APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

PALANIAPPA (PLAINTIFF), APPELLANT,

v.

LAKSHMANAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

1892. October 4. 1893. January 9.

Equitable assignment—Proceeds of an intended appeal—Property substituted by agreement between decree-holder and third parties for such proceeds—Right to follow such proceeds in hands of such third parties—Notice.

A judgment-debtor paid into Court the sum due under a decree passed against him on appeal. The expenses of the appeal had been advanced by the present plaintiff under an agreement signed by the appellants, which provided as follows: "you should first take out of the amount which may be collected from the defend-"ants the whole of the amount incurred on account of the said costs." Persons holding a decree against the successful appellants sought to enforce it against the money in Court having notice of the above agreement. Their application was first resisted by the successful appellants on the ground that the money was charity property, but subsequently it was consented to, and the money was paid out to them on their substituting certain other property for the purposes of the charity. The present plaintiff having obtained a decree on the above agreement, now sought to execute it against the money which had been so paid out:

Held, that the above agreement constituted a valid charge on the funds realized under the appellate decree, which charge was binding on the payees of the money and the plaintiff was not bound to proceed against the property substituted by them for the purposes of the charity.

APPEAL against the decree of C. Venkobachariar, Subordinate Judge of Madura (West), in original suit No. 40 of 1890.

The present defendants Nos. 4 to 6 brought a suit in 1885 against Reverend Father Laberthère and one Adimulam Pillai and his sons to recover the principal and interest due on a hypothecation bond and obtained, in the first instance, a decree against the last-named defendants only. On appeal, a decree was passed against Reverend Father Laberthère also, in satisfaction of which he paid into Court Rs. 44,763-12-8. The question for determination in this suit related to the rights in respect of this fund of various persons who claimed to share in it.

The present defendants Nos. 1 to 3 first claimed to execute against it a decree for Rs. 36,000 obtained by them against the

* Appeal No. 142 of 1891.

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present defendants Nos. 4 to 6. The latter then asserted that most of the money in Court represented charity property, of which they were trustees, and was accordingly not available for distribution in execution. But subsequently (before the institution of the present suit) these parties entered into an agreement in pursuance of which the charity-fund, to the amount of Rs. 28,600, was paid on 29th April 1889 to the present defendants Nos. 1 to 3, who furnished certain other property in substitution for it for the charity.

The plaintiff claimed to share in the fund in Court as holder of a decree passed against defendants Nos. 4 to 6 in a suit of 1887, and also under two agreements entered into between him and them, of both of which defendants Nos. 1 to 3 had notice at the date of the payment to them above referred to. The first of these agreements was entered into at the time of the institution of the suit of 1885 by the present defendants Nos. 4 to 6, and they thereby assigned to the present plaintiff a two-fifteenths share of their interest in the hypothecation bond to which that suit related, and he agreed to advance (and it was found that he did advance) the funds necessary for the litigation. The second of these agreements related to the costs of the appeal for which the present plaintiff advanced Rs. 3,000: under this agreement (filed as exhibit B) that sum was to be repaid out of monies which might be realized in execution of the decree that might be passed on the appeal. The present plaintiff brought a suit on the latter of these two agreements and obtained a decree for Rs. 4,702-13-0 in July 1889.

He now sued to establish his charge in respect of the amount due under the last-mentioned decree on the sum of Rs. 28,600 received by defendants Nos. 1 to 3 and to compel payment by them of the amount due under his decree.

The Subordinate Judge dismissed the suit holding that the plaintiff should have proceeded against the property that had been furnished by defendants Nos. 1 to 3 in substitution for the money paid to them under the above-mentioned arrangement of April 1889.

The plaintiff preferred this appeal.

Bhashyam Ayyangar and *Sivasami Ayyar* for appellant.

Sundara Ayyar for respondent No. 1.

JUDGMENT.—This was a suit brought by the appellant to compel the first, second and third respondents to refund Rs. 5,630,

with interest thereon at 9 per cent. per annum, from Rs. 28,600 drawn by them out of the amount paid to the credit of original suit No. 7 of 1885, on the file of the Subordinate Court of Madura. The facts which have given rise to this claim may be briefly stated as follows: In 1885, respondents 4 to 6 desired to sue Adimulam Pillai and his sons, who owed them a large sum of money, upon a hypothecation bond for Rs. 43,000, but had no funds at their disposal to pay the expenses of the suit which they had to institute. They assigned to the appellant two-fifteenths of their interest in the hypothecation bond, and in return he advanced the funds necessary for the prosecution of their claim. The result was the institution of original suit No. 7 of 1885 by respondents 4 to 6 against Adimulam Pillai and his sons and against Father Laberthère. Although the decree passed therein was in their favor, yet it exonerated Father Laberthère, the fourth defendant in that suit, from all liability for respondents' claim. Adimulam and his sons not being solvent, the said respondents preferred an appeal to the High Court (No. 84 of 1886) against so much of the decree as absolved Father Laberthère. They again borrowed from the appellant Rs. 3,000 to prosecute the appeal and secured its re-payment by document B. That document purports to be an agreement executed by them in appellant's favor on the 21st July 1886 and, after reciting the advance, charged it upon the costs, if any, which the High Court might award on appeal and, if no costs were awarded upon the thirteen-fifteenths or the respondents' share of the debt that might be decreed. On the 17th January 1888, the High Court decided that Father Laberthère was liable to the respondents to the extent of about Rs. 45,000 and ordered him to pay that amount, but directed each party to bear his or their costs.

Father Laberthère paid into Court Rs. 41,000 and odd on the 13th October 1888 and Rs. 3,000 and odd on a subsequent date in satisfaction of the appeal-decree. At this time there were several decrees and claims outstanding against respondents 4 to 6. The first, second and third respondents had a decree against them for Rs. 36,000 and odd in original suit No. 12 of 1882 on the file of the Subordinate Court. The appellant himself had three distinct claims against the money in deposit. He had a decree for more than Rs. 7,000 in original suit No. 14 of 1887, and he was also entitled to two-fifteenths of the amount in deposit by virtue of the assignment already mentioned. He claimed further a charge

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upon it for the amount due under agreement B-1, which formed the subject of original suit No. 48 of 1888, then pending. The fourth to sixth respondents urged that a thirty-two forty-thirds share of the amount in deposit represented certain properties which had been dedicated to a charity, and should be paid out to them in their capacity as trustees of that charity without being applied in liquidation of their private debts. Again, one Subramaniyam Chetty had two decrees to be satisfied by respondents 4 to 6, one in original suit No. 13 of 1887 and the other in original suit No. 546 of 1888. Each of these persons claimed payment from the amount in deposit, and on the 13th March 1889, the Subordinate Judge, by his order, exhibit C-2, distributed it in the following manner:—

	RS.	A.	P.
Amount in deposit	44,763	12	8
Thirty-two forty-thirds of the amount which is charity money	33,312	9	7
Amount available for distribution among creditors	11,451	3	1
Amount set apart on account of the claim of the appellant as the fourth plaintiff in original suit No. 7 of 1885 ...	1,526	13	2
Amount due to do. as decree-holder in original suit No. 14 of 1887	7,801	15	7
Balance available for decree-holder in original suit No. 13 of 1887	2,122	6	4

Exhibit C-2 shows that the claim made by respondents 1 to 3 as decree-holders in original suit No. 12 of 1882 and so much of the appellant's claim as rested on agreement B-1 were excluded from the distribution. On the 27th April 1889, however, respondents 1 to 3 entered into a compromise with respondents 4 to 6 whereby the latter agreed, *inter alia*, that Rs. 28,600 which was excluded from the distribution on the ground that it was charity-fund should be paid to the former, and the Subordinate Judge accepted the compromise and paid Rs. 28,600 to the first three respondents on the 29th April. On the 8th July 1889, original suit No. 48 of 1888, instituted by appellant against respondents 4 to 6 upon agreement B-1, was decreed in his favor, and on the 3rd October 1890 appellant brought the present suit. His case was that he had a first charge for the amount due under document B-1 on the sum

of Rs. 28,600 drawn by the first three respondents. The Subordinate Judge held that the charge could not be enforced against Rs. 28,600 paid to the respondents 1 to 3 and that the appellant ought to proceed against the property substituted for it by exhibit II; and on this ground he dismissed the suit. Hence this appeal.

The appellant's claim rests on agreement B-1, and there is no dispute as to its genuineness. The Subordinate Judge finds that Rs. 3,000 was, as stated therein, advanced by the appellant to respondents 4 to 6. The former and his two witnesses deposed to the advance and there is no evidence to the contrary. It is clear from exhibit B-1, that the amount due thereunder was agreed to be paid first out of monies which might be realized in execution of the final decree in original suit No. 7 of 1885. The material words in the document are, "you should first take out "of the amount that may be first collected from the defendants "(in original suit No. 7 of 1885) towards thirteen-fifteenths "share of the decree-debt due to us, the whole of the amount "incurred (spent) on account of the said costs."

It was urged in the Court below, and is reiterated on appeal, on behalf of respondents 1 to 3 that the document did not create a charge; that, if it did, it did not perfect it; that even if there was a completed charge, it was invalid; and that it was not enforcible either against respondents 1 to 3 or against Rs. 28,600 paid to them on account of their decree in original suit No. 12 of 1882.

The Subordinate Judge was of opinion that a complete charge was created and that it was valid as against the respondents, and we concur in that opinion. The transaction evidenced by document B-1 was substantially a contract by respondents 4 to 6 to appropriate what they might realize under the final decree in original suit No. 7 of 1885 for their thirteen-fifteenths share first to re-payment of the money advanced by the appellant under B-1. Though, at the date of the document, the fund out of which the advance was to be re-paid had not come into existence, and though it might possibly never have come into existence afterwards, yet that circumstance is not sufficient to prevent the charge taking effect against the fund when it subsequently came into existence. In *Collyer* v. *Isaacs*(1) the Master of the Rolls, Sir George Jessel, observed as follows: "The creditor had a mortgage security on

(1) L.R., 19 Ch. D., 342.

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"existing chattels and also the benefit of what was in form an "assignment of non-existing chattels which might be afterwards "brought on to the premises. That assignment, in fact, constituted "only a contract to give him the after-acquired chattels. A man "cannot in equity, any more than at law, assign what has no "existence. A man can contract to assign property which is to "come into existence in the future, and when it has come into "existence, equity, treating as done that which ought to be done, "fastens upon that property, and the contract to assign thus be-"comes a complete assignment." As for the contention that such assignment is recognized neither by the Transfer of Property Act nor by the Contract Act, the transaction is not invalidated by either of those enactments, and it falls under the rule of Equity which the Courts have to administer in this country. This is also the view taken by the High Courts at Calcutta and Allahabad, *Misri Lal* v. *Mozhar Hossain*(1) and *Bansidhar* v. *Sant Lal*(2). It is, therefore, sufficient to observe that when Father Laberthère paid into Court Rs. 44,000 and odd, the fund indicated by the agreement B-1 came into existence and the charge created by it became enforcible as against respondents 4 to 6.

As observed by the Subordinate Judge, respondents 1 to 3 had notice of appellant's claim under exhibits C and L, and the charge created by B-1 became, therefore, enforcible against them also when they took Rs. 28,600. Though they claimed a priority by reason of attachment, the Subordinate Judge adhered to the opinion which he expressed in C-2, viz., that they had no proper lien, and his decision on this point is not seriously questioned before us. The Subordinate Judge considers, however, that Rs. 28,600 represented a charity-fund, and that it was not open to the appellant to question its transfer to respondents 1 to 3 by respondents 4 to 6, the trustees of that fund, and that after such transfer, he could only proceed against the property substituted for it by the compromise II. To this compromise the appellant was not a party, and it was made against his will and to his prejudice. Such being the case, the Subordinate Judge is clearly in error in holding that the transfer is binding on the appellant and defeats his prior charge on the amount in deposit. The Subordinate Judge observes further that Rs. 28,600 was judicially

(1) I.L.R., 13 Cal., 262 at p. 264. (2) I.L.R., 10 All., 133 at p. 186.

recognized as charity money. There was no specific issue raised on this point, and if we considered it necessary to determine that question for the purposes of this suit, we would remit an issue for trial. But we are of opinion that even assuming that Rs. 28,600 represented a charity-fund, the charge created by document B-1 is not inoperative. The Subordinate Judge himself considers that but for the advance made under B-1 by the appellant and the prosecution of appeal No. 84 of 1886, Father Laberthère would not have had to pay into Court Rs. 44,000 and odd and that the fund out of which Rs. 28,600 was paid out for charity could not have come into existence. He, therefore, holds that the appellant might have had a lien by analogy to salvage lien, but refuses to enforce it on the ground that the appellant made his advance as a matter of speculation and had no interest in making it and that his claim was restricted to the property substituted for it under exhibit II. In his order C-2, he discussed the question whether agreement B-1 was champertous and came to the conclusion that it was not, and to that conclusion he adheres in his judgment in the present suit. This being so, we do not consider that he is warranted in holding that the transaction is inoperative for the purpose of creating a lien on a fund which might never have been recovered but for that transaction. Neither do we see our way to support his conclusion that the property substituted for Rs. 28,600 by exhibit II is the one against which the appellant ought to have proceeded. The appellant was no party to that document; it was entered into with the knowledge of his claim against his will and to his prejudice, and it cannot, therefore, defeat any prior claim which he had on Rs. 28,600 and transfer it to some other property. There is nothing to show that the one-third share in the Achampattu village which respondents 4 to 6 released from the charge they had upon it for the amount of the decree in their favor in original suit No. 12 of 1882 was as good a security as the fund in Court. It was not a *bonâ fide* investment of a trust fund for the benefit of the charity but it was the appropriation of a charity-fund to the payment of the private debts of respondents 4 to 6. There is no analogy between such appropriation and the investment of a charity fund in a bank. The appellant's claim to a charge upon the fund paid into Court by Father Laberthère and paid out to the first three respondents at the instance of the others, must be upheld,

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For the respondents it is next contended that out of the amount paid into Court by Father Laberthère, the appellant himself was paid Rs. 3,000 and that he is not entitled to charge the whole of the balance due under B-1 upon Rs. 28,600. This contention appears to us to be entitled to weight. Under exhibit B-1, the amount due under it was a first charge upon the thirteen-fifteenths share of the amount paid into Court by Father Laberthère. Out of that amount Rs. 28,600 was paid to respondents 1 to 3, Rs. 7,000 and odd to the appellant himself and Rs. 2,000 and odd to the decree-holder in original suit No. 13 of 1887, and the appellant is entitled to a refund of what was due to him under B-1 from each of those who shared in the amount deposited in Court in proportion to the amount drawn by them. The fund, on which the appellant had a charge, was intercepted by them all, and each is liable to replace it only in proportion to the extent to which he intercepted it.

The appellant is, therefore, entitled to a decree for refund of Rs. 1,938-13-6 and four-fifths of the costs incurred in the Lower Court and in this Court, the respondent being entitled to one-fifth the costs. The decree of the Subordinate Judge will be set aside, and a decree will be passed in appellant's favor for the amount indicated above with interest at 6 per cent. per annum from date of this decree, inclusive of costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Best.

1892. December 6. 1893. April 5, May 4.

VIGNESWARA (PLAINTIFF No. 2), APPELLANT,

v.

BAPAYYA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Limitation Act—Act XV of 1877, ss. 7, 8—Disability of one of two joint-claimants—Transfer of Property Act—Act IV of 1882, s. 99—Usufructuary mortgage.

In a suit by the two sons of a usufructuary mortgagor (deceased) to set aside the sale of the mortgage premises, which had taken place in execution of a money decree obtained by the mortgagee, it appeared that the suit, if brought by the first

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* Second Appeal No. 335 of 1892.