

THE CIVIL LAW IN PONDICHERRY:  
REFERE PROCEEDINGS FOR PROVISIONAL RELIEF

By a gubernatorial order of January 6, 1819, the French Code of Civil Procedure was extended to the French Settlements in India. One of the proceedings set out in the Code is known as *refere* proceedings. These proceedings are of a provisional nature and do not affect the determination of either party's claims on merits. Recourse is usually had to them when there is need for urgent action to be taken as when it is feared that the defendant might remove or destroy the properties which are sought to be taken care of by these proceedings. On the death of a father, for instance, the son who used to live with him may be in a position to remove from the house money or other property belonging to the father; other sons may, therefore, take immediate action to see that a proper inventory is made of all the properties of the deceased and a temporary administrator appointed. All that the other sons have to do in such circumstances is to approach the President of the Court of First Instance or, in his absence, the judge who officiates for him, to issue the necessary order for the purpose.

As these proceedings are generally unfamiliar to common law lawyers, it may be helpful to set out below the relevant articles in the Code of Civil Procedure, Chapter XVI:

**Article 806:**

In all cases of urgency or when there is need to decide provisionally upon difficulties relating to the execution of an executable title or a judgment, it shall be proceeded with as provided for in the following articles.

**Article 807:**

The demand shall be brought before a hearing held for that purpose by the President of the Tribunal of First Instance or by the judge who replaces him on the day and hour specified by the court.

**Article 808:**

If, nevertheless, the case requires urgency the President or

the one who will represent him, may permit the summoning either at the hearing or at his office at a specified hour even on holidays; and in that case, the summons may be served only by virtue of an order of the judge who will commission a huissier for this purpose.

**Article 809:**

The referee orders shall not cause any prejudice to the main issue. They shall be executable provisionally without surety if the judge has not ordered that surety shall be furnished. They shall not be susceptible of opposition. In cases where the law authorises an appeal that appeal may be filed even before the time limit of eight days from the date of the judgment and it shall not be admissible if it has been filed after fifteen days counting from the day of the notification of the judgment. The appeal shall be judged summarily and without any procedure.

**Article 810:**

The minutes of referee orders shall be deposited in the registrar's office.

**Article 811:**

In case of absolute necessity, the judge may order execution of his order upon minute.<sup>1</sup>

The special characteristics of these proceedings may be noted.

1. They may be resorted to in all urgent matters;<sup>2</sup> they are also available in case of difficulties concerning execution of a judgment.

2. Application may be made to a single judge sitting *en referee*.<sup>3</sup>

3. There need not be any pending action relating to the subject matter of the proceedings. They can be initiated independently of any pending action.

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1. Adapted from the English translation of the Code by Shri S. Maharajan (later Mr. Justice Maharajan of the Madras High Court) and his brother judges of the District Court at Pondicherry.

2. The question whether a matter is urgent is determined by the judge in his discretion and his decision is not reviewable by the *Cour de Cassation*.

3. The court of first instance is a collegiate court where, according to French tradition, three judges must hear and decide a case.

4. The relief granted is provisional and does not in any way prejudice the merits of the issue.

As indicated by Article 808 a party making an application for *refere* proceedings must summon his opponent to the hearing by a regular summons (*ajournement*). The summons should set out the grounds for the application. There should be reasonable notice given to the other party before he is required to appear for the hearing. In extremely urgent cases, a *refere* application may be heard by a judge outside his normal working hours, and where special permission is granted, even at his residence at any time of the day or night.

The filing of a document known as *placet* with the clerk of the court puts the matter on the calendar. The *placet* is in essence a copy of the summons. As the proceedings are of a summary nature, the arguments are very brief.<sup>4</sup> The court may ask for additional documents and other means of proof to come to a decision, but this is rarely done.

The decision in *refere* proceedings is called *ordonnance* (order).<sup>5</sup> It may be executed despite an appeal, and a decision may not be reopened by way of *opposition*<sup>6</sup> in case of default.

Orders in *refere* proceedings are appealable. Appeals should be filed within fifteen days from the date of notification of the order. They are heard<sup>7</sup> under the summary procedure set out in the Code of Civil Procedure. It may be generally observed that in these appeals ordinary rules apply in most respects.<sup>8</sup>

The same rules applicable to ordinary actions in regard to jurisdiction are in general applicable to *refere* proceedings. There are, however, a few exceptions. It is required in some cases that the proceedings should be commenced at the place where the remedy sought is to be enforced. To cancel an attachment granted *ex parte* a debtor has to initiate *refere* proceedings before the president of the court who ordered the attachment. When the attempted execution of a judgment raises disputes, the court of the place where the *huissier* (process server) attempted to effect execution assumes jurisdiction in *refere* proceedings.

4. In France they are usually made by the solicitors (*avoués*) of the parties and not by their barristers (*avocats*)

5. Decisions of a single judge of a collegiate court are called *ordonnances*.

6. In general, *opposition* is a remedy by which a party in default may obtain reopening of his case.

7. In France they are usually heard by a specialised panel of the appeal court

8. See P. Herzog, *Civil Procedure in France*, (The Hague, 1967) p. 418.

Article 554 of the Code provides:

If difficulty raised in execution of the judgment or acts require expeditious disposal, the tribunal of the place will take a decision on it provisionally and return it for cognizance on the merits by the tribunal of execution.

This provision has been extended by analogy to cover other cases where urgent action is considered important, with the result that *refere* proceedings are allowed to be taken in such cases.<sup>9</sup>

These proceedings are applied in a number of different situations and French lawyers tend to expand their ambit to cover new situations. There is provision made by legislation for the use of these proceedings in certain cases, as for instance, in disputes concerning the execution of judgments and those regarding special procedure for compelling the production of notarial documents. Under *refere* proceedings, an expert may be sought to be appointed for discovery purposes,<sup>10</sup> a temporary administrator may be appointed to look after property when it is left without proper provision made for its management on account of death or absence of the owner. It is not uncommon to have recourse to these proceedings to determine alimony or custody of children during pendency of petition in divorce and separation cases. Preliminary injunctions are also obtained by means of these proceedings. There are instances where *refere* proceedings have been used to evict persons occupying real property without any right to such occupation. We shall consider in detail a case of eviction of a person who did not have any right to a house he occupied. The case is of importance as it was taken in *cassation* from the District Court in Pondicherry to the Madras High Court sitting as *Cour de Cassation*.

## II

The Pondicherry (Administration) Act, 1962, passed by the Indian Parliament, replaced in respect of Pondicherry, the *Cour de Cassation* in Paris by the High Court in Madras. The statute

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9. P. Herzog, *op. cit.* p. 198, n. 181.

10. In France it is usual for victims of automobile accidents to commence *refere* proceedings with a view to getting an expert appointed to investigate the circumstances of the accident. This, according to Herzog, "is one of the limited means of discovery available under French law" (P. Herzog, *op. cit.* p. 230)

while extending the jurisdiction of the Madras High Court to Pondicherry, expressly provided that "the High Court shall have in respect of Pondicherry, all such jurisdiction as under the law in force immediately before the appointed day was exercisable in respect of the former French Establishments by the *Cour de Cassation*, the *Cour Superieur d'Arbitrage* and the *Counseil d'Stat of France*".<sup>11</sup>

The French Supreme Court known as *Cour de Cassation* is not a court of appeal. Its jurisdiction consists in either affirming the decision of the Court below or quashing (literally, breaking) the decision under review and rendering a decision of reversal. A *pourvoi*, the means by which a review is sought in the Court, leads to a re-examination of questions of law to see whether the decision of the court below is based on proper interpretation and application of the law. It is very rarely that the Court examines the whole record of the case. When the Court quashes a decision of the lower court, it does not substitute it by a decision of its own. The case is sent with the opinion of the Court to another lower court of the same rank. The lower court is not bound to accept the opinion of the *Cour de Cassation*. If it disagrees with the review court, the case will be reviewed again by the *Cour de Cassation*, this time by a bench of 35 judges. The decision reached by this bench is binding on a third lower court of the same rank to which the case will now be sent and that court will apply the law as declared by the *Cour de Cassation* in the instant case.<sup>12</sup>

It is these powers of review, familiar to the civil law system, that have been vested in the Madras High Court by the Administration Act of 1962. As the review is based generally on disputed questions of law, members of the *Cour de Cassation* will have to deal with complicated legal issues and are therefore expected to be excellent experts in French law, both substantive and procedural.

We shall look at one of the cases<sup>13</sup> which came in *cassation* before the Madras High Court. Mouttouperumal bought a house for Rs. 11,000 from Baluchettiar under a sale deed of July 24, 1967. He approached the referee judge in Pondicherry for an

11. Sect. 10.

12. The Court of Cassation, say Amos and Walton, "only review findings of law — not of fact, though sometimes it treats as law what might at first sight seem to be fact—brought before it by *pourvoi*." See Amos and Walton, *Introduction to French Law*, (Second edition, 1963) p. 8.

13. *Baluchettiar and Unnamalaiammal v. Mouttoupermal and others* Special Appeal No. 294 of 1964 (Civil).

order for eviction of the vendor, his brothers and sisters. The judge ordered the defendants as well as other occupants to deliver possession of the house to Mouttouperumal within a period of one month. The vendor, however, moved the Court of the Third Additional District Judge, Pondicherry, to *annul* the order of the referee judge. Baluchettiar's mother intervened in the suit and claimed that she had a right to maintenance and residence against her sons including the vendor.

The referee judge had pointed out that by virtue of the absolute sale which was not cancelled by a competent court, Mouttouperumal was entitled to possession. He had also indicated that the claim for maintenance by the intervenor was sufficiently secured by an attachment of the property effected under the summons of September 21, 1967. He had, therefore, ordered eviction of the occupants as prayed for by the purchaser and directed the parties to sue in the principal court to establish their substantive rights.

On appeal by Baluchettiar the District Judge observed that though Baluchettiar had already instituted a suit for the cancellation of the sale deed by *assignation*<sup>14</sup> dated October 14, 1967, the suit had not been enrolled, and that if it had been enrolled, he would have been inclined to cancel the referee order and send the parties to the principal court to seek such temporary relief as could be got in the circumstances. He therefore dismissed the appeal.

Baluchettiar and his mother thereupon filed a special appeal before the Madras High Court sitting as *Cour de Cassation*. The Court, in the course of its judgment, observed :

The procedure envisaged in Chapter XVI [of the French Civil Procedure Code dealing with referee proceedings] is a summary one and it does not affect the substantive rights of the parties. This is clear from Article 809 which specifically provides that the referee orders shall not cause any prejudice to the main issue.

The Court further observed that as Baluchettiar, the vendor who contested the proceedings and even filed a suit had withdrawn the appeal, it is for the mother of the vendor to establish her

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14. An *assignation*, also called *ajournement*, is essentially a summons, complaint and return of service, all rolled into one. These three elements of the *assignation* are traditionally combined into an extremely long and bewildering sentence, in spite of requests by the Ministry of Justice to use simple language.

right to residence and maintenance in separate proceedings. In the sale deed executed by Baluchettiar there was no reference to the rights of the mother. It stated that the vendor got the house under a partition with his brothers. As the partition deed was not produced, it was not known to the Court who the parties to the deed were and what provision was made for the vendor's mother. The Court expressed the view that the mother could not possibly claim a share in her husband's estate under the Hindu Succession Act, 1956, which was extended to Pondicherry in 1968. The house and other properties Baluchettiar inherited from his father, and the house he got under a partition deed registered in 1947. The Indian Succession Act, 1956, which was extended to Pondicherry from October 1, 1968, could "not confer any rights on Unnamalaiammal [the vendor's mother] in respect of her husband's estate which she did not already possess." The Court did not see any ground to quash the order of the referee court which put the purchaser in possession of the house purchased by him.

Though referee proceedings may appear strange to common law lawyers, its efficacy is undoubted. The very fact that French lawyers incline to extend the use of these proceedings to new situations bespeaks their relevance, usefulness and effectiveness as a means of provisional relief.

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