v. *Narayanasami*(1) it was held that a tenant demanding a *patta* from a landlord was not under a corresponding obligation to make his demand in writing. In *Narayana* v. *Muni*(2) it was held that the tender of a document containing an account of rent payable in the current fasli was good as a tender.

In the case before us the document tendered contained all the details required by Act VIII of 1865, s. 4, and was in fact a duplicate of the *patta* with a notice prefixed. Had the tenant executed a *muchalka* engaging to hold in the terms thereof, the contract would have been complete. The Judge seems to have been misled by the term " copy " in s. 39, for a copy of a *patta* served upon a tenant under the provisions of s. 39 is in reality a duplicate. The question whether the tenant was bound to go to the zemin cutcherry to take some other document does not really arise. The written document tendered him fulfilled the conditions required by law and contained sufficient information for him to decide whether he would accept it or not. It is not pretended that he did accept it or that he executed a *muchalka*. The landlord has therefore a right of suit under s. 9. The decree of the Courts below must be reversed and the suit remanded to the Court of first instance. The respondent must pay appellant's costs in this and in the lower appellate Court, and the costs in the Court of first instance will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

GOPALA (DEFENDANT No. 2), APPELLANT,

v.

SAMINATHAYYAN AND OTHERS (PLAINTIFF AND DEFENDANTS, NOS. 1 AND 3), RESPONDENTS.*

1888. Nov. 28. 1889. Jan. 8.

Transfer of Property Act, s. 81—Marshalling—Creditors of coparcenary and separate creditors—Act XXVII of 1860—Adoptive son of deceased creditor—Practice—Parties to cross appeals.

Suit by the adopted son of the obligee (deceased) of a hypothecation bond to recover principal and interest due on the bond against the land comprised in the hypothecation. Defendant No. 1, the obligor of the bond, had executed it as

(1) I.L.R., 8 Mad., 1. (2) I.L.R., 10 Mad., 363.

* Second Appeal No. 382 of 1888.

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manager of a joint Hindu family, of which defendant No. 2 was a member, and for the rightful purposes of the family. The family subsequently became divided, and the hypothecated property was divided between defendants Nos. 1 and 2. Defendant No. 1 afterwards hypothecated part of his share for a private debt to defendant No. 3, who having sued on his hypothecation and brought the land to sale in execution became the purchaser.

The District Munsif passed a decree for the plaintiff, against which defendants Nos. 2 and 3 preferred separate appeals, the plaintiff being the sole respondent to each appeal. The District Judge on appeal passed a decree directing that the plaintiff should first proceed against all the property which was not subject to the hypothecation to defendant No. 3, including the share of defendant No. 2.

Defendant No. 2 preferred a second appeal joining all the other parties:

Held, (1) that the plaintiff was under no obligation to obtain a certificate under Act XXVII of 1860 for the purpose of maintaining the suit;

(2) that as the plaintiff and defendant No. 3 were not creditors of the same person having demands against the property of that person, no case for marshalling arose; and consequently that the direction of the District Judge was wrong.

Per curiam.—Though both defendants Nos. 2 and 3 preferred separate appeals from the original decree, they only made the plaintiff respondent, and defendant No. 3 omitted to make the appellant before us (defendant No. 2) a party to his appeal, but the relief prayed for in each appeal was that the original decree might be set aside so far as it was in plaintiff's favor and against each appellant . . . . . Having regard to the relief claimed . . . . . we see no reason to hold that the appellant before us was a necessary party to the appeal preferred by defendant No. 3.

SECOND APPEAL against the decree of J. A. Davies, Acting District Judge of Tanjore, in appeal suits Nos. 117 and 140 of 1887, modifying the decree of C. G. Kuppusami Ayyar, District Munsif of Tanjore, in original suit No. 561 of 1885.

Suit to recover principal and interest due on a hypothecation bond, dated 25th May 1880, and executed by defendant No. 1 to the adoptive father (since deceased) of the plaintiff. Defendants Nos. 1 and 2 were members of a joint Hindu family, of which defendant No. 1 was the managing member; and the consideration for the bond sued on was a sum of Rs. 1,000 borrowed by him as such for family purposes.

In January 1881 the family property was divided between defendants Nos. 1 and 2; part of the property comprised in the hypothecation bond of 25th May 1880, viz., items Nos. 1, 3, 5 and 7 fell to the share of defendant No. 1, and part, viz., items Nos. 2, 4 and 6 to that of defendant No. 2.

On 10th March 1881 defendant No. 1 executed a hypothecation bond of part of his share, viz., items 1 and 5, for a private debt to defendant No. 3, who having obtained a decree upon the

hypothecation bond in original suit No. 2 of 1884 in the Tanjore District Court and brought the hypothecated property to sale in execution and became the purchaser.

Upon these facts the District Munsif held that the plaintiff was entitled to proceed against all the land comprised in his hypothecation bond, viz., items Nos. 1—7, both inclusive, and decreed accordingly. Against this decree defendants Nos. 2 and 3 preferred separate appeals, the plaintiff being made the sole respondent in either.

The District Judge, on appeal, referring to s. 82 of the Transfer of Property Act, modified the decree of the District Munsif by adding to it a direction as follows: "That the plaintiff do first "proceed against the property, plaint items Nos. 2, 3, 4, 6 and "7 not mortgaged to the third defendant and only after those "items have proved insufficient to meet his decree-debt against "the properties Nos. 1 and 5 which are mortgaged to the third "defendant."

Defendant No. 2 preferred this second appeal joining both the plaintiff and defendants Nos. 1 and 3 as respondents.

Mr. *Subramanyam* for appellant.

Rama Rau and *Pattabhiramayyar* for respondents.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Muttusami Ayyar and Shephard, JJ.).

JUDGMENT.—It has been found by the Courts below that the defendant No. 1 executed the hypothecation bond, exhibit A, prior to the partition between him and defendant No. 2 in consideration of money borrowed by him as managing co-parcener on account of the marriages of defendant No. 2 and his sister. There is evidence in support of the finding, and we must accept it in second appeal. The plaintiff was clearly not precluded from suing, as the adopted son of the obligee, to recover the debt due under exhibit A, and he was under no obligation to obtain a certificate under Act XXVII of 1860 for the purpose of maintaining the suit, nor is it shown that the partition deed, exhibit X, has been misconstrued on any point. The material questions argued before us are that the Judge was in error in altering the original decree in an appeal preferred by defendant No. 3 against the plaintiff so as to prejudice the appellant, defendant No. 2, who was not made a party to the appeal and in applying s. 82

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of the Transfer of Property Act in favor of defendant No. 3. It is true that though both defendants Nos. 2 and 3 preferred separate appeals from the original decree, they only made the plaintiff respondent, and that defendant No. 3 omitted to make the appellant before us a party to his appeal, but the relief prayed for in each appeal was that the original decree might be set aside so far as it was in plaintiff's favor and against each appellant, and so much of the property under hypothecation as severally belonged to him. Having regard to the relief claimed by each appellant before the Judge, we see no reason to hold that the appellant before us was a necessary party to the appeal preferred by defendant No. 3. It may be that before the Judge applied the doctrine of marshalling as between defendants Nos. 2 and 3 he should have made the former a party to the appeal and should have heard him also on the point; but the omission to do so was only an error of procedure and as the facts found are the same both against defendants Nos. 2 and 3 and as both are parties to the second appeal before us, the question of marshalling may be effectually dealt with by us, and in this view the error of procedure is immaterial. We desire, however, to consider whether the direction of the Judge that the plaintiff should first proceed against property not mortgaged to defendant No. 3 can be supported, and we reserve judgment on that point.

The judgment on the point reserved was delivered on the 8th day of January 1889, as follows:—

The question which we reserved for consideration when this appeal was heard was, whether the decision of the District Judge was right so far as it directed the plaintiff to proceed first against property not mortgaged to defendant No. 3. The facts found to be established in this case are shortly these: Seven items of land originally belonged to a joint Hindu family which consisted of two co-parceners, viz., defendants Nos. 1 and 2. In May 1880 those items were hypothecated to the plaintiff's father as security for a debt contracted by defendant No. 1, as the managing member, and for the benefit of the joint family. In January 1881 the two co-parceners entered into a partition, whereby items 2, 4 and 6 fell to the share of the second, and items 1, 3, 5 and 7 to the share of the first defendant. On 10th March 1881 defendant No. 1 hypothecated items 1 and 5 to defendant No. 3 as security for a debt which he contracted for his own use. The latter

instituted against the former original suit No. 2 of 1884, and purchased those items at a Court sale held in execution of the decree which she obtained. The plaintiff brought the present suit to recover his debt by the sale of items 1—7, and defendant No. 3 contended that she was entitled to the direction given by the Judge.

The Judge relied on s. 82 of the Transfer of Property Act, but that section has reference to a case of contribution, whilst the direction impugned in appeal could only be given, if it could be given at all, by way of marshalling securities under s. 81. We are of opinion that upon the facts found defendant No. 3 is not entitled to insist that the plaintiff shall first proceed against the items which fell to the share of defendant No. 2 so as to prejudice him. Section 81 appears to enact as a rule of law, the equity of marshalling securities as administered by the Court of Chancery in England and the principle on which it rests is that a person having two funds to satisfy his demand shall not, by his election, disappoint a party who has only one fund—*Aldrich* v. *Cooper*(1). But as pointed out by Lord Chancellor Eldon in *ex parte Kendall*(2), no marshalling ought to be enforced unless the parties between whom it is enforced are creditors of the same person and have demands against the property of the same person. In *ex parte Kendall*, the question was considered as between the creditors of a firm which originally consisted of five partners, and the creditors of four of them who carried on the partnership business as surviving partners after the death of one of the five, and the creditors of the four insisted that the creditors of the five should be ordered to proceed first against the separate estate of the deceased partner which was available to them only. After reserving judgment, the Lord Chancellor observed as follows: "That is an equity "which the creditors of the four have not. I am extremely well "satisfied that a creditor having a demand against one estate only "of his debtor, may in equity confine another creditor, having a "demand against two estates of the same debtor, to make good "his demand against that upon which he has no claim, so that he "may go against the other; but the proposition is perfectly "different, that creditors of the four partners, having no demand "against the separate estate of the deceased partner, shall compel "the joint creditors of the five, being also joint creditors of the

(1) 8 Ves., 308. (2) 17 Ves., 520.

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"four, to go against the separate estate of the deceased partner. "Whether it may be just or not, the creditors of the four have "no other right than the four themselves would have had, and the "equity of the creditors in these cases is worked out through "the equity which the debtors themselves have."

In the case before us defendant No. 3 was the creditor of the defendant No. 1 and not of the joint family, and items 2, 4 and 6, against which he insisted *inter alia* that the plaintiff should first proceed did not belong to his debtor, but belonged to defendant No. 2. Defendant No. 1 had no equity to insist that the plaintiff should first proceed against the separate property of defendant No. 2 in order to save his own separate estate. The direction given by the Judge is therefore bad in law, so far as it relates to items 2, 4 and 6, which fell to the share of defendant No. 2 and the decree appealed against is hereby modified by excluding those items from the direction embodied in the decree. The decree is confirmed in other respects, and the third respondent will pay the appellant the costs of this appeal. Respondents will bear their own costs in this Court.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, and Mr. Justice Parker.

1888. Nov. 20.

RAMANADAN (DEFENDANT No. 1), APPELLANT,

v.

RANGAMMAL (PLAINTIFF), RESPONDENT.*

Hindu law—Right of a widow to reside in the family dwelling-house—Sale of dwelling-house in execution of a decree obtained against the managing members of family on a debt incurred for family purposes.

A house, being ancestral property of a Hindu family, was sold in execution of a decree by which the decree-amount was constituted a charge on such property. The debt sued on had been incurred for the benefit of the family by the coparceners for the time being, but since the death of such coparceners' father:

Held, the widow of the latter who resided in the said house during her husband's lifetime was not entitled as against a purchaser for value in good faith under such decree (but with notice that she resided and during her husband's life had resided

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* Second Appeal No. 403 of 1886.