents had issue and the children also lived in this house. Annamalai had four sons, three of whom were minors, and Chandramouli, one son who was also a minor.

On 5th November 1941 the first respondent as the purchaser applied to the District Court of Ramnad for an order requiring the wives, the four sons of Annamalai and the son of Chandramouli, to deliver up possession of the property. When the purchaser came to take possession the tenants obstructed him and alleged that the sale was not binding on the minors. The application for an order for possession was made under sections 4, 5 and 56 of the Provincial Insolvency Act. Relying on the decision of this Court in *Ramaswami Chettiar v. Ramaswami Iyengar*(1) the District Judge held that the Court had power to make the order. He rejected a suggestion that the application did not lie by reason of the separation of Burma from British India. The question whether the sale was binding on the minors was left to be decided in separate proceedings should this claim be persisted in. Consequently, the District Judge ordered the respondents to the application to deliver possession to the purchaser. The appeal is from that order. In the first instance the appeal came before MOCKETT and

(1) (1921) I.L.R. 45 Mad. 434.

BELL J.J., who referred it to a Full Bench as *Ramaswami Chettiar v. Ramaswami Iyengar*(1) was decided by a Division Bench and is in conflict with *Venkatram v. Chokkier*(2) which was also decided by a Division Bench.

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As the Presidency-towns Insolvency Act was in force in Rangoon when the order of adjudication was passed, the insolvents' power to sell their sons' interests for the satisfaction of their debts devolved on the Official Assignee; *Sat Narain v. Behari Lal*(3) and *Sat Narain v. Sri Kishen Das*; *Same v. Bank of Upper India*(4). Therefore the Official Assignee had the power of conveying a full title to the purchaser of the property, subject to any contention on behalf of the minors that the debts of the fathers had been contracted for immoral or illegal purposes, which has never been suggested. The Official Assignee of Rangoon conveyed to the first respondent "all estate, right, title, interest, claim and demand of the said S. A. R. M. Chettiyar firm and the mortgagees". The family traded under the vilasam of S. A. R. M. The Official Assignee was not quite accurate in describing the property as the property of the firm. It was family property, but this error is not of importance because the Official Assignee must be deemed in law to have conveyed to the purchaser his full interest in the property and his interest was that of the fathers and the sons.

We will turn now to the question whether the District Court had power to order the delivery of the possession of the property to the respondent. Section 77 of the Provincial Insolvency Act states that all Courts having jurisdiction in insolvency and the officers of these Courts shall severally act in aid of and be auxiliary to each other in all matters of insolvency,

(1) (1921) I.L.R. 45 Mad. 434. (2) (1927) I.L.R. 51 Mad. 567.
(3) (1924) I.L.R. 6 Lah. 1 (P.C.). (4) (1936) I.L.R. 17 Lah. 644 (P.C.).

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and an order of a Court seeking aid with a request to another Court shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by the order, such jurisdiction as either of the Courts could exercise in regard to similar matters within their respective jurisdictions. The corresponding section in the Presidency-towns Insolvency Act is section 126. As a letter of request had been sent by the Rangoon High Court to the District Court of Ramnad, that Court was able to take all steps which were necessary for the administration of the estate there. Sub-section 1 of section 4 of the Provincial Insolvency Act gives the Court, subject to the provisions of the Act, full power to decide all questions whether of title or priority, or of any nature whatsoever, and whether involving matters of law or of fact, which may arise in a case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in a case of insolvency. Section 5 gives the insolvency Court the same powers as it has in the exercise of original civil jurisdiction and directs that it shall follow the same procedure. Sub-section 1 of section 56 states that the Court may, at the time of the order of adjudication, or at any time afterwards, appoint a receiver for the property of the insolvent, and the property shall thereupon vest in the receiver. Sub-section 3 says that, where the Court appoints a receiver, it may remove a person from the possession or custody of property belonging to the insolvent, provided that the insolvent himself has a present right to do so.

In *Ramaswami Chettiar v. Ramaswami Iyengar*(1) AYLING and VENKATASUBBA RAO JJ. held that sections 4, 5 and 56 of the Provincial Insolvency Act

(1) (1921) I.L.R. 45 Mad. 434.

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conferred power on the Court to inquire into the title and order the delivery of an insolvent's property to a purchaser from the Official Receiver and remove the obstruction of a third party. This decision was followed by another Bench of this Court (BEASLEY C.J., and BARDSWELL J.) in *Singaravelu Mudaliar v. Swaminatha Pillai*(1). In *Venkatram v. Chokkier*(2) RAMESAM and JACKSON JJ. held that, while an Official Receiver on the insolvency of a Hindu father could sell the family property including his son's share, the insolvency Court could not give possession of the son's share to the purchaser under section 4 of the Provincial Insolvency Act. The purchaser must, they considered, be relegated to a regular suit. The remarks made in the course of the judgment in this case are not consistent. In one place the learned Judges said :

"Once the Official Receiver has sold the property to a stranger and converted the insolvent's estate into money, his business is to distribute this money among the creditors and it cannot be said that delivery of possession is a necessary part in the work of distributing the assets of the insolvent among the creditors."

Later they said that in such a case as the one before them they did not see why the purchaser should not be given joint possession of the insolvent's share, whatever doubts there might be as to the son's share.

We consider that the opinion to be preferred is that expressed in *Ramaswami Chettiar v. Ramaswami Iyengar*(3) and in *Singaravelu Mudaliar v. Swaminatha Pillai*(1) which was decided later than *Venkatram v. Chokkier*(2). JACKSON J. who was a party to the decision in *Venkatram v. Chokkier*(2) granted the leave under clause 15 of the Letters Patent which allowed the appeal in *Singaravelu Mudaliar v. Swaminatha Pillai*(1) to be filed. In his judgment BEASLEY C.J.

(1) 1933 M.W.N. 1487.

(2) (1927) I.L.R. 51 Mad. 587.

(3) (1921) I.L.R. 45 Mad. 434.

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indicated that JACKSON J. had granted leave because he had come to the conclusion that *Ramaswami Chettiar v. Ramaswami Iyengar*(1) was correctly decided. Sections 4, 5 and 56 of the Provincial Insolvency Act are very widely worded and, without hesitation, we hold that they empower the Court to give possession to the purchaser of a property sold in insolvency proceedings at the instance of an Official Receiver.

The question whether the District Court had power to entertain a purchaser's application, notwithstanding the separation of Burma from India, has been decided by the judgment of the Federal Court in *Venugopala Reddiar v. Krishnaswami Reddiar*(2), which was an appeal from this Court. The judgment of this Court (MOCKETT and KUNHI RAMAN JJ.) is reported as *Krishnaswami v. Venugopala*(3). In 1932 a suit was filed in the Court of the Subordinate Judge of Trichinopoly for the possession of movable and immovable properties which to a large extent were situated in Burma. The question was whether the Subordinate Judge had power to continue the hearing of the suit after the separation of Burma from India on 1st April 1937. This Court held that he had and the decision was upheld by the Federal Court. Mr. Sitarama Rao on behalf of the appellant has argued that this decision does not apply because the application which has given rise to the present appeal was filed after Burma had been separated from India. We are unable to accept the contention. The application was only one step in the administration of the insolvent's estate which the Rangoon High Court had ordered before the separation. While Burma was a province of India, the Rangoon High Court had requested the District Court of Ramnad to aid it in the administration of this estate and the District Court had agreed to do so.

(1) (1921) I.L.R. 45 Mad. 434.

(2) [1943] F.C.R. 39.

(3) I.L.R. [1942] Mad. 376.

We consider that the judgment in *Venugopala Reddiar v. Krishnaswami Reddiar*(1) is directly in point.

For these reasons the appeal fails and must be dismissed with costs of the first respondent.

The learned Counsel for the appellants asks for a certificate under section 205 of the Government of India Act, 1935. The appellants are entitled to a certificate and one will issue.

G.R.

INCOME-TAX REFERENCE.

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

MEDAM GURUMURTHI SETTY, APPLICANT,

v.

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

Indian Income-tax Act (XI of 1922), sec. 25A—Partition under section means completed partition, not mere division in status—Partition complete only on division of entire properties.

Under section 25A of the Indian Income-tax Act, 1922, partition means completed partition. There is a distinction between separation of status and partition of family property. Consequently where the members of a joint Hindu family begin to live separately in pursuance of an arrangement by which some of the properties only are divided and the rest are left for division at a future date, there is no partition within the meaning of the section on the date of such separate living.

Sundar Singh Majithia v. Commissioner of Income-tax, United and Central Provinces(2) followed.

CASE referred to the High Court by the Income-tax Appellate Tribunal, Calcutta Bench, under section 66 (1) of the Indian Income-tax Act (XI of 1922) as amended by section 92 of the Income-tax (Amendment)

* Case Referred No. 24 of 1943.

(1) [1943] F.C.R. 39.

(2) I.L.R. [1943] All. 69 (P.C.).

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1944,
January 28.

GURUMURTHI v. COMMISSIONER OF INCOME-TAX, MADRAS. Act (VII of 1939) in Application No. 66, R.A. No.14-Madras, of 1942-43.

P. Chandra Reddi for applicant.—Following the decision of the Privy Council in *Sundar Singh Majithia v. Commissioner of Income-tax, United and Central Provinces*(1), the Bombay High Court recently held in *Gordhandas Mangaldas v. Commissioner of Income-tax, Bombay*(2) that section 25A of the Indian Income-tax Act contemplates physical division of the properties and not merely division of status. In the present case, however, nearly two-thirds of the properties of the value of about a lakh and a half of rupees had been actually divided and the members of the family were living separately from 15th October 1938. Partition of properties must therefore be deemed to have taken place on that date. To hold that every item of property belonging to the joint family must be partitioned before section 25A can be invoked would lead to hardship.

[PATANJALI SASTRI J.—In a case where only a very small portion of the property is left undivided the maxim, *de minimis non curat lex*, may perhaps apply. But this is not such a case.]

K. V. Sessa Ayyangar for respondent.

LEACH C.J.—The JUDGMENT of the Court was delivered by LEACH C.J.—The assessee was the managing member of a joint Hindu family consisting of himself and his four brothers. On 15th October 1938 the brothers agreed to separate and on 22nd January 1941 a deed of partition was executed and registered. The family estate consisted of immovable and movable properties. On the 15th October they divided the cash which they possessed and to each member was allotted a house. The other immovable property was also divided among the members on that date. On 25th December 1938 they divided the furniture and household utensils. The family had carried on a grocery business. The assets of this business were not divided until 24th February 1939. The assessee contended before the income-tax authorities and the Income-tax Appellate Tribunal, Calcutta Bench, that for the purposes of

(1) I.L.R. [1943] All. 69 (P.C.).

(2) I.L.R. [1943] Bom. 245.

section 25A of the Income-tax Act the partition must be deemed to have taken place on 15th October 1938. On the other hand the income-tax authorities maintained that the partition must be deemed to have taken place on the date when the deed was registered. The Appellate Tribunal concurred in this opinion. At the request of the assessee the Tribunal has referred to this Court the following question of law :—

“Whether the partition could be said to have taken place within the meaning of section 25A on 15th October 1938 when the members began to live separately though all the properties were not divided.”

There is a distinction to be drawn between separation of status and partition of family property. As pointed out by the Privy Council in *Sundar Singh Majithia v. Commissioner of Income-tax, United and Central Provinces*(1), section 25A refers only to a partition of the property. If the Income-tax Officer is satisfied that the joint family property has been partitioned among the various members or groups of members in definite portions, he must record an order to that effect. On this being done, the members are assessed in accordance with the provisions of the section.

Partition means a completed partition. The fact that some assets are divided and others are left for division at a future date would not be a partition within the meaning of the section. In this case important assets, namely, those of the business, were not divided until February 1939 and the Court has been informed that other assets still remain to be divided. In these circumstances it is clear that the date of the partition is not 15th October 1938, and that is the answer we give to the reference.

The Commissioner of Income-tax is entitled to his costs, Rs. 250.

N.S.

(1) I.L.R. [1943] All. 69 (P.C.).

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APPELLATE CIVIL.

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

1944,
January 21.

M. P. NAYAGAM (RESPONDENT), APPELLANT,

v.

A. R. KRISHNASWAMI (APPELLANT), RESPONDENT.*

Practice—Advocate's fees—High Court Fees Rules, 1933 (Madras), O. V, r. 20—Advocate appearing for creditor before Official Liquidator during settlement of list of creditors—Right of Advocate to tax costs against his client for such appearance—Rules of High Court (Madras), under Indian Companies Act (VII of 1913), rr. 73, 74, 84, 85 and 88—Official liquidator acting judicially in settling list of creditors.

The High Court Fees Rules, 1933 (Madras), as amended from time to time, apply to proceedings under the Indian Companies Act or the rules framed under the Act. Order V, rule 20, of the Fees Rules, therefore, is applicable to the case of an Advocate seeking to tax his bill of costs against his own client for fees due in respect of his appearance for the client (a creditor) before the Official Liquidator of a company, wound up under orders of Court, at the time of his settling the list of creditors in accordance with the rules framed under the Companies Act. In settling the list of creditors the Official Liquidator acts in a judicial capacity and his order is binding, subject to the right of appeal to the Judge of the Court.

APPEAL from the order of BELL J., dated 29th October 1943 and made in the exercise of the ordinary original civil jurisdiction of the High Court in Application No. 2154 of 1943 in Original Petition No. 22 of 1941.

V. M. A. Muthu for appellant.

K. S. Varadachari for respondent.

The JUDGMENT of the Court was delivered by
LEACH C.J. LEACH C.J.—The appellant engaged the respondent,

* Original Side Appeal No. 65 of 1943.

who is an Advocate of this Court, to appear for him in an application for the winding up of a company registered under the Indian Companies Act. An order for winding up was passed and the Official Receiver who functions as the Official Liquidator was, as required by law, called upon to settle a list of the creditors. The appellant is a creditor of the company and in the proceedings before the Official Liquidator the respondent appeared on behalf of the appellant. A dispute arose with regard to the fees which the respondent claimed for this work. Thereupon he applied to the Master for his bill of costs to be taxed under Order V, rule 20, of the Original Side Rules. The learned Master held that that rule did not apply, because in his opinion the proceedings before the Official Liquidator were not proceedings in which a party or an Advocate could apply for taxation. Accordingly he dismissed the application. On appeal, the order of the Master was reversed by BELL J. and he was directed to proceed with the taxation. The appeal is from the order of the learned Judge.

We consider that the order of the learned Judge is right. Rule 5 of the rules framed under the Indian Companies Act states that the High Court Fees Rules, 1933, as amended from time to time, shall apply to all proceedings under the Act and the rules framed under it, provided that, if the Judge so directs, the costs of an original petition shall be taxed by the Taxing Officer and the provisions of Order V, rule 19, of the High Court Fees Rules shall apply to the taxation, or the Judge may himself fix the amount of costs. Therefore the taxation rules of this Court apply to proceedings under the Companies Act or the rules framed under it.

In accordance with rule 73 of the Companies Rules the Judge directed the Official Liquidator to take steps to settle the list of creditors. Rule 74 says that, unless the Judge orders that a creditor or a class of creditors shall be admitted without proof,

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every creditor shall prove his debt. In examining the proof of a debt the Official Liquidator has to proceed under rule 84 and he may by virtue of rule 88 administer oaths and take affidavits. If a creditor is dissatisfied with the decision of the Official Liquidator, he may appeal under rule 85 to the Judge. In settling the list of creditors the Official Liquidator acts in a judicial capacity and his order stands, subject to the right of appeal to the Judge. This being the case, Order V, rule 20, applies and the application which the respondent made for the taxation of his bill of costs lay. It is somewhat surprising that the appellant has taken objection to this course. If he had his way, he would put the respondent to the expense of a suit rather than have the dispute as to his fees settled in this simple way.

The appeal fails and is dismissed with costs.

N.S.

APPELLATE CIVIL.

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

1944,
January 23.

W. KRISHNAMACHARI (SON AND LEGAL REPRESENTATIVE
OF PLAINTIFF), APPELLANT,

v.

DASU REDDIAR *alias* VEERASWAMI REDDIAR AND
TWENTY-ONE OTHERS (DEFENDANTS AND NIL), RESPONDENTS.*

Vendor and Vendee—Vendee retaining portion of purchase money agreeing to pay it to mortgagee—Mortgage comprising amongst other items property sold—Failure to discharge mortgage—Mortgaged properties sold in execution of mortgage decree—Subsequent suit by vendor for recovery of purchase money left with vendee—Failure of consideration—Maintainable—Transfer of Property Act (IV of 1882), sec. 55.

In a suit by a vendee for the specific performance of a contract to sell immovable property, a compromise decree was passed providing *inter alia* that the vendee should retain in

* Appeal No. 37 of 1942.

his hands a large portion of the consideration amount for the purpose of paying off the creditors of the vendor including a mortgagee to whom a sum of Rs. 27,500 was directed to be paid. The vendee paid the mortgagee a sum of Rs. 8,000 only and, as the balance was not paid, the mortgagee filed a suit. In execution of the decree obtained therein, the mortgaged properties which included the properties sold to the vendee as well as other properties belonging to the vendor were sold in court-auction. The vendor thereupon filed a suit against the vendee praying *inter alia* for the recovery of the sum of Rs. 19,500, on the ground that there has been a failure of consideration for the amount.

Held: The vendor was entitled to recover the amount. Though the vendee could not be compelled to refund the sum while the mortgage was subsisting, he was bound to return the amount to the vendor when the mortgage was discharged by other means than payment by himself.

Where, in pursuance of a contract to sell immovable property free of incumbrances, the vendee retains in his hands a portion of the purchase money to discharge an incumbrance on the property sold to him, he acts as the agent of the vendor as regards the disposal of the sum retained, and the vendor is entitled to call upon the vendee to account to him for any portion of the purchase money which by reason of subsequent events is not required for the fulfilment of the stipulation to discharge the incumbrance.

Raghunatha v. Sadagopa(1) and *Subba Row v. Varadaiah*(2) followed.

Naima Khatun v. Sardar Basant Singh(3) referred to.

APPEAL against the decree of the Court of the Subordinate Judge, Chingleput, in Original Suit No. 38 of 1940.

V. Govindarajachari for *V. C. Viraraghavan* for appellant.

K. Bhashyam for *R. Viswanathan* and *T. R. Srinivasan* for first respondent.

T. E. Ramabhadrachari for second respondent.

K. Narasimha Ayyar for seventh to twelfth and fifteenth to nineteenth respondents.

Other respondents were not represented.

Cur. adv. vult.

(1) (1911) I.L.R. 36 Mad. 348. (2) I.L.R. [1943] Mad. 885.
(3) (1933) I.L.R. 56 All. 766 (F.B.).

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The JUDGMENT of the Court was delivered by LEACH C.J.—The appellant's father sued in the Court of the Subordinate Judge of Chingleput to recover the sum of Rs. 2,30,000; the amount of the damages which he alleged he had suffered as a result of the first respondent's default in fulfilling his obligations under a contract for the sale of land and, in the alternative, for the recovery of Rs. 27,500 on the basis that there had been failure of consideration to this extent. The plaintiff died during the pendency of the suit, which was continued by the appellant. The Subordinate Judge held that the first defendant was in default and that a suit in damages lay, but he found that no loss had in fact been sustained by the plaintiff. He rejected in its entirety the alternative claim.

On 14th December 1923 the plaintiff agreed to sell for the sum of Rs. 82,750 his rights in the shrotriern villages of Koduvur and Seekanankuppam. The plaintiff's son was a party to the agreement. The agreement provided that the purchaser should pay to the vendor by 14th January 1924 a sum of Rs. 9,000 and a further sum of Rs. 5,000 within ten days from the date of the registration of the conveyance. The purchaser was to retain the balance of the consideration for the purpose of discharging the plaintiff's liabilities to his creditors. The agreement did not set out a list of the debts, but these were detailed in a letter written on 10th January 1924 by the plaintiff to the first defendant. The liabilities amounted to Rs. 68,689, of which Rs. 29,289 was then due to one A. N. Rangaswami Ayyangar, to whom the plaintiff had mortgaged his rights in these two villages as well as his rights in the village of Vedavakam and a house which he owned at Conjeeveram. The letter contained a demand for the fulfilment of the contract of 14th December 1923.

The plaintiff and his son failed to execute the conveyance of the properties sold to the first defendant, who instituted a suit (Original Suit No. 1 of 1924 in

the Court of the Subordinate Judge, Chingleput) for a decree for specific performance. This resulted in a compromise decree being passed on 29th April 1924. The decree provided that the consideration for the sale was still to be the sum of Rs. 82,750, but made certain changes in the contract. The first defendant was to pay to the plaintiff and his son the sum of Rs. 12,500 on or before 2nd May 1924 and Rs. 11,500 before 10th June 1924. He was to retain the balance of the money in his hands for the purpose of paying off the creditors, who were named and their debts specified. The sum retained was more than sufficient to pay off all the creditors. The excess was Rs. 7,250.

Clause (g) of paragraph 2 of the decree related to the payment to be made to Rangaswami Ayyangar and, as this provision is of special importance, we will set it out in full :

"That as the suit properties and the other properties belonging to the defendants have been mortgaged to Mr. A. N. Rangasami Ayyangar residing at Trivellore the plaintiff shall, for the purpose (of payment) to the aforesaid mortgagee, retain with him a sum of Rs. 27,500 (Rupees twenty-seven thousand and five hundred) from the sale amount. If it is found that an amount in excess of the sum so retained has to be paid to the aforesaid Rangaswami Ayyangar on 14th December 1923, the date of the suit agreement, the defendants shall without reference to the plaintiff pay such amount. If default is made (in such payment) and any loss should occur to the plaintiff thereby the defendants should make good the same. If the plaintiff does not pay the amount so retained and if loss should occur to the defendants (thereby) the plaintiff shall make good such (loss) to the defendants; that if the defendants have to pay a lesser amount to the aforesaid Rangaswami Ayyangar than the amount so retained and mentioned above the plaintiff shall pay to the defendants such difference (of the amount)."

The decree further provided that the conveyance should be to the first defendant or at his option to him and the second defendant.

On 22nd March 1926 on the directions of the first defendant the plaintiff and his son conveyed the Koduvur properties to the first defendant and the

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Seekanankuppam properties to the second defendant. The consideration for the conveyance to the second defendant was stated to be the sum of Rs. 32,000 and it is common ground that the second defendant discharged to this extent the plaintiff's liabilities. The first defendant fulfilled his obligations, except in respect of the debt due to Rangaswami Ayyangar. Only the sum of Rs. 8,000 was paid to Rangaswami Ayyangar and this came out of the moneys provided by the second defendant.

On 31st July 1933 Rangaswami Ayyangar filed a suit (Original Suit No. 39 of 1933) to enforce his mortgage and on 5th December 1934 he obtained a decree for Rs. 52,691-2-9. The difference between this sum and the Rs. 29,289 represented the accumulation of interest. In execution of the decree the properties mortgaged were sold on 18th November 1936. The Koduvur properties were purchased by the fourth defendant for Rs. 10,502. He also bought the Seekanankuppam properties. The price paid for these properties was Rs. 16,500. The decree-holder bought the Vedavakam properties for the sum of Rs. 7,501 and the Conjeeveram house for Rs. 3,001. The total amount realized by the sale was Rs. 37,504.

It was in these circumstances that the plaintiff instituted the suit which has given rise to this appeal. Numerous issues were raised in the trial Court; but in this Court the questions have been confined to (i) whether the plaintiff is entitled to recover from the first defendant Rs. 19,500, the amount which he failed to pay to Rangaswami Ayyangar, (ii) whether he is entitled in the alternative to damages for the first defendant's default, and (iii) whether the suit is barred by the law of limitation. The plea that the plaintiff is entitled to the Rs. 19,500 has been advanced first in this Court, as it is now conceded that if his claim is to be one in damages the decree will be for a smaller sum.

As we have already indicated, the first defendant retained in his hands more than sufficient to pay off

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all the creditors and he had no excuse for failing to pay Rangaswami Ayyangar the amount due to him. He could not, of course, be compelled to refund to the plaintiff this part of the purchase consideration while Rangaswami Ayyangar's mortgage on the Koduvur and Seekanankuppam properties remained outstanding, but it is no longer outstanding as the properties have been sold under the decree obtained by the mortgagee. The first defendant is not now in the position to make a payment to Rangaswami Ayyangar and consequently the plaintiff says that there has been a failure of consideration to the extent of Rs. 19,500, the difference between the Rs. 27,500 which the first defendant had to pay to the mortgagee under the compromise decree and the Rs. 8,000 which was paid to him on account.

The rights and liabilities of the vendor and vendee in a sale of immovable property are, in the absence of a contract to the contrary, regulated by the provisions of section 55 of the Transfer of Property Act. In *Naima Khatun v. Sardar Basant Singh*(1) a Full Bench of the Allahabad High Court pointed out that, where property has been transferred by a vendor to a vendee and there is a direction to the vendee to pay off a third person, the transaction may be one of any of the following characters:—

“(i) The amount left in the hands of the vendee may be a part of the purchase money remaining unpaid, in which case it is obviously money belonging to the vendor and if not paid as directed is still due to be paid to the vendor; or

(ii) it may amount to a covenant with an undertaking to relieve the vendor from his existing liability, in which case a suit on the covenant may lie; or

(iii) it may be a mere promise to perform an act for consideration, or a contract of indemnity, in which case a suit for damages incurred on the breach of the contract would lie under section 125 of the Contract Act; but it must be proved that loss has been sustained.”

(1) (1933) I.L.R. 56 All. 766 (F.B.).

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The plaintiff says that the case falls within the first category. On the other hand the contesting defendant says that it falls within the third category. On the contract embodied in the compromise decree we consider that the plaintiff's contention must prevail.

In *Raghunatha v. Sadagopa*(1) a Bench of this Court held that, where a person transfers immovable property to another in consideration of the transferee agreeing to pay debts due by the transferor to third persons, the transferor is entitled to sue the transferee for the recovery of those sums which the transferee has failed to pay to the third persons within a reasonable time and he is not bound to show that he has been damnified in any way by the transferee's failure. In that case the transferee had not undertaken to discharge secured debts, but in our opinion the same principle must apply, subject to the proviso that where the debt to be paid off by the transferee is secured by a mortgage the transferor cannot compel him to make a refund while the mortgage is outstanding.

In *Ram Rachhya Singh Thakur v. Raghunath Prasad Misser*(2) the Patna High Court had to consider the case where a vendee had failed to discharge a mortgage which it was his duty to pay off out of the consideration retained by him and it was held that the vendor was entitled to recover the amount notwithstanding that the mortgage had been discharged by a third party. In that case the plaintiff transferred to the defendant immovable property in consideration of the defendant agreeing to apply a portion of the purchase money for payment of a mortgage debt due by the vendor. The purchaser failed to discharge this debt, but the plaintiff's brother did so. It was also held that the vendor was entitled to recover the amount of the unpaid purchase money without any obligation to show that he had been damnified by the vendee's default.

(1) (1911) I.L.R. 36 Mad. 348.

(2) (1929) I.L.R. 8 Pat. 860.

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In delivering the judgment of this Court in *Subba Row v. Varadaiah*(1), PATANJALI SASTRI J. pointed out that, where the vendee retains in his hands money to discharge an incumbrance on the property sold to him, he acts as the agent of the vendor as regards the disposal of the sum retained, although the agency is one which cannot be revoked as the vendee has himself an interest in the money being applied in the manner indicated. Consequently, where immovable property is sold free from incumbrances, the vendor is entitled to call upon the vendee to account to him for any portion of the purchase money which events have shown is not required for the fulfilment of the stipulation. In the present case the property was sold free from incumbrances and these observations have application here.

We consider that there is ample authority for the plaintiff's proposition that he is entitled to recover from the first defendant the Rs. 19,500. Under the contract the first defendant was bound to pay this money to Rangaswami Ayyangar. As he failed in his duty he cannot be allowed to retain it in his hands. Consequently we hold that the plaintiff is entitled to a decree for the sum of Rs. 19,500, with interest from the date of the sale held in execution of the decree passed in Original Suit No. 39 of 1933, namely, 18th November 1936.

As this case may be carried further we will deal with the plaintiff's alternative claim for damages. It is conceded on behalf of the first defendant that he is bound to make good any loss which the plaintiff may have suffered as the result of the first defendant's default; but it is said that the Subordinate Judge was right in holding that no loss had in fact been suffered. The finding of the Subordinate Judge that the plaintiff had not been damnified is based on the opinion that there was no value left in the equity of redemption, the amount due to Rangaswami Ayyangar under his

(1) I.L.R. [1943] Mad. 885.

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mortgage being far in excess of the value of the property. This ignores the fact that as a result of the first defendant's default the plaintiff lost his rights in the village of Vedavakam and his ownership of the house in Conjeeveram. If the first defendant had fulfilled his obligations under the compromise decree, these properties would not have been lost to the plaintiff, as on the date of conveyance the first defendant had more than sufficient in his hands to pay off the mortgage in full. The value of these two properties is Rs. 10,502, the aggregate price which was realized for them at the court-auction. If the plaintiff were not entitled to recover the Rs. 19,500, admittedly he would be entitled to recover Rs. 10,502, with interest from the date of the plaint, 3rd March 1937, but as we hold that his first claim is well founded he will have a decree against the first defendant for the larger amount with interest.

There is no substance in the plea that the suit was barred by the law of limitation. The plaintiff's right of suit against the first defendant arose on 18th November 1936 when Rangaswami Ayyangar executed his decree. The suit was filed within twelve months of that date.

The plaintiff will have his costs here and below on the sum of Rs. 19,500 as against the first defendant. The plaintiff has sued *in forma pauperis* and the first defendant must pay the court-fee to Government on this amount. The balance of the court-fee will be paid by the plaintiff.

The appeal will stand dismissed as against the other respondents with costs, one set to be divided proportionately.

[The case was set down for being mentioned and the Court made the following further order :—]

The judgment means that the first defendant must pay the court-fee to Government on the sum of Rs. 19,500 both here and in the lower Court and the balance of court-fee in each Court will be paid by the plaintiff.

N.S.

APPELLATE CIVIL.

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

K. S. YELUMALAI CHETTY AND ANOTHER (PLAINTIFFS),
APPELLANTS,

1944,
January 25

v.

NATESACHARI AND FIVE OTHERS (DEFENDANTS),
RESPONDENTS.*

Hindu law—Alienation—One of two daughters alienating, without consent of the other, property inherited from their father—Alienation not binding on reversion though for necessary purpose.

Alienations made by one alone of two daughters of a Hindu, without the consent of the other, of properties inherited from their father do not bind the reversion, even though they are made for purposes necessary from the point of view of the family. In order to bind the reversion both the daughters must join or concur in the transaction.

Apalasuri v. Kannamma Nayuralu(1) followed; *Sri Gajapati Radhamani v. Maharani Sri Pusapati Alakarajeswari*(2) applied; *Gauri Nath Kakaji v. Gaya Kuar*(3) explained.

APPEAL from the judgment of CHANDRASEKHARA AYYAR J., dated 10th July 1942 and passed in the exercise of the ordinary original civil jurisdiction of the High Court in Civil Suit No. 74 of 1940.

D. R. Krishna Rao for appellants.

N. Gopala Menon, P. S. Ramaswami Ayyangar, T. R. Srinivasa Ayyar, M. A. Srinivasan, K. Bhashyam and V. Varadaraja Mudaliar for respondents.

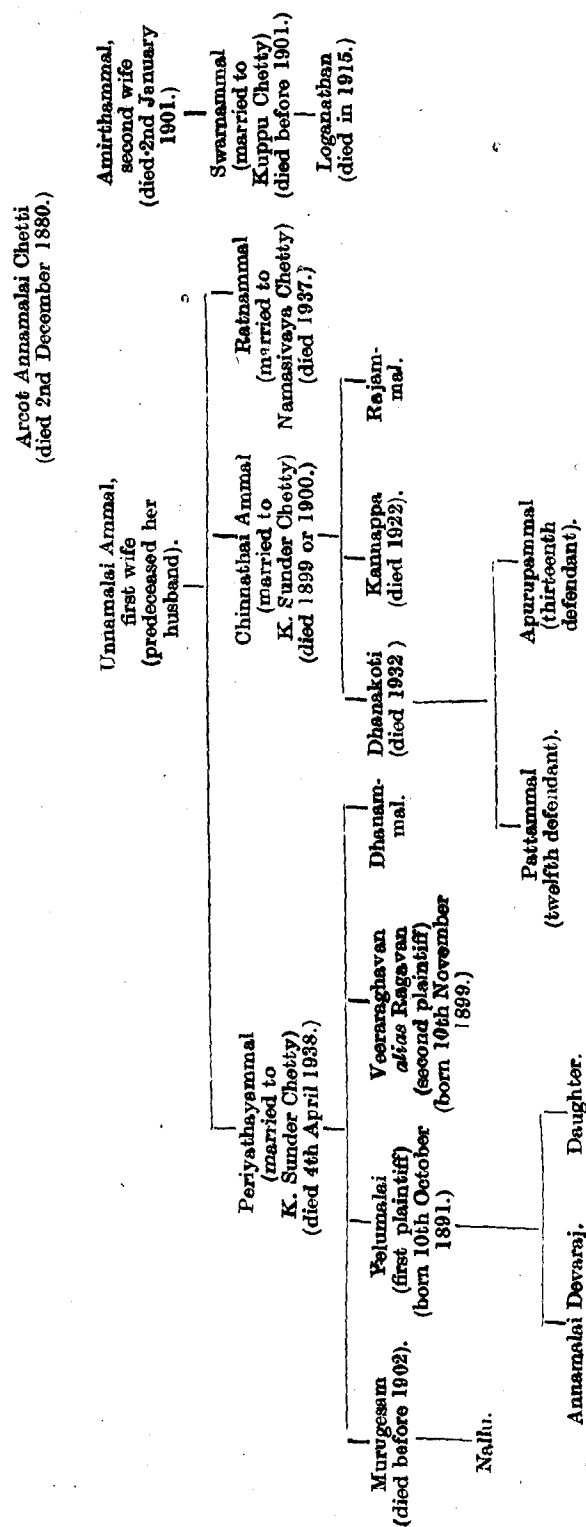
The JUDGMENT of the Court was delivered by LEACH C.J.—This is a suit by the reversioners to the estate of one Arcot Annamalai Chetti, who died on 2nd December 1880, for the recovery of the properties left by him, all of which were in the hands of alienees at the date of the institution of the suit. The following genealogical tree will help in the appreciation of the facts :—

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* Original Side Appeal No. 25 of 1942.

(1) (1925) 49 M.L.J. 479. (2) (1892) 19 I.A. 184; I.L.R. 16 Mad. 1.
(3) (1923) 55 I.A. 399.

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The plaintiffs claimed to be entitled to the properties described in schedules A and B of the plaint. In the trial Court it was held that the plaintiffs had established their claim to the properties described in schedule B and to one item in schedule A. The properties described in schedule A are eight in number. The one property in respect of which the plaintiffs succeeded was item No. 8. The plaintiffs have appealed in respect of the other properties mentioned in schedule A. Items Nos. 3, 4 and 5 stand together, as do items Nos. 1, 2, 6 and 7. The learned Judge (CHANDRASEKHARA AYYAR J.) held that the plaintiffs were not entitled to the possession of items Nos. 3, 4 and 5 because it had not been proved that they belonged to the estate of Annamalai Chetty at the time of his death. He rejected the plaintiffs' claim in regard to items Nos. 1, 2, 6 and 7 because he considered that they had been lawfully alienated by Ratnammal. We agree with the judgment of the learned Judge so far as it concerns items Nos. 3, 4 and 5, but we are unable to concur in it in so far as it concerns items Nos. 1, 2, 6 and 7.

Annamalai Chetty, in conjunction with his mother-in-law Sundarammal, purchased items Nos. 3 and 4 in 1862. The Collector's certificate was issued in their names in 1867. On 20th November 1880 Annamalai Chetti transferred his half share to his mother-in-law, who thereby became the sole owner of these properties. She transferred them to K. Sundaram Chetti, Annamalai Chetti's son-in-law, on 13th February 1884 and caused the Collector's certificate to be issued in his name. Having got the title to these properties Sundaram Chetti (together with his wives and son) mortgaged them under documents, dated 29th October 1897 and 16th February 1899. These mortgages were in the English form and each contained a power of sale which was exercised on 8th June 1914. The purchaser was one Jayaram

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Chetti and his successors in interest are the third and fourth defendants. Item No. 5 was bought by Annamalai Chetti and his son-in-law, Sundaram Chetti, on 11th March, 1876. On 20th November 1880 Annamalai Chetti transferred his half share to his daughter Periaithayammal. On 2nd July 1896 Periaithayammal and her husband Sundaram Chetti mortgaged the property to the Hindu Jananukula Saswatha Nidhi. Sundaram Chetti was also married to Periaithayammal's sister Chinnathayammal, and she joined in the mortgage as did Murugosa, Periaithayammal's son. This mortgage was also in the English form and contained a power of sale which was exercised on 28th April 1904. The purchaser was one Abbu Chetti, who mortgaged the property to the Nidhi on 30th April 1904. This mortgage likewise contained a power of sale which was eventually exercised and the property was purchased by the predecessor in title of the fifth defendant on 20th January 1912.

The case for the plaintiffs with regard to items Nos. 3, 4 and 5 is that in Civil Suit No. 164 of 1906 of this Court it was held that the properties belonged to the estate of Annamalai Chetti. That suit was instituted by Ratnammal to recover possession of her share in her father's properties. The defendants were her sister Periaithayammal, Abbu Chetti (Periaithayammal's son-in-law) who was in possession of two items of property, Kuppu Chetti (the husband of Swarnammal, Annamalai Chetti's daughter by his second wife) who was in possession of one item of property, and eleven other persons who were in possession of the properties described in the B schedule to the plaint. The action resulted in Ratnammal being placed in possession of certain properties belonging to her father and Periaithayammal in possession of other of his properties. It is said that the decision in this suit that items Nos. 3, 4 and 5 belonged to Annamalai Chetti operates as *res judicata*; but this

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contention was rejected by the learned trial Judge and we consider rightly rejected. Ratnammal was merely asking for the possession of her share of the properties and the plaintiffs in the present suit can only recover what belonged to Annamalai Chetti at the time of his death. As we have shown, Annamalai Chetti had parted with his interest in these three items before his death. The validity of the transfers has not been questioned before us and the Court is entitled to draw the presumption allowed by section 90 of the Indian Evidence Act. The transfers made by Annamalai Chetti conferred complete titles on the transferees and the mortgages which eventually led to the sale of the properties to the predecessors of the third, fourth and fifth defendants were valid. In these circumstances the plaintiffs have no claim whatsoever to these properties.

The learned Judge decided against the plaintiffs in respect of items Nos. 1, 2, 6 and 7 because he considered that Ratnammal had power to mortgage the properties without the consent of her sister Periaithayammal and that it had been shown that the mortgages were created for legal necessities of the family. We shall presently deal with the question whether these mortgages were created for a family purpose and the effect of the deeds, but before doing so we must indicate our reasons for dissenting from the learned Judge's opinion that Ratnammal acting alone could bind the reversioners.

Periaithayammal and Ratnammal were joint tenants of their father's estate and as such were exactly in the same position as if the estate had devolved on co-widows. In *Sri Gajapati Radhamani v. Maharani Sri Pusapati Alakarajeswari*(1) the Privy Council held that, where a widow without the consent of her co-widow mortgages a part of the estate to

(1) (1892) 19 I.A. 184; I.L.R. 16 Mad. 1.

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which they are jointly entitled by inheritance from their deceased husband, the mortgage does not affect the interest of the other widow in the property and consequently, when the other widow becomes entitled to the whole estate by reason of survivorship, she is unaffected by the mortgage. The fact that the mortgage was entered into to meet a family necessity did not alter the position. In *Apalasuri v. Kannamma Nayuralu*(1) a Bench of this Court (RAMESAM and VENKATASUBBA RAO JJ.) held that, when the estate is in the hands of co-widows, an alienation made for a family necessity does not bind the reversioner unless both the widows have joined in it. This opinion was dissented from by the Allahabad High Court in *Jai Narain Singh v. Munna Lal*(2). In that case co-widows divided their husband's estate between them and one of them alienated a considerable part of her share. The alienation was for a legal necessity. The Allahabad High Court held that the widow was competent to alienate without the consent of her coparcener and that the alienation bound the reversioner. The other widow was in fact a consenting party, but even if she had not consented the Court considered that the reversion would have been bound.

The Privy Council considered both *Apalasuri v. Kannamma Nayuralu*(1) and *Jai Narain Singh v. Munna Lal*(2) in *Gauri Nath Kakaji v. Gaya Kuar*(3) and expressed disapproval of the Allahabad decision. In delivering the judgment of the Board, Lord SALVESEN observed that each widow can deal as she pleases with her own life interest, but she cannot alienate any part of the corpus of the estate by gift or will so as to prejudice the rights of the survivor or a future reversioner. Their Lordships left open the question whether the reversion would

(1) (1925) 49 M.L.J. 479.

(2) (1927) I.L.R. 50 All. 439.

(3) (1928) 55 I.A. 399.

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be bound where it was necessary to raise money for a family purpose and one widow, having been asked to concur, unreasonably refused. That question does not arise in the present case. Ratnammal neither sought nor got the consent of Periathayammal to the mortgages which she created.

CHANDRASEKHARA AYYAR J. considered that *Sri Gajapati Radhamani v. Maharani Sri Pusapati Alakarajeswari*(1) and *Apalasuri v. Kannamma Nayuralu*(2) did not apply in a case like the present because the judgment in *Gauri Nath Kakaji v. Gaya Kuar*(3) contains this statement :

"It may be noted that the case arose not between the survivor of the widows and the mortgagee but between the mortgagee and the reversioner after the death of both widows." The statement was made in connexion with their Lordships' criticism of *Jai Narain Singh v. Munna Lal*(4) and they were merely pointing out that what the Allahabad High Court said was *obiter*. They added, however, that the opinion was not consistent with the judgment of the Board in *Sri Gajapati Radhamani v. Maharani Sri Pusapati Alakarajeswari*(1).

We are asked to ignore *Sri Gajapati Radhamani v. Maharani Sri Pusapati Alakarajeswari*(1) because that suit was one between widows and this suit is between reversioners and alienees and to ignore *Apalasuri v. Kannamma Nayuralu*(2) because it was not necessary in that case to decide whether both widows had to join in a mortgage in order to bind the reversion. We consider that the logical conclusion to be drawn from *Sri Gajapati Radhamani v. Maharani Sri Pusapati Alakarajeswari*(1) is that co-widows must join in order to bind the reversion. It may be pointed out that the appellant-widow died during the pendency of the appeal before the Privy

(1) (1892) 19 I.A. 184; I.L.R. 16 Mad. 1.
(3) (1928) 55 I.A. 399.

(2) (1925) 49 M.L.J., 479.
(4) (1927) I.L.R., 50 All., 849.

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Council and the reversioner was substituted as the appellant. While it may be that the opinion expressed in *Apalasuri v. Kannamma Nayuralu*(1) that in order to bind the reversion the co-widows must join in the transaction was *obiter*, it was expressed after a careful consideration of the authorities, and we agree with it.

asmuch as Periathayammal, did not join in or give her consent we must hold that the mortgages created by Ratnammal, even if they were necessary from the point of view of the family, do not bind the reversion.

We will now examine the facts. The mortgages created by Ratnammal were five in number and they are all in favour of one Swami Chetti. Ratnammal married as a mortgagor Dhanakoti, the elder son of her deceased sister Chinnathayammal. Dhanakoti was one of several presumptive reversioners. His execution of these deeds did not, however, add anything to the title of the mortgagee. The first mortgage was made on 11th April 1906 and was entered into as security for a sum of Rs. 1,600 which Ratnammal had borrowed from Swami Chetti. It contains this recital:

"Whereas the mortgagors aforesaid are in need of moneys for the discharge of their debts which have been all incurred for their family purposes and for the carrying on of a suit or suits for the recovery of possession of their share in all the properties movable and immovable belonging to the late Annamalai Chetti and whereas the mortgagors have applied to the mortgagee for a loan of Rs. 1,600 repayable with interest at eighteen per cent per annum on the security of their right, title and interest in all the properties aforesaid and the mortgagee has agreed to grant the said loan now this indenture witnesseth . . ."

In accordance with this recital the operative part merely charged the right, title and interest of the mortgagors. All that Ratnammal possessed was a life estate, joint with her sister. Dhanakoti had no right in the properties at all. The other mortgages were created on 24th August 1906, 29th January 1908,

(1) (1925) 49 M.L.J. 479.

1st August 1908 and 6th April 1909 respectively. The amounts raised were two sums of Rs. 300, one of Rs. 200 and another of Rs. 800. According to the recitals in the deeds, these sums were borrowed for the purpose of Ratnammal's suit. In every case the security offered and accepted was the right, title and interest of the mortgagors. We cannot regard these documents as showing that the moneys were required for family necessity; but, even if they were, all that the mortgagee got was Ratnammal's interest in the property, and that interest ceased on her death in 1937.

Swami Chetti brought a suit to enforce these mortgages and on 16th January 1930 he obtained a decree. This was never executed, but items Nos. 1, 2, 6 and 7 were sold by Ratnammal on various dates for the purpose of discharging the mortgage decree. The successors in interest of the purchasers are defendants 1, 2, 5 and 6. In the circumstances detailed they cannot be allowed to remain in possession of the properties. The properties belonged to the estate of Annamalai Chetti and the plaintiffs are entitled to them. The result is that the decree of the trial Court will be amended by the insertion of a declaration that the plaintiffs are entitled to items Nos. 1, 2, 6 and 7 and a direction that possession be given to them with mesne profits from the date of the death of Periathayammal, that is from 4th April 1938.

The alienees have claimed that they have effected improvements to the properties and an issue (issue 11) was framed on this question. In the Court below it was decided that this issue should be determined by the Official Referee. The inquiry before him will of course include the claim of the first, second, fifth and sixth defendants to improvements in respect of items Nos. 1, 2, 6 and 7.

The plaintiffs are entitled to their costs in this Court and below in respect of items Nos. 1, 2, 6 and 7 as

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against the first, second, fifth and sixth defendants. They will pay the costs here of the third, fourth and fifth defendants in respect of items Nos. 3, 4 and 5.

[The appeal was posted for being mentioned and the Court made the following further order :—]

The draft decree is in order. What this Court decided was that the alienees should have the value of the improvements effected by them and the amount was to be determined by the Official Referee.

N.S.

APPELLATE CIVIL.

Before Mr. Justice Mockett and Mr. Justice Bell.

SEELAM LINGAMMA (PETITIONER), APPELLANT,

v.

SEELAM VENKAYYA (RESPONDENT), RESPONDENT.*

Hindu law—Widow of a separated Hindu—Succession certificate in respect of her husband's assets—Absence of special circumstances—Her right to have certificate without security in preference to his divided brother.

In the absence of special circumstances rendering the taking of security necessary, a Hindu widow of a separated Hindu is entitled to the grant of succession certificate without security to enable her to collect the debts of her deceased husband, in preference to his divided brother.

Mt. Kausilla Kuer v. Mt. Sukhdei(1) and *Badri Narain Sahu v. Lachminia*(2) followed.

APPEAL against the order of the District Court of Guntur, dated 30th September 1943, and made in Original Petition No. 70 of 1943.

V. Rangachari for appellant.

Respondent was not represented.

The JUDGMENT of the Court was delivered by
MOCKETT J. MOCKETT J.—The appellant is a Hindu widow who

*Appeal Against Order No. 753 of 1943.
(1) A.I.R. 1923 All. 579.

(2) A.I.R. 1935 Pat. 10.

applied to the lower Court for a succession certificate in respect of a sum of money due to her deceased husband's estate. The respondent is her deceased husband's brother. He objected to the grant of the certificate, alleging that he was the deceased man's undivided brother. The learned District Judge has directed the certificate to issue on condition that the appellant should furnish security. Accordingly a question under sections 373 (3) and 375 arose. Though it seems there was material before him, the learned Judge did not think fit to decide this question of fact. He preferred to decide the rights of the widow to the succession certificate purely according to her status and the terms of the will. He said also :

“*Prima facie* the will gives the petitioner only a life interest with remainder to reversioners specified.”

The will gives the petitioner a life interest in certain immovable properties with remainder to named persons. It also gives her an absolute estate in certain immovable properties. This succession certificate however is concerned with money and the will is silent with regard to that.

In order to shorten the litigation in this case we propose to deal with the legal aspect of this matter. There are three decisions of the Allahabad High Court directly in point. The first is *Jai Dei v. Banwari Lal*(1) where TUDBALL and MUHAMMAD RAFIQ JJ. held that there might be special circumstances for requiring a Hindu widow to give security. In *Narain Dei v. Parmeshwari*(2) RICHARDS C.J. and BANERJI J. re-affirmed that security should not be taken from a Hindu widow of a separated Hindu asking for a certificate to enable her to collect debts, in the absence of special circumstances rendering the taking of security necessary. The learned Judges point out that on an application by a widow the only question which

(1) (1913) I.L.R. 35 All. 249.

(2) (1917) I.L.R. 40 All. 81.

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arises when she is admittedly entitled to a certificate is whether there are special circumstances making it expedient that she should be directed to give security. More recently, in *Mt. Kausilla Kuer v. Mt. Sukhdei*(1) WALSH and RYCES JJ. dealt with the position in very direct terms. They said :

"In the ordinary way a Hindu widow ought not to be called upon to give security at all. No doubt there are many reversioners who are interested, but it is not the business of the Court to go out of its way to look after the reversioners who have no vested interest and to assume everything against the widow."

With that statement of the law the High Court of Patna has expressed its agreement in *Badri Narain Sahu v. Lachminia*(2). The learned Judges had before them exactly the point before us now and they approved in express terms the statement of the law which proceeded from the Bench in *Mt. Kausilla Kuer v. Mt. Sukhdei*(1). We understand there is no direct authority in this High Court. We therefore think it right to express our agreement with the view held by the Allahabad and Patna High Courts. It must be remembered that, as pointed out by the Judicial Committee in *Vasonji Morarji v. Chanda Bibi*(3) at page 379, the estate taken by a Hindu widow is not to be regarded as an ordinary life estate. Their Lordships approved the statement of Mr. Mayne in the eighth edition of his Hindu Law at page 870 to the effect that a Hindu widow's estate

"is not a life estate, because, under certain circumstances she can give an absolute and complete title. Nor is it in any sense an estate held in trust for the reversioners. Within the limits imposed upon her the female holder has the most absolute powers of enjoyment."

It may be that an order requiring a Hindu widow to give security for the realization of debts due to her husband's estate would in many cases virtually

(1) A.I.R. 1923 All. 579.

(2) A.I.R. 1935 Pat. 10.

(3) (1915) LL.R. 37 All. 389 (P.C.).

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involve a prohibition on the money being collected at all and becoming barred by limitation. Accordingly, if in fact the deceased and the respondent became divided, then in the absence of special circumstances the widow is entitled to a succession certificate without security. But the question as to whether they are or not divided has not been determined.

We remand the matter for rehearing to the learned District Judge, who, after he has decided the question of fact relating to the division or otherwise, will deal with the question of the issue of a certificate in the light of the above observations. This is manifestly a case which the District Judge should dispose of as early as possible. The respondent does not appear. He will pay the appellant's costs of this civil miscellaneous appeal in any event and of the proceedings before the learned Judge out of which this appeal arises.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Mockett and Mr. Justice Bell.

VE. RM. N. R. SOMASUNDARAM CHETTIAR
(FIRST RESPONDENT), APPELLANT,

v.

CT. VE. KANNAMMAI ACHI AND THREE OTHERS
(PETITIONERS 1 AND 2 AND RESPONDENTS 2 AND 3),
RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XL—Receiver—Scope of enquiry against receivers—Ordinary questions of account and cases of wilful default and gross negligence—Court to enquire on application—Reference to commissioner improper—Allegations of fraudulent conduct and misappropriation against receiver—Party to be directed to file suit.

Order XL of the Code of Civil Procedure (Act V of 1908) contemplates an enquiry in cases of ordinary questions of

*Appeal Against Order No. 328 of 1943.

1944,
January 24.

SOMASUNDARAM v. KANNAMMAI AGRI. accounts and also cases of wilful default or gross negligence. It is not designed to cover what in substance is a case of conversion. Where an application under Order XL for accounts makes charges of wilful default and gross negligence against the receiver, the Court should not refer the matter for enquiry to a commissioner but should itself enquire into the said charges. But if the charge is one of fraudulent conduct and misappropriation the matter should be referred to a suit.

Manicka Mudaliar v. Andalammal(1), *Subal Chandra Kar v. Jatindra Mohan Ghose*(2), *Coomar Sattya Sankar Ghosal v. Rani Golapmonee Debee*(3) and *Suresh Chandra v. A. K. M. Enzmel*(4) referred to.

APPEAL against the order of the Court of the Subordinate Judge of Devakottah, dated 22nd April 1943, and made in Civil Miscellaneous Petition No. 641 of 1942 in Original Suit No. 217 of 1934.

B. Sitarama Rao and S. Panchapagesa Sastri for *T. S. Vaidhyanatha Ayyar* for appellant.

C. Padmanabha Ayyangar, A. Sundaram Ayyar, M. S. Krishnamurthi Sastri and T. K. Sundararaman for respondent.

JUDGMENT.

MOCKETT J.—It is unnecessary to set out the history of the suits in which the appellant was appointed as a receiver. It is enough to say that he was appointed receiver in two suits, Original Suit No. 217 of 1934 of the Subordinate Judge's Court of Devakottah and Original Suit No. 172 of 1936 (later Original Suit No. 13 of 1939 of the Subordinate Judge's Court of Sivaganga). In Original Suit No. 13 of 1939 certain charges were made against the receiver (appellant) which were withdrawn and he obtained his discharge. He has not obtained his discharge in Original Suit No. 217 of 1934. The present Interlocutory Application No. 641 of 1942 was an application by the respondents under Order XL, rules 3

(1) I.L.R. [1940] Mad. 636.

(3) (1900) 5 C.W.N. 223.

(2) (1926) I.L.R. 53 Cal. 881.

(4) (1935) 40 C.W.N. 479.

and 4 and section 151 of the Code of Civil Procedure. SOMASUNDARAM v. KANNAMMAI AGRI. MOCKETT J.

Order XL, rule 3, is as follows :—

“Every receiver so appointed shall

“(b) submit his accounts at such periods and in such form as the Court directs ;

and (d) be responsible for any loss occasioned to the property by his wilful default or gross negligence.”

We are more concerned with rule 4 which says :

“(1) If a receiver fails to submit his accounts at such periods and in such form as the Court directs, the Court may order his property to be attached until he duly submits his accounts in the form ordered.

(2) The Court may, at the instance of any party to any suit or proceeding in which a receiver has been appointed or of its own motion, at any time make an enquiry as to what amount, if any, is due from the receiver as shown by his accounts or otherwise, or whether any loss to the property has been occasioned by his wilful default or gross negligence and may order the amount found due or the amount of the loss so occasioned to be paid by the receiver into Court or otherwise within a period to be fixed by the Court. All parties to the suit or proceeding and the receiver shall be made parties to any such enquiry. . . .”

Then follows a proviso which says :

“Provided that the Court may, where the account is disputed by the parties and is of a complicated nature or where it is alleged that loss has been occasioned to the property by the wilful default or gross negligence of the receiver, refer the parties to a suit. In all such cases the Court shall state in writing its reasons for the reference.”

An examination of the application filed by the present respondents shows that in fact what is alleged against the receiver is fraudulent conversion. There are, it is true, numerous allegations as well involving pure questions of accounts. But the basis of the application is that the receiver has been guilty of deliberate fraud and misappropriation. It is alleged that he has acted *mala fide*, dishonestly and fraudulently. In charge No. II there is a serious allegation

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that he was taking advantage of the fact that certain co-widows who were not acquainted with business transactions were concerned and deliberately manipulated the accounts taking advantage of that fact. Throughout there are allegations of fraud and in one case, of "double fraud". There can be no doubt, as I have already stated, that the main allegation was that the receiver had been guilty of fraudulent conduct and misappropriation.

The learned Judge does not seem to have applied his mind to this part of the case at all. He, it is true, considered whether there were allegations of wilful default or gross negligence; but the question whether either of these two elements was seriously concerned does not seem to have been in his mind. He thought it was to the advantage of the parties not to have this matter referred to a suit, but he does not consider whether the accounts were of a complicated nature or whether they were disputed. He seems to think that the objection by the receiver to having this matter dealt with in a summary manner was most unreasonable. Finally he made the following order:—

"That the enquiry into the charges levelled by the petitioners against the first respondent receiver be made by a commissioner to be appointed."

Whether the learned Judge should have made the enquiry himself is a matter which we will consider; but this order referring so serious a matter to a commissioner is wrong beyond dispute. A Bench of this High Court in *Manicka Mudaliar v. Andalammal*(1) has condemned such a course.

The only question which remains is whether the enquiry should have been made by the learned Judge himself. Order XL, in my view, contemplates an enquiry in cases of ordinary questions of accounts and also cases of wilful default or gross negligence; but it is not in my opinion designed to cover what in

(1) I.L.R. [1940] Mad. 636.

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substance is a case of conversion. Where that is the case, however, can it be doubted that, when petitions in such matters come before the Court and reveal such allegations as are set out in this petition, the inevitable course would be that reference should be made to a suit? The decisions, to which we have been referred, of the Calcutta High Court; *Subal Chandra Kar v. Jatindra Mohan Ghose*(1), *Coomar Sattya Sankar Ghosal v. Ranee Golapmonee Debee*(2) and *Suresh Chandra v. A. K. M. Enamel*(3); deal with what is the practice of the Calcutta High Court in cases where there are allegations of wilful default. Wilful default is far removed from deliberate fraud. I think therefore that the learned Judge has never applied his mind to the principles which should have guided him in using his discretion in this case. In my view, the case as presented by the respondents was suitable for a suit and for no other procedure and wholly unsuitable for the form of enquiry which would be made by the procedure which the Court has adopted. I need hardly repeat that enquiry and report by a commissioner in charges of fraud against an officer of the Court is wholly illegal.

In the result, I think that the judgment of this Court should be substituted for the judgment of the lower Court, and the order, in my opinion, should be that the respondents, with regard to their charges against the appellant and an investigation of their mutual relations, should be referred to a suit. Therefore I would allow the appeal with costs here and below. In assessing the costs the taxing authority will take into account the costs of private printing.

BELL J.—I agree and would only add that in my opinion what the Court has to consider in an application made under Order XL, rule 4 (2), is (a) whether

BELL J.

(1) (1926) I.L.R. 53 Cal. 881.
(2) (1900) 5 C.W.N. 223. (3) (1935) 40 C.W.N. 479.

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it is alleged that money is due as shown by the receiver's accounts and/or (b) whether there is an allegation of loss occasioned by the receiver's wilful default or gross negligence. If either of these two conditions are present, then the Court may consider what powers it has. So far as the accounts are concerned, it may send them to be scrutinized and reported on by a commissioner in order to save the time of the Court. With regard to wilful default, considering the definition, the Court may hold an enquiry, the materials for which may be scrutinized in the first instance by some outside person. The Court has the further power that, where the accounts are disputed and are of a complicated nature or where loss has been occasioned by wilful default or gross negligence, the parties may be referred to a suit. "Wilful default" is defined by ROMER J., as he then was, in *City Equitable Fire Insurance Co., In re*(1) thus:

"An act or an omission to do an act, is wilful where the person of whom we are speaking knows what he is doing and intends to do what he is doing. But if that act or omission amounts to a breach of his duty, and therefore to negligence is the person guilty of wilful negligence? In my opinion that question must be answered in the negative unless he knows that he is committing and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty."

So far, then, the Judge may do these things. But, where there is any charge of fraud involved, then he must deal with that himself whether by an enquiry or by directing the parties to a suit. Otherwise, the commissioner or any person to whom he delegated any power in the matter would be exercising a function belonging only to the Judge and the greatest harm might ensue to the reputation and honour of a man innocent of any moral offence, though perhaps an inefficient and unbusinesslike receiver. Here, in the

(1) [1925] 1 Ch.D. 407.

order, appealed against, the Judge speaks over and over again of the necessity of a full enquiry. He speaks of the "findings" of the commissioner on charges made against the receiver. This can only mean that the commissioner is to enquire into and come to some conclusion upon the substance or otherwise of these charges. That is not what the law provides for. The charges are serious and numerous. The schedule of the application runs to ten and a half full printed pages and the charges themselves fall under no less than twenty headings. I agree entirely that it is a case where the parties should be referred to a suit in order that these charges can be investigated and dealt with properly by the Court.

I agree therefore with the order suggested by my learned brother.

G.R.

APPELLATE CIVIL.

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

JANASWAMI PURNA HANUMANTHA RAO,
(FIRST DEFENDANT), APPELLANT,

1944,
January 31.

v.

JANASWAMI RAMACHANDRAYYA *alias* PRAHLAD,
MINOR BY MOTHER AND NEXT FRIEND JAVASWAMI
LAKSHMIPRASANNAMMA AND TWO OTHERS,
(PLAINTIFF AND DEFENDANTS 2 AND 3),
RESPONDENTS*.

Evidence—Husband and wife—Wife filing suit against husband for partition on behalf of her minor son as next friend—Husband admitting she was wife but denying his parentage of minor—Admissibility of evidence in these proceedings—Rule in the Russell case(1)—Admissibility in divorce proceedings, left open—Indian Evidence Act (I of 1872), sec. 112—"Access"—Meaning.

L, the mother of R, a minor, filed a suit as his next friend for partition against H and certain others. H admitted that

* Appeals Nos. 79 and 80 of 1942.
(1) [1924] A.C. 687.

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L was his wife but, among other things, denied that R was born to him. He deposed that, though he was cohabiting with L at the time when R was presumably conceived, he was not the father of R. On a question as to the admissibility of the evidence in these proceedings,

held: There is nothing in the Indian Evidence Act which debars a husband from giving evidence of non-access to his wife, even though the effect of such evidence tends to prove that a child born during the continuance of the marriage to the wife is illegitimate. The rule in the *Russell* case(1) is not applicable to such proceedings. The question whether section 7 of the Indian Divorce Act can be read as importing the rule in the *Russell* case(1) into the trial of divorce proceedings left open.

John Howe v. Charlotte Howe(2) referred to.

Held further: The word "access" in section 112 of Indian Evidence Act does not mean actual sexual intercourse, and the only way in which the presumption under that section can be displaced is by proof that the parties to the marriage had no opportunity for intercourse with each other at any time when the child could have been begotten.

Karapaya Servai v. Mayandi(3) followed.

APPEALS against the decree of the Court of the Subordinate Judge of Guntur in Original Suit No. 49 of 1938.

Ch. Raghava Rao for appellant.

V. Subrahmanyam, S. Panchapagesa Sastri and G. C. Venkatasubba Rao for respondents.

The JUDGMENT of the Court was delivered by WADSWORTH J. WADSWORTH J.—These appeals arise out of a suit for partition brought by the minor plaintiff with his alleged mother as his next friend. The first defendant is alleged to be the father of the plaintiff; the second defendant is the first wife of the first defendant, and the third defendant is their daughter. In Appeal Suit No. 79 the appellant is the first defendant. In Appeal Suit No. 80 the appellant is the second defendant. There is also a memorandum of cross-objections by the plaintiff. The plaintiff's next friend,

(1) [1924] A.C. 687.

(2) (1913) I.L.R. 38 Mad. 466 (F.B.).

(3) (1933) I.L.R. 12 Rang. 243 (P.C.).

Lakshmiprasannam, was a widow when she married the first defendant on 17th March 1935. For the sake of brevity she will be referred to as P.W. 6. The first defendant is a pleader who at that time was carrying on a practice in two towns of the Guntur district, Narasaraopet and Gurzala. He had no son by his first wife, whose health was poor, though we are informed that a son has been born to her since the suit was filed. The parties are Brahmins and the marriage of the first defendant to a widow was naturally regarded as unorthodox. P.W. 6 lived with her husband, first at Narasaraopet, and then for a short time at Gurzala.

In February 1936 the first defendant discovered letters which led him to believe that P.W. 6 was carrying on an intrigue with her husband's cousin Suryanarayana and at the instance of this individual was administering noxious drugs to her husband. He reported to the police and P.W. 6 was arrested but released on bail. In March 1936 there seems to have been some sort of a reconciliation between the husband and wife and they resumed cohabitation. The complaint to the police was rejected and P.W. 6 continued to live with her husband. But at the end of May 1936 she made a complaint to the police that her husband had attempted to strangle her. She left him and went to Guntur where she spent some time with her uncle and others.

From 2nd July 1936 to the 10th September 1936, after another reconciliation, the first defendant was once more living with P.W. 6 in a house in Brodipet, Guntur. These dates are most important, for the plaintiff is alleged to have been born on 18th April 1937, so that in the ordinary course of nature he would have been conceived at or about the end of the first week of the previous July. In November 1936 the first defendant was apprised by means of a written statement filed by P.W. 6 in a suit relating to the

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incriminating letters that she was pregnant. There is abundant evidence to show that she was admitted into the Government Hospital, Guntur, on 18th April 1937 and that she gave birth to a son on the same day. When, however, the birth was reported to the municipal authorities two mistakes were made in the report; the name of the mother was wrongly given as Lakshminarasamma instead of Lakshmiprasannam, and the name of the father was given as Sistla Venkatakristnayya, which is the name of P.W. 1. P.W. 1 deposes that he is a distant relation of the lady and that it was he who took her to the hospital when she was taken ill. There is no evidence that any other woman called Lakshminarasamma gave birth to a child in the Government Hospital, Guntur, at this time and it was only after the plaintiff had instituted proceedings for the correction of the municipal birth register that the first defendant began to deny that the plaintiff was the child of P.W. 6.

A great deal of time was taken in the argument of the first defendant's appeal on the two questions connected with the birth of the plaintiff. The denial of the maternity of P.W. 6 seems to have been based almost entirely on the error in the report which the hospital authorities sent to the municipal office. We see no reason to go in detail into this question for we agree entirely with the lower Court that it was abundantly proved that the plaintiff is the son of P.W. 6 and that he was born in the Government Hospital, Guntur, on 18th April 1937. Not only are these facts established by the hospital registers, but the plaintiff has examined another lady who was a patient in the labour ward of that hospital at the same time; and the entire absence of any challenge to the birth until after the rectification proceedings were taken in December 1938, makes it clear that there is no substance in the doubts upon the maternity of P.W. 6.

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A more substantial question relates to the paternity of the first defendant. In the lower Court the first defendant was allowed to depose that, though he was cohabiting with P.W. 6 at the time when the child was presumably conceived, he was not the father of the child. Arguments have been heard on the question whether the rule in *Russell v. Russell*(1) applies to the trial of legitimacy proceedings in India. A Full Bench of the Calcutta High Court in *Sweeney v. Sweeney*(2) has held that the *Russell* case(1) is good law in India and that, whether in divorce or in legitimacy proceedings, the husband cannot be allowed to give evidence of non-access so as to bastardise the child. There is, however, a Full Bench decision of this High Court which was criticised by the Calcutta High Court in the case just quoted, from which a contrary view can be deduced. We refer to the decision in *John Howe v. Charlotte Howe*(3) where it was held that, whatever be the common law of England on the subject, under sections 118 and 120 of the Indian Evidence Act both the parties to proceedings for divorce are competent to give evidence as to non-access and the consequent illegitimacy of the child. This decision was before the *Russell* case(1); but it is to be noted that the House of Lords in the *Russell* case(1) did not purport to do more than lay down that what was admittedly the pre-existing common law of England in legitimacy proceedings on the subject of the admissibility of the evidence of husband or wife applied equally to divorce proceedings when that evidence tended to bastardise a presumed child of the marriage. The Full Bench of this Court held that on such matters Courts in India are governed, not by the common law of England, but by the Indian Evidence Act. Under Section 120 of that Act the parties to the suit and the husband or wife of any party to the suit are

(1) [1924] A.C. 687.

(2) (1935) I.L.R. 62 Cal. 1080 (F.B.).

(3) (1913) I.L.R. 38 Mad. 406 (F.B.).

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competent witnesses in all civil proceedings. When we wish to find out what evidence a competent witness can give, we must have regard to the general rules of relevancy and admissibility as laid down in the Evidence Act, subject only to such special exceptions as the Indian Statute law embodies. In our opinion there is nothing in the Evidence Act which debars a husband from giving evidence of non-access to his wife, even though the effect of such evidence may tend to prove that a child born during the continuance of the marriage to the wife is illegitimate. We are not now concerned with the question whether section 7 of the Indian Divorce Act can be read as importing the rule in the *Russell* case(1) into the trial of divorce proceedings in India.

The law governing the proof of legitimacy of a child born during the continuance of a marriage is laid down in section 112 of the Evidence Act. The fact that the child was born during the continuance of a valid marriage between the mother of the child and her husband is conclusive proof that the child is a legitimate child of the husband, unless it can be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten. The appellant in Appeal Suit No. 79 has laid great emphasis on the decisions of VENKATASUBBA RAO J. in *Jagannatha Mudali v. Chinnaswami Chetti*(2) and *Samuel v. Annammal*(3) where the learned Judge deduces from certain English decisions the rule that the word "access" in section 112 of the Evidence Act means actual sexual intercourse and not a mere opportunity of intercourse. If this view is correct and if the deduction from *John Howe v. Charlotte Howe*(4) adumbrated above is applied, it would follow that the husband was rightly allowed by the lower Court, to swear that, though during the period

(1) [1924] A.C. 687.
(3) (1934) 66 M.L.J. 279.

(2) (1931) I.L.R. 55 Mad. 243.
(4) (1913) I.L.R. 38 Mad. 466 (F.B.).

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when the child was presumed to be conceived, he was actually living with the mother and had every opportunity for complete marital relations, he did not, in fact, have sexual intercourse with his wife and that he was therefore not the father of the child. There is, however, clear authority of the Privy Council for holding that the decisions of VENKATASUBBA RAO J. referred to above embody an incorrect view of the meaning of the word "access" in section 112. In the case of *Karapaya Servai v. Mayandi*(1) their Lordships observe as follows:

"It was suggested by Counsel for the appellants that 'access' in the section implied actual cohabitation, and a case from Madras reports was cited in support of this contention. Nothing seems to turn upon the nature of the access in the present case, but Their Lordships are satisfied that the word means no more than opportunity of intercourse."

Presumably the case referred to by their Lordships was one of the decisions of VENKATASUBBA RAO J., which we have already quoted. It seems to us to be established by these observations of the Privy Council that the word "access" in section 112 of the Evidence Act does not mean actual sexual intercourse and that the only way in which the presumption under that section can be displaced is by proof that the parties to the marriage had no opportunity for intercourse with each other at any time when the child could have been begotten. We may add that, since the decision of the Privy Council, two single Judges of this Court have recognised that the view taken by VENKATASUBBA RAO J. must now be deemed to be erroneous; vide *Krishnappa v. Venkatappa*(2) and *Manicka Mudaliar v. Ammakannu*(3).

That being the law, the conclusion of fact on the paternity issue becomes inevitable. The first defendant and P.W. 6 were living together as husband and wife in the same house at Guntur from 2nd July 1936

(1) (1933) I.L.R. 12 Rang. 243 (P.C.).
(2) (1943) 56 L.W. 383. (3) (1941) 54 L.W. 411.

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to 10th September of that year; that is to say, they were living together during the whole of the period within which in the ordinary course of nature the plaintiff must have been conceived. There are no such circumstances as to make it impossible, or even improbable, that the first defendant could have begotten the plaintiff during this period. We must therefore hold that it is conclusively proved that the first defendant is the father of the plaintiff. We may add that the first defendant himself seems to have had no doubt regarding his paternity until about the time when the suit was filed. In fact, on receipt of the lawyer's notice indicating an intention to demand partition on behalf of the plaintiff, the first defendant sent a letter, Exhibit C-1, dated 20th December 1937, which contains no indication that he had any doubt as to his fatherhood of the child. We find therefore that the plaintiff is the child of the first defendant by his wife P.W. 6.

We now turn to the more difficult questions relating to the properties in which the plaintiff claims a share. For this purpose it is necessary to go back and trace the history of the first defendant's financial affairs.

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

In the result, therefore, Appeal Suit No. 80 is allowed and the plaintiff will pay the costs of the second defendant in both Courts, so far as the claim against her is concerned. We set aside the lower Court's decree in so far as it gives to the plaintiff a share in the immovable properties standing in the name of the second defendant.

Appeal Suit No. 79 of 1942 is allowed to this extent, that in lieu of the decree given by the lower Court there will be a decree that the plaintiff is entitled to recover from the first defendant Rs. 7,390-8-0 with interest at six per cent from the date of the plaint and proportionate costs in the lower Court. In view of the fact that the first defendant has failed on the contentions

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relating to the parentage of the plaintiff, which occupied a great deal of the Court's time, we direct him to pay the plaintiff's costs in this appeal. No order as to costs in the memorandum of cross-objections. In the view which we have taken of the validity of the gift to second defendant no provision is necessary for the marriage of third defendant.

The court-fee payable on the plaint in the lower Court will be recovered by the Government in the first instance from the first defendant and if paid will be deducted from the costs payable by the first defendant to the plaintiff.

G.R.

APPELLATE CIVIL.

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

TADEPALLI SAROJINIDEVI, MINOR BY FATHER AND
NEXT FRIEND TADIKONDA RAMAKRISHNA
RAO (PLAINTIFF), APPELLANT,

v.

TADEPALLI SRI KRISHNA ANJANEYA SUBRAH-
MANYAM AND FIVE OTHERS (DEFENDANTS 1 TO 6),
RESPONDENTS.*

Government of India Act, 1935—Entries Nos. 21 of List II and 7 of List III, Schedule VII—"Agricultural land"—Meaning of—Mango grove. "agricultural land"—Hindu Women's Rights to Property Act (XVIII of 1937)—Absence of Provincial Legislation corresponding to Hindu Women's Rights to Property Act—Hindu widow of deceased coparcener not entitled to share in mango grove under the Act—Entitled to maintenance under Hindu law notwithstanding her rights to share in non-agricultural land under the Act—Her share to be taken into account in fixing quantum of maintenance—Mode of dealing with common charges on family estate in suit for partition by woman entitled to share under Act pointed out.

For the purpose of entries No. 21 of List II and No. 7 of List III of Schedule VII of the Government of India Act,

* Appeals Nos. 311 and 390 of 1942.

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1935, the expression "agricultural land" must be taken to include lands which are used or are capable of being used for raising any valuable plants or trees or for any other purposes of husbandry. A mango grove is "agricultural land" in respect of which the Hindu Women's Rights to Property Act, 1937, does not operate to regulate succession.

The meaning of the words "agriculture" and "agriculturist", in several Indian enactments discussed.

Held further: In the absence of legislation by the Provincial Legislature corresponding to the Hindu Women's Rights to Property Act, a widow of a deceased coparcener is entitled to rights of maintenance under the ordinary Hindu law, notwithstanding her right to a share in the non-agricultural properties of the family allowed to her under the Hindu Women's Rights to Property Act, 1937. That share would, of course, be taken into account in determining the *quantum* of maintenance to be allowed to her.

Venkata Subbarattamma v. Krishniah and others (1) approved.

Mode of dealing with common charges on the family estate in a suit for partition by a woman entitled to a share under the Hindu Women's Rights to Property Act pointed out.

APPEALS against the decree of the District Court of Kistna at Chilakalapudi in Original Suit No. 5 of 1940.

Ch. Raghava Rao for appellant in Appeal No. 311 of 1942 and for respondent in Appeal No. 380 of 1942.

K. Bhimasankaran for respondents in Appeal No. 311 of 1942 and for appellants in Appeal No. 380 of 1942.

Cur. adv. vult.

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The JUDGMENT of the Court was delivered by PATANJALI SASTRI J.—These two connected appeals have been brought from a preliminary decree in a partition suit. One Ramachandra Rao died on 23rd February 1939 leaving him surviving his widow (plaintiff), two sons (defendants 1 and 2), an unmarried daughter by his predeceased wife (third defendant) and his mother (sixth defendant). The

(1) (1943) 1 M.L.J. 235.

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sons and daughter being minors were represented by their maternal grandfather, the fourth defendant, who was appointed as their guardian for the suit. The fifth defendant was a stranger with whom Ramachandra Rao carried on business in partnership as retailer of fancy goods under the style of Friends & Co. Soon after the death of Ramachandra Rao there were magisterial proceedings and inventories were prepared of the movables in the house including the articles belonging to Friends & Co. which had its shop in the front rooms of the same premises. The plaintiff sued for partition and delivery of a third share of Ramachandra Rao's properties which were set out in five schedules annexed to the plaint.

As Ramachandra Rao died undivided from his sons, the plaintiff's right to a share could only be based on the Hindu Women's Rights to Property Act, 1937, and though the claim was originally made in respect of all the properties it was conceded that she was not entitled to a share in the agricultural lands forming part of the estate, as it has since been held by the Federal Court that the Act does not operate to regulate succession to agricultural land in the Governors' Provinces but operates only in respect of other kinds of property; see *In re The Hindu Women's Rights to Property Act*(1). In the absence of parallel legislation by the Legislature of this Province in regard to agricultural land, this decision has given rise to new problems in apportioning or allocating, among the full and partial co-sharers, the common obligations to be borne by the estate as a whole, such as claims of creditors, maintenance holders and unmarried daughters, and some of these problems arise for consideration in the present case.

The first contention raised by Mr. Raghava Rao for the plaintiff relates to a mango grove (item 36,

(1) (1941) 3 F.C.R. 12.

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schedule A) forming part of the estate. The Court below negatived the plaintiff's claim to a share therein on the ground that it is agricultural land, succession to which is not regulated by the Hindu Women's Rights to Property Act. While it has been held in the decision already referred to that succession to "agricultural land" is a subject within the exclusive competence of the Provincial Legislature, there is no indication in the judgment as to what is "agricultural land" within the meaning of the entries No. 21 of list II and No. 7 of list III of Schedule VII of the Government of India Act, 1935. No case throwing light on the point has been brought to our notice, though numerous decisions were cited as to the connotation of the term "agricultural" or "agriculture" occurring in various other enactments relating, for the most part, to tenancy legislation in this and other Provinces. Many of these statutes contain their own definitions of the term and even where there is no definition the term had to be interpreted in the light of the object and general policy underlying the particular enactment and of other indications afforded by it. It seems to us therefore not profitable to discuss in detail any of those decisions as they cannot afford any useful guidance in the interpretation of the expression "agricultural land" in the Constitution Act. That Act has not defined the term which has accordingly to be interpreted in its ordinary sense controlled, no doubt, by the context of the Act.

It is somewhat remarkable that a word in such common use as "agriculture" should have given rise to a great divergence of judicial opinion in regard to its interpretation. In *Murugesu Chetti v. Chinna-thambi Goundan*(1) BHASHYAM AYYANGAR J. pointed out that the word was susceptible of a wider and

(1) (1901) I.L.R. 24 Mad. 421.

a narrower interpretation and that in its more general sense signified

"not only all field cultivation by tillage but also all garden cultivation for the purpose chiefly of procuring vegetables or fruits as food for man or beast and other products fit for human consumption by way of luxury, if not as an article of diet."

SHEPHERD J. was of opinion that in ordinary parlance neither a man who planted fruit trees or bushes in an enclosed space nor still less one who planted and maintained trees for firewood or other such purposes would be called an agriculturist. He recognized, however, that the word "agriculture" was capable of being applied to tillage of the soil in its widest sense and agreed with his learned colleague that the lease of a betel garden was a lease for "agricultural purposes" within the meaning of section 117 of the Transfer of Property Act which does not contain a definition of the term. In *Raja of Venkatagiri v. Ayyapareddi*(1) SADASIVA AYYAR J. expressed the opinion that the ordinary meaning of agriculture was the raising of annual or periodical grain crops through the operation of ploughing, sowing, etc. In *Panadai Pathan v. Ramasami Chetti*(2) SPENCER J. criticised the definitions of BHASHYAM AYYANGAR J. and SADASIVA AYYAR J. as being too narrow as they would exclude cultivation of flower, indigo, cotton, jute, flax, etc., from agriculture. According to him "agriculture" connotes

"the raising of useful or valuable products which derive nutriment from the soil with the aid of human skill or labour" and will include

"horticulture, arboriculture, and silviculture in all cases where the growth of trees is effected by the expenditure of human care and attention in such operations as those of ploughing, sowing, planting, pruning, manuring, watering, protecting, etc."

RAMESAM J. referred to the definitions in several dictionaries and English statutes and was inclined

(1) (1913) I.L.R. 38 Mad. 738.

(2) (1922) I.L.R. 45 Mad. 710.

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to think that the term would include the rearing of any plants requiring "some preparation of the ground and subsequent care by watering the plants". The learned Judges held that growing casuarina trees was an agricultural purpose under section 117 of the Transfer of Property Act. These views were in turn criticised by REILLY J. in *Chandrasekhara Bhurathi Swamigal v. Duraisami Naidu*(1) as being the "result rather of stretching than of defining the word (agriculture)" and as ignoring the first two syllables of that word. The learned Judge thought that according to its derivation it meant the cultivation of an open space as opposed to horticulture, the cultivation of comparatively small enclosed space. He would reject the test based on the nature of the products cultivated and define the term "rather by the circumstances in which the cultivation is carried on". He was accordingly of opinion that

"the planting of timber or firewood trees which are to stand on the land for a considerable number of years, forming plantations or woods or forests was opposed to the idea of agriculture, the cultivation of an open space",

notwithstanding that it might be necessary, for the purpose of growing such trees, first to prepare the land and later on to protect and water them. Relying also on certain indications in the Madras Estates Land Act he held, with the concurrence of ANANTAKRISHNA AYYAR J., that growing casuarina trees for fuel was not an agricultural purpose within the meaning of that Act. It is unnecessary to refer to the decisions of the other High Courts as those to which reference has been made sufficiently illustrate the difficulty in defining the term which admits of different interpretations.

Mr. Raghava Rao, however, claimed that the decision of the Privy Council in *Kesho Prasad Singh v.*

(1) (1931) I.L.R. 54 Mad. 900.

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Sheo Pragash Ojha(1) practically concluded the point in his favour, as it related more or less to the same kind of property as we are now considering, viz., grove land. It was a pronouncement on appeal from the decision in *Kesho Prasad Singh v. Sheo Pragash Ojha*(2) where, following a line of cases decided by that Court, it was held that land granted by a zamindar "for the purpose of planting a grove, the grantee agreeing to deliver one-half of the fruit to the zamindar", was not "land held for agricultural purposes" within the meaning of the Agra Tenancy Act. It would, however, appear that the earlier decisions in that Province were based on the peculiar status of "groveholders pure and simple" who had no rights in the land after the trees were cut. Their Lordships simply expressed their agreement with the opinion of the High Court that

"it is impossible to hold that that section (section 79) has any application whatever to such a property as the grove in fact is".

There is no discussion as to the connotation of the term "agriculture", and no test of any general application is indicated. We cannot therefore regard the decision as a conclusive authority on the question we have to decide in this case.

As we have already pointed out, the term "agriculture" is used in different senses and, in order to ascertain in what sense it is used in the Legislative Lists in Schedule VII of the Constitution Act, we must have regard to the object and purpose of section 100 of which these lists really form part. That section deals with the distribution of legislative powers as between the Federal and Provincial Legislatures and the lists enumerate the "matters" in respect of which those Legislatures have or have not power to make laws. In such context it seems to us that the expression "agricultural land" must receive the

(1) (1924) I.L.R. 46 All. 831 (P.C.). (2) (1921) I.L.R. 44 All. 19 (F.B.).

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widest meaning, for it would be somewhat grotesque to suppose that Parliament intended that lands devoted to the production of one kind of crop should devolve according to laws passed by Provincial Legislatures, while those used for growing another kind should pass according to laws made by the Central Legislature, or that "the circumstances in which the cultivation is carried on", *per* REILLY J. in *Chandrasekhara Bharathi Swamigal v. Duraisami Naidu*(1), should determine the law which governs the devolution of the land. Nor could it have been intended that succession to such lands should depend on the degree of tillage or preparation of the soil or of the skill and labour expended in rearing and maintaining the plants. We are of opinion that for the purposes of the relevant entries in Lists II and III of Schedule VII, the expression "agricultural land" must be taken to include lands which are used or are capable of being used for raising any valuable plants or trees or for any other purpose of husbandry. It follows that the mango grove in question is agricultural land in respect of which the Hindu Women's Rights to Property Act, 1937, does not operate to regulate succession.

The only other items of Schedule A as to which the plaintiff raised any objection before us are 31 and 32, a house and a site, which the fourth defendant, who was managing the properties on behalf of defendants 1 and 2 as their guardian, sold for Rs. 1,750 during the pendency of the suit. It was objected that the sale was for a low value and could not bind the plaintiff, but the lower Court has observed that neither the sale nor the price was questioned, and it has decreed to the plaintiff her share of the sale proceeds. The objection cannot therefore be entertained at this stage.

(1) (1931) I.L.R. 54 Mad. 900.

[His Lordship discussed the evidence and proceeded:]

For the reasons already indicated, we are unable to agree with the learned Judge's conclusion on this part of the case. The fifth defendant who has admittedly taken charge of all the assets of the firm as they stood at the time of the death of Ramachandra Rao is bound to account to the plaintiff for her share of the net assets due to the deceased partner at the time of the dissolution, with subsequent interest at six per cent per annum.

The only other dispute raised in the plaintiff's appeal relates to her right of maintenance. As already stated, in her plaint which was filed before the decision of the Federal Court referred to above the plaintiff claimed a third share of the entire family estate, but in view of that decision, the claim, so far as it related to agricultural lands which form a considerable portion of the estate, has failed. It is therefore urged for the plaintiff that she is entitled to maintenance as against these properties which have passed exclusively to defendants 1 and 2 and that such maintenance should also be provided for in this suit. As there is no prayer for this relief in the plaint, we have acceded to the plaintiff's request to allow her to amend the plaint suitably so as to raise this matter. The question accordingly arises whether, notwithstanding the right to a share in the non-agricultural properties of the family allowed to her under the Hindu Women's Rights to Property Act, 1937, the widow of a deceased coparcener is still entitled to any right of maintenance as under the ordinary Hindu law. It seems to us that this question must be answered in the affirmative. It may well be that, if the Act conferred upon the widow a right of succession in respect of all her husband's property, the right of maintenance allowed to her under the ordinary Hindu law as compensation for her exclusion from inheritance would no longer be available, although nothing is said in the Act

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about rights of maintenance. But that is not the position according to the decision of the Federal Court already referred to. The widow still stands excluded from succession to agricultural land in the absence of provincial legislation on parallel lines in respect of such land. It cannot, therefore, be said that the reason of the right has ceased to exist and the right is gone. It would be strange and anomalous if, as a result of an enactment designed to give "better rights" to the widow, she were to be placed in a worse position by being deprived of her pre-existing right of maintenance, with consequences which may well prove disastrous where the bulk of her husband's joint or separate property consists of agricultural land. We are therefore of opinion that the plaintiff is entitled to maintenance notwithstanding her right under the Act to a share in the non-agricultural part of the family estate. This share will, of course, be taken into account in determining the sum payable to her. A similar conclusion, it may be observed, was reached by KING J. in *Venkata Subbarattamma v. Krishniiah*(1).

The main contentions raised in the defendant's appeal were in regard to the provision to be made for certain common charges on the family estate. The third defendant claimed that a provision should be made for her maintenance until her marriage and for her marriage expenses. She also claimed that the jewels of her mother Raghavamma, the predeceased first wife of Ramachandra Rao, having been given away by the latter to the plaintiff, their value should be paid to her as the stridhanam heir of her mother out of the estate as a liability incurred by Ramachandra Rao. The sixth defendant, the adoptive mother of Ramachandra Rao, also claimed maintenance for herself. These claims were the subject-matters of issues 6 to 9, but the learned Judge below has left them undetermined, as in his

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opinion it would be unfair to charge the limited property in which the plaintiff is entitled to a share with these liabilities which should be more appropriately dealt with at a general partition of all the family properties between defendants 1 and 2. While it would no doubt be unfair to the plaintiff to debit the common liabilities chargeable to the family estate as a whole against the non-agricultural part of it, for that would result in the agricultural lands in the hands of the defendants, which in this case form the bulk of the family estate, escaping their just share of the burden, it would, on the other hand, be unfair to defendants 1 and 2 to give the plaintiff her share in the non-agricultural part freed from these liabilities as the learned Judge has done, for this would have the result, overlooked by him, of making these defendants solely responsible for the payment of these charges. It seems to us that the only equitable way of dealing with these common liabilities will be to apportion them between the non-agricultural part of the estate and the agricultural lands according to their respective value after ascertaining the same, though these lands do not fall to be partitioned in this suit, and to charge the share decreed to the plaintiff a proportionate part of what is found debitable to the non-agricultural part of the estate on such apportionment. It was said that such an apportionment would not have due regard to the fact that, while the plaintiff gets only the limited estate of a widow in the share allowed to her under the new Act, the shares of defendants 1 and 2 have passed to them absolutely. But it is to be remembered that the liabilities are a charge on the estate as a whole, and what is divisible among the co-sharers is only the residue after setting apart what is necessary to meet these liabilities. The fact that the widow is given only a limited right under the Act in the net divisible fund can have no relevance in the apportionment of the liabilities among those who share it. We

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accordingly direct that provision should be made for the maintenance and marriage expenses claimed before the plaintiff is given a decree for her share in the assets divisible in this suit.

As regards the third defendant's claim for the value of her mother's jewels alleged to have been given to the plaintiff by Ramachandra Rao, we consider that she should seek her remedy in a separate suit as it raises various questions which cannot be conveniently gone into in this suit.

A minor point was raised as regards the date from which the plaintiff was to be awarded mesne profits in respect of the third share of the immovable properties other than agricultural lands allowed to her. The lower Court held that she was entitled to such profits from the date of the death of Ramachandra Rao. This is clearly wrong as the plaintiff admits in her plaint that she was in joint possession of the properties till the date of suit. She will therefore get mesne profits only from that date.

In the result, both appeals are allowed to the extent indicated and the case is remanded to the lower Court for passing a revised preliminary decree in the light of this judgment after making such further enquiry as may be found necessary in that behalf. Parties will have liberty to adduce fresh evidence on all matters relevant to the enquiry. In Appeal Suit No. 311 of 1942, the plaintiff's costs as against the fifth defendant will abide and follow the result. Otherwise we make no order as to costs. In Appeal Suit No. 380 of 1942, the appellants 3 and 5 will be entitled to costs proportionate to their success and such costs will abide and be provided for in the revised preliminary decree. The lower Court will make its own order as to costs in that Court. The court-fee on the memoranda of appeal and cross-appeal will be refunded.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice King and Mr. Justice Shahabuddin.

IN RE CHIKATI GURUVULU (ACCUSED),

APPELLANT.*

1944,
January 20.

*Indian Penal Code (Act XLV of 1860), ss. 300 and 325—
Intention of accused only to steal jewels of deceased—Cutting
nostrils of deceased to facilitate theft—Death of victim unexpected
—Accused guilty of causing grievous hurt.*

Where the only intention of the accused who was convicted for the offence of murder was to steal the jewels of the deceased and the only violence which he committed, viz., cutting the nostrils of the deceased, was necessary in order to facilitate the theft and the death of the deceased was entirely unexpected, held that the conviction of the accused for the offence of murder could not be sustained and that he was guilty of the offence of causing grievous hurt under section 325 of the Indian Penal Code.

APPEAL against the order of the Court of Sessions of the Vizagapatam Division in Case No. 32 of the Calendar for 1943, dated 13th August 1943.

Appellant not represented.

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

The JUDGMENT of the Court was delivered by KING J.—The appellant has been found guilty by the learned Sessions Judge of Vizagapatam for the murder of an elderly woman named Ganagalla Sootamma on the night of the 1st May last. There is no doubt that the deceased met her death on that night and that both her nostrils were cut and certain jewels taken from her after the cutting. The evidence which has been accepted by the learned Judge as proving that the appellant was responsible for the injuries to the nostrils, which in their turn brought about the woman's death, is mainly that afforded by a confession of the accused himself. He has stated after he was arrested that he had throttled the deceased and killed her

KING J.

* Criminal Appeal No. 726 of 1943.

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and removed her nose rings by force and he promised to reveal the hiding place of those rings. In due course he produced the rings which have been exhibited as M.Os. 1 and 2. There is also evidence from two witnesses, P.Ws. 7 and 8, that at or near the time when the offence must have taken place they saw the appellant near the house of the deceased in which she was killed.

The learned Judge, after accepting this evidence, has held that the appellant is guilty of murder. It has however not apparently struck the learned Judge that any discussion is necessary as to whether the appellant was actuated by any of the intentions defined in section 300 of the Indian Penal Code. He has been found guilty of murder at the conclusion of the judgment, although every indication that can be discovered in the earlier portions of the judgment suggests that the appellant could not possibly have had any intention to kill the deceased. The cause of death is given in the medical evidence as shock and hæmorrhage, and one must presume that the hæmorrhage was caused by the injuries to the nostrils. There is nothing in the evidence to suggest that injuries of this kind would in the ordinary course of nature bring about death, and we think that in this sense also death in this case was unexpected and was due probably to the age and feeble health of the deceased. The accused no doubt says in his confession that he throttled the deceased. But the medical evidence shows only very slight signs of asphyxia. It is quite obvious that if the appellant had deliberately intended to kill the deceased by throttling her he could easily have achieved that purpose and that when he mentioned in his confessional statement that he had throttled her he was giving a mistaken view as to the real cause of her death, a mistake which was natural enough in view of the fact that he must have seized her by the neck.

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In paragraph 10 of the judgment the learned Judge clearly holds that the murder was what he has called accidental, that is to say, that the only intention of the appellant was to steal the jewels of the deceased and that from his point of view the only violence which he committed was that necessary in order to facilitate theft, and the death of the deceased was entirely unexpected.

On these facts the conviction of the appellant for the offence of murder cannot be sustained. The appellant, we feel quite satisfied, is guilty of having caused the injuries to the nostrils of the deceased which resulted in her death. But his intention could only have been to cause those injuries, and in the absence of any evidence that the injuries were sufficient in the ordinary course of nature to cause death or were such as the appellant knew to be likely to cause death, or were so imminently dangerous that they must in all probability cause death, the charge of murder must fail. We accordingly acquit the appellant of murder and substitute for that conviction a conviction under section 325 of the Indian Penal Code. The hurt which was caused is in our opinion grievous hurt because it would have resulted in a permanent disfiguration of the face. We sentence the appellant to five years' rigorous imprisonment.

Before leaving this case, we wish to point out that if the conviction for murder could have been sustained the only possible sentence would have been one of death. We are very dissatisfied with the reasoning of the learned Judge in paragraph 15 in which he explains why he has decided to impose the lesser sentence, and we must protest against the absurdity of imposing the lesser sentence in order that the accused might stand his trial for robbery.

V.V.C.

APPELLATE CRIMINAL.

*Before Sir Lionel Leach, Chief Justice, and
Mr. Justice Shahabuddin.*

1944,
March 21.

IN RE CHINNAYAN ROWTHER *alias* SAHUL HAMID.*

Defence of India Act, 1939, sec. 2 (5)—Defence of India Rules, r. 81—Delegation of power by Provincial Government to Additional District Magistrates and Subdivisional Magistrates on 27th July 1942—Order by District Magistrate prohibiting export of paddy or rice to places outside the district—Validity.

Where the petitioner was convicted for having attempted to smuggle rice from the district of Madura to the State of Travancore in violation of a notification issued by the Additional District Magistrate of Madura, dated 18th February 1943, under rule 81 of the Defence of India Rules by virtue of the powers delegated to him under section 2 (5) of the Defence of India Act, prohibiting the export of rice to places outside the Madura District without a permit,

held that the notification was *intra vires* and that the conviction of the petitioner was valid.

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 Madura Division in Criminal Appeal No. 185 of 1943 preferred against the judgment of the Court of the Additional First-class Magistrate of Dindigul in Calendar Case No. 238 of 1943.

K. S. Jayarama Ayyar and S. K. Ahmed Meeran for petitioner.

Advocate-General (Sir A. Krishnaswami Ayyar) and Assistant Public Prosecutor (N. Somasundaram) for the Crown.

The JUDGMENT of the Court was delivered by
LEACH C.J.—The petitioner was charged in the Court

* Criminal Revision Case No. 1024 of 1943 (Criminal Revision Petition No. 963 of 1943).

of the Additional First-class Magistrate of Dindigul with having attempted to smuggle rice from the district of Madura to the State of Travancore in violation of a notification issued by the Additional District Magistrate of Madura, dated the 18th February 1943, prohibiting the export of rice to places outside the Madura District. The Magistrate found the charge to have been proved and sentenced the petitioner to undergo rigorous imprisonment for a period of six months. An appeal to the Sessions Judge was dismissed. The accused has now applied to this Court to revise the order of the Sessions Judge. He does not challenge the findings of fact. He confines his case to the contention that the notification issued by the Additional District Magistrate prohibiting the export of rice from the Madura District did not apply in the circumstances. He maintains that he could only have been charged under an earlier notification issued by the Provincial Government, and as this had not been done the prosecution was illegal.

Rule 81 (2) of the Defence of India Rules empowers the Provincial Government so far as appears to it to be necessary or expedient for securing the defence of British India or the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community by order to provide *inter alia* for regulating or prohibiting the transport of articles or things kept for sale. Section 2 (5) of the Defence of India Act states that a Provincial Government may by order direct that a power or duty which by rule made under sub-section 1 is conferred or imposed on the Provincial Government shall, in such circumstances and under such conditions as may be specified, be exercised or discharged by an officer or authority, not being an officer or authority subordinate to the Central Government. Rule 81 (4) says that if a person contravenes an order made under the rule he shall be punishable with imprisonment for a term which may

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extend to three years or with fine or both. Rule 121 provides that a person who attempts to contravene, or abets, or attempts to abet, or does any act preparatory to, a contravention of, any of the provisions of the rules or of any order made thereunder, shall be deemed to have contravened that provision, or, as the case may be, that order.

By an order, dated 13th June 1942, the Governor of Madras in exercise of the powers conferred by sub-rule 2 of rule 81 of the Defence of India Rules passed an order prohibiting a person on or after 1st July 1942 from transporting paddy or rice from the Province of Madras to any place outside the Province except under and in accordance with the terms and conditions of a permit issued by the Special Officer for prices, Madras, or any other officer specially authorized by the Special Officer in this behalf. An exception was made in the case of a person transporting paddy or rice not exceeding three maunds in weight for private consumption.

On 27th July 1942 the Provincial Government delegated its powers conferred by rule 81 and certain other rules to all Additional District Magistrates and Subdivisional Magistrates within their respective jurisdictions. In pursuance of this delegation the Additional District Magistrate of Madura on 18th February 1943 notified the following order made by him :—

“No person shall export any amount of paddy or rice, however small, from any place in Madura district to places outside its limits except under a permit issued by the Collector of Madura, or by an officer authorized by him.”

The case for the petitioner is that he could not be charged under the notification issued by the Additional District Magistrate of 18th February 1943, but only under the notification issued by the Provincial Government on 13th June 1942, because he was engaged in transporting rice out of the Province into an Indian State, not from one district of the Madras Presidency

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to another. We are unable to accept this argument. It has not been suggested that rule 81 of the Defence of India Rules is in any way *ultra vires*, nor is it suggested that the legislative authority had no power to insert sub-section 5 of section 2 in the Act. It has in fact been accepted that the Provincial Government has all the powers conferred by rule 81 and that it has the power of delegation. It has in this case delegated to the Additional District Magistrate its power of controlling the transport of paddy and rice to places outside the district. The Additional District Magistrate has passed an order prohibiting the export of paddy or rice from the Madura District without a permit issued by the proper authority. The validity of this order is not, or cannot be, called in question. A person offends against it if he removes or takes any steps towards the removal of paddy or rice from the district without a permit. The petitioner offended against this order. He was caught in an attempt to transport rice from a place in the district to a place outside the district. It matters not whether he intended to take it to the State of Travancore or to either of the adjoining districts of Tinnevely or Ramnad. It was not necessary to mention the State of Travancore in the charge; and the fact that it was mentioned does not in any way change the position. The Additional District Magistrate of Madura was lawfully authorized to prohibit the transport of rice or paddy from that district without a permit and the petitioner contravened that order. The question whether the Provincial Government could in this case have itself taken action under its own notification does not arise and therefore does not call for discussion.

As we hold that the notification of the Additional District Magistrate of the 18th February is *intra vires*, the petitioner has been rightly convicted. Consequently his petition will be dismissed.

V.V.O.

APPELLATE CIVIL—FULL BENCH.

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

1944,
April 4.

SAHUL HAMEED ROWTHER (PETITIONER-ASSIGNEE
DECREE-HOLDER), APPELLANT,

v.

P. R. S. A. ARUNACHALAM PILLAI AND ANOTHER
(RESPONDENTS 2 AND 3), RESPONDENTS.*

*Indian Limitation Act (IX of 1908), Sch. I, arts. 181 and 182—
Attachment before judgment in a suit—Decree passed
subsequently—Execution of such decree—Art. 182 and
not art. 181 applicable—Decree not kept alive by reason of
attachment before judgment—Application for execution
to be made within the prescribed period—Intention to
execute decree not sufficient—Such intention gathered from
conduct of decree-holder in other proceedings irrelevant.*

Article 182 of the Indian Limitation Act governs an application for the execution of a decree even in a case where there has been an order of attachment before judgment and the decree is passed subsequently. Article 181, being a residuary article, is not applicable to such a case. A decree is not kept alive by reason merely of an attachment before judgment in the suit. An attachment before judgment does not continue indefinitely after judgment without an application for execution of the decree being made within the prescribed period. Mere intention to execute the decree is not sufficient and the fact that such an intention can be gathered from the conduct of the decree-holder in other proceedings is irrelevant. If a decree-holder fails to apply for execution of the decree within the prescribed period he loses his remedy in respect of the decree.

Observations to the contrary in *Ramanadhan v. Veerappa*(1) and *Surayya v. Venkataratnam*(2) disapproved.

Meyyappa Chettiar v. Chidambaram Chettiar(3) explained.

Rungiah Goundan & Co. v. Nanjappa Row(4) referred to.

APPEAL against the order of the Court of the Subordinate Judge of Tuticorin, dated 16th November 1942

* Appeal Against Order No. 24 of 1948.

(1) A.I.R. 1937 Mad. 84.

(2) (1923) I.L.R. 47 Mad. 176.

(3) (1923) I.L.R. 47 Mad. 482 (F.B.).

(4) (1903) I.L.R. 26 Mad. 780.

and made in Execution Application No. 194 of 1942 in Original Suit No. 13 of 1932. SAHUL HAMEED
ARUNACHALAM.

The appeal first came on for hearing before the Court (KING and HORWILL JJ.) who made the following

ORDER OF REFERENCE TO A FULL BENCH :—

The appellant is the assignee of the decree in Original Suit No. 13 of 1932 on the file of the Subordinate Judge of Tuticorin. That was a mortgage suit and the sale of the mortgaged property was duly effected and the decree with which we are now concerned is a personal decree against the mortgagor, the second respondent. That personal decree was granted on 10th August 1935. No application was put in by the appellant to execute this decree until 4th January 1940 when he applied for its transmission to the Court of Srivakuntam. Transmission was ordered but nothing effective was done and we have been informed that the decree was returned to Tuticorin. An execution application was filed on 3rd July 1942 and the question before us is whether this application is or is not barred by limitation. It may be mentioned here that the object of the appellant was that he, the decree-holder in Original Suit No. 13 of 1932, should execute his decree by executing a decree passed in Original Suit No. 95 of 1932 in the Court of the District Munsif of Kumbakonam. That decree was attached before judgment by the appellant on an application filed in November 1934 and the interim order of attachment was made absolute on the day on which the appellant obtained his personal decree in Original Suit No. 13, i.e., on 10th August 1935. The learned Subordinate Judge of Tuticorin has held that the execution application is barred by limitation and the decree-holder, as we have already stated, has appealed.

On the face of it the first of these two applications for execution filed in 1940 four and a half years after the passing of the personal decree must be barred by limitation under the provisions of article 182 of the Limitation Act. It is, however, contended first of all for the appellant that under paragraph 5 of the third column of article 182, this application is in time as it was made less than three years after the final order of a Court on an application to take some step-in-aid of execution. In order to understand this contention, further facts and dates have to be stated. We have already mentioned that the aim of the execution proceedings taken by the appellant is to execute the decree in Original Suit No. 95 of 1932

SAHUL HAMEED of which his judgment-debtor is the decree-holder. It was held on 21st January 1937 by the Subordinate Judge, Tuticorin, in appeals against certain orders, that the decree in Original Suit No. 95 of 1932 should be declared to be fully satisfied. On 3rd May 1937 the appellant filed a civil revision petition to the High Court against this order of the learned Subordinate Judge recording full satisfaction of the decree. It is now argued that the application to the High Court in May 1937, which was not finally disposed of until September 1939, was a step-in-aid of execution. It is clear from the language of article 182 itself that the action of the appellant in filing the civil revision petition cannot be claimed as such a step-in-aid. Paragraph 5 of the third column of article 182 requires that the application for a step-in-aid of execution must be taken to "the proper Court." Explanation II to the third column of article 182 lays down that "proper Court" means the Court whose duty it is to execute the decree or order. There can be no doubt whatever that the High Court is not such a proper Court within the meaning of that article and that therefore any application of any kind made to the High Court cannot be a step-in-aid under article 182.

The next contention of the appellant is based upon a ruling of a single Judge of this Court in *Mangamma v. Narayana-nappa*(1). That was a case in which a decree for money had been passed in 1922 and that decree had been declared satisfied on the application of the judgment-debtor in 1924. This order was reversed in April 1926 and then in 1928 the decree-holder applied for execution of the decree. It was held on a consideration of the meaning of the expression "date of the decree" in article 182 (1) that that portion of the article could not literally apply to the facts and therefore the application would have to be governed by article 181 and the application of the decree-holder was held to be in time. It does not seem to us that this decision deals directly with facts similar to those before us. Here, there can be no doubt that the decree of which the appellant is the decree-holder, i.e., the decree in Original Suit No. 13 of 1932, has never been declared to be fully satisfied. There has therefore been no technical obstruction of any kind to the execution of the decree in Original Suit No. 13 of 1932. The analysis of the meaning of the words "date of the decree" given by KRISHNAN PANDALAI J. therefore does not apply to the facts of the present case and the expression can mean only what it appears on its surface to mean, and therefore an application filed more than three

(1) (1933) 65 M.L.J. 747.

years after the date of the decree must, if article 182 is to be taken as applicable to its disposal, be held to be barred.

There is however still a third way in which it has been contended for the appellants that the present application is not barred by limitation. According to that contention the application falls not under article 182 but under article 181, and time began to run under that article only on 22nd September 1939 when the High Court reversed the order of the Subordinate Judge of Tuticorin passed on 21st January 1937. In support of the contention that article 181 applies, reliance was placed upon a decision of a Bench of this Court in *Surayya v. Venkataratnam*(1). The facts in that case were that certain properties belonging to a judgment-debtor had been attached before judgment. After the decree was passed against the judgment-debtor, a claim petition was put in by a third party and was allowed. After that order had been passed, the decree-holder filed a suit and had the order set aside. When he had thus successfully established the title of his judgment-debtor to the properties in question, he filed an execution application to proceed against those properties. That application was more than three years from the date of the decree. It was held in the circumstances that the application was governed by article 181 and not by article 182 and that it was filed in time as it was within three years of the date of the decree in the suit to set aside the order on the claim petition. This decision does not of course deal with precisely similar facts to those now before us, but most of the facts are similar. In both the cases certain property alleged by the plaintiff in a suit to be the property of the defendant was attached before judgment. In both cases there was no formal application in execution to proceed against that property until more than three years after the date of the decree. The decision in *Surayya v. Venkataratnam*(1) that article 182 does not apply and article 181 applies is based upon the principle that there was during part of the interval between the date of the decree and the date of the execution petition a legal bar which prevented the filing of any execution application. We think the situation as between the parties in this case is essentially the same as the situation in *Surayya v. Venkataratnam*(1) even though it was argued for the respondent that it can be legally distinguished. The ground of distinction in principle was that there has been no bar at all to the execution of the decree in Original Suit No. 13 of 1932, but the importance of that distinction disappears on a

(1) (1923) I.L.R. 47 Mad. 176.

SARUL HANEND v. ARUNACHALAM. perusal of the facts of the two cases. We consider that in both cases there has been a bar *not* against proceeding in execution in general, but only in respect of some particular items of property alleged to belong to the judgment-debtor. No doubt a further ground of distinction is discernible, namely, that the reason why an execution could not be filed in *Surayya v. Venkataratnam*(1) was because the Court in which that execution could alone be filed had already decided that the property belonged to some one other than the judgment-debtor whereas the decision in the present case was not the decision of the Court which passed Original Suit No. 13 of 1932 but the decision of the appellate Court in connection with Original Suit No. 95 of 1932. But the essential object of the applicant was to execute Original Suit No. 95 of 1932. And it is clear that so long as the judgment of the Subordinate Judge passed on 21st January 1937 was in force, although the appellant might formally have filed an execution application before the Court of the Subordinate Judge of Tuticorin to transmit his decree to some other Court, the moment he attempted to take any effective proceedings in execution he would be met with the adjudication that the decree in Original Suit No. 95 of 1932 had already been declared to be fully satisfied. In these circumstances we are of opinion that, if *Surayya v. Venkataratnam*(1) is to be regarded as still good law, we would in logic be compelled to extend the principles upon which it was decided to the facts of the present case, and to hold that the application of the appellant here was filed under article 181 and that limitation in his case began to run from 20th September 1939.

It is strenuously contended, however, for the second respondent here that *Surayya v. Venkataratnam*(1) is not good law and we think this contention is a sound one. It was pointed out by Mr. Swaminatha Ayyar for the second respondent that the decision in *Surayya v. Venkataratnam*(1) is based in the first instance upon a somewhat ill-advised concession by the Counsel who appeared in that case, that two prior decisions had established the principle that article 181 and not article 182 applied to certain circumstances. One of the cases was *Chalavadi Kotiah v. Poloori Alimelammah*(2). There it was held that an execution application had been wrongly dismissed and that although the formal order was one of dismissal, the legal effect of the order was a mere direction to the officer of the Court to remove the application

from the pending list. Such a direction did not in fact close **SARUL HANEND v. ARUNACHALAM** the proceedings and the execution application must be considered still pending. In those circumstances there would be no limitation running against the decree-holder until three years after the pendency of the petition had come to an end. It will be clear that there was no adjudication in that case that article 181 applied to the facts. The second case quoted in *Surayya v. Venkataratnam*(1) was a decision of the Privy Council in *Rameshvar Singh v. Homeshvar Singh*(2). That decision was based upon the interpretation by the Privy Council of article 182, paragraph 1 in the third column. It was held that the decree in that case was incapable of execution on the date on which it was passed and therefore the first clause in the third column of article 182 prescribing the date of the decree as the starting point of limitation was unworkable on the facts of that case. It followed necessarily that article 182 could not be applied at all and therefore article 181 must be applied. It is clear that *Rameshvar Singh v. Homeshvar Singh*(2) could easily have been distinguished had Counsel chosen to distinguish it from the facts in *Surayya v. Venkataratnam*(1) where there was no question of the inexecutability of the decree on the very date on which it was passed. Apart from the decision of the learned Judges in *Surayya v. Venkataratnam*(1) to extend the applicability of article 181 from the facts dealt with in *Chalavadi Kotiah v. Poloori Alimelammah*(3) and those dealt with in *Rameshvar Singh v. Homeshvar Singh*(2) to the case before them where there had been no execution application at all but only an attachment of certain property before judgment, no specific reasons are given based upon an analysis of the two articles in the Limitation Act for the decision of the Court. It seems to us impossible to hold that the application in *Surayya v. Venkataratnam* (1) equally with the application in the case before us does not clearly fall under article 182. It is in both cases an application for the execution of a decree and in neither case is it an application which can be said to be one impossible of being brought within the various provisions of the third column of article 182. It is only if article 182 can be definitely excluded that any question of the applicability of article 181 can arise and we are of opinion after a careful consideration of the decision in *Surayya v. Venkataratnam*(1) that no good reasons have been assigned for the exclusion of article 182 on the facts of that case. Although, therefore, as we have

(1) (1923) I.L.R. 47 Mad. 176. (2) (1920) 40 M.L.J. 1 (P.C.).
(3) (1907) I.L.R. 31 Mad. 71.

(1) (1923) I.L.R. 47 Mad. 176.

(2) (1907) I.L.R. 31 Mad. 71.

SARUL HAMMED v. ARUNACHALAM. explained, we would be prepared to extend the principle of *Surayya v. Venkataratnam*(1) to the facts of the case now before us, we cannot but feel that the decision in *Surayya v. Venkataratnam*(1) is itself wrong and that it requires reconsideration by a Full Bench of this Court.

Under rule 2, therefore, of the Rules of the High Court, Madras, Appellate Side, we refer to a Full Bench the decision of this appeal.

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

ON THE REFERENCE :

S. Ramachandra Ayyar for appellant.—[Counsel after stating the facts of the case proceeded :] The decree in Original Suit 13 of 1932 on the file of the Court of the Subordinate Judge, Tuticorin, was alive when the appellant as the assignee of that decree filed an application for execution on 3rd July 1942. It remained alive by reason of the application which Mohideen had made on 4th January 1940 for its transmission to the Court of the District Munsif, Srivaikuntam.

[LEACH C.J.—The question here is whether the decree was alive on 4th January 1940. The decree was passed on 10th August 1935 and more than four years had elapsed.]

In this suit there was an attachment before judgment of the decree in Original Suit No. 95 of 1932 which was held by the second respondent. The order of attachment before judgment was made absolute on 10th August 1935. The attachment was actually effected on 24th September 1935. It had the effect of keeping the decree alive, though no application for execution was filed within three years after the passing of the decree. When once there has been an attachment before judgment, the decree which is subsequently passed remains effective until the order of attachment is cancelled. [*Meyyappa Chettiar v. Chidambaram Chettiar*(2) was referred to.] Some sort of declaration of the decree-holder's intention to execute the decree is necessary. That is enough for the attachment before judgment to become an attachment in execution of the decree. An application for execution need not necessarily be filed. The intention to execute can be inferred from other circumstances or proceedings. In this case that is evident from the fact that the first respondent had opposed the second respondent's application to have the decree in Original Suit No. 95 of 1932 set off by way of part

(1) (1923) I.L.R. 47 Mad. 176. (2) (1923) I.L.R. 47 Mad. 483 (F.B.).

satisfaction of the decree in Original Suit No. 11 of 1931. **SARUL HAMMED v. ARUNACHALAM.** [*Ramanadhan v. Veerappa*(1) was referred to.]

The application filed by the appellant for execution is not barred by limitation as it falls not under article 182 but under article 181 of the Limitation Act; See *Surayya v. Venkataratnam*(2). In that as well as in the present case the property alleged by the plaintiff to be the property of the defendant was attached before judgment. In both of them there was no formal application for execution to proceed against that property for more than three years after the date of the decree. In that decision it was held that article 181 and not article 182 applied. In this case time began to run only from September 1939 when the High Court reversed the order of the Subordinate Judge of Tuticorin with regard to the entering up of the satisfaction of the decree in Original Suit No. 95 of 1932.

Even if article 182 of the Limitation Act applies to the case, the application of the appellant filed on 3rd July 1942 is in time. The time taken up in deciding the second respondent's application for set off and the subsequent appeals to the Subordinate Judge of Tuticorin and to the High Court must be excluded. As there was an impediment to execute the decree till September 1939 when the High Court finally disposed of the matter, the appellant is entitled to execute the decree within three years from that date. [*Mangamma v. Narayanappa*(3) was referred to.]

[*Chalavadi Kotiah v. Poloori Alimelammah*(4), *Rameshvar Singh v. Homeshvar Singh*(5) and *Rungiah Goundan & Co. v. Nanjappa Row*(6), were also referred to.]

A. Swaminatha Ayyar for respondents.—The attachment before judgment in the suit does not keep alive the decree subsequently passed. An execution petition must be filed within three years. [Order XXXVIII, rule 11, Civil Procedure Code, was referred to.] Article 182 of the Limitation Act applies to the case. The decision in *Surayya v. Venkataratnam*(2) requires reconsideration. The concession made by Counsel in that case that two prior decisions had established the principle that article 181 and not article 182 applied to certain circumstances, cannot be accepted. Apart from the decisions followed in that case, no special reasons were assigned for the exclusion of article 182 on the facts of that case. It is only when article 182

(1) A.I.R. 1937 Mad. 84. (2) (1923) I.L.R. 47 Mad. 176.
(3) (1933) 65 M.L.J. 747. (4) (1907) I.L.R. 31 Mad. 71.
(5) (1920) 40 M.L.J. 1 (P.C.). (6) (1903) I.L.R. 26 Mad. 780.

SANUL HANNEED can be definitely excluded that any question of the applicability of article 181 arises. In this case there was no obstruction to the execution of the decree in Original Suit No. 13 of 1932 and the time taken up in appeal cannot be excluded. The application of the appellant is barred by limitation.

Cur. adm. vult..

LEACH C.J. The JUDGMENT of the Court was delivered by **LEACH C.J.**—The learned Judges who have referred this appeal to a Full Bench have done so because they are of the opinion that the decision of this Court in *Surayya v. Venkataratnam*(1) requires re-consideration. We consider that the opinion is well founded, but as the whole appeal has been placed before us it is necessary for us to travel further afield.

The facts are somewhat complicated and in order to appreciate the position we have to bear in mind what has happened in three suits. The first of the suits is Original Suit No. 11 of 1931 of the Court of the District Munsif of Tuticorin. It resulted in a money decree being obtained by one Ibrahim against the second respondent on 2nd April 1932. The second case is Original Suit No. 13 of 1932 of the Court of the Subordinate Judge of Tuticorin. Here the first respondent obtained a preliminary mortgage decree against the second respondent. This was made final on 31st October 1933. On 8th October 1935 the first respondent assigned the decree to one Mohideen, who on 2nd June 1942 assigned it to the appellant, who is the son of Ibrahim. The third suit is Original Suit No. 95 of 1932. It was filed in the Court of the District Munsif of Kumbakonam by one Srinivasa Chettiar against Ibrahim. He obtained a decree on 16th February 1933 and on 27th November 1933 he assigned it to the second respondent, who caused it to be transferred to the Court of the District Munsif of Srivaikuntam for execution. Therefore the position was that Ibrahim and the first respondent had each

(1) (1923) LL.R. 47 Mad. 176.

obtained a decree against the second respondent who **SANUL HANNEED** had become entitled to a decree against Ibrahim. **ARUNACHALAM.**

LEACH C.J.

On 2nd February 1934 the second respondent, as the assignee of the decree in Original Suit No. 95 of 1932, applied for the attachment of the decree which Ibrahim had obtained against him in Original Suit No. 11 of 1931, which was for a larger amount. He obtained an order of attachment and on 20th March 1934 he applied to the District Munsif of Tuticorin to enter up satisfaction in Original Suit No. 11 of 1931 to the extent of the amount of the decree held by him in Original Suit No. 95 of 1932. On 24th September 1935 the District Munsif of Tuticorin passed an order on the second respondent's application for set off. He allowed the decretal debt in Original Suit No. 95 of 1932 to be set off against the decretal debt in Original Suit No. 11 of 1931 on the condition that the second respondent entered up full satisfaction of the decree in Original Suit No. 95 of 1932 within a period of six weeks.

On 2nd October 1935 the second respondent applied to the District Munsif of Srivaikuntam in Original Suit No. 95 of 1932 for an order entering up satisfaction of that decree. The application was opposed by Ibrahim and Mohideen. Their opposition was successful. By an order, dated 18th December 1935, the District Munsif refused to enter up satisfaction. This order resulted in the second respondent filing Appeal Suit No. 19 of 1936 in the Court of the Subordinate Judge of Tuticorin against the District Munsif's order. Ibrahim had filed Appeal Suit No. 111 of 1935 and Mohideen Appeal Suit No. 121 of 1935 in the same Court against the order passed by the District Munsif of Tuticorin allowing part satisfaction to be entered up in Original Suit No. 11 of 1931, conditional on the second respondent entering up full satisfaction in Original Suit No. 95 of 1932. Appeal Suit No. 19 of 1936 was allowed and Appeal Suits

SARUL HAMEED Nos. 111 and 121 of 1935 were dismissed. The
ARUNACHALAM dissatisfied parties carried the matters to this Court,
LEACH C.J. either by way of appeal or civil revision petition. The final result was that the order of the District Munsif of Srivaikuntam of 18th December 1935 was upheld and the order of the District Munsif of Tuticorin of 24th September 1935 was set aside.

We must now return to Original Suit No. 13 of 1932. On 12th November 1934 the first respondent, as the then holder of the decree in that suit, applied for a personal decree and at the same time asked for an attachment before judgment of the decree in Original Suit No. 95 of 1932 which was held by the second respondent. On 19th November 1934 the Subordinate Judge passed an interim order of attachment before judgment. On 10th August 1935 he granted the first respondent a personal decree and at the same time he made the order of attachment before judgment absolute. The attachment was actually effected on 24th September 1935. Nothing was done by way of enforcing payment of the personal decree until 4th January 1940 when Mohideen, as the holder, applied to the Subordinate Judge for an order directing its transmission to the Court of the District Munsif of Srivaikuntam for the purpose of execution. The application was granted on 12th January 1940 and Mohideen was directed to serve notice on the judgment-debtor in accordance with Order XXI, rule 22, of the Code of Civil Procedure. Mohideen left the matter there and on the expiration of six months the District Munsif of Srivaikuntam directed the decree to be returned to the Court of the Subordinate Judge of Tuticorin with a certificate of non-satisfaction.

On 3rd July 1942 the appellant, who was then the assignee of the decree in Original Suit No. 13 of 1932, applied to the Subordinate Court of Tuticorin for an order recognizing the assignment to him and

directing the re-transfer of the decree to the Court **SARUL HAMEED**
of the District Munsif of Srivaikuntam for execution. **ARUNACHALAM**
The Subordinate Judge held that the application was **LEACH C.J.**
barred by the law of limitation and consequently dismissed it without going into the merits. The present appeal is from that decision. The learned Judges who have made this reference have indicated that they are in agreement with the Subordinate Judge.

For the appellant it is said that the decree in Original Suit No. 13 of 1932 remained alive by reason of the application which Mohideen had made on 4th January 1940 for its transmission to the Court of the District Munsif of Srivaikuntam. If the decree were then alive, no doubt this application would be sufficient to start another period of limitation; but the question in this case is whether the decree was alive on 4th January 1940. As we have pointed out, it was passed on 10th August 1935, and more than four years had elapsed. The learned Advocate for the appellant says that the attachment before judgment had the effect of keeping the decree alive indefinitely, irrespective of any application for execution. In other words he maintains that once there has been an attachment before judgment the decree which is subsequently passed remains effective until the attachment is removed, however many years may pass in the meantime. The learned Advocate here relies on certain observations of **COUTTS TROTTER J.** in *Meyyappa Chettiar v. Chidambaram Chettiar*(1) and the judgment of **PANDRANG ROW J.** in *Ramanadhan v. Veerappa*(2). He has advanced two further contentions. One is that Article 181 and not Article 182 of the Limitation Act applies and the other is that, even if Article 182 applies, the decree was still alive on 3rd July 1942 when the appellant applied for the re-transmission of the decree to the Srivaikuntam District Munsif's Court.

(1) (1923) I.L.R. 47 Mad. 483 (F.B.). (2) A.I.R. 1937 Mad. 84.

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We are unable to accept the argument that once there has been an order of attachment before judgment, the decree which is subsequently passed remains alive until the order of attachment is cancelled. This contention is contrary to the provisions of the Limitation Act. Article 182 (1) provides that in respect of the execution of a decree or order of a Civil Court, not provided for by Article 183 or by section 48 of the Code of Civil Procedure, the period of limitation is three years and commences from the date of the decree or order. In our judgment this decree falls within Article 182. Section 9 of the Limitation Act states that once time has begun to run, no subsequent disability or inability to sue stops it. Order XXXVIII, rule 11, of the Code of Civil Procedure makes it clear that where there has been an attachment before judgment, it is unnecessary to apply for a further order of attachment; but it makes it equally clear that there can be no order for execution without an application in that behalf, and Article 182 of the Limitation Act requires the decree-holder to do this within three years.

In *Meyyappa Chettiar v. Chidambaram Chettiar*(1) COUTTS TROTTER J. said that he was unable to see that there was any difference in *rerum natura* between an attachment before judgment and an attachment in execution of a decree, except that the one was prospective and, after the condition was fulfilled which brought it into active operation, namely, the obtaining of a decree, it conferred a priority in time. An attachment before judgment was not a remedy of a kind higher than, or different from, an attachment applied for and obtained for the first time in execution of a decree already passed. These are the observations on which the learned Advocate for the appellant so much relies, but the learned Judge was not there discussing the question with which we are concerned,

(1) (1923) I.L.R. 47 Mad. 483 (F.B.).

and it is manifest from what he had said before that SABUL HANNEB v. ARUNACHALAM. LEACH C.J. he was not intending to imply that an attachment before judgment operates to keep alive the subsequent decree until the attachment is removed, however lengthy may be the interval. Earlier in the judgment he said that it appeared to him that Order XXXVIII, rule 11, provided that, when property had been attached before judgment, it remained attached when "in due course" after judgment the decree-holder applied for execution of his decree.

In *Ramanadhan v. Veerappa*(1) PANDRANG ROW J., after referring to the observations of COUTTS TROTTER J. in *Meyyappa Chettiar v. Chidambaram Chettiar*(2), said :

"The *ratio decidendi* of the Full Bench case appears to be that there must be some unmistakable declaration of the decree-holder's intention to execute the decree, before the attachment before judgment can become an attachment in execution of the decree. No doubt in ordinary cases such an election or declaration of intention would be made by presenting an execution application. But it does not seem that in every case without exception it should be done in this manner and in no other. If intention to execute can be inferred from other circumstances, there can be no doubt in this case there was an intention to execute as is apparent from the fact that the respondents impleaded themselves in the appeals pending in the High Court in connection with O.S. No. 153 of 1910 and were appearing in those appeals till the very end."

It is said that here PANDRANG ROW J. was laying down the proposition that an intention to execute is all that is necessary to keep an attachment before judgment alive. It matters not whether the decree-holder applies for execution provided that an intention to do so is to be gathered from what has happened in other proceedings. In this connection the learned Advocate for the appellant points to the fact that the first respondent had opposed the second respondent's application to have the decree in Original Suit No. 95

(1) A.I.R. 1937 Mad. 84.

(2) (1923) I.L.R. 47 Mad. 483 (F.B.).

SAHUL HAMEED v. ARUNACHALAM. of 1932 set off by way of part satisfaction of the decree in Original Suit No. 11 of 1931.

LEACH C. J.

If the opinion expressed by PANDRANG ROW J. is correct in law, the first respondent's action would probably have been sufficient for the appellant, but we are unable to accept what the learned Judge said in *Ramanadhan v. Veerappa*(1) as correctly expressing the law. Whether an attachment before judgment continues indefinitely after judgment cannot depend on what has happened in other proceedings. For continuance beyond three years from the date of the decree an application for execution must be filed within that period, otherwise the decree-holder loses his remedy.

We have said sufficient to indicate that we do not agree that Article 181 applies in this case, as the appellant would have it, and this is a fitting stage at which to make reference to *Surayya v. Venkataratnam*(2). That case was decided by KRISHNAN and ODGERS JJ. The facts were these. A decree-holder had obtained an attachment before judgment. A third party objected to the attachment and his objection was allowed. Consequently the decree-holder was compelled to file a suit to establish his right to sell the properties in execution. The suit was successful, whereupon the decree-holder applied for the sale of the properties attached before judgment. By this time more than three years had elapsed from the date of the decree and the judgment-debtor contended that the decree had become time barred. The argument was rejected on the ground that Article 181 of the Limitation Act was applicable and the period of three years ran from the date of the removal of the obstruction. We consider that the learned Judges here erred. Article 181 is a residuary article. It cannot be applied if the case

falls within Article 182, and in our opinion Article 182 applied. In the course of the judgment it was said :

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"The question thus before us is whether the view taken by the District Munsif that the present application is an application which could be treated as one for reviving the execution proceedings already commenced can be supported or not. It is clear from the authorities that, when an execution application is brought and properties are attached in execution of that application if any obstacle is placed in the way of the properties being sold and assets realized for the purpose of meeting the decree debt by the action of a third party putting in a claim petition and it becomes necessary for the decree-holder either to dispute the claim proceedings or to bring a suit to have the matter decided whether the properties are those of the judgment-debtor, his subsequent application to sell those properties is not governed by Article 182 of the Limitation Act, but is in the nature of a revival of the original application and Article 181 of the Limitation Act will apply.

It is, however, contended by the learned vakil for the respondent before us that that principle will not apply in the case of an attachment before judgment unless it had been followed by an application for execution of the decree after the decree was passed. We are unable to accept that contention. Under the Code the attachment before judgment enures to the benefit of the decree-holder when the decree is passed so that it is no longer necessary to attach the property—*vide* Order XXXVIII, rule 11, of the Civil Procedure Code."

We cannot accept this as an accurate statement of the legal position. As we have already pointed out, rule 11 of Order XXXVIII contemplates an application for execution which the learned Judges in this case did not really appreciate. The fact that there the execution proceedings were interrupted and it became necessary for the decree-holder to get his right of sale declared did not take the case out of Article 182 and relegate it to the residuary article. In *Rungiah Goundan & Co. v. Nanjappa Row*(1) it was pointed out that the criterion for determining whether Article 179 or 178 of the old Limitation Act—these correspond to Articles 182 and 181 of the present

(1) A.I.R. 1937 Mad. 84.

(2) (1923) I.L.R. 47 Mad. 176.

(1) (1903) I.L.R. 26 Mad. 780.

SAHUL HAMEED Act—applied to a particular application was to ascertain whether any one of the six points of time specified in column 3 of Article 179 was applicable to it, and if none of them was applicable, only then would Article 178 apply. The first clause of Article 182 applies here and therefore the case cannot fall within Article 181.

There is no substance at all in the contention that the time taken up in deciding the second respondent's application for set off and the subsequent appeals should in any event be excluded. Those proceedings had nothing to do with the decree obtained in Original Suit No. 13 of 1932 which throughout remained executable, notwithstanding what was transpiring or had transpired in the Court of the District Munsif of Tuticorin and in the Court of the District Munsif of Srivaikuntam.

For these reasons the appeal is dismissed with costs in favour of the second respondent and these will include the costs of the hearing before KING and HORWILL JJ.

V.V.C.

APPELLATE CIVIL.

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

V. K. R. S. T. FIRM (PLAINTIFFS), APPELLANTS,

v.

THE ORIENTAL INVESTMENT TRUST, LIMITED, BY ITS OFFICIAL LIQUIDATOR MR. G. RAJAGOPALAN (DEFENDANT), RESPONDENT.*

Company—Management entrusted to two managing directors one of whom authorised to borrow money by resolution of board of directors—Moneys borrowed from Nattukkottai Chetty firm—Borrowing managing director being agent of the firm, other managing director being manager of joint family owning it—Borrowing managing director misappropriating moneys borrowed—Misappropriation concealed

* Original Side Appeal No. 40 of 1942.

from auditors of company and its other directors—Suit by firm against company for recovery of moneys borrowed—Company liable—Constructive notice—Neither company nor firm to be imputed with knowledge of fraud committed.

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The management of a company was vested in a board of six directors of whom K and R were joint managing directors. By a resolution of the board the conduct of the company's business was put in the hands of R, and by another resolution he was authorised to borrow moneys from a Nattukkottai Chetty firm belonging to the joint family of which K was the manager. R was also the agent at Madras of the Nattukkottai Chetty firm and borrowed from the firm large sums of money on behalf of the company, but misappropriated them for paying his own losses in gambling. This was, however, concealed from the auditors of the company and the other directors. Neither K nor the other directors had knowledge that the company was being swindled by R until a few months before the winding up of the company was ordered by Court. On a claim by the firm against the company in liquidation for the moneys borrowed by R on its behalf,

held: The company was liable. The moneys were borrowed from the firm on behalf of the company under authority given by it. The firm had no knowledge that R was abusing his authority. R's knowledge of the fraud he was committing was not knowledge of the firm or company. Nor did the fact that K was a co-managing director of the company and the head of the firm make any difference. He had no knowledge of R's defalcations; nor could he be imputed with knowledge of them.

In re Hampshire Land Company(1) and *J. C. Houghton & Co. v. Nothard, Lowe and Wills*(2) followed.

APPEAL from the judgment and decree of BELL J., dated 2nd March 1942 and passed in the exercise of the ordinary original civil jurisdiction of the High Court in Civil Suit No. 222 of 1940.

K. Rajah Ayyar and *K. Subrahmanyam* for appellants.

T. V. Muthukrishna Ayyar for *S. Srinivasaraghavan* for respondent.

Cur. adv. vult.

(1) [1896] 2 Ch. 743.

(2) [1928] A.C. 1.

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The JUDGMENT of the Court was delivered by LEACH C.J.—On 21st July 1939 the Court passed an order for the compulsory winding up of the Oriental Investment Trust, Limited, a company registered under the Indian Companies Act. An undivided Chettiar family carrying on business under the vilasam of V.K.R.S.T. claimed to rank as a creditor in the sum of Rs. 1,36,274-1-2. The Official Liquidator disputed the validity of the claim except to the extent of Rs. 6,310-7-0. As the investigation of the question involved a lengthy inquiry, it was decided that it should be tried in accordance with the procedure prescribed for the trial of a suit on the original side of the Court. After the pleadings had been closed the suit came on for hearing before BELL J. who held that the contentions of the Official Liquidator were well founded and consequently only allowed the firm to rank as a creditor for the admitted sum of Rs. 6,310-7-0. This appeal is from the judgment of the learned Judge. It will be convenient hereafter to refer to the V.K.R.S.T. firm as “the firm” and the Oriental Investment Trust, Limited, as “the company”.

The members of the joint family were Kasi Viswanathan, his son Manikkam, his brother Narayanan and Narayanan's son Somasundara. Narayanan died on 16th January 1939. Kasi Viswanathan died after the trial and the appeal has been preferred by his son as the manager of the family.

The company was incorporated on 9th September 1936 with an authorised capital of Rs. 25,00,000 divided into 25,000 shares of Rs. 100 each. The shares actually issued numbered 6,068, and at the date of the winding up order only Rs. 25 per share had been paid by the subscribers. The principal promoters of the company were Kasi Viswanathan and PL. V. A. Ramanathan Chetty who was then a local director of

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the Reserve Bank of India. Kasi Viswanathan and Ramanathan were appointed the managing directors, but from the inception of the company the management of its business was left entirely to Ramanathan, who was also the agent of the Madras branch of the firm. Narayanan was the member of the family in charge of the firm, but there is no doubt that Ramanathan controlled the Madras business of the firm as well as that of the company.

The articles of association provided that the business of the company should be managed by the directors of whom there were six, including the two managing directors. Authority was given to the directors to delegate their powers to a committee consisting of one or more of their number. A formal agreement was entered into between the company and the managing directors under which, subject to the control of the directors, they were to have “either jointly or severally” the general conduct and management of the business and affairs of the company and, without prejudice to their general power, jointly and severally the power *inter alia* of buying and selling shares and securities on behalf of the company and of borrowing Rs. 25,000 without the sanction of the board of directors or Rs. 1,00,000 with the sanction of the board.

The memorandum of association sets out in unambiguous terms the objects for which the company was formed. The objects are restricted to those expected of a company incorporated for the purpose of carrying on business as an investment trust. Naturally power was taken to buy and sell shares, but this has erroneously been interpreted as authority to deal in differences on the stock exchange. From the very beginning Ramanathan, with the full consent of his fellow directors, commenced gambling in differences on behalf of the company. The shares subscribed provided a capital of only a little over

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Rs. 1,50,000. This was supplemented by borrowings from the firm to the extent of Rs. 1,23,136-12-0. The difference between this sum and the sum of Rs. 1,36,274-1-2 claimed by the firm represents interest. Notwithstanding that the funds of the company were so limited, the transactions entered into by Ramanathan on behalf of the company amounted in value to over a crore and a half of rupees and when the company went into liquidation it only possessed securities worth some Rs. 20,000. There is here clear indication of the unlawful nature of the business which was done. In fact, neither in this case nor in proceedings against the directors for misfeasance, which have given rise to Original Side Appeals Nos. 44, 47 and 52 of 1942 (these appeals are dealt with in a separate judgment*), has it been denied that the business done was otherwise than that of a gambling nature. The only excuse put forward is that the directors considered that they were entitled to do such business.

At a meeting of the board of directors held on 10th April 1937 the following resolutions were passed:—

"(i) Resolved that managing director Mr. PL. V. A. Ramanathan Chettiar be and is hereby authorised to invest the money of the company in shares and securities and sell them when deemed necessary provided that shares and securities beyond the value of Rs. 1,00,000 (rupees one lakh) shall not be bought or sold except with the permission of any other director present in Madras.

(ii) Resolved that the managing director Mr. PL. V. A. Ramanathan Chettiar is authorised to borrow money from Messrs. V.K.R.S.T. firm as and when it is necessary and the amount borrowed by him till date is approved."

The statutory report, made up to 3rd April 1937, was passed at this meeting and disclosed that heavy gambling had already been indulged in. It stated that Rs. 11,904-14-8 had been received as profits made in dealing in differences and that a sum of

* See page 107 *infra*.

Rs. 41,671-11-6 had been lost in such transactions. The statutory report was passed at a general meeting of the company held on 3rd May 1937.

The next balance-sheet was made up to 31st May 1937. It showed that there was owing to sundry creditors a sum of Rs. 54,967-0-4 and that this amount stood in a suspense account. This balance-sheet was approved of by the directors at a meeting held on 19th July 1937. On 21st February 1938 the board considered and passed a balance-sheet disclosing the position of the company as on 31st October 1937. By that time the advances by the firm had been reduced to Rs. 5,575-11-0 and the profit and loss account showed a profit of Rs. 17,974-5-4, out of which a dividend of six per cent was declared. Kasi Viswanathan was present at this meeting of the directors when this balance-sheet was approved, but he was not present at the earlier meetings to which reference has been made. There is, however, no reason to doubt that he knew of what had transpired at the earlier meetings.

The next statement of account, and the last before the company went into liquidation, was for the period of seventeen months ending 31st March 1939. This disclosed that Rs. 1,33,798-15-6 was due to the firm by the company and that Ramanathan had taken Rs. 1,42,632-6-3 of the company's funds. Until the month of March 1939, neither the directors nor the auditors had any idea that Ramanathan was helping himself to the company's moneys. This was only discovered when he debited himself with the amounts in his personal account. He had been gambling in shares on his own account and these sums had been devoted to the payment of his own differences. He had, of course, grossly abused the trust placed in him and he had rendered himself liable to prosecution. When his misconduct was brought to light he alleged that he had sufficient

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securities in Bombay to enable him to repay the whole of the Rs. 1,42,632-6-3 and he undertook to deliver the securities over to the company. His co-directors still believed in him and on 16th June 1939 they passed a resolution approving of the balance-sheet, which meant that they consented to Ramanathan being treated as having borrowed from the company the Rs. 1,42,632-6-3. Ramanathan went to Bombay with a representative of Kasi Viswanathan to whom he was to hand over the securities. They arrived in Bombay on 22nd June 1939 and then Ramanathan absconded. Although criminal proceedings were instituted against him he has so far evaded arrest.

The short ground on which BELL J. dismissed the firm's claim was that it was suing for moneys lent and that it had not been proved that the company had received the moneys. He regarded the firm's books as well as the company's books as being altogether unreliable, because they had been written up under the direction of Ramanathan. In his judgment he refers to both sets of accounts as being "admittedly faked". The learned Judge must here have been under a misapprehension, at any rate so far as the firm's books were concerned. The firm relied on its own books and has relied on them here. The entries made in them were made on the instructions of Ramanathan, but this does not mean that the moneys were not taken by Ramanathan as loans to the company under the authority given to him by the company to borrow from the firm.

It has not been disputed in this Court that with interest his borrowings amounted at the date of the liquidation to Rs. 1,36,274-1-2, the amount of the appellant's claim. It is, of course, disputed that the company is liable to make good the amount. The learned Judge was also not correct in saying that, except for the admitted amount of Rs. 6,310-7-0, none of the money borrowed by Ramanathan had

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found its way to the company. The Official Liquidator, in the affidavit which he filed in reply to the application of the firm to be allowed to rank as a creditor for Rs. 1,36,274-1-2, admitted that the company had actually received Rs. 31,310-7-0, but he considered that from this sum Rs. 25,000 should be deducted. The firm denies that Rs. 25,000 is deductible and Mr. Rajah Ayyar, on behalf of the firm, has advanced very good reasons in support of this contention. He has also shown that the company actually had the use of a further Rs. 15,000. He maintains that it is not necessary for the firm to recover the full amount claimed to show that the company had the use of the money borrowed by Ramanathan. This broad question will be discussed presently.

The reasons given by the Official Liquidator for his contention that the sum of Rs. 25,000 should be deducted from the Rs. 31,310-7-0 are these. On 4th August 1937 Ramanathan, on behalf of the company, drew a cheque in his own favour as the agent of the firm for the sum of Rs. 5,000 and on 4th August 1937 he drew a cheque for Rs. 20,000 in the same way. The words "Account of V.K.R.S.T. firm" appeared under his signature in each case. He did not pay these cheques into the firm. He struck out the words "On account of V.K.R.S.T. firm" and then cashed the cheques for his own purposes. Subsequently he made entries in the books of the company debiting the amounts to himself. No part of the moneys ever went back to the firm. In drawing the cheques Ramanathan was acting on behalf of the company, and he embezzled the proceeds before they had reached the firm. The fact that he struck out the words "On account of V.K.R.S.T. firm" before cashing the cheques is in itself strong indication of the fact that he was not holding the cheques as the agent of the firm. As the proceeds of the cheques were

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never paid into the firm it cannot be said that they represent a reduction in the company's liability to the firm.

We turn now to the question of the Rs. 15,000. On 9th November 1937 Ramanathan, acting under the authority given to him by the company to borrow from the firm, withdrew from it Rs. 39,500 in cash. Two days later he repaid to the firm Rs. 4,500, leaving a balance in his hands of Rs. 35,000. Admittedly Rs. 20,000 of this sum was used for the company. The Rs. 15,000 remaining was lent to one A. T. V. Subrahmanyam Chettiar, who had an account with the company. The lender was the company, not Ramanathan. The directors had authorised Ramanathan to lend money to A. T. V. Subrahmanyam. The loan was made on 9th November 1937 and A. T. V. Subrahmanyam's account with the company was immediately debited with the amount. As Ramanathan, in lending the money, was acting within the scope of his authority, there is no escaping from the conclusion that the money was lent by the company. We hold that the firm is, in any event, entitled to rank as a creditor in the sum of Rs. 46,310-7-0, the total of the three sums of Rs. 6,310-7-0, Rs. 25,000 and Rs. 15,000.

This brings us to the discussion of the question whether the firm is entitled to recover the whole of the Rs. 1,36,274-1-2. As we have already indicated, the directors were not aware of Ramanathan's misappropriations until the month of March 1939. The learned Judge was under the impression that Kasi Viswanathan knew more than he pretended to know. Kasi Viswanathan did not make a good impression in the witness-box and a perusal of his evidence shows that he fenced with the questions put to him. At the same time we cannot believe that he had any inkling of Ramanathan's misconduct until the month of March 1939. It stands to reason that he would

not have allowed his agent to borrow from the firm these large sums of money if he had known that he was utilizing them for the payment of his own gambling transactions. He was, of course, aware that Ramanathan was borrowing money from the firm under the authority given to him by the company and that he was borrowing money from the firm on his own behalf in respect of which there was a separate account. It is the usual practice in Chettiar firms for the agent to send periodically to his principals copies of the accounts and this practice was followed by Ramanathan. Ramanathan had acquired a reputation as a sound businessman, as his election to the Madras Board of the Reserve Bank of India indicates. In the early stages the company had earned a profit. It had appointed a firm of qualified auditors as the auditors of the company. They had drawn up three balance-sheets before 1939 and until the month of March 1939 they had been satisfied that everything was in order. Whether the directors and auditors were justified in regarding gambling in differences as legitimate business of the company is, of course, another matter. Obviously the gambling in differences was most improper and this will be discussed further in the appeals relating to the charges of misfeasance which have been preferred against certain of the directors. But, in our opinion, it cannot be said that Kasi Viswanathan had any knowledge before the first half of 1939 that Ramanathan had been swindling the company. It is not disputed that, if Ramanathan had borrowed money from another firm under the authority conferred upon him by the company, the lender would not have been put on inquiry as to the application of the money and that the company would in such circumstances be liable, notwithstanding that Ramanathan had misappropriated the moneys borrowed. Ramanathan's knowledge of the fraud which he was committing was not

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the knowledge of the firm or company. In *J. C. Houghton & Co. v. Nothard, Lowe and Wills*(1) Lord DUNEDIN said :

"The knowledge of a mere official like the secretary would only be the knowledge of the company if the thing of which knowledge is predicated was a thing within the ordinary domain of the secretary's duties. But what if the knowledge of the director is the knowledge of a director who is himself *particeps criminis*, that is, if the knowledge of an infringement of the right of the company is only brought home to the man who himself was the artificer of such infringement? Common sense suggests the answer but authority is not wanting."

Lord DUNEDIN then proceeded to quote from the judgment of VAUGHAN WILLIAMS L.J. in *In re Hampshire Land Company*(2) where VAUGHAN WILLIAMS L.J. said :

"If Wills had been guilty of a fraud, the personal knowledge of Wills of the fraud that he had committed upon the company would not have been knowledge of the society of the facts constituting that fraud; because common sense at once leads one to the conclusion that it would be impossible to infer that the duty, either of giving or receiving notice, will be fulfilled where the common agent is himself guilty of fraud. It seems to me that if you assume here that Wills was guilty of irregularity—a breach of duty in respect of these transactions—the same inference is to be drawn as if he had been guilty of fraud. I do not know, I am sure, whether he was guilty of actual fraud; but whether his conduct amounted to fraud or to breach of duty, I decline to hold that his knowledge of his own fraud or of his own breach of duty is, under the circumstances, the knowledge of the company."

Therefore the company must be held to be liable unless the fact that Kasi Viswanathan was a managing director of the company makes a difference. In our judgment it does not. He knew nothing of Ramanathan's defalcations until all the money had been borrowed and, on the authorities which we have just referred to, he cannot be imputed with knowledge, notwithstanding that he was a co-managing director

(1) [1928] A.C. 1.

(2) [1896] 2 Ch. 743.

of the company and the head of the firm which employed Ramanathan as its agent.

In order to succeed the firm has to satisfy the Court that the moneys now claimed were handed to Ramanathan as loans to the company under the authority conferred by it on him, and we consider that the evidence establishes this. Ramanathan had been given power to borrow from the firm. In the firm's books the withdrawals are entered as loans to the company. In the company's books credit is given to the firm for the amounts. As the money was withdrawn from the firm on behalf of the company under authority given by the company, the company must accept liability unless the firm had knowledge that Ramanathan was abusing his authority, which is not the case. For these reasons we direct the Official Liquidator to include the firm in the list of creditors for the sum of Rs. 1,36,274-1-2.

As the firm has succeeded it is entitled to the costs here and below. These will be paid out of the assets of the company. The Official Liquidator will also get his costs out of these assets. We certify for two Counsel.

N.S.

APPELLATE CIVIL.

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

T. S. P. L. S. THINNAPPA CHETTIAR (SECOND RESPONDENT), APPELLANT,

v.

G. RAJAGOPALAN, THE OFFICIAL LIQUIDATOR OF THE ORIENTAL INVESTMENT TRUST, LTD., MADRAS (IN LIQUIDATION) (APPLICANT), RESPONDENT.*

Indian Companies Act (VII of 1913), ss. 235 and 281—Misfeasance—Directors—Managing director of investment trust company gambling in differences on stock exchange—Such

* Original Side Appeals Nos. 44, 47 and 52 of 1942.

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transactions opposed to law—Other directors jointly and severally liable for losses arising to company thereby—Directors not entitled to benefit of sec. 281 in respect thereof—Losses shown in balance-sheets of company—No ratification by company of such transactions possible—Managing director authorized to borrow—Borrowings misappropriated by him—Liability of other directors for such misappropriations—No notice—Directors not liable—Position of co-managing director not different from other directors in that regard.

The objects of a company formed for carrying on the business of an investment trust included the power of buying and selling shares of other companies. Its management was vested in a board of six directors of whom K and R were joint managing directors. By a resolution of the board the conduct of the company's business was put in the hands of R and by another resolution the board authorized R to borrow on behalf of the company from a Nattukottai Chetty money-lending firm belonging to K's joint family. K was not present at the meeting of the board when those resolutions were passed, but he had knowledge of them subsequently. In conducting the business of the company R gambled in differences in shares with the full knowledge and consent of the other directors, and the losses arising therefrom were shown in the balance-sheets which were approved by the company in general meeting. In pursuance of the authority of the board R borrowed large sums of money from the Nattukottai Chetty firm but misappropriated them for paying his own losses in gambling. This was, however, concealed from the auditors of the company and the other directors who were not put on enquiry that R was borrowing money from the firm on behalf of the company and utilizing it for himself, until a few months before the winding up of the company was ordered by Court. In proceedings under section 235 of the Indian Companies Act taken by the Official Liquidator against the surviving directors for the recovery of the losses arising from R's gambling in differences and of the moneys borrowed by R, which the company had to repay to the Nattukottai Chetty firm,

Held: (i) The directors were jointly and severally liable for the payment of the losses incurred by the company owing to the gambling transactions.

Gambling in differences on the stock exchange is not a legitimate business for an investment trust. Contracts of such nature are unenforceable under the general law and

do not fall within the transactions contemplated by the memorandum of association of the company.

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(ii) The directors were not entitled to the benefit of the provisions of section 281 of the Indian Companies Act. Before section 281 can be invoked it must be shown that the directors have acted reasonably as well as honestly. Mere *bona fide* belief on the part of the directors that gambling in differences was a legitimate business of the company is not sufficient. In permitting R to gamble in differences the directors did not act reasonably.

(iii) The fact that the losses due to gambling were shown in the balance-sheets approved by the company in general meeting did not affect the liability of the directors for those losses. There could be no ratification of an illegal contract so far as the company was concerned.

Ashbury Railway Carriage and Iron Co. v. Riche(1) and *Flitcroft's case*(2) followed.

(iv) The directors other than R were not liable for the sums borrowed by him on behalf of the company from the Nattukottai Chetty firm and misappropriated by him. They were entitled to rely on their auditors and had no reason for suspecting the frauds of R.

Dovey v. Cory(3) followed.

(v) The position of K as a co-managing director was not different from the other directors in this respect. In the circumstances of the case he was no more liable than the other directors for the amounts borrowed by R from the Nattukottai Chetty firm.

J. C. Houghton & Co. v. Nothard, Lowe and Wills(4) applied.

APPEAL from the judgment and order of BELL J., dated 30th June 1942 and 17th July 1942 and passed in exercise of the ordinary original civil jurisdiction of the High Court in Application No. 1087 of 1941 in Original Petition No. 157 of 1939.

B. Sitarama Rao and *M. Murugappa Chettiar* for appellant.

T. V. Muthukrishna Ayyar for *S. Srinivasaraghavan* for respondent.

Cur. adv. vult.

(1) (1875) 7 H.L. 653.
(3) [1901] A.C. 477.

(2) (1882) 21 Ch.D. 519.
(4) [1928] A.C. 1.

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The JUDGMENT of the Court was delivered by LEACH C.J.—These three appeals arise out of proceedings instituted under section 235 of the Indian Companies Act by the Official Liquidator of the Oriental Investment Trust, Limited, which is in the process of being wound up compulsorily under an order of this Court passed on 21st July 1939. The company was incorporated on 9th September 1936. The first directors were C. Abdul Hakim, P. V. Swaminathan, V. K. R. S. T. Kasi Viswanathan Chettiar, S. Subbaraya Mudaliar, T. RM. T. SP. PL. Palaniappa Chettiar and PL. V. A. Ramanathan Chettiar. C. Abdul Hakim and P. V. Swaminathan died before the liquidation commenced and Kasi Viswanathan after the misfeasance summons had been heard. On 1st April 1937 T. S. PL. S. Thinnappa Chettiar joined the board. Charges of misfeasance were preferred against Kasi Viswanathan, S. Subbaraya Mudaliar, Palaniappa, Ramanathan and Thinnappa. It was claimed that as the result of their misconduct they were liable jointly and severally in the sum of Rs. 2,77,531-5-9. The learned Judge (BELL J.) considered that S. Subbaraya Mudaliar had not acted unreasonably and was entitled to the benefit of section 281 of the Indian Companies Act. He found that the Official Liquidator had established a charge of misfeasance against the other respondents and that the loss was to be apportioned as follows:—Kasi Viswanathan and Ramanathan were to be jointly and severally liable for Rs. 1,11,909-10-0, Palaniappa for Rs. 18,651-9-8 and Thinnappa for Rs. 18,651-9-8. Appeal No. 44 of 1942 has been preferred by Thinnappa, Appeal No. 47 of 1942 by the legal representative of Kasi Viswanathan and Appeal No. 52 of 1942 by Palaniappa. Ramanathan has not appealed. He absconded on 22nd June 1939 after it had been discovered that he had misappropriated large sums belonging to the company.

The principal promoters of the company were Kasi Viswanathan and Ramanathan, who were appointed joint managing directors. Kasi Viswanathan was the managing member of a joint Hindu family which carried on a money-lending business under the vilasam of V.K.R.S.T. in the Madras Presidency with its head office at Devakottai and a branch at Madras. The firm was of considerable standing. Ramanathan was its agent in Madras. Kasi Viswanathan's brother Narayanan, with whom he was joint, was in charge of the business there, but there is no doubt that the management of the Madras branch was largely in the hands of Ramanathan. Ramanathan had acquired a good reputation in the Chettiar community and was its representative on the Madras board of directors of the Reserve Bank of India. The authorized capital of the company was Rs. 25,00,000 divided into 25,000 shares of Rs. 100 each. At the time of the liquidation, only 6,068 shares had been issued and they were merely paid up to the extent of Rs. 25 per share. This gave a working capital of a little over Rs. 1,50,000. The objects for which the company was formed were those of an investment trust company; but very little investment business was done. Ramanathan was allowed to control the business of the company and at once commenced gambling in differences in shares. He did this with the full knowledge and consent of his brother directors. This matter has been discussed in the judgment which we have just delivered in Original Side Appeal No. 40 of 1942* and it is unnecessary to repeat all we have said there.

The paid up capital of the company was not sufficient for the transactions which Ramanathan was entering into on behalf of the company and he was authorized by the director to borrow money from the V.K.R.S.T. firm. Including interest the company owed to the firm at the date of the winding up the

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sum of Rs. 1,36,274-1-2. The magnitude of the gambling which was indulged in is to be gathered from the fact that, notwithstanding the comparatively small amount of capital available, the transactions entered into during the short existence of the company aggregated in value Rs. 1,61,77,443-0-8. The value of the investments held by the company at the time of the liquidation was only Rs. 20,000.

Ramanathan betrayed the trust which was placed in him. He also indulged in gambling in differences on his own behalf and to a large extent he utilized for his own purposes the moneys which he borrowed from the V.K.R.S.T. firm on behalf of the company. He succeeded in deceiving his brother directors, the auditors of the company and the partners of the firm until the month of March 1939, when he debited to his personal account with the company the moneys which he had borrowed for the company from the firm. On 13th June 1939 the auditors prepared a balance-sheet which showed that Ramanathan had taken altogether Rs. 1,42,632-6-3. The board very complacently agreed to treat this amount as representing loans from the company to Ramanathan. This was done because he said that he possessed securities in Bombay which were sufficient to meet his liability and he undertook to hand them over to the company. Kasi Viswanathan sent his representative with Ramanathan to Bombay to take delivery of the alleged securities, but when they arrived in Bombay Ramanathan absconded. Criminal proceedings were instituted against him and a warrant was issued for his arrest, but this has never been executed. The amount which the Official Liquidator sought to recover in the misfeasance proceedings represented what the company had lost by reason of these gambling transactions and what the company had to pay to the V.K.R.S.T. firm in respect of Ramanathan's borrowings. Original Side Appeal No. 40 of 1942 arose out of an action

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instituted by the firm to recover what Ramanathan had borrowed under the authority given to him by the company. The action was tried by BELL J. who held that the company was not liable to make repayment. The firm appealed and we have felt constrained to disagree with the learned Judge's finding. We have held that the company is liable to the firm for the moneys borrowed by Ramanathan.

The main questions which arise in the present appeals are whether the appellants are liable to replace the moneys which Ramanathan lost in the course of the transactions in differences which he entered into on behalf of the company, and whether they are liable to make good the money which the company has had to repay to the firm. The learned Judge held that they were liable in respect of the gambling losses, but not in respect of the borrowings because he considered that the company was not liable to repay the firm. If, however, on appeal the company was found liable in respect of the borrowings the appellants' liability would, he said, be correspondingly increased.

We concur entirely with the finding of the learned Judge that the appellants are liable for the loss incurred by the company in permitting Ramanathan to gamble in differences. Contracts of such a nature are unenforceable under the general law and they certainly did not fall within the transactions contemplated by the memorandum of association. The company had, of course, the power to buy shares and to sell them again should it be deemed advisable to do so, but by no stretch of imagination can it be said that gambling in differences on the stock exchange is legitimate business for an investment trust. All that the learned Counsel have been able to say on behalf of the appellants is that all the directors *bona fide* believed that this was legitimate business and that, therefore, the Court should exercise its discretion under section 281

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of the Indian Companies Act. Before section 281 can be invoked it must be shown that the directors have acted reasonably as well as honestly and in permitting Ramanathan to gamble in differences they were not acting reasonably. They cannot even say that they came to know of the nature of these transactions at a late stage. In the statutory report which was prepared on 10th April 1937 it was disclosed that the company had received in payment of differences Rs. 11,904-14-8 and had paid out in similar transactions the sum of Rs. 41,671-11-6. While directors are not trustees in the technical sense they hold a fiduciary position with regard to the assets of the company and the appellants were guilty of a grave breach of duty in allowing the company's funds to be dissipated in this way.

It has been pointed out that all the balance-sheets except the last one, which was drawn up as on 31st March 1939, were approved of by the company in general meeting. But this makes no difference to the position. There can be no ratification of an illegal contract so far as the company is concerned; see *Ashbury Railway Carriage and Iron Co. v. Riche*(1) and *Flitcroft's case*(2). In the former case Lord CAIRNS said:

"Now, I am clearly of opinion that this contract was entirely, as I have said, beyond the objects in the memorandum of association. If so, it was thereby placed beyond the powers of the company to make the contract. If so, my lords, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void at its beginning, it was void because the company could not make the contract. If every share-holder of the company had been in the room, and every share-holder had said, 'that is a contract which we desire to make, which we authorize the directors to make, to which we sanction the placing the seal of the company' the case would not have stood in any different position from that in which it stands now. The share-holders would thereby, by unanimous consent, have been attempting to do

(1) (1875) 7 H.L. 653.

(2) (1882) 21 Ch.D. 519.

the very thing which, by the Act of Parliament, they were prohibited from doing."

It is admitted that the loss on these transactions amounted to Rs. 1,36,092-3-6. We shall deal later with the matter of the individual liability of the appellants.

The more difficult question is whether the appellants can be called upon to make good to the company the Rs. 1,36,274-1-2 which the company has to repay to the V.K.R.S.T. firm in respect of Ramanathan's borrowings. That Ramanathan was duly authorized to borrow from the firm is not, and cannot be, disputed. It is now common ground that he used these moneys for the payment of his own gambling transactions. If the directors had been aware of the fact that Ramanathan was using the company's funds in this way and had neglected to interfere, they would undoubtedly be liable, but we are satisfied that they did not know until all the money had been borrowed and misappropriated. Therefore the Court has to decide whether their ignorance was due to their own negligence. On behalf of Thinnappa and Palaniappa it is said that they should not be judged by the same standard as Kasi Viswanathan, as he was a managing director. We will first discuss the law so far as it applies to ordinary directors and then consider the position of Kasi Viswanathan as a managing director. In passing it may be mentioned that the assets are sufficient to pay all the creditors and, therefore, only the shareholders are concerned.

In *In re Denham & Co.*(1) CHITTY J. held that an innocent director cannot be held liable for the fraud practised by his co-directors in issuing to the shareholders false reports and balance-sheets, provided that the books and accounts of the company have been kept and audited by duly appointed and responsible officers and he has no ground for suspecting fraud.

(1) (1882) 25 Ch.D. 752.

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In that case CHITTY J. pointed out that no one was bound to presume a fraud and that the directors were not bound to examine entries in the company's books. The opinion that directors are not bound to examine entries in the company's books had previously been expressed by JESSEL M.R. in *Hallmark's case*(1) and Lord DAVEY in *Dovey v. Cory*(2) agreed with what was said in these cases. In the present case it cannot be said that either Thinnappa or Palaniappa had any ground for suspecting that Ramanathan was acting fraudulently. The company had appointed a firm of qualified auditors and until Ramanathan had completed his misappropriations the auditors themselves were entirely in the dark. The balance-sheets of the 31st May 1937 and 31st October 1937, which were the last to be drawn up until the fraud had been discovered, had been passed by the auditors. When the statutory report was drawn up on 3rd April 1937 there was owing by the company to the firm Rs. 1,06,000. The balance-sheet of 31st May 1937 showed that the amount owing to the creditors had been reduced to Rs. 54,967-0-4 and that of 31st October 1937 showed that there was only due to the V.K.R.S.T. firm Rs. 5,575-11-0. Therefore it may safely be taken that the directors had no ground for suspicion. They acted improperly in allowing Ramanathan to gamble on the stock exchange and for this we hold them liable, but they were not put on inquiry whether Ramanathan was borrowing money from the firm on behalf of the company and utilizing it for himself. As Palaniappa and Thinnappa were entitled to rely on their auditors and had no reason for suspecting Ramanathan, they cannot be held liable for sums which Ramanathan took from the firm.

Does Kasi Viswanathan stand in a different position? It is true that he was a joint managing director with Ramanathan, but he cannot be imputed

(1) (1878) 9 Ch.D. 329.

(2) [1901] A.C. 477.

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with knowledge of Ramanathan's fraud simply because he was a co-managing director. The principles laid down by the House of Lords in *J. C. Houghton & Co. v. Nothard, Lowe and Wills*(1), which we have discussed in our judgment in Original Side Appeal No. 40 of 1942*, apply equally here. The acceptance of the office of a co-managing director undoubtedly involved special responsibilities, but on 10th April 1937 the board of directors passed a resolution which put into Ramanathan's hands, and his hands alone, the conduct of the company's business and by another resolution authorized him to borrow from the firm. Kasi Viswanathan was not present at this meeting, but it may be taken that he had knowledge of what had been decided on. Moreover, Kasi Viswanathan was living near Tinnevely, some four hundred miles away from Madras, and it could never have been intended that he should take an active part in the management of the company. Even if it were otherwise, the fact remains that with common assent everything was left to Ramanathan who deceived Kasi Viswanathan as much as he deceived the other directors. A managing director, like an ordinary director, is entitled to place reliance on the company's auditors, unless there exists ground for suspicion which was not the case here. Had Kasi Viswanathan examined the books before March 1939, he would not have found any indication of Ramanathan's misappropriations, and he was equally justified in trusting Ramanathan. For these reasons, we hold that Kasi Viswanathan is in no worse position than his co-directors. It may be added that the company's accountant was not called upon to give evidence. He was present in Court at the trial and was assisting the Official Liquidator in instructing Counsel. Had there been any ground for suspecting

(1) [1928] A.C. 1.

* See page 96 ante.

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Ramanathan, surely the company's accountant would have known of it.

The result is that the appellants together with Ramanathan must be held liable for the loss sustained by the company as the result of the gambling in differences, but not for the loss caused by Ramanathan's misappropriations. Kasi Viswanathan's legal representative says that the learned Judge erred in differentiating between the appellants, as they are jointly and severally liable to the company for the loss incurred. We consider that this argument is sound, except that Thinnappa cannot be made liable for any loss suffered before he joined the board. This is not a case in which the appellants can invoke section 281 of the Indian Companies Act. It is common ground that the losses up to the date when Thinnappa joined the board amounted to Rs. 31,111-7-6. The total loss on transactions in differences was Rs. 1,36,092-3-6 and Kasi Viswanathan, Ramanathan and Palaniappa must be held jointly and severally liable in this sum. The liability of Thinnappa will be Rs. 1,04,980-12-0 (Rs. 1,36,092-3-6 less Rs. 31,111-7-6). Ramanathan will, of course, be liable for the Rs. 1,41,439-2-3 as well. Interest at the Court rate will run from 17th July 1942, the date of the final order of the learned Judge. That order will be amended in accordance with this judgment. We do not propose to decide whether in law there is any right of contribution between the directors *inter se*. This question must be left to be decided in other proceedings, should the occasion arise. At the moment the Court is only concerned with the loss suffered by the company by reason of the misfeasance of the appellants as directors and, so far as the company is concerned, they are all liable to make good the loss on the gambling, subject to the deduction of Rs. 31,111-7-6 in the case of Thinnappa. The decision of the learned Judge

that S. Subbaraya Mudaliar should be exonerated has not been challenged.

The Official Liquidator will receive costs from the appellants, on the sum of Rs. 1,36,092-3-6. He will pay to the appellants out of the assets of the company costs on Rs. 1,41,439-2-3 (one set). He will have his own costs out of the estate. We certify for two Counsel.

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APPELLATE CIVIL.

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

GUDAPATI GOPALASWAMY (RESPONDENT), PETITIONER,

1944,
February 24.

v.

PUNUKOLLU RAMAYYA (PETITIONER), RESPONDENT.*

Guardians and Wards Act (VIII of 1890), ss. 34 (d), 34-A, 35 and 36—Auditor under sec. 34-A, powers of—Not entitled to decide questions of liability—No power in Court under s.c. 34 (d) to direct payment into Court more than that shown in guardian's accounts—No alteration by introduction of sec. 34-A.

Under section 34 (d) of the Guardians and Wards Act, 1890, the Court has no power to direct the guardian of a minor to pay into the Court more than the amount shown to be due in the accounts filed by him. The introduction of section 34-A into the Act has not altered the position. The auditor appointed under that section has no power to decide questions of liability or whether the guardian has or has not made advances to the estate or made payments in excess of his powers or in fraud of the estate. The auditor's duty is to audit the accounts submitted by the guardian and to prepare a balance-sheet on those accounts.

Hari Krishna Chettiar v. Govindarajulu Naicker(1) affirmed and followed.

* Civil Revision Petition No. 351 of 1943.
(1) (1925) 50 M.L.J. 273.

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RAMAYYA. PETITION under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court of Kistna at Masulipatam, dated 18th November 1942 and made in Civil Miscellaneous Petition No. 914 of 1940 in Original Petition No. 87 of 1939.

B. Manavala Choudhri for petitioner.

B. V. Ramanarasu for respondent.

LEACH C.J. The JUDGMENT of the Court was delivered by LEACH C.J.—The short question in this petition is whether the insertion of section 34-A in the Guardians and Wards Act, 1890, by the amending Act of 1929, compels the Court to place a different interpretation upon section 34 (d) from that placed upon it by this Court in *Hari Krishna Chettiar v. Govindarajulu Naicker*(1).

On 20th December 1939 the petitioner was appointed the guardian of the property of the two minor sons of one Kotayya. He was directed to submit his accounts once a year. The respondent entered into a surety bond for the due administration of the estate during the minority of the wards. On 19th September 1940 the respondent filed a petition in the guardianship proceedings asking for an order of the Court directing the petitioner to file his accounts and the relevant vouchers. On 15th January 1941 the petitioner filed a statement of accounts in which he showed that he had collected Rs. 3,864 and had disbursed Rs. 3,822-13-3, leaving a balance in his hands of Rs. 41-2-9. The District Judge sent the accounts for audit under section 34-A. Three reports were presented by the auditor and in the final one he stated that the estate had been wrongly debited with the following sums:—Rs. 265, Rs. 319-8-6 and Rs. 225. The first of these amounts had been taken by the petitioner himself by way of reimbursement of advances alleged to have been made by him on

account of the expenses in the guardianship proceedings. The petitioner said that the Rs. 319-8-6 represented a repayment to his mother of moneys advanced by her to him, as the guardian and that the Rs. 225 represented the discharge of a debt due by the estate to his mother. In the opinion of the auditor all these payments were fictitious. The predecessor of the District Judge who passed the order which is challenged in this petition examined the petitioner and recorded a statement. On that examination the present District Judge held that the auditor was justified in disallowing the three sums of Rs. 265, Rs. 319-8-6 and Rs. 225. Consequently he ordered the petitioner to pay the aggregate amount into Court. The petitioner challenges the correctness of this order. It is not an order appealable under section 47 of the Guardians and Wards Act, but an application for revision lies under section 115 of the Code of Civil Procedure if it was passed without jurisdiction.

Section 34 (c) states that the guardian of the property of a ward shall, if required by the Court, exhibit his accounts in the Court at such times and in such form as the Court from time to time directs. Clause (d) says that, if so required, the guardian shall pay into the Court the balance due from him on these accounts, or so much thereof as the Court directs. Section 34-A states that, when accounts are exhibited by a guardian of the property of a ward in pursuance of a requisition made under clause (c) of section 34 or otherwise, the Court may appoint a person to audit the accounts. The section does not contemplate anything more than an audit and the Court is given no other powers beyond those which it possessed before the section was inserted in the enactment.

In *Hari Krishna Chettiar v. Govindarajulu Naicker*(1) a Bench of this Court (VENKATASUBBA RAO and

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MADHAVAN NAIR JJ.) held that section 34 (d) did not empower the Court to direct the guardian to pay into the Court more than the amount shown to be due in the accounts filed by him. The words "on those accounts" were of importance. If the intention of the Legislature had been that the Court should have power under that section to compel the guardian to pay the amount actually found due, the clause would have been worded differently. We are in respectful agreement. Moreover, sections 35 and 36 contemplate a suit being filed against a guardian who has not fulfilled his duty and is required to make restitution to the estate. Section 35 deals with a case where an administration bond has been taken, and section 36 a case where there is no administration bond.

In *Subbarami Reddi v. Pattabhirami Reddi*(1) PHILLIPS and MADHAVAN NAIR JJ. held that where a guardian had filed his accounts and had been discharged the Court could not hold an inquiry under the Act into the correctness of the accounts and determine the amount in respect of which the guardian was actually accountable. The scheme of the Act was to relegate to a suit any dispute between the minor and the guardian. This opinion was accepted by a Full Bench of this Court in *Ramachandran v. Balasubramania*(2). The Full Bench held that the proper course for the Court to adopt on a minor coming of age was to refuse to grant the guardian a discharge if it appeared that there was sufficient reason to keep open the question of his liability and in that case to assign to the quondam minor the security bond. On the other hand, if the Court considered that the guardian had acted properly and was of opinion that no reasonable claim could be

brought against him, the Court should exercise the power which it had of discharging the guardian.

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It is said on behalf of the respondent that *Subbarami Reddi v. Pattabhirami Reddi*(1) and *Ramachandran v. Balasubramania*(2) are not in point because in each of these cases the Court was considering the position of a guardian who had been discharged. We do not agree. In our opinion there is no difference in principle. Section 41 (3) states that, when the powers of a guardian cease, the Court may require him or, if he is dead, his representative to deliver as it directs any property in his possession or control belonging to the ward or any accounts in his possession or control relating to past or present property of the ward.

In *Rama Rao v. Rengaswamy Rao*(3) WALLER J. said that he could not concede that the Court was bound to accept without scrutiny any account which the guardian chose to submit or to allow him to deliver only such property as he admitted himself to possess. In referring the present case to a Bench, BYERS J. has indicated his concurrence in this opinion. If by this is meant that the Court can in summary proceedings pass an order requiring a guardian to deliver up property which he denies possession of, we find ourselves unable to share the opinion. In any event it must be rejected in view of the decisions in *Hari Krishna Chettiar v. Govindarajulu Naicker* (4), *Subbarami Reddi v. Pattabhirami Reddi*(1) and *Ramachandran v. Balasubramania*(2).

Our attention has also been drawn to the fact that the Allahabad High Court in *Sita Ram v. Musamat Govindi*(5) expressed an opinion similar to that expressed by WALLER J. The judgment of the Allahabad Court does not carry the matter any further and it is to be observed that in *Misra Rangnath v. Misra Murari Lal*(6) another Bench of that Court

(1) (1926) I.L.R. 50 Mad. 80. (2) I.L.R. [1938] Mad. 667 (F.B.).

(1) (1926) I.L.R. 50 Mad. 80. (2) I.L.R. [1938] Mad. 667 (F.B.).
(3) A.I.R. 1926 Mad. 419. (4) (1925) 50 M.L.J. 273.
(5) (1924) I.L.R. 48 All. 458. (6) (1935) I.L.R. 58 All. 721.

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LEACH C.J. dissented from the opinion expressed in *Sita Ram v. Musammatt Govindi*(1). The later opinion was formed after section 34-A had been inserted in the statute.

We can see no justification for the suggestion that the insertion of section 34-A has altered the position. The auditor has no power to decide questions of liability or whether a guardian has or has not made advances to the estate. The auditor's duty is to audit the accounts and to prepare a balance-sheet on a proper basis. It will, of course, be within his duty to draw attention to suspicious features and to disputes, but that is quite a different matter from saying that he has the power of deciding whether the guardian has or has not made a particular payment in excess of his powers or in fraud of the estate when such matters are in dispute, which is the case here. If, on a balance-sheet correctly drawn, it is obvious that the guardian has in his hands more than what he has himself showed, the Court has no doubt power to order the guardian to pay into the Court the correct amount, but the balance-sheet must be drawn up on the accounts submitted by the guardian.

As we have indicated, sections 35 and 36 provide the procedure for recovering from the guardian what he owes to the estate, and in our judgment an order of the nature of the one under discussion can only be passed in a regular suit. Whether a suit is the best mode of procedure is another matter. We consider that it would be far better to have such matters as the present one determined in proceedings under the Act, in which case provision would, of course, have to be made for an appeal. This is however a question for the Legislature to decide. We can have regard only to the Act as it now stands, and in the circumstances the petition must be allowed with costs here and below.

N.S.

(1) (1924) I.L.R. 46 All. 458.

INCOME-TAX REFERENCE.

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

THE COMMISSIONER OF INCOME-TAX,
APPLICANT,

1944,
February 25.

v.

S. N. A. S. A. ANNAMALAI CHETTIAR,
KARAIKUDI, RESPONDENT.*

Indian Income-tax Act (XI of 1922), sec. 4 (1) (b) (iii)—Accrue, meaning of—Receipts from foreign business—Accumulated profits before 1939—Joint family—Partition—Allotment of business with profits to assessee in partition—Receipt of moneys from business subsequently—Income, assessable.

A joint Hindu family consisting of father and son carried on a money-lending business in the Federated Malay States until partition between them on 28th March 1939. Between 1st April 1933 and the date of partition, the business had earned considerable profits. Under the partition the business with all its profits was allotted to the son. Between 28th March 1939 and 12th April 1939, the son brought into British India Rs. 40,742 out of the accumulated profits of the business.

Held: Under section 4 (1) (b) (iii) of the Indian Income-tax Act, 1922, the son was assessable to income-tax on the amount so brought into British India. The profits accrued to him within the meaning of the section and, as he brought that amount out of the profits into British India during the year of account, he was liable to pay tax thereon.

CASE referred to the High Court by the Income-tax Appellate Tribunal, Calcutta Bench, at Bombay under section 66 (1) of the Indian Income-tax Act (XI of 1922) in Application No. 66, R.A. No. 3, Madras of 1943-44.

K. V. Sesha Ayyangar for applicant.—The sum of Rs. 40,742 received by the assessee in British India between 28th March 1939 and 12th April 1939 is a remittance of the profits of the foreign business belonging to him. The business which originally belonged to the joint family of the assessee and his

* Case Referred No. 43 of 1943.

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father was allotted to him on partition on 28th March 1939 as a going concern with all its accumulated profits. The profits retained their character as profits in the hands of the assessee subsequent to the partition; see *Arunachalam Chettiar v. Commissioner of Income-tax, Madras*(1). The decision of the Privy Council in *The Commissioner of Income-tax, Madras v. P. R. A. L. Muthukaruppan Chettiar*(2) is also to a similar effect. The interpretation by the Income-tax Appellate Tribunal of section 4 (1) (b) (iii) of the Indian Income-tax Act, 1922, that under the section the profits of a foreign business to be assessable must have accrued as such to the assessee at the inception is not correct. The profits accrued to the assessee in 1939 when the business together with the profits fell to his share in the partition. According to the view of the Appellate Tribunal liability to tax can be avoided by transferring a foreign business after accumulating the profits and the transferee then bringing the profits to British India. To construe the section in such a manner would defeat its purpose.

P. R. Srinivasan for respondent.—The decision in *Arunachalam Chettiar v. Commissioner of Income-tax, Madras*(1) relates to the applicability of section 26 (2) of the Indian Income-tax Act, as it then stood. The section has since been amended in 1939. The basis of the decision is different and it is of no application to the present case. The decision in *The Commissioner of Income-tax, Madras v. P. R. A. L. Muthukaruppan Chettiar*(2) also has no bearing on the interpretation of section 4 (1) (b) (iii) of the Act. The word "him" occurring in the section in two places means the assessee. In order to make the section applicable and the assessee liable two conditions must be satisfied: (i) the profits as such must have accrued to him and (ii) they must have been received by him in British India. The profits cannot accrue to the joint family, which is a separate entity for income-tax purposes, and also to the assessee. The profits cannot be deemed to be the profits of two different persons during the same period. The fact that by transferring a foreign business with its accumulated profits both the transferor and the transferee may escape liability to income-tax is no ground for not giving the words of the section their ordinary meaning. The assessee is entitled to take advantage of a lacuna in the provisions of the Act.

The JUDGMENT of the Court was delivered by
LEACH C. J. —In the statement of the case made by

(1) (1929) 3 I.T.C. 441, 449.

(2) (1935) 8 I.T.C. 338 (P.C.).

the Appellate Tribunal it is suggested that the Commissioner of Income-tax has misunderstood the findings of fact arrived at by the Tribunal and stated in its order of 9th February 1943. We do not think that there has been any misapprehension on the part of the Commissioner, but in any event the facts are clear.

Until 28th March 1939 the assessee was joint with his father. The family carried on a money-lending business in the Federated Malay States. On separation, the assessee received as his share of the family assets the business which the family had carried on in the Federated Malay States. Between 1st April 1933 and the date of partition this business had earned considerable profits, all of which accrued to the assessee under the partition. Between 28th March 1939 and 12th April 1939 the assessee brought to British India Rs. 40,742 of the accumulated profits and the Income-tax Officer decided that he was liable under section 4 (1) (b) (iii) of the Income-tax Act to pay the tax on this amount. The Appellate Assistant Commissioner disagreed with the Income-tax Officer and held that the assessee was not liable. The Appellate Tribunal agreed with the Appellate Assistant Commissioner. At the request of the Commissioner of Income-tax the Tribunal has referred for the opinion of this Court the following question:—

"Whether in the circumstances of the case the respondent is liable on the remittance of a sum of Rs. 40,742 brought by him into British India during the accounting year."

Section 4 (i) (b) (iii) reads as follows:—

"Subject to the provisions of this Act the total income of any previous year of any person includes all income, profits and gains from whatever source derived which, having accrued or arisen to him without British India before the beginning of such year and after the 1st day of April 1933, are brought into or received in British India by him during such year."

In accepting the case for the assessee, the Tribunal laid stress on the word "him" and considered that, as these profits had been earned by the joint family,

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he could not be assessed in respect of them. We consider that this is not a correct reading of the section. Under it a person is liable to pay the tax on income from whatever source derived which has accrued to him after 1st April 1933 and has been brought by him into British India. It is true that the profits were actually earned by the joint family, a different entity for the purpose of taxation, but on 28th March 1939 the assessee acquired the business and all the profits which had been earned between 1st April 1933 and that date. According to the Oxford Dictionary a primary meaning of the word "accrue" is "to come by way of addition or increase, or as an accession or advantage". By reason of the arrangement with his father the assessee instead of being a sharer in the business became the absolute owner thereof. Thereby the profits accrued to him in his own right and it was he who brought them into British India. The acceptance of the assessee's interpretation would mean, as Mr. Sessa Ayyangar has pointed out, that the tax could never be collected on profits earned by a person resident in this country but trading abroad if he transferred his profits to another before they were brought into British India. We cannot accept such a construction. We hold that the profits accrued to the assessee within the meaning of the section and as he brought them into British India he must pay the tax on them.

We answer the question by stating that the respondent is liable to pay the tax on the sum of Rs. 40,742 brought by him into British India during the accounting year.

The Commissioner has succeeded and is entitled to his costs Rs. 250.

N.S.

APPELLATE CIVIL.

Before Mr. Justice Mockett and Mr. Justice Bell.

INDO-COMMERCIAL BANK, LIMITED, THROUGH ITS
MANAGING DIRECTOR, S. N. N. SANKARALINGA AYYAR
(ASSIGNEE-DECREE-HOLDER—SECOND PETITIONER),
APPELLANT,

1944,
February 17.

v.

KUBERAN NAMBUDIRI'S SON NARAYANAN
NAMBUDIRI (SECOND RESPONDENT—SECOND
DEFENDANT), RESPONDENT.*

*Madras Nambudiri Act (XXI of 1933), ss. 2, 23, 24 and 25—
Nambudiri Brahman—Husband and wife, both members of
husband's illom—If husband claims partition, he must do so
for himself and his wife—Both receive their share jointly—
Except for change of religion, neither entitled to partition from
the other—Creditor attaching share of Nambudiri husband
who had separated from illom not entitled to bring it to sale.*

Under sections 2, 23, 24 and 25 of the Madras Nambudiri Act (XXI of 1933) the legal position among married Nambudiri Brahmans is as follows:—

On their marriage a husband and wife are both members of the husband's illom; he by birth, she by marriage. The husband is entitled to claim partition from his illom, but he must do so on behalf of himself and his wife. The husband and wife receive their respective shares jointly and, apart from the circumstances of a change of religion by either party arising, neither of them can claim partition from the other.

Held accordingly: A decree-holder is not entitled to attach the share of a Nambudiri husband who has separated from his illom and bring it to sale as the husband is disentitled to claim partition from his wife.

Deendyal Lal v. Jugdeep Narain Singh(1) referred to.

In the matter of Narayanan Nambudripad(2) distinguished.

APPEAL against the order of the Court of the Subordinate Judge of South Malabar at Palghat, dated 4th September 1942, and made in Execution Petition No. 29 of 1941 in Original Suit No. 17 of 1931.

* Appeal Against Order No. 45 of 1943.

(1) (1877) I.L.R. 3 Cal. 198 (P.C.).

(2) (1940) 2 M.L.J. 747.

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S. Panchapakesa Sastri and C. D. Venkataramanan
for appellant.

P. Govinda Menon for respondent.

Cur. adv. vult.

MOCKETT J. The JUDGMENT of the Court was delivered by MOCKETT J.—The appellant, the Indo-Commercial Bank, Limited, was the second petitioner, assignee-decree-holder, in the lower Court. The respondent was the second defendant in the suit and the second respondent in the lower Court. The petition before the Court was by the assignor and the assignee to record an assignment of the decree and to attach the share of defendants 2 and 3 in the illom properties. The learned Subordinate Judge made an order of attachment against the share of the third defendant but refused to make such an order against the share of the second defendant. Hence this appeal by the Indo-Commercial Bank, Limited.

The second and the third defendants are Nambudri Brahmins and members of an illom. Their legal position is defined by the Madras Nambudiri Act (XXI of 1933). The following dates are relevant. On 2nd September 1932 the decree was passed. On 1st August 1933, Act XXI of 1933 came into force. Some time in 1937 the second defendant married a Nambudiri woman. On 18th March 1940 there was a partition in the illom and in the words of paragraph 4 of the counter statement of the respondent "this defendant, his legally wedded wife and children and the third defendant are living as a separately divided branch of the *mana*." By paragraph 7 of the same statement he denied the liability of his share for attachment, he himself "not being entitled to ask for partition save with the consent of his legally wedded wife." It may be stated at once that no question of a Nambudiri wife's consent arises. What we have to decide is whether the plea, that the respondent

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being married he himself has no right to claim partition and consequently neither has an execution petitioner, is a good answer to an execution petitioner seeking to sell his share. The learned Subordinate Judge of South Malabar held that the plea was good and that the respondent's share could not be attached. The decision of this civil miscellaneous appeal depends upon a construction of sections 2, 23, 24 and 25 of the Madras Numbudri Act. Section 2 deals with definitions, but the explanation to the definition of "illom" is important. It reads thus :

"A female shall on her marriage cease to be a member of the illom in which she was born and become a member of the illom of her husband."

It follows that on their marriage the respondent and his wife were both members of the husband's illom, he by birth, she by marriage. This must be borne in mind in view of the wording of the proviso to section 23. Section 23 is as follows :—

"(1) Any member of an illom, male or female, may claim to take his or her share of all the properties of the illom over which it has power of disposal and separate from the illom :

Provided that where a male member of an illom whose wife is also a member thereof claims to separate from the illom, he shall do so on behalf of himself and his wife and the shares of the husband and wife shall be allotted to them jointly ; and save as provided in section 24, neither the husband nor the wife shall be entitled to claim partition from the other.

(2) (a) A member of an illom separating from it under sub-section 1 shall be entitled to such share of the illom properties as would fall to him or her if a division *per capita* were made among all the members of the illom then living.

(b) A husband and wife separating from an illom under the proviso to sub-section 1 shall be entitled to such share of the illom properties as would fall to them if a division *per capita* were made among all the members of the illom then living."

Sub-section 3 is not relevant. The section gives every member, male or female, of an illom a right to claim partition. But under the proviso when a male member having a wife who is also a member of the illom,

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as is the case before us, claims partition, he does so on behalf of himself and his wife and the allotment of the shares is made to them jointly. The concluding sentence is of great importance as it expressly denies to the husband and the wife the right to claim partition from each other. The result is that, though separate from the rest of the illom and in effect forming a new illom consisting of each other, neither is permitted to claim the right to partition his or her share, the shares being joint and indivisible. Marriage does not prejudice either the husband or wife from receiving their share; *vide* section 23-2 (b). The prohibition against partition by a husband or wife is almost emphasised by the fact that they are expressly allowed to claim partition only if either of them should change his or her religion [section 23 (1) proviso read with section (24)]. The proviso to section 25 does not assist in the determination of this appeal. It would appear to make the provisions of chapter II applicable to shares obtained by a husband and wife separating under the proviso to sub-section 1 of section 23. The position therefore is clear beyond doubt, namely: A married man is entitled to claim a partition but must do so on behalf of himself and his wife. They receive their respective shares jointly and, apart from the circumstances of a change of religion arising, neither of them may claim partition from the other. That, in my view, places an insuperable obstacle in the way of a decree-holder seeking to execute his decree against a married member of an illom who has partitioned from the rest of the family. The reason is that by the terms of the statute the only remedy by a decree-holder, namely, to attach and sell the right, title and interest of a co-sharer and having purchased, to compel partition as against the other co-sharers, is expressly denied. This remedy, as laid down by the Judicial Committee in *Deendyal Lal v. Jugdeep Narain Singh*(1), is always available to an

(1) (1977) I.L.R. 3 Cal. 198 (P.C.).

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executing creditor in cases where the judgment-debtor himself has a right to claim partition; but when, as in the case before us, there is no right to compel partition, it seems to me that the purchaser acquires nothing if he purports to buy the right, title and interest of a married Numbudiri co-sharer who has partitioned from the family.

It has however been argued that, in *In the matter of Narayanan Nambudripad*(1), PATANJALI SASTRI J. has generally decided that there is no restriction at all on the right (in that case) of the Official Assignee, to bring the interest of an insolvent member of an illom to sale on behalf of his creditors. It is clear from the judgment that the only point argued before the learned Judge was whether from a reading of the Madras Nambudri Act it could be derived that there was a general restriction on the right of execution by sale of the interest of an insolvent member. That was all that was decided and with that decision I am in complete agreement. It was argued however in the lower Court that an investigation of the record in the case before PATANJALI SASTRI J. showed that in fact the insolvent was married. I have consulted my learned brother PATANJALI SASTRI J. and he confirms, what I think is evident, that this aspect was never mentioned in Court and was never in the minds of anyone concerned in the case. The decision in *In the matter of Narayanan Nambudripad*(1) is therefore authority, with which I am in complete agreement, only for the general proposition contained in the head note and in the judgment. The learned Subordinate Judge before whom the above case was cited rightly formed the view that the point before him relevant to the marriage of the judgment-debtor was not considered by PATANJALI SASTRI J. and held that the share of the respondent, second defendant, was not attachable. The effect of

(1) (1940) 2 M.L.J. 747.

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section 23 is that in the circumstances of this case there was nothing to sell as the only remedy open to an executing creditor, namely, the right to compel a partition, could not be enforced under the provisions of section 23.

The result is that this appeal must be dismissed with costs.

BELL J.—I agree.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Krishnaswami Ayyangar.

IN RE GHOSH BEEVI (PLAINTIFF), APPELLANT.*

1944,
February 25.

Suits Valuation Act (VII of 1887), sec. 9—Notification of Madras High Court under—Prescribing valuation of subject-matter in suits for injunction—Appeals filed subsequent to notification, governed thereby—Court-fee payable accordingly—Court Fees Act (VII of 1870), sec. 7 (iv) (d).

The notification issued by the High Court at Madras under section 9 of the Suits Valuation Act, which states *inter alia* that "in suits for injunction, where relief is sought with reference to any immovable property, on the ground that the defendant denies the title of the plaintiff to the property and disturbs or threatens to disturb the plaintiff's possession thereof, the value of the subject-matter of the suit shall not be less than half the value of the property calculated in the manner provided in section 7, paragraph V, of the Court Fees Act, 1870", and which came into force on 1st November 1943, applies to all suits and appeals instituted or preferred subsequent to that date for obtaining such relief. For the purpose of court-fee it governs all appeals filed subsequent to 1st November 1943, even though the suits in which they are filed have been instituted earlier than that date. Accordingly, memoranda of appeals filed subsequent to that date praying for relief for injunction in such cases must bear court-fee calculated in the manner laid down in the notification.

* Stamp Register No. 654 of 1944.

Daivanayaka Reddiyar v. Renukambal Ammal(1) distin- GHOSH BEEVI,
guished. In re.

SECOND APPEAL sought to be preferred to the High Court against the decree of the District Court of Ramnad at Madura in Appeal Suit No. 681 of 1942 preferred against the decree of the Court of the District Munsif of Paramakudi in Original Suit No. 287 of 1941.

R. Kesava Ayyangar for appellant.

Government Pleader (K. Kuttikrishna Menon) for the Government.

ORDER.

KRISHNASWAMI AYYANGAR J.—The matter comes before me on a reference made by the Taxing Officer. The suit out of which the present second appeal has been sought to be preferred was instituted on 13th December 1941 for a permanent injunction restraining the defendants from trespassing on land alleged to be in the lawful possession of the plaintiff as a usufructuary mortgagee. The plaintiff valued the suit for the purposes of court-fee and jurisdiction on her own valuation at Rs. 100, a course which was open to her under section 7, clause iv (d), of the Court Fees Act read with section 8 of the Suits Valuation Act. A decree was passed in favour of the plaintiff and thereupon the first defendant appealed to the District Court. The appeal was disposed of on 4th October 1943 and it resulted in a reversal of the decree passed by the District Munsif. The plaintiff is now endeavouring to file a second appeal and she filed her memorandum in this Court on 3rd January 1944. Between the date when the District Court passed its decree and the date when the second appeal was filed here, a notification has been issued by the High Court under section 9 of the Suits Valuation Act with the previous sanction of the Provincial Government directing a change in the method by which

(1) (1927) I.L.R. 50 Mad. 857 (F.B.).

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the subject-matter of a suit of the character here in question is to be valued for the purposes of court-fee and jurisdiction. The notification amongst others states :—

“ In suits for injunction, where relief is sought with reference to any immovable property, on the ground that the defendant denies the title of the plaintiff to the property and disturbs or threatens to disturb the plaintiff's possession thereof, the value of the subject-matter of the suit shall not be less than half the value of the property calculated in the manner provided in section 7, paragraph V, of the Court Fees Act, 1870.”

The intention behind the notification is to take away from the plaintiff or the appellant as the case may be the right he had under section 7 (iv) (d) to value a suit of this kind at his discretion at any amount he likes. This notification came into force on 1st November 1943, more than two months before the second appeal was filed. The question is whether the plaintiff-appellant is entitled to pay the same court-fee on his memorandum of second appeal as he originally paid when he filed the suit or whether he should pay a fee determinable according to the method indicated by the new notification.

Mr. R. Kesava Ayyangar, the learned Advocate for the appellant, has contended that the value which was correctly fixed when the suit was instituted according to the law then in force continues to apply to the appeal and second appeal, in spite of alterations subsequently made. For this contention he relies on the decision of the Full Bench in *Daivanayaka Reddiyar v. Renukambal Ammal*(1). It is clear from the judgment of the Full Bench that the Court was then called upon to decide whether an amendment of the law made after the institution of the suit affected the right of appeal which the parties possessed as matters stood at the date of the suit. The Full Bench held that an amendment which came into force after the

(1) (1927) I.L.R. 50 Mad. 857 (F.B.).

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institution of the suit would not deprive the plaintiff of his right of appeal to the Court to which appeals lay at the date of the suit. There was no question raised there as to whether the alteration made in the court-fee payable applied to the appeal or not. If we look at the ground of the decision it seems clear that it proceeded on the well-known principle of law that the moment a suit is filed the plaintiff has a vested right of appeal to a particular tribunal which cannot be taken away by a subsequent enactment. This of course does not touch the question of court-fee in regard to which it is not possible to maintain that there is such a vested right. Strong reliance is placed upon the following passage occurring at page 865 of the report :—

“ Presumably the value of the subject-matter of the suit is its value at the time of filing. Such value has to be set forth in the plaint and court-fees paid accordingly. It is, however, contended that the value varies according to the particular enactment in force at the time ; and that, although it may have a particular value when it is filed, the value of the suit can be changed if the law in respect of valuation is altered. This contention was distinctly negatived so long ago as 1874 in *Muthusami Pillai v. Muthu Chidambara Chetti*(1) where it was held that it is the money value of the original suit that fixes the jurisdiction throughout the subsequent litigation in its several stages. If this is so, the value of the subject-matter of the suit is the same throughout and it cannot be altered after the decree has been passed simply by an alteration in a fiscal enactment.”

The last sentence in this extract clearly implies that the value of the subject-matter for the purpose of fixing the forum remains the same throughout and that it is not altered by a change in a fiscal enactment. The Full Bench had not to consider the effect of a fiscal enactment in so far as fiscal purposes are concerned and the ruling does not touch the question of court-fee. In the case before me the question is not

(1) (1874) 7 M.H.C.R. 356.

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a question of forum but a question of pure court-fee. The same remarks apply to the decision of the Punjab Chief Court in *Dhirta v. Kesri*(1).

The notification having taken effect on 1st November 1943, I can see no reason why it should be held inapplicable to an appeal preferred after it came into force. It follows that the court-fee payable in respect of the memorandum of second appeal must be calculated and paid in the manner laid down in the notification.

Time for payment of the court-fee, three weeks.

N.S.

APPELLATE CIVIL.

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

1944,
February 24.

SCHWEBE K.S.RM. FIRM THROUGH PARTNER, GOVINDAN,
alias RAMANATHAN CHETTIAR (PLAINTIFF), APPELLANT,

v.

SUBBIAH ALIAS SHANMUGHAM CHETTIAR, NOW KNOWN
AS S. P. SHANMUGHAM, AND FOUR OTHERS (DEFENDANTS
1 to 5), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sec. 53—Hindu law—Partition—Father allotted smaller share with intent to defeat his creditors—Right of creditors to avoid partition and proceed against what would be his proper share in family properties ignoring allotment of properties at partition—Absence of right to proceed against son's share—Bona fide partition, not liable to be set aside even though entered into for preventing son's share being attached—Colourable partition, not intended to be acted upon, can be ignored.

A partition of the properties of a joint Hindu family was sought to be set aside by a creditor of the father on behalf of the general body of creditors under section 53 of the Transfer of Property Act.

Held: (i) Where the partition is unequal and the father has been allotted a smaller share than would be his due with

* Appeal No. 258 of 1942.
(1) (1907) 3 I.C. 484.

intent to defeat his creditors, the latter can avoid the partition under section 53 and proceed against what would be his proper share in the family properties in execution of decrees obtained against him, ignoring the allotment of the properties at the partition;

(ii) they cannot, however, proceed against the son's shares in such execution, as the division of status brought about by the partition will stand, notwithstanding the avoidance of the partition as a fraudulent transfer; but

(iii) where the partition is fair and in accordance with the proper shares of the parties, it is not liable to be impeached under section 53, although it was entered into with a view to prevent attachment of the son's shares in execution of decrees obtained against the father after the partition and was in that sense *mala fide*; and

(iv) a mere colourable partition, not meant to operate between the parties, can be ignored and the creditor can enforce his remedies as if the parties still continued to be joint.

Case law reviewed.

APPEAL against the decree of the Court of the Subordinate Judge of Sivaganga in Original Suit No. 75 of 1939.

V. Seshadri for appellants.

B. Sitarama Rao and R. Subramaniam for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by PATANJALI SASTRI J.—This appeal has been brought by the plaintiff, a firm of Nattukottai Chetti money lenders and bankers, from a decree of the Court of the Subordinate Judge of Sivaganga dismissing their suit for setting aside an order whereby the 4/6ths share of the respondents 1 to 4 in their joint family property was released from attachment in execution of an order for restitution passed by the High Court of Judicature at Rangoon. The fifth respondent was impleaded *pro forma* as the receiver appointed in certain proceedings which were pending between the partners of the appellant firm, and no further reference will be made to him herein.

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The respondent's father, Subramaniam Chetti, who was carrying on business as banker and money lender at Rangoon and other places under the name and style "AT. K. PL. SP. Chettiar Firm", sued the appellants and others in the High Court at Rangoon in its original jurisdiction for recovery of Rs. 20,000 and obtained a decree on 27th July 1931. The appellants preferred an appeal to the same Court in its appellate jurisdiction on 17th August 1931, and pending the appeal deposited the decree amount in Court on 2nd December 1931, as one of its partners was arrested in execution of the decree. The money was drawn out by the decree-holder on the same day and the execution proceeding was closed. On 11th May 1933 the appeal was allowed and the suit brought by the respondent's father was dismissed as far as the appellant firm was concerned. Thereupon the latter applied for restitution of the sums of Rs. 20,000 with interest and obtained an order for payment of Rs. 22,690 with further interest at nine per cent till realisation together with costs of the application. This order was passed on 10th July 1933. As no payment was made in compliance with the said order, the appellants applied on 27th April 1936 for leave to take out execution. The application stated that respondent's father Subramaniam Chettiar was trading under the name and style of AT. K. PL. SP. for the benefit of his family and that leave should be granted under the provisions of Order XXI, rule 50, of the Code of Civil Procedure read with Order XXX, rule 10, to execute "the decree for restitution passed on 10th July 1933 by this Honourable Court" and the decree for costs in the appeal against "AT. K. PL. SP. Subramaniam Chettiar of Sirukudalpatti, Ramnad district". It may be mentioned here that the combined effect of the provisions referred to above is to render it necessary for a decree-holder who has obtained against a person carrying on business in a name or style other than his own name a decree

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in such name or style, to obtain the leave of the Court before executing the decree against any person whose position as the proprietor of the business has not already been established. The provisions contemplate the adjudication of the liability of such person as the proprietor of the business where such liability is disputed before leave to execute is granted. As the appellant's application alleged that the respondent's father was carrying on the business under the name of "AT. K. PL. SP. Chettiar firm" for the benefit of his family and asked for leave to execute under the provisions specified, the respondent's father filed a statement of objections contending (paragraph 4) that, in the absence of the parties on whom the restitution order was said to be binding, the Court could not adjudicate as to who are the persons liable and (paragraph 5) that the business of AT. K. PL. S.P. Chettiar firm was not carried on on behalf of and for the benefit of his family. To this the appellants filed a reply wherein they stated "the application is for execution against AT. K. PL. SP. Subramaniam Chettiar and no relief is claimed now against any others. The contentions do not therefore arise for consideration at the present stage". On this the Court passed the following order on 12th June 1936:—

"Both sides now agree that AT. K. PL. SP. Subramaniam Chettiar is carrying on business as the sole proprietor of the AT. K. PL. SP. Chettiar Firm and Mr. Anklesaria (Counsel for the latter) has no objection to leave being granted for execution of the order, dated 10th July 1933, against him as such sole proprietor. Mr. Venkatram (Counsel for the appellants) is satisfied with such leave. There will be an order accordingly granting leave for executing the order for restitution, etc."

Having obtained such leave, the appellants got the "decree for restitution" transmitted to the Subordinate Judge's Court of Sivaganga, Ramnad District, for execution and filed an application in that behalf on 10th August 1936. In that application, however, "the judgment-debtor against whom the

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decree was to be executed " was described as " AT. K. PL. SP. Chettiar Firm by proprietor Subramanian Chettiar (as manager of his joint family) ", and attachment of certain immovable properties which belong to the joint family of the aforesaid Subramanian Chettiar and other consequential reliefs were sought. When attachment of these properties was effected, petitions were filed by the respondents herein and by their step-brother, Palaniappa Chettiar, under Order XXI, rule 58, of the Code of Civil Procedure praying that four-sixths share of the former and the one-sixth share of the latter in the family properties should be released from attachment on the ground that, before the order for restitution was made, they had become divided from their father under a partition deed, dated 12th December 1932. The Court allowed the claims of the sons and directed the release of their shares from attachment holding that the partition was not a sham transaction as contended by the appellants herein, and that the claimants were in possession of their shares. It is to set aside the order thus obtained by the respondents releasing their four-sixths share in the family properties which were attached and to declare that the appellants are entitled to proceed against the said share in execution of the decree for restitution that the present suit has been brought. As the appellants attacked the partition not only as a mere sham and colourable transaction but also, in the alternative, as having been brought about with intent to defeat and delay the creditors of the father, even if it was intended to be operative between the parties thereto, the suit was instituted on behalf of all the creditors of Subramanian Chettiar as required by section 53 of the Transfer of Property Act. A similar suit was filed against Palaniappa Chettiar, the other son of Subramanian Chettiar, but that suit is not now before the Court.

The Court below did not go into the question whether the business of AT. K. PL. SP. Chettiar Firm

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at Rangoon was a joint family business of the respondents and their father or was carried on by the latter as his own individual concern in which his sons had no interest. Dealing with the case on the assumption that it was a joint family business the Court below found that (i) the partition put forward by the respondents was neither a sham and colourable transaction nor one brought about with intent to defeat or delay creditors, (ii) the liability for restitution arose only when the decree of the trial Judge was reversed on appeal and that therefore it was not a pre-partition debt, (iii) even on the footing that such liability arose at the time of the recovery of the money from the appellants and was thus a pre-partition debt, the shares allotted to the sons at the partition could not be proceeded against in execution, as the order for restitution was obtained against Subramanian Chetty after he ceased to represent the respondents by reason of the partition and (iv), in any event, the appellants were precluded by the terms of the order, dated 12th June 1936, whereby leave was given to execute the restitution order against Subramanian Chetty as the " sole proprietor " of the AT. K. PL. SP. Firm from claiming relief against the respondents in these proceedings. The appellants contest all these findings.

On the question of partition, we find it difficult to accept the suggestion of the appellants that it was a mere colourable and sham transaction not meant to operate between the parties. It is true that Subramanian Chetti's sons were all minors at the time of the partition and that they continued to be joint even after the partition. And it is also true that there was no division of the properties by metes and bounds and that the recitals as to there being no debts payable by the family was false, as there was a mortgage for Rs. 30,000 outstanding on one of the properties included in the deed. It is also in evidence that Subramanian Chetti departed from British India a few months later to avoid pressure of creditors and was

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eventually adjudicated insolvent. But these considerations, while no doubt giving rise to a strong suspicion that the parties intended to secure, if possible, the sons' shares in the family properties from the reach of the father's creditors as suggested for the appellants, do not lead to any inference that the transaction was not intended to be operative between the parties. Indeed, the very motive which according to the appellants prompted the execution of the deed at that juncture would be strong reason for supposing that the parties intended to bring about a real partition, for a sham transaction would not serve the purpose they had in view. On the other hand, several witnesses including the writer and the attestors have deposed that the partition was due to the quarrels between the two wives of Subramanian Chetty. The first wife who had only one son, apprehending that the second wife who had already four sons was likely to have more, demanded that the family properties should be divided according to the number of wives, while Subramanian Chetty and his second wife insisted the division should be according to the number of sons. The dispute is said to have been settled in the presence of the elder brother of the first wife (D.W. 2) and the father of the second wife (D.W. 5) by the father being given one and the sons five out of six shares. The Court below saw no reason to discredit the evidence of these witnesses and we are not disposed to differ from its view. We consider it unnecessary to review the evidence here as it has been considered in detail by the learned Subordinate Judge. It is sufficient to say that we agree with his conclusion that the partition was not a sham transaction intended to be inoperative between the parties.

But even so, urged Mr. Bhashyam for the appellants, the transaction was liable to be set aside under section 53 of the Transfer of Property Act as one brought about with intent to defeat or delay the creditors

of Subramanian Chetty if not those of the family. The suit is no doubt framed as a representative action so as to admit of such relief being granted if the right to such relief is established, but there are obvious difficulties in dealing with a partition among the members of a Hindu joint family as a "fraudulent transfer" coming within the section. A "transfer of property" is defined in section 5 of the Act as meaning

"an act by which a living person conveys property in present or in future to one or more other living persons or to himself or to himself and one and more other living persons." Can it be said that a partition is an act of conveying property by one living person to another; and if so, where a creditor "avoids" it, is the division of status brought about by the deed of partition which is vacated as against the creditors also to be deemed as nullified? The first of these questions was answered in the affirmative and the second in the negative by ABDUR RAHIM J. and *vice versa* by SPENCER J. in *Indoji Jithaji v. Kothapalli Rama Charlu*(1). In *Rasa Goundan v. Arunachala Goundan*(2) OLDFIELD and VENKATASUBBA RAO JJ. refused to accept the view of SPENCER J. and, holding that a partition was a transfer of property to which section 53 was applicable, affirmed a declaration of its invalidity by the lower Court at the instance of a creditor. The facts do not appear from the report and it is not clear whether the creditor in avoiding the partition sought to proceed against the debtor as a divided or an undivided member. In *Kuppan Chettiar v. Masa Goundan*(3) VARADACHARIAR J. held that a partition between a father and his sons precluded a creditor who obtained a decree against the father after the partition from proceeding against the properties allotted to the sons, although the partition was brought about for the very purpose of preventing the decree-holder from executing his decree against such properties.

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(1) (1919) 10 L.W. 498.

(2) (1923) 44 M.L.J. 513.

(3) I.L.R. [1937] Mad. 1004.

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The learned Judge expressed the opinion that, unless a smaller share than what the father was otherwise entitled to had been allotted to him at the partition, the transaction could not be assailed as a fraudulent transfer under section 53, however *mala fide* it might be in the sense that it was intended to defeat the right of a creditor holding a decree against the father to execute it against his sons' shares in the family properties. But if the partition was unequal and was consequently held not binding on the creditors of the father, the learned Judge opined that it would still be operative to bring about a division of status and that, although the father's proper share would be available to satisfy his debts, his creditors could not execute, against the sons' interests, decrees obtained against the father alone after the partition. See also *Veerappa Chettiar v. Annamalai Chettiar*(1) and *Kuppan Chettiar v. Masa Goundan*(2) where the learned Judge has expressed similar views.

The authorities referred to above would thus seem to establish the following propositions :—

(a) Where the partition is unequal and the father has been allotted a smaller share than would be his due with intent to defeat his creditors, the latter can avoid the partition under section 53 and proceed against what would be his proper share in the family properties in execution of a decree obtained against him, ignoring the allotment of the properties at the partition ;

(b) they cannot, however, proceed against the sons' shares in such execution, as the division of status brought about by the partition will stand notwithstanding the avoidance of the partition as a fraudulent transfer ; but

(c) where the partition is fair and in accordance with the proper shares of the parties, it is not liable to be impeached under section 53, although it was entered

(1) (1934) 68 M.L.J. 157.

(2) I.L.R. [1937] Mad. 1004.

into with a view to prevent attachment of the sons' shares in execution of decrees obtained against the father after the partition and was in that sense *mala fide* ; and

(d) a mere colourable partition, not meant to operate between the parties, could be ignored and the creditor could enforce his remedies as if the parties still continued to be joint.

Applying these propositions to the facts of the present case, it is to be observed that the partition in question practically did no more than define and fix the shares of Subramanian Chetty and his sons in each item of ancestral property in accordance with their rights under the Hindu law, and there was no attempt to favour the sons at the expense of the father's creditors. We have also found that it was not a sham transaction. Even assuming, therefore, that the circumstances in which the partition was effected justify the inference that it was brought about with a view to place the minor sons' shares in the family properties beyond the reach of Subramanian Chetty's creditors as far as it was possible under the law to do so, it cannot be " avoided " as a fraudulent transfer under section 53 of the Transfer of Property Act. It follows that the appellants are not entitled to attach the respondents' four-sixths share in the ancestral properties in execution of the decree for restitution which they have obtained from the High Court of Judicature at Rangoon, even on the footing that Subramanian Chetty's liability to make restitution arose on 2nd December 1931 when he drew the amount from Court, and was thus a pre-partition debt.

Mr. Bhashyam next put forward another line of argument on the footing that the business carried on in the name of the AT. K. PL. SP. Chettiar Firm was a family business. He urged that the suit which resulted in the recovery of Rs. 20,000 from the appellants must be regarded as having been brought by Subramanian Chetty as the manager of the family representing all

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the members including the respondents, that such representation implied that the persons represented were parties to the proceedings though they were not *eo nomine* on the record, and that the partition in 1932, during the pendency of the appeal preferred by the appellants herein, was immaterial as it could not affect the position of the respondents as parties to the proceedings throughout, including the proceedings for restitution. Strong reliance was placed in support of this argument upon the decision of a Full Bench in *Venkatanarayana v. Somaraju*(1) where a decree for mesne profits passed against a Hindu father after a partition between himself and his son was held executable against the son as the latter must be deemed to have been a party to the suit which was commenced before the partition when the father must be taken to have represented the son, as he was the manager of the family and the suit arose out of a transaction entered into on behalf of the family. The learned Judges referred to various Privy Council decisions holding that decrees obtained by or against a manager of a joint Hindu family bound the other members as they must be deemed to have been represented by the manager, and urged that this could be so only on the footing that the junior members were constructively parties through the manager. VENKATASUBBA RAO J. observed :

"The reason for holding that the members not joined should be held liable is, that they are substantially parties to the suit through the manager, in other words, they are sufficiently represented, though not *eo nomine* parties on the record. It follows from this that the decree can be executed not only against the parties whose names appear but also against those who must be deemed to be constructive parties. In this view it is immaterial whether the family continues to remain joint or become divided."

and VENKATARAMANA RAO J. said :

"A judgment against a person sued in a representative character is a judgment against every individual member

(1) I.L.R. [1937] Mad. 880 (F.B.).

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covered by the representation and therefore the bar of *res judicata* is held to apply to a member of a family not a party *eo nomine* to the litigation represented by its manager ; vide *Lingangowda v. Basangowda*(1). When they must be held to be parties to the suit, it is immaterial what the character of the property in their hands is, whether it is still undivided property or has become separate property by division."

This reasoning, however, would seem to overlook the fact that the applicability of the principle of *res judicata* which is made applicable to such cases by explanation 6 of section 11 of the Code of Civil Procedure—see *Lingangowda v. Basangowda*(1)—rests, not on the theory that the persons represented by the party litigating in respect of the common right are parties to the suit, but on the ground that such persons "shall, for the purposes of this section, be deemed to claim under the persons so litigating", which necessarily implies that these persons are themselves *not* parties to the suit. However that may be, we are clearly of opinion that it is not open to the appellants in these proceedings to claim relief on the footing that the AT. K. PL. SP. Chettiar Firm at Rangoon was a joint family concern. As stated already, the appellants obtained leave to execute the restitution decree and got it transmitted to the Court at Sivaganga for execution expressly on the agreed footing that "AT. K. PL. SP. Subramanian Chettiar is carrying on business as the sole proprietor of the AT. K. PL. SP. Chettiar Firm", the plea of family proprietorship of the business having been put forward by the appellants and withdrawn on objection raised by Subramanian Chetti, the appellants stating that "the application is for execution against AT. K. P.L. SP. Subramanian Chettiar and no relief is claimed against any others". Mr. Bhashyam sought to explain that the reference to "sole proprietor" in the order of the Court, Exhibit D-2 (c) dated 12th June 1936, and to "any others" in the appellant's reply

(1) (1927) I.L.R. 51 Bom. 450 (P.C.).

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affidavit, Exhibit D-2 (b), was only intended to convey that there were no other partners in the business, but this explanation cannot be accepted as the issue then raised did not relate to any partnership with strangers but only to the proprietorship of the joint family. We are therefore inclined to agree with the learned Subordinate Judge that the appellants are precluded by the terms of the order, dated 12th June 1936, based on the consent of parties, from claiming relief in these proceedings by way of attachment of the respondents' share in the family properties on the footing that the "AT. K. PL. SP. Chettiar Firm" was a family business.

The conclusions we have reached on the points discussed above are decisive of the appeal and it is unnecessary to say anything on the other questions argued before us.

The appeal fails and is dismissed with costs.

G.R.

APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice Shahabuddin.

EAST AND WEST LIFE INSURANCE COMPANY
LIMITED (APPELLANT), FIRST DEFENDANT,

v.

KOLLA VENKIAH AND THREE OTHERS (PLAINTIFF AND
DEFENDANTS 2 TO 4), RESPONDENTS.*

Life insurance—Declaration form filled up in English—Insured, not knowing the language, signing it in Telugu—Misrepresentations regarding health—Forfeiture of policy.

In connection with reinstating an insurance policy which had lapsed, an application form printed throughout in English was signed in Telugu by the insured person who could not read or write English. In the declarations which were filled up in English by the agent of the Insurance Company, it was stated that the insured had no sickness, ailment, or injury whatever

* Appeal No. 268 of 1942.

and that he had not been attended upon, nor prescribed for, by any physician during the period covered by the declaration. It was proved that he had undergone a five weeks' course of treatment for arsenic dermatitis as an in-patient in a hospital during that period.

Held: (i) The insured person must be held responsible for the untrue statements in the application form as the duty of making himself acquainted with the contents of what he was signing lay upon the insured person himself.

Biggar v. Rock Life Assurance Company(1) and *Newsholme Bros. v. Road Transport and General Insurance Co.*(2) referred to.

(ii) The Company was not liable to pay the sum due on the life policy as the declarations of the insured regarding his health were untrue and the complaint for which the treatment was undergone could not be said to be of a trivial nature.

Connecticut Mutual Life Insurance Co. of Hartford v. Mocre(3) distinguished.

APPEAL against the decree of the Court of the Subordinate Judge of Bapatla, dated 15th December 1941, and passed in Original Suit No. 31 of 1940.

P. Chandra Reddi for appellant.

V. Govindarajachari and *K. Krishnamurthi* for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by KING J.—The question at issue in this appeal is whether the appellant, The East and West Life Insurance Co., Ltd., is liable to pay to the first respondent, Kolla Venkayya, the sum due on a life policy issued to the first respondent's brother, Kolla Janakiramayya, in December 1935 for Rs. 15,000. The learned Subordinate Judge of Bapatla has granted a decree to the first respondent for Rs. 12,862-13-0, after making certain deductions from the claim which do not now concern us, but has refused him costs. The Company has appealed and the first respondent has filed a memorandum of cross-objections on the question of costs only.

The undisputed facts of the case are these. Premiums were due on the policy every six months. The

(1) [1902] 1 K.B. 516.

(2) [1929] 2 K.B. 356.

(3) (1881) 6 A.C. 644.

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premium due on 11th June 1936 was not paid in time. The policy therefore lapsed, but under its terms could be reinstated on "evidence being furnished of good health to the satisfaction of the directors." In September 1936 the premium was paid and the policy reinstated. In this connection an application form Exhibit D-16 printed throughout in English, was signed in Telugu by Janikiramayya, who could not read or write English. In that form were (amongst others) two declarations:

(i) That since the day of my examination for the abovementioned policy, I have had no sickness, ailment, or injury whatever except as follows:—

and (ii) I have not been attended, nor prescribed for by any physician, except as follows:—

Under both of these declarations the word "None" was written in English by the Company's agent in Bezwada (D.W. 5). According to the final clause of the application form the insured agrees that "if any of the statements or representations contained herein prove to be incomplete or untrue then this reinstatement shall be *ipso facto* null and void."

Now it is admitted that the answer "None" to these two declarations is in the literal sense of the word, and subject to a question of legal interpretation to be hereafter considered, untrue. From 13th February to 19th March 1936 Janikiramayya was treated as an in-patient at a Mission Hospital in Chirala for arsenic dermatitis.

In December 1936 and January 1937 there was a second delay in the payment of premium, a second application form similarly filled up and signed and a second reinstatement; but the evidence and arguments in the case have centred round the facts of the first reinstatement and we need not therefore consider the later events. Janakiramayya died on 9th May 1937, the cause of death being given on the certificate under the heading "Other fevers."

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The principal matter to be first considered is the circumstances in which Exhibit D-16 came to be signed. The case for the Company is that their agent D.W. 5 explained the contents of the form correctly in Telugu to Janikiramayya and wrote the word "None" on his instructions. The case for the first respondent, as outlined in his own evidence as P.W. 2, is that D.W. 5 gave him Exhibit D-16 at Bezwada (with the answers already filled in) and asked him to get Janikiramayya to sign it and return it by post. The learned Subordinate Judge deals with this matter in paragraph 13 of his judgment but does not come to any positive conclusion. He refers to a definite admission by D.W. 5 as proof that he *could* not have correctly translated the first declaration into Telugu, but then goes on to point out the failure of D.W. 5 to explain a discrepancy in date, from which the only reasonable inference would be to distrust D.W. 5's evidence as a whole, and hold that the fact of any interview between him and Janikiramayya in September 1936 was not proved.

Mr. Govindarajachari who appeared for the first respondent has thrown overboard his client's case as to the facts; and in order to rely upon the law as laid down in paragraph 600 (4) of Volume XVIII of Halsbury's Laws of England (Second Edition), and the case there quoted [*Joel v. Law Union and Crown Insurance Co.*(1)] has asked us to hold that D.W. 5 did meet Janikiramayya and intentionally misrepresented to him the meaning of the declarations. We are unable to accept this view.

We must point out in the first place that both P.W. 2 and D.W. 5 were giving evidence late in 1941, several years after the events of which they were speaking. It is difficult therefore to rely upon the memory of either, though in this respect it is more likely, we think, that P.W. 2 who was dealing in 1936

(1) 119081 2 K.B. 863 (C.A.).

with his own and his brother's individual concerns, would retain a better recollection of what happened than D.W. 5 to whom Janikiramayya's policy was only one of many to be considered in the ordinary routine of his duties. We are therefore unable to rely implicitly upon any admission by D.W. 5 as being necessarily an admission of the truth.

In the second place, though we naturally speak here with some hesitation, we cannot agree with the learned Judge's own interpretation of D.W. 5's evidence. The learned Judge says that D.W. 5 was definitely asked how he interpreted to Janikiramayya the first declaration, and gave an answer in Telugu which excluded the possibility of his having asked him anything more than whether he was there and then in good health. That D.W. 5 would make an admission thus cutting at the root of the Company's case (which he had upheld in examination-in-chief) is in the highest degree improbable. The original record of D.W. 5's evidence in the Judge's own hand is obscure and very nearly illegible, but it does establish, we think, that the question put to D.W. 5 was recorded, and that that question could not possibly have been "How did you translate or explain the first declaration?"

Finally, in our opinion, a consideration of the documents makes it extremely probable that there was no interview between D.W. 5 and Janikiramayya. The receipt, Exhibit P-3, shows that the premium was paid to D.W. 5 at Bezwada on 11th September. The application form was dated 19th September. It was this discrepancy that D.W. 5 was unable to explain, and we are not surprised at his inability. If the parties had met in person it was surely inevitable that both these matters of business, the payment of the premium and the execution of Exhibit D-16, would have been attended to simultaneously. Our view accordingly is that, in all probability, P.W. 2's

evidence is true that there was no interview between D.W. 5 and Janikiramayya and that no facts have been established to prove any positive misrepresentation by D.W. 5. The burden of proving this lies upon the first respondent and in the absence of proof it cannot be held that the Company is bound by anything which D.W. 5 may have said. Though we cannot commend the practice of calling upon an insured person who knows only Telugu to answer questions couched in English, the duty of making himself acquainted with the contents of what he was signing, undoubtedly lay upon Janikiramayya himself on the facts of this case, and he must be held responsible for the statements that he had had no sickness, ailment or injury since December 1935, and had not been attended upon or prescribed for by any physician: see *Biggar v. Rock Life Assurance Company*(1) and *Newsholme Bros. v. Road Transport and General Insurance Co.*(2).

We have said that the answers to the declarations in Exhibit D-16 are on the face of them untrue, but it was argued by Mr. Govindarajachari that questions and answers must be reasonably interpreted and that, judged by this test, the answers are substantially true. Much stress was laid upon the comparatively innocuous nature of arsenic dermatitis. P.W. 1, for instance, says that it is not a disease in the strict sense of the term, and does not affect longevity. D.W. 7 quotes a text-book which gives the death-rate from dermatitis as one in 15,000 to 22,000 injected. D.W. 6 says that Janikiramayya need not have stayed in the hospital at all, but was induced to enter it "for nursing care". It is common ground that by September 1936 (and indeed so early as in March) the dermatitis was cured.

It was therefore argued on all these facts that Janikiramayya might legitimately regard this incident

(1) [1902] 1 K.B. 516.

(2) [1929] 2 K.B. 356.

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in his life as of trifling importance in which no insurance company would take any interest in deciding whether to reinstate a policy or not. Reliance is placed in this connection upon the discussion in *Connecticut Mutual Life Insurance Co., of Hartford v. Moore*(1). We do not think this case is of much assistance to the first respondent. It is true that the expression "attendance by a doctor" is interpreted as excluding occasions when medical aid has been sought for some trifling ailment, occasions which are not likely to be present to the mind of a person filling up a proposal form, but it is noteworthy that whereas the term "serious illnesses" occurs in the judgment, the only non-serious complaints mentioned in it are a headache and a cut finger. It is impossible to consider a five weeks' course of treatment for arsenic dermatitis in hospital as on the same level as such trivial complaints, however free from danger the dermatitis may have been, and however complete its cure.

One further point must also be mentioned in this connection and that is that it cannot, in our opinion, be fairly said on the facts of this case that the disclosure of this illness by Janikiramayya would have had no influence on the Company's decision to reinstate the policy. The dermatitis was caused by an injection of arsenic. The arsenic was injected because the hospital authorities had reason to believe that Janikiramayya might have been suffering from syphilis. There is no positive proof in this case that Janikiramayya did suffer from syphilis and indeed there are indications to the contrary, but the Insurance Company under the terms of its policy, and of Exhibit D-16, was certainly entitled to be informed of facts which might have led it to suspect that syphilis was present. For the reasons which we have given, we do not therefore

(1) (1881) 6 A.C. 644.

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think that the answer "None" to the two declarations was true on a reasonable interpretation of their terms. If it was not true and if, as we have found, it was not induced by any misrepresentation as to the meaning of the declarations, it must necessarily follow upon the terms and conditions of Exhibit D-16 that the Company can legally repudiate liability.

In the result this appeal must be allowed, and plaintiff's suit dismissed with the costs of the appellant throughout. The memorandum of cross-objections must also be dismissed, but without costs as, in our opinion, the learned Subordinate Judge gave no valid reason for refusing costs to the first respondent on his view of the facts and law.

V.V.C.

APPELLATE CIVIL.

Before Mr. Justice Byers.

IN RE RAYALLA RAMAPPA (DISCHARGED GUARDIAN,
PERSON DIRECTED TO BE PROSECUTED), APPELLANT.*

1944,
July 24.

Code of Criminal Procedure (Act V of 1898), sec. 195 (1) (c)
—Guardian instituting suit on behalf of minor—Not a
"party" within meaning of the section.

A guardian instituting a suit on behalf of a minor is not a party to the proceeding within the meaning of section 195 (1) (c) of the Code of Criminal Procedure.

APPEAL against the order of the District Court of Bellary, dated the 18th day of September 1942, in Appeal Suit No. 116 of 1940 (Original Suit No. 101 of 1938, District Munsif's Court, Bellary).

T. S. Swaminatha Ayyar for appellant.

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

JUDGMENT.

BYERS J.—The main point taken in this appeal against an order under section 476 of the Code of

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* Appeal Against Order No. 501 of 1942.

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Criminal Procedure is that the appellant against whom a complaint has been directed to issue for offences he is alleged to have committed under sections 465, 467 and 471 of the Indian Penal Code was not a party to the proceeding within the meaning of section 195 (1) (c) of the Code. The appellant's learned Advocate relies on the decision in *Emperor v. Mallappa Tejappa*(1) in which it was held that the guardian or next friend of a minor plaintiff in a suit was not a party to the proceeding within the meaning of section 195 (1) (c) of the Code. In the course of the judgment reference was made to *Rup Chand v. Dasodha*(2), a case in which the question of limitation was involved: the plaintiff had appealed but failed to implead the guardian *ad litem* of the minor respondent, and by the time an attempt was made to remedy the defect the period of limitation had run out; objection was taken but it was held that there was no substance in it because the guardian *ad litem* was not a party to the suit or to the appeal. In *Satyanarayana v. Anjareddi*(3) the learned CHIEF JUSTICE and SOMAYYA J. held that the word "plaintiff" in section 95 of the Code of Civil Procedure must be confined to the plaintiff and it does not include the next friend of a minor plaintiff, and consequently no order could be made under that section against the next friend of a minor plaintiff by way of compensation. The learned Public Prosecutor contends that a guardian instituting a suit on behalf of a minor is as much a plaintiff as a party who is litigating in his own name; but in view of these authorities, and there is no decision cited to the contrary, I must hold that a guardian is not a party within the meaning of section 195 (1) (c) of the Code of Criminal Procedure. In view of this it becomes unnecessary to consider the other objections which have been taken to the order and it is accordingly set aside.

(1) A.I.R. 1937 Bom. 14.

(2) (1907) I.L.R. 30 All. 55.

(3) I.L.R. [1941] Mad. 985.

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There are, however, circumstances in this case which render it necessary that action should be taken against the appellant who has since 1928 been mainly instrumental in agitating the claims of his son to have been adopted by one Lakshmappa in that year. The falsity of the claim and the document on which reliance was placed has been found by more than one learned District Judge; and although the appellant may not be a party within the meaning of section 195 (1) (c) of the Code, it will be open to the learned District Judge to proceed against him in respect of an offence punishable under section 193 of the Indian Penal Code which he would appear to have committed. In the course of his evidence he stated that he was present when the adoption took place, that the adoption deed was drawn up and executed in his presence, and that he attested it. Whether or not the delay which has elapsed between 1928 and the present proceedings is material will no doubt be decided by the learned District Judge if he initiates further proceedings. No order as to costs.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

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

1944,
July 17.

NALAM RAMAYYA AND TWO OTHERS (DEFENDANTS),
APPELLANTS,

v.

NALAM ACHAMMA (PLAINTIFF) RESPONDENT.*

Evidence—Deed of partition inadmissible for want of registration—Proof of partition apart from deed—Inadmissible.

Where a deed of partition is inadmissible in evidence for want of registration, the partition cannot be proved by evidence apart from the deed.

Veera Raghava Rao v. Gopal Rao(1) approved.

Ramu Chetty v. Panchammal(2) overruled.

Rajangam Ayyar v. Rajangam Ayyar(3) and *Varada Pillai v. Jeevarathnammal*(4) distinguished.

APPEAL against the decree of the Court of the Subordinate Judge of Narasapur in Appeal Suit No. 97 of 1942 preferred against the decree of the Court of the District Munsif of Bhimavaram in Original Suit No. 269 of 1938.

ON THE REFERENCE:

Kasturi Seshagiri Rao and *M. Srinivasa Rao* for appellants.—In *Varada Pillai v. Jeevarathnammal*(4) all that the Judicial Committee held was that an unregistered document could be referred to for ascertaining the nature of possession. The Judicial Committee did not say that it could be used for proving title to a property covered by the document. In *Rajangam Ayyar v. Rajangam Ayyar*(3) the Judicial Committee held that it could be referred to for proving division in status. To the same effect is the decision in *Subba Rao v. Mahalakshamma*(5). It is not suggested that there cannot be an oral partition without any deed coming into existence embodying the agreement of partition. The exact point in the case is covered by the decision in *Veera Raghava Rao v. Gopal Rao*(1) where it was held that an unregistered deed could not be admitted in evidence for proving title in an

* Second Appeal No. 623 of 1943.

(1) (1941) 2 M.L.J. 707.

(2) A.I.R. 1926 Mad. 402.

(3) (1922) I.L.R. 46 Mad. 373 (P.C.). (4) (1919) I.L.R. 43 Mad. 244 (P.C.).

(5) (1930) I.L.R. 54 Mad. 27.

ejectment suit. To the same effect is the decision in *Ramappa v. Thirumalappa*(1). The view contrary to the above in *Ramu Chetty v. Panchammal*(2) and *Ahobilachariar v. Thulasi Ammal*(3) requires re-consideration.

P. Somasundaram and *P. Suryanarayana* for respondent.—There is no attempt in this case to prove the unregistered partition deed by other evidence. The plaintiff was in possession of the properties. Her separate possession of the properties must be presumed to be under a lawful agreement of partition. Views similar to those in *Ahobilachariar v. Thulasi Ammal*(3) have been held by the Lahore and Bombay High Courts.

Kasturi Seshagiri Rao was not called upon to reply.

The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal arises out of a suit instituted by the respondent in the Court of the District Munsif of Bhimavaram to recover from the brothers of her deceased husband properties which she alleged had fallen to his share on partition. The properties in suit admittedly had formed part of the estate of the joint family which consisted of the deceased, his brothers Ramayya and Appanna (the first and second appellants), and Appa Rao (the third appellant) who is the son of the second appellant. The plaintiff's case was that the partition was effected on 1st March 1934. Her husband obtained possession of the properties which were allotted to him and remained in possession until his death on 11th August 1938. After his death his brothers trespassed on the land and dispossessed her. The defendants denied that there had been a partition, but it transpired in the course of the case that partition had taken place and in this connection a document had been drawn up and signed by the parties. The document was not produced. On the evidence led before him the District Munsif held that it merely comprised lists of the properties which had been allotted to the respective coparceners. He also accepted the plaintiff's case in other respects and

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(1) (1939) 2 M.L.J. 649.

(2) A.I.R. 1926 Mad. 402.

(3) A.I.R. 1927 Mad. 830.

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consequently decreed the suit. On appeal the Subordinate Judge held that the document did constitute a deed of partition which required registration, but that the plaintiff was in law entitled to prove a partition by other evidence, which she had done. Consequently he concurred in the decree passed by the District Munsif. The defendants have appealed. The appeal raises the question whether the Subordinate Judge was right in holding that the partition could be proved by evidence apart from the deed and the case has been placed before a Full Bench as the decisions of this Court relating to this question reveal a conflict.

In *Ramu Chetty v. Panchammal*(1) KUMARASWAMI SASTRI J., sitting with VENKATASUBBA RAO J., held that, where a partition had taken place under a deed and the deed could not be proved for want of registration, the fact of partition could be proved by other evidence, namely, the conduct of the parties in their dealings with each other and with regard to the specific items of property. He quoted the decision of the Privy Council in *Rajangam Ayyar v. Rajangam Ayyar*(2) as an authority for the proposition that an unregistered partition deed can be put in evidence for the purpose of proving a division of status. The judgment of their Lordships did not say this, but in *Subba Rao v. Mahalakshamma*(3) a Bench of this Court held that regard can be had to the terms of an unregistered deed of partition when it is merely a question of deciding whether there has been a division of status, and the correctness of that decision has not been questioned.

In *Varada Pillai v. Jeevarathnammal*(4) the Judicial Committee held that unregistered documents could be examined with a view to ascertaining the nature of the possession. The question there was whether there had been a valid gift of immovable properties and whether the donee had acquired a

(1) A.I.R. 1926 Mad. 402.

(3) (1930) I.L.R. 54 Mad. 27.

(2) (1923) I.L.R. 46 Mad. 373 (P.C.).

(4) (1919) I.L.R. 43 Mad. 244 (P.C.).

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title by adverse possession. The documents were certain petitions which had been presented to the Collector, who was asked to register the properties in the name of the donee. Their Lordships said that, as a gift of immovable property is required to be made by a registered deed, the petitions could not be used as evidence of title, but it was permissible for the Court to look at them in order to ascertain the nature and character of the possession held by the person named in the petitions. In delivering the judgment of the Board, Viscount CAVE observed:

"In other words, although the petitions and order do not amount to a gift of the land, they lead to the inference that the subsequent receipt of the rents by Duraisani was a receipt in the character of donee and owner of the land, and therefore in her own right and not as trustee or manager for her mother and aunt."

The decision in effect was that, as the property had come to her in the circumstances indicated and as she had held it for twelve years, she had obtained title by adverse possession.

There is nothing in the judgment in *Varada Pillai v. Jeevarathnammal*(1) to support the proposition that an agreement which cannot be proved by reason of the fact that it has not been registered can be proved by other evidence. All that it amounts to is that an unregistered document can be examined to see under what circumstances a person came into possession. This is quite a different matter, and lends no support for the opinion of KUMARASWAMI SASTRI J.

The learned Advocate for the respondent also relies on the judgment of RAMESAM J. in *Ahobilachariar v. Thulasi Ammal*(2). It would appear that RAMESAM J. did regard the remarks of KUMARASWAMI SASTRI J. with favour, but it is not quite clear whether he intended to go quite so far.

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

(2) A.I.R. 1927 Mad. 830.

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An opinion emphatically opposed to that expressed by KUMARASWAMI SASTRI J. in *Ramu Chetty v. Pan-chammal*(1) was expressed by PATANJALI SASTRI J. in *Veera Raghava Rao v. Gopalarao*(2) where the facts were almost identical with the facts of the present case. There PATANJALI SASTRI J. held that, where a deed of partition is inadmissible by reason of the fact that it has not been registered, a co-sharer who happened to be in sole enjoyment of a particular property could not sue to eject another co-sharer who had disturbed his possession when he based his title on the partition deed. He could only bring a suit for partition of all the properties owned in common or for joint possession with his co-owners. The judgment of PATANJALI SASTRI J. was approved of in an appeal filed under clause 15 of the Letters Patent. I was a member of the Bench which heard that appeal.

The question has been fully argued in the present case and we see no reason to doubt the correctness of the opinion expressed by PATANJALI SASTRI J. in *Veera Raghava Rao v. Gopalarao*(2). If the judgment of KUMARASWAMI SASTRI J. were to be accepted, it would mean the overriding of the very emphatic provisions of section 17 of the Registration Act and section 91 of the Evidence Act, which is not to be contemplated. As we have already indicated, there is nothing in the judgment of the Privy Council in *Varada Pillai v. Jeevarathnammal*(3) which in any way supports the case for the respondent. If it were a question of proving an oral agreement entered into after that embodied in the unregistered document, evidence of subsequent conduct could, of course, be led in proof of the subsequent oral agreement, but not with regard to the earlier one. In the present case a division by metes and bounds took place before the execution of the partition deed.

(1) A.I.R. 1926 Mad. 402.

(2) (1941) 2 M.L.J. 707.

(3) (1919) I.L.R. 43 Mad. 244 (P.C.).

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As the property in suit admittedly had belonged to the joint family, the change in its character must be proved. As the agreement for partition cannot be proved, the Court can only regard the property as still belonging to the joint family. Moreover, as PATANJALI SASTRI J. pointed out, one co-owner cannot maintain a suit for trespass against another co-owner.

For the reasons given, the appeal must be allowed with costs throughout.

G.B.

APPELLATE CIVIL—FULL BENCH.

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

PURUSHOTHAMA NAIR (RESPONDENT-THIRD DEFENDANT),
APPELLANT,

1944,
July 18.

v.

RAYA PANDARAM (PETITIONER-PLAINTIFF), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), O. XXXIV, r. 13—
Suit by mortgagee impleading also non-mortgagors as
defendants—Preliminary decree—Appeal by a non-
mortgagor defendant and memorandum of objections by
mortgagee—Order for costs in favour of mortgagee against
the non-mortgagor defendant—Order for costs, discretion of
Court—Final decree including above costs without objection
by mortgagors—Effect—Sale of mortgaged property—Sale
proceeds proving insufficient to pay mortgage amount and
above costs—Right of mortgagee to execute above decree for
costs against the non-mortgagor defendant.

A non-mortgagor defendant in a mortgage suit appealed against the preliminary decree and the mortgagee filed a memorandum of cross-objections. The appeal was dismissed and the memorandum of cross-objections allowed and the appellant was directed to pay the mortgagee two sums as the costs of appeal and of the memorandum of cross-objections. No

* Appeal Against Order No. 281 of 1943.

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order as to costs was passed against the other defendants. A final decree was passed. The mortgagee in applying for execution to bring the hypotheca to sale included the decree for costs awarded to him in the appellate Court against the non-mortgagor defendant, without any objection being raised by the mortgagor defendants. The sale realized less than the amount due to him under the decree excluding the above costs. Thereafter the mortgagee attempted to execute the appellate decree for costs against the non-mortgagor defendant, who contended that the principles embodied in Order XXXIV, rule 13, of the Code of Civil Procedure should be applied and the decree for costs should be deemed to have been satisfied, since the sale proceeds should first be appropriated to interest and costs and then to the principal amount.

Held: The mortgagee was entitled to execute the appellate decree for costs against the non-mortgagor defendant. Costs are in the discretion of the Court and the Court can lawfully direct who shall be liable for costs. The non-mortgagor defendant was the sole appellant and he was the only person who opposed the memorandum of cross-objections filed by the mortgagee. He was the only person who could be made liable for costs in the appellate Court and the appellate Court expressly made him and him alone liable for costs. The fact that the mortgagor defendants did not raise any objection to the inclusion of the costs in the original execution, which they might well have done, cannot affect the right of the mortgagee decree-holder to proceed against the non-mortgagor defendants.

Rajagopalaswami Naicker v. Palaniswami Chettiar(1) approved.

Sabapathi Pillai v. Chockalinga Pillai(2) distinguished. APPEAL against the order of the Court of the Subordinate Judge of Coimbatore, dated 23rd February 1943, in Execution Application No. 908 of 1942 in Original Suit No. 211 of 1935.

ON THE REFERENCE:

C. K. Viswanatha Ayyar for appellant.—*Sabapathi Pillai v. Chockalinga Pillai*(2) laid down the principle regarding the appropriation of sale proceeds of mortgaged property. Sale proceeds must first go towards costs, then towards interest on the mortgage and then towards the

(1) (1931) I.L.R. 55 Mad. 332.

(2) (1913) 25 M.L.J. 552.

principal amount. See Order XXXIV, rule 13, of the Code of Civil Procedure. In this case, though the costs of appeal were made against the third defendant alone who was not one of the mortgagors and was also personal in character, the subsequent final decree passed at the instance of the mortgagee included these costs also, and execution was levied for the whole amount. This circumstance brings the present case within the rule laid down in *Sabapathi Pillai v. Chockalinga Pillai*(1). There is a decision of a Full Bench of the Lahore High Court supporting the contention of the appellant. The failure of the mortgagor defendants to object to the inclusion of the said costs in the final decree distinguishes the present case from *Rajagopalaswami Naicker v. Palaniswami Chettiar*(2). See also *Venugopalachariar v. Padmanabha Row*(3).

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for respondent were not called upon to reply.

The JUDGMENT of the Court was delivered by LEACH C.J.—On 23rd October 1936, the Subordinate Judge of Coimbatore passed a preliminary mortgage decree against eight defendants for the payment of the sum of Rs. 1,900 with interest and costs, which brought the total amount to Rs. 4,396-4-6. The mortgagors were the first and second defendants. The other defendants were alienees of portions of the properties mortgaged. The third defendant, who is the appellant in this appeal, appealed to the High Court against the preliminary decree. The mortgagee filed a memorandum of cross-objections. The result was that the appeal was dismissed and the memorandum of cross-objections was allowed. This Court held that the mortgagee was entitled to a total sum of Rs. 8,120-14-8. As the third defendant had lost both on the appeal and on the memorandum of cross-objections, this Court directed that he should pay as the costs on the appeal Rs. 273-8-7 and as costs on the memorandum of cross-objections Rs. 399-15-0. In due course the Subordinate Judge passed a final decree in accordance with the High Court's judgment, and on 6th February 1941

(1) (1913) 25 M.L.J. 552.

(2) (1931) I.L.R. 55 Mad. 332.

(3) (1915) 29 M.L.J. 120.

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the decree-holder applied for the sale of the hypotheca. There was then due to him Rs. 10,075-4-8 excluding the costs which the third defendant had been directed to pay by the appellate decree. The sale realized only Rs. 8,265 and, as the personal remedy against the mortgagors had become time-barred, the decree-holder was not able to apply for a personal decree against them. On 27th March 1942 he filed an application in the Court of the Subordinate Judge for execution of that part of the High Court's decree which directed the third defendant to pay costs. The application was returned to the decree-holder on the ground that the sale proceeds had to be appropriated first to the costs due to the decree-holder and, therefore, he was not entitled to ask for the execution of the decree for costs. On 13th July 1942 the decree-holder filed another application for execution of the decree for costs and asked that the delay in presenting this petition might be excused. On 6th August 1942 the Subordinate Judge rejected this application. On the 15th of that month the decree-holder applied to the Subordinate Judge for an order directing the High Court's decree for costs to be transferred to the Court of the Subordinate Judge of Palghat for the purpose of execution. On 23rd February 1943 this application was granted. The present appeal has been preferred by the third defendant against this order.

The appellant relies on the decision of this Court in *Sabapathi Pillai v. Chockalinga Pillai*(1). There a Bench, consisting of BENSON and SUNDARA AYYAR JJ., held that the principles embodied in Order XXXIV, rule 13, should be applied to sales held in execution of mortgage decrees. It was, of course, recognized that the rule only applied to cases covered by rule 12, but the learned Judges considered that the principles embodied in rule 13 should be followed in all sales held in execution of mortgage decrees. On this footing the

(1) (1913) 25 M.L.J. 552.

Court directed that the sale proceeds should first be appropriated to interest and the costs of the suit, and then to principal.

It is not necessary for us to consider whether the judgment in that case is open to criticism, as it has no application here. In that case the Court was considering merely the decree passed by the trial Court and there was no direction that a non-mortgagor defendant should be made personally liable for costs.

A case which is in point is *Rajagopalaswami Naicker v. Palaniswami Chettiar*(1). This was also decided by a Bench (JACKSON and PAKENHAM WALSH JJ.). It was there held that in a mortgage suit the Court has power to pass a personal decree for costs against defendants who were not parties to the mortgage, notwithstanding that the preliminary mortgage decree is silent on the point. The defendants were the mortgagor and his three sons who were impleaded as the second, third and fourth defendants. The trial Court in passing a mortgage decree, directed that after the hypotheca had been sold the plaintiff might apply for a personal decree against the mortgagor for the balance still due under the mortgage and costs and against the second and third defendants for the amount due for costs. As the decree had directed that the second and third defendants should be personally liable for costs, the decree-holder was entitled to proceed against them in execution.

That is what the decree-holder seeks to do in this case. The decree of this Court passed on the appeal against the preliminary mortgage decree expressly made the third defendant liable for the costs incurred in this Court. No order as to costs was passed against the other defendants. In the circumstances mentioned, the mortgagor defendants could no doubt have objected to the costs in the appeal being included in the sum for which execution was asked for on 6th February

(1) (1931) I.L.R. 55 Mad. 332.

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1941, but the fact that they raised no objection cannot affect the rights of the decree-holder to proceed against the third defendant. Costs are in the discretion of the Court and the Court can lawfully direct who shall be liable for costs. In this case the only person who could be made liable for costs was the third defendant. He was the sole appellant and he was the only defendant who opposed the memorandum of cross-objections filed by the decree-holder. If the contention advanced on behalf of the third defendant were to be accepted, it would mean that a person in his position could file an appeal to the Privy Council, without incurring any liability for the payment of costs there.

We consider that *Rajagopalaswami Naicker v. Palaniswami Chettiar*(1) was rightly decided and that the principle embodied in that judgment applies in the present case.

The appeal will be dismissed with costs.

G.B.

INCOME-TAX REFERENCE.

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

S. N. A. S. A. ANNAMALAI CHETTIAR, APPLICANT,

v.

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

*Indian Income-tax Act (XI of 1922), as amended by Indian
Income-tax (Amendment) Act (VII of 1939), ss. 9, 10
and 12—Resident in British India owning houses abroad—
Income from—Assessable under sec. 9—Ss. 10 and 12
inapplicable.*

The assessee, a resident in British India, carried on a money-lending business at Penang in the Malay Peninsula

* Case Referred No. 42 of 1943.
(1) (1931) I.L.R. 55 Mad. 332.

and in the course of the business acquired a number of houses there, from which he received rent. In the year 1941-42 he was assessed to income-tax in respect of the income derived from those houses during the previous year. The tax was levied under section 9 of the Indian Income-tax Act, 1922.

Held: The assessment was right. When the Indian Income-tax Act, 1922, was amended by the Indian Income-tax (Amendment) Act (VII of 1939), a resident in British India became liable to pay tax on income accruing to him without British India as well as on his income within British India. Thereafter section 9 of the Act became applicable automatically to income from house property owned abroad by a resident in British India.

Neither section 10 nor section 12 of the Act was applicable to the case.

Ramasami Chettyar v. Commissioner of Income-tax, Madras(1) rendered obsolete by reason of the amendment of the Act in 1939.

CASE referred to the High Court by the Income-tax Appellate Tribunal, Bombay, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922), as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939), in application No. 66, R.A. No. 10 Madras, of 1943-44.

P. R. Srinivasan for applicant.

K. V. Sesa Ayyangar for respondent.

The JUDGMENT of the Court was delivered by LEACH C.J.—The assessee is a Nattukottai Chettiar and before the Japanese occupation of the Malay Peninsula he carried on a money-lending business at Penang. While engaged in business there he became the owner of a number of houses from which he received rent. In the year 1941-42 he was assessed to tax under the Indian Income-tax Act in respect of the income derived from these houses during the previous year. The tax was levied on the basis of section 9 of the Act. The assessee contended that section 9 did not apply, but that section 10 did. This contention was rejected by the Income-tax authorities and by

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the Income-tax Appellate Tribunal, Calcutta Bench, on appeal from the order of the Additional Appellate Assistant Commissioner. At the request of the assessee the Tribunal has referred the following question for the opinion of this Court :—

“Whether in the circumstances of the case, the provisions of section 9 of the Income-tax Act were rightly applied for assessment of the income from house properties situated outside British India ?”

Until the Act was amended in 1939, income accruing abroad to a resident of India was not taxable until it was brought into British India. By Act VII of 1939 a resident in British India became liable to pay the tax on income accruing to him without British India as well as on his income within British India. The assessee says that the Tribunal was wrong in holding that section 9 can be applied to income derived by him from his house property in Penang, because the section was in the Act before its amendment in 1939 and then only applied to income from property situate in British India. He goes on to say that the income from his houses in Penang must be regarded as income accruing to him in the course of his business, which means the application of section 10. This latter argument is based on the decision of this Court in *Ramasami Chettyar v. Commissioner of Income-tax, Madras*(1). In that case the assessee carried on a money-lending business in Kuala Lumpur and received rents from properties which he had taken over in satisfaction of loans granted by him in the course of his business. The income from these properties was brought into British India, and the question was whether section 9 was applicable. It was held that it was not and that the tax should be levied in accordance with section 10 as income derived from business carried on abroad, the properties having been acquired in the course of the business.

(1) (1933) I.L.R. 57 Mad. 22.

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We consider that the decision in *Ramasami Chettyar v. Commissioner of Income-tax, Madras*(1) can no longer be applied. Foreign income is now taxable whether brought into India or not. Section 6 sets out the heads of income chargeable and the third head is income from property. When the Act was amended in 1939 by including income accruing abroad, section 9 automatically became applicable to income from house property owned abroad. Moreover the proviso to section 9 (1) (iv) itself gives clear indication that the Legislature did intend to make the section applicable to income derived from property outside British India. Clause (iv) allows certain deductions to be made in calculating the taxable amount of this class of income, but the proviso says that no allowance shall be made in respect of any interest or annual charge payable *without* British India and chargeable under the Act, not being interest on a loan issued for public subscription before 1st April 1938, except interest or a charge on which tax has been paid or from which tax has been deducted under section 18 or in respect of which there is an agent for the payee in British India who may be assessed under section 43.

In this Court it has been suggested that, if section 10 does not apply, section 12 does apply. Section 12 refers to income from “other sources”, that is, income from sources not specifically dealt with in the earlier sections of the Act. If section 10 cannot be applied, as we hold it cannot, section 12 is even more inappropriate.

We consider that the decision of the Tribunal upholding the assessment in accordance with section 9 of the Act was right and we answer the question referred accordingly.

The assessee will pay the costs of the Commissioner of Income-tax, Rs. 250.

N.S.

(1) (1933) I.L.R. 57 Mad. 22.

APPELLATE CIVIL.

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

1944,
March 7.

M. SHEIK DAWOOD ROWTHER (PLAINTIFF), PETITIONER,
v.

THE SOUTH INDIAN RAILWAY CO., LTD., BY ITS AGENT
AND GENERAL MANAGER, HAVING THEIR HEAD OFFICE
AT TRICHINOPOLY, SOUTH INDIA, AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

*Contract—Railway—Consignment note—Construction of—
Concession rate charged by mistake at booking station—
Difference collected at delivery station—Suit by consignor
for recovery of excess paid—Agreement under consignment
note to pay according to company's goods tariff—Failure
to read terms of consignment note—No legal effect—Note
providing for rectification of mistake—Company not liable
to refund—Indian Railways Act (IX of 1890), sec. 55.*

The South Indian Railway Company, Limited, through its booking clerks booked certain consignments of rice from stations on its line to Galle in Ceylon at a concession rate, overlooking the fact that the concession rate had been cancelled. The Ceylon Government Railway at Galle refused to deliver the goods except on payment of the difference between the concession rate and the ordinary rate then prevailing. In a suit by the consignor for the recovery of the excess sum paid, held that the additional amount was properly levied.

Under the forwarding note, which represented the contract between the consignor and the railway company, the consignor agreed to pay the rate according to the company's goods tariff. Though by mistake the concession rate which had been cancelled was charged, the contract itself provided according to the conditions in the forwarding note for the rectification of the mistake. Failure by the consignor to read the conditions on the back of the forwarding note had no legal effect and he must be deemed to have had notice of the cancellation of the concession rate and the re-imposition of the ordinary rate.

Parker v. South Eastern Railway Co.(1) applied and followed.

* Civil Revision Petition No. 135 of 1943.
(1) (1877) L.R. 2 C.P. 416.

Bhagwati Prasad v. B.B. & C.I. Railway(1) and *Manal SHEIK DAWOOD Krishna Nayak and Sons v. South Indian Railway Co., Ltd.*(2) referred to. S.I.Ry. Co., LTD.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Trichinopoly in Small Cause Suit No. 64 of 1942.

M. S. Venkatarama Ayyar for petitioner.

S. S. Ramachandra Ayyar for respondents.

The JUDGMENT of the Court was delivered by LEACH C.J.—For some time before 1st July 1941—the exact period has not been disclosed to the Court—the South Indian Railway Company, Limited, booked consignments of rice from stations on the company's line to Galle in Ceylon at a rate less than it had previously charged. The new rate was known as the concession rate and was the only rate ruling in the month of June 1941. On the 15th of that month the company cancelled the concession rate and reverted to the old rate as from 1st July 1941. The change was notified in the local rate advice No. 6 of 1941, which was circulated to all stations on the company's system. In July 1941 the petitioner wished to consign two waggons of rice from Tanjore to Galle and five waggons of this commodity from Adirampatnam to the same destination. Rice so consigned is carried over the South Indian Railway system to Dhanushkodi where it is shipped to Thalamannar and then placed on the Ceylon Government Railway. The booking clerks at Tanjore and at Adirampatnam accepted these consignments. Both of them forgot that the concession rate had been cancelled and consequently the consignments were accepted at the concession rate. The evidence of the station master at Adirampatnam is to the effect that a statement of the new rates was hung up in the station premises for the information of the public. The petitioner's

LEACH C.J.

(1) I.L.R. [1940] All. 212.

(2) (1942) 2 M.L.J. 348.

SHEIK DAWOOD
S.I.Ry.
Co., LTD.
LEACH C.J.

consignment from that station was accepted on 11th July 1941. The consignment from Tanjore was accepted on 1st July 1941. When the goods arrived at Galle the mistake had been discovered and the Ceylon Government Railway refused to deliver the goods to the consignee unless the difference between the concession rate and the ordinary rate was paid. The petitioner was compelled to comply with this demand, which meant the disbursement of an additional sum of Rs. 766-10-9. As he considered that the further demand was unlawful, he filed a suit in the Court of the Subordinate Judge of Trichinopoly to recover the amount. The suit was numbered Small Cause Suit No. 64 of 1942. The Subordinate Judge held that by reason of clause 5 of the conditions set out on the face of the forwarding note the petitioner was not entitled to recover and accordingly dismissed his suit. The petitioner has applied under section 25 of the Provincial Small Causes Courts Act, 1887, for revision of the decree passed by the Subordinate Judge. The South Indian Railway Company, Limited, and the Ceylon Government Railway were both made defendants in the suit and they are the respondents in this petition. They contend that the decision of the Subordinate Judge is right, but they say that in any event the petitioner was precluded from suing by reason of condition No. 8 printed on the back of the forwarding note.

Condition No. 5 on the face of the document reads as follows :—

"I agree that the railway company have the right of re-measurement, re-weighment, re-classification and re-calculation of rates, terminals and other charges at the place of destination, and of collecting before the goods are delivered any amount that may have been omitted or undercharged." Obviously the demand for the additional amount was not based on re-measurement or re-weighment. The respondents claim that it is based on a re-classification and re-calculation of rates. Numerous cases have

been referred to in the course of the arguments on this question, but we do not consider it necessary to discuss them. In our opinion this is clearly not a case of re-classification or of re-calculation of rates. There was only one class of rice and the arithmetic was correct. The mistake was in charging a rate which had been cancelled, instead of charging the rate which had been prescribed, the only rate which could be lawfully charged. Therefore if the case fell to be decided on condition No. 5 of the conditions on the face of the forwarding note, the consignor's case would be well founded; but we consider that the railways are entitled to judgment by reason of condition No. 8 of the conditions printed on the reverse of the document.

There is a prescribed form of forwarding note. It is addressed to the South Indian Railway Company, Limited, and commences with these words :

"Please receive the undermentioned goods, and forward by goods train to . . . on . . . railway as consigned below, and subject to the following conditions, which are accepted by me, namely :—"

Then are set out six conditions. Below the conditions are columns for the insertion by the consignor of the particulars required by the railway. Having inserted the particulars the consignor is required to sign this statement :

"I do hereby certify that I have satisfied myself that the description, marks, value and weight or quantity of goods consigned by me have been correctly entered in this forwarding note, and I agree to be bound by the conditions printed above and at the back of this forwarding note, and on the railway receipt granted for these goods."

The petitioner filled in the required particulars and appended his signature as required.

On the back of the forwarding note there are eleven conditions, No. 8 of which reads as follows :—

"Goods booked to stations on the South Indian Railway or railways worked by the South Indian Railway are carried subject to the rules and conditions printed from time to time

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LEACH C.J. in the railway company's goods tariff, and goods booked to or over a foreign railway are subject to the rules and regulations and to wharfage and other charges in force on such railway."

Sub-section 1 of section 55 of the Indian Railways Act, 1890, states that, if a person fails to pay on demand made by or on behalf of a railway administration a rate, terminal or other charge due from him in respect of animals or goods, it may detain them. Sub-section 5 says that, notwithstanding anything in the previous sub-sections, the railway administration may recover by suit a rate, terminal or other charge or balance thereof.

Rule 15 of the rules published in the goods tariff of the South Indian Railway states that the weight, description and classification of goods and quotation of rates as given in the railway receipt and forwarding note are merely inserted for the purpose of estimating the railway charges and the railway reserves the right of re-measurement, re-weighment, re-classification and re-calculation of rates, terminals and other charges and correction of "any other" errors at the place of destination and of collecting any amount that may have been omitted or undercharged. No admission is conveyed by a railway receipt that the weight as shown therein has been received or that the description of goods as furnished by the consignor is correct. The rules of the Ceylon Government Railway contain similar provisions.

Under the contract entered into between the petitioner and the South Indian Railway Company, Limited, the petitioner agreed to pay the rate according to the company's goods tariff. By mistake the concession rate which had been cancelled was charged, but the contract provided for the rectification of the mistake. The petitioner must be deemed to have had notice of the cancellation of the concession rate and the re-imposition of the ordinary rate. The alteration in the rate had been notified in the ordinary

way and a copy of the order revising the rate had been posted at the Adirampatnam station. Inasmuch as the petitioner accepted the rate set forth in the tariff (which means the amended tariff) and agreed to the rectification of any mistake, he cannot object to the additional charge. Failure to read the conditions on the back of the forwarding note would not help him. The principle of *Parker v. South Eastern Railway Co.*(1) would apply here. It has also to be remembered that the authority of a booking clerk to enter into such contracts is restricted. He cannot lawfully accept a consignment at a rate outside the tariff. Further the officials of the Ceylon Government Railway also had the right of refusing to deliver the goods to the consignee until the additional payment had been made. In these circumstances we hold that the petitioner's suit does not lie. We may add that support for this opinion is to be found in the decision of the Allahabad High Court in *Bhagwati Prasad v. B.B. & C.I. Railway*(2) and the judgment of SOMAYYA J. in *Manal Krishna Nayak and Sons v. South Indian Railway Co., Ltd.*(3).

The petition will be dismissed with costs.

N.S.

(1) (1877) L.R. 2 C.P. 416.

(2) I.L.R. [1940] All. 212.

(3) (1942) 2 M.L.J. 348.

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Madras. The goods arrived in this City on 2nd December 1942 when the appellants delivered to the respondents two of the twelve bales. They delivered two bales to each of the two other persons with whom they had contracted and retained the balance of six bales for sale by themselves. The market was rising then. The respondents, having ascertained that the appellants had received twelve bales, demanded delivery of three bales to make up the five bales which they had bought. This demand was made on 9th December 1942, but was not complied with. Thereupon the respondents filed the suit which has given rise to this appeal.

Both the parties have treated the shipment of goods which arrived in Bombay on 22nd October 1942 as a shipment under the contract. In other words, the respondents have accepted the position that the appellants were not able to make the shipment before. The respondents were entitled under the contract to the delivery of five bales. As the appellants only delivered to them two bales, the contract was broken to the extent of three bales.

The contract provided that delivery should be given "ex-godown, as and when the goods come". The learned Judge held that the date to be taken for the assessment of the damages was 10th December 1942 and in this connexion relied on section 35 of the Sale of Goods Act, which says that, apart from an express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery. The damages based on the market price ruling on 10th December 1942 amounted to Rs. 6,075 and a decree for this amount was passed. On the other hand, the appellants say that here there is an express contract. The sellers were bound to deliver to them the goods as soon as they arrived in Madras, which was on 2nd December 1942. If this date is to be taken, it is agreed that the decree will be for Rs. 4,725 and not for Rs. 6,075.

We have no hesitation in accepting the contention of the appellants. The stipulation that delivery should be given as and when the goods arrived in Madras amounted to a contract for delivery on the date of their arrival here. Although contracts relating to sale of goods are now dealt with under the Sale of Goods Act, 1930, certain sections of the Contract Act still apply to contracts for the sale of goods. Section 3 of the Sale of Goods Act says that the unrepealed provisions of the Contract Act, save in so far as they are inconsistent with the express provisions of the Act, shall continue to apply to contracts for the sale of goods. Section 73 of the Contract Act makes it clear that damages for a breach of a contract of the nature of the one we are now considering must be based on the market price ruling at the date of the breach. In the Sale of Goods Act, there is nothing inconsistent with section 73 of the Contract Act, and it must be taken to apply. If the contract had contained no stipulation with regard to delivery, the decision of the learned Judge would be right, but it did stipulate when the delivery was to be made, and delivery in this case should have been made on 2nd December 1942, which means that the contract was broken on that date. It follows that the respondents are entitled to Rs. 4,725, not to Rs. 6,075. The decree of the trial Court will be modified accordingly.

The appellants will pay costs on Rs. 4,725 and receive costs on Rs. 1,350 here and below.

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APPELLATE CIVIL.

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

1944,
March 3.

AMPERAYANI SUBBA RAO (PETITIONER), APPELLANT,

v.

CHERLO SESHU REDDI AND TWO OTHERS (RESPONDENTS),
RESPONDENTS.*

Provincial Insolvency Act (V of 1920), sec. 38, sec. 39 before its amendment by Act X of 1935—Sanction of composition scheme without giving notice to one creditor—Not binding on him in spite of approval of scheme by requisite majority of creditors—Creditor's name not entered in schedule under sec. 39.

Section 38 of the Provincial Insolvency Act provides that, in respect of a scheme for composition in satisfaction of the debts of an insolvent person, notice shall be served on all his creditors. The provision is mandatory and the section contemplates that all the creditors shall have an opportunity of stating their objections to the scheme.

Where a scheme of composition was sanctioned by the Court without giving notice to a creditor and without his knowledge,

held that the scheme was not binding on him notwithstanding that the scheme was approved by the requisite majority of creditors prescribed in the section. Such a scheme sanctioned before the amendment of section 39 of the Act by Act X of 1935 was not binding on the creditor for the reason also that his name was not mentioned in the schedule framed under that section.

APPEAL under clause 15 of the Letters Patent against the judgment and order of KUNHI RAMAN J., dated 7th April 1943 and made in Appeal Against Order No. 22 of 1942 preferred against the order of the District Court of Nellore, dated 21st October 1941 and made in Interlocutory Application No. 70 of 1941 in Insolvency Petition No. 50 of 1932.

K. Umamaheswaram for appellant.

* Letters Patent Appeal No. 52 of 1943.

K. Subba Rao, C. A. Vaidyalingam and T. Venkata-
tadri for respondents.

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The JUDGMENT of the Court was delivered by LEACH C.J.—The question in this appeal is whether a creditor is bound by a scheme of composition approved of under the Provincial Insolvency Act entirely behind his back. On 30th August 1933 the first respondent was adjudicated an insolvent by the District Judge of Nellore. A proposal was made for the acceptance by the creditors of a scheme of composition which provided for the payment of six annas in the rupee. This scheme was sanctioned by an order of Court, dated 18th April 1935, whereupon the order of adjudication was annulled. The appellant was a creditor. On 29th October 1934 he proved for the sum of Rs. 754-10-9 then due to him under a decree. The decree provided for the payment to him of future mesne profits. These were subsequently found to amount to Rs. 1,684-1-6. The appellant was given no notice of the proposal for a composition and the scheme was approved of without it being brought to his knowledge. On the approval of the scheme a special receiver was appointed to carry out its terms. The special receiver gave notice to the appellant. On 21st January 1941 the appellant applied to the Insolvency Court to be allowed to execute his decree. He contended that, as the scheme had been sanctioned without notice to him in spite of the mandatory provisions of section 38 of the Provincial Insolvency Act, he was not bound by it. He wished to have a declaration to this effect in order that he could proceed in execution without being hampered by the composition scheme. The District Judge held that his application was well founded and consequently granted it. The first respondent appealed to this Court and his appeal was heard by KUNHI RAMAN J., who held that the District Judge was wrong. The learned Judge considered that the composition scheme

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was binding on the appellant, notwithstanding that it had been approved of without notice to him.

Sub-section 1 of section 38 of the Provincial Insolvency Act states that, where a debtor, after the making of an order of adjudication, submits a proposal for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement of his affairs, the Court shall fix a date for the consideration of the proposal, and shall issue a notice to "all" creditors in such manner as may be prescribed. Sub-section 2 says that if, on the consideration of the proposal, a majority in number and three-fourths in value of all the creditors, whose debts are proved and who are present in person or by pleader, resolve to accept the proposal, it shall be deemed to be duly accepted by the creditors. Sub-section 4 says that, where the Court is of opinion, after hearing the report of the receiver, if a receiver has been appointed, and after considering any objections which may be made by or on behalf of any creditor, that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the Court shall refuse to approve the proposal.

Section 39, as it stood at the date of the approval of this scheme of composition, read as follows:—

"If the Court approves the proposal, the terms shall be embodied in an order of the Court and the Court shall frame a schedule in accordance with the provisions of section 33, the order of adjudication shall be annulled, and the provisions of section 37 shall apply, and the composition or scheme shall be binding on all the creditors entered in the said schedule so far as relates to any debts entered therein."

The direction in section 38 that notice shall be served on all creditors is mandatory and the section clearly contemplates that all the creditors shall have an opportunity of stating their objections to the scheme. It is true that here the scheme was approved of by the necessary majority of creditors, but the provisions of the section with regard to notice to

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the appellant were entirely ignored. It would be unreasonable in these circumstances to hold that the scheme is binding on the appellant; but even if this construction were open to question, section 39 makes it quite clear that the scheme is not binding on him. The section says that it is binding on all the creditors who are entered in the schedule. His name was not entered in the schedule. Therefore the scheme is not binding on him.

It may be mentioned that when the scheme was approved the Court was aware that the appellant was a creditor and set aside sufficient to pay him six annas in the rupee. It is astonishing that, notwithstanding its knowledge of the appellant's debt, the Court did not direct notice to him. KUNHI RAMAN J., in setting aside the order of the District Judge, states that, even if the appellant had been given notice and had expressed disapproval of the scheme, his voice would not have prevailed. This is an assumption which the learned Judge was not entitled to make. Unless the appellant had an opportunity of stating his reasons, it could not be said what weight they would carry. His reasons for opposing the scheme might have been so cogent that he would have carried the other creditors with him and have convinced the Court. An appellate Court is not entitled to enter into a speculation of this kind. It can only have regard to the provisions of section 38 and section 39 and, if these provisions are to be observed, as they must be, it is clear that the appellant cannot be held bound by the scheme.

The appeal will be allowed with costs against the first respondent in this Court and before KUNHI RAMAN J.

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APPELLATE CIVIL.

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

1944,
March 3.

PS. AR. AR. ARUNACHALAM CHETTIAR BY AGENT
SIVARAMAN CHETTIAR (PLAINTIFF), APPELLANT,

v.

PALANISWAMI GOUNDAN (SECOND DEFENDANT),
RESPONDENT.*

Madras Agriculturists Relief Act (IV of 1938), sec. 20, proviso—Starting point for period prescribed under—Not interim order, but order passed after hearing of application—Application by an insolvent under sec. 19 of the Act—Desirability of joining Official Receiver as party—Proceedings not void, if Official Receiver not joined—Objection to non-joinder to be taken in trial Court and not in appeal.

The starting point for the period of sixty days prescribed in the proviso to section 20 of the Madras Agriculturists Relief Act is the order for stay passed on the hearing of the application under the section and not any *ad interim* order for stay granted pending the hearing of the application.

Nataraja Gramani v. Sivakolundu Gramani(1) explained.

Though it is desirable that the Official Receiver should be impleaded as a party to an application by an insolvent for scaling down a debt under section 19 of the Madras Agriculturists Relief Act, proceedings under the section are not void because of the omission to make the Official Receiver a party. The objection as to the non-joinder of the Official Receiver must be taken when the application under section 19 is made to the trial Court. It cannot be raised for the first time only when an appeal is preferred from the application.

Jagannatha Aiyangar v. Senniveera Chettiar(2) and *Krishna Rao v. Official Receiver, East Godavari*(3) explained.

APPEAL under clause 15 of the Letters Patent against the judgment and decree of PATANJALI SASTRI J., dated 10th September 1943 and passed in Second Appeal No. 1532 of 1942 preferred against the decree of the

* Letters Patent Appeal No. 66 of 1943.

(1) (1942) 2 M.L.J. 735.

(2) (1941) 1 M.L.J. 197

(3) (1941) 2 M.L.J. 698.

District Court of Coimbatore in Appeal Suit No. 336 of 1941 preferred against the order of the Court of the Subordinate Judge of Coimbatore in Interlocutory Application No. 863 of 1940 in Original Suit No. 17 of 1935.

A. C. Sampath Ayyangar for appellant.

S. Panchapagesa Sastri and C. Vasudevan for respondent.

JUDGMENT.

LEACH C.J.—On 20th July 1935 the appellant obtained a mortgage decree against the respondent for the sum of Rs. 2,998-5-4. The mortgage was dated 22nd December 1931 and had been given as security for the repayment of amounts due on three promissory notes. On 12th July 1939 the decree-holder filed an application for the execution of his decree and in due course the Court fixed 17th July 1940 as the date for the sale of the mortgaged property. On the 15th July the judgment-debtor applied under section 20 of the Agriculturists Relief Act, 1938, for a stay of the execution proceedings, pending an application for scaling down under section 19 of the Act. On the 17th July the Subordinate Judge passed an order of *ad interim* stay. That was a stay pending the filing of the counter-affidavit by the decree-holder and the hearing of the application. The application was heard on the 25th July when an order for stay was passed under section 20. The application for scaling down was filed on 23rd September 1940 and resulted in the decretal amount being reduced to Rs. 2,088-9-6. The decree-holder appealed against this order to the District Judge, who affirmed the order of the Subordinate Judge. The decree-holder then appealed to this Court. He contended that the order could not stand because the application had not been filed within sixty days of the order of *ad interim* stay and that the application was not maintainable because the Official Receiver had not been made a party to the proceedings.

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under section 19. It appears that the respondent had been adjudicated an insolvent before the institution of the mortgage suit. The decree-holder also attacked the order on the merits. The appeal was heard by PATANJALI SASTRI J. who found against the decree-holder on all the points raised by him. This appeal is from the judgment of the learned Judge under clause 15 of the Letters Patent.

Section 20 of the Act states that the Court executing a decree shall, on application, stay the proceedings until the Court which passed the decree has passed orders on an application made or to be made under section 19. Then follows a proviso which states that, where within sixty days after the application for stay has been granted the judgment-debtor does not apply to the Court which passed the decree for relief under section 19 or where an application has been so made and is rejected, the decree shall be executed as it stands, notwithstanding anything contained in the Act to the contrary. The appellant says that, inasmuch as the application under section 19 was made more than sixty days after the order of *ad interim* stay, he is entitled to have the decree passed by the Subordinate Judge executed without any reduction. PATANJALI SASTRI J. held that the order for stay contemplated by the section was the order for stay passed on 25th July 1940 and not the *ad interim* order, and I respectfully agree. There is nothing in the section which contemplates an *ad interim* order. I do not doubt that the Court has the power to pass an order staying the execution proceedings pending the hearing of the application under section 20, but that application was not heard until after the respondent had filed his appearance and admitted that he was an agriculturist. If the *ad interim* order were to be the starting point for the sixty days period of limitation, it would mean that if the creditor were not served within the period the judgment-debtor would be precluded from having

his decree scaled down, which could never have been intended. In my judgment it is quite clear that the *ad interim* order was not an order falling within the section and that the order which did fall within the section was the order of the 25th July.

The contention of the appellant that the Official Receiver was a necessary party to the application under section 19 appears to be made on the observations of my learned brother WADSWORTH J. in *Jagannatha Aiyangar v. Senniveera Chettiar*(1) and *Krishna Rao v. Official Receiver, East Godavari*(2). In the former case my learned brother said that it seemed to him proper that on such an application the Official Receiver in whom the estate vests should be impleaded as a party, and in the second case said that it seemed to him desirable that both the Official Receiver and the insolvent should be made parties to an application under the section. PATANJALI SASTRI J. did not read these observations as meaning that an application under section 19 would not lie in the absence of the Official Receiver but that it was desirable that he should be made a party. I read the observations in the same way. Section 19 specifically refers to the application of the judgment-debtor who is an agriculturist. Section 21 provides that the Act shall not be applied to the debts of an insolvent where a dividend has been declared in the insolvency proceedings; but it goes on to state that, if a dividend has not been declared, the Act shall apply to debts payable by the insolvent if he would have been an agriculturist within the meaning of the Act but for his adjudication. It is quite a different matter to say that the Official Receiver should be made a party to an application under section 19 from saying that the proceedings are altogether bad if he is not made a party. It is obviously desirable that he should be joined and this is the usual procedure. I am certainly not prepared to go so far

(1) (1941) 1 M.L.J. 197.

(2) (1941) 2 M.L.J. 698.

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LEACH C.J. as to say that the proceedings would be void if the Official Receiver has not been made a party. In any event the objection should be taken when the application is made. There was no objection taken in this case to the non-joinder of the Official Receiver until the case came before PATANJALI SASTRI J. on second appeal. The learned Judge dealt with the question; but having done so rightly, went on to disallow it.

On the merits there is even less to be said for the appellant's case. The contract between him and his mortgagor provided for the payment of interest at the rate of thirty-six per cent per annum. He made his claim, however, on the basis of interest at twenty-four per cent per annum. The mortgagor contended that this was far too high and asked the Court to apply the Usurious Loans Act. The Subordinate Judge held that twelve per cent was ample and passed a decree on that basis. The appellant preferred no appeal. He now asks that the decretal amount should be calculated on the basis of interest at twenty-four per cent and the appropriations settled by the District Judge should be made on this basis. This is a request which has only to be made to be refused. The decree stands and cannot be re-opened. The respondent is entitled to have it scaled down in accordance with the provisions of the Act, and this has been done.

The appeal must be dismissed with costs.

WADSWORTH J. WADSWORTH J.—I agree entirely with the judgment which my Lord has just pronounced and wish only to add a few words with reference to observations of mine which have been quoted in support of the appellant's arguments.

On the question of limitation the appellant has quoted an *obiter dictum* in *Nataraja Gramani v. Sivakolundu Gramani*(1). The facts are not given in the report. The point raised was one of limitation with reference to an *ad interim* order of stay in an

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WADSWORTH J. application under section 20. I observed that the procedure of granting an *ad interim* stay followed by an absolute order is not contemplated by section 20 of Act IV of 1938 and that, when once a stay has been granted, limitation for an application under section 19 will begin to run. I should like to make it clear that in my opinion section 20 does not contemplate the grant of *ad interim* order of stay, but that if the Court finds it necessary to stay execution pending the hearing of the application under section 20, the Court has ample power to do so under the ordinary law. Such an *ad interim* stay order is not an order under section 20 at all and limitation for a proceeding under section 19 cannot run from that order. The order contemplated in the proviso to section 20 is the order of stay pending the disposal of an application under section 19, passed on the application under section 20.

On the question of the procedure to be adopted under section 21 of the Act, two decisions of mine have been quoted, which lay it down as a desirable procedure that both the insolvent and the Official Receiver should be parties to such an application. That is the procedure which has, I think, been generally adopted. The Act itself lays down no procedure. When the debt to be scaled down is due from an insolvent on whose estate no dividend has been declared and is due under a decree, it is obvious that section 21 has to be read with section 19 and that the application has to be made by the person who is the judgment-debtor on the record. In the present case both the present respondent and the Official Receiver were judgment-debtors on the record. There was nothing to prevent the application from being made by either of them and in my opinion it was desirable that whichever made the application the other party should be joined. But clearly the question whether the Official Receiver is a party on the record is largely a question of form, for in all probability when the application is made by the

(1) (1942) 2 M.L.J. 735.

ARUFACHALAM v. PALANISWAMI. debtor the Official Receiver will be financing the application and ready to come on record if desired. WADSWORTH J. As no objection was taken for the non-joinder of the Official Receiver in the trial Court, it is obvious that the objection cannot be raised in appeal.

I agree with the order that the appeal be dismissed with costs.

N.S.

APPELLATE CIVIL.

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

A. K. SHERFUDDIN (APPELLANT), APPELLANT,

v.

KAIROON BI AND FOUR OTHERS (RESPONDENTS),
RESPONDENTS.*

Practice—Second appeal—Code of Civil Procedure (Act V of 1908), sec. 100—Question of law—Proper effect of proved fact—Inam—Grant—Construction of—Personal inam—Inam Register, evidentiary value of—Wallace's Register—Traverse's Register—Entries in—Effect of.

The proper effect of a proved fact is a question of law and, where the Court has to decide what the inferences are which are to be drawn from the entries in certain registers, namely, (i) Wallace's Register compiled in 1802, (ii) Traverse's Register compiled in 1814, and (iii) the Inam Register compiled in 1864, in respect of the question whether a grant to a Muhammadan fakir was personal to him or in favour of a durga or mosque, the question is one of law.

Though the preparation of the Inam Register is a great act of state, it is not conclusive with regard to title when there is other evidence bearing on the question. Having regard to the entries in Wallace's Register and Traverse's Register which were earlier than the Inam Register, and which must be accepted in the case in preference to the latter, the grant was a personal one.

* Letters Patent Appeal No. 56 of 1943.

Dhanna Mal v. Moti Sagar(1) and Ballabh Das v. Nur Mohammad(2) followed.

Arunachellam Chetty v. Venkatachalapathi Guruswamikal(3) referred to.

APPEAL under clause 15 of the Letters Patent against the judgment and decree of KING J., dated 21st July 1943 and passed in Second Appeal No. 971 of 1942 preferred to the High Court against the decree of the Court of the Subordinate Judge of Trichinopoly in Appeal Suit No. 45 of 1941 (Original Suit No. 213 of 1937, District Munsif's Court, Trichinopoly).

K. S. Sankara Ayyar for appellant.

K. V. Sesha Ayyangar for respondents.

The JUDGMENT of the Court was delivered by LEACH C.J.—In the year 1674 a Rani of the Nayakhan dynasty made a grant of land to a Muhammadan named Dharves Ali Sha. The documentary evidence in this case leaves no doubt that the grantee was a member of a sect of fakirs who were followers of Jalaluddin Bukhari. When Dharves Ali Sha died he was buried on the property. He has since been regarded as a saint and his tomb as a durga. After the tomb had been recognized as a durga, a mosque was built by the side of it. When the mosque was erected is not known, but it is clear from the Inam Register of 1864 that there was then a mosque in existence. The main question which arises in this appeal is whether the grant to Dharves Ali Sha was a grant to him personally or for the endowment of a mosque. We shall in due course examine in detail the evidence relating to this question; but before doing so we think it necessary to refer to two previous suits and to the course which the present litigation has taken.

In Original Suit No. 96 of 1930 of the Court of the Subordinate Judge of Trichinopoly three Muhammadans and two Hindus brought a suit under section

(1) (1927) I.L.R. 8 Lah. 573 (P.C.). (2) (1935) 70 M.L.J. 455 (P.C.).
(3) (1919) I.L.R. 43 Mad. 253 (P.C.).

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92 of the Code of Civil Procedure for the recovery of the property now in suit and for the framing of a scheme for its management. There were six defendants and it is common ground that they were all descendants of the family of the grantee. They were in fact described as trustees "of the Jalali Fakir Durga and Mosque". The word "Jalali" also appears in the Inam Register and this gives the indication that Dharves Ali Sha was a member of the sect of fakirs to which reference has been made. The defendants had no objection to a scheme being framed, but they wanted to be appointed trustees and to be declared to be entitled to the balance of the income of the properties after meeting the expenses of the durga. The insistence that the properties of which they were in possession were the endowment of the durga as distinct from the mosque is not without significance. The fact that two of the plaintiffs were Hindus is another indication of the importance attached to the durga. In the course of the preliminary judgment the Subordinate Judge expressly held that the mosque was only a subsidiary institution attached to the durga and intended for the purpose of worship by those Mussalmans who resorted to the durga. A scheme was eventually framed by consent. It has been suggested in the present litigation that the decree in Original Suit No. 96 of 1930 prevents any claim being made by a descendant of the grantee, even though he were not a party to the suit. This contention cannot, however, be accepted. So far as the properties are concerned the only members of the grantee's family who are bound by what transpired in Original Suit No. 96 of 1930 are the defendants to that suit.

In Original Suit No. 135 of 1933 of the Court of the District Munsif of Trichinopoly the trustees who had been appointed by the Court in Original Suit No. 96 of 1930 brought a suit to recover certain properties

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which they claimed to be part of the endowment of the durga. These were then in the hands of alienees. They were quite distinct from the properties now in suit, but the question whether the original grant was personal to Dharves Ali Sha or to him for the endowment of a mosque arose. It was held that the grant was personal. That decision, however, only affects the properties which formed its subject-matter and also only binds the parties to the suit.

On 12th October 1936 one Muhammad Ibrahim Sahib, a descendant of the grantee, instituted the suit which has given rise to the appeal. He died during its pendency but it was continued by his legal representatives. The plaintiff advanced the plea that the properties which were held by the trustees appointed in Original Suit No. 96 of 1930 belonged to the descendants of Dharves Ali Sha and did not constitute an endowment of the durga or the mosque. He claimed a one-eighteenth share and it is accepted that if his case is well founded his heirs will be entitled to this share. The defendants to the suit were the trustees appointed in Original Suit No. 96 of 1930 and the other members of the family. The District Munsif held that the properties in suit constituted an endowment of the mosque. The plaintiff's legal representatives appealed to the Subordinate Judge, who held that the grant was personal to Dharves Ali Sha and, as the plaintiff was not bound by the decree in Original Suit No. 96 of 1930, he was entitled to a one-eighteenth share in the property. The executive trustee appointed under the scheme appealed to this Court. The appeal was heard by KING J. who held that the finding of the Subordinate Judge that the original grant was a personal one was a finding of fact and could not be challenged in second appeal. The learned Judge agreed with the Subordinate Judge that the decree in Original Suit No. 96 of 1930 did not operate as *res judicata*, as the appellant had contended.

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The present appeal is from the judgment of KING J. under clause 15 of the Letters Patent. The appellant is the executive trustee.

The first question which the Court is called upon to decide is whether KING J. was right in holding that the decision of the Subordinate Judge that the original grant was personal to Dharves Ali Sha could not be challenged as it constituted a finding of fact. We find ourselves unable to share the opinion of the learned Judge. In order to decide the question of title it is necessary for the Court to interpret entries in (i) Wallace's Register which was compiled in 1802, (ii) Traverse's Register which was compiled in 1814 and (iii) the Inam Register which was compiled in 1864. In *Dhanna Mal v. Moti Sagar*(1) the Privy Council pointed out that the proper effect of a proved fact is a question of law and the question whether a tenancy is permanent or precarious is a legal inference to be drawn from facts and not itself a question of fact. In *Ballabh Das v. Nur Mohammad*(2) their Lordships held that the inference to be drawn from a revenue survey *Khasra* and a map constituted a question of law. The position is very much the same here. As the Court has to decide what are the inferences to be drawn from the entries in the registers referred to, we have no doubt that the question is one of law.

It is now necessary to decide whether the Subordinate Judge was right in holding that the grant was personal to Dharves Ali Sha. Wallace's Register shows that the claimant to the property was a grandson of the original grantee and the grant was regarded as an inam, though the purpose is not specified. The entries only refer to a part of the property in suit, but it has not been suggested that any other portion was held on different terms. This register gives the

(1) (1927) I.L.R. 8 Lah. 573 (P.C.). (2) (1935) 70 M.L.J. 455 (P.C.).

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year of the grant as 1739 and the grantor as Nabab-kanza Abdulla Cawn. It is common ground that this means that the original grant was confirmed by the Muhammadan ruler who succeeded the last Nayak ruler. The entries in Traverse's Register are very similar, but the following interesting statement is made in the "Remarks" column:—

"On enquiry, it appears that 250 goolies of punjee and 50 goolies of nanjee land in the village of Ammapettah and 1½ chays of land in the village of Tenoor as also one chay of garden land in the garden of the royal demesne was granted in the year Racha of Salivahana 1606 by Meenachammal to a fakhir named Durvaish Ally. The present incumbents who state themselves to be the fakhir's grandsons and produce a copper Sashanam to this effect. They also delivered the purvanah inserted in this register by Coya Abdullah Khan to Mr. Wallace and have besides several other documents, which they now bring forward; these do not make the grant hereditary; but they further produce an Enayetnamah by Mahammad Ally to KISSAMULMOOLK, making the grant hereditary in the family of Durvaish Ally; this document is dated 4th of Rabulavel Heejeera 1207. The inam is very suspicious as this last voucher may be a forgery."

Salivahana 1606 corresponds to the year 1674. Traverse's Register covers the whole of the property comprised in the original grant.

Two extracts from the Inam Register have been exhibited. One is dated 9th March 1864 and the other 12th March 1864. In the column headed "General class to which the inam belongs" is inserted the word "Devadayam" which is defined in Wilson's Glossary as "lands or allowances for the support of a temple, an endowment". It is accepted by both sides in this case that the word "Devadayam" could be rightly used for an endowment of any religious or pious institution. Therefore the word "Devadayam" in itself does not signify that the lands referred to in the register constituted an endowment of a mosque. But in the column headed "Description of inam" appears under the date of 9th March 1864 the entry "For the support of Jalali Fakuri mosque". In

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the register of 12th March 1864 the entry is : " For the support of Jalale mosque. It is well kept up." Column 13 was for the insertion of the name of the original grantee. In the register of 9th March 1864 the name of Dharves Ali Sha is inserted; and the entry of 12th March 1864 is " For Jalale mosque Dharves Ali Sha". In both cases in column 16 which was intended for the insertion of the name of the then owner are inserted the names of the managers of the " Jalale Fakir Dharves Ali Sha mosque". In the remarks column under the date 12th March 1864 there are these statements :

" The inam is enjoyed in six shares by the six managers who are the lineal descendants of the grantee.

The share enjoyed by the father of manager No. 1 formed the subject of a lapse report by the Collector, which led to much correspondence.

This correspondence resulted from certain doubts suggested regarding the genuineness of some of the Persian grants produced in support of the inam and felt as to the tenure of the inam being a mosque grant or mere mutalignan continuable for life. After all, it was admitted according to the terms of the original grant on the copper plate that this was religious grant together with another in Tennur referred to in the plate.

The division of the inam in six shares was also considered allowable so long as the mosque for the support of which the inam was given, was efficiently maintained by the grantee's descendants. The share then vacant was also continued to No. 1. *Vide* Collector's order of 21st November 1847.

Another lapse on the death of the elder brother of No. 2 named Haiderallisha was reported to Collector in Arzies 1st August 1858, No. 386, and 11th December 1858, No. 671. It was not, however, disposed of by the Collector. There was a terraced mosque which having been swept away by the freshes of 1858, another tiled one has been now rebuilt.

To be confirmed free in one title deed so long as the mosque exists."

In the statement which was filed by the inamdars in the proceedings before the Inam Commissioners

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the following entry was made in column 13 which was headed " Particulars of present enjoyment " :—

" Out of the income derived from this excluding the expenses of the pallivasal (mausoleum) as per shares set out in column 2, the balance we are enjoying for ourselves."

The meaning of the word " pallivasal " is given in the Tamil Lexicon as " mosque". The word here is immediately succeeded by the word mausoleum, which indicates that the descendants of the grantee regarded the lands as constituting an endowment of the durga.

In *Arunachellam Chetty v. Venkatachalapathi Guruswamigal*(1) Lord SHAW, in delivering the judgment of the Board, said that it must not be forgotten that the preparation of the Inam Register was a great act of State, and its preparation and contents were the subject of much consideration under elaborately detailed reports and minutes. His Lordship proceeded to say :

" It is to be remembered that the Inam Commissioners through their officials made enquiry on the spot, heard evidence and examined documents, and with regard to each individual property the Government was put in possession not only of the conclusion come to as to whether the land was tax free but of a statement of the history and tenure of the property itself. While their Lordships do not doubt that such a report would not displace actual and authentic evidence in individual cases, yet the Board, when such is not available, cannot fail to attach the utmost importance, as part of the history of the property, to the information set forth in the Inam Register."

If the only evidence before the Court were the extracts from the Inam Register, we should, in face of these remarks of their Lordships, feel constrained to hold that the Subordinate Judge was wrong in describing the original grant as personal to Dharves Ali Sha. Their Lordships have, however, made it quite clear that the Inam Register is not conclusive with regard to title when there is other evidence

(1) (1919) I.L.R. 43 Mad. 253 (P.C.).

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bearing on the question. The entries in Wallace's Register and Traverse's Register cannot be ignored, and the entries therein were made long before the entries in the Inam Register. The entries in the two earlier registers give strong indication that the original grant was personal to Dharves Ali Sha and we consider that on this question these registers must be accepted in preference to the Inam Register. The entries in them are entirely inconsistent with the case set up by the trustees. Moreover, there is no evidence of any mosque having been erected on the property until we come to the Inam Register. The mosque is admittedly an adjunct of the durga and, therefore, it could not have been built before the tomb of Dharves Ali Sha had become recognized as the tomb of a saint. For these reasons we hold that the lands were granted personally to Dharves Ali Sha.

We may add that it has not been suggested that the descendants of the grantee had dedicated the lands as an endowment of the durga or the mosque. In fact it was throughout accepted that, if the Court should hold that the grant was personal to Dharves Ali Sha, the appeal must fail, subject to the argument on the question of *res judicata*. We have held that the grant was personal to Dharves Ali Sha, and we have also indicated that we agree with KING J. that the decree in Original Suit No. 96 of 1930 does not operate as *res judicata*.

For these reasons the appeal is dismissed with costs.

N.S.

APPELLATE CIVIL.

Before Mr. Justice Mockett and Mr. Justice Bell.

CHINTAKAYALA RAMAYYA AND TWELVE OTHERS
(DEFENDANTS 2 TO 14—PETITIONERS), APPELLANTS,

1944,
March 2.

v.

MITHINTI LAKSHMAYYA (PLAINTIFF-RESPONDENT),
RESPONDENT.*

Appeal—Application to set aside ex parte decrees—Orders—Suits restored to file subject to certain payments by a certain date, in default application to stand dismissed—Applicant defaulting—Order on later date noting default and stating ex parte decree to stand—First order appealable, second order merely recording the legal consequence of default.

On three applications to set aside three *ex parte* decrees respectively the Court passed an order on 5th July 1943 stating, *inter alia*: "The petitioners to pay Rs. 100 for costs of the respondents irrespective of the result in the suits within fifteen days from this date. They shall also deposit costs of the suits as a condition precedent before the trial of the suits which are hereby restored to file and posted peremptorily to 26th July 1943. In default, the petitions will stand dismissed with costs." On 26th July 1943 the Court further ordered: "As the direction given in the order on the said petitions is not obeyed, the order operates and the decrees passed already stand."

Held: The order of 5th July 1943 was final and appealable. The further order of 26th July 1943 merely recorded the legal position which had arisen from the non-fulfilment of the condition precedent by the petitioners.

Rajagopalachari v. Thathachariar(1) distinguished.

Narayan Putapa v. Vaikunt Subaya(2) referred to.

APPEALS against the orders of the Court of the Subordinate Judge of Guntur, dated 5th July 1943, and made in Interlocutory Applications Nos. 568, 569 and 570 of 1943 respectively in Original Suits Nos. 58, 82 and 83 of 1942 respectively.

T. S. Rama Rao for appellants.

P. Satyanarayana Rao for respondents.

* Appeals Against Orders Nos. 334 to 336 of 1943.

(1) A.I.R. 1925 Mad. 1182. (2) (1926) I.L.R. 51 Bom. 67 (F.B.).

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JUDGMENT.

MOCKETT J.—In this appeal Mr. Satyanarayana Rao has raised a preliminary point that no appeal lies. The facts are as follows :—

The appellants were defendants 2 to 14 in three suits—Original Suits Nos. 58, 82 and 83 of 1943. There is no appeal by the first defendant. Before suits, attachments before judgment of substantially all the debtors' properties were effected. On 21st March 1943 the defendants' vakil left hurriedly for Benares to be present with his son, who was stated to be sick with smallpox. On the 22nd March, it is said that an oral request was made by the third defendant for an adjournment. On the 25th March, Interlocutory Application No. 528 of 1943 was filed—an application to adjourn the case to April 5th—which was dismissed; and on that day, *ex parte* decrees were passed in the three suits. On 2nd April 1943, Interlocutory Applications Nos. 568, 569 and 570 were filed praying to set aside the three *ex parte* decrees. On 5th July 1943 an order was passed and in the judgment the learned Judge said :

“On the whole, I should think that the suits should be restored and sufficient costs should be awarded to the respondents as a panacea as was done by his Lordship in the case quoted above; *Venkateswara Rao v. Subrahmanyam*(1). I therefore order the petitioner to pay Rs. 100 for costs of the respondents irrespective of the result in the suits within fifteen days from this date. They shall also deposit costs of the suits as a condition precedent before the trial of the suits which are hereby restored to file and posted peremptorily to 26th July 1943. In default, the petitions will stand dismissed with costs.”

The decretal order on that judgment was :

“It is ordered that the petition be and the same is hereby allowed.

It is further ordered that the petitioners do deposit into Court a sum of Rs. 100 towards their costs in this petition and also in Interlocutory Applications Nos. 569, 570 and 625 to

(1) (1939) 2 M.L.J. 611.

627 of 1943 irrespective of the result of the suits and do also deposit the costs decreed on or before 26th July 1943. It is further ordered that in default of payment the petition do stand dismissed with costs.”

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Interlocutory Applications Nos. 625 to 627 of 1943 related to the first defendant and we are not concerned with them in any way. There were certain further proceedings by the appellants with which we are not concerned. It is enough to say that they claim that they were quite unable to comply with the order of the 5th July and have made attempts in the High Court to improve their position. An order for stay passed by the High Court reached the lower Court after the order of July 26th was passed. On the 26th July, that is to say, some days after the expiration of fifteen days from the 5th July and to which day the suits had been posted peremptorily by the learned Judge on 5th July 1943, the following order was passed :—

“Defendants are called and they are absent. The plaintiffs are ready. The defendants have not deposited the amount ordered to be paid into Court by this date in Interlocutory Applications Nos. 568 and 625 of 1943. As the direction given in the order on the said petitions is not obeyed, the order operates and the decrees passed already stand.”

Mr. Satyanarayana Rao has argued that this is not within Order XLIII, rule 1 (d). The appeals before us, he contends, are not against orders under rule 13 or rule 15 of Order IX rejecting an application for an order to set aside a decree or order passed *ex parte*. He contends that the order of 5th July 1943, far from being an order rejecting an application, is an order allowing the application and he contends that, if the appellants desire to appeal at all, they should have appealed not against the order of the 5th July, but against the order of the 26th July, which was the order dismissing the application to set aside the *ex parte* decree. It has been contended by learned Counsel for the appellants that this argument is fallacious, that the order of the 5th July was complete

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in itself and that the order of the 26th July was not an order in relation to these applications, and did nothing more than recall what had happened with regard to the order of the 5th July, viz., that it had worked itself out and that, therefore, the decrees in the suit automatically were restored to life. His words were: "The decrees passed already stand." There is no doubt that, if it appears that in these applications to set aside *ex parte* decrees an order implies that a further order is required to dispose of the applications, it is that last order, if it rejects the application, which should be attacked in appeal.

The cases seem to us to be entirely clear. There are two decisions of the Madras High Court and one decision of a Full Bench of the Bombay High Court on the topic. The earliest case is of no great assistance. It is *Venkatasami Naidu v. Shanmugam Pillai*(1). The precise terms of the order passed in the lower Court are unfortunately not set out; but the learned Judges, OLDFIELD and BAKEWELL JJ., held

"that the expression 'rejecting an application' under Order XLIII, rule 1 (d), signifies an immediate rejection and not a conditional or prospective rejection. . . ."

They went on to lay down what they thought to be the appropriate procedure. In the absence of the exact terms of the order, that case is of little assistance. It must presumably have been in terms which required a second order. MADHAVAN NAIR J. (as he then was) sitting alone, in *Rajagopalachari v. Thathachariar*(2), had to deal with this position. In that case, the order was that

"the *ex parte* decree will be set aside if in two weeks petitioner pays to plaintiff all costs of suit so far incurred unconditionally and further he puts the suit amount and interest decreed into Court in fourteen days. If he does not pay, petition will stand dismissed with costs."

(1) 1917 M.W.N. 815.

(2) A.I.R. 1925 Mad. 1182.

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The learned Munsif noted that the petition was to be called for final disposal on 13th September 1923. The matter came before the Court again and an order was passed finally dismissing the application to set aside the *ex parte* decree. It is clear that the interlocutory applications concerned in that case were treated as open and were expressly posted for further consideration; and it appears that, when they were heard, there was some discussion as to the terms. MADHAVAN NAIR J. rightly observes that all the parties as well as the Court treated the prior order as a conditional one. The last order was:

"Money not put into Court. Application rejected."

The learned Judge held that it was this last order which should be made the subject of an appeal.

The order, however, before us seems to be all comprehensive. What happened is this. The petitioners had to do certain things, viz., deposit costs into Court. If they did not do so, their petition was to stand dismissed with costs. I think that that order is exactly the type of order which is passed on the original side of the Bombay High Court and to which reference is made by the Chief Justice when delivering the judgment in the full Bench decision of five Judges in *Narayan Putapa v. Vaikunt Subaya*(1) who dealt with this very subject. The learned Chief Justice says at page 75:

"My brothers SHAH and FAWCETT tell me that in the mofussil it is usual to make two orders: viz., (a) a preliminary conditional order like that of May 30, and (b) a final order like that of July 18. That indeed is the practice pointed out in *Jagannath Sahi v. Kamta Prasad Upadhyaya*(2). On the Original Side the usual order provides that if the applicant does not comply with the conditions therein stated, then his application is to be dismissed, and the original *ex parte* decree to stand. In other words, on the Original Side we usually have one order and not two as is the case here. But whichever course is adopted, in my opinion, it makes no difference in principle."

(1) (1926) I.L.R. 51 Bom. 67 (F.B.). (2) (1913) I.L.R. 36 All. 77, 79.

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On May 30, 1925, the first order in that case was :

"Suit to be restored to file on the applicants or any of them furnishing adequate security for Rs. 3,000 only within one month. Applicants to bear costs of this application."

And then followed on July 18 the following order :—

"As security is not furnished in spite of ample opportunity given, the application fails and suit cannot be restored to file. Application is rejected with costs."

The learned Judges held that an appeal lay against the second order. It seems to us that, as already indicated, the form of the order in this is what the learned Chief Justice described as the "single order". When fifteen days had expired and the appellants had not complied with the terms imposed, automatically their petition was dismissed with costs and automatically the suits were restored to the file and were ready for hearing by the trial Judge.

To return for a moment to the judgment, that is exactly how the learned Judge appreciated the situation. He points out that the defendants are not there, that the plaintiffs are ready, that the defendants have not complied with the condition and that as the directions have not been obeyed, the order operates and the decrees passed already stand. It seems to be nothing more than the recording of the legal position, which had arisen from the non-fulfilment of a condition precedent by the appellants. We have perused the interlocutory applications and there was merely a reference to this judgment, which seems to be nothing more than an intimation to the clerical staff as to what had happened to them. But, in my view, no further order was passed at all and the reason, as I have indicated, is that no further order was required. It must naturally be a matter of difficulty to construe such orders as this, whether they are final or whether they require a second order to complete them. I personally am glad to give a liberal construction to these matters and not by extreme technicality to shut out an appellant from being heard; for after

all that is all that he asks for. It certainly seems to me that the order of July 5th concluded the matter and I do not suppose that either the Court or the parties had any other idea in their minds. I therefore hold that, as the order of the 5th July was the one and only order in this case and as an appeal has been filed against it, the preliminary objection must fail.

I will now deal with the suit on the merits. This case is similar to another which has recently come before us for the grant of leave, where the rights to have a suit restored have been accompanied by conditions that would appear to be unreasonable, because they are impossible of achievement. The lands of the defendants had been attached before judgment and they claim that by ordering the costs of the suit to be deposited as a condition precedent, which amount to a very large sum, they have been put on terms which they cannot possibly carry out. I therefore propose to substitute what I consider to be a reasonable order for the order which has been passed. The lower Court's order is set aside and instead the following order is passed :—

The appellants will pay to the respondents the sum of Rs. 425 altogether, which sum is made up of Rs. 100 in each of the suits and the costs of these appeals which have been estimated at Rs. 125. The amount will be paid within fourteen days of to-day, March 2. If the amount is not paid within that time then, without any further order being passed, this appeal will stand dismissed, with the result that the application to restore the suits will be taken to have been dismissed and the decrees passed already will stand.

BELL J.—I agree and would only add a word on the preliminary objection raised by the respondents. Where any further direction of the Court is required with regard to the matters in issue between the parties, it cannot be said that finality in any shape or form has been reached. What more on 5th July 1943 was

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required from the Subordinate Judge's Court? If the last sentence of the decretal order be left out, clearly there would be something lacking, that is to say, a ruling as to the effect of any default on the part of the petitioners. But this, the order provided for by saying:

"It is further ordered that in default of payment the petition do stand dismissed with costs."

Nothing further was left to be said as to the final result of the petition. The petitions were not, in fact, considered on 26th July 1943. They were never even mentioned. The Subordinate Judge refers to his previous order with regard to the suits which had been posted for trial on that date. As the defendants were absent, the *ex parte* decree already made was declared to be revived and stood.

Rajagopalachari v. Thathachariar(1), a decision of MADHAVAN NAIR J. (as he then was), is distinguishable on several grounds amongst which is the fact that both parties throughout treated the matter as relating to two orders. The words of the order were in that case:

"the *ex parte* decree will be set aside if in two weeks petitioner pays If he does not pay, petition will stand dismissed with costs."

Then it was added that the petition was to be called for final disposal on a later date. There were thus a conditional order and a final order. In the present case, there was one order which was final on 5th July 1943.

G.R.

(1) A.I.R. 1925 Mad. 1182.

APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice Horwill.

MATAM BASAYYA (PETITIONER-FIRST DEFENDANT),
APPELLANT,

v.

HANUMANTHA REDDI AND ANOTHER
(DECREE-HOLDER AND PURCHASER-COUNTER-
PETITIONERS) RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908) sec. 60 (1) (c)—
House in the occupation of agriculturist—Failure to claim
exemption in earlier stages of execution—Effect—Principle
of constructive res judicata—Applicability—No public
policy against alienation of agriculturist's house.*

Where a sale of the appellant's house in execution of a money decree against him was sought to be set aside on the ground that, under section 60 (1) (c) of the Code of Civil Procedure, a house in the occupation of an agriculturist is exempted from attachment and that the appellant had failed to claim his rights on two prior applications, first at the time when the property was attached and, secondly, when the property was brought to sale,

held that the appellant could not raise the objection subsequently after the property had been brought to sale. If a person during the course of execution proceedings does not raise an objection to the sale of property which, if raised, would prevent the property from being brought to sale, he is debarred by the principle of constructive *res judicata* from raising that same objection either in subsequent proceedings or at a subsequent stage in the same execution proceedings.

Section 60 (1) (c) was enacted to protect agriculturists. But the protection can be waived by the agriculturist. If he can waive his right under section 60, there cannot be any absolute prohibition against the sale of an agriculturist's house and, therefore, there is no bar to the application of the principle of constructive *res judicata*. Moreover, the fact that section 60 of the Code of Civil Procedure prohibits only the attachment of an agriculturist's house and does not prevent an agriculturist from selling his house privately

* Appeal Against Order No. 473 of 1943.

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if he so wishes, is an indication that there is no public policy against the alienation of an agriculturist's house.

Thakur Din v. Sita Ram(1) followed.

Somasundaram v. Kondayya(2) referred to.

Ramakrishnamma v. Venkatasubbiah(3) distinguished.

APPEAL against the order of the District Court of Bellary, dated 17th August 1943, and made in Execution Application No. 139 of 1943 in Execution Petition No. 11 of 1943 in Original Suit No. 31 of 1940.

Kasturi Seshagiri Rao for appellant.

P. Chandra Reddi and *K. Venkaturatnam* for respondents.

HORWILL J. The JUDGMENT of the Court was delivered by HORWILL J.—The question in this appeal is whether the sale of the appellant's house in execution of a money decree against him can be set aside on the ground that under section 60 (1) (c), Civil Procedure Code, a house in the occupation of an agriculturist is exempted from attachment. The lower Court held that in view of the conduct of the appellant in not claiming his rights on two prior applications, first at the time when the property was attached, and secondly when the property was brought to sale, he cannot raise the objection now after the property has been brought to sale.

There can be no doubt that if a person during the course of execution proceedings does not raise an objection to the sale of property which, if raised, would prevent the property from being brought to sale, he is debarred by the principle of constructive *res judicata* from raising that same objection either in subsequent proceedings or at a subsequent stage in the same execution proceedings. The learned Advocate for the appellant however seeks to distinguish this case by contending that there is an absolute bar laid down in section 60 (1) (c), Civil Procedure

(1) I.L.R. [1939] All. 602 (F.B.).

(2) (1925) 49 M.L.J. 401.

(3) (1934) I.L.R. 58 Mad. 389.

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Code, based on public policy which renders the sale of any house occupied by an agriculturist void. He has quoted *Aidal Singh v. Khazan Singh*(1) in support of his contention. That was a case in which the sons of an agriculturist in a subsequent suit contended that the sale of an ancestral house in which their father had been living and which had been brought to sale in execution of a decree against the father was absolutely void. The learned Judges held that as the sons had an independent cause of action they could bring a suit. They further held that in any event there was an absolute prohibition under section 60 (1) (c) against the sale of an agriculturist's house and that the sale therefore was void. The same questions however arose in a subsequent case before a Full Bench of the same High Court in *Thakur Din v. Sita Ram*(2); and the learned Judges on both points disagreed with the learned Judges in *Aidal Singh v. Khazan Singh*(1). They held that when the house was sold, the father represented not only himself but also his sons; and also that, as the father had not raised the objection at the first opportunity, he and his sons were debarred by the principle of constructive *res judicata* from raising the point in subsequent proceedings.

It is said that there is no direct decision on this question in this High Court; but a very similar question arose in *Somasundaram v. Kondayya*(3), in which was raised an objection to the sale of an inalienable inam that was not raised during the execution proceedings, with the result that the inam was sold. One of the learned Judges, VENKATASUBBA RAO J., said:

"It was next contended that the sale of an unenfranchised inam is absolutely void and the plaintiff's suit should on that ground be dismissed. I cannot follow this contention. As I have said, we are not here concerned with the true

(1) (1920) A.L.J. 1244.

(2) I.L.R. [1939] All. 602 (F.B.).

(3) (1925) 49 M.L.J. 401.

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facts of the case but only with the result of certain proceedings. Is the defendant to be permitted to plead that the land was inalienable at the time of the Court-sale? The effect of the order confirming the sale is that the land can be alienated. The order is conclusive, and it must be deemed that there is an adjudication that the property can be sold."

We consider this principle to be applicable to the case now under consideration. If it was obvious to the executing Court that the decree-holder was seeking to bring to sale a house in the occupation of an agriculturist, there might be a ground for argument that the Court acted without jurisdiction in selling it; but the question whether a particular house is a house in the occupation of an agriculturist is a question of fact. If there is nothing before the Court to show that the house sought to be sold is a house in the occupation of an agriculturist, it cannot be said that the Court acted without jurisdiction in selling that house. The learned Advocate for the appellant refers to *Ramakrishnamma v. Venkatasubbiah*(1) in which he says, a different view of this question was taken. The learned Judges were there primarily concerned with the question whether a dasabandham service inam was absolutely inalienable; but at the end of their judgment they said:

"We must hold that lands burdened with a dasabandham service, which is a service of a public nature, are inalienable as being against public policy and, being inalienable cannot be sold in execution of a decree against an inamdar. The lower appellate Court also found that estoppel cannot be relied upon to defeat a prohibition in law on the ground of public policy. No argument to the contrary was addressed to us by the appellant upon this point and that question therefore does not arise in this appeal."

The question whether the failure of the judgment-debtor to raise an objection before the sale would operate as *res judicata* against him if the same point were raised after the sale, did not come up for consideration. Even if, however, it be considered that

(1) (1934) I.L.R. 58 Mad. 389.

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Ramakrishnamma v. Venkatasubbiah(1) is an authority for the position that the sale of a dasabandham inam is absolutely void, a dasabandham inam can be distinguished from an agriculturist's house because, as the learned Judges point out in that case, it is a matter of public policy not to permit the sale of an inalienable inam; for the result would be that the service would become severed from the land; but we cannot find the same public policy behind the enactment in section 60 (1) (c), Civil Procedure Code. That section was undoubtedly enacted in order to protect agriculturists, in order that they might pursue their avocation despite the fact that there were decrees against them; but the protection can be waived by the agriculturist. The learned District Judge has quoted cases in his judgment in which it was laid down that an agriculturist can waive his right under section 60, Civil Procedure Code; and it is not denied by the learned Advocate for the appellant that he can do so. If an agriculturist can waive his right under section 60, then it seems to us to logically follow that there cannot be any absolute prohibition against the sale of an agriculturist's house and that there is therefore no bar to the application of the principle of constructive *res judicata*. Moreover, the fact that section 60, Civil Procedure Code, prohibits only the attachment of an agriculturist's house and does not prevent an agriculturist from selling his house privately if he so wishes, is an indication that there is no public policy against the alienation of an agriculturist's house.

The appeal fails and is dismissed with costs.

V.V.C.

(1) (1934) I.L.R. 58 Mad. 389.

APPELLATE CIVIL.

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

NAVANEETHA AMMAL (PLAINTIFF), APPELLANT,

v.

AMMAKANNU AMMAL AND TWO OTHERS
(DEFENDANTS), RESPONDENTS.*

Decree—Jurisdiction—Preliminary decree granting Hindu widow share in agricultural lands also under Hindu Women's Rights to Property Act (XVIII of 1937)—Decree not appealed against and becoming conclusive—Subsequent exclusion of agricultural lands in passing final decree—No power in Court—Direct attack of decree by appeal, review, revision or suit and collateral attack of it in other proceeding, difference between.

A Hindu widow filed a suit in the Court of a Subordinate Judge, for partition and recovery of a share of the property left by her husband, under the Hindu Women's Rights to Property Act, 1937. The Court passed a preliminary decree granting her a share also in the agricultural lands in the mistaken impression that the Act conferred such a right. No objection to the grant of a share in the agricultural lands was taken at any time before the passing of the preliminary decree; nor was an appeal filed against that decree. The error was, however, discovered when the application for passing a final decree came to be heard and the Court rectified the error by excluding the agricultural lands from partition under the final decree. On appeal,

held: The preliminary decree had become final and the Court acted wrongly in rectifying the error. The error relating to the grant of a share in the agricultural lands was merely an error of judgment, not touching the jurisdiction of the Court passing the preliminary decree.

Distinction between a direct attack of a decree by way of appeal, review, revision or suit according to circumstances, and a collateral attack of a decree by an attempt to avoid, defeat or evade its operation in a collateral proceeding, pointed out.

Case law discussed.

* Appeal No. 314 of 1942.

APPEAL against the decree of the Court of the Subordinate Judge of Vellore, dated 15th September 1941 and 30th October 1941 (Interlocutory Application No. 920 of 1940) and 31st March 1942 (Interlocutory Application No. 1014 of 1941) in Original Suit No. 50 of 1939.

N. Rajagopala Ayyangar for appellant.

T. L. Venkatarama Ayyar and L. Krishnaswami Ayyar for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by KRISHNASWAMI AYYANGAR J.—This appeal arises out of a suit instituted by the appellant for partition and recovery of a share of the property left by her deceased husband Thangavelu Pillai, by virtue of the provisions of the Hindu Women's Rights to Property Act, 1937. This Act became law on 14th April 1937, when it received the assent of the Governor-General. Before the Act, a widow had no right to a share in any part of her husband's property, if the husband died as a member of a coparcenary or had left a son or sons surviving. For the first time the Act gave her such a right.

Thangavelu Pillai who died on 28th June 1939 had married three wives in succession. The appellant is the second of his wives. Her two co-widows are Ammakannu Ammal and Dhanabaggiammal, impleaded as defendants 1 and 2 in the suit. His only son, Kanakasabapathi still a minor, by his third wife Dhanabaggiammal was joined as the third defendant. It is common ground that the estate left by Thangavelu Pillai comprised amongst others agricultural lands. Under the Act, the appellant is entitled to a one-sixth share in the divisible properties. No question arises about the quantum of the share. The only question is, what are the properties liable to division in the suit?

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The suit was instituted on 5th July 1939 more than two years after the enactment of the Hindu Women's Rights to Property Act, 1937. In her plaint the appellant claimed a share in all the assets left by Thangavelu Pillai, including the agricultural lands. Neither in the written statements filed by the defendants nor in the issues framed for trial was objection taken to the demand for a share in such lands on the ground that the Act did not apply to agricultural lands. It was not pleaded that so far as such lands are concerned her claim should be determined by the ordinary Hindu law and not by the Act. The result was that, when the Subordinate Judge came to pass the preliminary decree on 31st July 1940, he declared the right of the appellant to a share in all the properties in suit including the agricultural lands and directed the appointment of a commissioner for effecting a division by metes and bounds. In pursuance of the preliminary decree the plaintiff applied on 2nd October 1940 for the appointment of a commissioner for effecting the division, and for the passing of the final decree. Accordingly on 30th October 1940 the Court appointed a commissioner for effecting the division of the properties, and he made his report on 14th April 1941 submitting a scheme for the division of the immovable properties which consisted of house property of the value of Rs. 22,000 and agricultural lands of the value of Rs. 14,280. It is obvious that up to this point of time, the parties as well as the Court and the commissioner, all proceeded on the assumption that the Act applied to every species of property in a Governor's province without exception and that the plaintiff was entitled to a share in the entirety of her husband's estate. It would seem that just at this time the question whether the Hindu Women's Rights to Property Act (XVIII of 1937) and the Hindu Women's Rights to Property (Amendment) Act (XI of 1938) operated to regulate succession to agricultural land, a subject which fell within the exclusive jurisdiction

of the Provincial Legislature by reason of entry No. 21 of Part II of Schedule VII of the Government of India Act, 1935, was pending decision in the Federal Court. On 22nd April 1941 that Court pronounced its judgment declaring that the Acts in question do not operate to regulate succession to agricultural land in the Governors' provinces. It was after the publication of this decision that the contesting defendants, namely, defendants 2 and 3, woke up to discover that the appellant was not entitled under the provisions of the Hindu Women's Rights to Property Act, 1937, to claim a share in agricultural lands and they accordingly took the point in their objections to the report of the commissioner filed on 23rd June 1941. The matter came up before the Court on 13th September 1941 when the Subordinate Judge framed the following questions for decision:—

"(i) Whether the plaintiff and defendants 1 and 2 are entitled to have a final decree passed also in respect of the agricultural lands of their husband, and

(ii) whether the commissioner's report should be accepted."

After hearing arguments, the Subordinate Judge pronounced his order on 15th September 1941. He held that, notwithstanding the fact that the preliminary decree which had not been appealed against had become final, it was open to him to rectify that decree by giving effect to the decision of the Federal Court and accordingly ruled that the agricultural lands should be excluded from division in the final decree to be passed. The reasons he gave for the view he took may be stated in his own words:

"It follows from the decision of the Federal Court that the Imperial Legislature had no power to pass legislation affecting agricultural lands and that the provisions of the Hindu Women's Rights to Property Act cannot affect the agricultural lands. But it is only in pursuance of such illegal legislation that a preliminary decree has been passed. Now when it is clear that the legislation itself is bad, a decree of Court giving effect to the said legislation must also be bad and

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must be held to be illegal on the face of it and as such I think no Court can give effect to an illegal decree. In fact the decree must be construed to be one passed without jurisdiction, since the Court gets jurisdiction to pass such a decree only by virtue of the said Act which has now turned out to be an illegal one in so far as the agricultural lands are concerned."

It is obvious that by the expression "illegal legislation" here used, the Subordinate Judge only meant to convey the idea that the Indian Legislature had exceeded its powers in enacting a law regarding succession to agricultural land situate in a Governor's province and that, to the extent to which it purported to do so, the enactment must be held to be null and void. Therefore he regarded the preliminary decree which had not taken note of this illegality as also illegal on the face of it, so much so he thought it his duty to bring it into conformity with the law by excluding the agricultural lands.

The appellant contests the correctness of this decision and on her behalf it is urged that the Subordinate Judge is in error in thinking, as he presumably did, that the preliminary decree is illegal in the sense that it was one made without jurisdiction in so far as the agricultural lands were concerned and that it was therefore open to him to correct it, notwithstanding that it had become final. That it has become final is not questioned. For section 97 of the Code of Civil Procedure clearly enacts:

"Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."

The finality which, in the events which have happened, attaches to the decree will, of course, be of no consequence if the Court had purported to exercise its jurisdiction under a statute which did not in fact confer it. The Subordinate Judge is apparently of the opinion that he derived his jurisdiction to pass

the preliminary decree from the Hindu Women's Rights to Property Act, 1937, and as that Act did not confer on him jurisdiction in respect of agricultural lands, the decree passed by him on the footing that it did is a nullity. This, in our opinion, is a fundamental error due to a misconception of the source of his jurisdiction which is really derived not from that Act but from the Madras Civil Courts Act, 1873, and the Code of Civil Procedure, 1908. Section 4 of the former Act empowers the Provincial Government to fix the number of Subordinate Judges to be appointed under the Act and to vary it from time to time. Each of the Judges so appointed is authorized to exercise all or any of the powers conferred on the Court by that Act or any other law for the time being in force. Section 12 enacts:

"The jurisdiction of a District Judge or Subordinate Judge extends, subject to the rules contained in the Code of Civil Procedure, to *all* original suits and proceedings of a civil nature."

A Subordinate Judge accordingly possesses unlimited pecuniary jurisdiction, unlike a District Munsif whose jurisdiction is limited to suits in which the amount or value of the subject-matter does not exceed Rs. 3,000. If we now turn to the Code of Civil Procedure, the first section to be noticed is section 9 which confers on the Courts established by law, jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is either expressly or impliedly barred. The explanation to the section makes it plain that a suit in which the right to property is contested is a suit of a civil nature. Section 15 states that every suit shall be instituted in the Court of the lowest grade competent to try it. Section 16 and the sections which immediately follow it lay down the rules which determine territorial jurisdiction. Tested by these sections, it is common ground that it is the Court below which is the Court

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competent to try the present suit, possessing, as it did, the necessary jurisdiction pecuniary as well as territorial. It is needless to add that suits of this nature have not been excepted from the cognizance of the Subordinate Judge's Court. It would thus seem that all the conditions necessary for conferring jurisdiction upon the Subordinate Judge were present and he was therefore competent to try the suit.

If we now look at the plaint and consider it in the light of the decision of the Federal Court, the only criticism to be made is that it includes a claim for the partition and recovery of a share in properties in which the Hindu Women's Rights to Property Act, 1937, did not give her a share. In other words, the plaint included a claim which was untenable and which might even be taken as being untenable on the face of it, though the untenability was only discovered after the decision of the Federal Court.

The untenability of a claim is undoubtedly a reason for disallowing it. But if the Court wrongly allows it, the error may be corrected by resort to one or other of the modes known to law, viz., by review, appeal, revision or by suit, according to circumstances. Such attempts to vacate, modify or correct a decree of a competent Court by proceeding in one of the modes permitted by law are, what may be termed, direct attacks which will succeed if the error of fact or the deviation from law which is said to vitiate the decree or order is established. But a collateral attack is an attempt to avoid, defeat or evade the decree or order or to deny its effectiveness by or in a proceeding, other than a direct attack, with the object of rendering it a dead letter, a nullity to be ignored. If we bear this distinction in mind, it is clear that the preliminary decree originally passed by the Subordinate Judge was sought to be challenged by what was in substance a collateral attack, after the contesting defendants had let go the right and opportunity they undoubtedly

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had under the law to challenge its correctness by an appeal, that is to say, by a direct attack. The question thus presented is but an aspect of the doctrine of collateral attack which, as will be shown, can only succeed if an absolute lack of jurisdiction over the subject-matter is established.

Ledgard v. Bull(1) is a decision of the Privy Council in the course of what should be deemed a direct attack against the judgment of the District Judge of Cawnpore in a suit for the infringement of a patent, instituted in the Court of the Subordinate Judge of the same place. By section 22 of Act XV of 1859, an action for the infringement of a patent was maintainable only in the principal civil Court of original jurisdiction which was the District Court. The District Judge having withdrawn the suit to his own file on a petition for transfer filed before him under section 25 of the Code of Civil Procedure, 1877, tried and decreed the suit, overruling both of two objections specifically taken by the defendant in his written statement. Of these one alone is relevant for the present purpose. That objection was that under the Act XV of 1859 the Court of the Subordinate Judge in which the suit was filed was incompetent to entertain it and that this initial defect is not cured by the transfer, because the order of transfer was itself incompetent, as the District Court had no jurisdiction to make an order of transfer unless the Court from which the transfer was sought had itself jurisdiction to try it. The objection thus taken to the jurisdiction of the District Judge was sought to be got over by a plea of waiver by reason of the conduct of the defendant in concurring with the plaintiff in the application for the transfer, but this plea was negatived. The Board however thought it necessary to examine and expound the law relating to the question of jurisdiction as commonly spoken of, and the observations in

(1) (1886) LL.R. 9 ALL 191 (P.C.).

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this behalf are of much value in the present context. Their Lordships said :

"The defendant pleads that there was no jurisdiction, in respect that the suit was instituted before a Court incompetent to entertain it, and that the order of transference was also incompetently made. The District Judge was perfectly competent to entertain and try the suit if it were competently brought, and their Lordships do not doubt that in such a case a defendant may be barred by his own conduct from objecting to irregularities in the institution of the suit. When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit."

The distinction here drawn is between the case where a Court has no inherent jurisdiction, and its judgment is therefore wholly void, *coram non judice*, and a case where the proceedings are taken in a Court of competent jurisdiction, but irregularities are committed which if objected to in time would have entailed a dismissal. Although the consequences of a mere error of decision in the latter classes of cases are not in terms stated, the observations of the Board sufficiently imply that the judgment would not be open to avoidance or evasion by collateral attack if the party who had the opportunity omitted to take advantage of it by taking the objection at the proper time and, if we may add, by the proper mode as well. The observations extracted above were repeated by the Privy Council in *Minakshi v. Subramanya*(1) which was an appeal from a decision of the Madras High

(1) (1887) I.L.R. 11 Mad. 26 (P.C.).

Court in an appeal which had been heard and disposed of against the decision of the District Judge of Madura. No appeal really lay from the order of the District Judge, but the objection to its maintainability had not been taken before the High Court. The judgment of this Court was set aside with the comment that in the case on hand there was an inherent incompetency in the High Court to deal with the question brought before it, and no consent could confer that jurisdiction which the High Court never possessed. This case provides another instance of a direct attack.

Malkarjun v. Narhari(1) furnishes an illustration of the doctrine of collateral attack which can prevail only if the Court, which made the decree or order questioned, had acted wholly without jurisdiction. Nagappa had mortgaged his properties to the defendant, who subsequently purchased them at a sale in execution of a simple money decree obtained by a stranger against the mortgagor. The question was whether the court-sale was a nullity because the preliminary notice of the execution petition, required by section 248 of the Code of 1877 corresponding to Order XXI, rule 22, of the present Code, was served on two persons, Ramalingappa and Wyankappa, wrongly stated to be the legal representatives of the deceased judgment-debtor, the true legal representatives, namely, the plaintiffs, not having been served at all. Ramalingappa objected that he was not the legal representative, but the executing Court wrongly held that he was the true representative and went on with the execution, with the result that the property was ultimately sold to the defendant. The plaintiffs who could have had the sale set aside either by application under section 311—now Order XXI, rule 90, of the Code—or by suit within one year under article 12, clause (a), of the Limitation Act, took neither course, but instituted a suit for redemption entirely ignoring

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(1) (1900) I.L.R. 25 Bom. 337 (P.C.).

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the court-sale. The defendant set up his purchase in court-auction in defence of the suit. The trial and the appellate Courts dismissed the suit, but on second appeal the High Court of Bombay granted in effect a redemption decree as prayed for by the plaintiffs. The defendant appealed to the Privy Council, and their Lordships reversed the judgment of the High Court, and dismissed the suit. After observing that the decision of the High Court must rest on the principle that the sale was an absolute nullity, having been held in proceedings taken by the executing Court wholly without jurisdiction, Lord HOBHOUSE pointed out that the case was one in which the Court had jurisdiction to act but only it committed an error in deciding that Ramalingappa was the right legal representative, an error which did not render the sale null and void. The grounds of the decision will appear from the following passage:—

“The Code goes on to say that the Court shall issue a notice to the party against whom execution is applied for. It did issue notice to Ramalingappa. He contended that he was not the right person, but the Court having received his protest decided that he was the right person, and so proceeded with the execution. In so doing the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed. The real complaint here is that the execution Court construed the Code erroneously. Acting in its duty to make the estate of Nagappa available for payment of his debt, it served with notice a person who did not legally represent the estate, and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law.”

The language employed in this passage suggests that, where the Court has jurisdiction over the subject-matter, but arrives at an erroneous decision by misconstruing a statute, it can only be set aside by appropriate

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proceedings directly taken for the purpose and not simply ignored as a nullity. That is the reason why their Lordships point out later in their judgment that it was necessary for the plaintiffs to set aside the sale in order to clear the ground for redemption of the mortgage. They finally observe at page 352 that, if the sale is valid until vacated, that is, if the sale is a reality at all, it is a reality defeasible only in the way pointed out by law, as the case fell either within section 311 (now Order XXI, rule 90) of the Code of Civil Procedure or within article 12 (a) of the Limitation Act, 1877, or within both. This case would therefore seem to be a clear authority for the proposition that an erroneous decision by a Court of competent jurisdiction is not open to collateral attack, and can only be corrected or vacated by proceedings in the nature of a direct attack taken in the manner and within the time allowed by law, unlike a decision of a Court wholly without jurisdiction, which can be collaterally attacked as a nullity on account of the absence of inherent jurisdiction over the subject-matter. The test to be applied in deciding a question of this kind is to enquire whether a Court had the power and was under a duty to decide the matter, the wrong decision of which is alleged to make the order a nullity. This indeed was the test applied in *Nageswara v. Ganesa*(1) where the question was whether an order of adjudication, passed on a debtor's petition containing a false allegation of residence in Madras made in order to invoke the insolvency jurisdiction of this Court, was a nullity, and this objection was put forward in an interpleader suit instituted for determining whether the Official Assignee or a creditor of the insolvent was entitled to a sum of money. The objection was negatived on the ground that the High Court was a Court of competent jurisdiction notwithstanding that the debtor was not in fact a

(1) I.L.R. [1943] Mad. 217.

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resident of Madras, as the question of residence was a matter which the Court was entitled and bound to decide before making the order of adjudication. It was observed :

"A distinction has always to be made between competency or jurisdiction to make an order, and the correctness of the order on the merits where the Court had the jurisdiction to decide the question. We are of opinion that the High Court was a Court of competent jurisdiction for the present purpose and notwithstanding the fact that the debtor made a deliberately false allegation that he was a resident within the jurisdiction, the order is not rendered a nullity."

The consequences of a complete absence of jurisdiction have been stated in a number of decisions of the Calcutta High Court, but it is sufficient to refer to one of them only for the purpose on hand. In *Rajalakshmi Dasee v. Katyayani Dasee*(1) MOOKERJEE and CARNDUFF JJ. said :

"It is an elementary principle of law that, if a Court has no jurisdiction over the subject-matter, its judgments and orders are mere nullities, and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every Court in which they are presented; *Ferguson v. Mahon*(2), *Briscoe v. Stephens*(3), *Buchanan v. Rucker*(4), *Attorney-General v. Hotham*(5), *Perkin v. Proctor*(6), *Ex-parte Kinning*(7) and *Brown v. Compton*(8). If a Court has no jurisdiction, its judgment is not merely voidable, but void, and it is wholly unimportant how precisely certain and technically correct its proceedings and decisions may have been; if it has no power to hear and determine the case, its authority is wholly usurped and its judgments and orders are the exercise of arbitrary power under the forms, but without the sanction of the law."

The question whether an executing Court is entitled to go behind the decree or question its validity on the ground that the Court which passed it had no jurisdiction over the subject-matter may at first sight look as if it involves an aspect of the doctrine of collateral

(1) (1910) I.L.R. 38 Cal. 639, 668.

(3) (1824) 2 Bing 213.

(5) (1823) T. & R. 208.

(7) (1847) 4 C.B. 507.

(2) (1839) II A. & E. 179.

(4) (1808) 9 East 192.

(6) (1768) 2 Wilson 382.

(8) (1800) 8 T.R. 424.

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attack which we are now considering. But such cases do not appear to be germane to the present discussion. Differing views have been expressed on this question by the Madras High Court in *Zamindar of Ettiyapuram v. Chidambaram Chetty*(1) and the Rangoon High Court in *S. A. Nathan v. S. R. Samson*(2) on the one hand, and the Calcutta High Court on the other in *Gora Chand Halder v. Prafulla Kumar Roy*(3) and *Kalicharan Singha v. Bibhutibhushan Singha*(4). We doubt whether cases of this type furnish useful guidance because, as pointed out by WALLIS C. J. in *Zamindar of Ettiyapuram v. Chidambaram Chetty*(1), the jurisdiction of the executing Court as such is circumscribed by the words of section 47 of the Code of Civil Procedure. The matter is besides complicated by the change in the language of Order XXI, rule 7, introduced by the Code of 1908. The following observations of the learned Chief Justice indicate the difference in principle due to the special provisions of the Code :—

"An objection to the jurisdiction is a ground for setting aside the decree and is not one of those questions relating to the 'execution, discharge or satisfaction of the decree' which are required by section 47 to be dealt with in execution. The provision in section 225 of the old Code that a Court might proceed to execute decrees transferred to it without requiring further proof, among other things, of the jurisdiction of the Court which passed the decree lent some colour to the view that it was open to a Court to which a decree had been sent for execution to go into the question whether the Court which passed that decree had jurisdiction to do so, and influenced the decisions which are referred to in the order of reference. These words, however, have been omitted advisedly in the corresponding Order XXI, rule 7, of the new Code."

In the light of the foregoing discussion, it appears to us plain that the decision of the Court below cannot be supported. It is unquestionable that the nature and the value of the subject-matter was such that the suit

(1) (1920) I.L.R. 48 Mad. 675 (F.B.). (2) (1931) I.L.R. 9 Rang. 480 (F.B.).
(3) (1925) I.L.R. 53 Cal. 166 (F.B.). (4) (1932) J.L.R. 60 Cal. 191.

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fell within its jurisdiction. The preliminary decree was no doubt passed on what we may now take it to be an error in that it recognized in the plaintiff a right to a share in the agricultural lands which had not been really conferred on her by the Hindu Women's Rights to Property Act, 1937, as it was wrongly thought. But this error was merely an error of judgment, not touching the jurisdiction of the Court, which remained as it was, wholly unimpaired by anything contained in that Act. In this view the decision of the Subordinate Judge must be set aside. The case will now go back to him for the passing of a final decree after such enquiry as may be necessary, by a commissioner or otherwise, in accordance with the declaration of rights made by the preliminary decree.

It is only necessary to add that the Court or the commissioner as the case may be should consider afresh the points which require to be determined before the passing of the final decree. The Subordinate Judge's direction that the memo. given by defendants 2 and 3 regarding the annual rents of the properties should be preferred to that of the plaintiff is irregular and must be vacated. The commissioner should be left to decide the matter as best as he could, the Court interfering with his findings later, if that is necessary, for a correct decision of the matter. Nor is there any justification for the Subordinate Judge allotting item 12 to the third defendant at a valuation of Rs. 1,500, while the plaintiff was willing to take it at Rs. 1,800, and herself face the litigation if there should be any. As we have said the whole matter should be considered afresh.

The appellant is entitled to her costs here and in the Court below.

N.S.

APPELLATE CRIMINAL.

*Before Mr. Justice Mockett and Mr. Justice
Kuppuswami Ayyar.*

IN RE THAMBI alias SUBBARAYA PILLAI
(ACCUSED), PRISONER.*

1944,
July 18.

*Criminal Trial—Practice—Accused person—Date and place of
arrest—Recording of—Necessity.*

Police officers should always be in a position to provide the Court with the date and place of arrest of an accused person and any special circumstances attending it. It may be—and often is—of great importance, frequently in the interests of the accused, for the Court to know when and where the arrest was made. The Sessions Judges should elicit these details from the police witnesses.

TRIAL referred by the Court of Session of the Coimbatore Division for confirmation of the sentence of death passed upon the prisoner in the Case No. 49 of the Calendar for 1944 on 15th April 1944 and APPEAL by the prisoner against the said sentence of death under section 302, Indian Penal Code, and the sentence of transportation for life under section 307, Indian Penal Code, passed upon him in the said case.

V. R. Narayanan for accused.

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

The JUDGMENT of the Court was delivered by MOCKETT J.—The accused has been convicted and sentenced to death for the murder of one Chokkayya Pillai on 31st December 1943. At the same time, he was tried and convicted for the attempted murder of Palaniswami Pillai. For this, he was sentenced to transportation for life. [After discussing the evidence in the case His Lordship proceeded :]

MOCKETT J

The accused was arrested on 13th January 1944, having absconded since 31st December, the day of the occurrence. We were interested to know where

* Referred Trial No. 101 of 1944 and Criminal Appeal No. 374 of 1944.

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he was arrested, but this is not stated. Reference to the case diary shows that he was produced from somewhere by two villagers to the police. With regard to this aspect of the case we propose to say a few words in conclusion. As to this referred trial and appeal, the learned Judge was manifestly right. He could not possibly have come to any other conclusion. Both the convictions and the sentences are confirmed and the appeal is dismissed.

We desire to emphasise, as we have done in a previous case, that evidence of arrest should not only state the date, but the place of the arrest. It may be—and often is—of the greatest importance, frequently in the interests of the accused, for it to be known where and when the arrest is made. It is obvious that an arrest made soon after the occurrence in the accused's own village may put one complexion on a case. An arrest of the accused made long after in a distant place may have a different significance. We have already expressed these views in Referred Trial No. 130 of 1942 when the Bench made these observations:

"P.W. 11 is the investigating officer. We made this comment about his evidence. He deputed a constable to arrest the accused, but the constable has not given evidence. We have had cause to notice recently that there has been a tendency on the part of the prosecution not to give evidence of arrest. In our view, evidence of arrest should invariably be given unless there is any special reason for not doing so. It is always helpful for the Court to know when and where the accused person is arrested because it is a circumstance that may be of assistance to the Court not only from the point of view of testing the prosecution evidence but also in the interest of the accused himself."

Police officers should always be in a position to provide the Court with the date and place of arrest and any special circumstances attending it. The learned Sessions Judges should require these details from the police witnesses.

V.V.C.

APPELLATE CRIMINAL.

Before Mr. Justice Byers.

IN RE DRAKSHA CHINNA GURUMURTHI (ACCUSED),
PETITIONER.*

1944,
August

Defence of India Rules (1939), r. 39—Possession—Accused and his undivided brother, members of a joint Hindu family—Occupation of room where prejudicial literature was found—Burden of proving innocence cast on accused—“Occupation” in cl. 2 of the rule, meaning of.

The joint occupation of a room, where prejudicial literature was found, by the accused and his undivided brother is sufficient occupation within the meaning of rule 39 (2) of the Defence of India Rules so as to cast upon the accused the burden of proving his innocence. It is not necessary in such a case for the prosecution to prove that the accused is in sole occupation of the premises.

The use of the word “occupation” in rule 39 (2) contemplates physical occupation rather than occupation in the sense of being the legal tenant or other person who may be looked to for the payment of taxes, etc.

Anantanath Chatterji v. King Emperor(1) and *Sumatibai v. Emperor*(2) distinguished.

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 Cuddapah in Criminal Appeal No. 9 of 1944 preferred against the judgment of the Court of the Additional First-class Magistrate, Cuddapah, in Calender Case No. 253 of 1943.

K. Krishnaswami Ayyangar and *N. C. Raghavachari* for accused.

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

ORDER.

BYERS J.—The petitioner was convicted of the unlawful possession of prejudicial literature under

BYERS J

* Criminal Revision Case No. 291 of 1944 (Criminal Revision Petition No. 277 of 1944).

(1) (1943) I.L.R. 22 Pat. 549.

(2) A.I.R. 1944 Bom. 125.

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rule 39 of the Defence of India Rules and sentenced to rigorous imprisonment for two years, his conviction and sentence being upheld on appeal.

The facts of the case in so far as they are necessary at this stage are that the petitioner was living in a house with his mother and his undivided elder brother, the latter having been found to be the manager of the family. In the room shared by the petitioner and his brother a large quantity of highly prejudicial matter was found by the police in an unlocked metal box when they searched the premises. Some attempt was made in the evidence to show that there was other material in this box which would identify it as the property of the petitioner, but this evidence was not accepted. However, the convicting Magistrate relied upon rule 39 (2) of the Rules and, as the petitioner was in occupation of the premises, the burden lay upon him of proving his innocence. The witnesses examined for the defence were disbelieved and the petitioner was convicted and sentenced as already stated.

The only question which arises in revision is whether the joint occupation of the room by the accused and his undivided brother is sufficient occupation within the meaning of rule 39 (2) of the Defence of India Rules so as to cast upon him the burden of proof. In support of his argument that it does not, his learned Advocate relied on two decisions. The first is *Anantanath Chatterji v. King Emperor*(1). That was a case in which the alleged prejudicial literature was found in a room in the occupation of an accused and his elder brother, the latter being a person who was detained under the Defence of India Rules and the former only a young boy who pleaded that he had no knowledge of the books or of their origin. It was held that he was not in occupation of the premises within the meaning of the rule, but

(1) (1943) I.L.R. 22 Pat. 548.

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from the judgment it does not appear that the question how far the joint occupation of premises by undivided members of the same Hindu family is effective occupation was examined. BROUGH J. appears to have reached his conclusion more upon a consideration of the effect of shifting the burden of proof, and there was also the circumstance that the accused was only a boy. MANOHAR LALL J. held that the publications found in the room were not prejudicial documents within the meaning of the rule, and so he did not find it necessary to express an opinion on the question arising under rule 39 (2).

The other case relied on is *Sumatibai v. Emperor*(1), a case in which a husband and his wife had been convicted for the possession of prejudicial literature found in the premises occupied by them both. It was held in that case that his wife should not be held to be the occupier of the house unless it could be shown that she was in fact the occupier and that her husband was a mere appendix to her.

Neither of these cases deals with the occupation of premises by undivided members of a Hindu joint family, each of whom owns an undivided share in every portion of the property and each of whom is competent to exercise his rights of ownership in the property. I consider that the use of the word "occupation" in rule 39 (2) of the Defence of India Rules contemplates physical occupation rather than occupation in the sense of being the legal tenant or other person who may be looked to for the payment of taxes, etc. If the Legislature had intended that the occupation contemplated by sub-clause 2 of the rule was to be sole or effective occupation, the necessary words would doubtless have been inserted. The petitioner's learned Advocate has strenuously argued that the mere presence of prejudicial literature in a room where the accused lives is not sufficient proof

(1) A.I.R. 1944 Bom. 125.

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of possession by him. But if possession can be proved, then there is no necessity to have recourse to clause 2 of the rule; because if actual possession is established then the case comes under clause 1. My view is that it is not necessary for the prosecution to prove that the accused is in sole occupation of premises where prejudicial literature has been found, and that joint occupation with another person is sufficient occupation for the purposes of the rule in order to cast the burden of proof upon him. In the earlier of the two cases cited, BROUGH J. has commented upon the difficulties of proof in such a case where one of several persons is prosecuted for the possession of prejudicial literature found on premises in the possession of them all; but with all due respect to the learned Judge, I cannot agree that the physical occupation of premises by several members of a family should not be accepted as occupation by any one of them merely because the operation of the rule may result in difficulties in discharging the burden which the rule imposes. It was doubtless with a view to meeting cases of this kind, where prejudicial literature is found on premises in the joint occupation of more than one person, that the rule was framed so as to throw upon those persons the burden of disproving their guilt, in the same way that section 65 of the City Police Act and section 64 of the Madras Abkari Act throw upon an accused person the burden of proving his innocence.

There is no necessity for any interference in revision and the petition is dismissed.

V.V.C.

PRIVY COUNCIL.

K. R. EASWARAMURTHI GOUNDAN, APPELLANT,

v.

THE KING-EMPEROR, RESPONDENT.

[APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

Indian Penal Code (Act XLV of 1860), sec. 216—Essentials of offence—"Knowing", meaning of—Code of Criminal Procedure (Act V of 1898), sec. 75 and Form II of Schedule V—Warrant of arrest—Proof—Indian Evidence Act (I of 1872), ss. 62, 64 and 65—Code of Criminal Procedure, sec. 87 (3) not overriding the requirements of Evidence Act—Scope of sec. 87—Proclamation—Not evidence of issue of warrant—Not equivalent to notice to public of its contents—Warrant of arrest, public document—Proof stringent—Objection as to proof of issue of warrant substantial—Privy Council—Criminal appeal brought by special leave—Main question to be considered.

The appellant was charged and convicted under section 216 of the Indian Penal Code for the offence of "harbouring" two persons who were suspected of having committed a murder. The prosecution sought to prove by means of two proclamations, one in respect of each of the two suspected persons, that the warrant for arrest of the suspected persons had been issued and that the appellant knew of its issue.

Held that the conviction under section 216 of the Indian Penal Code could not be sustained as there was no legal evidence to prove the essential foundation of the case for the prosecution, namely, that any order had ever been made for the arrest of the two men said to have been "harboured." The proclamation was made under section 87 of the Code of Criminal Procedure, but there was nothing in that section which made the proclamations legal evidence of the issue of the warrant or order of arrest nor was there anything either in section 87 or in the facts of the case which made it possible to impute to the appellant notice of the proclamations or their terms.

Section 216 of the Indian Penal Code requires, if the offence is to be established, first, that there has been an order for the apprehension of a certain person as being guilty of an offence, secondly, knowledge by the accused party of the order,

* Present: LORD MACMILLAN, LORD WRIGHT and SIR GEORGE RANKIN.

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and thirdly, the harbouring or concealing by the accused of the person with the intention of preventing him from being apprehended.

Sections 62, 64 and 65 of the Indian Evidence Act define the only evidence which the law permits in order to prove a warrant of arrest and that is, under section 62 of the Act production of the original order, or, under the conditions specified in section 65, of a certified copy. A warrant of arrest is a public document which affects the personal liberty of the subject. Form II of Schedule V of the Code of Criminal Procedure prescribes its form. It has to bear the appropriate signature and seal. Any laxity of proof might have serious consequences. It might for instance lead to error as to the identity of the person to be apprehended. Secondary evidence other than a certified copy would not necessarily or even obviously show that the statutory form had been complied with.

The objection that the issue of the warrants has not been proved is not technical but substantial.

The words in sub-section 3 of section 87 of the Code of Criminal Procedure cannot be read as overriding the requirements of the Evidence Act or as making the proclamation evidence that the warrants had been issued. The method of proving the warrant is not a requirement of the section which merely deals with the proclamation itself and the mode of publishing it and the like. Nor does section 87 expressly or by implication make the proclamation equivalent to notice to the public of its contents, even to the inhabitants of the town or village where it is published.

The word "knowing" in section 216 of the Indian Penal Code means something more than and different from the words "has reason (or sufficient cause) to believe". Knowing implies a fact which can be known. It does not necessarily import actual evidence of the senses, but it does import knowledge of something actual by means of authentic or authoritative information.

In a criminal appeal brought by special leave of His Majesty in Council, their Lordships of the Judicial Committee are not concerned with formal rules, such as the rule relating to the concurrent findings of fact in the Courts below, but only with the question whether there has been a miscarriage of justice.

APPEAL (No. 1 of 1943), by special leave, from a judgment of the High Court (July 3, 1942) against the judgment and order of the Court of Sessions of the Coimbatore Division (July 28, 1941) against the

order of the Court of the Subdivisional Magistrate, Coimbatore (March 24, 1941).

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Pritt K.C. and Handoo for appellant.

Roberts K.C. and Khambatta for the Crown.

The JUDGMENT of the Judicial Committee was delivered by Lord WRIGHT.—The appellant, a wealthy landowner, merchant and banker with large interests in Tiruppur, where he resided, and other places in the Province of Madras, was charged along with ten other persons under section 216 of the Indian Penal Code with the offence of "harbouring" two persons who were suspected of having committed a murder on or about 8th March 1940. The murdered man was Muthu Goundan, of Othuvillaipudur. The police formed the opinion that the murder was committed by four persons, all of them Valayans, a low tribe among the depressed and criminal classes of Madras, aided and abetted by one R. V. I. Goundan, the father-in-law of the appellant. Two of these four Valayans are the persons whom the accused was said to have "harboured." These men, along with R. V. I. Goundan, being subsequently tried for the murder or abetment, were acquitted. Of the eleven men later charged with "harbouring", ten including the appellant were convicted by the Subdivisional Magistrate who tried the case, the appellant being sentenced to six months' rigorous imprisonment and a fine of Rs. 1,000, with a further three months' rigorous imprisonment in default of paying the fine. On appeal, the Sessions Judge set aside all the convictions and sentences. On a further appeal by the prosecution from the orders of acquittal, HORWILL J., who heard the appeal in the High Court of Madras, confirmed all the acquittals except that of the appellant; as to him, the Judge restored the conviction and sentence passed by the Subdivisional Magistrate. Special leave to appeal was granted to the appellant by His Majesty in Council.

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In the result, as will appear later, their Lordships arrived at the opinion, on the conclusion of the arguments, that the appeal should be allowed on the ground that there was no evidence admissible in law to prove the essential foundation of the case for the prosecution, namely, that any order had ever been made for the arrest of the two men said to have been "harboured". In view of the decisive character of this objection to the conviction, it will be enough here to summarise as shortly as possible the material facts and to outline the course which the proceedings below took. First, however, the terms of section 216 must be set out. That section is in the following terms :

"Section 216.— . . . whenever a public servant, in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence, whoever, knowing of such . . . order for apprehension, harbours or conceals that person with the intention of preventing him from being apprehended, shall be punished in the manner following, that is to say, if the offence for which the person . . . is ordered to be apprehended is punishable with death, he shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ; . . . "

The section requires, if the offence is to be established, first, that there has been an order for the apprehension of a certain person as being guilty of an offence, secondly, knowledge by the accused party of the order, thirdly, the harbouring or concealing by the accused of the person with the intention of preventing him from being apprehended. The character of a warrant of arrest is defined in section 75 of the Code of Criminal Procedure, 1898, as follows :—

"Section 75.—(1) Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer, or in the case of a Bench of magistrates, by any member of such Bench ; and shall bear the seal of the Court.

(2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed."

The form prescribed for such a warrant is set out in Schedule V of the Code :

"Schedule V. Form II.—Warrant of Arrest.
(See Section 75.)

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To (name and designation of person
or persons who is or are to execute the warrant) whereas
of stands charged with the offence of
(state the offence), you are hereby directed to arrest the said
and to produce him before me. Herein fail
not.

Dated this day of 19 .
(Seal)."

A warrant or order of this character is a public document, and the conditions necessary to prove it are prescribed in sections 62, 64 and 65 of the Evidence Act, which are in the following terms :—

"62. Primary evidence means the document itself produced for the inspection of the Court.

64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

65. Secondary evidence may be given of the existence, condition or contents of a document in the following cases :—

(a) when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or, of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it ;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest ;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time ;

(d) when the original is of such a nature as not to be easily movable ;

(e) when the original is a public document within the meaning of section 74 ;

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(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence;

(g) when the originals consist of numerous accounts of other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

The ten persons charged together with the appellant were the pattagar or proprietor of an estate at Palayakottai, in the grounds of which the two suspected Valayans were eventually arrested; eight other persons who were servants of the pattagar; and another person said to have assisted the appellant. The appellant was arrested on 29th September 1940, the pattagar and the others arrested with him having been arrested on 23rd August 1940. The charge against the appellant was in due course framed by the Subdivisional First-class Magistrate of Coimbatore. It was dated the 18th January 1941 and was in the following terms:—

"That on or about the 13th day of July 1940, Soratta Valayar, son of Vettai Valayar, and Koora Valayar, son of Alaga Valayar, were ordered to be apprehended for an offence under section 302, by the Sub-Magistrate, Udumalpet, a public servant in the exercise of his lawful powers as such public servant, and that you knowing of the said order for apprehension on or about the 22nd day of August 1940, at Palayakottai harboured the said Soratta Valayar and Koora Valayar with the intention of preventing them from being apprehended and thereby committed an offence punishable under section 216 of the Indian Penal Code, and within my cognizance."

The charge referred to an order, though without giving any precise date for it. It specified the place and date of the offence and alleged that the accused

knew of the alleged order before the date of the alleged offence, which was said to have been committed on or about 22nd August 1940. It is clear that it was necessary for the prosecution to establish that before that date the order existed and was known to the appellant, and that the acts amounting to harbourage were done by the appellant with that knowledge. The prosecution sought to prove both that the warrant of arrest had been issued and that the appellant knew of its issue by means of two proclamations, one in respect of each of the two suspected Valayans. These were except for the name of the particular suspect in identical terms. It will be enough to quote one of them.

"In the Court of the Sub-Magistrate, Udumalpet.
R.C. XI of 1940 *Calendar Case*.

Whereas complaint has been made before me that Soratta Valayan, son of Sellappan alias Vettai Valayan, Nallur, Palladam Taluk, has committed (or is suspected to have committed) the offence of murder, punishable under section 302 of the Indian Penal Code and the warrant of arrest issued was returned with the endorsement that the said Soratta Valayan could not be found and whereas it has been shown to my satisfaction that the said Soratta Valayan has absconded (or is concealing himself to avoid the execution of the said warrant);

Proclamation is hereby made that the said Soratta Valayan is required to appear at Udumalpet Camp before this Court, to answer the said complaint on the 18th August 1940, at 10 a.m.

Dated this 5th day of July 1940.
(Signed) JOHN A. SAMUEL,
Sub-Magistrate."

There was no evidence at all in this case to show that the proclamations or either of them came to the knowledge of the appellant, or that he had ever visited Nallur, or that it was reasonable to assume that he had done so, or (apart from the evidence of his alleged association with the two Valayans) that he had ever associated with the type of person usually to be found in a Valayan village.

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It is obvious that there could not be proof that the appellant knew of the orders or warrants of arrest, unless or until the issue of the warrants had been proved. The proclamation was made under section 87 of the Code of Criminal Procedure, but there is in their Lordships' opinion, as will be explained later, nothing in that section which makes the proclamations legal evidence of the issue of the warrant or order of arrest, nor is there anything either in section 87 or in the facts of the case which makes it possible to impute to the appellant notice of the proclamations or their terms. This makes it unnecessary to comment on the curious fact that the date of the warrants of arrest given in the proclamations (5th July 1940) differs from the date given in the charge (on or about 13th July 1940). It will not be surprising that the same vagueness as to dates recurs in the evidence called to establish the "harbouring." There was some discussion as to what were the dates of the various occurrences spoken to by the evidence, but there is in their Lordships' opinion no evidence to show that there ever were the orders or warrants proof of which was essential to the prosecution's case, so that it will not be necessary to make any meticulous examination of the evidence. It is sufficiently clear in their Lordships' opinion that the Sessions Judge was right in his conclusion on this aspect of the case, which was in effect that even on the prosecution's evidence the appellant brought the Valayans to the pattagar's compound nearly four months before the proclamations were issued and was not said to have associated with them at that place later than six weeks before the proclamations. The Sessions Judge in his judgment pointed out that although the necessary warrants or orders had not been filed, he nevertheless felt justified in inferring from the terms of the proclamations that they had been issued. On this point their Lordships are unable to agree with the Sessions Judge for reasons to be stated later. But

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they do agree with his conclusion that, even assuming, as he did, that the warrants had in fact been issued, it had not been proved that the appellant knew of them. He went on to emphasise the difference between the positive word "knowing" used in section 216 and the words "has reason to believe" as used in section 212 of the Code as an alternative to "knows." He also referred to the definition of "has reason to believe" in section 26 of the Code as meaning "having sufficient cause to believe." In their Lordships' opinion the Sessions Judge was right in holding that the word "knowing" meant something more than and different from the words "had reason (or sufficient cause) to believe." The latter words might be satisfied even though no warrant had in fact been issued. "Knowing" however implies a fact which can be known. It does not necessarily import actual evidence of the senses, but it does import knowledge of something actual by means of authentic or authoritative information. The Sessions Judge also held that the proclamations could not be deemed to establish that the appellant "knew" of the issue of the warrants. He accordingly held that the appellant should be acquitted.

HORWILL J. on appeal reversed that decision. It is not necessary to examine his analysis of the evidence of fact. It is enough to say that their Lordships prefer in general that of the Sessions Judge. But he erroneously, as their Lordships think, treated the objection that the issue of the warrants had not been proved as a "technical" objection, and he rejected or disregarded the distinction between "knowing" and "having reason to believe." He read section 216 as if it contained the latter words. These two errors are, in their Lordships' opinion, sufficient to vitiate his judgment and the resulting conviction and sentence.

But their Lordships think that the appeal should be allowed on the single ground that there is no evidence

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that the warrants or orders were ever issued. Sections 62, 64 and 65 of the Evidence Act define the only evidence which the law permits in order to prove a warrant of arrest, and that is, under section 62 of the Act, production of the original order, or, under the conditions specified in section 65, of a certified copy. A warrant of arrest is a public document which affects the personal liberty of the subject. The statute as quoted above prescribes its form. It has to bear the appropriate signature and seal. Any laxity of proof might have serious consequences. It might for instance lead to error as to the identity of the person to be apprehended. Secondary evidence other than a certified copy would not necessarily or even obviously show that the statutory form had been complied with. But it is unnecessary to emphasise this point. The objection taken on the appellant's part is not technical but substantial. Mr. Roberts, the able Counsel for the Indian Government, did not in the end contest its validity. Indeed, he said that the Indian Government would not countenance any relaxation of the stringency in regard to warrants of arrest of sections 62 and 65.

It is sufficient to refer briefly to an argument based on sub-section 3 of section 87, the words of which are as follow:—

"(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day."

Their Lordships cannot read these words as overriding the requirements of the Evidence Act or as making the proclamation evidence that the warrants had been issued. The method of proving the warrants is not a requirement of the section which is merely dealing with the proclamation itself and the mode of publishing it and the like. Nor does section 87 expressly or by implication make the proclamation

equivalent to notice to the public of its contents, even to the inhabitants of the town or village where it is published.

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Some reference was made to the rule relating to concurrent findings of fact in the Court below. If that rule applied at all, it would involve concurrent findings in all the Courts below, whereas here there are such findings in only two out of three. But in a criminal appeal brought by special leave of His Majesty in Council, their Lordships are not concerned with formal rules, but only with the question whether there has been a miscarriage of justice, as in their opinion for the reasons given there has been in this case.

In their judgment the appeal should be allowed and the conviction set aside.

They will humbly so advise His Majesty.

Solicitors for appellant: *Douglas Grant & Dola.*

Solicitor for respondent: *Solicitor, India Office.*
v.v.c.

APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice Chandrasekhara Ayyar and Mr. Justice Shahabuddin.

IN RE A PLEADER, TIRUPPUR.*

1944,
September 11.

Legal Practitioners Act (XVIII of 1879), ss. 13 and 14—Pleader—Allowing suits to be dismissed for default—Negligence—Not professional misconduct—Pleader—Misappropriation of client's money—Acquittal by criminal Court on that charge—Decision of criminal Court to be accepted.

Where two pleaders were charged with "professional misconduct and grossly negligent and improper conduct" in that they had allowed certain suits in which they were instructed to appear to be dismissed for default without intimation to the party who engaged them and without his instructions,

* Referred Case No. 37 of 1944.

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held that the charge was merely one of negligence and the negligence did not amount to professional misconduct.

Where a pleader was charged with having withdrawn moneys from Court in cases in which he was appearing on behalf of a party and utilizing them for his own purposes, but it was found that he had been tried and acquitted in a criminal Court on a charge of misappropriation of those moneys,

held that the decision of the criminal Court must be accepted and the charge against the pleader should be dismissed.

NOTICE under sections 13 and 14 of the Legal Practitioners Act against a pleader in Tiruppur, to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court.

Advocate-General (P. V. Rajamannar) for the Crown.—[After stating the facts Counsel proceeded:] The second charge, which applied to both the respondents, was that they allowed certain suits in which they were appearing to be dismissed for default. It is a case of negligence for which they may be held liable in other proceedings, but it does not amount to professional misconduct. The first charge, which applied only to the first respondent, was that he had withdrawn moneys from Courts in cases in which he was appearing for his client and that he utilized the moneys for his own purposes. He had been charged in a criminal Court with misappropriation of those moneys; after trial, as he was found not guilty, he was acquitted. The High Court in appeal confirmed that judgment. The finding and decision of the criminal Court should be accepted.

K. Rajah Ayyar and C. D. Venkataratnam for first respondent.

S. S. Ramachandra Ayyar for second respondent.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—The first respondent is a pleader practising at Tiruppur. The second respondent is a pleader practising at Coimbatore. They were instructed by the Official Receiver of Coimbatore to institute certain legal proceedings on his behalf. The first respondent was concerned with proceedings at Tiruppur and the second respondent with cases at Coimbatore. They have been charged with professional misconduct. Two charges were framed. The first charge, which

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only applied to the first respondent, was to the effect that he had withdrawn moneys from Court in cases in which he was appearing on behalf of the Official Receiver, Coimbatore, and that he utilized them for his own purposes. The second charge which applied to both the respondents, was that they were guilty of "professional misconduct and grossly negligent and improper conduct" in that they had allowed various suits in which they were instructed to appear to be dismissed for default without intimation to the Official Receiver and without his instructions. The second charge is merely one of negligence, and negligence does not amount to professional misconduct. The District Munsif who held an inquiry gave a decision to this effect. With regard to the first charge it transpired in the course of the inquiry that the first respondent had been charged in a criminal Court with misappropriation of these moneys. He had been found not guilty, and on appeal this decision had been concurred in by this Court. As the first respondent has been acquitted in a criminal Court, this Court must accept the decision. There is a definite finding in regular proceedings that the first respondent has not misappropriated these moneys and that has to be accepted.

The result is that the second charge against both the respondents and likewise the first charge against the first respondent are dismissed.

v.v.c.

APPELLATE CIVIL—FULL BENCH.

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

ZAKKA PATTABHIRAMA REDDI (DEFENDANT),
APPELLANT,

v.

MENAKUR BALARAMI REDDI AND OTHERS (NIL),
RESPONDENTS.*

Madras Hindu Religious Endowments Act (II of 1927), sec. 9 (13)—“Trustee,” if includes a de facto trustee acting in derogation of the rights of de jure trustee—Trustee’s period of office expiring—Granting of lease of trust property after lawful trustees were appointed—Whether such de facto trustee a “landholder” under Madras Estates Land Act (I of 1908), sec. 3 (5)—Lessee, if can claim occupancy rights under Madras Estates Land Act (1908), sec. 6 (as amended by the Third Amendment Act of 1936).

The trustees appointed under a scheme settled by a Court continued to be in management of a non-excepted temple even after the expiry of their term and refused to hand over possession to the trustees appointed under the provisions of the Madras Hindu Religious Endowments Act (II of 1927) which came into force subsequently. In the course of such management after the expiry of their term, they purported to grant in 1933 a lease of a shrotriem village belonging to the temple for a period of five years. In a suit filed in 1938 by the lawfully appointed trustees for the recovery of possession of the village the lessee contended that, as he was in possession of the property on 30th June 1934, he had acquired a permanent right of occupancy in the lands in the village by reason of section 6 of the Madras Estates Land Act, 1908, as amended by the Madras Estates Land (Third Amendment) Act, 1936.

Held: The plaintiffs-trustees were entitled to a decree for possession against the lessee. The persons by whom the lessee was let into possession did not come within the definition of “trustee” in section 9 (13) of the Madras Hindu Religious Endowments Act. They were wrongdoers and could not be allowed to deal with the property in defiance of the rights of

the true owners. It was not a case where *de facto* trustees in the absence of *de jure* trustees took action with regard to the property of the trust in the interests of the trust, but where persons who having no manner of right to be in possession of trust property wrongfully kept the lawful trustees out of possession and purported to grant rights in the trust property to a third person. The lessors did not come within the definition of “landholder” in section 3 (5) of the Madras Estates Land Act as persons entitled to collect the rent.

Attakoya v. Kunhikoya(1) referred to.

(ii) Even if it was accepted for the purposes of the case that the trustees appointed under the scheme were *de facto* trustees in 1933, it could not be in the interests of the trust for them to grant a lease of a large block of trust property for such a long period as five years to one person, especially when there were proposals before the Legislative Council to alter the law relating to inam villages.

APPEAL against the decree of the District Court of Nellore in Appeal Suit No. 72 of 1941 preferred against the decree of the Court of the Subordinate Judge of Nellore in Original Suit No. 72 of 1938.

P. Chandra Reddy for appellant.—The trustees appointed under the scheme were *de facto* trustees. Though there were *de jure* trustees, trustees appointed by the Temple Committee and by the Madras Hindu Religious Endowments Board, the trustees appointed under the scheme did not hand over possession of the temple properties, and in fact were acting as trustees. On 17th July 1933, as *de facto* trustees they granted a lease of the shrotriem village of Jonnavada belonging to the temple for Rs. 2,000 per year to the first defendant, who is the appellant here. They did it in the interests of the institution. As trustees they were bound to lease the trust property. If they had not leased it, the temple would have lost the income and the trustees would have been liable for not discharging their duties. The first defendant who obtained the lease of the village, as he was in possession of the property on 30th June 1934, had obtained a permanent right of occupancy by reason of section 6 of the Madras Estates Land Act, as amended in 1936. The definition of “trustee” in section 9 (13) of the Madras Hindu Religious Endowments Act (II of 1927) includes any person who is liable as if he were a trustee. Under

(1) I.L.R. [1940] Mad. 50.

* Second Appeal No. 342 of 1943.

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section 40 of that Act, the trustee should lease the trust property; and by reason of the definition in section 9 (13), the trustee in section 40 includes also a *de facto* trustee. Section 3, clause 5 of the Madras Estates Land Act defines "landholder". The lessors of the temple property come within that definition as persons entitled to collect rents by virtue "of any provision of law," the provision of law being section 40 of the Madras Hindu Religious Endowments Act. The *de facto* trustees could alienate the temple property. They acted *bona fide* and for the benefit of the trust. The first defendant who obtained the lease is entitled to claim an occupancy right by virtue of section 6 of the Madras Estates Land Act. [*Kasim Saiba v. Sudhindra Thirtha Swami*(1) and *Sheo Shankar Gir v. Ram Shewak Chowdhri*(2) referred to.]

Advocate-General (P. V. Rajamannar) and K. Subba Rao for respondents.—Trustees had been lawfully appointed by the Temple Committee and the Hindu Religious Endowments Board. The trustees appointed under the scheme had no right to keep the *de jure* trustees out of possession of the trust property. The definition of "trustee" in the Madras Hindu Religious Endowments Act cannot include such *de facto* trustees as act in fraud of the rights of the lawful trustees; otherwise it would lead to the impossible position that the right of the *de jure* trustees could be defeated by *de facto* trustees who in law are mere trespassers. The definition of "landholder" in the Madras Estates Land Act is subject to there being nothing repugnant in the subject or context. [*Attakoya v. Kunhikoya*(3) referred to]. In the present case it would be contrary to the scheme of the Madras Hindu Religious Endowments Act to treat the lessors of the temple property as "trustees." They had no right to lease the property when there were lawfully appointed trustees. Further the lease granted by the *de facto* trustees could not be said to be in the interests of the temple. A large block of land had been given on lease to one person for five years especially when there were proposals before the Legislative Council to alter the law relating to inam villages. In any view the right to claim possession by the appellant is not sustainable.

Our. adv. vult.

The JUDGMENT of the Court was delivered by
LEACH C.J.—In *Vedakannu Nadar v. Ranganatha*

(1) (1895) I.L.R. 18 Mad. 350.

(2) (1896) I.L.R. 24 Cal. 77.

(3) I.L.R. [1940] Mad. 80.

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Mudaliar(1) a Bench of this Court held that a *de facto* trustee is in no better position than a trustee *de son tort* and cannot maintain an action on behalf of the trust, even should it be for the benefit of the trust. This opinion is said to be in conflict with the judgment of this Court in *Kasim Saiba v. Sudhindra Thirtha Swami*(2) and of the Calcutta High Court in *Sheo Shankar Gir v. Ram Shewak Chowdhri*(3). The appeal has been placed before a Full Bench as CHANDRA-SEKHARA AYYAR J., before whom it came in the first instance, was of opinion that it involved consideration of these decisions. When the facts of the case are fully appreciated it is apparent that the appeal does not call for such a discussion.

The shrotriem village of Jonnavada in the Nellore District belongs to two deities, Sri Mallikarjuna Swami and Sri Kamakshi Thayi. At the Inam Settlement the ownership of the village by these deities was recognised. In original Suit No. 52 of 1917 of the Court of the Subordinate Judge, Nellore, a scheme was settled for the management of the temple (which is a non-excepted temple) and of its endowments. Five trustees were appointed for a period of five years and the scheme provided that the Court should appoint new trustees every five years. The period of office of the trustees first appointed expired on 1st May 1929. On 3rd January 1929 one of the three trustees who were then functioning induced the Subordinate Judge to pass this order:—

"Under section 75 of Act II of 1927 the scheme in force now is to be deemed as one settled under the Act and as it does not provide for appointment of trustees by the Temple Committee, section 51 (2) has no application. If the scheme requires modification so as to bring it into conformity with the provisions of the Act, the course to be adopted is that provided for under section 57 (4). Pending such modification the three trustees will have to carry on the management of the temple."

(1) (1938) 2 M.L.J. 663.

(2) (1895) I.L.R. 18 Mad. 350.

(3) (1896) I.L.R. 24 Cal. 77.

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The Court had no power to give this direction but, even if it had, the powers purported to be conferred upon the three trustees expired on 13th May 1930, when the District Temple Committee appointed new trustees under the authority conferred by section 51 of the Madras Hindu Religious Endowments Act (Act II of 1927). The trustees who were appointed under the scheme had certainly no right to continue in management of the trust after the appointments which were made by the District Temple Committee on 13th May 1930, but they refused to hand over possession to the lawfully appointed trustees and continued to hold themselves out as the trustees of the temple. On 8th August 1935 the Madras Hindu Religious Endowments Board, as it had the power to do, appointed a new board of trustees. The members consisted of the two plaintiffs and the second defendant in the suit which has given rise to this appeal. Even then the trustees appointed under the scheme refused to give possession of the trust properties to the trustees appointed by the Board who were compelled to apply to the District Court under section 78 of the Act for an order for possession. The order asked for was granted and enforced.

On 17th July 1933 the trustees appointed under the scheme purported to grant to the first defendant a lease of the village of Jonnavada for a period of five years. At that time they were in unlawful possession of the property, as the District Temple Committee had exercised its powers under section 51 of the Act. When the plaintiffs were appointed trustees by the Board and had taken action under section 78 they sought possession of the property from the first defendant. He claimed that, as he was in possession of the property on 30th June 1934, he had obtained a permanent right of occupancy by reason of section 6 of the Madras Estates Land Act, 1908, as amended by the Madras Estates Land (Third Amendment)

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Act, 1936. The result was that the plaintiffs were compelled to file the present suit in the Court of the Subordinate Judge, Nellore. The lands covered by the lease comprised 17.66 acres of wet lands, 61.63 acres of dry lands and 321.17 acres of pasture lands. The Subordinate Judge held that the first defendant had acquired a permanent right of occupancy in the wet and dry lands, but not in the pasture lands in respect of which he granted the plaintiffs a decree. The plaintiffs appealed to the District Judge, who held that the Subordinate Judge had erred in refusing them a decree in respect of the dry and wet lands. This appeal is from the decree passed in the appeal to the District Judge.

It will be seen that this is not a case where *de facto* trustees in the absence of *de jure* trustees take action with regard to the property of the trust in the interest of the trust, but where persons who have no manner of right to be in possession of trust property wrongfully keep the lawful trustees out of possession and purport to grant rights in the trust property to a third person. The learned Advocate for the appellant says that, although the lessors had no right to keep the *de jure* trustees out of possession, they were in fact acting as trustees, and the definition of "trustee" given in section 9 (13) of the Madras Hindu Religious Endowments Act includes any person who is liable as if he were a trustee. Section 40 of that Act says that the trustee of a religious endowment is bound to administer its affairs and to apply the funds and properties of the endowment in accordance with the terms of the trust, the usage of the institution and all lawful directions which a competent authority may issue in respect thereof, and as carefully as a man of ordinary prudence would deal with his own affairs, funds or properties. It is argued that the word "trustee" in this section must, by reason of the definition, be deemed to include *de facto* trustees.

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Section 3 (5) of the Madras Estates Land Act defines "landholder" as meaning a person owning an estate or part thereof and as including a person entitled to collect the rents of the whole or any portion of the estate by virtue of a transfer from the owner or his predecessor-in-title or of an order of a competent Court or "of any provision of law." It is admitted on behalf of the appellant that the trustees appointed under the scheme could not, after the five years' period of office had expired, be deemed to be the owners of the estate, but it is said that the words "or of any provision of law" attract the provisions of section 40 of the Madras Hindu Religious Endowments Act, read with the definition of "trustee" in that Act, and consequently the lessors must be deemed to come within the definition of "landholder" in the Madras Estates Land Act as persons entitled to collect the rent.

We regard this argument as entirely fallacious. The definition of "trustee" in the Madras Hindu Religious Endowments Act cannot embrace persons who are purporting to act as trustees in fraud of the rights of the lawful trustees. If the argument advanced on behalf of the appellant were to be accepted it would mean that *de jure* trustees could be defeated by persons who are in law mere trespassers.

In *Attukoya v. Kunhikoya*(1) the appellants, who were landholders within the definition of section 3 (9) of the Madras Local Boards Act, also came within the definition of "tenant." It was pointed out there that the definition of "landholder" is subject to there being nothing repugnant in the subject or context, and to treat the appellants both as "landholders" and "tenants" would not only be contrary to the scheme of the Act, but would be impossible. It would certainly be contrary to the scheme of the Madras Hindu Religious Endowments Act and lead to an impossible position to hold that the persons by whom

(1) I.L.R. [1940] Mad. 50.

the first defendant was let into possession come within the definition of "trustee." They are wrongdoers and cannot be allowed to deal with the property in defiance of the rights of the true owners.

Accepting for the purposes of this case that a *de facto* trustee can alienate trust property when he acts *bona fide* and for the benefit of the trust and that the trustees appointed under the scheme were in 1933 entitled to the designation of *de facto* trustees, the position of the first defendant would not be improved. It could not be in the interests of the trust for *de facto* trustees to grant a lease of a large block of trust property for such a long period as five years to one person, especially when there were proposals before the Legislative Council to alter the law relating to inam villages.

For the reasons given, this appeal is dismissed with costs.

V.V.C.

APPELLATE CIVIL.

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

KAZA SIVARAMAKRISHNA RAO (FIRST
RESPONDENT), APPELLANT,

v.

JONNALAGADDA SEETHARAMAYYA AND EIGHT
OTHERS (APPELLANT AND RESPONDENTS 2 TO 9),
RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), ss. 38, 39 and 42—
Execution—Jurisdiction—Court passing mortgage decree
over properties within and outside its jurisdiction—Decree
transferred to another Court for execution—Transferee Court
entitled to sell properties outside its jurisdiction also.

Where a Court passes a mortgage decree in respect of
properties lying within and without its jurisdiction and

* Letters Patent Appeal No. 61 of 1943.

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transfers the decree for execution to another Court, the transferee Court has the same powers to execute the decree as the Court which passes it and can sell the properties lying outside the boundaries of its jurisdiction as well as those lying within them.

Abdul Hafiz Saheb v. Abdul Sukkur Saheb(1) explained and followed.

APPEAL under clause 15 of the Letters Patent against the judgment and order of the High Court, dated 27th July 1943 and passed in Appeal Against Order No. 510 of 1942 preferred against the order of the District Court of Kistna at Chilakalapudi, dated 21st July 1942 and made in Civil Miscellaneous Petition No. 54 of 1942 in Execution Petition No. 68 of 1941 in Original Suit No. 59 of 1936, Sub-Court, Masulipatam.

P. Satyanarayana Rao for appellant.

P. Sivaramakrishnaiya for respondents.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—This letters patent appeal raises a question with regard to the powers conferred by section 42 of the Code of Civil Procedure on a Court to which a decree has been transferred for purposes of execution. In order to understand what is involved we must set out the facts in this case.

On 31st May 1925 the third respondent mortgaged a house belonging to him in Bezwada to the Co-operative Building Society of Bezwada to secure a sum of Rs. 4,000. On 20th September 1926 the third respondent and his sons (the fourth and fifth respondents) created a second mortgage on this property in favour of the second respondent and by the same deed a first mortgage on other properties consisting of agricultural lands. Subsequently the building society advanced to the third respondent a further sum of Rs. 800 in respect of which it obtained a third

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charge on the house. The third respondent failed to repay to the building society the moneys advanced by it to him and on 20th December 1933 the building society obtained an award against him. This was executed on 16th December 1934 and at the auction the property was purchased by the appellant. In the meantime the second respondent instituted a suit in the District Court of Kistna to enforce the mortgage which the third respondent and his sons had created in his favour on 20th September 1926. The District Court had jurisdiction by reason of the fact that the lands in respect of which the second respondent had obtained a first mortgage were situate within the territorial limits of the District Court's jurisdiction. The suit remained on the file of the District Court until 16th November 1936, when it was transferred to the Court of the Subordinate Judge of Masulipatam. By that time the second respondent had assigned the mortgage to the first respondent, who became the second plaintiff in the suit.

On 16th August 1938 the first respondent obtained from the Subordinate Judge a preliminary decree and on 13th December 1940 a final decree. On 19th March 1941 the decree of the Court of the Subordinate Judge was transferred to the District Court of Kistna for execution. As the decree-holder had not obtained an encumbrance certificate in respect of the agricultural lands and as the Court refused to grant him further time for its production, the application for execution was proceeded with only in respect of the house in Bezwada, the sale of which was fixed for 2nd February 1942. The appellant became aware of the course of events in January and on the 26th of that month he filed a petition asking for an order directing the decree-holder to proceed first in execution against the lands in the Kistna District. This application was, however, not pressed and was formally dismissed on the day fixed for the sale of the house in Bezwada.

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The first respondent purchased the property at the auction.

On 4th March 1942 the appellant filed an application under Order XXI, rule 90, for an order setting aside the sale. He advanced two grounds. The first was that the District Court had no jurisdiction to execute the decree so far as the Bezwada property was concerned. The second ground was that the proclamation of sale had not disclosed the earlier mortgage in favour of the building society. The first respondent contended that the application did not lie because the appellant, by filing the application of the 26th January 1942, had submitted to the jurisdiction of the District Court. All these questions were answered in favour of the appellant. The first respondent appealed to this Court. The appeal was heard by HORWILL J., who was of the opinion that the District Court had jurisdiction to sell the Bezwada property and that the irregularity in not mentioning in the sale proclamation the earlier mortgage in favour of the building society had not resulted in substantial loss to the appellant. He agreed, however, with the District Judge that the petition of the 26th January 1942 did not imply any waiver of the objection to jurisdiction. As the learned Judge was of the opinion that the District Court had jurisdiction to sell the Bezwada property and that the appellant had not suffered any real loss as the result of the omission in the sale proclamation, he allowed the appeal. The present appeal is from this decision.

As we agree with HORWILL J. that the District Court had jurisdiction to sell the house in Bezwada and that the appellant suffered no loss as the result of the irregularity in the publication of the sale proclamation, it is unnecessary for us to discuss the question of waiver. We may mention in passing that no argument has been addressed to us on the question of material irregularity. The only substantial question

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is whether the learned Judge was right in holding that the District Court had all the powers of the trial Court in the matter of execution.

Section 38 of the Code of Civil Procedure states that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. Section 39 contains provisions with regard to the transfer of decrees for purposes of execution. Sub-section 1 (c) says that the Court which has passed a decree may on the application of the decree-holder send it for execution to another Court, if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it. Section 42 provides that the Court executing a decree transferred to it for execution shall have the same powers in executing it as if it had been passed by itself. HORWILL J. held that, as section 42 gives the Court to which a decree is transferred for execution the same powers for this purpose as the Court which passed it had and as the trial Court had the power to sell in execution the Bezwada property, notwithstanding that it was outside its jurisdiction, the District Court also had the power to sell this property.

We agree with this opinion. It is now well-settled law in this province that a Court which passes a mortgage decree in respect of properties lying within and without its jurisdiction has the power to sell in execution all the properties covered by the decree. That being the law, the District Court by reason of section 42 had the same power as the Court of the Subordinate Judge of Masulipatam had of selling the house in Bezwada.

In the course of the arguments before HORWILL J. several cases were cited, but only one of them has real application. That case is *Abdul Hafiz Saheb v. Abdul*

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Sukkur Saheb(1) which was decided by VARADACHARIAR J., who discussed the powers conferred by section 42 on the Court to which a decree is transferred for execution. The facts there were these. A money decree was passed by the Court of Small Causes at Trichinopoly. It was transferred for execution to the Court of the District Munsif of Trichinopoly as one of the defendants had immovable property within the jurisdiction of that Court. After the transfer, an application was made to the District Munsif to execute the decree by ordering the arrest of the second defendant. It was contended that, inasmuch as the object for which the decree had been transferred was the attachment of the immovable properties of the first defendant, the District Munsif could not entertain a petition for the arrest of the second defendant. It was held that the District Munsif had power to execute the decree in this way. Having referred to section 38, Order XXI, rule 10, and section 42, VARADACHARIAR J. said that unless in the order of transfer there was express limitation of the purpose for which the decree was transferred—assuming that such limitation could control the provisions of the Code as to jurisdiction—the natural effect of these statutory provisions was to impose no limitation on the Court to which a decree had been transferred for execution. We agree. We can see nothing in section 42 or in any part of the Code of Civil Procedure which restricts in the mode of execution the power of the Court to which a decree has been transferred for execution. This means that when a mortgage decree has been transferred to a Court for execution it can sell the properties lying outside the boundaries of its jurisdiction as well as those lying within them.

The appeal will be dismissed with costs.

N.S.

(1) (1937) 2 M.L.J. 602.

APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and
Mr. Justice Shahabuddin.*

THE GOVERNMENT OF THE PROVINCE OF MADRAS
THROUGH THE COLLECTOR OF RAMNAD AT MADURA
(FIRST DEFENDANT), APPELLANT,

1944,
March 23.

v.

AL. AR. RM. VELLAYAN CHETTIAR AND TWO OTHERS
(PLAINTIFFS AND SECOND DEFENDANT), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), sec. 80—Provisions
mandatory—Waiver of—Not valid—Notice of suit to
Government by one alone of two co-plaintiffs—Invalid.*

Under section 80 of the Code of Civil Procedure, a notice issued by one of two co-plaintiffs, who are joint proprietors of a village, against the Provincial Government in respect of a suit for setting aside the decision of a Survey Officer on a boundary dispute between the parties is not valid. Section 80 requires the notice to state the name of the plaintiff and, when there are more than one plaintiff, the names of all must be given.

Venkata Rangiah v. Secretary of State(1) followed.

Secretary of State for India in Council v. Perumal Pillai(2) dissented from.

The language of section 80 is in the imperative and its requirements cannot be waived.

Bhagchand Dagadusa v. Secretary of State for India(3) and *Gaekwar Baroda State Railway v. Hafiz Habib-ul-Haq*(4) applied and followed.

APPEAL against the decree of the Court of the Subordinate Judge of Devakottai in Original Suit No. 204 of 1939.

Government Pleader (K. Kuttikerishna Menon) for appellant.

V. Ramaswami Ayyar for respondents 1 and 2.

K. Rajah Ayyar for third respondent.

* Appeal No. 392 of 1942.

(1) (1935) 41 L.W. 591.

(2) (1900) I.L.R. 24 Mad. 279.

(3) (1927) I.L.R. 51 Bom. 725 (P.O.).

(4) I.L.R. [1938] All. 601 (P.O.).

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The JUDGMENT of the Court was delivered by LEACH C.J.—The first and second respondents are the proprietors of the village of Karaikudi. They instituted a suit in the Court of the District Munsif of Devakottai against the Provincial Government and the Municipal Council of Karaikudi for a decree setting aside a decision of a Survey Officer under the Madras Survey and Boundaries Act, 1923. Section 14 of the Act gives an aggrieved party the right of bringing a suit to challenge a decision of the Survey Officer, provided he does so within three years from the date of the notification of the order. The suit was filed on 13th September 1936, which was within the time allowed, and the plaintiffs averred that they had given to the defendants the notice required by law. The defendants filed separate written statements on 3rd February 1937, but no objection was taken by them to the validity of the notice. Before the District Munsif a question arose with regard to the value of the subject-matter of the suit and it was eventually decided that the value exceeded that of the pecuniary jurisdiction of the District Munsif. Consequently, on 30th November 1938, the plaint was returned to the plaintiffs for presentation to the Court of the Subordinate Judge of Devakottai. It was presented to the Subordinate Judge's Court on 13th September 1939. On 23rd March 1940 the municipal council filed a fresh written statement and their example was followed by the Provincial Government on the 29th of that month. In the new written statements objection was taken to the validity of the notice. A preliminary issue was framed on this question on 12th November 1940 and was decided by the Subordinate Judge in favour of the plaintiffs. The case was then tried on the merits and resulted in the order of the Survey Officer being set aside. The appeal has been filed by the Provincial Government against this decree. The municipal council, as the third respondent, supports the appellant.

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The Provincial Government says that the notice which it received did not comply with the requirements of section 80 as it was only given on behalf of one of the proprietors, whereas there are admittedly two proprietors. The Subordinate Judge held that it sufficiently indicated that there were two proprietors; but here he clearly erred and the learned Counsel for the plaintiffs-respondents rightly has made no attempt to support the judgment on this ground. The Subordinate Judge also held that the defendants had waived their right to question the notice and that, in any event, they were estopped by their conduct from saying that it was bad. The plaintiffs-respondents maintain that here the Subordinate Judge was right.

Section 80 of the Code of Civil Procedure says that no suit shall be instituted against the Crown or against a public officer in respect of any act purporting to be done by such officer in his official capacity, until the expiry of two months next after notice in writing has been given of the claim. The section requires that the notice shall state the cause of action, the name, description and place of residence of the plaintiff and the relief that he claims and that the plaint shall contain a statement that the notice has been served. Section 350 of the Madras District Municipalities Act, 1920, contains similar provisions with regard to suits against municipal councils. Before the decision of the Privy Council in *Bhagchand Dagadusa v. Secretary of State for India*(1) there was some divergence of opinion in India with regard to the interpretation of section 80 of the Code of Civil Procedure; but their Lordships' decision in that case set all doubt at rest. They said that the section is express, explicit and mandatory, and it admits of no implications or exceptions. They added that it imposes a statutory and unqualified obligation upon the Court.

(1) (1927) I.L.R. 51 Bom. 725 (P.C.).

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Before dealing with the question of waiver and estoppel, we may mention that, in the course of his arguments on behalf of the plaintiffs-respondents, Mr. V. Ramaswami Ayyar suggested that notice given on behalf of one of the plaintiffs was a sufficient compliance with the section, and in this connection he referred to the decision of this Court in *Secretary of State for India in Council v. Perumal Pillai*(1), where it was held that a notice was not invalid because it only proceeded from two out of three joint owners. That case was decided long before the judgment of the Privy Council in *Bhagchand Dagadusa v. Secretary of State for India*(2). The question has, however, been raised in this Court since the pronouncement of their Lordships. In *Appa Rao v. Secretary of State for India*(3) SUNDARAM CHETTY J. held that, where the notice had been given by only one of two plaintiffs who had instituted a suit against the Secretary of State, it was not a compliance with the section; and his judgment was upheld by a Division Bench in an appeal under clause 15 of the Letters Patent; *Venkata Rangiah v. Secretary of State*(4). That judgment is binding on us, but we may add that we find ourselves in complete agreement with it. As section 80 requires the notice to state the name of the plaintiff, the names of all when there are more than one must be given.

Support for the argument based on waiver and estoppel is to be found in the decision of the Bombay High Court in *Hirachand Himatlal v. Kashinath Thakurji*(5), in that of the Calcutta High Court in *Purna Chandra Sarkar v. Radharani Dassya*(6), and in that of the Patna High Court in *Ramnarain v. Ram Kishun*(7). But we consider that the learned Judges who decided those cases had not sufficient regard to the

(1) (1900) I.L.R. 24 Mad. 279. (2) (1927) I.L.R. 51 Bom. 725 (P.C.).
(3) (1930) I.L.R. 54 Mad. 416. (4) (1935) 41 L.W. 591.
(5) (1942) 44 Bom. L.R. 727. (6) (1930) 53 C.L.J. 31.
(7) A.I.R. 1934 Pat. 354.

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wording of section 80 and to its interpretation by the Judicial Committee in *Bhagchand Dagadusa v. Secretary of State for India*(1). In *Hirachand Himatlal v. Kashinath Thakurji*(2) a Division Bench of the Bombay High Court held that delay in objecting to the notice under section 80, even of long duration, would not be a ground in itself for holding that the notice had been waived, but if the plaintiff were prejudiced by the delay it would be another matter and in such circumstances the defendant must be deemed to have waived his right to notice. In that case the objection to the notice had been taken at such late stage that a fresh suit would have been time-barred. It was in these circumstances that the Court considered that the doctrine of waiver operated. The decision of the Calcutta High Court in *Purna Chandra Sarkar v. Radharani Dassya*(3) was to the same effect and based on similar facts. The reasoning of the Patna High Court in *Ramnarain v. Ram Kishun*(4) was also the same.

Section 80 says expressly that no suit shall be instituted until the expiration of the two months after the notice. Therefore, if the notice given is defective, as is the case here, the section has not been complied with, which means that the Court has no jurisdiction to try the action. The language of the section is in the imperative and consequently there can be no question of waiver and no question of estoppel. It is very desirable, of course, that the defendant should take an objection at the earliest possible moment, but failure to do so will not deprive the section of its force. If the section works hardship it is for the Legislature to remedy it, as the Privy Council has pointed out. Support for our opinion is to be found in the judgment of VENKATARAMANA RAO J. in *Marina Ammayi v.*

(1) (1927) I.L.R. 51 Bom. 725 (P.C.). (2) (1942) 44 Bom. L.R. 727.
(3) (1930) 53 C.L.J. 31. (4) A.I.R. 1934 Pat. 354.

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Secretary of State for India in Council(1), where it was held that it was not open to a Collector to waive a plea as to want of proper notice under section 80. In that case the suit was filed before the expiration of the two months. The objection was not taken until the trial had commenced. The learned Judge said that, having regard to the imperative nature of the provisions of the statute, it was not open to the Collector to waive the requirements of the section and referred to the decision of the Privy Council in *Gackwar Baroda State Railway v. Hafiz Habib-ul-Haq*(2). In that case a suit had been filed against the Gackwar Baroda State Railway, through the manager and engineer-in-chief of the undertaking. That official appeared and pleaded that the suit as framed was not maintainable as the railway was owned by the Maharaja of Gackwar of Baroda, a sovereign prince, and was managed by his Government. It was pleaded that the privilege under sections 86 and 87 of the Code of Civil Procedure had been waived. Their Lordships held that there could be no waiver in such a case. The provisions of sections 86 and 87 were imperative and, having regard to the public purpose which they serve, they could not be waived. The same reasoning applies here.

As the appeal must be allowed on the ground that section 80 of the Code of Civil Procedure was not complied with, it is not necessary for us to discuss the merits. The appellant is entitled to costs here and below and they will be paid by the plaintiffs-respondents.

N.S.

(1) (1941) 1 M.L.J. 328.

(2) I.L.R. [1938] All. 801 (P.C.).

APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and
Mr. Justice Shahabuddin.*

G. J. SUBBARAYALU AND ANOTHER (DEFENDANTS),
APPELLANTS,

v.

A. Rm. A. N. ANNAMALAI CHETTIAR (PLAINTIFF),
RESPONDENT.*

Contract—Construction—Purchase of cinema projector—Not hire-purchase—Failure to pay instalments—Breach—Forfeiture of deposit—Relief against—Conditions for—Burden of proof—Seller's right to recover projector together with hire at agreed rate—Decree for market value of projector as on date of judgment and hire up to that date—Indian Contract Act (IX of 1872), ss. 84, 73 and 74.

The proprietors of a cinematograph theatre agreed to purchase a cinematograph projector and its accessories for a sum of Rs. 4,500 on the following conditions:—(i) The buyers were to pay as an advance the sum of Rs. 1,000 which was to be treated as security for the due performance by them of the contract. In the event of default on their part, the Rs. 1,000 was to be forfeited. (ii) The balance of the purchase consideration, Rs. 3,500, was to be paid in ten equal monthly instalments commencing on 30th September 1941. (iii) If the buyers defaulted, the vendor had the option to adopt one of two courses. He could forfeit the advance, insist on the return of the machine and its accessories and charge rent at the rate of Rs. 350 per month for every month the articles remained in the hands of the buyers. In the alternative, the vendor could demand immediate payment of the entire balance of the purchase consideration with interest at six per cent per annum. (iv) The property in the machine was not to pass to the buyers until they had paid the purchase price in full.

The buyers failed to pay the instalments in accordance with the terms of the contract and the vendor, after giving notice to the buyers demanding the return of the projector and its accessories and the payment of the amount due for hire, filed a suit against them for the recovery of possession of the machine and its accessories and for other reliefs.

* Original Side Appeal No. 5 of 1943.

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Held : (i) The contract was not one of hire-purchase and the vendor was entitled to forfeit the deposit and to insist on the return of the projector with hire at the rate agreed upon.

Lee v. Butler(1) and *Auto Supply Co., Ltd. v. Raghunatha Chetty*(2) followed.

(ii) The burden of showing a ground for relief against forfeiture was on the buyers and they had failed to discharge it.

Natesa Aiyar v. Appavu Padayachi(3) explained.

Manian Patter v. The Madras Railway Company by its Agent and Manager(4) and *Abbakke Heggadhi v. Kinhiamma Shetty*(5) referred to.

(iii) The buyers were liable to pay the value of the machine not as on the date of the contract but the present value only, that is, the value as on the date of the judgment together with hire at the agreed rate up to the date of the judgment.

APPEAL from the judgment and decree of BELL J., dated 11th January 1943 and passed in the exercise of the ordinary original civil jurisdiction of the High Court in Civil Suit No. 40 of 1942.

R. Gopalaswami Ayyangar and *S. Sankara Ayyar* for appellants.

Roland Braddell and *R. Rangaswami Ayyangar* for respondent.

LEACH C.J.—The JUDGMENT of the Court was delivered by LEACH C.J.—The appellants are proprietors of a cinematograph theatre at Madura. On 21st August 1941 they agreed to buy from the respondent, and the respondent agreed to sell to them, a cinematograph projector and its accessories for the sum of Rs. 4,500 on conditions set out in writing. The conditions were these :

(i) The buyers were to pay as an advance the sum of Rs. 1,000, which was to be treated as security for the due performance by them of the contract. In the event of default on their part, the Rs. 1,000 was to be forfeited.

(1) [1893] 2 Q.B. 318.

(3) (1913) I.L.R. 38 Mad. 178 (F.B.).

(2) (1929) I.L.R. 52 Mad. 829.

(4) (1905) I.L.R. 29 Mad. 118.

(5) (1906) I.L.R. 29 Mad. 491.

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(ii) The balance of the purchase consideration, Rs. 3,500, was to be paid in ten equal monthly instalments commencing on 30th of September 1941.

(iii) If the buyers defaulted, the vendor had the option to adopt one of two courses. He could forfeit the advance, insist on the return of the machine and its accessories and charge rent therefor at the rate of Rs. 350 per month for every month the articles remained in the hands of the buyers. In the alternative, the vendor could demand immediate payment of the entire balance of the purchase consideration with interest at six per cent per annum.

(iv) The property in the machine was not to pass to the buyers until they had paid the purchase price in full.

On 30th September 1941 the appellants paid Rs. 350 but in October only Rs. 50 and in November only Rs. 200. The sum of Rs. 350 was tendered and accepted without prejudice after the suit had been filed. The fact that it was accepted without prejudice was not stated in the written statement, as it ought to have been. As the appellants were in default, on 26th December 1941 the respondent through his Advocate wrote to the appellants demanding possession of the projector. This letter was not delivered. We have no doubt that the first appellant himself was responsible for the non-delivery. It was tendered at his Madura address, at Mysore, at Madras and again at Madura, as the postmarks show. On 18th February 1942 the respondent's Advocate wrote another letter demanding possession of the machine and payment of the amount due for hire. This letter was no doubt delivered, but it was not answered. The appellants allege that they wrote to the respondent on 20th February 1942 and again on the 25th February, but the respondent denies that these letters were ever received. The letter of 20th February 1942 makes no reference to the respondent's letter of the 18th

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of that month, but it contains the statement that the amount due in respect of the projector was Rs. 685-4-9. The letter of 25th February 1942 makes no reference to the respondent's letter of the 18th. The respondent's case is that these letters were never sent and alleged copies have been put in with the object of strengthening the appellants' case. We consider that this criticism is well founded. The suit was filed on 2nd March 1942. In their written statement the appellants pleaded that they had paid Rs. 1,700 on 12th December 1941 and that only Rs. 313 was due at the date of suit.

The action was tried by BELL J., who accepted the respondent's version of the facts. The learned Judge held that (i) the respondent was entitled to forfeit the deposit of Rs. 1,000 and to recover possession of the projector; (ii) the appellants were liable in a sum of Rs. 1,500 for hire of the projector at the rate of Rs. 350 per month up to the date of the plaint and for the further sum of Rs. 3,150 as hire from the date of the institution of the suit to the date of the judgment; and (iii) the appellants were to pay the further sum of Rs. 4,500 as the value of the machine, unless they returned it to the respondent within fourteen days.

We agree with the learned Judge's findings on the facts. It is impossible to believe that the appellants paid the Rs. 1,700 on 12th December 1941 as alleged by them. They admit that they did not get a receipt and the untrustworthy nature of their testimony is to be gathered from the statement that the machine was defective and incapable of producing sound. If it had been in this condition they would not have retained it and they themselves would have repudiated the contract.

The more difficult question is whether the respondent is entitled to forfeit the deposit and to insist on the return of the projector with hire at the rate

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agreed upon. The respondent admits that the contract does not constitute one of hire-purchase and that the case falls within *Lee v. Butler*(1). That this is so cannot really be doubted. In *Auto Supply Co., Ltd., v. Raghunatha Chetty*(2) this Court pointed out that an essential feature of a contract for hire-purchase was the option given to the prospective purchaser to terminate the contract and return the chattel. The option is absent in the present case.

This Court has accepted the proposition that, when the circumstances warrant, it can grant relief against forfeiture; see *Manian Patter v. The Madras Railway Company by its Agent and Manager*(3) and *Abbakke Heggadhi v. Kinkhiamma Shetty*(4). In *Natesa Aiyar v. Apparu Padayachi*(5) a Full Bench of the Court had to consider the question whether sections 64 and 74 of the Indian Contract Act applied in these circumstances. On 24th February 1903, A agreed to purchase from B certain lands for a sum of Rs. 41,000, of which Rs. 4,000 was paid in advance. The sum of Rs. 20,000 was to be satisfied by a mortgage on the property and the balance was to be paid in cash before 24th May 1903 when the property was to be conveyed. It was agreed that the advance of Rs. 4,000 was to be forfeited if there was delay on the part of the purchaser. The purchaser failed to perform the contract and the seller forfeited the deposit of the sum of Rs. 4,000. According to the head-note, WHITE C.J. and MILLER J. (SADASIVA AYYAR J. dissenting) held that neither section 64 nor section 74 of the Contract Act is applicable to a deposit of this nature because the stipulation for its forfeiture in case of breach is not one by way of penalty. We do not, however, read the majority decision as indicating that relief can never be given in a case of a deposit, but as meaning that in that case the forfeiture of the deposit was not unreasonable as it

(1) [1893] 2 Q.B. 318.

(2) (1929) I.L.R. 52 Mad. 829.

(3) (1905) I.L.R. 29 Mad. 118.

(4) (1906) I.L.R. 29 Mad. 491.

(5) (1913) I.L.R. 38 Mad. 178 (F.B.).

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merely represented ten per cent of the purchase consideration. In fact, in the course of his judgment, MILLER J. pointed out that there might be cases where the Court must find that the amount of deposit or payment in advance is so great in comparison with the amount payable under the contract that the parties could not have intended it as merely security for performance, but rather as a punishment for non-performance of the contract. The learned Judge went on to add that in such cases the Court might doubtless refuse to allow the retention of the whole of the deposit.

Therefore, what we have to consider is whether the forfeiture provisions of this contract are so unreasonable as to justify the Court in granting relief to the buyers. With regard to the advance of Rs. 1,000, there does not appear to be any real ground for saying that the provision for forfeiture is unreasonable. According to the first appellant's own evidence, the machine deteriorated at the rate of twenty per cent per annum. In fact very little has been said, or could be said, by Mr. Gopalaswami Ayyangar on this question. He has rightly concentrated on the provision of the contract entitling the seller to revoke the contract for purchase and charge hire at the rate of Rs. 350 per month. At first sight this does appear to be a rather harsh provision, but on full consideration we do not think the appellants are entitled to relief. The projector was of German make and, when the contract was entered into, the war with Germany had been in progress for nearly two years. It was impossible to get fresh supplies from the Continent of Europe and, as far as the Court knows, from England or America. The demand for such machines must have been far greater than the supply; in fact it is to be doubted whether there was any supply at all. In these circumstances we do not consider a rent of Rs. 350 a month as being unreasonable in case of default. That the appellants could make profitable use of it at this rate is shown by the fact

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that they have made no attempt to comply with the order of the learned Judge directing them to deliver the machine to the respondent within a fortnight of his judgment. The burden of showing a ground for relief against forfeiture is on the appellants and they have failed to discharge this burden.

There is, however, a further question and here the appellants are on firmer ground. As we have pointed out, the learned Judge directed the appellants to pay Rs. 4,500, the full value of the machine at the date of the contract, in the event of their failure to surrender the machine to the respondent within the time fixed by him. The appellants cannot be called upon to pay the value of the machine at the date of the contract *plus* hire, but merely the present value *plus* hire. The only evidence we have of gauging its present value is the evidence with regard to depreciation and on this basis the value must be taken to be Rs. 4,500 less twenty per cent per annum from 21st August 1941 to this day. As the appellants have had the use of the machine from the date of the judgment of the learned Judge to this date, they must however continue to pay the hire at the rate of Rs. 350 per mensem. Accordingly we vary the decree passed by BELL J. by directing that, in addition to the amount of hire awarded by him, the respondent is entitled to Rs. 350 per month from the date of the decree of the trial Court to this date and by ordering the appellants to deliver the projector and its accessories to the respondent within fourteen days from this date or in the alternative pay Rs. 2,250 (Rs. 4,500 less twenty per cent per annum for two and a half years).

The appellants have succeeded on the question of the present day value of the machine, but have otherwise failed. In these circumstances the parties will pay and receive proportionate costs. We certify for two Counsel.

N.S.

APPELLATE CIVIL.

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

ABDUL SATTAR ISMAIL AND SEVEN OTHERS,
APPELLANTS,

v.

ABDUL HAMID SAIT AND TWENTY OTHERS,
RESPONDENTS.*

Cutchi Memons—Migration of a Cutchi Memon in 1870 to Bangalore—His son dying in 1934 leaving a will—Will, construction of—Testator governed by Hindu law of succession—Bequests, validity of—Gifts in favour of mosques and for other charitable objects—Wakf, creation of—Validity—No uncertainty as regards property dedicated—Wakf not rendered invalid by inclusion of movables in dedicated property—Objects of wakf—Validity—No failure of wakf even if some objects invalid—Mussalman Wakf Validating Act (VI of 1913), ss. 2, 3 and 4.

One of the sons of a Cutchi Memon, who migrated to Bangalore from Cutch in 1870, died in Bangalore on 24th April 1934, leaving a will in respect of his self-acquired properties, movable and immovable. After making bequests of movable property to various members of his family and provision for the maintenance and education of his grandchildren and other endowments, the testator gave directions for creating a wakf of the residue and remainder of his estate. The wakf was intended for the education, maintenance, marriage, support and other expenses of the testator's grandchildren and their descendants from generation to generation, and it was further provided that, in the event of the descendants of the grandchildren becoming extinct, the trustees shall hold the wakf estate in trust for the following charities in such proportion as the trustees shall think fit:—(i) Mosques and provision for imams to conduct worship therein, (ii) distribution of alms to poor persons and assistance to the poor to enable them to perform the pilgrimage to Mecca, (iii) celebrating the death anniversaries of the testator and of the members of his family, (iv) reading the Koran in public places and also at private houses, and (v) maintenance of the testator's poor relations and dependants. In a suit for administration of the estate left by the testator,

* Original Side Appeal No. 35 of 1942.

held: (i) The testator was governed by the Hindu law ^{ABDUL SATTAR} of inheritance and succession and he had full testamentary ^{ABDUL HAMID} power over the properties left by him. The will must be construed according to Hindu law except in so far as it operated to create a wakf.

(ii) The wakf was not invalid either for the reason that the will did not immediately vest the residue of the estate in the trustees of the wakf or for the reason that there was uncertainty with regard to the property dedicated. The dedication to wakf was complete and was not subject to any contingency.

(iii) The fact that the property dedicated to wakf included movable property did not in any way affect its validity, especially in view of the definition of "wakf" in the Mussalman Wakf Validating Act, 1913.

(iv) All the five objects mentioned in the wakf, for which the trustees could devote the income of the wakf estate in the event of the testator's family becoming extinct, are valid objects of wakf. But even supposing that some of the objects are invalid, the wakf would not fail as the whole of the income could be devoted to valid objects.

Case law reviewed and discussed.

APPEAL and memoranda of cross-objections from the decree dated 6th April 1942 and judgment dated 19th December 1941, 27th February 1942, 5th March 1942, 11th March 1942, 13th March 1942, 2nd April 1942 and 6th April 1942 of SOMAYYA J. in Civil Suits Nos. 280 of 1939 and 286 of 1939.

K. Rajah Ayyar, T. A. Rangachari, D. Narasaraju, P. P. Selvarajan and T. A. Krishnamachari for appellants.

B. Sitarama Rao, S. Krishnamachari, J. Lakshmayya, P. K. Janakiram, K. S. Rajagopala Ayyangar, S. Govind Swaminathan, D. R. Krishna Rao, S. Azimuddin, M. Subramania Sarma, P. G. Menon, C. Veeraraghavalu Chetty, S. Krishnamurthi, T. T. Srinivasan, A. Ramaswami and A. Sundaresa Ayyar for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal raises important questions LEACH C.J.

ABDUL SATTAR of law, in the first place, with regard to the testamentary capacity of Cutchi Memons before the passing of the **ABDUL HAMID**. Cutchi Memons Act, 1938 and, in the second place, with regard to the validity of a wakf which a Cutchi Memon by his will directed should be endowed by the property forming the residue of his estate.

LEACH C.J.

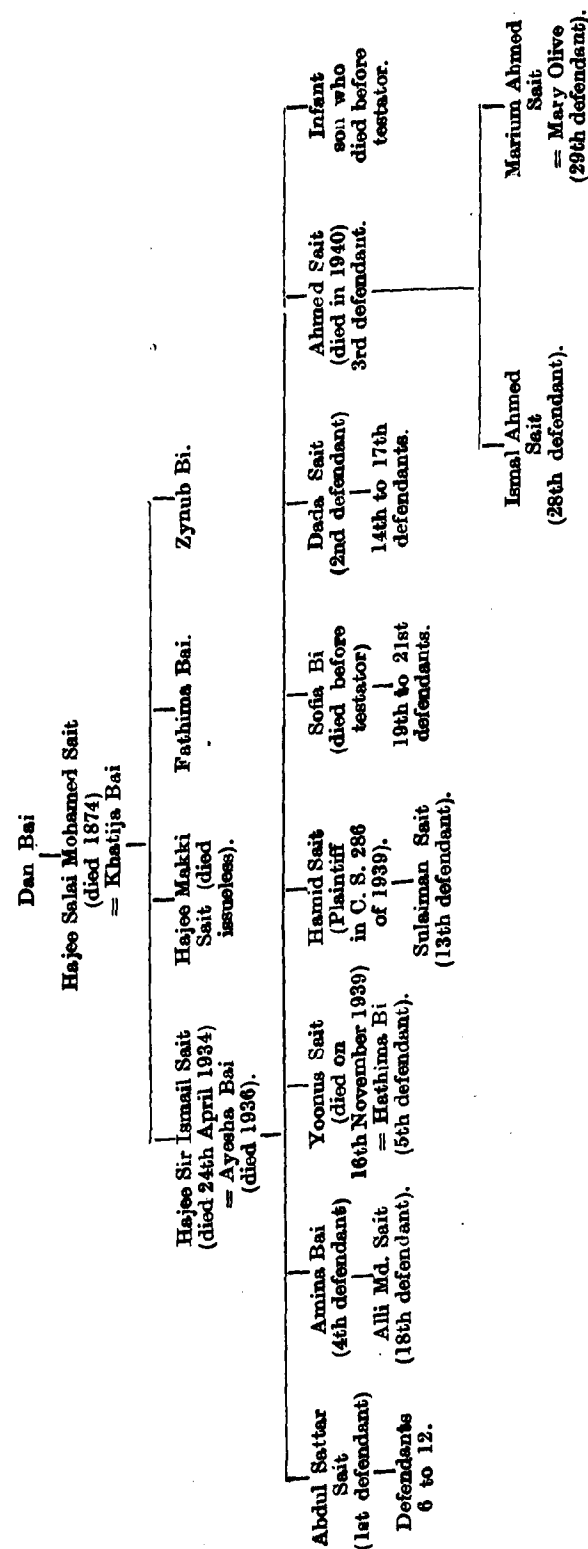
The appeal arises out of two suits filed on the original side of this Court for the administration of the estate of Hajee Sir Ismail Sait, a wealthy Mussalman of the Hanafi sect and a member of the Cutchi Memon community, who died in Bangalore on 24th April 1934. He had eight children, seven of whom survived him, as did their mother. He left a will and a codicil thereto, both of which have been admitted to probate by this Court. On 6th December 1939 two of the testator's grandsons, sons of his eldest son, filed Civil Suit No. 280 of 1939 for the administration of the estate in accordance with the testamentary directions given by their grandfather. On 16th December 1939 his third son filed Civil Suit No. 286 of 1939 for the administration of the estate on the basis that the will was invalid. The two suits were tried together by SOMAYYA J. and this appeal is from his judgment. The relationship between the parties will be gathered from the following genealogical tree.

(See next page.)

The descriptions are those of the parties to the second suit, all of whom were all the parties to the first suit.

Admittedly the properties left by the testator had been acquired by him as the result of his own exertions. His will is dated 19th March 1934. He made specific bequests of immovable property to various religious, pious and charitable institutions and a sum not exceeding Rs. 25,000 for the erection on the lands of the Jamma Masjid in the Old Poor House Road, Bangalore, of shops and business premises which were to constitute an additional endowment of this mosque. After making bequests of movable property

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ABDUL SATTAR to various members of his family and provision for
 ABDUL HAMID. the maintenance and education of his grandchildren,
 LEACH C.J. he gave these directions (clause 15):

"Whereas with the object of attaining nearness to God and reward in the world to come, I am desirous of making wakf of all the rest, residue and remainder of my estate in the hands of my trustees not hereinbefore or by any codicil specifically disposed of or dealt with and after my trustees shall have set apart thereout sufficient to provide for the payments hereinbefore directed to be made such wakf is hereinafter called the wakf estate and shall for all time after my death be known as the "Wakf Estate of Hajee Sir Ismail Sait of Bangalore" for the education, maintenance, marriage, support and other expenses of all my grandchildren now born or to be born and their descendants both male and female from generation to generation in proportion to their respective shares in my estate if the devolution thereof had been governed by the Muhammadan law applicable to the Hanafi sect in case of intestacy."

In clause 21 of the will the testator made provision for the application of the income of the wakf estate in the event of his family becoming extinct. The clause reads as follows:—

"In the event of the descendants both male and female of my said grandchildren becoming extinct the wakf trustees for the time being shall hold the wakf estate and the investments for the time being representing the same in trust for the following charities in such proportion as my wakf trustees shall think fit:—

(i) Mosques and provision for imams to conduct worship therein.

(ii) Distribution of alms to poor persons and assistance to the poor to enable them to perform the pilgrimage to Mecca.

(iii) Celebrating the death anniversaries of myself and of the members of my family.

(iv) Reading the Koran in public places and also at private houses.

(v) Maintenance of my poor relations and dependants."

The testator appointed his second son Yoonus and two others who were not members of the family as his executors and his eldest son Abdul Sattar,

Yoonus and one Abdul Sattar Abba of Mysore to be the first trustees and muttawallis of the wakf estate. Only Yoonus proved the will. The codicil is not of importance. It is common ground that it relates only to the school fees of a deceased grandson and that it stands or falls with the will.

Cutchi Memons are the descendants of Hindus who were forcibly converted to Muhammadanism some 400 years ago. In spite of their conversion they retained the Hindu law of succession and inheritance and, generally speaking, their descendants continued to adopt as their personal law the Hindu law in such matters until the Cutchi Memons Act of 1938 was passed. The plaintiff averred that the family had elected to be governed by the Muhammadan law in matters of succession and inheritance and therefore the testator was unable to dispose of more than one-third of his estate by will. The plaintiff also challenged certain of the legacies and the validity of the wakf. His case in all respects was strongly opposed by the first defendant and his sons. They maintained that the testator had full disposing power and that the will was valid in its entirety. The plaintiff is supported by the second, third, fourth, fifth, twenty-eighth and twenty-ninth defendants. All the other members of the family support in the main the first defendant and his sons. The two questions of importance are whether the testator had power to dispose of the whole of the estate by will or whether his power was limited to the Muhammadan rule of one-third and whether he created a valid wakf in respect of the residue of his estate. There were numerous other questions raised below, but in the view which we take of the case it will not be necessary to discuss the other questions, save one which is raised in a memorandum of cross-objections filed by the fifth defendant.

The testator's father migrated from Cutch to Bangalore in 1870 and ever since the family has

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resided in Bangalore. The learned Judge rejected the plaintiff's contention that the family had elected to be governed by Muhammadan law and held that it had retained the personal law which the testator's father brought with him from Cutch in 1870. This finding is not challenged. Indeed, it could not be in view of the testator's statement in his will that he had not made a declaration under the Cutchi Memons Act, 1920. That Act permitted a Cutchi Memon to make a declaration that he desired to obtain the benefit of the Act and thereafter the declarant and all his minor children and their descendants were to be governed in matters of succession and inheritance by the Muhammadan law. The learned Judge went on, however, to hold that, notwithstanding that the Cutchi Memons retained the Hindu law of succession and inheritance, the testator was governed by the Muhammadan law with regard to testamentary power. He considered that, as at the time of the conversion of Cutchi Memons the Hindu law did not recognize wills, they presumably adopted the Muhammadan law in this respect. The appellants are the first defendant and his sons. They maintain that the learned Judge erred in holding that the testator's testamentary power was restricted to one-third of his estate. With regard to the wakf, SOMAYYA J. held that it was valid, but that its endowments must be limited to one-third of the residue of the immovable property. He considered that there could be no dedication of movable property. The plaintiff has filed a memorandum of cross-objections in which he says that the learned Judge should have held the wakf to be invalid in its entirety.

It may be mentioned that, since the passing of the Cutchi Memons Act, 1938, all Cutchi Memons are in matters of succession and inheritance governed by the Muhammadan law. The Court can, however, only have regard to what was the personal law of the testator at the time of his death, and that law

was undoubtedly the law of Cutchi Memons in Cutch in 1870; see *Abdurahim Haji Ismail Mithu v. Hali-mabai*(1) and *Muhammad Ibrahim Rowther v. Shaik Ibrahim Rowther*(2). There have been several cases decided by the Bombay High Court with regard to the testamentary power of Cutchi Memons and these we shall examine presently. Before doing so, however, we will refer to the will-making power of Hindus generally, as this has an important bearing on the case.

The origin of testamentary power among the Hindus is discussed at length in the ninth edition of Mayne. There is reference to this matter in the latest edition of the work, but the ninth edition is more helpful. In the ninth edition, at page 566, it is pointed out that, while the idea of a will is wholly unknown to Hindu law and the native languages do not even possess a word to express the idea, yet there can be no doubt that from the earliest period of our acquaintance with India we find traces of a struggling towards the testamentary power, often checked, but constantly renewed. The right of a Hindu to make a will in respect of his self-acquired property was recognized first in Bengal, then in Bombay and then in Madras. It can safely be taken that long before the testator's father left Cutch the right of a Hindu to make a will of his own property was recognized throughout Hindustan. Consequently it is said by the appellants, and with reason, that testamentary power had before 1870 become embodied in the Hindu law and all those who were governed by the Hindu law in matters of succession and inheritance had the right of exercising the power. The law of wills is part of the law of inheritance as the Bombay High Court pointed out in *Mancharji Pestanji v. Narayan Lakshumanji*(3).

(1) (1915) 43 I.A. 35.

(2) (1922) L.L.R. 45 Mad. 308, 314 (P.C.).

(3) (1868) 1 Bom. H.C.R. 77.

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LEACH C.J. As this case in this connection is mainly concerned with the position on the Bombay side of India, the following extract from the judgment of WESTROPP J. in *Narottam Jagjivan v. Narsandas Harikisandas*(1) delivered in 1866 is relevant :—

“ In the Supreme Court the wills of Hindus have been always recognized, and also in the High Court at the original side ; whatever questions there may formerly have been as to the right of a Hindu to make a will relating to his property in the mufassal, or as to the recognition of wills by the Hindu law, there can be no doubt that testamentary writings are, as returns made within the last few years from the zillahs show, made in all parts of the mufassal of this presidency ; but, as might have been expected, much more frequently in some districts than in some others, and this Court at its appellate side has, on several occasions, recognized and acted upon such documents. That Hindus may make wills, and such wills may be admitted to proof, is contemplated by sections 1 and 13 of Act XXVII of 1860, an enactment which more especially concerns the mufassal. The testamentary power of Hindus is by Lord KINGSDOWN in 9 Moor's Indian Appeals, page 121, and by Knight BRUCE L.J., *ibid*, page 135, treated as completely established. It is, therefore, now too late to deny to Hindus in the mufassal of this presidency the right to make wills, as the District Judge has done in the present case.”

The Supreme Court of Bombay was established in the year 1823 and the Bombay High Court in 1865.

In *Basant Singh v. Brij Raj Saran Singh*(2), a case where the question was raised whether the customary law of the Delhi District governed the Jats of that district, the Privy Council said that such customary law found to exist in 1880 and 1910 must be taken to have the ordinary attribute of a custom that it was ancient and, unless the contrary was proved, it must be assumed to have existed prior to 1858 when one Khushal Singh left the Delhi District.

If the right of a Hindu to make a will is not inherent in his personal law, it must be taken to be a

(1) (1866) 3 Bom. H.C.R. (A.C.J.) 6. (2) (1935) I.L.R. 57 All. 494 (P.C.).

customary right and, therefore, a right which existed long before 1870 when the testator's father left Cutch, unless the contrary is proved ; and there has been no attempt to do this here.

Cutch is a Native State under the political superintendence of the Government of Bombay, and Cutchi Memons move freely between Cutch and the City of Bombay. Many of them reside and trade in Bombay. In 1885 the Bombay High Court in *Mahomed Sidick v. Haji Ahmed and others*(1) had to consider the question whether a Cutchi Memon could dispose of ancestral property by will, and it was held that he could not. The will of a Cutchi Memon, whose father had carried on business in Cutch and Bombay, was admitted to probate. In the judgment in that case SCOTT J. said that Cutchi Memons appeared as litigants in 1847, but for over thirty years the community had wisely abstained from litigation. The judgment then proceeds :

“ But although the reports contain no decisions between 1847 and 1881 concerning Cutchi Memons, there have been many concerning a similar Muhammadan sect, the Khojas, concerning whom in *Shivji Hasum and others v. Datu Marji Khoja*(2) the late Chief Justice and WEST J. held it to be settled law that ‘ in the absence of settled evidence to the contrary, the Hindu law is applicable to matters relating to property, inheritance and succession among Khoja Muhammadans’. As regards the Cutchi Memons themselves, there is considerable evidence of another character, which shows it to have been their practice also to follow Hindu law as their own law of inheritance. In almost every application for letters of administration, and in the carrying out of almost every will made by the community during that time, the Hindu law has been followed. As early as 1845 this very family, whose members are now litigating, divided the family property, amounting to nearly three lakhs of rupees, according to Hindu rules. In a series of exhibits put in by Mr. Starling, Hindu law is evidently considered the governing law of the sect. Thus, out of sixty Cutchi Memon wills on the list

(1) (1885) I.L.R. 10 Bom. 1.
(2) (1874) 12 Bom. H.C.R. (A.C.J.) 281.

ABDUL SATTAR v. ABDUL HAMID. furnished by the Ecclesiastical Registrar, in only one (No. 38) the principles of Muhammadan law seem to have guided the Registrar." LEACH C.J.

In 1915 in *Advocate-General of Bombay v. Jimbabai*(1) BEAMAN J. held that Cutchi Memons had acquired by custom the right of disposing of the whole of their property by will, but he considered that a Cutchi Memon's will should be construed by reference to Muhammadan law. The latter part of this opinion has not found acceptance in later cases, and it must be taken that the Bombay High Court now interprets wills of Cutchi Memons in accordance with the Hindu law. In *Abdulsakur v. Abubakkar*(2) MIRZA J. strongly criticized the judgment of BEAMAN J. and refused to follow it. He was firmly of the opinion that a Cutchi Memon's will should be construed according to Hindu law. The question was raised before a Bench of the Bombay High Court in 1935 in *Adambhai v. Allarakhia*(3) and the opinion of MIRZA J. was accepted. The question was also raised in this Court in *Siddick Hajee Aboobucker Sait v. Ebrahim Hajee*(4) where, after an exhaustive examination of the authorities, KUMARASWAMI SASTRI J. held that Cutchi Memons were governed by the Hindu law. They could, he found, dispose of self-acquired property by will, but not joint family property.

Mr. Sitarama Rao, on behalf of the plaintiff, says that, while the right of Cutchi Memons residing in Bombay to make wills has been recognized, it does not follow that Cutchi Memons in Cutch had this right in 1870 and that there has been no attempt in this case to prove what the position was in Cutch in 1870. It hardly lies in the plaintiff's mouth to say this. It was no part of his case as set out in the plaint. There he pleaded that the testator was governed by Muhammadan law and not by Hindu law and the

(1) (1915) I.L.R. 41 Bom. 181.
(3) (1935) 37 Bom. L.R. 686.

(2) (1929) I.L.R. 54 Bom. 358.
(4) (1920) 31 M.L.T. 183.

parties went to trial on that basis. After the evidence had been closed, Mr. Sitarama Rao was briefed to address the Court on the case. He had not appeared in it before then. He was allowed by the learned Judge to take the point, but the correctness of the learned Judge's decision in this respect is certainly open to question as it had never been suggested at any previous stage that there was a difference in the law governing Cutchi Memons living in Cutch and Cutchi Memons living in Bombay. We are not prepared to accept the argument. Cutch is only some 250 miles from the City of Bombay and, as we have already pointed out, it is under the political superintendence of the Governor of Bombay and free movement takes place between the two places.

It is now firmly established that Cutchi Memons are governed by Hindu law in matters of succession and inheritance and the right of a Hindu to dispose of his self-acquired property by will is equally firmly established throughout India. As Cutchi Memons are governed by the Hindu law in matters of inheritance and as the law of wills is part of the law of inheritance, they must be held to have the same right as Hindus of disposing of their personal property by will unless there is a custom to the contrary, which has not been proved. In fact there has been no attempt to prove such a custom. On the other hand, the Bombay High Court has expressly recognized the right of Cutchi Memons to make wills, and this Court has done the same.

For the reasons indicated, we hold that the testator is governed by the Hindu law of inheritance and succession; that the testator had full testamentary power over the property of which he died possessed; and that the will must be construed according to Hindu law, except in so far as it operates to create a wakf.

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Learned Counsel in the course of the arguments agreed that, if the Court should hold that the testator had full testamentary power, the only substantial question left would be with regard to the validity of the wakf. The plaintiff says that the wakf is invalid for these reasons: (i) there was no immediate vesting of the wakf property in the wakf trustees; (ii) as the endowment was to consist of the residue of the estate, there was uncertainty with regard to the property; (iii) the Muhammadan law does not recognize a dedication of movable property, and part of the residue must consist of movables; and (iv) the celebration of the death anniversaries of the testator and of the members of his family, the reading of the Koran in public places and private houses, and the maintenance of the testator's poor relations and dependants, are not recognized by Muhammadan law as valid objects of wakf.

Although the learned Judge held in favour of the validity of the wakf in so far as the endowment consisted of immovable properties which were included in the residue of the estate, he did not consider that the wakf trustees would be justified in devoting any of the income for the advancement of the testator's descendants or for marriage expenses. It has been agreed that, if this Court holds that the wakf is otherwise valid, it will be lawful for the trustees to make advancements out of the income should they think fit and to make payments on account of marriage expenses. It is conceded by the contesting defendants that, as the testator's testamentary powers were those of a Hindu, he could not by his will have created a wakf had the Mussalman Wakf Validating Act, 1913, not been passed.

In a number of cases the Privy Council had held that a Muhammadan could not make a wakf of his property when the primary object of the dedication was to benefit his descendants. Muhammadan

lawyers did not accept the correctness of this ruling **ABDUL SATTAH**
 and, as their opinion conformed to the wishes of the **ABDUL HAMID**
 Muhammadan community, the Validating Act was **LEACH C.J.**
 passed in order to allow a Muhammadan to create a wakf for the benefit of his descendants. Section 2 of the Act defines "wakf" and "Hanafi Mussalman". It says that "wakf" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable and that "Hanafi Mussalman" means a follower of the Mussalman faith who conforms to the tenets and doctrines of the Hanafi school of Mussalman law. Section 3 reads as follows:—

"It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes:—

(a) for the maintenance and support wholly or partially of his family, children or descendants; and

(b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated:

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character."

Section 4 says that no such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf.

We agree with the learned Judge that the wakf is not invalid because the will does not immediately vest the residue of the estate in the wakf trustees, and that there is no uncertainty with regard to the property dedicated. Clause 17 of the will directs that the executors, whom the testator describes as

ABDUL SATTAR his trustees, shall transfer to the wakf trustees the residue of his estate as soon as they can conveniently do so. Having ascertained the debts due by the estate, it would be a very simple matter for the executors to ascertain what the residue would consist of. It would consist of what remained after providing for the payment of the debts, the delivery to the legatees of their bequests and the setting aside of sufficient property to comply with the testator's directions with regard to the maintenance, education and marriage expenses of his grandchildren. Mr. Sitarama Rao has agreed that the only grandchildren who are entitled to the benefit under these directions are the grandchildren who were born during the lifetime of the testator.

In *Pathukutti v. Avathalakutti*(1) **MUTTUSAMI AYYAR J.** made these observations :

"The dedication should not depend on a contingency and the appropriation must at once be complete and not suspended on anything. Baillie, at page 556, gives an illustration, observing if one were to say 'my mansion is a charity appropriated to the poor if my son arrives', and the son should arrive, the mansion does not still become wakf. He adds, if one should say this, 'my land is charity if such a one pleases', and if the person referred to should indicate his pleasure, still the wakf would be void. I take the reason to be that at the time of settlement there was no absolute or complete appropriation in the sense that no proprietary interest was reserved and that the property was effectually constituted to be charity property. I do not desire to be understood as saying that the interposition of an intermediate estate limited in duration would invalidate the creation of a wakf provided that there was an out and out appropriation at the time of the settlement. In that case, the appropriation to religious use would only be deferred so long as the interposed estate continued and there would be no reason for saying that the religious appropriation might fail altogether."

These observations were quoted with approval by the Allahabad High Court in *Khaliluddin v. Sri*

(1) (1939) I.L.R. 13 Mad. 66, 73 (F.B.).

Ram(1), where it was held that, when a wakf is challenged as being invalid because it constitutes a contingent dedication, the test is to see whether the dedication was complete at the time it was made and not dependent on an event which might or might not happen.

In *Rustam Ali Khan v. Mushtaq Husain*(2) the Allahabad High Court held that a wakf was not invalid because the creator had directed that the income of the estate should be devoted in the first instance to the paying off of a mortgage debt on the property. This case went to the Privy Council, *Muhammad Rustam Ali Khan v. Mushtaq Husain*(3), but the question was not raised there. The inference is that the point was not taken because it was obviously unsustainable.

In Tudor on Charities, Fifth Edition, page 61, it is said :

"If the gift to charity is residuary upon a void gift, the general rule is that it fails if the Court finds that the precedent gift is of unascertainable amount. But the charitable gift is valid if the subject-matter needed for the precedent gift can be reduced to certainty by means of an inquiry."

The cases on which this statement of the law is based are given in the foot-note. In the present case the residue of the estate was readily ascertainable and the executors were directed to deliver it over to the wakf trustees with all convenient speed. In these circumstances it cannot in our judgment be said with reason that there was uncertainty with regard to the property dedicated or that the dedication was subject to a contingency.

The next question is whether the dedication of that part of the residue which consists of movable property is unlawful. Before the passing of the Mussalman Wakf Validating Act, it was the view of this Court and of other High Courts in India, except the Allahabad High Court, that there could not be a

(1) (1933) I.L.R. 56 All. 293.

(2) (1916) 14 A.L.J. 554.

(3) (1920) I.L.R. 42 All. 609 (P.O.).

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valid dedication to wakf of movable property, unless it were accessory to land or allowed because of certain traditions concerning the Prophet and the sacred writings or there was a custom to make wakf of it; see *Kadir Ibrahim Rowther v. Mahomed Rahumadulla Rowther*(1). The contesting defendants say that all this has been changed by the Validating Act of 1913, and we consider that there is great force in this argument. A "wakf" is there defined as the permanent dedication of "any property" for any purpose recognized by the Mussalman law as religious, pious, or charitable. On behalf of the plaintiff it has been said that, as the object of the Act was to make lawful dedications of property for the benefit of the descendants of the creator of the wakf, it cannot be taken to alter the law in any other respect. The Court can, however, only have regard to the wording of the sections in the Act when no ambiguity exists. While it is true that the primary object of the Act was that just mentioned, it was necessary to define "wakf" and the definition must have general application. There cannot be one definition of wakf when the object falls within the Act and a different definition when it does not. In any event this wakf falls within the Act and we hold that the fact that the property dedicated includes movable property does not in any way affect its validity.

This brings us to the question of the validity of the five objects for which the wakf trustees can devote the income in the event of the family becoming extinct. All these objects are included in the list given in Mulla's Principles of Muhammadan Law as valid objects of wakf. It is common ground that the first two objects are valid. The third object is celebrating death anniversaries of the testator and the members of his family. In *Ramanadham Chettiar v. Vada Levvai Marakayar*(2) this Court held that the

(1) (1909) I.L.R. 33 Mad. 118.

(2) (1910) I.L.R. 34 Mad. 12.

performance of *fateha*, which so far as it involved the expenditure of money consisted in feeding the poor, was a valid object of wakf. The judgment in that case was approved by the Privy Council in *Ramanadham Chettiar v. Vada Levvai Marakayar*(1) where their Lordships pointed out that part of the *fateha* ceremony was to feed the poor. In *Kaleloola Sahib v. Nuseerudeen Sahib*(2) it was held that a wakf by a Muhammadan lady for the upkeep of her husband's tomb and "for the daily, monthly and annual expenses of the aforesaid mausoleum, such as lighting, frankincense, flowers, and the salaries of repeaters of Koran and readers of benediction, etc., as well as for the annual *fateha* ceremonies of the deceased and after my death for my annual *fateha* ceremony" was not valid as it ran contrary to the rule against perpetuities. In *Kunhamutty v. Ahmad Musaliar*(3) it was pointed out that in view of the decision of the Privy Council in *Ramanadham Chettiar v. Vada Levvai Marakayar*(1) this decision could no longer be considered good law. We hold that the observance of the anniversaries of the deaths of the testator and members of his family, involving as it does the feeding of the poor, constitutes a valid object of the wakf.

The fourth object is the reading of the Koran in public places and also at private houses. Here the plaintiff relies on the judgment of STANLEY C.J. in *Mazhar Husain Khan v. Abdul Hadi Khan*(4) and the judgment of this Court in *Kunhamutty v. Ahmad Musaliar*(3). In the former case BANERJI J. held that, where a substantial portion of the income of the wakf property was devoted to the expenses of the annual *fateha* of the founder and the members of her family, the annual expenses of burning lamps in a mosque and the salary of Hafiz and readers of the Koran, the wakf was valid. STANLEY C.J. doubted the

(1) (1916) I.L.R. 40 Mad. 116 (P.C.).

(2) (1904) I.L.R. 18 Mad. 201.

(3) (1934) I.L.R. 58 Mad. 204.

(4) (1911) I.L.R. 33 All. 400.

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LEACH C.J. validity of such a foundation. In the second case this Court held that the dedication of property for the purpose of providing funds for the recitation of Koran over the tomb of a private person, although he be a descendant of the Prophet, did not create a valid wakf. On the other hand the defendants rely upon the provisions of the Validating Act and the following passage to be found in Ameer Ali's work on Muhammadan Law, Volume I, page 273 :—

"The words 'piety' and 'charity' have a much wider significance in Mussalman law and religion than in any other system. *Khair, birr, ishan*, etc., include every purpose which is recognized as good or pious under the Mussalman religion and the Mussalman law; and the test of what is 'good' or 'pious' or 'charitable' is the approval of the Almighty. Every 'good purpose' (*Wajah-ul-khair*) which God approves, or by which approach (*kurbat*) is attained to the Deity, is a fitting purpose for a valid and lawful wakf or dedication. A provision for one's self, for one's children, for one's relatives is as good and pious an act as a dedication for the support of the general body of the poor."

This is not a case of the founder of wakf merely directing the Koran to be read over his tomb and therefore does not fall within *Kunhamutty v. Ahmad Musaliar*(1). The reading of the Koran in public and private places can only be regarded as religious and pious and it seems to us that it must also be regarded as charitable, for the reading is for the benefit of all Mussalmans. The fact that money may be expended on the reading of the Koran in private places as well as in public places does not detract from the religious, pious and charitable character of the object.

The fifth object is the maintenance of poor relations and dependants. The decision of the Allahabad High Court in *Mukarram Ali Khan v. Anjuman-un-nissa Bibi*(2) is directly in point here. In that case it was held that a wakf created for the reading of *fateha* and for charitable purposes including the maintenance

(1) (1934) I.L.R. 58 Mad. 204. (2) (1922) I.L.R. 45 All. 152.

of the founder's poor relations and dependants WAS ABDUL SATTAR v. ABDUL HAMID.
LEACH C.J. valid according to Muhammadan law. Strong support for the validity of this provision is also to be found in Baillie, at page 586, and Ameer Ali, Volume I, at page 370. We agree with the learned trial Judge that this is a valid provision according to Muhammadan law.

But even supposing that the last three objects are invalid, this would be no ground for holding that the wakf failed. Ameer Ali points out (Volume I, page 414) that the *cy-pres* doctrine is carried to the utmost limit in the Mussalman system. In *Ruqia Begam v. Suraj Mal*(1) the Allahabad High Court expressly held that, if one of the objects was good and one bad, the whole of the income could be devoted to the good object. With this opinion we are in agreement.

It follows that in our judgment the testator created a valid wakf in respect of the residue of his estate for the objects set forth in his will and that the estate must be administered in accordance with the testator's directions. Consequently the appeal will be allowed and the plaintiff's memorandum of cross-objections dismissed. The appellants and their supporters will have one set of costs out of the estate and the plaintiff and his supporters another set of costs, also out of the estate. We certify for two Counsel. The plaintiff's memorandum of cross-objections will be dismissed without costs.

The memorandum of cross-objections filed by the fifth defendant has reference to the gift of jewels which the testator made to his second son, Yoonus. At page 109 of the evidence the learned Judge caused the following note to be made :—

"There were two boxes in an iron safe in the Essex Lodge. Under clause 13 of the will Sir Hajee declared that

(1) (1936) A.L.J. 231.

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he had already made a gift of the jewels in one box to Yoonus and the jewels in the other box to Dada. The fifth defendant claims the jewels said to have been gifted to Yoonus and the second defendant claims his jewels contained in one of these boxes. All the parties now agree through their Advocates that these jewels claimed by Yoonus's widow the fifth defendant and by the second defendant may be declared to be theirs. They all say that they do not lay any claim to them. The plaintiff says that he does not recognize their claims to these jewels under the will but, even apart from the will, they are entitled to them and they may have them. Therefore their claim to this jewellery need not be tried and no evidence is recorded about it."

The fifth defendant is the widow of Yoonus.

At page 179 of the judgment the learned Judge says :

"As regards the jewels which are alleged to have been gifted to the late Mohamed Yoonus by Sir Hajee, the written statement of the fifth defendant states that the gift was made long prior to the death of Sir Hajee and that the gift was valid. This is what was conceded by all parties at the time of the trial. The result of this is not that the jewels in question can be handed over to the fifth defendant solely but to all the heirs of the late Yoonus, of whom the fifth defendant is one."

The fifth defendant states that the note made by the learned Judge in the course of the evidence constitutes an agreement between all the parties that she personally was to have the jewels. We do not agree. The paragraph which we have quoted from the judgment shows that the learned Judge only intended that the fifth defendant was to have the jewels handed to her as representing the estate of her deceased husband and this course will be followed.

The memorandum of cross-objections filed by the fifth defendant is dismissed, but we do not think it necessary to make any additional order for costs.

The agreement with regard to the Calcutta Distillery shares referred to in the last paragraph of page 175 of the judgment of SOMAYYA J. stands.

The estate will be administered by the receivers ABDUL SATTAR v. HAMID. in accordance with our judgment. If any directions are required they will be given on application by the LEACH C.J. receivers to the Original Side.

N.S.

APPELLATE CIVIL.

Before Mr. Justice Mockett and Mr. Justice
Krishnaswami Ayyangar.

MINOR ATHILINGA GOUNDER BY GUARDIAN
THIRUMAL AMMAL (SECOND DEFENDANT), APPELLANT,

v.

MINOR RAMASWAMI GOUNDAR AND TWO OTHERS
(PLAINTIFFS AND FIRST DEFENDANT), RESPONDENTS.*

Hindu law—Partition—Father not retaining a share for himself but only some properties for maintenance—Father dividing bulk of family properties between his sons by different wives—Father contemplating birth of future sons and providing for them out of the properties allotted to their own mother and uterine brothers and not out of the other branch—Right of after-born son to re-open partition on the ground of no share being reserved to father on partition.

A Hindu had two wives. By the senior wife he had one son and by the junior wife two sons. They were all minors. He effected a partition of the family properties by which he allotted one share to the senior wife and her son, and two shares for the junior wife and her two sons. He did not reserve any share for himself but only retained a few items of properties for his own maintenance without power of alienation. After his lifetime these properties were to be taken by his three sons in equal shares. He also provided that if any son should be born thereafter to either of his wives, that son should get his share out of the properties allotted to his own mother and uterine brother or brothers under the partition deed and not from out of the properties allotted to the other branch. Another son who was born to the senior wife one year after the partition contended that he was entitled to re-open the partition as no share had been reserved by his father for himself at the partition.

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Held: He was entitled to re-open the partition and the above provision in the deed for the contingency of a son being born to him after the partition did not take away the right of the after-born son.

Chengama Nayudu v. Munisami Nayudu(1) followed.

Ganpat v. Gopalarao(2) distinguished.

APPEAL against the decree of the Court of the Subordinate Judge of Tuticorin in Appeal Suit No. 46 of 1941, preferred against the decree of the Court of the District Munsif of Tuticorin in Original Suit No. 31 of 1940.

A. Swaminatha Ayyar for appellant.

R. Ramamurthi Ayyar for respondents.

JUDGMENT.

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KRISHNASWAMI AYYANGAR J.—This second appeal arises out of a suit instituted by the two sons of one Alagu Gounder by his second wife against his two sons by his first wife. Alagu Gounder had married two wives, Kasi Ammal and Onnammal. On 28th November 1934 he effected a partition of the family properties but reserved no share for himself. At this date he had one son Alagu Goundan by his senior wife Kasi Ammal and two sons Perumal and Ramaswami by his junior wife Onnammal. They were all minors. The scheme of the partition was to allot one share to Kasi Ammal and her son the first defendant, and two shares to Onnammal and her two sons the plaintiffs in the present suit. He retained for himself a few items of properties for his own maintenance but without power of alienation. After his lifetime these properties were to be taken by his three sons in equal shares. The possibility of male children being subsequently born was contemplated and to meet that contingency the following provision was inserted in the deed; "male children who might hereafter be born out of your (the two wives Kasi Ammal and

(1) (1896) I.L.R. 20 Mad. 75.

(2) (1899) I.L.R. 23 Bom. 636.

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Onnammal) loins should be provided for out of the shares allotted to the respective families". The word "families" occurring here has reference to the two branches represented by the two wives of Alagu Gounder. The meaning of the clause is that if a son should be born in future to either of his wives that son should get his share out of the properties allotted to his own mother and uterine brother or brothers under the partition deed and not from out of the properties allotted to the other branch.

Alagu Gounder died in 1939. The plaintiffs who are the two sons by his junior wife instituted the suit for the recovery of a two-thirds share in those properties which had been reserved for the maintenance of the father under the partition deed. The defendants were (i) Alagu Goundan, the first son by the senior wife Kasi Ammal, who had been born before the date of the partition and (ii) another son, by the same Kasi Ammal, born on 18th November 1935 nearly a year after the partition. The contention of the subsequently born son who is the appellant in the second appeal is that he is entitled to have the partition reopened as no share had been set apart for the father at the partition. He relies upon the principle of Hindu law stated at page 381 of Mulla's Hindu Law to the following effect:—

"Where the father has not reserved a share for himself at a partition with his sons, a son who is born as well as begotten after the partition is entitled to have the partition reopened and to have a share allotted to him not only in the property as it stood at the time of the original partition, but in the accumulations made with the help of that property."

This statement of the law is practically the same as that laid down in *Chengama Nayudu v. Munisami Nayudu*(1). The correctness of this proposition so far as it goes has not been challenged before us and indeed it appears to be amply supported by authority.

(1) (1896) I.L.R. 20 Mad. 75.

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One of the contentions advanced in the Courts below was that on a true construction of the deed it must be held that a share had really been allotted to the father and that the rule of law relied on cannot therefore be invoked. The lower appellate Court has not accepted this contention and I am of opinion that taking the document as a whole it cannot be said that what was retained by the father was anything but a provision for his maintenance. It was certainly not a share in the property because this provision is not only limited to the duration of his life but is immediately followed by the express statement that on his death his sons should divide the properties equally among themselves.

Here then we have a case where a partition was made by the father by dividing the family property amongst his sons, but reserving no share for himself. The appellant who was begotten and born after the partition is obviously within the rule stated above, and is *prima facie* entitled to have the partition re-opened and obtain for himself a share equal to that of his brothers. Mr. Ramamurti on behalf of the respondents contends however that the rule has been too broadly enunciated and, according to him, it requires to be qualified. It is said that the after-born son cannot reopen the partition even when the father had reserved no share for himself, if the father had made some other provision for some share being given to him, and that provision is not unfair. It is argued that in the present case the direction that the future born son should get his share out of the share allotted to his uterine brother or brothers is such a provision and that it takes away his right to have the partition re-opened. No authority has been cited in support of the qualification contended for by the respondents' Counsel. Reference was made to the decision of RANADE J. in *Ganpat v. Gopalarao*(1), where the facts

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were as follows. In 1875 one Venkatrav who had at the time three sons effected a division of the family properties by allotting a one-third share to his eldest son and keeping the remaining two-thirds in his own possession for the benefit of his two other minor sons. In 1880 Venkatrav had another son born to him and that son instituted a suit in 1895 for a fresh partition of the whole of Venkatrav's properties, ignoring the partition of 1875. The learned Judge held that the plaintiff was not entitled to have a fresh partition, though the eldest son of Venkatrav had received a one-third instead of a one-fourth share to which alone he was entitled. The suit was instituted after the death of Venkatrav. After stating that the general rule of Hindu law, as expounded by the Mitakshara, Mayukha and the Smriti Chandrika, is that a son born after partition has no claim on the wealth of his separated brother and that he has a preferential claim on the wealth of his parents only, the learned Judge observes as follows:—

"The somewhat vague texts of Vishnu and Yajnyavalkya, which direct separated brothers to give a share to an after-born son, apply to sons *who have no provision made for them*, and have further been explained by the commentators as applicable only to the case of posthumous sons. In the present case, there has been no partition between the brothers. The father only cut off one of his sons with a separate provision, and retained the rest of the property in his own charge and management for the sons of his younger wife. All branches of the family gave effect to this understanding for over twelve years, and it cannot now be disturbed at appellant's instance. His claim can only be made against respondents Nos. 2 and 3, who lived with their father in union, and with whom he himself has been all along living as a member of a joint family." (The italics are mine.)

It is quite clear that the facts of this case are totally different from those of the present, because the effect of the partition was to separate the eldest son from the family, the other members, namely, the

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father and his two other sons, living and continuing to live in union. It is not a case where the father had not reserved a share for himself at the partition. Indeed, the contrary is implied from the fact that the family properties other than that allotted to the eldest son were retained in the hands of the father who with his two other sons still constituted a joint family. It may be that he intended that the two-thirds in his hands should be taken by his two sons who remained with him. But if the question of their rights *inter se* were raised, the only answer would be that the father and his two sons should share the properties retained in his hands. It is abundantly clear from the context that the learned Judge in using the words in italics was only paraphrasing the rule of law laid down in *Chengama Nayudu v. Munisami Nayudu*(1), and accepted as correct in all the later cases and the text-books. I am unable to agree that those words lend support to the qualification for which Mr. Ramamurti has contended.

The result is that the rule of law as stated in Mulla's Hindu Law applies to the facts of the present case. The appellant is an after-born son and his father, Alagu Gounder, had not reserved a share for himself. The consequence is that the appellant is entitled to have the partition re-opened. In this view the decision of the Subordinate Judge cannot stand. The appeal is accordingly allowed and the decree of the District Munsif restored with costs here and in the lower appellate Court payable by respondents 1 and 2.

MOCKETT J.

MOCKETT J.—I agree. I am adding a few words because I should like to make it clear that we are being invited to engraft a new rule of Hindu law on to the principles relating to sons born after partition. The position with regard to sons born after partition is

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well established to-day. It is stated in Mayne's Hindu Law, paragraph 420 :

"If the father had divided the whole property among his sons, retaining no share for himself, then the sons, with whom partition was made, must allot from their shares a portion equal to their own to an after-born son."

In this case I agree that there was no allotment of shares to the father because all that was arranged was that there should be provision for his maintenance during his lifetime. But it is argued by the learned Counsel for the respondents that, inasmuch as the partition deed did make provision in anticipation for a son born after partition, that arrangement should stand, provided it was a fair arrangement. That may be a sound rule of commonsense, but there is no authority for it and none has been cited before us. The decision, *Ganpat v. Gopal Rao*(1), to which my learned brother has referred is on totally different facts and it is interesting to note that the learned Judge when giving judgment expressly (at page 641) mentions that the feature of the case before him was that there was no partition between the three sons of Venkatrav (the father) in which Venkatrav left no share for himself. I should be very reluctant, except constrained by clear authority, to hold that there was any rule of Hindu law relating to this matter which involved a consideration of what was and was not a proper provision to be made for a potential post-partition son or sons. I prefer the rule as it stands and I agree with my learned brother that that rule to-day is clear. The learned Judge has decided this case on the basis that the provision which had been made for the post-partition son was fair. In my opinion, he erred. It may be pointed out that under the arrangement in the partition the appellant would have got one-sixth only, whereas under the law, as I understand it, he gets one-fourth. In so deciding, the learned Judge has

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done the very thing to which I have referred, namely, he has brought into existence a new rule of Hindu law. I accordingly agree that this appeal should be allowed and with the order proposed as to costs.

G.R.

APPELLATE CIVIL.

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

MOHAMMED IBRAHIM (FIFTH DEFENDANT), APPELLANT,
v.

1944,
April 6.

THE NORTHERN CIRCARS FIBRE TRADING
COMPANY, COCANADA, AND EIGHT OTHERS (PLAINTIFFS
AND DEFENDANTS 1, 2, 4 AND 6), RESPONDENTS.*

*Immovable property—Fixtures—“ Things attached to the earth ”
meaning of—Movable property—Document creating charge
on machinery attached to building—If compulsorily regis-
trable—Such machinery, if movable or immovable property—
Test—Intention of parties—Same person purchasing land
and machinery attached to it from persons owning them
separately—Intention of such person to keep machinery as
part of land—Transfer of Property Act (IV of 1882),
ss. 3, 4 and 100—Indian Registration Act (XVI of
1908), ss. 2 (6) and 2 (9).*

In deciding whether machinery installed in a building or attached to land is movable or immovable property, the degree and nature of the attachment is a consideration but only a minor consideration. The more important consideration is the object of the annexation, which is a question of fact to be determined by the circumstances of each case. The true test is to ascertain the intention of the person concerned in installing the machinery or attaching it to the land. The intention may be express or implied from the circumstances in which he attaches the machinery. In the absence of proof one way or the other the intention to be attributed is that of a person acting from motives of self-interest.

Accordingly, where land and the machinery attached to it belong to different owners and both are purchased by a third

* Appeal No. 343 of 1942.

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person for the purpose of carrying on a business for his own individual benefit, it may be inferred that the intention of the purchaser is not to keep the two things apart but to make the machinery part of the land. In such a case the machinery is immovable property and a document creating a charge thereon requires registration according to law.

Case law discussed.

APPEAL against the decree of the Court of the Sub-ordinate Judge of Cocanada, dated 23rd December 1941 and passed in Original Suit No. 83 of 1935.

Ch. Raghava Rao and A. Satyanarayana for appel-
lant.

P. Somasundaram and P. Suryanarayana for
respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by KRISHNASWAMI AYYANGAR J.—The appellant in this appeal was the fifth defendant in the suit out of which it has arisen. He is the assignee of a mortgage decree obtained by the third defendant on a mortgage executed on 6th July 1934 by defendants 1 and 2 over the property known as the South India Bone Mills at Samalkot. The property comprised land as well as the plant and machinery installed thereon for the manufacture of bone meal. The mortgagors were the owners of three other mills also with which however we are not concerned in this appeal. Prior to the execution of the mortgage aforesaid, the mortgagors had on 16th November 1943 entered into an agreement with plaintiffs 2 to 4 who were carrying on a business under the name of the Northern Circars Fibre Trading Company, Cocanada, which was the first plaintiff in the suit. By this agreement the second defendant who was doing business in the name of C. Raju, Import and Export Company, Cocanada, pleaded as the first defendant to the suit, entrusted the management of his several mills to the first plaintiff for a period of two years. The Northern Circars Fibre

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Trading Company, who were thus entrusted with the management, undertook amongst others to invest a sum of Rs. 25,000 in cash in the business and this amount was to carry interest at twelve per cent per annum. They were referred to in the agreement as the dubashees. It was a term of the agreement that

"the monies invested by the dubashees shall be a first charge on the assets of the firm".

The plaintiffs instituted the suit for the recovery of a sum of Rs. 66,746-9-9 as due to them in respect of the moneys invested by them in the business together with interest and the commission earned by them. They also claimed to be entitled to a first charge on the machinery in the mills, the stock-in-trade and the goodwill of the business. The agreement of 16th November 1933 had not been registered under the provisions of the Indian Registration Act, but the plaintiffs claimed that the provisions of the agreement relating to the charge were none the less effective in so far as the movables, viz., the plant and machinery and the stock-in-trade, were concerned.

Subsequent to the institution of the suit a compromise was arrived at between the plaintiffs and defendants 1 and 2 by which these defendants agreed to pay plaintiffs 2, 3 and 4 a sum of Rs. 35,000 in full satisfaction of the claim in suit. Defendants 3 and 4 who were not parties to the compromise contended that the dubashee agreement in so far as it purported to give the plaintiffs a charge over the plant and machinery in the South India Bone Mills at Samalkot was invalid for want of registration because the said plant and machinery were immovable property. The suit was first tried in July 1937 by Mr. Bhaskara Reddi, the then Subordinate Judge, who pronounced judgment on 19th July 1937 dismissing the suit on the ground that though the agreement purported to create a charge over movable as well as immovable properties it was invalid for want of registration not only in respect of the immovable properties but also

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in respect of the movable properties because the two sets of properties were inseparable from one another and the charge therefore failed in its entirety. The plaintiffs appealed to this Court in Appeal Suit No. 320 of 1937. The judgment of the Subordinate Judge was reversed and the case was sent back for re-hearing, this Court holding that it is possible to separate the movable and the immovable assets and the charge should be regarded as valid in so far as the movables were concerned. The case then came up before Mr. R. M. V. S. Rao for fresh trial and he pronounced his judgment on 23rd December 1941 decreeing the suit in so far as the plant and machinery installed in the mill were concerned on the ground that they constituted movable and not immovable property. The fifth defendant who, as we have said, is the assignee of the mortgage decree obtained by the third defendant has preferred this appeal.

The only question raised in the appeal is whether the Subordinate Judge is right in holding that the machinery installed in the premises of the factory at Samalkot is movable property. The learned Judge has found that the main machine is installed on a small cement platform to which it is fixed by means of bolts at the four corners. It is also held in position by being attached to iron pillars fixed in the ground to a depth of nearly six or seven feet. At the same time he was of opinion that the machine can be dismantled into parts and conveniently removed as it is not difficult to break the platform and pull out the iron pillars to which the machine is screwed down. He came to the conclusion that the machinery was movable property by asking himself the question whether the mill (machinery) existed for the land or the land existed for the mill (machinery), that is, whether the mill is of primary importance and the land only of secondary importance in this case or *vice versa*. His view appears to be that the bone mill stands embedded

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in and attached to the earth not for the beneficial enjoyment of the land in which case alone it should be regarded as immovable property but for the beneficial enjoyment of the mill itself which therefore remained notwithstanding the attachment movable property only. After the best consideration we can give to the question we are of opinion that the learned Judge's decision cannot be supported. The real question which falls to be decided in this appeal is whether the writing evidenced by the dubashee agreement referred to above is required by law to be registered because it purports to create a right, title or interest in immovable property of the value of Rs. 100 and upwards. It is common ground that the value of the machinery is more than Rs. 100 and, if it is immovable property, the agreement requires registration in order that the charge may take effect. If the machinery however is movable property, the agreement does not, of course, require registration.

"Movable property" is defined in section 2, clause 9, of the Registration Act as including

"standing timber, growing crops and grass, fruit upon and juice in trees, and property of every other description, except immovable property".

The machinery in question not falling within any of the enumerated species of movable property referred to in the section, it becomes necessary to enquire whether it is property of a description other than immovable property. Turning to the definition of "immovable property" in clause 6 of the same section we find it is stated that it

"includes land, buildings . . . and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass".

From this definition it is clear that what is really movable property may become immovable property if it is attached to the earth or permanently fastened to anything which is attached to the earth. The

Transfer of Property Act, 1882, relating to transfers of immovable property contains in section 3 a definition of the expression "attached to the earth" for purposes of that Act. The definition is this:

"'Attached to the earth' means—

(a) rooted in the earth, as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls or buildings; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached."

It was argued for the appellant that the question whether the dubashee agreement requires to be registered or not is primarily to be decided on the language of the definition of "immovable property" contained in the Registration Act rather than on that to be found in the Transfer of Property Act. The Transfer of Property Act, it will be remembered, governs charges created on immovable property. Section 100 states:

"Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge."

One of the provisions here alluded to is that contained in section 59 which makes instruments creating a charge in respect of property of a value over Rs. 100 compulsorily registrable. If we now turn to section 4 of the Transfer of Property Act we find it says that section 59 is among a group of sections therein mentioned which should all be read as supplemental to the Indian Registration Act, 1908. So far as the question of registration is concerned, we think that the two Acts are *in pari materia* and it will therefore be wrong to construe the definition of "immovable property" in the one Act as being different from that in the other, in the absence of words clearly pointing to a distinction.

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Coming back to the definition of "immovable property" in the Registration Act and leaving out the several species of immovable property enumerated therein which are all different from the property here under consideration, it will be seen that the governing principle with respect to immovable property in general is stated in the following words:—

"Things attached to the earth or permanently fastened to anything which is attached to the earth."

The first part of the definition implies that what is really movable property may become immovable property by being directly attached to the earth. The second part indicates that though the attachment is not direct, still if the movable property is fastened to something which is directly attached to the earth, it will be immovable property for the purpose of this Act. The Transfer of Property Act, as we have already observed, contains a definition of "things attached to the earth", but not of "things permanently fastened to anything which is attached to the earth". We are however loath to accept as correct a dissection and analysis of the definition given by the Registration Act for the purpose of giving it a wider scope than what is expressed in the definition contained in the Transfer of Property Act. Indeed, it seems to us that clause (c) of the latter definition which refers to a mediate and not a direct attachment is substantially what is referred to in the second part of the definition in the Registration Act. The inquiry should accordingly be not whether the attachment is direct or indirect but what is the nature of the attachment and what its object and purpose. The question is often a difficult one, but certain rules have been laid down in the decided cases for guiding the Court. The classic statement of the law on this point is that contained in the judgment of BLACKBURN J. in *Holland v. Hodgson*(1) where looms attached to the floor and

(1) (1872) L.R. 7 C.P. 328.

beams of a worsted mill were deemed to be fixtures. It was observed:

"There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation and the object of the annexation. When the article in question is no further attached to the land than by its own weight it is generally to be considered a mere chattel; see *Willshear v. Cottrell*(1) and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land; see *D'Eyncourt v. Gregory*(2). Thus blocks of stone placed one on the top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall would remain chattels. On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to show that it was never intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly fixed to the ground in order to bear the strain of the cable, yet none could suppose that it became part of the land, even though it should chance that the ship-owner was also the owner of the fee of the spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land. Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel."

In *Reynolds v. Ashby*(3) Lord LINDLEY, dealing with a case where machinery had been obtained on a

(1) (1853) I.E. & B. 674.

(2) (1866) L.R. 3 Eq. 382.

(3) [1904] A. C. 466.

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hire purchase agreement from the owner and attached to a factory for the purpose of working it, observed :

"The purpose for which the machines were obtained and fixed seems to be unmistakable ; it was to complete and use the buildings as a factory. It is true that the machines could be removed if necessary, but the concrete beds and bolts prepared for them negative any idea of treating the machines when fixed as movable chattels."

After observing that the English cases were not all reconcilable, his Lordship pointed out :

"In dealing with them (fixtures) attention must be paid not only to the nature of the thing and to the mode of attachment, but to the circumstances under which it was attached, the purpose to be served and last but not least to the position of the rival claimants to the things in dispute."

It will thus be seen that the degree and nature of the attachment is no doubt a consideration but only a minor consideration. The more important consideration is the object of the annexation which is a question of fact to be determined by the circumstances in each case. For instance, if a tenant for years or a tenant for life buys and fixes machinery of great value to the tenement occupied by him, it is unlikely that he would have intended to so attach the machinery as to make it part of the immovable property. In *Subramanian Chettiar v. Chidambaram Servai*(1) decided by WADSWORTH J. the question was whether an oil engine which was installed by making a concrete base fitted with bolts and attaching it to the bolts by means of nuts, was movable or immovable property. The engine was installed by a tenant of a building holding a lease for a period of three years for the generation of electricity for lighting and running a cinema. While recognising the difference between the English and the Indian law in regard to fixtures, the learned Judge expressed the opinion that there is nothing in the English cases which made them inapplicable in the determination of the test to be applied for ascertaining whether and in what circumstances movables

(1) (1939) 51 L.W. 155.

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annexed or attached to an immovable property became themselves immovables. The learned Judge observed, if we may say so with respect, quite correctly :

"If a thing is imbedded in the earth or attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached, then it is part of the immovable property. If the attachment is merely for the beneficial enjoyment of the chattel itself, then it remains a chattel, even though fixed for the time being so that it may be enjoyed. The question must in each case be decided according to the circumstances."

He has pointed out that, when the owner of a building installs machinery therein, he may well have intended to make a permanent improvement to the premises which he owned in order to facilitate the user of those premises but that a tenant in temporary occupation of leased premises is not likely to have had any such intention in making the improvement, and he accordingly held that the oil engine did not become and was not therefore immovable property. As we have already indicated, the more important test is to ascertain the intention of the persons concerned when he attaches and installs his own machinery to the land or building. The intention may be express or implied from the circumstances in which he attaches the machinery. In the absence however of proof one way or the other it seems to us that it would be proper to apply the test which the Privy Council laid down in *Gokaldas Gopaldas v. Puranmal Premeekhdas*(1) for ascertaining the true intention of a purchaser of the equity of redemption when he pays off a prior mortgage and subsequently claims subrogation. Their Lordships observed :

"The obvious question to ask in the interest of justice equity and good conscience is, what was the intention of the party paying off the charge ? He had a right to extinguish it and a right to keep it alive. What was his intention ? If there is no express evidence of it, what intention should be ascribed to him ? The ordinary rule is that a man having a

(1) (1884) I.L.R. 10 Cal. 1035 (P.C.).

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right to act in either of two ways, shall be assumed to have acted according to his interest."

On this principle the intention to be attributed is that of a person acting from motives of self-interest. Applying this test, what we find here is this. The second defendant was at the date of the dubashee agreement the owner of the factory and the owner of the bone crushing mill located in it. It is true that before his purchase the site and the land on which the factory stood belonged to one of four partners of the firm which owned the machinery in common having installed it for the purpose of manufacturing bone meal. It was said that until the purchase by the defendant the machinery and the land belonged to different owners and that it would never have been the intention of the partnership to treat the machinery as part of the land. While we agree that there is considerable force in this argument, we cannot assent to the proposition that when the second defendant purchased the land and the machinery he continued to have the same intention which his vendors had before him. There was no reason whatever for thinking that he intended to keep the two things apart. It is obvious that his object was to become the owner of both for the purpose of carrying on the business and for his own and individual benefit. If the argument is correct, namely, that the same intention which the vendors had must be attributed to the purchaser, the only way of establishing a different intention would be by the purchaser removing the machinery from the ground to which it was annexed and again attaching it with the express intention of making it part of the land. We cannot imagine that the law requires any such procedure to be adopted for inferring an intention on the part of the purchaser to make the machinery part of the land.

Taking all the circumstances of the case before us, we are of opinion that the plant and machinery of the bone mill are immovable property so annexed to the

floor of the factory as to become part of it. It follows that the appeal must be and is accordingly allowed. The suit is dismissed as against the fifth defendant. The appellant is entitled to his costs here and in the Court below.

N.S.

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APPELLATE CRIMINAL.

Before Mr. Justice Byers.

IN RE K. V. SUBRAMANIA AYYAR (ACCUSED),
PETITIONER.*

1944,
July 25.

*Code of Criminal Procedure (Act V of 1898), ss. 408 and 413—
Motor Vehicles Act (IV of 1939)—Imposition of fines
amounting to Rs. 45 and disqualification for holding
driving licence—Not appealable.*

Where a First Class Magistrate imposed on the petitioner fines amounting in all to Rs. 45 and disqualified him for holding a driving licence for three months for committing offences punishable under the Motor Vehicles Act,

held that under section 413 of the Code of Criminal Procedure no appeal lay against the order. Section 4 of the Code of Criminal Procedure, read with section 53 of the Indian Penal Code, makes it clear that the punishment which has to be specified under section 367 (2) of the Code of Criminal Procedure cannot include an order of disqualification for holding a licence.

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 Sessions of the Coimbatore Division in Criminal Appeal No. 122 of 1943 preferred against the judgment of the Court of the Joint First Class Magistrate of Coonoor in Sessions Case No. 47 of 1943 and the judgment of the said

* Criminal Revision Cases Nos. 84 and 85 of 1944
(Criminal Revision Petitions Nos. 81 and 82 of 1944).

SUBRAMANIAM,
In re. Court of the Joint First Class Magistrate of Coonoor
in the said Sessions Case No. 47 of 1943 respectively.

A. C. Muthanna for *N. Ramanatha Ayyar* and
P. S. Kailasam for petitioner.

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

ORDER.

BYERS J. *BYERS J.*—The petitioner was convicted by the learned Joint First Class Magistrate, Coonoor, of offences punishable under sections 78, 86 and 116 of the Motor Vehicles Act and sentenced to pay fines amounting in all to Rs. 45. He was also disqualified for three months for holding a driving licence under section 17 (1) of the Act; but when an appeal was taken to the Sessions Court of Coimbatore under section 17 (7) of the Act, the learned Judge set aside the order of disqualification although he held that no appeal lay against the convictions. Against that order Criminal Revision Case No. 84 of 1944 has been brought, and Criminal Revision Case No. 85 of 1944 is against the convictions by the learned Joint Magistrate.

Regarding the right of appeal it is contended that it is taken away by section 413 of the Code of Criminal Procedure only when there is a sentence of fine not exceeding Rs. 50 and that as there is in addition to the fines the order of disqualification an appeal will lie under section 408 of the Code. This argument assumes that an order of disqualification for holding a driving licence is a punishment, but it is clear from section 4 of the Code of Criminal Procedure read with section 53 of the Indian Penal Code that the punishment which has to be specified under section 367 (2) of the Code of Criminal Procedure cannot include an order of disqualification for holding a licence. This also appears from section 17 (1) of the Motor Vehicles Act, which provides for the imposition of an order of disqualification in addition to any other punishment authorized by law; and clause 7 of the same section

confers upon the appellate Court the power to revise an order of disqualification although no appeal lies from the conviction. The order of the learned Sessions Judge dismissing the appeal as not competent is clearly correct and the revision petition in respect of it has to be dismissed.

Regarding Criminal Revision Case No. 85 of 1944, the convictions for disobeying a traffic signal, failing to produce the driving licence, and driving recklessly or dangerously depend upon findings of fact which cannot be challenged in revision and this petition also has to be dismissed.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice Lakshmana Rao and Mr. Justice Kuppuswami Ayyar.

IN RE A PLEADER, BELLARY.*

Legal Practitioner—Taking client's signatures on blank sheets of paper—Professional misconduct.

It is most objectionable for legal practitioners to take their clients' signatures on blank sheets of paper. When it is done, for instance, in the case of a plaint there can be no proper verification as required by the Code of Civil Procedure. A practitioner who permits this to be done is guilty of unprofessional conduct.

NOTICE under sections 13 and 14 of the Legal Practitioners Act on a pleader calling upon him to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court for his grossly improper conduct in the discharge of his professional duty.

Advocate-General (P. V. Rajamannar) for the Crown.—In a plaint filed in Court, large blank spaces were noticed by the District Munsif between the typed matter and the plaintiff's signatures. The District Munsif thought that the

* Referred Case No. 50 of 1944.

A PLEADER
BELLARY,
In re.

respondent pleader had induced his client to sign blank sheets of paper in order to use them for the preparation of the plaint. If that were a fact, it is professional misconduct. There would not then be a verification of the plaint as required by the Code of Civil Procedure. The evidence in this case is to the effect that signatures of the client were taken after the plaint was prepared. The respondent cannot be held guilty of professional misconduct.

V. S. Narasimhachar for respondent.

LEACH C.J.—The ORDER of the Court was delivered by LEACH C.J.—The respondent is a pleader practising in the district of Bellary. He has been accused of professional misconduct in that he induced a client to sign blank sheets of paper in order that they could be used for the preparation of a plaint which would then be regarded as having been duly signed and verified by the client. The plaint was filed in the Court of the District Munsif of Bellary and, as the District Munsif considered that the spacing of the document was such as to indicate that this had happened, he submitted the document to the District Judge who instituted these proceedings against the respondent.

We agree with the learned District Judge that it is most objectionable for practitioners to take their clients' signatures on blank sheets of paper. For instance, when this is done in the case of a plaint there can be no proper verification as required by the Code of Civil Procedure. A practitioner who permits this to be done is undoubtedly guilty of unprofessional conduct.

The question here is whether the District Judge was justified on a mere perusal of the document in coming to the conclusion that the respondent had prepared the plaint on sheets of paper which his client had signed in blank. Undoubtedly the spacing of the document does give rise to strong suspicion, but suspicion is not sufficient. Both the respondent and the client have given evidence on oath that the client's signatures on the pages of the plaint were written

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after the document had been prepared. In order to substantiate the charge of professional misconduct there must be evidence in support of it and we do not consider that the fact that the client's signatures appear at the bottom of pages 3 and 4 with considerable spacing above them is in itself sufficient to hold the respondent guilty of the charge preferred against him. The suspicion is strong, but that, as we have said, is not sufficient. There must be something more.

In these circumstances we are unable to follow the suggestion of the District Judge that the respondent should be censured and we dismiss the charge. But we may add that, if such a charge were proved, the Court would be called upon to consider whether a censure would be sufficient punishment for unprofessional conduct of this nature.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

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

SRINIVASA IYER (PLAINTIFF), PETITIONER,

v.

GOVINDA KANDIYAR AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

1944,
October 9.

Slavery bond—Test—Farm labourer receiving money from landlord and executing bond agreeing to work under him—Amount not to be called in by landlord so long as labourer worked under him—In case of refusal to work, amount repayable with high rate of interest from date of refusal—No prohibition to labourer seeking service elsewhere—Bond, not slavery bond.

A farm labourer received a certain amount of money from a landlord and executed a bond agreeing to work as a labourer under him. The amount was not to be called in by the landlord so long as the labourer worked under him. In case he refused

* Civil Revision Petition No. 1778 of 1943.

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to work, the amount was repayable at a certain high rate of interest from the date when the landlord ceased to have the use of the services of the labourer. There was no prohibition against the labourer applying for service elsewhere. On the labourer leaving his service, the landlord filed a suit on the bond claiming the principal amount with interest at 6½ per cent from the date of the cessation of service.

Held: The bond was not a slavery bond and a decree could be passed for the amount claimed.

Periana Kone v. Palayathan(1) and *Kannakkal v. Karuppan Samban*(2) followed.

Sundara Reddy v. Jagannathan(3) and *Rama Sastriar v. P. Ambalakaran*(4) distinguished.

Ram Sarup Bhagat v. Bansi Mandar(5) not followed.

PETITION under section 25 of the Provincial Small Cause Courts Act (IX of 1887) praying the High Court to revise the decree of the Court of the District Munsif of Tiruturaipundi, dated 17th September 1943, in Small Cause Suit No. 302 of 1943.

P. S. Ramachandran for petitioner.—The lower Courts relying on *Ram Sarup Bhagat v. Bansi Mandar*(5) held that the bond in question constituted a slavery bond. But the present case falls within the principle recognized by this Court in *Periana Kone v. Palayathan*(1) which distinguished *Ram Sarup Bhagat v. Bansi Mandar*(5) and held that a similar bond was not a slavery bond. To the same effect is the decision in *Kannakkal v. Karuppan Samban*(2) where also a similar bond was held not to amount to a slavery bond. The decisions in *Rama Sastriar v. P. Ambalakaran*(4) and *Sundara Reddy v. Jagannathan*(3) turned on the peculiar terms of the respective bonds in those cases and are distinguishable from the terms of the bond in question.

K. S. Desikan and *K. Raman* for respondents.—In the present case the bond does not prescribe any period when the principal amount is to be paid. It looks as if it constitutes perpetual labour. The terms of the bond in the present case are similar to those of the bond which the Court had to consider in *Sundara Reddy v. Jagannathan*(3) and the principle of law laid down in *Ram Sarup Bhagat v. Bansi Mandar*(5) should be applied.

P. S. Ramachandran was not called upon to reply.

(1) (1919) 10 L.W. 202.

(2) (1926) 25 L.W. 601.

(3) A.I.R. 1927 Mad. 818.

(4) A.I.R. 1929 Mad. 267.

(5) (1915) I.L.R. 42 Cal. 742.

The JUDGMENT of the Court was delivered by LEACH C.J.—The first respondent is the father-in-law of the second respondent. On 18th July 1929 they executed a bond in favour of the petitioner. Under it the second respondent was to work as a farm labourer for the petitioner. The second respondent left the petitioner's employment on 1st May 1942, whereupon the petitioner filed Small Cause Suit No. 302 of 1943 in the Court of the District Munsif, Tiruturaipundi, to recover the money due under the bond. The District Munsif held that the document constituted a slavery bond and dismissed the suit. The question which we are called upon to decide is whether the bond can in law be regarded as a slavery bond.

The operative part of the bond reads as follows:—

"For paying and discharging the dues under the debt bond for personal labour executed by Vayira Padayachi out of us in favour of Manakkudi Rama Mudaliar for Rs. 70 and the dues under promissory note for Rs. 30, in all Rs. 100 for two items, free from all claims, excluding the amount paid already, the amount borrowed from you by us in cash is Rs. 86. In lieu of interest on the said amount of rupees eighty-six, Vayira Padayachi of us shall remain in your pannai (farm), and do the pannai labour and receive the wages, kalavadi, manyam according to the pannai usage. On the above understanding we have executed this document. In case of failure to do so or in case labour is undertaken elsewhere, or in case of non-appearance for work, we agree to add interest at the rate of Rs. 2 per cent per month from that date and pay the same whenever demanded by you without pleading any apportionment of liability. To this effect we have executed this bond apart from the bond in respect of personal labour executed by Govinda Kandian out of us on 5th July 1910 and apart from the sundry amounts we have received."

It will be observed that the defendants received in cash the advance of Rs. 86. This advance was not to be called in while the second defendant worked for the plaintiff. In case he refused to do so the advance was to be repayable with interest at two per cent per month from the date when the plaintiff ceased to have

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the use of the second defendant's services. The second defendant was not prohibited from applying for service elsewhere.

There is nothing here in the nature of a slavery bond. It is true that the rate of interest is very high, but under the existing law the Court has power to reduce exorbitant interest. Moreover, the plaintiff in bringing this suit only claimed interest at 6½ per cent per annum from the date when the second defendant left his farm.

The case falls well within the principle recognized by this Court in *Periana Kone v. Palayathan*(1) and *Kannakkal v. Karuppan Samban*(2). The decisions of this Court in *Sundara Reddy v. Jagannathan*(3) and *Rama Sastriar v. P. Ambalukaran*(4) are based on entirely different facts and the judgments have no application. It is true that the case for the respondents receives support from the decision of the Calcutta High Court in *Ram Sarup Bhagat v. Bansi Mandar*(5) where the facts were very much the same, except that the repayment was to be made in a certain month in any year and that on default interest at 75 per cent per annum was to be charged. We are not prepared to follow this decision. As we have said, there is nothing in the bond here in the nature of slavery and the decisions of this Court in *Periana Kone v. Palayathan*(1) and *Kannakkal v. Karuppan Samban*(2) support this view. The system of granting advances to agricultural labourers on these terms may be a very bad one; but it is quite a different thing to say that they bind persons entering into such bonds as slaves to their masters.

The petition for revision must be allowed and a decree passed in favour of the petitioner in accordance with the prayer in his plaint, with costs here and below.

G.R.

(1) (1910) 10 L.W. 202.

(2) A.I.R. 1927 Mad. 818.

(3) (1926) 25 L.W. 601.

(4) A.I.R. 1929 Mad. 207.

(5) (1915) I.L.R. 42 Cal. 742.

APPELLATE CIVIL.

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

PARU KUTTY AMMA (PLAINTIFF), APPELLANT,

v.

VASUDEVAN (MINOR) BY GUARDIAN A. M. KUTTI
SANKARAN AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

1944,
August 28.

Will—Construction—Requests in favour of grandchildren jointly—Direction for possession and management of bequeathed property during their minority and for delivery to them jointly on their attaining majority—Right of each grandchild to claim his share on his attaining majority—Indian Succession Act (XXXIX of 1925), sec. 117.

A testator left certain properties to his granddaughter and grandson and directed that the properties should be in the possession and management of the father of the grandchildren during their minority and should then be handed over to them jointly. The granddaughter having attained majority filed a suit for recovery of her half share of the legacy, while her brother, the grandson, was still a minor.

Held: The claim was maintainable.

Husenbhoy v. Ahmedbhoy(1), *Gosling v. Gosling*(2) and *Lloyd v. Webb*(3) followed.

APPEAL against the decree of the Court of the Subordinate Judge of Ottapalam in Original Suit No. 36 of 1942.

K. Kuttikrishna Menon and A. Gopala Krishnan for appellant.

T. K. Raman Nambisan for first respondent.

P. Govinda Menon and T. C. Raghavan for second respondent.

The JUDGMENT of the Court was delivered by LEACH C.J.—The appellant filed a suit in the Court of the Subordinate Judge of Ottapalam for partition and possession of the properties left jointly to her and

LEACH C.J.

* Appeal No. 153 of 1943.

(1) (1901) I.L.R. 26 Bom. 319.

(2) (1859) 123 R.R. 107.

(3) (1896) I.L.R. 24 Cal. 44.

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LEACH C.J.

her brother under the will of their grandfather Ravunni Panikker, who died on 3rd December 1938. The Subordinate Judge dismissed the suit on the ground that her claim was premature. The appeal is against that decision.

Ravunni Panikker had three sons and a daughter. His eldest son is the second defendant, who is the father of the plaintiff and the first defendant. The testator left certain properties to his sons and daughter, and other properties to the son and daughter of the second defendant. The will provided that the properties left to the plaintiff and the first defendant should remain in the possession and management of their father during their minority and then they were to be handed over to them jointly. After the plaintiff became of age she filed this suit. Her brother was then and still is a minor. Three preliminary issues were framed, two of which were decided in favour of the plaintiff. The third issue was whether the suit was premature, and that it was premature was strenuously argued on behalf of the father. The Subordinate Judge held that it was premature. He was of the opinion that section 117 of the Indian Succession Act, which allows the accumulation of income provided that the period is not longer than eighteen years, had bearing. We fail to see what application this section has here. The plaintiff received an absolute interest in one half of the properties left by the testator to her and her brother, and on her attaining majority she was entitled to be put in possession of her share.

In *Husenbhoy v. Ahmedbhoy*(1) the Bombay High Court held that, where property is left to a person absolutely and the will directs that it should not be handed over to a legatee until he has attained a certain age beyond majority, the direction must be ignored, unless the will confers an interest in the property upon some other person for the intervening period. If it does not, the legatee is entitled on attaining majority

(1) (1901) I.L.R. 28 Bom. 319.

to be placed in possession of his legacy. This principle was laid down in *Gosling v. Gosling*(1). It was also applied by the Calcutta High Court in *Lloyd v. Webb*(2).

We hold that that principle governs this case and that the Subordinate Judge was wrong in declaring the plaintiff's suit to be premature. The first defendant is represented by a guardian *ad litem* appointed by the Court. The guardian *ad litem* supports the appeal. The opposition only comes from the father and it follows from what we have said that we consider that his objection is unsustainable.

The appeal is allowed and the suit remanded to the trial Court to hear and determine the other issues according to law. The appellant and the first respondent are entitled to their costs (one set each) which will be paid by the father. The costs of the trial Court will abide the further hearing.

N.S.

APPELLATE CIVIL.

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

AMICHAND DOSS DWARAKADOSS (PLAINTIFF—
FIRST RESPONDENT), APPELLANT,

v.

T. MANAVALAN TIRUMALPAD AND TWO OTHERS
(DEFENDANTS 2, 5 AND 7—APPELLANT AND RESPONDENTS
3 AND 4), RESPONDENTS.*

*Indian Limitation Act (IX of 1908), art. 36—Applicable to
suit by shareholder against directors of company for com-
pensation in respect of misleading prospectus—Indian
Companies Act (VII of 1913), sec. 100.*

Article 36 of the Indian Limitation Act governs a suit by a shareholder against the directors of a company for compensation for loss suffered as the result of a false and misleading prospectus published by them when calling for subscriptions in respect of an issue of shares by the company.

(1) (1859) 123 R.R. 107. (2) (1896) I.L.R. 24 Cal. 44.

* Letters Patent Appeal No. 76 of 1943.

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LEACH C.J.

1944,
August 15.

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DOSS
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v.
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TIRUMALPAD.

APPEAL under clause 15 of the Letters Patent against the judgment of KUNHI RAMAN J., dated 25th October 1943 and passed in City Civil Court Appeal No. 54 of 1942, preferred against the decree of the City Civil Court, Madras (Principal Judge) dated 24th September 1942 and passed in Original Suit No. 3104 of 1939.

M. Sham Das for *Arunachalam, Jagannadha & Co.* for appellant.

N. A. Krishna Ayyar and *S. R. Subramania Ayyar* for respondents.

LEACH C.J.—The JUDGMENT of the Court was delivered by LEACH C.J.—The question in this appeal is whether article 36 of the Limitation Act applies in the case of an action against the directors of a company for compensation for loss suffered as the result of a misleading prospectus.

On 13th September 1936 a prospectus was published in a local newspaper calling for subscriptions in respect of an issue of shares by a company called the Cochin Furniture Company, Limited. Believing the statements in the prospectus, the appellant applied for two hundred and fifty shares, which were promptly allotted to him. The capital required was not obtained and the company was compelled to go into liquidation. On 8th September 1939 the appellant filed a suit in the City Civil Court, Madras, for rescission of the contract and for compensation for the loss which had resulted to him from the misrepresentation contained in the prospectus. The company and all the directors were made parties. The trial Court held that the prospectus did contain false statements and that the appellant was entitled to compensation in the sum of Rs. 450. The appellant did not proceed with his plea for rescission of the contract. He limited his case to the claim for compensation. One of the directors entered into a compromise with the appellant but the others contested the suit.

It was contended by the contesting defendants that the claim had been preferred out of time as the

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article which governed the claim against them was article 36. The appellant persuaded the Principal Judge of the City Civil Court, who tried the suit, that the appropriate article was article 120. Accordingly the suit was held to be in time. On appeal to this Court, KUNHI RAMAN J. agreed with the trial Court that the appellant had a cause of action against the directors and that the finding of the trial Court that the appellant had suffered loss to the extent of Rs. 450 was correct. He disagreed, however, on the question of limitation. In his opinion the case was governed by article 36, which meant that the suit was out of time. Consequently he set aside the decree of the City Civil Court and directed that the appellant's suit be dismissed. This appeal is from the judgment of KUNHI RAMAN J.

Article 36 fixes the period of limitation at two years for suits "for compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided for". There is no article in the Limitation Act which specially provides for actions against a promoter or director of a company in respect of a false statement made in a prospectus. A person who is responsible for the issue of a false prospectus commits a tort and by reason of the provisions of section 100 of the Indian Companies Act is under a statutory liability to provide compensation. Article 36 must apply to this case unless the tort complained of arises out of the contract for the issue of shares. In our opinion it does not, but is independent of the contract. The contract is between the subscriber for shares and the company. The liability of the directors is confined to something which preceded the contract to which they are not parties.

We agree with KUNHI RAMAN J. that article 36 applies and consequently we dismiss the appeal with costs.

N.S.

APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and
Mr. Justice Shahabuddin.*

1944.
August 17.

THE MADRAS PROVINCIAL CO-OPERATIVE BANK,
LTD., MADRAS (DEFENDANT), APPELLANT,

v.

THE SOUTH INDIAN MATCH FACTORY, LTD. (IN
LIQUIDATION) BY ITS OFFICIAL LIQUIDATOR THE
OFFICIAL RECEIVER OF MADRAS (PLAINTIFF),
RESPONDENT.*

*Negotiable Instruments Act (XXVI of 1881), ss. 10 and 85—
"Payment in due course"—Company in liquidation—
Property of company sold by official liquidator—Pur-
chaser issuing cheque for sale price in favour of
official liquidator—Bank paying cheque amount to official
liquidator in person across counter—Amount misappro-
priated by official liquidator—Official liquidator removed
and another appointed in his place—Successor filing suit
against bank for recovery of cheque amount again—Bank
liable—Bank's negligence in payment across counter—
Indian Companies Act (VII of 1913), sec. 244A—Madras
High Court Rules under the Act, r. 66.*

In respect of a sale of certain properties belonging to a company which was being wound up under orders of Court, a cheque was issued upon a bank for the amount of the price less the advance, by the purchaser in favour of the official liquidator. The amount of the cheque was paid by the bank to the official liquidator personally across its counter and the money was misappropriated by him. The official liquidator was subsequently removed from office and another person was appointed in his place. In a suit by the new official liquidator against the bank for the recovery of the amount of the cheque,

held : The bank was liable to pay the amount. The bank committed breach of a statutory duty and was negligent in paying to the official liquidator direct over the counter. The payment was not one made in due course within the meaning of section 10 of the Negotiable Instruments Act and the bank was not entitled to claim the benefit of section 85

of the Act. By reason of the provisions of section 244A of the Indian Companies Act and rule 66 of the rules framed by the High Court under that Act, the bank must be deemed to have known that the official liquidator ought to have a bank account and that he could not collect the amount of the cheque except through his bank. The negligent payment of the cash to the official liquidator facilitated his misappropriation of the money.

APPEAL from the judgment and decree of BELL J., dated 3rd December 1943 and passed in the exercise of the ordinary original civil jurisdiction of the High Court in Civil Suit No. 141 of 1943.

V. Radhakrishnaiya for appellant.

R. Narasimhachari for respondent.

The JUDGMENT of the Court was delivered by LEACH C.J.—On 16th February 1939 an order for the compulsory winding up of the South Indian Match Factory, Limited, was passed in proceedings on the original side of this Court and one M. Ramachandra Rao, who was then an Advocate of this Court, was appointed the official liquidator. The main assets consisted of the factory building and machinery. The Court directed the sale of these properties by private treaty and the official liquidator entered into negotiations with one Shamsuddin Rowther. In the month of January 1940 an agreement was entered into between the official liquidator and Shamsuddin Rowther for the sale of the properties, subject to the confirmation of the Court, for a sum of Rs. 5,750 and Rs. 200 was paid as earnest money. This payment was made by a crossed cheque in favour of the official liquidator. Under section 244A of the Indian Companies Act the official liquidator was required to open an account with a bank and pay therein moneys received by him in the course of the liquidation. Rule 66 of the rules framed then by this Court under the Indian Companies Act required that all bills and other securities payable to the company or to the official liquidator should, unless the Judge otherwise

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* Original Side Appeal No. 4 of 1944.

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directed, as soon as they came into the hands of the official liquidator, be deposited by him in the bank for the purpose of being presented for acceptance and payment or payment only as the case might be. The official liquidator here failed to open an account with a bank. The cheque for Rs. 200 was drawn by the purchaser of the factory and plant on the Madras Provincial Co-operative Bank, Limited. It was a crossed cheque but the liquidator induced the bank to cash the cheque. The Court sanctioned the sale to Shamsuddin Rowther and on the 9th May a cheque for Rs. 5,550 was handed over to the official liquidator by the purchaser in discharge of the balance of purchase consideration. This cheque was drawn on the Madras Provincial Co-operative Bank, Limited, by the Advocate who was acting for the purchaser. It was an open cheque. The same day the official liquidator presented it to the Madras Provincial Co-operative Bank, Limited, for payment, and payment was made. The official liquidator misappropriated the proceeds for which he was prosecuted, convicted and sentenced. This resulted in his name being struck off the roll of Advocates. On 8th February 1943, BELL J. passed an order removing M. Ramachandra Rao from the office of the official liquidator and appointed the Official Receiver of Madras to act in that capacity. The new official liquidator on 12th February 1943 instituted a suit on the original side of this Court against the Madras Provincial Co-operative Bank, Limited, for the recovery of Rs. 5,550. He alleged that the bank had acted negligently in paying the cheque and that it was also liable for conversion. The suit was tried by BELL J., who held that the claim was well founded and passed a decree for Rs. 5,550 with interest. This appeal is from the judgment of the learned Judge.

The drawer of the cheque had an account with the bank and there was sufficient money in the account to

meet the cheque. It is the duty of a bank in such circumstances to obey the order of its customer. Section 31 of the Negotiable Instruments Act says that the drawee of a cheque having sufficient funds of the drawer in his hands properly applicable to the payment of such cheque must pay the cheque when duly required so to do and, in default of such payment, must compensate the drawer for any loss or damage caused by such default. If the payee had been a private individual the action of the bank in paying the amount of the cheque could not have been called in question. It is said that inasmuch as the cheque was drawn in favour of an official liquidator the bank was put on inquiry and was negligent in paying over to him personally the amount for which the cheque was drawn. Before paying M. Ramachandra Rao the Rs. 5,550, the bank called for his order of appointment which was, it is said, sufficient in itself to put it on inquiry. It is also said that its officers must be deemed to know the law and that M. Ramachandra Rao had no right to ask for payment to him personally.

The order of appointment has been exhibited. Clause 6 (f) prohibited the official liquidator, without the sanction of the Court, from endorsing a bill of exchange, hundi or promissory note in the name and on behalf of the company. Clause 7 stated that, subject to the retention in his hands of such moneys as might be required for current and necessary expenses, the official liquidator should deposit all moneys collected by him into the Imperial Bank of India within seven days after the receipt thereof to the credit of the liquidation account. The cheque in question was made out to "M. Ramachandra Rao, official liquidator in Original Petition No. 5 of 1939, or order". From the cheque itself the bank had notice that it was made out to him as official liquidator and that it realised this in full is shown by the fact that it called for the order of appointment. The

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contention of the plaintiff that the bank acting through its officers must be deemed to know the law cannot be contradicted, and this case must proceed on the basis that the bank knew that the official liquidator ought to have a bank account and that he could collect the amount of this cheque only through his bank. Section 244A of the Indian Companies Act and rule 66 of the rules framed by this High Court under the Indian Companies Act make this perfectly clear.

We will now turn to section 85 of the Negotiable Instruments Act. Section 85 says that, where a cheque payable to order purports to be endorsed by or on behalf of the payee, the drawee is discharged by payment "in due course". Section 10 defines what is payment "in due course" and it says it means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned. Therefore, section 85 only protected the bank if it made payment in accordance with the tenor of the instrument, in good faith and without negligence. Was this payment made to M. Ramachandra Rao by the bank on 9th May 1940 a payment made in good faith and without negligence? We have no doubt that the officers of the bank did not realize, as they should have done, that the bank was doing something improper, but in the circumstances there was negligence. They know or must be deemed to have known that this money could only be collected by the payee through his own bank and, therefore, it was most improper on his part to ask for payment over the drawee's counter. In our judgment there was here a clear breach of a statutory duty placed upon the bank and the learned Judge was right in holding the bank liable. The payment of the cash to M. Ramachandra Rao facilitated his misappropriation

of the money. As payment was not made in due course section 85 does not help the bank and it must take the consequence of its negligence.

The appeal is dismissed with costs.

N.S.

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1944,
July 19.

APPELLATE CIVIL.

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

KAYAKKOOL PILLATI KRISHNAN ATIYOTI,
KARNAVAN AND MANAGER OF HIS TARWAD (FIRST DEFEN-
DANT), APPELLANT,

v.

THAYYULLATHIL MOOSA AND SIXTEEN OTHERS
(PLAINTIFF AND DEFENDANTS 2 TO 17), RESPONDENTS.*

*Malabar Tenancy Act (Madras Act XIV of 1930), sec. 41—
Assignee from jenmi of arrears of rent due in respect of
kanom—Not entitled to a charge on kanom property under
sec. 41.*

An assignee of the arrears of rent due to a jenmi in respect of a kanom is not entitled to a charge on the kanom property for those arrears. Section 41 of the Malabar Tenancy Act gives a charge to the landlord for arrears of rent and to no one else.

Forbes v. Maharaj Bahadur Singh(1) and *Vyaperumal v. Alagappa*(2) followed.

Swaminatha Aiyar v. Ramanatha Aiyar(3) and *Neroth Puthenpura Kunhikannan v. Pulappati Achu*(4) dissented from.

APPEAL against the decree of the Court of the Subordinate Judge of Tellicherry in Appeal Suit No. 292 of 1942, preferred against the decree of the Court of the District Munsif of Badagara in Original Suit No. 610 of 1941.

* Second Appeal No. 666 of 1943.

(1) (1914) I.L.R. 41 Cal. 926 (P.C.). (2) (1931) I.L.R. 55 Mad. 468.
(3) I.L.R. [1944] Mad. 44. (4) (1944) 1 M.L.J. 18.

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C. K. Viswanatha Ayyar for appellant.
P. Govinda Menon for respondents.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—On 6th December 1940 the sixteenth defendant in this suit as the jenmi assigned to the seventeenth defendant the rent due for the eleven years from 15th September 1930 to 15th September 1941 from the kanomdar holding under a kanom demise dated 29th December 1922. On 9th August 1941 the assignee assigned his rights to the plaintiff, who instituted the suit in the Court of the District Munsif of Badagara to recover the amount of rent due in respect of the eleven years. He claimed that he was entitled under section 41 of the Malabar Tenancy Act, 1929, to a charge for the amount. The District Munsif held that the plaintiff was not entitled to a charge under that section but only to a money decree in respect of six years immediately preceding the suit. On an appeal filed by the plaintiff the Subordinate Judge disagreed with the judgment of the District Munsif. He considered that the plaintiff was entitled to a charge. Consequently he gave him a decree for the full amount claimed and declared that it constituted a charge on the property. The first defendant, who is the kanomdar, has appealed. The opinion of the Subordinate Judge is in accordance with the judgment of SOMAYYA J. in *Swaminatha Aiyar v. Ramanatha Aiyar*(1), which was followed by HORWILL J. in *Neroth Puthenpura Kunhikannan v. Pulappati Achu*(2). On the other hand the case for the appellant receives support from the judgment of CHANDRASEKHARA AYYAR J. in the unreported case of *Unikoracham Veetil Kunhi Pokker v. Thenamprath Panakkat Anantan Nambiar*(*). CHANDRASEKHARA AYYAR J. considered that the question is governed by the judgment of the Privy Council in *Forbes v. Maharaj Bahadur Singh* (3) and

(*) Second Appeal No. 853 of 1934 (unreported).
(1) I.L.R. [1944] Mad. 44. (2) (1944) 1 M.L.J. 18.
(3) (1914) I.L.R. 41 Cal. 926 (P.C.).

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the decision of this Court in *Vyraperumal v. Alagappa*(1). SOMAYYA J. was of the opinion that these cases were not really in point. We prefer the view expressed by CHANDRASEKHARA AYYAR J.

Section 41 of the Malabar Tenancy Act reads as follows :—

“Renewal fees and arrears of michavaram or rent due to the landlord together with interest, if any, payable on the same shall be a charge on the interest of the person from whom they are due in the holding in respect of which they are due as at the time of the creation of such interest and such charge shall have priority over all other charges on the same except the charge for the revenue and any dues thereon payable to Government or to a local authority and made a charge thereon by any law for the time being in force.”

The case of *Forbes v. Maharaj Bahadur Singh*(2) had reference to the Bengal Tenancy Act, 1885, section 65 of which says :

“Where a tenant is a permanent tenure holder, a raiyat holding at fixed rates or an occupancy raiyat, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon.”

In *Forbes v. Maharaj Bahadur Singh*(2) a zamindar, who had transferred his interest in the zamindari, brought a suit against the tenant for arrears of rent which had accrued due to him before the transfer. The question was whether the erstwhile landlord was entitled to a charge on the land in respect of unpaid rent. The Judicial Committee held that he was not entitled to a charge. In delivering the judgment of the Board, Mr. AMEER ALI said :

“It seems to their Lordships clear on an examination of the different sections bearing on the subject that the right to bring the tenure or holding to sale under section 65 appertains exclusively to the landlord ; and that a person to whom certain rents are due, and who obtains a decree therefor after he has parted with the property in which the tenancy is situate, has no such right. The contrary view, their Lordships think, would give rise to a very anomalous situation.

(1) (1931) I.L.R. 55 Mad. 468. (2) (1914) I.L.R. 41 Cal. 926 (P.C.).

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A zamindar to whom certain arrears are due, as in the present case, may sell his property, without assigning, for purposes of his own, the back-rents as he is entitled to do; he may then sue for those back-rents; before any decree is made in this suit, the tenant falls into arrears to the new landlord who brings a similar suit. Both the ex-landlord and the present landlord obtain decrees for their respective arrears. In whose decree and on whose application is the tenure to be sold? The question admits of only one answer that it is the existing landlord alone who can execute the decree; the ex-landlord is an outsider, and, whilst he can execute his decree against the debtor as a money decree, he has no remedy against the tenure itself."

Mr. AMEER ALI proceeded to say :

"The learned Judges of the High Court seem to think that either from the nature of the debt being arrears of rent, or the decree being for arrears of rent, the tenure becomes *ipso facto* hypothecated so to speak for the debt; and that consequently the person to whom the debt is due, although he has ceased to be the landlord, and is to all intents and purposes, so far as other rights and obligations under the law are concerned, a total stranger to the property with which those rights and obligations are inseparably connected, he has the special remedy given to the landlord to recover arrears attached to the tenure. This conception of the legal position seems to their Lordships untenable, for the charge created by section 65 is clearly in favour of the landlord."

Section 148 (h) of the Bengal Tenancy Act declares that, notwithstanding anything contained in section 232 of the Civil Procedure Code, an application for the execution of a decree for arrears obtained by a landlord shall not be made by an assignee of the decree unless the landlord's interest has become and is vested in him. There is no corresponding section in the Malabar Tenancy Act and consequently SOMAYYA J. thought that the judgment of their Lordships could not be applied when the question was one of interpretation of section 41 of the Malabar Tenancy Act. The passages from the judgment which we have quoted are really based on the provisions of section 65 of the Bengal Tenancy Act. Their Lordships point out that the section creates a charge in favour of the

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landlord and that it would lead to a very anomalous position to hold that the ex-landlord as well as the present landlord were given a charge for arrears of rent. The same reasoning applies to section 41 of the Malabar Tenancy Act. The charge created is clearly in favour of the landlord. No one but he is mentioned. We cannot regard the absence of a section corresponding to section 148 (h) of the Bengal Tenancy Act as material. The plaintiff is not the landlord and he has never held that position. He is merely the assignee of a debt.

SOMAYYA J. was also impressed by the fact that the Malabar Tenancy Act does not contain a section corresponding to section 128 of the Madras Estates Land Act which states that, where in the execution of a decree, an order for sale has been passed, and a person who is interested in the land pays the amount due, he shall be entitled to a charge in respect thereof. Here again, we do not consider that the absence of such a provision in the Malabar Tenancy Act alters the position. The Legislature was providing for a charge in exceptional circumstances. If anything, the insertion of section 128 in the Madras Estates Land Act makes the case for the appellant in the present case all the stronger.

In *Vyaperumal v. Alagappa*(1) this Court held that when one member of a joint family, in order to prevent arrest in execution of a decree obtained by the landlord against himself and another coparcener for arrears of rent due by both under the Madras Estates Land Act, pays the amount due, he is not entitled by virtue of sections 5 and 128 of that Act or under the general law or by virtue of sections 82 and 100 of the Transfer of Property Act to a first charge on the other coparcener's portion of the holding. It was pointed out that the charge created by section 5

(1) (1931) I.L.R. 55 Mad. 468.

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of the Madras Estates Land Act only applies to rent due to a landlord in that capacity and that section 128 only applies in the special circumstances contemplated by it. In holding that the charge created by section 5 is for the benefit of the landlord and applies to rent only so long as it is due to him, the Court expressly relied upon the judgment of the Judicial Committee in *Forbes v. Maharaj Bahadur Singh*(1). We consider that the judgment in *Vyraperumal v. Alagappa*(2) has direct bearing here. In fact the present case cannot be really distinguished.

We hold that section 41 of the Malabar Tenancy Act gives a charge to the landlord for arrears of rent and to no one else. The plaintiff is not a landlord and never was. Therefore, all he is entitled to is a money decree.

It follows that the decision of the District Munsif was right and the decree passed by him must be restored with costs here and before the Subordinate Judge.

N.S.

APPELLATE CIVIL.

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

P. K. CHINNASWAMI (PLAINTIFF), APPELLANT,

v.

C. DOCTOR & CO., TEXTILE AND AIR-CONDITIONING
ENGINEERS, 41-A, BRUCE STREET, BOMBAY FORT,
BY ITS MANAGING PROPRIETOR MR. VADILAL
(DEFENDANT), RESPONDENT.*

Agent—Remuneration—Commission agent introducing buyer to firm dealing in spinning machinery—Buyer entering into contract to purchase two sets of spinning machinery and agreeing to pay price in instalments—Firm agreeing to

(1) (1914) I.L.R. 41 Cal. 926 (P.C.). (2) (1931) I.L.R. 55 Mad. 468.
* Appeal No. 7 of 1943.

pay Rs. 6,000 to agent after satisfactory expiry and conclusion of business with buyer—Buyer failing to pay instalments regularly—Buyer subsequently purchasing only one set of machinery—Claim of agent to Rs. 6,000—Unsustainable.

CHINNASWAMI
v.
DOCTOR & Co.

The plaintiff, a commission agent, introduced the defendants, who were the agents of a German firm manufacturing cotton machinery, to a company carrying on spinning business. As a result thereof a contract was entered into between the defendants and the company by which the latter was to buy two sets of cotton spinning machinery at the price of £24,400 from the German firm. The contract provided that confirmation should be obtained from the manufacturers, on which event the buyers were to pay to the defendants Rs. 25,000 and the balance against delivery of the shipping documents. On the date of the contract the defendant's manager wrote to the plaintiff as follows:—"Allow me to tender my heartfelt thanks for your valuable assistance in my booking the order for Messrs. Kumaran Mills, Ltd. (the company) and, as a token of my appreciation, I hereby undertake to pay a sum of Rs. 6,000 after the satisfactory expiry and conclusion of the Kumaran business". The company paid a sum of Rs. 15,000 only to the defendants and failed to pay the balance. Thereupon a fresh contract for supply of only one set of cotton spinning machinery for £12,873-10-0 was made and fulfilled. On the plaintiff suing the defendants for payment of the sum of Rs. 6,000 as commission, the trial Court gave a decree for Rs. 3,000 only. On appeal by the plaintiff to the High Court,

Held: The plaintiff was not entitled to the balance of Rs. 3,000 as the contract for buying two sets of spinning machinery was not carried out. Under the letter of the defendants to the plaintiff, payment of Rs. 6,000 as commission was to be only on the completion of the contract by its fulfilment.

Chapman v. Winson(1) followed.

Valarshak Seth Apear v. Standard Coal Co. Ltd.(2) distinguished.

Luxor (Eastbourne), Ltd. v. Cooper(3) referred to.

APPEAL against the decree of the Court of the Subordinate Judge, Coimbatore, in Original Suit No. 198 of 1940.

(1) (1904) 91 L.T. 17.

(2) (1943) 2 M.L.J. 405 (P.C.).

(3) [1941] A.C. 108.

CHINNASWAMI *K. V. Ramachandra Ayyar and S. Thyagaraja Ayyar*
 v.
 DOCTOR & Co. for appellant.

S. Panchapagesu Sastri and P. S. Ramachandran
 for defendant.

THE JUDGMENT of the Court was delivered by
 LEACH C.J. LEACH C.J.—The plaintiff in this suit is a commission agent. In 1937 and 1938 the defendants were acting as the agents of a German firm named Rich Hartmann, whose business was the manufacture of cotton machinery at Chemnitz in Germany. The defendants employed the plaintiff to introduce them to the management of the Kumaran Mills, Limited, a company carrying on business at Coimbatore. As the result of the plaintiff's introduction to the management of the Kumaran Mills, Limited, a contract was entered into under which the firm of Rich Hartmann were to sell and the Kumaran Mills, Limited, were to buy two sets of cotton spinning machinery at the price of £24,400 packed and delivered f.o.b. Hamburg. The contract further provided that confirmation should be obtained from the manufacturers, on which event the buyers were to pay to the defendants Rs. 25,000 and the balance of the £24,400 against delivery of the shipping documents. On the same day (30th November 1937) the defendants' manager wrote to the plaintiff this letter:

"Allow me to tender my heartfelt thanks for your valuable assistance in my booking the order for Messrs. Kumaran Mills, Ltd., and as a token of my appreciation, I hereby undertake to pay a sum of Rs. 6,000 (rupees six thousand) after the satisfactory expiry and conclusion of the Kumaran business."

The next day Kumaran Mills, Limited, deposited with the defendants Rs. 10,000 on account of the Rs. 25,000 which was to be paid on confirmation of the contract being received from the manufacturers. The confirmation was in fact received on 17th February 1938. On 4th March 1938 the buyers made a further

payment of Rs. 5,000. They did not pay the balance of Rs. 10,000 and apparently were not in a position to do so. As the result of further negotiations a fresh contract was entered into, under which the manufacturers were to supply only one set of cotton spinning machinery, the price being £12,873-10-0. This contract was fulfilled.

The plaintiff then instituted a suit in the Court of the Subordinate Judge of Coimbatore to recover the sum of Rs. 6,000 which he alleged he was entitled to under the letter written to him by the defendants on 30th November 1937. The Subordinate Judge held that as the original contract had not been fulfilled he was not entitled to Rs. 6,000, but he gave him a decree for Rs. 3,000 in respect of the second contract. This amount was based on the fact that the second contract represented only half the value of the first contract. The plaintiff has appealed. He says that inasmuch as he introduced the defendants to the Kumaran Mills, Limited, and a contract for the supply of two sets of cotton spinning machinery was entered into, he is entitled to the full amount of Rs. 6,000. The defendants resist this claim. They say that the words "after the satisfactory expiry and conclusion of the Kumaran business" must be construed as meaning that he was to get the Rs. 6,000 only in the event of the first contract being carried through, that is, delivery of the machinery by the manufacturers and payment for it by Kumaran Mills, Limited. The defendants have not in this Court challenged the correctness of the Subordinate Judge's finding that they are liable for Rs. 3,000.

Before examining the meaning to be attached to the words "after the satisfactory expiry and conclusion of the Kumaran business", we will refer to certain of the authorities which have been quoted in the course of the arguments, as these are helpful. In *Luxor (Eastbourne), Ltd. v. Cooper*(1) Viscount

(1) [1941] A.C. 108.

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CHINNASWAMI v. SIMON L.C. discussed the various classes of cases relating to the remuneration of commission agents.

LEACH C.J. The first class is that in which the agent is promised a commission by his principal if he succeeds in introducing to his principal a person who makes an adequate offer, usually an offer of not less than the stipulated amount. The second class is that in which the property is put into the hands of the agent to dispose of for the owner, and the agent accepts the employment and expends money and time in endeavouring to carry it out. The third class is that where, by the express language of the contract, the agent is promised his commission only upon completion of the transaction which he is endeavouring to bring about between the offeror and his principal. The plaintiff contends that this case falls within the first class. The defendants contend that it falls within the third category. If the case falls within the first class, there can be no doubt that the plaintiff will be entitled to succeed in the appeal, but otherwise if it falls within the third class. The Privy Council pointed out in the recent case of *Valarshak Seth Apear v. Standard Coal Co., Ltd.*(1) that a broker who is employed by a seller to introduce him to a prospective purchaser is entitled to be paid whatever is in the circumstances the usual commission on all contracts resulting from the introduction. This statement of the law, of course, implies that there is no contract to the contrary. If the case falls within the third category, the plaintiff must fail because the authorities show that the word "completion" must be taken to mean the performance of the contract, that is, the delivery of the goods and the payment for them.

In *Chapman v. Winson*(2) the contract between the principal and the commission agent was couched in these terms :

"If your friend is named and introduced within one week and becomes the purchaser of the above hotel, you shall be

(1) (1943) 2 M.L.J. 405 (P.C.).

(2) (1904) 91 L.T. 17.

paid as and by way of commission a sum of £50 when and if the purchase is completed by private treaty."

The Court of Appeal, reversing the decision of the Divisional Court, held that the word "completed" meant completed in the legal sense by the payment of the purchase money. The buyer did not pay the purchase money and the contract fell through. Consequently it was held that the agent was not entitled to the commission. COLLINS M.R. said that the word "completed" meant an introduction and agreement resulting in completion, which involved the payment of the purchase money. The judgment in that case is in accordance with the judgments of the Court of Appeal in *Battams v. Tompkins*(1) and *Lott v. Outhwaite*(2).

In *Martin v. Perry and Daw*(3) the plaintiff engaged the defendants as agents to find a purchaser for his business, commission being payable "on a sale being effected". The purchaser did not complete the contract. It was there held that a sale is not effected unless (a) one introduces a purchaser who pursues the matter to completion, or (b) one introduces a purchaser who at all times and at the proper time is ready, able and willing to execute the contract into which he enters.

It follows that, if the words "after the satisfactory expiry and conclusion of the Kumaran business" contained in the letter of 30th November 1937 mean payment only on the completion of the contract, the plaintiff is not entitled to the balance of Rs. 3,000. In our opinion, this is the only meaning which can reasonably be given to these words. "The Kumaran business" was the contract which the Kumaran Mills, Limited, had entered into with the agents of the firm of Rich Hartmann to buy two sets of cotton spinning machinery at the price of £24,400, and the "satisfactory expiry and conclusion" of that contract would only

(1) (1892) 8 T.L.R. 707.

(2) (1893) 10 T.L.R. 76.

(3) [1931] 2 K.B. 310.

CHINNASWAMI
v.
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LEACH C.J.

take place after the goods had been shipped and the buyers had paid for them against delivery of the shipping documents or of the goods. As that contract was not fulfilled, the plaintiff by reason of his own contract of agency was not entitled to the Rs. 6,000.

The appeal fails and is dismissed with costs.

N.S.

APPELLATE CIVIL.

*Before Sir Vere Mockett, Officiating Chief Justice, and
Mr. Justice Kuppuswami Ayyar.*

1944,
July 28.

HARJIVANDAS C. PARIKH AND ANOTHER (DEFENDANTS),
APPELLANTS,

v.

TRIVENI BAI ALIAS RADHA BAI (PLAINTIFF),
RESPONDENT.*

*Practice—High Court, Original Side Rules—Official Referee—
Report by—Findings of fact as well as of law liable to be
questioned before trial Judge.*

Where on the original side of the High Court a report of the Official Referee was confirmed by the trial Judge with the general observations, *inter alia*, that there were enough materials before the Official Referee on which he could come to the conclusions he did and that the learned Judge was not satisfied that the Official Referee was wrong either in his method of approach to the matters as to which he was asked to inquire or in the conclusions to which he came,

held, on appeal, that the findings of the Official Referee including findings of fact were open to challenge before the trial Judge in the same manner as any finding is open to challenge before an appellate Court, that the judgment confirming the report should be set aside and that the case should be remitted back to the Original Side to be heard and decided on the merits.

* Original Side Appeal No. 31 of 1943.

PARIKH
v.
TRIVENI.

APPEAL from the judgment dated 25th January 1943 and 29th January 1943, and decree dated 12th February 1943, of BELL J. and passed in the exercise of the ordinary original civil jurisdiction of the High Court in Civil Suit No. 247 of 1936.

K. Rajah Ayyar for *L. Krishna Das* and *T. C. A. Anandalwar* for appellants.

V. V. Srinivasa Ayyangar for *V. S. Rangachari* for respondents.

The JUDGMENT of the Court was delivered by MOCKETT O.C.J.—The defendants 3 and 4 are the appellants and the plaintiff the respondent. There is a long family history relating to these parties which it is unnecessary to discuss. A decree of GENTLE J., dated 4th October 1940, provided *inter alia* that a partnership, the subject-matter of the suit, should stand dissolved as and from 20th March 1936 and that the suit should be referred to the Official Referee to take the following accounts:—(a) An account of the credits, property and effects belonging to the partnership; (b) an account of the debts and liabilities of the partnership; and (c) an account of the dealings and transactions between the said partners from 29th November 1931 to 20th March 1936. There was an appeal against the judgment and decree of GENTLE J. and it is sufficient to say that by a judgment, dated 9th August 1943, the appeal against the judgment of GENTLE J. was dismissed by the CHIEF JUSTICE and LAKSHMANA RAO J. The result, therefore, was that the decree of GENTLE J. having been confirmed, the matter went to the Official Referee to be dealt with in the terms of the decree. The Official Referee heard the matter and it will be seen that in dealing with the subject-matter of the reference he had to consider some complicated questions of law apart from pure questions of accountancy and arithmetic. After numerous hearings, his report was finally signed on 5th January 1942 and in due course it came before

PARIKH
v.
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MOCKETT O.C.J. our learned brother BELL J. on 25th January 1943. It appears from the learned Judge's judgment—and this is confirmed by learned Counsel who now appear before us—that a contest took place before the learned Judge with regard to the objections and cross-objections filed by the respective parties. The judgment of the learned Judge was as follows:—

"I am obliged for being referred to the case, *Manicka Mudaliar v. Andalammal*(1), which shows so clearly the scope and limits of the Official Referee's duties. In this case the judgment of GENTLE J. and his findings are in my respectful view clearly unequivocal. His directions as to what the Official Referee was to do appear to admit of no doubt whatever. Being so guided, the Official Referee has investigated the matter and I think there were enough materials before him on which he could come to a conclusion. I think he was entitled on that material to come to the various conclusions he did. The objections have been very fully and very well argued by Counsel for the respective parties but on the whole I do not think that they are sustainable or should be sustained. I am not satisfied that the Official Referee either was wrong in his method of approach to the matters as to which he was asked to inquire or in the conclusions to which he came."

It would appear, therefore, that the learned Judge took the view that, unless it could be shown that there was no evidence before the Official Referee or that he had dealt with the case in some manner apparently wrong or illegal, no attack could be made upon his findings.

It is true, as those who had experience of the Original Side twenty years ago know, that there was at one time an idea in that Court that findings of fact of the Official Referee could not be attacked unless it could be shown that they were based on no evidence. That view, however, has long ceased to obtain and it is quite clear that a finding of the Official Referee can be attacked just as any other finding can be attacked. This has been emphatically stated by VENKATASUBBA RAO O.C.J. and VENKATARAMANA RAO J. in Original Side Appeal No. 61 of 1934. The

(1) I.L.R. [1940] Mad. 636.

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MOCKETT O.C.J. attention of BELL J. was not drawn to this judgment. The case, *Manicka Mudaliar v. Andalammal*(1), to which the learned Judge referred, as he rightly observed, deals with the scope and limits of the Official Referee's duties; but nowhere can any authority be found for the proposition that his findings when within that scope and according to that duty cannot be attacked in appeal as any other finding. The extent to which a Court in fact would interfere in matters of accounts is, of course, according to the view which the individual Judge takes.

In this case, however, we have before us an appeal which involves the investigation into questions of fact. The learned Judge while confirming the Official Referee's report has unfortunately given no reasons except as above stated. Consequently this appeal is actually before us as an appeal direct from the Official Referee and the judgment which we should give would be the judgment which should be given by the original side Judge. Twenty of the thirty grounds of appeal before us are directed to the Official Referee's report. The view we generally take on this matter is that, for however long a time it was actually heard, it has never been decided. We have no alternative except to allow this appeal by setting aside the judgment of the learned Judge and directing the whole matter to go back to the Original Side to be heard and decided on the merits with reasons for the findings. The costs of this appeal will be in the discretion of the learned Judge who finally hears the reference from the Official Referee. As this matter has been considerably delayed already, we have no doubt that the original side Judge will give it his earliest attention. The court-fee on the appeal will be refunded.

The payment of Rs. 300 a month to the respondent will continue until the decree of the original side Judge.

N.S.

(1) I.L.R. [1940] Mad. 636.

APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice Bell.

1944,
August 16.

M. M. P. L. CHOKKALINGAM CHETTIAR (SECOND
DEFENDANT—SECOND RESPONDENT), APPELLANT,

v.

M. L. R. M. LAKSHMANAN CHETTIAR (PLAINTIFF
AND THIRD DEFENDANT—PETITIONER AND THIRD
RESPONDENT), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), O. XXI, r. 2, cl. 3—
Sale of judgment-debtor's properties in execution—
Purchase by decree-holder—Realizing of moneys due under
decree—Application by decree-holder for delivery of property—
Judgment-debtor opposing it—Plea of agreement that judg-
ment-debtor to remain in possession of property—O. XXI,
r. 2, cl. 3, if a bar to recognizing the plea—Scope of O. XXI,
r. 2.*

The first respondent obtained a decree which provided for the payment to him of a sum of Rs. 25,000 and gave him a charge upon certain mills. He proceeded to execute the decree and on 12th April 1940 brought those mills to sale. They were purchased at the court-auction by the decree-holder himself for Rs. 38,125 and that amount satisfied his claim for the money due to him under the decree. The sale was confirmed on 16th October 1940 and the confirmation of the sale was subsequently upheld on appeal to the High Court. Then the first respondent filed an application under Order XXI, rule 95, Civil Procedure Code, for delivery of the property which he had purchased. The appellant, who was the judgment-debtor under the decree, resisted the application of the decree-holder, and pleaded that he and the decree-holder and a third person had all entered into an agreement on 9th January 1941, one term of which was that the appellant was to be allowed to remain in possession of the mills. The Subordinate Judge held that the plea could not be recognized under the provisions of Order XXI, rule 2, clause 3, as it had not been certified or recorded under any earlier clause of that rule. On appeal,

held: The view of the Subordinate Judge was wrong in refusing to consider the plea of the appellant in the case on its

* Appeal Against Order No. 127 of 1944.

merits. An examination of Order XXI, rule 2, as a whole shows that it cannot possibly apply to a situation in which the decree-holder has realized his money by selling the judgment-debtor's property in execution and receiving the sale-proceeds, either in cash if someone else has purchased the property or by set-off if he has purchased it himself.

Abdul Azim Sahib v. Chokkan Chettiar(1) and *Sultan Sahib Marakayar v. Chidambaram Chettiar*(2) referred to.

Sankara v. Sundara(3) and *Alagasundaram Pillai v. Pichuvier*(4) distinguished.

APPEAL against the order of the Court of the Subordinate Judge of Mayavaram, dated 11th February 1944, in Execution Petition No. 212 of 1943 (in Original Suit No. 115 of 1929 on the file of the Court of the Subordinate Judge of Devakotta).

K. Rajah Ayyar and *R. Rangachari* for appellant.

R. Gopalaswami Ayyangar and *K. Sundararajan* for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by KING J.—The question involved in the determination of this appeal is the interpretation of Order XXI, rule 2 of the Code of Civil Procedure. The facts of the case are that the first respondent obtained a decree in Original Suit No. 115 of 1929 on the file of the Subordinate Judge of Devakotta. That decree provided for the payment to him of a sum of Rs. 25,000 and gave him a charge upon the Peralam rice mills. The first respondent proceeded to execute the decree and on the 12th of April 1940 brought these mills to sale. They were purchased at the court-auction by the decree-holder himself for Rs. 38,125 and it is common ground that this amount completely or almost completely satisfies the claim of the first respondent for the money due to him under the decree. This sale was confirmed on 16th October 1940 and the confirmation of the sale was subsequently upheld on

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(1) (1935) I.L.R. 58 Mad. 893 (F.B.).
(3) I.L.R. [1943] Mad. 322 (F.B.).

(2) (1908) I.L.R. 32 Mad. 136.
(4) (1929) I.L.R. 52 Mad. 899 (F.B.).

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appeal by the High Court. After the disposal of the appeal the first respondent filed an application under Order XXI, rule 95, for delivery of the property which he had purchased. The appellant, who was the judgment-debtor under the decree, resisted the application of the decree-holder, and pleaded that he and the decree-holder and a third person had all entered into an agreement on 9th January 1941, one term of which was that the appellant was to be allowed to remain in possession of the mills. The learned Subordinate Judge of Mayavaram held that this plea could not be recognized under the provisions of Order XXI, rule 2, clause 3, as it had not been certified or recorded under any earlier clause of that rule. The question is, whether this view of the learned Subordinate Judge is right or wrong?

There is no direct authority on this question, and we are not surprised at the absence of any such direct authority, for the pleading of a mutual agreement of any kind by a judgment-debtor at a time subsequent to the sale of his property and the confirmation of that sale must, in the nature of things, be a very rare occurrence. At the same time it seems to us that the task of interpreting Order XXI, rule 2, involves no great difficulty. What are the conditions under which alone the provisions of Order XXI, rule 2, become operative? They are clearly these—that a decree-holder has a decree in his favour directing the payment of money to him, and that from the Court's point of view that decree has not yet been executed. Rule 2 amplifies the permission given to the decree-holder by rule 1 to receive his money or its equivalent out of Court and, if he has done so, lays upon him the duty of reporting the satisfaction or adjustment in whole or in part to the Court. Rule 2 provides also that the judgment-debtor or certain other persons interested may make a similar report. If the decree-holder reports this the Court must record satisfaction.

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If anyone else reports it the Court must record satisfaction if it finds that cause has not been shown against it. Finally in clause 3 the rule provides that a payment or adjustment not so certified or recorded "shall not be recognized by any Court executing the decree." What now is the inevitable result of action being taken under clause 3? It is this, that the decree has *not* been satisfied or adjusted, and therefore that the decree-holder can still proceed to recover his money by process of execution. An examination of the rule as a whole will thus show that it cannot possibly apply to a situation in which the decree-holder has realized his money by selling his judgment-debtor's property in execution and receiving the sale-proceeds, either in cash if someone else has purchased the property or by set-off if he has purchased it himself.

We have already stated that there is no direct authority on this question; but learned Counsel on both sides have called our attention to various decisions of the Madras High Court which bear indirectly upon the question, and we now proceed to consider these.

The first set of these decisions deals primarily with the question of limitation. It has been held in *Sultan Sahib Murakayar v. Chidambaram Chettiar*(1), and this has been confirmed by a Full Bench decision in *Abdul Azim Sahib v. Chokkan Chettiar*(2), that an application by a decree-holder who has purchased the property of his judgment-debtor in execution for delivery of that property to him is not an application for execution falling within article 182 of the Limitation Act. Before article 180 was enacted and no specific provision was made in the Limitation Act for applications of this kind, it was held that the residuary article corresponding to the present article 181 would apply to such applications. Now that article 180 has been included in the schedule of the

(1) (1908) I.L.R. 32 Mad. 136.

(2) (1935) I.L.R. 58 Mad. 893 (F.B.).

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Limitation Act it is clear according to the Full Bench decision that article 180 applies. These rulings have been cited before us by the learned Counsel for the appellant. It seems to us that if any help were required they do materially help in the interpretation of Order XXI, rule 2. These decisions depend upon an analysis of the precise nature of the application made by the decree-holder in those particular circumstances. It is stated in the former of those decisions on page 138 :

"It is clear that an application by a decree-holder for delivery of possession of property purchased in execution is not in strictness an application for execution of the decree, a direction for delivery of possession being no part of the decree."

The presumption, therefore, that may be drawn from the principle of these rulings is that execution in the strict sense of the term is over before such an application can be made ; and indeed it is clear that this is the correct view if we consider the alternative case of the purchase of the judgment-debtor's property not by the decree-holder but by some stranger-purchaser.

As against this the learned Counsel for the respondent has referred us to a line of cases culminating in the Full Bench decision in *Sankara v. Sundara*(1), which lay down that an application of a decree-holder-purchaser for delivery of the property purchased by him in execution is a step-in-aid of execution within the meaning of that expression in article 182 of the Limitation Act. It seems to us that this is quite irrelevant for the purpose of our present decision. It deals only with a situation in which a subsequent application for execution has been put in by the decree-holder and the question is, whether that application is in time or not ? If the application with which we have to deal is simply an application for delivery,

(1) I.L.R. [1943] Mad. 322 (F.B.).

and has not been followed by any fresh application in execution, obviously, under the authority of *Abdul Azim Sahib v. Chokkan Chettiar*(1), article 180 must be applied. The interpretation of a certain application as a step-in-aid must necessarily be confined to certain circumstances, as is clear from the head note to the latest Full Bench decision which runs as follows :—

"An application by a decree-holder for delivery of possession of the immovable property purchased by him in a sale held in execution of a decree is a step-in-aid of the execution of the decree within the meaning of article 182 (5) of the Indian Limitation Act, for the purpose of computing limitation in respect of a fresh application by him for execution of that decree against the judgment-debtor, for the balance of the decree amount."

Our attention has next been drawn to another Full Bench ruling of this High Court reported as *Alagasundaram Pillai v. Pichuvier*(2). The question there at issue was whether proceedings under rule 97 or rule 100 of Order XXI of the Code of Civil Procedure are proceedings to which Order IX of the Code applied. It was held that Order IX does not apply to these proceedings. The reason was that Order IX does not apply to proceedings in execution, unless of course those proceedings are proceedings which fall within the terms of section 47. In order to reach this decision the learned Judges were constrained to hold that applications under rules 97 and 100 were applications in execution, the main reason for that decision being that they were applications provided for by the Code of Civil Procedure in Order XXI which deals with the whole subject of execution of decrees and orders. It does not seem to us that this ruling either, directly touches the main question now at issue. There is, in our opinion, a clear distinction to be drawn between proceedings for execution of the decree and the proceedings in execution. In fact, the learned

(1) (1935) I.L.R. 58 Mad. 893 (F.B.). (2) (1929) I.L.R. 52 Mad. 899 (F.B.).

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Judges themselves, in this ruling, point this out very clearly, and they say that, "proceedings under rules 97 and 100 follow as *sequelae* on the execution of the decree (using the word 'execution' in its stricter sense) and on the Court-sale, and the Legislature has enacted that such proceedings shall be regarded in law as part of the execution proceedings." This decision, therefore, in no way shakes the principle upon which it has been decided in *Abdul Azim Sahib v. Chokkan Chettiar*(1) that article 180 of the Limitation Act applies to an application of this kind on the ground that it is not an application for execution.

Finally it has been argued for the respondent that an application of this kind for delivery of property purchased by the decree-holder in execution of his decree falls within section 47 and therefore we ought to hold that it falls within rule 2 of Order XXI as well. It will be obvious however that the language of section 47 is very different from the language of rule 2. Section 47 directs that all questions relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit. It is easy to see that applications which are filed after the execution of the decree in the strict sense of the word has been completed relate to such execution and therefore fall under section 47. But, as we pointed out at the outset of this judgment, Order XXI, rule 2, is concerned only with satisfaction and adjustment of a decree, and the manner in which such satisfaction or adjustment should be brought to the notice of the Court, and the inevitable result of the non-existence of any satisfaction or adjustment out of Court or the non-certification of such satisfaction or adjustment is that the decree remains unexecuted and the decree-holder still has a valid claim for his money. We return, therefore, to the interpretation of rule 2 with which we started

and we hold that the learned Subordinate Judge was wrong in refusing to consider the plea of the appellant in this case on its merits.

The learned Judge has formulated three points for determination in paragraph 6 of his judgment. He has determined only the first two points and we have had to disagree with him on these points. This appeal will accordingly be allowed. The application will be restored to file and the learned Subordinate Judge will be directed to dispose of it according to law after considering and giving his finding upon the third point for determination. The appellant's costs of this appeal will be paid by the first respondent.

V.V.C.

APPELLATE CIVIL.

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

SRI VIZIARAM GAJAPATHIRAJ BAHADUR, RAJA OF
VIZIANAGARAM, BEING MINOR REPRESENTED BY HIS NEXT
FRIEND, ESTATE MANAGER UNDER THE COURT OF WARDS
(PLAINTIFF), APPELLANT,

v.

SRI SRI SRI VIKRAMA DEO VARMA, MAHARAJA
OF JEYPORE (DEFENDANT), RESPONDENT.*

Court of Wards Act (I of 1902), sec. 35—Madras Impartible Estates Land Act (II of 1904), sec. 4 (1)—Power of Court of Wards to make bona fide compromises of disputed claims so as to bind the estate, similar to position of manager of joint Hindu family—Contract by Court of Wards on behalf of ward not bad for want of mutuality—Contract—Some clauses unenforceable but separable from other enforceable clauses—Specific performance—Waiver—Person standing to lose by non-enforcement of certain

1944,
April 18.

* Appeal No. 418 of 1940.

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clauses—Right to waive—Transfer of Property Act (IV of 1882), sec. 110—Parties contemplating execution of lease within reasonable period after completion of certain acts—Lease to run from date of completion of said acts—Limitation—Specific performance—Delay not amounting to laches—Effect.

There were two old boundary disputes regarding forest areas between two adjacent estates of V and M. One of the disputes related to the G forest in the plains and the other to the S forest in the Agency. When both the estates were under Government officials, the estate of M being under the Court of Wards and the estate of V under a trustee, in February 1921 the Collector submitted to the Court of Wards a draft agreement of compromise embodying the suggestions made by the trustee. Besides making provisions regarding the admissions and withdrawals to be made by the estates and the grant of permanent leases, it provided also a method for fixing the rent to be paid by V estate to M estate and for its periodical revision. It was also understood that the lease should be given until after the contemplated survey had been completed. It did not specifically state the date when the lease should commence. On 23rd July 1921 the Agency Commissioner who had assumed the function of the Court of Wards wrote to the trustee: "I am prepared to execute an agreement on the lines of the draft sent with your letter referred to, the details of which are being examined. I agree also to the boundaries of the block to be leased to Vizianagaram being surveyed by the Government Survey Party and to the resulting plans forming part of the agreement and lease. Will you please arrange for the survey as soon as possible." The Agency Commissioner considered the terms to be beneficial to the M estate. The survey was not completed till the end of 1928. By this time the Maharaja of J had become proprietor of M estate. By the end of 1933 V estate learned that J estate had no intention of performing the agreement. The portion of the compromise relating to G forests in the plains was severable from the portion relating to S forests in the Agency. On behalf of V estate a suit for specific performance was filed against the Maharaja of J. The claim against G estate was given up for want of registration and the suit was confined to the Agency portion. The defendant contended that there was no concluded contract and that it was merely an agreement to agree in that there was no binding agreement as regards rent and the date of the commencement of the lease.

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Held (i) There was a definite offer and acceptance embodying all the terms necessary to make a concluded bargain. The Agency Commissioner had approved of the basic proposal regarding the fixation of rent and the reference in the letter of acceptance to the examination of the details may well denote no more than the consideration of the administrative arrangements necessary to bring the agreement to fruition. The parties contemplated the execution of the lease within a reasonable period after the completion of the preparatory work, namely, the survey operations, etc. The parties must be deemed to have made their agreement in the light of the statutory provisions of section 110 of the Transfer of Property Act and it was understood that the lease was to run from the date on which it was executed.

Kailash Chandra Bhoomik v. Bejoy Kanta Lahiri Chowdhury(1) and *Ikramull Huq v. Wilkie*(2) followed.

(ii) The permanent lease contemplated by the agreement was within the power of the Court of Wards. The combined effect of section 35 of the Court of Wards Act and section 4 (1) of the Madras Impartible Estates Land Act was to assimilate the Court of Wards to the position of a manager of a joint Hindu family as regards its power to make *bona fide* compromises of disputed claims so as to bind the estate. There was an actual dispute, the settlement of which was in the interests of the estate and it was settled by a compromise which appeared to the Agency Commissioner to be a fair arrangement, having regard to the contentions of the parties and one which was desirable with a view to prevent future litigation. The Court could not nullify that compromise on the ground that one party appeared to have driven a better bargain than the other party.

(iii) In view of the fact that the Registration Act is not applicable to the Agency tracts and that the claim in respect of G estate had been given up, the contract was admissible without registration. The plaintiff being the person who stood to lose by the non-enforcement of the clauses relating to G estate, it was open to him to waive it.

Samuvier v. Ramasubbier(3) followed.

The clause relating to G estate being separable from the rest of the contract, specific performance of the contract relating to the other portions could be ordered.

Hawksley v. Outram(4) followed.

(1) (1915) 28 C.W.N. 190.

(3) (1931) I.L.R. 55 Mad. 72.

(2) (1907) 17 M.L.J. 454 (P.C.).

(4) [1892] 3 Ch.D. 359.

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(iv) There was no question of laches in the case. When a statute provides a period of limitation for the bringing of a suit, the remedy for specific performance will not ordinarily be refused on the ground of delay if the suit is within the prescribed period, unless it amounts to waiver of one's rights under the agreement.

(v) The contract was not bad for want of mutuality. Section 35 of the Court of Wards Act empowers the Court to bind the ward by a contract of this nature and such a contract could have been enforced against the Court of Wards and was therefore enforceable against the present proprietors of the Estate.

APPEAL against the decree of the Court of the Agency Subordinate Judge, Jeypore, dated 8th March 1940, and passed in Original Suit No. 10 of 1937.

S. Venkatesu Ayyangar for appellant.

*Sir A. Krishnasami Ayyar (Advocate-General),
N. Rajagopala Ayyangar, M. Seshachalapathi and
D. V. Reddi Pantulu* for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by WADSWORTH J. WADSWORTH J.—This appeal arises out of a suit for specific performance brought by the appellant, who is the Raja of Vizianagaram represented by the Manager under the Court of Wards, against the respondent, the Maharaja of Jeypore. The agreement which is sought to be enforced is a compromise of two alleged disputes regarding forest areas, one relating to the Gudupa forest in the plains and the other relating to the Samidha forest in the Agency. The agreement in substance provides that the appellant shall acknowledge the title of the respondent to the area in dispute in the Samidha forest and shall be given a permanent lease of that forest including the portions which have always been admittedly the property of the respondent, while as to the Gudupa forest the respondent is to acknowledge the title of the appellant. The suit has been dismissed on various grounds which will be enumerated hereafter.

The dispute has a long history which need only be summarised briefly. In the disputed areas the boundary between the estates of Vizianagaram and Madgole runs through forest. The precise location of the boundary was in dispute at the end of the last century. In 1899 Mr. Hatchell of the Madras Survey Department took up the dispute regarding the Samidha forest and fixed a boundary which is alleged to have given some six square miles hitherto treated as the property of Vizianagaram to the estate of Madgole. In 1901 there was a survey of the boundary in the Gudupa reserve which resulted in the recognition of the title of the Vizianagaram estate to some 750 acres of scrub jungle in the Gudupa area claimed by Madgole. We are mainly concerned in the present appeal with the Samidha block. It is fairly clear that, though no appeal was preferred against Mr. Hatchell's decision, it was not accepted by the Vizianagaram estate. The documents exhibited show that the estate officials continued to assert the rights of the estate in the portion allotted to Madgole at the survey and it would also appear that the inhabitants of the villages affected by this decision resented their inclusion in the Madgole estate. In 1915 the Madgole estate was under the control of the Court of Wards and the Vizianagaram estate was being administered by Mr. Fowler as trustee under a settlement made by the late proprietor. At this time there were constant complaints from the Vizianagaram officials that the Madgole forest officers were issuing permits within the Vizianagaram boundary and that under cover of these permits the licensees were extracting timber from areas belonging to the Vizianagaram estate. It was also found that the administration of the Madgole forests adjacent to the Samidha forest was attended with difficulties owing to the fact that the only communications with those forests lay through the Vizianagaram estate. In those circumstances negotiations started between the

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Collector representing the Court of Wards which had charge of the Madgole estate and Mr. Fowler representing the Vizianagaram estate for a lease of the Madgole forests in the Samidha vicinity to the Vizianagaram estate. This lease appears to have been suggested as a counter proposal to the claim by Vizianagaram that the Madgole permit stations should be located outside the Vizianagaram boundary in order to prevent illicit practices. In 1916 the negotiations resulted in a definite proposal by the trustee of the Vizianagaram estate for a lease of the right to collect royalties on forest produce from the Madgole forests passing through the Samidha valley. This correspondence seems to have led to the resuscitation of the dispute regarding the location of the boundary between the two estates in this area and in January 1917 the Collector issued an order, Exhibit YYYYY-7, under the Survey and Boundaries Act stating that a dispute had arisen between the two estates regarding this boundary and referring the dispute under section 22 (a) of the Survey and Boundaries Act to the decision of the local Deputy Tahsildar. In August 1918 the Sub-Collector, Narasapatam, informed the Collector that there was every prospect of an amicable settlement of the dispute regarding the boundary and in consequence thereof the proceedings of the Deputy Tahsildar were adjourned *sine die*. In October 1918 under Exhibit YYYYY the Collector reported to the Court of Wards that there was a dispute between the two estates, firstly, regarding the Samidha forest in which the Madgole estate claimed the boundary as fixed by Mr. Hatchell in 1899 and Vizianagaram contended that a large block included by Mr. Hatchell within the Madgole estate was really the property of Vizianagaram and, secondly, with reference to the Gudupa forest in which Vizianagaram was contending for a boundary as fixed in the survey whereas Madgole was claiming a right to possession of a considerable

area excluded from its limits in that survey. The Collector expresses the opinion that the two disputes would involve a costly litigation unless an amicable settlement could be reached and he submits for approval a general scheme of compromise whereunder the Madgole estate will admit the title of Vizianagaram to the whole of the Gudupa reserve surveyed as part of this estate in 1901, the Vizianagaram estate would withdraw its contentions that the title of the Madgole estate based on the 1899 survey was barred by adverse possession and would admit the title of the Madgole estate to the disputed area, in consideration of the Madgole estate granting a permanent lease not only of the disputed area, but also of the adjacent Madgole forests, on a yearly rent to be decided by the District Collector and the trustee in consultation with each other, but to be based on the average of the forest receipts for the past five years. The lease was to be subject to a condition of good forestry and the right of the Court of Wards to depute a senior forest officer to make regular inspections.

It will be noted that at this stage there was no very definite understanding as to the basis upon which rent should be calculated except that it would bear some relation to the five years' receipts. There was correspondence arising out of this proposal, the Court of Wards asking for details regarding the extents of forest involved and expressing a doubt regarding its power to grant a permanent lease. In the report of the Collector, dated 28th January 1919, the extent of the disputed area in the Samidha forest is given as 11½ square miles. A good deal of emphasis has been laid in the lower Court on the increase in this area, when compared with the six square miles apparently in dispute at the time of Mr. Hatchell's survey. The learned Subordinate Judge has even gone so far as to suggest that the area in dispute in the Samidha forest was deliberately exaggerated in order to make

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it appear that the arrangement was beneficial to the Madgole estate under the administration of the Court of Wards. This is a very serious allegation to make against responsible officers of the Government who had no interest in the dispute other than their anxiety to improve the administration of the two estates and we have been unable to find any basis for the allegation. The only thing that appears is that the estimated area of the disputed portion in 1918 was nearly double the area alleged to have been wrongly assigned to Madgole in 1899; but it does appear that in the interval between 1899 and 1919 the Vizianagaram estate had been exercising alleged rights in the forests situated near the boundary of the two estates without much regard to the decision of 1899 and that Vizianagaram had rightly or wrongly been claiming a right by adverse possession to a very considerable area. That area was estimated by responsible officers on both sides at $11\frac{1}{2}$ square miles in 1918. It seems to us preposterous to suggest merely because of the difference between the area claimed by the Vizianagaram estate in 1918 and the area disallowed to Vizianagaram in 1899 that the Collector representing not Vizianagaram but Madgole had deliberately inflated the claim of Vizianagaram in order to make his proposals for a compromise more acceptable to the Court of Wards.

The Court of Wards took the opinion of the Advocate-General on the question of its power to give a perpetual lease and as a result of further correspondence with the Collector an order was issued, Exhibit CLXI (r) dated 12th October 1920, in which the Court of Wards approved the suggestion that the agreement should contain a clause that the compromise was for the advantage of the wards and for the benefit of the estate and a provision that the rent should be subject to revision every ten years, and pointed out that nothing had yet been decided as to

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the rent and directed that the Collector was to settle with the trustee how the rent was to be calculated, if on net receipts, the principle on which the net amount was to be determined and the proportion of the net receipts to be paid as rent. All these points were to be settled and actually embodied in the deed of compromise and the final arrangement reported to the Court for approval. As a result of this order there was correspondence between the Collector representing the Court of Wards and the trustee of the Vizianagaram estate. In Exhibit ZZ, dated 1st December 1920, the trustee proposed a method of calculating the net receipts after deducting expenses, and in dealing with the question of proportion of the net income to be fixed as rent, the trustee observed that the total area was about $20\frac{1}{2}$ square miles of which $12\frac{1}{2}$ square miles was at present under the enjoyment of Vizianagaram but to be surrendered to Madgole. On this area therefore a nominal rent was reasonable whereas for the rest of the area, 8 square miles, it is stated that Madgole was entitled to levy "full rent". It was therefore suggested as equitable that for the whole of the area the proportion of the net receipts to be paid as rent should not exceed one-half; and the important suggestion is made that the rent for the first decade should be fixed after the forests had been under the management of Vizianagaram for one year, subsequent rent to be revised every ten years. The reason for this suggestion is obviously the difficulty of arriving at a correct figure of net receipts until the whole block had been under a single management for a sufficiently long period. Great emphasis has been laid on behalf of the respondent on this letter, the suggestion being that if the figure of $12\frac{1}{2}$ square miles in the possession of Vizianagaram is excessive the whole basis upon which the rent was fixed will be destroyed; but as already observed, we are not convinced that there

GAJAPATHIRAJ has been any substantial exaggeration of the area actually claimed by Vizianagaram at the time of the dispute.

On 19th February 1921 the Collector submitted to the Court of Wards a draft agreement which embodied these suggestions made by the trustee of the Vizianagaram estate and also proposed the acceptance of the trustee's further suggestion that as a preliminary to the lease there should be a survey of the blocks leased out, the cost of the survey to be apportioned between the two estates. This draft is the final draft which it is proposed in the plaint to enforce. Besides the provisions originally suggested regarding the admissions and withdrawals to be made by the two estates and the grant of a permanent lease of the Madgole forests and the disputed portion in the Samidha neighbourhood, it was provided that the rent to be paid by the Vizianagaram estate shall be revised periodically once in ten years and in such revisions the annual rent fixed shall be one-half of the annual net receipts during the preceding ten years and the manner in which the net receipts should be calculated was specified. As to the first ten years, the only provision was that the rent to be paid shall be fixed in the first instance by the Collector and the trustee; but it is clear from the correspondence that the understanding between the parties was that for the first ten years' period also the rent should be one-half of the net proceeds and should be fixed in the second year on the basis of the first year's receipts. This is shown by the letters, Exhibit ZZ dated 1st December 1920, Exhibit AAA dated 26th January 1921, Exhibit NN-1 dated 29th January 1921 and Exhibit OO dated 12th February 1921. Under this draft agreement therefore the only substantial point still to be settled was the date of the commencement of the lease. At this point, it is clear that the understanding was that no lease should be given until after the survey

had been completed. The question whether there was any understanding regarding the date of the commencement of the lease thereafter is a matter which will be discussed separately.

When this draft agreement arrived in the office of the Court of Wards, it was pointed out that the Court of Wards had ceased to have jurisdiction over the Agency tracts within which the whole of the forest, except for the Gudapa area, was situated. This was the result of the constitution of the Agency Division on 6th November 1920 and the notification making the Agency Commissioner to be the Court of Wards for the estates situated within the Agency Division. The Court of Wards, Madras, therefore issued proceedings, Exhibit YYYYY-14, dated 7th June 1921, referring to rule 23 of the Agency Rules and holding that it was the Agency Commissioner that should pass orders in the matter. The whole of the file relating to this agreement was therefore transmitted to the Agency Commissioner. On 23rd July 1921 the Agency Commissioner, having received the papers from the Court of Wards, Madras, sent a letter, Exhibit CCC, to the trustee of the Vizianagaram estate which runs as follows:

"As the disputed plots lie in the agency tracts, the matter under reference has been referred to me for final decision and disposal. . . . I am prepared to execute an agreement on the lines of the draft sent with your letter referred to, the details of which are being examined. I agree also to the boundaries of the block to be leased to Vizianagaram being surveyed by the Government Survey Party and to the resulting plans forming part of the agreement and lease. Will you arrange for the survey to be made as soon as possible and let me know the date when it will begin? The Madgole estate will bear half the cost of survey."

The letter referred to by the Agency Commissioner is Exhibit OO, dated 12th February 1921, in which the trustee makes his final proposal to the Collector. This letter from the Agency Commissioner, Exhibit CCC, is relied on by the appellant as constituting a

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final acceptance by the Agency Commissioner as Court of Wards for the Madgole estate of the proposal contained in the draft agreement. It is contended for the respondent that the words "the details of which are being examined" imply a reservation and that therefore the acceptance cannot be treated as unconditional. We are unable to accept this contention. It seems to us that the Agency Commissioner gave an unconditional acceptance of the terms set forth in the draft to him. The examination of details by the Agency Commissioner may well denote no more than the consideration of the administrative arrangements necessary to bring the agreement to fruition. It seems to us, therefore, that there was in July 1921 a definite offer and acceptance embodying all the terms necessary to make a concluded bargain, except that the actual sum payable as rent for the first ten years was left to be calculated by the two officers concerned and this provision was accepted on behalf of the Madgole estate by the Agency Commissioner acting as the Court of Wards; that is to say, the Agency Commissioner considered it for the benefit of the Madgole estate that a lease should be given on a rent based on half the net proceeds, that the net proceeds should be calculated in the way laid down in the schedule to the draft agreement and should be revised each ten years on the basis of the previous ten years' figure and that the Collector and the trustee should in consultation with each other calculate on the agreed basis the sum payable as rent for the first ten years with reference to the first year's receipts.

After this stage was reached nothing much happened for a considerable period except preparations for survey. It was of course necessary to clear the forest on the boundary line as a preliminary to the demarcation. There was trouble with the local inhabitants and delay in getting this work done. It was however eventually completed and

the survey started. Meanwhile in October 1923, GAJAPATHIRAJ
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the Agency Division was abolished and the Madgole estate came once more under the supervision of the Court of Wards in Madras. In 1926 a new Collector came into office and took up the question of the fixation of the rent for the first period. He suggested that it was necessary for the Madgole estate to have some sort of check over the accounts of the Vizianagaram estate on the basis of which future rents were to be fixed and he suggested that the rent for the first year should be fixed at a cash figure of Rs. 1,650 and a revision should be made in the second year. The Collector's letter concludes: "Please state whether you approve the above conditions and if so the final draft agreement may be sent to me embodying them." By this time the trust in respect of the Vizianagaram estate had ceased to operate and the Raja himself replied to the Collector in Exhibit WWWW, dated 15th May 1926, pointing out that it had been agreed in Exhibit OO, dated 12th February 1921, that the rent was to be fixed on the basis of the figures of the first year's occupation and that thereafter there should be a decennial revision and he pointed out also that the proposal for a cash rent in the first year and a revision on the basis of the figures in the second year was not in accordance with the terms already decided on. He accepted as reasonable the suggestion that monthly accounts of the forest receipts should be sent to the Madgole Range Officer, but declined to accept the suggestion that this officer should have a right to check the accounts of the Vizianagaram officials. If necessary the District Forest Officer might inspect the permit stations on behalf of the Madgole estate. To this the Collector replied in Exhibit WWWW-1, dated 5th June 1926, agreeing to the Raja's suggestion that the rent for the first period should be fixed in the second year's occupation and that this figure should

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Now after this interchange of letters there was no longer anything of substance to be settled regarding the lease. The only point as yet outstanding, viz., the way in which the Vizianagaram accounts were to be checked on behalf of Madgole was settled. They were to be checked only by the transmission of monthly statements to the Madgole office. It has been suggested that this last stage of the agreement cannot bind the Madgole estate because there is no evidence that it received the approval of the Court of Wards. It is, however, really a matter of detail. The Court of Wards represented by the Agency Commissioner had already approved of the basic proposal regarding the fixation of rent and had already approved of the suggestion that the calculation of rent for the first ten years was to be worked out in agreement by the representatives of the two estates. It does not appear that any further sanction by the Court of Wards was necessary to bind the estate with the agreement taken as a whole.

The survey was not actually completed till the end of 1928. By this time the Court of Wards had ceased to have control of the Madgole estate. The Ranis of Madgole estate having surrendered their interest to the Maharaja of Jeypore, the respondent here, the latter had become the proprietor of the estate. In March 1929 the Diwan of Vizianagaram wrote Exhibit XXV to the Diwan of Jeypore reporting the completion of the survey and the receipt of the maps and asking for arrangements to be made for the execution of the agreement and delivery of the forest to the Vizianagaram officials. On this it would appear that the Diwan of Jeypore called for reports from his subordinates but no action was taken either to complete or to repudiate the agreement in spite

of reminders from the Vizianagaram estate. The GAJAPATHIRAJ
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WADSWORTH J. plaintiff alleges that the Vizianagaram estate had no definite knowledge before 31st December 1933 that the defendant had no intention of performing the contract. It would appear that a good deal of the delay in coming to a decision on the part of Jeypore was due to the absence of the late Maharaja from headquarters and his death in 1931, but no definite action was taken on behalf of the Jeypore estate even when a registered notice was sent, Exhibit TTTT, dated 25th November 1933, threatening a suit if no final reply was received before 31st December 1933.

The first question to be decided in this appeal is whether there was a concluded contract. It has been contended by the learned Advocate-General on behalf of the respondent that there was no binding agreement, firstly as to the amount of rent, and secondly as to the date of the commencement of the lease, and that in the absence of certainty on these two points the contract cannot be enforced. The learned Advocate-General has relied upon the undoubted proposition that a mere agreement to agree cannot constitute a contract. We have, however, indicated our opinion that Exhibit CCC, dated 23rd July 1921, constitutes a definite acceptance on behalf of the Court of Wards of all the essential provisions of the agreement, which provisions provided for the definite fixation of the rent on an agreed basis. The ratio of half the net proceeds was undoubtedly accepted for the whole of the term of the lease. The basis on which the rent for the first ten years was to be calculated and also the basis of the decennial revisions were covered by the agreement. Though the actual figure of the rent was not yet determined, there was no longer any uncertainty regarding the way in which it should be fixed throughout the lease.

The learned Advocate-General has relied on the decision in *May and Butcher, Limited v. The King*(1).

(1) [1934] 2 K.B., Note at page 17.

GAJAPATHIRAJ V. VIKRAMA DEO. WADSWORTH J. That was a case in which the parties agreed to the sale of goods at a price to be subsequently fixed between the parties, any dispute to be referred to arbitration. It was held that there was no concluded contract between the parties for an essential part of the contract was left undetermined and it was pointed out that the arbitration clause had no operation until there was an agreement and there was no agreement until the parties had at some future date fixed the price. It seems to us however that the correspondence of 1926 already referred to must be read as part of the contract between the parties and that after the letter Exhibit WWWW-1 wherein the Collector finally agreed to the method of checking the Vizianagaram accounts there was no longer any uncertainty as to any matter relating to the lease except the actual date on which it should begin.

The learned Advocate-General argues that an agreement to lease which does not fix the date on which the lease is to begin cannot be enforced. This argument is based on the rule in *Marshall v. Berridge*(1) where the Court of appeal held that in order to have a contract which would satisfy the Statute of Frauds it is necessary to find within the four corners of the agreement the date from which the contemplated lease shall begin and that if the contract is defective in this respect there is no enforceable contract and specific performance cannot be granted. In the case of *Srimati Giribala Dasi v. Kali Das Bhanja*(2) their Lordships of the Privy Council state

"it is elementary that specific performance of an agreement to grant a lease cannot be decreed unless that agreement either expressly or impliedly to be granted fixes the date from which the term is to run",

and on the peculiar facts of that case whereunder the agreement provided for the execution of a

permanent lease "hereafter" their Lordships held, differing from the High Court, that the correspondence between the parties did not indicate an intention that the lease should begin from the date of the agreement as was contended and that therefore the date of the commencement was left uncertain and the lease could not be enforced. In that case their Lordships were dealing with very special facts and no reference was made to the statutory rule embodied in section 110 of the Transfer of Property Act which lays down that

"where no day of commencement is named, the time so limited begins from the making of the lease".

The Privy Council had to deal with another case, *Ikramull Huq v. Wilkie*(1), where the parties agreed in a series of letters that the lease should be executed shortly of certain properties of which the lessor was to get possession from the tenants and construct a godown for the occupation of the lessee in the course of three or four months. There was some delay in getting possession of the land. When it was obtained, the lessee was asked whether he wanted the building constructed according to the original plan or had any alterations to suggest and the lessor said that he was prepared to finish the building within four months. Thereupon the lessee repudiated and justified the repudiation on the ground of the delay on the part of the lessor in not putting himself in a position to complete the transaction. Their Lordships held on the facts of that case that the period within which the buildings were to be ready was not an essential part of the contract and the contemplation of both parties was that everything should be done without any unreasonable delay. In the circumstances they held that there was a completed contract of which specific performance would be granted. That was clearly a case in which the agreement between the

(1) (1881) 19 Ch. D. 233.

(2) (1920) 39 M.L.J. 329 (P.C.).

(1) (1907) 17 M.L.J. 454 (P.C.).

GAJAPATHIRAJ v. VIKRAMA DEO. WADSWORTH J. parties did not contain any fixed date for the commencement of the lease. Although their Lordships did not expressly consider the effect of section 110 of the Transfer of Property Act, they do hold that the agreement contemplates the execution of the lease within a reasonable period and by implication it must be inferred that the lease was to run from the date of its execution. The circumstances of that case bear some resemblance to those of the present case. Here too the original agreement contemplates survey operations as a preliminary to the execution of the lease. The precise date on which those survey operations would be concluded was not known. The delay in their completion was not due to the default of either party. It is natural to infer that the parties contemplated the execution of the lease within a reasonable period after the completion of preparatory work. The delay after that date was due partly to the death of the Maharaja of Jeypore and partly to the indecision of his successor; but in the absence of any other date being contemplated it seems to us reasonable to infer from the circumstances that the parties made their agreement in the light of the statutory provisions of section 110 of the Transfer of Property Act and that it was understood that the lease was to run from the date on which it was executed. A similar view has been taken by the Calcutta High Court in the case of *Kailash Chandra Bhounik v. Bejoy Kanta Lahiri Chowdhury*(1) where the learned Judges rely upon the decision of the Privy Council just quoted and hold that there was a concluded agreement in the absence of an express stipulation for the date of the commencement of the lease and that it is legitimate to read into the agreement the statutory provisions of section 110 of the Transfer of Property Act. We hold that the agreement in the present case is certain and definite both as to the rent and as to

(1) (1915) 23 C.W.N. 190.

the date from which the lease is to commence and it is not unenforceable for uncertainty in either of these particulars.

The next question is whether the permanent lease contemplated in this agreement was within the power of the Court of Wards. We have already indicated our opinion that the final decision of the parties regarding the manner of the fixation of the net profits for the purpose of calculating the rent for the first ten years must be deemed to have been made with the authority of the Court of Wards, having regard to the approval of the draft agreement by the Agency Commissioner. At the time when the agreement was concluded the Madras Impartible Estates Land Act had not been extended to the Agency districts. It was however extended by a notification, dated 27th November 1928, and we may take it that the agreement could not now be enforced if it is deemed to offend against the provisions of that Act. Under Section 35 of the Court of Wards Act,

"the Court . . . may give leases . . . of the whole or any part of such property for such terms, as it thinks fit, . . . and may generally pass such orders and do such acts not inconsistent with the provisions of this or any other Act for the time being in force as it may judge to be for the advantage of the ward or for the benefit of the property".

The Court of Wards has formally decided that the execution of this agreement is to the advantage of the ward. The Court must however be limited by the restrictions on alienation under the Impartible Estates Land Act. Section 4 (1) of that Act provides that,

"the proprietor of an impartible estate shall be incapable of alienating or binding by his debts, such estate or any part thereof beyond his own lifetime unless the alienation shall be made, or the debt incurred, under circumstances which would entitle the managing member of a joint Hindu family, not being the father or grand-father of the other coparceners, to make an alienation of the joint property, or incur a debt,

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binding on the shares of the other coparceners independently of their consent ”.

It is well established that the managing member of a Hindu joint family can bind the joint family by a compromise made *bona fide* for the benefit of the estate and not for his personal advantage; *vide* Mayne's Hindu Law, Tenth Edition, page 402.

An attempt has been made to argue that even granting the *bona fide* nature of the settlement accepted by the Court of Wards, it is necessary for the Court to examine critically the details of the bargain between the parties, in order to ascertain whether that bargain was really beneficial to the estate, the suggestion being that if there is reason to think that the Court might have made a better bargain than it did, the compromise will not be binding on the estate. It seems to us that this is not the correct line of approach to a compromise entered into by a manager or representative of a Hindu joint family. No doubt if the bargain is so palpably unfair in its nature as to throw a doubt upon the *bona fides* of the manager, the details of that bargain may assume a very great importance. But where it is clear that there was an actual dispute the settlement of which was in the interest of the estate and that the dispute has been settled by a compromise which appeared to the manager to be a fair arrangement having regard to the contentions of the parties and one which was desirable with a view to prevent future litigation, it is not in our opinion open to the Court to nullify that compromise merely on the ground that one party appears to have driven a better bargain than the other party. The attack on the compromise in the present case rests mainly on assumptions regarding the *bona fides* of the claim by Vizianagaram to have title in an extent of 11½ square miles in the Samidha forests and the suggestion is made that Vizianagaram was giving up practically nothing and was getting a lease of forests admittedly belonging to the Madgole estate

for an inadequate rent. We see no reason to think that the claim put forward by Vizianagaram to the disputed area was one which was known to be unsubstantial. Although under this agreement Madgole gave up possession of the disputed area and of a further block admittedly belonging to Madgole, the estate was to get a very substantial rent and to be rid of all trouble and expense in connection with the management of a block of forest admittedly not easy to administer by the Madgole officials. Moreover the arrangement between the parties was made at a time when each of the estates was under the management of responsible Government officers who had no interest in the matter other than that of an official anxious to administer his charge to the best of his ability. We see no reason to think that this arrangement was unduly favourable to the Vizianagaram estate, nor do we consider that there are any grounds for thinking that the Court of Wards or the Agency Commissioner failed in their duty towards the Madgole estate in accepting the terms agreed upon. We are moreover of opinion that the contract between the parties is within the powers of the proprietor of an impartible estate, having regard to the existence of the dispute and the arrangements made for its settlement.

The question arising out of the non-registration of this agreement need not detain us long. The Registration Act does not apply to the Agency Districts. The clause in the agreement relating to the Gudupa forest must be deemed to be one which purports to declare a right, title and interest of the value of more than Rs. 100 in immovable property and, by virtue of section 49, the document cannot be used in evidence of the transaction relating to the Gudupa reserve in the absence of registration. This fact, however, has less importance now, seeing that in this Court the appellant has abandoned his claim to enforce against the respondent the surrender of rights in the Gudupa

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forest contemplated in clause 1 of the draft agreement. There is no legal impediment to the admission in evidence of the unobjectionable portion of the document, part of which has to be excluded for want of registration; and seeing that the appellant is the person who stands to lose by the non-enforcement of the first clause, it is open to him to waive it; vide *Samuvier v. Ramasubbier*(1). It seems to us that the clause relating to Gudopa is clearly separable from the rest of the contract and that, if the appellant who is the person adversely affected by the non-enforcement of this clause is prepared to abide by the rest of the contract, the respondent cannot object to the enforcement of the rest of it; vide *Hawksley v. Outram*(2). In this view it is not necessary to go into the question whether the proviso to section 49 of the Registration Act is retrospective.

It has been contended for the respondent that specific performance should be refused by reason of the laches of the appellant and there was also a plea that the enforcement of the contract was barred by limitation. The latter plea is clearly untenable for there was no date fixed in the agreement for its performance from which limitation could run. Nor was there any express refusal to complete the agreement. The suit was brought within three years of the time when, as a result of the final notice from the appellant, refusal to complete the agreement might be inferred. It seems to us also that there can be no question of laches in this case. When the statute provides a period of limitation for the bringing of a suit, the remedy of specific performance will not ordinarily be refused on the ground of delay if the suit is within the prescribed period. No doubt cases might arise in which the delay in filing the suit might have led the other side to infer that the plaintiff had waived his rights under the agreement and in such cases the plea of laches might be considered

a ground for refusing specific performance. But there is nothing of the kind here. Quite clearly the Vizianagaram estate was throughout insisting on the completion of the agreement. There was no suggestion that the agreement would not be completed so long as the Court of Wards managed the Madgole estate. Even thereafter the Vizianagaram estate was pressing for the completion of the agreement and there was no clear indication of the attitude of the Maharaja of Jeypore in the matter. We are of the opinion that specific performance should not be refused by reason of the delay in filing the suit.

It has been suggested that specific performance should be refused because there was a lack of mutuality in the contract at its inception. We are unable to appreciate this contention. Section 35 of the Court of Wards Act empowers the Court to bind the Ward by a contract of this nature and such a contract could have been enforced against the Court of Wards and is therefore enforceable against the present proprietor of Madgole. There is therefore no question of mutuality. It was not suggested that the contract was unenforceable against the Rajah of Vizianagaram.

In the result, therefore, the appeal is allowed and there will be a decree directing the respondent to execute a lease deed in the terms contemplated in the agreement accepted in Exhibit CCC, dated 23rd July 1921, and to embody therein the terms regarding the first year's rent accepted in the letter Exhibit WWW-1, dated 5th June 1926, and to attach thereto the plans of the forest block to be leased, prepared at the survey of the boundaries at the instance of both parties. The first clause of the draft agreement relating to the Gudopa reserve will not be enforced. The lease deed will be executed within six months from to-day, failing which the Court will itself execute the lease. The appellant will be entitled to his costs throughout.

G.R.

(1) (1931) I.L.R. 55 Mad. 72.

(2) [1892] 3 Ch.D. 359.

APPELLATE CIVIL.

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

1944,
August 21.

MERLA JANAKIAMMA (SECOND PLAINTIFF), APPELLANT,

v.

SRI INUGANTI VENKATA RAJAGOPALA CHINNA-
RAO GARU (THIRD DEFENDANT), RESPONDENT.*

Indian Limitation Act (IX of 1908), art. 156—"Ninety days from the date of the decree or order appealed from" means ninety days from the date when the decree becomes appealable for the party concerned—Res judicata—Decree in favour of certain party though some findings against him—Adverse findings not incorporated in decree—Decree not appealable by the party—Such findings not operating as res judicata—Parties affected by decree appealing therefrom—Adverse findings cease to operate as res judicata—Hindu law—Properties purchased by a member of a joint Hindu family in his own name—Absence of sufficient nucleus in the joint family—Mortgage by him—Burden not shifted to mortgagee of proving that the properties were separate properties of mortgagor.

A mortgagee filed a suit on his mortgage for the recovery of a certain sum and for the sale of the mortgaged properties, impleading the mortgagor and his son as party defendants, describing the mortgaged properties as the self-acquired and separate properties of the mortgagor, and stating that the mortgagor's son was added as a party since he was claiming an interest in them as the undivided son of the mortgagor. Alternatively, he stated that, even if the properties were joint family properties, the mortgage was valid since it was granted for purposes binding on the son. The Court found that the properties were not the self-acquired properties of the mortgagor but were the joint family properties of the mortgagor and his son and that, since the mortgage was given for discharging certain antecedent debts of the mortgagor, it was binding on his son. On 10th December 1935 a decree was passed for the whole amount with interest and costs to be recovered by the sale of the entire hypotheca including the son's share therein. While proceedings in execution were in progress, the Madras Agriculturists Relief Act was passed in

* Appeal No. 60 of 1943.

1938. The mortgagor's son applied under section 19 of the Act to have the decree scaled down and "amended" in accordance with the provisions of the Act. The Court held that the finding that the properties were joint family properties had become *res judicata* and as such the son had a "saleable interest in agricultural or horticultural land". The son's liability was considerably reduced and the decree was amended on 9th November 1942. Within ninety days of the amended decree the mortgagee filed an appeal.

Held: (1) The appeal was not barred by time.

The words "ninety days from the date of the decree or order appealed from" mentioned in article 156 of the Indian Limitation Act, mean ninety days from the date when the decree becomes appealable by the party concerned. The mortgagee obtained under the original decree all the reliefs prayed for in spite of the adverse finding on the question of the joint family ownership of the hypotheca. She could not have appealed from the decree which made no reference to the finding. The amendment brought about a vital alteration by substantially reducing the relief originally granted to her on the basis of the adverse finding which previously was not prejudicial to her.

(2) The adverse finding could not operate as *res judicata* after a competent appeal had been filed from the decree.

(3) The properties were purchased by the mortgagor in his own name. In the absence of evidence showing that the joint family was possessed of properties with the aid of which the mortgaged properties could have been purchased, the burden was not shifted to the mortgagee of proving that they were the separate properties of the mortgagor.

APPEAL against the decree of the Court of the Subordinate Judge of Cocanada, dated 10th December 1935, and made in Original Suit No. 16 of 1935, as amended by the order, dated 9th November 1942, and made in Interlocutory Application No. 1683 of 1938 on the file of the said Court of the Subordinate Judge of Cocanada.

V. Suryanarayana for appellant.

Sir A. Krishnaswami Ayyar and P. S. Raghavarama Sastri for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by PATANJALI SASTRI J.—This is an appeal brought by

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the plaintiff against a mortgage decree passed by the Court of the Subordinate Judge of Cocanada on 10th December 1935 and amended by the same Court on 9th November 1942 under the provisions of the Madras Agriculturists Relief Act, 1938.

The mortgage bond on which the suit was based was executed by the respondent's father for a sum of Rs. 40,000, describing the properties charged as his self-acquired and separate properties. Relying on this description, the appellant alleged in the plaint that the properties were the separate properties of the mortgagor, but as the respondent was claiming an interest therein as the undivided son of the mortgagor he was also impleaded in the suit and a decree for sale of the entire properties was sought on the footing that, even if the properties were found to be the joint family properties of the respondent and his father, the latter having granted the mortgage for purposes binding on the respondent, the mortgage was valid also in respect of the respondent's interest. The mortgagor was the first defendant, and the respondent the third defendant in the suit. Certain other persons were also made parties, but this appeal is concerned only with the third defendant, the sole respondent.

The Court found that the mortgaged properties were joint family properties of the respondent and his father but, the mortgage having been effected mainly for the purpose of discharging certain antecedent debts of the mortgagor, it was binding on the respondent, and passed a decree for Rs. 1,13,448-6-4 with subsequent interest and costs to be recovered by sale of the entire hypotheca including the respondent's half share therein. The decree having thus granted to the appellant all the reliefs he claimed, though his case that the hypotheca was the separate property of the mortgagor was found against, the appellant had no occasion to prefer an appeal to displace that finding, as indeed no appeal could be preferred against a mere

adverse finding to which no reference was made in the decree.

While proceedings in execution were in progress, the Madras Agriculturists Relief Act, 1938 (hereinafter referred to as the Act) was passed for a compulsory scaling down of debts due by "agriculturists" as defined in the Act. The respondent, claiming to be such an agriculturist, applied under section 19 to have the decree scaled down and "amended" in accordance with the provisions of the Act. The application was opposed by the appellant on the grounds, *inter alia*, (i) that the respondent was not an agriculturist within the meaning of the Act, and (ii) that, in any case, the hypotheca was the separate property of the mortgagor who was not an agriculturist and, as the respondent was not made personally liable under the decree, he was not in any way affected by it and so could not claim to have it scaled down. It is to be observed that, in order to qualify as an agriculturist under the Act, the respondent must have "a saleable interest in any agricultural or horticultural land" of the kind described in section 3 (ii), and the mortgaged property being admittedly such land, the first ground of objection would fail if the property is owned by the joint family. The finding arrived at in the suit in regard to the joint family ownership of the property would thus be a complete answer to both the grounds of objection raised by the appellant if such finding could be regarded as *res judicata* in the proceeding for scaling down the decree, and the respondent contended accordingly. The Court below accepting the contention refused to try the same issue again and amended the decree, so far as the respondent was concerned, by (i) wiping out all the interest accrued due till 1st October 1937 under section 8, (ii) reducing the interest on costs from six per cent to five per cent per annum till 22nd March 1938 under section 9, and (iii) separating the respondent's half share of the debt as scaled down

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from that of his father (who was a non-agriculturist) under section 14. The result was that the respondent's liability was reduced to Rs. 20,000 (half of the principal sum originally advanced) with interest at six per cent per annum from 1st October 1937 till date of payment and half the costs with interest at five per cent per annum from 10th February 1936 till 22nd March 1938 and thereafter at six per cent per annum till date of payment, his half share in the mortgaged property being made liable only for the reduced amount. The relief granted to the appellant under the original decree having thus been materially altered to her prejudice by the "amendment" under section 19 of the Act, she has preferred this appeal from the decree as amended, challenging the correctness of the view taken by the learned Subordinate Judge on the question of *res judicata* and seeking to have the finding in the suit as to the joint family ownership of the mortgaged property reversed and set aside by this Court.

The decree having been passed in 1935 and the appeal having been presented in 1943, a question of limitation arises at the threshold. Under article 156 of the Limitation Act the period prescribed for civil appeals to this Court is ninety days from "the date of the decree or order appealed from". If time ran from the date of the original decree, the appeal would be hopelessly barred but, if the period is calculated from the date of the amendment of the decree by the Court below on 9th November 1942, the appeal would be well within time. The question is which is the correct *terminus a quo* in the circumstances of the case—the date of the original decree or the date of the amendment? It has to be borne in mind in this connection that the amendment here in question was not one made in order to express the real intention which the original decree was meant to express but did not, such as an amendment under section 152 of the Code of Civil

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Procedure, in which case it may be that the amendment does not give rise to a fresh starting point, though it may be a proper ground for extension of time under section 5 of the Limitation Act; see *Visvanathan Chetti v. Ramanathan Chetti*(1). The position here is different and the circumstances are somewhat peculiar. The appellant, as already stated, had obtained under the original decree all the reliefs she had sought in the suit in spite of the adverse finding on the question of the joint family ownership of the hypotheca. She could not, therefore, have appealed from the decree which made no reference to the finding; see *Run Bahadur Singh v. Lucho Koer*(2). The "amendment" under section 19 of the Act, however, brought about a vital alteration, as we have explained above, by substantially reducing the relief originally granted to her, and this alteration was based on the adverse finding which previously was not prejudicial to her. It would be startling if, in such circumstances, the appeal were to be held barred by limitation long before the appellant's right of appeal came into being. Such a construction of the phrase "the date of the decree" in article 156 cannot be accepted. The article clearly pre-supposes that the remedy by way of appeal has become available to the appellant, and the date of the decree can only mean the date when the decree became appealable for the party concerned; cf. *Peer Ammal v. Nalluswami Pillai*(3). It follows that the appeal is not barred by time. We may here observe that, even otherwise, we should have readily extended the time under section 5 of the Limitation Act for, in our opinion, this is eminently a case where such extension would be justified.

The appeal against the amended decree in so far as it has disallowed a portion of the relief claimed in the suit being thus admissible, no finding of the lower

(1) (1901) I.L.R. 24 Mad. 646. (2) (1884) I.L.R. 11 Cal. 301 (P.C.).
(3) (1930) I.L.R. 54 Mad. 455.

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Court on which such disallowance is based can be *res judicata*, for the simple reason that no finding of a Court of first instance can be said to have "finally decided" any matter in issue when a competent appeal has been preferred from its decree.

Turning now to the merits of the issue relating to the ownership of the hypotheca, we are of opinion that the finding arrived at in the suit cannot be supported. No evidence was produced by the respondent to show that the property in question belonged to the joint family of himself and his father. It is not disputed that the properties were purchased by the father in his own name, and in more than one transaction he asserted his exclusive right to them as his self-acquisitions. It was urged for the respondent that, if any member of a Hindu joint family claimed any property in his possession to be his separate property, the onus was on him to prove that it was acquired by him out of his own funds and without the aid of the family estate. But, before the appellant could be called upon to assume such burden, it was incumbent on the respondent to show that the family was possessed of some property with the aid of which the property in dispute could have been acquired; see *Venkataramayya v. Seshamma*(1). In the absence of any evidence to that effect, it was for the respondent to establish that the mortgaged property was joint family property [see *Rai Shadi Lal v. Lal Bahadur*(2)], and he has failed to do so. The finding of the lower Court on this issue is apparently based upon a misreading of the evidence of P.W. 4. There is nothing in it to warrant the supposition that there was a nucleus of family property. The mortgaged property must therefore be held to be the self acquisition of the mortgagor in which the respondent can have no interest. It follows that the respondent, being in no way liable under the mortgage

(1) I.L.R. (1937) Mad. 1012.

(2) (1932) 64 M.L.J. 298 (P.C.).

in question, has no *locus standi* to make any application under the Act in respect of the debt.

In the result, the amended decree is set aside and the original decree dated 10th December 1935 restored, subject to the modification that the respondent and the second defendant whose name is said to have been included by mistake will be exonerated from liability. The respondent will pay the costs of this appeal and of Interlocutory Application No. 1683 of 1938 to the appellant.

G.R.

APPELLATE CRIMINAL.

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

PUBLIC PROSECUTOR, APPELLANT,

v.

KARUMURI SUBBA RAO (ACCUSED), RESPONDENT.*

Defence of India Rules (1939), r. 81 (2) (b)—G.O. No. 243, Public (War), dated 21st January 1942—Notification made by Collector acting under the above provisions in respect of withholding matches from sale—Prosecution—Validity of.

Purporting to act in exercise of the powers conferred by clause (b) of sub-rule (2) of rule 81 of the Defence of India Rules read with Government Order No. 243, Public (War), dated the 21st January 1942, the Collector of West Godavari notified an order on 9th January 1943, clause 1 of which stated that no person selling matches should withhold them from sale to any person on demand and on offer of the price fixed by the Government of India in that behalf so long as he possessed saleable stock. The respondent refused to sell any matches to a person notwithstanding that there were large stocks available in the shop and thereupon he was charged under the Collector's order and convicted.

Held that, although the respondent was guilty of the offence of withholding the matches from sale, yet he could not be convicted as the notification of the Collector and the

* Criminal Appeal No. 395 of 1944.

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charge framed against the respondent were defective. The Collector was not empowered under clause (b) of sub-rule 2 of rule 81 of the Defence of India Rules, to provide that a person selling matches commits an offence when he withholds matches from sale notwithstanding that he possesses saleable stock. If the Collector had invoked clause (a) the notification would have been in order. But as he acted under clause (b) the notification was invalid. As the charge against the respondent also made reference to clause (b) and not to clause (a) it was defective.

Emperor v. Mahadev Mahalu(1) explained and distinguished.

APPEAL under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) by the Sessions Judge of the West Godavari Division at Ellore in Criminal Appeal No. 217 of 1943 (Calendar Case No. 167 of 1943, Joint Magistrate's Court, Narsapur).

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

V. Parthasarathy for accused.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—The respondent was charged in the Court of the Joint Magistrate of Narsapur with an offence punishable under rule 81 (4) of the Defence of India Rules. His father has a shop at Narsapur in which he sells matches retail. On 22nd April 1943 a peon of the Tahsildar at Narsapur went to this shop to buy some matches. The respondent was in charge of the shop and told the would-be customer that he had no matches in stock. This was untrue. In fact, there were large stocks of matches on the premises and additional large stocks in a godown belonging to the proprietor. On 9th January 1943 the Collector of West Godavari notified an order, clause 1 of which stated that no person selling matches should withhold them from sale to any person on demand and on offer of the price fixed by the Government of India in that behalf so long as he possessed saleable stock. This notification purported to be

(1) (1942) 44 Bom. L.R. 921.

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made in the exercise of the powers conferred by clause (b) of sub-rule 2 of rule 81 of the Defence of India Rules read with G.O. No. 243, Public (War), dated the 21st January 1942. As the respondent had refused to sell any matches to the peon notwithstanding that there were large stocks available in the shop, he was charged under the Collector's order. The Magistrate held that the charge had been substantiated. He fined the respondent Rs. 100 and directed that in default of payment he should undergo rigorous imprisonment for one month. The respondent appealed to the Sessions Judge, who set aside the conviction. In doing so the Sessions Judge relied on a decision of the Bombay High Court. The Provincial Government has filed the present appeal, which is an appeal against the acquittal, on the ground that the Sessions Judge had misread the judgment of the Bombay High Court.

It is abundantly clear that the Sessions Judge failed to appreciate what was said by the Bombay High Court. The case is *Emperor v. Mahadev Mahalu*(1) and the facts there were these. A retail grocer had in his shop four pounds of sugar for sale. The police sent a person to buy one pound of sugar from him. The grocer refused to let him have more than one anna's worth of sugar on the ground that he wished to reserve the remaining quantity of sugar in his possession for retail sale to his regular customers. The Court held that on these facts the offence of withholding from sale had not been committed. It was quite reasonable for a retailer to refuse to sell a large part of his stock to one customer. In the course of his judgment in that case, BEAUMONT C.J. observed that, in order to bring home the offence, the police would have to go much further than they had gone and show that the accused was over a period withholding his sugar from sale. The Sessions Judge has

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regarded this statement as meaning that, before there can be a "withholding" from sale, the "withholding" must extend over a period. That is not the effect of the judgment when read as a whole. The learned Chief Justice said in an earlier passage that one must construe the word "withholding" in relation to the facts of each particular case, and with respect we agree. In the present case there was a flat refusal to sell even one box of matches to the customer notwithstanding that there were large stocks in the shop. The Bombay decision has no bearing on the case now before us.

If the position rested there, we should feel bound to allow the appeal, but it has been pointed out to us that the notification of the Collector is defective and that the charge framed against the respondent was also defective. Clause (b) of sub-rule 2 of rule 81 of the Defence of India Rules does not relate to withholding from sale. The clause has reference to the controlling of prices. Therefore the Collector was not empowered by clause (b) to provide that a person selling matches commits an offence when he withholds matches from sale notwithstanding that he possesses saleable stock. If he had invoked clause (a) the notification would have been in order, but clause (a) was not invoked. This is no doubt the result of an oversight, but it is an oversight which affects the validity of the notification. The charge against the respondent also made reference to clause (b). This naturally followed from the mistaken notification. There was no offence under clause (b) but under clause (a) and he was not charged under clause (a). In the face of these technical defects we do not think we should be justified in allowing the appeal which will consequently be dismissed.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

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

V. S. A. KRISHNA MUDALIAR (PLAINTIFF),
APPELLANT,

v.

V. S. A. SABAPATHI MUDALIAR (FIRST DEFENDANT),
RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 24—Letters Patent, Madras, cl. 13—Powers of High Court under sec. 24 and cl. 13—Distinction between.

Under section 24 of the Code of Civil Procedure a High Court has power, *inter alia*, to transfer to its file a suit pending in a Court subordinate to it and pass any suitable orders in the suit and, if necessary, re-transfer it for trial or disposal to the Court from which it was withdrawn. But under clause 13 of the Letters Patent it has only the power to remove a case filed in a mufassal Court to its file for trial and determination, but not to re-transfer it to the Court from which it was withdrawn and the decision to the contrary in *Jumna Bai v. Ramanathan Chetti*(1) is not good law.

APPEAL from the judgment and order of BYERS J. dated 23rd May 1944 and passed in the exercise of the extraordinary original civil jurisdiction of the High Court in Application No. 1179 of 1944.

The appeal came on for hearing and the Court (MOCKETT and KUPPUSWAMI AYYAR JJ.) referred the matter to a Full Bench.

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

ON THE REFERENCE :

K. Rajah Iyer for appellant.—The order has been made under the extraordinary original civil jurisdiction of the High Court under clause 13 of the Letters Patent, relying upon the decision in *Jumna Bai v. Ramanathan Chetti*(1).

* Original Side Appeal No. 33 of 1944.
(1) (1928) I.L.R. 53 Mad. 52.

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Section 24 does not enlarge the powers of the High Court under clause 13. Even under section 24 the High Court cannot re-transfer a suit which it has withdrawn from the mufassal.

[LEACH C.J.—The language of the section is clear and we are against you.]

Section 24 contemplates notice to be given to the parties, and that has not been done in the case.

Sir A. Krishnasami Ayyar for respondent was not called upon to reply.

LEACH C.J.—The JUDGMENT of the Court was delivered by LEACH C.J.—Up to 17th September 1941 the appellant, the respondent and their brother V. S. Armuga Mudaliar, who constituted a joint Hindu family, carried on business in cloth at Chennimalai (Coimbatore), Coimbatore, Kumbakonam, Tiruppur, and Jaffna in Ceylon. On that date they divided and by a deed of partition the respondent was allotted the businesses at Chennimalai and at Jaffna. To the appellant fell the business at Tiruppur, where the family carried on a ginning factory, and a sum in cash. Armuga was given the businesses at Coimbatore and Kumbakonam.

In 1942 the Government of India passed an Ordinance which established control over the export from India of cotton piecegoods to Ceylon and other countries and piecegoods merchants were informed that applications for licences permitting the export of such goods would be considered only on their furnishing statements of their exports during 1941–42. It has been stated in the course of the arguments that the effect of this notification was that only those persons who had exported piecegoods during the period mentioned were allowed to possess export licences.

As the respondent had been allotted the Jaffna business, he applied for a licence permitting him to export a quota based on the total export business of the family before its partition, and his application

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was granted. The appellant and Armuga themselves then applied for licences with the object of exporting piecegoods to Ceylon. Their applications were refused and they were referred by the Controller to a civil Court for the establishment of their rights. Thereupon the appellant filed Original Suit No. 101 of 1944 in the Court of the Subordinate Judge of Coimbatore for a declaration that he was entitled to a one-third share in the export quota based on the business of the family before partition and for an injunction restraining the respondent from obtaining a licence for more than one-third of that quota. The respondent was made the first defendant in the suit and Armuga Mudali, the second defendant. This suit was filed on 14th April 1944, the day before the Subordinate Judge's Court was due to close for the summer vacation. Along with the plaint was filed an application (Interlocutory Application No. 357 of 1944) asking for an interim injunction restraining the first defendant from obtaining a licence for more than one-third share. This application was granted *ex parte* on the following day. Notice of the application had not been served on either of the defendants. In fact the second defendant was not made a party to the application for a temporary injunction.

As the Subordinate Judge's Court was then closed, the first defendant was not in a position to appear before the Subordinate Judge and ask him to vacate the interim order under the provisions of Order XXXIX, rule 4, of the Code of Civil Procedure, and consequently on 16th May 1944 he filed an application on the Original Side of this Court asking for an order (i) transferring the suit and the application for a temporary injunction to this Court, (ii) vacating the interim injunction, (iii) directing the hearing of the application for an interim injunction by this Court and then (iv) the re-transfer of the suit to the Subordinate Judge's Court. The application purported to be made under clause 13

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of the Letters Patent, Order XXXIX, rule 4 and section 151 of the Code of Civil Procedure. It was heard by BYERS J., who granted all the respondent's prayers. The learned Judge was apparently of the opinion that the deed of partition entitled the respondent to an export quota based on the business of the family in 1941-42. This is an appeal from the judgment of the learned Judge. In the first place it came before MOCKETT and KUPPUSWAMI AYYAR JJ., who referred it to a Full Bench, as they considered it raised a point of practice of the greatest importance, a practice which had been followed since the decision of this Court in *Jumna Bai v. Ramanathan Chetti*(1).

In *Jumna Bai v. Ramanathan Chetti*(1) RAMESAM J. held that, where a suit is pending in a mufassal Court which is closed for the summer recess, the High Court has power under clause 13 of the Letters Patent to transfer the suit to itself and pass an interim order therein. The application for transfer should, he said, be made on the Original Side of the High Court and should ask for an injunction or other interlocutory relief and then apply for the re-transfer of the whole proceedings to the mufassal Court. The application which the respondent made was obviously based on this judgment.

The first question is whether clause 13 of the Letters Patent can legitimately be read in this way. The clause gives the High Court power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, a suit being within the ordinary jurisdiction of a Court subject to its superintendence, when it thinks proper to do so. But does this mean that it can under this clause withdraw a suit from a subordinate Court and, having quashed an objectionable interim order, then send the suit back to the original Court for trial? If we have to have regard to the wording of the clause, as one must, it seems to us merely to contemplate

the removal of a case filed in a mufassal Court to this Court for trial and determination.

But this does not mean that BYERS J. had not the power to entertain the application which was filed by the respondent on 16th May 1944. Section 24 of the Code of Civil Procedure was not referred to in the application; but, we are informed by Sir Alladi Krishnaswami Ayyar that the attention of BYERS J. was drawn to it in the course of hearing. The section gives power to the High Court to transfer a suit to this Court and afterwards re-transfer it for trial to the Court in which it was originally filed. It states that on the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may transfer a suit, appeal or other proceeding pending before it for trial or disposal to a Court subordinate to it competent to try it, or withdraw a suit, appeal or other proceeding pending in a Court subordinate to it and then (i) to try or dispose of it, or (ii) transfer it for trial or disposal to a subordinate Court or (iii) re-transfer it for trial or disposal to the Court from which it was withdrawn. The section appears to us to give full power to this Court to do what was done by BYERS J. in this matter. It must, however, be observed that the section requires notice to be given to the parties and an opportunity of being heard. The learned Judge did not cause notice to be given to the second defendant in the suit, which he should have done.

We have now to decide whether the learned Judge was right in holding that the plaintiff was not entitled to an injunction. We think that on the material before him he should not have gone to this length. There was no evidence before the Court that the Jaffna business was supplied with piecegoods from the Chennai branch alone. It may be that goods were sent to Jaffna from the other branches of the firm, in

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which case a clearer complexion would be put on the case. Then there is the fact that the application was heard by the learned Judge on the 23rd May and the Subordinate Judge's Court was due to reopen on the 17th June. In these circumstances and bearing in mind that the second defendant had not been served with notice of the application for an interim injunction, we think that it would have been better if the learned Judge had not adopted the course which he did but had directed that the matter be disposed of by the Subordinate Judge on the reopening of his Court after due notice to all the parties to the suit. The application for an interim injunction could not properly be decided on the evidence then before the Court.

It follows that we consider that the application should be re-heard by the Subordinate Judge, after notice to all parties and after giving them an opportunity of letting in the evidence they require. Accordingly we allow the appeal and direct the Subordinate Judge to take this course. He will hear the application as soon as possible, and we imagine that the parties will be able to agree to the order on the application being the order in the suit. The whole question is left open for decision by the Subordinate Judge after the further hearing.

Costs in this Court, before BYERS J. and before us will be made costs in the cause.

G.B.

APPELLATE CIVIL.

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

THE CALICUT BANK, LTD. (IN LIQUIDATION) BY OFFICIAL
LIQUIDATOR (RESPONDENT), APPELLANT,

1944,
September 15.

v.

SRIMATI C. RADHALAKSHMI (PETITIONER),
RESPONDENT.*

Execution—Application by court-auction purchaser for possession of house—Tenant in occupation entitled to benefit of Madras House Rent Control Order, 1941—Symbolic delivery subject to tenant's rights under that Order—Madras House Rent Control Order, 1941, cls. 2 (3) and 7-A (1).

In deciding in execution proceedings an application with regard to possession of house property, the Court must have regard to the provisions of the Madras House Rent Control Order, 1941. Consequently a purchaser in court-auction of a house can get only symbolic possession thereof subject to the rights of the tenant occupying it in accordance with the provisions of that Order.

APPEAL and civil revision petition against the order of the Court of the Subordinate Judge of South Malabar, dated 5th July 1943 and made in Execution Application No. 441 of 1943 in Original Suit No. 25 of 1938.

John & Row and R. Rajeswara Rao for appellants.

S. R. Subramaniam for respondent.

The JUDGMENT of the Court was delivered by LEACH C.J.—The question here is whether a Court must have regard to the provisions of the Madras House Rent Control Order, 1941, when deciding in execution proceedings an application with regard to the possession of house property.

LEACH C.J.

In Original Suit No. 25 of 1938 in the Court of the Subordinate Judge of South Malabar the P. and O.

* Appeal Against Order No. 677 of 1943 and Civil Revision Petition No. 1470 of 1943.

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Banking Corporation, Limited, obtained a mortgage decree for a large sum of money against one C. Unnithiri. Certain members of the mortgagor's family, including his three children who were minors, were made defendants. The minors were represented by their mother Radhalakshmi, the respondent in this appeal. The Bank of Calicut, Limited, which is now in liquidation, held a second mortgage on the properties of which one was the house in which the respondent and her children were living. At the sale held on 4th January 1943 in execution of the mortgage decree the official liquidator of the Calicut Bank, Limited (hereinafter referred to as the official liquidator) purchased the house for the sum of Rs. 52,000. The sale was confirmed on 6th February 1943.

Through their mother as their next friend the minors filed Original Suit No. 6 of 1943 in which they challenged the right of the mortgagees to sell the house and certain other properties. In the course of the proceedings they applied for an interim injunction against the official liquidator restraining him from taking possession of the house and from seeking confirmation of the sale. This application was dismissed by an order, dated 11th March 1943. An appeal followed, but this was also dismissed.

On 2nd March 1943 the official liquidator filed an application asking for an order directing the delivery to him of possession of the house and his prayer was granted on 11th March 1943. Notwithstanding this order the official liquidator was obstructed by one Kallingal Kitta who, it is alleged, was acting at the instigation of the respondent. This necessitated the official liquidator applying for an order against Kallingal Kitta and the order was granted on 30th March 1943.

In 1942 a receiver was in possession of the house and on the 18th April of that year he leased it to the respondent at a rent of Rs. 25 per month. On 7th

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June 1943 the respondent sent a notice to the receiver and the official liquidator under sub-clause 1 of clause 7-A of the Madras House Rent Control Order, 1941. That clause provided that, if a tenant in possession wished to extend the period of his tenancy by not less than six, and not more than twelve months, he might give the landlord, not less than one month before the expiry of the tenancy, a written notice of his intention and, on the delivery of the notice, the tenancy should be deemed to have been extended for the period specified in the notice. The clause also provided that the right of extending the tenancy conferred by this sub-clause might be exercised by the tenant as often as he thought fit. This Order has been amended since, but the amendments do not affect the question under discussion in this appeal.

Clause 2 (3) of the Order defines the word "landlord" as including the person who is receiving or is entitled to receive the rent of a house whether on his own account or on behalf of himself and others or as an agent or trustee or who would so receive the rent or be entitled to receive the rent if the house were let to a tenant. The receiver was a landlord within the meaning of the Order and the respondent was entitled to avail herself of the provisions of clause 7-A (1).

On 16th June 1943 the respondent filed an application in the Court of the Subordinate Judge under section 47 of the Code of Civil Procedure asking that the order for possession should be limited to symbolical possession and relied on the rights conferred upon her as a tenant by the House Rent Control Order, 1941. The Subordinate Judge held that her application was well founded and consequently directed that only symbolical possession should be given to the official liquidator. The appeal is from that order.

We have no doubt that the order of the learned Subordinate Judge is right. The Madras House Rent Control Order conferred upon the respondent the right

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of having her tenancy continued provided she had given the requisite notice, which she had. She was in lawful possession of the house and the auction purchaser could only get possession of the property subject to her rights under the Order. We agree with the observation of the Subordinate Judge that, where the extension of a tenancy is by operation of statute, the Court is not concerned with the lack of merit in the tenant or of the hardship caused to the landlord.

The appeal must be dismissed with costs. The revision petition is also dismissed but without costs. The costs of the liquidator will come out of the estate.

N.S.

APPELLATE CIVIL.

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

ANAGHA VENKATA LAKSHMI NARASIMHA RAO
(PLAINTIFF), APPELLANT,

v.

THE PROVINCE OF MADRAS REPRESENTED BY THE
COLLECTOR OF GUNTUR AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

Madras Restoration of Village Officers (Validation) Act (XVIII of 1939), sec. 3—Valid—Indian Evidence Act (I of 1872), sec. 4—No conflict between the two sections—Government of India Act, 1935, sec. 107 and Schedule VII, List III, entry No. 5.

Section 3 of the Madras Restoration of Village Officers (Validation) Act (XVIII of 1939) is *intra vires* the Madras Legislature and is a valid provision of law. It is not in conflict with the provisions of section 4 or of any other section of the Indian Evidence Act.

APPEAL against the decree of the Court of the Subordinate Judge of Guntur in Appeal Suit No. 16 of 1942 preferred against the decree of the Court of the District

* Second Appeal No. 1079 of 1943.

Munsif of Narasaraopet in Original Suit No. 281 of 1940.

V. Govindarajachari for appellant.

Government Pleader (K. Kuttikrishna Menon) for first respondent.

A. Lakshmayya for second respondent.

The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal raises the question whether the Madras Legislature was acting within its powers when it enacted section 3 of the Madras Restoration of Village Officers (Validation) Act (XVIII of 1939). The Act was passed to restore to village officers or their heirs offices which they had lost by reason of their association or connection with political movements. Section 2 of the Act empowers the Provincial Government to pass orders for restoration in such circumstances. Section 3 states that, if the Provincial Government declares that an order passed by it is of the nature referred to in section 2, the declaration shall be conclusive proof of the fact and all Courts shall take judicial notice of it. It is said that in making this second provision the Legislature exceeded its powers.

The appeal arises out of a suit filed by the appellant in the Court of the District Munsif of Narasaraopet for a declaration that his removal from the office of the karnam of Thalarlapalli village was unlawful and for a mandatory injunction directing his reinstatement. In 1921 the office was held by one Krishnayya, but he was removed because he had not within the time allowed to him passed the prescribed tests. He had three sons, Hanumayya, Suryanarayana and Lakshminarasimha Row (second defendant). None of his sons was qualified for the office and the Collector appointed Sriramulu, the father of the plaintiff. It transpired during the course of the trial that the second defendant was a supporter of the Congress party and was suspected of having taken part in the civil

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disobedience movement of 1921. This was not the reason given by the Collector for passing over him. The reason given was that he was not qualified for the post. Sriramulu was the nearest agnatic relative of the Krishnayya family. He was appointed on 23rd September 1921 and held the office until 28th April 1933, on which date the Collector selected the plaintiff to succeed his father. By an order dated 11th October 1939 the Government of Madras removed the plaintiff from the post and appointed the second defendant in his stead. The Congress party was then in power and it is common ground that the order appointing the second defendant was passed because it was considered he had lost the appointment in 1921 on account of his political opinions.

The plaintiff felt himself aggrieved by this action and filed the present suit. The District Munsif dismissed it on the ground that it was not maintainable in a civil Court by reason of the provisions of sections 2 and 3 of the Madras Restoration of Village Officers (Validation) Act of 1939. This decision was concurred in on appeal by the Subordinate Judge of Guntur. The plaintiff has now appealed to this Court.

Here it has been contended that section 3 of the Act is in conflict with the Indian Evidence Act and therefore the Legislature had no power to place it in the Act. If the Legislature had the power there can be no doubt that the suit was rightly dismissed. The order appointing the second defendant was professedly passed under section 2. A declaration was made by the Provincial Government under section 3 and the declaration was published in the *Fort St. George Gazette* on 22nd October 1939.

The argument in support of the contention that the Legislature acted beyond its powers is this. Section 107 of the Government of India Act states *inter alia* that, if a provision of a Provincial law is repugnant to any existing Indian law with respect to one of the matters

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enumerated in the Concurrent Legislative List, then, subject to the provisions of that section, the existing Indian law shall prevail and the Provincial law shall to the extent of the repugnancy be void. Entry No. 5 in the Concurrent Legislative List reads :

"Evidence and oaths ; recognition of laws, public acts and records and judicial proceedings."

Therefore the Provincial Legislature could not pass an Act relating to evidence if repugnant to the Indian Evidence Act unless sub-section 2 were invoked, which was not the case.

It is said that section 3 of the Madras Restoration of Village Officers (Validation) Act of 1939 is repugnant to the last paragraph of section 4 of the Indian Evidence Act, which is in these terms :

"When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it."

We fail to see how section 3 of the Madras Restoration of Village Officers (Validation) Act can be said to be in conflict with this provision of law. It is obviously not in conflict. There is no connection between the two. It is conceded by the learned Advocate for the appellant that section 3 of the Provincial Act is not repugnant to any other section of the Indian Evidence Act. Therefore the plea of *ultra vires* must be rejected.

Whether the Provincial Government was justified in displacing the plaintiff and appointing the second defendant to the office of the karnam of Thalarlapalli is another matter. If section 3 had not been inserted in the Provincial Act, it might have been open to the appellant to contend that the case did not fall within the four corners of section 2. The Court cannot, however, go into that question, as the Legislature has provided that a declaration under section 3 shall be conclusive proof that the order passed is one of the nature contemplated by section 2. The Legislature

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had the power to insert the provision and, as it has done so, the jurisdiction of the Courts is ousted. The question whether this is wise does not call for discussion here.

The appeal must be dismissed with costs in favour of the second respondent.

N.S.

APPELLATE CIVIL.

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

1944,
September 4.

M. C. CHINNIAM CHETTIAR (FIRST DEFENDANT),
APPELLANT,

v.

SIVAGAMI ACHI alias SORNAM ACHI AND FIVE OTHERS
(PLAINTIFF AND DEFENDANTS 2 TO 6), RESPONDENTS.*

Hindu Women's Rights to Property Act (XVIII of 1937) as amended by Hindu Women's Rights to Property (Amendment) Act (XI of 1938), sec. 3 (2)—"Interest", meaning of—Joint family consisting of father and adopted son—Adopted son dying leaving widow—Father adopting another son—First adopted son's widow suing thereafter for partition under sec. 3—Share of—One-third, not half.

Subsequent to the death of his only son a Hindu made an adoption of another boy. The widow of the deceased son thereafter made a demand for partition of the joint family estate and filed a suit for the recovery of her share under sub-section 2 of section 3 of the Hindu Women's Rights to Property Act, 1937.

Held: The widow was entitled to a one-third and not to a half share in the estate. Having regard to the words used in sub-section 2 of section 3 of the Act and to the nature of the interest of a coparcener in a joint family governed by the Mitakshara law, the widow got no greater rights than those possessed by her husband and, when she sought partition, the joint family had been increased by the adoption of a son by the head of it. The word "interest" in sub-section 2 does

* Appeal No. 202 of 1943.

not mean the same thing as the word "share" used in sub-section 1 of the section, and the interest which the husband had in the family estate was a fluctuating interest. The widow could not be in a better position than her husband if he had lived.

Appovier v. Rama Subba Aiyar(1) applied.

Observations in Mayne's Hindu Law, Tenth Edition, at pages 721 and 722, approved.

APPEAL against the decree of the Court of the Subordinate Judge of Sivaganga, dated 30th November 1942 in Original Suit No. 36 of 1941.

B. Sitarama Rao and R. Subramanyam for appellant.

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 LEACH C.J.—The question in this appeal is one of interpretation of sub-section 2 of section 3 of the Hindu Women's Rights to Property Act, 1937. The sub-section states that, when a Hindu governed by a school of Hindu law other than the Dayabhag school or by customary law dies, 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. Sub-section 3 states that an interest devolving on a Hindu widow under the provisions of the section shall be the limited interest known as a Hindu woman's estate, provided that she shall have the same right of claiming partition as a male owner.

The first respondent is the plaintiff in the suit. She is the widow of one M. C. Thiagarajan Chettiar, who was the adopted son of the appellant and was joint with him. Thiagarajan died on 19th February 1940. On 12th June 1941 the appellant adopted the

(1) (1866) 11 M.I.A. 75.

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third defendant (the third respondent). On 6th August 1941 the first respondent filed this suit for partition, as she had the right to do by virtue of the Hindu Women's Rights to Property Act. The main question is whether she was entitled to a half share or only to a one-third share in the family property. She claimed to be entitled to a half share because this was the extent of the interest which her husband had in the property at the time of his death. The father-in-law maintained that, by reason of his adoption of a son after the death of Thiagarajan, the plaintiff's interest was only one-third. The Subordinate Judge considered that it was quite clear that the plaintiff's contention was right and he gave her a decree for partition on the basis that she had a Hindu woman's interest in one half of the estate. The question is not so simple as the Subordinate Judge imagined. In fact it is one of considerable difficulty. On a careful consideration of the very able arguments which have been addressed to us by Counsel, we have come to the conclusion that the interpretation placed upon sub-section 2 by the Subordinate Judge is erroneous and that he should only have given the plaintiff a decree for one-third of the estate.

For the plaintiff stress has been laid on the word "had" with which sub-section 2 concludes. It is said that, as a son's widow is given the interest which her husband "had" at the time of his death, nothing which happens afterwards can cut down that interest. This argument presupposes that a coparcener's interest in the family estate is a fixed interest and that the word "interest" in the sub-section should be interpreted as "share", which is the word used in sub-section 1. This cannot be accepted. A coparcener's interest is not a fixed interest. It is subject to alteration. For example, it is affected by the death of a coparcener, by the birth of a son to a coparcener, or by the adoption of a son by a coparcener.

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Lord WESTBURY, in delivering the judgment of the Privy Council in *Appovier v. Rama Subba Aiyan*(1), said :

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

During his lifetime the interest of the plaintiff's husband was an uncertain one. His father might have had a son born to him. He could, of course, have fixed his share by insisting on partition, but this he did not do. The section does not give the plaintiff any greater rights than those possessed by her husband and, when she sought partition, the joint family had been increased by the adoption of a son by the head of it. The question is fully discussed by the learned author of the Tenth Edition of Mayne's Hindu Law, at pages 721 and 722, and we are in full agreement with the observation made there that a widow cannot be deemed to be in a better position than her husband if he had lived.

This Court has accepted the principle that, when a coparcener sells or charges his interest in a family estate, the alienee merely gets his interest as it stood at the date of the alienation, and it is said for the plaintiff that this supports her case. We do not agree that there is an analogy. Here we are concerned with the interpretation of the statute and we are of opinion, having regard to the words used and the nature of the interest of a coparcener in a joint family governed by the Mitakshara law, that the Legislature did not intend to give, and has not in fact given, the widow greater rights than those possessed by her deceased husband.

It has also been suggested on behalf of the plaintiff that she had demanded a partition before the adoption of the third defendant. If this were in fact the case,

(1) (1866) 11 M.L.A. 75.

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LEACH C.J. her claim for a half share in the property would be well founded; but it is quite clear that no such demand was made until after the adoption had taken place. All that the plaintiff can point to here is a letter which her Advocate wrote to her father-in-law on 31st May 1941. The plaintiff had received information that her father-in-law proposed to adopt a son, and she entered a protest. She alleged that the proposal was in contravention of an agreement which had been reached between her father-in-law and her father. The concluding portion of the letter reads as follows:—

“My client therefore calls on you not to make an adoption in contravention of the said agreement but to fulfil it in all its terms within a week of the receipt hereof, failing which she will be obliged to enforce all the reliefs she is entitled to in virtue of the said agreement and under the Hindu Women's Rights to Property Act, by process of Court.”

This is not a demand for partition. It is a threat to enforce her rights to partition should her father-in-law proceed with the proposed adoption. Admittedly, she made no actual demand for partition until the adoption had taken place.

The appeal must be allowed and the case remanded to the trial Court to proceed with the partition in accordance with this judgment. The plaintiff will receive from the defendant costs in the trial Court based on the value of one-third of the estate. She will pay to the appellant costs in this Court based on the difference between one half and one-third of the value of the estate.

N.S.

APPELLATE CIVIL.

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

CHITTAM SUBBAYYA (PLAINTIFF), APPELLANT,

1944,
September 12.

v.

MUTHYALA RAMACHANDRAPPA AND TWO
OTHERS (DEFENDANTS 1 TO 3), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 35A—“By the party by whom such claim or defence has been put forward”, meaning of—Order for compensation in favour of one co-defendant against another co-defendant—Validity.

An order for costs in favour of a defendant by way of compensation under section 35A of the Code of Civil Procedure can be passed both against the plaintiff and a co-defendant who instigates the plaintiff to put forward a false claim against him and supports the plaintiff in the conduct of the suit. The co-defendant in such a case is a party within the words “by the party by whom such claim or defence has been put forward” in the section and the section is sufficiently wide to bring him within it.

APPEAL against the decree of the District Court of Bellary in Original Suit No. 46 of 1941 and appeals against the order of the District Court of Bellary, dated 10th February 1943 and made in Original Suit No. 46 of 1941.

V. S. Narasimhachari for appellant.

M. S. Ramachandra Rao and A. Bhujanga Rao for first respondent.

Other respondents were not represented.

The JUDGMENT of the Court was delivered by LEACH C.J.—Appeal No. 237 of 1943 is against a decree passed by the District Judge of Bellary dismissing a suit filed under the provisions of Order XXI, rule 63, of the Code of Civil Procedure. Civil Miscellaneous Appeals Nos. 341 and 344 of 1943 are against

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* Appeal No. 237 of 1943 and Appeals Against Orders Nos. 341 and 344 of 1943.

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an order for costs passed by the District Judge under the provisions of section 35A of the Code of Civil Procedure.

In Original Suit No. 22 of 1929 of the same Court the first defendant sued for partition of the estate of the joint family of which he was a member. The first defendant in that suit was his brother. He is the father of the second defendant in the present suit. A decree for partition was passed and it was made the subject of an appeal to this Court (Appeal No. 189 of 1937). The appeal was decided on 6th August 1938 and this Court directed that the father of the second defendant should pay personally to the first defendant a sum of Rs. 52,000 and that the second defendant and his brother should also be liable for the sum with the first defendant, but that their liability should be restricted to their shares in the family estate. The case was remanded to the District Court to pass a final decree in accordance with the judgment of this Court. The final decree was passed on 14th September 1939.

In Original Suit No. 9 of 1938 of the Court of the Subordinate Judge of Bellary the second defendant obtained a money decree for a sum of Rs. 10,000 against the third defendant. This decree was confirmed by this Court in appeal (Appeal No. 206 of 1939) on 14th June 1939. On 14th October 1939 the second defendant transferred this decree to the plaintiff.

In Execution Petition No. 87 of 1939 of the District Court of Bellary the first defendant applied for execution of the decree which he had obtained in Original Suit No. 22 of 1929 by the attachment of the decree which the second defendant had obtained against the third defendant in Original Suit No. 9 of 1938. The plaintiff, as the transferee of that decree, objected. He had previously applied for an order recognising him as the holder of the decree. That application and his objection to the first defendant's prayer for execution were heard together. The District Judge dismissed the

plaintiff's application to be brought on the record and also his petition in the execution proceedings by an order dated 12th December 1940. Appeal Against Order No. 356 of 1941 was filed by the plaintiff against the order of the District Judge refusing to recognise him as the transferee of the decree in Original Suit No. 9 of 1938, and Civil Revision Petition No. 1029 of 1941 for revision of the order overruling his objection to the execution petition filed in Original Suit No. 22 of 1929. This Court allowed Appeal Against Order No. 356 of 1941, but rejected the civil revision petition. By that time the plaintiff had filed the present suit.

The learned District Judge dismissed the plaintiff's suit because he was of the opinion that the transfer by the second defendant of his decree in Original Suit No. 9 of 1938 to the plaintiff was a dishonest arrangement in order to defeat the claim of the first defendant. He considered that the plaintiff's suit was false and vexatious and that it had been filed at the instance of the second defendant. In these circumstances he directed the plaintiff and the second defendant to pay to the first defendant jointly a sum of Rs. 1,000 as compensatory costs under section 35A of the Code of Civil Procedure. Appeal No. 237 of 1943 and Civil Miscellaneous Appeal No. 341 of 1943 have been filed by the plaintiff, the former against the decree dismissing his suit and the latter against the order for costs passed under Section 35A. Civil Miscellaneous Appeal No. 344 of 1943 has been filed by the second defendant against this order for costs.

We consider that the evidence justifies the conclusion of the District Judge that the transfer to the plaintiff of the decree in Original Suit No. 9 of 1938 was made for the purpose of defeating the decree obtained by the first defendant in Original Suit No. 22 of 1929. The plaintiff is a close friend of the second defendant. The transfer to him of the decree was made a month after the first defendant had obtained

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the final decree in Original Suit No. 22 of 1929. Although the second defendant had obtained a decree for a sum of Rs. 10,000 against the third defendant the consideration for the transfer is said to be Rs. 5,000, made up for the most part of moneys alleged to be due by the second defendant to the plaintiff under promissory notes. Only Rs. 120 was paid by the plaintiff to the second defendant in cash. In the course of his evidence the plaintiff explained that the consideration for the transfer was limited to Rs. 5,000 as there had been a dispute between the second defendant and his uncle Ramachandrappa. Why this should diminish the value of the decree is not explained. The plaintiff is not a man of wealth. He says he owns two houses worth Rs. 4,000 and that he has lent Rs. 2,000 or Rs. 3,000 to others; but there is only his word for this, and he did not impress the District Judge as being a man of substance.

There is a further and more important factor in the case. On 1st March 1939 the first defendant, as the decree-holder in Original Suit No. 22 of 1929, applied to the District Court for a temporary injunction restraining the defendants in the suit from receiving or realizing amounts due to them from debtors under decrees or other proceedings in Court or on documents or otherwise till the complete satisfaction of his decree. The first and the third defendants gave an undertaking that they would not collect debts belonging to them or to the family in the meantime. The second defendant was willing to give an undertaking that he would not collect debts belonging to the family, but he refused to give an undertaking with regard to his own affairs. The District Judge did not regard this as being at all satisfactory and on 23rd March 1939 he passed an order directing the second defendant to deposit all his collections in Court, pending the final decree. Notwithstanding this order the second defendant transferred the decree to the plaintiff and or

a sum equal to only half the amount of the decree. The District Judge considered that in making the transfer he was acting in the face of the order of 23rd March 1939. We consider that there is here ample material to support the finding of the District Judge that the transfer of the decree in Original Suit No. 9 of 1938 to the plaintiff was not *bona fide* and was made with the object of defeating the decree obtained by the first defendant. This being so, Appeal No. 237 of 1943 must be dismissed with costs.

Section 35A of the Code of Civil Procedure permits a Court to make an order for costs by way of compensation when a suit has been filed falsely or vexatiously, and an objection to it on such grounds has been put forward at the earliest opportunity. In his written statement the first defendant averred that the transfer was a collusive arrangement between the plaintiff and the second defendant and specifically pleaded that the suit was malicious and vexatious. If the transfer of the decree in Original Suit No. 9 of 1939 was not *bona fide*, but was entered into for the purpose of defeating the first defendant, the suit was a false one and vexatious. The District Judge finds this to be the case, and in the circumstances he was fully justified in making the order against the plaintiff.

The real question is whether he had power under the section to make such an order for costs against the second defendant. The section empowers a Court to pass an order against the party by whom the false claim has been put forward. The second defendant did not file a written statement, but he supported the plaintiff. In fact he gave evidence on his behalf. We have agreed with the finding of the District Judge that the transfer was made for an ulterior purpose. As the second defendant was behind the suit filed by the plaintiff and was a party to it, we consider that section 35A is sufficiently wide to bring him within it. Being the instigator of the suit, having supported the plaintiff

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in its conduct and being a party to it, he comes within the words "by the party by whom such claim or defence has been put forward". We consider that the District Judge was right in making both the plaintiff and the second defendant, who was the real actor, responsible for these costs.

Civil Miscellaneous Appeals Nos. 341 and 344 of 1943 are dismissed with costs.

N.S.

APPELLATE CIVIL.

*Before Sir Vere Mockett, Officiating Chief Justice, and
Mr. Justice Kuppuswami Ayyar.*

KRISHNAVENI AMMAL (THIRD DEFENDANT),
APPELLANT,

v.

M. D. SOUNDARARAJAN AND SIX OTHERS
(PLAINTIFF AND-NIL), RESPONDENTS.*

Specific Relief Act (I of 1877), sec. 42—Suit by creditor for declaring certain alienations made by his debtor as being benami to defraud creditors—Not maintainable—Transfer of Property Act (IV of 1882), sec. 53—Inapplicable.

Where a creditor filed a suit against his debtor and the latter's wife and daughter, praying for a declaration that certain alienations made by the debtor in favour of the wife and daughter were benami in nature for the purpose of defrauding creditors,

held: The suit was not maintainable. In the absence of circumstances attracting the provisions of Order XXI, rule 63, of the Code of Civil Procedure, such a declaration could not be granted. Neither section 53 of the Transfer of Property Act nor section 42 of the Specific Relief Act was applicable to the case. Section 53 of the Transfer of Property Act was inapplicable because the disputed transactions, according to the allegations in the plaint, were not real and were not binding even between the parties thereto. Section 42 of the

* Original Side Appeals Nos. 79 of 1942 and 8 of 1943

Specific Relief Act had no application because the creditor had no right in the property in respect of which the declaration was sought and no legal character of his was in question. That section 42 of the Specific Relief Act is not exhaustive in scope is no ground for granting such a declaration.

K. R. M. A. Firm by their Agent Meyappa Chettiar v. Maung Po Thein and three others(1) and *Maung Ba Maung v. Maung Ba Yin*(2) followe l.

Sheoparsan Singh v. Ramnandan Prasad Singh(3) referred to.

Case law discussed.

APPEALS from the judgment of CHANDRASEKHARA AYYAR J., dated 17th August 1942 and passed in the exercise of the ordinary original civil jurisdiction of the High Court in Civil Suit No 109 of 1941.

Advocate-General (P. V. Rajamannar) for N. Subramanyam and E. R. Krishnan for appellant in Original Side Appeal No. 79 of 1942.

R. Rajagopala Ayyangar for appellant in Original Side Appeal No. 8 of 1943.

C. R. Rajagopalachari and M. A. Srinivasan for respondents.

Cur. adv. vult.

JUDGMENT.

MOCKETT Offg. C.J.—In these connected appeals the first respondent filed a suit, Civil Suit No. 109 of 1941, against Elayaperumal Naicker as first defendant, his wife E. Balammal as second defendant, and his daughter Krishnaveni Ammal as third defendant. There was also a claim against one Nataraja Pillai, the fourth defendant, the first defendant's clerk, relating to the transfer of a motor car. The second and third defendants appeal and, so far as they are concerned, the form of the suit was for a declaration that certain alienations made in favour of the wife and daughter respectively were benami in nature for the purpose of defrauding the first

(1) (1926) I.L.R. 4 Rang. 22.

(2) [1940] Rang. L.R. 59 (F.B.).

(3) 1916 I.L.R. 43 Cal. 694 (P.C.).

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defendant's creditors. The learned trial Judge, CHANDRASEKHARA AYYAR J., decreed the suit in favour of the plaintiff and the third defendant appeals in Original Side Appeal No. 79 of 1942 and the second defendant in Original Side Appeal No. 8 of 1943. The form of the plaint, and this is made clear by the prayer, is for a declaration that the properties transferred to the appellants were benami in nature. Paragraph 5 states that the transactions are benami and fictitious. This means that the plaintiff alleged not that there was an actual transfer to the defendants but that there was only a transfer in form, the actual property remaining with the transferor. The learned Judge has so found. Accordingly the learned Judge held that section 53 of the Transfer of Property Act had no application, it not being a transfer binding between the parties. It was therefore not voidable at the instance of the creditor. The plaint, however, as already stated, proceeds on the basis that there was no real transaction, the transfers being benami, that is to say, in the name of the wife and the daughter, but the property actually remaining with the husband.

The appellants have contended before us that following upon this finding the learned Judge should have dismissed the suit and that section 42 of the Specific Relief Act could not be called in aid by the respondent in the absence of facts attracting the provisions of Order XXI, rule 63, of the Code of Civil Procedure. The appellants argued that for these reasons the suit could not be regarded as a declaratory suit. It is not suggested that any claim or objection had arisen for investigation within the meaning of rule 63. The learned Judge, however, held that section 42 was not exhaustive and that the suit, although not within section 53 of the Transfer of Property Act, would lie apart from the provisions of section 42 of the Specific Relief Act.

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That the provisions of section 42 are not exhaustive is well established by authority; see *Robert Fischer v. The Secretary of State for India in Council*(1), *Ramachandra Rao v. Secretary of State for India*(2) and *Secretary of State for India v. Subba Rao*(3). In each of those cases on the facts the defendants had challenged a substantive right of the plaintiff. In *Robert Fischer v. The Secretary of State for India in Council*(1) the plaintiff prayed for a declaration that an order of the Government to his prejudice be declared invalid. In *Ramachandra Rao v. Secretary of State for India*(2) a suit for a declaration that an order debarring one from acting as vakil for another in a village Court was void, was held to be maintainable though not covered by section 42 of the Specific Relief Act. In the latest Madras decision, *Secretary of State for India v. Subba Rao*(3), BEASLEY C.J. and BARDSWELL J. held that a suit by a karnam for a declaration that an order of the Board of Revenue was invalid as being to his prejudice, was maintainable although not comprehended by section 42 of the Specific Relief Act. At page 755, BARDSWELL J. discusses the question as to what extent section 42 is not exhaustive of declaratory suits and he refers to the decision of the Privy Council in *Sheoparsan Singh v. Ramnandan Prasad Singh*(4). At page 704 of the Privy Council case, Sir LAWRENCE JENKINS makes the following observations regarding section 42:—

"A plaintiff coming under this section must, therefore, be entitled to a legal character or to a right as to property. Can these plaintiffs predicate this of themselves? Clearly not; and this is, in effect, stated in the plaint, where they described themselves as entitled to Bachu Singh's estate in case of an intestacy after the death of the defendant widows." Sir LAWRENCE JENKINS went on to say that the suit must fail at the very outset, the plaintiffs not being clothed with a legal character or title which

(1) (1898) I.L.R. 22 Mad. 270 (P.C.). (2) (1915) I.L.R. 39 Mad. 808.
(3) (1933) I.L.R. 56 Mad. 749. (4) (1916) I.L.R. 43 Cal. 694 (P.C.).

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would authorise them to ask for a declaratory decree sought by the plaintiff. In *Ramakrishna v. Narayana*(1) NAPIER J. held that, although section 42 was not intended to be exhaustive, declaratory relief would not be given in respect of rights arising out of a contract affecting only the pecuniary relationship between the parties unless there were exceptional circumstances to take it out of the ordinary rule. The learned Judges, at page 83, stated that no such case had been brought to their notice. In *Sheoparsan Singh v. Ramnandan Prasad Singh*(2) referred to above, their Lordships refer to *Kathama Natchiar v. Dorasinga Tever*(3) wherein it is stated that reversionary suits were in a special class and had been entertained by the Courts *ex necessitate rei*.

It is well to consider the exact allegations of the plaintiff in his plaint. The effect of the plaint may be stated as follows. Paragraph 3 alleges that the first defendant owes the plaintiff a large sum of money in respect of which he, the plaintiff, had filed Civil Suit No. 121 of 1939 in the High Court. Paragraph 4 alleges the first defendant was heavily indebted to various creditors. Paragraph 5 and following paragraphs allege the transfers by the first defendant to his wife and daughter, the subject of the suit. Such facts are of almost daily occurrence in the various Courts of this presidency and the usual and proper remedy in such circumstances would have been for the plaintiff to apply to the Court for an order for attachment before judgment. Had he obtained such an order, he could have attached the properties transferred to the wife and daughter as being the properties of the first defendant. That would have been a perfectly logical course in that he alleges in paragraph 5 that the transfers were made in the name of the wife and daughter. It may be added that the

(1) (1914) I.L.R. 39 Mad. 80. (2) (1916) I.L.R. 43 Cal. 604 (P.C.).
(3) (1875) L.R. 2 I.A. 160, 191.

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decree in Civil Suit No. 121 of 1939 was not passed until November 1941, so that at the time of this plaint the plaintiff was in no different position from any other creditor of the first defendant. I am of opinion that this suit does not lie and should have been dismissed. It was clearly not within section 53 of the Transfer of Property Act, as, with respect, the learned Judge rightly held. It is not, I consider, a suit to which section 42 of the Specific Relief Act applies. There is no authority for the proposition that on the facts such as these an ordinary declaratory suit can lie. If it were so, the Courts would be flooded with suits by creditors attacking transactions made by debtors. As already stated, the machinery of the Code relating to attachment before judgment, Order XXXVIII, rules 5 to 13, is available to creditors. In such proceedings, if adopted, for example in this case, it would have been for the present appellants to establish their title and very probably a suit could have been properly instituted under Order XXI, rule 63, of the Code of Civil Procedure.

Whilst the exact facts of this case are not covered by authority in this High Court, there are two decisions of the High Court of Rangoon on the topic. In *K.R.M.A. Firm by their Agent Meyappa Chettiar v. Maung Po Thein and three others*(1) the plaintiffs in the suit claimed a declaration of their right to attach certain properties in execution of a decree in another suit. The learned Judges, observing that the suit before them did not fall within the provisions of Order XXI, rule 63, proceeded to discuss the applicability of section 42 of the Specific Relief Act. They noted that the plaintiffs had not adopted their remedy by attachment. At page 24, there appear the following observations:—

“Before appellants can succeed they must show that they have a right ‘as to the property’ in suit. The only right

(1) (1926) I.L.R. 4 Rang. 22.

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which they claim is a right to attach that property under a decree for money. They do not claim that they have themselves any title to the property or to any part of it. All that they are seeking to establish is that their judgment-debtors have rights as to the properties."

They held that the suit was rightly dismissed since the plaintiff claimed no right of his own in the property. More recently in *Maung Ba Maung v. Maung Ba Yin*(1) a Full Bench of the Rangoon High Court considered the following question :—

"Can a creditor sue under section 42 of the Specific Relief Act for a bare declaration that a transfer has been made by his judgment-debtor fraudulently with intent to defeat or delay his creditors, or must he sue for cancellation of the deed of transfer either as his sole remedy or as a relief further to that declaration ?"

The learned Judges held that *K.R.M.A. Firm by their Agent Meyappa Chettiar v. Maung Po Thein and three others*(2) was rightly decided. They discuss cases within section 42 of the Specific Relief Act where the suit for a bare declaration would only lie when the plaintiff is entitled to any legal character or to any right as to any property. DUNKLEY J., at page 71, observes :

"It is essential to bear in mind the distinction between a substantive right and a right which is conferred by rules of procedure. The right of a judgment-creditor to attach the property of his judgment-debtor is a mere procedural right, conferred by the Code of Civil Procedure. It is not a substantive right as to the property, and therefore cannot give rise to a right of suit under section 42 of the Specific Relief Act."

I respectfully agree with the decisions in both *K.R.M.A. Firm by their Agent Meyappa Chettiar v. Maung Po Thein and three others*(2) and *Maung Ba Maung v. Maung Ba Yin*(1).

It is true, as laid down in the various decisions to which I have referred, that the general view is that section 42 of the Specific Relief Act is not exhaustive, but there is no authority for the proposition that a suit

(1) [1940] Rang. L.R. 59 (F.B.).

(2) (1930) I.L.R. 4 Rang. 22.

for a declaratory decree will lie when the plaintiff is neither entitled to any legal character nor to any right in the suit property. To return to the judgment of their Lordships in *Sheoparsan Singh v. Ramnandan Prasad Singh*(1), their Lordships repeat the warning given in *Sree Narain Mitter v. Sreemutty Kishen Soondory Dasse*(2) where it was stated :

"There is so much more danger in India than here of harassing and vexatious litigation that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation."

I consider that this suit should have been dismissed for exactly the same reason as given by their Lordships in *Sheoparsan Singh v. Ramnandan Prasad Singh*(1) at page 705, to which reference has already been made, namely, because the plaintiff in the appeals before us is clothed with neither a legal character nor title to the suit property. I will conclude by adding that their Lordships after noticing the facts in relation to the plaintiff's legal position did not even discuss whether the suit would lie *aliunde*.

For the above reasons I consider that these appeals should be allowed with costs against respondents 3 to 7 and the suit dismissed without costs.

KUPPUSWAMI AYYAR J.—I agree.

N.S.

(1) (19 6) I.L.R. 43 Cal. 694 (P.C.).
(2) (1872) L.R.I.A. Sup. Vol. 149, 162.

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APPELLATE CIVIL.

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

1944,
April 5.

THE PROVINCE OF MADRAS REPRESENTED BY THE
COLLECTOR OF EAST GODAVARI (DEFENDANT), APPELLANT,

v.

SRI RAJAH UPPALAPATI SURYANARAYANESWARA
JOGI JAGANNADHA RAJU GARU AND ANOTHER
(PLAINTIFFS), RESPONDENTS.*

River—Bed of—Question of fact depending on time and place and also on fluctuation of the river, nature of the land, its growth and user—River, tidal and navigable—The Crown, owner of the bed of such river—Grant of land adjacent to such river—No presumption of title to bed ad medium filum—Nature of the river at the time of grant, the test—Subsequent cross-bundling of the river affecting its navigability, immaterial—Lankas—Claim on the principle of re-formation in situ and of accretion—Tests to be applied—Case set up in pleadings to be adhered to.

The proprietors of the Gopalpur estate filed two suits to establish their rights to two lankas situated in the bed of the Vasishta branch of the river Godavari mainly on two grounds, (i) as the Vasishta was neither tidal nor navigable at the locality in question, they as riparian proprietors owned the bed of the river *ad medium filum aquae*, which included the land in dispute, and (ii) even if the river was held to be tidal or navigable and the entire bed was in consequence vested in the Government, the new formation was an accretion to or a re-formation *in situ* of certain old lankas admittedly appertaining to the plaintiffs' village which lay on the eastern bank of the river subtending the formation. It was found: (i) the river was tidal and continuously navigable at the time of the grant to the plaintiff but, owing to the cross-bundling of the river later, its navigability at the spot in question became affected during certain periods of the year; (ii) some lands claimed were mere sand banks visible when the water was low and submerged when the water was high; (iii) some were new formations on the bed of the river; (iv) some were re-formations *in situ* of lands belonging to the

* Appeals Nos. 58 and 441 of 1942.

plaintiffs which were washed away; and (v) some portion was a vertical formation from the bed of the river, not identifiable as a re-formation of any land formerly belonging to the estate.

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Held: The river was tidal and navigable and the Crown was the owner of the bed of the river. The ownership of the bed of the river would depend upon its character at the time of the grant of adjacent land to the plaintiffs. As the river was navigable at the particular spot at the time of the grant to the plaintiffs, any later cross-bundling of the river affecting its navigability would not affect its character or the title of the Crown to the bed of the river.

Secretary of State for India v. Venkatanarasimha Naidu(1) and *Subbarayudu v. Secretary of State for India*(2) referred to.

There is no presumption that a grant of lands on the banks of a tidal or navigable river passed title to the bed of the river *ad medium filum*.

The question whether any particular piece of land is or is not to be held part of the bed of a river at any particular spot, at any particular time, is one of fact, to be determined not by any hard-and-fast rule, but by regarding all the material circumstances of the case, including the fluctuations to which the river has been and is subject, the nature of the land and its growth and its user.

Hindson v. Ashby(3) followed.

Alabama v. Georgia(4) considered.

It is impossible to draw a hard-and-fast line between that which is a sand bank still forming part of the river-bed and that which is an accretion or re-formation belonging to the owner of the land to which the accretion is attached or of the soil formerly existing at the point of re-formation. Accretion implies that a portion of the river-bed becomes the property of the adjoining area by a process of gradual and imperceptible recession of the stream. In such a case the land claimed to have thus accreted should be shown to have definitely ceased to be part of the bed before the title of the owner of the bed could be said to have been lost. But the doctrine of re-formation *in situ* rests on the principle that the title of the owner to the land washed away or submerged is not absolutely extinguished unless he has abandoned it, but continues to remain in such owner, provided such land can be identified by boundaries, landmarks, or otherwise, subject to such easements of navigation or other rights to which the flow of water thereon may give rise.

(1) (1919) 11 L.W. 256.
(3) [1896] 1 Ch. 78.

(2) (1927) I.L.R. 50 Mad. 961.
(4) 16 Lawyers Edition 556, 560.

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Lepez v. Muddun Mohun Thakur(1), *Hursuhai Singh v. Syud Looft Ali Khan*(2), *Maharaja of Dumraon v. Secretary of State for India in Council*(3), *Rani Hemanta Kumari Debi v. The Secretary of State for India in Council* and *Sri Sundari Debi v. The Secretary of State for India in Council*(4) followed.

Per PATANJALI SASTRI J.—In India the Crown's ownership to the bed of a river will be presumed if it is either tidal or navigable in its natural state.

Maharaja of Pithapuram v. Secretary of State for India(5) followed and explained.

In cases of this kind parties should be strictly confined to the case which they make in their pleadings, for claims based on accretion, or re-formation *in situ* or on riparian ownership up to the middle of the stream involve different considerations and require different media of proof.

Sree Eckowrie Sing v. Heeraloll Seal(6) followed.

APPEALS against the decrees of the Court of the Subordinate Judge of Cocanada (Additional Judge), dated 23rd June 1941, in Original Suit Nos. 26 and 27 of 1939 respectively.

Government Pleader (*K. Kuttikrishna Menon*) and *A. Rama Rao* for appellant.

Sir A. Krishnaswami Ayyar (Advocate-General), *V. Govindarajachari* and *K. Venkatarama Raju* for respondents.

Cur. adv. vult.

JUDGMENT.

WADSWORTH J.

WADSWORTH J.—These two appeals arise out of suits brought by the proprietors of the Gopalpur estate to establish their right to two lankas situated in the bed of the Vasishta branch of the river Godavari. The major appeal, Appeal Suit No. 58 of 1942, relates to what is alleged to be a re-formation of, or accretion to, the Balaramuni lanka adjacent to the zamindari village of Udumudi. This lanka lies between the seventh furlong of the 24th mile and the fifth furlong of the 25th mile, according to the mileage on the left

(1) (1877) 13 M.I.A. 497.

(3) (1927) I.L.R. 6 Pat. 481 (P.C.).

(5) I.L.R. [1942] Mad. 5: 2.

(2) (1874) I.L.R. 2 I.A. 28.

(4) (1900) 3 C.L.J. 560 (P.C.).

(6) (1868) 12 M.I.A. 136.

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bank of the river, and it is about thirty miles from the sea. Appeal Suit No. 441 of 1942 relates to the Bellampudi lanka situated between the 28th mile and the sixth furlong of the 28th mile, that is to say, lower down the river. The evidence is to a large extent common in both appeals and the general questions arising are also common. I will deal first with the major appeal, Appeal Suit No. 58 of 1942, and thereafter consider the special features of the Bellampudi case.

The village of Udumudi belonging to the Gopalpur estate is situated on the left bank of the Vasishta Godavari more or less opposite to two Government villages, the northernmost being Nadupudi and the southernmost, Pedamallam. The river flows roughly north to south. The mileage along the banks of the river is reckoned from the Dowleswaram anicut which goes right across the river Godavari just before the various branches of the delta divide. The land claimed by the Gopalpur estate consists of a roughly triangular island with its apex in the south-eastern corner and its eastern side running more or less parallel to and within a furlong of the eastern bank of the river. This island consists of a central portion which is now under cultivation and an outer fringe of sand planted with *nanal* or reeds, the usual procedure in reclaiming a sand-bank from the river being to plant reeds to assist the deposit of fertile silt.

The island claimed by the plaintiffs lies roughly north of the site of the Balaramuni lanka as located in the earliest plan we have on record, namely, the survey of 1863. To the north of the site now in dispute there was in 1863 another lanka called Merka lanka. In 1863 the northern portion of the Balaramuni lanka belonged admittedly to the Gopalpur estate except for a small strip on the western side which was attached to the Government village of Nadupudi situated on the western bank of the river. The whole of the southern

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portion of this Balaramuni lanka was in 1863 attached to the Government village of Pedamallam which is also situated on the west bank of the river. Similarly with the Merka lanka, the southern portion of the lanka was attached to the estate village of Udumudi but there was a strip to the west of this which appertained to the Government village on the western bank. We do not know on what principle this division of the lankas, which lie almost entirely in the eastern half of the river, was made. The original grant of the Gopalpur estate is not produced. The survey of 1863 does not indicate that any portion of the bed of the river, apart from these islands, was attached to the Gopalpur estate. The position, therefore, in 1863 was that both to the north and to the south of the area now claimed to be part of the Gopalpur estate there were islands owned partly by the Government and partly by the estate, the portions belonging to the estate being those portions adjacent to the area now claimed. It may be mentioned that the extreme northern portion of the area now claimed actually overlaps to a small extent the southern extremity of the Udumudi Merka lanka belonging to the Gopalpur estate as it existed in 1863.

We know nothing about the state of the river between 1863 and 1878. In 1878, however, the Gopalpur estate was under the Court of Wards and a survey was made of the lankas belonging to that estate. There was also a land register prepared and, with the help of the rough plans and the register, the dimensions and shape of the lankas and the position of the individual survey numbers therein can be fairly accurately fixed. Exhibits A series are the plans prepared in the Court of Wards survey. They are not drawn to scale; but the measurements, including a limited number of diagonal measurements, are given, so that it has been possible to plot this survey to scale. Exhibit MMM is a plan drawn to scale of the Balaramuni lanka as

it existed in 1878. It is clear from this plan that the Balaramuni lanka had extended in a northerly and easterly direction so as to comprise nearly double the area which fell within the Udumudi village in 1863. There was also an extension of the Merka lanka in a southerly and easterly direction. The effect of the accretions to these two lankas in relation to the present suit claim is clearly illustrated by a combined plan which has been prepared by the Lankas Deputy Surveyor at the instance of the Court during the hearing of this appeal. This plan has been exhibited in appeal as Exhibit XXXIX. It will be seen from this plan that, whereas no part of the Balaramuni lanka in 1863 overlapped the site now claimed by the Gopalpur estate, a considerable portion of the accretions to this lanka overlaps the south-west of the site now claimed. Similarly, the accretion to the Merka lanka at the time of the Court of Wards survey of 1878 extends very considerably the area of this lanka which coincides with the northern portion of the area now claimed by the plaintiffs. Without taking actual measurements, it would appear that between one-third and one-half of the site now in suit coincides either with the Balaramuni lanka or with the Merka lanka as they existed in 1878. It seems to me that there can be no question regarding the title of the estate to the accretions surveyed in 1878 as part of these two lankas falling within the estate. No doubt the survey may not strictly bind the Government, though it was presumably conducted by a Government surveyor at the instance of the Estate Collector. But clearly the results of this survey were embodied without question in the land registers of the estate and it can be demonstrated that for many years the estate, without objection from the Government, treated the accretions to the two lankas as its own property, collecting revenue and auctioning those portions of the lanka which were not given on patta.

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There is no plan of the river between 1878 and 1895 but, the estate registers, Exhibits DDD-14, UU, Z-1 and C, show the stages by which the northern and eastern portions of the Balaramuni lanka were washed away in successive floods. By the time of the survey of 1895 commonly known as the "Water tax or Mamool Wet Survey" embodied in the plan, Exhibit II, the actual extent of the Balaramuni lanka had fallen from approximately 119 acres, which was the extent in 1878, to a little over 38 acres. By 1895 the strip on the west of the lanka belonging to the Government village of Nadupudi had disappeared into the river. We are not of course concerned with the southern portion of the lanka which belonged to the Government village, Pedamallam. The next plan is the River Chart Survey undertaken by the Government of India in 1903, the map of which is Exhibit IV and the corresponding register, Exhibit KKK. This plan shows that the portion of the Balaramuni lanka shown as cultivable land belonging to the Udumudi village had been still further reduced by erosion in the north-eastern corner, but a sand-bank had formed extending a considerable distance to the east and the west of the lanka. In all these early plans there is a channel of the river separating the Balaramuni lanka both from the Merka lanka to the north and from the main bank of the river to the east, and the width of this channel which had decreased between 1863 and 1878 showed a tendency to increase in the later period. By 1903 the cultivable extent of the Balaramuni lanka in Udumudi village had fallen to 24.34 acres.

After 1903 there is a gap in the evidence until 1920. An attempt has been made on behalf of the estate to contend that Exhibit XVI, a plan which shows a large island more or less over the site now claimed by the plaintiffs, belongs to the year 1919. The evidence is not at all clear. The plan bears at its foot the engineer's signature with a date in 1920,

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but at the top of the plan there is the draftsman's signature of July 1929. The plan was treated in the lower Court as a plan of 1929. A comparison of the conformation of the land with the plans of the years preceding and succeeding 1919 makes it very unlikely that this was a plan of that date. There is no oral evidence to show when or how this plan was prepared. The learned Government Pleader has suggested that this is one of a series of lanka survey plans which were usually prepared by inserting in a skeleton plan drawn up at an earlier date by the Public Works Department details roughly demarcated as a result of the Lanka Inspector's visits from time to time. It seems most probable that this is the correct explanation of Exhibit XVI and that the date of the Superintending Engineer's signature is the date of the preparation of the skeleton plan of the river, while the details regarding the formation of the lankas were inserted in 1929, the date of the draftsman's signature. It is, however, regrettable that this point was not made clear by the evidence in the lower Court. We may take it for the purpose of this appeal that Exhibit XVI is a plan prepared in 1929 and is therefore of little importance since the litigation started in 1931.

Exhibit V is the Lanka Inspector's plan of 1920-21. It is common ground that at or about this time the whole of the cultivable soil of the Balaramuni lanka had been washed away. Exhibit V shows nothing but an irregular sand-bank in the southern portion of the site formerly occupied by the Balaramuni lanka. Proceeding northwards there is a channel with a small island, then roughly in the middle of the site now claimed by the estate we find a large, roughly quadrilateral sand-bank extending east to west. This is separated from the remains of the Merka lanka and from the bank of the river by a channel which runs first to the east, then southwards, cutting off the various sand-banks from the main river. Some doubt

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is thrown on this plan in so far as it shows a flowing channel between the remains of the Balaramuni lanka and the sand-bank to the north of it. The karnam has deposed that there is no water in this channel. It may well be that this was a shallow depression which would be dry during the low water months and would contain water at other times of the year. The fact, however, remains that the whole of the Udumudi Balaramuni lanka had been washed away, except for the existence of a sand-bank, presumably submerged when the river was high, and there was nothing in the nature of cultivable land in the central sand-bank, part of which corresponds to the area now claimed by the plaintiffs.

The lanka now claimed by the plaintiffs seems to have begun to form as cultivable land somewhere about the year 1924. At any rate, Exhibit XX, the survey of 1927, with the corresponding register, Exhibit VIII, shows a large survey number 1 with a subdivision 1/2 in which were patches of cultivation. This cultivation cannot be precisely located; but it would appear that the whole block overlaps part of what was originally the Merka lanka and part of what was originally the Balaramuni lanka; but it does not appear that there was at this time any channel flowing to the south of this block of cultivation. If Exhibit XVI has been correctly dated in the year 1929, it would show that the block of cultivation by this time was in the centre of the island, that it was surrounded by *nanal* or reeds, and that the whole formation extended as far as the boundary between Pedamallam and Udumudi, there being a channel separating it on the north from the Merka lanka and on the east from the main river bank. Finally, we have the plan attached to the encroachment notices which led to the suit showing an occupation roughly triangular in shape extending in a northerly direction so as to overlap slightly the original area of the Merka

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lanka, but extending in a south-easterly direction to a point some distance to the north of the boundary between Udumudi and Pedamallam and not overlapping the original Balaramuni lanka as it was in 1863.

It will be gathered from this summary of the documentary evidence that the area now claimed by the estate is a formation arising from the bed of the river at some time after 1920, assisted perhaps in its formation by the existence of sand-banks which may be the remains of the pre-existing lankas; but certainly it was not a lateral accretion to any existing land which was definitely above the normal high water mark at the time. It will be gathered also that this area now claimed by the plaintiffs lies partly over the site which was an accretion to the Balaramuni lanka in the year 1878, partly over a site which has always, so far as we know, been situated in the bed of the river, and partly over the site which in 1878 was attached to and treated as a cultivable portion of the Merka lanka in the north.

Now the claim of the estate to this formation is based on various contentions. Firstly, it is contended that the whole of the plot now in dispute was demarcated as part of the Gopalpur estate with field numbers 548 and 587 to 597. This statement is not quite correct, for survey number 587 is shown in the Court of Wards Survey as "Godavari river"; and it is difficult to see how the action of the surveyor in giving to a portion of the river a number in the survey of the village describing it as "river", could operate to grant the bed of the river to the estate which owned the village, in the absence of evidence that the original grant included any portion of the bed of the river. Similarly the plaintiffs contend that the whole of the disputed locality was surveyed as part of the estate in 1895 and that it has been recognized as part of the estate and cannot therefore be claimed by Government.

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It is contended that the disputed lanka has been in the continuous possession and enjoyment of the Gopalpur estate and that the estate is entitled to it either as an accretion to or a re-formation of land belonging to the estate. The plaintiffs also assert that the Vasishta Godavari river is not a tidal and navigable river in the disputed locality and that the bed of the river up to the middle of the stream belongs to the plaintiffs as owners of the land on the left bank. The plaintiffs therefore claim not merely the cultivated area, but also the sand shoals around it and ask for a declaration that the whole locality belongs to them and they also allege that even if the Government was once entitled to the land, it has lost it by adverse possession. The declaration given by the lower Court is that the plaintiffs are the owners of Balaramuni lanka of 93 acres 37 cents and also of about 100 acres of sand shoals surrounding it "as per plan attached to the decree". There is no plan attached to the decree amongst the records in Court and there are no materials upon which the location of the sand shoals decreed to the plaintiffs can be precisely fixed.

The first question to be decided is whether the bed of the river belongs to the Government. We are not able to accept the contention of the learned Government Pleader that this question is governed by *res judicata* as a result of the decision in Second Appeal No. 785 of 1942, a case relating to a different portion of the same river. A great deal of time has been spent in the lower Court in considering the question whether the Vasishta Godavari at the disputed point is navigable throughout the year. The evidence seems to show that, in times of low water, navigation is carried on with extreme difficulty by utilizing the tide and making bunds and excavations in order to bring up boats capable of carrying cargoes. Light boats of very shallow draught, such as are used by fishermen, seem to ply throughout the year. It seems

to me, however, having regard to the known facts regarding the river, that the question of navigability, if it arises at all, should not be considered with reference to conditions as they exist now but with reference to conditions as they existed at the time of the grant. If at the time of the grant the bed of the river cannot be deemed to have been conveyed to the zamindar, any doubt regarding the navigability of the river in the present condition would not operate so as to convey half the bed of the river to the zamindar. In or about 1852 a great irrigation work was constructed consisting of a dam or anicut right across the river at Dowleswaram, some twenty-five miles above the disputed locality and an elaborate series of canals and channels, whereby water was intercepted and distributed throughout the delta. It is not disputed that the river Godavari above this dam is navigable throughout the year. The dam however intercepts the whole of the low level water which flows towards the sea after the floods have disappeared. The flood season is normally from the end of June to about the end of September. The extreme low water season is during the months of April to June. During the latter period the only water which flows in the Godavari river below the Dowleswaram anicut consists of percolation water, drainage water and such water as may be ascribed to springs. Seeing that the river is navigable throughout the year above the Dowleswaram anicut it is reasonable to infer that before the anicut was constructed the main branches of the river, of which the Vasishta is one, would also have been navigable throughout the year.

The question whether the river is tidal at the disputed locality seems to me also fairly clear, though I do not agree with the learned Subordinate Judge who has held that the river is not tidal. Exhibit XXVI is a statement of tidal readings taken by the Public Works Department at the fifth furlong of the 26th mile

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during the month of June 1937. This shows very considerable differences of level at different states of the tide. Thus on 6th June there was a rise and fall of nearly four feet. On 13th June the rise was three feet. In the middle of the month the differences are very slight. Towards the end of the month we again find differences of two to three feet. Quite clearly the Vasishta Godavari is subject to the influence of tides at this point which is roughly one mile below the area under consideration in Appeal Suit No. 58 of 1942 and about two miles above the area under consideration in Appeal Suit No. 441 of 1942. The Government expert, D.W. 4, definitely states that the effects of the tide are noticeable up to Gopalpur, which is six miles above the suit locality. The plaintiffs' expert, P.W. 25, admits that the river is tidal within twenty-five miles of the mouth and that if the bed has been scoured out the tide might come up about six miles further. The report of the Commissioner, Exhibit GG, is to the effect that there is an ebb and flow of the tide at the disputed locality, though the action is not sufficient to enable boats laden with cargoes to pass freely up and down the river in seasons of low water. On this state of the evidence it seems quite clear that the river at the point now in dispute is tidal and that it must be deemed to have been continuously navigable at the time of the grant to the plaintiffs. It follows therefore that the bed of the river belongs to the Crown.

This leads to the further question, what constitutes the bed of a river? This is a question which is not always easy to answer and two attempts to answer it have been frequently adopted by the decisions. In the case of *Alabama v. Georgia*(1), the Supreme Court of the United States of America defined the bed of a river as "that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in

(1) 16 Lawyers Edition 556, 560.

the supply of water, and which is adequate to contain it at its average and mean stage during the entire year without reference to the extraordinary freshes of the winter or spring, or the extreme droughts of the summer or autumn."

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This definition has been accepted by the English Courts as one possible definition for the guidance of the Courts, that is to say, the criterion is whether the land in question is situated within the area over which the river will flow in a normal condition and which will sometimes be covered and sometimes left bare according to the quantity of water coming down the river. Another criterion which is perhaps more applicable to conditions in India is suggested in the decision of ROMER J. in *Hindson v. Ashby*(1). The learned Judge says:

"I think that the question whether any particular piece of land is or is not to be held part of the bed of a river at any particular spot, at any particular time, is one of fact, often of considerable difficulty, to be determined, not by any hard and fast rule, but by regarding all the material circumstances of the case, including the fluctuations to which the river has been and is subject, the nature of the land, and its growth and its user."

The learned Judge quotes a decision of the Supreme Court of the United States where emphasis is laid upon the appearance of the soil, its vegetation and so on when deciding whether a particular piece of land is part of the bed of river. This decision in *Hindson v. Ashby*(1) came up in appeal, *Hindson v. Ashby*(2), and the principles upon which the trial Court had proceeded were affirmed, though the decision was reversed on facts.

Now applying these two tests to the present case we have to consider whether a mere sand-bank, visible when the water is low, submerged when the water is high, is to be regarded as part of the bed of a river or as an island capable of ownership by a person who is not the owner of the bed of the river. It is of course impossible to draw a hard and fast line between that

(1) [1896] 1 Ch. 78.

(2) [1896] 2 Ch. 1.

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which is a sand-bank still forming part of the river-bed and that which is an accretion or re-formation belonging to the owner of the land to which the accretion is attached or of the soil formerly existing at the point of re-formation. The process of formation in the river Godavari consists ordinarily in the rise of a sand-bank owing to the shifting of the river-bed by floods, the planting of the sand-bank with reeds, the interception of silt by the reeds grown on the sand and the gradual formation of cultivable land which will be considerably above the water level at all seasons except during high flood. It seems to me that until this last stage is reached, that is to say, until the soil has been deposited so as to raise the bank above the ordinary level of the water, there can be no question of any completed title by lateral accretion to the land to which the sand-bank is attached. If, however, the sand-bank is a re-formation of land formerly owned and washed away, the owner may be presumed to have retained his title in the site of the land he formerly occupied and, when it reappears, even though the re-formation is incomplete, he is entitled to a declaration of his right thereto, provided that the re-formation is identifiable with the original land and there has been no abandonment of his right therein. The leading cases cited before us on this subject are: *Lopez v. Muddun Mohun Thakur* (1), *Hursuhai Singh v. Syud Lootf Ali Khan* (2), *Maharaja of Dumraon v. Secretary of State for India in Council* (3) and *Rani Hemanta Kumari Debi v. The Secretary of State for India in Council* and *Sri Sundari Debi v. The Secretary of State for India in Council* (4).

There has been some discussion before us of the difficult theoretical question which arises when the bed of a river is increased by the gradual and imperceptible process of diluvion and subsequently land is re-formed on the site washed away. Will the accession to the bed

(1) (1870) 13 M.I.A. 467.

(2) (1874) L.R. 2 I.A. 28.

(3) (1927) I.L.R. 6 Pat. 481 (P.C.).

(4) (1906) 3 C.L.J. 560 (P.C.).

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of a river by this process of diluvion, which is the inverse process to that of accretion, prevail over the right of the former owner to retain ownership of the site which was his, at any rate until the river washed away the upper soil? I do not, however, find it necessary to propound an answer to this question for, it seems to me, that it does not arise on the facts of the present case if properly viewed. We know that portions of the site now in dispute were formerly occupied by the Merka lanka in the north and the Balaramuni lanka in the south, both of which were at these points recognized as appertaining to the Gopalpur estate. We know that the Balaramuni lanka was extensively eroded during the period from 1878 to 1903. There is, however, no material for holding that this erosion was a gradual and imperceptible process. In fact so far as the registers are available it would appear that extensive blocks of land were washed away in particular floods, that the extent so washed away was duly recorded and remissions of revenue were granted in respect thereof. In these circumstances it cannot, in my opinion, be said that the process of erosion was gradual and imperceptible so as to provide a basis for the argument that the title of the former owner to these sites so washed away has been extinguished.

Now summing up the position in the light of the evidence and of the law as summarised above, it seems to me clear that at the time when the suit lanka was formed there was no existing land of the Gopalpur estate to which it can be deemed to be a lateral accretion. Such sand-banks as remained appear to have been, so far as the evidence goes, mere elevations in the bed of the river not capable of effective occupation, at any rate in the years 1920-21. We are not therefore concerned with any question of lateral accretions. I may, however, observe that the attempt of the learned Government Pleader to dispute the title of the estate to the cultivable lands surveyed as part of the estate

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in 1878, on the ground that the process of gradual accretion is not established, must fail, for it seems to me that the recognition of the estate's right to these lands as accretions must have been undoubted, in view of the treatment of these lands both at the time of the survey and subsequently. The right of the estate to the cultivable lands demarcated as part of the estate in 1878 being established, it seems to me to make no difference whether the estate's right depended on an original grant or an accretion to that grant. The estate was the full owner of the cultivable lands shown in the plans and registers of 1878. Those lands were to a large extent washed away by a series of floods. There is nothing to show that the Government as the owner of the bed of the river acquired title to the portions so washed away. To the extent therefore to which these lands belonging in 1878 to the estate can be shown to have re-formed as part of the area now in dispute, clearly the title of the Gopalpur estate must prevail. To the extent to which the land now in dispute cannot be shown to be a re-formation of either Balaramuni lanka or the Merka lanka, it must, in my opinion, be deemed to be a new formation in the bed of a river belonging to the owner of the bed, namely, the Government. The plan which has been prepared at our instance, Exhibit XXXIX, shows the extent to which the two lankas as they existed in 1878 belonged to the plaintiffs' village of Udumudi and overlap the area now claimed by the plaintiffs. The title of the plaintiffs will be declared to the land and to the bed of the river included within the red lines marked on this plan and the plaintiffs will be entitled to a refund of so much of the penal assessment as has been levied with reference to land included within these red lines the amount to be determined by the lower Court. The appeal and the suit having succeeded only in part, I think it proper that both parties should bear their own costs throughout.

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I will turn now to the evidence regarding the Bellampudi lanka, which is the subject-matter of Appeal Suit No. 441 of 1942. The site claimed by the plaintiff consists of 43.85 acres. The plaint definitely proceeds on the basis that this area is a re-formation of a lanka formerly belonging to the estate and identifiable with land that originally belonged thereto. It is also contended that if there be any excess in area it would still be part and parcel of this re-formed lanka or that in any view of the case it would be a lateral accretion to the re-formed lanka which belonged to the proprietors of the Gopalpur estate. There is no contention that the disputed land is a lateral accretion to the bank of the river belonging to the proprietors. An attempt has been made to argue the case on the footing that the land now disputed was a lateral accretion to the strip of land bordering the bank which clearly belongs to the plaintiffs. On the facts I doubt very much whether this could be established; but it would be most unfair to require the defendant to meet such a case which is not, in my opinion, suggested either in plaint or in the issues.

The Bellampudi lanka has a much shorter history, so far as documents go, than the Balaramuni lanka. The survey of 1863 shows no formation of any kind in the area in dispute and no accretions to the left bank of the river. The Court of Wards survey in 1878 is also negative. At the time of the mamool wet survey in 1895 there was still no lanka and the relevant survey numbers on the river bank are given as Nos. 88 to 90. In 1903 the river chart survey, Exhibit VI, shows two narrow strips, Nos. 93 and 92, adhering to the riparian numbers, corresponding to those already mentioned. It is conceded that these two numbers, 93 and 92, belong to the zamindar. To the west of these two numbers there was an extensive area, No. 89, described as "sand" with description "dubbu grass" in the accounts. The accounts also show that originally the

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word "zamindar" was written against this number but was subsequently scored off. No creek is shown between this No. 89 and the two riparian accretions 92 and 93. There is no documentary evidence at all for the interval between 1903 and 1920. In 1920 the lanka Inspector's survey shows a narrow strip of cultivated land adhering to the eastern bank, similar in shape and location to the two numbers 93 and 92 found in Exhibit VI. To the west of this narrow strip there is a creek which is shown as containing water for about half its length and below that there is marked what is described as a low *paya* blocked up. A *paya* is a channel, but not necessarily one which would contain water in the dry season. To the west of this creek and dry channel there is marked a sand shoal. The 1927 plan, Exhibit XXVII, shows a similar cultivated strip along the bank such as is found in the earlier plan. To the west of that in its northern portion is a formation on which were growing nanal and grass, below which there is shown a channel running east and then south along the edge of the cultivated strip cutting off another formation which is described as "nanal or reed". The application for permission to cultivate thirteen acres situated in the neighbourhood of the third, fourth and fifth furlongs of the 28th mile is accompanied by a sketch, Exhibit G-1. This cultivable area would correspond to the land separated in 1927 by a channel from the nanal growth in the river bed proper. This sketch shows nanal in the space between the cultivated strip and the river bed. In 1930 the Government issued an encroachment notice to which a plan, Exhibit XXIII, is attached. This plan shows an area of 37.35 acres in the occupation of the zamindar situated between the first furlong of the 28th mile and the sixth furlong of the 28th mile, separated by a silted up channel from the narrow strip adhering to the river bank. The documents prior to 1903 on which the lower Court seems to rely, Exhibits

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M, N, O, P and Q, seem to have no reference whatever to the area now in dispute. They may well refer to the narrow strip adjoining the river bank to which the title of the zamindar is admitted.

The facts to be deduced from the plans are as follows. Before 1903 there was no formation at all in the area under consideration. In 1903 there was an extensive sand bank on which there was grass, adjacent to the strip which the estate had brought under cultivation. There is no evidence that this sand bank ever became an effective accretion to the land of the estate or that it was ever cultivated or brought under the occupation of the estate. We do not know anything about the later history of this area until after 1920 when a series of plans indicates the formation first of a sand shoal, then of land in process of reclamation and finally of a reclaimed area, separated from the strip adjoining the river bank by what was apparently always either a channel or silted up water course. On these facts the only inference possible seems to be that the area claimed in this suit is a vertical formation, not identifiable as a re-formation of any land formerly belonging to the estate. As I have already stated, it is not claimed as an accretion to the bank, but I am of opinion that on the facts proved, even if such a plea could be taken, it would have to be found that this land has not been shown to be an accretion to the riparian land owned by the estate. The tidality of the river at this point is even less in doubt than that of the river higher up dealt with in the other appeal. Since this land must be regarded as a vertical formation arising in the bed of the river and since the bed of the river belongs to the Government, the plaintiffs cannot claim this land. This appeal, Appeal Suit No. 441 of 1942, is allowed with costs throughout and the suit is dismissed.

We fix the Advocate's fees as Rs. 750 and Rs. 375 for the junior in Appeal Suit No. 58 and at Rs. 400 and Rs. 200 for the junior in Appeal Suit No. 441.

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PATANJALI SASTRI J.—I agree. In view, however, of the importance of some of the questions argued before us I desire to add a few observations. As my learned brother has narrated the relevant facts and reviewed the material evidence in his judgment, which I have had the advantage of reading, it is unnecessary to go over the same ground here.

The larger lanka which is the subject-matter of Appeal Suit No. 58 of 1942 is claimed by the respondents mainly on two grounds, namely, (i) as the Vasishta is neither tidal nor navigable at the locality in question, they, as riparian proprietors own the bed of the river *ad medium filum aquae* which includes the land in dispute and (ii) even if the river is held to be tidal or navigable and the entire bed is in consequence vested in the Government, the appellant herein, the new formation is an accretion to or a re-formation *in situ* of certain old lankas admittedly appertaining to the respondents' village Udumudi which lies on the eastern bank of the river subtending the formation. The appellant contests both these grounds and the question is whether they are well founded.

The Court below has found that the river is neither tidal nor navigable at the point. But our examination of the evidence shows that it is tidal, though it is not navigable in its present state during the dry season (June to September) as the construction in or about 1852 of the *anicut* at Dowleswaram twenty-five miles higher up diverts the waters of the stream in those months into a net-work of artificial canals and channels for irrigating the delta area. It is admitted on behalf of the respondents that, in spite of the construction, the seepage and drainage water flowing down the river below the dam is of sufficient volume and depth to render it navigable even during the summer for about twenty-five miles from the mouth of the river. The lanka now claimed is situated six miles higher up. It is not disputed that above the *anicut* the stream is navigable throughout the year. In these circumstances

it is argued for the appellant that, on the question of ownership of the bed of the river, tidality and not navigability is the determining factor, and that, even if navigability in the sense of being navigable throughout the year [see *Secretary of State for India v. Venkatanarasimha Naidu*(1), and *Subbarayudu v. Secretary of State for India*(2)] were held to be the basis of the Crown's title, it must have reference to the natural state of the stream and the cross-bunding cannot affect the character of the river as a navigable stream or the title of the Crown. The respondents, on the other hand, contend that in this country the ownership of the Crown in the bed of a river is determined by its navigability throughout the year, and that the ebb and flow of the tide at the point is immaterial. In my opinion, neither of these contentions in its extreme form making tidality or navigability the sole test is correct.

The true position would seem to be that the Crown's ownership of the bed will be presumed if the river is either tidal or navigable. It is well established in English Common law that the bed of tidal waters vests *prima facie* in the Crown. The reason of the rule is thus explained by Farnham on Waters and Water Rights, Volume I, page 179 :

"The one unique feature of the sea is the tide. When, therefore, it was established that the King had title to the sea, it was an easy step to the conclusion that the sea went as far as the tide did, so that the King's title extended up the rivers as far as the tide flowed."

and he cites the *Banne case*(3) as saying that the reason why the King has an interest in such navigable river as high as the sea ebbs and reflows is because such river partakes of the nature of the sea. Indeed, the title of the Crown to the bed has been held in England not to extend further than the tide, though

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(1) (1919) 11 L.W. 256.

(2) (1927) I.L.R. 50 Mad. 961.

(3) Davies Rep. 149.

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the river may, in fact, be navigable even above that point. In *Hindson v. Ashby*(1) LINDLEY L.J. said:

"There is no question here of any right upon the part of the Crown to the bed of the river, for at Wraybury the river, though navigable, is not and never was tidal. Hale. de Jure Maris, Ch. iv."

Thus under the English Common law the ownership of the Crown in the bed of a river ends and that of the riparian owners begins at the point where the stream ceases to be tidal, alike in navigable and non-navigable rivers. This limitation on the Crown's ownership of the bed has not always been accepted by the Courts in America where it is held in some cases that the bed of a navigable stream vests *prima facie* in the Crown even where it is non-tidal, such extension of the Crown's ownership being founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment. This view is vigorously criticised by Farnham who stresses the distinction between a public right and a public use, and points out that the public easement of navigation can well co-exist with the riparian ownership of the bed (Volume I, pages 247 and 248). The doctrine of the Crown's ownership of the bed of navigable but non-tidal rivers has, however, been recognized and given effect to by this Court in a recent decision in *Maharaja of Pithapuram v. Secretary of State for India*(2) where the earlier cases have been reviewed. However that may be, there seems to be nothing in the doctrine that the ownership of tidal waters is *prima facie* in the Crown which precludes its application to this country, and no authority holding it to be inapplicable to the conditions here has been brought to our notice. Reference was made to the observations at page 543 in the recent decision already referred to as supporting the view that navigability alone is the test of the Crown's ownership of the bed and tidality is immaterial.

(1) [1896] 2 Ch. 1, 9.

(2) I.L.R. [1942] Mad. 532.

After referring to the Privy Council decision in *Tarakdas Acharjee Choudhury v. The Secretary of State for India in Council*(1) the learned Chief Justice who delivered the judgment of the Court observed:

"Neither in this case nor in *Haradas v. The Secretary of State for India in Council*(2) was any suggestion made that the tide is a factor in deciding the ownership of the bed of a public navigable river in India."

I do not read this passage as laying down that tidality can be no test at all in deciding the ownership of the beds of rivers in India. All that was apparently meant was that the tide was not an essential factor in determining title to the bed of a public navigable river in this country. The learned Judges did not have to consider the question of the ownership of the soil in the converse case of a tidal but non-navigable stream. I am of opinion that the title to the bed of the Vasishta at the locality in question where the tide ebbs and flows must be taken *prima facie* to belong to the Crown even though the river in its present state is not navigable there throughout the year.

The other branch of the appellant's contention also seems to me to be well founded. Assuming navigability to be the sole basis of the Crown's ownership of the bed, as suggested for the respondents, can it be said that the Vasishta is not navigable merely because the anicut intercepts almost the entire waters of the stream so as to render navigation difficult without artificial aids for some distance below during the summer months? The navigability of a river, I apprehend, must be judged with reference to its natural state, and if it was navigable before the construction of the dam and the title to the bed was in the Crown, it is difficult to see how such title could be divested merely because the crossbundling has reduced the volume of water flowing down the stream below the construction, any more than the title of a riparian

(1) (1935) 60 M.L.J. 171 (P.O.).

(2) (1917) 26 C.L.J. 590 (P.C.).

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owner could be divested by the river being made navigable by deepening the bed by artificial means. The Crown's title must be taken to continue unless the respondents are able to show that such title was lost by grant or adverse possession of the bed, and there is no room for applying the principle of riparian ownership extending up to the middle thread of the stream. No question of adverse possession was raised before us, and indeed no continuous possession of any portion of the bed could have been possible in such a fluctuating river which from time to time shifts its course encroaching, submerging and receding owing to the action of the mighty floods which flow down the stream. As for grant by the Crown, at the time of the permanent settlement of the respondents' estate in or about 1803, the river must undoubtedly have been navigable throughout the year at the locality in question, and there is no presumption that a grant of lands on the banks of a tidal or public navigable river passed title to the bed *ad medium filum*. The respondents have not produced their *sannad* which must be in their possession, and there is no satisfactory evidence to show that the river-bed where the suit lanka has sprung up was included in the respondents' estate.

Turning next to the other ground on which the respondents' claim was sought to be sustained before us, viz., accretion and re-formation *in situ*, the principle of accretion has thus been explained by their Lordships of the Judicial Committee in *Lopez v. Muddun Mohun Thakur*(1):

"Where there is an acquisition of land from the sea or a river by gradual, slow, and imperceptible means, there, from the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land."

In *Secretary of State v. Raja of Vizianagram*(2) their Lordships observe that, in dealing with the great

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rivers in India, it is necessary to bear in mind the comparative rapidity with which formations and additions take place and that the words "slow and imperceptible" used in the earlier decisions are only qualifications of the word "gradual" and must be understood and applied with reference to the condition of the country where the question arises. In the present case there is no clear evidence to show that the new blocks of land, shown in the survey maps Exhibits A series of 1878 to the north of the Balaramuni lanka and to the south of the Meraka lanka adjoining the portions which admittedly belonged to the respondents, were formed by a process which can be said to be "gradual" even in the qualified sense explained by their Lordships. These blocks of land are not to be found in the survey map of 1863, and as we have no reliable evidence regarding the state of these old lankas between 1863 and 1878 when the new blocks appear to have come into existence, it is not possible to say that their formation was so gradual as to entitle the respondents to claim them as *accretions* to their old Balaramuni and Meraka lankas. The maps, Exhibits A series, the land register, Exhibit B, and the plan, Exhibit MMM, relating to the survey of 1878, however, indicate that these blocks adjoining the old lankas on the north and on the south respectively were treated as integral parts of these lankas and were surveyed and demarcated as appertaining to the Udumudi village. As the survey operations of 1878 were admittedly conducted by the officers of the Government at the instance of the Court of Wards who were then in management of the Gopalpur estate during the minority of the proprietor, it is not unreasonable to infer that the new formations shown in the survey maps of 1878 were treated by all concerned as increments to the respondents' lankas and as such belonging to them. During the subsequent period, however (i.e., from 1878 to 1895) we find that not

(1) (1870) 13 M.I.A. 467.

(2) (1921) I.L.R. 45 Mad. 207 (P.C.).

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only the new blocks referred to above but even considerable portions of the old lankas were washed away by the river, as the cultivation and other accounts of the estate show a steady dwindling of their areas. Here again, it is not possible to say whether the irruption by the river was so gradual that the respondents could be said to have lost their title to the portions washed away on the principles of diluvion. Then followed a period during which the river began to throw up new formations again which, after various intermediate changes in shape and extent, assumed by 1930 the form of the island now in dispute. This block is separated from the Balaramuni lanka on the south and from the Meraka lanka on the north by *payas* or watercourses, and it does not adjoin the Udumudi village on the bank. It is thus clear that it cannot be regarded as a lateral accretion to any land belonging to the respondents, but must be regarded as an independent vertical formation in the bed of the stream. Title to it must therefore be in the Crown unless the respondents are able to establish by clear proof of identity that any part of it is a re-formation *in situ* of their old lanka lands washed away by the river.

The principle that land washed away but subsequently re-formed on its original site belongs to the original proprietor is well established; see *Maharaja of Dumraon v. Secretary of State for India in Council*(1). Whether this principle is applicable only where the land is lost to the original owner by a sudden irruption of the river in which case the title of the original owner continues unless abandoned, or whether it applies also to cases where the original owners' title is lost by the gradual slow and imperceptible process of diluvion, we need not pause to enquire, as it does not appear on the evidence in this case that the encroachment was by such slow and imperceptible degrees as to

(1) (1927) I.L.R. 6 Pat. 481 (P.C.).

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destroy the respondents' title to the land submerged. The learned Government Pleader, however, argued that, while the principle of re-formation *in situ* might be applicable to the extent to which the respondents' portion of the old Balaramuni lanka or the Meraka lanka as shown in the survey map of 1863 could be traced into the island now in dispute and identified with any part of it, the principle could not be invoked in respect of the increments to these lankas shown in the plan of 1878. It is difficult to appreciate this distinction. When once these accretions are held to belong to the respondents, as I think they should be for the reasons already indicated, no logical differentiation can be made between the respondents' title to the original lankas and their title to the subsequent accretions thereto. Their title to both must, in quality and scope, stand on the same footing and there would seem to be no reason why the respondents should be denied the benefit of the re-formation of the accreted land any more than the re-formation of the original nucleus. The learned Government Pleader had also urged that the principle is not applicable unless the new formation has clearly ceased to be part of the river-bed and has merged out of the surface of the stream in a cultivable or usable state. It may be mentioned here that while the central portion of the island in dispute is fit for cultivation and is actually cultivated, being covered by alluvial deposits, there is a wide fringe of sandy waste all around. It was said that these sand shoals are still part of the river-bed and that the respondents could not claim title to any portion thereof, even if such portion could be identified with the site of the old lankas washed away. Reference was made to the definition of river-bed in *Hindson v. Ashby*(1) where, dealing with a claim to a strip of land alleged to be an accretion to the land of a riparian owner, ROMER J. observed that the

(1) [1896] 1 Ch. 78.

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question whether any part of river-bed had lost its character as such and has accreted to dry riparian land was one of fact to be determined not by any hard and fast rule, but by regarding all the material circumstances of the case including the fluctuations of the river, the nature of the land, and its growths and user, an observation which was approved by the Court of Appeal in *Hindson v. Ashby*(1). In this view, it was said, the surrounding sand shoals could not, by their very character and appearance, be said to have ceased to be part of the bed of the river in the ownership of the Crown. This may well be a material consideration if these portions were claimed as accretions; for accretion implies that a portion of the river-bed becomes the property of the adjoining owner by a process of gradual and imperceptible recession of the stream, and it is but common justice in such a case that the land claimed to have thus accreted should be shown to have definitely ceased to be part of the bed before the title of the owner of the bed could be said to have been lost. But the doctrine of re-formation *in situ* rests on the principle that the title of the original owner to the land washed away or submerged is not absolutely extinguished unless he has abandoned it but continues to remain in such owner, provided such land can be identified by boundaries, landmarks or otherwise, subject, of course, to such easements of navigation or other rights to which the flow of water thereon may give rise. When the water has receded and the land re-appears again, the original owner is held entitled to take the property if it can be clearly identified. This being the reason of the rule, it is difficult to see why it should be regarded as necessary that the land encroached upon by the river should be shown to have ceased to be part of the river-bed before it can be claimed by the original owner as his property. There is no question of recovering, in such cases, what

(1) (1886) 2 Ch.D. 1.

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did not originally belong to the owner. I am, therefore, of opinion that the respondents are entitled to claim such portion or portions of the island in dispute as can be proved to have formed on the ascertained site of their old lankas or of the accretions thereto shown in the survey plans of 1878.

The respondents' claim to the other block of land called the Bellampudi lanka is the subject of the connected appeal. The respondents' ownership of the bed to the middle of the stream has already been negatived. The only other ground of claim is disclosed in respondents' pleading is an alleged re-formation on the site of an old lanka which originally belonged to them. There are no satisfactory materials to establish the identity of the new formation with the site of any old submerged lanka which once belonged to respondents. An attempt was, however, made before us to show that the land in dispute was an accretion to their riparian land. But no such case was put forward in the plaint, the reference to lateral accretion in paragraph 6 being obviously to "any excess in area" in the new formation. In cases of this kind, it is essential that parties should be strictly confined to the case which they make in their pleadings, for claims based on accretion, on re-formation *in situ*, or on riparian proprietorship up to the middle of the stream, involve different considerations and require different media of proof. In *Sree Eckowrie Sing v. Heeraloll Seal*(1) their Lordships of the Privy Council observed:

"The plaintiffs must succeed or fail on their title to the land as alluvial. It is not competent for them now, the cause having been decided on this title, to raise at the hearing of their appeal a different case, viz., one simply of original ownership of the site of the lands re-formed. Had that been the case alleged, some defence might have been made, founded on the nature of a boundary river, the ownership of its soil, the character, sudden or gradual of the original loss of land,

(1) (1888) 12 M.I.A. 130.

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and the effect of change from such causes in the land itself on the ownership in the soil."

In the present case, the respondents based their claim to the land as a re-formation of the site originally owned by them. It is not therefore competent for them now to raise a different case, namely, that the new formation is an alluvial accretion to their riparian land. Nor have they substantiated this new ground of claim.

I concur in the order made by my learned brother.

G.B.

APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice Bell.

KRISHNA AYYAR (PLAINTIFF), APPELLANT,

v.

GOMATHI AMMAL AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Indian Limitation Act (IX of 1908), art. 118—Suit by representative of a reversion for declaration that an adoption is untrue or invalid—Period of limitation six years—Not applicable to a case where fraud is specifically alleged by succeeding reversioner—Applicability of art. 95.

Article 118 of the Indian Limitation Act gives a right, which is strictly limited to a period of six years, to the then representative of a reversion to obtain a declaration that a particular adoption is untrue or invalid. If no suit is filed within that period then no succeeding reversioner can file any such suit. If a suit has been filed, the decision in that suit must be binding upon the succeeding reversioner. But these principles do not apply to a case in which a specific allegation of fraud is made by a succeeding reversioner. There is an inherent right of action to any person who can prove that a decree which would otherwise bind him cannot be held to bind him on the ground that it was obtained by fraud.

* Appeal No. 458 of 1942 and Civil Miscellaneous Petition No. 3058 of 1944.

Chiruvolu Punnamma v. Chiruvolu Perrazu(1), Varamma v. Gopaladasayya(2) and Kesho Prasad Singh v. Sheo Pragash Ojha(3) referred to.

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APPEAL against the decree of the Court of Subordinate Judge of Tinnevely in Original Suit No. 27 of 1941 and Civil Miscellaneous Petition No. 3058 of 1944 and PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court may be pleased to issue an order directing the amendment of the plaint in Original Suit No. 27 of 1941 on the file of the Court of the Subordinate Judge of Tinnevely.

A. Swaminatha Ayyar and S. Thyagaraja Ayyar for appellant.

K. R. Rangaswami Ayyangar, V. Meenakshisundaram and S. V. Rama Ayyangar for respondent.

The JUDGMENT of the Court was delivered by KING J.—This appeal arises out of a suit brought by the plaintiff in the Court of the learned Subordinate Judge of Tinnevely with the main purpose of obtaining a declaration that the adoption of the second defendant is untrue in fact and, in any case, invalid. The plaintiff is the son of the sister of one Sundaram Ayyar, who died in April 1925. Besides his sister, the sixth defendant, Sundaram Ayyar left a widow, the first defendant, and is said to have left a will by the terms of which he authorised his widow to adopt a son. It is the case of the widow, the first defendant, and the alleged adopted son, the second defendant, that the second defendant was, in fact, adopted on 13th September 1925 in pursuance of this authority so given. The plaintiff's case is that there was no actual adoption on 13th September 1925, or at any other time, and that the will itself is not genuine and, therefore, there was no such authority conferred by Sundaram Ayyar on his widow. The plaintiff states

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(1) (1906) I.L.R. 29 Mad. 390 (F.B.). (2) (1918) I.L.R. 41 Mad. 659 (F.B.).
(3) (1924) I.L.R. 46 All. 831 (P.O.).

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that he was born on 16th July 1920 and therefore, as he became of age in July 1938 and has brought this suit in June 1941, he contends that it is not barred by the law of limitation. It must now be stated that the question of the fact and validity of the second defendant's adoption has already been brought in issue in a previous suit. This suit was filed in 1931 by plaintiff's mother, the sixth defendant, and there is now no dispute on the question of the status of the sixth defendant and her right to bring the suit, or upon the fact that the suit was brought within six years of the time at which the sixth defendant became aware of the adoption. That suit was eventually dismissed in 1933 as the result of a compromise between the sixth defendant, who was then the plaintiff in the suit, and the present second defendant. By the terms of that compromise, the sixth defendant was given properties worth Rs. 7,000. The plaintiff now alleges in his plaint that this compromise was brought about in fraud of his own possible future interests in the property and he asserts that the existence of this fraud in the matter of the compromise provides him with a new cause of action accruing from its date.

Not less than eighteen issues were framed in the present suit. The eighth issue was whether the suit is barred by limitation; and, as the learned Judge points out, the consideration of this issue was taken up as a preliminary measure by the Court at the instance of the vakils for the contesting defendants. The Court has decided the issue after a consideration of the main point of law, whether the sixth defendant in bringing the suit in 1931 can be considered a representative of the reversion as a whole and therefore representative of her son, the present plaintiff. He answers this point in the affirmative and holds consequently that the plaintiff can have no independent right to bring a fresh suit on the same cause of action. In any case, the suit which has been brought by the plaintiff is at

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a time more than six year after the adoption must have become known to his predecessor-in-interest and therefore is barred under article 118 of the Limitation Act. Except for the two formal issues 9 and 10, the other issues have not been considered and the suit has naturally been dismissed with costs on this finding on this question of limitation. Against that decree the plaintiff has now appealed.

There can be no doubt that the learned Judge is right in holding that this suit is barred, apart from the question of fraud. It is agreed by both sides that the learned Judge has rightly interpreted the law on this question that article 118 gives a right, which is strictly limited to a period of six years, to the then representative of the reversion to obtain a declaration that a particular adoption is untrue or invalid. Two things follow. If no suit is filed within the period of six years, then no succeeding reversioner can file any such suit. If a suit has been filed, the decision in that suit must be binding upon the succeeding reversioner. As we say, there is no dispute at all upon this point. The only dispute is as to whether these principles apply to a case in which a specific allegation of fraud is made by a succeeding reversioner. On this point, various authorities, to which reference has been made both by the learned Judge and in the argument before us, afford no direct guidance, because in every one of the cases it is clear that no definite question of fraud arose. It is argued against the appellant that it may well be that the inactivity or negligence of a reversioner within the six years permitted by article 118 of the Limitation Act may be due to fraud and that there is, therefore, no logical inconsistency in extending the protection afforded to an adopted son of this kind to the case of a reversioner, who has not failed to file a suit but has negligently or fraudulently allowed a suit to be dismissed. We are not prepared to extend the

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principle to a case of that kind; and we think that it must be clear that the main reason from the adopted son's point of view for the restriction of the right of the reversion to the bringing of a single suit within six years and the refusal to grant to any succeeding reversioner a private individual cause of action, must be in order to protect him from continual harassment by one suit after another. The reason for this protection entirely disappears in a case like the present when, as we must assume for the purposes of this appeal, the adopted son as alleged in the plaint has been guilty of fraud. There is, in our opinion, an inherent right of action to any person who can prove that a decree which would otherwise bind him cannot be held to bind him on the ground that it was obtained by fraud.

We do not, we think, consider that there is any need to analyse in detail the various rulings to which our attention has been called in the hearing of this appeal. One significant point, however, we must stress at this stage. We have already stated that there were no precise allegations of fraud by any of the parties in the cases which have been dealt with; but there are sporadic references to fraud in more than one of these decisions, and it is quite clear from those references that the decisions to which the various learned Judges have come, would very probably have been modified if the question of fraud had entered into the facts of the case. The first of such references is to be found on pages 403 and 404 of *Chiruvolu Punnamma v. Chiruvolu Perrazu*(1). There, their Lordships are quoting from a judgment delivered by SIR BARNES PEACOCK and what he says is this:

"It is unnecessary for the Court now to determine whether, if in such a case the defendant should succeed in establishing the validity of the adoption, the decree would not be binding upon the persons who might eventually succeed upon the death of the widow in the same manner as the decree

(1) (1906) I.L.R. 29 Mad. 390 (F.B.).

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against the widow representing the rights of her husband in an estate is binding upon the reversionary heirs. It has been decided by the Privy Council that such a decree is binding upon the reversionary heirs in *Ranee Surnomoyee's case*(1). This of course is upon the assumption that the suit is honestly brought and conducted."

In *Varamma v. Gopaladasayya*(2) in the judgment of COUTTS TROTTER J., towards its conclusion at page 679, the following observations occur:—

"It follows in my judgment that if a reversioner who is competent to do so challenges an alienation or an adoption unsuccessfully or fails to challenge it within the period allowed by the law of limitation, the result is binding on his successors in the reversion. The *argumentum ab inconvenienti* is pressed upon us, that so to decide would open the door to fraudulent and collusive actions between the widow and the nearest reversioner bartering away the rights of subsequent reversioners. I think the answer to be that proof of such fraud and collusion would at once invalidate the result which was sought to be achieved."

Finally, in *Kesho Prasad Singh v. Sheo Pragash Ojha*(3) we find this paragraph on page 836:

"Their Lordships of course recognize that the principle is less obviously just where it operates to bind the ultimate reversioners by the result of a suit in which a plaintiff had failed whose interest, then merely presumptive, never ultimately matured. The danger of a feigned issue in such a suit is not to be overlooked. But this danger is mainly serious where the failure of the first suit has been brought about by fraud or collusion where, of course, further and different considerations would arise."

These quotations from the judgments concerned have, of course, no direct bearing upon the facts before the learned Judges, but they are valuable none the less and it seems clear that they have been stated as axiomatic propositions, which could not be contested. As we have already said, we are of the opinion that nothing deprives the plaintiff of his present right of action based upon the fraud which he asserts between the second defendant and plaintiff's

(1) (1864) 2 W.R. 13 (P.C.). (2) (1918) I.L.R. 41 Mad. 659 (F.B.).
(3) (1924) I.L.R. 46 All. 831 (P.C.).

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mother, the sixth defendant. The contention put forward on behalf of the second defendant that he cannot be subjected to the ordeal of a second adjudication on this matter is to our minds of no importance, and must fail before the plaintiff's general right. The question of limitation does not enter into this matter at all. It is not contested that the sixth defendant did bring her suit within time, and, subject to the decision of issue 15 in this case, it is not contested that reckoning from the date which the plaintiff himself gives of his own birth, this suit by him, if it be maintainable at all, was brought within time under the provisions of article 95. The learned Judge in disposing of the suit appears to us to have lost sight altogether of that part of plaintiff's case which depends upon the alleged fraudulent action of the second defendant and the plaintiff's mother, the sixth defendant, though, as we shall indicate presently, plaintiff himself was probably most to blame for that fact. We hold that the present suit is maintainable and is maintainable upon the facts alleged in the plaint as originally filed by the plaintiff.

We are of opinion, however, that the plaint none the less requires amendment. We notice that in the plaint as originally presented to the Court, the plaintiff in formulating his reliefs in paragraph 22 merely states that the withdrawal of the suit in 1931 by the sixth defendant is not binding on him, and asks as his main relief that he shall have a declaration that the alleged adoption of the second defendant is untrue and invalid. It is no wonder on this manner of formulating his reliefs that the Court has been misled into regarding this suit as primarily and even exclusively one for a declaration against the alleged adoption of the second defendant.

The plaintiff has now filed an application to amend the plaint, the amendment being confined to

paragraph 22 and he has now stated that he wishes to ask for the following reliefs :—

(i) that the dismissal of the suit of 1931 be set aside, that the razinamah entered into in the said suit be declared not binding upon the plaintiff and the reversionary heirs entitled to succeed to the estate of the late Sundaram Ayyar,

(ii) that the suit be revived and the trial be permitted to be conducted by the present plaintiff, by substituting him in the place of his mother, and

(iii) that a declaration be given that the second defendant was never in fact adopted by the first defendant, and, at any rate, that any such adoption was invalid.

A formal objection has been filed on behalf of the defendants to the amendment of this plaint. But, in view of the conclusions at which we have arrived and which have been embodied in this judgment, we must permit the amendment to be made.

The only serious objection, in our opinion, amongst those raised by the respondents is one dependent upon the law of limitation. This objection, in our opinion, has no force, because, although paragraph 22 has now been amended, the facts upon which the reliefs as now formulated in paragraph 22 are claimed, were already part of the plaint when it was first presented. There can be no question, therefore, that it is only at this stage that the plaintiff is putting forward any new case against the defendants. The suit will now be remanded to the learned Subordinate Judge for further disposal according to law. The defendants will of course be permitted to file additional written statements. But in so far as these additional written statements may contain any contention that even after the plaint has been amended the suit is not maintainable, the learned Subordinate Judge will clearly understand that it is now finally decided by

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this Court that the suit is maintainable upon the amended plaint.

We have already indicated that the blame for the disposal of the suit in the way in which it has been disposed of by the learned Judge rests mainly upon the plaintiff himself, and the manner in which he has drafted his plaint, and in all probability on the manner in which he, like his opponents, confined his arguments to the question of limitation. There is nothing to show that he protested against the request of the vakils for the defendants to take the eighth issue as a preliminary issue in the case, and we must conclude that the absence in the judgment of the learned Judge of all reference to any cause of action derivable from the allegations of fraud in the plaint was due to the fact that the matter was never pressed before him.

In these circumstances we see no reason to interfere with the decision of the learned Judge that the costs of the suit be payable by the plaintiff, those costs of course now being confined to the costs incurred up to the time of the learned Judge's judgment. With regard to this appeal, we consider the most appropriate order to be passed is that the respondents be not called upon to pay the appellant's costs, but that costs of both sides be costs in the cause. The court-fee paid on the memorandum of appeal will be refunded to the appellant.

v.v.o.

APPELLATE CRIMINAL.

Before Mr. Justice Byers.

G. SRINIVASA AYYANGAR (COMPLAINANT), PETITIONER,

1944,
August 9.

v.

RAMASWAMI AYYANGAR AND ANOTHER (ACCUSED),
RESPONDENTS.*

Indian Penal Code (Act XLV of 1860), ss. 167 and 193—Amin—Making false return on execution process entrusted to him—Offence under sec. 193 and also under sec. 167 of the Code—Complaint by Court necessary under sec. 195 (1) (b) of the Code of Criminal Procedure (Act V of 1898).

Where it was alleged that, at the instance of a party to a litigation, an amin intentionally made a false return on an execution process entrusted to him, with intent to cause injury to some other persons,

held, as the offence was one punishable under section 193 of the Indian Penal Code, a complaint by the Court was necessary under section 195 (1) (b) of the Code of Criminal Procedure.

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 (Additional) First Class Magistrate of Kumbakonam in Calendar Case No. 327 of 1943.

C. D. Venkataraman for petitioner.

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

P. Chandra Reddi and R. Rangachari for respondents.

ORDER.

BYERS J.—The first accused is an amin who is alleged to have intentionally made a false return on an execution process entrusted to him at the instigation of a party to the litigation with intent to cause injury to some other persons, and the question which now arises for decision is whether this was an offence

BYERS J.

* Criminal Revision Case No. 148 of 1944 (Criminal Revision Petition No. 141 of 1944).

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punishable under section 167 or section 193 of the Indian Penal Code. If the former section is applicable, then no complaint is required under section 195 (1) (b) of the Code of Criminal Procedure; but if the latter section is applicable, then the complaint at the instance of a party is not maintainable.

The process was issued in the course of proceedings in execution of a decree of a District Munsif's Court and the execution proceedings were adjourned pending the return of the process. It was the amin's duty to remove an offending obstruction on the property in suit and to put the decree-holder in possession before returning the process to the Court; but he did neither of these things, and he returned the process with a false report that he had, in fact, removed the obstruction and placed the party in possession.

According to the rules contained in Chapter II, Part I (Volume 2) of the Civil Rules of Practice read with Order XXI, rule 25, of the Code of Civil Procedure, the amin is required to endorse on the process the manner of its service or execution and, when returning it to the Court, he has to make an affidavit of his return, for which purpose Nazirs, Deputy Nazirs, and Assistant Nazirs are empowered to administer the oath. It is, therefore, clear that the process-server or amin is, under Order XXI, rule 25, of the Code of Civil Procedure and the relevant rules in the Civil Rules of Practice, bound by an express provision of law to state the truth and to make an affidavit as to the mode of his return. This brings him within the scope of section 191 of the Indian Penal Code and, as the execution warrant or process arose in the course of a judicial proceeding and forms part of the record of those execution proceedings, the offence committed by the amin comes under section 193 of the Indian Penal Code. The offence also appears to come under section 167 of the Indian Penal Code, which does not require the complaint of the Court under section 195

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(1) (b) of the Code of Criminal Procedure, but there is ample authority in support of the proposition that a complainant cannot avoid the provisions of section 195 of the Code by making his complaint for a lesser offence for which a complaint by the Court is not necessary. The distinction between section 167 and section 193 of the Indian Penal Code seems to be that whereas the former section relates to the incorrect preparation of a public record as such, the latter section applies when the record forms part of the records of a judicial proceeding, as it does in the present case.

In the result, I find that the view taken by the learned Magistrate that the complaint is not maintainable is correct and the revision petition is dismissed.
V.V.C.

APPELLATE CRIMINAL.

Before Mr. Justice Byers.

IN RE. ANGAPPA MUDALIAR AND ANOTHER (ACCUSED),
PETITIONERS.*

1944,
August 2.

Opium Act (I of 1878), sec. 9 (b)—First petitioner, a debarred person, employed as servant by second petitioner—Former found in possession of opium while carrying it to latter's shop—Licence issued in second petitioner's name—First petitioner guilty—Second petitioner committing breach of a condition in his licence—Conviction illegal.

The first petitioner was found in possession of opium which he was carrying on behalf of the second petitioner to the latter's opium shop; and when asked to account for his possession, he produced a transport licence issued in the name of the second petitioner, who was a licensed vendor. The first petitioner was a debarred person within the meaning of condition 14 in the vendor's licence. Both the petitioners

* Criminal Revision Case No. 278 of 1944 (Criminal Revision Petition No. 264 of 1944).

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were convicted for offences punishable under section 9 (b) of the Opium Act.

Held: (i) that the conviction of the first petitioner was proper; the words "no person who has been debarred by the Collector from bidding at the sales of abkari or opium shops shall be employed in any capacity in connection with the management or the working of shops" in the conditions governing the sale of opium are sufficiently wide to cover the transport of opium from one shop to another; and as the permit which he had in his possession was not issued in his name, his conviction could not be assailed.

(ii) The conviction of the second petitioner was illegal because, by employing the first petitioner as a servant to carry the opium from one shop to another, he had committed only a breach of condition 14 of his licence, and there is no provision in the Opium Act under which a breach of the conditions in the licence is punishable under the Act.

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 Additional First Class Magistrate of Erode, dated 31st December 1943, and passed in Calendar Case No. 281 of 1943.

C. K. Venkatanarasimham for petitioners.

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

ORDER.

BYERS J.

BYERS J.—On the night of 25th July 1943 the first petitioner was found in possession of half a cake of opium which he was carrying on behalf of the second petitioner to the latter's opium shop at Barghur; and when asked to account for his possession, he produced a transport licence issued in the name of the second petitioner, who is a licensed vendor. The first petitioner is a debarred person within the meaning of condition 14 in the vendor's licence. Both the petitioners were convicted for offences punishable under section 9 (b) of the Opium Act, the first petitioner for transporting the drug without a valid licence, and the second petitioner for employing a debarred person contrary to condition 14 of his licence.

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—
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So far as the first petitioner is concerned, it is stated in the conditions governing the sale of opium that

"no person who has been debarred by the Collector from bidding at the sales of abkari or opium shops shall be employed in any capacity in connection with management or the working of shops or depots, licensed for the sale of liquor, opium or intoxicating drugs."

These words are sufficiently wide to cover the transport of opium from one shop to another in accordance with the rules; and, as the permit which the first petitioner had in his possession was not issued in his name, his conviction under section 9 (b) cannot be assailed.

Regarding the second petitioner, the learned Public Prosecutor has pointed out that there is a lacuna in the Act as it makes no provision for the prosecution of offenders who commit breaches of the conditions of their licences. Rules have been framed by the Local Government under section 5 of the Opium Act, and rule 21 gives the Collector power to cancel or suspend any licence or permit for a breach of the conditions or on conviction for an offence under the Act; but there is nothing in the Act corresponding to section 56 of the Madras Abkari Act under which a breach of the conditions is punishable under the Act. It is clear that the second petitioner committed breach of condition 14 of his licence by employing the first petitioner as a servant to carry the opium from one shop to another; but, as the rules stand, this is punishable only by cancellation or suspension of the licence under rule 11 (b) or 21 of the rules.

In the result the conviction and sentence of the first petitioner are confirmed, and the conviction of the second petitioner is set aside and the fine, if paid, ordered to be refunded.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

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

THE DISTRICT JUDGE OF ANANTAPUR,
REFERRING OFFICER,

v.

K. V. VEMA REDDI (ADVOCATE), RESPONDENT.*

Bar Councils Act (XXXVIII of 1926), ss. 14 (1) and 19—Advocate enrolled by Bombay High Court after Bar Councils Act came into force—Not practising in that High Court or in Courts subordinate thereto—If entitled to practise in Courts subordinate to Madras High Court—Legal Practitioners Act (XVIII of 1879), ss. 4 and 38.

The respondents were Advocates of the High Court of Bombay enrolled after the Indian Bar Councils Act (XXXVIII of 1926) came into force. They had never practised in that Court or in any Court subordinate thereto.

Held that by virtue of section 14 (1) of the Indian Bar Councils Act they were entitled to practise in Courts subordinate to the High Court of Madras. Section 4 of the Legal Practitioners Act has no application to Advocates enrolled under the Indian Bar Councils Act by any High Court.

CASES referred by the District Judge of Anantapur and the District Judge of South Kanara for the decision of the High Court on the question whether an Advocate who is enrolled in a High Court other than the Madras High Court, but who is not ordinarily practising in such other High Court or in some Court subordinate thereto, is entitled to practise in the Courts in the Madras Province, other than the Madras High Court.

Advocate-General (P. V. Rajamannar) for the Crown.—In both the references the Advocates concerned were enrolled by the Bombay High Court after the Bar Councils Act, 1926, came into force. They did not practise in that High Court or in any Court subordinate thereto. In the first reference the Advocate was practising in the Courts of the Anantapur

* Referred Cases Nos. 47 and 49 of 1944.

District. In the second reference the Advocates were practising in the Courts of the South Kanara District. The question to be decided is whether they can practise in Courts subordinate to the Madras High Court.

Sub-section 1 of section 14 of the Bar Councils Act entitles them to so practise. The references were made because of section 4 of the Legal Practitioners Act which says that Advocates should ordinarily practise in the Court on the roll of which they are entered or some Court subordinate thereto. Section 38 of the Legal Practitioners Act says that section 4 of that Act does not apply to Advocates who have been enrolled under the Bar Councils Act. The amendment made by section 19 of the Bar Councils Act to section 38 of the Legal Practitioners Act was overlooked by the District Judges who made the references. As there is no other provision of law prohibiting the respondents from practising in the subordinate Courts of this Province they are entitled to practise in such Courts.

S. Panchapagesa Sastri for the Advocates' Association.

K. C. Subrahmaniam Chetti for the Bar Association.

B. Sitarama Rao and Kasturi Seshagiri Rao for respondents.

The ORDER of the Court was delivered by LEACH C.J.—These two references have been heard together and can conveniently be dealt with in one judgment. The first reference has been made by the District Judge of Anantapur and the question raised is whether the respondent, who is an Advocate of the Bombay High Court, having been enrolled by that Court on 13th September 1937, is entitled to practise in the Courts of the Anantapur District. Although he was enrolled by the Bombay High Court he has never practised in that Court or in any Court subordinate thereto. He has confined his practice entirely to the Courts of the Anantapur District. The second reference has been made by the District Judge of South Kanara. There are here three respondents and all of them were enrolled by the Bombay High Court after the Indian Bar Councils Act, 1926, came into force in that province, as was the case in the first reference, and they have

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since been practising in the Courts of the South Kanara District. These references have been made in consequence of the wording of section 4 of the Legal Practitioners Act. We shall refer to the section in a moment, but in passing we may say that if it stood alone a very difficult question would arise. The attention of the learned District Judges who have made these references has unfortunately not been drawn to an amendment to section 38 of the Legal Practitioners Act which was made by the Indian Bar Councils Act and when section 38, as amended, is taken into consideration it is quite clear that these Advocates are entitled to practise in the Courts subordinate to this Court.

Sub-section 1 of section 14 of the Indian Bar Councils Act says :

"An Advocate shall be entitled as of right to practise—

(a) subject to the provisions of sub-section 4 of section 9, in the High Court of which he is an Advocate ; and

(b) save as otherwise provided by sub-section 2 or by or under any other law for the time being in force, in any other Court in British India and before any other Tribunal or person legally authorized to take evidence ; and

(c) before any other authority or person before whom such Advocate is by or under the law for the time being in force entitled to practise."

We are not concerned here with sub-section 2 which only refers to practice in High Courts. Therefore, an Advocate enrolled by any High Court is entitled by virtue of sub-section 1 to practise in subordinate Courts of this Province provided that there is no other law which prohibits him from doing so.

Section 4 of the Legal Practitioners Act reads as follows :—

"Every person now or hereafter entered as an advocate or vakil on the roll of any High Court under the Letters Patent constituting such Court or under section 41 of this Act or enrolled as a pleader in the Chief Court of the Punjab under section 8 of this Act, shall be entitled to practise in all the Courts subordinate to the Court on the roll of which he is entered, and in all revenue-offices situate within the local

limits of the appellate jurisdiction of such Court, subject, nevertheless, to the rules in force relating to the language in which the Court or office is to be addressed by pleaders or revenue-agents ; and any person so entered who ordinarily practises in the Court on the roll of which he is entered or some Court subordinate thereto shall, notwithstanding anything herein contained, be entitled as such to practise in any Court in British India other than a High Court on whose roll he is not entered, or, with the permission of the Court or in the case of a High Court in respect of which the Indian Bar Councils Act, 1926, is in force, subject to rules made under that Act in any High Court on whose roll he is not entered, and in any revenue-office."

These references have been made by reason of the words "and any person so entered who ordinarily practises in the Court on the roll of which he is entered or some Court subordinate thereto shall, notwithstanding anything herein contained, be entitled as such to practise in any Court in British India other than a High Court on whose roll he is not entered." The respondents have not ordinarily practised in the Bombay High Court or in Courts subordinate thereto and, if the section stood alone, it would be doubtful whether they would be entitled to practise in Courts subordinate to this Court. Section 38 of the Legal Practitioners Act makes it quite clear, however, that section 4 does not apply to Advocates who have been enrolled under the Indian Bar Councils Act. The words "and except as provided by section 36, nothing in this Act applies to persons enrolled as Advocates of any High Court under the Indian Bar Councils Act, 1926" were added to section 38 by section 19 of the Indian Bar Councils Act. Consequently section 4 has no application to Advocates enrolled under the Indian Bar Councils Act by any High Court. That being the position, section 4 must be ignored, which means that so far as the respondents are concerned there is no other law for the time being in force which prohibits them from practising in the subordinate Courts of this Province.

The references will be answered accordingly.

V.V.C.

DISTRICT
JUDGE,
ANANTAPUR,
v.
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LEACH C.J.

APPELLATE CIVIL—FULL BENCH.

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

1944,
November 13.

AYI GOUNDAN AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

SOLAI GOUNDAN AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

*Indian Limitation Act (IX of 1908), art. 182 (5) Step in aid
of execution—Application need not necessarily be in
pending execution petition.*

The wording of article 182 (5) of the Indian Limitation Act clearly shows that an application to take a step in aid of execution is entirely separate from an application for execution. It is not necessary for the purpose of saving limitation under the article that an application taken as a step in aid of execution should be made in a pending execution petition.

Kunhi v. Seshagiri(1) approved.

Kuppuswami Chettiar v. Rajagopala Aiyar(2), *Balasubramania v. Chit Co. Yela Nidhi*(3), *Abdul Kharim Saheb v. Lakshmanaswami*(4) and *Rama Subbaya v. Thimmiah*(5) overruled.

APPEAL against the decree of the District Court of Coimbatore in Appeal Suit No. 276 of 1940 preferred against the order of the Court of the District Munsif of Gobichettipalayam, dated 31st August 1940, and made in Interlocutory Application No. 727 of 1939 in Original Suit No. 79 of 1933.

The second appeal first came on for hearing before WADSWORTH and PATANJALI SASTRI JJ., and WADSWORTH J. on behalf of the Court made the following

ORDER OF REFERENCE :—

On 19th December 1933 the appellants obtained a preliminary decree on a mortgage. On 12th March 1934 a final decree was passed. On 2nd April 1935 they filed Execution Petition No. 514 of 1935 praying for a sale of the hypotheca. This execution petition was pending for approximately five months. While it was pending, the second plaintiff filed Execution

Application No. 527 of 1935 praying under Order XL, rule 1, Civil Procedure Code, that he might be appointed receiver to collect the rents and profits of the property. This application purports to have been filed as an application in the pending execution petition and the reason for which a receiver was asked was the alleged attempt to remove trees from the land. On 29th June 1935 the second plaintiff was appointed receiver on furnishing security. Neither the application nor the order contemplates any automatic adjustment of his collections to the decree. On 12th September 1935, after the receiver had been appointed, Execution Petition No. 514 of 1935 was dismissed. On 8th October 1935 the second plaintiff as receiver filed Execution Application No. 1115 of 1935 alleging that he had been obstructed in his attempt to take possession of the properties and praying for delivery of possession to him as receiver through the Court. On 25th October 1935, possession having been delivered, that petition was closed. On 24th October 1938 a fresh execution petition (Execution Petition No. 732 of 1938) was filed. It was ultimately dismissed without any finding on a plea raised by way of objection thereto that the execution petition was barred by limitation. On 8th March 1939 the decree-holders filed Interlocutory Application No. 727 of 1939 praying the Court to amend the decree under section 19 of Madras Act IV of 1938. This application was dismissed on the ground that there was no subsisting decree owing to the bar of limitation. It is against this order that the present second appeal arises.

The only other fact which needs notice is that on 9th March 1940 the judgment-debtors asked the Court to remove the receiver from possession and he was accordingly made to deliver the properties back to the judgment-debtors.

The only question in this appeal is whether the decree is barred by limitation. It was suggested that, so long as the receiver was realising profits as a result of an application preferred in the execution petition, limitation would not run. But it has not been established that the process of realisation of the profits under the receivership order was in fact a process of execution. It is, however, contended Execution Petition No. 732 of 1938 was filed less than three years after the final order in Execution Application No. 1115 of 1935 and that this application must be deemed to be a step in aid of execution. It was held by a Bench of this Court in *Sambasiva Mudali v. Krishnan*(1) that, when there had been a sale in execution and there was a danger of the property being lost by non-payment

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* Second Appeal No. 341 of 1943.

(1) (1882) I.L.R. 5 Mad. 141.

(2) (1921) I.L.R. 45 Mad. 466.

(3) A.I.R. 1919 Mad. 220.

(4) A.I.R. 1928 Mad. 440.

(5) (1941) 2 M.L.J. 754.

(1) (1900) 5 I.C. 758.

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of the revenue in the interval between the sale and the confirmation thereof, an application by the decree-holder for the appointment of a receiver to safeguard the property by the payment of this revenue was a step in aid of execution. A similar view has been taken by the Lahore High Court in *Ghanayya Lal & Co. v. Jassa Ram Hira Nand*(1). It seems to us that, if the application by one of the decree-holders for his appointment as a receiver to safeguard the properties for the purpose of the realisation of the decree therefrom in execution is a step in aid of execution, a subsequent application by the same decree-holder as receiver for the delivery of those properties to him must also be deemed to be a step in aid of execution. It is a step in the same direction for the same purpose as the original application. It is, however, objected that, in order to save limitation under article 182 (5) of the Limitation Act, the application which is to be treated as a step in aid of execution must be filed in a pending execution petition. On this question there seems to be a very grave conflict of authority of this Court. Cases in which it has been held that the application need not be in a pending execution petition are *Kunhi v. Seshagiri*(2), *Sankara Nainar v. Thangamma*(3), *Krishna Patter v. Seetharama Patter*(4) and *Kannan v. Avvulla Haji*(5). Cases in which the contrary view has been taken are *Balasubramania v. Chit Co. Yela Nidhi*(6), *Kuppuswami Chettiar v. Rajagopala Aiyar*(7), *Balaguruswami Naicken v. Guruswami Naicken*(8), and there are observations tending in the same way in *Rama Subbayya v. Thimmiah*(9) and *Abdul Kharim v. Pulavarti Lakshmanaswami*(10). It seems to us most desirable that this conflict of authority should be solved by the decision of a Full Bench. We refer to a Full Bench the following question :—

"Whether for the purpose of saving limitation under article 182 (5) of the Limitation Act, it is necessary that the application taken as a step in aid of execution should have been made in a pending execution petition."

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

ON THE REFERENCE :

S. S. Ramachandra Ayyar for appellant.—In this case we are not concerned with the question whether the application in question constitutes a step in aid of execution. If

- (1) A.I.R. 1929 Lah. 57.
(3) (1921) I.L.R. 45 Mad. 202.
(5) (1926) I.L.R. 50 Mad. 403.
(7) (1921) I.L.R. 45 Mad. 466.
(9) (1941) 2 M.L.J. 754.

- (2) (1882) I.L.R. 5 Mad. 141.
(4) (1926) I.L.R. 50 Mad. 49.
(6) A.I.R. 1919 Mad. 220.
(8) (1924) 48 M.L.J. 506.
(10) (1927) 112 I.C. 36.

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it amounts to a step in aid of execution, is the limitation not saved under article 182 (5) of the Indian Limitation Act because it was not made in a pending execution petition? The leading case is *Kunhi v. Seshagiri*(1), where it was held that the application need not be in a pending execution petition. The same view has been expressed in *Sankara Nainar v. Thangamma*(2), *Kannan v. Avvulla Haji*(3), and *Rarichan v. Kunhamu*(4) which considered the conflict of views in various decisions and followed *Sankara Nainar v. Thangamma*(2). *Balaguruswami Naicken v. Guruswami Naicken*(5) cannot be an authority for the contrary view since it stated that the view in *Kunhi v. Seshagiri*(1) should be followed. In *Latafat Ali Khan v. Kalyan Mal*(6) the Allahabad High Court held that application need not be in a pending execution petition. The contrary view was expressed in *Kuppuswami Chettiar v. Rajagopala Aiyar*(7), *Balasubramania v. Chit Co. Yela Nidhi*(8), *Abdul Kharim Saheb v. Lakshmanaswami*(9) and *Rama Subbayya v. Thimmiah*(10). None of these cases referred to *Kunhi v. Seshagiri*(1). In *Krishna Patter v. Seetharama Patter*(11) a doubt was expressed as to the correctness of the view in *Kuppuswami Chettiar v. Rajagopala Aiyar*(7).

A. C. Sampath Ayyangar for respondents.—The application referred to in the second part of article 182 (5), after the word "or", must have reference to an execution petition referred to under the first part of article 182 (5). If the particular step in aid of execution is of a nature that could be taken in an execution petition, it could not save limitation unless an execution petition is filed and the step-in-aid is taken in it. As pointed out in *Balasubramania v. Chit Co. Yela Nidhi*(8), excepting in very few instances it would be possible to get the relief in a pending execution petition. *Kunhi v. Seshagiri*(1) comes under the exception. The following cases have a bearing; *Veerappa Setti v. Munisami Achari*(12) and *Venkataramanamma v. Purushotham*(13).

S. S. Ramachandra Ayyar was not called upon to reply.

The OPINION of the Full Bench was delivered by LEACH C.J.—Article 182 (5) of the Limitation Act, 1908, as amended by the Indian Limitation (Second

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- (1) (1882) I.L.R. 5 Mad. 141. (2) (1921) I.L.R. 45 Mad. 202.
(3) (1926) I.L.R. 50 Mad. 403. (4) (1934) I.L.R. 57 Mad. 808.
(5) (1924) 48 M.L.J. 506. (6) I.L.R. [1938] All. 342.
(7) (1921) I.L.R. 45 Mad. 466. (8) A.I.R. 1919 Mad. 220.
(9) A.I.R. 1928 Mad. 440. (10) (1941) 2 M.L.J. 754.
(11) (1926) I.L.R. 50 Mad. 49. (12) (1934) I.L.R. 58 Mad. 301, 307.
(13) (1900) I.L.R. 24 Mad. 188.

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Amendment) Act, 1927, states that for the execution of a decree or order not provided for by article 183 or by section 48 of the Code of Civil Procedure the period of limitation shall be three years from the date of the final order passed on an application for execution or on an application to take some step in aid of execution. Before the amendment in 1927 the period commenced from the date of the application. The corresponding article in the Limitation Act of 1877 was article 179 (4) which also made the starting point of limitation the date of the application. One of the cases, to which reference will be made, arose under the Act of 1877, some of them under the Act of 1908 before the amendment, and some after the amendment. Nothing really turns on this, because for the purpose of answering the question referred it is immaterial whether the starting point is the date of the application or the date of the order passed thereon. The question is whether an application to take a step in aid of execution of a decree or order can be made when there is no application for execution pending.

The decisions of this Court reveal a strong conflict of opinion, but in passing it may be mentioned that in some of the cases very little reason has been given for the opinion expressed. We will take first the cases which have decided that an application to take a step in aid of execution can be made the starting point, notwithstanding that an application for execution is not pending. These are *Kunhi v. Seshagiri*(1), *Sankara Nainar v. Thangamma*(2), *Kannan v. Avvulla Haji*(3) and *Rarichan v. Kunhamu*(4), all of which were decided by Division Benches.

In *Kunhi v. Seshagiri*(1) an application was made by a decree-holder to the Court for a certificate that a copy of a revenue register was necessary in order to

(1) (1922) I.L.R. 5 Mad. 141.
(3) (1926) I.L.R. 50 Mad. 403.

(2) (1921) I.L.R. 45 Mad. 202.
(4) (1934) I.L.R. 57 Mad. 808.

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proceed in execution. Apparently the revenue authorities were in the habit of refusing an application for a copy of the register without a certificate that a copy was required for a necessary purpose. An application for execution had at that time to be accompanied by a copy of the revenue register. The question before the Court was whether the application to the Court for a certificate amounted to a step in aid of execution. The Court said that it did and consequently started a fresh period of limitation. The importance of this decision is that there was no application for execution pending, nor could there be one until a copy of the revenue register had been obtained. The Bench was composed of INNES and MUTTUSAMI AYYAR JJ. In the course of his judgment, MUTTUSAMI AYYAR J. pointed out that clause 4 of article 179 of the Limitation Act, 1877, referred first to an application for actual execution and then to a step-in-aid. This, he considered, led to the inference that the step in aid of execution might be some preliminary proceeding prior to the actual execution.

In *Sankara Nainar v. Thangamma*(1) RAMESAM J. remarked that there was no warrant for the view that an application to take a step in aid of execution should be made in execution and no authority had been cited in support of the proposition. The learned Judge did not proceed to discuss the question and it must be taken that he formed this opinion on the wording used in the article. SPENCER J., who was of the same opinion, said that the law only required that there should be an application in accordance with law made to the proper Court.

In *Kannan v. Avvulla Haji*(2) DEVADOSS and SUNDARAM CHETTI JJ. referred to these two cases and said that it was too late in the day to question the principle laid down in *Kunhi v. Seshagiri*(3).

(1) (1921) I.L.R. 45 Mad. 202.

(2) (1926) I.L.R. 50 Mad. 403.

(3) (1882) I.L.R. 5 Mad. 141.

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The same question arose in *Balaguruswami Naicken v. Guruswami Naicken*(1) which was decided by DEVA-DOSS and WALLACE JJ. who observed that, where the act of the plaintiff was not in furtherance of execution or in a pending execution, his act could not be said to be one in aid of execution. It was sought to read this observation as supporting the opinion that there could not be an application to take a step in aid of execution when there was no application for execution pending; but in *Kannan v. Arvulla Haji*(2) it was made clear that *Balaguruswami Naicken v. Guruswami Naicken*(1) was not to be regarded as going to this length and, as we have indicated, the Court there held that *Kunhi v. Seshagiri*(3) should be followed.

The conflict in decisions was referred to in *Rarichan v. Kunhamu*(4) which was decided in 1934. The Division Bench, which heard that appeal, considered that the balance of the decisions appeared to confirm the correctness of the view taken in *Sankara Nainar v. Thangamma*(5).

The decisions in which the contrary view has been expressed are *Kuppuswami Chettiar v. Rajagopala Aiyar*(6), *Balasubramania v. Chit Co. Yela Nidhi*(7), *Abdul Kharim Saheb v. Lakshmanaswami*(8) and *Rama Subbayya v. Thimmiah*(9). These were also decided by Division Benches. The first of these appeals was heard by AYLING and VENKATASUBRA RAO JJ. The basis of the decision there was the opinion that a man could not be said to take some step in aid of a petition which had not been initiated. The Court did not, however, consider the case of *Kunhi v. Seshagiri*(3) which clearly shows that there can be an application which is a step in aid of execution outside

(1) (1924) 48 M.L.J. 506.

(3) (1882) I.L.R. 5 Mad. 141.

(5) (1921) I.L.R. 45 Mad. 202.

(7) A.I.R. 1919 Mad. 220.

(2) (1926) I.L.R. 50 Mad. 403.

(4) (1934) I.L.R. 57 Mad. 808.

(6) (1921) I.L.R. 45 Mad. 466.

(8) A.I.R. 1928 Mad. 440.

(9) (1941) 2 M.L.J. 754.

proceedings for execution. In none of the other cases was any reason given for the view expressed and in no case was *Kunhi v. Seshagiri*(1) mentioned or considered.

The question now under discussion was raised before PHILLIPS and MADHAVAN NAYAR JJ. in *Krishna Patter v. Seetharama Patter*(2). The learned Judges said that they were not prepared to accept *Kuppuswami Chettiar v. Rajagopala Aiyar*(3) without further consideration of the matter in the light of all the cases decided by the Court and left it there.

We consider that *Kunhi v. Seshagiri*(1) should be followed. The question must be decided on the wording of the article and the wording shows that the application to take a step in aid of execution is entirely separate from the application for execution. The important word is "or". Therefore a fresh period of limitation starts from the date of the final order in an application to take a step in aid of execution as well as from the date of a final order in an application for execution. Here we are not called upon to decide what is or what is not a step-in-aid. If an application amounts to an application to take a step-in-aid, that is sufficient and it does not depend whether there is then pending an application for execution.

Consequently the answer which we give to the question referred is that it is not necessary for the purpose of saving limitation under article 182 (5) of the Limitation Act that an application taken as a step in aid of execution should be made in a pending execution petition.

The costs of this reference will be made costs in the appeal.

G.R.

(1) (1882) I.L.R. 5 Mad. 141.

(2) (1926) I.L.R. 50 Mad. 49.

(3) (1921) I.L.R. 45 Mad. 466.

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APPELLATE CIVIL.

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

1944,
September 4.

CHUTTA VEETIL PUTHU PARAMBIL MUHAMMAD
KOYA AND FOUR OTHERS (PLAINTIFFS), APPELLANTS,

v.

PONMANICHANDAKATH KATHEESSA BI AND
SEVENTEEN OTHERS (DEFENDANTS 1 TO 14 AND NIL),
RESPONDENTS.*

Private international law—Will—Validity—Sunni Muhammadan born at Malabar migrating to Ceylon and domiciled there—His death at Ceylon leaving a will—Testator making dispositions of all his properties, movable and immovable, situated both in British India and Ceylon—Validity of dispositions—Law of Ceylon applicable to dispositions of immovables at Ceylon and movables wherever situate—Ceylon Ordinance No. XXI of 1844—Immovables in British India governed by lex situs, namely, Muhammadan law—Legacies in favour of heirs and dispositions exceeding one-third of testator's British Indian properties, invalid under that law.

A Muhammadan of the Sunni sect, born at Malabar, migrated to Ceylon and acquired a domicile there, abandoning the domicile of origin. He died in 1936 at Colombo, leaving a will by which he made dispositions of all his properties, immovable and movable, situated both in Ceylon and British India. On a question arising as to the validity of the will,

held: The dispositions under the will took full effect in regard to the immovable properties situated within Ceylon and to the movables whether situated within or outside it, but only partially in regard to the immovable properties situated in British India. The law of the country of the testator's domicile, namely, of Ceylon, applied to the immovable properties within Ceylon and to the movables whether in Ceylon or in British India. Under that law the testator had full powers of disposition over the movables wherever situated. The Ceylon Ordinance No. XXI of 1844 conferred upon him complete power of disposing all his property, including immovable property, within the Island of Ceylon. But the

* Appeal No. 351 of 1942.

Ordinance left untouched the Muhammadan law which, being the *lex situs*, governed the immovable properties in British India. Under the Muhammadan law legacies in favour of heirs are invalid and those in favour of other persons are valid only to the extent of one-third of the testator's properties. The will was consequently invalid under the Muhammadan law in so far as it made dispositions of immovable properties in British India in favour of the testator's heirs and also in so far as it purported to give in favour of persons other than heirs more than one-third of those properties.

Ahamath v. Sariffa Umma(1) referred to.

APPEAL against the decree of the Court of the Subordinate Judge of South Malabar at Calicut, dated 31st March 1942, and passed in Original Suit No. 39 of 1937.

Sir A. Krishnaswamy Ayyar and *C. K. Viswanatha Ayyar* for appellants.

K. Rajah Ayyar, S. Ramanujachari, C. D. Venkataramanan, B. Sitarama Rao and *B. Pocker* for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by LEACH C.J.—On 10th November 1936 one Puthen Veettil Umbichi Haji, a Muhammadan of the Sunni sect, died in Colombo possessed of considerable property there and in British India. He left a will, dated 7th March 1933, to which he added three codicils, dated respectively 25th September 1934, 4th February 1936 and 9th April 1936. By his will and codicils he disposed of the whole of his estate. The broad question raised by the appeal is whether by reason of an Ordinance passed by the legislative authority of Ceylon he acquired full testamentary power.

The testator was born at Chaliyam in Malabar in 1865. That this was the year of his birth has been agreed to by both sides in the course of the arguments in this Court. In his youth the testator migrated to Colombo where from a small beginning he built up a

(1) [1931] A.C. 799.

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large fortune. His heirs according to Muhammadan law are his widow Katheessa Bi, his daughter Ayissa Bi, and a cousin Moideen Kutti Haji who died on 5th December 1936. The testator had another daughter Ameena Bi who predeceased her father, leaving three sons and a daughter. The suit which has given rise to this appeal was filed by the heirs of Moideen Kutti Haji for the administration of the estate by the Court on the footing that the will was invalid. The Subordinate Judge held that the testator had acquired a domicile in Ceylon and that by reason of the Ceylon Ordinance No. XXI of 1844 he had full power to dispose of all his property by will. Consequently he dismissed the suit. The plaintiffs have appealed. They say that the testator had never abandoned his Indian domicile but, even if he had, the Ceylon Ordinance gave him no power to dispose of immovable property situate outside the Island of Ceylon. For reasons which we shall in due course state, we are of opinion that the Subordinate Judge was right in holding that the testator had acquired a domicile in Ceylon and that the Ceylon Ordinance gave him full power of disposing of all his property situate in the island and of movable property wherever it might be, but we do not agree that it conferred upon him power of disposing of his immovable property in British India. His power of disposal of such property was merely that allowed by the Muhammadan law.

It is agreed that for the purpose of deciding this appeal it is not necessary to discuss in detail the directions given by the testator. It is sufficient to state that, after making a number of bequests and constituting a waqf, he left one-third of the residue of his estate to his widow, one-third to his daughter Ayissa Bi and the remaining one-third to the children of his deceased daughter Ameena Bi. It is common ground that, if the estate falls to be administered according to Muhammadan law, the testator's cousin

Moideen Kutti Haji is entitled as a residuary to three-eighths of what falls to the heirs.

We have no hesitation in agreeing with the Subordinate Judge that the testator abandoned his domicile of origin and acquired a domicile in Ceylon. It is true that his wife and daughters always lived in Malabar and that he bought a house in Calicut for the members of his family. It is in evidence that when a Moplah leaves Malabar to reside abroad, his wife does not usually accompany him. It is the common practice for her to remain in her own locality and be content with visits from her husband. Throughout the fifty years during which the testator was living in Colombo, he paid very few visits to Calicut and his visits were of very short duration. He was married in 1913 when he was forty-eight years of age. After 1913 he visited Calicut only in 1915, 1918, 1926, 1927 and 1936, and, as the Subordinate Judge points out, on each occasion special business brought him over to India. It is said that, inasmuch as his wife and daughters were in Malabar and he had acquired a house in Calicut, he must be deemed to have had an intention to return there when he had become too old for business and, therefore, the finding that he had abandoned his domicile of origin was erroneous.

This contention ignores important evidence to the contrary. The first codicil to the will contains the following recital:—

“Whereas I have executed my said last will and testament in accordance with the laws governing intestate succession in Ceylon, inasmuch as I have acquired my permanent domicile in Ceylon, and I have no intention whatsoever of abandoning the said domicile.”

There is evidence which cannot be contradicted that it was his wish that he should be buried in Colombo and his wish was respected. In 1934 he applied for permission to be buried in the Wolfendal Mosque, Colombo. In this connection representations were made to the Chairman of the Municipal Council and

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Mayor of Colombo by Mr. A. R. A. Razik, another prominent resident of that city. In a letter, dated 17th August 1934, and addressed to the testator, the Mayor stated that he had personally no objection in the special circumstances of the case to the grant of the permission when actually required. The testator was in fact buried in this mosque. At one time the testator contemplated building a mosque in Colombo in order that he might be buried within its precincts. In addition to this evidence, letters have been exhibited which show that the testator regarded Colombo as his permanent home, and there is oral testimony which is not open to question that the testator had stated that he wanted to remain in Colombo for the rest of his life.

As the testator had acquired a domicile in Ceylon, Ceylon Ordinance No. XXI of 1844 applied to him. The judgment of the Privy Council in *Ahamath v. Sariffa Umma*(1) makes it clear that the Ordinance conferred upon the testator complete power of disposing of all his property within the Island of Ceylon. In these circumstances the bequests by the testator so far as they relate to his property in Ceylon cannot be challenged.

It is an accepted rule of international law that a testator can dispose of his property according to the law of the country of his domicile. The country of domicile here was Ceylon and the law of that country recognizes full testamentary disposition. Therefore the testator had the right of disposing of his movable property in British India.

We shall now turn to the question of the bearing of the Ceylon Ordinance on immovable property held by the testator in British India. It is said that the legislative authority in Ceylon has no power to alter the personal law of Muhammadans domiciled in the island so as to affect the succession to their immovable

(1) [1931] A.C. 799.

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property situate abroad. This may be the case, but the Court is not called upon to give a decision on the point, as it is quite clear from the Ordinance itself that the legislative authority did not intend to alter the Muhammadan law of succession in respect of immovable property outside the island. Section 1 of the Ordinance opens with these words :

"It shall be lawful for every person competent to make a will, to devise, bequeath and dispose of by will all the property within this colony which at the time of his death shall belong to him or to which he shall be then entitled."

It will be observed that the power is limited to all the property *within* the colony. Section 4 deals with wills made beyond the limits of the colony and this only applied to dispositions of immovable property within the colony. Therefore the Ordinance leaves untouched the Muhammadan law in so far as immovable property situate abroad is concerned. In these circumstances there can be no doubt that the testator's immovable possessions in British India are governed by the *lex situs*, which is the personal law of the Muhammadans in British India. Under that law a Muhammadan can leave one-third of his estate as he likes, provided that he does not leave it to his heirs according to Muhammadan law. The testator did purport to leave property of his in British India to his heirs, namely, his widow and his surviving daughter. This was unlawful according to the *lex situs* and to this extent his will cannot stand.

As they are not heirs according to Muhammadan law, the testator's bequest to the children of his deceased daughter is lawful, provided that they do not get more than one-third of the immovable property in British India. They cannot get more than one-third. After this legacy has been provided for, the widow will get one-eighth, Ayissa Bi one-half and the plaintiffs three-eighths of the immovable property in British India. All property in Ceylon and the movable property abroad will be distributed according to the

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will. We may add that the gifts made by the testator during his lifetime and upheld by the trial Court have not been questioned in this Court.

The case will be remanded to the trial Court with directions to administer the estate in accordance with this judgment. We consider that the costs of all parties, both here and below, should be paid out of the estate.

N.S.

APPELLATE CIVIL.

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

1944,
September 13.

UMMAJI JAVICHAND FIRM OF GUNTUR (SEVENTH
RESPONDENT), APPELLANT,

v.

RAO BAHADUR RAVULA SUBBA RAO GARU REPRESENTED BY HIS GENERAL POWER OF ATTORNEY AGENT,
HARIPRASADA RAO (PETITIONER), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), ss. 144 and 151—Order for restitution apart from sec. 144—Inherent powers of Court—Refusal of order under sec. 151 in absence of equities.

In execution of a decree obtained by him against the sons of his debtor, S attached the interests of the judgment-debtors in certain properties and purchased them in court-auction. An application of the judgment debtors under Order XXI, rule 90, of the Code of Civil Procedure having been dismissed, the sale was confirmed. Out of the sale price deposited by S in Court the other creditors who had attached the interests of the judgment-debtors were paid certain amounts by way of rateable distribution. The judgment-debtors thereafter filed a suit to set aside the sale, which was dismissed by the trial Court. But on appeal the sale was set aside as S did not oppose it. The creditors who had obtained rateable distribution were not made parties to the suit or appeal. It was found that S had surrendered his rights under the sale

* Appeals Against Orders Nos. 469 and 668 of 1943.

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as he was given under a consent decree in another suit security by way of a charge subject to a prior mortgage over the properties purchased by him. S filed subsequently an application for restitution of the amounts paid to the other two creditors by way of rateable distribution.

Held: Neither section 144 nor section 151 of the Code of Civil Procedure was applicable to the case. The equities were not such as to entitle S to get restitution by means of an application under section 151, even assuming that the provisions of that section could be invoked in cases where section 144 of the Code did not apply.

Case law discussed.

APPEALS against the order of the Court of the Subordinate Judge of Bapatla, dated 12th day of November 1942, and made in Execution Application No. 136 of 1941 in Original Suit No. 64 of 1934.

P. Somasundaram, M. S. Ramachandra Rao and D. R. Krishna Rao for appellant.

P. Satyanarayana Rao and B. S. Ramachandra Rao for respondent.

The JUDGMENT of the Court was delivered by LEACH C.J.—The question in these appeals is whether the lower Court had the power to order restitution on a petition or whether it should have relegated the petitioner to a regular suit.

In Original Suit No. 64 of 1934 in the Court of the Subordinate Judge of Bapatla the first respondent sued Venkataratnarao and Kamaraju, the minor sons of one Ramakoteswara Rao, for the recovery of a sum of money due by them under the pious obligation rule of Hindu law. He obtained a decree and attached the judgment-debtors' interest in certain properties belonging to the family. An auction was held on 1st December 1936 and the decree-holder purchased the interest of the judgment-debtors for a sum of Rs. 2,363, which he paid into Court. The judgment-debtors applied under Order XXI, rule 90, of the Code of Civil Procedure for an order setting aside the sale. The application was dismissed because they

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failed to comply with the requirements of the rule. On 28th September 1937 the sale was confirmed. There were other creditors who had attached the judgment-debtors' interest in these properties and they applied for rateable distribution of the Rs. 2,363. Their applications were granted and the money was paid out rateably.

Notwithstanding the provisions of rule 92 of Order XXI, the judgment-debtors filed a suit (Original Suit No. 77 of 1937) in the Court of the District Munsif of Bapatla for a declaration that the sale was void by reason of material irregularity. The District Munsif rightly held that the suit did not lie and dismissed it on 23rd December 1939. The only contesting defendant in the suit was the first respondent, the auction purchaser. The creditors who obtained rateable distribution of the Rs. 2,363 were not made parties. The judgment-debtors appealed to the Subordinate Judge. This appeal (Appeal No. 92 of 1940) was decided on 17th April 1940 and was allowed. Certain reasons were given by the Subordinate Judge for his decision, but we cannot accept them as valid grounds for his decision. The first respondent did not support the judgment of the District Munsif and this was in all probability the deciding factor.

The reason why the first respondent did not oppose the appeal is made plain by what happened in Original Suit No. 32 of 1937 in the Court of the Subordinate Judge of Bapatla. That suit was filed by one Kuppuswami Chowdari against the judgment-debtors, their father and the first respondent to enforce a mortgage which he held over the properties attached by the first respondent in execution of his decree in Original Suit No. 64 of 1934 and other properties belonging to the family. On 20th April 1940, that is, three days after Appeal No. 92 of 1940 had been allowed, a decree was passed by consent in Original Suit No. 32 of 1937 and under it the first respondent gave up his rights

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under the attachment which he had obtained in execution of his own decree, receiving as compensation a second charge for the sum of Rs. 4,000 on the properties which he had bought at the auction held on 1st December 1936. The decree also provided that Kuppuswami Chowdari, the mortgagee decree-holder, should proceed first against the other properties of the family. There can be no doubt that the first respondent surrendered the rights which he had obtained in the execution proceedings because he was given security for the payment of the Rs. 4,000.

In Execution Application No. 136 of 1941 the first respondent applied to the Subordinate Judge for an order directing the creditors who had obtained rateable distribution of the Rs. 2,363 to pay into Court the amounts which they had received. The application purported to be under sections 144 and 151 of the Code of Civil Procedure. The application was successful and this has led to the institution of the two appeals now before us. Civil Miscellaneous Appeal No. 469 of 1943 has been filed by a creditor who received Rs. 346-3-6 out of the Rs. 2,363 and Civil Miscellaneous Appeal No. 668 of 1943 by a creditor who drew Rs. 563-12-0. They were the fourth and seventh respondents respectively in the first respondent's application for restitution. The Subordinate Judge considered that the matter was governed by the decision of this Court in *Rego v. Ananthamathi*(1). He held that the case did not fall within section 144, but he was of the opinion that he could make the order asked for by reason of the inherent powers of the Court reserved by section 151. We shall discuss *Rego v. Ananthamathi*(1) presently but, before doing so, it will be convenient to refer to certain other cases which were quoted in the course of the arguments. These are *Raja Rao v. Ananthanarayanan Chetty*(2), *Macha*

(1) I.L.R. [1942] Mad. 949. . . . (1921) 42 M.L.J. 308.

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Koundan v. Kottora Koundan(1) and *Jai Berhma v. Kedar Nath Marwari*(2).

The facts in *Raja Rao v. Ananthanarayanan Chetty*(3) which was decided by a Division Bench were these. Certain properties were attached in execution proceedings and brought to sale. The purchase consideration was paid by the successful bidders into Court and was rateably distributed among other creditors of the judgment-debtor. The sons of the judgment-debtor, who had objected in the execution proceedings to the properties being sold on the ground that they belonged to a trust, brought a suit to establish this claim. The decree asked for was granted and the plaintiffs recovered possession of the properties. The auction purchasers then applied for an order for the refund of the purchase moneys which had been paid out to the other creditors of the judgment-debtor. The question before the Court was whether section 144 applied and, if it did not, whether section 151 could be invoked in order to obtain a refund of the moneys paid out to the creditors. It was held that section 144 did not apply because the decree under which the sale had taken place had not been varied. The Court considered that section 151 could not be called in aid because that section had been inserted in the Code in order to meet the ends of justice and to prevent an abuse of the process of the Court. It should not be invoked to obtain an order which only sets right one injustice by the infliction of another.

The case of *Macha Koundan v. Kottora Koundan*(1) was decided by a Full Bench. A mortgagee sued to enforce his mortgage and obtained a decree for sale. His legal representative instituted proceedings in execution of the decree and in the sale which followed the property was purchased by the respondent for

(1) (1935) I.L.R. 59 Mad. 202 (F.B.). (2) (1922) I.L.R. 2 Pat. 10 (P.C.).
(3) (1921) 42 M.L.J. 208.

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a sum of Rs. 825. The mortgagor was a member of a tarwad, the junior members of which sued for a declaration that the decree and the sale were not binding on them. They further claimed that they were entitled to be put in possession of the property. This suit was successful. The respondent as the auction purchaser then filed an application under sections 47, 147 and 151 of the Code of Civil Procedure for a refund of the purchase money. The question raised was whether he was entitled to an order on a petition or whether he was bound to institute a regular suit. The Court held that the remedy was by suit and not by application. The principal judgment was delivered by RAMESAM J. who summarized his conclusions in the following words:—

“The result is, in a case where the sale is set aside in execution by an application under rules 89, 90 or 91, the auction purchaser can obtain a refund on an application under Order XXI, rule 93, Civil Procedure Code. But where the sale turns out to be futile by a finding in another suit, the only remedy that the party has is a regular suit and not an application under Order XXI, rule 93. There may be defences in that suit, e.g., that the case was not properly conducted and that the finding is not binding.”

The Subordinate Judge considered that the judgment of the Full Bench did not apply in the present case because the auction purchaser was not the decree-holder but a stranger. For the appellants it is contended that the distinction drawn by the Subordinate Judge has no real bearing.

The Privy Council decided *Jai Berhma v. Kedar Nath Marwari*(1). There the property had been sold in execution and the sale confirmed, but the sale had been set aside in an earlier appeal to the Judicial Committee. Some of the properties of the judgment-debtors were encumbered and some were unencumbered. The unencumbered properties were three-eighths of the whole and the encumbered properties

(1) (1922) I.L.R. 2 Pat. 10 (P.C.).

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five-eighths. The decree-holders attached three-eighths of the encumbered properties, but by mistake the Court sold three-eighths of the unencumbered properties and confirmed the sale, as did the Calcutta High Court; but on appeal to the Privy Council their Lordships held that the sale must be set aside. The purchasers at the auction had paid the amount of their bid Rs. 1,12,000 into Court. There were other creditors of the judgment-debtors who held decrees and they attached this money, which was in due course paid out to them. Having won their appeal to His Majesty in Council, the judgment-debtors applied for an order for possession of the properties by way of restitution. The auction purchasers were in possession and they contended that they could not be compelled to vacate without recovering their money. This contention was accepted by the Patna High Court which then had jurisdiction and the High Court's decision was concurred in by the Privy Council. The Judicial Committee held that the judgment-debtors could not get possession until they had paid the auction purchasers the difference between the Rs. 1,12,000 and the amount which had been received by the auction purchasers in mesne profits during the period of their possession. Their Lordships said that the auction purchasers had parted with their purchase money by paying it into Court on the faith of the order of confirmation and the certificate of sale. This money had been distributed amongst the other creditors and it would be inequitable and contrary to justice that the judgment-debtors should be restored to the property without making good to the auction purchasers the moneys which had been applied for their benefit. Their Lordships rejected the suggestion that the auction purchasers should look to the creditors to whom the Rs. 1,12,000 had been paid. In coming to this conclusion their Lordships undoubtedly had regard to the inherent powers of the Court. The

facts were, however, very different from the facts in the present case.

We now turn to *Rego v. Ananthamathi*(1). The suit there was on a mortgage which had been executed by one member of a joint family. The plaintiff said that the properties mortgaged constituted the separate estate of the mortgagor and obtained a decree on this basis. The properties were sold in execution, but in order to prevent the sale being confirmed the other coparceners paid into Court the purchase price, the sum of Rs. 11,470, the amount required by order XXI, rule 89. In the circumstances they were entitled to have the sale set aside and an order to this effect was passed. Another creditor of the mortgagor attached Rs. 9,000 of the Rs. 11,470 and the amount was paid out to him. The other coparceners appealed against the decree which had been passed in favour of the mortgagee and the appellate Court held that the decree was not binding on the appellants as the properties belonged to the family. Thereupon they applied by a petition for an order on the attaching creditor for the restitution of the Rs. 9,000. The Court recognized that section 144 of the Code of Civil Procedure did not apply, but considered that section 151 enabled a Court to recall money paid out by it to a person not entitled to it. They did not, however, decide whether the equities were such as to entitle the petitioners to an order. They sent the case back to the executing Court to consider and decide this question. The judgment in *Raja Rao v. Ananthanarayanan Chetty*(2) was distinguished on the ground that the facts there were very different.

We are not called upon in these appeals to decide whether *Raja Rao v. Ananthanarayanan Chetty*(2) and *Rego v. Ananthamathi*(1) can stand together and if not which is to be preferred, nor need we pause to consider how far the judgment of the Privy Council in *Jai*

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(1) I.L.R. [1942] Mad. 949.

(2) (1921) 42 M.L.J. 808.

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Berhma v. Kedar Nath Marwari(1) really goes. We will assume for the purpose of deciding these appeals that a Court can in a case to which section 144 does not apply invoke section 151 when the equities demand it. But this is not such a case. So far as the equities are concerned the appellants have far the better case. As we have pointed out, the first respondent did not oppose the appeal (Appeal No. 92 of 1940). He allowed the sale to be set aside when the judgment-debtors were not entitled to this and he did so because of the advantage which he was to receive under the decree to be passed by consent in Original Suit No. 32 of 1937. We are not prepared on an application which does not fall within section 144 to allow him to recover from the appellants what they received of the Rs. 2,363 under the order of the executing Court. As indicated in *Macha Koundan v. Kottora Koundan*(2), the appellants in a regular suit filed would have an opportunity of showing that the appeal (Appeal No. 92 of 1940) should not have been allowed. We are firmly of the opinion that this is not a case in which section 151 should be applied and that the first respondent's remedy, if he has one, is by a regular suit to which he must be relegated.

The appeals are allowed with costs here and below.

N.S.

(1) (1922) I.L.R. 2 Pat. 10 (F.C.). (2) (1935) I.L.R. 59 Mad. 202 (F.B.).

APPELLATE CIVIL.

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

T. A. JANAKUMARA NAINAR (PLAINTIFF), APPELLANT,

v.

T. A. SAMANTHABADRA NAINAR (DEFENDANT),
RESPONDENT.*

1944,
September 12.

Contract of indemnity—Absolute in terms—Effect—Loss attributable to change in law—If covered—When such terms could be construed as qualified—Rule of construction—Test—Tamil word “kalan”—Meaning of.

In an indemnity bond, dated 5th July 1930, after reciting the settlement between the parties and the assignment of certain promissory notes and mortgages in full satisfaction of the debt due to the plaintiff, the defendant stipulated as follows: “I shall make good the loss if any dispute (*kalan*) should arise owing to the renewal of the said bonds or in realizing the dues on the renewal of the said bonds. I agree to pay the costs of going to Court and the costs which might be ordered by the Court. I agree to make good the loss if any dispute (*kalan*) should arise in realising the amounts on the above-mentioned deeds. I hold myself responsible until the cash in respect of assigned deeds and bonds is realised.” Contemporaneous deeds of assignment of the mortgages also contained words to a similar effect. The plaintiff filed suits on the mortgages and, owing to the relief given to the mortgagors under the provisions of the Madras Agriculturists Relief Act (IV of 1938), realized amounts considerably less than the amounts due to him under the mortgages. Thereupon the plaintiff filed a suit against the defendant for the recovery of the loss, being the difference between the amounts realized by him on the mortgages as aforesaid and the full amounts payable thereunder. The defendant contended, *inter alia*, that the said covenants to indemnify did not cover losses arising out of the operation of the Madras Agriculturists Relief Act, as neither of the parties could have foreseen in 1930 the passing of such an Act by the Legislature in 1938.

Held: The defendant was liable to make good the loss. The Tamil word *kalan* is a word of somewhat loose connotation

* Appeals Nos. 95 and 108 of 1943.

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and in the context it means dispute. The contract of indemnity being absolute in terms must be deemed to cover losses attributable even to a change of law which the parties could not have foreseen at the time of the contract.

Whether the obligation under a contract absolute in terms becomes qualified by an occurrence which the parties did not foresee and provide for is a question of construction in each case, regard being had to the language used, the nature of the contract and the surrounding circumstances, the test being what they would as fair and reasonable men have agreed upon if they had in view the possibility of such occurrence. In the circumstances of the case if the possibility of a law scaling down these debts had occurred to the parties they as fair and reasonable men would not have agreed that the obligation to indemnify should be at an end.

Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation, Ltd.(1) followed.

APPEALS against the decree of the District Court of North Arcot in Original Suit No. 9 of 1942, dated 2nd November 1942.

V. T. Rangaswami Ayyangar and *K. Kalyanasundaram Ayyar* for appellant.

K. Rajah Ayyar and *V. Seshatri* for respondent.

Cur. adv. vult.

PATANJALI
SASTRI J.

The JUDGMENT of the Court was delivered by PATANJALI SASTRI J.—This appeal and cross-appeal arise out of a suit to enforce an indemnity bond. The plaintiff's claim having been partly allowed and partly disallowed, both parties have preferred appeals.

Between 1926 and 1929 the defendant borrowed various sums of money on promissory notes from the plaintiff's father who died in February 1930. In July 1930 there was a settlement of account and a sum of Rs. 11,859-5-0 having been found to be due from the defendant the latter assigned to the plaintiff in full satisfaction of the debt ten promissory notes of the value of Rs. 4,182-15-0 and two mortgages of the value of Rs. 4,583-10-0 executed in his own favour by third parties, and paid Rs. 1,071-7-0 in cash aggregating

in all to Rs. 9,838, the balance being remitted by the plaintiff. The promissory notes were endorsed and delivered and for the mortgages which were of the years 1911 and 1929 two assignment deeds were executed on 3rd July 1930. The principal and interest due under each mortgage up to the date of the assignment was calculated and specified in the deeds which were in similar terms, and the plaintiff was authorized to "recover directly the above amount of principal and interest as well as the interest that will accrue hereafter according to the terms of the hypothecation deed". And in each deed there was a stipulation that "if in the matter of such recovery any dispute (*kalan*) arises I shall make good (the loss)". The defendant also executed on 5th July 1930 a so-called "receipt" which was really in the nature of an indemnity bond. In this document, after reciting the settlement of account between the parties and the assignment of the promissory notes and mortgages in full satisfaction of the debt due to the plaintiff, the defendant stipulated as follows :

"I shall make good the loss if any dispute (*kalan*) should arise owing to the renewal of the said bonds or in realizing the dues on the renewal of the said bonds. I agree to pay the costs of going to Court and the costs which might be ordered by the Court. I agree to make good the loss if any dispute (*kalan*) should arise in realizing the amounts on the abovementioned deeds. I hold myself responsible until the cash in respect of assigned deeds and bonds is realized."

In 1935 the plaintiff sued in the Court of the District Munsif, Ranipet, to enforce the mortgage of 1929 which was assigned to him for Rs. 1,409-12-0 and obtained a decree for Rs. 3,015. This decree was, however, scaled down to Rs. 1,165 on 26th October 1938 at the instance of the mortgagor who claimed the benefit of the Madras Agriculturists Relief Act, 1938. The plaintiff also brought Original Suit No. 13 of 1937 in the Court of the Subordinate Judge of Vellore claiming Rs. 6,409-5-7 on foot of the other mortgage assigned

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(1) [1942] A.C. 154, 184.

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to him for Rs. 3,173-14-0 but, the said Act having come into force during the pendency of the suit and the mortgagor in this case too having claimed its benefit, a decree for Rs. 63-13-0 only was passed after scaling down the debt in accordance with the provisions of that Act. The plaintiff thereupon issued a notice of demand on 7th October 1939 requiring the defendant to make good the loss by paying the difference between the amounts realized by him on the mortgages as aforesaid and the full amounts payable thereunder, and failing to obtain satisfaction of his claim instituted the present suit for recovery of the amount (Rupees 7,833-3-7) with interest at six per cent per annum from the date of demand. The defendant pleaded, *inter alia*, that the covenants to indemnify the plaintiff contained in the deeds of assignment and the so-called receipt did not cover losses arising out of the operation of the Madras Agriculturists Relief Act, 1938, as neither of the parties could have foreseen in 1930 the passing of such an Act by the Legislature and that, in any event, the indemnity extended only to the sum of Rs. 4,583-10-0, the amounts due on the two mortgages on the date of assignment, i.e., 3rd July 1930, and not to the interest accruing due subsequent to that date. He also claimed such relief as he might be found entitled to under the Madras Agriculturists Relief Act, 1938, as he was an agriculturist within the meaning of that Act. The Court below rejected the first plea but accepted the second and passed a decree for Rs. 4,583-10-0 with interest at six and one-fourth per cent per annum less the amounts realized by the plaintiff on the mortgages, i.e., for rupees 4,176-1-1. From this decree the plaintiff has preferred Appeal Suit No. 95 of 1943 claiming the balance of the amount sued for, and the defendant has preferred Appeal Suit No. 108 of 1943 contending that the covenant for indemnity does not cover losses due to the new Act.

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It is obvious that the two assignment deeds and the so-called receipt are parts of the same transaction and must be read together. There was some controversy as to the exact connotation of the Tamil word “*kalan*” so commonly used in conveyances in this part of the country. Mr. Rajah Ayyar for the defendant suggested that it signified a defect in title, referring to *Annathurai Aiyar v. Ramanuja Chariar*(1) where the word was understood in that sense, and urged that the covenant contemplated only losses due to some invalidating fact such as fraud, want of due execution, absence of consideration, etc., vitiating the mortgages assigned. We are unable to accept this restricted interpretation of the covenants. It is most unlikely that the parties, while foreseeing and guarding against such contingencies, would have failed to provide against the much more obvious and probable contingency of the debtor's default in payment. “*Kalan*” is a word of somewhat loose connotation and its official translation as “dispute” is supported by Winslow's Dictionary and would seem to fit the context best. In this sense the covenant must be taken to provide for indemnification of the plaintiff against loss arising out of any dispute raised by the debtors in the matter of realising the mortgage debts assigned to him by the defendant. The contract being thus absolute in terms must, *prima facie*, be taken to cover losses attributable even to a change of the law which the parties could not have foreseen at the time of the contract.

Mr. Rajah Ayyar, however, contended that people must ordinarily be taken to contract with reference to the law as existing at the time, and that a term or condition should be implied that the obligation should cease if the law was subsequently altered so as to affect the rights of parties in a manner not contemplated by them. On this principle, it was urged that, when

(1) (1912) 22 M.L.J. 411.

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the Madras Agriculturists Relief Act was passed eight years later resulting in the scaling down of the debts assigned to the plaintiff, the debtors being agriculturists, the indemnity ceased to be operative. There is no warrant either in principle or in precedent, for the broad proposition contended for by the learned Counsel. No doubt contracts absolute in their terms have sometimes been construed as subject to implied conditions qualifying the obligation. In England, where there is no positive rule of law such as is enacted in section 56 of the Indian Contract Act declaring contracts void for supervening impossibility of performance, Courts have often implied a condition, as a matter of construction, that the contract, though absolute in terms, shall be discharged if its substratum or essential foundation disappears or performance becomes impossible. Many of the decisions cited in the course of the argument before us are only illustrations of cases where the Courts have implied or refused to imply such a condition in contracts absolute in terms; e.g., *Baily v. De Crespigny*(1), *Newby v. Sharpe*(2) and *Walton Harvey, Ltd. v. Walker and Homfrays, Ltd.*(3). It is unnecessary to discuss these and other similar decisions to which we were referred, as the rule of construction applicable in such cases has been recently expounded in the House of Lords. In *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation, Ltd.*(4) Lord WRIGHT observed:

"It is true that a contract, absolute in terms, may be absolute also in effect. The contractor, if he cannot perform, must pay damages. *Prima facie*, the actual language governs. But a contract absolute in terms is not necessarily absolute in effect.

* * * * *

It is a question of the construction of the particular contract whether the obligation is absolute or whether it is qualified. It will thus be seen that the Court is not claiming

(1) (1869) L.R. 4 Q.B.D. 180.
(3) L.R. [1931] 1 Ch. 274.

(2) (1878) 8 Ch.D. 39.
(4) [1942] A.C. 154, 184.

to exercise a dispensing power, or to modify or alter contracts. The parties did not express the qualification because they did not think of the possibility of the occurrence but, as Lord WATSON said in *Dahl v. Nelson, Donkin & Co.*(1), 'when one or other of these possibilities becomes a fact the meaning of the contract must be taken to be not what the parties did intend (for they had neither thought nor intention regarding it) but that which the parties as fair and reasonable men would presumably have agreed upon, if having such possibility in view they had made express provision as to their several rights and liabilities in the event of this occurrence'. In short, in ascertaining the meaning of the contract and its application to the actual occurrences, the Court has to decide, not what the parties actually intended, but what as reasonable men they should have intended. The Court personifies for this purpose the reasonable man."

It will be seen that this statement of the law affords no support to the broad contention of Mr. Rajah Ayyar that a change in the law affecting the rights of parties makes a contract unenforceable in virtue of an implied term to that effect. It is a question of construction in each case regard being had to the language used, the nature of the contract and the surrounding circumstances.

The question then is whether the defendant is absolved from his liability to indemnify the plaintiff by reason of the enactment of the Madras Agriculturists Relief Act, 1938, in the circumstances of this case. As has been stated, the contract is absolute in terms. The new Act does not prohibit the payment of debts due by agriculturists; it only confers on them certain benefits by providing for a scaling down of their debts. There is no question of the mortgagors' covenant to pay or the defendant's covenant to indemnify having been rendered impossible of performance. And what are the surrounding circumstances? On the date of the contract, the defendant owed Rs. 11,854 to the plaintiff and, being unable to pay the amount in cash, he assigned to the plaintiff certain promissory

(1) (1881) 6 A.C. 38, 59.

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notes and mortgages of lesser value (Rs. 9,833) in full satisfaction, undertaking to indemnify the plaintiff against loss in realising the debts. In that situation, if the possibility of a law scaling down these debts had occurred to the parties, would they "as fair and reasonable men" have agreed that the obligation to indemnify should be at an end? We think not. Indeed, to imply such a term would be inconsistent with the intention of the parties and defeat the very object of the settlement arrived at. We may refer, in this connection, to the decision of this Court in *Subramanian Chettiar v. Batcha Rowther*(1) where it was held that the obligation of a surety was not affected (except, of course, in so far as he is himself an agriculturist) by the principal debtor obtaining relief under the Act, though the point now raised was not argued in that case.

The question next arises as to what sum the defendant is liable to pay under the covenant for indemnity. We are unable to agree with the learned District Judge's conclusion on this point. The learned Judge assumed that the loss to the plaintiff arose on the date of the assignment itself, i.e., 3rd July 1930, and finding that the defendant was an agriculturist within the meaning of the new Act, proceeded to scale down the liability by disallowing all interest on the amount of the loss till 1st October 1937. This is clearly wrong as the plaintiff's loss arose only when the mortgage-debts were scaled down, i.e., on 31st August 1938 and 26th October 1938 respectively, and such loss was, plainly, the difference between the full amounts payable under the bonds and the amounts actually realized by the plaintiff, i.e., Rs. 7,833-3-7, the sum claimed in the suit. The only relief which the defendant could claim as an agriculturist under the Act is in respect of interest for the period subsequent to the dates aforementioned, but the plaintiff has

(1) (1941) 2 M.L.J. 751.

claimed interest only from the date of his demand, viz., 7th October 1939, and that at six per cent per annum which is less than the statutory rate. No question, therefore, arises of awarding relief to the defendant as an agriculturist. We may notice here, in order to reject a suggestion founded on the last clause in the so-called "receipt" quoted above, that the transaction was only a contract of guarantee and that, the liability of the defendant as a surety having arisen on 3rd July 1930, all subsequent interest on the amounts due in respect of the mortgages as on that date should be wiped out under the new Act as he has been found to be an agriculturist. No such suggestion was made in the Court below, and whatever may be the legal effect of the clause relied upon if it had stood alone, we are satisfied that the document read as a whole and with the covenants in the assignment deeds is clearly a contract of indemnity and must receive effect accordingly.

In the result, Appeal Suit No. 95 of 1943 is allowed and the plaintiff will have a decree as prayed for with costs throughout. Appeal Suit No. 108 of 1943 is dismissed with costs.

One Advocate's fee in both appeals.

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APPELLATE CIVIL.

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

1944,
August 31.

RAO BAHADUR S. A. S. RM. RAMANATHAN CHETTIAR
(PLAINTIFF), APPELLANT,

v.

M. P. PALANIAPPA CHETTIAR AND FIVE OTHERS
(DEFENDANTS 1, 2 AND 5 TO 8), RESPONDENTS.*

Madras Hindu Religious Endowments Act (II of 1927), sec. 73—Suit filed under—No power in Court to settle scheme in such suit—Trustee—Denial by him of existence of substantial endowment—Breach of trust, if denial not properly explained, ground for removal from trusteeship—Transfer of Property Act (IV of 1882), sec. 123—Gift—Three modes of voluntary transfer of property in favour of temple, (i) dedication directly to deity, (ii) transfer of property by way of gift to trustees under sec. 123, and (iii) creation of trust—Mere credit entries, by a person wishing to create trust, in his own account books in favour of trust without corresponding allocation of sums credited—Not amounting to dedication, gift or creation of trust.

In a suit brought under section 73 of the Madras Hindu Religious Endowments Act for the removal of the defendants from trusteeship, the appointment of a proper trustee and an account of the defendants' management of the temple properties, it was found: (i) Though the temple owned extensive properties, the defendants denied in certain proceedings before the Hindu Religious Endowment Board and in the suit that the temple owned any property except a small item. (ii) The defendants were proprietors of a firm in Rangoon whose agent was acting as their banker, there being a regular course of remittances and withdrawals. Credits were made in favour of the temple in the Rangoon accounts under the defendants' instructions balanced by corresponding debits to them of certain moneys. It was contended that these book entries had the effect of transferring the moneys from the defendants as donors to themselves as the trustees of the temple and that a valid gift had been created within section 123 of the Transfer of Property Act.

Appeal No. 332 of 1939.

Held: (1) A denial by the trustees of the existence of a substantial endowment, if not properly explained, constitutes a breach of trust which might warrant their removal from the trusteeship, but that, in the circumstances of this case, the order of the trial Court refusing to remove the trustees was justified.

Sivasankara v. Vadagiri(1) explained.

(2) There are three modes in which a voluntary transfer of property in favour of a temple can be validly and effectually made: (i) A dedication of property directly to the deity, which is sanctioned by Hindu law and needs no compliance with the provisions of the Transfer of Property Act. The subject-matter of the dedication must be some specific property or asset, and a mere credit entry in a book of account cannot be the subject of a dedication.

Gangi Reddi v. Tammi Reddi(2), *Sooniram Ramniranjandass v. Alagu Nachiyar Koil*(3) and *Narasimha Swami v. Venkatalingum*(4) followed.

(ii) Property may be transferred by way of gift to the trustee of a temple, complying with the provisions of section 123 of the Transfer of Property Act. In the circumstances of the case no constructive delivery of the money could be assumed, since no particular sum was even separated from the general funds of the defendants' family or business and placed on a footing incompatible with the exercise of beneficial ownership by the defendants' family.

(iii) The third mode is by the creation of a trust, but the credit entries in question did not amount in law to the creation of a trust since a mere credit entry in favour of a charity which did not correspond to an allocation of the sums credited cannot amount to holding the sums in trust.

Hirbai v. Jan Mahomed Khalakdina(5) followed.

There was no dedication of gift or trust of the sums (other than those received from strangers) credited to the temple and the defendants were not accountable for such sums.

Sooniram Ramniranjandass v. Alagu Nachiyar Koil(3) and *Chambers v. Chambers*(6) followed.

Held further: In a suit instituted under section 73 of the Madras Hindu Religious Endowments Act, the Court has no power to settle a scheme.

(1) (1899) I.L.R. 13 Mad. 6.
(3) [1939] Rang. L.R. 59 P.C.).
(5) (1881) I.L.R. 7 Bom. 229.

(2) (1927) I.L.R. 50 Mad. 421 (P.C.).
(4) (1927) I.L.R. 50 Mad. 687 (F.B.).
(6) I.L.R. [1944] Mad. 617 (P.C.).

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PALANIAPPA. APPEAL against the decree of the District Court of South Arcot, dated 20th February 1939, and passed in Original Suit No. 37 of 1935.

A. Swaminatha Ayyar and M. S. Thyagaraja Ayyar for appellant.

K. Rajah Ayyar for V. Ramaswami Ayyar and N. G. Krishna Ayyangar for respondents.

Cur. adv. vult.

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THE JUDGMENT of the Court was delivered by PATANJALI SASTRI J.—This is an appeal from the judgment and decree of the Court of the District Judge of South Arcot dismissing with costs a suit brought by the appellant under section 73 of the Madras Hindu Religious Endowments Act (II of 1927) for the removal of the respondents and two other members of their family, since deceased, from the trusteeship of a temple known as Sri Elamaiyakkinar Temple situated at Chidambaram, for the appointment of a proper trustee and for an account of the respondents' management of the temple properties. The appellant alleged in his plaint various acts of misfeasance and malfeasance and misappropriation of trust moneys by the respondents' family in the course of their management, as grounds for the reliefs sought. The respondents pleaded, *inter alia*, that the appellant was not a "person having interest" in the temple within the meaning of the Act referred to above and was therefore not entitled to sue, that the temple owned only about one acre of nanja land in cusba Chidambaram, which fetched an annual rent of about 15 to 20 *kalam*s of paddy, that it had no other source of income, that the temple was maintained only by the private munificence of the respondents and that they were not accountable. The respondents also denied the allegations of mismanagement and breaches of trust and claimed to be the hereditary trustees of the temple not liable to be removed. The Court below held that the appellant was not entitled to sue as a person

having interest in the temple and that he had failed to prove that the respondents or any of them committed any of the acts of misfeasance or malfeasance alleged in the plaint, and dismissed the suit.

At the previous hearing of the appeal this Court held that the appellant came within the definition of a "person having interest" in section 9, sub-section 9, of the aforesaid Act and was thus entitled to sue and, finding that the trial was neither complete nor satisfactory, set aside the dismissal of the suit and referred the case back to the lower Court for trial on the following issues:—(i) Whether any amounts or properties have been dedicated in trust to the *nava-rathri kattalai*, *deepa kattalai*, and *uchikala kattalai* and are in the hands of the defendants. (ii) Whether any fund or property has been dedicated to the *pooja paditharam* and is in the hands of the defendants. (iii) Whether any immovable properties other than the admitted extent of one acre and odd have been dedicated to the temple and are in the hands of the defendants. (iv) Whether there has been any breach of trust by the defendants in respect of the above funds or properties. Both parties were permitted to adduce additional evidence on these issues. The learned Judge having submitted his findings after an elaborate trial, the appeal comes on for further hearing and disposal.

It is common ground that the temple in question is an "excepted temple" as that term is defined in section 9, sub-section 5, of the said Act and that the respondents' family are the hereditary trustees thereof. It is also common ground that the family carried out extensive renovations and repairs to the temple premises spending large sums of money for the purpose, though the source of the money is a matter of dispute between the parties; the appellant alleging that the bulk, if not the whole of it, consisted of subscriptions collected from the public, while the respondents

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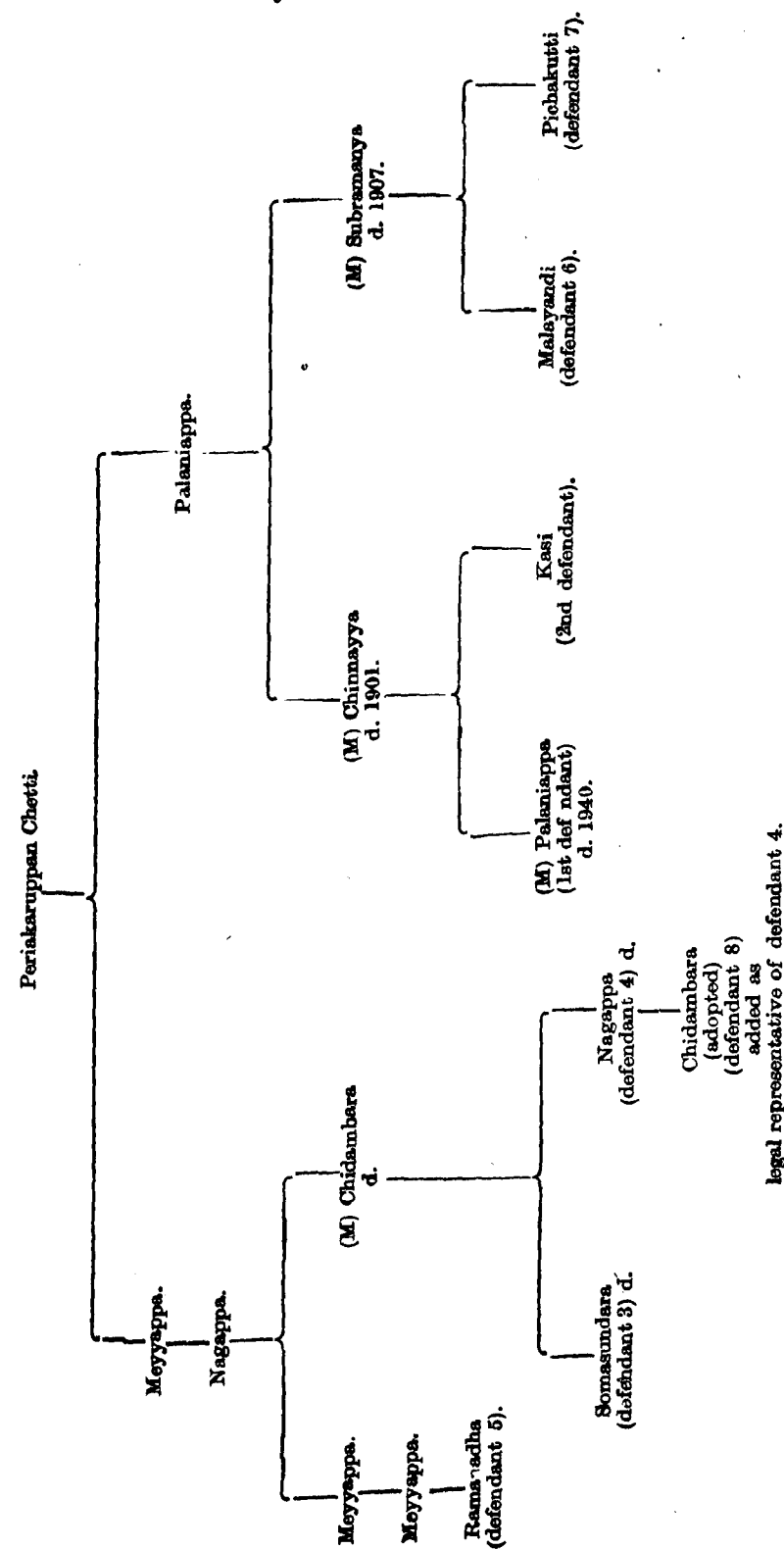
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alleged that practically all the money came out of their own family funds. It is also not seriously disputed that the respondents have throughout been conducting the customary services and festivals in the temple in accordance with *mamool* and that the temple has been greatly benefited by their management.

The following pedigree shows the relationship of the respondents to one another and the persons who have been in management of the temple on behalf of the family from time to time (marked by the letter "M" annexed to their names).

Before dealing with the issues as to the extent of the temple properties and the accountability of the respondents for the management thereof, it will be convenient to consider the claim for their removal from trusteeship. At the retrial after remand, numerous charges of misfeasance and breach of trust were raised against the respondents, but the learned District Judge after an elaborate investigation found that, though there has been some irregularity, no serious charge involving dishonest or fraudulent conduct was brought home to the members of the respondents' family, and he has recorded his general impression that they had, on the whole, dealt with the temple honestly and fairly. We may state at once that after hearing Mr. Swaminatha Ayyar, the appellant's learned Counsel, at considerable length we agree with the learned Judge's conclusion and share his impression. Most of the charges of suppression of temple funds and misappropriation thereof based upon entries in the accounts produced by the respondents turned out, on a careful scrutiny of the accounts, to be altogether unfounded, their formulation appearing in many cases to be due to a misapprehension of the relative entries. Apart from the respondents' alleged failure to account for certain moneys claimed to be trust moneys, which will be dealt with

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presently, practically the only charge which calls for serious consideration, as a ground for removal, is the denial, in certain proceedings before the Hindu Religious Endowments Board and in the present litigation, of the existence of any trust fund or property except one acre of inam land situated in cusba Chidambaram. It is now admitted that the temple owns and has always owned considerable immovable properties in the shape of lands and houses in Chidambaram and surrounding villages, and also certain funds dedicated for kattalais. While so, it was represented to the Board in 1929 by the fourth defendant, acting on behalf of the family, that the temple owned only one acre of land and no other property. He stated: "It (the temple) owns one acre nearly. It gets an income of 20 kalams. Apart from this it has no other income. The expenses are met from our family."

Acting on this representation, the Board passed an order, dated 8th October 1929 (Exhibit V), excluding the temple from the scope of the Madras Hindu Religious Endowments Act. Again, in the written statement filed in this suit by the fourth defendant on 13th February 1936, which was adopted by the respondents, a similar denial was made, and it was repeated by the first respondent in his petition to the Board filed on 21st June 1937 for a declaration that the temple was an "excepted temple" within the meaning of the Act, as also in his deposition as D.W. 2 at the original trial of this suit in 1939. It would also appear that in 1934, presumably in anticipation of this suit, the respondents opened a new set of accounts known as "P.R.M.P. kattalai accounts" to which they transferred all the properties of the temple which had till then been shown in the temple accounts, and it was not until it became clear at the trial that the appellant would succeed in establishing the title of the temple that they conceded its ownership of the properties. It will thus be seen

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that the fourth defendant and the first defendant falsely denied the title of the temple to a considerable extent of immovable properties which are now admitted to belong to it, and there can be no doubt that this conduct, whatever the motive behind it, was improper. Mr. Rajah Ayyar, while making no attempt to justify such conduct, submitted that it was probably inspired by an anxiety to make it appear that the temple was a petty temple not worth the trouble of supervision and control by the Board or by the Court, and that it was certainly not due to any dishonest intention to appropriate temple property. The learned Counsel also pointed out that the prominent members of the family who were mainly responsible for the ill-advised denial of the trust, viz., the fourth defendant and the first respondent, were both dead and that the other respondents, beyond adopting the written statement filed by the fourth defendant in this suit, did not actively take part in such denial at any time before suit. These submissions are not without force and, while we are not prepared to acquit the respondents altogether of improper conduct, we consider, agreeing with the learned District Judge, that it does not justify their removal from the office of dharmakarta—cf. *Siva-sankara v. Vadagiri*(1).

It is unnecessary to go into the details of the dispute regarding the immovable properties belonging to the temple. As has been stated, it is now admitted by the respondents that the temple owns lands in the Elanangur and Vayalamur villages exclusively and the lands in Nandimangalam village jointly with the Ponnambalam Mutt situated in Chidambaram. It is also admitted that the houses and buildings in Chidambaram town claimed by the appellant to be temple properties, except those covered by the sale deeds Exhibits XXI and XXI-a and XXII,

(1) (1889) I.L.R. 13 Mad. 6.

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belong to the temple. Even in the last mentioned properties the respondents do not claim any beneficial interest, but only state that they appertain to a distinct charity, namely, the Patasala known as "Elamaiyakkinar Koil Patasala" situated at Chidambaram. The Court below has accepted this case and the appellant's learned Counsel has not succeeded in showing that the finding is wrong. Similarly, as regards the lands in certain other villages alleged to belong to the temple, it has been found that the ownership of the temple was not established and the appellant has been unable to displace that finding. It is admitted that certain immovable properties were purchased for the *navarathri kattalai* in 1934 under Exhibit D-1, but it is represented on behalf of the respondents that these properties were reconveyed to the original owner in pursuance of an agreement in that behalf and that the proceeds have been invested on a mortgage of immovable properties with the sanction of the Hindu Religious Endowments Board. This transaction is said to have taken place after the judgment of the lower Court was pronounced. The respondents also admit that they have a sum of Rs. 1,122-5-0 in their hands as a capital fund endowed by one Swaminatha Pillai for *akhanda deepam kattalai* (perpetual burning of light at the shrine) and they have expressed their willingness to hold it subject to such directions as the Court may think fit to issue.

Turning now to the main question as to respondents' liability to account for various trust funds alleged to be in their hands, the claim relates to three sums found credited in the accounts of the Rangoon M.P. business and one sum credited in the Madras M.P.P.C.T. business. The respondents' family were the proprietors of the business at both places. In the Rangoon books the credits appear in three different folios headed *pooja paditharam kattalai*

(Rs. 37,347-2-3 as on 17th September 1909), *deepa kattalai* (Rs. 1,859-13-0 as on 16th September 1909) and *uchikala kattalai* (Rs. 4,634-7-3 as on 4th September 1909), and in the Madras account a sum of Rs. 1,404-11-0 stands credited as on 6th September 1906 in the folio headed "*kattalai* account of Elamaiyakkinar Temple, Chidambaram". As the first mentioned amount is by far the largest, the controversy centred mainly round that item but, as the respondents' answer to all these claims is substantially the same, the main consideration relevant to that item apply to the other items as well. It may be mentioned here that, though the entry relating to the *uchikala kattalai* would seem to show that one Sigappi Achi was the donor, it is in evidence that she was the paternal aunt of the fifth defendant and that, after she died without issue, her stridhanam properties reverted, according to custom among the Nattukottai Chetti community, to her parents' family, i.e., to the respondents' family who caused the credit entries to be made in her name. On 4th October 1899 an account headed "*pooja paditharam* of Elamaiyakkinar Kovil at Chidambaram" was opened in the Rangoon books and a sum of Rs. 3,000 was credited therein. It was followed by various other credits and, in 1904, amounts credited under other heads were also brought into this account so as to augment the balance to Rs. 24,877-14-3 in April 1905, which with further interest amounted to Rs. 36,347-2-3 on 16th September 1909. No further interest was added, but there were numerous drawings between 1909 and 1912 which reduced the credit balance to Rs. 28,857-10-0 as on 1st October 1912. This balance does not appear to have been carried forward to any other account and remains unadjusted. It is admitted that some of the credits represent contributions made by third parties for various subsidiary *kattalais* brought under this head, and there

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can be no doubt that the respondents would be liable to account for such amounts if the latter still remained unexpended in their hands. But, as pointed out by the learned District Judge, these contributions were relatively very small, and it has not been shown that their total, even if Rangoon *tavanai* interest is added, would exceed the sum of about Rs. 8,000 drawn from this account from 1909 to 1912 for expenditure on the *pooja* and other services in the temple during that period. We may mention here, only to dismiss, the suggestion that these contributions were made as permanent endowments, the interest on which alone being intended to be spent on the services. The very smallness of the contributions and the recitals in some of the entries clearly indicate that the amounts were intended to be spent in their entirety on the services specified. The sums received from outsiders and credited in the account may, therefore, be taken to have been more than accounted for by the drawings for expenses of the services in the temple between 1909 and 1912. The question then is whether the other credits in the accounts made at the instance of one or other member of the respondents' own family evidence valid gifts or trusts made or created in favour of the charity.

In support of the suggestion that these credits represented actual sums of money appropriated for the performance of the services and held as deposits, reliance was placed on the reference to *hundis* sent from *oor* (i.e. Karaikudi, the respondents' headquarters) in the opening credit entry of Rs. 3,000 in the *pooja paditharam* account and in the credit entry of Rs. 1,600 in the *deepa kattalai* account. The books of the Rangoon business for the year 1899 in which the entry was made are not forthcoming, but the *oorkadai* or the headquarters accounts relating to the period have been produced. In these accounts the amount is credited to the Rangoon business and debited as an expense on 15th November 1899. The

entry runs thus; "Credit-again as on the said date (i.e., 19th Purattasi Vikari corresponding to 4th October 1899) for the *pooja paditharam* of Youvaneswarar (i.e., the principal deity) at Chidambaram Rs. 2,000 and for the *pooja paditharam* of *Visveswarar*, *Visalakshi* and *Nandikeswarar* (subsidiary deities in the suit temple) Rs. 1,000, by one hundi, bearing half per cent interest written and given—Rs. 3,000". The debit entry in the account is in similar terms with the words "for purchasing village" added at the end. It is clear from these entries that at Rangoon the amount must have been credited to the *pooja paditharam* account and debited to *oor*, an inference supported by the similar entries relating to the *deepa kattalai* made in the year 1907 for which the Rangoon books are produced. A sum of Rs. 1,600 was then credited to that *kattalai* and debited to "Karaikudi P.S.", i.e., the father of defendants 5 and 6, who appears to have sent the *hundi* in that case. There was some controversy as to the meaning of these entries, the appellant suggesting that the reference to the *hundis* indicated that the agent of the business at Rangoon must have realised the *hundis* and credited the proceeds in the respective accounts which accordingly must be taken to evidence actual appropriations of moneys for the services, while the respondents urged that it was apparent, from the amounts being debited by the Rangoon agent to the *oorkadai* in the one case and to the father of defendants 5 and 6 in the other, that the *hundis* must have been drawn on the Rangoon M.P. firm itself, and that they were no more than letters of instruction, and the entry itself was a mere book entry without any fund having come into the hands of the agent and actually appropriated to the charities. As the transactions took place many years ago, no witness who could speak to the details thereof from his personal knowledge was available, and the matter has to be decided on the entries alone. If

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the *hundis* had been drawn upon a stranger firm and the Rangoon agent cashed them and got the money, there would be no need for him, on crediting the amounts to the respective services, to debit the same to *oor* or to Karaikudi P.S. It was presumably because no money actually came into the hands of the agent, that on making the credit entries as directed by his principals he had to debit corresponding sums in the manner aforesaid in order to square his accounts. It is therefore reasonably clear that the *hundis* must have been drawn on the agent himself in each case and that no cash or fund actually came into his hands. We are therefore of opinion that the entries in the Rangoon books referred to above were no more than book entries made under instructions sent by the respondents' family without any corresponding sums being actually set apart for the charities at the time. No other credit entries in the *pooja paditharam* account referring to any *hundis* having been sent from *oor* have been brought to our notice, and they must all be taken to represent merely book entries as there is no evidence to show that corresponding sums were either remitted from *oor* or actually set apart at Rangoon for the charity. Can it be said, in such circumstances, that there was an effectual transfer of funds to the temple?

There are three modes in which a voluntary transfer of property in favour of a temple can be validly and effectually made. Firstly, by dedication of the property directly to the deity. This mode is sanctioned by Hindu law and needs no compliance with the provisions of the Transfer of Property Act, there being no transfer of property to a "living person" within the meaning of section 5 of that Act. See *Gangi Reddi v. Tammi Reddi*(1), *Sooniram Ramniranjandass v. Alagu Nachiyar Koil*(2) and *Narasimha Swami v. Venkatalingum*(3). The subject-matter of

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a dedication must, however, be some specific property or asset and a mere credit entry in a book of account cannot be the subject of a dedication. Secondly, property may be transferred by way of gift to the trustee or trustees of a temple. Such a transfer, being one made to a living person, must comply with the requirements of section 123 of the Transfer of Property Act and can only be effected, in the case of movable property, by a registered instrument duly executed or "by delivery". There being no registered instrument here, Mr. Swaminatha Ayyar contended that there was, in the circumstances of the case, a sufficient delivery of the moneys credited to constitute valid gifts. The respondents, he pointed out, were acting in a dual capacity. They were already the trustees of the suit temple and they desired, as donors, to provide for the *pooja paditharam* and allied services therein. They were the proprietors of the Rangoon M.P. Firm whose agent was acting as their banker, there being a regular course of remittances and withdrawals. In such circumstances, it was urged, a credit in favour of the temple in the Rangoon accounts under respondents' instructions, balanced by a corresponding debit to them, was the only business mode of transferring the moneys from the respondents as donors to themselves as trustees of the temple, and there was accordingly a valid gift, as delivery under section 123 can be actual as well as constructive. We are unable to accept this argument. We are of opinion that no constructive delivery can be assumed in the circumstances of the present case, as no particular sum was ever separated from the general funds of the respondents' family or business and placed on a footing incompatible with the exercise of beneficial ownership by the respondents' family. It does not even appear that either the family at *oor* or their agent at Rangoon had, on the dates of the credit entries, sufficient cash balance on hand available for an actual allocation to the charity. No valid

(1) (1927) I.L.R. 50 Mad. 421 (P.C.). (2) [1939] Rang. L.R. 59 (P.C.).
(3) (1927) I.L.R. 50 Mad. 687 (F.B.).

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gifts of money can in such circumstances be held to have been made by the respondents as donors by constructive delivery to themselves as trustees of the temple, as suggested by the appellant's learned Counsel. It remains to consider whether the credit entries in question amount in law to the creation of a trust, which is the third mode of voluntary disposition. Here, again, some of the considerations, already adverted to, preclude the finding of a perfectly created trust. The trust in this case being a public religious trust, the provisions of the Trusts Act are, no doubt, inapplicable, but an intention to create a trust and transferable property are as essential for public as for private trusts. There was no express declaration of trust here and, as has been stated, there was no actual allocation of any sum or sums of money in respect of which the respondents can be said to have divested themselves of all beneficial interest and undertaken the obligations of trustees. A credit entry in favour of a charity which does not correspond to an allocation of the sum credited can amount to no more than a promise to give the sum and, as observed by WEST J. in *Hirbai v. Jan Mahomed Khalakdina*(1), to promise a thing is not to hold it in trust. The periodical crediting of interest in the same account on which Mr. Swaminatha Ayyar laid stress is no more consistent with a completed gift or perfected trust than with a simple promise to give. On the other hand, the fact that the respondents made no entries in the temple accounts kept by them at Chidambaram corresponding to the credits in their own Rangoon books is certainly more consistent with the supposition of an intention to give than of a gift or trust. Furthermore, on the latter supposition, the respondents would clearly be guilty of a breach of trust in employing temple funds in their own business, a thing not to be readily assumed. For all these reasons we must

(1) (1881) I.L.R. 7 Bom. 229, 243.

hold that there was no dedication or gift or trust of the sums (other than those received from strangers) appearing in the accounts of the *pooja paditharam* and other *kattalais* in the books at Rangoon and Madras and that the respondents are not accountable for the same.

The above conclusion receives support from two recent decisions of their Lordships of the Judicial Committee in *Sooniram Ramiranjandass v. Alagu Nachiyar Koil*(1) and *Chambers v. Chambers*(2). In the first-mentioned case, a Chettiyar firm of money-lenders credited a certain sum in its books in the name of a temple but there was no allocation of any assets, the firm continuing to use all its funds in its business as before. Interest was credited periodically in the same account, but there were no drawing by the temple. On the adjudication of the firm as insolvent, payment of the amount in full was claimed by the trustee of the temple on the footing that the amount appearing in the account was trust money belonging to the temple. The claim was resisted on the ground that no endowment or trust had been created. It was found that the trustees of the temple were in entire ignorance of the credits, and evidence was given to the effect that it was usual for Chettiyar firms to credit something towards charity, but the manager of the charity had no right to demand payment when they chose and the firm had its discretion to expend any moneys for the temple as occasion might arise. On these facts their Lordships held that there was no endowment of any property and no creation of a trust. Mr. Swaminatha Ayyar attempted to distinguish the decision by pointing out that the trustee of the charity there was a different person and that he had no knowledge of the credit entries made in the accounts of the firm, while in this case no question of communication could arise as

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(1) [1939] Rang. L.R. 59 (P.C.).

(2) I.L.R. [1944] Mad. 617 (P.C.).

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the respondents who were the proprietors of the Rangoon business were also the trustees of the suit temple. It is true the decision to some extent proceeded on the evidence adduced in the case to the effect referred to above, but the following observations as to the effect of mere credit entries made in books of account are pertinent to the present case :—

“The *prima facie* meaning of the entries in the insolvent's books discloses an intention on the part of the firm to treat itself as debtors to the temple in a sum which should increase as time went on. To hold that they are trustees because they have consented to be debtors would not only be unjustified, but would be inconsistent with their intentions as manifested by their conduct in making no allocation of any assets, in using their whole funds in their business as before, and in computing interest at a rate and in a manner applicable to an ordinary customer.”

As regards the contention based on the Hindu law of dedication, their Lordships made the following remarks :—

“The same reasons are equally forceful to disprove the suggestion that the entries effect an endowment of property for the deity. The first question to be asked on that suggestion is, what property has been made debutter or charged in favour of the idol? The second is, what proof is there of any such intention? As an interpretation of the conduct of the insolvent firm the theory of endowment breaks down as completely as does the theory that the firm intended to declare itself trustees for the temple.”

These passages would seem to show that, in their Lordships' opinion, an allocation of specific property or fund to charity is essential both for effecting an endowment under the Hindu law and for creating a valid trust.

In the other case, a person who was the proprietor of a business instructed the agent in charge to credit large sums in the names of his wife and other relatives in his account books and debit them to his capital account. Letters were also sent intimating that the sums thus credited were in the nature of personal gifts from him and would bear interest at a certain

rate but were subject to certain restrictions as to withdrawal. Interest at the said rate was also credited in the same accounts and wife also withdrew various sums of money from time to time. When the bankers who had granted large overdrafts to the business objected to the payment of interest on the amounts credited, the question arose whether there was a valid gift or trust in respect of the said amounts. This Court held that there was neither a completed gift nor a valid trust; see *Chambers v. Chambers*(1). The gift failed as there was no registered instrument or delivery of property as required by section 123 of the Transfer of Property Act. The Court refused to accept the argument that the credit entries in the books amounted to a constructive delivery of the sums credited. The Court also refused to give effect to the incomplete gift as a declaration of trust as there was nothing to show that the donor intended to create a trust or to constitute himself a trustee, his only intention having been to make gifts. This decision was approved by their Lordships of the Privy Council. No attempt was made before them to support the transaction as a gift and, negating the contention that a valid trust had been created, their Lordships observed :

“What then was the subject-matter of this alleged trust? Mr. Justice GENTLE seems to have been of opinion that it was a fund of two lakhs of rupees. But that was not so. No such sum was ever set aside and appropriated by Mr. Chambers as a fund transferable to Mrs. Chambers of which he was to be a trustee with all the consequential obligations of such a position.”

These observations clearly indicate that a mere credit entry without setting aside and appropriating the sum credited is not sufficient to create a valid trust.

In the view we have expressed above as to the respondents' liability to account, it has become unnecessary to consider the further questions as to the

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rate of interest chargeable to them and the right of reimbursement claimed by them.

Although there was no prayer in the plaint that scheme should be settled for the proper management of the temple and its properties, Mr. Swaminatha Ayyar pressed upon us the desirability of this Court framing a scheme in view of the irregularities brought to light and the conduct of the respondents in denying the existence of trust properties which have now been established to be substantial. Mr. Rajah Ayyar, however, has raised a question as to the power of the Court to grant such relief in this suit which has been brought under section 73 of the Madras Hindu Religious Endowments Act, while making it clear that the respondents have no objection to a proper scheme being framed for the management of the temple and its properties. There can be no doubt as to the desirability of settling a scheme providing for the due administration of the temple and its endowments and for the exercise of adequate supervision over the management. But, having carefully considered the question raised by Mr. Rajah Ayyar, we are constrained to come to the conclusion that the Court has no power to settle a scheme in a suit brought under section 73 of the Madras Hindu Religious Endowments Act.

It is well known that, before the passing of that Act, suits for reliefs in respect of public charities were maintainable under section 92 of the Civil Procedure Code, but section 73 of the Madras Act abrogates section 92 of the Code in regard to suits claiming any relief in respect of the administration or management of a religious endowment in this Province and provides that no such suit shall be instituted except as provided by that Act. A comparison of the two sections reveals that while section 73 is closely modelled on section 92 of the Code, clauses (f) and (g) of sub-section (i) of the latter are omitted from sub-section 1 of the former. The reason for the omission is to be found in the

provisions of sections 57, 63, 64, 65 and 76 of the Madras Act. The last mentioned section provides for alienation of immovable trust property subject to certain conditions and limitations and corresponds to clause (f) of section 92 (1) of the Code, while the other sections which correspond to clause (g) make provision for settling schemes for "non-excepted" and "excepted" temples by the Board constituted under section 10 of that Act. Schemes settled by the Board are to be final, subject to the result of any suit which the trustee or any person having interest may institute to modify or set aside such schemes. Further, provision is made for modification or cancellation, for sufficient cause, of schemes settled by the Court under the Act or "deemed to be settled under the Act"; section 75. It is clear that the Act which is a comprehensive piece of legislation with detailed provisions for the efficient protection, control and supervision of Hindu religious endowments in this Province, vests the power of settling schemes initially in a statutory body, namely, the Board constituted under section 10, and the Civil Court's jurisdiction is limited to the modification or cancellation of schemes settled by the Board in the first instance or of schemes settled by the Court itself under the Act or deemed to be settled under the Act. We are therefore of opinion that this Court has no power in these proceedings to formulate a scheme for the suit temple as suggested for the appellant. It is left to the Board to take suitable action to secure the proper administration of the temple and its endowments.

Our attention has been drawn to a recent decision by a Bench of this Court (KRISHNASWAMI AYYANGAR and KUNHI RAMAN JJ.) where a decree settling a scheme for "Sri Vedanayagi Amman Temple and Patasala Trust" was passed (Appeal Suit No. 281 of 1938) in a suit instituted with the consent of the Advocate-General under section 92 of the Code of

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Civil Procedure and also with the sanction of the Board under section 73 of the Madras Act II of 1927. The trust was there described as a "composite trust" for the *thiruppani* of the temple and the maintenance of the *patasala* at Vedaranyam and no objection was raised, apparently, to the Court's power to settle a scheme for such a trust, for there is no discussion of the question in the judgment of the learned Judges. We cannot therefore regard the case as an authority in point.

In the course of the argument before us reference was frequently made to a *patasala* known as the "Elamaiyakkinar Koil Veda Patasala" situated at Chidambaram. Nothing was said in the plaint about this *patasala* or the properties attached to it nor was any mention made of it at the original hearing of the appeal before us. At the enquiry in the Court below after the remand, questions relating to the *patasala* were sought to be raised by the appellant but the learned District Judge declined to permit him to do so. Mr. Swaminatha Ayyar claimed before us that the *patasala* was a subsidiary charity attached to the suit temple and so came within the scope of this litigation, while the respondents who claim also to be the trustees of the *patasala* maintain that it is an independent trust only named after the deity in the suit temple to distinguish it from other similar institutions at Chidambaram. Obviously, a dispute of this kind cannot be allowed to be raised at this stage and we have not gone into this question. It appears however that there are considerable properties appertaining to this trust, and the respondents admit that the *patasala* has not been functioning for the last about ten years for want of pupils. It seems desirable in such circumstances that the respondents or other persons interested should move the appropriate authorities for directions for the control of the properties and for the use of the income derived therefrom.

In the result, the respondents are directed to invest the capital fund admitted to be in their hands relating to Swaminatha Pillai's *akhanda deepa kattalai* in proper securities in accordance with the directions of the Board which will be applied for within four weeks from this day. Subject to this order the appeal is dismissed. The appellant's costs in both the Courts will come out of the trust estate. The respondents will bear their own costs. A copy of this judgment will be sent to the Hindu Religious Endowments Board for such action as it may think fit to take in the light of our observations.

G.R.

APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice Bell.

KOVURU KALAPPA DEVARA (PLAINTIFF),
APPELLANT,

v.

KUMARA KRISHNA MITTER AND ANOTHER
(DEFENDANT AND NIL), RESPONDENTS.*

Indian Contract Act (IX of 1872), sec. 29—Money due on account of dealings in 1930—Document executed in 1933 to pay certain sum with interest after two years "after deductions as would be agreed upon"—Document endorsed to appellant with the original cause of action under the document in 1938—Suit to enforce claim filed in 1938—Agreement void for uncertainty—Suit barred by limitation—Indian Limitation Act (IX of 1908), sec. 19—Period of limitation to be computed from the time when acknowledgment was signed.

The appellant was the endorsee of a document, Exhibit A, and at the same time the assignee of all rights under the original cause of action under that document. The appellant's

* Appeal No. 466 of 1941.

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assignor and the respondent had dealings in mica in 1930. The respondent purchased mica from the appellant's predecessor and was in the habit of selling that mica in England and sending cheques to the appellant's predecessor to pay for it. He stopped payment of one of these cheques. In 1933 Exhibit A was executed in which the respondent undertook to pay the appellant's predecessor after two years the sum of Rs. 12,600 with a certain interest "after deductions as would be agreed upon." The claim based upon this document with its original cause of action was assigned to the appellant in 1938. In a suit filed by the appellant in 1938 to enforce his claim,

held: (i) The suit based upon the terms of the document Exhibit A must fail by reason of section 29 of the Indian Contract Act. The parties had expressed their agreement so vaguely that its meaning was not certain or capable of being made certain;

(ii) The suit based upon the original cause of action in 1930 was barred by limitation. Though in the acknowledgment which the respondent's predecessor gave in 1933 there was a clear promise to pay and that payment was deferred until a further period of two years, the acknowledgment could be used to extend the period of limitation only to the extent to which the Indian Limitation Act permitted. Under section 19 of the Act, where there is an acknowledgment of liability, the fresh period of limitation shall be computed from the time when the acknowledgment was so signed. The acknowledgment in 1933 afforded him only a further period of three years in which to file his suit but, as it was filed in 1938, it was barred by limitation.

Spencer v. Hemmerde(1) referred to and distinguished.

APPEAL against the decree of the District Court of Nellore in Original Suit No. 19 of 1939.

T. R. Venkatrama Sastri for *Alladi Subrahmanyam* for appellant.

K. Umamaheswaram for respondents.

The JUDGMENT of the Court was delivered by KING J.—The appellant here is the endorsee of a document, Exhibit A, and at the same time the assignee of all rights under the original cause of action under that document. It is common ground that the

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appellant's assignor and the respondent had dealings in mica in 1930. The respondent purchased mica from the appellant's predecessor and was in the habit of selling this mica in England and sending cheques to the appellant's predecessor to pay for it. Of one of these cheques he stopped payment. Subsequently in 1933 Exhibit A was executed in which the respondent undertook to pay to the appellant's predecessor after two years the sum of Rs. 12,600 with a certain interest "after deductions as would be agreed upon." It was the claim based upon this document with its original cause of action that was assigned to the appellant in 1938. The learned District Judge has dismissed the suit and the appellant now appeals.

Two main difficulties stand in the way of the appellant and are the reasons why the suit was dismissed. The first is that no suit will lie on the terms of Exhibit A itself because they embody an agreement which in the words of section 29 of the Contract Act is one, the meaning of which is not certain or capable of being made certain. The second reason is that, if the appellant falls back upon the original cause of action in 1930, although he can rely upon Exhibit A as an acknowledgment of indebtedness given by the respondent's predecessor in 1933, that will afford him only a further three years in which to file his suit, and the suit being filed in 1938 is barred by limitation.

It is contended on the first question that section 29 of the Contract Act does not apply and that it will be possible for the Court after scrutinizing the various registered notices and other evidence in the case to give some intelligible meaning to the expression "after deductions as would be agreed upon." It seems to us however that the Court is not called upon to decide between conflicting claims put in by both sides as to the meaning of a document. Section 29 contemplates that that meaning shall be clear on the face of it. The

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very first illustration given in the section is of an agreement by *A* to sell to *B* a hundred tons of oil. That agreement is held in the illustration to be void for uncertainty, though it might be argued that it was open both to *A* and *B* to go into the witness box and give evidence from which it would not be beyond the power of the Court to arrive at the actual truth regarding an agreement which has been so vaguely expressed. It has been clear from the arguments before us that there are two very "obviously different views in regard to the interpretation of the final few words of Exhibit A. It has been claimed by Mr. Venkatrama Sastriar on behalf of his client that the real meaning of the phrase is that, if in fact there had been no agreement regarding a reduction at any time before suit, and if the money had become payable, the full amount of Rs. 12,600 could be claimed. There is also another and, in our opinion, more plausible interpretation that Rs. 12,600 was intended to be the maximum beyond which in no circumstances could the appellant's predecessor claim, and that some deduction was contemplated by both parties as being certain. However, the parties have expressed this matter in a language with which they were not very familiar in so vague a fashion that, in our opinion, there can be no doubt that the learned Judge was right in holding that the suit based upon the terms of this document must fail by reason of section 29 of the Contract Act.

The next question is whether the plaintiff can sue upon the original cause of action, and this is a question merely of limitation. It is argued that because in the acknowledgment which the respondent's predecessor gave in 1933 there is also a clear promise to pay and that that payment is deferred until a further period of two years, therefore no suit could have been filed even upon the original cause of action by the appellant's predecessor between 1933 and 1935. In support of this contention we were referred to the judgment of

Lord WRENBURY in *Spencer v. Hemmerde*(1) at page 537:

"Thus if he writes, 'I acknowledge the debt and will pay it to you six months hence' the implied promise which would be a promise to pay forthwith is superseded by the express promise to 'pay six months hence,' and an action cannot be brought until the six months have expired."

Whatever may be the case in England, the question of limitation has been codified in this country in the Limitation Act and it seems to us that an acknowledgment can be used to extend the period of limitation only to the extent which the Limitation Act itself permits. The language of section 19 of the Act is clear that where there is an acknowledgment of liability the result which follows is that the fresh period of limitation shall be computed *from the time when the acknowledgment was so signed*. There can be no doubt, we think, that the learned District Judge is right also in holding that any suit based upon the original cause of action in 1930 is barred by limitation.

In the result this appeal must fail and is dismissed with costs.

V.V.C.

APPELLATE CRIMINAL.

Before Mr. Justice Happell.

IN RE A. V. VISWANATHA CHETTI (ACCUSED),
PETITIONER.*

1944,
September 7.

Foodgrains Control Order, 1942—Breach of condition in licence issued ther under—Defence of India Rules, 1939, R. 81 (2) and (4)—Offence punishable under.

Where, in contravention of Rules 3 and 7 of the licence issued to him under the Foodgrains Control Order, the petitioner was found to have failed to exhibit a notice board in

(1) [1922] 2 A.C. 507.

* Criminal Revision Case No. 539 of 1944 (Criminal Revision Petition No. 510 of 1944).

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front of his shop showing the prices of the foodgrains for sale and to have failed to maintain his stock-account correctly,

held: that the petitioner was liable for conviction of offences punishable under Rule 81 (4) read with Rule 81 (2) of the Defence of India Rules. The conditions of the licence should be regarded as part of the Foodgrains Control Order so that a contravention of any one of the conditions would be a contravention of an order made under Rule 81 (2) and punishable under Rule 81 (4).

In re Chenchu Raghavalu Chetty(1) referred to.

Umesh Chunder Ghose v. Queen-Empress(2) explained and distinguished.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Additional Sessions Judge of the Court of Session of Salem Division in Criminal Appeal No. 4 of 1944 (Calendar Case No. 150 of 1943 on the file of the Sub-divisional First Class Magistrate, Dharmapuri).

K. S. Jayarama Ayyar for V. R. Srinivasan for petitioner.

Assistant Public Prosecutor (N. Somasundaram) for the Crown.

Cur. adv. vult.

ORDER.

HAPPELL J

HAPPELL J.—The petitioner has been convicted of offences punishable under Rule 81 (4) read with Rule 81 (2) of the Defence of India Rules and has been sentenced to pay a fine of Rs. 60 or, in default, to undergo six weeks' rigorous imprisonment. The petitioner, as a result of an inspection of his business premises on 8th June 1943, was found to have failed to exhibit a notice board in front of his shop showing the prices of the foodgrains for sale and to have failed to maintain his stock-account correctly in contravention of rules 3 and 7 of the licence issued to him under the Foodgrains Control Order.

(1) (1943) 2 M.L.J. 378.

(2) (1899) I.L.R. 26 Cal. 571.

Rule 81 (4) of the Defence of India Rules provides that

"if any person contravenes any order made under this rule he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both."

The Foodgrains Control Order was made under Rule 81 (2). Mr. Jayarama Ayyar for the petitioner does not challenge the finding that the petitioner had contravened the terms of his licence. He argues that no offence punishable under Rule 81 (4) was committed because there has been no contravention of an order made under Rule 81 but a mere breach of a condition of the licence issued under the order. This argument was advanced before KUPPUSWAMI AYYAR J. in *In re Chenchu Raghavalu Chetty*(1) and he refused to accept it. Mr. Jayaram Ayyar, however, says that he feels justified in pressing the same argument before me, because *In re Chenchu Raghavalu Chetty*(1) was dismissed *in limine* and because the attention of KUPPUSWAMI AYYAR J., was not drawn to a Bench decision of the Calcutta High Court in *Umesh Chunder Ghose v. Queen-Empress*(2).

The question in *Umesh Chunder Ghose v. Queen-Empress*(2) arose under the Opium Act (I of 1878). The appellant had been convicted under section 9 of the Opium Act on the footing that by failing to keep correct accounts of the sale of opium he had contravened a rule made under section 5 of the Act. Rule 15 (1) of the rules made under section 5 stated that

"a person to whom a licence has been granted . . . may sell opium by retail in accordance with the conditions specified in the licence."

The conditions were issued as subsidiary rules by the Board of Revenue and rule 13 sets out the manner in which accounts of the sale of opium were to be kept. Rule 18 provided that in case of an infringement of any of the conditions the licence should be cancelled.

(1) (1943) 2 M.L.J. 378.

(2) (1899) I.L.R. 26 Cal. 571.

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I do not find that any general proposition is laid down in *Umesh Chunder Ghose v. Queen-Empress*(1) such as is contended for by Mr. Jayaram Ayyar, namely, that a breach of a condition in a licence issued under an order is not punishable as if it was a breach of the order itself. The learned Judges who decided *Umesh Chunder Ghose v. Queen-Empress*(1) seem to have founded their decision on the fact that the subsidiary rules which constituted the licence were issued separately by the Board of Revenue and not by the Government, that the penalty provided for a breach of the rules issued by the Board of Revenue was cancellation of the licence and that Government had not issued any rule under section 5 of the Act which makes the preparation of an incorrect account punishable under section 9.

In my opinion, the reasoning on which the decision in *Umesh Chunder Ghose v. Queen-Empress*(1) is founded will not apply to the contravention of a condition of the licence issued under the Foodgrains Control Order. It is true that the licence is actually issued by the Provincial Government or by an officer authorized by the Provincial Government to do so; but clause 4 of the order states that licences shall be in Form A, a form set forth in the second schedule to the order, and clause 6 (1) enacts that

"no person being the holder of a licence issued or deemed to be issued under this order shall contravene any of the conditions mentioned in Form A"

and, while stating that the licence of any person who contravenes any of its provisions may be cancelled, specifically provides that this is without prejudice to any other action that may be taken against him. It is clear that the Government of India intended that the conditions of the licence should be regarded as part of the Foodgrains Control Order so that a contravention of any one of the conditions would be a contravention of an order made under Rule 81 (2)

(1) (1899) I.L.R. 26 Cal. 571.

and punishable under Rule 81 (4), and, in my judgment, effect has been given to the intention by the terms of the Foodgrains Control Order.

With respect, therefore, I agree with the decision of KUPPUSWAMI AYYAR J. in *In re Chenchu Raghavulu Chetty*(1). The petition is dismissed.

V.V.C.

APPELLATE CRIMINAL.

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

IN RE MUTHU NADAR, ACCUSED.*

Code of Criminal Procedure (Act V of 1898), sec. 439—
Punishment—Sentence of imprisonment till rising of Court
—Valid—When to be imposed.

A sentence of imprisonment till the rising of the Court is a sentence which is in accordance with law. A direction by the Court that a person shall be confined in the Court premises till the Court rises constitutes imprisonment within the meaning of the Penal Code and the Criminal Procedure Code. The Court has power to pass such a sentence where the facts of a case warrant it, but it should only be imposed in very exceptional cases.

In re Kunhi Bava(2) and *In re Ramalingayya*(3) overruled.

Bird v. Jones(4) and *Parankusam Narasaya Pantulu v. Captain R.A.C. Stuart*(5) referred to.

CASE taken up by the High Court on perusal of the Calendar and judgment in Sessions Case No. 82 of 1944, on the file of the Court of Session of the Tinnevely Division, dated 29th August 1944.

Public Prosecutor (V. L. Ethiraj) for the Crown.
V. T. Rangaswami Ayyangar and R. Santanam for accused.

(1) (1943) 2 M.L.J. 378.

* Criminal Revision Case No. 752 of 1944 (taken up as No. 9 of 1944).

(2) (1928) 58 M.L.J. 550.

(3) I.L.R. [1943] Mad. 230.

(4) (1845) 7 Q.B. 742; 115 E.R. 688.

(5) (1865) 2 M.H.C.R. 396.

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January 18.

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LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—The accused was found guilty by the Sessions Judge of Tinnevely of an offence under section 323 of the Indian Penal Code and was sentenced to imprisonment till the rising of the Court. Under the provisions of section 439 of the Code of Criminal Procedure, BYERS J. called upon the accused to show cause why a sentence should not be passed upon him according to law. In *In re Kunhi Bava*(1) JACKSON J. had expressed the opinion that such a sentence was not in accordance with law and in *In re Ramalingayya*(2) HORWILL J. had said the same. The question whether such a sentence is a sentence passed according to law has been fully argued before us and, for reasons which we shall state, we consider that these decisions must be overruled.

Neither the Indian Penal Code nor the Code of Criminal Procedure directs where a sentence of imprisonment shall be served. In most of the punishment sections to be found in the Indian Penal Code only the maximum period of imprisonment is stated, but in a few sections which relate to offences of a very serious nature a minimum sentence is fixed. For instance, the minimum sentence for murder is transportation for life and for robbery or dacoity with attempt to cause death or grievous hurt it is seven years imprisonment. Unless the punishment section fixes a minimum the Court has full discretion to pass a sentence of imprisonment for any period less than the maximum, for instance, for five minutes if this would fit the offence.

In the well-known case of *Bird v. Jones*(3) the question of what amounted to imprisonment was fully discussed. COLERIDGE J. quoted the dictum of Coke that

"every restraint of the liberty of a free man will be an imprisonment, although he be not within the walls of any common prison"

and WILLIAMS J. quoted Blackstone's statement that

"every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public street." (3 Bl. C. 127.)

The definition of imprisonment to be gathered from these judgments was accepted by this Court in *Parankusam Narasaya Pantulu v. Captain R.A.C. Stuart*(1). It was there stated that the retaining of a person in a particular place or the compelling of him to go in a particular direction by force of an exterior will overpowering or suppressing in any way his own voluntary action was an imprisonment on the part of the person who exercised that exterior will. Therefore, a direction by the Court that a person shall be confined in the Court premises till the Court rises constitutes imprisonment and, in our judgment, imprisonment within the meaning of the Penal Code and the Criminal Procedure Code.

In *In re Kunhi Bava*(2) a person was convicted under sections 193, 196 and 471 of the Indian Penal Code and was sentenced to imprisonment till the rising of the Court and to a fine of Rs. 300. Dealing with the adequacy of this sentence JACKSON J. said :

"When the statute lays down that for a certain offence, as for that under section 471, Indian Penal Code, or under section 193, the punishment shall be imprisonment, it means that the offender shall go to jail and imprisonment till the rising of the Court is a clear evasion of that intention.

Possibly in rare cases when the offence is obviously technical, a Court may be justified in taking the extreme step of evading the statute which it is appointed to administer; but on the learned Judge's own showing, this was not such a case."

(1) (1928) 56 M.L.J. 550.
(2) I.L.R. [1943] Mad. 230. (3) (1945) 7 Q.B. 742; 115 E.R. 668.

(1) (1965) 2 M.H.C.R. 396.

(2) (1928) 56 M.L.J. 550.

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If the learned Judge intended to lay down that where a person is convicted of an offence under any of these sections the Indian Penal Code contemplates that ordinarily he shall be sentenced to imprisonment in jail, but where the offence is of a very technical nature the Court would be justified in passing a nominal sentence of imprisonment, we could understand him, but we cannot agree that the passing of a sentence until the rising of the Court would mean the evasion of the statute. If such a sentence amounted to an evasion the Court would be wrong in passing it, because it would be illegal.

In *In re Ramalingayya*(1) HORWILL J. observed:

"Even in cases where the alternative of fine is not permissible by law, it is objectionable to sentence persons to imprisonment till the rising of the Court because it is not a form of imprisonment recognized by law, and it is used to circumvent the provisions of law that require a sentence of imprisonment in jail for a particular term."

HORWILL J. did not refer to the judgment of JACKSON J. but he evidently had it in mind. The only difference is the use of the word "circumvent" instead of the word "evade".

Section 510 of the Indian Penal Code provides that a person who in a state of intoxication appears in a public place and there conducts himself in such manner as to cause annoyance shall be punished with simple imprisonment which may extend to twenty-four hours. If such a sentence were passed, say, for instance, by a Magistrate when in camp it might be impossible to send the accused person to a jail for such a short period. Is it reasonable to suppose that the offender could not lawfully be compelled to serve his sentence of imprisonment in some place other than a jail? The answer we give is emphatically in the negative.

(1) I.L.R. [1943] Mad. 230.

Our attention has been drawn to section 383 of the Code of Criminal Procedure and we are told that it has been suggested that it indicates that a sentence of imprisonment must be undergone in jail. The section reads as follows:—

"Where the accused is sentenced to transportation or imprisonment in cases other than those provided for by section 381, the Court passing the sentence shall forthwith forward a warrant to the jail in which he is or is to be confined, and, unless the accused is already confined in such jail, shall forward him to such jail with the warrant."

We certainly do not agree with the suggestion and consequently do not find in it any support for the opinions expressed in *In re Kunhi Bava*(1) and *In re Ramalingayya*(2). The requirement of the section that the Court passing the sentence shall forthwith forward a warrant to the jail in which the accused person is to be confined merely contemplates the case where the Court intends the sentence of imprisonment to be undergone in jail. It leaves entirely untouched the case where the Court passing the sentence directs that the imprisonment shall take place within the precincts of the Court.

The validity of a sentence of imprisonment till the rising of the Court is recognized in the Criminal Rules of Practice framed by this Court. The first paragraph of rule 102 says:

"The Government consider the awarding of short-term imprisonments as undesirable and Magistrates, before passing such sentences, should consider whether imprisonments till the rising of the Court allowed by law could not appropriately be passed instead, or the provisions of section 562, Criminal Procedure Code, applied in favour of accused persons."

Of course, if a sentence till the rising of the Court were not one allowed by law, we should not be bound to have regard to this rule, but it was inserted after consideration and we do not doubt the wisdom which lies behind it. It may well be that a sentence of

(1) (1928) 56 M.L.J. 550. (2) I.L.R. [1943] Mad. 230.

MUTHU NADAR, imprisonment until the rising of the Court should only
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LEACH C.J. be imposed in very exceptional cases, but where the facts warrant it we hold that the Court has power to pass it.

In the present case the Crown has made no suggestion that the sentence is inadequate, and we see no reason why it should not stand. The records will be returned to the Sessions Court.

V.V.O.

PRIVY COUNCIL.

M. ETHIRAJULU NAIDU, APPELLANT,

v.

A. RANGANATHAM CHETTI AND OTHERS,
 RESPONDENTS.

[APPEAL FROM THE HIGH COURT OF JUDICATURE AT
 MADRAS.]

Lease—Construction—Lessee to be paid market value of superstructure before surrendering possession—Lessee entitled to remain in possession of property until exact amount tendered or paid.

Where a lease provides that a tenant of a plot of land shall be entitled to be paid before he surrenders possession of the land, either after the expiry of the term of the lease or at any time, the price of a superstructure built by him on the land, the price being fixed according to the market value of superstructure as at the time of ascertainment and payment, he is entitled to remain in possession and enjoyment of the land as a tenant on the same terms as before until the exact amount of the market value is paid or tendered to him.

APPEAL (No. 21 of 1944) by special leave from a judgment of the High Court at Madras in its civil appellate jurisdiction (18th September 1940) affirming with modifications a judgment of that Court (11th May 1938) in a suit filed in its ordinary civil jurisdiction.

The facts of the case and the arguments of Counsel appear sufficiently in the judgment of the Judicial Committee.

W. W. K. Page for appellant.

Respondents were not represented.

The JUDGMENT of the Judicial Committee was delivered by Lord GODDARD.—This is an appeal by special leave from a judgment of the High Court at Madras in its civil appellate jurisdiction affirming with modifications a judgment of that Court in

* Present: Lord RUSSELL OF KILLOWEN, Lord GODDARD and Sir MADHAVAN NAIR.

* J.C.
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its ordinary civil jurisdiction in an action in which the appellant claimed possession of certain land and the superstructure thereon and mesne profits. The case depends entirely on the true construction of clause 4 of a lease, dated 1st February 1923, made between the appellant and the predecessor in title of the respondents. The facts which can be succinctly stated are that on 18th October 1912 the appellant and his brother granted a lease to the father of the respondents of a plot of land in the City of Madras for a term of ten years from 1st October 1912, at a rent of Rs. 50 per mensem, the tenant to be at liberty to erect a building on the land demised. The tenant built a theatre on the land, and shortly before the lease expired the appellant, who had become the sole owner of the land, agreed to grant a new lease to the lessee. Accordingly on 1st February 1923 a new lease for ten years from 1st October 1922 at a rent of Rs. 100 per mensem was executed. The clause material in this action was in these terms :

" The lessee shall always and in any event be entitled to be paid the price of the superstructure built on the said plot of land before he surrenders possession of the land either on the expiry of the lease hereby granted or any other future lease or at any time. The price shall be fixed according to the market value of the buildings as at the time of ascertainment and payment."

On 9th October 1932 the appellant's *vakil* demanded possession of the property and offered the sum of Rs. 3,000 as representing the true market value. This offer was refused by the respondents, who had become entitled to the lease on the death of their father, and who contended, first, that under the provisions of the City Tenants' Protection Act, which was passed before the execution of the lease, they were entitled to buy the property and that, if not entitled to the benefit of that Act, they were entitled to remain in possession by virtue of the aforementioned clause until they were paid the present market price

which they alleged was one lakh of rupees. The first contention of the respondents has been disposed of by a decision of the Board adversely to them and it is unnecessary to refer to it further*. As to the second, the appellant contends that the clause in question gives the respondents only a possessory lien as security for payment of the purchase price, and that as the respondents have remained in possession as though they were still lessees and have indeed granted a sub-lease they have acted inconsistently with their lien and must be regarded as trespassers and held accountable for mesne profits. The respondents on the other hand contended in the Courts below that they were entitled to hold over as tenants by virtue of the clause at the rent reserved by the lease until they were paid the present market price. On the true construction of the clause their Lordships are of opinion that the respondents' contention was clearly right. Until they are paid they cannot be required to surrender possession, and are therefore entitled to remain in possession, and if they remain they stay there as tenants on the same terms as were contained in the lease. Their Lordships do not doubt that the meaning of the clause is that the respondents could hold over till they were paid. In their opinion, therefore, the judgments in both Courts below were right in the result, but as they are not in agreement with some of the reasons given they will briefly refer to them. The case was first heard by WADSWORTH J. On the question whether the respondents were wrongfully in possession of the property he held that it depended on whether or not the sum offered by the appellant was "ridiculously low" or whether it approximated to the true value of the superstructure and accordingly referred the action to the Official Referee to ascertain the value. On the reference the

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* See Ranganatham v. Ethirajulu; I.L.R. [1940] Mad. 172 (P.C.).

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Referee found on the basis which was subsequently held to be correct that the value was Rs. 18,000, six times what had been offered and about a sixth of what had been asked. On the matter coming up for further consideration before VENKATARAMANA RAO J., while he expressed agreement with WADSWORTH J., he went on to hold that this was not a case of lien but that the lessees could enjoy the property till the amount was paid and that they could not be treated as trespassers liable to account for mesne profits. On appeal to the appellate jurisdiction of the High Court, Sir LIONEL LEACH C.J. and HORWILL J. took the same view as did WADSWORTH J., that the respondents were not bound to accept an offer which was ridiculously inadequate. In their Lordships' opinion the case does not depend on whether an offer ought or ought not to have been accepted, unless perhaps the exact amount which was found to be the present market value had been offered. The clause contemplates that the price is to be fixed, which must mean by agreement or by valuation, and it could have been so fixed before the expiration of the term. The respondents were entitled to be paid the present market price, no less and no more, and until that price was paid or at least tendered they were entitled to remain in possession and enjoyment of the property. Their Lordships will humbly advise His Majesty that the appeal should be dismissed.

Solicitors for appellant: *Lambert & White.*

T.F.R.M.

APPELLATE CIVIL—FULL BENCH.

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

H.H. THE PRINCE OF ARCOT ENDOWMENT, TRICHINOPOLY (ADMINISTERED BY H.H. THE PRINCE OF ARCOT NAWAB AZEEMJAH SIR GHULAM MUHAMMAD ALI KHAN BAHADUR, THROUGH HIS AUTHORIZED AGENT KHAN BAHADUR AL HAJ GHULAM JEELANI QURAISHI SAHIB BAHADUR), PLAINTIFF,

v.

P. ARUNACHALAM PILLAI AND ANOTHER,
DEFENDANTS. *

Indian Stamp Act (II of 1899) sec. 2 (16) and art. 30 of sch. 1-A of the Madras Stamp (Amendment) Act (VI of 1922)—Application for lease—Terms of lease mentioned—Oral grant of lease by lessor—Stamp, if payable on application.

Where a lessor, acting on an application in writing submitted to him by the lessee embodying all the terms of the tenancy, purports orally to let out his property to the lessee for the stipulated rent on the same conditions as are mentioned in the application, the application submitted by the lessee does not constitute a lease liable to stamp duty under article 30 of Schedule I-A of the Madras Stamp (Amendment) Act, 1922.

CASE stated under section 60 (1) of the Indian Stamp Act by the Principal District Munsif of Trichinopoly in his letter, dated 28th March 1944 (Original Suit No. 126 of 1944 on his file).

Government Pleader (K. Kuttikrishna Menon) for the Crown.—The tenants made applications for the grant of leases. In those applications all the terms of the lease were mentioned. The lessor granted oral leases. This procedure was adopted to evade stamp duty payable under article 30 of schedule I-A of the Madras Stamp (Amendment) Act, 1922. The application amounts to a lease. [Section 2 (16) of the Indian Stamp Act, 1899, which defines "lease" referred to.]

K. Ahmed Meeran for plaintiff.

Defendants were not represented.

* Referred Case No. 22 of 1944.

1945,
January 8.

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LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—The Principal District Munsif of Trichinopoly has referred under section 60 (1) of the Indian Stamp Act to this Court for decision the following question :—

“Where a lessor, acting on an application in writing submitted to him by the lessee embodying all the terms of the tenancy, purports to orally let out his property to the lessee for the stipulated rent on the same conditions as are mentioned in the application, does the application submitted by the lessee to the lessor not constitute a lease liable to stamp duty under article 30 of Schedule I-A of the Madras Stamp (Amendment) Act, 1922 ?”

As the result of suits filed in the District Munsif's Court it appeared that the respondent was in the habit of granting oral leases on terms embodied in written applications made by prospective tenants. Whether a stamp duty is required depends upon whether such an application can be held to be a lease. It is quite clear from the definition of “lease” to be found in section 2 (16) of the Indian Stamp Act, 1899, that it cannot.

The definition says that “lease” means a lease of immovable property and includes also (a) a patta, (b) a kabuliyat or other undertaking in writing, not being a counter-part of a lease, to cultivate or occupy or pay or deliver rent for immovable property, (c) any instrument by which tolls of any description are let and (d) any writing on an application for a lease intended to signify that the application is granted.

Such an application as we have here does not constitute a lease. It is merely a request to the owner of the property to grant to the applicant a lease on the terms embodied therein. There could be no lease unless the application were followed by a patta or kabuliyat or an indorsement on the application itself signifying that it was granted. Here no patta has been granted, nor is there a kabuliyat nor has the landlord signified in writing on the application his consent to the application. No doubt this procedure

has been adopted in order to evade stamp duty, but there is nothing improper in the procedure and consequently a stamp duty is not payable.

The question referred must be answered in the negative.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

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

THE OFFICIAL RECEIVER, GUNTUR (FIRST RESPONDENT), PETITIONER,

1944,
November 27.

v.

NARRA GOPALAKRISHNAYYA AND TWO OTHERS
(APPELLANT AND RESPONDENTS 2 AND 3), RESPONDENTS.*

Provincial Insolvency Act (V of 1920), ss. 28 (7), 30 and 54—Corresponding ss. 51, 116 and 56 of Presidency-towns Insolvency Act (III of 1909)—Difference—Effect—Decision of Judicial Committee under Presidency-towns Insolvency Act in Mohamed Siddique Yousuf v. Official Assignee of Calcutta(1) inapplicable to insolvency under the Provincial Insolvency Act.

Under the Provincial Insolvency Act the property of an insolvent does not vest in the Official Receiver until the date of the presentation of the petition for adjudication, which means that all unlawful transactions entered into by the insolvent prior to that date require to be set aside. But under the Presidency-towns Insolvency Act an order of adjudication operates to vest the property of an insolvent in the Official Assignee from the earliest proved act of insolvency and, therefore, any alienation by the insolvent from the commencement of the act of insolvency is entirely inoperative.

The decision of the Judicial Committee in *Mahomed Siddique Yousuf v. Official Assignee of Calcutta*(1), a case under the Presidency-towns Insolvency Act, is not applicable to orders of adjudication under the Provincial Insolvency Act.

Differences between the relevant sections of the two Acts pointed out.

* Civil Revision Petition No. 430 of 1944.

(1) I.L.R. [1943] 2 Cal. 517 (P.C.).

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Ex parte Learoyd(1) distinguished.

Ma Htwe v. Maung Pu(2) relied on.

PETITION under section 75 (1) of Act V of 1920; praying the High Court to revise the decree of the District Court of Guntur in Civil Miscellaneous Appeal No. 109 of 1943, dated 26th January 1944 (Interlocutory Application No. 1970 of 1942 in Insolvency Petition No. 4 of 1941, Sub-Court, Guntur).

The petition came on for hearing before the Full Bench constituted as above.

ON THE REFERENCE :—

A. Lakshmayya for petitioner.—The debtor was adjudicated under the Provincial Insolvency Act. There is some difference in the language between sections 28 (7), 30 and 54 of the Provincial Insolvency Act on the one hand and the corresponding sections 51, 116 and 56 of the Presidency-towns Insolvency Act on the other. The question for consideration is, is the language so different as to make the decision of the Privy Council in *Mahomed Siddique Yousuf v. Official Assignee of Calcutta*(3), a case under the Presidency-towns Insolvency Act, inapplicable to an adjudication under the Provincial Insolvency Act? The Privy Council followed *Ex parte Learoyd*(1) since the language of sections 51 and 116 of the Presidency-towns Insolvency Act substantially coincided with that of the corresponding sections 11 and 10 of the Bankruptcy Act, 1869 [Counsel read sections 6, 27 and 54 of the Provincial Insolvency Act and proceeded:] The Privy Council overruled the decision of the High Court in *Official Assignee of Madras v. O.R.M. O.R.S. Firm*(4) which held that *Ex parte Learoyd*(1) was inapplicable even to an adjudication under the Presidency-towns Insolvency Act. In a case under the Provincial Insolvency Act, a Division Bench of the Rangoon High Court in *Ma Htwe v. Maung Pu*(2) held that *Ex parte Learoyd*(1) was inapplicable, but that was before the Privy Council decision. An unreported decision of a single judge of this High Court in Civil Revision Petition No. 1474 of 1943 has followed *Ma Htwe v. Maung Pu*(2), after the Privy Council decision. The absence of words in

(1) (1878) 10 Ch. D. 8.

(3) I.L.R. [1943] 2 Cal. 517 (P.C.).

(2) (1936) I.L.R. 14 Rang. 748.

(4) (1936) I.L.R. 50 Mad. 541.

section 30 of the Provincial Insolvency Act as to the effect of publication of the order of adjudication in the Official Gazette is cured by section 41 of the Indian Evidence Act, so that the effect is the same under the two Acts.

[CLARK J.—One of your chief difficulties in the case is the difference in the language between section 28 (7) of the Provincial Insolvency Act and the corresponding section 51 of the Presidency-towns Insolvency Act. Under the latter section the order of adjudication relates back to the earliest act of insolvency within three months of the presentation of the petition, but under the former section it relates back only to the date of presentation of the petition. Further, the title of the Official Receiver to the property which has been the subject of fraudulent preference by the insolvent does not vest in the Official Receiver unless proceedings are taken by him to avoid the transaction under section 54 of the Provincial Insolvency Act.]

Vedantam Subrahmanian for respondents was not called upon to reply.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by LEACH C.J.—This civil revision petition raises the question whether the recent decision of the Privy Council in *Mahomed Siddique Yousuf v. Official Assignee of Calcutta*(1) applies to orders of adjudication under the Provincial Insolvency Act as well as to orders of adjudication under the Presidency-towns Insolvency Act.

To appreciate the full effect of the judgment in that case a short statement of the facts on which it is founded is necessary. One Ali Mahomed Hashim was adjudicated an insolvent by the High Court of Calcutta. It was alleged and found that he had committed several acts of insolvency. One of the acts alleged against him was the granting of a fraudulent preference to a creditor (the appellant in the Privy Council). To this creditor he had assigned, within three months of the petition asking for his adjudication, a decree which he had obtained for

(1) I.L.R. [1943] 2 Cal. 517 (P.C.).

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Rs. 6,750 and interest. The assignee had not been given notice of the application for adjudication and had not been made a party to the insolvency proceedings. The date of the order of adjudication was 13th June 1939. On 5th April 1939 the petitioning creditor obtained a decree against the insolvent for Rs. 15,789-10-0. In the month of May 1939 the appellant instituted proceedings in execution of the decree which had been assigned to him and an order was made that the judgment-debtor should pay the amount into Court; but the order further provided that the money was not to be withdrawn without the leave of the Insolvency Court. In August the appellant applied for leave to take the decretal amount out of Court. Leave was given subject to leave being obtained in the suit. The appellant then applied in the suit for leave, but his application was opposed by the Official Assignee. On 31st August 1939 the Court held that the appellant was entitled to withdraw the amount on furnishing security, but said that, if the Official Assignee made any application on the first Insolvency day after the reopening of the Court which was then closed for the vacation, the appellant's application was to abide the result; if no application was made by the Official Assignee, the order on the appellant's application was to be granted as asked for.

On 23rd November 1939 the Official Assignee moved the insolvency Court to declare the assignment to the appellant void and to pass an order setting it aside. The Official Assignee raised two contentions. The first was that the transfer having been found to be an act of insolvency in the order of adjudication, the transferee was no longer in a position to say that the transaction was valid. This argument was based on the judgment in *Ex parte Learoyd*(1). The second contention was that the evidence showed that there was in fact a fraudulent preference. The learned

Judge hesitated to apply the principle laid down in *Ex parte Learoyd*(1) in view of the fact that the Madras High Court in *Official Assignee of Madras v. O.R.M. O.R.S. Firm*(2) had held that it did not apply in India, but he found that the intention to prefer had been proved. On appeal a Division Bench of the Calcutta High Court expressed the opinion that *Ex parte Learoyd*(1) did apply. The Privy Council agreed with the appellate Court and consequently their Lordships overruled *Official Assignee of Madras v. O.R.M.O.R.S. Firm*(2). They held, however, that the appellant was entitled to appeal against the adjudication order and indicated that the provisions of section 5 of the Limitation Act could here be invoked.

In *Ex parte Learoyd*(1) the Court of Appeal held that, by virtue of sections 10 and 11 of the Bankruptcy Act, 1869, an adjudication in bankruptcy was conclusive against a third party; but a third party whose title to property was affected by the adjudication order was a person "aggrieved" and therefore was entitled to appeal against the order of adjudication. Section 10 of the Bankruptcy Act, 1869, provided that an order of adjudication in bankruptcy should be published in the London Gazette and the production of a copy of the Gazette containing the order should be conclusive evidence in all proceedings of the debtor having been duly adjudged a bankrupt and of the date of adjudication. Section 11 stated that the bankruptcy of a debtor should be deemed to have relation back to and to commence at the time of the act of bankruptcy or, if more acts than one had been committed, to have relation back to and to commence at the time of the first of the acts proved to have been committed within twelve months of the order of adjudication. Similar provisions are to be found in the Presidency-towns Insolvency Act and this

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(1) (1878) 10 Ch.D. 3.

(1) (1878) 10 Ch.D. 3.

(2) (1926) I.L.R. 50 Mad. 541.

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was the reason for the application in the Calcutta case of the principles settled by *Ex parte Learoyd*(1). Section 116 corresponds to section 10 of the Bankruptcy Act, 1869, and section 51 to section 11.

It follows that, if the relevant provisions of the Provincial Insolvency Act are on all fours with those of the Presidency-towns Insolvency Act, the principle of *Ex parte Learoyd*(1) must be applied to adjudications under the Provincial Insolvency Act, but not otherwise. An examination of the relevant sections shows that there are wide differences between the two Acts. Section 116 of the Presidency-towns Insolvency Act states that a copy of the Official Gazette containing a notice inserted in pursuance of the Act shall be evidence of the facts stated in the notice. Section 51 says that the insolvency of a debtor shall be deemed to have relation back to and commence at (a) the time of the commission of the act of insolvency on which an order of adjudication is made against him, or (b) if the insolvent is proved to have committed more acts of insolvency than one, the time of the first of the acts of insolvency proved to have been committed by him within three months next preceding the date of the presentation of the insolvency petition.

The section dealing with the publication of the order of adjudication under the Provincial Insolvency Act is section 30 which says that notice of an order of adjudication shall be published in the Official Gazette, but it does not provide that the publication of the notice shall be evidence of the facts stated therein, as is the case with section 116 of the Presidency-towns Insolvency Act. The relation back section is also different. In the Provincial Insolvency Act it is section 28 (7), which says that an order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition on which it is made.

(1) (1878) 10 Ch. D. 3.

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There is a further difference between the two Acts. Section 54 of the Provincial Insolvency Act says that every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view to giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and "shall be annulled by the Court". The words "shall be annulled by the Court" do not appear in the corresponding section of the Presidency-towns Insolvency Act, section 56.

Therefore we have these differences between the two Acts: (i) Under the Provincial Insolvency Act the publication in the Official Gazette of the order of adjudication is not evidence of the facts stated therein as is the case in the Presidency-towns Insolvency Act; (ii) the order of adjudication under the Provincial Insolvency Act relates back only to the date of the petition asking for the adjudication, whereas in the Presidency-towns Insolvency Act it relates back to the very act of insolvency itself; and (iii) the Provincial Insolvency Act requires a fraudulent transfer to be annulled by a direct order of the Court which is not the case under the Presidency-towns Insolvency Act. The first two are the most important of the differences.

The question whether *Ex parte Learoyd*(1) could be applied in the case of an adjudication under the Provincial Insolvency Act fell to be decided in 1936 by a Division Bench of the Rangoon High Court of which I was a member. The case was *Ma Htwe v. Maung Pu*(2). The Court held that *Ex parte Learoyd*(1) had no application because of the differences in the wording

(1) (1878) 10 Ch. D. 3.

(2) (1936) I.L.R. 14 Rang. 748.

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of the Bankruptcy Act, 1869, and the Provincial Insolvency Act. This decision was followed by this Court (BYERS J.) in an unreported case.* The question has been fully argued before us and we consider that there is no room to doubt that *Ex parte Learoyd*(1) does not apply when the adjudication order has been passed under the Provincial Insolvency Act, because that Act does not contain the provisions on which the decision in *Ex parte Learoyd*(1) was based. Under the Presidency-towns Insolvency Act as under the Bankruptcy Act, 1869, an order of adjudication operates to vest the property of the insolvent in the Official Assignee from the earliest proved act of insolvency and, therefore, any alienation by the insolvent from the commencement of the act of insolvency is entirely inoperative. Under the Provincial Insolvency Act the property does not vest in the Official Receiver until the date of the presentation of the petition, which means that all unlawful transactions entered into prior to that date require to be set aside.

In the case now before us, the Subordinate Judge held that the decision of the Judicial Committee in *Mahomed Siddique Yousuf v. Official Assignee of Calcutta*(2) applied; but this view was not shared by the District Judge on appeal. It follows from what we have said that we are in agreement with the opinion of the District Judge and consequently the petition must be dismissed with costs.

G.R.

* Civil Revision Petition No. 1474 of 1943.
(1) (1878) 10 Ch. D. 3. (2) I.L.R. [1943] 2 Cal. 517 (P.C.).

INCOME-TAX REFERENCE.

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

AR. KR. V. VELAYUDHAN CHETTIAR, PAGANERI,
RAMNAD, APPLICANT,

1944,
October

v.

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

Hindu law—Ancestral property—Gifts of money by father in favour of his son—Ancestral property in son's hands in absence of intention to treat them as personal to him—Indian Income-tax Act (XI of 1922), sec. 3.

The assessee, who was the manager of a Hindu undivided family consisting of himself and his three sons, was assessed to income-tax for the years 1939-40 and 1940-41 on the basis that a business carried on by him at Colombo belonged to the joint family and that two sums of money of Rs. 25,000 and Rs. 8,221 received by him as gifts from his father in July 1924 and June 1925 respectively and utilized in the business constituted ancestral property in his hands. The assessee contended that those moneys were his separate property.

Held.—The moneys which the assessee's father gave to him must be regarded as ancestral property in his hands. Where a Hindu father gives his self-acquired property to his son the latter takes it as ancestral property unless it is apparent that the father intended the gift to be merely personal to his son.

Nagalingam Pillai v. Ramachandra Tevar(1) followed.

Lal Ram Singh v. Deputy Commissioner of Partabgarh(2) referred to.

Case law reviewed.

CASE referred to the High Court by the Income-tax Appellate Tribunal, Calcutta Bench, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922), in Application No. 66, R.A. Nos. 4 and 5 (Madras), of 1943-44.

* Case Referred No. 63 of 1943.

(1) (1901) I.L.R. 24 Mad. 429. (2) (1923) I.L.R. 45 All. 596 (P.C.).

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T. R. Venkatarama Sastri for P. R. Srinivasan for applicant.

C. S. Rama Rao Sahib for respondent.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—This is a reference by the Income-tax Appellate Tribunal, Calcutta Bench, under section 66 of the Indian Income-tax Act. The Tribunal has not accurately set out the facts, but these are not in dispute and they may be stated very shortly.

The assessee is joint with his three sons. In 1922 he started at Negombo in Ceylon a business in partnership with a stranger to the family. On 7th May 1924 he embarked on a cloth business in Colombo. Here he had no partner. In the month of July 1924 his father gave him a sum of Rs. 25,000 and in the month of June of the following year a sum of Rs. 8,221. The assessee was one of three brothers and each received the same amount. In the statement of the case it is said that the gift to the assessee in June 1925 was a sum of Rs. 24,665. This was the amount which was divided by the father between his three sons. Another mistake in the statement of the facts made in the order of reference is that the assessee commenced his business in Colombo after the death of his father. His father died in 1934.

On 26th May 1938 a deed of partnership was executed by the assessee and his two elder sons who were majors. The third son was a minor but it was provided that he was to be taken into the partnership on attaining majority. The father and the three sons were each to have a one-fourth share in the profits.

For the years 1939-40 and 1940-41 the assessee was assessed to income-tax on the basis that he was the head of a joint Hindu family and that the partnership business belonged to the family. The income-tax authorities took the view that the money which the assessee had received from his father in 1924 and 1925 constituted ancestral property in his hands and this

opinion was accepted by the Appellate Tribunal. The assessee then asked the Tribunal to make this reference. The application was opposed by the Commissioner of Income-tax, but the Tribunal considered that a question of law did arise and has referred four questions. These read as follows:—

“(a) Whether on the facts and in the circumstances of the case the gifts of money made by Velayudhan Chettiar’s father must be taken in law as impressed with the character of ancestral property in the hands of Velayudhan Chettiar;

(b) whether on the facts and in the circumstances of the case the business carried on at Colombo in part with money gifted by Velayudhan Chettiar’s father was a business of the Hindu undivided family of Velayudhan Chettiar and his sons, the income therefrom being assessable as the income of the undivided family;

(c) whether there were any materials to justify the finding that part of the capital for the partnership business at Negombo started in 1922 by Velayudhan Chettiar came from gifts made by Velayudhan Chettiar’s father and that the Negombo partnership was an adjunct or part of the sole Colombo business, the two together forming one business;

(d) whether the assessment made on the income of the sole business at Colombo and partnership business at Negombo was rightly made on the applicant in the status as a Hindu undivided family or whether the applicant was liable to be assessed only in respect of his share of income under the partnership deed dated 26th May 1938.”

The last three questions turn on the answer to be given to the first question.

There is ample authority of this Court in support of the decision of the Tribunal that the gift of the Rs. 25,000 in July 1924 and that of the Rs. 8,221 in June 1925 constituted ancestral property in the hands of the assessee. In *Nagalingam Pillai v. Ramachandra Tevar*(1) it was held that where a father gives his self-acquired property to his son he takes it as ancestral property unless it is apparent that he intended the gift to be merely personal to his son. This case was decided by SHEPHARD and BENSON JJ. In delivering the judgment of the Court, SHEPHARD J. said:

(1) (1901) I.L.R. 24 Mad. 429.

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"As the father is at liberty to make any disposition he pleases or to leave his self-acquired property to descend as ancestral property, so when making any disposition in favour of his son he is at liberty to preserve for the property the quality of ancestral property. Whether in any given case the property was intended to pass to the son as ancestral property or as self-acquired property must be a question of intention turning on the construction of the instrument of gift. Following the principle laid down in *Mahomed Shumsool v. Shewukram*(1), I think that, if there are no words indicating the contrary intention, the natural inference should be that the father intended his sons to take his property as their ancestral estate."

This decision has been accepted as good law by this Court in *Rajah of Ramnad v. Sundara Pandiaswami Thevar*(2), *Krishnaswami Naidu v. Seethalakshmi Ammal*(3), *Indoji Jithaji v. Kothapalli Rama Charlu*(4), *Shyama Bhai v. Purushothamados*(5), *Janakiram Chetty v. Nagamony Mudaliar*(6), *Visveswara Rao v. Varahanarasimham*(7) and *Ramachandra Aiyar v. Ranganayaki Ammal* (8).

Mr. T. R. Venkatrama Sastri, on behalf of the appellant, has suggested that we should refer to a Full Bench the question whether the law was correctly stated in *Nagalingam Pillai v. Ramachandra Tevar*(9) because some other High Courts have expressed a contrary opinion. We are not prepared to adopt this course. The decision in *Nagalingam Pillai v. Ramachandra Tevar*(9) has been followed in this province for nearly forty years and we do not consider it proper, especially in view of the many occasions on which it has been affirmed, to refer the matter to a Full Bench. In *Lal Ram Singh v. Deputy Commissioner of Partabgarh*(10) the attention of the Privy Council was drawn to the conflict of authority but Their Lordships did not consider that that case called for its

(1) (1874) L.R. 2 I.A. 7.

(2) (1914) 27 M.L.J. 694.

(3) (1915) I.L.R. 39 Mad. 1029.

(4) (1919) 10 L.W. 498.

(5) (1925) 21 L.W. 551.

(6) (1925) I.L.R. 49 Mad. 98.

(7) (1937) M.W.N. 396.

(8) (1941) 1 M.L.J. 557.

(9) (1901) I.L.R. 24 Mad. 429.

(10) (1923) I.L.R. 45 All. 596 (P.C.).

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decision. They left the matter open until a more fitting opportunity arose. So far as we are concerned, we are bound by *Nagalingam Pillai v. Ramachandra Tevar*(1) and, as it has not been overruled by the Privy Council, we must follow it.

As the Tribunal was right in holding that the money which the assessee's father gave to him must be regarded as ancestral property in his hands, the first question must be answered in the affirmative.

Learned Counsel are agreed that in this view there is no necessity for an answer to any of the remaining three questions.

The assessee must pay the Commissioner's costs, Rs. 250.

N.S.

APPELLATE CIVIL.

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

SRI KOTHANDARAMASWAMI TEMPLE AT ADAMBAR
BY ITS TRUSTEES S. VAITHIANATHA AYYAR AND ANOTHER
(PLAINTIFFS), APPELLANTS,

v.

VEEZHINATHA AYYAR AND ANOTHER (DEFENDANTS 1 AND
2), RESPONDENTS.*

Madras Hindu Religious Endowments Act (II of 1927), ss. 44 and 73—Scope of—Directions in will to perform religious services in temple out of income of immovable properties belonging to testatrix—Suit by temple trustees to enforce charge thus created—Maintainable—Not barred by ss. 44 and 73.

A testatrix left directions in a will that the cost of performing religious services in a temple should be met out of the income of certain immovable properties belonging to her. The trustees of the temple filed a suit against the persons in

* Letters Patent Appeal No. 16 of 1944.

(1) (1901) I.L.R. 24 Mad. 429.

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possession of the immovable properties for enforcing the charge created by the testatrix.

Held.—Neither section 73 nor section 44 of the Madras Hindu Religious Endowments Act was a bar to the suit. Section 73 had no application as the suit did not come within the categories referred to in sub-section 1 of the section and was not one for the administration or management of a religious endowment. Nor did section 44 exclude either expressly or by clear implication the right of suit in a civil Court. The liability under the charge arose under the general law and the ordinary method of enforcing that liability is by a suit in the civil Court having jurisdiction in the matter.

Secretary of State for India v. Jagannadham(1) referred to.

APPEAL under clause 15 of the Letters Patent against the judgment and decree of CHANDRASEKAHARA AYYAR J., dated 7th March 1944 and passed in Second Appeal No. 862 of 1943 preferred against the decree of the Court of the Subordinate Judge of Mayavaram in Appeal Suit No. 79 of 1942 (Original Suit No. 175 of 1941, District Munsif's Court, Mayavaram).

T. V. Ramanatha Ayyar for appellants.

S. Thyagaraja Ayyar for respondents.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—By a will dated 6th June 1895 one Ponnammal directed that out of the income of certain immovable properties belonging to her the cost of performing religious services in temples specified by her should be met. One of the temples is the Sri Kothandaramaswami Temple at Adambar in the Tanjore District, of which the appellants are the trustees. In 1941 they instituted a suit in the Court of the District Munsif of Mayavaram against the first and the second respondents, the successors in interest of one Subbaraya Ayyar who became possessed of the properties subject to the charges created by the testatrix. There were other defendants but it is not necessary to state why they were joined as parties.

(1) I.L.R. [1941] Mad. 850 (F.B.).

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The first and second respondents strenuously defended the action. In the first place they denied that a valid charge had been created by the testatrix in favour of the Sri Kothandaramaswami Temple and they averred that the suit was not maintainable by reason of the provisions of sections 44 and 73 of the Madras Hindu Religious Endowments Act of 1926. The District Munsif held that a valid charge had been created and under it the first and second respondents were liable to pay to the trustees of the temple fifteen kalams of paddy per annum. He considered, however, that the plea that the only remedy of the trustees was an application under section 44 of the Act must prevail when the section was read together with section 73, and accordingly he dismissed the suit. On appeal by the trustees the Subordinate Judge concurred in the opinion of the District Munsif that a valid charge had been created in favour of the Sri Kothandaramaswami Temple. He did not agree with the District Munsif that section 44 was a bar to the suit, but went on to hold that it was not maintainable by reason of section 73, inasmuch as sanction for the institution of the suit had not been granted by the Hindu Religious Endowments Board. The Subordinate Judge agreed with the District Munsif that the charge in favour of the Sri Kothandaramaswami Temple was in respect of an annual payment of fifteen kalams. The trustees then appealed to this Court. This appeal was heard by CHANDRASEKHARA AYYAR J., who agreed with the District Munsif that section 44, read in conjunction with sub-section 3 of section 73, prohibited the trustees from filing a suit and limited their remedy to an application under section 44. The learned Judge gave, however, a certificate under clause 15 of the Letters Patent, which has permitted the trustees to file this further appeal.

We are of the opinion that section 73 of the Act has no application here. Sub-section 1 permits the

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Board or any person having an interest and having obtained the consent of the Board to institute a suit in the District Court to obtain a decree (a) appointing or removing the trustee of a math or excepted temple or of a specified endowment attached to a math or excepted temple, (b) vesting property in a trustee, (c) declaring what proportion of the endowed property or of the interest therein shall be allocated to a particular object of the endowment, (d) directing accounts and enquiries, or (e) granting such further or other relief as the nature of the case may require. The words "granting such further or other relief as the nature of the case may require" cannot be read as extending the classes of suits contemplated by the section. The present suit does not come within any of the categories specified in sub-section 1. Sub-section 2 admittedly is not in point. Sub-section 3 states that sections 92 and 93 and rule 8 of Order I of the first schedule of the Code of Civil Procedure shall have no application to a suit claiming relief in respect of the administration or management of a religious endowment and no suit in respect of such administration or management shall be instituted except as provided by the Act. This is not a suit for the administration or management of a religious endowment. It is a suit filed by the trustees to recover money due to the temple and secured by a charge on immovable properties. As the suit does not come within the categories referred to in sub-section 1 and is not one for the administration or management of a religious endowment, section 73 cannot have application.

The more substantial question is whether section 44 in itself precludes the institution of a suit in such a case as the present one. The section says that, where an endowment for the performance of a charity or service connected with a temple consists merely of a charge on property and there is failure in the due

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performance of the charity or service by the person responsible, the trustee of the temple may require the person in possession of the property on which the endowment is charged to pay to the trustee the expenses incurred or likely to be incurred in causing the charity or service to be performed otherwise. In default of the payment as required by the trustee, the Court shall on his application pass an order for the recovery of the amount and the order may be enforced as if it were a decree of the Court. The Court referred to in this section is the District Court.

The section clearly permits the District Judge on a mere application to order the recovery of the amount so charged, but this does not in itself mean that the trustees of a temple benefited by a charge are compelled to proceed under the section. Obviously where, as here, the validity of the endowment is denied, it is far better to have the question decided in a regular suit, especially as the Act does not provide for an appeal against an order passed under section 44. In *The Secretary of State for India v. Jagannadham*(1) it was pointed out that to exclude the jurisdiction of the civil Courts (which means the appropriate civil Court) the exclusion must be explicitly expressed or clearly implied. Therefore the question is whether section 44 can legitimately be read as excluding the right of suit in the appropriate civil Court. The section certainly does not expressly exclude the right of suit and we do not think it can be read as implying its exclusion. Admittedly, if section 73 is ruled out, there is no other section which can be called in aid by the contesting respondents. It must be borne in mind that this is not a case where the liability is statutory as opposed to a liability under the common law. As stated in *Secretary of State for India v. Jagannadham*(1), where the liability is statutory, the party must adopt the remedy given to him by the statute. The liability

(1) I.L.R. [1941] Mad. 850 (F.B.).

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of the first and the second respondents arises under the general law of the land and the ordinary method of enforcing that liability is in the civil Court having jurisdiction in the matter.

We hold that section 44 does not preclude the trustees from filing a suit in the Court of the District Munsif; and, as they have substantiated their case, the appeal must be allowed and a decree passed in their favour. It is admitted that on this basis the plaintiffs are entitled to recover Rs. 105 from the first and the second respondents. Consequently there will be a decree for this amount with interest from the date of suit. The appellants will have their costs throughout, based on this figure, against the first and the second respondents.

N.S.

APPELLATE CIVIL.

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

1944,
October 12.

PAZHANCHERI PANANGAT BLAHAYIL THACHUNNI
NAIR (PLAINTIFF), APPELLANT,

v.

PAZHANCHERI PANANGAT BLAHAYIL KARNAVAN AND
MANAGER UNNIAPPAN NAIR AND FIFTEEN OTHERS
(DEFENDANTS 1, 13 TO 16, AND 2 TO 12), RESPONDENTS.*

*Madras Marumakkattayam Act (XXII of 1933), ss. 32 and 50—
Scope—Customary law regarding suits for accounts against
karnavan not affected—Junior member of tarwad not
entitled to file suit for accounts against karnavan.*

Section 32 of the Madras Marumakkattayam Act, 1932, has not altered the customary law which does not permit a suit for accounts to be filed by a junior member of a tarwad against the karnavan.

Manavadan v. Sredevi(1) referred to.

* Second Appeal No. 1808 of 1943.
(1) (1926) I.L.R. 50 Mad. 431.

APPEAL against the decree of the Court of the Subordinate Judge of Ottapalam in Appeal Suit No. 260 of 1942 preferred against the decree of the Court of the District Munsif of Chowghat in Original Suit No. 420 of 1942.

P. Govinda Menon and V. Karunakara Menon for appellant.

K. Kuttikrishna Menon and T. K. Raman Nambisan for first respondent.

Other respondents were not represented.

The JUDGMENT of the Court was delivered by LEACH C.J.—The question which the Court has to consider in this case is whether section 32 of the Madras Marumakkattayam Act, 1932, has altered the customary law to the extent of permitting a suit for accounts to be filed against a karnavan.

The appellant is a junior member of a tarwad of which the first respondent is the karnavan. He sued in the Court of the District Munsif of Chowghat for a decree granting *inter alia* the following reliefs:—
(i) Ordering the karnavan to produce in Court within a date specified the daily accounts, ledgers, counterfoil receipt books and vouchers relating to the income and expenditure of the tarwad from 1st Kanni 1117 to 31st Chingam 1117 (that is, from 17th September 1941 to 16th September 1942) and (ii) directing the karnavan to render true and correct accounts of all the income and expenditure and generally of the management of the tarwad since he became the karnavan. The District Munsif considered that a suit of this nature could now be brought by reason of the provisions of section 32 of the Madras Marumakkattayam Act. The karnavan appealed to the Court of the Subordinate Judge of Ottapalam. The Subordinate Judge agreed with the District Munsif that in the circumstances of the case the karnavan could be compelled to produce his books of account and relevant papers in Court, but disagreed with him on the question whether a suit for

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accounts lay. The Subordinate Judge was of the opinion that it did not and consequently modified the decree passed by the District Munsif. The plaintiff has appealed to this Court. The karnavan accepts the legality of the finding so far as it directs him to produce his accounts in Court and we are informed that this part of the decree has been complied with.

Section 32 of the Act reads as follows :—

“The karnavan shall keep true and correct accounts of the income and expenditure of the tarwad. The accounts of each year shall be available for inspection at the tarwad house by the major anandravans once in a year throughout the month of Kanni following such year and any such anandravan may take copies of or extracts from such accounts.”

Clause (b) of section 50 says that nothing contained in the Act shall be deemed to affect any rule of Marumakkattayam law, custom or usage except to the extent expressly laid down in the Act.

It is common ground that before the Act was passed a junior member of a tarwad was not entitled under the customary law to bring a suit for accounts against the karnavan. If the karnavan had caused loss to the estate by reason of his own act of misfeasance or fraud, a suit requiring him to make good the loss would lie at the instance of a junior member of the tarwad; but the suit had to be based on some specific act of misfeasance or fraud. If in the course of such a suit it was proved that the karnavan had been guilty of misfeasance or fraud, he could be removed. The customary law is concisely stated in the judgment of this Court in *Manavadan v. Sredevi*(1).

Therefore, before the Act was passed, this suit would not have been maintainable, even in so far as it directed the production into Court of the accounts. As we have indicated, it is accepted that the section permits a suit to be filed by a junior member requiring the karnavan to produce the accounts into Court if he has failed to make them available for inspection at the

(1) (1926) I.L.R. 50 Mad. 431.

tarwad house; but this does not mean that a suit for accounts will lie. The section does not contemplate such a suit. It merely contemplates the keeping of correct accounts and the production of them for inspection. Section 50 puts it beyond all doubt that the customary law is not altered except to the extent of the express provisions in the Act. The customary law did not permit of a suit for accounts against the karnavan, and to hold that section 32 contemplates such a suit would be doing grave violence to its wording. The section, of course, leaves untouched the right of a junior member to bring a suit to compel the karnavan to make good any loss caused to the estate by reason of his misfeasance or fraud and the right to sue for his removal on the ground of neglect of his duties or abuse of his powers. The plaintiff has succeeded in getting the accounts brought to Court and, if those accounts show that the karnavan has failed in the fulfilment of his duties, the plaintiff has his remedy under the customary law.

The appeal is dismissed with costs in favour of the first respondent.

N.S.

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APPELLATE CIVIL.

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

PAZHAVEETIL CHEKKARA KUNHI KANNAN
(APPELLANT), APPELLANT,

v.

ELAMKANDI KINATHUMKARA CHAPPAN
(FIRST RESPONDENT), RESPONDENT.*

*Practice—Application for security for costs after printing of
papers and appeal in rough list—Refusal—Promptness in
applying essential—Code of Civil Procedure (Act V of
1908), O. XLI, r. 10.*

An application for security for costs filed at a late stage when the record had been printed and the appeal had appeared in the rough list, which meant that all costs in connection with the printing of the record had been incurred, should be refused. Promptness is the essence of such an application.

APPEAL under clause 15 of the Letters Patent against the order of HAPPELL J., dated 30th August 1944 and made in Civil Miscellaneous Petition No. 2973 of 1944.

K. Kuttikrishna Menon and A. Achuthan Nambiar for appellant.

S. Venkatachala Sastri for respondent.

LEACH C.J. The JUDGMENT of the Court was delivered by LEACH C.J.—This is an appeal from an order of HAPPELL J. directing that the appellant should furnish security for the costs of the respondent in Appeal No. 119 of 1943 of this Court. The appellant's complaint is that the application for security for costs was made at a very late stage and, on the accepted principle that promptness is the essence of such an application, the learned Judge should have refused it. We consider that this argument is well founded.

The appeal was filed on 22nd February 1943 and was admitted on 18th March 1943. The respondent

* Letters Patent Appeal No. 46 of 1944.

was served in due course. The application for an order for security for costs was filed on 25th July 1944 by which time the record had been printed and the case had appeared in the rough list, which meant that all costs in connection with the printing of the record had been incurred.

The learned Judge, in passing the order for security for costs, had regard to what had happened in an application made by the respondent for the execution of the costs awarded to him in the trial Court. This application was filed in the month of October 1943. The judgment-debtor contended that he was possessed of no means. His statement was disbelieved and the Subordinate Judge who heard the application for execution held that he had sufficient money to pay off the amount due to the decree-holder. Accordingly he directed a warrant to be issued for the arrest of the judgment-debtor. It was not executed because he could not be found and on 10th January 1944 the Subordinate Judge dismissed the application for execution.

If the decree-holder had then applied to this Court for an order for security for costs, he would undoubtedly have got it and rightly so, but he did not apply until six months later. The Court closed for the long vacation at the end of April 1944 and the decree-holder had ample time in which to make the application before the vacation commenced. He took no steps until the case was ready for hearing. In these circumstances we consider that he is precluded from getting an order for security for costs. He has only himself to blame for the present situation.

The appeal must be allowed with costs here and before HAPPELL J.

N.S.

KUNHI KANNAN
CHAPPAN.
LEACH C.J.

APPELLATE CIVIL.

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

1944,
October 18.

PENUGONDA RADHAKRISHNAMURTHY (SECOND RESPONDENT), APPELLANT,

v.

V. A. Y. ETHIRAJULU CHETTY & CO., V. ALWARIAH CHETTY BEING ITS PARTNER, AND ANOTHER (FIRST RESPONDENT AND PETITIONER), RESPONDENTS.*

Letters Patent (Madras), cl. 15—Appeal against order of single Judge of High Court setting aside order of City Civil Court refusing extension of time for passing award—Not maintainable—Indian Arbitration Act (X of 1940), sec. 39 (1) and (2).

An appeal under clause 15 of the Letters Patent against the judgment of a single judge of the High Court setting aside an order of the City Civil Court under the provisions of section 39 of the Indian Arbitration Act, 1940, is barred by reason of sub-section 2 of the section.

APPEAL under clause 15 of the Letters Patent against the judgment of KUPPUSWAMI AYYAR J., dated 4th November 1943 and passed in Appeal Against Order No. 152 of 1943 preferred against the order of the City Civil Court, Madras, dated 29th December 1942 and made in Original Petition No. 117 of 1941.

C. Vasudevan for appellant.

B. Venkataramiah for respondents.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C. J.—This is an appeal from a judgment of KUPPUSWAMI AYYAR J. setting aside an order of the Principal Judge of the City Civil Court under the provisions of section 39 of the Indian Arbitration Act, 1940. Two applications had been filed in the City Civil Court for an order extending the time allowed to an umpire for the passing of his award. The umpire awarded the first respondent a sum of

* Letters Patent Appeal No. 7 of 1944.

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Rs. 600; but the award was not made within the time allowed by law. The Principal Judge of the City Civil Court refused the applications on the ground that by granting them the opposite party would lose valuable rights. The first respondent then appealed to this Court. KUPPUSWAMI AYYAR J. considered that the applications for extension of time should have been granted, and allowed the appeal. Accordingly he sent the case back to the City Civil Court to decide the other points raised in the proceedings.

A preliminary objection has been taken. It is contended that this appeal does not lie by reason of sub-section 2 of section 39 which says that no second appeal shall lie from an order passed in an appeal under the section, although nothing in the section shall affect or take away a right to appeal to His Majesty in Council. This objection is sound. It is true that clause 15 of the Letters Patent, if it stood alone, would allow the appeal; but clause 44 of the Letters Patent says that the provisions are subject *inter alia* to the legislative powers of the Governor-General in Legislative Council. The Indian Arbitration Act is an Act of the Central Legislature and the provisions of section 39 must prevail.

The appeal is dismissed with costs.

N.S.

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LEACH C.J.

APPELLATE CIVIL.

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

1944,
October 13.

MULLAPUDI HANUMAYYA (SECOND RESPONDENT),
APPELLANT,

v.

ANNADASU CHINA BAPANAYYA AND TWO OTHERS
(PETITIONERS AND FIRST RESPONDENT), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXI, r. 89—Deposit under—Personal attendance of judgment-debtor unnecessary—Making deposit through agent, valid—No power-of-attorney required for agent.

Under Order XXI, rule 89, of the Code of Civil Procedure the deposit required to be made by a judgment-debtor can be made through an agent. Personal attendance of the judgment-debtor when paying the money is not necessary. Nor need the authorization to the agent to make the deposit be by means of a power-of-attorney. It is sufficient if the deposit is made on his behalf and under his directions.

Venkata Kutumba Rao v. Venkatappa(1) applied.

Syed Ibne Hasan v. Din Dayal(2) not followed.

APPEAL against the order of the Court of the Subordinate Judge of Tenali, dated 4th October 1943 in Execution Application No. 236 of 1943 in Execution Petition No. 95 of 1942 in Original Suit No. 32 of 1934.

M. S. Ramachandra Rao and D. R. Krishna Rao for appellant.

P. Somasundaram and Ch. Raghava Rao for respondents.

LEACH C.J. The JUDGMENT of the Court was delivered by LEACH C.J.—On 7th April 1943 immovable property was sold by the Subordinate Court of Tenali in execution of a money decree. Within time the judgment-debtors applied under order XXI, rule 89, of the Code of Civil Procedure for an order setting aside the

le and deposited the necessary amount. The application was opposed by the auction purchaser on the ground that the decretal amount had not been paid to Court by the judgment-debtors themselves, it by one V. Bapamma who was acting as their agent. The objection was rightly overruled by the subordinate Judge and the sale was set aside. The auction purchaser has, however, preferred this appeal.

The appellant relies on a decision of a single Judge of the Allahabad High Court who apparently was of the opinion that the money must be deposited either by the judgment-debtor himself or by an agent authorized by special or general power of attorney. We are not prepared to follow this decision, which was given in the case of *Syed Ibne Hasan v. Din Dayal*(1). In our opinion it does not correctly state the law. There is, however, a decision of a Bench of this Court which does; see *Venkata Kutumba Rao v. Venkatappa*(2). In that case the deposit was made by the pleader's clerk, not by the pleader, and it was suggested that this vitiated the application. The Court rejected the contention and stated that the mere fact that the clerk sent the money by the hand of his clerk instead of taking it to the treasury himself would not invalidate the application.

Rule 89 requires the deposit to be made by the judgment-debtor, but that does not mean that it requires the personal attendance of the judgment-debtor when paying the money. A judgment-debtor can pay in the money through an agent and we can see no necessity for a power of attorney. The judgment-debtor must, of course, direct the payment to be made. The judgment schedule shows that the money was paid by V. Bapamma on behalf of the judgment-debtors, and she obviously paid it as their agent. This was sufficient.

The appeal is dismissed with costs.

N.S.

* Appeal Against Order No. 791 of 1943.
(1) (1923) 46 M.L.J. 119.

(2) A.I.R. 1931 All. 449 (2).

(1) A.I.R. 1931 All. 449 (2).

(2) (1923) 46 M.L.J. 119.

APPELLATE CIVIL.

Before Mr. Justice Mockett and Mr. Justice
Kuppuswami Ayyar.

1944,
November 30.

SEETHA BAI AND ANOTHER (RESPONDENTS 2 AND 3),
APPELLANTS,

v.

NARASIMHA SHET AND TWO OTHERS (PETITIONER
AND RESPONDENTS 1 AND 4), RESPONDENTS.*

*Hindu law—Joint family consisting of widows and minors—
Widows not coparceners—Nature of their right under Hindu
Women's Rights to Property Act (XVIII of 1937)—Court—
Power of, to appoint guardian of the joint family properties
of such minor members.*

Hindu widows may be members of a joint Hindu family but they are not members of the coparcenary. Under the Hindu Women's Rights to Property Act, 1937, the only right which they get, analogous to that of a coparcener, is the right to demand a partition and the nature of that right is that of a widow's estate. Accordingly, where a joint Hindu family consisted of two minor coparceners and certain widows,

held that the Court had power to appoint a guardian for the joint family properties of the minor members.

Gharibullah v. Khalak Singh(1) distinguished.

APPEAL against the order of the District Court of South Kanara, dated 25th November 1943, and made in Original Petition No. 6 of 1942.

K. Srinivasa Rao and S. Ramayya Nayak for appellants.

K. Vittal Rao for respondents.

The JUDGMENT of the Court was delivered by KUPPUSWAMI AYYAR J.—The appeal arises out of proceedings under the Guardians and Wards Act started by one Narasimha Shet, the grand-uncle of one Gopalakrishna, one of the two minors, for whose properties a guardian was sought to be appointed.

* Appeal Against Order No. 809 of 1943.
(1) (1903) I.L.R. 25 All. 407, 416 (P.C.).

The other minor was Kamalaksha. The minors are the sons of one K. Ramachandra Krishna Shet who died on 5th November 1941, leaving behind him three widows, Sita Bai, Shanta Bai and another Sita Bai. Kamalaksha is his son by Shanta Bai, and Gopalakrishna is his son by Sita Bai the fourth respondent in the lower Court. The deceased owned some house property besides a jewellery business. Admittedly it was joint family property in the hands of his sons. Narasimha Shet stated in his petition that all the properties of the late Ramachandra Krishna Shet devolved on his two sons by right of survivorship. There were no adult male members in the family. There were quarrels between the three widows and therefore a guardian was sought to be appointed for the properties of the minors. The widows claimed that they were entitled to a share in the property under the Hindu Women's Rights to Property Act, 1937, and that they were entitled to remain in possession as undivided members of the coparcenary consisting of the two minors and themselves and that no guardian should be appointed. Shanta Bai, the mother of Kamalaksha, wanted, if a guardian was to be appointed, that she herself should be appointed as the natural guardian of her son. The learned District Judge found that the widows were not coparceners and observed :

"In view of the misunderstandings and opposing claims made by the widows, I do not consider that it is desirable that any of the members of the family should be appointed as property guardian. It appears best in the circumstances to appoint an outsider to take charge of the properties to which the minors Kamalaksha and Gopalakrishna are entitled. Mr. K. P. Gopalakrishna Rao will be appointed as property guardian on his furnishing security for Rs. 3,000."

Sita Bai, the first wife, and Shanta Bai, the second wife, of the deceased have filed this appeal. Their contention is that as the properties of the two minors were properties of a joint Hindu family coparcenary,

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no guardian should be appointed. The next contention is that, if a guardian should be appointed, the mother Shanta Bai should be appointed guardian of Kamalaksha and no other.

There is no force in the contention that no guardian should be appointed because the property owned by the minors was their joint Hindu family coparcenary property. It is true that there are observations of the Privy Council in *Gharibullah v. Khalak Singh*(1) that it has been well settled by a long series of decisions in India that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family. That is because in all such families there is a manager or *karta* who is entitled to be in possession of the properties on behalf of the family and no individual member of the family can predicate which property or what share in the property he will be entitled to, as it is a fluctuating interest. In the case before us the coparcenary consists of only the two minor sons and there is therefore no one who could be in juridical possession of the property as *karta*. The two widows are not members of the coparcenary. They may be members of the family. Under the Act the nature of their right is a widow's estate. The only right which they have, analogous to that of a coparcener, is the right to demand a partition. None of the widows could claim to be a manager of the joint Hindu family of which the two minors were members. It is not disputed that it has been held by other High Courts in India that, where the joint family consists only of minors, a guardian could be appointed in respect of the joint family properties of the minor members. The learned District Judge was justified in finding that, in the particular circumstances of this case, a guardian should be appointed for the two minors.

(1) (1903) I.L.R. 25 All. 407, 416. (P.C.).

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With regard to Kamalaksha, it is stated that it has not been proved that there has been any act of mismanagement by his mother, his natural guardian, to justify her being removed and another guardian appointed. There is no evidence that she committed any act of mismanagement. It is true that she claimed an interest in the property under the Hindu Women's Rights to Property Act, 1937, but that is a just claim and cannot be said to be adverse to the minors. If Shanta Bai, the mother of Kamalaksha, furnishes security to the satisfaction of the learned District Judge within three months from to-day, she will be appointed as guardian of her son Kamalaksha in the place of Mr. K. P. Gopalakrishna Rao. The order appointing him as the guardian of the other minor Gopalakrishna is confirmed.

We make no order as to costs.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Mockett and Mr. Justice
Kuppuswami Ayyar.

DHARARAMA SUBBAYYA AND ANOTHER (RESPONDENTS
12 AND 13), APPELLANTS,

1944,
November 1.

v.

ANNAVARAPU LAKSHMI NARASIMHAM AND TWO
OTHERS (PETITIONER AND RESPONDENTS 2 AND 3),
RESPONDENTS.*

Mesne profits—Ascertainment of—Defendant, entitled to remain in possession of lands, had let them to tenants—Tenant not entitled to occupancy rights in them—Mesne profits, to be calculated on gross yield deducting the cultivation charges and other expenses—In such case no scope for allowance for collection charges for defendant.

In a suit for recovery of possession of certain lands with mesne profits, a preliminary decree was passed. It was found

* Appeal No. 267 of 1943.

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that the defendants had let out the lands to certain tenants during the accounting period and that the tenants were not entitled to any occupancy rights therein.

Held: The mesne profits had to be ascertained with reference to the gross yield of the lands, and the net income after deducting the cultivation charges and other expenses would represent the mesne profits payable to the decree-holder. In such a case there was no scope for allowing any deduction to the defendants for charges incurred for collecting the rent, since they were entitled to be in actual possession of the lands which they had let to tenants and received income from them.

Secretary of State for India in Council v. Sarojekumar Acharjya Chaudhuri(1), *Grish Chunder Lahiri v. Shoshi Shikhareswar Roy*(2) and *Krishnayya Rao v. Maharaja of Pithapuram*(3) distinguished.

APPEAL against the judgment and decree of the Court of the Subordinate Judge of Tenali, dated 31st December 1942, and passed in Interlocutory Application No. 142 of 1940 in Original Suit No. 30 of 1937.

G. Venkatrama Sastri, N. Subrahmanyam and G. Durga Bai for appellants.

V. Subramanyam for first respondent.

Other respondents were not represented.

JUDGMENT.

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KUPPUSWAMI AYYAR J.—The appellants are respondents 12 and 13 in Interlocutory Application No. 142 of 1940 on the file of the Subordinate Judge of Tenali. They are the legal representatives of the first defendant in Original Suit No. 30 of 1937 on the file of that Court. It was a suit for recovery of possession of certain properties with mesne profits. A preliminary decree was passed on 17th March 1939 and the properties were taken possession of shortly thereafter. There were two appeals to this Court against the preliminary decree which were both dismissed on 4th February 1942. In the meanwhile, Interlocutory Application No. 142 of 1940 was filed

(1) (1934) I.L.R. 62 Cal. 499 (P.C.). (2) (1900) I.L.R. 27 Cal. 951 (P.C.).
(3) I.L.R. [1942] Mad. 562.

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on 9th February 1940 for ascertaining the mesne profits. A commissioner was appointed to ascertain the same. After taking evidence and after examining the documents, he submitted a report on 14th November 1941. The learned Subordinate Judge on receipt of the report heard the objections of both sides and gave a decree, and it is against this decree for mesne profits that this appeal has been filed by respondents 12 and 13, who are the legal representatives of the first defendant in the suit.

The only two points urged are that the learned Subordinate Judge had gone wrong in estimating the mesne profits payable in respect of some of the items for the years 1934–1935 and 1935–1936, and the other is in respect of his refusing to allow Rs. 231–1–7 claimed as collection charges. So far as the first objection is concerned, I do not think the appellants have made out a case for interfering with the order of the learned Subordinate Judge. A commissioner was appointed to inspect the lands for ascertaining what the income from these lands would be and his report has been accepted. The appellant sought to let in evidence some lease deeds alleged to have been executed in the material years and they have been rejected by the commissioner and the learned Subordinate Judge agreed with him. They are unregistered documents and there are indications to show that they must have been obtained subsequently. Further, it is a matter only of approximation. When there are no definite data and when an estimate could be made approximately, it cannot be said that the learned Subordinate Judge had gone wrong in accepting the estimate of the commissioner who had given cogent reasons for arriving at the figure mentioned by him in his report.

The only other point is about the collection charges. The appellants' case is that they had leased these lands to tenants and had to collect rent from them

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and, for collecting the rental from the lands, they had to incur expenses for going to the localities for getting the lease deeds and again for collecting monies and that the learned Judge ought to have allowed them ten per cent on the gross income of the properties for such collection charges. There would be justification for the appellants in claiming the collection charges if the mesne profits had been assessed on the actual rent collected by them. This is not a case in which the tenant in possession of the lands had occupancy rights. The right which the appellants had was a right to be in actual possession of the lands and receive income from them. It is only in cases where the person who has to pay mesne profits had no right to be in physical possession of the land but only to collect rent, it can be said that there would be justification for deducting the collection charges out of the rent collected by him from the tenants in possession for ascertaining the mesne profit. In a case where the person is entitled to be in actual possession, then the mesne profits have to be ascertained with reference to the yield of the land, and the net income after deducting the cultivation charges and other expenses would represent the mesne profits payable to the decree-holder. In this case, the commissioner has not fixed the mesne profits payable on the basis of the amount actually received by the appellants as rent. The lease deeds for the years in question were not proved and he had therefore to fix the mesne profits with reference to the yield from the property. He no doubt referred to subsequent lease deeds but it was only for the purpose of pointing out that the figure fixed by him was not high. If the mesne profits had to be fixed with reference to the yield of the property, it cannot be said that there would be any scope for allowing any deduction for collection charges. The gross income from the land minus the expenses that will have to be incurred for

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getting the gross yield would be the net income from the properties and this is the basis on which mesne profits had been fixed in this case and there can hence be no scope for allowing any deduction for collection charges. The commissioner in his report clearly indicated that he fixed the mesne profits with reference to the yield from the property and also after taking into consideration the cultivation expenses. Further the appellants have not let in evidence to show that they had incurred any collection charges. They rely upon a judgment of the Judicial Committee in *Secretary of State for India in Council v. Sarojekumar Acharjya Chaudhuri*(1), following the ruling of the Privy Council in *Grish Chunder Lahiri v. Shoshi Shikhareswar Roy*(2). In both these rulings there is reference to the practice of allowing ten per cent for collection charges. They are all cases from Bengal where there is the permanent settlement. In most of these cases, it will be only the right to receive rent from the actual person cultivating the lands that would be the basis for the mesne profits. In such cases the collection charges had necessarily to be deducted and that was why evidently the practice grew up in Bengal, in the absence of evidence, of fixing ten per cent as allowance for collection charges. It is not a custom of the people but only a practice of Court that is referred therein and, so far as I am aware, there has been no practice followed by Courts either in the mufassal or here of any definite percentage being allowed as collection charges when the mesne profits are fixed with reference to the yield of the land and when the person who is liable to account for the mesne profits is entitled to be in actual possession of the land. The case in *Krishnayya Rao v. Maharaja of Pithapuram*(3) was a case with reference to the zamindari. In *Secretary of State for India in Council v. Sarojekumar Acharjya Chaudhuri*(1) it was the case of an island

(1) (1934) I.L.R. 62 Cal. 499 (P.C.). (2) (1900) I.L.R. 27 Cal. 951 (P.C.).
(3) I.L.R. [1942] Mad. 562.

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and the Secretary of State was made to pay mesne profits but then, in the case of zamindari and other public bodies, they have an establishment to make these collections and, in such cases, there may be a justification for a deduction of the expenses of the establishment employed in the collection, but I do not think it can be said in the case of parties like the appellants there will be any justification for making an allowance for collection charges when the mesne profits are fixed with reference to the yield of the land.

Another point that was urged for the appellants is that with reference to items 10 to 20, the learned Subordinate Judge ought to have given a joint decree against them and the second defendant, but then it is the plaintiff that can complain against this omission and not the appellants. It may be that the appellants are entitled to a claim for contribution from the second defendant but this is not a matter about which we are concerned in this appeal.

I would therefore dismiss the appeal with costs.

MOCKETT J.

MOCKETT J.—I agree. I only wish to add a few remarks with regard to the contentions of the learned Counsel for the appellants, that it has been laid down for all time that in all the Courts in India there is a rule to the effect that ten per cent is the customary allowance for the collection expenses of the profits. The decision of the Privy Council in *Secretary of State for India in Council v. Sarojekumar v. Acharjya Chaudhuri*(1) was cited to a Bench of this High Court in *Krishnayya Rao v. Maharaja of Pithapuram*(2) and it will be observed at page 580 that, when referring to that decision, PATANJALI SASTRI J. noticed that it is "a case arising in Bengal". An examination of the earlier decision which was approved by the Judicial Committee, namely, *Grish Chundar Lahiri v. Shoshi Shikhareswar Roy*(3), shows that there was "a well-recognised practice in these Courts" (which

(1) (1934) I.L.R. 62 Cal. 499 (P.C.). (2) I.L.R. [1942] Mad. 562.
(3) (1909) I.L.R. 27 Cal. 951 (P.C.).

means, the Courts of Bengal) and supported by evidence to the effect that ten per cent allowance should be made as a matter of ordinary practice for collection. The cases referred to by Sir JOHN WALLIS in *Secretary of State for India in Council v. Sarojekumar Acharjya Chaudhuri*(1) are all Calcutta cases. I venture therefore to think that, when Sir JOHN WALLIS observed in the course of the judgment that "in India" ten per cent is the customary allowance for mesne profits, his Lordship was referring to the Courts in India with whom their Lordships were then concerned, namely, the Courts in Bengal. The authorities cited before the Board by Mr. Dunne no doubt establish that it is customary to deduct collection charges but nowhere can it be found other than in Bengal that there is a custom that the amount of deduction should be ten per cent. I am fortified in expressing this view by the fact that as stated by my learned brother, who has far greater experience in these matters than I, no such custom has ever come to his notice. I may add, neither has it come to my notice. The fact is that this may be a useful custom in the conditions prevailing in Bengal but the necessity for its appearance as a rule of practice in the Madras Courts has not yet arisen. I entirely agree with my learned brother's judgment with regard to the merits of this appeal, which should be dismissed with costs.

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(1) (1934) I.L.R. 62 Cal. 499 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice Bell.

1944,
August 15.

M. G. NATESA CHETTIAR (PLAINTIFF-APPELLANT),
APPELLANT IN APPEAL AGAINST ORDER NO. 420 OF 1943
AND RESPONDENT IN APPEAL AGAINST ORDER NO. 458 OF
1943,

v.

SUBBUNARAYANA AYYAR AND TWO OTHERS
(DEFENDANTS-RESPONDENTS), RESPONDENTS IN APPEAL
AGAINST ORDER NO. 420 OF 1943 AND APPELLANTS IN
APPEAL AGAINST ORDER NO. 458 OF 1943.*

*Transfer of Property Act (IV of 1882), sec. 52—Lis pendens,
doctrine of—Scope—Not applicable to involuntary sale in
execution of decree on mortgage created prior to suit—Code
of Civil Procedure (Act V of 1908), O. XXXIV, r. 1.—
No provision compelling mortgagee to implead prior charge-
holders in execution proceedings—Mortgagee-plaintiff with
knowledge of sale in favour of defendants in enforcement of
their charge—Necessity to implead them in execution
proceedings—Omission—Effect.*

R, who had a melwaram right in village C, mortgaged it by means of three deeds in 1921, 1922 and 1923 to the plaintiff in Original Suit No. 33 of 1940, District Munsif's Court, Dharmapuri. Defendants 1 to 3 in the suit were inamdars of that village whose right consisted in receiving every year from R one-third of the sum payable by him to Government as peshcush. Attached to that right was a first charge on the mittadar's interests in the village. On 30th June 1933 defendants sued the mortgagor for arrears of payment of one-third of the peshcush and for enforcement of their charge. They obtained a decree on 10th April 1934, brought the mortgagor's property to sale on 24th October 1934 and obtained delivery in execution of their decree on 4th December 1934. To that suit the plaintiff who, by virtue of defendants' prior charge, had become a puisne mortgagee was not made a party. On 12th October 1933 plaintiff sued the mortgagor on the three mortgages. He obtained a decree on 25th July 1934, sold the mortgagor's property on 3rd October 1935 and

* Appeals Against Orders Nos. 420 and 458 of 1943.

obtained confirmation of his sale on 6th March 1936. In his suit the plaintiff did not implead the defendants as parties. The defendants were not made parties to the proceedings in execution taken by the plaintiff in 1935 and 1936. Plaintiff then sought to obtain delivery of the property which he had purchased and the defendants obstructed him. An application by him to remove the obstruction was dismissed. He then filed Original Suit No. 33 of 1940 to set aside the adverse order. Relying on the provisions of Order XXXIV, rule 1, of the Code of Civil Procedure, he contended that defendants ought to have impleaded him in their suit of 1933 and, not having done so, their decree could not be binding upon him; but as defendants did not acquire rights to the equity of redemption until October 1934, he was not bound to implead the defendants in the suit filed by him in October 1933 and that therefore his own title was superior to that of the defendants.

Held: (i) The doctrine of *lis pendens* could not be extended to the case and therefore the plaintiff could not claim that his decree, dated 25th July 1934, was binding on the defendants who were not in fact parties to the suit.

The transfer to which the provisions of section 52 of the Transfer of Property Act can properly be applied is the creation of the mortgage itself, not the subsequent sale in the enforcement of the mortgage.

Chinnaswami Padayachi v. Darmalinga Padayachi(1) followed.

Ram Sanehi Lal v. Janki Prasad(2) not followed.

(ii) The plaintiff was within his rights in filing his suit without impleading the defendants; but, although no specific provision of the Code of Civil Procedure compelled him to implead the defendants in taking his proceedings in execution in 1935 and 1936, he ought to have done so as he must have become aware of the sale in October 1934 by which defendants acquired their title. The refusal to implead the defendants in the execution proceedings was deliberate and the plaintiff could not claim any equitable relief.

APPEALS against the order of the Court of the Subordinate Judge of Salem, dated 12th January 1943 and made in Appeal Suit No. 185 of 1942 preferred against the decree of the Court of the District Munsif of Dharmapuri in Original Suit No. 33 of 1940.

(1) (1932) 63 M.L.J. 394.

(2) (1931) I.L.R. 53 All. 1023 (F.B.).

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

T. R. Arunachala Ayyar and *P. S. Raghavarama Sastri* for respondent.

Cur. adv. vult.

KING J. The JUDGMENT of the Court was delivered by KING J.—These appeals are concerned with a village in the Salem district called Chettihalli. The mittadar or owner of the melvaram right in this village was one Ramakrishna Chettiar (to be referred to hereinafter as the mortgagor). He mortgaged his rights in this and other villages to the plaintiff in Original Suit No. 33 of 1940, District Munsif's Court, Dharmapuri, from which the present appeals have arisen. This was so long ago as 1921, 1922 and 1923, and was effected by three mortgage deeds. Defendants 1 to 3 in Original Suit No. 33 of 1940 are inamdars of Chettihalli whose right consisted in receiving every year from the mittadar one-third of the sum payable by the mittadar to the Government as peshcush. Attached to this right is a first charge on the mittadar's interests in the village.

On 30th June 1933 the defendants sued the mortgagor for arrears of this payment of one-third of the peshcush, and for the enforcement of their charge. They obtained a decree on 10th April 1934, brought the mortgagor's property to sale on 24th October 1934, and obtained delivery in execution of their decree on 4th December 1934. To this suit the plaintiff, who, by virtue of the defendants' prior charge, may now be called the puisne mortgagee, was not made a party.

On 12th October 1933 plaintiff sued the mortgagor on the three mortgages. He obtained a decree on 25th July 1934, sold the mortgagor's property on 3rd October 1935 and obtained confirmation of his sale on 6th March 1936. In this suit plaintiff did not implead the defendants. Plaintiff next sought to obtain delivery of the property which he has purchased. Defendants naturally obstructed him. An application by plaintiff to remove the obstruction was dismissed on 18th

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August 1938. The result was the present suit by plaintiff filed in August 1939, though now numbered as Original Suit No. 33 of 1940, to set aside the adverse order. The suit was dismissed by the learned District Munsif of Dharmapuri. Plaintiff's appeal against this decree dismissing his suit was heard by the learned Subordinate Judge of Salem who on 12th January 1943 passed an order of remand, against which both parties have now appealed.

The learned Subordinate Judge's findings were these :

(i) Plaintiff must pay to defendants the amount due on their decree.

(ii) In calculating this amount plaintiff will have to pay interest, but defendants must give credit for income received by them from the village while they were in possession of it.

(iii) Defendants must pay to plaintiff the proportionate amount due to him on his decree for this particular village.

(iv) These sums will be set off one against the other, and the exact amount thus found to be due by the defendants will be declared.

(v) If defendants do not pay, the property will be sold, and directions are given for the distribution of the sale-proceeds. (It follows from this that if defendants do pay, their possession will not be disturbed, and their ownership will be recognized.)

(vi) The suit was remanded for an enquiry into the precise amount thus to be declared payable by the defendants, and for the passing of a decree on the lines indicated by the learned Subordinate Judge.

Both parties have appealed from this order of remand. The principal appeal is that of the plaintiff (Civil Miscellaneous Appeal No. 420). He contends that he has the better title to the property concerned, and that defendants have no right to redeem him. Defendants in Civil Miscellaneous Appeal 458 contend that the plaintiff cannot redeem them, so that their title is unassailable and plaintiff's suit should be forthwith dismissed. There was also a contention (not, however, formulated in the grounds of appeal) that defendants need not give credit for the income which they had received.

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The plaintiff's case regarding the superiority of his own title was put very simply as follows, and depends on the provisions of Order XXXIV, Civil Procedure Code. Defendants ought to have impleaded him in their suit of 1933 (*see* rule 1 of that order) and not having done so the decree which they obtained cannot be binding upon him. Plaintiff, on the other hand, was not bound to implead the defendants in *his* suit (*see* the same rule). Plaintiff filed his suit in October 1933, defendants acquired no rights to the equity of redemption until October 1934. When the case is put in this simple manner there can be no doubt that plaintiff is right in contrasting his own correct procedure with the incorrect procedure of the defendants, but it does not in our opinion necessarily follow that plaintiff's title, as subsequent purchaser in his own suit, must prevail over defendants' title as purchasers in theirs. It is only if the doctrine of *lis pendens* can be successfully applied to this case that plaintiff can claim that his decree binds the defendants, who were not in fact parties to his suit.

The plaintiff in contending that the doctrine of *lis pendens* can be extended to the present case relies on a Full Bench ruling of the Allahabad High Court, *Ram Sanehi Lal v. Janki Prasad*(1). In Madras, however, the extension of the doctrine to cover the case of an involuntary alienation in execution of a mortgage decree has been refused; *see Chinnaswami Padayachi v. Darmalinga Padayachi*(2). The transfer to which the provisions of section 52, Transfer of Property Act, can properly be applied is the creation of the mortgage itself, not the subsequent sale in the enforcement of the mortgage. It may be that, as argued for the plaintiff, the enunciation of this legal principle in *Chinnaswami Padayachi v. Darmalinga Padayachi*(2) was *obiter dictum*, but with respect, we do not consider the principle any the less sound on that account and we prefer to follow it rather than the contrary view as expressed in Allahabad.

(1) (1931) I.L.R. 58 All. 1023 (F.B.). (2) (1932) 63 M.L.J. 394.

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NARAYANA.
—
KING J.

We thus reach the position in which each party relies upon a title which is imperfect in that it does not bind the other. In these circumstances, are there any grounds for preferring the plaintiff? So far as priority of time in the acquisition of the title is concerned, it is the defendants and not he who can claim the advantage. Plaintiff contends that in equity he should be preferred, again stressing the correctness of his procedure in filing his suit. But we see no particular meritorious behaviour in plaintiff when we look at the history of this case as a whole. He was of course within his rights in filing his suit without impleading the defendants, but, although no specific provision of the Civil Procedure Code compelled him to implead the defendants in taking his proceedings in execution in 1935 and 1936, he ought, in our opinion, to have done so. There can be no serious doubt that plaintiff must have become aware of the sale in October 1934 by which defendants acquired their title. Certainly no facts were put forward in appeal in support of any plea of ignorance, and naturally plaintiff would always be greatly interested in the payment by his mortgagor of his annual dues to the defendants. We are of opinion therefore that the refusal to implead the defendants in the execution proceedings was deliberate and that plaintiff can claim no equitable relief. His appeal must be dismissed with costs.

The defendants have not seriously pressed their appeal. They succeeded in persuading the first Court that no redemption is possible of a decree like theirs based upon a charge given for annual payments, but did not repeat this attempt before the learned Subordinate Judge or before us. The claim that they are not liable to account for income received is negatived by *Natesan Chettiar v. Ramalinga Chettiar*(1).

Their appeal also fails and is dismissed with costs.

V.V.C.

(1) (1937) 46 L.W. 332.

APPELLATE CIVIL.

*Before Mr. Justice King and Mr. Justice Bell.*DR. R. G. RAJAN AND ANOTHER (APPELLANTS),
PETITIONERS,

".

N. SRINIVASA NAIDU AS TRUSTEE OF SRI VENKATA-
RAMANASWAMI CHATRAM CHARITY, ENANGUDI, AND TWO
OTHERS (RESPONDENTS), RESPONDENTS.**Court Fees Act (VII of 1870) sec. 35—(Madras) Notification of
17th May 1943 published in G.O. No. 5791—Scope of—
Reduction of court-fee—Restriction of, to suits in which status
of defendant as trustee either at the time of suit or previously
undisputed.*

The notification published in G.O. No. 5791, dated 17th May 1943, reducing the court-fee chargeable in any suit for possession or joint possession between trustees, or between a plaintiff who claims to be a trustee and a defendant who is alleged to have ceased to be a trustee, to one-third of what it would be if the suit related to a claim in respect of private property, is restricted in its scope to suits in which the status of the defendant as trustee either at the time of the suit or previously is undisputed.

Held accordingly, that in an appeal preferred against a decree in a suit filed by two plaintiffs who claimed to be trustees of certain trust property against the defendants who put forward the same claim, no reduction of court-fee could be claimed by virtue of the above notification, as the plaintiffs did not concede that the defendants had any right to be trustees.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court may be pleased to issue a certificate in favour of the petitioners herein for refund of Rs. 774-15-0 being the excess court-fee that has been paid on the memorandum of appeal in Appeal No. 280 of 1943 on the file of the High Court preferred against the decree of the District Court of East Tanjore at Negapatam in Original Suit No. 14 of 1942.

* Civil Miscellaneous Petition No. 3553 of 1944.

R. Sundaralingam for petitioner.*Government Pleader (K. Kuttikrishna Menon)* for

the Crown.

A. V. Viswanatha Sastri for first respondent.*R. Viswanathan* for third respondent.

Second respondent was not represented.

The ORDER of the Court was delivered by KING J.—

This petition relates to Appeal No. 280 of 1943 and is filed by the appellants. The appeal was filed on 9th August 1943 and a court-fee of Rs. 1,162-7-0 was paid. It is now contended that in accordance with the terms of a notification published in G.O. No. 5791, dated the 17th May 1943, this court-fee is excessive and that all that need have been paid was one-third of the amount. The notification runs :

"In exercise of the powers conferred by section 35 of the Court Fees Act, 1870, His Excellency the Governor of Madras is hereby pleased to reduce the fee chargeable in any suit for possession or joint possession between trustees, or between a plaintiff who claims to be a trustee and a defendant who is alleged to have ceased to be a trustee, to one-third of what it would be if the suit related to a claim in respect of private property."

Court-fee has been paid on the appeal on the footing that the ordinary court-fee payable on a claim in respect of private property was due. The learned Government Pleader opposes this application and contends that the suit in question does not fall within the terms of the notification. This is a suit by two plaintiffs who claim to be trustees of certain trust property against the defendants who put forward the same claim. It is possible that a "suit between trustees" is an expression which might in other circumstances have been applied to such a situation; but it seems to us that in view of the second portion of the notification relating to a suit between a plaintiff who claims to be a trustee and a defendant who is alleged to have ceased to be a trustee, the intention of the Government was to restrict the notification to suits

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in which the status of the defendant as trustee either at the time of the suit or previously is undisputed. Here of course the plaintiffs do not concede that the defendants have any right to be trustees. In these circumstances we hold that the application must fail and that what the appellants have already paid is the correct court-fee. This application is accordingly dismissed with costs.

V.V.C.

APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice Kuppuswami Ayyar.

1944,
October 27.

PERIAMBAL CHETTIAR (FIRST DEFENDANT), APPELLANT,

v.

SUNDARAMMAL (PLAINTIFF), RESPONDENT.*

Hindu Law—Maintenance—Wife by her conduct during her husband's life-time forfeiting her right to be maintained by him—Husband bequeathing his properties by will to others and disinheriting her—Her right to be maintained out of the estate after his death.

A Hindu wife had forfeited her right to maintenance from her husband during his life-time owing to her failure in her duty towards him. The husband died leaving a will bequeathing all his properties to a relation of his, specifically stating therein that his wife had no claim to succeed to his property.

Held: After the husband's death the widow was entitled to be maintained out of his estate. By her conduct she did not permanently forfeit her right to maintenance, but that right was only suspended and the suspension ceased when her husband died. He had no right to execute a will which could defeat such a right.

APPEAL against the decree of the District Court of North Arcot at Vellore in Original Suit No. 5 of 1943.

* Appeal No. 372 of 1943.

B. C. Seshachala Ayyar for appellant.

K. V. Ramachandra Ayyar for respondent.

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KING J.

The JUDGMENT of the Court was delivered by KING J.—This appeal arises from a suit brought by the widow of one Pachayappa Chettiar against the first defendant who succeeds to the property of Pachayappa Chettiar by virtue of a will executed by him on 6th January 1942. First defendant is the maternal uncle of the testator. In his will the testator specifically states that his wife, the plaintiff, has no claim to succeed to his property. The plaintiff and her husband had not lived together from 1929 until the date of the husband's death. In 1930 there was a magisterial order under the Code of Criminal Procedure against the husband for the payment of maintenance to the plaintiff, but the effect of this order was nullified by subsequent civil litigation undertaken by the testator in a suit in 1931 for the restitution of conjugal rights. In that suit he obtained a decree which was confirmed on appeal in 1933. After 1933 no serious attempts appear to have been made to persuade the plaintiff to live with the husband and no proceedings were taken through Court to execute the decree. The validity of the will was attacked by the plaintiff in the course of her suit, but it has been found that the will was genuine and valid. The plaintiff's alternate claim, therefore, to be granted maintenance out of the husband's estate was considered and it was held that she was entitled to maintenance.

The principal point which has arisen for decision in this appeal is whether in the circumstances of this case the plaintiff had any right to be maintained out of her husband's property. It is argued on behalf of the appellant that the plaintiff had forfeited her right to maintenance by her conduct, and that therefore her husband had every right when executing his will to dispose entirely of all his estate without any

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SUNDARAMMAL. thought for any possible right of his wife to be maintained out of it after his death.

KING J.

There can be no doubt in the circumstances of this case that if the plaintiff had applied for maintenance against her husband while her husband was still alive, she would have failed to get it. Though the parties may still differ as to the circumstances which led to the separation in 1929, the litigation which ended in 1933 is conclusive on that point as against the plaintiff. It is attempted to be argued for the appellant that the effect of the conduct of the plaintiff in deserting her husband for no satisfactory reason in 1929, and her refusal to obey the decree for restitution of conjugal rights has deprived her finally of any claim to be maintained in her new status as a widow. For this no direct authority has been adduced, though we have been asked to regard a judgment of a Bench of this Court as dealing with facts so similar that the principle of that judgment ought to be applied. That is a case decided by a Bench of which one of us was a member—*Sankaramurthy v. Subbamma*(1). The facts were that a claim was made by a widowed daughter-in-law against the devisee or donee of the self-acquired properties of her father-in-law. We held that during the lifetime of the father-in-law the daughter-in-law had no legal claim to be maintained out of her property, that the father-in-law could dispose of it as he wished, and that no obligation attached to any person to whom he had disposed of that property by gift or will, although an obligation would have attached to his heir-at-law. The facts of that case are, in our opinion, quite distinct from the facts with which we have now to deal, and the question of the powers of a Hindu to dispose of his self-acquired property and the distinction which we drew between succession by inheritance and acquisition of property through a will or a gift do not arise here at all. The simple issue

(1) I.L.R. [1939] Mad. 242.

in this case is whether the right which a Hindu widow undoubtedly possesses to be maintained out of the property of her deceased husband is or is not finally forfeited by her conduct during the husband's life-time. On this aspect of the relationship between husband and wife there is no direct authority quoted before us. On the other hand the respondent can rely upon a decision of a Bench of this Court in *Surampalli Bangaramma v. Surampalli Brambaze*(1) in which the nature of the right of a wife to be maintained separately by her husband is considered. It is there held that, by conduct which disqualified her from being separately maintained, a wife does not permanently forfeit her right to maintenance, but that that right is only suspended. This decision is binding upon us and if the right of a wife is suspended and is suspended only because she failed in her duty towards her husband, then it must necessarily revive and the suspension must necessarily cease when her husband dies. There can therefore be no doubt that at the moment when her husband died, the plaintiff had a right to be maintained out of his estate and, according to the provisions of the Succession Act, no person can execute a will which can defeat such a right.

It is next argued that the quantum of maintenance is too large but no concrete facts have been stated before us to justify this contention.

Finally the appellant contends that, inasmuch as the plaintiff filed this suit in the alternative to recover her husband's property itself or for maintenance, it is inequitable that the first defendant should be made to pay the whole of the court-fee due to Government, the suit being filed in *forma pauperis*. This is not a case in which the learned Judge has passed his order with regard to costs arbitrarily. He has been at great pains to set out in three pages of his judgment the reasons for his order. Orders as to costs are

(1) (1908) I.L.R. 31 Mad. 338.

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KING J. discretionary and in circumstances in which the learned Judge has carefully explained the reasons for his order, we see no reason at all to interfere with his discretion.

In the result this appeal must fail and is dismissed with costs.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice Happell.

THE CROWN PROSECUTOR, APPELLANT,

v.

M. SP. S. V. M. MEYAPPA CHETTIAR (ACCUSED),
RESPONDENT.*

The Defence of India Rules, 1939, Rule 117—Person in possession of several motor cars—Filling up application form for supplementary coupons in respect of petrol—Omission to state all the cars in his possession—Liability.

Rule 117 of the Defence of India Rules makes punishable the making of any statement required by or under any of the rules which the person making it knows or has reasonable cause to believe is false or not true. It can make no difference whether the falsity or untruthfulness of the statement is due to a mis-statement of fact or to an omission.

Where a person who is in possession of several motor cars and is required to give the registered number and horse-power of all the motor cars in his possession in filling up the application form for supplementary coupons in respect of petrol, gives the registered number and horse-power of only one of them, he makes a statement which he knows or has reasonable cause to believe is false or not true and is liable to be punished under Rule 117 (2) of the Defence of India Rules.

APPEAL under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) by the Third Presidency Magistrate of the Court of the Presidency Magistrates.

* Criminal Appeal No. 403 of 1944.

Egmore, Madras, in Calendar Case No. 2354 of 1943 on his file.

Crown Prosecutor (P. Govinda Menon) for the Crown.

K. S. Jayarama Ayyar for C. K. Venkatanarasimham for respondent.

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JUDGMENT.

HAPPELL J.—This is an appeal by the Provincial Government against the order of the Third Presidency Magistrate acquitting the accused in Calendar Case No. 2354 of 1943. The offence of which the accused was charged was under Rule 117 (2) of the Defence of India Rules.

HAPPELL J.

It was said that in filling up Form K of the form used under the Motor Spirit Rationing Order in respect of applications for supplementary coupons, the accused under column 7 stated in effect that he had only one car, namely, MSC 1737, whereas in fact he had another car in Ramnad MDR 1341.

Column 7 of Form K runs :

"If the application refers to a private car or motor cycle give registered number and horse-power of all motor cars and motor cycles in applicant's possession or in possession of applicant's firm which are available for his use or in the possession of any member of family residing with the applicant."

Rule 117 (1) of the Defence of India Rules states :

"If any person when required by or under any of these Rules to make any statement or furnish any information, makes any statement or furnishes any information which he knows or has reasonable cause to believe to be false or not true, in any material particular he shall be punishable with imprisonment, etc."

And in effect the accused was charged with making a statement under the Defence of India Rules, namely, the statement in Form K, which he knew or had reasonable cause to believe was false or not true. The accused himself explained, first, that the forms of applications were filled up by his driver whom he had left in Madras when he had gone to Devakottai and

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HAPPELL J.

that he was not himself aware of all the details the driver had given under the several heads, and, secondly, that in any case the other car MDR 1341 was in the possession of Meyyappa Chettiar and Firm and not in his own possession. With regard to the first explanation the learned Third Presidency Magistrate rightly held that the accused could not shelve the responsibility by the plea that the applications were filled up by his employee. He signed all the applications and it was for him to prove, if that was his case, that he did not know what details had been given. With regard to the second explanation there was no satisfactory evidence that the car did belong to the firm, and it should be remembered that there is evidence that the accused himself signed applications in respect of the car MDR 1341 also in his individual capacity. Furthermore there is no evidence, even if the car did belong to the firm, that it was not put at the accused's disposal.

The Third Presidency Magistrate acquitted the accused because, the point for determination being whether the omission to give the number of the car in column 7 of the application, i.e., the number of the other car, was an offence, he was of opinion that it was not for the reason that an omission was not, as he puts it, intended to be penalised by Rule 117 of the Defence of India Rules. The construction put by the Third Presidency Magistrate on Rule 117 of the Defence of India Rules is clearly wrong. That rule makes punishable the making of any statement required by or under any of the rules which the person making it knows or has reasonable cause to believe is false or not true; and it is manifest that, if a person who is in possession of several motor cars and is required to give the registered number and horse-power of all the motor cars in his possession, gives the registered number and horse-power of only one of them, he makes a statement which he knows or has reasonable

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cause to believe is false or not true. It can make no difference whether the falsity or untruthfulness of the statement is due to a misstatement of fact or to an omission. If therefore the accused knew or had reasonable cause to believe that his entry under column 7 which amounts to a statement that he had only one car was false or not true, he should have been convicted. It has already been pointed out that the Third Presidency Magistrate was right in his view that the plea that the responsibility for the return was that of the accused's employee must be rejected, and, that being so, as the accused did know that he had another car but at the same time made a return that he had only one car MSC 1737, he made a statement which he had reasonable cause to believe was false or not true within the meaning of Rule 117. He should therefore have been convicted.

His acquittal by the Third Presidency Magistrate is set aside and he is convicted of the offence charged, namely, an offence under Rule 117 (2) of the Defence of India Rules. With regard to the sentence this appeal has been brought mainly because of the construction put by the Third Presidency Magistrate on Rule 117 of the Defence of India Rules and not because of the gravity of the offence committed. The accused has already been convicted of an offence arising out of the same set of circumstances, namely, the taking of both his cars to Devakottai in April 1942 and for that offence he was sentenced to pay a fine of Rs. 600. It will be sufficient in this case to inflict a nominal fine. The accused is consequently sentenced to pay a fine of Rs. 5 or in default to undergo simple imprisonment for one week.

V.V.C.

APPELLATE CRIMINAL.

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

IN RE SUBBIA GOUNDAN AND OTHERS, ACCUSED.*

*Code of Criminal Procedure (Act V of 1898), sec. 349 (1)—
Trial of several accused by Stationary Sub-Magistrate—
All found guilty of the offence with which they were
charged—One of them a "young person" with the meaning
of Madras Children Act (IV of 1920)—Proper procedure
to be followed in such cases.*

Three persons were accused before a Stationary Sub-Magistrate of an offence punishable under section 355 of the Indian Penal Code. The first and third accused were adults, the second accused was a boy of fourteen years of age and therefore a "young person" within the meaning of the Madras Children Act, 1920. The Magistrate was of opinion that all the accused were guilty and sentenced each of the adults to pay a fine of Rs. 40 and in default to suffer rigorous imprisonment for two months. He considered that the second accused should be dealt with under the Children Act and accordingly referred the case so far as the second accused was concerned to a Joint Magistrate under section 5 of the Act. On reference,

held, that the action of the Stationary Sub-Magistrate fell under section 349 (1) of the Code of Criminal Procedure, which meant that he could not convict any of the accused and was required to send all of them to the Joint Magistrate.

Emperor v. Mottayyan alias Perumal and another(1) approved.

CASE referred for the orders of the High Court under section 438 of the Criminal Procedure Code, by the District Magistrate of Coimbatore in his letter, Reference No. 4678 of 1944, dated 22nd October 1944.

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

Accused was not represented.

The JUDGMENT of the Court was delivered by
LEACH C.J.—This reference has been made by the
District Magistrate of Coimbatore under section 438 of

* Criminal Revision Case No. 870 of 1944.

(Case Referred No. 46 of 1944.)

(1) 1941 M.W.N. 96.

the Code of Criminal Procedure. It raises a question with regard to the effect of section 349 when there are several accused and one of them is a child or young person within the meaning of the Madras Children Act, 1920.

Three persons were accused before the Stationary Sub-Magistrate of Udumalpet with an offence punishable under section 355 of the Indian Penal Code. The first and third accused were adults, the second accused was a boy of fourteen years of age and therefore a "young person" within the meaning of the Children Act. The Stationary Sub-Magistrate was of the opinion that all the accused were guilty of the offence with which they were charged and sentenced each of the adults to pay a fine of Rs. 40 and in default to suffer rigorous imprisonment for two months. He considered that the second accused should be dealt with under the Children Act and accordingly referred the case so far as the second accused was concerned to the Joint Magistrate, Pollachi, under section 5 of that Act. The Joint Magistrate was of the opinion that all the accused should have been sent to his Court and, as they had not, the convictions of the adult accused were unlawful. He referred the matter to the District Magistrate, who agreed with him. Hence this reference.

Sub-section 1 of section 349, Criminal Procedure Code, states that whenever a Magistrate of the second or third class, having jurisdiction, is of opinion, after hearing the evidence of the prosecution and the accused that the accused is guilty and that he ought to receive a punishment different in kind from, or more severe than, that which he is empowered to inflict, he may record the opinion and submit his proceedings and forward the accused to the District Magistrate or Sub-divisional Magistrate to whom he is subordinate. Sub-section 1-A states that when more accused than one are being tried together and the Magistrate considers it necessary to proceed under

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sub-section 1 in regard to any of the accused, he shall forward all the accused who are in his opinion guilty to the District Magistrate or Sub-divisional Magistrate. This sub-section was inserted in 1923 by the Amendment Act of that year, three years after the Madras Legislature had passed the Children Act. Therefore it must be assumed that it was inserted with knowledge of that Act.

The Stationary Sub-Magistrate was of the opinion that the second accused ought to receive a punishment different in kind from that which he was empowered to inflict. He had no power to deal with the second accused under the Children Act. Section 4 of that Act says that the powers conferred on Courts by it shall be exercised only by the High Court, a Court of Sessions, a District Magistrate, a Sub-divisional Magistrate, a salaried Presidency Magistrate, a Juvenile Court constituted under section 36, and a Magistrate of the first or second class specially authorized in that behalf. The Stationary Sub-Magistrate could have proceeded under section 562 (1-A) of the Criminal Procedure Code and have released the second accused after an admonition. Evidently he thought that the second accused should not be dealt with so lightly and decided to make use of section 5 of the Children Act.

His action clearly fell within sub-section 1 of section 349 of the Criminal Procedure Code, which meant that he could not convict any of the accused and was required to send all of them to the Joint Magistrate. It has been suggested that the Children Act stands quite apart from the Criminal Procedure Code and that it could never have been intended that section 349 of the Code should be applied when a Magistrate wished to have a child or youthful offender dealt with under the Children Act. In inquiring into the intention of the Legislature we can only have regard to the words used in the statute. There is nothing in the Criminal Procedure Code which places a case in

which there are several accused and one of them is a child or youthful person outside the provisions of section 349 and the same observation applies to the Children Act. A decision to this effect was given by LAKSHMANA RAO J. in *Emperor v. Mottayyan alias Perumal and another*(1), and it follows from what we have said that we consider it to be right.

The conviction of the first and third accused by the Stationary Sub-Magistrate must be set aside and he will be directed to send all the accused before the Joint Magistrate, Pollachi.

V.V.O.

APPELLATE CIVIL.

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

V. K. NARASIMHAN, PETITIONER,

v.

P. K. PADMANABHA RAO AND ANOTHER, RESPONDENTS.*

Madras House Rent Control Order, 1941, cl. 7-A—Power of Controller to fix fair rent under—Landlord applying for eviction on ground of tenant being unwilling to pay fair rent—Controller fixing fair rent in excess of original rent—Validity.

Where the fair rent of a house has not been previously fixed under the Madras House Rent Control Order, 1941, the Controller has power on an application by a landlord under clause 7-A of the Order to fix the fair rent and such rent may be in excess of the rent paid by the tenant at the time when the Order came into force. Clause 7-A stands alone and is independent of clauses 3, 4, 5 and 6 of the Order.

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 all the

* Civil Miscellaneous Petition No. 44 of 1945.
(1) 1941 M.W.N. 96.

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1945,
March 22.

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records relating to the proceedings L. Dis. Nos. 11952 of 1944 before the Collector of Madras on appeal from the proceedings L. Dis. No. 8828 of 1944 of the Controller, Madras, which resulted in the order of the Collector of Madras, dated 15th November 1944, purporting to fix the fair rent of house No. 46, Sullivan's Garden Road, Mylapore, Madras, and for quashing the said proceedings and order of the Collector of Madras.

N. Srinivasa Ayyangar for petitioner.

T. Krishna Rao for *C. R. Krishna Rao* for first respondent.

Advocate-General (P. V. Rajamannar) for second respondent.

LEACH C.J.

The ORDER of the Court was pronounced by LEACH C.J.—This is an application for the issue of a writ of *certiorari* with the object of quashing an order passed by the Collector of Madras under clause 7-A of the Madras House Rent Control Order, 1941. It is clear that the petitioner has misread the effect of that clause.

On 16th August 1942 the petitioner became a tenant of the first respondent in respect of a house known as No. 46, Sullivan's Garden Road, Mylapore, Madras, on a monthly rent of Rs. 30. On 1st August 1943 the petitioner agreed to the rent being increased to Rs. 35 a month, and on 1st April 1944 he agreed to an increase to Rs. 40 a month. On 24th July 1944 the first respondent wrote to the petitioner giving notice that he required a rent of Rs. 60 a month. The petitioner refused to agree to this and contended that he was entitled to remain in possession of the house at a rent of Rs. 30 per month, the rent which he was paying when the Madras House Rent Control Order was applied to the City of Madras. On this basis he claimed to be entitled to recover from his landlord Rs. 10 a month in respect of April, May and June 1944 and suggested that the Rs. 30 should be credited to the rent due in respect of the month of July.

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LEACH C.J.

In these circumstances the first respondent applied to the Controller for an order of eviction of the petitioner on the ground that he was not willing to pay the fair rent for the premises. There had been no application for the fixing of the fair rent, and consequently it was necessary for the Controller to decide what the fair rent was. He found that the municipal valuation for the year 1939-40 and preceding years had been based on a monthly rental of Rs. 60 but that owing to deterioration in the premises the valuation was reduced in respect of the year 1943-44. It was then based on a monthly rental of Rs. 40. The Controller considered that the fair rent would be Rs. 50 a month and directed the petitioner to pay rent at this rate from 1st October 1944, failing which he was to be evicted from the premises. Both the parties appealed to the Collector who fixed the fair rent at Rs. 60 a month. It is that order which the petitioner challenges in these proceedings.

For the petitioner it is said that clause 7-A must be read in conjunction with clauses 3, 4, 5 and 6 which relate to the fixing of the fair rent at the instance of the tenant, that the fair rent cannot be fixed at the instance of the landlord and that a tenant is entitled to remain in possession of a house at the rent which he was paying when the Control Order came into force. Clause 7-A was inserted in the Order on 4th July 1944 and it is obvious that sub-clause 2 was inserted for the benefit of the landlord. So far as it is relevant to the matter before us, the clause reads as follows :—

“(1) A tenant in possession of a house shall not be evicted therefrom, whether in execution of a decree or otherwise and whether before or after the termination of the tenancy except in accordance with the provisions of this clause.

(2) A landlord wishing to evict a tenant in possession shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the application is satisfied

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(i) that the tenant has not paid; and is not ready and willing to pay the rent due in respect of the period before such application; or

(ii) that the tenant is not ready and willing to pay the fair rent of the house for such period thereafter as he may continue to be in possession; or

(iii) that the tenant has, without the consent of the landlord, sub-let the entire house or used it for a purpose other than that for which it was leased; or

(iv) that the landlord was at no time during the twelve months immediately preceding the date of his application residing within the limits of the city, town or village in which the house in question is situated, that it is essential in the public interest that he should take up residence in such city, town or village and that he is unable to secure other suitable accommodation,

the Controller shall make an order directing the tenant to put the landlord in possession of the house, and if the Controller is not so satisfied, he shall make an order rejecting the application."

Clause 7-A stands alone. If, as is suggested, it must be read in conjunction with clauses 3, 4, 5 and 6, it would have no meaning. Under clause 7-A a landlord cannot have the fair rent fixed with retrospective effect; but he can have it fixed, and if the tenant is not willing to pay the fair rent thereafter the landlord is entitled to an order of eviction. In this case the fair rent was fixed in accordance with law by the Collector, and his order must stand. The application is dismissed with costs.

Solicitor for second respondent: *Crown Solicitor (H. M. Small).*

N.S.

PRIVY COUNCIL

MARUDANAYAGAM PILLAI, APPELLANT

v.

MANICKAVASAGAM CHETTIAR, RESPONDENT

[APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS]

Code of Civil Procedure (Act V of 1908), O. XXI, rr. 66, 69 and 90—Settlement of sale proclamation—Duty of decree-holder to give correct particulars of valuation of property brought to sale—Duty of Court to check information furnished by parties—Decree-holder over-estimating in ignorance amount of prior charge and purchasing property in court-auction at undervalue—Material irregularity—Loss to judgment-debtor—Sale liable to be set aside under r. 90—Waiver by judgment-debtor to object to sale held in court-auction—Essentials

Order XXI, rule 66, of the Code of Civil Procedure, imposes upon the Court the duty of causing a proclamation of the intended sale to be made and requires the proclamation to be drawn up after notice to the decree-holder and the judgment-debtor. Such proclamation must specify, as fairly and accurately as possible, amongst other things, any encumbrance to which the property is liable. The Court ought, as far as practicable, to bring its mind to bear upon the contents of the proclamation and, where material is readily available to check the information supplied by the parties, it ought to avail itself of such material. Apart from the duty cast upon the Court, sub-rule 3 of rule 66 provides that every application for an order for sale shall be accompanied by a statement signed and verified in the manner mentioned, and containing, so far as they are known to, or can be ascertained by, the person making the verification, the matters required by sub-rule 2 to be specified in the proclamation.

Where, therefore, a sale takes place at a serious undervalue occasioned by failure on the part of the Court and of the decree-holder to carry out their obligations under rule 66 in the matter of mentioning the proper amount of a prior charge in the proclamation of sale and the judgment-debtor sustains substantial injury thereby, the case falls within the language of Order XXI, rule 90, of the Code of Civil Procedure.

* *Present*—LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD SIMONDS, SIR MADHAVAN NAIR, AND SIR JOHN BEAUMONT

* J.C.
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The sale in such circumstances is liable to be set aside, even though the conduct of the judgment-debtor is dilatory and unsatisfactory, provided it does not amount to waiver on his part to object to it. To constitute such a waiver, proof is necessary that the judgment-debtor knew the true facts from which an intention on his part to waive his right to object to a misstatement in the proclamation can be inferred.

APPEAL from the judgment and order of the High Court of Judicature at Madras, dated 24th September 1941, which on appeal modified the judgment and order of the Court of the Subordinate Judge of Mayavaram, dated 15th February 1939.

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

J. M. Pringle for appellant.

C. S. Rewcastle K.C. and *Sir Alfred Wort* for respondent.

SIR JOHN
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The JUDGMENT of their Lordships was delivered by Sir JOHN BEAUMONT.—This is an appeal from the judgment and order of the High Court of Judicature at Madras, dated 24th September 1941, which, on appeal, modified the judgment and order of the Subordinate Judge of Mayavaram, dated 15th February 1939.

The question in the appeal is whether a sale of immovable property, including land in the village of Tiruvali, made in execution of a mortgage decree obtained by the respondent against the appellant's predecessor is bad as regards the said land and should be so far set aside under Order XXI, rule 90, of the Code of Civil Procedure, on the ground of material irregularity and fraud in publishing and conducting the sale.

The said mortgage was executed on 26th January 1925, by one Srirangathammal in respect of land in three villages, including that of Tiruvali, to secure the repayment within one year of Rs. 36,000, with interest at the rate of fifteen per cent per annum.

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The mortgagor was the widow of the last male proprietor of the estate, holding therein the limited interest of a Hindu widow, and the appellant was the next presumptive reversioner. So far as regards the land in the village of Tiruvali and certain other lands, the mortgage was expressed to be made subject to a prior mortgage (hereinafter referred to as the "prior mortgage") dated 16th November 1924 by the same mortgagor in favour of third parties, to secure repayment of Rs. 44,500 and interest. The prior mortgage included lands not covered by the respondent's mortgage. In 1929, the mortgagees instituted a suit on the prior mortgage before the Subordinate Judge of Mayavaram joining the respondent as puisne mortgagee and on 12th August 1929 obtained a decree for Rs. 79,238-2-6 with a direction for sale if the monies were not paid by 12th February 1930. The realizations under this decree will be mentioned later.

In 1930, the respondent instituted a suit before the same Subordinate Judge on his mortgage, and on 7th October 1930 obtained a preliminary decree for Rs. 66,778-11-9, and on 27th July 1931 a final decree. In 1931, in a suit instituted by the appellant as next reversioner against the said Srirangathammal for an injunction to restrain her from committing waste, a receiver was appointed for the estate and on 7th April 1931 he was added as a defendant in the suit on the prior mortgage and on the 27th July he was added as a defendant in the suit on the respondent's mortgage. On 15th December 1931, the respondent applied under rule 66 (2) of Order XXI for execution of his decree and he annexed to his application a draft proclamation which directed that the sale should be subject to the mortgage decree obtained on the prior mortgage, and contained this statement:

"A low valuation is made as there is a prior charge of about Rs. 80,000 according to the said decree in respect of the aforesaid properties."

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The value put upon the properties by the respondent amounted to Rs. 7,317. In May 1932, Srirangathammal died, and the appellant was added as a defendant in the respondent's suit, the receiver having been previously discharged. On 13th September 1932, the appellant, by his pleader, adopted the answer which had been put in by the receiver in the respondent's suit and which had challenged the respondent's draft proclamation, and the appellant agreed to put in a draft sale proclamation in the way in which he would have it, and the matter was then adjourned until 6th October 1932. On the 6th October the appellant's pleader asked for an adjournment and, on its refusal, stated that he had no instructions to proceed with the matter. No draft proclamation was put in by the appellant, and the Court thereupon approved the draft proclamation put in by the respondent, and adopted the respondent's valuation as the upset price. On 2nd November, the Court directed that the sale should take place on 19th December. On the 25th October, the appellant had made an application alleging that the widow mortgagor had no power to bind the reversion and that accordingly the decree for sale on the respondent's mortgage could not affect the interest of the appellant, and on 16th December the appellant applied for an adjournment of the sale until this point had been determined. The Subordinate Judge thereupon adjourned the sale to 23rd January 1933, the appellant waiving a fresh proclamation. In the absence of such waiver the appellant would have been entitled to insist upon a fresh proclamation under rule 69 of Order XXI. Further adjournments were obtained at the instance of the appellant, who on each occasion waived a fresh proclamation, and the sale ultimately took place on 28th March 1933. At the sale the respondent, the decree-holder, who had obtained leave to bid under rule 72, Order XXI, was the only bidder, and he purchased at Rs. 16

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above the upset price. From the judgment of the learned Subordinate Judge, it appears that after the sale the prior mortgagee sold certain land subject to the respondent's mortgage for some Rs. 10,000 and that the respondent paid to him a further sum of Rs. 1,000 balance due on the prior mortgage. In the result the respondent acquired free from incumbrances and at a price rather less than Rs. 20,000 property which he had valued at Rs. 7,317 subject to a mortgage for Rs. 80,000.

The position under the prior mortgage appears from Exhibit MM which is the suit register in the Subordinate Court of Mayavaram of the prior mortgage suit. It appears that in January 1931 the receiver paid into Court Rs. 3,000, and in September a further Rs. 20,000 and these sums had been paid out to the decree-holder prior to December 1931. In June 1932 sales were effected in the prior mortgage suit and sums amounting to Rs. 30,444 were paid into Court and these sums were paid out to the decree-holder in July and August 1932. In November and December 1932 there were further sales for sums amounting approximately to Rs. 16,000, and this sum was paid out to the decree-holder by 4th March 1933. The position therefore is that at the time when the draft proclamation was submitted by the respondent the sum of approximately Rs. 80,000 mentioned therein as due on the prior mortgage (which was correct as the sum originally due) had been reduced by a sum of Rs. 23,000. At the date when the proclamation was approved, namely, 6th October 1932, the sum had been reduced by a further Rs. 30,444; and at the date of the sale the sum had been reduced by a further Rs. 16,000, making a total reduction of Rs. 69,000.

On 19th June 1933, the appellant applied under rule 90 of Order XXI to set aside the sale on the ground of material irregularity or fraud in publishing or conducting it. The learned Subordinate Judge came

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to the conclusion that the sum of Rs. 80,000 mentioned in the proclamation as the amount due on the prior mortgage was wrong at the respective dates of presenting and settling the proclamation and of the sale for the reasons hereinbefore stated, and that had the Court known the true facts the upset prices would have been fixed at a much higher figure, and that the appellant had been seriously prejudiced by the mistake in the proclamation. He stated that he was not prepared to hold that the respondent had been guilty of fraud in misstating the amount due on the prior mortgage, though he considered the case to be one of grave suspicion. He held further that there was nothing to show that the appellant was aware of the payments into Court in the prior mortgage suit.

On appeal the High Court held that there was no material irregularity in the proclamation which had prejudiced the appellant. They took the view that the only mistake in the proclamation at the time when it was presented and approved by the Court was that the figure of Rs. 80,000 should have been Rs. 87,000. They considered that the further payments into Court beyond the Rs. 23,000 must have been made in respect of sales which were challenged and the payments out must have been on some form of undertaking that the amount would be refunded if the sales were eventually set aside. Their Lordships can find nothing on the record to justify these conjectures, and the further evidence read before their Lordships on behalf of the appellant, without objection from the respondent, consisting of affidavits made in the prior mortgage suit in relation to the payments out, makes it abundantly clear that these payments were only made after the sales had been confirmed. The whole basis of the High Court's judgment therefore fails, and the reasoning has not been relied upon by Counsel for the respondent. The learned Judges did not think it necessary to consider the evidence as to the state of knowledge of the parties.

The respondent based his case on waiver by the appellant, contending that the appellant must have known about the sales of his own property in the prior mortgage suit, and about the disposal of the purchase monies, that accordingly when he waived his right to a fresh proclamation he must be taken to have accepted the statements in the existing proclamation and to have waived his right to object to them, and reliance was placed upon the decisions of this Board in *Girdhari Singh v. Hurdeo Narain Singh*(1) and in *Arunachellam v. Arunachellam*(2).

The efficacy of a plea of waiver by the appellant depends on the ability of the respondent to prove that the appellant knew the true facts from which an intention on his part to waive his right to object to a misstatement in the proclamation can be inferred. Their Lordships appreciate that there are reasons for suspecting that the appellant may have known more about the dealings with his property in the prior mortgage suit than he was prepared to admit, but they think that there are reasons at least equally cogent for suspecting that the respondent was in like case. The respondent was a party to the prior mortgage suit; he was presumably served with notice of the execution proceedings, and he was interested in seeing that the direction which the Court had given, that property subject to the prior mortgage which was not subject to the respondent's mortgage should be sold before that subject to the respondent's mortgage, was carried out. If the respondent knew the true facts, if he purchased at what he knew was too low a figure based on an upset price accepted by the Court owing to his own initial misrepresentation and subsequent suppression of material facts, his conduct would amount to fraud on the Court, as the learned Subordinate Judge points out. The Court could not have allowed the respondent purchasing

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(2) (1888) I.L.R. 12 Mad. 19 (P.C.)

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at a court-sale to take advantage of his own fraud, whatever the conduct of the appellant might have been.

However, as already noted, the learned Subordinate Judge did not find fraud against the respondent, nor did he find knowledge on the part of the appellant requisite to found a plea of waiver, and the High Court did not disagree with these findings of fact. Their Lordships think that, whatever grounds for suspicion there may be, there is no material on the record which would justify the Board in disregarding the findings of fact by the Subordinate Judge who had seen the witnesses, including the appellant himself, in the witness box. Their Lordships therefore will dispose of the appeal on the basis that neither the appellant nor the respondent at the material dates knew the position under the prior mortgage.

Order XXI, rule 66, imposes upon the Court the duty of causing a proclamation of the intended sale to be made and requires the proclamation to be drawn up after notice to the decree-holder and the judgment-debtor, and such proclamation must specify, as fairly and accurately as possible, amongst other things, any encumbrance to which the property is liable. In most cases no doubt the Court has no means of checking the information supplied by the parties but the Court ought, as far as practicable, to bring its mind to bear upon the contents of the proclamation and, where material is readily available to check the information supplied by the parties, the Court ought to avail itself of such material. In the present case all the facts relating to the prior mortgage could have been ascertained by an inspection of the suit register on the files of the Court. When the proclamation was settled, and again when the sale took place, it might well have occurred to the officer of the Court responsible that it was unlikely that nothing had occurred in the prior mortgage suit since its inception, even if he did not recall having himself sold properties in that suit,

and that it was desirable to check the figure of Rs. 80,000. The power conferred upon the Court by rule 66 (4) for summoning a witness for the purpose of ascertaining the matters to be specified in the proclamation shows that the Court is not intended to act blindly on information supplied by the parties. Their Lordships think that the Subordinate Court cannot be acquitted of a measure of carelessness in not having checked this figure of Rs. 80,000 both when the proclamation was approved and when the sale subsequently took place. Apart from the duty cast upon the Court, rule 66, sub-rule 3, provides that every application for an order for sale shall be accompanied by a statement signed and verified in the manner mentioned, and containing, so far as they are known to, or can be ascertained by, the person making the verification, the matters required by sub-rule 2 to be specified in the proclamation.

It is clear that the respondent if he did not know the position in the prior mortgage suit could easily have ascertained it, seeing that he was a party to the suit, which was in the same Court. The position therefore is that this sale took place at a serious undervalue occasioned by failure on the part of the Court, and of the respondent decree-holder, to carry out their obligations under rule 66, and there can be no doubt that the appellant sustained substantial injury thereby. Their Lordships are of opinion that the case falls within the language of rule 90 and that, however dilatory and unsatisfactory the conduct of the appellant may have been, he has not on the facts found debarred himself of the right to have the sale set aside.

Their Lordships will humbly advise His Majesty that this appeal be allowed, the order of the High Court be set aside and the order of the Subordinate Judge be restored. The respondent must pay to the

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appellant his costs of the appeal to the High Court and of the appeal to His Majesty in Council.

Solicitors for appellant: *Lambert & White.*

Solicitors for respondent: *Douglas Grant & Dold.*

N.S.

APPELLATE CIVIL—FULL BENCH

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

1944,
December 12

CHELLA SUBBANNA AND ANOTHER (DEFENDANTS 2 AND 5),
APPELLANTS

v.

CHELLA BALASUBBA REDDI (SECOND PLAINTIFF AND
DEFENDANTS 3 AND 4), RESPONDENTS *

Hindu law—Mitakshara law—Family remaining joint—Gift by one member of his interest in family estate in favour of one of several coparceners—Invalid—Relinquishment under similar circumstances, operating for the benefit of all the other members

A member of a joint Hindu family governed by the Mitakshara law cannot give his interest in the family estate to one of several coparceners if they remain joint in estate. In such circumstances he can relinquish his interest, but the relinquishment operates for the benefit of all the other members.

Peddayya v. Ramalingam(1) overruled.

Venkatapathi Raju v. Venkatanarasimha Raju(2) and *Anand-rao v. Vasantrao*(3) considered and applied.

APPEAL against the decree and judgment of the Court of the Temporary Subordinate Judge, Cuddapah, dated 12th December 1942, and made in Original Suit No. 1 of 1942.

The appeal came on for hearing in the first instance before LEACH C.J. and CLARK J., and LEACH C.J. on behalf of the Court made the following

* Appeal No. 257 of 1943

(1) (1888) I.L.R. 11 Mad. 406

(2) I.L.R. [1937] Mad. 1 (P.C.)

(3) (1907) 9 Bom. L.R. 595 (P.C.)

ORDER OF REFERENCE TO A FULL BENCH:—

This is an appeal against the decree passed by the Subordinate Judge of Cuddapah in a suit for partition. Two appeals were filed against this decree. One of them, Appeal No. 135 of 1943 in which the third and fourth defendants were the appellants, has been dealt with in a separate judgment. The appeal with which we are now concerned has been filed by the second and fifth defendants. All the questions raised here, except two, have been decided in the other appeal.

The first question left undecided is whether the Subordinate Judge was right in holding that the properties standing in the name of the second defendant's son constituted family property. He held that they did, but the son was not a party to the suit. The appellants have decided that they will not press this objection to the Subordinate Judge's judgment and will leave the question of the son's interest in the properties standing in his name to be decided in other proceedings, should they be instituted.

The second question for decision is whether a deed of gift executed by one Pedda Subbayya in favour of his brother Bala Subbayya, the first defendant, on 28th October 1911 is valid. By that deed Pedda Subbayya purported to dispose of the whole of his interest in the family properties. He had decided to live a religious life and to abandon all worldly affairs. The Subordinate Judge held that this deed of gift was invalid. The appellants say that, where a joint Hindu family consists of more than two members, one coparcener can give his interest to one of the other coparceners without a partition taking place.

It is said that the decisions of this Court in *Peddayya v. Ramalingam*(1), *Thangavelu Pillai v. Doraisami Pillai*(2) and *Veerammal v. Kamu Ammal*(3) do not cover the present case. In the first of these cases a Division Bench held that, if one coparcener can alienate in favour of the other coparceners as a body, there is no reason why he should not do so in favour of one of them who alone may need such help. In that case a partition had taken place and the question was whether one of the coparceners was entitled to receive the shares of two other coparceners in the movable property of the family. It was held that he could. In *Thangavelu Pillai v. Doraisami Pillai*(2) the question was whether a gift by a father of his

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(3) (1915) 2 L.W. 850

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interest in the family property in favour of his only son could be upheld as a relinquishment and the answer given was in the affirmative. In *Veerammal v. Kamu Ammal*(1) also the joint family consisted of a father and a son.

In the present case there were three coparceners. In the judgments referred to, there are observations which may be regarded as support for the deed of gift now questioned. The point has, however, not directly arisen before and, as it is an important one, we consider it necessary to refer the following question to a Full Bench:—

Where a joint Hindu family consists of more than two members, can one coparcener give his interest in the family estate to one of the other coparceners without a partition taking place?

The appeal then came on for hearing, in pursuance of the Order of Reference, before the Full Bench constituted as above.

ON THE REFERENCE :

P. Satyanarayana Rao with *R. Ramalinga Reddi* for appellants.—In *Peddayya v. Ramalingam*(2) this Court had to consider the effect of a statement made by two coparceners in the plaint filed by them for partition of family properties to the effect that they had relinquished their interest in certain family properties in favour of one of the other coparceners. The plaint effected a severance in their status. But the observations of the learned Judges are general and to the effect that one coparcener can relinquish his share in favour of another to the exclusion of others. *Thangavelu Pillai v. Doraisami Pillai*(3) considered *Peddayya v. Ramalingam*(2) and held that a valid relinquishment need not necessarily be in favour of all the remaining coparceners. *Veerammal v. Kamu Ammal*(1) followed *Peddayya v. Ramalingam*(2). If the relinquishment acts as an alienation of his share, there is no legal impediment to one coparcener relinquishing his share in favour of another coparcener to the exclusion of others. He could have achieved his object by giving notice of separation to the other coparceners and thereafter could have dealt with his share as he liked. *Ananthachari v. Krishnaswami*(4) has referred to *Peddayya v. Ramalingam*(2) and *Thangavelu Pillai v. Doraisami Pillai*(3) with approval.

(1) (1915) 2 L.W. 850
(3) (1914) 27 M.L.J. 272

(2) (1888) I.L.R. 11 Mad. 406
(4) I.L.R. (1938) Mad. 410

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In an unreported case* *BYERS J.* followed *Peddayya v. Ramalingam*(1) and distinguished *Venkatapathi Raju v. Venkatanarasimha Raju*(2). The learned editor of the tenth edition of *Maynes Hindu Law* at page 497 expresses the opinion that after the decision of Privy Council in *Venkatapathi Raju v. Venkatanarasimha Raju*(2) the decisions of this Court in *Peddayya v. Ramalingam*(1) and *Thangavelu Pillai v. Doraisami Pillai*(3) are not good law. The learned editor also cites *Mukund Dharman v. Balkrishna Padmanji*(4), and *Wasantrao v. Anandrao*(5) which was affirmed by the Privy Council in *Anandrao v. Vasantrao*(6), in support of his view. Relinquishment is really transfer of property to a person who already owns a share in it, as opposed to a gift which is a transfer of property to a person who has no share in it.

K. Krishnaswamy Ayyangar with *K. S. Jayaram* and *N. C. Raghavachari* for first respondent.—At page 407 of *Sarcar Sastri's Hindu Law*, 1940 Edition, the learned editor adversely criticises *Peddayya v. Ramalingam*(1). *Visalakshi Aiy v. Mahalinga*(7) is also contrary to the view expressed in *Peddayya v. Ramalingam*(1). *Shivajirao v. Vasantarao*(8) which was an offshoot of *Wasantrao v. Anandrao*(5) came up later before the Bombay High Court and the Court understood *Wasantrao v. Anandrao*(5) and *Anandrao v. Vasantrao*(6) as saying that a relinquishment cannot be effective in favour of one of several coparceners.

Other respondents were not represented.

Cur. adv. vult.

The OPINION of the Full Bench was delivered by *LEACH C.J.*—The question propounded is whether one member of a joint Hindu family consisting of several members can, irrespective of a partition of the family estate, give his own interest therein to one of the other coparceners. If the judgments of this Court in *Peddayya v. Ramalingam*(1) and *Thangavelu Pillai v. Doraisami Pillai*(3) are to be followed the answer must be in the affirmative, but it is said that the decision of the Privy Council in *Venkatapathi Raju v. Venkatanarasimha Raju*(2) has made it clear

LEACH C.J.

* Second Appeal No. 192 of 1943

(1) (1888) I.L.R. 11 Mad. 406 (2) I.L.R. (1937) Mad. 1 (P.C.)
(3) (1914) 27 M.L.J. 272 (4) (1927) I.L.R. 52 Bom. 8 (P.C.)
(5) (1904) 6 Bom. L.R. 925 (6) (1907) 9 Bom. L.R. 595 (P.C.)
(7) (1910) 7 I.C. 800 (8) (1908) I.L.R. 33 Bom. 267

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that the observations in *Peddayya v. Ramalingam*(1) and *Thangavelu Pillai v. Doraisami Pillai*(2) cannot be regarded as embodying a correct statement of the law.

In *Peddayya v. Ramalingam*(1) a joint Hindu family governed by the Mitakshara law consisted of four brothers. Disputes arose with regard to the right of succession to the movable property left by their father. The plaintiff claimed that the whole of this property belonged to him under an arrangement made by the father. In another partition suit two of his brothers by their plaint had relinquished their shares in this property. They accepted the position that it was their father's wish that it should devolve upon the plaintiff. In the suit which gave rise to the appeal the plaintiff claimed three quarters of the property on the ground that two of his brothers had relinquished their interest in it in his favour. This claim was upheld by the trial Court, by the District Court on first appeal and by this Court on second appeal. The appeal to this Court was heard by MUTTUSAMI AYYAR and SHEPHERD JJ., who after quoting the following texts,

(i) "If any one of the brethren has a competence from his own occupation and desires not the property, he may be debarred from his share, giving him a trifle in lieu of maintenance" (Manu, Ch. ix, page 207).

(ii) "The separation of one who is able to support himself, and is not desirous of participation, may be completed by giving him some trifle" (Yagnavalkya 2-117),
proceeded to say :

"According to the Smrithis, then, the renunciation operates as alienation of one coparcener's interest in favour of the others. If he can alienate in favour of the other coparceners as a body, there is no reason why he should not do so in favour of one of them, who alone may need such help In this case Bogalingam and Gangayya, in fulfilment of their natural obligation to give effect to what they believed to be the wish of their father, gave up their interest in plaintiff's

(1) (1888) I.L.R. 11 Mad. 406

(2) (1914) 27 M.L.J. 272

favour, and their act may be regarded as the severance of their interest coupled with a direction to make over their shares to the respondents when he should separate."

The last part of this statement indicates that the Court realized that it would be contrary to the idea of a Hindu joint family for one coparcener to have a greater share in the estate than the other coparceners while they remained joint.

In *Thangavelu Pillai v. Doraisami Pillai*(1) another Division Bench of this Court held that a gift by a father of all his interest in the family estate to his only son could be upheld as a relinquishment. In that case the only members of the joint family were the father and the son, and therefore the case presented no difficulty, but the Court accepted *Peddayya v. Ramalingam*(2) as direct authority for the proposition that one coparcener could not only relinquish his share in favour of the remaining coparceners, but he could do so in favour of one of them so as to increase his interest in the joint estate. In the course of the judgment it was observed that the giving of a trifle to the outgoing coparcener as contemplated by the texts could not be regarded as a condition precedent to the validity of the relinquishment and the learned Judges reiterated this opinion in *Veerammal v. Kamu Ammal* (3). There can be no doubt with regard to the correctness of the latter assertion.

In *Ananthachari v. Krishnaswami*(4) VARADACHARIAR J. referred to what had been decided in *Peddayya v. Ramalingam*(2) and *Thangavelu Pillai v. Doraisami Pillai*(1) without making any comment thereon.

We will now turn to the judgment of the Privy Council in *Venkatapathi Raju v. Venkatanarasimha Raju*(5). There a member of a joint Hindu family

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(1) (1914) 27 M.L.J. 272

(2) (1888) I.L.R. 11 Mad. 406

(3) (1915) 2 L.W. 850

(4) I.L.R. [1938] Mad. 410

(5) I.L.R. [1937] Mad. 1 (P.C.)

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governed by the Mitakshara law relinquished his interest in the family estate and went to live in another village. From thence onwards he and his descendants cut themselves off from the family. It was held that the renunciation extinguished his interest in the family estate, but it did not affect the status of the remaining members who continued to be coparceners as before. The passage in the judgment of their Lordships which is relevant to the present case reads as follows :—

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

Here two principles are stated: (i) When the members of a Hindu family have defined shares in the family estate they can no longer be deemed to be joint in estate, and (ii) the renunciation of one member of his interest in the family merely extinguishes that interest in favour of the continuing coparceners. It is true that their Lordships do not deal directly with the case where one coparcener purports to give

(1) (1903) I.L.R. 30 Cal. 725 (P.C.)

his share to one of several other coparceners, but it follows from what they have said that he cannot do so if the donee and the other coparceners are to remain joint in estate. The relinquishment by one coparcener of his interest in the family estate in favour of the members of the coparcenary does not amount to an alienation; it merely amounts to an extinction of his interest in favour of the others. The gift of his interest to one of several other coparceners would not mean the extinction of that interest. It would mean an alienation of it. It is well settled law that there cannot be such a gift to a stranger and it is now clear that there cannot be a gift to a fellow-coparcener if the family is to remain undivided.

There is another Privy Council judgment which supports the proposition that there cannot be a renunciation by one member of a joint family in favour of one of several other members of the family while the family remains joint. In *Wasantrao v. Anandrao*(1) one Madhowrao executed a release of his interest in the family property in favour of his father. The Bombay High Court held that the release must be treated as being, not for the benefit of the father alone, but of the coparcenary and the shares were to be determined as though Madhowrao had died. This case went to the Privy Council as *Anandrao v. Vasant-rao*(2). Their Lordships held that the governing principles had been rightly applied by the High Court and dismissed the appeal.

At page 497 of the tenth edition of Mayne's Hindu Law the learned editor expresses the opinion that the dicta in *Peddayya v. Ramalingam*(3) and *Thangavelu Pillai v. Doraisami Pillai*(4) cannot be considered good law especially after the decision of the Privy Council in *Venkatapathi Raju v. Venkatanarasimha Raju*(5). It follows from what we have said that we

(1) (1904) 6 Bom. L.R. 925

(2) (1907) 9 Bom. L.R. 595 (P.C.)

(3) (1888) I.L.R. 11 Mad. 406

(4) (1914) 27 M.L.J. 272

(5) I.L.R. [1937] Mad. 1 (P.C.)

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are in full agreement with this opinion and that additional support for it is to be found in the judgment of their Lordships in *Anandrao v. Vasantrao*(1).

The answer which we give to the question referred is this: A member of a joint Hindu family governed by the Mitakshara law cannot give his interest in the family estate to one of several coparceners if they remain joint in estate. In such circumstances he can relinquish his interest but the relinquishment operates for the benefit of all the other members.

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

G.R.

INCOME-TAX REFERENCE

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

1944,
October 27

MESSRS. G. S. RAMASWAMIER & SONS, MADURA,
APPELLANT

v.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
RESPONDENT *

Excess Profits Tax Act (XV of 1940) as amended by Excess Profits Tax (Second Amendment) Act (XXIV of 1941), ss. 10 and 10-A—Transaction, meaning of—Not confined to transactions in course of a business—Includes formation of new partnership for carrying on same business

A firm of four partners carrying on the business of manufacture and sale of cloths stopped the manufacturing side of the business on 13th April 1940. On that day the same four partners started two new firms, two of them being partners in one firm and the other two in the other firm, for the purpose of manufacturing cloths. The cloths manufactured by the new firms were sold only to the old firm which carried on the business of selling those goods only. In respect of the year of

(1) (1907) 9 Bom. L.R. 595 (P.C.)
* Case referred No. 53 of 1943

account commencing from 14th January 1940 to 13th January 1941, the old firm was assessed to excess profits tax on the footing that the entire profits both of manufacture and of sale were made by it. On a reference to the High Court,

held: The assessment was valid. The formation of the two new firms, which was found to be for the purpose of evading payment of excess profits tax, was a transaction within the meaning of section 10-A of the Excess Profits Tax Act, 1940, as amended by the Excess Profits Tax (Second Amendment) Act (XXIV of 1941).

The word "transaction" in section 10-A has a very wide meaning. It is not confined only to transactions made in the course of a business. It includes also the formation of a new partnership for the purpose of carrying on the same business.

CASE referred to the High Court by the Income-tax Appellate Tribunal under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922) as amended by section 92 of the Indian Income-tax (Amendment) Act, 1939 (Act VII of 1939) in Application No. 66, R.A. No. 19, Madras, of 1942-43.

Sir A. Krishnaswami Ayyar for *N. Rajagopala Ayyangar* for appellant.—Formation by the same members of the new partnerships in addition to the old partnership for the purpose of carrying on the business is not a "transaction" within the meaning of section 10-A (1) of the Excess Profits Tax Act. The transaction referred to in the section means a transaction made in the course of carrying on the particular business. Formation of a new partnership is not such a transaction. A firm is recognized as a separate entity under the Indian Income-tax Act. A new partnership is a different *persona* from the old partnership and its transactions cannot in law be considered to be the transactions of the old partnership. That the new partnerships have been actually formed is not denied and they are different entities from the old partnership in the eye of the law. Formation of the new partnerships is not, therefore, a transaction of the old partnership which is assessed to tax. The terms of section 10-A (1) clearly indicate that the transactions referred to in the section must be those of the particular assessee, namely, the old firm.

C. S. Rama Rao Sahib for respondent.

The JUDGMENT of the Court was delivered by LEACH C.J.—The assessee in this case is the firm of G. S. Ramaswamier and Sons. The partners are four

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brothers. Until 1929 they constituted a joint Hindu family, but in that year a separation took place. It is not necessary to set out the course of events between 1929 and 1936, because this case turns on what happened after 13th January 1936 when the brothers formed the firm of G. S. Ramaswamier and Sons. The business of this firm was the manufacture of dhuppattas at Madura and dhavanies at Paramakudi. The goods manufactured were sold by branches of the firm at Bombay, Nagpur and Poona. On 13th April 1940 two new firms were started, one under the style of G. R. Narasimha Ayyar and Company and the other under the style of G. R. Ramachari and Company. Two of the brothers were the partners in G. R. Narasimha Ayyar and Company and the other two were the partners in G. R. Ramachari and Company. The new firms commenced the manufacture of the same goods, which were sold during the year of account (14th January 1940 to 13th January 1941) by the branches of G. S. Ramaswamier and Sons at Bombay, Nagpur and Poona. The Excess Profits Tax Officer regarded the formation of the two new firms as a transaction within the meaning of section 10-A, and accordingly assessed G. S. Ramaswamier and Sons to the excess profits tax on the basis that it had made all the profits for this period. The assessee appealed to the Income-tax Appellate Tribunal which agreed that the formation of the two new firms was a transaction within the meaning of the section and consequently confirmed the assessment. The assessee then asked the Tribunal to make a reference to this Court under section 66 of the Income-tax Act. The Tribunal considered that a point of law did arise and has referred the following question:—

“Whether in the circumstances of the case the splitting up of a firm into two firms can be said to be a transaction within the meaning of section 10-A of the Excess Profits Tax Act.”

The question was framed on the statement of facts set out in paragraph 4 of the order of reference. In that paragraph the Tribunal stated that the firm of G. S. Ramaswamier and Sons had been split up into two firms, which was not in fact the case. This was discovered before the reference was actually made to this Court and a correction was made in the statement of facts in paragraph 4. The correction reads as follows:—

“The applicant is a firm of four partners. They were manufacturing cloth at Madura and Paramakudi, and selling that cloth at Bombay, Nagpur and Poona. On 13th April 1940 two new firms were started by the same four partners, two of them were partners in one firm and the other two in the other firm. The applicant ceased to manufacture cloth from that day and the new firms carried on the manufacture, one at Paramakudi and the other at Madura. They sold such cloth only to the applicant-firm and the applicant-firm restricted their sales to the goods manufactured by these two firms only.”

On this fresh statement of facts it is necessary to amend the question referred, and we amend it to read as follows:—

“Whether in the circumstances of the case the formation of the two new firms—G. R. Narasimha Ayyar and Company and G. R. Ramachari and Company—can be said to be a transaction within the meaning of section 10-A of the Excess Profits Tax Act.”

The finding of the Tribunal that the two new firms were formed in order to evade the payment of excess profits tax is a finding of fact and cannot be questioned here. We may, however, add that there can be no doubt about the correctness of the finding.

Section 10 of the Excess Profits Tax Act, which received the assent of the Governor-General on 6th April 1940, as amended by Act XXIV of 1941, reads as follows:—

“(1) In computing profits for the purposes of this Act no deduction shall be made in respect of any transaction or operation of any nature if and so far as it appears that the transaction or operation has artificially reduced or would artificially reduce the profits.

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(2) If the Excess Profits Tax Officer is satisfied that any person has entered into or carried out any transaction or operation by which the profits have been or would be artificially reduced, he may, with the previous approval of the Inspecting Assistant Commissioner, direct that such person shall pay, in addition to any excess profits tax for which he is or, but for such transaction or operation, would be liable, a penalty not exceeding the tax evaded or sought to be evaded."

Section 10-A was inserted by the amending Act of 1941 and is in these terms:

"(1) Where the Excess Profits Tax Officer is of opinion that the main purpose for which any transaction or transactions was or were effected [whether before or after the passing of the Excess Profits Tax (Second Amendment) Act, 1941] was the avoidance or reduction of liability to excess profits tax, he may, with the previous approval of the Inspecting Assistant Commissioner, make such adjustments as respects liability to excess profits tax as he considers appropriate so as to counteract the avoidance or reduction of liability to excess profits tax which would otherwise be effected by the transaction or transactions.

(2) Without prejudice to the generality of the powers conferred by sub-section 1, the powers conferred thereby extend—

(a) to the charging with excess profits tax of persons who but for the adjustments would not be chargeable with any tax or would not be chargeable to the same extent;

(b) to the charging of a greater amount of tax than would be chargeable but for the adjustments.

(3) Any person aggrieved by a decision of the Excess Profits Tax Officer under this section may appeal in the prescribed time and manner to the Appellate Tribunal."

Sir Alladi Krishnaswami Ayyar on behalf of the applicant says that the word "transaction" within the meaning of section 10-A must be confined to a transaction in the course of the business of the assessee and not to the formation of a new partnership for the carrying on of the same business. The word "transaction" has a very wide meaning. It can be applied to any particular act done in the carrying on of a business; but one of its meanings—see the Oxford Dictionary—is the carrying on or completion

of an action or a course of action. Therefore the formation of these firms constituted a "transaction" and the object of the transaction was the evasion of the excess profits tax. Section 10-A was inserted in the statute in order to allow the Excess Profits Tax Officer to go behind any transaction the object of which was the evasion of tax and to assess the assessee as if it had not taken place. If Sir Alladi Krishnaswami Ayyar's definition of the word "transaction" were to be accepted, there would have been no necessity for the insertion of section 10-A at all. Transactions of the nature referred to by him would come under sub-section 1 of section 10.

There is no ambiguity in the provisions of section 10-A and, as the formation of these firms was a transaction devised to evade the tax, the answer to the reference must be that it is a transaction within the meaning of section 10-A.

The assessee will pay the costs of this reference, Rs. 250.

N.S.

APPELLATE CIVIL

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

DUVVURI LAKSHMI NARASAMMA AND TWO OTHERS
(RESPONDENTS), APPELLANTS

v.

MANDALA SWAMI AND TWENTY-SEVEN OTHERS
(PETITIONERS), RESPONDENTS *

Letters Patent (Madras), cl. 15—Appeal against order of single Judge of High Court refusing certificate for appeal to Federal Court—Not maintainable—Government of India Act, 1935, sec. 205

An appeal under clause 15 of the Letters Patent does not lie against the order of a single Judge of the High Court

* Letters Patent Appeal No. 78 of 1944

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refusing to grant a certificate under section 205 of the Government of India Act.

APPEAL under clause 15 of the Letters Patent against the order of SHAHABUDDIN J., dated 18th September 1944, and made in Civil Miscellaneous Petition No. 3042 of 1944 praying that in the circumstances stated therein the High Court may be pleased to grant a certificate under section 205 of the Government of India Act, 1935, to appeal to the Federal Court against the judgment and decree of the High Court, dated 10th December 1943, and passed in Civil Revision Petitions Nos. 1007 to 1014 of 1942 presented to the High Court to revise the decrees of the Court of the Subordinate Judge of Vizagapatam in Small Cause Suits Nos. 145 of 1941, 132 of 1939, 146, 147, 148, 149, 150 and 151 of 1941 respectively.

T. Ramamurthi and D. V. Reddi Pantulu for appellants.

LEACH C.J. The JUDGMENT of the Court was delivered by LEACH C.J.—This is an appeal against an order of SHAHABUDDIN J. refusing to grant a certificate under section 205 of the Government of India Act. The appellants desired to appeal to the Federal Court against an order passed by the learned Judge on a revision petition. The learned Judge held that no question of the interpretation of the Government of India Act or any Order in Council made thereunder arose at the trial and consequently he refused to grant a certificate.

This Court has no power to interfere. The section says that an appeal shall lie to the Federal Court from a judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Act or an Order in Council made thereunder. The order of SHAHABUDDIN J. was the order of the High Court and he alone could grant the certificate.

The appeal is dismissed.

N.S.

APPELLATE CIVIL

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

D. HAJEE ABDULLA SAHIB (PLAINTIFF), APPELLANT

v.

SHAFFEE MUHAMMAD SAHIB AND ANOTHER
(DEFENDANTS), RESPONDENTS *

1944,
November 2

Practice—Counter-claim—High Court—Original Side—Suit for dissolution of partnership and accounts—Defendants denying plaintiff being partner—Defendants' counter-claim for accounts on allegation of plaintiff being their commission agent—Plaintiff's claim dismissed—Defendants' counter-claim allowed—Preliminary decree accordingly—Subsequent application by defendants to withdraw their counter-claim—Not maintainable—Plaintiff's right to proceed with taking of accounts—Terms

In a suit for the dissolution of an alleged partnership and the taking of accounts, the defendants denied that the plaintiff was a partner and contended that he was only their commission agent. The defendants preferred a counter-claim asking for an account against the plaintiff. The plaintiff's claim was rejected and the counter-claim was allowed. A preliminary decree for the taking of accounts was accordingly passed. The defendants thereafter applied for the withdrawal of the counter-claim. The counter-claim was thereupon dismissed by the trial Court notwithstanding the opposition of the plaintiff. On appeal,

held: The defendants were not entitled to withdraw the counter-claim after the passing of the preliminary decree. After a preliminary decree for accounts is passed, it is open to any party to the suit to take further proceedings in pursuance thereof, and the plaintiff is entitled to initiate the supplementary proceedings.

Lachmi Narain Marwari v. Balmakund Marwari(1) followed.

APPEAL from the judgment and decree of CHANDRASEKHARA AYYAR J., dated 14th and 21st February 1944 and passed in the exercise of the ordinary original

* Original Side Appeal No. 26 of 1944
(1) (1924) I.L.R. 4 Pat. 61 (P.C.)

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civil jurisdiction of the High Court in Civil Suit No. 123 of 1943.

K. Rajah Ayyar and R. Rangachari for appellant.

K. Narasimha Ayyar and T. V. Subrahmania Ayyar for respondents.

LEACH C.J. The JUDGMENT of the Court was delivered by LEACH C.J.—In a suit filed by the appellant on the original side of this Court in which he asked for a decree for the dissolution of an alleged partnership and the taking of accounts, the defendants (the respondents) preferred a counter-claim. They denied that the plaintiff was a member of the partnership. They averred that he had acted as their commission agent and was indebted to them in this connection in the sum of Rs. 1,84,542-15-7. Consequently they asked for an account. The plaintiff's claim to be a partner was rejected by the learned trial Judge (CHANDRASEKHARA AYYAR J.) and his decision has been confirmed by this Bench on appeal. The learned Judge granted the respondents' claim for an account and consequently passed a preliminary decree for the taking of the accounts. After this had been done, the respondents decided that they would not proceed with their counter-claim and accordingly they asked the Court to dismiss it. The appellant objected on the ground that the passing of the preliminary decree for accounts entitled him to insist on the accounts being taken. CHANDRASEKHARA AYYAR J. was of the opinion that the respondents could withdraw their counter-claim at any stage and consequently he dismissed it with costs. The plaintiff has appealed against the decree dismissing the counter-claim.

It is not to be doubted that the respondents had the right to withdraw their counter-claim at any stage before the passing of the preliminary decree. The question is whether that right continued once the Court had decreed the taking of the accounts. On a consideration of the authorities we consider that the

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learned Judge erred in holding that the respondents were entitled to withdraw their counter-claim after the passing of the preliminary decree.

In *Annu v. Somasundara*(1) a Bench of this Court held that, if the taking of the accounts in a suit for accounts resulted in an amount being found due to the defendant, he was entitled to have a decree passed in his favour for the sum found due. This decision was based on the judgment of the Privy Council in *Hurrinath Rai v. Krishna Kumar Bakshi*(2). In *Lachmi Narain Marwari v. Balmakund Marwari*(3) Lord PHILLIMORE, in delivering the judgment of the Privy Council, observed that after decree it was open to any party to a suit, to whose interest it was that further proceedings should be taken, to initiate the supplementary proceedings; but in the ordinary case it was the plaintiff who moved. Later in the judgment, Lord PHILLIMORE said :

"After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside. After a decree any party can (as already stated) apply to have it enforced."

That suit was one for partition. The observations made in *Lachmi Narain Marwari v. Balmakund Marwari*(3) apply here as the Court had granted a preliminary decree for the taking of accounts. Although this decree was passed at the instance of the respondents, the taking of accounts may possibly result in a benefit to the appellant. The appellant is the accounting party and it will be for him to file his accounts, to which objection can be taken by the respondents. If they do not want to proceed with the matter, there is no reason why he should not proceed. In fact, as we have shown, the Privy Council has definitely laid down that after a decree has been passed

(1) (1930) I.L.R. 54 Mad. 654 (2) (1886) I.L.R. 14 Cal. 147 (P.C.)
(3) (1924) I.L.R. 4 Pat. 61 (P.C.)

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it is open to any party to the suit to initiate further proceedings.

The appeal will be allowed and the case remanded to the original side for the taking of accounts in the light of this judgment. It will, of course, be for the appellant to pay the fees required for the hearing before the Official Referee and, if he fails to do so, there will be a final decree passed dismissing the respondents' counter-claim. The same course will be adopted if the appellant does not proceed to file his accounts with due diligence and do all that is required of him in this connection.

The costs of this appeal will be costs in the counter-claim proceedings. The appellant is entitled to the refund of the court-fee paid on the memorandum of appeal.

N.S.

APPELLATE CIVIL

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

CHELLAMMAL (RESPONDENT), PETITIONER

v.

MUTHULAKSHMI AMMAL (APPELLANT), RESPONDENT *

Code of Civil Procedure (Act V of 1908), O. XXXIII, rr. 2 and
5 (a)—Pauper application—Utmost good faith and full and
accurate statement of properties necessary

Utmost good faith is required of the petitioner in a petition for leave to appeal in *forma pauperis* in the matter of the disclosure of his or her assets. Any intentional departure from good faith, whatever the motive may be, must result in the dismissal of the petition. Under Order XXXIII, rule 2, read with Order XXXIII, rule 5 (a), of the Code of Civil Procedure, it is the bounden duty of the petitioner to make a full and accurate verified statement of his or her properties.

Kuppuswami Naidu v. Varadappa Naidu(1) approved and followed.

* Civil Miscellaneous Petition No. 5559 of 1944
(1942) 2 M.L.J. 345

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court may be pleased to dispauperise the respondent therein, to direct her to pay the requisite court-fee on the memorandum of appeal and to direct her to furnish proper security for costs in Original Side Appeal No. 69 of 1943 preferred against the judgment and decree of CHANDRASEKHARA AYYAR J., dated 19th July 1943 and passed in the exercise of the ordinary original civil jurisdiction of the High Court in Testamentary Original Suit No. 14 of 1942.

K. C. Doraiswami for petitioner.

T. R. Sangameswara Ayyar for respondent.

The ORDER of the Court was pronounced by LEACH C.J.—This is an application for an order cancelling the leave granted to the respondent to appeal in *forma pauperis*. The petitioner in Original Petition No. 258 of 1942 on the original side of this Court applied for letters of administration to the estate of her deceased husband R. P. P. Adikesavalu Chettiar. The respondent entered a caveat and opposed the application. Her opposition was unsuccessful and the Court ordered letters of administration to issue to the petitioner. The respondent then applied to be allowed to appeal in *forma pauperis* against this order. She swore an affidavit in which she stated that all the property she possessed was clothing worth Rs. 40. The petitioner had no knowledge then of the respondent's financial position and, as the Government Solicitor did not object to a declaration of the respondent's pauperism, she was allowed to appeal in *forma pauperis*. It has since come to the knowledge of the petitioner that on 8th February 1944 the respondent sold certain immovable property for the sum of Rs. 1,300. This was some two months after she had been allowed to appeal in *forma pauperis*. The purchaser was her son. It is in these circumstances

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the petitioner asks the Court to set aside the order allowing the respondent to appeal as a pauper.

The relevant facts are set out in an affidavit sworn by the petitioner. The respondent herself has not denied the allegations of the petitioner, but she has filed an affidavit sworn by her son. He alleges that the house belonged to his father and it was mortgaged to the Co-operative Society, Rasipuram. In his affidavit the son states that his mother is only entitled to a one-third of the equity of redemption. There is here a clear admission on his part, and he is representing his mother in these proceedings, that when she swore the affidavit in support of her application for leave to appeal in *forma pauperis* she had an interest in the property. It follows that she obtained an order from the Court without disclosing material facts. In fact, her action amounted to a fraud on the Court. The son says that the equity of redemption is of no value; but we are certainly not prepared to accept his word for this.

As was pointed out in *Kuppuswami Naidu v. Varadappa Naidu*(1), the utmost good faith is required of the petitioner in the matter of the disclosure of his or her assets and that any intentional departure from good faith, whatever the motive may be, must result in the dismissal of the petition. Under Order XXXIII, rule 2, read with Order XXXIII, rule 5 (a), of the Code of Civil Procedure, it is the bounden duty of the petitioner to make a full and accurate verified statement of his or her properties. The petitioner alleges that the respondent's sons are really behind the appeal and this is no doubt the case. As we have already indicated, one of the sons is resisting the present application on his mother's behalf. It is said by the learned Advocate for the respondent that she is an old woman of eighty years of age and did not realize what she was

(1) (1942) 2 M.L.J. 345

doing. We will take it that she was in the hands of of her sons and that they are responsible for the present position, but she must bear the responsibility for the present position. There has been a fraud on the Court and the question whether the equity of redemption is substantial or of little value is beside the point.

The application is granted. If the respondent wishes to proceed with the appeal, she must pay the requisite court-fee within one week. She must also pay the costs of this application.

The petitioner asks for an order for security for costs. We are not prepared to grant this application as it is made at such a late stage.

N.S.

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APPELLATE CIVIL

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

KUNHI PATHUMA AND THREE OTHERS
(DEFENDANTS 2 TO 5), APPELLANTS

1944,
November 23

v.

SUNDARA AYYAR AND ANOTHER (PLAINTIFF AND
FIRST DEFENDANT), RESPONDENTS *

Marumakkattayam law—Mappillas of Malabar governed by that law in matters concerning property except as to succession—Mappilla Succession Act (Madras Act I of 1918)

There is a presumption that the Mappillas of Malabar are governed by the rules of property of the Marumakkattayam law unless the contrary is established. That law is applicable to them in all matters concerning property, except in regard to succession to property governed by the Mappilla Succession Act (I of 1918). Consequently a mortgage of immovable

* Letters Patent Appeal No. 28 of 1944

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property executed by a Mappilla mother on behalf of herself and her minor children constituting a tarwad is binding on the children. The mother as the head of the tavazhi or tarwad is the guardian of the minors and they are bound by her act.

APPEAL under clause 15 of the Letters Patent against the judgment and decree of HORWILL J., dated 20th January 1944 and passed in Second Appeal No. 22 of 1943 (Appeal Suit No. 204 of 1941, District Court, North Malabar, Original Suit No. 142 of 1939, District Munsif's Court, Taliparamba).

B. Pocker for appellants.

P. Govinda Menon for respondents.

LEACH C.J.—The first respondent instituted a suit in the Court of the District Munsif of Taliparamba to enforce a mortgage of immovable property which had been executed by the second respondent on her own behalf and on behalf of the appellants who are her children. The family is a Mappilla family of North Malabar. The mother and her children were made defendants. The only real question in the suit was whether the interests of the children were affected by the mortgage. It was alleged that their father and not their mother was their lawful guardian and, as he had not signed the mortgage on their behalf, it could not be enforced against them. This defence was successful and the decision was upheld by the District Judge on appeal by the plaintiff. The plaintiff then appealed to this Court and HORWILL J. reversed the decisions of the Courts below. He held that the mother was the lawful guardian of the minors and that consequently the mortgage decree should embrace the interests of her children as well as her own interests in the mortgaged property. This appeal is from the judgment of the learned Judge.

Admittedly there is no authority which has real bearing on the question involved in the appeal, and

our decision must be based on first principles. In the District Munsif's Court and in the District Court the mother and her children were regarded as constituting a tavazhi; but it would appear that there is no tarwad, which means that they themselves constituted a tarwad. They are governed in all matters relating to property by the Marumakkattayam law unless the Mappilla Succession Act, 1918, applies. That Act says that, when a Mappilla dies intestate, his private property shall devolve upon his heirs according to the rules of Muhammadan law. The Act has no application here.

If the Marumakkattayam law applies in this case, admittedly the second respondent, the mother, as the head of the tavazhi or tarwad, will be the guardian of the minors and they will be bound by her act. On the other hand, if the Muhammadan law applies, the father of the children will be the guardian and they will not be bound. In Mr. P. R. Sundara Ayyar's treatise on The Malabar and Aliyasanthana Law, it is said at page 234 :

"At any rate it cannot be assumed as a fact that the Muhammadan law governed the Mappillas previous to their adoption of the Marumakkattayam system. Such being the case, and the dominant prevailing system being Marumakkattayam, the presumption should be that the Mappillas are governed by all the rules of property of the Marumakkattayam law unless the contrary is established."

We consider that that principle should be applied here. The family is governed by the Marumakkattayam law in all matters relating to property unless there happens to be private property undisposed of by will. Therefore in most matters the Marumakkattayam law must be regarded as governing the family, and we consider that HORWILL J. arrived at the correct decision when he applied it in this case.

The appeal fails and is dismissed with costs. Time for redemption will be four months from this date.

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

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November 16

GHADIYAM SUBBA REDDI (APPELLANT), APPELLANT

v.

TOKALA VENKATRAMAYYA AND ANOTHER
(RESPONDENTS), RESPONDENTS *

Hindu Law—Joint family—Debt—Renewal by manager of promissory note after expiry of period of limitation while Court closed for vacation—Execution of renewed promissory note on payee threatening to file suit on re-opening of Court—Renewal binding on junior members—Indian Limitation Act (IX of 1908), sec. 4

On 19th May 1931, the manager of a Hindu joint family executed a promissory note for a debt binding on the family. On 2nd June 1934, when the Court in which a suit on the promissory note could be filed was closed for the summer vacation, he renewed the promissory note as the payee threatened to file a suit on the re-opening day of the Court. The promissory note of 2nd June 1934 was renewed again by one dated 27th May 1937, on which the payee filed a suit against the manager and the junior members of the family. The latter contended that the promissory note was not enforceable against them on the ground that the manager had no powers to renew the first promissory note on 2nd June 1934 when it had become barred by limitation.

Held: The promissory note was binding on the junior members also. The second promissory note executed on 2nd June 1934 was not given to revive a claim barred by limitation. The claim was not then barred but was still enforceable by reason of section 4 of the Indian Limitation Act. The manager was acting within his powers and for the benefit of the family when he executed the promissory note in renewal.

Chinnaya v. Gurunatham (1) distinguished.
Case law discussed.

* Letters Patent Appeal No. 31 of 1944
(1) (1932) I.L.R. 5 Mad. 169 (F.B.)

APPEAL under clause 15 of the Letters Patent against the judgment and decree of CHANDRASEKHARA AYYAR J., dated 23rd March 1944 and passed in Second Appeal No. 738 of 1943 preferred to the High Court against the decree of the Court of the Subordinate Judge of Bapatla in Appeal Suit No. 240 of 1941 (Original Suit No. 257 of 1940, District Munsif's Court, Ongole).

Ch. Raghava Rao for appellant.

V. S. Narasimbachar for respondent.

The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal raises a question which admittedly is not directly covered by authority. On 19th May 1931 the first defendant in the suit, as the manager of a joint Hindu family consisting of himself and his two brothers, executed a promissory note in favour of the plaintiff's brother. The plaintiff and his brother who were also joint subsequently separated and the promissory note fell to the share of the plaintiff. On 2nd June 1934 the first defendant executed a promissory note in renewal of that made on 19th May 1931. More than three years had elapsed, but the earlier promissory note was still enforceable on 2nd June 1934. The holder had threatened to file a suit on the earlier instrument, but was unable to do so immediately as the Court was closed for the summer vacation. He said that he would file the suit on the re-opening of the Court and, in order to avoid this, the first defendant as the manager of the joint family executed the note of 2nd June 1934, when the Court was still closed. This promissory note was renewed by one dated 29th May 1937, on which the plaintiff instituted the present suit against the maker of the instrument and his two brothers. The second and third defendants pleaded that as against them the suit was not maintainable as the manager had no authority in law to execute the promissory note of 2nd June 1934. They relied

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on the decision of the Full Bench of this Court in *Chinnaya v. Gurunatham*(1). Their contention prevailed and the suit was dismissed as against them, but a decree was passed against the first defendant. The plaintiff appealed to the Subordinate Judge who agreed with the District Munsif. He then appealed to this Court and CHANDRASEKHARA AYYAR J., who heard the appeal, held that the Courts below had taken the correct view but, as the point was a new one and there were no cases having direct application, he gave a certificate which has resulted in this appeal being filed under clause 15 of the Letters Patent.

Before CHANDRASEKHARA AYYAR J. three cases were quoted and these are referred to in his judgment. The first one is the Full Bench decision in *Chinnaya v. Gurunatham*(1) where it was held that a manager has authority to make payments for the family, and that he has the same authority to acknowledge as he has to create debts, but that he has no power to revive a claim barred by limitation, unless he is expressly authorized so to do. The second case is *Debendra Nath Roy v. Kartic Prasad Das*(2) where RANKIN C.J. held that a payment of interest on a money bond, after the expiration of three years from the date fixed for payment, when the Court was closed, did not save limitation under section 20 of the Limitation Act. Section 4 permits a suit to be filed on the day the Court re-opens after a vacation where the period of limitation provided for the suit expires during the vacation. It was pointed out that this section is quite independent of section 20 of the Limitation Act and RANKIN C.J. considered that, if one were to introduce into the wording of sections 19 and 20 the consideration that is brought into force by section 4, the law of limitation would become extremely unworkable. This decision was followed by KING J.

(1) (1932) I.L.R. 5 Mad. 169 (F.B.)

(2) (1928) I.L.R. 55 Cal. 1210

in *Chidambaram Chettiar v. Venkatasubba Naik*(1) which had reference to section 19 of the Limitation Act.

It is obvious that *Debendra Nath Roy v. Kartic Prasad Das*(2) and *Chidambaram Chettiar v. Venkatasubba Naik*(1) have really no bearing and the only case which requires consideration is *Chinnaya v. Gurunatham*(3). We do not agree that the principle laid down there is applicable to the present case. As the result of the decision of the Full Bench, it has for over sixty years been accepted in this province that the manager of a joint family cannot revive a time-barred debt so as to affect the other members of the family. There is, however, a difference between a debt which is unenforceable in law and one which is enforceable by reason of section 4 of the Limitation Act. When the promissory note of 2nd June 1934 was executed, the holder of the note of 19th May 1931 had the right to file a suit to enforce payment, notwithstanding that the instrument was more than three years old, provided that he did so on the day the Court re-opened after the vacation. The liability was the liability of all the members of the joint family and, in order to save payment being enforced at a time inconvenient to the family, the manager gave a fresh promissory note. The new promissory note was not given to revive a claim barred by limitation because the claim was not then barred. Section 4 applied. In these circumstances we consider that the Full Bench decision does not apply and that the manager was acting within his powers and for the benefit of the family when he executed the promissory note in renewal.

In the course of his judgment CHANDRASEKHARA AYYAR J. expressed the opinion that to hold that the manager had the power of renewal in such circumstances

(1) (1937) 1 M.L.J. 262

(2) (1928) I.L.R. 55 Cal. 1210

(3) (1932) I.L.R. 5 Mad. 169 (F.B.)

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would confer enormous powers on the managing member and impose great hardship on the rest of the family. He also considered that it would introduce a large element of confusion into the law. We do not share these opinions. In the first place, there was no hardship on the family but, on the other hand, as we have already pointed out, the new promissory note was executed in the interests of the family, and we fail to see in what way our decision can introduce any element of confusion into the law of limitation.

The result is the appeal is allowed and the case will be remanded to the trial Court to hear and decide in accordance with law the other questions arising in the suit. The appellant is entitled to his costs before the Subordinate Judge, before CHANDRASEKHARA AYYAR J. and in this Court. The costs in the trial Court will abide the result of the suit.

N.S.

APPELLATE CIVIL

Before Mr. Justice Mockett and Mr. Justice
Kuppuswami Ayyar

SUBRAMANIAN alias SEENI CHETTIAR, MINOR,
BY FATHER AND GUARDIAN R. M. S. N. NARAYANAN
CHETTIAR (SECOND DEFENDANT), APPELLANT

v.

M. P. P. S. P. L. MUTHIAH CHETTIAR AND ANOTHER
(FIRST PLAINTIFF AND FIRST DEFENDANT),
RESPONDENTS *

Hindu law—Adoption—Widower—Nattukottai Chettiar community—Custom—Stridhanam properties given to Nattukottai Chettiar woman reverting to her parents' side on her death without issue—Subsequent adoption by her husband—Effect—Right of such adopted son to get back the properties

A Nattukottai Chettiar woman died leaving no children. She left behind her stridhanam properties which had been

* Appeal No. 319 of 1943

presented to her by her parents and their relations. On her death without issue, according to the custom prevailing in the Nattukottai Chettiar community, these properties reverted to the parents' family and became vested in her nearest relation. After her death, her husband adopted a son who claimed those properties.

Held that he was entitled to the properties. By the fact of adoption he became not merely the son of his adoptive father but also that of his adoptive father's deceased wife. In this respect there was no distinction between adoption by a widow and adoption by a widower. The adoption related back to the date of her death, which had the effect of divesting the estate vested in her relation on her parents' side.

Case law reviewed and discussed.

APPEAL against the decree of the Court of the Subordinate Judge of Devakottai in Original Suit No. 83 of 1942.

K. Rajah Ayyar and M. S. Vaidyanatha Ayyar for appellants.

R. Gopalaswami Ayyangar for respondents.

Cur. adv. vult.

JUDGMENT.

MOCKETT J.—The judgment of my learned brother which I have had the advantage of reading has so fully set out the facts and issues for determination in this case that I do not propose to repeat them. I am in complete concurrence with all his conclusions on the issues of fact and I propose to add nothing with regard to points 2 and 3 which relate to the question whether in the case of item 1 of schedule C the property concerned is that of the first plaintiff or of Deivanai and in the case of items 1 to 4 of schedule D whether the properties belong to Deivanai or to the joint family. With regard to the question of fact as to whether the adoption of Subramaniaya by the first defendant has been proved, I consider that apart from the oral evidence the documents support the allegation that the adoption was carried out. All the probabilities are in favour of that conclusion. D.W. 1, Subramaniam

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Chettiar, states that his brother "gave his son to me in adoption and I took the boy in adoption". A muri on cadjan leaves was written. The document itself has not been printed. It was filed in the lower Court as Exhibit D-10 and it is not disputed that it was a document prepared for the purpose of the adoption. That the adoption was contemplated, quite clearly caused consternation to the first plaintiff on hearing of the proposal from D.W. 1. A reference to the complete translation of Exhibit P-15, a notice, and Exhibit P-17, a telegram, both of which take explicit objection to the adoption show what his reactions were. But the first defendant was in earnest. Invitations were issued. Exhibit D-8 (a) and Exhibit D-8 (d) are accounts of the presents given on the occasion. I see no reason to suppose that these documents are not genuine. The adoption is said to have taken place on 7th June 1939 and I consider it likely that, so far from altering his intention, the attitude of the plaintiffs might well have fortified the first defendant's determination to see the matter through. I question the admissibility of the statements attributed to Deivanai which do not appear to me to come within the provisions of section 32 of the Evidence Act. But there remains the evidence of D.W. 1 and the documents and the fact that the second defendant was deputed to perform Deivanai's funeral ceremonies. It seems to me that the conclusion of the learned Judge that this adoption took place is amply supported by the evidence. The evidence to disprove it is virtually non-existent.

With regard to the question of law involved, it is important first to consider whether the learned Judge's conclusion relating to the custom alleged by the plaintiff is correct. That conclusion is to be found in paragraph 84 of the judgment and reads as follows :—

"I find that the custom of reverter alleged by the plaintiffs in paragraph 21 is true and valid to the extent that

presents and moneys proved to have been given by the members of the parental family and their relatives revert to the parental family and the presents and moneys given by the husband's family and their members revert to the husband's family."

But was that custom pleaded in paragraph 21 of the plaint? The effect of the authorities seems to be that a custom must be proved to be certain, reasonable, immemorial and without interruption and each of these circumstances should be alleged in the plaint. It is convenient to set out that part of paragraph 21 of the plaint which purports to plead the custom on which the plaintiffs rely. It is as follows :—

"According to the custom of the Nattukottai Chettiar community to which the plaintiffs and defendants 1 to 3 in particular belong, the first plaintiff has become entitled at the moment of said Deivanai Achi's death to all the things left by her and referred to in schedules E and F as well as the properties mentioned in C and D schedules if for any reason they also can be said to have belonged to or have been left by her as her effects when she died and all other properties which may hereafter be established or proved to have been left by her by the right or the principle of reverter. According to the binding and immemorial custom of Nattukottai Chettiar community, if a Nattukottai Chettiar woman dies leaving behind her no child or children born to her or any son adopted to her and her husband prior to her death or any lineal descendant or descendants by any such child or children or adopted son, the stridhanam, seermurai and other siruvattu monies and properties of whatever nature they may be whether jewels, vessels, cloths, etc., presented or given to her either at the time of the marriage by her parents' family or relatives or on subsequent numerous occasions in accordance with the general usage, practice or custom of the community or acquired by her from her parents' house or other relations in any manner whatsoever except any property that might have been acquired or got directly from her husband's family and all accumulations, descend and go to her father or the father's child or children adoptive or natural or his or their lineal descendants, if any, surviving her by right of reverter."

I omit the rest of the paragraph as it is more in the nature of an argument than in the nature of a pleading. The important allegation is that, according

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to the binding and immemorial custom of the Nattukottai Chettiar community, if a Nattukottai Chettiar woman dies leaving behind her no child or children born to her or any son adopted to her and her husband prior to her death or any lineal descendant or descendants by any such child or children or adopted son, the stridhanam and other properties given by her relatives or by her parents or it would seem by anyone at any time other than her husband's family descend and go to her father or his family. The only exception is property derived from her husband's family. I again stress the words "or any son adopted to her and her husband prior to her death" and especially the words "prior to" which of course raised the all important point in this case. The plea seeks to exhibit an important addition to the custom of descent of property among Nattukottai Chettiars as recognized by this Court and I do not consider that the evidence is such that the addition to the custom pleaded has been proved. In so far as the customs amongst this community have been accepted, two decisions of this High Court are in point. MADHAVAN NAIR J. (as he then was) delivering the judgment of the Bench held in *Official Assignee of Madras v. Muthayee Achi*(1) that the following custom had been proved by unimpeachable evidence:—

"The amounts of the gifts are handed over to the senior male member of the bridegroom's family in the shape of hundies drawn in favour of the bridegroom by the senior male member of the bride's father's family for the amounts. They are so handed over to him for his making them accumulate by lending them out for interest. He invests them in the money-lending shop of his family if that family has one, and in some other shop if his family has none or if the shop of that family is not financially sound or if the bride's father's family so desires. Interest is allowed on them at the rate current in Rangoon adding it to the principal amounts and interest, is payable to the bride on demand during her lifetime and is taken by the children of the marriage if any

(1) 1937 M.W.N. 493

are left when the bride dies and by her father's family otherwise."

WALLACE and JACKSON JJ. in *Palaniappa Chettiar v. Chockalingam Chetti*(1) stated as follows:—

"It seems clear that there is a custom having the force of law by that, if the daughter of the family dies issueless, the stridhanam will revert to her parents, but there is at present no clear custom having the force of law by which such reverter occurs when the daughter has issue and dies leaving issue. There is no certain custom in such a case governing the destiny of the stridhanam, and that destiny is apparently being decided by mutual arrangement sometimes one way, sometimes another."

The learned Judges were concerned to consider this topic as it was contended before them that the stridhanam reverted to the parents even when the daughter had female issue and that female issue died without issue. I accept the position that these decisions establish the custom therein stated. But neither of these cases nor any of the others cited to us establishes that the reverter to the parents operates so as to exclude a son adopted after the daughter's death. The all important question, namely, whether a son adopted after the daughter's death is to be treated as being in the same position as a son adopted before her death is the very point which we have to decide now. The introduction of the words "prior to her death" in the pleading shows that the plaintiffs were fully conscious of the extent of the custom which it was incumbent on them to prove. The written statement of the second defendant explicitly denied the custom and pleaded that according to the custom obtaining among the Nattukottai Chetti community an adoption made to a deceased lady is perfectly valid and will vest all her properties in the adopted son even if they had vested already in others. This custom also has not been established by the appellants but that does not affect the decision in this case.

(1) (1929) 57 M.L.J. 817

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The ultimate decision will rest on the law and not on custom.

I am concerned with the question of law as I do not agree with the finding of the learned Judge relating to the plaintiff's alleged custom. With all respect to the learned Judge I consider that his finding in paragraph 84 does not deal with the very precise pleading in paragraph 21 of the plaint. There is no allusion to the position which arises in the case of an adoption after the daughter's death. I need not repeat in full the analysis by my learned brother of the evidence to prove the plaintiff's alleged custom.

Of the nine witnesses called, the learned trial Judge expressly states that he derived no assistance from the evidence of P.Ws. 2, 4, 6 and 7. I entirely agree that the very slender evidence which remains does not prove the custom alleged. Indeed, it hardly touches it, if at all. There was no evidence as to what was the custom on facts such as are now before us. In paragraph 41 of his judgment the learned Judge expressed the view that

"on the question of the custom of devolution set up by the plaintiffs there is no difficulty in holding on the evidence adduced, that the custom is that whatever has been given to the bride at the time of the marriage and thereafter by the members of the parental family and their relatives reverts to the parental family, and that whatever has been given by the husband's family and their relatives reverts to them."

But this does not decide the point as it disregards the words "adopted . . . prior to her death". I am unable to find in the record evidence proving the custom pleaded by the plaintiffs and accordingly must differ from the finding on this topic by the learned Judge. It is necessary therefore to approach the legal position on the basis that no custom has been proved which assists me in determining the point of Hindu law involved which seems to me to be this: In the case of an adoption after the death of the adoptive father's wife, does the stridhanam and

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other properties acquired by the latter other than from her husband's family revert on her death to her father's family or descend to the adopted son. It follows too that it is necessary to decide whether property vested in the members of her father's family becomes divested in the event of an adoption after her death by her husband, which is what happened in this case.

So far as the position of an adopted son in the family of the adopter is concerned, there is an authority of the Judicial Committee in *Padmakumari Debi Chowdhurani v. Court of Wards*(1):

"An adopted son occupies the same position in the family of the adopter as a natural-born son, except in a few instances, which are accurately defined both in the Dattaka Chandrika and Dattaka Mimansa, the authorities that govern the decision of questions of adoption arising in the Bengal School. And no text has been produced to show that an adopted son cannot succeed to the estate of such relatives of his father as are sprung from a different family."

In the absence therefore of any special custom, which has been negatived in this case, the adopted son will have the same rights of inheritance, his existence as a son taking effect as at the time of his adoptive father's death. Mr. AMBER ALI delivering judgment in *Pratapsingh Shivsingh v. Agarsingji Rajasangji*(2) observed:

"Now it is an explicit principle of the Hindu law that an adopted son becomes for all purposes, the son of his father, and that his rights unless curtailed by express texts are in every respect the same as those of a natural-born son."

In *Sankaralingam v. Veluchami*(3) LEACH C.J. delivering the judgment of the Full Bench summarised the arguments in favour of a right in the adopted son to demand his share in the family estate, notwithstanding that the other coparceners have already partitioned, and they are as follows:—

"(i) It is a rule of Hindu law that an adoption dates back to the date of the death of the father.

(1) (1881) I.L.R. 8 Cal. 302, 311 (P.O.)

(2) (1918) I.L.R. 43 Bom. 778, 792 (P.C.)

(3) I.L.R. [1943] Mad. 309 (F.B.)

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(ii) There is no reason why an adopted son should be placed in an inferior position to that of the posthumous son, the heir of a disqualified person and the absent coparcener.

(iii) The right of the adopted son to demand re-partition has been recognized in two cases; *Krishna v. Sami*(1) and *Bajirao v. Ramkrishna*(2).

(iv) There is support to be found for the proposition in *Strange*.

(v) As an adoption divests an estate of inheritance it would be unjust to deny to the adopted son the right of claiming a re-partition when the rule of survivorship applies."

Holding that an adopted son was entitled to re-open a partition made by the members of the family after the death of the coparcener but before the adoption, the Full Bench held that the adoption was the over-riding factor and restored the position so far as the partition was concerned, subject to lawful alienations in the meantime. That the adopted son is bound by such alienations appears to be the only limitation of his rights and all other properties which had come into the hands of those who took part in the partition reverted to the adopted son. The legal position of the adopted son is therefore established by the highest authority.

So far, as his position *vis-a-vis* his adoptive father is concerned. It is, however, argued before us that the position is not the same *vis-a-vis* his mother, or to put it in another way, the wife of his adoptive father. In the case before us, no complication arises from the fact that Subramaniam had more than one wife. Deivanai who died on 28th August 1938 was his sole wife. Subramaniam, the first defendant, adopted the second defendant, whose name is also Subramaniaya, on 7th of June 1939, and it is argued that the second defendant although having a father never had a mother and therefore could not succeed to Deivanai's estate.

The decisions referred to above assist in solving this difficult question. The case of *Sundaramma v.*

(1) (1885) I.L.R. 9 Mad. 64 (F.B.) (2) I.L.R. [1941] Nag. 707

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Venkatasubba Ayyar(1) has a direct bearing upon it as the judgments contain important observations by PHILLIPS J. and MADHAVAN NAIR J. (as he then was) respectively which discuss the general position of a son adopted by the widower after his wife's death. PHILLIPS J. discussing the decision of the Privy Council in *Narasimha v. Parthasarathy*(2) took the view that if the son can be deemed to be the natural and legitimate son of his father, by the same fiction he would be the son of his father's wife also, and at page 951 MADHAVAN NAIR J. observed :

"To give full effect to the fiction of adoption and to assimilate the fact to an imitation of nature the adopted boy should have a mother. I do not think it is impossible to conceive the deceased wife as the fictional mother of the adopted child. The theory of a 'receiving mother' being discarded, I cannot find any difficulty in holding that the wife of the adoptive father though she was dead at the time of adoption can be considered as the adoptive mother."

There is therefore authority binding upon me which goes some way towards the solution of this case. It seems to me to amount clearly to this, namely, that an adopted son does become the son both of his adoptive father and his adoptive father's deceased wife. When dealing with fictions, I cannot see why decisions arising out of fiction should not be carried to their logical conclusion. In *Amarendra Mansingh v. Sanatan Singh*(3) which concerned the validity of an adoption, their Lordships at pages 656 and 657 emphasised, after consideration of the case law, that it would not be possible to say that the sole test of the validity of an adoption is the vesting or divesting of property and at page 657 observed :

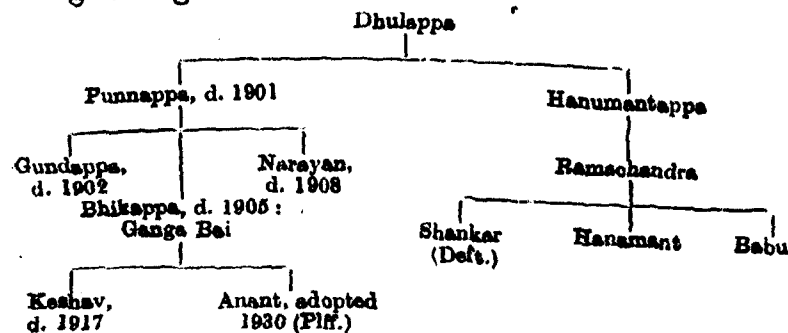
"It necessarily follows (their Lordships think) from this decision [*Pratapsingh Shivsingh v. Agarsingji Rajasangji*(4)] that the vesting of the property on the death of the last holder in someone other than the adopting widow, be it either another coparcener of the joint family or an outsider claiming by reverter, or, their Lordships would add, by inheritance

(1) (1926) I.L.R. 49 Mad. 941 (2) (1914) I.L.R. 37 Mad. 199 (P.C.)
(3) (1932) I.L.R. 12 Pat. 642 (P.C.) (4) (1918) I.L.R. 43 Bom. 778 (P.C.)

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cannot be in itself the test of the continuance or extinction of the power of adoption."

In the present case, there is no question of the power to adopt. It would seem that their Lordships took the view that material considerations should take second place to the spiritual considerations which are the basis of the Hindu law of adoption. The latest decision of the Judicial Committee relating to divesting is *Anant v. Shankar* (1). The following is the genealogical table in that case:



At the time of Keshav's death, his nearest heir was the defendant Shankar, a remote collateral, who obtained possession from the Collector in 1928. The adoption in 1930 of Anant by Ganga Bai resulted in a suit by Anant through Ganga Bai as his next friend. The plaintiff succeeded before the trial Judge and obtained a decree for possession and for a declaration that he was the lawfully adopted son of Bhikappa and as such the heir of Keshav. The High Court set aside the order for possession and mesne profits and qualified the declaration by adding the words, "except as regards the watan property which has already vested in the defendant." The High Court took the view that as the coparcenary had come to an end on the death of Keshav in 1917 and the family property had then vested in his heir, the subsequent adoption in 1930 though valid would not revive the coparcenary or divest Keshav's heir, the adopting widow not being herself Keshav's heir. Their Lordships allowed the appeal

(1) (1943) 2 M.L.J. 599 (P.C.)

and in the course of the judgment observed as follows at page 675:

"If the effect of an adoption by the mother of the last male owner is to take his estate out of the hands of a collateral of his more remote than a natural brother would have been and to constitute the adopted person the next heir of the last male owner, no distinction can in this respect be drawn between the property which had come to the last male owner from his father and any other property which he may have acquired. Keshav's separate watan property devolves not on his mother who would be his heir at the general law but on the nearest male in the line of heirs; and if the plaintiff's adoption as son to Bhikappa puts him in that position, his right to succeed cannot be limited to such watan property as Keshav derived from Bhikappa. On this ground the appellant's suit succeeds as regards the two parcels of land which Keshav inherited from Narayan."

The whole subject of divesting is discussed by the learned editor of Mayne's Hindu Law, 1938 Edition, at pages 234 and 235. As already stated, the exact position before us now has not been the subject of judicial determination but from a consideration of the authorities, if it is correct to premise that the second defendant is the son of Deivanai for all purposes, I feel constrained to hold that by his adoption he was entitled to the properties of the deceased Deivanai and that any properties which vested in the plaintiff become divested. I would add my agreement with my learned brother's view that, with regard to the properties other than those which are clearly *stridhanam* in character, there is no evidence to show from what source Deivanai derived the funds. I am also in general agreement with the conclusions arrived at by my learned brother and the order proposed.

KUPPUSWAMI AYYAR J.—The appellant is the second defendant. The first respondent is the first plaintiff and the second respondent is the father of the appellant and first defendant in the suit. The second plaintiff, the wife of the first plaintiff (first respondent) is not a party to this appeal, and her claim as set forth in the plaint was disallowed. She

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has not filed any appeal. The third defendant, the adoptive mother of the first plaintiff, is dead and no legal representatives have been brought on record as the first plaintiff claimed to be her heir. The names of defendants 4 to 13 who were some of the debtors in respect of the outstandings which were the subject-matter of the litigation were struck off on the ground that they were unnecessary parties and they have not been made parties to this appeal.

The subject-matter of the suit consisted of several items of movable and immovable properties and outstandings described in Schedules A to F of the plaint. The suit so far as the items described in Schedules A, B and E of the plaint except item 6 of Schedule B as also the suit in respect of items 5 to 8 of Schedule F of the plaint has been dismissed. A decree was passed only in favour of the first plaintiff and that in respect of item 6 of Schedule B, items 1 to 4 (a) of F schedule and the items shown in Schedules C and D. In the memorandum of appeal, it is specifically stated that item 2 in Schedule C is not in dispute in this appeal. With regard to item 6 of Schedule B, the decree was passed against the first defendant; he has not filed any appeal, nor has he filed any memorandum of cross-objections. Thus, the appeal relates only to item 1 of Schedule C, the four items in Schedule D and items 1 to 4 and 4 (a) of Schedule F.

The first plaintiff was taken in adoption by the third defendant, the widow of the late Shanmugam Chetty *alias* Palaniappa Chetty on 27th May 1936. The second plaintiff is his wife. Shanmugam Chetty died in October 1928 leaving behind him his widow Egammai Achi, the third defendant, and a daughter by name Deivanai Achi. The first defendant (the second respondent) married Deivanai more than thirty years prior to the suit. Shanmugam Chetty was blind of both eyes and the first defendant, the son-in-law, was helping him in writing the accounts, etc., and

was generally in management. After his death, as Egammai was an illiterate woman, the first defendant, the husband of Deivanai, her only daughter, was practically managing the properties and investing the income at his will in the names of Deivanai and Egammai. After the first plaintiff was adopted by Egammai he and his wife lived in the family house for some time; but misunderstandings arose and when the plaintiffs were away, defendants 1 and 3 and Deivanai closed the front door of the house and locked it and removed all the valuables, account books, etc., to the house situated in item 1 of Schedule C which was behind the family house. Subsequently, Deivanai fell ill and died on 28th August 1938 leaving no children. It is the plaintiff's case that on the death of Deivanai, all stridhanam properties given to her by her parents and their relations devolved, by a custom of reverter prevailing in the Nattukottai Chetty community to which they belonged, on the paternal family. The plaintiffs, therefore, claim that all the properties which are the subject-matter of litigation which stood in the name of Deivanai were either the properties of the first plaintiff's family or if they were the properties which had their nucleus in the gifts by the parents and their relations to Deivanai, they reverted to the family of the first plaintiff on Deivanai's death. The properties mentioned in Schedules C, D, E and F which were claimed to be properties of Deivanai were settled on the second plaintiff by the first plaintiff under a document, dated 6th June 1939, Exhibit P-12, which has not been printed. The plaintiffs, therefore, prayed for a decree directing defendants 1 to 3 to render a true and proper account of the management of the properties of the first plaintiff's family and to furnish a true inventory of all the properties and other documents relating to the family and for recovery of such properties as may be found to be family properties and

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the properties described in Schedules A and B of the plaint. There was also a prayer for a declaration that the properties mentioned in Schedules C and D of the plaint were part of the family properties of the first plaintiff and for a decree for recovery of item 1 of Schedule C and for an injunction restraining defendants 1 to 3 from obstructing the plaintiff in his possession and enjoyment of item 2 of Schedule C. Schedule D consisted of four items of outstandings, and the prayer was for a declaration that they were the joint family properties of the first plaintiff and for an injunction restraining defendants 1 to 3 from realising or dealing with any of the outstandings or securities or shares referred to in Schedule D of the plaint. With regard to the properties mentioned in Schedules E and F of the plaint, the prayer was for a decree declaring that the properties and investments mentioned in Schedules E and F belonged to the first plaintiff as having been obtained by him by the communal custom of reverter on the death of Deivanai leaving no issues at the time of her death, and for directing the first and third defendants to render a true and proper account in respect of those items.

The third defendant, Egammai, supported the plaintiff's case but pleaded that she was entitled to the properties of Deivanai in preference to the first plaintiff and that the first plaintiff would be entitled to them only after her death. She denied having had any hand in the management, pleaded that it was the first defendant alone that was liable to account and denied her liability to account to the plaintiffs.

Defendants 1 and 2 pleaded that the second defendant was taken in adoption by the first defendant on 7th June 1939 in accordance with the wishes of Deivanai expressed on the eve of her death. The custom of reverter pleaded was denied and it was further pleaded that it was the second defendant who would be entitled to the properties of Deivanai on her death as her

adopted son. Items 1 and 2 of Schedule C, the four items of Schedule D and items 1 to 4 (a) of Schedule F were claimed as properties of Deivanai inherited by the second defendant as her adopted son. With regard to item 1 of Schedule C their case was that the western portion of it was given by the third defendant to the first defendant in 1914 with the concurrence of Shanmugam Chetty; that the building was put up on it by Shanmugam for the use of the first defendant the expenses of construction having been debited against him by Shanmugam in his account and that ever since then he had been in possession and enjoyment of it. The eastern portion of that item belonged to the first defendant, and he had enclosed it by a compound wall and put up a tiled shed on it. It was denied that any jewels were presented to Deivanai by her parents at the time of the marriage. The jewels made and purchased from out of the funds of the first defendant save those worn by her were all left with the mother Egammai Achi and the keys of the rooms which were all kept by the first defendant were with the plaintiffs and the third defendant.

The learned Judge found that the first defendant was not in management of the properties of the first plaintiff's family and that he was not bound to account. He also found that except item 6 of Schedule B which belonged to the first plaintiff and was handed over to the first defendant and which he was hence bound to return, the other items of Schedules A and B were not in the possession of the first defendant. The two items in Schedule C were found to belong to the joint family of the first plaintiff. With regard to the four items in Schedule D, the finding was that they belonged to the late Deivanai and that on her death by the custom of reverter they devolved on the first plaintiff. He also found that the adoption of the second defendant by the first defendant as the adopted son of the late Deivanai was true and valid, but held that the

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adoption would not divest the first plaintiff of the estate of Deivanai and that therefore he, the first plaintiff, was entitled to the items shown in Schedule D and to items 1 to 4 (a) of Schedule F. It was found that the first defendant was not in possession of any of the items mentioned in Schedule E of the plaint or of items 5 to 9 of Schedule F. It was further held that items 1 to 4 and 4 (a) of Schedule F were the properties of Deivanai and that the first plaintiff became entitled to them on her death. The learned Subordinate Judge found that the settlement deed in favour of the second plaintiff was not valid and that it would not operate as a bar to divesting Deivanai's estate by the second defendant if it be found that he will be entitled to divest the intermediate heir and obtain possession of her estate from him.

As already stated above, the second plaintiff has not filed any appeal, nor is she a party to this appeal. The finding of the learned Judge that item 1 of Schedule C belongs to the joint family of the first plaintiff is disputed by the appellant. The first respondent disputes the findings of the learned Judge that D schedule properties belonged to Deivanai. The correctness of the finding about the truth and validity of the adoption of the appellant, the second defendant, is also disputed by the first respondent (the first plaintiff).

The main points for consideration in this appeal are :

- (i) Whether the adoption of the appellant as the son of Deivanai is true and valid ;
- (ii) whether item 1 of Schedule C belonged to the first plaintiff or was it the property of Deivanai ;
- (iii) whether items 1 to 4 of Schedule D belonged to Deivanai or to the joint family of the first plaintiff ;
- (iv) whether the custom pleaded in paragraph 21 of the plaint is true and valid to any and what extent ;
- (v) whether the adoption of the appellant would divest the first plaintiff of the properties of Deivanai which vested in him on the death of Deivanai and vest them in the appellant ;

(vi) which of the properties described in Schedules D and F of the plaint would vest in the first plaintiff on the death of Deivanai under the custom of reverter.

Point No. 1.—The learned Subordinate Judge has found that the adoption of the appellant by the second respondent on 7th June 1939 is true and valid. The main evidence in the case was that of D.W. 1, the first defendant, who spoke to the fact that he took the boy in adoption on that day and that the boy was handed over to him by his natural father, his brother. An adoption muri, Exhibit D-10, was executed then. The adoption was preceded by the issue of invitations and Exhibit D-8 (a) is one such invitation card. Presents were made on the occasion and Exhibit D-8 (d) is the account maintained of the presents so made. D.W. 1, the first defendant, stated that his brothers and all the pangalis were present at the adoption and that neither Egammai nor the first plaintiff attended the function. That the first plaintiff had notice of the impending adoption is clear from the telegram, Exhibit P-17, sent by him and from the registered notice, Exhibit P-15, sent on 5th June 1939. They indicate that he knew of the proposal to adopt the appellant on 7th June 1939 and did not want it to take place. As a matter of fact, to defeat the consequent effect of that adoption, he, the first plaintiff, executed on 6th June 1939, Exhibit P-14, a registered settlement deed in favour of his wife in respect of the properties that stood in Deivanai's name, viz., the properties described in Schedules C to F of the plaint. Comment was made on the fact that no other person except the first defendant (D.W. 1) had been examined to prove the *factum* of adoption and it is urged that no reliance ought to be placed on his evidence. The evidence of D.W. 1 is corroborated by the adoption muri and the accounts maintained in respect of the presents made then as also by the admitted fact that it was widely known a few days prior to the adoption that the adoption was going to take place, as is clear from the very notice and

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telegram sent by the first plaintiff. If the adoption did not take place on that day as stated by D.W. 1 it must have been quite easy for the plaintiffs to have examined any of the neighbours to show that no such adoption took place on that day, as was announced in the invitations. We therefore agree with the learned Subordinate Judge that the first defendant did take the second defendant in adoption on 7th June 1939 and that there was the giving and taking by the natural parents and by the adoptive father respectively.

In *Sundaramma v. Venkatasubba Ayyar*(1) it was held that an adopted son of a Hindu whose only wife had died before the adoption became the son of that wife so as to inherit as such to the relations of her father's family. In *Sowanthara Pandian Ayyangar v. Periaveeru Thevan*(2) a Full Bench of this Court approved the above decision and held that such an adopted son of a Hindu widower became the adopted son of his predeceased wife. It was averred that the first defendant had a Vaduga wife and a son by her, but this was not proved. The first defendant, at the time of the adoption, was a widower with no children and he had married only one wife, the late Deivanai Achi. The learned Judge was hence justified in finding that the second defendant was validly adopted by the first defendant on 7th June 1939 and that by the adoption he, the second defendant, became the adopted son of the late Deivanai Achi as well.

Point No. 2.—The appeal is by the second defendant, the adopted son of Deivanai, and consequently it is confined to those properties that are claimed by him as her heir, viz., item 1 of Schedule C and the four items of Schedule D and items 1 to 4 and 4 (a) of Schedule F.

Before considering the question as to how far the adoption of the appellant on 7th June 1939 would divest the person in whom the properties of Deivanai had

vested immediately after her death, it will be necessary to consider whether the items in dispute in this appeal belonged to Deivanai or to the first plaintiff's family as contended by the first respondent.

[His Lordship discussed the evidence and proceeded:]

The learned Subordinate Judge rightly found that item 1 of Schedule C belonged to the first plaintiff as part of his family properties and was not part of Deivanai's estate.

Point No. 3.—The plaintiff's case was that the outstandings shown as items 1 to 4 of Schedule D were transactions in respect of the moneys of the family of the first plaintiff invested in Deivanai's name. To prove this there was absolutely no evidence. Since the documents relating to these outstandings stood in the name of Deivanai till her death and as the mortgage deed in respect of item 2 of D schedule was obtained in the name of Egammai by way of renewal of a debt that stood in Deivanai's name after the latter's death, the learned Subordinate Judge drew a presumption that they belonged to Deivanai. There is no presumption of advancement in India.

[His Lordship discussed the evidence and proceeded:]

In any case, there is no evidence to show that they belonged to the joint family of Shanmugam Chetty or of his son, the first plaintiff.

Coming to the other five items in respect of which the ownership of Deivanai was not disputed before us, viz., items 1 to 4 and 4 (a) of Schedule F, it is not disputed at any rate before us that items 1 and 2 are the stridhanam properties given by the parents' family to Deivanai at the time of her marriage as found by the learned Judge. However, it was urged for the respondent that the money came from Shanmugham's funds while the appellant contended that it came from Egammai. But there can be no doubt that it came from the parents of Deivanai and that it was the

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stridhanam money given to her at the time of her marriage. About the other three items, 3, 4 and 4-a, the only evidence is that they stand in the name of Deivanai. Item 3 are Overseas Bank shares of the value of Rs. 1,000. Item 4 is a deposit of Rs. 500 with the eleventh defendant. Item 4-a is a deposit of Rs. 200 with the tenth defendant. There is no relevant evidence to show with what funds the shares were purchased or the deposits were made. The only evidence to which our attention was drawn in respect of these items is the statement of D.W. 1, the first defendant, that his wife told him that her mother gave her Rs. 1,000 for Kandasaram and that the Overseas Bank shares were purchased with it and that he did not remember her having mentioned any other items to him. This statement of Deivanai is not relevant evidence to prove the truth of the facts contained in that statement. Our attention was not drawn to any other evidence to show how these investments came to be made or with what funds. It may be that the money came from her husband or his relations or from what was given by her parents or parents' relations or it may also be that it was obtained from other persons besides the relations of the parents and the husband. There is thus no evidence to show with what funds the investments were made by Deivanai.

Points 4 to 6.—The next question for consideration concerns the person on whom the properties that belonged to Deivanai devolved on her death. Under the rules of Hindu law, the property of a Hindu woman devolves on her death in the following order: (i) unmarried daughter, (ii) married daughter who is unprovided for, (iii) married daughter who is provided for, (iv) daughter's daughter, (v) daughter's son, (vi) son, (vii) son's son. If there be none of these, her stridhanam would go to her husband if the marriage is in an approved form and after him to the husband's heirs in the order of their succession

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to him. If she was married in an unapproved form it would go to her mother, then to her father, then to the father's heirs and then to the husband's heirs in preference to the Crown. In this case, there is no evidence that Deivanai was married in an unapproved form. She had no children. There were only her husband, her mother, and her adopted brother surviving. But her husband after her death adopted a son who became by the adoption her adopted son as well, as found above. Consequently, her husband would be, according to the general rules of Hindu law, the heir entitled to the properties if there had been no adoption subsequently. In any view of the case under the general rules of Hindu law when her husband survived her, her adopted brother, the first plaintiff, would have no rights to her properties. But it was pleaded in the plaint that among the Nattukkottai Chettiars, to which community Deivanai belonged, there is a custom known as "reverter" under which,

"if a Nattukkottai Chettiar woman dies leaving behind her no child or children born to her or any son adopted to her and her husband prior to her death or any lineal descendant or descendants by any such child or children or adopted son, the stridhanam, seermurai and other siruvattu monies and properties of whatever nature they may be whether jewels, vessels, cloths, etc., presented or given to her either at the time of the marriage by her parents' family or relatives or on subsequent numerous occasions in accordance with the general usage, practice or custom of the community or acquired by her from her parents' house or other relations in any manner whatsoever except any property that might have been acquired or got directly from her husband's family and all accumulations descend and go to her father or the father's child or children adoptive or natural or his or their lineal descendants, if any, surviving her by right of reverter."

It was pleaded on the strength of this custom that all the properties of Deivanai Achi except those that had been acquired or got directly from her husband's family devolved upon the first plaintiff, the only male member of her parents' family. The

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appellant and his father, the first defendant, denied that there was any such custom as pleaded in paragraph 21 of the plaint. On issue 9 which runs thus: "Whether the custom of 'reverter' alleged by the plaintiffs in paragraph 21 of the plaint is true and valid?", the learned Subordinate Judge gave the following finding in paragraph 84 of his judgment:—

"I find that the custom of reverter alleged by the plaintiffs in paragraph 21 is true and valid to the extent that presents and moneys proved to have been given by the members of the parental family and their relatives revert to the parental family and the presents and moneys given by the husband's family and their members revert to the husband's family."

It is rather unfortunate that the learned Subordinate Judge has not found specifically whether this result will follow only in the circumstances stated in paragraph 21 of the plaint, viz., if the deceased left no children or lineal descendants or no adopted son *adopted by her and her husband prior to her death*. He has not discussed the evidence with regard to this particular condition as to whether the custom of reverter would come into operation only if there had been no adopted son or descendants of any such adopted son *adopted before the woman's death*. In short, the custom pleaded was that an adoption after her death could in no way affect the inheritance or reversion.

The matter is not covered by judicial decision and our attention is not drawn to any instance in which there has been any case of adoption of any son to a woman after her death by her husband whose claim to the properties of his adoptive mother had been denied or refused. The evidence on this point let in in the case consists of the evidence of P.W. 1 and P.Ws. 3 to 12. All that P.W. 1 stated was that among Nattukkottai Chettiars, if a woman died without issue, her stridhanam reverted to the parents of the woman and that her husband had no right to them, and it is only the presents given by her husband and his family that will revert to him. He

further added that a boy adopted to Nattukkottai woman after her death would not get her properties. He had known no instance of any such adopted son in his caste getting such properties. He gave three instances in which on the death of a Nattukkottai Chetti woman without issues, her parents took away her properties. What properties were taken in those instances and how those properties were obtained by the lady there is no evidence about. In none of the instances given by him was it mentioned that there was an adopted son, adopted subsequent to her death. So the evidence of this witness does not go further than that in some cases he knew that the properties of a Nattukkottai Chetti woman who died leaving no issues were taken away by her parents even though the husband was alive. P.W. 3 stated that if a married woman died without issue her stridhanam and other jewels and properties given by her parents revert to them, and those given by her husband's family revert to them. He also stated that siruvattu funds revert to the parental family. He gave five instances. In the first instance given by him, he merely stated that the siruvattu money was given to her parental family as also the jewels and vessels. But he did not state how the woman acquired those properties. In the second instance he stated that the parents gave away the money payable to the husband's house and the boy's family handed over stridhanam, etc., given by the parents of the girl to the latter. And he added that in the three other instances stated by him the same practice was followed. But in none of those cases was it stated that there was any adoption to the woman subsequent to her death. He, however, added: "There is no practice among us of a custom of adopting a boy in such cases so as to divert the devolutions stated by me." But this statement of his had no relevancy to the point under consideration as it was

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not the appellant's case that the adoption of the second defendant was based on any particular custom in the community. He was taking his stand under the general rule of Hindu law and not on any particular custom. In cross-examination, the witness said that he had not heard of any instance of a woman "dying without issues where an arrangement to adopt a son to the family was arranged and decided upon."

[His Lordship discussed the oral evidence of P.Ws. 4 to 12 and proceeded:]

In none of these instances was there as already stated above, any adoption subsequent to the death of the woman. It cannot therefore be said that the plaintiff has proved there could be any scope for the application of this custom of reverter in cases where there has been an adoption to the woman after her death by her husband. In this view it will be unnecessary to go into the question if the custom as found by the learned Subordinate Judge had been validly established or not.

There is one circumstance which goes to disprove the custom pleaded by the plaintiff that there will be a reverter in the absence of an adopted son adopted in the lifetime of the deceased woman. According to D.W. 1, even in her lifetime shortly before her death the late Deivanai desired to adopt the appellant as her son and requested his father to give the boy in adoption and that the adoption took place only in pursuance of her wish. The learned Subordinate Judge has accepted this version of D.W. 1, and it is also in evidence that it was the appellant that performed the funeral ceremonies of Deivanai. The general trend of the evidence of the plaintiff's witnesses who were examined to prove the custom about the reverter was to the effect, that all disputes relating to the deceased estate would be raised and settled usually before the removal of the corpse of the woman to the cremation ground and that the properties also will be

handed over to the woman's paternal family before the completion of the funeral ceremonies. P.W. 2 in particular has given evidence on this point. If it was a fact that an adoption subsequent to the death of the woman would not vest the property of the woman in such subsequently adopted son, there could have been no difficulty for the first plaintiff to have obtained from the first defendant the properties of Deivanai which would devolve on the first plaintiff by the custom of reverter on her death without issues. There is no evidence to show that there was any talk or any attempt then to obtain the properties of Deivanai from the first defendant or Egammal Achi. It is the consciousness of the fact that the woman had already desired that the second defendant should be adopted and that he would be adopted and that on such adoption the properties would go to him that would account for the first plaintiff not following the usual practice prevalent among Nattukkottai Chettians of having this matter decided and settled even before the corpse was removed to the cremation ground and obtaining possession of the properties and documents before the termination of funeral ceremonies. This is a circumstance which goes to disprove the plaintiff's contention that a subsequently adopted son will not be entitled to succeed to the properties of his adoptive mother.

Even if the custom as found by the learned Subordinate Judge is true and valid, the first plaintiff can claim a right only to those properties proved by him to have been given by the parents. The custom as found by the learned Judge relates only to two sets of properties of a Nattukkottai Chetti woman, namely, those given by her parents and their relations and secondly those that are given by her husband and her relations. The first plaintiff cannot succeed to any of the properties, which are the subject of this appeal under this custom without proving that they

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were either given to Deivanai by her parents or their relations or were subsequent accretions of such gifts. As pointed out above, it is only in respect of items 1 and 2 of Schedule F that there is evidence to prove that they were stridhanam properties of Deivanai given to her by her parents. In respect of items 2 to 4-a of Schedule F and in respect of items 3 and 4 of Schedule D, there is no evidence to show as to how Deivanai was able to get the funds. With regard to items 1 and 2 of Schedule D, if they are the properties of Deivanai, the evidence goes to show that the money came in respect of those outstandings from her mother Egammai.

It was contended for the plaintiffs that the adoption of the appellant by his father after the death of Deivanai would not divest the property which had devolved on or reverted to the first plaintiff by the custom of reverter referred to above, as this is a case of adoption to a woman after her death and hence the adoption need not be given effect to as if the adoption had taken place in the lifetime of Deivanai herself. In *Padmakumari Debi Chowdhurani v. Court of Wards*(1) their Lordships of the Judicial Committee pointed out that an adopted son occupies the same position in the family of the adopter as a natural-born son, except in a few instances, which are accurately defined both in the *Dattaka Chandrika* and *Dattaka Mimamsa*. This was followed by the Judicial Committee in *Kali Komul Mozumdar v. Uma Sunker Moitra*(2). In *Pratapsingh Shivsingh v. Agarsingji Rajasangji*(3) his Lordship Mr. AMEER ALI who delivered the judgment of the Judicial Committee in that case observed at page 793 :

"Now it is an accepted principle of the Hindu law that an adopted son becomes for all purposes, the son of his father, and that his rights unless curtailed by express texts are in every respect the same as those of a natural-born son . . .

(1) (1931) I.L.R. 8 Cal. 302, 311 (P.C.)
(2) (1933) I.L.R. 10 Cal. 232, 237 (P.C.)
(3) (1918) I.L.R. 43 Bom. 778, 793 (P.C.)

Again it is to be remembered that an adopted son is the continuator of his adoptive father's line exactly as an *aurasa* son, and that an adoption, so far as the continuity of the line is concerned, has a retrospective effect; whenever the adoption may be made there is no *hiatus* in the continuity of the line."

In that particular case, the dispute was as between an adopted son adopted after the death of the last owner and the person who claimed a right to the grantors' estate, when the grant of the property terminated on the death of the last male owner without any male issue and the property reverted back to the family of the original grantors. It was not a case of inheritance but a case of reverter, and it was held that a subsequent adoption would divest the original grantor and that the adoption must be considered to have been made in the lifetime of the adoptive father and that there will be a divestment. In *Sankaralingam v. Veluchami*(1) it was pointed out that it was a rule of Hindu law that the adoption dates back to the date of the death of the father, that there was no reason why an adopted son should be placed in an inferior position to that of the posthumous son, and that such an adoption would divest an estate of inheritance already vested. It is only by applying these principles of law it was held in that case that a subsequently adopted son could ask for a re-opening of a partition effected in the joint family before he was adopted. In *Anant v. Shankar*(2) which is the latest case on the point, the Judicial Committee, following the decision in *Amarendra Mansingh v. Sanatan Singh*(3), held that a subsequent adoption would vest the property in the adopted son displacing any title based merely on inheritance from the last surviving coparcener. In that case, on the death of Keshab, the only son, of the adoptive father of the plaintiff who was adopted subsequently by the mother of Keshab after his father's death

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(1) I.L.R. [1943] Mad. 309 (F.B.) (2) (1943) 2 M.L.J. 599 (P.C.)
(3) (1933) I.L.R. 12 Pat. 642 (P.C.)

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under a power given by Keshab's father, not only the coparcenary property of which he was the sole surviving owner but also property inherited by him from his uncle Narayan devolved on one Shanker the defendant in the suit, a collateral cousin of Keshab. After the adoption of Anant, the plaintiff, he filed the suit not only in respect of the coparcenary property of which Keshab was the sole and surviving owner but in respect of the property inherited by him from Narayan, his uncle. It was held that in respect of both kinds of properties there was a divestment of the estate which vested in Shanker on Kesav's death and that both properties on adoption vested in the plaintiff. It was also pointed out that the decisions in *Bhoobun Moyee's case*(1) as interpreted in *Faizuddin Ali Khan v. Tincouri Saha*(2) was no longer good law after the decision of the Privy Council in *Amarendra's case*(3). The only limitation to this divesting is in respect of properties already alienated before the adoption, as was pointed out in *Veeranna v. Sayamma*(4). Vide also the following observations at the bottom of page 124 in *Sankaralingam Pillai v. Veluchami Pillai*(5) made by VENKATRAMANA RAO J., after referring to the decisions in *Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo*(6), *Veeranna v. Sayamma*(4) and *Bamundoss Mookerjee v. Mussamut Tarinee*(7):

"The principle deducible from these decisions is that though the title of the adopted son dates back to the death of the adoptive father for inheriting or taking his adoptive father's estate, he takes the estate subject to the dispositions made within the competency of the person who was entitled to hold the said estate until his adoption."

In this case, though the adoption to Deivanai of the appellant was subsequent to her death it would take effect as if he had been adopted in the lifetime of Deivanai herself. As already stated above, there is no

(1) (1865) 10 M.I.A. 279

(2) (1895) I.L.R. 22 Cal. 565

(3) (1933) I.L.R. 12 Pat. 642 (P.C.)

(4) (1928) I.L.R. 52 Mad. 398

(5) (1942) 1 M.L.J. 119

(6) (1876) I.L.R. 1 Mad. 69 (P.C.)

(7) (1858) 7 M.I.A. 169

evidence to prove the custom alleged in the plaint that unless the adoption takes place in the lifetime of a Nattukottai Chetti woman the property will vest in the parents' family according to the custom. Under Hindu law, the adopted son is in the same position as a natural son and unless there be any custom varying this rule of Hindu law—and in this case there is no evidence of any such custom—the adopted son will be entitled to divest the estate which had already vested in any intermediate holder. In *Pratapsingh Shivsingh v. Agarsingji Rajasangji*(1) his Lordship Mr. AMEER ALI made the following observations:—

"Now it is to be observed that when a hereditary grant of the nature in dispute is made by a Hindu subject to the limitation that it shall be descendible in the direct male line, or, in other words, that it shall enure so long as the grantees' male line lasts, the existence of the line must be determined by the rules and provisions of the Hindu law, unless there be any custom varying those rules. The limitation itself is a variation of the Hindu law; where a further custom is alleged confining the line to natural born issue alone, it must be proved affirmatively and conclusively, and not derived from implications."

It is contended that the fiction that the adoption should be considered to have taken place in the lifetime of the adoptive father should be confined to only adoptions by a Hindu widow after her husband's death and not to cases of adoption by a widower so as to make the adopted son the son of his deceased wife. It is true that there are no authorities on this point. But then that is no reason why this distinction should be made. Adoption itself is a fiction, and fictions play a large part in the law of adoption. In *Sundaramma v. Venkatasubba Ayyar*(2) PHILLIPS J. made the following observation:—

"Wherever possible, therefore, a mother should be found for the boy and the fact that such a mother died before the adoption can be no obstacle in view of the fictitious character of the whole principle of adoption."

(1) (1918) I.L.R. 43 Bom. 778 (P.C.) (2) (1926) I.L.R. 49 Mad. 941, 944

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MADHAVAN NAIR J., as he then was, in the same case observed at page 951 :

"As his adoption puts the adopted son in the place of a legitimate son as regards the rights of inheritance in the family of the adopter, he must be considered to be the heir to any rights arising after the adoption from his father's wife's position in his adoptive family, though she was not alive at the time of the adoption. To give full effect to the fiction of adoption and to assimilate the fact to an imitation of nature the adopted boy should have a mother. I do not think it is impossible to conceive the deceased wife as the fictional mother of the adopted child."

The learned Subordinate Judge has relied on the ruling of this Court in *Govindaraja Pillai v. Mungalam Pillai*(1). It has no application to the facts of this case. There, a grant had to be construed. The intention of the person who executed the document had to be gathered and in construing in the document the words, "if there is no issue, after your death, your brothers should take the properties", were construed as excluding a later adopted son. That decision has therefore no application to the facts of this case.

Applying the principles of the above cited ruling, it has to be held that the adoption of the second defendant by the first defendant, must be given effect to as if the appellant was taken in adoption in the lifetime of Deivanai, and that he will divest all intermediate estates which had vested before his adoption subsequent to the death of Deivanai either by inheritance or by the application of the custom of reverter.

It is urged however for the first respondent that in this case, since there has been an alienation of C to F schedule properties in favour of the second plaintiff, there could be no divestment. There will be some force in this argument if the second plaintiff had filed an appeal. She, the second plaintiff, the person in whose favour the settlement deed was executed by the

first plaintiff, has not cared to file an appeal. So far as she is concerned, she cannot be granted any relief in this appeal. The learned Judge found that Exhibit P-14 did not evidence a *bona fide* alienation but was only a document got up to defeat the rights of the second defendant, and the learned Judge was of the opinion that if it was a *bona fide* alienation it might be a good answer in the event of the second defendant being found entitled to divest the estate of Deivanai. He further stated "But taking the circumstances under which it was executed, I cannot hold that the settlement deed even if true is valid so as to operate as a bar to divesting Deivanai's estate by the second defendant in the event of its being found that he is entitled to divest her estate and obtain possession of her properties from the heirs." The alienation in *Veeranna v. Sayamma*(1) was also a gift and not an alienation for consideration. Whatever it be, that would not justify a decree in favour of the first plaintiff in respect of these properties, the lower Court having granted no relief to the second plaintiff in the suit. If the second defendant had been the plaintiff, and he had to sue for the establishment of his right in the properties, it would be different. The question now in this appeal is whether the learned Judge, having found that the second plaintiff could not claim any rights as against the second defendant and others, was justified in finding that the first plaintiff had a valid title to the properties and giving a declaratory decree in his favour. It is therefore not necessary for us to go into this question as to how far the second plaintiff will be entitled to a decree.

As already found above, it is only in respect of items 1 and 2 of schedule F there is evidence to show that they represent the properties given by the parents of Deivanai to her at the time of the marriage. That both were stridhanam in the stricter sense in which it is used is not disputed. But in respect of the other

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properties which have been found by us to belong to Deivanai, there is no evidence to show from whom Deivanai got the funds for making those investments, except in respect of items 1 and 2 of Schedule D which we have found to be properties of Egammai. It is therefore not necessary to give any finding in this case as regards the class of properties to which the custom of reverter would apply, whether it would apply to seermurai, siruvattu and other properties as well. The evidence on this point is not only meagre but vague. Though a number of instances were given, there is no evidence as to what the nature of the properties concerned in those instances were, whether any of them can be said to be seermurai or siruvattu properties. Further, the only two cases relied upon to show recognition of this custom are *Official Assignee of Madras v. Muthayee Achi*(1) and *Palaniappa Chettiar v. Chockalingam Chetti*(2). In the former case, the only question for consideration was whether there was a trust in respect of stridhanam given to a Nattukottai Chetti woman which were invested in the name of her husband. It is true that there are observations therein to show that the trust was for the benefit of the woman and her issues. The question was not who were all the beneficiaries of the trust but whether there was a trust or not, and that case therefore has no bearing on the facts of this case. In the latter case, there is a reference to the custom, and the custom was said to exist only in the case of stridhanam properties presented to a girl by her parents at the time of her marriage. This Court was not prepared to extend that custom to other cases in the absence of sufficient evidence. In the case before us, there can be no doubt that in the absence of any issues or lineal descendants of a Nattukottai Chetty woman, her stridhanam, namely, presents made to her at the time of her marriage by her parents revert back on her death without any

(1) 1937 M.W.N. 493

(2) (1939) 57 M.L.J. 817

children or lineal descendants to the parents of the family. But I do not think that the evidence would justify the extension of this custom to other kinds of property, and further it is not necessary to give a finding on that point in view of our findings as to how and with what funds the properties which are the subject-matter of the appeal were acquired by Deivanai.

So far as items 1 and 2 of D schedule are concerned, they have been found to be the properties of Egammai. The plaint is based on the allegation that they were either the properties of Shanmugam or Deivanai. It is only on that basis that the first plaintiff has claimed them. But if they did not belong to Shanmugam or Deivanai, the suit in respect of the same must necessarily fail. It is true that Egammai died subsequent to the suit and the first respondent is her adopted son. The learned Counsel for the first respondent stated that the appeal on this ground should be dismissed as regards items 1 and 2 of Schedule D. But then the parties have not gone to trial on the basis that they are Egammai's properties. The cause of action for the same arose after the filing of the suit, and it is not for us to speculate about the pleas likely to be raised by the parties in respect of a claim based as heir of Egammai. It will not therefore be open to this Court to consider that question in this appeal.

In the result, the appeal has to be allowed only in respect of D schedule properties and items 1 to 4 and 4-a of F schedule and the suit in respect of them dismissed.

The appellant and the first respondent will receive and pay proportionate costs in both the Courts.

G.R.

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APPELLATE CIVIL

*Mr. Justice Somayya and Mr. Justice Chandrasekhara Ayyar*1944,
December 15PONNAMMAL AND TWO OTHERS (RESPONDENTS 2 TO 4),
PETITIONERS

v.

RAJAMBU AMMAL (APPELLANT), RESPONDENT *

Practice—Privy Council—Appeals to—Consolidation—No power in Court to consolidate appeals for purposes of furnishing security for costs and depositing printing charges—Code of Civil Procedure (Act V of 1908), O. XLV, r. 4

There is no provision of law empowering the High Court to consolidate appeals for the purposes of furnishing security for costs and depositing printing charges in connection with appeals to the Privy Council.

Venkatrao Shrinivasarao v. Basavprabhu Sirdesai(1) applied and followed.

PETITION praying that in the circumstances stated in the Civil Miscellaneous Petition No. 5646 of 1944 (for leave to appeal to His Majesty in Council against Appeal Suit No. 400 of 1942) the High Court may be pleased to direct the consolidation of the said Appeal No. 400 of 1942 along with Appeal No. 381 of 1941 (Original Suit No. 28 of 1933, Sub-Court, Trichinopoly) both for value and for the purpose of printing and for furnishing security deposit required under Order XLV of the Code of Civil Procedure in the appeal to His Majesty in Council and petition under sections 109 and 110 and Order XLV, rules 1, 2, 3, 7 and 8 of the Code of Civil Procedure, and clause 39 of the Letters Patent, praying that in the circumstances stated therein the High Court may be pleased to grant a certificate to enable the petitioners to appeal to His Majesty in Council against the judgment and decree of the High Court, dated 28th April

* Civil Miscellaneous Petitions Nos. 5645 and 5646 of 1944
(1) (1944) 46 Bom. L.R. 724

1944, and passed in Appeal No. 400 of 1942, preferred against the decree of the Court of the Subordinate Judge of Trichinopoly (Additional Judge), dated 25th February 1941, and passed in Original Suit No. 27 of 1933.

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T. S. Venkatarama Ayyar for *T. V. Ramanatha Ayyar* for petitioners.

K. G. Srinivasa Ayyar for respondent.

The ORDER of the Court was pronounced by SOMAYYA J.—The petitioners in these petitions are the legal representatives of the defendant (deceased) in Original Suit No. 27 of 1933 on the file of the lower Court and the sole respondent in Appeal No. 400 of 1942 on the file of this Court. The value of the subject-matter of the suit and of the appeal to His Majesty in Council in this case is below Rs. 10,000; but the two suits, Original Suits Nos. 27 and 28 of 1933, were disposed of by the lower Court by a common judgment; and the appeals in this Court were also disposed of by a common judgment. They raise substantially the same questions, namely, the mental capacity of Somasundara and the way in which the defendants conspired together to obtain the various alienations in their favour. We think this is a fit case in which consolidation should be ordered. Civil Miscellaneous Petition No. 5645 of 1944 is therefore ordered and we direct the appeal to His Majesty in Council to be consolidated with the appeal from the decree of this Court in Appeal Suit No. 381 of 1941. If this is done, the value of the combined appeals is over Rs. 10,000 and we grant the necessary certificate for the reasons which we have given in our order in Civil Miscellaneous Petition No. 5281 of 1944.

SOMAYYA J.

There is a further prayer that even for the purposes of furnishing security and depositing printing charges, the two appeals may be consolidated. Order XLV, rule 4, of the Code of Civil Procedure deals only with

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the question of consolidation as regards valuation for purposes of appeal to His Majesty in Council and we have not been referred to any provision of law under which consolidation may be ordered in respect of deposit of printing charges or furnishing security. As regards consolidation for furnishing security, the question has been dealt with in *Venkatarao Shriniwasarao v. Basavprabhu Sirdesai*(1). The learned Judges came to the conclusion that there is no provision empowering the Court to order consolidation for the purpose of security for costs. They referred to and relied upon an earlier case of the Patna High Court in *Mussammat Bibi Nabi Zohra v. Rai Baijnath Goenka Bahadur*(2). The question as regards consolidation in respect of printing charges is in no way different from the question as regards consolidation for purposes of security. Following these decisions, we reject this part of the prayer in the petition. The petitioners must deposit the printing charges and furnish security.

N.S.

APPELLATE CRIMINAL

Before Mr. Justice Byers

PUBLIC PROSECUTOR, APPELLANT

v.

VERAJLAL SHETH (ACCUSED), RESPONDENT *

Madras Gaming Act (III of 1930), ss. 3 and 8—“Gaming” does not include wagering or betting

Gaming as defined in section 3 of the Madras Gaming Act (III of 1930) does not include wagering or betting.

The accused was using his house for receiving bets on the daily closing prices of the New York Cotton Market;

(1) (1944) 46 Bom. L.R. 724

(2) (1919) 4 Pat. L.J. 198

* Criminal Appeal No. 369 of 1944

held, that he could not be convicted under section 8 of the Act for keeping a common gaming house.

Ram Pratap Nemani v. Emperor(1) and *Keep v. Stevens*(2) followed.

APPEAL under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) by the Court of the Sub divisional Magistrate of Ellore in Criminal Appeal No. 44 of 1943 on his file. (Calendar Case No. 740 of 1943, Deputy Tahsildar-Magistrate's Court, Chintalapudi.)

Assistant Public Prosecutor (*N. Somasundaram*) for the Crown.

K. S. Jayarama Ayyar for *R. Gnanasambandam* for respondent.

JUDGMENT.

BYERS J.—The facts out of which this appeal arises are that the house occupied by the accused was searched by the police acting under section 5 (1) of the Madras Gaming Act on the night of 25th September 1943 and a considerable quantity of betting slips, registers, telegrams, calculation sheets, etc., was seized. The accused was charged with keeping a common gaming house punishable under section 8 of the Act, the particular form of wagering being what is known as the New York Cotton Speculation Business in which wagers were laid on the New York closing prices each day. The exact method followed does not appear in the evidence, but a detailed description of the *modus operandi* is to be found at pages 976 and 977 of the report in *Ram Pratap Nemani v. Emperor*(1). The accused was acquitted and, in this appeal by the Crown against the acquittal, the only point which arises for decision is whether “gaming” as defined in section 3 of the Madras Gaming Act includes wagering or betting.

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BYERS J.

1944,
November 6

(1) (1912) I.L.R. 39 Cal. 968

(2) (1909) 100 L.T. Rep. 491

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"Gaming" is defined in section 3 of the Act in these words :

"Gaming does not include a lottery, but includes wagering or betting on a horse-race except when such wagering or betting takes place,—

(i) on the date on which such race is to be run ; and

(ii) in a place or places within the race enclosure which the authority controlling such race has with the sanction of the Provincial Government set apart for the purpose."

On behalf of the accused, Mr. K. S. Jayarama Ayyar contends that gaming is not betting or wagering and that, as it has been defined in the Act as including wagering or betting on a horse-race only under certain limited conditions, his client cannot be convicted of keeping a common gaming house where there was wagering or betting on events other than a horse-race. In the Oxford English Dictionary gaming is defined as

"the action or habit of playing at games of chance for stakes ; gambling."

Sir William Anson's definition of wager or bet is :

"A promise to give money or money's worth upon the determination or ascertainment of an uncertain event."

The principal distinction between gaming and betting or wagering is thus immediately apparent ; in gaming the stake is laid by the players upon a game, the result of which may depend to some extent upon the skill of the players ; but in a bet or wager the winning or losing of the stake depends solely upon the happening of an uncertain event. In *Ram Pratap Nemani v. Emperor*(1) the learned Judges gave the following definitions :—

"Gaming is playing at any game, sport, pastime or exercise, lawful or unlawful, for money or any other valuable thing, which is staked on the result of the game, i.e., which is to be lost or won according to the success or failure of the person who has staked : *Reg. v. Ashton*(2) and *Lockwood v. Cooper*(3). Wagering which includes betting is making a contract on an unascertained event past or future (in which the parties have

(1) [1912] I.L.R. 39 Cal. 968

(2) [1852] 1 El. & Bl. 286

(3) [1903] 2 K.B. 428

no pecuniary interest other than that created by the contract) by which the parties are to gain or lose according as the uncertainty is determined one way or the other : *Carlill v. The Carbolic Smoke Ball Co.*(1)."

This decision is of particular interest in the present case because it arises out of almost identical facts on which persons had been charged under section 44 of the Calcutta Police Act for keeping a common gaming house. In that Act no definition of "gaming" was attempted, and the learned Judges held that this form of speculation in cotton prices was "betting pure and simple" which did not come within the accepted meaning of the term "gaming." This decision was in 1912, and in 1913 the Act was amended and the following definition of "gaming" included :

"'gaming' includes wagering or betting (except wagering or betting upon a horse-race, when such wagering or betting takes place—

(a) on the date on which such race is to be run, and

(b) in an enclosure which the Stewards controlling such race have with the sanction of the Local Government, set apart for the purpose), but does not include a lottery."

The corresponding amendment of the Madras City Police Act was not effected until 1941, prior to which the definition was identical with that still contained in section 3 of the Madras Gaming Act. In 1941 the following definition was substituted :—

"'Gaming' does not include a lottery but includes wagering or betting, except wagering or betting on a horse-race when such wagering or betting takes place—

(i) on the date on which such race is to be run, and

(ii) in a place or places within the race enclosure which the authority controlling such race has with the sanction of the Provincial Government set apart for the purpose.

For the purposes of this definition, wagering or betting shall be deemed to comprise the collection or soliciting of bets, the receipt or distribution of winnings or prizes, in money or otherwise, in respect of any wager or bet, or any

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(1) [1892] 2 Q.B. 484

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act which is intended to aid or facilitate wagering or betting or such collection, soliciting, receipt or distribution."

That gaming does not include betting appears also from the decision in *Keep v. Stevens*(1). In that case the accused had been convicted under section 17 of the Licensing Act, 1872, which is in these words :

"If any licensed person—(i) suffers any gaming or any unlawful game to be carried on on his premises ; or (ii) opens, keeps, or uses, or suffers his house to be opened, kept, or used, in contravention of the Act of the session of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and nineteen, intituled "An Act for the suppression of betting-houses" [that is, the Betting Act, 1853] he shall be liable to a penalty not exceeding for the first offence ten pounds and not exceeding for the second and any subsequent offence twenty pounds."

It was held that betting on horse-races was not "gaming" within the meaning of section 17, sub-section 1 of the Licensing Act, and that a licensed person who merely allows bets on horse-races to be made in his licensed premises does not "suffer gaming to be carried on, on his premises" within the meaning of that sub-section.

There is ample authority that gaming as at present defined in section 3 of the Act does not include wagering or betting and it follows that the accused cannot be convicted under section 8 read with section 3 of the Madras Gaming Act, 1930.

In the result the appeal against the acquittal of the accused is dismissed.

V.V.C.

(1) (1909) 100 L.T. Rep. 491

APPELLATE CIVIL—FULL BENCH

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

KOMPELLA YAGNANARAYANA SOMAYAJULU
AND SEVEN OTHERS (DEFENDANTS), APPELLANTS

1945,
February 27

v.

AKALLA SUBBARAYUDU (PLAINTIFF), RESPONDENT *

Madras Agriculturists Relief Act (IV of 1938), ss. 7, 8, 9 and 13—Ultra vires to the extent to which the sections offend against sections 32, 79 and 80 of the Negotiable Instruments Act (XXVI of 1881).

In view of the judgment of the Federal Court in *The Bank of Commerce, Ltd., Khulna v. Kunja Behari Kar*(1), the Madras Agriculturists Relief Act (IV of 1938) is *ultra vires* the Provincial Legislature to the extent to which sections 7, 8, 9 and 13 of the Act offend against sections 32, 79 and 80 of the Negotiable Instruments Act. The decision of the Federal Court now governs the matter and not the decision in *Nagaratnam v. Seshayya*(2).

APPEAL against the decree of the Court of the Subordinate Judge of Amalapuram in Appeal Suit No. 77 of 1942, preferred against the decree of the Court of the District Munsif of Razole in Original Suit No. 227 of 1941.

The appeal came on for hearing in the first instance before WADSWORTH and PATANJALI SASTRI JJ. and, on behalf of the Court, WADSWORTH J. made the following

ORDER OF REFERENCE TO A FULL BENCH:—

The appellants in this case were the defendants in a suit to recover an amount of money due on a promissory note executed after Madras Act IV of 1938 came into force. Their plea was that the promissory note was a renewal of earlier transactions and that it was executed as a mere acknowledgment of anterior debts on the understanding that they would be held liable only to the extent to which they would be liable on applying Madras Act IV of 1938 to the debt. It was

* Second Appeal No. 1427 of 1943

(1945) 1 M.L.J. 24 (F.C.) (2) I.L.R. [1939] Mad. 151 (F.B.)

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therefore contended that there was failure of consideration, and there were various other pleas taken. The suit was decreed in both the Courts below and in second appeal it is contended that the decision is wrong by reason of the applicability of Madras Act IV of 1938 to the debt. Before we went into the question of the tenability of these contentions, an objection was taken for the respondents that by reason of the decision of the Federal Court in the case of *The Bank of Commerce, Ltd., Khulna v. Kunja Behari Kar*(1) it must now be held that Madras Act IV of 1938 does not apply to debts due on negotiable instruments and therefore the contentions raised in this appeal are not open to the appellants. A Full Bench of this Court in *Nagaratnam v. Seshayya*(2) held that the provisions of Madras Act IV of 1938 could validly be applied to scale down debts due under negotiable instruments. The correctness of this decision was considered by the Federal Court in the case of *Subrahmanyam Chettiar v. Muttuswami Goundan*(3) which was decided on the basis that the debt then in question, though it originated in a debt under a promissory note, had actually become a debt due under a decree before the impugned Act came into force and therefore it was a debt amenable to the processes of that Act, the question of the validity of the Act as affecting promissory note debts which had not ripened into decrees before the Act came into force being left open. The more recent case arose under the Bengal Money-Lenders Act. Their Lordships refer to their previous decision and consider the question of the validity of provincial legislation affecting negotiable instruments with reference to the provisions of the Constitution Act. It is, however, pointed out that the Bengal Act expressly applies to promissory note debts, whereas the Madras Act does not contain any specific provision with reference to promissory note debts. It is contended that the effect of this recent decision is to supersede the decision of the Full Bench in *Nagaratnam v. Seshayya*(2). Though the majority of the cases arising under this Act have already been decided, there are still many appeals pending before this Court in which the applicability of Madras Act IV of 1938 to promissory note debts may have to be considered. We therefore think it desirable to refer to a Full Bench the question whether the decision of the Federal Court in *The Bank of Commerce, Ltd., Khulna v. Kunja Behari Kar*(1) must be deemed to have overruled the decision of the Full Bench in *Nagaratnam v. Seshayya*(2).

(1) (1944) F.L.J. 269

(2) I.L.R. [1939] Mad. 151 (F.B.)

(3) [1940] F.C.R. 188

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

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ON THE REFERENCE :—

C. Rama Rao for appellants.—In order to find out whether an Act or portion of it is *ultra vires* a Legislature, the Court has to scan the particular Act in question. Its character cannot be attacked by analogy, on the ground that a similar Act passed by another Legislature has been construed by the Federal Court in a particular manner. A Full Bench of this Court in *Nagaratnam v. Seshayya*(1) held that under the Madras Agriculturists Relief Act (IV of 1938) debts covered by negotiable instruments could be scaled down. In *Subrahmanyam Chettiar v. Muttuswami Goundan*(2) the Federal Court held that if the debts covered by negotiable instruments ripened into a decree then the decree could be scaled down under Act IV of 1938. But their Lordships left open the question whether debts covered by negotiable instruments which had not ripened into a decree could be scaled down under Act IV of 1938. The Bengal Money Lenders Act, 1940, provided for the scaling down of all debts. In *The Bank of Commerce, Ltd., Khulna v. Kunja Behari Kar*(3) the Federal Court held that sections 30, 36 and 38 of the Bengal Money Lenders Act, 1940, in so far as they offended against sections 32, 79 and 80 of the Negotiable Instruments Act were *ultra vires* the Provincial Legislature. By analogy, similar sections of the Madras Act cannot be held to be *ultra vires* the Provincial Legislature, because it is an Act specially intended for the relief of agriculturists, though in working out their rights some provisions of the Negotiable Instruments Act may be incidentally encroached upon.

V. Subrahmaniam for respondent.—In substance there is no difference between the Madras Act and the Bengal Act in this respect. In *Nagaratnam v. Seshayya*(1) the Full Bench held that the encroachments on sections 32, 79 and 80 of the Negotiable Instruments Act were merely incidental but the Federal Court held that similar encroachments on the said sections by the corresponding provisions of the Bengal Act were substantial and as such were *ultra vires*. So long as *The Bank of Commerce, Ltd., Khulna v. Kunja Behari Kar*(3) stands, *Nagaratnam v. Seshayya*(1) cannot be followed.

Advocate-General (P. V. Rajamannar) supported the arguments of the Advocate for respondent.

(1) I.L.R. [1939] Mad. 151 (F.B.)

(2) [1940] F.C.R. 188

(3) (1945) 1 M.L.J. 24 (F.C.)

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The OPINION of the Full Bench was delivered by LEACH C.J.—The question which is raised in this reference is whether the judgment of the Federal Court in *The Bank of Commerce, Ltd., Khulna v. Kunja Behari Kar*(1) has overruled the decision of the Full Bench of this Court in *Nagaratnam v. Seshayya*(2) in so far as it relates to negotiable instruments. The Full Bench held that the Madras Agriculturists Relief Act, 1938, was *intra vires* the Provincial Legislature in all respects. The main attack on the Act was that its scaling down provisions were repugnant to the Negotiable Instruments Act, and that legislation on matters affecting negotiable instruments was confined to the Federal Legislature. It was held that, as the Act was intended for the relief of agriculturists overburdened with debt and that as money-lending and agriculture were provincial subjects, the Provincial Legislature had the power to pass the Act, notwithstanding that in some respects it trenched on a subject confined to the Federal Legislature. It was pointed out that the only effect of the Act, so far as such instruments were concerned, was to reduce liability where the maker or indorser was an agriculturist.

There was no appeal from this judgment, but in another case, *Subrahmanyam Chettiar v. Muttuswami Goundan*(3), the question of the validity of the Act was considered by the Federal Court. In that case, an agriculturist had given a promissory note in respect of money lent to him and the lender had obtained a decree on it before the commencement of the Act. The Federal Court, without deciding whether the Madras Agriculturists Relief Act was *ultra vires* in so far as it affected negotiable instruments, held that in all other respects it was *intra vires* and that the argument that it affected negotiable instruments did not arise there because the debt covered by the

(1) (1945) 1 M.L.J. 24 (F.C.) (2) I.L.R. [1939] Mad. 151 (F.B.)
(3) [1940] F.C.R. 188

negotiable instrument had ripened into a decree of Court before the Act was passed. The question whether it was *ultra vires* in so far as it affected moneys due under negotiable instruments which had not ripened into decrees was left entirely open.

The question left open fell for decision in *The Bank of Commerce, Ltd., Khulna v. Kunja Behari Kar*(1) which raised the question whether the Bengal Money-Lenders Act, 1940, was *intra vires* the Bengal Legislature. That Act provided for the scaling down of all debts. The Madras Act was confined merely to debts due by agriculturists. The Federal Court held that the Bengal Act was *intra vires* the Provincial Legislature except in so far as it affected negotiable instruments. To that extent it was *ultra vires* because it ran counter to sections 32, 79 and 80 of the Negotiable Instruments Act. The contention, that the rules enacted in these sections were among the essentials of the law relating to promissory notes and that sections 30, 36 and 38 of the Bengal Act affected them so substantially that it would be impossible to regard them as merely incidental encroachments on the law relating to promissory notes, was accepted.

If sections 7, 8, 9 and 13 of the Madras Act offend against sections 32, 79 and 80 of the Negotiable Instruments Act, we must, in view of the judgment of the Federal Court in *The Bank of Commerce, Ltd., Khulna v. Kunja Behari Kar*(1), hold that the Act is *ultra vires* to that extent. It is obvious that these sections of the Madras Act do run counter to the sections of the Negotiable Instruments Act enumerated and therefore we feel constrained to hold that the latest decision of the Federal Court governs the matter. That is the answer which we give to the question referred.

The Federal Court gave leave to appeal to the Privy Council. It has been suggested that in these

(1) (1945) 1 M.L.J. 24 (F.C.)

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circumstances we should defer answering the question until the Judicial Committee has given its decision, but we cannot agree to this course. The granting of leave to appeal does not necessarily mean that an appeal will follow. In any event, it will be considerable time before the decision of the Privy Council is given and there are many cases pending before the Courts of this Province in which the question now before us is raised. Following the judgment of the Federal Court, as we feel bound to do, does not mean that those who are affected by our decision are left without any course open to them. They can take steps to safeguard themselves in the event of the Privy Council taking a different view from that taken by the Federal Court.

The costs of this reference will be made costs in the appeal.

G.R.

APPELLATE CIVIL—FULL BENCH

Before Sir Lionel Leach, Chief Justice, Mr. Justice Lakshmana Rao and Mr. Justice Kuppuswami Ayyar

SALVAPANTHULA SESHAGIRI RAO AND ANOTHER
(PLAINTIFFS 2 AND 3), APPELLANTS

v.

REBALA SUBBARAMI REDDY AND FIFTEEN OTHERS
(DEFENDANTS 2 TO 17), RESPONDENTS *

Indian Limitation Act (IX of 1908), art. 182 (5)—“Final order”—Code of Civil Procedure (Act V of 1908), O. XXI—Decree-holder filing execution petition complying with rules 11 and 13 of O. XXI—Execution petition returned under rule 14 without being registered or numbered for filing patta extracts—Petition re-presented without patta extracts—After several adjournments execution petition rejected by an order in these terms: “Patta extracts not

filed. Further time not applied for. Rejected.”—“Final order” within art. 182 (5)—Non-numbering of execution petition, of no consequence.

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A decree-holder filed in Court an execution application for attachment and sale of the properties of one of the judgment-debtors, complying with all the requirements of Order XXI, rules 11 and 13, of the Code of Civil Procedure. It was returned to the petitioner, without being registered or numbered, for filing extracts from the patta register under rule 14. The petition was re-presented. The patta extracts were not filed and the Court after granting several adjournments finally rejected the application for execution in an order stating: “Patta extracts not filed. Further time not applied for. Rejected.”

Held: The order was a final order within the meaning of article 182 (5) of the Limitation Act. The execution application was in accordance with the law on the date of the presentation. It was judicially considered and a final order was passed thereon. Under the circumstances the non-numbering of the execution application was of no consequence.

Case law reviewed.

APPEAL against the order of the Court of the Subordinate Judge of Nellore, dated 3rd March 1943, and made in Execution Petition No. 65 of 1941 in Original Suit No. 91 of 1924.

ON THE REFERENCE:

B. V. Ramanarasu for appellants.—The execution petition in question satisfied the requirements of Order XXI, rules 11 and 13, of the Code of Civil Procedure. It was returned for the patta to be filed as contemplated by rule 14. It was re-presented without the patta. The petition was rejected without being numbered. In *Govind Prasad v. Pawankumar*(1) it was held that if an execution petition satisfied the mandatory provisions of rules 11 and 13, it would be one “in accordance with law” within the meaning of article 182 (5) of the Indian Limitation Act. The execution petition will be one “in accordance with law” unless the non-numbering of it takes it out of that category. *Khadir Sahib v. Viswanatha Ayyar*(2) which is relied on by the lower Court is not an authority on this point, because there the delay in re-presenting the execution petition was not excused by the

(1) I.L.R. [1943] Nag. 669 (P.C.)

(2) I.L.R. [1943] Mad. 357

* Appeals Against Order Nos. 803 of 1943 and 196 of 1944

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Court and so it was held that it had no legal existence. In the following cases it was held that the non-numbering of the execution petition is not fatal to it; *Ramachandra Naidu v. Muthu Chettiar*(1), *Parankusa Naidu v. Ayyanna Naidu*(2), *Mahalakshmi Ammal v. Subramania Chettiar*(3), and *Marimuthu Pillai v. Abdul Ganni Rowther*(4) which distinguished *Sathappa Chettiar v. Chokkalingam Chettiar*(5). There are also two unreported judgments to the same effect-- Appeal Against Appellate Order No. 73 of 1943 and Appeal Against Order No. 437 of 1943.

K. Krishnamurthy for respondents.—The language of Order XXI, rule 17, of the Code includes rule 14 also within its ambit. In *Govind Prasad v. Pawankumar*(6) the Privy Council relied on three circumstances in the case for coming to their conclusion, one of which was the numbering of the execution petition. Rule 143 of the Madras Civil Rules of Practice makes the numbering of the execution petition an essential ingredient. The non-numbering of the execution petition in question concludes the matter against the appellants.

LEACH C.J.—The JUDGMENT of the Court was delivered by LEACH C.J.—These two appeals arise out of an order passed in execution proceedings by the Subordinate Judge of Nellore. The question in Appeal Against Order No. 803 of 1943 is one of limitation. Appeal Against Order No. 196 of 1944 raises a question of *res judicata*, but it is admitted that, if this Court decides the question of limitation in favour of the appellants in Appeal Against Order No. 803 of 1943, it will mean the dismissal of Appeal Against Order No. 1956 of 1944.

In order to appreciate the question of limitation, it is necessary to set out the course of events between 28th October 1929 and 3rd March 1943 the date of the order under appeal. On 28th October 1929 one Salvapantula Subba Rao obtained a money decree in the Court of the Subordinate Judge of Nellore for Rs. 2,000 with interest against Rebala

(1) (1943) 1 M.L.J. 236
(2) (1943) 2 M.L.J. 513
(5) 1940 M.W.N. 69

(3) (1943) 1 M.L.J. 445
(4) (1943) 2 M.L.J. 521
(6) I.L.R. [1943] Nag. 609 (P.C.)

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Venkata Reddi, Rebala Subbarami Reddi and certain others. Venkata Reddi was the first defendant and Subbarami Reddi the second defendant. On 25th October 1932 the decree-holder applied for execution against the second defendant and the legal representatives of the first defendant, who had died in the meantime. The legal representatives were made parties as respondents 3 to 5. On 14th January 1933 the decree was transferred to the District Court for execution. On 4th May 1933 the decree-holder filed an application in the District Court for execution by attachment and sale of the properties of the second defendant and the legal representatives of the first defendant. The application complied with all the requirements of Order XXI, rules 11 and 13, of the Code of Civil Procedure, but was returned to the decree-holder on two grounds. The first ground was that the petition was not accompanied by a vakalat. The second was that the Court required, under rule 14, the petitioner to file extracts from the patta register. The pleader who presented the application was under no obligation to file a vakalat because he had filed one in the Subordinate Judge's Court in connection with a petition for the amendment of the decree. This was brought to the notice of the Court and the pleader re-presented the petition which was then accepted, although it was not registered or numbered. The District Judge insisted on the patta extracts being filed and on three occasions he granted further time for this purpose. The last date given was 14th September 1933. As the patta extracts had not been filed on that date, the District Judge rejected the application for execution in an order couched in these terms:—

"Patta extracts not filed. Further time not applied for. Rejected."

The appeals turn on the question whether this order was a final order within the meaning of article 182 (5) of the Limitation Act.

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On 26th March 1936 the decree-holder filed a fresh application for execution and on 4th July 1936, on this application, the District Judge ordered the arrest of the second defendant. The decree-holder failed, however, to pay the necessary batta, and consequently, on 25th July 1936, the application was dismissed. The decree-holder took no further steps until 19th July 1939, when he filed a third application for execution. This was dismissed on 8th December 1939, also for non-payment of batta. On 20th February 1941 Execution Application No. 40 of 1941 was filed by the legal representatives of the decree-holder, who was then dead. The application asked for the recognition of the legal representatives of the decree-holder and for the transfer of the decree to the Court of the Subordinate Judge for execution there. On 8th March 1941 the District Judge passed an order as prayed in Execution Application No. 40 of 1941 and on 15th July 1941 the decree-holder's legal representatives filed in the Subordinate Judge's Court an application for execution. The judgment-debtors took the objection that the application was out of time. Admittedly his objection would have been well founded if the order of 14th September 1933 were not a final order on an application made in accordance with law. The Subordinate Judge held that it was not a final order and, relying on the decision of this Court in *Khadir Sahib v. Viswanatha Ayyar*(1), dismissed the application for execution so far as it concerned the legal representatives of the first defendant. He held, however, that the application was not time barred so far as the second defendant was concerned, because he had not appealed against the order of 4th July 1936 directing his arrest and the doctrine of *res judicata* applied. Appeal Against Order No. 803 of 1943 has been filed by the legal representatives of the decree-holder and Appeal Against Order No. 196 of 1944 by the second defendant.

(1) I.L.R. [1943] Mad. 357

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In *Govind Prasad v. Pawankumar*(1), the Privy Council said that, where an application for execution complied with the provisions of rules 11 to 13 of Order XXI but an order passed under rule 14 was not complied with, the application was nevertheless one in accordance with law within the meaning of article 182 (5) of the Limitation Act. Rule 14 was merely permissive, unlike rules 11, 12 and 13 which were mandatory. It was pointed out that the Court in that case might well have abstained from requiring the applicant to produce the certified extracts and have proceeded with the execution of the decree, seeing that the property had been under attachment and the necessary particulars about it were already known. In the present case the property was not under attachment, but all the particulars required by rule 13 were given either in the petition or in a schedule annexed thereto. In *Govind Prasad v. Pawankumar*(1), the application for execution was dismissed for default in compliance with the direction given under rule 14. Their Lordships held that, as the application was in accordance with law when it was presented, containing all that was required by rules 11 and 13, the order dismissing it for default in compliance with the direction of Court under rule 14 was a final order within the meaning of article 182 (5) and therefore started a fresh period of limitation. That is the position here.

The learned Advocate for the respondents in Appeal Against Order No. 803 of 1943, who also appears for the appellant in Appeal Against Order No. 196 of 1944, has endeavoured to draw a distinction between *Govind Prasad v. Pawankumar*(1) and this case on the ground that in the former case the application was registered and a number given to it, whereas in this case it was not registered and consequently received no number. In this connection he relies on

(1) I.L.R. [1943] Nag. 669 (P.C.)

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observations of VARADACHARIAR J. in *Sathappa Chettiar v. Chokkalingam Chettiar*(1). We shall refer to that case in a moment, but in passing we may say that we consider that it does not render support for the contention that the non-numbering of the application which was dismissed on 14th September 1933 is fatal. The questions here are whether that application was in accordance with law on the date of the presentation, whether it was judicially considered and whether a final order passed thereon. The non-numbering of the application is, in our opinion, of no consequence, and there are six decisions of this Court to the same effect, namely, *Marimuthu Pillai v. Abdul Ganni Rowther*(2), *Mahalakshmi Ammal v. Subramania Chettiar* (3), *Parankusa Naidu v. Ayyanna Naidu*(4), *Ramachandra Naidu v. Muthu Chettiar*(5), *Ponnusami Voikkaran v. Gopalaswami Ayyar*(*) and *Muthukrishna Ayyar v. Sivarama Ayyar* (†). The last two cases have not been reported; but we have perused the judgment in *Muthukrishna Ayyar v. Sivarama Ayyar*(†), which was decided by MOCKETT and BELL JJ. In delivering the judgment there MOCKETT J., in dealing with the question of the non-numbering of the petition, said that it seemed to him that the proper test was not whether some clerk remembered to write a number on a petition, but whether in fact the petition was before the Judge, was judicially considered and judicially decided. If these conditions were satisfied, the absence of a number was of no importance whatever. We are entirely in agreement with these observations.

In *Sathappa Chettiar v. Chokkalingam Chettiar*(1) the facts were altogether different from the facts in the present case and the difference has been discussed in *Marimuthu Pillai v. Abdul Ganni Rowther*(2).

(1) 1940 M.W.N. 69

(2) (1943) 2 M.L.J. 521

(3) (1943) 2 M.L.J. 513

(4) (1943) 1 M.L.J. 445

(5) (1943) 1 M.L.J. 236

* Appeal Against Appellate Order No. 73 of 1943

† Appeal Against Order No. 437 of 1943

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Sathappa Chettiar v. Chokkalingam Chettiar(1) was a case of rejection of an application for non-compliance with an order passed under rule 17 of Order XXI. The application was not in order and, as the petitioner did not amend it as required by the Court, it was rejected. The question was whether that amounted to a dismissal under rule 57 or only a rejection under rule 17. Rule 17 is merely concerned with the contents of an application. In the present case there was no question of any defect in the application. The application was in order from the very beginning. In the course of his judgment VARADACHARIAR J. referred to the fact that sub-rule 4 of rule 17 requires the Court, when the application is admitted, to enter in the proper register a note of the application and the date on which it was made; and it is this passage of the judgment on which the respondents so much rely. As we have indicated, we do not read the remarks of VARADACHARIAR J. as meaning that, when an application had not been numbered, it must be deemed not to be in accordance with law and not before the Court. If his remarks were to be so construed, we should have to express our respectful dissent, but we see no reason for any such construction.

The learned Subordinate Judge has entirely misread the judgment in *Khadir Sahib v. Viswanatha Ayyar*(2). He regarded that case as being authority for the proposition that the application which was dismissed on 14th September 1933 was one which could not be deemed to be in existence. In *Khadir Sahib v. Viswanatha Ayyar*(2) an execution petition was filed on 2nd October 1933, but it was not numbered, and three days later it was returned to the decree-holder for the purpose of filing encumbrance certificates. The decree-holder did not comply with this order and did not re-present the petition within the time allowed. On 28th September 1936 he filed another

(1) 1940 M.W.N. 69

(2) I.L.R. [1943] Mad. 357

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application for execution and attached thereto the unnumbered petition which had been returned to him on 5th October 1933. The judgment-debtors objected to this new application being granted on the ground that the law of limitation had operated to bar it. Thereupon the decree-holder asked the Court to excuse the delay in re-presenting the petition of 2nd October 1933 and this the Court refused to do. On these facts KRISHNASWAMI AYYANGAR and KUNHI RAMAN JJ. held that the petition of 2nd October 1933 had no legal existence and therefore any order passed in connection with it could not be regarded as a final order on an application in accordance with law. With respect we agree with all that was said in that case, but it has no bearing here.

In the present case there was a petition before the Court, it was in accordance with law, and on it a final order dismissing it was endorsed. Consequently, Appeal Against Order No. 803 of 1943 must be allowed with costs and Appeal Against Order No. 196 of 1944 dismissed with costs.

The case will be remanded to the lower Court with directions to proceed with the hearing of the petition for execution which the decree-holder's legal representatives filed on 15th July 1941 and to decide it in accordance with law.

G.R.

INCOME-TAX REFERENCE

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

RM. P. RM. P. VALLIAPPA CHETTIAR, MADURA,
APPLICANT

1944,
December 15

v.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
RESPONDENT*

Excess Profits Tax Act (XV of 1940), ss. 2 (5) and 2 (19) and first schedule—Income from house properties acquired in course of money-lending business in foreign places and income from production of raw rubber in rubber gardens situated abroad, assessable to tax under the Act.

Income derived from house properties situated in places outside British India and acquired in the course of a money-lending business carried on by an assessee in those places, and income derived from production of raw rubber in rubber gardens belonging to him in foreign places are assessable to excess profits tax under sections 2 (5) and 2 (19) of the Excess Profits Tax Act read with the first schedule of the Act.

Ramasami Chettyar v. Commissioner of Income-tax, Madras(1) and *Ponnuswami Pillai v. Commissioner of Income-tax, Madras*(2) followed.

Annamalai v. Commissioner of Income-tax, Madras(3) distinguished.

CASE referred to the High Court by the Income-tax Appellate Tribunal, Calcutta Bench, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939), in Application No. 66, R.A. No. 44, Madras, of 1943-44.

K. Rajah Ayyar for P. R. Srinivasan for applicant.—Income from house property at Kuala Lumpur is not income from business and is not assessable to excess profits tax. Though the property may have been originally acquired by the

* Case Referred No. 11 of 1944

(1) (1933) I.L.R. 57 Mad. 22 (S.B.) (2) (1929) 3 I.T.C. 378 (S.B.)
(3) I.L.R. [1945] Mad. 170

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assessee's father in the course of the money-lending business at Kuala Lumpur, it has been, subsequent to his death, inherited by the son who is the assessee. What was once an asset of a business may subsequently become the property of an individual as such. There is no clear finding in the case that the property is still treated as an asset of the business at Kuala Lumpur. "Business" is defined in section 2 (5) of the Excess Profits Tax Act and acquisition of property by inheritance is not within the definition and is excluded by it. The property is held by the son as an investment only and is exempt from excess profits tax. The recent decision in *Annamalai v. Commissioner of Income-tax, Madras*(1) holds that income from house property situated abroad is not assessable to income-tax under the head "business". The decision in *Ramasami Chettyar v. Commissioner of Income-tax, Madras*(2) is not, therefore, of much value as an authority.

Income from production and sale of raw rubber is also not income from business. Business implies two elements, namely, buying as well as selling. Production of raw rubber does not involve any process of manufacture. The decision in *Ponnuswami Pillai v. Commissioner of Income-tax, Madras*(3) relates to tea which involves the processes of curing and roasting amongst others. But it purports to follow an English decision relating to rubber.

C. S. Rama Rao Sahib for respondent.—It has been found as a fact by the income-tax authorities that the son carried on the money-lending business at Kuala Lumpur during the relevant period. It was not contended by the assessee before the Income-tax Appellate Tribunal that the house property did not form part of that business. The word "profits" is defined in section 2 (19) of the Excess Profits Tax Act and, read with rule 4 of the first schedule to the Act, includes income derived by letting house property. The scheme of the Excess Profits Tax Act is different from that of the Income-tax Act. The reasoning in the decision in *Ramasami Chettyar v. Commissioner of Income-tax, Madras*(2) is applicable to the present case.

The decision of the Privy Council in *Commissioner of Income-tax, Madras v. Mathias*(4) recognises that income from a coffee plantation is income from business.

[The decisions in *Vallambrosa Rubber Co., Ltd. v. Farmer*(5) and in *Back v. Daniels*(6) were referred to.]

(1) I.L.R. [1945] Mad. 170

(3) (1929) 3 I.T.C. 378 (S.B.)

(5) (1910) 5 T.C. 529

(2) (1933) I.L.R. 57 Mad. 22 (S.B.)

(4) I.L.R. [1939] Mad. 178 (P.C.)

(6) (1924) 9 T.C. 183

The JUDGMENT of the Court was delivered by LEACH C.J.—The assessee carried on a money-lending business at Kuala Lumpur in the Federated Malay States at all times material to this reference. In the course of the money-lending business immovable properties had been acquired, and one of the questions was whether the assessee was liable to excess profits tax in respect of that income. He also owned rubber estates in the Federated Malay States and the further question was raised whether he was liable to excess profits tax in respect of that income. The Excess Profits Tax Authorities and the Income-tax Appellate Tribunal, Calcutta Bench, held that he was assessable to excess profits tax in respect of both these sources of income. At the request of the assessee the Tribunal has referred to this Court the following question:—

"Whether, in the circumstances of the case, it is correct to include in the profits of the assessee's business, the income from the house properties and rubber gardens in Malaya under sections 2 (5) and 2 (19) of the Excess Profits Tax Act read with the first schedule to the said Act."

In the course of his address to the Court, Mr. Rajah Ayyar on behalf of the assessee suggested that the house property in Kuala Lumpur was not acquired in the course of the money-lending business, but represented investments in real estate which his father had entered into. This assertion is obviously one which we cannot take into consideration. Before the Excess Profits Tax Officer the case proceeded on the basis that the houses had been acquired in the money-lending business. Before the Appellate Assistant Commissioner it was apparently said that this was not in accordance with the facts and he was asked to review the case on the basis that the houses merely represented investments. The Appellate Assistant Commissioner rightly said that it was far too late in the day to raise such a contention and the assessment proceeded on the same basis as it had proceeded on before the Excess Profits Tax Officer. As far as we

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can gather, this question was not raised before the Appellate Tribunal. In any event it cannot be raised here.

LEACH C.J.

In *Ramasami Chettyar v. Commissioner of Income-tax, Madras* (1) a Special Bench of this Court held that rents derived from properties taken over in discharge of loans made in the course of a foreign money-lending business and treated as assets of the business could be assessed as part of the profits of that business when remitted to British India. Therefore, the income derived from the houses now held by the assessee represented profits made by him in his business and consequently he is liable to Excess Profits Tax by reason of the provisions of sections 2 (5) and 2 (19) read with rule 4 (2) of schedule I of the Act.

Mr. Rajah Ayyar suggested that the decision of this Court in *Annamalai v. Commissioner of Income-tax, Madras* (2) had in effect overruled *Ramasami Chettyar v. Commissioner of Income-tax, Madras* (1). This is, however, not the case. In *Annamalai v. The Commissioner of Income-tax, Madras* (2) the Court was merely concerned with the question whether an assessee was to be assessed to income-tax in respect of the income from house property abroad as representing the profits of a business under section 10 or merely as income from house property under section 9. It was held that in view of the amendment of the Income-tax Act in 1939 the assessment should be made under section 9. The question there was quite a different one from that with which the Court is now concerned.

The Income-tax Tribunal was also right in confirming the assessment of the assessee to excess profits tax in respect of the income derived from his rubber estates. This income represented income from business. In *Ponnuswami Pillai v. Commissioner of Income-tax, Madras* (3) a Special Bench of this Court

(1) (1933) I.L.R. 57 Mad. 22 (S.B.) (2) I.L.R. [1945] Mad. 170
(3) (1929) 3 I.T.C. 378 (S.B.)

held that the income from a tea estate carried on in Ceylon represented profits and gains of a business within the meaning of section 4 (2) of the Income-tax Act. There can be no difference in principle between a tea estate and a rubber estate. In both cases the raw product has to go through some process of manufacture before being placed on the market.

Consequently, the answer which we give to the reference is that it is correct to include in the profits of the assessee's business the income from his house properties and rubber gardens in Malaya under sections 2 (5) and 2 (19) of the Excess Profits Tax Act read with the first schedule to the said Act.

The assessee must pay the costs of this reference, Rs. 250.

N.S.

APPELLATE CIVIL

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

MANIKKA SUNDARA BHATTAR AND TWO OTHERS
(PLAINTIFFS 2, 3 AND 5), APPELLANTS

v.

R. S. NAYUDU, EXECUTIVE OFFICER AND TRUSTEE OF SRI MINAKSHI SUNDARESWARAR DEVASTHANAM AT MADURA, AND EIGHT OTHERS (DEFENDANTS 1 TO 3 AND 5 TO 10), RESPONDENTS*

Madras Temple Entry Authorization and Indemnity Act (XXII of 1939)—Intra vires the Provincial Legislature—Government of India Act, 1935, sec. 298 (2) (b) and Schedule VII, List II, entry 34, and List III, entry 9—"Charitable institutions" in entry 34, meaning of—Includes religious institutions—Suit for damages and for restraining non-caste Hindus from entering Minakshi Temple at Madura, not maintainable without sanction of Provincial

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Government after enactment of Madras Temple Entry Authorization and Indemnity Act (XXII of 1939), ss. 4 and 5.

The Madras Temple Entry Authorization and Indemnity Act, 1939, is *intra vires* the Madras Legislature. Under entry 34 of the Provincial Legislative List of the Government of India Act, 1935, the Provincial Legislature is empowered to enact it. Entry 9 of the Concurrent, Legislative List can also be invoked in support of the validity of such legislation.

The words "charitable institutions" in entry 34 of the Provincial Legislative List include religious institutions. In using the words "religious and charitable endowments" in that entry, Parliament merely followed the previously existing "Devolution Rules" and did not intend to restrict the meaning of the word "charitable" where it is used in connection with the word "institutions".

Commissioners for Special Purposes of Income-tax v. Pemsel(1) and *T. R. Ramachandra Aiyar v. Parameswaran Unni*(2) followed.

The United Provinces v. Atiqua Begum(3) referred to.

Case law considered.

The Madras Temple Entry Authorization and Indemnity Act, 1939, is not rendered void by the provisions of section 298 (2) (b) of the Government of India Act, 1935. That section has nothing to do with the powers of the Legislature to legislate with regard to religious institutions. Nor is the Act of 1939 invalid because it may affect the Hindus of other provinces who happen to visit the temples governed by it.

Consequently, a suit filed before the enactment of the Act of 1939 for the purpose of obtaining reliefs *inter alia*, (i) restraining by permanent injunction certain non-caste Hindus from entering the Minakshi Sundareswarar Temple at Madura and (ii) recovering the cost of the performance of the purification ceremonies alleged to have become necessary because of their entry into the temple, is not maintainable after the Act came into force, in view of the refusal of the Provincial Government to sanction its continuance under section 5 of the Act.

APPEAL against the decree of the District Court of Madura, dated 26th June 1943, and passed in Appeal Suit No. 51 of 1942 preferred against the decree of

(1) [1891] A.C. 531

(2) (1918) I.L.R. 42 Mad. 360

(3) [1940] F.C.R. 110, 124

the Court of the Subordinate Judge of Madura (Principal Judge) in Original Suit No. 48 of 1939.

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T. L. Venkatarama Ayyar and G. R. Jagadisa Ayyar for appellants.

Sir A. Krishnaswami Ayyar, K. Rajah Ayyar, N. Rajagopala Ayyangar, T. A. Ramaswami Reddi, K. Subramaniam and Alladi Kuppuswami for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by LEACH C.J.—The main question in this appeal is whether the Provincial Legislature had power to pass the Madras Temple Entry Authorization and Indemnity Act, 1939, the object of which was to throw open the Hindu temples of the province for the purpose of worship to all Hindus who by custom or usage had previously been excluded from entry therein. The Courts below have held that the Act is *intra vires* the Provincial Legislature. For reasons which we shall in due course state, we consider that this decision is right.

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The suit which has given rise to the appeal was filed on 13th July 1939, some two months before the Act came into force. At the time of the institution of the suit there were six plaintiffs and ten defendants. The first defendant was the Executive Officer of the Sri Minakshi Sundareswarar Devasthanam at Madura, one of the famous temples of South India. Defendants 2 to 7 were described as members of "the prohibited or scheduled classes", by which was meant that they were persons who were not entitled to enter the temple or its precincts. It was alleged that on 8th July 1939 defendants 2 to 7 were received by the first defendant at the entrance to the temple and were marched into the temple by the eighth and ninth defendants. The tenth defendant, who was a temple bhattar, was present and he was directed to perform puja for the party,

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which he did at the shrines of Sri Vinayagar, Sri Subramanya and Sri Minakshi. The plaintiffs regarded this as a desecration of the temple and asked *inter alia* for the following reliefs:—(i) that the first defendant as the trustee of the temple be directed to cause purification ceremonies to be carried out; (ii) that the first, eighth and ninth defendants be restrained by permanent injunction from taking into the temple defendants 2 to 7 or any other member of the prohibited or scheduled classes; (iii) that defendants 2 to 7 be restrained by permanent injunction from entering the temple; and (iv) that the defendants be directed to deposit into Court Rs. 3,100 for the cost of the performance of the purification ceremonies.

That non-caste Hindus had been debarred from entering the temple is common ground and the invasion of the temple by defendants 2 to 7 on 8th July 1939 is not disputed.

The Madras Temple Entry Authorization and Indemnity Act, 1939, received the assent of the Governor-General on 4th September 1939 and was published in the *Fort St. George Gazette* on 11th September 1939. Section 2 provides a complete indemnity for all who had anything to do with the demonstration at the Sri Minakshi Sundareswarar Temple, Madura, on 8th July 1939. Section 3 states that, if in the opinion of the trustee or other authority in charge of a Hindu temple in the Province of Madras, the worshippers of which are generally not opposed to the removal of the disability imposed by custom or usage on certain classes of Hindus in regard to entry into or offer of worship in the temple, the trustee or other authority may, with the approval of the Provincial Government and notwithstanding anything contained in the Madras Hindu Religious Endowments Act, 1926, or any other law, throw open the temple to these classes and thereafter persons belonging to these classes shall have the right to enter into and offer

worship in the temple. Then follows a proviso which reads as follows:—

“ Provided that in the case of the temples specified in the schedule to this Act and other Hindu temples in the province which have been thrown open to the classes aforesaid before the commencement of this Act, such approval shall not be required and the said temples shall be deemed to have been thrown open to the classes aforesaid under the provisions of this section.”

The schedule contains the names of seven temples of which the Sri Minakshi Sundareswarar Temple, Madura, is one.

Section 4 states that no person who enters or offers worship in a temple thrown open or deemed to be thrown open under the provisions of section 3 shall by reason only of the entry into the temple or worship there be deemed to have committed an actionable wrong or offence or be sued or prosecuted therefor.

Section 5 is of special importance in this case. It reads as follows:—

“ No suit for damages, injunction or declaration or for any other relief, no prosecution for any offence, and no application or other proceeding under the Madras Hindu Religious Endowments Act, 1926, or any other law, shall be instituted in respect of any entry into or worship in any temple thrown open or deemed to have been thrown open under section 3, on the ground that such entry or worship is against the usage or custom which excludes certain classes of Hindus from such entry or worship; and no suit or other proceeding shall be instituted in respect of such entry or worship on the ground that there has been any irregularity or failure in complying with the provisions of section 3, without the previous sanction of the Provincial Government. No suit, prosecution, application or proceeding of the nature aforesaid instituted before the commencement of this Act shall be continued thereafter without the sanction of the Provincial Government.”

If the Madras Legislature had power to enact this statute, it is quite clear that the present action cannot be maintained because the Provincial Government has refused to sanction it.

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On 18th September 1939 the eighth defendant filed in Court a memorandum in which he submitted that by virtue of the Act the suit was no longer maintainable and that it should be dismissed with costs. On the basis of this memorandum the Subordinate Judge framed a preliminary issue on the question whether the suit was barred by the Act. Having heard the parties, by an order, dated 3rd April 1940, he held that the Act was *intra vires* the Provincial Legislature, but he considered that it was necessary that the defendants should be called upon to file written statements. In his opinion the Act did not purport to give non-caste Hindus the right to enter all portions of the temple in derogation of the rights hitherto enjoyed by caste Hindus and it was necessary to decide from what place non-caste Hindus should be allowed to worship. On 25th April 1940 the Subordinate Judge passed another order supplementing his order of 3rd April 1940. In his further order he referred to two customs or usages with regard to temple worship. The first was the custom which excluded non-caste Hindus from entering the temple and the second was that which permitted only the pujaris to enter the *sanctum sanctorum*, Brahmins alone to worship from the ante-chamber or Ardha Mandapam, and Kshatriyas, Vysias and Sudras to worship from the Maha Mandapam. Notwithstanding that the plaintiffs did not ask in their plaint for an adjudication on the question, should the Act be held to be valid, the Subordinate Judge considered that the Court should decide from what places the various communities should worship. Following this order, defendants 1 to 3 and 5 to 9 filed written statements. The fourth defendant had died in the meantime and the tenth defendant allowed the case to proceed against him *ex parte*.

The Subordinate Judge who passed the orders of the 3rd and 25th April 1940 was succeeded by another Subordinate Judge, who on 23rd December

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1941 framed the issues arising on the pleadings. On 26th January 1942 he delivered a judgment dismissing the suit. He disagreed with his predecessor that the Court was called upon to decide what was the rank or precedence in worship of the various communities *inter se*, as this question had not been raised in the plaint. The only question was whether the Madras Temple Entry Authorization and Indemnity Act was within the powers of the Provincial Legislature and, as it was, the suit was barred. Three of the plaintiffs appealed to the District Judge, who concurred in the judgment delivered by the Subordinate Judge dismissing the suit. The same three plaintiffs have now appealed to this Court.

On behalf of the appellants, Mr. T. L. Venkatarama Ayyar has advanced four contentions, namely, (i) the Act does not fall within entry 34 of the Provincial Legislative List of the Government of India Act, 1935, or within any other entry; (ii) if it does fall within entry 34 of the Provincial Legislative List or within any other entry, the Act is nevertheless unlawful as it offends against section 298 (2) (b); (iii) the Provincial Legislature had no power to pass an Act affecting the rights of Hindus of other provinces to worship at temples in this province; and (iv) in any event the plaintiffs are entitled to a decision prescribing the station from which non-caste Hindus may worship within the temple.

Entry 34 of the Provincial Legislative List reads as follows:—

“Charities and charitable institutions; charitable and religious endowments.”

In his well-known speech in *Commissioners for Special Purposes of Income-tax v. Pemsel*(1), Lord MACNAGHTEN said that charity in its legal sense comprises four principal divisions: trust for the

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relief of poverty, trust for the advancement of education, trust for the advancement of religion, and trust for other purposes beneficial to the community not falling under any of the preceding heads. While he accepts this definition of the word "charity" and concedes that the words "charitable institutions" could include religious institutions, Mr. Venkatarama Ayyar says that, inasmuch as the words "charitable and religious" are both used in connection with the word "endowments" in the entry, the word "charitable" which precedes the word "institutions" must be taken to exclude religious institutions. In other words, as a distinction is made between charitable and religious endowments, the word "charitable" used in connection with "institutions" must be taken to have a restricted meaning. This is a plausible argument, but when the matter is fully considered it is manifest that the argument cannot be accepted.

The Madras Endowments and Escheats Regulation, 1817 (Madras Regulation VII of 1817) vested in the Board of Revenue the general superintendence of all endowments in land or money granted for the support of mosques, Hindu temples or colleges or for other pious and beneficial purposes. It was the duty of the Board of Revenue to take such measures as might be necessary to ensure that all endowments for the maintenance of such establishments were duly appropriated to the purpose for which they were destined by the Government or the individuals by whom the endowments were made. By the Religious Endowments Act, 1863, the Government divested itself of the management of religious endowments and left to the trustees or managers this duty. The Act did not give the Court power to frame a scheme for the management of a religious endowment, but the defect was remedied by the Code of Civil Procedure of 1877. Section 539 of that Code provided that in the case of an alleged breach of an express or constructive trust

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created for public charitable purposes, or whenever the direction of the Court was deemed necessary for the administration of such a trust, the Advocate-General acting *ex officio*, or two or more persons having a direct interest in the trust and having obtained the consent in writing of the Advocate-General, might institute a suit to obtain a decree *inter alia* settling a scheme for its management.

In view of the wide meaning of the word "charitable" and the fact that the Government had divested itself of the management of religious endowments, there can be little room for doubt that the section was intended to apply to religious trusts as well as to other public trusts; but in *Radhabai v. Chimnaji Bin Ramji Sali*(1) the Bombay High Court did raise a doubt whether the section was applicable to the devasthan of an idol or temple dedicated merely to the purposes of the idol or temple, and in *Karuppa v. Arumuga*(2) this Court held that trusts for religious purposes were excluded from the purview of section 539 of the Code of 1877. The Bombay judgment was delivered before the enactment of the Code of Civil Procedure of 1882 and, as it ran counter to the intention of the Legislature, the opportunity was taken to amend section 539 to make it quite clear that the section did apply to religious endowments. Consequently the words "or religious" were inserted after the word "charitable" and before the word "endowments".

In his judgment in *T. R. Ramachandra Aiyar v. Parameswaran Unni*(3), WALLIS C.J. referred to *Radhabai v. Chimnaji Bin Ramji Sali*(1) and *Karuppa v. Arumuga*(2) and expressed the opinion that the Bench which decided *Karuppa v. Arumuga*(2) would not have come to the conclusion which it had come to, if attention had been called to the fact that ever

(1) (1878) I.L.R. 3 Bom. 27

(2) (1882) I.L.R. 5 Mad. 383

(3) (1918) I.L.R. 42 Mad. 360

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since the Statute of Elizabeth religious uses had formed one of the most important branches of charitable uses in English law, so that the English lawyer who drafted the Code of Civil Procedure, 1877, must necessarily be taken to have included religious in charitable purposes, unless they were expressly excluded. WALLIS C.J. had no doubt that the Legislature intended to include charitable uses in section 539 of the Code of 1877 and that the alteration in 1882 was only intended to remove doubts. With these observations of Sir JOHN WALLIS we are in entire agreement.

In *The University of Bombay v. The Municipal Commissioner for the City of Bombay*(1) the Bombay High Court held that the words "charitable purposes" had acquired a technical meaning in the Bombay Presidency and in that sense they included all purposes within the meaning of the Statute of Elizabeth. In *Anjuman Islamia of Muttra v. Nasiruddin*(2) the Allahabad High Court held that a religious purpose might be a charitable purpose and a society for religious purposes would ordinarily be a society for charitable purposes. Therefore, there can no longer be any doubt that the expression "charitable institutions" in India, as in England, includes religious institutions.

We will now inquire into the reason why in entry 34 of the Provincial Legislative List of the Government of India Act, 1935, both the words "charitable" and "religious" are used in connection with the word "endowments". Section 45-A of the Government of India Act (the Act of 1915 as amended by the Act of 1919) stated that provision might be made by rules under the Act *inter alia* for the classification of subjects, in relation to the functions of Government, as central and provincial subjects, for the purpose of distinguishing the functions of Local Governments

(1) (1891) I.L.R. 16 Bom. 217

(2) (1906) I.L.R. 29 All. 384

and Local Legislatures from the functions of the Governor-General in Council and the Indian Legislature. Rules were framed under this section and were called "The Devolution Rules". They contained a list of central subjects and a list of provincial subjects. Clause 23 of the Provincial List was, "Religious and charitable endowments". Rules were also framed under section 81-A of the Act. These were called "The Reservation of Bills Rules". Clause 2 (a) of these Rules provided that the Governor of a Governor's province should reserve for the consideration of the Governor-General any Bill which had been passed by the Legislative Council of the province and was presented to the Governor for his assent, if it appeared to the Governor to contain provisions affecting *inter alia* the religion or religious rites of any class of British subjects in British India, unless it had been previously sanctioned by the Governor-General under section 80-A (3).

Therefore, before the Government of India Act, 1935, the Provincial Legislature had, subject to the control of the Governor-General, when religion or religious rites were affected, power to legislate in respect of religious charities and this power was continued in the Government of India Act, 1935. In using the words "religious and charitable endowments" in entry 34 of the Provincial Legislative List, Parliament merely followed the wording of the Devolution Rules. It would be unreasonable to suppose that in doing so it intended to restrict the meaning of the word "charitable" where it is used in connection with the word "institutions". If we accepted the argument advanced on behalf of the appellants, it would mean holding that Parliament had deliberately abstained from granting to Indian Legislatures the power of legislating with regard to religious institutions. This could never have been its intention. Moreover, as was pointed out by the

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Federal Court in *The United Provinces v. Atiqah Begum*(1), the entries in the Legislative Lists of the Government of India Act, 1935, are not to be read in a narrow or restricted sense, and each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it.

For these reasons we have no hesitation in saying that entry 34 of the Provincial List gave the Madras Legislature power to enact the Madras Temple Entry Authorization and Indemnity Act, 1939, and that by reason of this enactment the suit is not maintainable.

The respondents also rely on entry 9 in the Concurrent List, "Trusts and Trustees". The appellants' objection here is that some of the properties were given directly to the deities of the temple and therefore to this extent there was no trust. But the argument ignores the scheme which the District Court of Madura framed in 1924 for the management of the temple. A copy of the scheme has been produced in this Court. Clause 3 of the scheme reads as follows:—

"The possession and management of all the properties, movable and immovable, vested in the said deities or belonging or appurtenant to the devasthanams and the entire administration of the devasthanams shall be vested in the trustee." Whatever was the position before the framing of the scheme, it is manifest that all the properties belonging to the temple are now vested directly in the trustee. By virtue of section 75 of the Madras Hindu Religious Endowments Act, 1926, which came into force on 8th February 1927, the scheme is deemed to be one settled under that Act. Therefore, the temple and its endowments constitute a trust and, by virtue of entry 9 in the Concurrent List, the Provincial Legislature had power to legislate with regard to it. Entry 34 of the Provincial List is sufficient in itself but, if

(1) [1940] F.O.R. 110, 124

there were any doubt, entry 9 in the Concurrent List could be invoked.

The other contentions advanced on behalf of the appellants do not call for much discussion. The suggestion that section 298 (2) (b) of the Government of India Act, 1935, renders the Act void is obviously untenable. Sub-section 1 of section 298 says that no subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India. Sub-section 2 (b) says that nothing in the section shall affect the operation of any law which recognizes the existence of some right, privilege or disability attaching to members of a community by virtue of some personal law or custom having the force of law. This is really a qualification of sub-section 1 and has nothing to do with the powers of the Legislature to legislate with regard to religious institutions.

The suggestion that the Act of 1939 is bad because it may affect Hindus of other provinces who happen to visit Madura and go to the temple for worship is on no higher plane. The proposition has only to be stated to be rejected.

The last contention is that the trial Court erred in not demarcating the places within the temple which the various communities should use for the purpose of worship. The second Subordinate Judge was quite right in not entering into a discussion of this question. The relief was not asked for in the plaint. The plaintiffs' attitude throughout was that non-caste Hindus had no right to enter the temple and that the episode of 8th July 1939 involved its desecration. The question did not arise on the pleadings and therefore cannot be considered. Whether it could be properly

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raised in other proceedings is a matter with which the Court is not concerned.

For the reasons given, the appeal is dismissed with costs. We certify for two Counsel and fix the senior Counsel's fee at Rs. 1,500.

We grant a certificate under section 205 of the Government of India Act, 1935.

N.S.

APPELLATE CIVIL

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

AYINAMPUDI KOTAYYA AND TWO OTHERS
(DEFENDANTS 1 TO 3), APPELLANTS

v

AYINAMPUDI KRISHNA RAO AND SIXTEEN OTHERS
(PLAINTIFFS AND DEFENDANTS 4 TO 18), RESPONDENTS*

Hindu law—Partition—Notice by guardian on behalf of minor demanding partition—Subsequent suit—Court passing decree—Severance in status taking effect from date of notice.

Where the mother of a Hindu minor acting as his lawful guardian gives notice on his behalf demanding partition of the joint family properties, severance in status takes place from the date of such notice if, in a suit filed in pursuance thereof, the Court decrees partition, holding that partition is for the benefit of the minor.

Observations in *Rangasayi v. Nagarathnamma*(1) followed.

APPEAL against the decree of the Court of the Subordinate Judge of Tenali, dated 18th August 1943 and passed in Original Suit No. 37 of 1941.

B. V. Ramanarasu for appellants.

A. Lakshmayya, A. Sambasiva Rao and T. V. Rangachari for respondents.

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(1) (1938) I.L.R. 57 Mad. 95 (F.B.)

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The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal arises out of a suit for partition filed by the minor sons of one Rama Rao who died in the month of May 1941. They sued through their mother as their next friend. The principal defendants were their grandfather (the first defendant), their uncle Tatayya (the second defendant), and their aunt Vemuri Sitaramamma (the third defendant). A notice demanding a partition was served upon the first defendant, the manager, by the plaintiffs' mother who was their lawful guardian, on 27th October 1941. The suit was instituted on the 29th of the following month. The first defendant did not object to a partition and a decree for partition was granted. The appellants are the first three defendants. They contend that the Subordinate Judge erred in declaring that a gift of two acres of land by the first defendant in favour of his daughter, the third defendant, was not binding on the family. They further contend that the Subordinate Judge erred in refusing to allow certain debts incurred by the first defendant to be charged against the family estate. We have no hesitation in concurring in the findings of the Subordinate Judge.

The family estate consisted of only 10.35 acres of immovable property. On 6th November 1941 the first defendant conveyed two acres to his daughter, ostensibly for the purpose of defraying her marriage expenses. She had been married two years before. This gift absorbed practically one-fifth of the whole estate. Even if the third defendant had not been married and it was necessary to make some provision for her marriage expenses, the conveyance to her of two acres was entirely unreasonable, considering the small amount of property which the family possessed; but the marriage had taken place two years before and the conveyance was executed after the demand for severance had been made. In these circumstances the first defendant had no right to convey this property to his daughter and

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it is obvious that in doing so he was acting in fraud of the plaintiffs' rights. The conveyance cannot be allowed to stand.

The debts which the Subordinate Judge held were not binding on the family were represented by the promissory notes marked as Exhibits D-4, D-6, D-9, D-11, D-12, D-13, D-17, D-18, D-19, D-20 and D-22 respectively. The total amount was Rs. 1,685-4-0. Exhibits D-4, D-6, D-11 and D-13 were renewals of old promissory notes and in each case the renewal was after the date of the notice given by the plaintiffs' mother demanding partition. The other promissory notes had been executed before the notice. They were said by the contesting defendants to represent moneys borrowed for family necessities. The Subordinate Judge has found that none of these promissory notes represents a genuine debt. The judgment indicates substantial ground for this finding, but it is not necessary for us to inquire whether these moneys were actually borrowed, because it is evident that the promissory notes which were executed after the date of severance are not binding on the plaintiffs and as regards the other promissory notes no family necessity has been proved.

The learned Advocate for the appellants has contended that the date of the notice, namely, 27th October 1941, given by the mother demanding partition is not the date on which in law the severance in status took place. He has said that the severance only took place on the date of the filing of the suit. This contention is entirely opposed to what is said by two of the learned Judges of the Full Bench which decided *Rangasayi v. Nagarathnamma*(1). In his judgment in that case, RAMESAM J. referred to the fact that a minor was not capable of exercising a discretion in law and that a suit for partition filed on behalf of the minor could only be maintained if the Court considered

(1) (1938) I.L.R. 57 Mad. 95 (F.B.)

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that a partition was in the interests of the minor; but he was of the opinion that the discretion could be exercised by the minor's guardian and in such a case the proper way of describing the situation was that the exercise of the option on behalf of the minor effected a severance conditional on the Court finding that it was for the benefit of the minor. ANANTAKRISHNA AYYAR J. was of the same opinion. In the course of his judgment he said that the logical result would be that even a notice given on behalf of a minor to the other members of the family would be effectual in working a severance of the joint status, provided the Court found in the suit for partition that it was for the benefit of the minor. It is said that these opinions were in the nature of *obiter dicta*. This may be so, but with respect we entirely agree with them. If it were otherwise, great injustice might be done to a minor co-parcener. Take the case where it is obvious, as the result of the manager's mismanagement of the family affairs, that there should be a partition. If the severance did not date back to the date of the notice, but only from the date of the filing of the suit, much to the detriment of the minor might happen in the meantime. The notice cannot, of course, be effective unless the Court holds that the partition is for the benefit of the minor. If it so holds, then the logical conclusion is that the severance must date back to the giving of the notice.

We are not called upon in this case to decide whether anybody can give such a notice on behalf of a minor, because here the lawful guardian of the minor plaintiffs was their mother and it was she who gave the notice.

It follows that those promissory notes which were renewed after 27th October 1941 cannot in any event be held to bind the minors and they are under no liability in respect of the other promissory notes because necessity has not been shown.

The appeal is dismissed with costs in favour of the first, second and third respondents.

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[The case having been set down to be mentioned, the Court made the following further order :—]

By mistake costs were given in favour of the first, second and third respondents, whereas costs should have been awarded in favour of the first and second respondents only. The third respondent was not represented and therefore was not entitled to any costs. By consent the decree will be amended accordingly.

N.S.

APPELLATE CIVIL

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

EKOLLU SUBBARAMI REDDI (APPELLANT),
APPELLANT

v.

EKOLLU CHENCHURAGHAVA REDDI AND THREE OTHERS
(RESPONDENTS), RESPONDENTS*

Hindu law—Partition—Paternal grandfather—Not entitled to sub-divide properties amongst minor grandsons—Sub-division not valid as family settlement—No right to represent minor grandsons in the transaction—Not their guardian under Hindu law.

Where a Hindu joint family consists of a grandfather, his son and minor grandsons by a deceased son, the grandfather can make a partition and allot to the grandsons their share of the joint family properties. But he cannot sub-divide the properties forming their share among the grandsons *inter se*. They take jointly the properties allotted to them and any sub-division made by the grandfather will not bind them. Nor can such sub-division take effect as a valid family settlement if the minors are not represented by their lawful guardian at the partition. Under the Hindu law the grandfather is not the lawful guardian of his minor grandsons and he does not have the same powers as the father in regard to partition of Joint family properties.

* Letters Patent Appeal No. 25 of 1944.

Aiyavier v. Subramania Aiyar(1) explained.
Chennappa v. Onkarappa(2) referred to.

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APPEAL under clause 15 of the Letters Patent against the judgment and decree of HORWILL J., dated 17th February 1944 and passed in Second Appeal No. 348 of 1943, preferred against the decree of the Court of the Subordinate Judge of Nellore in Appeal Suit No. 29 of 1940 (Appeal Suit No. 28 of 1940, District Court, Nellore) preferred against the decree of the Court of the District Munsif of Kavali in Original Suit No. 285 of 1937.

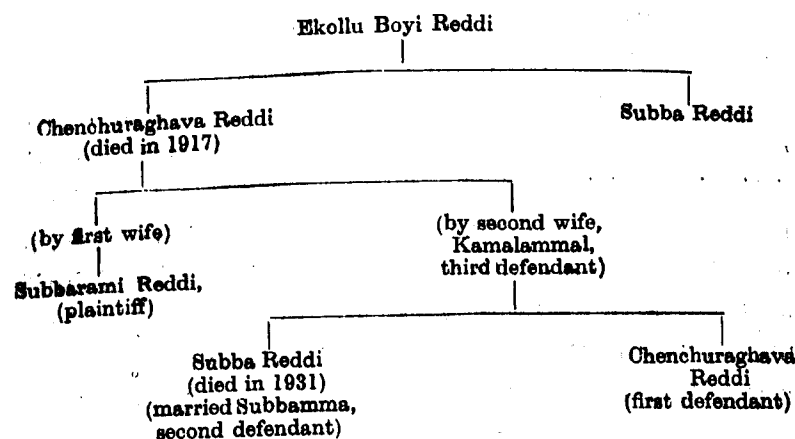
C. A. Vaithilingam for Advocate-General (P. V. Rajamannar) and *K. Subba Rao* for appellant.

K. Umamaheswaram for respondents.

The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal raises a question with regard to the powers of a grandfather when he effects a partition between himself, his son and the sons of a deceased son. There are other questions involved in the appeal and, in order to appreciate them, it is necessary to state in some detail the claim set out in the plaint, the pleas advanced by the defendants and the course of events in the Courts below.

LEACH C.J.

The following pedigree shows the relationship between the parties :—



(1) (1917) 32 M.L.J. 439

(2) I.L.R. [1940] Mad. 358 (F.B.)

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In 1923 the joint family consisted of Boyi Reddi, his second son Subba Reddi, and the three sons of his elder son Chenchuraghava Reddi who had died in 1917. By his first wife, Chenchuraghava Reddi had one son (the plaintiff) and, by his second wife, he had two sons, one of whom died in 1931. The other is the first defendant. We will refer to Boyi Reddi as "the grandfather". There were living in the family house his wife, the second wife of Chenchuraghava Reddi, and Subbamma, the wife of Subba Reddi the grandson who died in 1931. The women were not on friendly terms and the grandfather decided that it would be better to have a partition of the family properties. Accordingly he set aside for himself what was apparently far less than his real share in the family estate. The rest he divided into two portions, one of which he gave to his son Subba Reddi, and the other he gave to his grandsons. It is common ground that so far his action was in accordance with the powers given to him by Hindu law. There is authority for this and it is to be found in the judgment of this Court in *Aiyavier v. Subramania Aiyar*(1). He did not, however, stay his hand there. He divided the properties set aside as the share of Chenchuraghava Reddi's branch into three parts, one of which he allotted to the plaintiff, and the other two parts he gave to his other two grandsons who were represented by their mother, the third defendant. The plaintiff was not living with his step-mother. On his mother's death he went to live with his maternal grandfather in whose charge he was. The maternal grandfather appears to have acquiesced in the grandfather's division of the family estate and to have accepted on behalf of the plaintiff the portion which the grandfather had allotted to the plaintiff. The plaintiff and his step-brothers were all minors at the time. The main question in the appeal is whether the grandfather had the right of dividing among his grandsons

(1) (1917) 32 M.L.J. 439

the properties which fell to Chenchuraghava Reddi's branch.

The action of the grandfather was not questioned when the plaintiff became of age, and he did not question it until he filed the present suit on 30th October 1937. His half-brother Subba Reddi had died six years before, and the plaintiff maintained that he was entitled, not to one-third of the properties set aside by the grandfather for his father's share, but to a half, as Subba Reddi's interest had devolved upon him and the first defendant. The suit was for a partition of the properties on this basis. The first defendant resisted the suit and pleaded that the properties which the grandfather divided in 1923 were his own acquisitions and, therefore, he was entitled to do what he liked with them. The suit was filed in the Court of the District Munsif of Kavali, who framed ten issues on the averments in the pleadings. He proceeded, however, to decide the case without inquiring into the question whether the properties dealt with by the grandfather in 1923 belonged to the joint family or whether they belonged to him absolutely. He assumed that they belonged to the joint family and held that even so the grandfather was entitled to divide amongst his grandsons the properties which would have fallen to the share of their father, had he been alive.

The plaintiff appealed to the Subordinate Judge of Nellore. The Subordinate Judge agreed with the District Munsif and further expressed the opinion that the arrangements made by the grandfather for the partition of the properties could be upheld as a family settlement because it was necessitated by strife between the female members of the family. Consequently the Subordinate Judge dismissed the appeal. The plaintiff then appealed to this Court. The appeal was heard by HORWILL J. who concurred in the judgment of the Subordinate Judge, although he doubted whether

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Aiyavier v. Subramania Aiyar(1) could be regarded as actual authority for the proposition that a grandfather was in the same position as a father under Hindu law in this respect. The appeal is from the judgment of HORWILL J.

It is, in our opinion, manifest that the partition effected by the grandfather cannot be upheld on the basis that it constituted a family settlement. The grandfather was not the lawful guardian of the plaintiff or of his half-brothers. In *Chennappa v. Onkarappa*(2) a Full Bench of this Court held that the father of a Hindu minor is his lawful guardian and, in his absence, the mother fulfils that position. Where both the father and mother are dead, no relative can be regarded as the lawful guardian without an order of the Court. The properties allotted to the plaintiff's half-brothers were accepted by their mother on their behalf, and she was their lawful guardian as their father was then dead. The maternal grandfather of the plaintiff accepted the properties allotted to the plaintiff, but the maternal grandfather was not his lawful guardian. The minor was living with him and under his protection, but this did not entitle him in law to act on behalf of the plaintiff. Therefore, nothing which his grandfathers did could bind him in the matter of the partition and, having no legal guardian, he could not be required to accept the partition on the basis that it represented a family settlement. Moreover, the defendants did not plead that the partition should be upheld on this ground. There is no suggestion in their written statements that the arrangement made by the grandfather constituted a family settlement. Their case was, as we have seen, that the properties belonged to the grandfather absolutely and that he was entitled to do with them as he liked. The fact that it was no part of the defendants' case that the partition represented a family settlement is an additional reason for disagreeing with the observations

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of the Subordinate Judge and of HORWILL J. in this connection.

The decision of the appeal depends on whether the Courts below were justified in placing the grandfather in the same position as the father in the matter of the partition of a joint family estate. *Aiyavier v. Subramania Aiyar*(1) is certainly no authority for the proposition that the grandfather has the same powers as the father, although it is direct authority for the proposition that a grandfather can separate from his grandsons. If the joint family merely consisted of himself and his grandsons, the grandfather would be entitled in law to take a half and leave the other half to the grandsons; but it is quite a different matter to say that, when a joint family consists of a father, a son and the sons of a deceased son, he can divide the third share, which would have fallen to his deceased son had he lived, among that son's sons. The father is the lawful guardian of his sons, but the grandfather is not the lawful guardian of his grandsons unless he is so appointed by an order of the Court.

Therefore, in this case the grandfather had no authority to say that the properties which were allotted to his elder son's branch should be divided in a particular way amongst the members of that branch. He could allot to the branch its share of the family estate, but he could not sub-divide the properties forming the share. The grandsons as between themselves were joint and they would take the properties allotted to them jointly. No case has been quoted to us in which this question has directly arisen, but there does not appear to be any room for doubt as to the answer to be given. It may be mentioned that in Mulla's Principles of Hindu Law the same opinion is expressed, but there is no discussion of the question; see Ninth Edition, page 392.

(1) (1917) 32 M.L.J. 439

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It follows that, in our judgment, the plaintiff cannot be compelled to take as his full share in the family estate the properties which his maternal grandfather accepted on his behalf. Since his half-brother Subba Reddi is dead, he is entitled to a half-share of all the properties set aside by his grandfather for his father's branch, subject to a provision for the maintenance of his step-mother and the widow of his deceased half-brother. That is, of course, if the properties, which the grandfather divided, in fact constituted the family estate. This question has not been considered, and consequently it is necessary to remand the case to the trial Court to decide it and also the other issues which were left without decision. There will be an order accordingly. The District Munsif will hear and decide all the remaining issues in the light of this judgment and, having done so, he will pass a fresh decree.

The appellant is entitled to his costs here, before HORWILL J. and before the Subordinate Judge. The costs of the trial Court will abide the result of the further hearing. The appellant is also entitled to a refund of the court-fees paid on the various memoranda of appeals.

N.S.

APPELLATE CIVIL

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

M. T. PHILLIP (PLAINTIFF), APPLICANT

v.

MUHAMMAD SIDDIQUE ADAM BY AGENT ABDUL
SHUKAR (FIRST DEFENDANT), RESPONDENT *

*Presidency Small Cause Courts Act (XV of 1882), sec. 69—
Madras Small Cause Court Rules, O. XXI, rr. 32 and 53—
Attachment of movable by seizure without prohibitory order*

* Case Referred No. 9 of 1944

*under r. 32—Suit by claimant to set aside claim order under
r. 53—Proof of claimant's title to attached property essential—
Mere proof of illegality of attachment insufficient for succeeding
in suit—Code of Civil Procedure (Act V of 1908),
O. XXI, r. 63.*

Mere proof by an unsuccessful claimant that the attachment by seizure of the goods in his possession was illegal as being contrary to the provisions of Order XXI, rule 32, of the rules framed at Madras under the Presidency Small Cause Courts Act is not sufficient for him to succeed in a suit filed by him under Order XXI, rule 53, of those rules. He must establish also that the goods did not belong to the judgment-debtor at the time of the attachment but belonged to him. To succeed in a suit to set aside an order on a claim petition the claimant must prove his title to the property in dispute.

Bavamma v. Papanna(1) followed.

Pakirayya v. Kamasastris(2) explained.

Nagarmal Marwari v. King Emperor(3) distinguished.

CASE referred to the High Court by the Chief Judge of the Court of Small Causes, Madras, under section 69 of the Presidency Small Cause Courts Act in New Trial Application No. 112 of 1943 from Suit No. 1932 of 1942 on the file of the Third Judge of the Court of Small Causes, Madras, for decision on the following question of law :—

“Whether in a suit by an unsuccessful claimant for setting aside the order in his claim petition, it is sufficient for him in order to succeed in the suit under Order XXI, rule 53, of the rules of the Presidency Small Cause Court, to show that the attachment was by seizure of the goods from his physical possession without a prohibitory order against him under Order XXI, rule 32, of the said rules, irrespective of the finding that the attached goods belonged to the judgment-debtor at the time of the attachment.”

R. Rajeswara Rao for applicant.

R. Viswanatha Ayyar for respondent.

The JUDGMENT of the Court was delivered by LEACH C.J.—This is a reference under section 69 of the Presidency Small Cause Courts Act. In order to

(1) (1937) 1 M.L.J. 133

(2) (1932) I.L.R. 56 Mad. 508

(3) (1931) I.L.R. 11 Pat. 493

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understand the question referred the facts must be stated.

The respondent filed Small Cause Suit No. 8410 of 1941 against one T. C. Krishnan, the proprietor of a hotel called the Empire Hotel, for money alleged to be due to him. The respondent obtained an order for attachment before judgment of six fans said to be on the hotel premises. When the bailiff went to the hotel, there were no fans to be found. The respondent then applied for the attachment of six electric fans "removed and kept at No. 15 Perianna Maistri Street". The application was granted and the bailiff proceeded to No. 15, Perianna Maistri Street, where he found two electric fans. The applicant objected to the attachment on the ground that the fans were his. He alleged that they had been sold to him by Mahdi Ali, the third defendant in the respondent's suit. The bailiff nevertheless seized the fans and this led to the applicant filing a petition asking for the release of what he claimed to be his property. He averred that the bailiff had acted unlawfully in seizing the fans. The correct procedure was, he said, to serve upon him a prohibitory order under Order XXI, rule 32, of the Madras Small Cause Court Rules, but this had not been done. Rule 32 states that in the case of (a) a debt not secured by a negotiable instrument, (b) a share in the capital of a corporation, (c) other movable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of, a Court, the attachment shall be made by a written order prohibiting, in the case of "other movable property", the person in possession of it from giving it over to the judgment-debtor.

There can be no doubt that the applicant's objection was well founded. The bailiff had not the power, and could not in the circumstances be given the power, to seize the two fans. The applicant's claim petition was, however, resisted on the ground that the

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applicant had no title to the fans. It was said that they belonged to the judgment-debtor and that they had been removed from his premises in order to prevent their seizure under an order for attachment. This was found to be the case and the Judge who heard the applicant's petition dismissed it. Thereupon the applicant filed a regular suit under the provisions of Order XXI, rule 53, of the Small Cause Court Rules. The Judge, who tried it, held that the applicant's possession of the fans was not *bona fide* and he dismissed the suit, whereupon the applicant filed an application for a new trial which was heard by the three Judges of the Court. The finding that the applicant's possession of the fans was in fraud of the respondent was conclusive. The applicant, however, contended that he was entitled to have his suit decreed because the bailiff had acted unlawfully in seizing the articles when he should merely have served upon him a prohibitory order. Two of the learned Judges were of the opinion that this plea was not sufficient and that it was incumbent upon the applicant to show title to the property. The learned Chief Judge of the Court took a different view. He considered that, as the applicant was in physical possession of the fans, he was entitled to succeed in the suit by reason of the illegal action of the bailiff. He relied on the judgment of the Patna High Court in *Nagarmal Marwari v. King Emperor*(1). In these circumstances the learned Judges have referred the following question to this Court:—

"Whether in a suit by an unsuccessful claimant for setting aside the order in his claim petition, it is sufficient for him in order to succeed in the suit under Order XXI, rule 53, of the rules of the Presidency Small Cause Court, to show that the attachment was by seizure of the goods from his physical possession without a prohibitory order against him under Order XXI, rule 32, of the said rules, irrespective

(1) (1931) I.L.R. 11 Pat. 493

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of the finding that the attached goods belonged to the judgment debtor at the time of the attachment."

Order XXI, rule 53, of the Small Cause Court Rules, under which the applicant filed his suit, reads as follows :—

"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 such suit, if any, the order shall be conclusive."

The wording is the same as the wording of rule 63 of Order XXI of the Code of Civil Procedure. The rule clearly indicates that the plaintiff in such a suit has to establish his title to the property in dispute.

In *Pakirayya v. Kamasastris*(1) a Bench of this Court held that a plaintiff claimant was entitled to assert the title, which he had at the time when the suit was instituted, to show that the order of attachment should not have been made. It has been suggested that the judgment in this case supports the applicant; but we are unable to agree. The Bench did not hold that a plaintiff claimant had no need to show title and that all that was necessary was to establish an illegal attachment. The judgment indicates that they recognized the necessity of proving the title to possession but, when this is done, the plaintiff claimant can proceed to have the attachment set aside on the ground of illegality. The question now before us was fully discussed by VENKATARAMANA RAO J. in *Bavamma v. Papanna*(2). In that case an order for the attachment of a judgment-debtor's property had been made. His wife claimed that the property was hers. Her objection was overruled and she filed a suit under Order XXI, rule 63, of the Code of Civil Procedure. It was held that she had no title to the property as she was merely a benamidar for her husband. It was nevertheless contended that she was entitled to a decree because the attachment was illegal. It transpired

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that the judgment-debtor had been adjudicated before the attachment and the property had devolved upon the Official Receiver who was a party to the suit. VENKATARAMANA RAO J. held that it was essential for the plaintiff to prove title before being allowed to take an objection to an illegality in the attachment.

That it is the correct view of the law is not, in our opinion, open to serious question. In the first place, we have got the wording of Order XXI, rule 63, of the Code of Civil Procedure, which is followed in the Small Cause Court Rules. As we have already said, the rule itself indicates that the plaintiff must prove title. If this were not the case, a person, who was in possession of property which he had stolen, would be able to get a decree restoring the property to him, should he be able to show that there was some flaw in the issue or the execution of the warrant of attachment, notwithstanding that he had stolen the goods from the judgment-debtor and they had been seized as the property of the judgment-debtor. The applicant has not stolen the goods with which this case is concerned, but he was in possession of them without any title and as the result of a fraudulent scheme to defeat the respondent. In these circumstances he is not in a position to ask the Court to restore the property to him because it was seized and not merely attached by means of a prohibitory order.

The decision in the Patna case on which the Chief Judge relied has no application here. The question was whether a person was liable to be prosecuted under section 186 of the Penal Code for having resisted an attaching officer.

For the reasons given, the answer to the reference must be in the negative. The costs of the reference will be made costs in the cause.

N. S.

(1) (1932) I.L.R. 56 Mad. 508

(2) (1937) 1 M.L.J. 133

APPELLATE CIVIL

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

P. RAJAGOPALA CHETTI (PLAINTIFF), APPELLANT

v.

A. KESAVA PILLAI AND EIGHT OTHERS (DEFENDANTS 1 TO 9),
RESPONDENTS*

Transfer of Property Act (IV of 1882), ss. 52 and 100 as amended by Transfer of Property (Amendment) Act (XX of 1929)—Sec. 100 not overriding sec. 52—Lis pendens—Suit for maintenance with prayer for a charge on immovable property—Mortgage of that property taken bona fide from a party during pendency of suit without notice thereof—Mortgagee nevertheless affected by lis pendens and bound by decree creating charge.

Section 100 of the Transfer of Property Act does not override section 52 of the Act. The amendment introduced in section 100 by the Transfer of Property (Amendment) Act, 1929, is not intended to qualify the doctrine of *lis pendens* embodied in section 52. Consequently a person, who takes a mortgage from some of the parties, during the pendency of a suit for maintenance with a prayer *inter alia* for a charge on certain properties inclusive of the property mortgaged, takes it subject to the charge given under the decree in the suit, even though the mortgage is taken *bona fide* without notice of the suit.

APPEAL under clause 15 of the Letters Patent against the judgment and decree of SOMAYYA J., dated 16th April 1944 and passed in City Civil Court Appeal No. 35 of 1942, preferred to the High Court against the decree of the City Civil Court, Madras, in Original Suit No. 928 of 1940.

N. Srinivasa Ayyangar for appellant.

T. R. Arunachalam for R. Srinivasan, T. C. A. Anandahwar, N. S. Raghavan, and A. Viswanatha Ayyar for A. Sundaresan for respondents.

The JUDGMENT of the Court was delivered by
LEACH C. J. LEACH C. J.—The only question in this appeal is whether

section 100 of the Transfer of Property Act overrides section 52. The City Civil Court, which tried the suit, held that it did not, and this opinion was shared by SOMAYYA J. on appeal. This appeal has been filed under clause 15 of the Letters Patent against the judgment of the learned Judge.

We can see no room to doubt the correctness of the judgments below. Section 52 of the Transfer of Property Act, which embodies the doctrine of *lis pendens*, is couched in very wide terms. Section 100 was amended by the Transfer of Property (Amendment) Act, 1929, when the following words were added to the second paragraph:—

“and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.”

The argument is that, as the mortgagee in this case took the mortgage without knowledge of the pendency of a suit filed on the original side of this Court in which a charge was given to the plaintiff, his rights are not affected by the charge. That suit was Civil Suit No. 75 of 1936 and was filed by a widow of a deceased coparcener for maintenance and for marriage expenses. The plaintiff asked for a charge on the property mortgaged and on other properties. A decree was passed on 28th April 1939 giving her a charge on all the properties mentioned in the plaint in respect of the amount payable to her for maintenance. It was during the pendency of that suit that the two surviving coparceners executed a mortgage in favour of the appellant.

The words “save as otherwise expressly provided by any law for the time being in force”, which form part of the amendment to section 100, clearly put the appellant out of Court. Section 52, which is a law for the time being in force, expressly provides that property cannot be transferred or otherwise dealt with by a

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party to a suit or proceeding so as to affect the rights of another party thereto "under any decree or order which may be passed except under the authority of the Court and on such terms as it may impose". Moreover, the Legislature could never have intended by the amendment to section 100 to qualify the doctrine of *lis pendens*. Section 100 cannot be read without regard to what is said in section 52.

The same opinion was expressed by the Bombay High Court in the recent case of *Ramchanāra Gururao v. Kamalabai*(1).

The appeal is dismissed with costs. The second and third respondents are minors and appear by their guardian *ad litem*. We fix the Advocate's fee here at Rs. 50.

N.S.

ORIGINAL CIVIL

Before Mr. Justice Clark

[IN THE MATTER OF THE INDIAN COMPANIES ACT VII OF 1913
AND IN THE MATTER OF THE INDIAN NATIONAL AGENCIES,
LIMITED]

1945,
January 16

P. V. DAMODARA REDDI AND ANOTHER, APPELLANTS

2.

**INDIAN NATIONAL AGENCIES, LIMITED,
Respondents***

Indian Companies Act (VII of 1913), sec. 38—Register of members of company—Public document—Rectification of register to be made by Court under sec. 38—Removal of name of a member from register by directors or any other officer of company, illegal—Allotment of shares to members wrongly made, no ground for directors removing names from register—Application for shares—Allotment—How far applicant can assume that directors acted regularly—Six members

(1) I.L.R. [1944] Bom. 274
* Application Nos. 2258 and 2259 of 1944

of a company—All of them directors—Meeting of board of directors and general body meeting of company, merely two descriptions of same body—Effect.

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There were six members of a company and all of them were directors. One of the articles of the articles of association provided as follows : " The shares shall be under the control of the directors who may allot or otherwise dispose of the same only among the existing members but shall not without the consent of the company in general meeting allot or otherwise dispose of them to outsiders." Two persons applied in writing for shares of the company. These applications were considered at a meeting of the directors in which five were present. Each applicant was allotted two shares and they joined the meeting as directors. They attended a number of other meetings also. They were duly entered on the register of the members of the company. On an objection taken by the auditors of the company their names were removed from the register of the company. They applied to the Court for rectification of the register by reinstating their names in the books. The company sought to justify their action on the ground that the allotments of the shares were made by the directors without the consent of the company in general meeting and as such the allotments were void and wholly inoperative.

Held: (1) The removal of the applicants' names from the register of members was wholly illegal. The register of the members of a company is a public document and there is no provision in the Companies Act which permits the directors of a company or an officer of a company to make any alteration to the register in the circumstances of this case. The remedy of the company was to apply to the Court under section 38 for the rectification of the register.

(2) The applicants made their offer by their applications for shares. Article 5 gave power to the directors to allot shares. The applicants were entitled to assume that the directors were acting regularly and that the sanction of the company in general meeting had in fact been obtained and therefore the allotments could not now be avoided by the company.

The Royal British Bank v. Turquand(1) followed.

(3) Further, in the present case a meeting of the board of directors of the company and the company in general meeting are two descriptions of one and the same body and it is too

(1) (1856) 6 E. & B. 327

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technical to consider whether the six members of the company were not to be regarded as having sanctioned what five of their members did as directors.

Express Engineering Works, Limited, In re(1) followed.

Row & Reddi for appellant.

V. K. Thiruvengkatachari for respondent.

JUDGMENT.

CLARK J.

CLARK J.—P. V. Damodara Reddi and D. Duraiswami Nayudu, each applied in writing for shares in the Indian National Agencies, Limited. These shares were of the face value of Rs. 1,000. Their applications were considered at a meeting of the directors of the company held on 12th April 1942. The applications for shares appear to have been made in February 1942. Each of the applicants was allotted two shares at the meeting of 12th April 1942 and the minutes of that meeting recorded that, upon these allotments being made, the two applicants joined the meeting, that is, as directors of the company. As well as being present at the remainder of this first meeting, the applicants are said to have been present at a number of other subsequent meetings. The applicants were duly entered on the register of the members of the company.

Some eight months later, in about December 1942, the directors of the company resolved to cancel the allotment of these shares to the applicants. The present applications are applications to rectify the register by reinserting the names of the applicants. The applications are numbered as Applications Nos. 2258 and 2259 respectively of 1944. I have heard these applications together.

It is said on behalf of the company that the resolution to remove these applicants' names from the register of members was passed in consequence of a report of the auditor of the company on the balance sheet of the company's affairs as at 30th November 1942. In that report, the auditor expresses the view

that the allotment of the shares to the applicants was *ultra vires* and that the allotments might therefore be cancelled by the directors.

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CLARK J.

Before proceeding further, I may say I am disposed to regard the removal by the company of the applicants' names from the register of members as wholly illegal. The register of the members of a company is a public document and I know of no provision in the Companies Act which permits the directors of a company or any officer of a company to make any alteration to the register in the circumstances alleged in the present case. If these members' names had been improperly added to the register, the remedy of the company was to apply to this Court under section 38 for the rectification of its register and not to take upon itself to alter the register.

As, however, the question of the validity or otherwise of the allotment of these shares is now before me on the present applications, I think it would be more proper and suitable for me to dispose of these applications on the merits rather than to allow the applications on the ground stated above and leave the company to file similar applications again, if they are so advised.

The company claims that these allotments were invalid by reason of the provisions of article 5 of the articles of association. That article provides as follows :—

"The shares shall be under the control of the directors who may allot or otherwise dispose of the same only among the existing members but shall not without the consent of the company in general meeting allot or otherwise dispose of them to outsiders."

It is said that, as the allotments were made by the directors without the consent of the company in general meeting, they are accordingly void and wholly inoperative.

Now section 30, sub-section 2, of the Act provides that a person who agrees to become a member of a

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company and whose name is entered in its register of members shall be a member of the company. The names of both the applicants were entered in the register of members and accordingly the only question to be decided is whether they agreed to become members of the company. If they did, then the applications must succeed.

An agreement to become a member of a company is usually constituted by an offer in the form of an application for shares and an acceptance of that offer by allotment. Admittedly each of the applicants made a written application and the only question is whether those applications were accepted by the company.

As I have earlier observed, the company, relying on article 5 of the articles of association, contends that acceptance of the applicants' offers by the directors alone was entirely inoperative and accordingly there were no allotments. Further, it is urged on behalf of the company that the applicants must be deemed, whatever may have been the fact, to have contracted on the footing of the articles of association including, of course, article 5. This is, I think, undoubtedly the case. As was observed by Lord CAIRNS L.J. in *Peel's case*(1):

"If the memorandum and articles of association are in existence when he (the member) applies for shares, and if he agrees to take his shares on the footing of the memorandum and articles of association (which would seem to be the case here), then I think that he ought to be held bound to look to the memorandum and articles of association before he applied for shares."

But, in my view, this does not dispose of the matter. There are, I think, two grounds on which these allotments must, in the circumstances of this case, be regarded as valid and binding on the company. In the first place, I consider that the applicants are entitled to rely on the rule laid down in *The Royal British Bank v. Turquand*(2). In that case, the articles of

the company gave power to borrow with the sanction of a general meeting and it was held that a lender need not enquire whether such sanction had, in fact, been given. He was entitled to assume that it had and it was held further that the absence of sanction could not affect his position. The rule is stated as follows in *Palmer's Company Precedents*, Fifteenth Edition, at page 70:

"This rule is that where a company is regulated by an Act of Parliament, general or special, or by a deed of settlement or memorandum and articles registered in some public office, persons dealing with the company are bound to read the Act and registered documents, and to see that the proposed dealing is not inconsistent therewith; but they are not bound to do more; they need not inquire into the regularity of the internal proceedings—what Lord HATHERLEY called 'the indoor management'. They are entitled to assume that all is being done regularly."

Applying these rules to the present case, I hold that the applicants were entitled to assume that the directors were acting regularly and that the sanction of the company in general meeting had, in fact, been obtained. That being so, the allotments cannot now be avoided by the company and the applicants must be regarded as persons who agreed to become members of the Company. This, added to the fact that their names had been added to the register of members, constitutes them members of the company and, as such, they are entitled to have their names re-entered on the register of members from the date on which they have been improperly removed.

The other ground, which is equally strong and in favour of the applicants, rests on the peculiar circumstances existing in this company. At the time when the applicants made applications for shares, there were only six members of this company and all of them were directors. Five of them were present at the meeting at which the allotments were made. Now it is said on behalf of the company that, despite that circumstance, the allotments were bad because the previous consent

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(1) (1867) 2 Ch. App. 674, 684

(2) (1856) 6 E. & B. 327

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of the company in general meeting had not been obtained. But in this case, a meeting of the board of directors of the company and the company in general meeting are two descriptions of one and the same body and in these circumstances I find it altogether too technical to consider whether the six members of the company are or are not to be regarded as having sanctioned what five of their number did as directors. In this connection, reference may be made to the case of *Express Engineering Works, Limited, In re.*(1) which concerned a private company of five members, all of whom were directors. It is unnecessary to refer to the facts of the case but the following passages from the judgments of the learned Judges of the Court of Appeal who dealt with that case are, I think, particularly apt. Lord STERNDALÉ M.R., at page 470, observed ;

"In the present case these five persons were all the corporators of the company and they did all meet, and did all agree that these debentures should be issued. Therefore it seems that the case came within the meaning of what was said by Lord DAVEY in *Salomon v. Salomon & Co.*(2): 'I think it an inevitable inference from the circumstances of the case that every member of the company assented to the purchase, and the company is bound in a matter *intra vires* by the unanimous agreement of its members.' "

Later, Lord STERNDALÉ says :

"It was said here that the meeting was a directors' meeting but it might well be considered a general meeting of the company, for although it was referred to in the minutes as a board meeting, yet if the five persons present had said, 'We will now constitute this a general meeting' it would have been within their powers to do so, and it appears to me that that was in fact what they did."

WARRINGTON L.J. observed as follows :

"It happened that these five directors were the only shareholders of the company, and it is admitted that the five, acting together as shareholders, could have issued these debentures. As directors they could not, but as shareholders

(1) [1920] 1 Ch. 466

(2) [1897] A.C. 22

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acting together they could have made the agreement in question. It was competent to them to waive all formalities as regards notice of meeting, etc., and to resolve themselves into a meeting of shareholders and unanimously pass the resolution in question. Inasmuch as they could not in one capacity effectually do what was required but could do it in another, it is to be assumed that as business men they would act in the capacity in which they had power to act. In my judgment they must be held to have acted as shareholders and not as directors, and the transaction must be treated as good as if every formality had been carried out."

I accordingly allow these petitions and direct the rectification of the register of members of this company by the re-entry of the applicants' names with effect from the date when they were wrongfully removed by the company. The applicants will have their costs of these applications.

G.R.

APPELLATE CIVIL

Before Mr. Justice King and Mr. Justice Bell

KADAMBAN NAMBU DRIPAD AND OTHERS
(PLAINTIFFS), APPELLANTS

1944,
December 5

v.

THE ENGLISH AND SCOTTISH JOINT CO-OPERATIVE
WHOLESALE SOCIETY (INCORPORATED IN ENGLAND)
BY ITS GENERAL MANAGER MR. FRANCIS HAMILTON
FARMER (DEFENDANT) AND OTHERS, RESPONDENTS *

*Landlord and tenant—Malabar law—Lease for 48 years—
Covenant for renewal—Karnavan of an illom leasing out
uncultivated land for developing it into planting estate—
Lease providing for renewal if lessee required it—Terms
of tenancy and rent after 48 years not mentioned in the
agreement—Specific Relief Act (I of 1877), sec. 12—
Contract enforceable—Presumption that renewal should be*

* Appeals Nos. 465 of 1943 and 61 of 1944

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on fair and reasonable terms—Karnavan entitled to grant right of renewal.

The karnavan of an illom in the Malabar district granted a lease of certain land to a company in 1891 for a period of forty-eight years. The land was in a wild and uncultivated condition and the lease was granted for the specific purpose of its being developed into a planting estate. Clause 7 of the lease provided: "If, after forty-eight years of proper conduct and cultivation under this karar, you require this property yourself, you should, on that day, get the same granted under a special separate karar executed to you and conduct yourself in possession thereunder." Relying on this clause, the lessee claimed a right of renewal of the lease of land. The lessor, on the other hand, contended (i) that the clause did not confer any such right, (ii) that, even if it did, the agreement was vague and could not be specifically enforced, as under that clause the parties did not decide what the terms of the tenancy should be and how much rent was to be paid, and (iii) that it was beyond the powers of a karnavan of a Malabar illom to make provision for the disposal of trust or illom property in that way for such a long period.

Held: (i) Clause 7 of the lease did grant to the lessee a right of renewal. The clause could have no other significance but as an expression of the intention of the parties that forty-eight years after the lease came into operation, it would be renewed if the lessee required a renewal.

(ii) The agreement could be specifically enforced. It should be presumed that in 1891 the parties did agree with each other that when the renewal came to be granted in 1939, it should be on fair and reasonable terms.

May and Butcher, Limited v. The King(1) and *Secretary of State for India v. Volkart Brothers*(2) referred to.

(iii) On a consideration of the nature of the use to which the land was to be put, the karnavan who executed the lease in 1891 did not act in excess of his powers in giving the right of renewal to the lessee.

Kalliani Amma v. Govinda Menon(3) and *Ramunni v. Kerala Varma Valia Raja*(4) distinguished.

(1) [1934] 2 K.B. 17 (footnote)

(3) (1911) I.L.R. 35 Mad. 648

(2) (1928) I.L.R. 50 Mad. 595

(4) (1891) I.L.R. 15 Mad. 166

APPEALS against the decree of the Court of the Subordinate Judge of the Nilgiris at Ootacamund in Original Suits Nos. 72 and 38 of 1942.

Sir A. Krishnaswami Ayyar for *P. Govinda Menon* and *C. P. Venkataramanan* for appellants.

O. T. G. Nambiar and *K. Kuttikrishna Menon* for respondents.

The JUDGMENT of the Court was delivered by KING J.—The subject matter of these appeals is the right which has been claimed by the English and Scottish Joint Co-operative Wholesale Society, Limited, to the renewal of a lease of land granted to their predecessors-in-title in the year 1891 for forty-eight years. In Original Suit No. 38 of 1942, the Society filed a suit for specific performance of a covenant in that lease to renew it. In Original Suit No. 72 of 1942, there was a suit by some of the lessors to eject the Society. The learned Subordinate Judge of Coimbatore has decreed the suit of the Company, though not in full. He has held that the Company had the right to renew the lease but that the lease could not be renewed upon the original terms. He has therefore fixed other terms which shall be current for the renewed period of forty-eight years. As a consequence of this, the suit by the lessors to eject the Company has been dismissed. It is the plaintiffs in Original Suit No. 72 of 1942 who are now the appellants in both these appeals.

The lease in question has been exhibited as Exhibit P-1. It deals with about 133 acres of land which were said to belong in jenm not to the lessors themselves but to the Ponnani Devaswom. The actual lessor was the karnavan of an illom to which this devaswom was attached. The lease was for forty-eight years and the rates of rent were duly provided for. In clause 4 of the lease, it was provided that there should be no payment for improvements if either the lessor recovered possession of the property or if the lessee

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surrendered possession or if he were evicted by the lessor. In paragraph 7, there was the following provision :—

“ If, after 48 years of proper conduct and cultivation under this karar, you require this property yourself, you should, on that day, get the same granted under a special separate karar executed to you and conduct yourself in possession thereunder.”

It is this clause which has given rise to the present litigation.

It is contended by the lessor that this clause does not confer upon the lessee any right to a renewal and by the lessee that it does confer such a right upon him. It seems to us that the view of the lessee must prevail. There seems no significance at all in the existence of this clause if it does not confer a right of renewal. It is a matter of common knowledge that when any agreement comes to an end it is always open to the parties to negotiate for a renewal of the agreement if they wish. There is no need whatever to insert so obvious a provision in any agreement. The mere fact that the language of clause 7 seems to subject the lessee to a kind of obligation to obtain the lease from the lessor does not in any way affect its true meaning in our opinion. We feel that the clause can have no other significance but as an expression of the intention of the parties that forty-eight years after the lease comes into operation it will be renewed if the lessee requires a renewal. We accordingly agree with the learned Subordinate Judge in his view that under clause 7 there was granted to the lessee a right of renewal.

It was further argued that, even if such a right of renewal were granted by clause 7, it is not a contract or agreement which the Court can specifically enforce because it is too vague. The parties have agreed upon only one thing, namely, that the tenancy shall be renewed. They have still to agree upon at least two very essential matters connected with the tenancy,

namely, the term for which it shall last in its renewed form, and the rent which shall be paid. It is impossible, so runs the argument, to regard clause 7 as any kind of contract unless the parties have already decided what the term is to be and how much rent is to be paid. In support of this argument, Sir Alladi Krishnaswami Ayyar for the appellants referred us to a decision of the House of Lords appended as a footnote to *Foley v. Classique Coaches, Ltd.*(1), which is the case of *May and Butcher, Limited v. The King* (2). We are however quite unable to agree that the facts of that case are in any way parallel to the facts here. That was a simple case of a tentative agreement by the parties to buy certain property in which it was held that until the purchase price was fixed there could be no contract. The very case itself to which *May and Butcher, Limited v. The King*(2) was thus appended, *Foley v. Classique Coaches, Ltd.*(1), and a decision of this Court reported as *Secretary of State for India v. Volkart Brothers*(3) show on the other hand quite clearly that there can be an enforceable agreement in which the Court may presume that, although the question of price or rent has not been already agreed upon by the parties, they have agreed with one another that the price or rent to be eventually paid shall be a fair and reasonable one. We consider that the present case comes clearly within the principle of those rulings rather than the ruling relied upon by Sir Alladi Krishnaswami Ayyar, and that we must presume here that in 1891 the parties did agree with each other that when the renewal came to be granted in 1939 it should be on fair and reasonable terms. We hold therefore that this agreement can be specifically enforced, subject only to the next argument put forward on behalf of the appellants. That argument was that it was beyond the powers of either a trustee, if the

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(1) [1934] 2 K.B. 1

(2) [1934] 2 K.B. 17 (footnote)

(3) (1926) I.L.R. 50 Mad. 595

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lessor be so regarded, or a karnavan of a Malabar illom, to make provision for the disposal of trust or illom property in this way for a period of more than forty-eight years. We were referred in this connexion to two cases of the Madras High Court; *Kalliani Amma v. Govinda Menon*(1), where it is laid down that a karnavan cannot make an alienation for such a long period as sixty years in the absence of special necessity or special benefit, and *Ramunni v. Kerala Varma Valia Raja*(2); where it is regarded as axiomatic in the judgment that a perpetual lease was a disposition of an improvident character which could not bind a karnavan's successors. These rulings do not seem to us to have any particular bearing upon the facts of the case with which we now have to deal. They do not purport to lay down any fixed or unalterable rule limiting the power of a karnavan or a trustee in granting a lease to any particular period. It is of course true that leases in Malabar are normally granted for twelve years. It might well be said that it would be improvident on the part of a karnavan to grant a lease of ordinary land for any longer period. But, as the learned Subordinate Judge has pointed out, the peculiar nature of the land with which we are now concerned must necessarily be regarded. It was waste land which was in a wild uncultivated condition at the time of the lease in 1891, and was granted on lease for the long period of forty-eight years for the specific purpose of its being developed into a planting estate. The learned Subordinate Judge holds that a long lease of this kind was essential for such a purpose to be effected, and it is significant that for the whole period between 1891 and 1939 no one in the illom has ever attempted to set aside the transaction entered into in 1891. It seems to us that if a lease of this kind can be

granted for forty-eight years, and we agree that it can, in order that the land may properly be developed, a provision that it must inevitably be renewed, if the lessee wishes it, can be made by the karnavan. It seems to us clear that what is intended in a lease of this kind is the permanent improvement of the land, and its permanent use as a planting estate, and that if land is to be used in this way it will necessarily tend to the general prosperity of the owners of the land; and that it is in the interest of all parties that security of tenure should be granted to persons who are prepared to risk the capital necessarily required for improving the land. We are quite unable to hold that, in giving to the lessee the right to demand a renewal, the karnavan was doing anything against the interests of his illom or of the trust property which he represents. There is nothing in the evidence in the case to suggest that any other kind of lease would have been appropriate to this land. Reference to other leases shows that they were of a somewhat similar nature, and the most that could be argued on this part of the case was that *prima facie* it is improvident and unwise on the part of any karnavan to tie the hands of himself and his successors for any long period ahead. That such tying of the hands was necessary in the general interest of all parties is, we think, sufficiently proved in this case by a consideration of the nature of the use to which the land was to be put. We are accordingly of the opinion that the karnavan who executed the lease in 1891 did not act in excess of his powers in giving the right of renewal to the lessee.

There remains only the question of the terms under which the new lease has been ordered to be executed by the Court. The lease is to be in force for another period of forty-eight years. It has been argued for the appellants that this period is too long, but it seems to us that there are no materials in this case for coming to any such finding.

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(1) [1911] I.L.R. 35 Mad. 648 (2) (1891) I.L.R. 15 Mad. 166

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As we have already indicated, leases of this kind of land seem to be for long periods, and it is in the interests of all parties that they should be, and that reasonable security of tenure should be granted to lessees. Not to do so would inevitably seriously affect the prosperity of the country. We see no reason, therefore, especially in view of the fact that the matter does not appear to have been brought at all prominently before the learned Subordinate Judge, for altering the term which he has fixed. With regard to the actual rent and renewal fees, they are adopted from a proposal made by the respondent-Society in case its contention should not be accepted that the old terms should be repeated. Sir Alladi Krishnaswami Ayyar for the appellants has indicated that he does not wish to object to these terms in detail, as there is no sufficient material on the record to show that they are in any way unfair or unreasonable.

The result then is that the Appeals, 465 of 1943 and 61 of 1944, fail on all points and must be dismissed with the costs of the respondent-Society.

Solicitors for respondent: *King & Partridge.*

V.V.C.

APPELLATE CIVIL

*Before Mr. Justice Wadsworth and Mr. Justice
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PR. M. RAMASWAMI CHETTIAR ALIAS PERIA-
KARUPPAN CHETTIAR (PETITIONER—
THIRD DEFENDANT), APPELLANT

v.

M.PL. RM. RAMASAMI CHETTIAR (RESPONDENT-
PLAINTIFF), RESPONDENT*

*Madras Agriculturists Relief Act (IV of 1938)—Judgment-
debtor's original liability arising under deposit made by
decree-holder—Periodical settlements of account—Accrued*

* Appeal Against Order No. 726 of 1943

*interest added to principal—Interest made to run on accumu-
lated amount for next period—Interest cannot be said to
have been paid—Decree based on amount arrived at at the
last settlement of account—In scaling down the decree debt
amount mentioned, the settlement of account to be ignored
and the amount properly payable to be ascertained by apply-
ing appropriate provisions of Act.*

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The original liability which resulted in a decree arose out of deposits made by the decree-holder from time to time in the judgment-debtor's firm. There were periodical settlements of account in respect of such deposits, though at irregular intervals, the interest being added to the principal sums outstanding and made to carry interest at the stipulated rate for the next period. On a question as to the extent of relief to which the judgment-debtor, who was an agriculturist, was entitled to under the Madras Agriculturists Relief Act,

held: There was no warrant for the fiction that, in such cases, the interest can, by the mere process of being capitalized, be said to have been paid. In scaling down such decree-debts, the amounts mentioned in the deposit receipts should not be taken as the principal, but the process should be carried further back and the amount properly payable by the judgment-debtor should be ascertained after applying the appropriate provisions of the Act.

Paton v. Inland Revenue Commissioners(1) followed.

Pazhaniappa Mudaliar v. Narayana Aiyar (2) held not good law.

APPEAL against the Order of the Court of the Subordinate Judge of Sivaganga, dated 20th July 1943 and passed in Interlocutory Application No. 135 of 1943, in Original Suit No. 49 of 1935.

A. Swaminatha Ayyar and A. Sundaram Ayyar for appellant.

K. Rajah Ayyar and V. Seshadri for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by PATANJALI SASTRI J.—This appeal arises out of an application made by the appellant under section 19 of the Madras Agriculturists Relief Act, 1938, to scale down a decree obtained by the respondent.

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(1) [1938] A.C. 341

(2) (1942) 2 M.L.J. 753

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The parties are Nattukottai Chettiars carrying on business as money-lenders and bankers and there were dealings between them extending over a number of years. For amounts due in respect of such dealings the appellant's father executed two deposit-letters for Rs. 4,870-12-0 and \$ 2,735.45, respectively. The respondent brought a suit against the appellant and his father and brothers, who formed a Hindu joint family, on the said deposit-letters and obtained the decree in question against the appellant's father, who was the first defendant, personally and against the family properties of the appellant and his brothers. In execution of the decree the respondent attached a house as belonging to the family of the judgment-debtors but the appellant put forward a claim that it was his separate property, having been purchased by him for Rs. 26,000 from one Karuppan Chettiar, to whom the appellant's father had sold it as his self-acquisition. The claim was rejected by the Court executing the decree, which held that the sales put forward by the appellant were benami transactions unsupported by consideration. On appeal (Appeal Against Order No. 302 of 1940) this Court, without going into the question of benami, allowed the respondent to bring the house to sale as it was admitted by the appellant's Counsel that part of the purchase money reserved with Karuppan Chettiar for payment to certain creditors of the appellant's father including the respondent had not been paid and that the appellant's father was therefore entitled as the vendor to a charge on the property for the unpaid balance of the purchase money which the respondent would in any event be entitled to proceed against in execution of his decree. The Court said:

"In these circumstances it seems to us sufficient to say that the order of the lower Court should be set aside and that it should be declared that the decree-holder is entitled to bring the house to sale in enforcement of the vendor's lien on the house . . . in execution of this very decree."

When, however, the respondent attempted to bring the house to sale in accordance with the aforesaid order, the appellant again objected that the order was not binding on him as his Counsel had no authority to make the admissions which he made and that the right to enforce the vendor's lien was barred by limitation. This objection was overruled by the Court executing the decree and its order was upheld by this Court in appeal (Appeal Against Order No. 88 of 1942). Thereupon the appellant initiated the present proceedings seeking relief under section 19 of the Madras Agriculturists Relief Act on behalf of the joint family.

There was no dispute before us that the judgment-debtors are agriculturists within the meaning of the Act. The respondent however contended that his decree although originally a simple money decree, as a result of the order of this Court in Appeal Against Order No. 302 of 1940 aforesaid, became a liability for which a vendor's lien is provided and as such is exempted from the provisions of sections 8 and 9 of the Act by virtue of section 10 (2) (ii). The respondent also urged that the relief now sought by the appellant not having been claimed by him in the earlier execution proceedings which culminated in Appeal Against Order Nos. 302 of 1940 and 88 of 1942 respectively, it was no longer open to the appellant to claim such relief now. These contentions were overruled by the Court below and the respondent has raised them again before us in his memorandum of cross-objections. We are of opinion that there is no substance in either of these objections. The order of this Court in Appeal Against Order No. 302 of 1940 allowing the respondent to bring the house in question to sale in execution of the decree cannot possibly have the effect of converting the decree into a liability for which a charge is provided under section 55, clause IV, sub-clause (b), of the Transfer of Property Act. It was and remained a simple money decree passed against the

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judgment-debtors for moneys due under deposit-letters. The appellant's father was no doubt entitled to a vendor's charge on the house for the balance of unpaid purchase money due to him for the same to Karuppan Chetti, and this charge of the judgment-debtor was made available to the respondent by the order of this Court allowing him directly to bring the charged property to sale. But this additional facility provided for the realization of the respondent's decree could not alter the nature of the liability so as to bring it within the category exempted under section 10 (2) (ii) of the Act.

The argument based on the appellant's failure to put forward his claim to relief under section 19 of the Act in the earlier execution proceedings is equally untenable. As pointed out in *Nagappa v. Annappoorani*(1) the Court is not acting in execution in dealing with applications under section 19 of the Act, which are proceedings of "an independent nature". It is true that in the present case the Court executing the decree was the same as the Court which passed the decree, which alone has jurisdiction to grant relief under section 19. But this circumstance did not make it obligatory for the appellant to raise the question of relief in the execution proceeding. It appears, however, he referred to the point in his statement of objections filed in Execution Petition No. 86 of 1941, though he concluded by stating that he would file a separate petition under section 20 of the Act, and nothing was said about it either in the order of the executing Court or of this Court in appeal (Appeal Against Order No. 88 of 1942). But, clearly, the appellant was not bound to raise the question of relief under the Act by way of objection to the execution of the decree on peril of losing his right to such relief if he failed to do so.

1) I.L.R. [1941] Mad. 261 (F.B.)

The question next arises as to the extent of relief to which the appellant is entitled under the Act. As stated already, the parties are Nattukottai Chetti bankers and the liability in question arose out of deposits made by the respondent from time to time in the appellant's family firm. There were periodical settlements of account in respect of such deposits, though at irregular intervals, the interest being added to the principal sums outstanding and made to carry interest at the stipulated rate for the next period. Having regard to this mode of dealing the Court below held, following the decision of this Court in *Pazhaniappa Mudaliar v. Narayana Aiyar*(1), that all the interest accrued due and capitalized as aforesaid before the deposit-letters on which the decree was based must be deemed to have been paid and discharged and to be no longer "outstanding" to be scaled down under the Act. Hence the Court treated the amounts for which the receipts were passed as the principal for the purpose of applying the provisions of the Act. The appellant's learned Counsel, after attempting to distinguish the present case from the one cited above on grounds which seem to us unsubstantial, suggested that the question requires re-consideration as the decision of the English Court of Appeal in *Inland Revenue Commissioners v. Holder*(2), which was relied on and followed by this Court, was disapproved by the House of Lords in *Paton v. Inland Revenue Commissioners*(3), in so far as that decision laid down that the entering of the amount of interest as a debit at each of the half yearly or yearly rests should be deemed to be a "payment" of such interest as between the banks and their customers according to the usage governing their mode of dealing. We accept the suggestion of the learned Counsel and we do so the more readily as the decision impugned

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(1) (1942) 2 M.L.J. 753

(2) [1931] 2 K.B. 81

(3) [1938] A.C. 341

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is our own. Unfortunately, the case before the House of Lords was not then brought to our notice and we followed the high authority of the Court of Appeal in a matter of such general importance to banking interests. But the House of Lords in *Paton's* case(1) elaborately reviewed the earlier decisions in England dealing with the question and came to the conclusion that there is no warrant for the fiction that in such cases the interest can, by the mere process of being capitalized, be said to have been paid. Lord ATKIN observed:

"The question is whether when the charges are added to the existing indebtedness at the end of one half year and the whole sum brought down as a debit item at the beginning of the next half year so that interest is charged on the last half year's interest, the charges have been paid. The ordinary man would, I think, say that so far from being paid they are added to the ordinary indebtedness because they are not paid and I can see no reason why the law should say anything different.

* * * * *

It would seem that the members of the Court of Appeal in *Holder's* case(2) considered that there was a line of authority which led them to the conclusion that in these circumstances the interest must in law be deemed to have been paid. I do not think that this is the result of the cases."

The other members of the House expressed the same view. In the light of this authoritative exposition, it must be held that the decision in *Pazhaniappa Mudaliar v. Narayana Aiyar*(3) is not good law.

The result is that in scaling down the decree-debt the amounts mentioned in the deposit-receipts should not be taken as the principal but the process should be carried further back and the amount properly payable to the respondent should be ascertained after applying the appropriate provisions of the Act.

The order of the lower Court is set aside and the case is remitted for disposal in the light of this

(1) [1938] A.C. 341

(2) [1942] 2 M.L.J. 753

(3) [1931] 2 K.B. 81

judgment. Parties will pay and receive proportionate costs in that Court. The respondent will pay the costs of the appeal. The memorandum of objections is dismissed with costs.

R.

APPELLATE CRIMINAL

Before Mr. Justice Mockett

J. BECKETT AND OTHERS (ACCUSED), PETITIONERS

1944,
December 19

v.

MRS. WENDY E. NORRIS (COMPLAINANT), RESPONDENT*

*Indian Penal Code (XLV of 1860) sec. 499, exception 9—
Committee members of social club—Honest freedom of
expression—Protection under the exception even if wrong
—Written statements of accused persons—Proper con-
sideration to be given specially in cases where burden of proof
is cast on them.*

In criminal cases, as accused persons cannot give evidence on oath under the Indian law, proper consideration should be given to the written statements filed by them, specially in cases where the burden of proof is cast on them.

The committee members of a social club, even if wrong, deserve and are given the protection embodied in exception 9 to section 499 of the Indian Penal Code, without which it would be impossible for such a body to function. This is especially so when a complaint has to be issued not to a member himself about his own conduct but to a member relating to the conduct of another person. Honest freedom of expression must be preserved unless committees are always to have the threat of criminal proceedings hanging over them.

Where the respondent, who was the wife of a member of a social club and was privileged to use the club under one of its rules, preferred a complaint against the members of the committee for defaming her in a letter addressed by them to her husband,

* Criminal Revision Case No. 696 of 1944 (Criminal Revision
Petition No. 657 of 1944)

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held that as the committee had acted in good faith even if they were mistaken, and did not act without due care and attention, they were entitled to be acquitted.

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 City Magistrate of Madura, dated 23rd June 1944, and passed in Calender Case No. 144 of 1944.

C. Krishnaswami Ayyar for petitioner.

N. T. Ragunathan and *P. Govinda Menon* for Public-Prosecutor (*V. L. Ethiraj*) for the Crown.

C. R. Pattabhiraman, *C. V. Nilakantan* and *N. Kotyswara Rao* for respondent.

Cur. adv. vult.

ORDER.

MOCKETT J.

MOCKETT J.—The petitioners are the committee members of the Kodaikanal Club. They have been convicted of defaming Mrs. Norris, who, as the wife of a member, is privileged to use the club under rule IV, clause 2 of the club rules. She is not of course a member of the club. The penalty imposed by the learned Magistrate was a fine of Rs. 10 on each accused. This is a most unfortunate case in many respects. The complainant was no doubt (although dealing with her own countrymen) entitled to avail herself of the remedy by prosecution rather than by civil action in damages. The effect has been curious in a community used to, what I will describe as, the right rather than the privilege of giving evidence on oath. Although it has been of the utmost importance in this case that they should (the burden of proof being cast upon them) be able to give evidence on oath, the accused have been prohibited from doing so owing to the proceedings being in a criminal forum. I will return to this aspect of the case later.

The facts are as follows. The Kodaikanal Club has opened its door to members of the Services—Officers are honorary members—and on two nights a

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week, the dance room is thrown open to British Other Ranks of His Majesty's forces. The Other Ranks are confined to the dance room and are prohibited from using certain other rooms of the club of which the reading room is one. They are also (no doubt for good and sufficient reasons) not allowed to consume intoxicating liquors in the club. Mrs. Norris receives a number of British Other Ranks at her house "Speke" as paying guests at a small charge—and there is no doubt that she is much interested in their entertainment and welfare. On 28th October 1943, by Exhibit G, the Honorary Secretary, on behalf of the Committee, wrote to the complainant's husband Dr. Norris in Ceylon pointing out that Mrs. Norris at about 9-15 p.m. on the 23th October was in the reading room before the fire with Other Ranks. It was pointed out that the presence of Other Ranks as guests was restricted to the recreation room on Tuesdays and Fridays from 7-30 to 10-30 p.m. The letter concludes: "The Committee will be glad if you and Mrs. Norris will observe this rule in future." By Exhibit G-1, Dr. Norris acknowledged Exhibit G and apologised saying that he was in no doubt that the breach of the rule by his wife was due to inadvertence. On 10th February 1944, the alleged defamatory letter by the Honorary Secretary (Exhibit A) was sent to Dr. Norris, who was still in Ceylon. It reads as follows:—

"Dear Sirs,

On 29th October 1943 as instructed by the Committee, I wrote to you on the subject of your wife having introduced non-members (B.O.Rs.) into the club. On that occasion, the President personally spoke to your wife and explained to her the breach of the rules, which she had committed.

You replied in your letter, dated 3rd November 1943, expressing regret in the belief that your wife had acted inadvertently in ignorance of the rules.

I am now directed by the Committee to bring to your notice that on the night of Tuesday, February 1st, 1944, a member of the Committee found your wife and several R.A.F

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(B.O.Rs.) drinking in the reading room of the club—a place which they are not allowed to enter. The Committee also learns that on the afternoon of 8th February 1944, your wife was also seen in the reading room along with a B.O.R. On the same night after the dance, a servant of the club reported that your wife was with several B.O.Rs. in the reading room and she asked for them to be served with intoxicating drinks.

I am directed by the Committee to inform you that, in their opinion, the conduct of your wife is injurious to the harmony and interests of the club with reference to rule XII (2).

I am also directed to inform you that in the event of any further such breach of the rules by your wife, after you had an opportunity of communicating with her, the Committee acting under rule XII (4) will proceed to withdraw from her the privilege of using the club.

I am forwarding to you separately a copy of the rules of club and I am sending to your wife a copy of this letter.

Yours faithfully,

(Signed) _____

Hony. Secretary."

It will be seen that there are three incidents referred to—one on the 1st February, the second on the afternoon of the 8th February, and the third on the evening of the 8th February. I am not concerned with the second incident as the Magistrate has quite rightly paid no attention to it, since the Committee apologized. Apart from that, on the face of it, it is clearly not defamatory. The charge against the accused differs in one respect from the actual alleged incident. It will be seen in the letter, Exhibit A, incident No. 3 reads thus :

"On the same night after the dance, a servant of the club reported that your wife was with several B.O.Rs. in the reading room and she asked for them to be served with intoxicating drinks."

In the charge, this incident is re-produced as follows :—

"That on the same night she was with B.O.Rs. in the reading room and asked for drinks to be served to them."

The distinction may have been inadvertently made, but it is not immaterial. The Magistrate was,

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therefore, concerned with two incidents, and the case before him was put in this manner. Issues (i) and (ii) were, (i) Were the allegations defamatory *per se*? (ii) If so, were they true? and (iii) If not, were the accused protected by any one or more of the exceptions to section 499, Indian Penal Code? Presumably, the 8th and 9th exceptions were invoked. The 9th exception seems to be appropriate.

It is therefore necessary to look at the evidence. I might at this stage say that although this is a criminal revision case, I am constrained to investigate the evidence, because it appears to me that certain important aspects have been overlooked and that no proper consideration has been given to the statements of the accused themselves. This is regrettable. They are, no one doubts, honourable men who by reason of their exercising a semi-public function have found themselves haled before a criminal Court. They deserved at least as much consideration as the complainant.

[His Lordship then discussed the evidence and proceeded:]

My impression of the two incidents is this. With regard to the first, that Mrs. Norris was not having a drink of any sort in the reading room on the night of February 1st, but that Mr. Lake honestly thought that she was, and from the surrounding circumstances was quite entitled to think so. With regard to the second incident on the evening of February 8th—that the servants did see the Other Ranks either in the lounge or reading room or both: Other Ranks admittedly went into the reading room and were in the lounge for a brief time as stated by Mrs. Norris. I think the servants formed an honest opinion that the drinks were ordered for them; and here again, they were justified in forming that opinion, even if it was a wrong one. With regard to this incident, it does not appear that any complaint was made to the Secretary regarding the non-serving of drinks; and it is quite certain

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that they were not served because of the above belief of the barman.

The question then arises, were the Committee acting honestly and with due care and attention in writing to Dr. Norris on the basis that the Secretary and servants had made true report. These matters are always questions of fact in every case. I have already indicated that they were abundantly justified in doing so with regard to the incident of the night of February 1st. As to the incident of February 8th, it seems to me that following on the incident of October 1943 and the incident—a most unfortunate incident—of February 1st, 1944, there was nothing so striking about the report from a trusted servant on February 8th as to introduce the element of negligence into the conduct of the Committee when they accepted their employee's account. Is a committee precluded from believing an old and trusted servant? Had this been a civil suit, the accused would have been in a much more favourable position. They could have given evidence on oath. The plea of privilege would have been almost irresistible as there could hardly have been any element of malice. The Magistrate has negatived malice alleged only against accused 1, Mr. Beckett, rightly describing the suggestion as baseless. The definition of good faith would have been that found in the General Clauses Act:

"A thing shall be deemed to be done in good faith where it is done honestly whether it is done negligently or not."

I have accepted that the statements contained in Exhibit A are defamatory but not in the least in the manner Dr. Norris supposes. I do not attach the sinister meaning to the word "drinking" which, the evidence shows, so offended Dr. Norris. Had the expression been "having drink with" or "having drinks with," I doubt if anything would have been thought of it. I cannot believe that anybody reading that letter would ever have understood anything more than that the complaint was that Mrs. Norris had

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broken the club rules, in the first incident, by being with persons in a prohibited part of the club and, in the third incident, by endeavouring in breach of the rules to provide persons with alcohol, who were not permitted to consume it in the club. These are definite breaches of the club rules and such allegations may well be defamatory, but not very defamatory, of the persons about whom they are made. Still I do not think that the members of the Kodaikanal Club would have been very greatly shocked and distressed at hearing of this conduct on the part of one of their members as the prosecution urges. After all, what Mrs. Norris was doing, if true, was breaking the club rules in her over-hospitality to Service guests.

The question, then, is entirely one of good faith. A good deal of confusion seems to have been introduced in this case by a discussion in the lower Court, which was sought to be prolonged before me, based on the notion that Mrs. Norris is a member of the Kodaikanal Club. She is not a member. She is a person privileged to use the club by reason of her husband being a member. Rule XII refers to the infringement of rules and the penalties therefor. At the stage when Exhibit A was written, it was clearly not the intention of the Committee then to take disciplinary action provided by rule XII against Mrs. Norris, i.e., to withdraw her privilege of using the club. That they contemplated so doing, if there was any further breach of the rules is evident from the penultimate paragraph in Exhibit A. What then was the position of the Committee at the time of the writing of Exhibit A? There had been according to their information, breaches of the club discipline by a person who had no more than the privilege of using the club. Whether informally they might have approached her before posting Exhibit A is not a matter for me to decide. It so much depends on the personalities concerned. The Committee might have been wiser in first approaching Mrs. Norris informally; on the other hand, they

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might not. The member concerned was Dr. Norris and the Committee were undoubtedly entitled to address him. They had already had trouble from one lady who, having the privilege of using the club, had been reprimanded or cautioned for breaking the rules. The Committee did approach her direct and were threatened with legal proceedings for their pains. After that, the Committee were perhaps a little shy of approaching the lady privileged members, and so they wrote to the complainant's husband sending a copy of the letter to Mrs. Norris for her information, which I do not think can be criticized. It is, however, clear from the last sentence of clause 4 of rule XII that, had it been decided to withdraw the complainant's privilege, she should, under the general law for which there is abundant authority in what are known as the Club Cases, have received due notice of the inquiry and been given an opportunity to reply to the charge against her. The Committee did not decide to do that. They quite definitely decided only to issue a warning with a statement of the facts as they understood them to the member responsible, Dr. Norris. They expressly omitted the words injurious to the "character and reputation" of the complainant and confined their complaint to "harmony and interests." *Vide* rule XII, clause 2. With regard to the action of the Committee, it is remarkable that virtually no attention was paid, at any rate as far as can be derived from the judgment, to the written statements of the accused. It must be remembered it was their only method in these criminal proceedings of replying, especially in a Court where club servants were regarded as automatically unbelievable against the word of the member. I cannot but be impressed by the earnestness of the accused's written statements, especially that of Mr. Westerdale. That they acted honestly and in good faith in the sense that those expressions are ordinarily understood is beyond doubt. There have been a number of criticisms of their conduct after

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the letter was sent. Mrs. Norris complains bitterly that they would not then hear her. Here again for the reasons I have indicated above, I express no opinion about this. All I am concerned with is that the libel had been published by then, and any subsequent conduct of the Committee is relevant only to the penalty. The Committee is criticized because they apologized and withdrew with regard to the second incident but withdrew only the allegations relating to incidents 1 and 3. I express no opinion about this either, especially as I hope this unhappy affair will soon be forgotten. I think it, however, right to say this, that nothing that has emerged in this case seems to me in the least to affect the character of Mrs. Norris, nor that of any member of the Committee. To me, the most striking feature of the whole affair is an apparent lack of proportion shown by everybody in respect of the whole story. The only importance the case has is that it shows how extremely difficult it is in a social club for a committee faced with any form of disciplinary action against members or quasi-members to act with universal approval. It is for that reason that, even if wrong, committees deserve and are given that protection (embodied in exception 9) without which it would be impossible for such a body to function. This is most especially so when a complaint has to be issued not to a member himself about his own conduct but to a member relating to the conduct of another person. Honest freedom of expression must be preserved unless committees are always to have the threat of criminal proceedings hanging over them.

Having indicated that the Committee of this club acted in good faith even if they were mistaken, and did not act without due care and attention, it follows that this petition must be allowed. The accused are acquitted and the fines, if paid, will be refunded.

Solicitors for petitioners : King & Partridge.

V.V.C.

APPELLATE CIVIL—FULL BENCH

Before Sir Lionel Leach, Chief Justice, Mr. Justice Lakshmana Rao and Mr. Justice Kuppuswami Ayyar

1945,
February 18

VALI VENKATASWAMI CHETTIAR (PETITIONER),
APPELLANT

v.

RAMALINGAM, MINOR, AND FIVE OTHERS (RESPONDENTS),
RESPONDENTS *

Mortgage—Mortgage bond stipulating payment "on demand"—Money repayable at once and limitation running from date of bond—Words in vernacular, "when required by you" or "when demanded"—Mean the same unless indications in bond conveying contrary intention—Stipulation to pay interest on specified dates in each year not indicating an intention not to demand principal until the accrual of interest—Indian Limitation Act (IX of 1908), art. 116.

Where a mortgage bond provides that the mortgage money shall be payable "on demand", it becomes repayable at once and limitation starts from the date of the bond. The position is not altered when the words "when required by you" or "whenever demanded" are used in the bond. They are usually literal translations of words used in bonds written in the vernacular, the vernacular expression being intended to convey the same meaning as the English expression "on demand". There must be something more in the mortgage deed than these expressions to justify the Court in holding that the cause of action on the bond arises only when a demand has in fact been made. The stipulation in a bond for payment of interest on a specified day of each year does not indicate that the parties intend that the mortgage money cannot be demanded until the interest accrues up to that date and, therefore, in such a case the right to sue is not excluded until that date.

Case law reviewed.

APPEAL against the order of the District Court of South Arcot, dated 12th August 1943, and made in Miscellaneous Petition No. 205 of 1942 in Original Suit No. 7 of 1938.

The appeal came on for hearing in the first instance before WADSWORTH and PATANJALI SASTRI JJ.

* Appeal No. 67 of 1944

and, on behalf of the Court, PATANJALI SASTRI J. VENKATASWAMI delivered the following

RAMALINGAM

ORDER OF REFERENCE :—

This is an appeal against an order dismissing an application for a supplemental decree in a suit for sale after the mortgaged properties have been sold. The only question argued before us relates to the plea of limitation which was upheld by the Court below.

The mortgage was granted on 2nd June 1931 and the suit brought on 22nd February 1938. It was urged for the appellant that on a proper construction of the bond the mortgage money was not payable before 31st March 1932 and that, the suit having been instituted within six years from that date, the claim for a supplemental decree against the mortgagor was not barred by time. The bond provides: "I shall pay before the 31st March of each year the interest accruing on this sum of Rs. 9,000 at three-fourths per cent per mensem from this day. In default of payment of interest before the due date I shall add the balance interest due to the principal and shall pay the aggregate amount together with interest thereon at three-fourths per cent per mensem. I shall pay the principal and the outstanding interest when required by you. In default of payment as aforesaid, I agree to your proceeding against the hypotheca and against me and my other properties and recovering the amount of the principal and interest." It was argued that the stipulation for payment of interest on the 31st March every year showed that the parties contemplated that interest up to 31st March 1932 at least should have accrued due before payment of the mortgage money could be demanded and that therefore the right to sue was excluded till that date. We are unable to accept this interpretation. The stipulation, in our opinion, only means that, if the mortgage money is left outstanding till 31st March, the interest accrued due will be paid on that date, and does not imply that the money should not be called in before that date. The clause cannot be taken to control and modify the clear provision that the principal and interest should be paid when required by the mortgagee.

Even so, it is contended for the appellant, the claim is not barred by limitation as time runs only from the date of the demand for payment by the appellant which was made only in December 1937; while the respondent maintains that, there being no time fixed for payment and no option reserved to the mortgagee to call in the money or not on a default of the mortgagor, the mortgage money was payable forthwith without

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any demand, and that limitation therefore began to run from the date of the bond. The question accordingly arises whether the expression "when required by you" (*vendumbothu*) means what it says and makes demand a term of the contract or whether it should be regarded as mere technical words, the money being payable immediately without demand. We had occasion recently to consider this question in Appeal Suit No. 417 of 1941 and we held, relying on *Sawmy Rao v. Official Assignee of Madras*(1), *Seetharama Aiyer v. Muniswami Mudaliar*(2) and *Sivasubramania Pillai v. Nagappa Pillai*(3), that the expression "on demand" or words of similar import when they occur in a mortgage bond should be understood as making a demand necessary for the mortgage money to become payable, and that time ran from the date of demand. In particular, we felt ourselves bound by *Sawmy Rao v. Official Assignee of Madras*(1) which we thought and still think to be directly in point. The Court was dealing with a plea in bar under Order II, rule 2, of the Code of Civil Procedure, but the point turned on whether the principal and interest had become due when prior suit for interest alone was brought. The bond contained an independent covenant to pay interest every month besides providing that the principal and interest shall be paid "whenever demanded". No time was fixed for payment and no question arose of the mortgagee calling in the mortgage money at his option on a default of the mortgagor. It was held that demand was necessary before the mortgage money became payable and that, no demand having been made before the institution of the prior suit, Order II, rule 2, did not apply. Though the other two decisions relied on by us may be distinguishable as involving exercise of an option by the mortgagee the observations therein on the meaning of the expression "on demand" when used in mortgage deeds are quite general. It appears, however, that there are other decisions of this Court not then brought to our notice which take a different view; *Perianna Goundan v. Muthuvira Goundan*(4), *Kamalambal v. Purushotham Naidu*(5) and *Balasubramania v. Manickam*(6).

In view of this divergence of judicial opinion on the point which is one of some general importance, we refer the following question to a Full Bench:—

"Is the claim for a supplemental decree in a suit for sale barred by time where the bond provides that the mortgage-money shall be paid whenever demanded and the suit is brought

(1) (1925) I.L.R. 48 Mad. 703

(3) (1926) 25 L.W. 615

(5) (1934) 67 M.L.J. 499

(2) (1918) 37 M.L.J. 613

(4) (1897) I.L.R. 21 Mad. 139

(6) A.I.R. 1938 Mad. 429

more than six years from the date of the bond but within six years from notice of demand?"

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

ON THE REFERENCE :

T. E. Ramabhadrachari for appellant.—The relevant provisions of the Limitation Act are articles 57, 59, 75, 116 and 132. Is the starting point the same for recovering the mortgage amount under article 132 and for getting a supplemental decree after the sale of the mortgaged property? In *Kuttiassan v. Suppi*(1) the subject-matter of the suit was not one of mortgage. Even in such a case it was held that limitation ran from the date of demand. In *Perianna Goundan v. Muthuvira Goundan*(2) the mortgage deed provided that the loan was payable on demand. It was held that no demand was necessary and the starting point of limitation was the date of the bond. In *Nettakaruppa Goundan v. Kumarasami Goundan*(3) three years' time was given to the mortgagor to pay the principal amount. There was a default clause which enabled the mortgagee to call in the loan earlier on the happening of a contingency. The contingency arose but the mortgagee did not make any demand of the principal amount. He filed a suit after twelve years of the default but within twelve years of the date fixed for payment. It was held that the suit was in time because the mortgagee had to make the demand before enforcing the default clause.

[LEACH C.J.—Because it was only an option given to the mortgagee and not an obligation.]

To a similar effect are the following cases: *Karunakaran Nair v. Krishna Menon*(4), *Narna v. Ammani Amma*(5) and *Ramadh Bibi Ammal v. Kandasami Pillai*(6). In *Seetharama Aiyar v. Muniswami Mudaliar*(7) the distinction between such a clause appearing in a negotiable instrument and appearing in a mortgage was pointed out. The law merchant had construed such a clause in a negotiable instrument as meaning payable immediately but there is no warrant for such a construction when it appears in a mortgage bond. Though *Sawmy Rao v. Official Assignee of Madras*(8) was not a case in which question of limitation was involved yet the Court had to consider the meaning of such a clause for the applicability of Order II, rule 2, of the Code of Civil Procedure. But the consideration

(1) (1893) 3 M.L.J. 199

(3) (1898) I.L.R. 22 Mad. 20

(5) (1916) I.L.R. 39 Mad. 981

(7) (1918) 37 M.L.J. 613

(2) (1897) I.L.R. 21 Mad. 139

(4) (1911) I.L.R. 36 Mad. 66

(6) 1919 M.W.N. 82

(8) (1925) I.L.R. 48 Mad. 703

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is the same in both the cases. In *Sivasubramania Pillai v. Nagappa Pillai*(1) there was a stipulated period for payment and a default clause which enabled the mortgagee to call in the amount earlier. It was held that demand was necessary. The Privy Council case of *Lasa Din v. Gulab Kunwar*(2) was also a similar case. In *Kamalambal v. Purushotham Naidu*(3) it was assumed that there was no distinction in this respect between a negotiable instrument and a mortgage bond. In *Bala-subramania Chetty v. Manick Chettiar*(4) it was held that the surrounding circumstances could be looked into to find out if the words "on demand" appearing in a mortgage bond meant "forthwith" or "on the making of a demand". In the present case a mortgage bond was given in connection with a debt due on a promissory note. This circumstance pointedly supports the contention of the appellant.

The observations in *Karunakaran Nair v. Krishna Menon*(5), *Seetharama Aiyar v. Muniswami Mudaliar*(6) and *Sawmy Rao v. Official Assignee of Madras*(7) also support the contention of the appellant, while those in *Perianna Goundan v. Muthuvira Goundan*(8) are *contra*.

S. T. Srinivasagopala Chari for respondents.—Article 116 of the Limitation Act should be read with article 59. Personal remedy will be barred after six years from the due date which is the date of the mortgage bond. In *Ratnasabapathy Chettiar v. Devasigamony Pillai*(9) a Full Bench of this Court held that the article applicable in connexion with supplemental decrees was article 116 of the Limitation Act. In *T.C. Bose v. Obedur Rahman Chowdhury*(10) the case of *Perianna Goundan v. Muthuvira Goundan*(8) was considered and it was held that such a clause appearing in a mortgage bond must have also the same meaning as in a promissory note, which means, forthwith.

Cur. adv. vult.

The OPINION of the Court was delivered by LEACH C.J.—The question referred is in the following form :—

"Is the claim for a supplemental decree in a suit for sale barred by time where the bond provides that the mortgage-money shall be paid whenever demanded, and the suit is

(1) (1936) 25 L.W. 615
(2) (1934) 67 M.L.J. 499
(3) (1911) I.L.R. 36 Mad. 66
(7) (1925) I.L.R. 48 Mad. 703
(9) (1938) I.L.R. 52 Mad. 105 (F.B.)

(2) (1932) I.L.R. 7 Luck. 442 (P.C.)
(4) 1938 M.W.N. 113
(6) (1918) 27 M.L.J. 613
(8) (1897) I.L.R. 21 Mad. 139
(10) (1928) I.L.R. 6 Rang. 297

brought more than six years from the date of the bond but within six years from notice of demand?"

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LEACH C.J.

The reference arises out of an application to the District Court of South Arcot for a personal decree in a mortgage suit. The property hypothecated had been sold, but the amount realized was not sufficient to discharge the full liability. The application was opposed on the ground that the personal remedy had become time-barred and this plea was accepted. The mortgage was executed on 2nd June 1931 and the suit to enforce payment was not filed until 22nd February 1938. In the order of reference the relevant portion of the deed has been translated as follows :

"I shall pay before the 31st March of each year the interest accruing on this sum of Rs. 9,000 at three-fourths per cent per mensem from this day. In default of payment of interest before the due date, I shall add the balance interest due to the principal and shall pay the aggregate amount together with interest thereon at three-fourths per cent per mensem. I shall pay the principal and the outstanding interest when required by you. In default of payment as aforesaid, I agree to your proceeding against hypotheca and against me and my other properties and recovering the amount of the principal and interest."

The District Judge considered that there was here an agreement to repay the loan "on demand", which meant that it became repayable on the date of the deed. As more than six years had elapsed he held that the application for a personal decree had been filed out of time. The mortgagee appealed to this Court. The appeal came before WADSWORTH and PATANJALI SASTRI JJ., who had held in the unreported case of *Pattapurayi Venkatasubba Rao v. Thayi Narasappa**, that the expression "on demand" or words of similar import when used in a mortgage bond should be understood as requiring a demand to be made for repayment and that time only ran from the date of the demand. The learned Judges based their decision on *Sawmy Rao*

* Appeal No. 417 of 1941

VENKATASWAMI v. Official Assignee of Madras(1), Seetharama Aiyar v. RAMALINGAM Muniswami Mudaliar(2), and Sivasubramania Pillai LEACH C.J. v. Nagappa Pillai (3). When the present case was before them, other judgments of the Court were brought to their notice and as these revealed a conflict of opinion they have made this reference.

All the decisions of this Court which have bearing on the question have been examined in the course of the arguments addressed to us and we shall refer to them presently in the order of the date, but before doing so we think it necessary to emphasize what the Limitation Act has to say in this connection and to draw attention to the judgment of the Privy Council in *Lasa Din v. Gulab Kunwar* (4).

Article 57 fixes the period of limitation in a suit for money payable for money lent at three years from the date on which the loan is made. In a suit for money lent under an agreement that it shall be payable on demand the period is the same and time again runs from the date when the loan is made. This provision is contained in article 59. If the suit is, however, based on a contract in writing registered, the period is by virtue of article 116, six years from the date of the loan. In *Ratnasabapathy Chettiar v. Devasigamony Pillai* (5) a Full Bench of this Court held that article 116 applies to a claim based on a personal covenant to pay the balance due to the mortgagee after the sale of the mortgaged property should anything remain owing. Article 75 states that for a suit on a promissory note or bond payable in instalments, which provides that if default be made in one or more instalments the whole shall be due, the period of limitation is three years from the day when the default is made, unless the payee or obligee waives the benefit of the provision. Article 116 again extends the period to six years if the bond is registered. Article 132 provides

(1) (1935) I.L.R. 48 Mad. 708

(2) (1918) 37 M.L.J. 613

(3) (1936) 25 L.W. 615

(4) (1932) I.L.R. 7 Luck. 442 (P.C.)

(5) (1928) I.L.R. 52 Mad. 105 (F.B.)

that in a suit to enforce payment of money charged on immovable property the period is twelve years from the time when the money sued for becomes due. VENKATASWAMI v. RAMALINGAM LEACH C.J.

In *Lasa Din v. Gulab Kunwar*(1) the Judicial Committee held that under article 132 the money becomes payable only when the stipulated period has expired or a default having occurred the mortgagee has exercised his option to enforce the mortgage. In that case the principal money was payable at the end of six years, but there was a clause which empowered the mortgagee to realize before the expiration of the stipulated period the principal and interest by sale of the mortgaged property in default of payment of interest as agreed. The mortgagor defaulted in the payment of interest for the first year and it was contended for the defendants that on this default the principal money became due and therefore the suit had to be filed within twelve years from the date of default. Their Lordships rejected this argument and held that the default clause merely gave the mortgagee an option to enforce the mortgage at an earlier date. If he did not exercise the option the money secured became payable only at the end of the stipulated period.

The earliest case of this Court to which reference is necessary is *Perianna Goundan v. Muthuvira Goundan*(2). This was a suit to recover money due under a mortgage executed before the Transfer of Property Act was passed. The deed provided that the loan should be payable on demand. The suit was filed more than twelve years after the date of the deed. It was held that no demand was necessary and that the starting point of limitation was the date of the deed. Consequently the suit was time-barred by reason of article 132. The Court considered that to hold otherwise would lead to an anomaly for which there was no justification. If it was intended that money lent on the

(1) (1932) I.L.R. 7 Luck. 442 (P.C.)

(2) (1897) I.L.R. 21 Mad. 139

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security of immovable property, though payable on demand, should not be subject to the general rule as to money lent and payable on demand, the language of the third column of article 132 would have been so framed as to make this clear.

In *Nettakaruppa Goundan v. Kumarasami Goundan*(1) a mortgage bond, dated 9th October 1880, provided for payment on 9th October 1883, but it was stipulated that, if interest was not paid as agreed, the loan should be repaid with interest at an increased rate when the obligee required it. There was default in the payment of interest, but the mortgagee did not call in the loan. The suit was filed within twelve years of 9th October 1883. The Court held that it was within time. *Karunakaran Nair v. Krishna Menon*(2), *Narna v. Ammani Amma*(3) and *Ramadh Bibi Ammal v. Kandasami Pillai*(4) embody the same principle.

We now come to the earliest of the three cases on which WADSWORTH and PATANJALI SASTRI JJ. based their opinion that, where the mortgage bond makes the money payable on demand, a demand must be made in order to start limitation running. It is *Seetharama Aiyar v. Muniswami Mudaliar*(5). There a subscriber to a chit fund executed an instalment bond in favour of the proprietor of the fund. The bond contained this provision :—

"We shall severally or jointly without setting up proportionate liability pay in lump on demand the balance due with interest at one per cent per mensem from the date of default." It was held by SESHAGIRI AYYAR J., sitting alone, that this provision disclosed an intention that, if the promisee wanted to enforce his rights under the default clause by requiring the promisor to pay the whole of the amount, he must make a demand. The learned Judge considered that, except in transactions

connected with the law merchant, the words "on demand" meant that there should be a demand before a cause of action arose. We certainly do not share the view that, where the words "on demand" are used, there must be a demand except in cases with which the law merchant is concerned. The view expressed by SESHAGIRI AYYAR J. conflicts with the provisions of article 59 of the Limitation Act. There may be an agreement in writing for money lent which has got nothing to do with the law merchant. Any agreement for money lent payable on demand makes the money payable at once and time begins to run from the date of the loan. As we have indicated, this was the view accepted in cases decided by Division Benches of this Court until SESHAGIRI AYYAR J. struck this note of dissent.

The next in order of date of the other two decisions on which the learned Judges who made this reference relied when deciding *Pattaparayi Venkatasubba Rao v. Thayi Narasappa** is *Sawmy Rao v. Official Assignee of Madras*(1), which came before COUTTS TROTTER C.J. and KRISHNAN J. The question there was not one of limitation but of the application of Order II, rule 2, of the Code of Civil Procedure. A mortgage bond contained an independent personal covenant to pay interest every month besides providing for payment of principal with interest on demand. The mortgagors defaulted in paying interest and the mortgagee wrote stating that if they did not pay the amount due for interest the matter would be placed in the hands of his vakil with instructions to file a suit against them, not only for the recovery of the interest, but also for principal and any expenditure that might be incurred on this account. Notwithstanding this notice the interest was not paid and the mortgagee instituted a suit in the Court of Small Causes, Madras, to recover merely the sum of Rs. 416 which was due

(1) (1898) I.L.R. 22 Mad. 20

(2) (1911) I.L.R. 36 Mad. 83

(3) (1916) I.L.R. 39 Mad. 981

(4) 1919 M.W.N.

(5) (1918) 37 M.L.J. 613

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(1) (1925) I.L.R. 48 Mad. 703

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for interest. A decree was passed. Subsequently the mortgagee sued on his mortgage and it was contended that the suit was barred by Order II, rule 2. The Court refused to accept this contention. The mortgage bond contained these provisions :

"We and our heirs shall pay severally and jointly the said amount of rupees five thousand with interest at one per cent per mensem to you and to your heirs whenever demanded. We shall pay the interest of the said debt every month, within the fifth of that month, commencing from the 5th of the current month May. We and our heirs shall pay the principal amount, rupees five thousand (Rs. 5,000) and the interest due therefor, to you and to your heirs whenever demanded. In default of our doing so, you and your heirs shall legally proceed upon us and on our heirs and on the mortgaged properties mentioned in schedule A below and on our other properties, and shall realize the amount."

In the course of his judgment, COUTTS TROTTER C.J. said that it was clear that there was an independent covenant for payment of interest and that the principal actually became payable not on failure to pay the current monthly instalment of interest but on failure to comply with the demand to pay the principal and interest together. WADSWORTH and PATANJALI SASTRI JJ. construed this as deciding that a demand must be made before the principal became due. COUTTS TROTTER C.J. and KRISHNAN J. had not before them the question before us. It was not suggested there that the suit was time-barred and the discussion was confined to the effect of Order II, rule 2. The judgments in *Perianna Goundan v. Muthuvira Goundan*(1) and *Nettakaruppa Goundan v. Kumarasami Goundan*(2) were not referred to. Therefore we do not regard the case as an authority for the proposition that a demand must be made when the deed provides that the mortgage money shall be payable on demand. If it were to be so regarded we should feel compelled to express dissent.

(1) (1897) I.L.R. 21 Mad. 139

(2) (1898) I.L.R. 22 Mad. 20

In *Sivasubramania Pillai v. Nagappa Pillai*(1), VENKATASWAMI v. RAMALINGAM, the third case relied on by WADSWORTH and PATANJALI SASTRI JJ., there was a mortgage bond which contained these provisions :

"As I owe to you in cash the said mortgage amount of Rs. 10,000 (which is) the balance of the sale amount due to you in the matter of the purchase by me, of the said properties from you on this date, I shall pay the interest accruing thereon at the rate of one per cent per mensem from this date, on the 12th Chitrai of each year and shall pay the principal amount in cash on 24th April 1924, on which the stipulated period of two years expires. Even if there be default on any one of the due dates in respect of payment of principal or interest, compound interest will be added on the principal and interest once in 12 months at the rate of Re. 1-4-0 per cent per mensem from the date of default, irrespective of other due dates and the interest accruing and the principal will, when required by you, be paid (by me) in cash. Till the entire payment of the principal (which is) this mortgage amount and the interest, the undermentioned properties are put to remain as hypotheca."

It was held that the default clause was for the benefit of the mortgagee and that he could waive it, but the Court also held that where there was a power given to the mortgagee to claim payment of the whole amount due on the mortgage deed on the occurrence of a single default and where it was also provided that to exercise that power a demand by the mortgagee was necessary, money did not become payable until a demand was actually made. Undoubtedly the parties to a mortgage deed can agree that the principal sum shall not become payable until a demand is actually made ; but this must be clearly expressed. Whether a demand is necessary when the deed says that the money shall be payable "when required" is another matter.

It remains to mention two other judgments of this Court, *Kamalambal v. Purushotham Naidu*(2) and *Balasubramania Chetty v. Manicka Chettiar*(3). In the

(1) (1926) 25 L.W. 615

(2) (1934) 67 M.L.J. 499

(3) 1938 M.W.N. 113

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former of these cases, it was held that where a mortgage bond is payable on demand, the period of limitation begins to run from the date of the execution of the bond. In the latter case it was held that the words "on demand" ordinarily mean forthwith.

Without hesitation we accept as being correct the decisions of this Court which say that when a mortgage bond provides that the mortgage money shall be payable on demand it becomes repayable at once and limitation starts from the date of the bond. The question then is whether the position is altered when the words used are "when required by you" or "whenever demanded". In our judgment such expressions mean "on demand". They are usually literal translations of words used in bonds written in the vernacular, the vernacular expression being intended to convey the same meaning as the English expression "on demand". We consider that there must be something more in a mortgage deed than this to justify the Court in holding that the cause of action on the bond only arises when a demand has in fact been made. To construe the words "when required by you" as meaning something more than "on demand" would in our judgment be putting a forced construction on the words and would run counter to the intention of the Legislature when it inserted article 59 in the Limitation Act.

When the present case was before WADSWORTH and PATANJALI SASTRI JJ. it was argued that the stipulation for payment of interest on the 31st March of every year indicated that the parties intended that the mortgage money could not be demanded until interest had accrued up to 31st March 1932 and therefore the right to sue was excluded until that date. The learned Judges were unable to accept this interpretation and held that the provision merely meant that if the mortgage money was left outstanding till 31st March 1932 the interest accrued

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would be paid on that date. The stipulation did not imply that the money should not be called in before the date, and that the clause could not be taken to control or modify the clear provision that the principal and interest should be paid when required by the mortgagee. That being the case the contention that time here would run only when a demand was made rests entirely on the use of the words "when required by you" in the next sentence. It follows from what we have said that the bond was in effect one payable on demand and that a demand was not necessary to commence time running. We answer the reference in this sense.

The costs of the reference will be made costs in the appeal.

[The appeal then came on for hearing after the expression of the above opinion of the Full Bench and the Court (WADSWORTH and PATANJALI SASTRI JJ.) delivered the following

JUDGMENT :—

In view of the decision of the Full Bench, it must be held that the application for a personal decree was barred by limitation. The appeal is therefore dismissed with costs of respondents 1 to 4 including costs of the reference to the Full Bench. Advocate's fee Rs. 500 (to include the hearing before the Full Bench.)]

G.R.

INCOME-TAX REFERENCE

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

1945,
January 5

THE OFFICIAL RECEIVER OF RAMNAD AT
MADURA, PETITIONER

v.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
RESPONDENT *

Indian Income-tax Act (XI of 1922), sec. 66 (3)—Income-tax Appellate Tribunal Rules, r. 14—Application for reference to High Court presented on last day of limitation at Madras office of the Tribunal—Application returned—Application then sent by post to Bombay office—Rejection of application as out of time—Subsequent application to High Court under sec. 66 (3)—Not maintainable.

After the dismissal of his appeal by the Income-tax Appellate Tribunal, an assessee presented an application for reference to the High Court under section 66 (1) of the Indian Income-tax Act at the Madras office of the Tribunal on the last day of limitation prescribed under the section. The Madras office refused to receive the application as the rules did not provide for its presentation to the Tribunal itself. The assessee then posted it to the Registrar of the Tribunal at Bombay where it was received out of time. The Tribunal refused to make the reference because the period of limitation had expired and it had no power to extend the period. The assessee thereupon applied to the High Court under section 66 (3) of the Act for an order directing the Tribunal to treat the application as having been made in time.

Held:—The decision of the Tribunal was right and no order could be passed under section 66 (3). The Court can act under the section only if it is not satisfied of the correctness of the Tribunal's decision. Rule 14 of the Income-tax Appellate Tribunal Rules is mandatory and the Tribunal can entertain an application for reference only if it is filed in accordance with the provisions of that rule.

PETITION praying that in the circumstances stated therein the High Court may be pleased to require

* Civil Miscellaneous Petition No. 5685 of 1944

the Appellate Tribunal, Madras Bench, to treat the application to refer the case to this High Court under section 66 (1) of the Indian Income-tax Act as made within the time allowed under sub-section 1 of section 66 of the Indian Income-tax Act.

K. Bhashyam and T. R. Srinivasan for petitioner.

C. S. Rama Rao Sahib for respondent.

The ORDER of the Court was delivered by LEACH C.J.—The petitioner is the Official Receiver of Ramnad and in that capacity represents the estate of one P. P. V. CT. Chidambaram Chettiar. For the year 1941–42 the petitioner was assessed to income-tax on the income of the estate. The petitioner challenged the correctness of the assessment and appealed, first to the Assistant Commissioner of Income-tax and then to the Income-tax Appellate Tribunal, Madras, in each case unsuccessfully. The order of the Appellate Tribunal dismissing his appeal was received by the petitioner on 12th May 1944. He was of the opinion that the question involved was one which justified a reference to the High Court under section 66 (1) of the Income-tax Act, but before taking steps in this direction he desired to have the sanction of the Subordinate Judge of Devakottai. Sanction was obtained and the petition was presented at the office of the Appellate Tribunal in Madras on 11th July 1944, the last day of the period of limitation. Section 66 (1) provides a period of sixty days for such an application.

Rule 14 of the Appellate Tribunal Rules requires an appeal to be presented in person or by a representative to the Registrar at Bombay or to some person authorized in that behalf by the Registrar, but adds that an appeal which is received in the office of the Registrar by post within the prescribed period of limitation shall be deemed to have been validly presented. Rule 14 is in Part IV of the Rules. Rule 45 says that, subject to the provisions of Part VI, the

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provisions of Parts III and IV shall apply to the presentation, notices and hearing of an application for reference as if it were an appeal. There is no provision in the rules for the presentation of an appeal or an application for reference to the Tribunal itself. In these circumstances the Madras office of the Appellate Tribunal refused to receive the application presented on 11th July 1944 with the result that the petitioner posted it to the Registrar at Bombay where it was received out of time. The Tribunal refused to make the reference because the period of limitation had expired and it had no power to extend the period. The petitioner has now applied to this Court under section 66 (3) for an order directing the Appellate Tribunal to treat the application as having been made in time.

Sub-section 3 of section 66 states that, if on an application being made under sub-section 1 the Appellate Tribunal rejects it on the ground that it is time-barred, the assessee or the Commissioner, as the case may be, may, within two months from the date on which he is served with notice of the rejection, apply to the High Court, and the High Court, if it is not satisfied of the correctness of the Appellate Tribunal's decision, may require the Appellate Tribunal to treat the application as made within the time allowed under sub-section 1. Therefore the Court can only act under sub-section 3 if it is not satisfied of the correctness of the Appellate Tribunal's decision. If it is satisfied that the decision is correct, no order can be passed. Undoubtedly the order of the Appellate Tribunal was correct. Rule 14 is mandatory and the application for a reference by the Appellate Tribunal could only be filed in accordance with the rule. The position may be a hard one for the petitioner, but the rules must be interpreted according to the language used therein. The petitioner would appear to have

had ample time in which to make the application, but whether he had or not makes no difference to the position.

The application is dismissed. We make no order as to costs.

N.S.

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INCOME-TAX REFERENCE

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

A. CHOCKALINGAM CHETTIAR, KARAIKUDI,
APPLICANT

1945,
January 12

v.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
RESPONDENT *

*Indian Income-tax Act (XI of 1922), as amended by Income-tax
Amendment Act (VII of 1939), sec. 2 (1) (a)—“Agricultural
income”, meaning of—Income from agricultural land in
Burma not within section.*

Income from agricultural land in Burma is not covered by the definition of “agricultural income” in section 2 (1) (a) of the Indian Income-tax Act, 1922, and is not exempt from assessment to income-tax. “Agricultural income” in the section means only agricultural income arising in British India. Officers of the Crown in Burma are not officers of the Crown within the meaning of the section.

CASES referred to the High Court by the Income-tax Appellate Tribunal, Calcutta Bench, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act (VII of 1939) in Applications, No. 66, R.A. Nos. 16 and 15, Madras, 1943-44.

S. Panchapagesa Sastri and K. S. Rajagopalachari for applicant.—Income from agricultural land in Burma is agricultural income as defined in section 2 (1) (a) of the Indian Income-tax Act. The land is subject to a local rate

* Cases Referred Nos. 19 and 20 of 1944

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which is collected by the officers of the Crown in Burma. Officers of the Crown in Burma are officers of the Crown within the meaning of section 2 (1) (a), though Burma ceased to be part of British India after the enactment of the Government of India Act, 1935. The word "Crown" was substituted in the place of "Government" in the section by the Government of India (Adaptation of Indian Laws) Order, 1937, while the words "Provincial Government" and "Central Government" have been substituted in other contexts and in other Acts by that Order. "Officers of the Crown" in section 2 (1) (a) do not mean officers of the Crown in British India only. That will be introducing a limitation which is not in the section. Burma was part of British India previously and, if it was intended to exclude officers of the Crown in Burma and to take away the exemption from tax relating to agricultural income from Burma, appropriate words would have been used for the purpose in the section. Being a provision in a taxing statute, it must be construed liberally in favour of the subject.

C. S. Rama Rao Sahib for respondent was not called on to reply.

The JUDGMENT of the Court was delivered by LEACH C.J.—The Income-tax Appellate Tribunal, Calcutta Bench, has referred to this Court for answer the following question:—

"Whether the income from agricultural land in Burma is covered within the definition given in section 2 (1) (a) of the Indian Income-tax Act."

Section 2 (1) (a) reads as follows:—

"Agricultural income" means any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land-revenue in British India or subject to local rate assessed and collected by officers of the Crown as such."

The assessee says that agricultural land in Burma is subject to a local rate assessed and collected by officers of the Burma Government who are officers of the Crown. That may be the case, but we cannot accept that officers of the Crown in Burma are officers of the Crown within the meaning of the Indian Income-tax Act. Agricultural income is exempt from income-tax in British India because it pays tax in another

form to a Government in India and that tax is assessed and collected by officers of the Crown in British India. Exemption from income-tax of agricultural income can only mean exemption of agricultural income in British India.

The answer which we give to the question is that income from agricultural land in Burma is not covered by the definition given in section 2 (1) (a) of the Act.

The assessee will pay the Commissioner's costs, Rs. 250.

The same question has been referred in Case Referred No. 19 of 1944 and consequently the same answer will be given. There will be no order as to costs here.

N.S.

APPELLATE CIVIL

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

KONJETI KOTAYYA (DEFENDANT), APPELLANT

v.

KONJETI ANNAPURNAMMA (PLAINTIFF),
RESPONDENT *

1945,
January 2

*Hindu Women's Rights to Property Act (XVIII of 1937)—
No right conferred by Act on widow of coparcener in lease
of agricultural land obtained by his joint family—Govern-
ment of India Act, 1935, Schedule VII, List II, entry 21,
and List III, entries 7, 8 and 10.*

The Central Legislature has no power to legislate with regard to succession to agricultural land in the Governors' Provinces. Agricultural land is exclusively a provincial subject. No distinction can be drawn in this respect between corporeal and incorporeal rights in agricultural land. The Hindu Women's Rights to Property Act, 1937, therefore, does not confer upon the widow of a deceased Hindu coparcener any interest in a lease of agricultural land obtained by the joint family consisting of himself and his father.

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In re The Hindu Women's Rights to Property Act, 1937, and the Hindu Women's Rights to Property (Amendment) Act, 1938; and In re a special reference under section 213 of the Government of India Act, 1935(1), Megh Raj v. Allah Rakhia; Megh Raj v. Bahadur(2) and Khantamayee v. Rukmini(3) referred to.

APPEAL against the decree of the Court of the Subordinate Judge of Guntur in Appeal Suit No. 122 of 1941 (Appeal Suit No. 12 of 1941, District Court, Guntur) preferred against the decree of the Court of the District Munsif of Gurzala in Original Suit No. 79 of 1939.

Ch. Raghava Rao and G. C. V. Subba Rao for appellant.

M. S. Ramachandra Rao and D. R. Krishna Rao for respondent.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—The respondent was married to the appellant's son, Konjeti Narayana, who died on 17th March 1939. The father was joint with his son and they were the only coparceners. On third April 1939 the respondent filed a suit in the Court of the District Munsif of Gurzala for a partition of the family estate. She based her claim on the rights conferred upon her by the Hindu Women's Rights to Property Act, 1937. An asset of the family consisted of a lease of 11.13 acres of agricultural land for a period of twenty years, commencing from 3rd March 1934. One of the questions raised in the suit was whether the plaintiff was entitled to a half interest in this lease. The defendant contended that the Indian Legislature had no power to legislate with regard to agricultural land and therefore the Act could not be read as conferring upon the plaintiff an interest in the lease. At the time of the trial, the Federal Court had not given its decision in *In re The*

(1) [1941] F.C.R. 12

(2) [1942] F.C.R. 53

(3) (1944) 48 C.W.N. 789

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Hindu Women's Rights to Property Act, 1937, and the Hindu Women's Rights to Property (Amendment) Act, 1938; and In re a special reference under section 213 of the Government of India Act, 1935(1). In that reference the Federal Court held that these Acts did not operate to regulate succession to agricultural land in the Governors' Provinces, but operated to regulate devolution by survivorship of property other than agricultural land. The District Munsif held that the Act was *intra vires* the Central Legislature and consequently the plaintiff was entitled to a half share in the lease as well as to a half share in all the other properties of the joint family. The defendant appealed to the Subordinate Judge of Guntur. By that time the Federal Court had delivered its judgment in the case referred to. The Subordinate Judge held, however, that the judgment did not affect the right of the plaintiff to a half share in the lease. The lessor was indebted to the family in the sum of Rs. 400. He was not able to repay the amount, but in satisfaction of the debt he granted to the joint family the right to occupy and enjoy the 11.13 acres of land for a period of twenty years. In these circumstances, the Subordinate Judge regarded the lease as representing a debt due to the family and on this footing dismissed the appeal except as regards one item. The defendant has now appealed to this Court.

Before the Subordinate Judge it was suggested that the interest created on 3rd March 1934 was more in the nature of a mortgage; but this is not the real position. The interest created was undoubtedly that of a lessee, the consideration for the lease being the Rs. 400 which the lessor owed to the family; and we shall deal with the appeal on this basis, although in passing we may say that the same considerations would appear to arise even if the document constituted a mortgage and not a lease.

(1) [1941] F.C.R. 12

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Entry 21 of the Provincial Legislative List of the Government of India Act, 1935, confers upon the Provincial Legislatures of the Governors' Provinces the right to legislate with regard to :

"Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents ; transfer, alienation and devolution of agricultural land ; land improvement and agricultural loans ; colonization ; Court of Wards ; encumbered and attached estates ; treasure trove."

In the Concurrent Legislative List there are these relevant entries :

Entry 7 : " Wills, intestacy, and succession, save as regards agricultural land."

Entry 8 : " Transfer of property other than agricultural land ; registration of deeds and documents."

Entry 10 : " Contracts, including partnership, agency, contracts of carriage, and other special forms of contract, but not including contracts relating to agricultural land."

The Federal Court held that in this state of affairs the Central Legislature had no power to legislate with regard to succession to agricultural land in the Governors' Provinces. Agricultural land was exclusively a provincial subject. The question then is whether any distinction can be drawn between corporeal and incorporeal rights in agricultural land. In our judgment there cannot, and if any support for this opinion is needed we think that it is to be found in the following passage from the judgment of the Federal Court in *Megh Raj v. Allah Rakhia ; Megh Raj v. Bahadur*(1) :

"The expression ' agricultural land ' has not been defined in the Constitution Act. It must accordingly be understood in the sense which it ordinarily bears in the English language. In the judgment of the High Court, the definition of ' land ' in the English Interpretation Act, 1889, has been quoted. It is unnecessary to refer to it here, because it was conceded before us on both sides that in the Constitution Act ' land ' comprises both corporeal and incorporeal rights and interests."

(1) [1942] F.C.R. 53

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It is true that in that case there was no contest on the question, but it is difficult to see how there could be any contest. Parliament could never have intended to give a Provincial Legislature the exclusive power of legislating with regard to corporeal rights in agricultural land and withholding from it the power of legislating with regard to incorporeal rights in such property. It follows that in our judgment the Hindu Women's Rights to Property Act, 1937, did not confer upon the plaintiff any interest in the lease in question, because the Legislature which passed it had no power to legislate with regard to leases of agricultural land. It may be added that the Calcutta High Court expressed a similar opinion in *Khantamayee v. Rukmini*(1).

The appeal must be allowed but, as it has been confined to the matter of this lease, the rest of the decree passed by the Subordinate Judge will stand. The appellant will have his costs in this Court, and in the Courts below he will have further costs based on the value of the lease.

N.S.

APPELLATE CIVIL

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

MINOR RAMASWAMI SENNANDAR BY GUARDIAN
DANDAYUTHAPANI SENNANDAR (SECOND DEFENDANT),
APPELLANT

v.

MINOR MURUGAYYAN KATTAVETTI AND TWO
OTHERS BY NEXT FRIEND SUNDARATHAMMAL
(PLAINTIFFS), RESPONDENTS *

*Hindu Women's Rights to Property Act (XVIII of 1937).—
No right conferred by Act on widow in simple mortgage of
agricultural land executed in favour of her husband.*

The Hindu Women's Rights to Property Act, 1937, does not confer on a Hindu widow any right to or interest in a

(1) (1944) 48 C.W.N. 759

* Second Appeal No. 1816 of 1943

1945,
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simple mortgage of agricultural land executed in favour of her husband.

Case law considered.

APPEAL against the decree of the Court of the Subordinate Judge of West Tanjore in Appeal Suit No. 251 of 1942 preferred against the decree of the Court of the District Munsif of Tiruvadi in Original Suit No. 210 of 1938.

G. N. Chari for appellant.

K. S. Desikan for respondents.

LEACH C.J. The JUDGMENT of the Court was delivered by LEACH C.J.—On 14th June 1925 Kulandaivelu, the father of the first defendant, executed a mortgage of agricultural land in favour of Arumuga, the father of the plaintiff, to secure a loan of Rs. 400. The mortgage deed fixed the period of redemption at two years. Kulandaivelu settled the mortgage property on the second defendant but, of course, the settlement was subject to the rights of the mortgagee. On 21st January 1938 Arumuga died leaving a widow and three sons. The sons, as the legal representatives of their father, brought the present suit to enforce payment of the mortgage debt. They were all minors and were represented by their mother as their next friend. The second defendant pleaded that the suit was defective because the mother herself was not a plaintiff. It was said that by virtue of the Hindu Women's Rights to Property Act, 1937, she had acquired an interest in her husband's estate and therefore she should have joined in the suit. This argument prevailed in the trial Court (the Court of the District Munsif of Tiruvadi), but on appeal the Subordinate Judge of Tanjore reversed the decree of the District Munsif. The second defendant has appealed.

In *In re the Hindu Women's Rights to Property Act, 1937, and the Hindu Women's Rights to Property (Amendment) Act, 1938*; and *In re a special reference*

under Section 213 of the Government of India Act, 1935(1) the Federal Court held that the Hindu Women's Rights to Property Act did not operate to regulate succession to agricultural land in the Governors' provinces; and in *Megh Raj v. Allah Rakhia*; *Megh Raj v. Bahadur*(2) it was accepted that in the Constitution Act "land" comprises both corporeal and incorporeal rights and interests. Today in *Kottayya v. Annapurnamma* * we have held that the decision in *In re the Hindu Women's Rights to Property Act, 1937, and the Hindu Women's Rights to Property (Amendment) Act, 1938*; and *In re a special reference under Section 213 of the Government of India Act, 1935(1)* applies to a lease of agricultural land and therefore the Hindu Women's Rights to Property Act does not confer on a Hindu widow a right to such property. There is no difference in principle between a lease and a mortgage. They are both interests in land. Moreover, this Court in common with most other High Courts of India has held that a mortgage suit is a "suit for land". The learned Advocate for the appellant has suggested that the decision of the Federal Court in *In re the Hindu Women's Rights to Property Act, 1937, and the Hindu Women's Rights to Property (Amendment) Act, 1938*; and *In re a special reference under Section 213 of the Government of India Act, 1935(1)* does not apply to a simple mortgage, as is the case here, because the debt can be separated from the security. It is true that the mortgagee can give up his security and sue on his debt; but when he seeks to enforce his security, his suit is one to enforce his interest in the land. That is the answer.

The appeal is dismissed with costs.

N.S.

(1) [1941] F.C.R. 12

(2) [1942] F.C.R. 53

* See page 777 ante

APPELLATE CIVIL

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

N. P. KRISHNA AYYAR (APPELLANT), APPELLANT

v.

SUDALAIMUTHU PILLAI AND ANOTHER (RESPONDENTS),
RESPONDENTS *

*Indian Limitation Act (IX of 1908), arts. 29, 48 and 49—
Attachment of brick-kilns—Attaching creditor taking delivery
on executing security bond—Claim petition by owner—
Redelivery to owner ordered—Owner on taking redelivery
discovering removal of bricks from kilns—Suit for compen-
sation for wrongful removal of bricks filed by owner within
three years of his taking redelivery—Suit in time—Art. 49
applicable—Neither art. 29 nor art. 48 applicable.*

In a suit for rent filed by S against P, an attachment before judgment of two brick kilns was made. As it was not possible to remove the kilns, the amin left them in the custody of S and his friend on their executing a security bond. K claimed that the kilns belonged to him and applied under Order XXI, rule 58, of the Code of Civil Procedure, objecting to the attachment. Pending the disposal of that application he applied also for delivery of the kilns to him. The attachment was cancelled on 25th January 1936 and delivery of the kilns was given to K on 26th January 1936. On taking delivery K discovered that all the bricks had been removed from one kiln and a quarter of the bricks from the other kiln. The suit for rent was subsequently dismissed and the claim of K was also allowed on 4th March 1936. On 25th January 1939 K filed a suit against S and his friend for compensation for wrongful removal of the bricks.

Held: The suit was in time. Article 49 of the Indian Limitation Act applied and, as the suit was filed within three years from 26th January 1936 when the wrongful removal must have taken place, it was not barred by limitation. Neither article 29 nor article 48 was applicable to the case.

APPEAL under clause 15 of the Letters Patent against the judgment and decree of CHANDRASEKHARA AYYAR J.,

* Letters Patent Appeal No. 34 of 1944

dated 10th March 1944, and passed in Second Appeal No. 460 of 1943 preferred against the decree of the Court of the Subordinate Judge of Tinnevely in Appeal Suit No. 163 of 1942 preferred against the decree of the Court of the District Munsif of Srivaikuntam in Original Suit No. 245 of 1940.

A. Swaminatha Ayyar for appellant.

R. S. Srinivasacharya for respondents.

The JUDGMENT of the Court was delivered by LEACH C.J.—The question in this appeal is one of limitation. The appeal has been filed against the judgment of CHANDRASEKHARA AYYAR J. in a second appeal confirming the dismissal of a suit filed by the appellant in the Court of the District Munsif of Srivaikuntam. We consider that the appeal is well founded.

In the year 1935 the first defendant instituted in the Court of the District Munsif of Tinnevely Small Cause Suit No. 2391 of 1935 against one Paramuthu Kudumban for the recovery of Rs. 99 alleged to be due by way of rent. The first defendant applied for the attachment before judgment of two brick kilns which he alleged belonged to Paramuthu Kudumban. The application was granted and the attachment effected. As it was not possible to remove the kilns the amin left them in the custody of the first and second defendants on their entering into a security bond for the sum of Rs. 1,500. The bond was executed on 19th December 1935. On 17th January 1936 the plaintiff filed a petition under Order XXI, rule 58, of the Code of Civil Procedure, objecting to the attachment on the ground that the kilns belonged to him. On 25th January 1936 the plaintiff filed an interlocutory application (No. 56 of 1936) asking the Court to direct delivery of the kilns to him. He had deposited in Court the amount of the first defendant's claim. The District Munsif heard the application on the same day. He passed an order cancelling the attachment and directing the first and second defendants to deliver

LEACH C.J.

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the kilns to the plaintiff. The delivery was effected on 26th January 1936. The plaintiff then discovered that all the bricks had been removed from one kiln and a quarter of the bricks from the other kiln. On 5th February 1936 the District Munsif passed an order closing Interlocutory Application No. 56 of 1936. On 4th March 1936 he dismissed the first defendant's suit and allowed the plaintiff's petition under Order XXI, rule 58. On 16th March 1936 the plaintiff filed Execution Petition No. 370 of 1936 to enforce the security bond to the extent of Rs. 1,458, the value which he placed on the bricks which had been removed from the kilns. This application was dismissed on the ground that the plaintiff's remedy was by suit and not in execution proceedings. Thereupon he applied to this Court for revision (Civil Revision Petition No. 1209 of 1936). On 25th January 1939, while the civil revision petition was pending, the plaintiff filed the present suit. On 24th October 1939 this Court heard the application for revision. The defendants conceded that the plaintiff had a remedy by way of suit and contended that the question of their liability should be decided in the suit and not in the execution proceedings. The Court accepted the contention and left the rights of the parties to be decided in the present suit.

The suit was originally filed in the Court of the District Munsif of Tinnevely, but was transferred to the Court of the District Munsif of Srivaikuntam, who delivered judgment on 12th December 1940. The District Munsif held that the suit was maintainable and that the plaintiff had suffered loss to the extent of Rs. 703-10-0, but he considered that the plaintiff's remedy was barred by the law of limitation. In his opinion the suit fell within article 29 of the Limitation Act. The plaintiff appealed to the Subordinate Judge of Tinnevely, who agreed with the District Munsif that the suit was barred by the law of limitation. He

also held that the suit was not maintainable. It was not open to the defendants to question the maintainability of the suit as in the revision proceedings they had conceded that the plaintiff's remedy was by way of suit. This did not, of course, prevent them from raising the contention that the suit had been filed out of time. The plaintiff then appealed to this Court and the only question raised was that of limitation. The appeal was heard by CHANDRASEKHARA AYYAR J., who held that the suit was time-barred, whether the appropriate article was article 29, or 48, or 49. The learned Judge considered that the period of limitation commenced from the date of the bond, namely, 19th December 1935. Here the learned Judge erred. The suit was not on the bond. It was a suit for compensation for the wrongful removal of the bricks. If it had been a suit on the bond, the appropriate article would have been article 68, which fixes the period of limitation at three years from the date when the condition of the bond is broken, and the suit would have been in time. The date of the breaking of the bond must be taken to be 26th January 1936 when the first and second defendants failed to deliver the kilns in the same condition as they were in when they were left in their custody on 19th December 1935. Mr. Swaminatha Ayyar, on behalf of the appellant, has frankly conceded that the suit is not one on the bond and, therefore, nothing more need be said about article 68.

For the defendants it has been contended that the District Munsif was right in holding that article 29 applied. It is clear, however, that this article does not apply. It provides a period of limitation of one year for a suit for compensation for wrongful seizure of movable property under legal process, the year commencing from the date of the seizure. This is not a suit for compensation for wrongful seizure of movable property under legal process. As we have

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LEACH C.J. already said, it is a suit for compensation for wrongful removal of the bricks.

The only articles which can possibly apply are articles 48 and 49. Article 48 relates to a suit for specific movable property lost or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the property. The period is three years from the date when the person having the right to the possession of the property first learns in whose possession it is. The suit cannot be said to fall under this article because it is not suggested by the plaintiff that the property is now in the possession of the defendants and the claim is not made on that basis. We are of opinion, however, that the suit falls within article 49. This article relates to a suit for specific movable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the property. Here the period is three years from the date of the wrongful taking. The plaintiff says that these bricks were removed by the defendants; and if the defendants were responsible for their removal or allowed them to be removed, the suit will lie against them, and it will be in time because the wrongful removal must have taken place on 26th January 1936 and the suit was filed within three years of that date. It has, however, not been found that the defendants were responsible for the wrongful removal of the bricks. This question will have to be investigated by the trial Court. We hold that the suit is within time and consequently the appeal must be allowed.

The case will be remanded to the trial Court for a decision on the question of the defendants' responsibility for the removal of the bricks. If the trial Court holds that the defendants are liable, the District Munsif will pass a decree in favour of the plaintiff for Rs. 703-10-0, the amount which he has found to be the value of the bricks removed. The new decree

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LEACH C.J. will be appealable to the Subordinate Judge both on the question of liability and on the question of the amount of compensation. The effect of this judgment is that the decree of the Subordinate Judge on first appeal is entirely set aside.

The appellant is entitled to his costs in the Subordinate Judge's Court, before CHANDRASEKHARA AYYAR J. and in this Court. The costs of the trial Court will abide the further hearing. He is also entitled to a refund of the court-fee paid on his appeal to the Subordinate Judge's Court, the court-fee paid on the second appeal and to that paid on the Letters Patent Appeal.

N.S.

APPELLATE CIVIL

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

NARASINGI VANNACHAND FIRM, GUNTUR, AND
ANOTHER, APPELLANTS

1945,
January 29

v.

SURYADEVARA NARASAYYA AND TWO OTHERS,
RESPONDENTS *

*Code of Civil Procedure (Act V of 1908), O. XXI, rr. 91 and 92—
Scope of—Suit by auction purchaser for refund of purchase
money relating to a defined portion of property sold in
court-auction on ground of judgment-debtor not having
saleable interest therein—Maintainability—No right of
suit in absence of total failure of consideration and want of
title in entire property.*

In execution of a decree for money the decree-holder attached 4.02 acres of agricultural land as the property of the judgment-debtor and purchased it in court-auction for a sum of Rs. 2,030. He then applied to the executing Court to set aside the sale on the ground that the judgment-debtors

* Letters Patent Appeals Nos. 41 and 69 of 1944

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had title only to 1.02 acres of land. The application was dismissed and the sale was confirmed. A suit was thereafter filed by him for a refund of Rs. 1,992-9-10, being the proportionate part of the purchase money relating to the three acres to which the judgment-debtors had no title.

Held: The suit was not maintainable. Having regard to the provisions of Order XXI, rules 91 and 92, of the Code of Civil Procedure, a suit for a refund of purchase money paid in respect of a court-sale does not lie unless there is a total failure of consideration or a total want of title in the judgment-debtor in regard to the property sold.

Macha Koundan v. Kottora Koundan(1) explained.

Sundara Gopalan v. Venkatavarada Ayyangar(2) and *Nagalinga Chettiar v. Guruswami Aiyar*(3) referred to.

APPEAL under Clause 15 of the Letters Patent against the judgment and decree of the High Court, dated 13th July 1944 and passed in Second Appeal No. 650 of 1943 preferred against the decree of the Court of the Subordinate Judge, Tenali, in Appeal Suit No. 70 of 1940 (in Original Suit No. 138 of 1937, District Munsif's Court, Tenali), and appeal under clause 15 of the Letters Patent against the judgment and decree of the High Court, dated 13th July 1944 and passed in Second Appeal No. 462 of 1943 preferred against the decree of the Court of the Subordinate Judge of Tenali in Appeal Suit No. 75 of 1940 (in Original Suit No. 138 of 1937, District Munsif's Court, Tenali).

P. Somasundaram for appellants in Letters Patent Appeal No. 41 of 1944.

K. Mangachari for *V. Govindarajachari* for appellant in Letters Patent Appeal No. 69 of 1944.

V. Subrahmanyam for respondents.

LEACH C.J. The JUDGMENT of the Court was delivered by LEACH C.J.—These appeals have been filed under clause 15 of the Letters Patent from a judgment of CHANDRASEKHARA AYYAR J. They raise an interesting question of law but, in order to appreciate it, we must set out the facts.

(1) (1935) I.L.R. 59 Mad. 202 (F.B.) (2) (1893) I.L.R. 17 Mad. 228
(3) (1930) 59 M.L.J. 232

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LEACH C.J.

In Original Suit No. 109 of 1921 the fourth defendant obtained a money decree against defendants 1 to 3. In execution of this decree, the fourth defendant attached as the property of the judgment-debtors 4.02 acres of agricultural land, and on 14th July 1930 the property was sold by the Court. The plaintiff bought it for the sum of Rs. 2,030, which was paid into Court. Defendants 5 to 9 had each obtained a money decree against defendants 1 to 3 and they applied for rateable distribution of the Rs. 2,030. In the month of September 1931 the money was paid out rateably to them and the fourth defendant.

On 13th August 1930 the plaintiff had filed an application in the Court which had executed the decree for an order setting aside the sale on the ground that the judgment-debtors had title only to 1.02 acres. This application was dismissed by an order dated 7th July 1931, and the sale was confirmed by an order dated 17th August 1931. On 7th April 1937 the plaintiff filed the present suit to recover from defendants 4 to 9 proportionately the sum of Rs. 1,992-9-10, which represented the three acres to which judgment-debtors had no title. It was contended by defendants 4 to 9 that the suit was not maintainable and that in any event it was barred by the law of limitation. The District Munsif rejected these contentions and decreed the suit. On appeal the Subordinate Judge agreed, as did CHANDRASEKHARA AYYAR J. in second appeal. The appellants in Letters Patent Appeal No. 41 of 1944 are the fourth and seventh defendants. The appellant in Letters Patent Appeal No. 69 is the fifth defendant. The sixth and the ninth defendants have been made respondents; the eighth defendant is dead. CHANDRASEKHARA AYYAR J. based his decision on the question of the maintainability of the suit on *Macha Koundan v. Kottora Koundan*(1) which was decided by a Full Bench of

(1) (1935) I.L.R. 59 Mad. 202 (F.B.)

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this Court. The appellants say that the learned Judge has misunderstood the effect of that judgment. We agree that that is so, and we shall proceed to set out our reasons.

The Code of Civil Procedure of 1859 contained no provision for the recovery of the purchase money paid on a court-sale when it turned out that the judgment-debtor had no right, title, or interest in the property. When that Code was replaced by the Code of 1882, the Legislature recognized the injustice of allowing the decree-holder to retain the purchase consideration when it was shown that the judgment-debtor had no interest whatsoever in the property sold, and consequently provided that, when it was proved that there had been a total failure of consideration, the purchaser could apply to the Court to set aside the sale and direct the repayment to him of the purchase money. These provisions were contained in sections 313 and 315, and they are embodied in Order XXI, rules 91, 92 and 93, of the present Code. Sub-rule 3 of rule 92 contains a provision which was not found in the Code of 1882. It says:

"No suit to set aside an order made under this rule shall be brought by any person against whom such order is made."

Therefore, so far as the Code is concerned, there is machinery for the recovery of the purchase money when it is proved that the judgment-debtor had no saleable interest in the property.

In *Sundara Gopalan v. Venkatavarada Ayyangar*(1) MUTTUSWAMI AYYAR J. held that there could be no application for a refund unless it was established that the judgment-debtor had no right, title or interest in the property. The implied warranty of title in respect of sales by private contract could not be extended to court-sales except in so far as the extension was justified by the Code of Civil Procedure. A distinction was, however, made when there had

(1) (1893) I.L.R. 17 Mad. 228

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been fraud. This judgment was followed by the Calcutta High Court in *Sonaram Dass v. Mohiram Dass*(1) and by the Allahabad High Court in *Shanto Chandar Mukerji v. Nain Sukh*(2). In *Nagalinga Chettiar v. Guruswami Aiyar*(3) this Court applied the same principle in a case where two items of property had been sold in one lot and it was subsequently found that the judgment-debtor had no title to one of the items.

We will now turn to *Macha Koundan v. Kottora Koundan*(4). There the property was sold in execution of a mortgage decree and it was subsequently discovered that the mortgagor had no interest at all in the mortgaged property. The question was whether the auction purchaser had, in addition to the right given to him by Order XXI, rule 91, a right to file a suit to recover what he had paid. The Full Bench (BEASLEY C.J., RAMESAM and KING JJ.) held that a suit did lie. In delivering the judgment of the Court, RAMESAM J. pointed out that the Legislature had recognized a right in the auction purchaser to a refund of the money paid if the judgment-debtor's interest in the property turned out to be nothing. The right having been recognized and there being nothing in the Code to prohibit a suit for the recovery of the purchase money when there had been a total failure of consideration, a suit lay under the general law. The Court was considering a case where there had been a total failure of consideration and the judgment cannot, in our opinion, be read as laying down that there is a right of suit in a case of partial failure of consideration.

In the course of his judgment, CHANDRASEKHARA AYYAR J. observed that, once it was conceded that there was a right of suit to recover money paid under circumstances which apply here, apart from the

(1) (1900) I.L.R. 28 Cal. 235

(2) (1930) 59 M.L.J. 232

(3) (1901) I.L.R. 23 All. 355

(4) (1935) I.L.R. 59 Mad. 202 (F.B.)

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summary remedy provided by the Code of Civil Procedure, which was confined only to cases where the sale was set aside on the ground of want of any saleable interest, it was difficult to understand why the remedy should be deemed to exist only when there was a total failure of title and not when there was a partial failure. He went on to express the opinion that the judgment of the Full Bench was authority for the proposition that, where there has been a failure of consideration in respect of a part of the property sold, a suit will lie. There is nothing in the judgment of the Full Bench to support this opinion and we refuse to extend the principle there laid down to a case where the purchaser would have no remedy under the Code of Civil Procedure. It must be borne in mind that there is no warranty of title in a court-sale. If the judgment-debtor has no interest in the property sold the sale can be set aside, but the Code says that if the judgment-debtor has some interest in the property auctioned the sale must stand. It has been stressed in the course of the arguments today that where there is an injury there must be a remedy. We agree, but the answer here is that there has been no injury. What the executing Court put up for sale was a plot of agricultural land in which the judgment-debtors admittedly had an interest and their interest passed to the plaintiff.

For these reasons, we hold that the suit did not lie and must be dismissed. In the circumstances it is not necessary for us to consider the question of limitation.

The appellants will have separate sets of costs against the plaintiff-respondent in this Court, before CHANDRASEKHARA AYYAR J. and in the Subordinate Judge's Court, as there were two appeals in each of these Courts. The plaintiff-respondent will also pay one set of costs in the trial Court to be divided amongst the contesting defendants.

N.S.

APPELLATE CIVIL

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

V. KOTHANDARAMAN (PLAINTIFF), APPELLANT

v.

V. ARUMUGA NAICKER AND TWELVE OTHERS
(DEFENDANTS), RESPONDENTS *

1945,
January 19

Hindu Transfers and Bequests (City of Madras) Act (VIII of 1921), sec. 2 (2)—“Come into operation”, meaning of—Applicability of the Act to cases of vesting after its enactment though testator dying prior thereto—Bequests of residue in favour of testator's unborn grandsons, i.e., son's sons to be divided amongst them equally on their coming of age—Validity—Testator dying leaving four sons and no grandsons—Two sons dying subsequently without issue—One son dying leaving a son—Surviving son having one son—Suit by son of deceased son for half share of residue—Premature—Suit not maintainable—Indian Succession Act (XXXIX of 1925), sec. 114.

A Hindu testator died on 17th February 1910, leaving him surviving four sons A, V, R and M and two daughters. By his will dated 24th April 1909 he gave directions *inter alia* that the residue of his estate should be divided equally among his grandsons, that is, his son's sons, when they became of age, until which time the estate was to be managed by executors. He directed also that the surplus income of the estate should be invested pending the division of the residue among his grandsons. No grandson had been born to him at the time of his death. But A had a son S in May 1921, and K was born to V on 20th November 1921. Before the grandsons were born, the testator's sons and his surviving daughters executed a deed on 14th February 1921 partitioning the estate among themselves. The testator's widow was a party to that agreement which provided for her maintenance. The executors also acquiesced in it. R died without issue in 1924 and V died in 1932. K thereafter filed a suit in the High Court in or about 1942, impleading A, his son S, M and others, praying for a decree declaring that he was entitled to a half share of the estate left by the testator. M died without issue during the pendency of the suit.

* Original Side Appeal No. 22 of 1944

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v.
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Held: The suit was premature. K had no right to demand a partition of the estate between himself and S, as it had not vested in them. Before it could be divided, the possibility of other grandsons being born must be exhausted, and that could not happen during the lifetime of A.

The bequest to the unborn grandsons was valid by virtue of the provisions of the Hindu Transfers and Bequests (City of Madras) Act, 1921. The words "come into operation" in sub-section 2 of section 2 of the Act mean that the Act applies to a case of vesting after the Act though the testator died before the Act.

Sivarama Aiyar v. Gopalakrishna Chettiar(1) followed.

Case law considered.

The bequest in favour of the unborn grandsons was not rendered invalid by the circumstance that the testator did not make any provision for an intermediate estate.

Venkayamma v. Narasamma(2) explained.

Appu Bhatta v. Uma Sundari Amma(3) referred to.

APPEAL from the judgment and decree of CHANDRASEKHARA AYYAR J., dated 19th August 1943 and passed in the exercise of the ordinary original civil jurisdiction of the High Court in Civil Suit No. 112 of 1942.

W. S. Krishnasami Naidu for appellant.

S. Narayana Ayyangar, S. Daivasigamani, C. Srinivasachari, K. Sankara Sastri, S. Ramaswami Ayyangar, R. Vijayarangam, L. V. Krishnaswami Ayyar and R. Krishna Ayyar for respondents.

Cur. adv. vult.

LEACH C.J.—The JUDGMENT of the Court was delivered by LEACH C.J.—The plaintiff in the suit is the appellant. He is a grandson of one Velayudha Naicker who died on 17th February 1910. He sued on the original side of this Court for a decree declaring that he was entitled to a half share of the estate left by his grandfather under a will dated 24th April 1909. The suit was tried by CHANDRASEKHARA AYYAR J., who dismissed it mainly on the ground that the provisions of the will

on which the plaintiff relied were invalid by reason of section 114 of the Indian Succession Act which embodies the Indian rule against perpetuities.

Velayudha Naicker had four sons, Arumugam, Venkatachalam, Rajamanickam and Muthuswami. Rajamanickam died in 1924 without issue. The plaintiff is the son of Venkatachalam who died in 1932. Velayudha Naicker had also three daughters, Papathi Ammal, Janaki Ammal and Baby Ammal. Baby Ammal died in infancy and nothing further need be said with regard to her. Papathi Ammal died before the institution of the suit. Arumugam, his son Sampath, Muthuswami and Janaki Ammal were made parties to the suit, being the first, second, third and fourth defendants respectively. Muthuswami died during the pendency of the action, also without issue. There were eleven other defendants, who were made parties as alienees of properties which had formed part of the estate.

By his will Velayudha Naicker appointed his son-in-law Nagalingam Pillai, his brother Murugesam Pillai and three others, Davoo Pillai, Kesava Pillai and Muthuswami Naicker as his executors. He also nominated his daughters, Papathi Ammal and Janaki Ammal, as trustees of his will. Probate was granted by this Court on 31st August 1910 to three of the executors, namely, Nagalingam Pillai, Murugesam Pillai and Muthuswami Naicker. At the time of the testator's death all his sons were minors, but the two elder sons were married. He described his eldest son as a drunkard, a gambler and a shameless creature; and it is apparent that he feared that his other sons might develop similar bad habits, as all they were to receive under the will were small monthly allowances, and these subject to good behaviour.

In the course of his directions the testator said:

"My principal object is that my grandsons, that is, sons of my sons, should get my estate equally divided when they

(1) (1924) 47 M.L.J. 337

(2) (1916) I.L.R. 40 Mad. 540

(3) (1925) 51 M.L.J. 734

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become of age, until which time the estate must be managed by executors who must be our relations and who must always be five in number if possible."

In the penultimate paragraph of the will he said:

"My present four sons have nothing to do with my estate and, if they incur debt, they are only responsible for the same as the estate is my self-acquisition."

It is now common ground that these provisions are to be read as a bequest of the residue of his estate to all sons of his sons in equal shares.

The testator left to his daughter Papathi Ammal Rs. 6,000 to enable her to buy a suitable residence. After making certain minor provisions the testator directed that the surplus income of the estate should be invested pending the division of the residue of the estate among his grandsons. No grandson had been born to him at the time of his death, and only two have been born since, the second defendant and the plaintiff. The second defendant was born in the month of May 1921 and the plaintiff on 20th November 1921. The possibility of the birth of further grandsons cannot, however, be ruled out during the lifetime of Arumugam.

On 14th February 1921, that is, before any grandson had been born, the testator's sons and his surviving daughters, Papathi Ammal and Janaki Ammal, decided to ignore the will and executed a deed partitioning the estate among themselves. The testator's widow was a party to the agreement, which provided for her maintenance. The executors also acquiesced in the arrangement.

There were three main lines of defence, namely: (i) that the will contained no devise or bequest in favour of the grandsons; (ii) that, as there were no grandsons born at the time of the death of the testator, the Hindu Transfers and Bequests (City of Madras) Act, 1921, did not apply; and (iii) that the properties referred to in the will were not the self-acquired assets of the testator, but belonged to the joint family. The

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learned Judge held that the will should be interpreted as a bequest of the residue of the estate to grandsons who might be born, that by reason of the Hindu Transfers and Bequests (City of Madras) Act, 1921, a bequest to unborn grandsons might be made, and that the properties did not belong to the family, but to the testator in his own right. As we have already indicated, it is now accepted that the will must be read as leaving to the testator's grandsons the residue of his estate. The finding that the properties belonged to the testator is also accepted. This Court is, however, called upon to consider and decide the question of the application of the Hindu Transfers and Bequests (City of Madras) Act, 1921, and, if it is of the opinion that the bequest in favour of unborn grandsons is valid, whether the suit is premature, as the possibility of further grandsons being born cannot be ruled out. The latter question was not raised in the pleadings and was not taken in the course of the arguments in the Court below. It was raised by this Court and it has here been fully argued. We consider that this is an important question and, if the suit is not maintainable at this stage, the Court will not be required to decide whether section 114 of the Indian Succession Act has the effect of rendering the bequest to the unborn grandsons of the testator invalid.

Section 3 of the Hindu Transfers and Bequests (City of Madras) Act, 1921, states that subject to the limitations and provisions specified in the Act, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that a person for whose benefit it may have been made was not born at the date of the disposition. Sub-section 1 of section 2 applies the Act to all transfers *inter vivos* and wills made by persons governed by the Hindu law who are domiciled within the limits of the ordinary original civil jurisdiction

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of the High Court of Madras. Sub-section 2 of section 2 states that in the case of transfers *inter vivos* or wills executed before the date of the Act, its provisions shall apply to such dispositions as are intended to come into operation at a time which is subsequent to 14th February 1914. The Act received the assent of the Governor-General on 27th March 1921. The Hindu Transfers and Bequests Act, 1914, which was an Act of the Madras Legislature also provides that no disposition of property by a Hindu, by transfer *inter vivos* or by will, is invalid by reason only that a person for whose benefit it has been made was not born at the date of the disposition. That Act came into force on 14th February 1914. In *Soundararajan v. Natarajan*(1), on 16th December 1920 this Court held the Act of 1914 to be invalid so far as the City of Madras was concerned. By the Hindu Disposition of Property Act, 1916, the Central Legislature enacted similar provisions with regard to the whole of British India except the Province of Madras. The Hindu Transfers and Bequests (City of Madras) Act, 1921, was passed in order to apply the same provisions to the City of Madras.

In *Venkayamma v. Narsamma*(2) a Bench of this Court held that, if a testator intended that his disposition should take effect at a future date and that date happened to be subsequent to the passing of the Act of 1914, then by virtue of that Act the disposition would be valid. This decision was followed in *Muthuswami Ayyar v. Kalyani Ammal*(3). In *Shanmuga Devar v. Shanmuga Devar*(4) another Bench of this Court said that, if the final vesting was to take place after the passing of the Act, it would validate the disposition. In *Sivarama Aiyar v. Gopalakrishna Chettiar*(5), after a discussion of the authorities, RAMESAM J. observed that the words "come into operation"

(1) (1920) I.L.R. 44 Mad. 446

(3) (1916) I.L.R. 40 Mad. 818

(2) (1916) I.L.R. 40 Mad. 540

(4) (1919) 53 I.C. 303

(5) (1924) 47 M.L.J. 337

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applied to all cases of vesting after the Act though the testator died before the Act. Therefore there is ample authority of this Court for the contention that the will falls within the Hindu Transfers and Bequests (City of Madras) Act, 1921, there being no difference between that Act and the Hindu Transfers and Bequests Act, 1914.

For the contesting respondents it has been suggested that despite the provisions of the Hindu Transfers and Bequests (City of Madras) Act, 1921, the bequest of the residue of the estate to unborn grandsons is invalid because the testator did not make any provision for an intermediate estate; and in this connexion reference was made to the opinion expressed by SPENCER J. in *Appu Bhatta v. Uma Sundari Amma*(1) that there must be a life estate between. SPENCER J. referred to certain remarks of ABDUR RAHIM J. in *Venkayamma v. Narsamma*(2), but it appears to us that those remarks were made with reference to the general law and without regard to the effect of the Madras Act of 1914, which ABDUR RAHIM J. considered later. The question in that case was whether the testator, who interposed a life estate, intended that all the grandsons who might be born before the death of his widow should take his estate, the death of the widow being the time fixed for distribution. It was suggested that the testator really intended to benefit only the sons of his daughter who might be born at the date of his death and not those who might be born thereafter. Dealing with this suggestion, ABDUR RAHIM J. said that, if there was no intervening life estate, this argument of the appellant no doubt would have force, but the fact that the life estate intervened prevented the application of the general rule that only the persons born at the death of the testator were intended to take. Having made reference to the general rule, the learned Judge then went on to decide the effect of the Act of

(1) 1925) 51 M.L.J. 734

(2) (1916) I.L.R. 40 Mad. 540

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1914 and held that by virtue of it a bequest in favour of the unborn grandsons was good, as the disposition was under a will which was to take effect only after the date of the Act. We do not regard the judgment in that case as deciding that a life estate must be interposed before a gift to unborn persons can be valid under the Act of 1914.

The Act of 1914 and that of 1921 allow property to be left by will to a person unborn at the date of the will. The only restriction on this power so far as this case is concerned is the rule against perpetuities which is embodied in section 114 of the Succession Act. This section says that no bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong. The testator clearly intended that the residue of his estate should devolve upon his grandsons. In the meantime the estate was vested in his executors who were to hold the residue of it until all his unborn grandsons became of age, when there was to be an equal division among them. We consider that the Act of 1921 makes this provision valid.

We will now turn to the question whether the suit is premature. There can be no doubt that the partition which took place in 1921 contravened the terms of the will, and that the plaintiff and the second defendant are not bound by the action of their respective fathers in this connexion. But, has the time arrived for the division of the residue of the estate among them as grandsons of the testator? The suit is not one for the declaration that the partition is not binding on the plaintiff, but for the division of the estate between him and the second defendant. The plaintiff has no right to demand a partition of the estate between himself and the second defendant

unless it has vested in them, which is not the case. The testator directed that it should vest when all his unborn grandsons became of age and until then it should be held by his executors. The effect of this direction is that the executors are the lawful holders of the estate until the time comes for its partition among the testator's grandsons. Before the estate can be divided, the possibility of other grandsons being born must be exhausted, and that cannot happen during the lifetime of Arumugam. The plaintiff is clearly not entitled at the moment to claim an equal division of the residue of the estate between himself and the second defendant; and, as that is his claim, the present suit cannot now be maintained. In these circumstances, we do not propose to embark upon a discussion of the effect of section 114 of the Indian Succession Act, and we dismiss the appeal on the ground that the suit is premature.

The contesting respondents are entitled to their costs of the appeal. The appeal was filed in *forma pauperis* and the appellant must pay the court-fee to Government.

N.S.

APPELLATE CIVIL.

Before Mr. Justice Wadsworth and Mr. Justice
Patanjali Sastri

MATTAPALLI RAJU AND FOUR OTHERS (DEFENDANTS 1
TO 4 AND 6), APPELLANTS

v.

CHALLA VENKATA RAGHAVAYYA AND SIX OTHERS
(PLAINTIFF AND DEFENDANTS 3 TO 8), RESPONDENTS *

Code of Civil Procedure (Act V of 1908), O. XXIII, r. 1 (3)—
Suit for redemption of mortgage—Abandonment of claim—
Dismissal of suit—Subsequent suit for same purpose under

* Appeals Nos. 256 of 1942 and 174 of 1943

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Transfer of Property Act (IV of 1882), sec. 60, incompetent—Mortgage—Suit by mortgagee for possession of mortgaged properties in terms of mortgage—No right in mortgagor or any person claiming through him to redeem mortgage.

Section 60 of the Transfer of Property Act does not override the provisions of Order XXIII, r. 1, sub-rule 3, of the Code of Civil Procedure. Consequently, a mortgagor cannot file a second suit for redemption under that section, when a prior suit filed by him for the said purpose has been dismissed under Order XXIII, r. 1, sub-rule 3, in consequence of the abandonment of his claim in the suit.

Raghunath Singh v. Haneraj Kunwar(1) distinguished.

Held further: In a suit by a mortgagee to recover possession of the mortgaged properties in accordance with the terms of the mortgage neither the mortgagor nor a person claiming through him can claim to redeem the properties.

Hari Ram Shah v. Mahin Shah(2) followed.

APPEALS against the decrees of the Court of the Subordinate Judge of Cocanada in Original Suits Nos. 11 of 1938 and 54 of 1926 respectively.

V. Viyyanna for appellants.

V. Govindarajachari for Vepa P. Sarathi and K. Mangachari for respondents.

Cur. adv. vult.

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The JUDGMENT of the Court was delivered by PATANJALI SASTRI J.—These appeals have been brought from decrees passed by the Court of the Subordinate Judge of Cocanada in two suits, one for redemption and the other for ejectment. The suits were tried and decided separately but the appeals have been heard together as they arise out of the same mortgages and lease. As the parties are differently arrayed in the suits, it will be convenient to refer to them as the mortgagor, the mortgagees and the lessees.

On 2nd January 1914 the mortgagor acting for himself and as the guardian of his undivided minor son granted a mortgage of 51.20 acres of inam lands in Veeravaram, East Godavari District (hereinafter

called the suit lands), along with certain other lands to secure a sum of Rs. 30,000 lent by the mortgagees. The mortgage was non-possessory in respect of the suit lands and possessory in respect of the other lands to which no further reference need be made as they were sold with the consent of the mortgagees to satisfy the debt in part. On 27th November 1915 he executed another mortgage with possession of the suit lands for Rs. 4,000, but as the lands were in the occupation of the lessees under a lease for fifteen years from fasli 1320 to fasli 1334 (1910-11 to 1924-25) at an annual rent of Rs. 1,000, the mortgagees were to receive the rents from the lessees and to take possession of the lands on the expiry of the lease. There was a further mortgage on 31st July 1916 of the suit lands with two additional properties, one of which called the Chatram Peradu land with a house thereon was also placed in the possession of the mortgagees. This bond which was also for Rs. 4,000 provided, *inter alia*, that on the expiry of the lease at the end of fasli 1334 (30th June 1925) the mortgagees should take the suit lands on cowle for an annual rent of Rs. 4,000 which, after the payment of revenue and taxes payable in respect of the lands, should be applied first in reduction of the balance due under the mortgage of 1915, next in discharge of the principal and interest of this bond and thereafter towards the interest due under the first mortgage of 1914. The mortgagees were, however, to relinquish the lands irrespective of the terms of the cowle, whenever the mortgagor paid the amounts due under all the mortgages.

As provided in the bond of 1915, the lessees paid the rents to the mortgagees till 1922 when the mortgagor issued a notice to them (the lessees) alleging that all the mortgages aforesaid had been discharged and demanding that the rent falling due thereafter should be paid to himself. Accordingly the lessees

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(1) (1934) I.L.R. 54 All. 561 (P.C.) (2) A.I.R. 1928 Lah. 668

paid the rent for the subsequent period to the mortgagor till the expiry of the lease in June 1925 when it was renewed at first for one year and then for a further period of ten years under a registered cowle, dated 23rd December 1925. In view of this repudiation of their rights, the mortgagees, after making ineffectual demands for the arrears of rent and surrender of possession, brought a suit against the lessees in 1926 to recover possession of the suit lands together with arrears of rent from 1922 till the expiry of the original lease in 1925, and mesne profits thereafter till delivery, claiming that the mortgages had not been fully discharged and that they were entitled to possession under the terms of the bonds of 1915 and 1916. The suit was dismissed on the preliminary ground that the mortgagees were not entitled to possession under the bonds but, on appeal, this Court, by judgment dated 27th April 1932, reversed the decision and remanded the suit for disposal after full trial. After a regrettable delay of nearly ten years, due for the most part to various interlocutory proceedings some of which were carried to this Court, a preliminary decree for sale was passed on 31st October 1942. From this decree the mortgagees have preferred the Appeal Suit No. 174 of 1943.

The subsequent events which have led up to the other appeal, Appeal Suit No. 256 of 1942, may now be briefly stated. As a counter-move to the mortgagees' suit to eject the lessees, the mortgagor sued in 1929 to redeem and recover possession of the mortgaged properties including the suit lands after payment of any sums that might be found due to the mortgagees. The suit did not, however, proceed to trial for, on 7th November 1932, there was a compromise between the mortgagor and the mortgagees evidenced by two documents whereby the mortgagor agreed to convey the suit lands and the two additional items included in the mortgage of 1916 to the mortgagees in discharge

of his liability under the mortgages and for an additional sum of Rs. 100 to be paid by the latter at the time of the registration of the sale deed which was to be executed within three months, and the mortgagees for their part undertook, on the execution of such deed, to convey to the mortgagor's wife, Mahalakshamma, the two additional items mortgaged in 1916 for her maintenance and residence. In pursuance of this compromise the suit was allowed to be dismissed with costs on 9th November 1932, and, it is not now disputed, the Chatram Peradu land in the possession of the mortgagees (one of the items which they had agreed to convey to the mortgagor's wife) was delivered over to the mortgagor. No registered deeds, however, were executed as provided in the compromise, nor was the sum of Rs. 100 paid to the mortgagor. It is to be noted that nothing was said in the compromise about the possession of the suit lands which continued as before in the occupation of the lessees who were not parties to the settlement, though they had also been impleaded in the suit for redemption as defendants 7 and 8. Notwithstanding the compromise it would appear that the mortgagor continued to receive from the lessees the rent reserved under the cowle for ten years granted to them on 23rd December 1925, and in 1934 he applied to be made a party defendant in the mortgagee's suit to evict the lessees, alleging that the mortgages were not fully supported by consideration and had been fully discharged by the payments made by him and by the income received by the mortgagees from the properties placed in their possession. This was obviously an attempt to resile from the compromise and to revive his claim to redeem which he abandoned in 1932 by withdrawing the suit, Original Suit No. 53 of 1929, taking advantage of his own default in not executing a sale deed as provided for in the compromise. Realising, apparently, that his claim to redeem

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the mortgages could not succeed if put forward merely as a defence to the mortgagee's suit to recover possession from the lessees, he did not press for the trial of the additional issues raised in consequence of his pleas regarding the mortgages, and by a consent order made by this Court in Civil Revision Petition No. 1406 of 1935 on 6th November 1936 the trial was confined to the issues originally framed on 11th November 1926, i.e., before he was added as a party to that suit, with the result that he practically dropped out of those proceedings though his name was not struck off the record. He then instituted the suit, Original Suit No. 11 of 1938, making substantially the same allegations and claiming redemption and recovery of possession of the suit lands, and a decree for redemption on payment of Rs. 2,655-13-0 found due on the mortgages with interest and costs was passed by the Court below on 2nd February 1942. From this decree the mortgagees have preferred the appeal, Appeal Suit No. 256 of 1942.

It may be mentioned here that the Madras Agriculturists Relief Act, 1938, having been passed during the pendency of the suit, the mortgagor, being an agriculturist within the meaning of that Act, claimed to have the mortgage debts scaled down in accordance with the provisions of that Act, and the sum found due as aforesaid was arrived at on that basis. This sum was also adopted for the purpose of the decree in the other suit, Original Suit No. 54 of 1926, which was passed subsequently on 31st October 1942.

It will be convenient to deal first with the suit for redemption as the determination of the issues arising therein will have a bearing on the question as to the proper decree to be made in the other suit. Two contentions have been raised on behalf of the mortgagees: first, that the suit is barred under Order XXIII, rule 1, of the Code of Civil Procedure, by reason of the dismissal of the previous suit, Original

Suit No. 53 of 1929, brought for the same relief and, secondly, that the mortgagor having agreed to sell to the mortgagees the remaining mortgaged properties including the suit lands in discharge of the liability under the mortgages and for an additional sum of Rs. 100 to be paid by them under the compromise of 1932, and the mortgagees having delivered back possession of the Chatram Peradu land to the mortgagor in furtherance of such agreement, the mortgagor is debarred under section 53-A of the Transfer of Property Act from claiming possession of the properties agreed to be sold, although no registered instrument of transfer has been executed in accordance with the agreement.

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On the first point, it has been stated already that in pursuance of the compromise entered into with the mortgagees, the mortgagor abandoned his claim to redeem and recover possession of the suit lands in the previous suit, Original Suit No. 53 of 1929, which was accordingly dismissed with costs without trial. Now, Order XXIII, rule 1, so far as it is material here, reads thus:

"(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

* * * * *

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule 2, he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim."

The subject-matter or the claim in the present suit is the same as in the previous suit, the mortgages sought to be redeemed as well as the properties sought to be recovered (except the Chatram Peradu land which the mortgagor had already got back in pursuance of the compromise) being the same. *Prima facie*, therefore, the rule applies and bars the present suit.

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It is, however, urged for the mortgagor that redemption actions stand on a special footing as mortgagors have a statutory right to redeem under section 60 of the Transfer of Property Act at any time after the mortgage money has become due and they can be deprived of such right only in the manner contemplated in that section, and that, therefore, Order XXIII, rule 1, cannot bar the exercise of such right until it is extinguished "by act of the parties or by a decree of a Court". Reliance is placed in support of this argument on the decisions of the Judicial Committee in *Raghunath Singh v. Hansraj Kunwar*(1) and *Sri Raja Papamma Rao v. Sri Vira Pratapa H. V. Ramachandra Razu*(2). It is true that section 60 confers upon a mortgagor a right to redeem on certain conditions

"provided that the right conferred by this section has not been extinguished by act of the parties or by decree of a Court".

But this enactment cannot have the effect of overriding other statutory provisions which may limit or bar the exercise of such right in certain circumstances. Order XXIII, rule 1, contains no saving provision in favour of suits for redemption and there is nothing in section 60 of the Transfer of Property Act to qualify the operation of that rule in such suits.

The decisions relied on do not conflict with this view. In *Raghunath Singh v. Hansraj Kunwar*(1) a decree for redemption and possession was made on payment of a certain sum on or before a certain date, but providing that, in case of default in such payment, the "case will stand dismissed". The mortgagor failed to pay and the mortgagee continued in possession of the mortgaged property. A fresh suit for redemption, brought after the execution of the previous decree became barred by limitation, was held maintainable. Their Lordships, while recognizing that the

previous decree would be *res judicata* if it involved a decision that the mortgagor's right to redeem was extinguished, proceeded to examine the effect of that decree in the light of the relevant provisions of the Transfer of Property Act; and came to the conclusion that, notwithstanding the direction that, in default of payment, the "case will stand dismissed", the old decree did not operate to extinguish the right to redeem as it was not made in conformity with the provisions of sections 92 and 93 of the Act. Their Lordships observed:

"The right to redeem is a right conferred upon the mortgagor by enactment, of which he can only be deprived by means and in manner enacted for that purpose, and strictly complied with. In the present case the only basis for the claim that the right to redeem has been extinguished is section 60; but in their Lordships' view the old decree cannot properly be construed as doing that which it does not purport to do, namely, as extinguishing the right to redeem."

This is no authority for the proposition that, when once a suit to redeem a mortgage has been withdrawn or abandoned and consequently dismissed, a fresh suit for redemption is maintainable, notwithstanding the provisions of Order XIII, rule 1, sub-rule 3; or, in other words, that section 60 of the Transfer of Property Act overrides the provisions of Order XXIII, rule 1. Their Lordships did not have to consider the effect of a withdrawal of a redemption action in view of Order XXIII, rule 1, and their decision lends no support, in our opinion, to the view that suits for redemption are not affected by the bar enacted in that provision. The learned Counsel for the mortgagor laid stress in particular on the observation:

"It is impossible to say (as may be said under English law) that the dismissal of a redemption action operates as a foreclosure, unless the justification of that statement is to be found in the language of the Act."

But the context makes it fairly clear that their Lordships were referring to dismissal for non-compliance

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(1) (1934) I.L.R. 56 All. 561 (P.C.) (2) (1936) I.L.R. 19 Mad. 249 (P.C.)

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with the directions in a decree which declares and gives effect to the mortgagor's right to redeem, and not to dismissal on grounds such as limitation, withdrawal, etc. The other decision relied on has still less bearing on the present case. In a suit to enforce a simple mortgage, the decree, instead of ordering a judicial sale in default of payment as it should have done according to the provisions of the Transfer of Property Act, directed that the plaintiff shall be put in possession of the mortgaged property "as provided in the terms of the bond", and it was held that the decree did not preclude the mortgagors from maintaining a suit for redemption as it did not purport to put an end to the relation of mortgagor and mortgagee altogether, but only made the mortgagee thereafter a mortgagee in possession.

As we hold that the respondent's suit is barred under Order XXIII, rule 1, of the Code of the Civil Procedure, it is unnecessary to consider the appellant's further contention based on section 53-A of the Transfer of Property Act.

Turning now to the other suit, various questions were raised in defence by the lessees including alleged permanent rights of occupancy but they have not been argued before us. As has been stated, the main issue in the case, viz., "Whether the plaintiffs are entitled to eject the defendants and obtain possession", (issue 2) was found in favour of the mortgagees by this Court by its judgment, dated 27th April 1932. The Court then observed :

"In their capacity as usufructuary mortgagees the plaintiffs would be entitled to recover not only the rents due on the suit lands (as per Exhibit D) but also to eject the defendants after the expiration of the term of their lease and get possession of the same for appropriating the profits thereof towards the mortgage debt. Plaintiffs would, of course, not be entitled to eject the defendants unless the mortgagor has such a right."

This reservation about the mortgagor's right to eject the lessees can have reference only to their

claim of permanent rights of occupancy, but this claim has now been negatived and, though the learned Counsel for the lessees stated he was not abandoning the point, he did not press it before us in view of the decision of this Court in *Kuppi Reddi v. Bheemanna*(1). It would therefore seem to follow that the mortgagees must have a decree for possession with arrears of rent from 1922 to 1925 and mesne profits thereafter on the footing of unlawful use and occupation of the lands. But the learned Subordinate Judge, relying upon a decision of the Privy Council in *Muhammad Sher Khan v. Raja Seth Swami Dayal*(2) and in view of the decree for redemption passed in favour of the mortgagor in the other suit, held that the defendants in this suit should be given a "chance to redeem the mortgages", and accordingly passed a decree for sale adopting the amount found due to the mortgagees in the other suit. The question is whether the decree can be supported in all the circumstances of the case.

We are of opinion that the decision of the Privy Council in *Muhammad Sher Khan v. Raja Seth Swami Dayal*(2) has no application here. That was a case where the mortgagee claiming to be entitled to possession of the mortgaged property in the events that had happened sued the mortgagor and obtained delivery of possession. The mortgagor then brought a suit for redemption but the suit was dismissed by the Courts in India. The mortgagor then preferred appeals to His Majesty in Council from both the decrees and the appeals were consolidated and heard together. Their Lordships held that the mortgagor was entitled to redeem and passed one preliminary decree for redemption in both suits observing :

"As both suits are now before the Board there will be no difficulty in passing one decree in both so framed as to give due effect to this right."

(1) (1922) 17 L.W. 712.

(2) (1921) I.L.R. 44 All. 185 (P.C.)

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They also gave effect to the mortgagee's right to possession by directing that in taking accounts the period during which the mortgagee may have been in possession under the decree in his suit for possession should be excluded. The position here is essentially different as we have now held that the mortgagor's suit for redemption must fail, and there is accordingly no question of so moulding the reliefs in both suits as to give effect to the rights of the mortgagor and the mortgagees. The learned Subordinate Judge was largely influenced by the fact that the mortgagor had already obtained a decree for redemption in the other suit, and if that decree were to stand there would be much to say in favour of the course adopted by the learned Judge. But as that decree has to be set aside there seems to be no justification for refusing to the mortgagees the reliefs against the lessees to which this Court has already held he is entitled.

Furthermore, it is to be remembered that under the consent order in Civil Revision Petition No. 1406 of 1935 the issues raised by the mortgagor after he was added as a party were withdrawn from the suit and the trial was directed to be

"confined to the issues framed on 11th November 1926 before remand by the High Court in Appeal Suit No. 470 of 1930."

That is to say, the suit had to proceed as originally brought against the lessees alone. It is true that the mortgagor was subsequently permitted by order of this Court, dated 30th January 1942, in Civil Revision Petition No. 665 of 1940 to amend his written statement by including a plea based on the Madras Agriculturists' Relief Act, 1938. Such permission however cannot have the effect of superseding the consent order which was not apparently brought to the notice of the Court. It seems to us therefore that the suit must be dealt with as one between the mortgagees and the lessees alone, the mortgagor having chosen to drop

out of the proceeding and to seek his remedies by suing for redemption. In this view the decision in *Muhammad Sher Khan v. Raja Seth Swami Dayal*(1) will have still less application to the present case. On the other hand, it has been held by the Lahore High Court in *Hari Ram Shah v. Mahin Shah*(2) that a mortgagor or persons claiming through him cannot claim to redeem in a suit by the mortgagee to recover possession in accordance with the terms of mortgage. If so, the rule must apply *a fortiori* to persons in the position of the lessees in this case.

The learned Subordinate Judge has however relied on the order of this Court, dated 29th March 1940, in Civil Revision Petition No. 1581 of 1938 as a conclusive determination of the lessee's right to redeem the mortgages in this suit. This is, in our opinion, a misapprehension of the import and effect of the order. The lessees applied to the lower Court for leave to file an additional written statement raising the plea that the mortgages in question were liable to be scaled down under the recently passed Madras Act IV of 1938 and that, if so scaled down, no debt would be left and the suit should be dismissed. The application was rejected and they preferred the Civil Revision Petition. It was contended that, by virtue of the cowle which they obtained from the mortgagor on 23rd December 1925, they, as persons claiming under him, were entitled to redeem the mortgages and therefore interested in the determination of the amount properly payable to the mortgagees. This Court accepted the contention and granted leave to file the statement. How far such a defence to the suit framed as one in ejectment could be successfully maintained was a different question which would be determined only in the suit. It could hardly have been intended on an interlocutory application of that kind to decide that question finally. In any case, the order can have

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(1) (1921) I.L.R. 44 All. 185 (P.C.)

(2) A.I.R. 1928 Lah. 668

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no more binding force than an interlocutory order which it really is, and the point is still open to the mortgagees in this appeal from the decree in the suit. (See section 105 of the Code of Civil Procedure.)

In the result, both the appeals are allowed. Original Suit No. 11 of 1938 will be dismissed. The appellants will have their costs here and in the Court below. In Original Suit No. 54 of 1926 the appellants will have a decree for possession and for arrears of rent and mesne profits. As the sums payable in respect of such arrears and profits have not been determined, an inquiry will be made by the lower Court and a decree will be passed in accordance with the result of such inquiry. The appellants will have their costs in both Courts. The memorandum of objections is dismissed with costs.

G.B.

APPELLATE CIVIL

Before Mr. Justice Byers

S. A. BALAGURUMURTHI CHETTIAR (PETITIONER),
PETITIONER

v.

O. C. MUHAMMAD ISMAIL AND TWO OTHERS
(RESPONDENTS), RESPONDENTS*

*Civil Rules of Practice and Circular Orders, rr. 197, 200—
Pendency of suit—Officer specially appointed by Court
under r. 197—Order of Court for sale of property in its
custody—Liability to be charged with poundage under r. 200.*

An order issued by a Court for the sale of property in its custody during the pendency of a suit, either by the process establishment or by an officer specially appointed under rule 197 of the Civil Rules of Practice and Circular Orders, is a process and the sale is chargeable with poundage under rule 200.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the

* Civil Revision Petition No. 1109 of 1944

Subordinate Judge of Dindigul in Interlocutory Application No. 389 of 1943 in Original Suit No. 40 of 1943 and dated 21st November 1944.

A. C. Sampath Ayyangar for petitioner.

Respondents were not represented.

JUDGMENT

BYERS J.—This revision petition under section 115 of the Code of Civil Procedure challenges the jurisdiction of the learned Subordinate Judge of Dindigul to levy poundage on the sale of property under the following circumstances.

The suit was brought to recover damages for a breach of contract by the defendants to purchase piecegoods from the plaintiff on the allegation that the defendants refused to accept delivery and pay for the goods. After the issue of the Cloth Control Order the plaintiff filed an application for the sale of the goods through the Court and for this purpose he brought them into Court. No objection was offered and a member of the local Bar was appointed to sell the property in the precincts of the Court. This was done and when the plaintiff applied to withdraw the proceeds of the sale, the learned Subordinate Judge held that poundage must first be deducted.

The levy of poundage is provided for by the rules framed by the High Court under section 20 of the Court Fees Act, and in the schedule printed at page 225 of Volume I of the second edition of the Civil Rules of Practice and Circular Orders, the following scale is provided:—

“In respect of sales, a fee by way of poundage on the purchase money calculated at one anna in the rupee on the first 350 rupees, half an anna in the rupee on any additional sum up to Rs. 1,000, and quarter anna in the rupee on any additional sum above Rs. 1,000.”

This schedule is preceded by the following rule, headed by the words “Process Fees”:

“The following schedule of fees chargeable for serving and executing processes issued by the High Court of Madras

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in its appellate jurisdiction and by all civil and revenue Courts established within the High Court's appellate jurisdiction, having been framed by the High Court under section 20 of the Court Fees Act, 1870, and confirmed by the Government of Madras and sanctioned by the Governor-General of India in Council, will come into force from the 1st day of July 1884."

Mr. Sampath Ayyangar's contention is that an order issued to an Advocate by the Court under rule 197 of the Civil Rules of Practice and Circular Orders is not a process within the meaning of the rule and that the sale held by him in obedience to the Court's directions is not a sale which attracts the operation of rule 200, under which poundage is payable. He argues that poundage is a fee levied for the remuneration of the officer conducting the sale and that it originates from the fees chargeable by a sheriff for executing warrants and conducting sales. Nazirs and Deputy Nazirs, he rightly points out, are now remunerated by a monthly salary, so the poundage is appropriated by the Crown towards the cost of maintaining the nazarat establishments entrusted with the service of process and the execution of decrees. As the Advocate appointed on this occasion under rule 197 of the Civil Rules of Practice and Circular Orders receives for his labours the fee which is payable by the plaintiff after it has been fixed by the Court in accordance with the rule, Mr. Sampath Ayyangar's contention is that the necessity for poundage in a sale of this kind no longer exists because there is no function to be performed by the nazarat and because the receiver's or Commissioner's fee has already been separately provided for. This argument ignores the concluding words in rule 197, which must be read with the final sentence of paragraph 1 of rule 200. After providing for fixing the remuneration of such a person appointed to hold the sale, the rule expressly states that:

"Such remuneration shall include all personal and travelling expenses, but not the expenses of the sale."

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At the end of rule 200, after providing for the method of paying poundage fees, the following direction is found:

"The amount deducted or paid on account of poundage shall form part of the costs and expenses of the sale."

It is evident, therefore, that any remuneration paid to a person appointed to conduct the sale is exclusive of the poundage which, under rule 200, is one of the expenses of the sale.

The next argument put forward by Mr. Sampath Ayyangar is that as Chapter IX in the Civil Rules of Practice and Circular Orders is entitled "Proceedings in execution", the rules for the levy of poundage can apply only to sales in execution of decrees. This is giving an unnecessarily narrow meaning to the word "execution", and that the Chapter does not relate solely to the execution of decrees is made clear by the wording of rule 137 which is in the following words:—

"The following rules shall apply to all proceedings in execution, as well of decrees as of orders, and in this chapter the word 'decree' includes 'order'."

Mr. Sampath Ayyangar contends that there was no order of the Court which was being executed at the time, but this ignores the fact that the Court's direction for the sale of the property pending disposal of the suit was an order passed on an application by the plaintiff. The sale was therefore an order of the Court, and the subsequent direction to the person appointed to sell the property in pursuance of its order must be held to be a proceeding in execution.

The argument that an order directing a sale of property other than in execution of a decree is not a process within the meaning of section 20 of the Court Fees Act ignores the definitions of the word "process" in Wharton's Law Lexicon and Ramanatha Ayyar's Law Lexicon of British India. It will be sufficient to quote only those appearing in the latter volume as they are almost identical with the definitions given in the former. The learned author defines the word

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"process" at some length, but the following extracts are sufficient for our present purposes to show that it is not limited to the narrow sense of a summons or warrant:—

"The term 'process' as a legal term has a very comprehensive signification. One of its definitions is that it is a writ, warrant, subpoena, or other formal writing issued by authority of law.

The word 'process' has in law a well established legal meaning in its application to the commencement of the proceedings. It is used to designate the writ or other judicial means by which a defendant is brought into Court to answer a charge, though there may afterwards be issued, in the progress of the case, interlocutory and final processes.

The term 'process' includes any and every writ, rule, order, notice or decree including any process of execution that may issue in or upon any action, suit or legal proceedings.

Judicial 'process', in its largest sense, comprehends all the acts of the Court, from the beginning of the proceeding to its end. In a narrow sense, it is the means of compelling a defendant to appear in Court, after suing out the original writ in civil and, after indictment, in criminal cases. In every sense, it is the act of the Court. Any means of acquiring jurisdiction is properly denominated process. The term is sufficiently comprehensive to include an attachment, garnishment, or execution.

All the steps taken in an execution, the seizure and the sale—are, in the natural meaning of the word, comprehended in the term 'process'. These definitions, read with the relevant rules in the Civil Rules of Practice and Circular Orders and the rules framed under section 20 of the Court Fees Act, are sufficient to show that an order issued by the Court for the sale of property in its custody during the pendency of the suit, either by the process establishment or by an officer specially appointed under rule 197 of the rules, is a process and that the sale is chargeable with poundage.

There is no error of jurisdiction and the petition is ordered to be dismissed.

V.V.O.

APPELLATE CRIMINAL

Before Mr. Justice Mockett

IN RE S. JESUDAS APPADURAI PILLAI (ACCUSED),
PETITIONER *

1945,
January 24

Indian Evidence Act (I of 1872), sec. 157—"At or about the time", meaning of—Object of section—Delayed statements not admissible?

The words "at or about the time" in section 157 of the Indian Evidence Act mean that the statement must be made at once or at least shortly after when a reasonable opportunity for making it presents itself. What is a reasonable time is a question of fact in each case. The object of the section is to admit statements made at a time when the mind of the witness is still so connected with the events as to make it probable that his description of them then would be accurate. But if time for reflection passes between the event and the subsequent statement, it not only can be of very little value but may be actually dangerous as such statements can be easily brought into being. Such delayed statements are inadmissible. The section says that the statement must be made "at or about the time" not "at any time after the event."

English and Indian 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 session of Coimbatore division, dated 4th September 1944 and passed in Criminal Appeal No. 119 of 1944 preferred against the judgment of the Court of the Subdivisional Magistrate, Coimbatore, dated 21st July 1944 and passed in Calendar Case No. 95 of 1944.

K. S. Jayarama Ayyar for T. R. Ramachandran for petitioner.

Assistant Public Prosecutor (N. Somasundaram) for the Crown.

Cur. adv. vult.

ORDER

MOCKETT J.—The petitioner who is the Tahsildar of Tiruppur taluk was convicted under section 161 of

MOCKETT J

* Criminal Revision Case No. 710 of 1944 (Criminal Revision Petition No. 670 of 1944)

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the Indian Penal Code for having received an illegal gratification of Rs. 120 from P.W. 1 for recommending him for a licence to trade in rice. He was convicted and sentenced to undergo rigorous imprisonment for two months and to pay a fine of Rs. 500. His appeal was dismissed by the learned Sessions Judge of Coimbatore. The facts are very simple. It is alleged that on the 19th May an application, Exhibit A, addressed to the Sub-Collector of Pollachi was prepared by P.W. 1. On the 20th May he went to the Taluk office with the petition and there the accused was present. P.W. 1 says that he learnt apparently from a peon that it was necessary to pay Rs. 100 if his petition was to succeed. This statement is of course hearsay, inadmissible and should not have been received in evidence. He borrowed Rs. 100 from P.W. 4 and handed Rs. 120 to the accused at his house on the 21st May, alternatively on the 23rd. The prosecution is not quite definite about this. Not having received his licence he made a complaint and then prosecution followed. P.W. 1, as the bribe giver, was of course an accomplice and as a matter of expediency his evidence should be corroborated "in material particulars implicating the accused"; *Vyasa Rao v. The King Emperor*(1). The corroboration relied on by the prosecution was: (i) that the petition was promptly dealt with. This implies that any Government servant who does his work promptly must have been bribed for the purpose—a cynical point of view which I must emphatically reject. (ii) The evidence of P.W. 4 that P.W. 1 borrowed Rs. 100 from him on the 20th May and (iii) the evidence of P.Ws. 2 and 3 described by the Magistrate as "very good corroboration." Their evidence was to the effect that at some time after the 21st May, P.W. 1 mentioned to them that he had paid this bribe. The Magistrate thinks this incident occurred "a few days

(1) (1911) 21 M.L.J. 283

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after" the payment. The learned Judge states very vaguely that it was "one day." The lower Courts both seem to have accepted as corroboration of P.W. 1's evidence the three circumstances mentioned. The most important evidence is that of P.Ws. 2 and 3. It is admissible if at all under section 157 of the Evidence Act as a statement made by P.W. 1 relating to the giving of the bribe "at or about the time" when it was given. Section 157 is a general exception to the common law rule of evidence that hearsay evidence is inadmissible. In England such statements made by witnesses are only admitted in the case of sexual offences against women and children. An "immediate complaint" made by the person assaulted can be admitted as corroborative of the complainant's credibility and as showing consistency of conduct. This is well established in *The Queen v. Lillyman*(1) and *Rex v. Osborne*(2). In such cases the complaint must be made at the first opportunity or as Stephen's Digest of the Law of Evidence, Tenth Edition, page 170, puts it "reasonably soon after the alleged offence." A consideration of the English cases with regard to what period was considered to be "reasonably soon" is instructive. In *Reg. v. Kiddle*(3) there was a delay of three to four hours. In *The Queen v. Lillyman*(1) the period is stated to be "very shortly after." In *Reg. v. Rush*(4) WRIGHT J. observed that the lapse of time between the committing of the offence and the making of the statement was important and rejected a complaint made "a day after the offence was committed." In *Reg. v. Ingrey*(5) Lord RUSSELL of KILLOWEN rejected a complaint made a few days after. The Court of Criminal Appeal in the case of *John Lee*(6) ruled that it must depend upon the circumstances of each case whether it could be said that

(1) (1896) 2 Q.B. 167
(2) [1905] 1 K.B. 551
(3) (1898) Cox's Cr. Law Cases, Vol. XIX 77
(4) (1896) 60 J.P. 777
(5) (1900) 64 J.P. 106
(6) (1911) 7 Cr. App. Rep. 31

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the complaint was made "on the first reasonable opportunity which offers itself." These words are almost identical with those used by the Court of Crown Cases Reserved in *Rex v. Osborne*(1). The wording of section 157 of the Evidence Act is to the effect that a statement must be made "at or about the time when the fact took place." There is a dearth of authority as to the meaning of "at or about the time." *Mangat Rai v. Emperor*(2) shows that proximity of time must be established. In *Emperor v. Ram Chandra Roy*(3) there was an interval of twenty hours between the event and the statement sought to be put in as evidence of corroboration. The Bench considered that this interval was too long and refused to admit this statement. Both these decisions with which I respectfully agree are based, as are the English cases, on the premise that in point of time the fact and the statement must be approximate. No Madras cases have been cited but I see no difficulty in understanding the words. I think, that "at or about the time" must mean that the statement must be made at once or at least shortly after when a reasonable opportunity for making it presents itself. The object of the section seems to me to be to admit statements made at a time when the mind of the witness is still so connected with the events as to make it probable that his description of them then would be accurate. For example, if A returns to his house and says to a friend "I have just seen B in the Mount Road" and later the question arose whether B was in Madras on that day, the statement of A to his friend might be valuable corroboration of A's evidence that he in fact did see B on that day. The more familiar example is in murder cases when a witness who has seen a murder at once tells some third party what he has seen. But if time for reflection passes between the

(1) [1905] 1 K.B. 551

(2) A.I.R. 1928 Lah. 647

(3) A.I.R. 1928 Cal. 732

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IN re
MOCKETT J.

event and the subsequent statement it not only can be of very little value but may be actually dangerous as such statements can be easily brought into being. Such delayed statements are in my opinion inadmissible. The section says that the statement must be made "at or about the time" not "at any time after the event."

The above important considerations when applying section 157 and admitting the evidence of P.Ws. 2 and 3 seem to have been wholly overlooked by the lower Courts. In the first place, it was never ascertained when they were made. The learned Judge, as already indicated, was content to say that they were made "one day." An examination of the evidence of P.W. 2 indicates that the statement was not made until the end of September, long after the event. P.W. 2 says he was examined by the Sub-Collector ten or fifteen days after he met P.W. 1. According to Exhibit C he saw the Sub-Collector on the 25th of September. The evidence relied on as corroborating P.W. 1 was unquestionably that of P.Ws. 2 and 3. I cannot suppose that either of the lower Courts would have acted on the corroboration of P.W. 4 alone who states that he lent Rs. 100 to P.W. 4, a man whose name he did not know, and who made no note of the transaction. This is specially important in view of the fact that the cross-examination of P.W. 1 showed that his character as a witness was extremely dubious. It must be further observed that the fact of P.W. 1 borrowing Rs. 100 does not implicate the accused in the absence of reliable evidence that he received Rs. 100. It is interesting to notice that the accused had a number of prosecutions similar to this launched against him in 1943, all of which ended in acquittals. He states that he has been the subject of persecution by the local Goundars who resented his activities as a Government servant during the 1942 disturbance and after. That may or may not be

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so ; but a consideration of this case shows that this conviction when examined rests entirely on the word of P.W. 1 who made no complaint until his licence was not forthcoming which may have been for good and sufficient reason. The corroboration relied on (assuming that an accomplice can corroborate himself under section 157 which I gravely doubt) was manifestly inadmissible. Section 157 cannot possibly contemplate the admission of a statement made long after the event. I am not attempting to lay down what is a reasonable time as this is a question of fact in each case. It is enough for the purposes of this case to hold that the statement of P.W. 1 to P.Ws. 2 and 3 was not made at the time of the event nor was it made at "about the time" which means within a reasonably short time after the event.

The petition is, therefore, allowed and the accused acquitted. The fine, if paid, will be refunded.

V.V.C.

APPELLATE CIVIL—FULL BENCH

Before Sir Lionel Leach, Chief Justice, Mr. Justice Lakshmana Rao and Mr. Justice Kuppuswami Ayyar

CHOWDARI ABDUL SUBHAN SAHIB (DEFENDANT),
APPELLANT

1945,
February 13

v.

KANTE RAMANNA (PLAINTIFF), RESPONDENT *

Code of Civil Procedure (Act V of 1908), Q. XXI, rr. 2 and 92—Uncertified adjustment of decree—Property subsequently sold in execution—Sale confirmed—Suit by auction purchaser for possession—Plea of such uncertified adjustment not open to judgment-debtor or any one claiming under him in defence of suit.

It is not open to a judgment-debtor or any one standing in his shoes to plead an uncertified adjustment of a decree by way of defence to a suit filed by an auction purchaser for possession of property sold in execution of the decree. An uncertified adjustment cannot be pleaded in bar of execution and under the provisions of Order XXI, rule 92, of the Code of Civil Procedure, if a sale is confirmed by the Court it confers an absolute title on the auction purchaser, whether he be the decree-holder or a stranger, provided there was title in the judgment-debtor. The fact that the decree-holder has deliberately deceived the judgment-debtor and by false statements prevented him from taking steps to have the adjustment certified is not material.

Ramayyar v. Ramayyar(1) overruled.

Lakshmanchandra Naskar v. Ramdas Mandal(2) followed.

Case law reviewed.

APPEAL under clause 15 of the Letters Patent against the judgment and decree of HAPPELL J., dated 25th February 1944 and passed in Second Appeal No. 515 of 1943 preferred to the High Court against the decree of the Court of the Subordinate Judge of Rajahmundry in Appeal Suit No. 15 of 1940 (Original Suit No. 50 of 1937, District Munsif's Court, Ramachandrapur).

V. Rangachari and K. V. Rangachari for appellant.—A purchaser of property at a sale held in execution of a decree

* Letters Patent Appeal No. 21 of 1944

(1) (1907) I.L.R. 21 Mad. 356

(2) (1929) I.L.R. 57 Cal. 403 (F.B.)

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which had previously been satisfied by payment is not entitled to maintain a suit for possession against a purchaser of that property under a private sale from the judgment-debtor. The latter purchaser can rely upon the satisfaction of the decree, though uncertified by the executing Court, as a defence to the suit. The decree-holder acted fraudulently in not bringing to the notice of the Court that the decree was satisfied. In proof of that fraud the uncertified payment can be set up in defence of the suit for possession; see *Ramayyar v. Ramayyar*(1). The decision in *Periathambi Udayan v. Vellaya Goundan*(2) holds that a judgment-debtor can maintain a suit for recovering back the amount paid by him in execution of a decree which had already been discharged under an agreement between himself and the decree-holder. *Ramayyar v. Ramayyar*(1) was not followed in *Ganapathy Ayyar v. Chenga Reddi*(3), but it was cited with approval in *Budrudeen v. Gulam Moideen*(4). The decision of the Full Bench in *Subramanyam v. Ramaswami*(5) merely holds that a payment or adjustment which is not certified within the prescribed time cannot be set up in defence to an application by a transferee decree-holder for recognition of the transfer in his favour. The provisions of Order XXI, rule 2, of the Code of Civil Procedure, apply only to proceedings in an executing Court. They do not affect the maintainability of suits or of defences to suits; see *Tegh Singh v. Amin Ohand*(6). That decision has been followed by the Madras High Court in *Kulathu Ayyar v. Vaithilinjam Ayyar*(7) which holds that a payment or adjustment, even if uncertified, can be raised by way of defence to a suit. It has been held at Madras in a number of decisions that a matter relating to execution, discharge or satisfaction of a decree can be set up as a defence to a suit for possession by a court-auction purchaser; see *Venkataramanachariar v. Meenatchisundaramaier*(8), *Thathu Naick v. Kondu Reddi*(9) and *Munishi China Dandasi v. Munishi Pedda Tatiah*(10). The Full Bench decision of the Calcutta High Court in *Lakshmanchandra Naskar v. Ramdas Mandal*(11), besides being opposed to the Madras decisions, is distinguishable on the facts. Section 47 of the Code of Civil Procedure is not a bar because both the plaintiff and the defendant in

(1) (1897) I.L.R. 21 Mad. 355

(2) (1897) I.L.R. 21 Mad. 409

(4) (1911) I.L.R. 38 Mad. 357

(6) (1889) I.L.R. 6 All. 369

(8) (1904) 19 M.L.J. 1

(10) (1920) 41 M.L.J. 261

(3) (1905) I.L.R. 29 Mad. 312

(5) (1932) I.L.R. 55 Mad. 720 (F.B.)

(7) (1927) 26 L.W. 349

(9) (1909) I.L.R. 32 Mad. 242

(11) (1929) I.L.R. 57 Cal. 403 (F.B.)

the present suit derive title from the same party, the judgment-debtor, and the dispute is one between the representatives of the same party; see *Annamalai v. Ramasami*(1). Order XXI, rule 92, of the Code of Civil Procedure, is not applicable to a case where the fraud alleged is not one in the conduct or publication of a sale but is of a different kind. The rule does not prohibit the institution of a suit in cases of fraud other than that in conducting and publishing a sale. The principle of *lis pendens* is also not applicable as the proceedings in execution after the decree has been satisfied are vitiated by fraud on the part of the decree-holder. Further, the proceeding in execution resulting in the sale in favour of the plaintiff cannot be deemed to be pending within the meaning of section 52 of the Transfer of Property Act, once the decree has been fully satisfied by payment.

C. Rama Rao for respondent.—In *Seth Nanhelal v. Umrao Singh*(2) the Privy Council has held that a payment or adjustment in discharge of a decree cannot be pleaded after third parties acquire rights so as to prejudice those rights.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by LEACH C.J.—The question in this appeal is whether an uncertified adjustment of a decree can be pleaded by way of defence to a suit for possession instituted by the purchaser of property sold in execution of the decree against the judgment-debtor or his representative. The appeal has been heard by a Full Bench as there is considerable conflict of authority.

LEACH C.J.

On 16th March 1911 one Lakshmi Narasamma, the widow of deceased member of an undivided family, obtained a decree for maintenance against the two brothers of her husband and was given a charge on the property now in suit and other properties belonging to the joint family. Some time before 1924—the record does not disclose the exact date—the decree was satisfied by a lump sum payment, but the adjustment was not certified under Order XXI, rule 2, of the Code of Civil Procedure. In 1927 in Insolvency Proceedings No. 20 of 1927 on the file of the Subordinate Judge of Rajahmundry, one of the brothers,

(1) I.L.R. [1941] Mad. 428 (F.B.) (2) (1930) 58 I.A. 50

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LACH C.J. Jogayya Sastri, was adjudicated an insolvent. In 1932 the Official Receiver sold the insolvent's share in the property in suit to one Subbarayudu, whose sons conveyed it on 19th July 1933 to the defendant. On 4th November 1935 the defendant purchased the interest of the other brother, Kameswara Rao. The property had been let to a tenant named Y. Virraju and in 1933 the defendant filed a small cause suit (No. 1071 of 1933) in the Court of the District Munsif, Cocanada, for the rent due in respect of a half share of the property and obtained a decree. After the defendant had purchased the interest of Kameswara Rao and thereby had become entitled to the whole property subject to the charge in favour of Lakshmi Narasamma, he gave notice to Virraju to vacate. Virraju denied the defendant's title and consequently the defendant filed Original Suit No. 89 of 1936 in the Court of the District Munsif of Cocanada for the ejectment of Virraju. On 15th March 1937 he was granted a decree and as a result obtained possession.

In the meantime Virraju had induced the decree-holder in the maintenance suit to proceed in execution for arrears of maintenance for three years. This petition was filed on 15th March 1936 for the recovery of the sum of Rs. 258. The judgment-debtors did not enter any appearance and on 8th December 1936 the property was sold by the Court to the plaintiff for Rs. 375. Notice of these proceedings was not served upon the defendant and he was entirely ignorant of what was happening. On 23rd March 1937 the plaintiff was given symbolical possession of the property. Virraju was still in physical possession. On 14th July 1937 the plaintiff filed the present suit in the Court of the District Munsif of Ramachandrapur for an injunction restraining the defendant from interfering with his possession. On 4th July 1938 the suit was converted into one for possession of the property. The District Munsif found that the

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LACH C.J. maintenance degree had been satisfied long ago, that the sale in execution which took place on 8th December 1936 had been obtained as the result of fraud on the part of the decree-holder and Virraju, that the plaintiff was not a *bona fide* purchaser, but merely a benamidar for Virraju, and that the defendant was a *bona fide* purchaser for value without notice of the charge on the property or of the execution proceedings. On these findings the District Munsif dismissed the suit. On appeal the Subordinate Judge concurred in all the findings of fact arrived at by the District Munsif and confirmed the decree passed by him. The plaintiff then appealed to this Court. The appeal was heard by HAPPELL J. who, relying on the judgment of the Full Bench of the Calcutta High Court which decided *Lakshmanchandra Naskar v. Ramdas Mandal*(1), allowed it and consequently ordered the defendant to deliver possession of the property to the plaintiff. The present appeal is by the defendant under clause 15 of the Letters Patent.

HAPPELL J. accepted as being well established the following propositions of law stated in Mulla's commentary on the Civil Procedure Code, Eleventh Edition, pages 744 and 745 :—

“(i) Where the adjustment of a decree has not been certified the judgment-debtor cannot successfully resist execution of the decree by pleading that it has been satisfied, because of the bar imposed by clause 3 of Order XXI, rule 2; (ii) a judgment-debtor cannot maintain a suit for an injunction restraining the decree-holder from executing the decree or a suit to set aside it, because such suits relate to execution within the meaning of section 47 of the Code; and (iii) a judgment-debtor can maintain a suit to recover back the money paid to the decree-holder but uncertified as damages for breach of contract, because such a suit does not fall within the purview of section 47.”

We agree that these propositions must now be regarded as being well established. Sub-rule 3 of rule 2 of Order XXI is most emphatic in its language.

(1) (1929) I.L.R. 57 Cal. 403 (F.B.)

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It says that a payment or adjustment which has not been certified or recorded shall not be recognized by any Court executing the decree. Sub-rule 1 of rule 92 says that, where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale shall become absolute, and sub-rule 3 that no suit to set aside an order made under rule 92 shall be brought by any person against whom such order is made. Therefore, fraud on the part of the decree-holder in abstaining from certifying an adjustment will not help the judgment-debtor, once the sale has been confirmed in execution. In these circumstances it is difficult to see any foundation for the opinion expressed in some of the reported cases that a judgment-debtor or his representative can plead an uncertified adjustment of the decree in answer to a suit for possession by the auction purchaser.

In *Lakshmanchandra Naskar v. Ramdas Mandal*(1) the question whether an objection to a sale in execution on the ground that the decree, in execution of which property was sold, was satisfied before the sale can be pleaded by the judgment-debtor by way of defence in the purchaser's suit for possession of the property was fully discussed. It was held that the judgment-debtor could not set up an uncertified adjustment as a bar to the suit. His only remedy was to sue for damages or for the recovery of the money paid under the adjustment. In the course of his judgment RANKIN C.J. pointed out that a question between plaintiff and defendant as to whether the decree had been satisfied or was a decree of which the plaintiff was entitled to have execution was one of a class of questions which section 47 of the Code said "shall be determined by the Court executing the decree". Section 47 did not mean merely that the

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execution Court must determine it, if it was raised in the course of the execution proceedings. It meant that the Court executing the decree was given exclusive jurisdiction over the matter as being one which related to the execution. The words "and not by a separate suit" showed clearly that the section was forbidding for this purpose the use of the ordinary means whereby rights were determined. Later in his judgment the learned Chief Justice observed that as between parties and their representatives the act of the Court in effecting a sale was to confer title to property and not merely to litigation. It was part of the purpose of section 47 to ensure that, so far as regards parties to the suit, the executing Court should, where the decree itself was valid, settle and determine the right to have execution and give a title to the purchaser. It was no part of its purpose to put a premium upon the forceful or wrongful seizure of possession or to make titles valid or invalid according as the one party or the other was plaintiff or defendant in any litigation subsequent to the sale—a thing which was a matter of pure chance.

We will now examine the decisions of this Court. In *Ramayyar v. Ramayyar*(1) a decree had been adjusted, but the decree-holder had not caused the adjustment to be certified. He had falsely stated to the judgment-debtor's agent that the requisite petition certifying the adjustment had been presented. Having made this statement and thereby having prevented the judgment-debtor himself taking the necessary steps, he proceeded to apply for execution. Having obtained leave to bid at the sale, he purchased the property at the auction. When the judgment-debtor discovered what happened, he filed an application under section 311 of the Code of 1882, to which Order XXI, rule 90, of the present Code corresponds, and later another application under section 244, to which

(1) (1897) I.L.R. 21 Mad. 356

ABDUL SUBHAN section 47 corresponds, on the ground that a fraud
 RAMANNA had been practised on the Court. SHEPARD and
 LEACH C.J. BODDAM JJ. held that the judgment-debtor was
 entitled to have the sale set aside and observed that, if the Court had been apprised of the facts, the decree-holder would not have been given leave to bid and the sale would never have taken place. This decision was clearly wrong and has not been followed. In *Budrudeen v. Gulam Moideen*(1) SUNDARA AYYAR and AYLING JJ. expressed the opinion that the decision in *Ramayyar v. Ramayyar*(2) could be regarded as right if the first application which the judgment-debtor made were considered as an application for recording the adjustment. The learned Judges in *Ramayyar v. Ramayyar*(2) did not, however, treat the application as one for the recording of the adjustment.

In *Periathambi Udayan v. Vellaya Goundan*(3) this Court held that a judgment-debtor could not object to execution where there had been an uncertified adjustment, but he could sue to recover what he had paid to the decree-holder if it were too late to have the adjustment certified.

In *Budrudeen v. Gulam Moideen*(1) the Court held that a judgment-debtor's objection to execution on the ground that the decree had been satisfied could be treated as an application to certify if the objection were filed within ninety days of the adjustment.

The question whether an uncertified adjustment can be pleaded as an objection to execution was considered by a Full Bench of this Court in *Subramanyam v. Ramaswami*(4) and the answer was that it could not, but the judgment does not preclude the Court treating such an objection as an application for certification if taken within the period of limitation.

(1) (1911) I.L.R. 36 Mad. 357
 (3) 1997 I.L.R. 21 Mad. 409

(2) (1897) I.L.R. 21 Mad. 356
 (4) (1932) I.L.R. 55 Mad. 720 (F.B.)

ABDUL SUBHAN In *Venkatanamanachariar v. Meenatchisundaram-*
 RAMANNA aiyer(1) WHITE C.J. and DAVIS J. held that, where
 LEACH C.J. a decree-holder has purchased property sold in execution of his decree and he sues for possession, the defendant is entitled to raise the defence that the sale certificate is inaccurate in that certain items of property not comprised in the decree have been included in it. They relied on a decision in *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha*(2) which was overruled by the Full Bench which decided *Lakshman-chandra Naskar v. Ramdas Mandal*(3). This Court followed *Venkatanamanachariar v. Meenatchisundaram-aiyer*(1) in *Munishi China Dandasi v. Munishi Pedda Tatiah*(4).

The judgments delivered by this Court in *Thathu Naick v. Kondu Reddi*(5) disclosed a difference of opinion. There, the holder of a mortgage decree applied for execution and asked for permission to bid at the sale. Permission was given, but the Court fixed an amount as the minimum at which he was to start bidding. The decree-holder bought the property in the name of a third person for less than the minimum fixed by the Court and less than the principal amount secured by the mortgage. The Court confirmed the sale and symbolical possession was given to the purchaser, who was resisted by the persons in actual possession. The auction purchaser then brought a suit for possession. The defendants pleaded that the decree-holder had acted fraudulently in that he had induced the Court to confirm the sale without having brought to its notice the fact that he had paid less than the amount fixed. It was held by MILLER and SANKARAN NAIR JJ. that it was open to the defendants to have the sale set aside in the suit by way of answer to the plaintiff's claim.

(1) (1904) 19 M.L.J. 1 (2) (1897) I.L.R. 24 Cal. 355
 (3) (1929) I.L.R. 57 Cal. 403 (F.B.) (4) (1920) 41 M.L.J. 261
 (5) (1909) I.L.R. 32 Mad. 242

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ABDUR RAHIM J. dissented. He was of opinion that the sale could not be set aside except on an application under sections 294 and 244 of the Code then in force. SANKARAN NAIR J. considered that, as a plaint in a suit in the Court executing the decree might be treated as an application under section 244, a written statement containing an answer to the plaintiff's claim could be treated as an application under section 244.

In *Kulathu Ayyar v. Vaitthilingam Ayyar*(1) it was held that a defendant could plead an uncertified adjustment by way of defence to a suit provided that he was not one of the parties to the decree.

In our judgment it is not open to a judgment-debtor or any one standing in his shoes to plead an uncertified adjustment of the decree by way of defence to a suit filed by the auction purchaser for possession. We are in accord with all that was said in *Lakshmanchandra Naskar v. Ramdas Mandal*(2). An uncertified adjustment cannot be pleaded in bar of execution and once the sale has been confirmed by the Court it confers an absolute title on the auction purchaser, whether he be the decree-holder or a stranger, provided there was title in the judgment-debtor. This is clearly the effect of Order XXI, rule 92. It matters not whether the decree-holder has deliberately deceived the judgment-debtor and by false statements prevented him from taking steps himself to have an adjustment certified. To hold that a judgment debtor or his representative can resist a suit for possession by the auction purchaser would mean a disregard of statutory provisions expressed in unambiguous language.

The decision in *Ramayyar v. Ramayyar*(3) is overruled, as are those decisions of this Court which say that a suit for possession by the auction purchaser

(1) (1937) 26 L.W. 349 (2) (1929) I.L.R. 57 Cal. 403 (F.B.)
(3) (1937) I.L.R. 21 Mad. 286

can be resisted by the judgment-debtor or his representative on the ground that there has been an uncertified adjustment.

The appeal fails and is dismissed with costs.

N.S.

INCOME-TAX REFERENCE

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

THE COMMISSIONER OF INCOME-TAX, MADRAS,
APPLICANT

1945,
February 16

v.

K. C. MANAVIKRAMAN RAJAH, ZAMORIN RAJAH OF
CALICUT (DECEASED) BY LEGAL REPRESENTATIVE
SRI P. C. VEERABAYAN alias KUTTUNNI RAJAH,
THE ZAMORIN RAJAH OF CALICUT, RESPONDENT *

*Indian Income-tax Act (XI of 1922), sec. 2 (1) (a)—
Agricultural income—Moneys paid by a Malabar tenant to
landlord in addition to avakasam and additional avakasam
at time of renewal of lease—Such payments to landlord,
though not lawful, "agricultural income".*

Moneys paid, in addition to *avakasam* and additional *avakasam*, by a tenant of agricultural lands in Malabar to his landlord at the time of the renewal of his lease is agricultural income within the meaning of section 2 (1) (a) of the Indian Income-tax Act, 1922. Such payments claimed by the landlord by way of power of attorney fees, writing charges, expenses of the estate office, presents to the landlord, and sundry expenses, etc., though they may not be lawful, are still agricultural income as moneys paid for the grant of a renewal of the lease.

Raja Rajendra Narayan Bhanja Deo v. Commissioner of Income-tax, Bihar and Orissa(1) applied and followed.

CASE referred to the High Court by the Income-tax Appellate Tribunal, Bombay Bench, under section 66 (1) of the Income-tax Act (XI of 1922) as amended

* Case Referred No. 36 of 1944
(1) (1929) I.L.R. 9 Pat. 1 (F.B.)

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RAJAH

by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939) in Application No. 66, R.A. No. 24 (Madras), 1943-44.

C. S. Rama Rao Sahib for applicant.—The additional exactions by way of writing fees, power of attorney fees, interview fees, presents to the landholder and the like are not agricultural income within the meaning of section 2 (1) of the Indian Income-tax Act. They are not rent or renewal fee within the definition of those terms in the Malabar Tenancy Act (Madras Act XIV of 1930). "Renewal fee" is defined in section 3 (t) and "Rent" in section 3 (u) of the Malabar Tenancy Act. In his accounts the landholder himself has appropriated those amounts, not under the head of renewal fee, but under other heads. The illegality of the exactions may not by itself be material for the purpose of the Indian Income-tax Act, as was pointed out by the Patna High Court in *Raja Rajendra Narayan Bhanja Deo v. Commissioner of Income-tax, Bihar and Orissa*(1). But the real question is whether those additional payments to the landholder, unlawfully levied by him, can be considered to be revenue derived from land. Can the proximate, as distinguished from a remote, source of such payments be stated to be land? In other words, are those payments directly traceable to the relationship of landlord and tenant or to some other cause? The renewal of the lease may no doubt be the occasion or opportunity for extorting those illegal demands or for making those unlawful payments. But the lessee can obtain a renewal by applying to the competent Court without paying those illegal exactions.

M. Subbaraya Ayyar for respondent was not called on to reply.

The JUDGMENT of the Court was delivered by LEACH C.J.—The assessee is the Zamorin of Calicut. He owns agricultural lands in the district of Malabar which he leases to tenants. Under the Malabar Tenancy Act, 1930, a tenant is entitled to renewal of his lease, which is usually for twelve years. It is the custom in that part of India for the tenant to pay a renewal fee, which is known as *avakasam* and additional *avakasam* which is a percentage of the *avakasam*. The assessee has been in the habit of

(1) (1929) I.L.R. 9 Pat. 1 (F.B.)

requiring his tenants to pay more than the *avakasam* and additional *avakasam* before granting them renewals. What the assessee exacts from his tenants on a renewal is allocated in his books under the following heads:—(i) *Avakasam*, (ii) additional *avakasam*, (iii) *thirumasapoli*, (iv) power of attorney fees, (v) writing charges, (vi) *thirumulkazcha*, (vii) *thirukkaikanom*, (viii) sundry expenses, (ix) expenses at the tenant's place, and (x) expenses for the estate office. We are told that *thirumasapoli* is a religious ceremony held monthly, *thirumulkazcha* is an offering made by the tenant for the purpose of getting a personal interview with the landlord, and that *thirikkaikanom* is a further present to him. The Income-tax Officer treated the *avakasam* and the additional *avakasam* as agricultural income, as the Indian Income-tax Act defines such income as rent or revenue derived from land which is used for agricultural purposes. He was not, however, prepared to treat the excess demanded from the tenant as agricultural income. On an appeal by the assessee to the Appellate Assistant Commissioner it was held that the excess must also be treated as agricultural income. The Appellate Tribunal, Bombay Bench, agreed with the Appellate Assistant Commissioner, but at the request of the Commissioner of Income-tax it has referred to this Court under section 66 (1) the Income-tax Act the following question:—

"Whether in the circumstances of the case, the extra amount of Rs. 3,500 is 'agricultural income' within the meaning of section 2 (1) (a) of the Act."

The sum of Rs. 3,500 represents the excess over the *avakasam* and additional *avakasam*.

We consider that the Tribunal correctly decided this question. The further exactions of the landlord may be reprehensible; but he insists on these payments before he is prepared to grant a renewal of a lease. He gets the further income as the owner of agricultural

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land. It is accepted that the *avakasam* and additional *avakasam* come within the definition of agricultural income. If a fee exacted for the granting of a renewal is agricultural income, it is difficult to see why a further exaction for whatever purpose should not be so classified if the payment is demanded before the lease is renewed. A Full Bench of the Patna High Court in *Raja Rajendra Narayan Bhanja Deo v. Commissioner of Income-tax, Bihar and Orissa*(1) held that mutation fees paid by the assessee's tenants upon succession to holdings of tenants by inheritance were agricultural income, although the exactions were illegal, as the money was paid by the tenants to the landlord by reason of the relationship of landlord and tenant. The Tribunal relied on that case. We consider that there is no difference in principle between that case and this.

The answer which we give to the reference is that the extra amount of Rs. 3,500 recovered by the assessee is agricultural income within the meaning of section 2 (1) (a) of the Act.

The Commissioner will pay the costs of the reference, Rs. 250.

N.S.

(1) (1939) I.L.R. 9 Pat. 1 (F.B.)

INCOME-TAX REFERENCE

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

S. MARIMUTHU PILLAI OF MURUGUR, APPLICANT

v.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
RESPONDENT*

1945,
February 23

Indian Income-tax Act (XI of 1922), sec. 4 B—Hindu undivided family—Ordinary residence of—Determination—"Not ordinarily resident", meaning of in case of such families—Periods of stay in British India of successive managers of joint family taken into consideration in determining "ordinary" residence of the family.

S was the manager of a Hindu undivided family consisting of himself and his two sons, M and another. S was resident in British India until his death on 12th September 1937. M who was in Ceylon returned to British India in September 1937 and has been since residing there. M became the manager of the family after his father's death. The family owned certain tea estates in Ceylon. The family represented by M was assessed to income-tax in respect of the year of account, 1939-40, including also the income from the tea estates, on the footing that the family was "ordinarily resident" in British India in the year of account within the meaning of section 4B (b) of the Indian Income-tax Act.

Held: The assessment was proper. The joint family was resident in British India throughout. The test for determining whether a Hindu undivided family is "ordinarily resident" in British India is to determine the "ordinary residence" of its manager and for this purpose section 4B (b) must be read along with section 4B (a) and section 4A (a) of the Act. The periods of residence and stay in British India of the successive managers of a Hindu undivided family during its continued existence can be taken into account for the purposes of section 4B of the Indian Income-tax Act.

CASE referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench at Bombay, under section 66 (1) of the Indian Income-tax Act, 1922

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(Act XI of 1922) as amended by section 92 of the Income-tax Amendment Act, 1939 (Act VII of 1939) in Application No. 66, R.A. No. 47, Madras, of 1943-44.

M. Subbaraya Ayyar for applicant.

C. S. Rama Rao Sahib for respondent.

PATANJALI
SASTRI J.

The JUDGMENT of the Court was delivered by PATANJALI SASTRI J.—This reference arises out of an assessment made upon one Marimuthu Pillai as the manager of the joint Hindu family consisting of himself and his undivided brother for the year 1940-41.

It is common ground that the family (hereinafter referred to as the assessee) was “resident” in British India within the meaning of section 4A (b) of the Indian Income-tax Act, but the assessee was also treated as “not ordinarily resident” in British India within the meaning of section 4B of that Act. The question whether the assessee was not ordinarily resident in British India became material in connection with the assessment of the income of certain tea estates owned in Ceylon. If the assessee was also “ordinarily resident” in British India, such income would be assessable to tax in British India, irrespective of whether or not it was received in or brought into British India. The Income-tax authorities assessed the income on that footing, rejecting the contention that the assessee was not ordinarily resident in British India, as Marimuthu Pillai, who was the manager of the family during the year of account (1939-40), had not been in British India for more than two out of seven years preceding that year. The assessee’s appeal to the Income-tax Appellate Tribunal having proved unsuccessful, he applied to the Tribunal under section 66 (1) of the Act for a statement of the case to this Court as a point of law was involved, and the following question has accordingly been referred for our decision:—

“Whether, in the circumstances of the case, the assessee which is a Hindu undivided family must be deemed to be

‘not ordinarily resident’ in the material year of account within the meaning of section 4B of the Indian Income-tax Act.”

The relevant facts may be briefly stated. Sellamuthu Pillai, the father of Marimuthu Pillai, died on 12th September 1937, having made a will whereby he bequeathed, among other properties, his share in the tea estate in question to his two sons with whom he formed a joint family. It was found, and the finding has not been challenged before us, that the sons took the properties under their father’s will as members of a joint family. Sellamuthu Pillai was in British India throughout. Marimuthu Pillai, who was in Ceylon before the death of his father, returned to British India in September 1937 and has since been here. He became the manager of the family after his father died and was the manager during the year of account (1939-40). On these facts the question arises whether the assessee can be said to have been “ordinarily resident” in British India in the year of account within the meaning of section 4B of the Act.

Section 4B (so far as it is material here) reads as follows:—

“For the purposes of this Act—

(a) 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;

(b) a Hindu undivided family is deemed to be ordinarily resident in British India if its manager is ordinarily resident in British India.”

It will be seen that the test of a joint Hindu family being “ordinarily resident” in British India is the ordinary residence (to adopt the expression used in the marginal note) in British India of its manager, and this test has to be determined with reference to clause (a) of the section, read with section 4A (a), as

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the manager is an individual. That is to say, in order to be ordinarily resident in British India, the manager must have been "resident" in British India within the meaning of section 4A (a) in nine out of the ten preceding years and must also have been here for at least two years during the previous seven years. It is argued by Mr. Subbaraya Ayyar for the assessee that the residence or stay in British India relevant under section 4B (b) is only that of the person who happened to be the manager of the family during the year of account, as the residential qualification has, under section 4 (1), to be determined with reference to that year, and that the period or periods of residence or stay of any previous manager should not be taken into account. We cannot agree. There is nothing in section 4B to indicate that the periods of residence and stay in British India of the successive managers of a Hindu undivided family during its continued existence should not count for purposes of the section. The joint family now assessed has been in existence from before Sellamuthu's death in September 1937, and, under the Hindu law, he was the manager and was admittedly in British India throughout. The conditions of section 4B are, therefore, satisfied, and the decision of the Income-tax Appellate Tribunal is right. The answer to the question referred is that the assessee must be deemed to be ordinarily resident in British India in the year of account within the meaning of section 4B of the Income-tax Act.

The assessee will pay the Commissioner of Income-tax Rs. 250 for his costs.

N.S.

INCOME-TAX REFERENCE

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

THE COMMISSIONER OF INCOME-TAX, MADRAS,
APPLICANT

1945,
January 12

RM. AL. CT. ANNAMALAI CHETTIAR, RESPONDENT *

Indian Income-tax Act (XI of 1922), as amended by Indian Income-tax (Amendment) Act (VII of 1939), sec. 4 (1) (c), second proviso—Remittance of profits—Assessee not ordinarily resident in British India depositing profits from foreign business in a bank abroad—Instructions by him to bank to send money from deposit to obtain fixed deposit receipt in its branch at Karaikudi—Amount of fixed deposit paid to him at Karaikudi in the next year—Receipt of profits in British India by obtaining such fixed deposit receipt—Amount assessable to income-tax.

The assessee, a Nattukottai Chettiar "not ordinarily resident" in British India within the meaning of section 4B of the Indian Income-tax Act, carried on a money-lending business at Kajang in the Federated Malay States. In the year of account he instructed the Indian Overseas Bank, Limited, at Kuala Lumpur to remit to its Karaikudi branch a sum of Rs. 8,000 which the bank at Karaikudi was to hold as a fixed deposit of his repayable at the end of twelve months. The money which he paid into the bank at Kuala Lumpur when he gave those instructions represented profits made by him at Kajang. When the deposit matured the amount was paid to him at Karaikudi.

Held: The sum of Rs. 8,000 must be treated as profits of the assessee's business outside British India brought into British India by him in the year of account and was assessable to income-tax under section 4 of the Act.

Case referred to the High Court by the Income-tax Appellate Tribunal under section 66 (1) of the Indian Income-tax Act of 1922, (Act XI of 1922), as amended by section 92 of the Income-tax (Amendment) Act,

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1939 (Act VII of 1939) in Application No. 66, R.A. No. 7, Madras, of 1943-44.

ANNAMALAI

C. S. Rama Rao Sahib for applicant.—The assessee, who was a resident of British India but not ordinarily resident there, had deposited his foreign income in a bank at Kuala Lumpur and instructed it to obtain a fixed deposit receipt for a portion thereof from a branch bank at Karaikudi within British India. The bank acted as the agent of the assessee in securing the fixed deposit receipt and by obtaining it the assessee must be taken to have brought into British India that amount of his foreign income within the meaning of the second proviso to section 4 (1) (c) of the Indian Income-tax Act. Under the fixed deposit receipt the amount was payable in British India and to that extent the assets of the assessee in British India must be deemed to have been augmented. A remittance of profit need not be by cash only; it may be in the form of a valuable security. In substance it amounts to a remittance of money and a purchase therewith of a British Indian security. It is a British Indian investment by the assessee and the amount was actually paid in British India to the assessee in the subsequent year. The amount is assessable to income-tax.

N. Panchapagesa Ayyar for respondent.—The foreign income was deposited in the bank at Kuala Lumpur and the bank thereby became the debtor of the assessee. A portion of that debt was in the form of a fixed deposit receipt in the name of the assessee got by the bank from its branch at Karaikudi. The fixed deposit receipt was delivered to the assessee at Kuala Lumpur only and nothing was done by the assessee in British India to attract the operation of the second proviso to section 4 (1) (c) of the Act. The amount of the fixed deposit receipt was not payable in the year of account but only long thereafter. It was not convertible into cash during that year. A post-dated cheque, for instance, on a bank in British India, which is not capable of being cashed during the year of account, cannot be considered to be a remittance of profit in that year. In the account books of the assessee the amount of the fixed deposit receipt was treated all along as a foreign asset only.

LEACH C.J.—The JUDGMENT of the Court was delivered by LEACH C.J.—The assessee is a Nattukottai Chettiar who was carrying on a money-lending business at Kajang in the Federated Malay States. In the year

of account he instructed the Indian Overseas Bank, Limited, at Kuala Lumpur to remit to its Karaikudi branch a sum of Rs. 8,000 which the bank at Karaikudi was to hold as a fixed deposit of the assessee, repayable at the end of twelve months. The money which the assessee paid into the bank at Kuala Lumpur when he gave those instructions represented profits which the assessee had made at Kajang. This is not disputed. When the deposit matured the amount was paid to the assessee at Karaikudi. In these circumstances the Income-tax Officer held that the remittance from Kuala Lumpur represented a remittance of profits made by the assessee at Kajang and included this amount in the assessment.

There was an appeal to the Appellate Assistant Commissioner, who took a different view of the transaction. The Appellate Assistant Commissioner considered that the money on deposit with the Karaikudi branch of the bank merely represented an asset of a person resident abroad and therefore should not have been included in the assessment. This opinion was accepted by the Income-tax Appellate Tribunal whereupon the Commissioner of Income-tax applied for a reference under section 66 (1) of the Indian Income-tax Act. Consequently the Tribunal has referred this question :—

“Whether in the circumstances of the case this sum of Rs. 8,000 could be treated as profits of the respondent's business outside British India brought into or received by him in British India in the year of account.”

We have no hesitation in holding that the correct view was that taken by the Income-tax Officer. The assessee provided the money which the bank remitted from Kuala Lumpur to Karaikudi and that money constituted profits made by him in his money-lending business at Kajang. When the money arrived in Karaikudi it was held by the bank as a fixed deposit in accordance with the assessee's instructions, and thus constituted an asset of his which had been

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acquired out of profits made abroad. There can be no difference between the present case and a case where a Nattukottai Chettiar doing business abroad instructs his bank there to buy for him Indian securities out of the profits made by him in such business. Those securities when bought in India would represent profits brought into this country. In the same way the deposit receipt which the respondent got from the Karaikudi branch of the bank represented an investment in British India of Rs. 8,000 of his profits made abroad. Admittedly he realized the investment in the next year.

We answer the reference by saying that the Rs. 8,000 must be treated as profits of the respondent's business outside British India brought into British India by him in the year of account.

The Commissioner is entitled to his costs, Rs. 250.

N.S.

APPELLATE CIVIL

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

TAR MAHOMED JANOO (PLAINTIFFS), APPELLANTS

v.

K. M. S. LAKSHMANA AYYAR AND SONS
(DEFENDANTS), RESPONDENTS *

Cotton Cloth and Yarn (Control) Order, 1943, as amended on 14th March 1944—Contract for sale of yarn made before promulgation of Order but delivery subsequently—Vendor insisting upon contract price being paid on delivery—Suit by vendee for recovery of difference between contract price and price fixed under Order—Maintainable—Cotton Cloth and Yarn (Contracts) Ordinance, 1944 (II of 1944)—Retrospective effect.

On 15th April 1943 the plaintiffs and the defendants entered into a contract under which the defendants were to

* Original Side Appeal No. 44 of 1944

sell to the plaintiffs *inter alia* twenty-five half bales of yarn, sixty counts second quality, at Rs. 27-8-0 per five lbs. The delivery was to be given in August 1943, but the contract provided for an extension of the period by three months, should the delay be the result of a cause over which the sellers had no control. There was delay in the fulfilment of the contract which, it was admitted, was excusable. On 4th September 1943 the defendants intimated their readiness to deliver the goods, but the plaintiffs took delivery on 29th September 1943. Under the Cotton Cloth and Yarn (Control) Order, 1943, which was promulgated on 17th June 1943, a notification was issued on 23rd September 1943 by which a maximum price was fixed for the cotton yarn of the sixty counts. This was less than the contract price. The Cotton Cloth and Yarn (Control) Order, 1943, was amended from time to time and the Cotton Cloth and Yarn (Contracts) Ordinance, 1944, was published in the *Fort St. George Gazette* on 20th January 1944. As the defendants refused to deliver the goods unless the contract price was paid, the plaintiffs paid the amount under protest and thereafter filed a suit against the defendants for the refund of the difference between the contract price and the price fixed under the Cotton Cloth and Yarn (Control) Order.

Held: The suit was maintainable by reason of the provisions of the Cotton Cloth and Yarn (Contracts) Ordinance, 1944, which was retrospective in effect. The plaintiffs were entitled to a refund of the difference between the contract price and the price fixed by the notifications made under the Cotton Cloth and Yarn (Control) Order, 1943, as amended on 14th March 1944.

APPEAL from the judgment and decree of the KUNHI RAMAN J., dated 26th April 1944 and passed in the exercise of the ordinary original civil jurisdiction of the High Court.

T. V. Muthukrishna Ayyar and C. Srinivasachari for appellants.

M. Subbaraya Ayyar for respondents.

The JUDGMENT of the Court was delivered by LEACH C.J.—This is an appeal from a judgment of KUNHI RAMAN J. in a suit tried on the original side of the Court. The appellants, who are the plaintiffs, are a firm of merchants dealing wholesale in cotton

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yarn at Cocanada and other places. The defendants are a firm also dealing in cotton yarn and have a branch at Cocanada. The defendants are the selling agents of the Madura Mills, Limited, for a certain area in the Madras Presidency, but in the contract with which the appeal is concerned they contracted as principals. On 15th April 1943 the plaintiffs and defendants entered into a contract at Cocanada under which the defendants were to sell to the plaintiffs *inter alia* twenty-five half bales of yarn, sixtys second quality, at Rs. 27-8-0 per five lbs. The delivery was to be given in the month of August 1943, but the contract provided for an extension of the period by three months, should the delay be the result of a cause over which the sellers had no control. There was delay in the fulfilment of this part of the contract, but it is common ground that the delay was excusable.

On 4th September 1943 the defendants wrote to the plaintiffs stating that these twenty-five half bales of cotton yarn were ready for delivery to them at Cocanada. Delivery was not taken until the 29th September. On the 23rd of that month a notification was issued under the Cotton Cloth and Yarn (Control) Order, 1943 (which will hereafter be referred to as "the Order"), by which a maximum price was fixed for cotton yarn of this count. This was less than the contract price. When the plaintiffs took delivery, they did so under protest, as they considered that they were entitled to a reduction in the price fixed by the contract as the result of the amendment in the Order. The defendants refused to give delivery until the contract price was paid and consequently the plaintiffs were forced to comply with their demand. They filed the present suit to recover with interest a sum of Rs. 5,125, which they maintain they had been unlawfully compelled to pay. The learned Judge dismissed the suit as he considered that the

Order did not apply to this contract. The plaintiffs have appealed.

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In order to understand the position it is necessary to refer to various amendments made in the Order and to the Cotton Cloth and Yarn (Contracts) Ordinance, 1944, which will hereafter be referred to as "the Ordinance". The Order was promulgated on 17th June 1943. It did not then fix maximum prices, but gave the Textile Commissioner power to do so. On 31st August 1943 the Textile Commissioner fixed the maximum prices, both ex-factory and retail, at which yarn might be sold. The notification did not, however, fix the price of sixtys. Clause 2 of the notification said:

"The ex-mill maximum prices apply in respect of all deliveries on and after 19th August 1943 of goods originally contracted for delivery in August 1943 and onwards."

On 23rd September 1943 this notification was amended. The following clause was inserted as clause 2:—

"The maximum prices, ex-mill and retail, for cloth and yarn of kinds or qualities other than those specified above shall be more or less, as the case may be, than the prices fixed above by an amount equal to the customary difference between the prices of the nearest kinds or qualities specified above and the kinds and qualities not so specified."

Clauses 2 and 3 of the earlier notification remained, renumbered as 3 and 4 respectively. Here sixtys were not referred to specifically, but the insertion of the new clause had the effect of fixing the ceiling price of sixtys at Rs. 22-6-0 per five lbs.

On 11th December 1943 the Textile Commissioner issued a notification fixing the maximum prices ex-factory at which yarns could be sold. For sixtys the maximum price was Rs. 42 per ten lbs. carded and Rs. 45 per ten lbs. combed. The yarn sold by the defendants to the plaintiffs was to be carded. Clause 8 of this notification said that the maximum retail price should be twenty per cent above the prices set

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out in the notification or above the actual ex-mill contract price stamped on the Texmark label, which-ever was less.

The Ordinance, which was dated 13th January 1944, was published in the *Fort St. George Gazette* on 20th January 1944. The notifications issued under the Order only referred to prices ex-factory and retail prices. The Ordinance dealt with contracts between one wholesale dealer and another or a wholesale dealer and a retail dealer. Section 2 of the Ordinance states that, where after the making of a contract for the sale of cotton cloth or cotton yarn by one wholesale dealer to another or by a wholesale dealer to a retail dealer, the maximum prices ex-factory and retail at which cloth or yarn may be sold have been fixed under the Order, then, notwithstanding anything to the contrary in the contract, when delivery takes place in pursuance of a contract after the date of the Order, the maximum price which may be charged shall not in any case exceed the maximum retail price fixed by the Order, nor shall it, in the case of a first or subsequent sale after delivery from the manufacturer, exceed by more than a percentage to be fixed in this behalf by the Textile Commissioner the price paid on the occasion of "the last preceding transfer". Where the Order has fixed a maximum price, the price charged cannot exceed the maximum. The section goes on to provide that, where in pursuance of a contract the buyer has paid a price exceeding that laid down by the section, whether voluntarily or in execution of a decree passed by a Court or otherwise, he shall be entitled to receive from the seller any sum so paid in excess. Sub-section 2 says that the provisions of the section shall apply to contracts whether made before or after the commencement of the Ordinance and to sales made in pursuance of a contract on or after 15th August 1943.

Therefore, the Ordinance gives statutory sanction to an action like the present one. Unfortunately, in

the Court below the plaintiffs did not base any argument on the Ordinance and naturally the learned Counsel for the defendants did not refer to it.

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On 14th March 1944 amendments were made in clause 12 of the Order which then provided that a dealer should not buy or sell, except to a consumer, yarn at a price which exceeded by more than three per cent the ex-mill maximum price or ex-mill contract price, whichever was less, when the godown or station was within hundred miles from the manufacturer's premises. If the godown or station happened to be more than hundred miles away, the percentage was to be seven and a half.

The claim by the plaintiffs for a refund of Rs. 5,125 does not take into account the amendment in the Order last referred to. Mr. Muthukrishna Ayyar on their behalf very properly admits that the amendment applies to the contract in suit and that the maximum price fixed by the notification of 23rd September 1943 must be increased by seven and a half per cent, as Cocanada is more than hundred miles away from Madura where the yarn was manufactured. On this basis the claim for refund must be reduced to Rs. 3,445-13-0.

For the respondents Mr. Subbaraya Ayyar has contended that the refund must be based merely on the notification of 11th December 1943. He says that as a result of the Ordinance his clients are entitled to the benefit of clause 8 of the notification of 11th December 1943, because section 2 (1) of the Ordinance says that the maximum price which may be charged for yarn shall not exceed the maximum retail price fixed by the Order. This argument ignores what follows in the sub-section. The part which Mr. Subbaraya Ayyar refers to does not apply here because the case falls exactly within the provision next following, which says that the price shall not, in the case of a

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first or subsequent sale after delivery from the manufacturer, exceed by more than a percentage to be fixed by the Textile Commissioner the price paid on the occasion of the last preceding transfer. The Textile Commissioner has fixed the price to be paid. It is fixed under the amendment of 14th March 1944. The Ordinance has retrospective effect. It applies to all contracts made before or after the commencement of the Ordinance and to sales made on or after 15th August 1943 in pursuance of a contract made before or after the Ordinance.

Mr. Subbaraya Ayyar does not challenge the correctness of the figure of Rs. 3,445-13-0 and, for reasons indicated, we hold that the plaintiffs are entitled to a decree for this amount with interest at six per cent from the date of suit. The plaintiffs will have costs on the decretal amount both in this Court and in the lower Court.

N.S.

APPELLATE CIVIL

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

A. DRAIVIASUNDARAM PILLAI (PLAINTIFF),
APPELLANT

v.

N. SUBRAMANIA PILLAI (DEFENDANT), RESPONDENT *

Will—Charity—Bequest for creating a matam over the tomb of testator and for performing pooja therein—Validity—Cy-pres doctrine—Applicability—No general charitable intention—Bequest invalid and intestacy to that extent.

A provision in a will that the testator should be buried in a *samadhi* and that a matam should be erected over it, where pooja to Siva was to be performed daily, does not amount to

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a dedication of property to a public charity. The direction that money should be spent on the building of a tomb and its maintenance does not constitute a charitable endowment. Such a direction is not lawful and the gift is not valid. The principle of the decision in *Rogerson, In re. Bird v. Lee*(1), which embodies an exceptional rule of English law, cannot be applied to it. In the absence of a general charitable intention indicated in the will, the doctrine of *cy-pres* is also not applicable. Where a testator dies leaving a will containing such a provision without expressing a general charitable intention, he must be regarded as having died intestate to that extent.

Kunhamutty v. Ahmad Musaliar(2) followed.

APPEAL against the decree of the District Court of Tinnevely, dated 25th August 1943 and passed in Appeal Suit No. 258 of 1942 preferred against the decree of the Court of the Subordinate Judge of Tuticorin in Original Suit No. 32 of 1940.

A. V. Viswanatha Sastri for appellant.

B. Sitaramu Rao and R. Ramamurthi Ayyar for respondent.

The JUDGMENT of the Court was delivered by LEACH C.J.—The Court is here concerned with the interpretation of the will of one Kanakasabapathi Pillai, who died on 13th August 1940. The testator had married twice, but no children were born to him and both his wives predeceased him. He appointed as his executors the plaintiff and the defendant. The plaintiff is a brother of the testator's second wife. The defendant is a son of the testator's brother and is the heir at law.

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In 1934 the testator contemplated retiring from the world and of becoming, to use the expression found in his will, a *yathra sanyasi*. It is apparent from the will that despite his religious inclinations he was a man of considerable vanity and he was anxious to erect a monument to himself, which would "serve to place him before the eyes of the public even

1945,
January 24

(1) [1901] I Ch. 715

(2) (1934) I.L.R. 58 Mad. 204

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more prominently than any dharmam performed when he was alive". We are here quoting from the judgment under appeal. The main question involved in it is whether the will, which was executed on 29th April 1934, constitutes a dedication of the residue of the estate for public charitable purposes.

On the death of the testator, his nephew, the defendant, took possession of his estate. The will had been registered, but the defendant decided to repudiate it. He alleged that the testator had publicly stated that he was cancelling the will and consequently had torn it up. As the result of the defendant's attitude, the plaintiff was compelled to file this suit. He asked the Court to hold that the defendant had forfeited his office as joint executor by reason of his conduct and that a decree for possession should be granted to him. The defendant persisted in his averment of the revocation of the will. In addition he pleaded that its main provisions were contrary to law and that, as the heir of Kanakasabapathi Pillai, he was entitled to the whole of the residue of the estate. The suit was tried by the Subordinate Judge of Tuticorin, who held that the plea of revocation of the will was false, but he agreed with the defendant that the testator's main directions were invalid, inasmuch as the dominant motive in his mind was the erection of a *samadhi* in which he was to be buried and that the money could not be devoted to such a purpose. On appeal the District Judge of Tinnevely upheld the decree of the Subordinate Judge.

It is common ground that the testator did not become a *sanyasi* and that he continued living as before, until he was murdered on 13th August 1940. He was cremated in the usual manner and the arrangements for the cremation were admittedly carried out by the defendant. Even if he had become a *sanyasi*, the cremation prevented him from being

buried as such, and this has been stressed in the Courts below. Moreover, a person who is not a *sanyasi* cannot be buried in a *samadhi*.

The most important clauses of the will are 16 and 17. They read as follows:—

"16. In the thatched house situate in item 8 of schedule III I am conducting poor feeding for the mendicants who come there." From and out of the properties aforesaid the executors shall in the place where the thatched house is standing build for not less than Rs. 4,000 a matam facing east for the purpose of conducting the poor feeding and one temple for installing Vinayakar and Nataraja; and in accordance with the funds then available the building shall be constructed as required by Sastras with chunam and baked bricks, shall prepare the images of Vinayakar and Nataraja, shall install them, shall perform the mandala pooja and conduct the Atta festival, monthly festival and daily pooja; and besides this shall carry on these permanently for ever. A person shall be appointed for preparing food in the poor feeding matam and the poor feeding shall be conducted for the mendicants who come there without refusing food to any one.

17. I have intended to construct a building in my lifetime itself in the south-west corner of the site which is set out as item 8 aforesaid and which is adjacent to the nanja land for keeping me in *samadhi*. If it is not completed the executors shall from and out of the properties aforesaid spend to the extent of Rs. 300, shall keep me in *samadhi* in the said place, shall build the matam, shall inscribe on stone the words 'Kanakasabapathi Samadhi Matam' and shall fix the stone in the front portion of the matam and the said stone with the inscription shall be included in the construction of the building; and besides this, a Sivalingam shall be installed in the said *samadhi* and the mandala pooja, the daily pooja and also the yearly guru pooja shall be conducted permanently. For this purpose a person shall be appointed and the same shall be carried on. The poor feeding of the mendicants with food served on leaves spread shall be performed during the mandala pooja and the yearly guru pooja."

It is accepted by both sides that the concluding portion of clause 17 does not mean that the mendicants should be fed in the *samadhi* matam but in the matam referred to in clause 16.

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In clause 18 of his will the testator gave directions that the poor should be supplied with buttermilk from the 1st April to the 1st June each year.

The appellant says that the Courts below were wrong in holding that the main object of the testator was to erect a *samadhi* in which he was to be buried and that the separate *matam* was intended merely to be an adjunct of the tomb. We consider that there is much force in this contention. In the first place, it is obvious that the *matam* contemplated in clause 16 of the will was to be a much bigger building than the *matam* which was to be erected over the tomb. The *samadhi* was to be built in a corner of the plot and only Rs. 300 was to be spent on it. The *matam* which was to be used for the feeding of the poor was to cost not less than Rs. 4,000 and within its precincts idols were to be installed, one of Vinayakar and the other of Nataraja. In these temples within the *matam* there was to be daily *pooja* as well as *pooja* on festival days. We consider that the directions contained in clause 16 of the will are valid. They have the effect of constituting a public charity. The directions in clause 18 with regard to the supply of buttermilk to poor persons also constitutes a bequest for a public charity. Therefore, the will must stand so far as these directions are concerned.

We now turn to the question whether the provision in the will that the testator should be buried in a *samadhi* and a *matam* erected over it, where *pooja* to Siva was to be performed daily, can be regarded as a dedication of property to a public charity. The direction that money should be spent on the building of a tomb and its maintenance would certainly not constitute a charitable endowment; see *Kunhamutti v. Ahmad Musaliar*(1) and the judgment given in the footnote which commences on page 211. The *matam* over the tomb could only be regarded as an adjunct

(1) (1934) I.L.R. 58 Mad. 204

of the tomb and therefore such a building could not be deemed to be a building erected for a public charitable purpose, even though daily worship was to take place there. Therefore, we regard the directions contained in clause 17 as being unlawful. It is said that nevertheless the Court should here apply the doctrine of *cy-pres*.

The Court cannot apply the doctrine of *cy-pres* unless it can be gathered from the will that the testator had a general charitable intention. If such an intention is clearly expressed, it will be given effect to in another way, should the way intended by the testator be open to objection or be impracticable. The fact that a person makes a charitable bequest in order that his name shall be kept prominently before the public will not render his action invalid. Regard can only be had to the nature of the bequest. Therefore, where there is a general charitable intention, the fact that vanity lies behind it will not matter. We are unable to read this will as expressing a general charitable intention. The testator's charitable intention is limited, being confined to the provisions of clauses 16 and 18 of the will. The directions in clause 17 are not of a charitable nature. There the testator is really making provision for the erection of a monument to his memory. A general charitable intention being absent, we are unable to apply the *cy-pres* doctrine to clause 17.

As an alternative to the application of the doctrine of *cy-pres*, Mr. A. V. Viswanatha Sastri has asked us to apply the principle referred to in *Rogerson, In re. Bird v. Lee*(1). There, a testator left a sum of £1,000 to his trustees with a direction that it should be invested in the names of the vicar and the church wardens of a certain church upon trust to maintain and repair his tomb in the churchyard and to distribute the balance that there might be out of

(1) [1901] 1 Ch. 715

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the income among certain almshouses. It was held that, as the gift to maintain the tomb was invalid, the whole of the income went to the vicar and the churchwardens on behalf of the almshouses. This decision followed *Fisk v. Attorney-General*(1), *Dawson v. Small*(2) and *In re. Birkett*(3). It is pointed out in Tudor on Charities, Fifth Edition, page 61, that cases relating to a gift of the income of a fund for the upkeep of a tomb followed by a gift of the particular residue to charity have received exceptional treatment in England. We are not prepared to apply an exceptional rule of English law in a case like this. Moreover, we think it follows from the decision in *Kunhamutty v. Ahmad Musaliar*(4) that, so far as clause 17 of the will is concerned, the gift fails and the testator must be regarded as having died intestate to that extent.

The result is that the appeal succeeds in so far as the directions in clauses 16 and 18 of the will are concerned and the case will have to be remanded to the trial Court for a further hearing in the light of this judgment. The residue of the estate will be devoted to the objects set out in those clauses after deducting what falls to the heir at law by reason of the failure of the directions in clause 17. The Subordinate Judge will inquire and ascertain what proportion of the estate shall be attributed to clauses 16 and 18 and what proportion to clause 17. When the proportions have been ascertained the plaintiff will be entitled to possession of the proportion of the estate attributed to clauses 16 and 18. The defendant will have as the heir the proportion attributed to clause 17.

Inasmuch as the defendant repudiated the will and set up a false case of cancellation, he should not be allowed to remain in possession of the estate pending

(1) (1907) L.R. 4 Eq. 521
(2) (1878) 9 Ch.D. 576

(3) (1874) L.R. 18 Eq. 114
(4) (1934) I.L.R. 58 Mad. 204

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the further hearing. A receiver was appointed to hold the estate pending the hearing of this appeal, and we consider that there should be a receiver to hold the estate until the case has been finally decided. The plaintiff is willing to act as receiver without remuneration and undertakes to furnish security. We think it is fit and proper that we should appoint him receiver on these terms and we make an order accordingly. He will furnish security to the satisfaction of the trial Court in the sum of Rs. 3,000. We may add that we consider that in due course there should be a scheme framed for the management of the trust, and the plaintiff has intimated his intention of taking steps in this direction.

The parties will pay and receive proportionate costs throughout, but the plaintiff will get his costs out of the estate.

N.S.

APPELLATE CIVIL

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

PUTHIYETATH MAYAN (APPELLANT), APPELLANT

1945,
January 10

v.

AMMINIKANDI KRISHNAN NAYAR (RESPONDENT),
RESPONDENT *

Malabar Tenancy Act (Madras Act XIV of 1930), sec. 33—
"Family", meaning of—Includes father and son whether governed by Mitakshara law or Marumakkattayam law—Possession of kudiyiruppu by father tacked on to son's possession of it for purposes of section.

The word "family" in section 33 of the Malabar Tenancy Act, 1929, is not used in any restricted sense. It includes a father and son whether they are governed by the Marumakkattayam law or the Mitakshara law. The object of the

* Letters Patent Appeal No. 14 of 1944

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section is to prevent a tenant who has been in possession of a kudiyruppu for ten years from being evicted; and the occupation by a father of a kudiyruppu can be tacked on to his son's occupation of it when the son follows his father as a tenant.

APPEAL under clause 15 of the Letters Patent against the judgment and order of MOCKETT J., dated 25th February 1944 and passed in Appeal Against Order No. 675 of 1943 preferred to the High Court against the order of the District Court of North Malabar at Tellicherry, dated 6th August 1943 and made in Appeal Suit No. 146 of 1943 (Referred Interlocutory Application No. 184 of 1943 in Original Suit No. 650 of 1942, District Munsif's Court, Quilandy).

B. Sitarama Rao for *S. Venkatachala Sastri* for appellant.

K. Kuttikrishna Menon for respondent.

LEACH C.J.—The JUDGMENT of the Court was delivered by LEACH C.J.—The only question which arises in this appeal is with regard to the meaning to be given to the word "family" in section 33 of the Malabar Tenancy Act, 1929.

On 11th June 1931 the appellant granted a lease of the kudiyruppu in suit to the respondent's father, his father's two brothers, and his father's sister, who constituted a tavazhi. Section 3 (m) (1) of the Act defines "kudiyruppu" as meaning and including the site of a residential building, the site or sites of other buildings appurtenant thereto, such other lands as are necessary for the convenient enjoyment of the residential building, and the easements attached thereto. In the year 1935 (the exact date has not been disclosed) the father purchased the interests of his two brothers in the lease. On 6th July 1936 he assigned his interest therein to the respondent. Some time in 1937 the respondent purchased his aunt's interest in the lease and thereby became the sole

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lessee. Admittedly he became the tenant of the "kudiyruppu" within the meaning of the definition of "tenant" given in section 3 (v).

In 1942 the appellant instituted a suit in the Court of the District Munsif of Quilandy for the eviction of the respondent, who thereupon filed an application under section 33. That section reads as follows:—

"In any suit for eviction relating wholly or in part to a kudiyruppu, which has been in the continuous occupation of a tenant or the members of his family for ten years on the date of the institution of the said suit, such tenant shall be entitled to offer to purchase the rights in the kudiyruppu, of the landlord who seeks to evict him, at the market price on the said date."

The respondent contended that he and his father were members of the same family within the meaning of the section and consequently he was entitled to the benefit of the section. For the appellant it was said that, as the father and the son were governed by Marumakkattayam law, the son could not be regarded as a member of his father's family, and that the word "family" must be construed in a restricted sense. The appellant's interpretation was accepted by the District Munsif, but on appeal the District Judge of North Malabar held that here the word "family" had a more comprehensive meaning and would include a father and a son, whether they were governed by the Marumakkattayam law or the Mitakshara law. The appellant appealed to this Court. The appeal was heard by MOCKETT J., who agreed with the District Judge. The present appeal has been filed under clause 15 of the Letters Patent.

It is necessary to refer to the provisions of sections 3 (c), 14 (5) and 20 (5), because the word "family" appears in all these sections. But before doing so, we would point out that the Act governs all tenancies in Malabar whether they are held by families governed by the Marumakkattayam law, or the Mitakshara law, or the Muhammadan law,

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or the general law. Its main object is to prevent unreasonable eviction of tenants and to give them the right of permanent occupation of land held by them.

Section 3 (c) defines the word "cultivate" with its grammatical variations as meaning

"cultivate either solely by one's own labour or with the help of the labour of the members of one's tarwad or family or of hired labourers or both or direct or supervise cultivation by such members or hired labourers, jointly or separately".

A proviso is added, but it is unnecessary to refer to it. Here no difficulty can arise in the interpretation of the word "family" because the word "tarwad" is also used. Section 14 relates to grounds for eviction of cultivating verumpattamdars. It says that no suit for eviction of such a verumpattamdard from his holding shall lie at the instance of his landlord except on the grounds enumerated in the section. The fifth ground reads as follows:—

"that, at the end of an agricultural year, the landlord requires the holding *bona fide* for his own cultivation or for that of any member of his family or tarwad or tavazhi who has a proprietary and beneficial interest therein;"

The section concludes with an explanation which is in these words:

"In the case of a landlord governed by a law other than the Marumakkattayam law, the wife or husband and the children of the landlord shall be deemed to be members of the landlord's family having a proprietary and beneficial interest in the holding."

It follows that the word "family" is used in this section in a comprehensive sense. Section 20 relates to grounds for eviction of customary verumpattamdars, kuzhikanamdars or kanamdars, and its provisions are similar to those embodied in section 14.

We now return to section 33. Here the word "family" stands alone. In these circumstances, did the Legislature intend that the word should be construed strictly in a particular case, namely, in the case of a tarwad as meaning only the persons who are

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LEACH C.J.

recognized as members thereof by the Marumakkattayam law, and in the case of a joint family governed by the Mitakshara law as meaning merely such persons as the Mitakshara law recognizes as members, or that it should be construed as meaning a group of persons consisting of the parents and their children? In the opinion of the District Judge the word "family" would properly and naturally include a household or domestic circle of parents and children living together under the same roof, even though there was no community of property between all or some or any two of them; and he remanded the case to the trial Court for a decision whether the respondent and his father were members of one family in this sense. MOCKETT J. substantially agreed. He considered that the word "family" here should be given its ordinary meaning in the English language.

It is unfortunate that the Legislature did not make its meaning clear, as it took pains to do in section 3 (c), in section 14 (5) and in section 20 (5). The statute is in the English language and, unless there is some strong indication to be found in section 33 or elsewhere in the Act, the word "family" must be given the meaning which it has in the English language. Moreover, it has to be remembered that the object of the section is to prevent a tenant who has been in possession of a kudiyruppu for ten years from being evicted; and it would be a strange thing if the father's occupation could not be tacked on to the son's occupation when the son followed his father as the tenant. We agree with the District Judge and MOCKETT J. that the word "family" is not used in the restricted sense suggested by the appellant. To give it such a restricted meaning would, in our opinion, defeat the intention of the Legislature. It may be added that a similar opinion is expressed by Mr. C. Govindan Nair in his work on the Malabar Tenancy Act.

For these reasons we dismiss the appeal with costs.

N.S.

APPELLATE CIVIL

Before Mr. Justice King and Mr. Justice Bell

1945,
February 16

NAGARATNAM PILLAI (FIRST DEFENDANT), APPELLANT

v.

KAMALATHAMMAL (PLAINTIFF), RESPONDENT *

Code of Civil Procedure (Act V of 1908), O. VIII, rr. 1, 9, 10 and O. XLIII, r. 1 (b)—R. 10 applies to default by party under r. 9 and not under r. 1—Requisition for written statement in r. 9 relates to written statement called for subsequent to the one already put in by defendant.

Rule 10 of Order VIII of the Code of Civil Procedure applies only to some default by a party under rule 9 and not under rule 1 of that order. The requisition upon any of the parties for a written statement referred to in rule 9 can relate only to a written statement which is called for by the Court subsequent to the written statement which the defendant has already put in. It cannot amount to a mere repetition of the requisition already provided for in rule 1.

The view of SESHAGIRI AYYAR J. in *Rangasami Udayan v. Manickam Pillai*(1) approved.

APPEAL against the Order of the Court of the Subordinate Judge of Tanjore, dated 2nd February 1944 and passed in Original Suit No. 47 of 1943.

A. Swaminatha Ayyar and S. Thyagaraja Ayyar for appellant.

K. Rajah Ayyar for respondent.

KING J.—The JUDGMENT of the Court was delivered by KING J.—This is an appeal by the first defendant against the judgment of the learned Subordinate Judge decreeing Original Suit No. 47 of 1943 as against the appellant. The appeal is filed under Order XLIII, rule 1 (b), of the Code of Civil Procedure which provides a right of appeal from an order under rule 10 of Order VIII pronouncing judgment against

* Appeal Against Order No. 158 of 1944
(1) 1917 M.W.N. 241

a party. The judgment does not say specifically that it is being pronounced against the first defendant under that order; and because this is so, a preliminary objection was raised on behalf of the plaintiff that no miscellaneous appeal lay and that the appellant's only right was to file a regular appeal and pay the required court-fee. We have found against this preliminary objection. Although the language of paragraph 2 of the judgment is somewhat ambiguous and refers not only to the failure of the appellant to file his written statement in time, but also to the fact that at the trial on 2nd February 1944 he did not appear, it seems clear to us that this judgment must be regarded as essentially passed against the appellant because he did not file his written statement by the 31st January as called upon to do by the Court. There is no doubt that when he was called upon to file a written statement by the 31st January he was definitely warned that if he did not do so judgment would be pronounced against him under Order VIII, rule 10. It seems therefore to us reasonable to construe the judgment and decree in this case as recording an action of the learned Subordinate Judge taken under Order VIII, rule 10. The appeal, therefore, cannot be said to be incompetent under Order XLIII, rule 1 (b).

It is, of course, common ground that the written statement was not filed on the 31st of January. On that day, the appellant filed an application asking for a further three months' time for filing his written statement. That application was supported by an affidavit from a cousin of the appellant and a medical certificate granted on the 30th January in Trichinopoly. The medical certificate that the appellant was suffering from mental worry and high blood pressure, and in the opinion of the doctor, could not do any intelligent mental work for another three months. He required peace of mind and complete rest. The

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learned Judge passed orders on the second of February rejecting the application. He held that the facts in the case did not show that the appellant was in such a position that he was unable to attend to his share in the preparation of the written statement. We see no reason to differ from the discretion of the learned Subordinate Judge in refusing the application, and would point out further that, on the 31st January, there appears to have been no attempt made to obtain any affidavit from an Advocate to show that the Advocate, whose primary duty, as we conceive it, is to prepare the written statement on behalf of his client, made any attempt to do so which was frustrated by the client's state of health. We are therefore not prepared to allow this appeal on the ground that the learned Judge erred in his discretion in refusing the application.

There is, however, a point of law taken in regard to an order under rule 10. It is argued that an order under rule 10 cannot be passed if a defendant fails to file a written statement when required to do so under rule 1, and that rule 10 can apply only to some default by a party under rule 9. There can be no doubt that the default of the appellant in this case was under rule 1 and not under rule 9. The question whether rule 10 relates only to rule 9 or may also be taken to relate to rule 1 is not free from difficulty. The only time when the matter appears to have come up for decision in this Court is in *Rangasami Udayan v. Manickam Pillai*(1). There the learned Judges differed. AYLING J. held that rule 10 applies to rule 1 as well as to rule 9, and SESHAGIRI AYYAR J. held to the contrary. There is therefore no authority of this High Court binding us in disposing of this matter. We are of opinion that the view of

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SESHAGIRI AYYAR J. is the preferable view. Rule 9 of Order VIII runs thus :

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"No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same."

It is clear to us that the requisition upon any of the parties for a written statement referred to in rule 9 can relate only to a written statement which is called for by the Court subsequent to the written statement which the defendant has already put in. It cannot amount to a mere repetition of the requisition already provided for in rule 1. The word "written statement" is appropriate because rule 9 gives the Court power to call upon any of the parties to file a written statement. The expression "any of the parties" includes the plaintiff, and though it is not impossible to describe an additional pleading filed by the plaintiff on the direction of the Court as an additional plaint, it is much more appropriate to call it a written statement. The further words "the additional written statement" will of course apply to a defendant who has already filed the ordinary written statement contemplated under rule 1. The next point is whether the expression in rule 10 "when any party from whom a written statement is so required fails to present the same within the time fixed by the Court" relates only to rule 9 or to rule 1 as well. It seems to us very difficult to hold that the word "so" occurring in this context in rule 10 can possibly be related back to rule 1. It must, in our opinion, refer to something which is in close juxtaposition to itself and that can only be the provision of rule 9. It is true, as pointed out by AYLING J., that there seems to be no logical reason why a party who fails to comply with an order under

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rule 9 should suffer this drastic penalty, whereas the same penalty is not provided for a party who commits default under rule 1. But that is a defect in the Order which should, in our opinion, be set right if necessary by appropriate amendments. We must hold that there is something very strange on a natural interpretation of the words in rule 10 to make it relate to rule 1, even on the view suggested by AYLING J. that rules 2 to 8 may be regarded as sub-rules under rule 1. The fact remains that two pages of printed matter intervene between the requisition of the Court under rule 1 and the word "so" occurring in rule 10. We are accordingly of opinion that the learned Judge had no jurisdiction to pronounce judgment under rule 10 against the appellant. In so far, therefore, as he must be deemed to have done so, his decree will be set aside, and it will be deemed to be a decree passed against the appellant because the appellant was *ex parte*. There will be no order as to costs.

V.V.C.

APPELLATE CIVIL

Before Mr. Justice Wadsworth and Mr. Justice
Patanjali Sastri

KOLANGARAKANDI MOOZHIPURATH GOPALAN
AND THREE OTHERS (PLAINTIFFS), APPELLANTS

v.

MARUTHIYOTT VEETIL SANKARAN NAIR AND
ANOTHER (DEFENDANTS), RESPONDENTS *

*Malabar Compensation for Tenants Improvements Act (I of 1900),
ss. 5 and 6—Landlord and tenant—Landlord obtaining
decree for eviction of tenant subject to payment of compen-
sation for improvements—Creation of statutory tenancy—
Relationship between landlord and tenant same as tenancy
sued on—Failure of landlord to pay immediately value of*

* Second Appeal No. 1423 of 1943

*improvements as determined by decree—Right of tenant for
revaluation of improvements—Right of landlord to set off
against the improvements any future rent—Rights to be
determined as matters in execution—Later suit by landlord
for rent for subsequent periods barred by sec. 47 of the
Code of Civil Procedure (Act V of 1908).*

A landlord filed a suit under a registered lease (*marupat*) and obtained a decree on 19th December 1932, for possession with arrears of rent and future rent for three years on payment of the value of improvements under the Malabar Compensation for Tenants Improvements Act, which was confirmed on appeal on 28th October 1935 except for enhancement of the value of the improvements. No steps were taken to execute the decree. After the passing of the Madras Agriculturists Relief Act (IV of 1938) the arrears of rent under the decree earlier than 30th September 1938 were cancelled by the application of section 15 of the Act. The landlord filed a second suit in 1942 to recover the arrears of rent for the Malabar years corresponding to 1939-1942.

Held: The suit was barred under the provisions of section 47 of the Code of Civil Procedure. The combined effect of sections 5 and 6 of the Malabar Compensation for Tenants Improvements Act is that, where a landlord obtains a decree for the eviction of a tenant subject to the payment of compensation for the improvements, a statutory tenancy is created for the period during which the decree may be pending execution. During this statutory tenancy, the relations between the parties are governed by the lease sued on. If the landlord does not immediately pay for the value of the improvements as determined at the time of the decree, the tenant acquires a right to re-valuation of the improvements and the payment of any excess and the landlord obtains the right to set off against these improvements any future rent. But any question relating to the increase of improvements and the amount of future rent to be set off against these improvements is to be determined by the executing Court as a matter arising in execution. Therefore, any attempt by the landlord to recover the rent separately for the subsequent periods ignoring his previous decree would be barred by section 47 of the Code of Civil Procedure.

APPEAL against the decree of the Court of the Subordinate Judge of Tellicherry in Appeal Suit No. 16 of 1943 preferred against the decree of the Court of the District Munsif of Quilandi in Original Suit No. 436 of 1942.

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A. Achuthan Nambiar for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by
WADSWORTH J. WADSWORTH J.—The appellants sued to recover a sum of Rs. 128-7²⁰ being the arrears of rent for the Malabar years corresponding to 1939 to 1942 due under a registered *marupat* or lease, dated 19th May, 1919. The plaintiffs had filed a previous suit, Original Suit No. 609 of 1931, for possession and arrears of rent on the basis of the same *marupat* and got a decree on 19th December 1932 for possession with arrears of rent and future rent for three years on payment of the value of improvements. There was an appeal by the tenant and in appeal the value of the improvements was enhanced, but the decree was otherwise confirmed on 28th October 1935. No steps appear to have been taken at any time to execute this decree. On 10th September 1939, after Madras Act IV of 1938 had come into force, the tenants made a deposit of the arrears of rent for the Malabar year corresponding to fasli 1346. There must also have been a similar deposit in respect of the rent of fasli 1347 on some date before 30th September 1938, for it is common ground that the earlier arrears of rent under the decree have been cancelled by the application of section 15 of Madras Act IV of 1938. But no papers have been exhibited regarding the deposit in respect of fasli 1347. Whether because of difficulties under the law of limitation or because of their inability to pay for the improvements, the appellants, instead of seeking to enforce their previous decree for possession, filed the present suit in which they claimed the right to recover the arrears of rent for the years corresponding to 1939 to 1942 by the sale of the tenant's rights. It was contended for the tenants that the decree in the former suit was barred by limitation, that if it was not barred a separate suit for rent would not lie by reason of section 47 of the

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Civil Procedure Code and the provisions of section 6 of the Malabar Compensation for Tenants Improvements Act, and that the lease sued on no longer subsisted, having been merged in the prior decree. The trial Court held that the earlier decree was barred by limitation, that the lease sued on did not subsist by reason of that decree and that the suit was barred by the application of section 47 of the Civil Procedure Code. The lower appellate Court, without going into the question of limitation, dismissed the suit on the ground that, under section 6(4) of the Malabar Compensation for Tenants Improvements Act, the right of the landlord to rent for the years subsequent to the decree has to be determined as a matter arising in execution and cannot form the subject of a separate suit.

In appeal it is contended that section 47 of the Civil Procedure Code has no application, that the conduct of the respondents in taking advantage of section 15 of Act IV of 1938 amounts to an admission of the subsistence of the tenancy and that the fact that the previous decree had become unexecutable does not deprive the landlord of his right to file a separate suit for future rents. Reference is also made to the decision of the Privy Council in *Raghunath Singh v. Hansraj Kunwar*(1) wherein the right to file a second suit for the redemption of a mortgage when the first decree did not foreclose the right of redemption was recognized.

The relevant provisions of the Malabar Compensation for Tenants Improvements Act are sections 5 and 6. Section 5 gives the tenant a right on ejectment to compensation for improvements and provides that every tenant to whom compensation is so due shall, notwithstanding the determination of the tenancy, be entitled to remain in possession until ejectment in execution of a decree or order of Court and the tenant so

(1) (1934) I.L.R. 56 All. 561 (P.C.)

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continuing in possession shall during such continuance hold as a tenant subject to the terms of his lease. Section 6(1) provides that in a suit for ejectment, when the defendant establishes a claim for compensation for improvements, the amount thereof shall be ascertained and the decree shall provide that the defendant shall put the plaintiff in possession of the land with the improvements thereon on payment by the plaintiff into Court of the amount found due for compensation. Sub-section 2 provides for the adjustment of rent due by the defendant to the plaintiff against the amount found due from the plaintiff to the defendant by way of compensation for improvements. Sub-section 3 provides for what is to happen when there is a delay on the part of the plaintiff in paying compensation for improvements. In such circumstances there is to be a re-valuation and a further adjustment of subsequent rent, etc., against the value of improvements and the decree has to be varied in accordance with the order of the executing Court. Sub-section 4 provides that every matter arising under sub-section 3 shall be deemed to be a question relating to the execution of a decree within the meaning of section 244, Civil Procedure Code (now corresponding to section 47, Civil Procedure Code). Reading all these provisions together, it is clear that, when the landlord has obtained a decree for the eviction of the tenant subject to the payment of compensation for improvements, a statutory tenancy is created for the period during which the decree may be pending execution. During this statutory tenancy the relations between the parties are governed by the terms of the lease sued on. If the landlord does not immediately pay the value of improvements as determined at the time of the decree, the tenant acquires a right to re-valuation of the improvements and the payment of any excess, and the landlord obtains the right to set off against these improvements any future rent. But,

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any question relating to the increase of improvements and the amount of future rent to be set off against these improvements is to be determined by the executing Court as a matter arising in execution. *Prima facie*, therefore, any attempt by the landlord to recover the rent separately for the subsequent periods ignoring his previous decree would be barred under section 47 of the Civil Procedure Code. So much has recently been held by HOBWILL J. in *Sultan Abdur Rahman Ali Raja Avargal v. Premi and others* (*), with which decision we are in agreement. It follows, therefore, that the lower Courts were right in holding that the present suit for rent is barred under section 47 of the Civil Procedure Code. We may add that in our opinion the decision in *Raghunath Singh's case*(1) has no application, having regard to the provisions of the special Act.

It has, however, been suggested in the course of arguments that this suit might be treated as an application under section 47 in execution of the previous decree. There are difficulties in the way of such a procedure. Firstly, the plaintiffs have not asked for the adjustment of the rents now claimed against the previous decree for improvements, nor do they seek to work out their rights by the process of eviction. What they are trying to do is to bring the tenants' rights to sale in execution of a decree for subsequent rent. Assuming that permission might in a proper case be given for the "recasting of the pleadings so as to transform the suit into an application for the adjustment of the arrears now claimed against the previous decree for improvements, the appellants would be confronted with serious difficulties of limitation. It has been suggested before us that the decree in the former suit might be regarded as merely declaratory in its effect until the adjustment of rent against the value of improvements has been made and

* Second Appeal No. 1301 of 1943 (1) (1934) I.L.R. 58 All. 561 (P.C.)

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the balance has been paid by the plaintiffs. That is to say, the suggestion is that the plaintiffs could work out their rights under the decree at any time by depositing the value of improvements, and limitation would not begin to run until by such deposit the decree had become in the full sense of the word executable. This argument which is based on the reasoning of the Privy Council in *Rameshwar Singh v. Homeshwar Singh*(1) seems to overlook the fact that the decree in the present case is executable on the very date on which it was passed. There was nothing to prevent the plaintiffs from paying into Court the balance due from them by way of improvements and getting possession immediately after the decree was passed; vide *Ramappaya v. Charda Bhatta*(2). It would appear, therefore, that limitation would begin to run against the plaintiffs from the date of the passing of the decree. In view of the doubt on the question whether the previous decree was, on the date when the present suit was filed, capable of being executed and in view of the fact that the appellants in the present suit seem deliberately to have framed their plaint in order to avoid questions of limitation with reference to the previous decree, we do not think that this is a proper case for treating the plaint in the suit as an application for the execution of the previous decree.

We are, therefore, in agreement with the decision of the lower appellate Court that the present suit is barred by the provisions of section 47, Civil Procedure Code, read with section 6 (4) of the Malabar Compensation for Tenants Improvements Act, and we dismiss the appeal with costs.

G.R.

(1) (1920) 40 M.L.J. 1 (P.C.)

(2) (1910) 7 I.C. 588

APPELLATE CIVIL

Before Mr. Justice Mockett and Mr. Justice
Kuppuswami Ayyar

THE BOARD OF COMMISSIONERS FOR HINDU
RELIGIOUS ENDOWMENTS, MADRAS, THROUGH ITS
PRESIDENT (FIRST DEFENDANT), APPELLANT

1945,
February 9

MARUTHA NAICKER AND TEN OTHERS (PLAINTIFF
AND DEFENDANTS 2 TO 7 AND NIL), RESPONDENTS*

*Madras Hindu Religious Endowments Act (11 of 1927), sec.
9 (II)—Charitable service connected with temple—Religious
endowment within section though secular in character—
Connection with temple, depending on facts of each case.*

A charitable service may be secular but still may be a religious endowment as defined in section 9 (11) of the Madras Hindu Religious Endowments Act, if such charitable service is connected with a temple. Whether a service or charity is connected with a temple will depend on the special facts in each particular case.

APPEAL against the decree of the District Court of Madura, dated 15th January 1943, and passed in Original Suit No. 8 of 1941.

Advocate-General (P. V. Rajamannar) and M. Chockalingam for appellant.

K. V. Ramachandra Ayyar and T. N. Sundaresa Ayyar for first respondent.

K. Veerasami for K. S. Ramamurthi for respondents 2, 3 and 5 to 7.

Respondents Nos. 8 to 11 were not represented.

Cur. adv. vult.

JUDGMENT.

KUPPUSWAMI AYYAR J.—The appellant is the first defendant in the suit, the Board of Commissioners for Hindu Religious Endowments, Madras. The suit

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was for setting aside a scheme framed in respect of a Hindu religious endowment and was filed by a community known as the Santakula Sowmyanarayana Kavaraya community. The plaintiff's case was that defendants 2 to 7 were some of the representatives of the community to which the plaintiff belonged and that it was on their motion that the Board framed the scheme. That is why they were added as supplemental defendants. They support the Board. The endowment consists of certain shops at Palni owned by the community. The plaintiff's father and his ancestors were in management of these properties on behalf of the community. There was a document, Exhibit P-3, under which the plaintiff was allowed to continue in management of the property. It was complained that the endowment was not properly managed and that was why a scheme was framed. The plaintiff's case is that there was no endowment in respect of the property, that it was open to the community to do anything they chose with the income, and the four objects for which the money was to be spent were not wholly of a religious character and consequently the Board had no authority under section 57 of the Hindu Religious Endowments Act to frame a scheme. The learned District Judge, Madura, found that three of the four objects specified in Exhibit P-3 could be brought under the scope of religious endowment within the meaning of section 9 (11) and could be held to be attached to the temple of Sri Dandayudapani Devasthanam and Sri Lakshminarayana temple in the sense that they are for service connected with these two temples. He found that the suit trust was not a public religious endowment, because one of the four objects, namely, performance of the charities, was not religious and therefore was not a religious endowment. He found however, that the suit trust was a single inseparable trust, partly for religious and partly for secular objects, and

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until, under section 77, the Board separates the religious from the secular charities the Board is not entitled to frame a scheme under section 57 of the Act. He found, however, that the plaintiff was not a hereditary trustee and that the scheme was not vitiated by any irregularity in procedure; but in view of the fact that the suit properties, though trust properties, are not all religious endowments within the meaning of section 9 (11), he set aside the scheme. Hence this appeal.

The only question for consideration is whether one of the charity services mentioned in Exhibit P-3, namely the second, *nadapudutan ubhayam*, watershed charity and distribution of horse-gram, gruel, etc., services in the Ramanuja Kootam at Srirangam, commencing from the sixth day festival of the Chitra festival of every year, was not a charity connected with the temple so as to make the endowment not a religious one. The learned District Judge has found that, so far as the other three charity services were concerned, they can be held to be religious endowments attached to the deity of Sri Dandayuthapani temple and Sri Lakshminarayana Perumal temple at Palni. The first one was a fireworks celebration in a particular building on the 8th day festival in the Chaitrotsavam of Sri Lakshminarayana Perumal temple of Palni. The third one was that of bringing *theertha kavadi* from Kodumudi for Sri Dandayuthapaniswami. The fourth was a *tirukkalyana mandagappadi* at the Tirukkalyana Mandapam at the foot of Swamimalai at Palni. So far as the last one is concerned, it is a ritual connected with the temple. So also was the third. But with regard to the first, the fireworks celebrations which was to be celebrated on a day on which there was to be a festival at Palni, it is not clear how it could be said to be in any way different from that of having a watershed charity and the distribution of water or the distribution of

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balance after meeting the expenses, it shall be deposited in the Co-operative Bank, Palni, it cannot be said that it was only the income that was endowed and that there was only a charge on these properties for the expenses to be incurred in connection with these services.

I would therefore find that all the four services are services in connection with the temple and consequently it is a religious endowment as defined in section 9 (11) of the Hindu Religious Endowments Act. If so the Board is entitled to frame a scheme.

The other issues have been found against the appellant, and the correctness of the same has not been questioned in this Court.

I would therefore allow the appeal and dismiss the suit with costs in both the Courts to be paid by the first respondent.

MOCKETT J.—I agree.

G.R.

APPELLATE CIVIL

Before Mr. Justice Horwill and Mr. Justice
Kuppuswami Ayyar

S. K. R. S. SABAPATHI CHETTIAR (SECOND
RESPONDENT), APPELLANT

v.

LAKSHMANAN CHETTIAR AND FIVE OTHERS
(PETITIONER, ORIGINAL DECREE-HOLDER AND
RESPONDENTS 1 AND 3 TO 5), RESPONDENTS *

*Code of Civil Procedure (Act V of 1908), O. XXI, r. 16—
Notice to transferor of decree and to such of judgment-
debtors against whom execution was sought, essential—Notice
to other judgment-debtors immaterial, absence of notice
to them not vitiating execution proceedings.*

Under the proviso to Order XXI, rule 16, of the Code of
Civil Procedure, notice has to be served on the transferor

* Appeal Against Order No. 302 of 1944

of the decree and such of the judgment-debtors against whom the transferee seeks execution. Those judgment-debtors against whom the decree is not going to be executed are not interested in the execution proceedings and the absence of notice to them will not vitiate the execution proceedings.

Ram Des Ram v. Frank Coombs(1) and *Charubala Dei v. Baikunatha Nath*(2) relied on.

APPEAL against the order of the Court of the Subordinate Judge, Devakottah, dated 11th April 1944, and made in Execution Petition No. 127 of 1943 in Original Suit No. 1 of 1941.

R. Gopalaswami Ayyangar for appellant.

M. S. Venkatarama Ayyar for respondents.

The JUDGMENT of the Court was delivered by KUPPUSWAMI AYYAR J.—The appellant is the eighth defendant and the appeal arises out of proceedings in execution of the decree in Original Suit No. 1 of 1941 on the file of the Subordinate Judge's Court, Devakottah. The execution petition was filed by the assignee-decree-holder. Notice was ordered to be issued to the original decree-holder and to the judgment-debtors. All of them were served except defendants 1 and 4. The petitioner exonerated defendants 1, 2 and 4 from the decree and, as the others were served, the petition was proceeded with. The assignment was recognised and the properties of the eighth defendant which were sought to be proceeded against were directed to be sold. The petition was adjourned for settlement of sale proclamation. It is against that order this appeal has been filed by the eighth defendant. His contention is that, since notice had not gone to all the judgment-debtors, the assignment ought not to have been recognised as the service of notice on all the judgment-debtors is a condition precedent before such an order could be passed, and that goes to the root of the jurisdiction. Secondly, it was contended that the assignment was

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(1) (1930) I.L.R. 52 All. 898

(2) A.I.R. 1939 Cal. 419

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really a discharge and that the assignment was taken in the name of the respondent *benami*, for the second defendant who was one of the judgment-debtors. On both the points the learned Subordinate Judge found against the appellant.

With regard to the question as to whether the assignment could not be recognised without notice being taken to defendants 1 and 4, our attention has been drawn to the proviso to Order XXI, rule 16, of the Code of Civil Procedure which runs thus :

"Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution."

It is urged that the Court had no jurisdiction to pass any orders with reference to the assignment until notice had gone to the transferor and to the judgment-debtor or judgment-debtors and their objections were heard. In this case notice had gone to the transferor and notice had also gone to all the judgment-debtors except defendants 1 and 4 who were exonerated from the decree by the petitioner. The executing Court had no necessity to hear the objections of these persons against whom the decree was not going to be executed at any time. The question was considered by the Allahabad High Court in *Ram Deo Ram v. Frank Coombs*(1). This is what was stated in that case :

"The question, therefore, is whether the auction sale should be held to be valid as against the mortgagor who did receive notice or whether it should be held to be altogether invalid. We consider that the mere fact that notice was not issued to the subsequent mortgagee is not a sufficient reason for holding that the auction sale was invalid as against the mortgagor. Accordingly we consider that by that auction sale the plaintiff acquired the rights of the mortgagor."

(1) (1930) I.L.R. 52 All. 898

They also pointed out that in the rulings cited before them notice was not issued to any judgment-debtor at all.

The Calcutta High Court in *Charubala Dei v. Baikunatha Nath*(1) stated that, if some of the judgment-debtors waived their rights to have notice, then it would not invalidate the execution proceedings. This is what they stated :

"It therefore appears that the parties directly interested in the service of notices, Order XXI, rule 16, Civil Procedure Code, had expressly waived any rights which they may have had in respect of such notices. It appears from the provisions of Order XXI, rule 16, Civil Procedure Code, that the notices to which reference is made in that rule are merely for the benefit of the transferors and the judgment-debtors and it was apparently the intention of the Legislature to ensure that execution proceedings should not be continued unless the transferors and the judgment-debtors had had a suitable opportunity of coming forward to contest the validity of the assignment if they wished to do so."

In this case there was no necessity for the issue of notice on those persons against whom the decree was not going to be executed and who were not interested in the execution proceedings. Consequently, the absence of notice on those persons, we think, will not affect the proceedings in execution. The learned Subordinate Judge was, therefore, justified in finding that, since notice had gone to all persons against whom the decree was to be executed and to the transferor, the Court had jurisdiction to recognise the transfer and, as the transfer was recognised by the executing Court, the decree was to be executed only against those to whom notice had gone.

With regard to the other question as to whether the assignment was *benami* for one of the judgment-debtors and therefore amounted to a discharge, there is absolutely no evidence except that of the petitioner as D.W. 1, and he had no personal knowledge

(1) A.I.R. 1939 Cal. 419

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of the discharge. He merely stated that the second defendant told him that the decree was discharged. But a statement by the second defendant to the witness will not be evidence of the truth of that statement. It is stated for the appellant that the assignment itself had not been proved, but we find from the endorsement on Exhibit P-1 signed by the Judge that it was admitted by D.W: 1, who is the appellant. It is true that in the counter it was stated that the plaintiff has to prove the assignment but then, when the genuineness of the document was admitted by the appellant and it was marked as an exhibit, it cannot be said that the appellant had been in any way prejudiced by the non-examination of any witness to prove it.

The appeal accordingly fails and is dismissed with costs.

G.R.

APPELLATE CIVIL

Before Mr. Justice Horwill

1944,
November, 14

THE PROVINCE OF MADRAS, REPRESENTED BY THE
COLLECTOR OF MALABAR (FOURTH DEFENDANT),
APPELLANT

v.

LAXMI AMMA AND OTHERS (PLAINTIFFS AND DEFENDANTS
1 TO 3 AND 5 TO 17), RESPONDENTS *

*Code of Civil Procedure (Act V of 1908) O. XLI, r. 23, and
s. 115—Trial Court—Rejection of plaint under O. VII,
r. 11—Appeal to District Judge—Appellate Court setting
aside order of lower Court and remanding suit for trial
on merits—Such order not an order under O. XLI, r. 23
and not appealable—Revision under s. 115 of the Code—
Validity of District Judge's order.*

The plaintiffs were junior members of a tarwad, who sought to avoid a decree passed against a junior member of the family and the karnavan personally and against the karnavan as representative of the tarwad. They alleged that

* Appeal Against Order No. 2 of 1944

the karnavan did not represent them in that suit; but they alleged also that they were not bound by the decree even if he was the karnavan and represented the tarwad. They sought a declaration that the decree was not binding on them. But no court-fee was paid to have the decree set aside. The first Court held that the plaintiffs had not paid sufficient court-fee, on the ground that it was necessary to set aside the decree. The plaint was therefore rejected. An appeal was preferred against the order rejecting the plaint and the District Judge held that, since there was an allegation in the plaint that the karnavan did not represent the plaintiffs in that suit, they need pay court-fee only on that basis. He therefore allowed the appeal, set aside the order of the lower Court and remanded the suit to the lower Court for trial on the merits. On appeal to the High Court by the Government who was party to the suit,

held: (1) No appeal lay against the order of the District Judge as the order did not fall within Order XLI, rule 23, of the Code of Civil Procedure; but the Court could act under section 115 of the Code of Civil Procedure and exercise its powers of revision.

(2) The order of the District Judge would be right if the plaintiffs were content to base their case entirely on the allegation that the karnavan did not represent them in the suit and that the decree was therefore void. If, however, the plaintiffs failed to establish their case on that ground, they would not be able to have the decree set aside so far as they were concerned without paying the proper court-fee for avoiding the decree.

Madhorao v. Keshao(1), *Basheshar Nath v. Bidhi Chand*(2) and *Cotton Syndicate v. Malawa Mal*(3) considered.

APPEAL against the order of the District Court of South Kanara, dated 31st August 1943, and made in Appeal Suit No. 412 of 1941 (Original Suit No. 52 of 1940, Sub-Court, South Kanara).

The Government Pleader (K. Kuttikrishna Menon) for appellant.

A. Achutan Nambiar for respondents.

ORDER.

HORWILL J. —The plaintiffs are junior members of a tarwad, who sought to avoid a decree passed against

HORWILL J.

(1) I.L.R. [1941] Nag. 629

(2) A.I.R. 1937 Lah. 380

(3) A.I.R. 1929 Lah. 83

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a junior member of the family and the karnavan personally and against the karnavan as representative of the tarwad. They alleged that the karnavan did not represent them in that suit; but they also gave reasons why they would not be bound by the decree even if he was the karnavan and represented the tarwad. So it would seem that they wished their case to be discussed both on the basis that the karnavan did not represent them in that suit and on the basis that he did. No court-fee was paid to have the decree set aside; and they sought a declaration that the decree was not binding on them. The first Court held that the plaintiffs had not paid sufficient court-fee; for it was necessary to set aside the decree to grant them all the reliefs they prayed for. The plaint was therefore rejected. As the rejection of a plaint is deemed to be a decree under section 2 (2) of the Civil Procedure Code, an appeal was preferred; and the learned District Judge held that since there was an allegation in the plaint that the karnavan did not represent the present plaintiffs in that suit, they need pay court-fee only on that basis. He therefore allowed the appeal, set aside the order of the lower Court and remanded the suit to the lower Court for trial on the merits.

A preliminary objection is taken that no appeal lies. The Government, as appellant, says that the order in question is an order of remand and is therefore covered by Order XLI, rule 23 of the Civil Procedure Code. This rule deals with two types of cases: (i) where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and (ii) where the appellate Court in reversing or setting aside a decree under appeal deems it necessary in the interests of justice to remand the case. In my opinion, the present case does not fall within either of these two categories. The suit was not disposed of on a preliminary point. The Court, by rejecting the plaint, refused to consider the suit.

Although the learned District Judge said that he was remanding the appeal, he did not in fact do so, his order amounting to a direction to the trial Court to entertain the plaint and proceed with the suit. The Government rely on *Madhorao v. Keshao*(1), where a single Judge of the Nagpur High Court held that Order XLI, rule 23, would apply to an order of an appellate Court. The learned Judge said:

"In *Raman Nayar v. Krishnan Nambudripad*(2), the Madras High Court defined a preliminary point as any point whether of fact or law the decision of which avoids the necessity for the full hearing of the suit. In *Govinda v. Baliram*(3) I held that a preliminary point is one which when determined in favour of the plaintiff permits the progress of the suit but when determined against him concludes the suit."

Even if we accept the definition of the learned Judge of a preliminary point, it would not include an order rejecting a plaint; for the order was not one concluding the suit. The suit had never been taken up for trial; and the suit could not be disposed of until the plaint had been accepted. The learned Judge dissents from a decision of a single Judge of the Lahore High Court in *Basheshar Nath v. Bidhi Chand*(4), in which it was held that the rejection of a plaint was not disposal of a suit on a preliminary point. *Basheshar Nath v. Bidhi Chand*(4) followed an earlier decision of the same Court in *Cotton Syndicate v. Malawa Mal*(5), where it was held that the rejection of a plaint was not a disposal of a suit on a preliminary point. The learned Government Pleader refers to two Calcutta cases in which it was held that a second appeal lay in cases where the appellate Court agreed with the trial Court that the plaint could not be admitted. The case of a second appeal is however very different from an order of remand. Although the learned Judges

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(1) I.L.R. [1941] Nag. 629 (2) (1922) I.L.R. 45 Mad. 990 (F.B.)
(3) (1930) 27 Nag. L.R. 226
(4) A.I.R. 1937 Lah. 386 (5) A.I.R. 1929 Lah. 83

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gave no reason why a second appeal should lie, yet it might be argued that, where the appellate Court dismissed the appeal, the order was tantamount to again rejecting the plaint and therefore gave rise to another appeal. It might also perhaps be said that since the rejection of a plaint is deemed under section 2 (2) of the Code to be a decree, section 100 of the Code would apply and give a right of second appeal. A civil miscellaneous appeal would however be admissible only if the provisions of Order XLI, rule 23, were complied with. Moreover, it would seem anomalous, when an order refusing to reject a plaint is not made appealable, that the order of an appellate Court which has the same effect should be appealable. I therefore agree with the learned Advocate for the respondents that an appeal does not lie.

The learned Government Pleader however argues that, even though an appeal does not lie, he has a right to come to this Court in revision; because the first Court gave him a valuable right in rejecting the plaint and, if the lower Court for wrong reasons ordered the plaint to be admitted, it would give rise to a question of jurisdiction which this Court can consider in revision. The learned Government Pleader has pointed out a distinction between a case like the present and one where the trial Court has refused to levy more court-fee from the plaintiff and the defendant has sought to invoke the powers of this Court under section 115 to set aside the first Court's order. Whether that distinction can or cannot be drawn, there is no doubt that this Court can interfere in revision if the facts justify it in doing so.

The learned District Judge would be right if the plaintiffs were content to base their case entirely on their allegation that the karnavan did not represent them in the suit and that the decree is therefore void. If, however, the plaintiffs fail to establish their allegation that the decree is void for want of proper

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representation in the suit, they would not be able to have the decree set aside so far as they were concerned without paying the proper court-fee for avoiding the decree. I am requested by the learned Advocate for the respondents to give the plaintiffs some further time to consider their position and to pay further court-fee if they deem it advisable. They will be given two months for that purpose after the records reach the lower Court.

The parties will bear their own costs in this Court.
V.V.C.

APPELLATE CRIMINAL

Before Mr. Justice Happell

OGILA DORAISWAMI NAIDU AND ANOTHER,
ACCUSED *

1945,
January 7

*Code of Criminal Procedure (Act V of 1898), ss. 380 and 562—
Nature of enquiry contemplated under s. 380—Magistrate
not empowered to set aside conviction already recorded.*

When an accused person comes before a Magistrate under section 380 of the Code of Criminal Procedure, he can be treated only as a convicted person and the Magistrate is not empowered to set aside the conviction already recorded by the Magistrate who refers the case. The kind of enquiry or the nature of the additional evidence contemplated by section 380 is such enquiry or evidence as may assist the Magistrate to whom the accused has been forwarded to exercise his discretion properly under section 562 of the Code of Criminal Procedure.

Public Prosecutor v. Gurappa Naidu (1) followed.

CASE referred for the orders of the High Court, under section 438 of the Criminal Procedure Code by the District Magistrate of Chittoor in his letter Ref. D1-1980 of 1944, dated 27th July 1944.

* Criminal Revision Case No. 598 of 1944 (Case Referred No. 28 of 1944)
(1) (1933) I.L.R. 57 Mad. 85

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N. Somasundaram (Assistant Public Prosecutor) for the Crown.

ORDER

HAPPELL J.

HAPPELL J.—The Sub-Magistrate, Puttur, in Criminal Case No. 422 of 1944, convicted two youths of offences under section 380 of the Indian Penal Code. The prosecution case was that the first accused, who was travelling in the same carriage as P.W. 1, picked P.W. 1's pocket of a purse as soon as the train stopped at Puttur Railway Station and passed the purse over to the second accused. P.W. 1 did not actually see the first accused taking the purse from his pocket but he says he saw him pass the purse to the second accused, and P.W. 2, a refreshment attendant, says that he saw the first accused pick P.W. 1's pocket and pass the purse to the second accused. As the accused had not been previously convicted, the Sub-Magistrate thought that the case was a fit one to be dealt with under the provisions of section 562 of the Criminal Procedure Code and accordingly forwarded the two accused to the Joint Magistrate of Chandragiri. The Joint Magistrate was of opinion that the accused should not have been convicted and he requested the District Magistrate of Chittoor to address this Court to quash the conviction. The District Magistrate in the reference now under consideration has recommended that the conviction should be set aside.

The learned Joint Magistrate appears to have been in some doubt as to whether he himself was not empowered after further enquiry to set aside the conviction, and in his letter to the District Magistrate he asks what is the nature of the enquiry contemplated within the meaning of section 380 if no enquiry could be conducted under section 380, Criminal Procedure Code, which may upset the conviction. When an accused person comes before a Magistrate under section 380, he can be treated only as a convicted person and the Magistrate is not empowered to set

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aside the conviction already recorded by the Magistrate who refers the case; vide *Public Prosecutor v. Gurappa Naidu*(1). The kind of enquiry or the nature of the additional evidence contemplated by section 380 is clearly such enquiry or evidence as may assist the Magistrate to whom the accused have been forwarded to exercise his discretion properly under section 562, Criminal Procedure Code. In the present case, for instance, the Sub-Magistrate says that the accused are "young boys still in their teens". As boys are in their teens from the age of thirteen to nineteen, the Joint Magistrate might want to ascertain what the age of the youths really is.

So much for the question asked by the Joint Magistrate. As regards the reference, it does not seem to me that it was necessary for it to have been made. The District Magistrate, it may be noted, says nothing at all on the merits. In my opinion, the appreciation of the evidence made by the Sub-Magistrate is to be preferred to the opinion of the Joint Magistrate. The Joint Magistrate seems to have accepted the explanation of the accused, which was not supported by any evidence, that the first accused picked the purse up. Moreover, it is not correct to say, as he does, that the only evidence against the first accused is that of P.W. 2. P.W. 1 says that he saw the first accused hand the purse to the second accused. No doubt he does not say that he actually saw the first accused pick his pocket. But why, if the first accused had innocently picked the purse up from the platform, should he have immediately handed it to the second accused? P.W. 1's evidence, therefore, does corroborate the evidence of P.W. 2 and it seems to me that there are no adequate grounds for differing from the conclusion reached by the Sub-Magistrate that the prosecution had proved its case that the accused were guilty of the offence charged under section 380. The

(1) (1933) I.L.R. 57 Mad. 85

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reference, therefore, is not accepted and the records will be returned to the Joint Magistrate through the District Magistrate, Chittoor, to be dealt with in accordance with the provisions of section 562, Criminal Procedure Code.

V.V.C.

APPELLATE CRIMINAL

Before Mr. Justice Mockett

1945,
January 17

IN RE B. L. V. RANGARAO, ACCUSED *

Indian Penal Code (XLV of 1860), ss. 420 and 467—charges of forgery and cheating under—Accused acquitted of cheating but convicted for offence of forgery—Appeal against conviction—Appellate Court entitled to come to its own conclusion as to facts on the whole evidence in spite of acquittal for the offence of cheating.

The accused was charged under section 467 of the Indian Penal Code for forgery and section 420 for cheating, the allegation being that he forged a signature on a money order form and cheated by impersonating the true owner. The Assistant Sessions Judge acquitted the accused of the offence of cheating but convicted him of the offence of forgery. The accused appealed. On a reference by the Sessions Judge,

held: The Sessions Judge could come to his own conclusion with regard to the appeal against the conviction under section 467 quite untrammelled by the fact that the acquittal under section 420 of the Indian Penal Code stood. The order of acquittal might act as a plea in bar to further trial for cheating, but it did not in the least act as a plea in bar with regard to the facts in so far as they were relevant in considering the charge of forgery.

Syed Gulam Ghouse Sha Sahib Kadiri v. Emperor(1) referred to.

CASE, referred for the orders of the High Court under section 438 of the Criminal Procedure Code, by the Sessions Judge of Vizagapatam Division in his

* Criminal Revision Case No. 758 of 1944 (Case Referred No. 36 of 1944)
(1) 1933 M.W.N. (Crl.) 139

order of reference, dated 11th September 1944 and made in Criminal Appeal No. 100 of 1944 preferred against the judgment of the Assistant Sessions Judge of Chicacole in Sessions Case No. 34 of 1944.

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

Accused was not represented.

ORDER

MOCKETT J.—This is a reference by the learned Sessions Judge of Vizagapatam under section 438 of the Criminal Procedure Code. The accused was charged under section 467, Indian Penal Code—forgery, and section 420, Indian Penal Code—cheating, the allegation being that he forged a signature on a money order form and by impersonating the true owner cheated. The learned Assistant Sessions Judge of Chicacole acquitted the accused of cheating but convicted him of forgery. The accused appealed and the learned Sessions Judge appears to find himself embarrassed by having on the record an acquittal which he considers inconsistent with the conviction. He seems to think that while the acquittal stands his hands are in some manner tied with regard to confirming the conviction. It is not so. The whole evidence is before the Court. He is entitled, if he thinks fit, to express his disagreement with the finding of fact in the acquittal, although there being no appeal the acquittal still stands. He is not in the least bound by any finding of facts in the acquittal. The fact that the trial Judge was able to acquit of cheating and convict of forgery makes evident that this is not a case where on precisely the same facts a man is tried for two offences.

So far as this reference is concerned, BURN J. in *Syed Gulam Ghouse Sha Sahib Kadiri v. Emperor*(1) has held that this High Court will not as a rule interfere with acquittals in revision. In any

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In re
MOCKETT J.

case a Court can do no more than set an acquittal aside. The reference will be returned to the learned Sessions Judge with these observations. He can come to his conclusion with regard to the appeal against the conviction under section 467 quite untrammelled by the fact that the acquittal under section 420, Indian Penal Code, stands. It may act as a plea in bar to further trial for cheating, but it does not in the least act as a plea in bar with regard to the facts in so far as they are relevant in considering the charge of forgery. This position frequently arises in the High Court in which there are appellants before us in cases where some of the other accused have been apparently quite wrongly acquitted on similar evidence.

APPELLATE CRIMINAL

Before Mr. Justice Mockett

IN RE NATESA MUDALIAR (ACCUSED No. 2)
PETITIONER*

1945,
January 17

*Indian Penal Code (Act XLV of 1860) ss. 457 and 380—
Separate convictions—Separate sentences—Validity.*

A person who is convicted under section 457 of the Indian Penal Code for the offence of lurking house-trespass and section 380 for the offence of theft in a building can be awarded separate sentences on each count.

Ponniiah Lopes, In re(1) referred to.

Makhru Dusadh v. King-Emperor(2) dissented from.

PETITION under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Subdivisional Magistrate, Saidapet, dated 14th November 1944 and passed in Criminal Appeal Nos. 24 and 25 of 1944 preferred against the Judgment of the Court of the

* Criminal Revision Case No. 987 of 1944 (Criminal Revision Petition No. 920 of 1944)

(1) (1933) I.L.R. 57 Mad. 643, 646

(2) A.I.R. 1926 Pat. 367

Stationary Sub-Magistrate, Saidapet, dated 24th October 1944 and passed in Calendar Case No. 2499 of 1943.

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

P. Konnan for the Petitioner.

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In re

ORDER

MOCKETT J.—The petitioner has been convicted under section 457 and 380 of the Indian Penal Code. Section 457 of the Indian Penal Code concerns lurking house-trespass which is defined in section 443. It is house-trespass after taking precautions to conceal the house-trespass from the person who has a right to exclude the trespasser from the building. Section 380 of the Indian Penal Code concerns theft in a building. It should be clear that it is quite possible to commit the offence of lurking house-trespass without stealing anything at all, just as it is possible to commit theft in a building without committing lurking house-trespass. The offences are therefore quite distinct. A bench of this Court has discussed this topic in connection with sections 147 and 323 of the Indian Penal Code, in the case reported as *Ponniiah Lopes, In re*(1). BARDSWELL J. observes:

"There has been a general agreement amongst all the High Courts except that of Lahore that if a person is convicted of rioting and of a substantive offence of hurt of some kind he can be awarded separate sentences, and this is what was held by this Bench in a case reported as *Sothavalan v. Rama Kone*(2)."

With all respect to the learned Judges in *Makhru Dusadh v. King Emperor*(3), I am unable to follow their ruling that a person convicted of house-breaking followed immediately by theft could only be punished under section 457 of the Indian Penal Code. It must be remembered that section 35 of the Code of Criminal Procedure was amended in 1923. So far as this High court is concerned, I am satisfied that there

(1) (1933) I.L.R. 57 Mad. 643, 646 (F.B.) (2) (1932) I.L.R. 56 Mad. 481
(3) A.I.R. 1926 Pat. 367

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is no prohibition of separate sentences being passed in a case such as is now before me. I do not think, however, that such a course is desirable when one sentence can be made to run concurrently. In this case I am quite satisfied that the learned Judge intended to impose a sentence of eight months rigorous imprisonment. He has actually sentenced the accused petitioner to four months rigorous imprisonment on each count, the sentences to run consecutively. Under the circumstances I shall not interfere.

The petition is dismissed.

