APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

1886. March 22, April 5.

SUNDARAM AND ANOTHER (REPRESENTATIVES OF DEFENDANTS NOS. 45 AND 46), APPELLANTS,

and

SANKARA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 503—Receiver—Powers—Limitation—Cause of action.

A zamíndárí was attached in execution of certain decrees against the zamíndár, and the plaintiff was appointed receiver with full powers, under s. 503 of the Code of Civil Procedure, to manage the zamíndárí. Before the appointment of the receiver, the zamíndár had expended certain sums at the defendants' request to repair a tank for the irrigation of lands held by them in common with him. This suit was brought to recover the sums so expended.

It was objected that the receiver could not maintain the suit on the ground that the sum sued for was neither the subject of a suit against the zamíndár nor property attached in execution of a decree against him:

Held, that the receiver could maintain the suit.

It was also contended that the suit, whether viewed as one for contribution or upon a contract, was barred by limitation in respect of all payments made by the zamíndár more than three years before the suit; and further, that the receiver could only sue the defendants severally for their proportionate shares of the sum claimed:

Held, that the suit being for work and labour done at their request was not barred by limitation, and that the defendants were jointly and severally liable for the sum sued for.

APPEAL from the decree of C. Rámáchandra Ayyar, Subordinate Judge of Madura (East), in suit No. 5 of 1884.

The facts of the case are set out in the judgments of the Court (Brandt and Parker, JJ.).

Bháshyam Ayyangár for appellants.

Hon. *Subramanya Ayyar* for respondent.

BRANDT, J.—This suit was instituted by the receiver of the Sivaganga zamíndárí. The receiver was appointed on the 9th March 1882; the zamíndárí was attached in January 1881 in execution of original suit 35 of 1879, and the plaintiff was

* Appeal 33 of 1885.

appointed receiver of the property under attachment, with full powers under s. 503, Civil Procedure Code.

The suit was instituted on the 25th January 1884.

The defendants are the proprietors of, or sharers in, a dharmasanam (inám) village, Vembathúr, in the zamíndárí; the inám is held in 128 shares, of which 109 and a fraction belong to the defendants, and the remaining 18 and a fraction belong to the zamíndár, by purchase. The village of Vembathúr is irrigated from a kanmoi or tank in the zamíndárí ayyan village, Kall-urani; this tank receives its supply from the Vaigai river by means of a channel; and from the tank an ayyan zamíndárí village, as well as the defendants' dharmasanam village, receives its supply, the water passing to the former through five sluices, and to the latter through two sluices. The zamíndár, as such, is entitled only to collect poruppu (a light assessment) on the inám lands.

There appears to be no question that the inámdárs are entitled to the water flowing through the two sluices, which irrigate about the same quantity of lands as the other five sluices.

The plaintiff's case is that, owing to heavy floods in 1877, the plaint kanmoi or tank, and the channel that supplies it were so much damaged as to make cultivation impossible; that "the cost of repairing the said common kanmoi and its channel was usually paid by the zamíndár and the said dharmasanam villagers;" that the zamíndár obtained a loan from Government of Rs. 1,50,000, and with part of this repaired the plaint tank; that in September 1878 an estimate for Rupees 13,990 for this purpose was prepared and sanctioned, and the work finally completed at a cost of Rs. 13,934-14-0, completion certificates having been given by the Special Supervisor on the 9th June and 1st September 1881: that the defendants "consented to pay their shares as usual in the amount which might be spent for the repairs of the said kanmoi and channel," and that, at the request of Muttayyar, the father of defendant No. 1, and of Krishnayyar, defendant No. 4, "who were the chief among them" (the dharmasanamdárs), the contract for the work was given to those two persons jointly with two contractors, Mahadevayyar and Palaniyandia Pillai, and that the money paid as aforesaid was paid to the said four persons. That the sum of Rs. 5,972-5-7, that is, one-half of the whole less the proportionate share payable by the zamíndár as one of the dharmasanam co-sharers, is due from the defendants; that though

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pressed for payment they have not paid; that interest at 12 per cent. per mensem on the sum claimed should be allowed from the completion of the work; that "the cause of action is the non-payment of money by the defendants;" and that it arose on the 1st March 1881, the date of the completion of the tank work, and on the 1st September 1881, the date of the completion of the channel work.

Twenty-five out of the 55 defendants contested the claim; of these the appellants, defendants Nos. 45 and 46, whose defence was adopted by the other contending defendants, pleaded that the plaintiff, as receiver, could not maintain the suit;

that the claim is barred by limitation in respect of any moneys paid by the zamíndár more than three years prior to suit, *i.e.*, prior to 25th January 1884; that a decree cannot be given for the whole sum claimed, or against the defendants jointly and severally; that, as the zamíndár is a co-sharer with the defendants in the dharmasanam village, he cannot sue for contribution in respect of the money said to have been expended without stating the specific liability of each co-sharer.

The custom alleged by the plaintiff was denied; and the allegations as to the loan of money from Government and the expenditure of part of it on the repair of the plaint channel and tank were denied; and it was denied that the contesting defendants consented or agreed to pay their proportionate share of the cost, prior to execution of the work; they further said that they are not bound by the agreements, if any, which any other co-sharers may have entered into in the matter; that the tank and channel in question had always been treated by the zamíndárs as their exclusive property, and the maintenance and repairs thereof have been at the exclusive cost of the zamíndárs, who have an exclusive right of fishery in and over the tank when full, and of cultivating the bed of the tank when dry; and that the repairs set out in the plaint were not urgent nor necessary.

Among the other issues framed by the Subordinate Judge was this, the 3rd, "whether the suit is maintainable?" but in disposing of this, the Lower Court appears to have had regard only to the objections that the zamíndár, being a co-sharer, could not sue the other co-sharers for contribution jointly, and that the defendants cannot be held jointly and severally liable for the whole amount. The 2nd issue is framed specially with reference to this latter

contention, and the 2nd and 3rd issues were disposed of together. The Subordinate Judge does not appear to have considered or disposed of the objection that the receiver is not capable of maintaining the suit.

The Subordinate Judge held that the objections raised and considered in reference to the 2nd and 3rd issues were not maintainable.

As to whether the defendants agreed to contribute their share towards the cost of the repairs in this case (5th issue), it was held that though there was no proof that all the co-sharers agreed, it was proved that the father of defendant No. 1 and defendants Nos. 4 and 8 as leading men among them, and representing the shareholders, several of whom also were then present, requested that the tank and channel might be repaired, and they must be taken to have duly represented the whole body of shareholders, and that they agreed to pay a moiety of the cost. As to whether the custom set up on the zamíndár's behalf was proved (6th issue), the evidence, oral and documentary, was held to establish that the defendants on all occasions of repairs being made contributed a moiety of the cost and that in some instances they paid their shares after the repairs were completed.

It was held that there was not misjoinder of parties nor of causes of action, and a decree was given against "the defendants" for the principal sum sued for, with interest at 6 per cent. per annum, from the 15th December 1883 and proportionate costs.

The appellants contest all the findings on the facts and again raise the points of law taken in their written statement and which they contend were wrongly decided or not decided in the Lower Court.

The first question to be determined in appeal is whether the suit, brought by the receiver, is maintainable.

A receiver does not represent the estate for all purposes; he would have none of the powers which may be conferred under s. 503, of the Code of Civil Procedure, in respect of property belonging to the judgment-debtor not attached in the suit in which the order was made; but in the present case, the whole zamíndári was attached, and in order to determine whether the receiver can sue, it is necessary to ascertain what the real cause of action is, and on what right or rights it is based. The cause of action is stated in the plaint to be "non-payment of the money by the defendants;"

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but the customary repair of the dharmasanam tank at the joint cost of the zamíndár and the defendants and the necessity for the repairs in the present instance were set out, as well as the alleged consent of the defendants to pay their share 'as usual.' And it is contended on behalf of the respondent, and must in my opinion be held proved, that the respondent is under an obligation, whether enforcible by common law, or created by the terms of the original grant of the inám, or by custom to make necessary repairs, and that the dharmasanamdárs are bound to contribute towards such repairs: indeed, these facts were in the event hardly denied on behalf of the appellants. If the suit had been for recovery of the money on the alleged agreement to pay alone, the suit would not, in my opinion, have been maintainable by the receiver; but after considerable doubt, I agree with my learned colleague that the right of the zamíndár to be recouped to the extent of one-half of the cost of the repairs, if otherwise established, is maintainable in a suit by the receiver. The obligation to repair is one which the defendants might no doubt sue to compel a receiver in charge of the estate to fulfil; and the money sued for, which I find was in the result paid by the zamíndár only because it was not paid before or at the time of making the repairs, as it should have been, was money not belonging to the zamíndár personally, but advanced, it may be assumed, on the security of his estate and certainly for the purpose, among others, of making necessary repairs to irrigation works in the estate; and if now recovered will be available not for the personal use of the zamíndár, but of the creditors on whose behalf the estate has been attached.

The statement in the plaint that "the defendants consented to pay their shares as usual in the amount which may be spent for the repairs;" coupled with exhibit R in which the intended repairs and the amount of the sanctioned estimate are notified to the mahájanams, and the latter are "previously warned" that they should forthwith pay Rs. 7,362-8-0, the half share due by them; as well what appears in exhibits K, M, N, and A, afford some grounds for the contention that the custom was for the dharmasanamdárs' share to be paid, if at all, in advance: but the latter and other documents and the oral evidence in my opinion establish the fact that even if this was the proper course, when payment in advance could not be obtained, the repairs were done at the expense of the zamíndár and the defendants' share recovered afterwards.

And in the instance now in dispute, I have no doubt, and I think it is established by the evidence, that the dharmasanamdárs, as a body, represented by their headmen, expressed a wish to have the repairs done, admitted the necessity, and agreed to pay their share. The contract was not signed till December 1878, and as no dates are given as to when the alleged consent was actually given, it is quite possible it was after the date of R, September 1878, that the defendants asked the zamíndár to expend the money which they knew he had, and promised to recoup him afterwards. That this is so, is borne out to some extent by the fact that defendant No. 45, one of the appellants here, appears from exhibit V to have stated to the receiver that he was willing to pay his share if informed how much was due.

It is true that two months afterwards his son in exhibit IV [2] objected to pay this share; but the objections are put on grounds which cannot be supported, as that the repairs were done without notice, that more was done than was necessary, and that the zamíndár was bound to make the repairs in return for the exclusive rights of fishery enjoyed by him in the tank, and for the use of the bed of the tank when dry. This latter contention is supported by no evidence deserving of credit, and the liability to pay a share in the expenses of repair is not denied. And the findings as the obligation on the part of the zamíndár and of the defendants and as to the promise on the part of the latter being what they are, I am of opinion that the finding of the Lower Court, namely, that the obligation on the part of the defendants to make good their share did not arise until the work was completed, is correct, and that the claim therefore is not barred by time.

As to the objection that the suit is not maintainable by reason of the zamíndár being by purchase a co-sharer with the defendants, I think this is clearly untenable: he sues for the balance due after deducting the amount due by him as such co-sharer, and the fact of his having such interest in the dharmasanam village can in no way affect his right to sue in the capacity of a landlord under an obligation to repair the tank.

As regards the joint and several liability of the defendants on the other hand, I have had no little doubt. The fact that each sharer is jointly and severally liable for the poruppu does not appear to me conclusive as to their joint and several liability for the half

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of these repairs; while the fact that the pattá for the whole village stands in the name of one person only appears to me to raise some doubt whether the suit should not have been brought either against that person alone, or against all the sharers for their respective shares severally: but, it is to be observed that in the notice R demand is made on the whole body of shareholders for the lump sum, and that not only is there no evidence that objection to this was taken by any of the share-holders, but that, as I find, the latter consented to and indeed urged, the carrying out of the repairs with moneys to be advanced by the zamíndár and, it must be presumed, on the conditions therein specified, save that they were not to be called on to pay their share in advance.

It is true that exhibits IV and V would seem to show that the receiver was prepared to accept the separate shares due from individual sharers; but this he might well do suing only those who refused to pay for the balance due, without admitting that no joint and several liability existed; and the only conclusion to which I can come is that by custom or otherwise such joint and several liability attaches in this case to each sharer.

I agree then in the result that this appeal should be dismissed with costs.

PARKER, J.—The first point is whether the plaintiff, as a receiver, appointed under s. 503 of the Code of Civil Procedure, is competent to maintain this suit. The whole zamíndárí is under attachment, and the receiver has, under s. 503, all such powers as to bringing suits, . . . and for the realization, management, protection, preservation and improvement of the property as the owner himself has.

Granted that there is upon the zamíndár as the holder of the estate, a common law obligation to maintain the tank with the right to recover half of the expense thereof from the inámdárs, I think there can be no doubt that in the event of necessity, the obligation would rest upon the receiver to spend such sum as might be requisite for the due maintenance of the tank, and that he would be at liberty to sue to recover from the inámdárs the half of such sum as he might have paid out of the treasury of the estate. Why then should he not sue to recover for the estate monies so expended before the date of his appointment as receiver?

If the estate be an impartible zamíndárí, it would descend at the death of the holder to his eldest son. Let us assume that the

zamíndár left by will to his second son all his personal property and outstanding debts; upon which of the two would the right to collect these sums from the inámdárs devolve? It appears to me that the right would devolve upon the eldest son as zamíndár; and that the obligation and the right to be recouped cannot be dissevered. Inasmuch as the obligation passes with the estate, so also does the right to be recouped. I think therefore that the plaintiff, as receiver, can maintain this action.

The next point is whether the suit is based on an agreement, or upon custom. It is contended for the appellants that in the first case no binding agreement is proved, and in the second that the plaintiff cannot recover upon the suit as framed, and that no custom having the force of law is made out.

The custom that the mahájanams of Vembathúr should contribute half the expenses of the repairs of this tank can be traced back to 1833 (exhibit K); to 1838 (exhibit M); to 1840 (exhibit L); to 1842 (exhibit N); to 1856 (exhibit VI); to 1862 (exhibit A); and to 1872 (exhibit D). There is abundant oral evidence to the same effect, including that of the karnam's gumasta (plaintiff's first witness) who speaks from an official experience of 33 years. I gather that the custom has been to collect the mahájanams' half share for the repairs beforehand, if possible, but that when this has not been found practicable it has been afterwards collected by more or less of compulsion. As the tank is not in a common village, but in one belonging to the zamíndár only, it may well be that he has been under an obligation to keep it in repair and that the mahájanams could not actually interfere in its up-keep, though they were liable for half the expenses thereof, getting as they did half the supply. Upon the whole, therefore, I am of opinion that plaintiff has succeeded in showing the existence of a custom which is ancient, certain and reasonable, these being the necessary requisites of a valid custom.

The Subordinate Judge has found that the defendants agreed to pay their half share as usual, and exhibit R shows that the usual attempt was made to collect beforehand the half share due from the mahájanams. There is to my mind no objection which can be fairly taken to the form of the suit. The plaintiff does not base his claim upon agreement as distinguished from custom, but upon both combined—upon agreement made in accordance with custom. I agree with the Subordinate Judge that the agreement

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was made by the leading men among the mahájanams as representing and binding the rest.

The question of limitation comes next. Being of opinion that the obligation rested upon the zamíndár to do the work for the joint benefit of himself and the mahájanams, and that there was no time *absolutely* fixed for the re-payment to him of the sums so expended, the article of the Limitation Act which will govern the suit will be article 56 of schedule II, and the law will imply under the circumstances that the work was done at the defendants' request. The time will therefore, run from the date when the work was done. The work was carried out under Government supervision, and the completion certificates are dated 1st March and 1st September 1881. The suit was brought on 25th January 1884 and is in time.

Lastly, it is contended that the defendants are not jointly liable to the plaintiff for this claim, but are only severally liable, each to the extent of his respective holding.

The plaintiff in this case holds a double character :—1st as zamíndár, 2ndly as inámdár for 18·46 shares out of 128. He sues, however, as zamíndár, to recover from all the sharers jointly, half the expenses incurred by him less the amount for which he himself is liable for his 18·46 shares.

Putting aside for the moment the fact that the zamíndár is himself a part sharer, the question is, are all the sharers jointly liable to him as zamíndár for the monies spent on their joint behalf? The pattá stands in the name of one mahájanam only, and all the sharers are jointly and severally liable for the poruppu. The fact that the lands are periodically distributed according to their proportionate shares, is a matter which affects them only *inter se*. Whatever piece of land each may be holding at any given time, and whatever be the number of shares into which the village is divided at any given time, all alike are liable to the zamíndár for the poruppu due to him on the entire village. This of course does not detract from the right of any one sharer to contribution from the rest, should he be made to pay the whole poruppu. These repairs are made by the zamíndár to the tank as landlord for the common good of the whole village held in the name of one mahájanam, and it seems to me therefore that all the sharers will be jointly and severally liable.

Nor can it in my opinion make any difference that the zamíndár is himself a sharer. As a sharer he would no doubt be liable in a suit for contribution, if he had not paid up the full amount due on his own shares. But he has done this, and the suit is only brought as zamíndár for the balance jointly and severally due from those sharers who have not paid up. If he recovers from any one of them, that sharer will be able to claim contribution from any one of the rest who has not paid up the full amount due on his share.

Upon these grounds, I have come to the conclusion that the decree of the Lower Court was correct, and I can see no reason why interest should not be allowed. I would dismiss the appeal with costs.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, and Mr. Justice Muttusámi Ayyar.

PONNAPPA PILLAI (PLAINTIFF), APPELLANT,

and

PAPPUVAYYANGÁR AND ANOTHER (DEFENDANTS NOS. 2 AND 3), RESPONDENTS.*

1885. April 24.

Hindú Law—Liability of ancestral estate for father's debt—Effect of sale in execution of mortgage decree and of money decree against the father—Transfer of Property Act, s. 85.

Where the property of an undivided Hindú family, consisting of father and sons, has been sold in execution of a decree obtained against the father only for a debt contracted by him for purposes neither immoral nor illegal, the sons cannot recover their shares from the purchaser, if the decree has been obtained upon a mortgage or hypothecation of the property directing such property to be sold to realize the debt. It is otherwise if the decree in execution of which the sale takes place is a mere money decree.

Per Kernan, J.—It will still be necessary in all cases where a creditor seeks in suit to bind a son's estate in ancestral or other property for a debt incurred by his father and not by him, that the son should be made party to the suit.

Girdharee Lall v. *Kantoo Lall* (L.R., 1, I.A., 321).

Muddun Thakoor v. *Kantoo Lall* (L.R., I, I.A., 321).

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* Second Appeals, 703, 704, and 705 of 1878.