[3 Mad. 370.]

APPELLATE CIVIL.

The 13th August 1878, The 3rd February 1879.

PRESENT:

SIR WALTER MORGAN, KT., CHIEF JUSTICE, AND MR. JUSTICE MUTTUSAMI AYYAR.

Muttayan Chetti.....(Plaintiff), Appellant

and

Sangili Vira Pandia Chinna Tambiar.....(Defendant), Respondent.*

Hindu Law—Impartible Zamindari—Sanad—Law Succession—Property inherited through mother—Power of Hindu father over son's share in ancestral property.

Where an ancient paleiyam was converted into a Zamindari with a permanent assessment in 1803, by Government and a Sanad-i-Milkeut istimirar (deed of permanent property) was granted to the Zamindar with the usual stipulations, reservations and directions, concluding with the words "Continuing to perform the above stipulations and to perform the duties of allegiance to the British Government, its laws and regulations, you are hereby authorised and empowered to hold in perpetuity to your heirs, successors and assigns at the permanent assessment herein named the Zemindari of Sivagiri."

Held that the Hindu Law of succession was applicable, subject to such modifications as flow from the impartible nature of the estate.

Property inherited through a mother is not 'self-acquired' as between her son and grandson.

If a woman succeeds to an impartible Zamindari, the estate which devolves on her demise upon her son does not thereby become self-acquired property in the hands of the latter.

The course of decisions in the *Madras* Presidency from 1818 has been to recognise equal ownership by the son in the grandfather's estate, though it may not be divided between the father and the son, and to uphold the father's alienation only to the extent of his share.

Semble.—The decision in *Girdharee Lall's* case was not intended to vary the courses of decisions in this Presidency.

[371] *Semble.*—The doctrine of the pious duty of the son to pay his father's debts does not apply in the case of an impartible Zamindari, where the son is not able to protect his interest as in the case of ordinary property by electing a division.

THE defendant in this suit was the son of the late Zamindar of *Sivagiri*, who, as defendant in O. S. 8 of 1867 in the Civil Court of *Tinnevelly*, consented to a decree in the terms of a compromise whereby certain property was hypothecated as security for a debt of Rs. 55,872-12-0 to be paid by the defendant by instalments in full satisfaction of the plaintiff's claim in that suit.

A decree was passed in the terms of the compromise on 4th September 1868.

The plaintiff (who was represented by the plaintiff in the former suit) alleged that the 'Zamin' was the self-acquisition of the late Zamindar; that the debt was a just debt contracted by defendant's father for the upkeep of the estate, on the liability of the whole estate, before the defendant's birth and for the benefit of the family of the Zamindar; that in the lifetime of

* Appeal No. 14 of 1877 against the decree of F. C. Carr, District Judge of Tinnevelly dated 29th November 1876.

the Zamindar the property hypothecated was attached by him to recover instalments due under the decree; that the other creditors attached the whole estate on several occasions; that after the late Zamindar's death (27th September 1873) he again attached the property hypothecated, on 23rd February 1874, for the tenth instalment due under the decree; that the District Court advertised that all the estate would be sold on account of all the creditors; that he thereupon prayed for a separate sale of the land hypothecated to him or for a sale of the estate subject to his charges, but the petition was dismissed, on 23rd February 1874, without inquiry; that on 25th February 1874 the right, title, and interest of the late Zamindar was sold to a third party; that the defendant having presented a petition to the Court praying for a release of the attachment made by plaintiff for the tenth instalment, an order was passed on 18th April 1874 that the attachment ceased with the sale of the Zamindari. The plaintiff prayed that the orders of 23rd February and 18th April 1874 might be cancelled; that the plaintiff's right to recover Rs. 88,062-12-0 from the property hypothecated by the former decrees and from all other property which devolved on the defendant from the late Zamindar might be established.

No written statement was put in, and the suit was dismissed on the ground that it was barred by the decree in the former suit.

[372] On appeal the High Court (MORGAN, C.J., and HOLLOWAY, J.) remitted the case for trial on the ground that the question of the liability of the estate in the hands of the debtor's successors was neither heard nor determined, and that a fresh suit was the most appropriate method of determining whether the defendant took the estate through the debtor or by a perfectly independent title.

The case was retried by the same Judge on 26th November 1876.

It was contended for the defendant that the suit was not legally maintainable, that the debt was not proved to be legally or morally binding on the present Zamindar, and that the late Zamindar had no power to encumber the estate beyond his own tenure of the property, while the plaintiff sought to show that the debt was incurred before the birth of the present Zamindar, that it was a *bona fide* debt contracted for absolute necessity, and that the entire Zamindari was the self-acquired property of the late Zamindar.

The District Judge found that the Zamindari was an ancient paleiyam which was converted into a Zamindari with a permanent peiscush by the Government in 1803, when the then Palayagar was granted a Sanad-i-Milkeut istimirar and created first Zamindar of *Sivagiri*. He died in 1819 and was succeeded by his only daughter as second Zamindar. She died in 1835 and was succeeded by her son, who lived till 1873 and was succeeded by his son the present defendant.

It was contended for the plaintiff that the third Zamindar held the estate as self-acquired property. The district Judge was of opinion that, if the Hindu Law applied, the contention was valid, but held that the Zamindari was not subject to Hindu Law, but held as an impartible estate under the Sanad from Government and was not ordinary self-acquired property. The District Judge also held that the plaintiff, having taken his share of the rateable distribution of the proceeds of the whole estate, was legally barred by Section 271 of the *Code of Civil Procedure* (1859) from still enforcing his claim over the property mortgaged; found that the debt was not of family necessity, nor one which a son was legally bound to pay for his father because the creditor at one period held ample security for his debt, but made no attempt to satisfy it by realising the security and dismissed the suit.

[373] The plaintiff appealed to the High Court on the following grounds:—

I. That the Zamindari came to defendant's hands burdened with the debts of his father, whether incurred before or after defendant's birth, and that defendant having assets of his father in his possession, his liability for his father's debts was co-extensive with the amount of assets received by him ;

II. That the Hindu Law applied to this case ;

III. That the Zamindari was either self-acquired property of the late Zamindar, or was at any rate not property in which defendant acquired any right by reason of his birth or any independent title ;

IV. That even if the Zamindari was ancestral property in which defendant acquired right by birth, the plaintiff was still entitled to charge his debt on the Zamindari as being a debt incurred under circumstances which would entitle plaintiff to charge it on the estate, and

V. Lastly that the plaintiff was not barred in any way from maintaining the suit.

The Advocate-General (Hon. *P. O'Sullivan*), Mr. *Mills*, and *A. Ramachandrayyar* for the Appellant.

V. Bhashyam Ayyangar for Respondent.

The Court (MORGAN, C. J., and MUTTUSAMI AYYAR, J.) delivered the following

Judgment :—This was a suit to recover Rupees 88,062-12-0 from the Zamindari of Sivagiri now in defendant's possession.

The plaintiff in his plaint alleged that he obtained a Razinama Decree in Original Suit No. 8 of 1867 against the late Zamindar on the security of a portion of the Zamindari ; that the debt decreed was one of family necessity, contracted before the birth of the defendant ; and that the whole Zamindari including the portion hypothecated was liable for the same. For the defendant it was contended that the suit did not lie, and that the debt was binding neither upon the present Zamindar, nor upon the Zamindari, nor upon any part of it. The Lower Court originally held that the suit was not maintainable, but, on appeal, it was decided by this Court that the question of the liability of the estate in the hands of the defendant to satisfy the decree against his father was one of considerable difficulty and that a regular suit was the most appropriate mode of determining it. The history of the Zamindari in so **[374]** far as it is necessary for the purpose of this suit, is sufficiently set forthin paragraph 8 of the Judgment appealed against. In his revised judgment the District Judge considers that, as the second Zamindar was a woman, the third Zamindar would, under the ordinary Hindu Law, have held the Zamindari as his self-acquired property, but that he had not held it as such by reason of its being an impartible estate held exceptionally under a Sanad (Exhibit E 18) from the Government. The first question for decision is whether the Hindu Law is not applicable in this case. It seems to us that the Sanad only rendered permanent the peishcush or assessment which had varied from time to time, changed the character of the estate, which had till then been that of a Southern Paleiyam, into that of ordinary Hindu property, and recognized the ordinary Hindu Law as governing the succession to it in order to determine the right of interference exercised by Government on the ground of tenure, without prejudice to impartibility or any other special incident which had already attached to the estate by the custom of the family originating no doubt in the ancient tenure. We are, therefore, of opinion that the Zamindari, though impartible by custom, is doubtless governed by the Hindu

Law subject, as observed by the Privy Council in 9 *Moore*, p. 685, to such modifications as flow from its impartibility.

This view brings under our consideration the next question whether, when the Zamindari vested in the defendant's father, it became his self-acquired property. In support of this contention it is urged for the appellant, first, that the second Zamindar was a woman; secondly, that she took an obstructed heritage; and, thirdly, that when it passed into her son's possession it ceased to be ancestral property in which his son (defendant) had ownership, by birth.

For the reasons mentioned in our judgment in the *Sivaganga* case, I. L. R., 3 Mad., 309, we think that though a daughter, inheriting to her father, succeeds as heir, and does not take, as is at times stated, merely a life-estate, still she takes but a qualified heritage, which, under the text of *Katyayana*, passes upon her death to her father's in preference to her own heirs. Her succession being thus rather a case of obstruction or interposition than of regular inheritance for herself and her own heirs and estate taken by her being moreover, as observed in that judgment, **[375]** not her *Stridanam*, her intervention as heir does not in our opinion alter what was originally ancestral into self-acquired property. According to all the texts of the Hindu Law of which we are aware of the absence of peternal or maternal property or of any aid from it is a necessary ingredient in the conception of self-acquired property and the author of the *Mitakshara* defines it as property which has been acquired by the co-parcener himself without any detriment to the goods of the father or mother (*Mitakshara*, Chapter I, Section IV, p. 2). We think it is clearly erroneous to say that property inherited through a mother is self-acquired as between her son and grandson.

It may not be ancestral in the sense in which property inherited by the father from the paternal grandfather is liable to parition under the *Mitakshara* Law at the instances of the son, but it is not self-acquired property on that ground for purposes other than those of partition.

It should further be remembered that the principle that the right of alienation is an incident of ownership has to be applied under the Hindu Law subject to a few exceptions.

The basis on which the Hindu theory of restrictions on the alienation of immoveable property is constructed is the text of *Vyasa* cited in *Mitakshara*, Chapter 1, Section I, paragraph 27. "They who are born, and they who are yet unbegotten, and they who are still in the womb require means of support. No gift or sale should therefore be made." This text would seem to point to the archaic notion current in ancient agricultural communities that the family is a corporate body and that landed property, however acquired, is the fund for its subsistence, not only as it is at a given time, but as it may be at any time. We refer to it, not to question the modifications as regards the power of alienation established by decided cases on equitable considerations, but to indicate the necessity that still exists for closely examining the grounds on which we may be asked to recognize and sanction what may substantially be regarded as a fresh modification. Again, the author of the *Mitakshara* defines heritage in Chapter 1 Section I, p. 2, as wealth which becomes another's property solely by reason of relationship to the owner; and in commenting on this text *Subudini Balambattá* exclude from it any other mode of acquisition; such as purchase or the like. Thus **[376]** it seems to be clear that the Hindu notion of inheritance is not conventional, the demise of the owner, the survival of the heir and a certain relationship between them being its elements,

Property inherited through the mother is, therefore, we think, inheritance, and not self-acquisition, which refers to a distinct mode of obtaining property.

As to the contention that obstructed heritage is on the footing of self-acquired property, it is in our opinion equally untenable. The author of the *Mitakshara* refers to the division into obstructed and unobstructed heritage with a view to introduce the rule of law that the nearer excludes the more remote and, in Chapter 2, Section I, p. 2, declares that on failure of the first among the heirs who take an obstructed heritage, the next in order is heir to the estate of one who has departed for heaven. The corresponding incident in the case of unobstructed heritages is the right of representation mentioned in Chapter 1, section V, paragraph 2, where he states that grandsons have a right by birth in the granfather's property equally with sons. This passage ought to be read with the Vedic text cited by *Menu, viz.*, the son of a man is the father himself. The term "son" being interpreted in a spiritual sense as meaning the three connected with the same pinda, or funeral cake; it includes the son, grandson and great-grandson, the conventional character of the right of representation under the Hindu Law thus consisting in recognizing rather the extention of the meaning of the term "son" than a special privilege of lineal descent as the foundation for the right. Such being the case, we fail to see how obstructed heritage can be regarded as self-acquired property. Moreover, it appears to us to be a contradiction in terms to say that heritage is self-acquired property. Nor do we see sufficient reason to hold that an unrestricted power of alienation is an incident of obstructed heritage. Taking, for instance, the case of a brother's succession, his inheritance, though obstructed, becomes as between his own son and grandson unobstructed, directly it vests in him, though its nature is important when there is a competition between him and another brother's son as to who ought to succeed. It is likewise unreasonable to hold that because this Zamindari was taken as obstructed heritage by the daughter, it did not since become unobstructed or it ceased to be ancestral as between her son and grandson.

[377] The next text relied upon during the argument as supporting the plaintiff's claim is that which classes property as ancestral, paternal and self-acquired. It is contended that ownership by birth is restricted to the property of the paternal grandfather or that paternal and maternal property is not ancestral. Here again the purpose of the classification seems to be mistaken.

In Chapter I, section 1, paragraph 23, of the *Mitakshara* the commentator refers to the controversy whether birth or partition is the cause of property and comes to the conclusion that it is the former on the authority of the text of *Gautama. viz.*, "Let ownership of wealth be taken by birth, as the venerable teachers direct." He then refers to the father's power of alienation over moveables inherited from the paternal grandfather (*Yajnyavalcya* cited in p. 24), to the gift of immoveable property by the husband to the wife (*Vishnu* cited in p. 25), to the power of alienation for indispensable religous duties (Vedic text cited in p. 26), and to a donation or mortgage or sale of immoveable property in a season of distress for the benefit of the family (*Vrihaspati* cited in p. 28), as exceptions resting on special texts, though inconsistent with the theory of ownership by birth, and he next forbids the alienation of immoveable property whether acquired by the father or grandfather (*Vyasa* cited in p. 27).

Again, he alludes to a distinction in the nature of ownership by birth, with respect to the estate paternal and ancestral (Chapter I, Section 1, p. 33) and describes it in Chapter I, section 5, as consisting specially in the one case, *viz.*, of ancestral property, in a right of representation (p. 2) in a right to demand

partition during the father's life (p. 8), in the absence of a power in the father to make unequal partition among his sons, and in the grandson's power of prohibition when the father commits waste (p. 9). As to ownership by birth in paternal estate, he describes it generally as consisting in a right in co-heirs to divide the effects equally of both parents, section 3, and in section 4 excludes them, whether inherited from the father or mother, from effects which are according to him not liable to partition. The conclusion we come to, therefore, is that ownership by birth is not, as is alleged, confined to ancestral or paternal grandfather's property, but extends also to paternal, *i.e.*, father or mother's property, and that, in the former case, it is a vested interest and equal to, and co-ordinate [378] with, that of the father, while in the latter it is inchoate and consists in a chance of succession and in a power of prohibition where the father alienates immoveable property for other than authorized purposes. In this view the theory of ownership by birth has nothing to do with the question before us, which relates to the father's power to alienate immoveable property and not to partition. The text which seems to us to govern it are those that restrict the power of alienation, and define the son's liability to pay the father's debts.

As to the restriction on the alienation of immoveable property, the course of decisions in this Presidency has recognized a power in the father to alienate immoveable property, acquired by himself. This, though no doubt resting on equitable considerations, is a departure from the strict *Mitakshara* law, and the question we have now to decide is reduced to this, *viz.*, whether he should sanction a similar departure from the *Mitakshara* law in the case of immoveable property descending on the father through his mother from his maternal grandfather. He who acquires property may have a special privilege and equity which one who inherits it whether from father or mother or maternal grandfather, may not possess. Again, the spiritual benefit conferred on the paternal grandmother by the son and grandson is on the same footing with that conferred on the paternal grandfather. In later decisions it was regretted that the law of the *Mitakshara* should have been departed from at all, even in the case of immoveable property acquired by the father.

We do not, therefore, think that the contention that this Zamindari should be treated for purposes of alienation as if it was acquired by the late Zamindar is well founded.

The next question for decision is whether the debt now sought to be recovered, which, though in part improvident, is neither immoral nor vicious, and is further partly secured by a mortgage, is binding on the present Zamindar, who was not born when it was contracted. The mortgage which the plaintiff seeks to enforce was executed in 1868, while the defendant was born in 1855. It is, therefore, certainly competent to him to show that, though the debt in dispute was contracted before he was born, it was not one which ought to bind the Zamindari in his possession. It is true that the alienation of ancestral property in which the son acquires owner- [379] ship by birth is valid as against him when it takes place before his birth, but a debt incurred but not secured on the Zamindari before he was born is not governed by the same principle.

As to the contention that a debt may not have been incurred for family necessity and may still be binding on the son, provided that it is neither immoral nor vicious, we do not clearly see our way to uphold it. According to the text of *Yagnyavalcya* the alienation of immoveable property without the son's consent is forbidden, and, according to the text of *Vrihaspati*, the father can only alienate it where there is a family necessity It is then argued that,

as observed by the Judicial Committee in *Girdharee Lall's* case (L. R. 1, I. A., 321) the son is under a pious obligation to pay the father's debt, where such debt is neither immoral nor vicious.

There can be no doubt that it is the pious duty of a son to pay his father's debt. *Narada* says that fathers desire male offspring for their own sake, reflecting "this son will redeem me from every debt due to superior and inferior beings." Therefore, a son begotten by him should relinquish his own property and assiduously redeem his father from debt, lest he fall into a region of torment. If a devout man or one who maintained a sacrificial fire die a debtor, all the merit of his devout austerities or of his perpetual fire shall belong to his creditors." (1 Dig. *Higg.* edition 202).

If this text is to be enforced as imposing a legal duty, we shall have to compel sons who have inherited no property from their father, either ancestral or self-acquired, to pay the father's debt, for the text directs him to pay it from his own property. Again, this pious obligation is confined to the son and grandson, and does not extend to the great-grandson, and in the case of the grandson it is limited to the payment of the principal. *Vrihaspati* says: "The sons must pay the debt of their father, when proved, as if it were their own, or with interest; the son's son must pay the debt of his grandfather but without interest, and his son or the great-grandson shall not be compelled to discharge it unless he be heir and have assets."

Vishnu observes likewise: "If he who contracted the debt should die, or become a religious anchoret, or remain abroad for twenty years, that debt shall be discharged by his sons or **[380]** grandsons, but not by remoter descendants against their will." (1 Dig. *Higg.* edition, 185.)

Thus the obligation does not depend on the relation as partakers of the same funeral cake and is not co-extensive with the capacity to inherit.

Consequently, if there are sons, grandsons and great-grandsons, the obligation must be held to be valid to the full extent of the debt as against the first, to the extent of the principal as against the second, and not at all as against the third. Again, the allusion in the text of *Narada* to "every debt due to superior and inferior beings" would seem to favour the view that pious duties were enforced by Hindu tribunals in the exercise of their jurisdiction over matters which are purely spiritual. When the learned *Advocate-General* is pressed with these difficulties in recognizing the son's pious obligation as a legal obligation, he argues that though it is not to be enforced as such where no assets are inherited, still the son's ownership in ancestral property is subordinate to that of the father and the father's predominant interest gives it the character of a legal duty with respect to the alienation of ancestral property. But in Chapter I, Section 5, p. 9, the author of the *Mitakshara* says: "The grandson has a right of prohibition if his unseparated father is making a donation, or sale, or effects inherited from the grandfather: but he has no rights of interference if the effects were *acquired* by the father. On the contrary, he must acquiesce because he is dependent." In p. 10 he states: "Consequently the difference is this. Although he has a right by birth in his father's and grandfather's property, still since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest *as it was acquired by himself*, the son must acquiesce in the father's disposal of his own acquired property; but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction (if the father be dissipating it)." According to *Vignyanesvara Yogi*, the author of the *Mitakshara*, the son's ownership in ancestral estate is not subordinate but

co-ordinate, and it is dependent only where the father himself acquires the property. The course of decisions in this Presidency from the date of *Ramasami* v. *Seshachella* (2 Strange N. C., Ed. 1827, p. 74. *Sec.* 1 M H. C. R. 474.) has been to recognize equal **[381]** ownership by the son in the grandfather's estate though it may not be divided between the father and the son, and to uphold the father's alienation only to the extent of his share, though in *Bengal* it has been held that an undivided share is not alienable. This difference in the view of the two High Courts is referred to by the Judicial Committee in *Deen Dyal Lal* v. *Jugdeep Narainsing* (L. R., 4 I.A., 252).

In these circumstances it is not easy to conclude that the Lords of the Judicial Committee intended to vary the course of decisions in this Presidency. In the decision in *Kantoo Lall's* case there are remarks which show that the father and son were probably acting in collusion with one another against the purchaser, and that the suit was not brought till ten years after the sale was completed.*

The pious duty of a son may be foundation for presuming the son's concurrence in the alienation by the father when, with the knowledge of it, the son elects to remain in coparcenery with the father and takes no step to set aside the alienation, until the father becomes destitute after a considerable lapse of time ; when, acting in collusion with him, he tries to upset a transaction in which he may be fairly presumed to have acquiesced in the special circumstances of the case. Furthermore, the property now in litigation is an impartible Zamindari in which the son cannot protect his interest, as in ordinary property, by electing a division. The only question then which remains to be considered is whether the debt now in dispute was incurred under family necessity. The Court below holds that there was no necessity for contracting the debt. Though we concur in the view that, under more prudent management, the arrears of peishcush in 1863 might have been avoided, still we think that, in so far as the plaint debt was applied to the liquidation of debts which had been contracted for paying the assessment, it is binding on the defendant. The original lender advanced the money to relieve the Zamindari from attachment for arrears of peishcush, and he was bound only to look to the immediate pressure on the estate and the benefit accruing to it from the advance. There is nothing in the evidence to lead us to the conclusion that this was a fraudulent contrivance between the late Zamindar and the creditor to enable him to apply the **[382]** income from the estate to purposes other than those warranted by the law. To this extent we think that the debt is binding upon the Zamindari.

We shall, therefore, vary the Judgment appealed against so as to adjudge to the plaintiff Rs. 26,049-4-7 with proportionate costs on the security of the Zamindari and otherwise confirm it.

NOTE.—The amount decreed to plaintiff was subsequently enhanced upon review to Rs. 35,284 on 3rd March 1880.

NOTES.

[This case was **reversed** on appeal to the Privy Council in (1882) 6 Mad. 1 P. C. =9 I.A. 128, who holding that *Girdharee Lal* v. *Kantoo Lal* was applicable to cases in the

*[With reference to this observation the Privy Council remarked in (1882) 6 Mad. 1 P.C. :—
"It was said in the Judgment in *Girdhavi Lall's* case, "There is no suggestion either that the bond or the decree was obtained bename for the benefit of the father or merely for the purpose of enabling the father to sell the family property and raise money for his own purpose. There is nothing of the sort suggested and nothing proved. That statement certainly did not justify the assertion of the High Court, which was clearly a mistake, that in that case there were remarks which show that the father and son were probably acting in collusoin with one another against the purchaser."

Madras Presidency also, and that the fact of the Zamindary being impartible could not affect its liability for the payment of the father's debts when it came into the hands of the son by descent from the father, observed. "The Defendant is liable for the debts due from his father to the extent of the assets which descended to him from his father, and all the right and interest of the defendant in the Zemindary which descended to him from his father became assets in his hands, and that right and interest, if not duly administered in payment of his father's debts, is liable as against the defendant to be attached and sold in execution of the amount that may be decreed against him."

The Privy Council concurred in holding that the property was not the self-acquired property of the defendant's father.

For notes of case law on these points, *see* the Notes to 6 Mad. 1 in the Law Reports Reprints.]

[3 Mad. 382.]

APPELLATE CIVIL—FULL BENCH.

The 18th March, 1880.

PRESENT:

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND MR. JUSTICE INNES, MR. JUSTICE KERNAN, MR. JUSTICE KINDERSLEY, AND MR. JUSTICE MUTTUSAMI AYYAR.

Nellaya Variyathsilapani.....(First Defendant) Appellant.

and

Vadakipat Manakel Ashtamurti Nambudri and others.....(Plaintiff) Respondents.*

The question whether a Kanam is to be regarded as a lease or a mortgage depends upon the object for which the tenure was created.

Where a Kanam is granted as a security for the repayment of money advanced to the jenm, the law of a limitation applicable to mortgages must be applied.

Enquiries as to the value of improvements must be held before decree and cannot legally be reserved, with or without the consent of the parties for determination in the execution department.

IN this case the plaintiff as Uralar (trustee) of a Malabar Devasam (temple) sought to recover certain lands from the defendants.

The first defendant contended that he held a Kanam right over the lands claimed, and that the plaintiffs' right to recover these lands had become barred by limitation.

It was suggested in answer that a Kanam was a lease and not a mortgage and the case was referred for the decision of a Full Bench upon this point.

[383] Mr. *Spring Branson* and *Bhashyam Ayyangar* for Appellant.

Mr. *Lascelles* for Respondents.

Upon further consideration of the facts of the case the Court came to the conclusion that the first defendant had not established the right set up by him as Kanamdar.

* Appeal No. 8 of 1878 against the decree of K. Kunjan Menon, Subordinate Judge of South Malabar, dated 28th September 1877 (reported by order of the Court).