

relating to public bodies and official acts prescribing special rules of limitation and not providing for disabilities [see *Darby and Bosanquet's Treatise on Limitation* in page 669].

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In my opinion the question submitted to us must be answered in the negative.

This second appeal then came on for final disposal before Collins, C.J., and Shephard, J., and the Court delivered the following judgment:—

JUDGMENT.—The decree must be reversed and the suit dismissed with costs throughout.

## APPELLATE CIVIL.

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

RAMASAMI CHETTI (PLAINTIFF), APPELLANT,

v.

MANGAIKARASU NAACHIAR AND OTHERS  
(DEFENDANTS), RESPONDENTS.\*

1894.  
Aug. 20, 21.  
Sept. 26.

*Hindu law—Mortgage of zamindari lands by zamindar's widow to secure her husband's debts—Appropriation of the assets of deceased towards payment of his debts.*

In a suit on a mortgage of lands forming part of a zamindari, it appeared that the zamindar died without issue, being indebted to the plaintiff, and that his widow subsequently borrowed money from the plaintiff for her own purposes, including litigation successfully prosecuted by her to make good her claim to the estate. The widow being pressed for payment executed the mortgage sued on and afterwards paid to the plaintiff two sums, being the proceeds of the sale of her husband's jewels and of the execution of a decree in his favour realized after his death. These sums were appropriated to the payment of the widow's debt by the mortgagee who, after her death, brought the present suit against the deceased zamindar's mother then come into possession of the estate, his undivided half-brothers being joined also as defendants:

*Held* (1), that the widow was entitled to mortgage the estate for the payment of her husband's debts, and was not bound to discharge them out of income;

(2), that the two payments by the widow of money belonging to the estate of the deceased zamindar should have been applied in liquidation of his debt.

APPEAL by the plaintiff against the decree of Venkataranga Ayyar, Subordinate Judge of Madura (East), in original suit No. 36 of

\* Appeal No. 151 of 1893.

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1890, and a memorandum of objections by the defendants against the same decree.

Suit to recover principal and interest due upon a hypothecation bond, dated 5th July 1888, and executed in favour of the plaintiff by one Thanga Nachiar, the widow of the late Zamindar of Pandalkudi, who had died without issue on 29th November 1887. It was stipulated in the bond that the obligor should pay the principal sum on the 4th July 1889 together with interest at 12 per cent. per annum, and that in default of payment on the specified date compound interest should be paid.

The consideration of the instrument sued upon was made up of the principal and interest of debts contracted by the late zamindar, and the property subject to the charge formed part of his estate. Thanga Nachiar had died before the institution of the present suit which was in the first instance brought against the mother of the late zamindar as sole defendant, it being averred that she was entitled to be and in fact was in possession of his properties. Subsequently his two divided step-brothers were brought on to the record as defendants by the orders of the court.

The following were the issues framed in the suit :—

(1) Whether the items of consideration set forth in the hypothecation bond of 5th July 1888 were genuine debts due by the late Seemaichami Taver or not ?

(2) Whether assuming they were so, Thanga Nachiar was under any legal necessity to execute the hypothecation bond and whether it is a *bonâ fide* transaction and is binding on the defendants ?

(3) Whether the sum of Rs. 46,405-15-7 or any other and what sum was received by the plaintiff from the estate of the late Seemaichami Taver during the life time of Thanga Nachiar, and whether the plaintiff was bound in the first instance to have given credit for such sum towards the debt, if any, due by Seemaichami Taver as pleaded by the defendant ?

(4) Whether the provision in the hypothecation bond regarding compound interest is binding on the defendant ?

(5) Whether the plaintiff's claim is in any view barred by limitation ?

(6) What decree, if any, is plaintiff entitled to ?

The first and second issues were determined in favour of the plaintiff as also was the fourth, with regard to which the Subordinate

Judge quoted *Ohhab Nath v. Kamta Prasad*(1), and also referred to evidence which showed that the deceased zamindar used to pay to the plaintiff compound interest on the sums from time to time borrowed by him.

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The third issue was dealt with in paragraphs 22 to 27 of the Subordinate Judge's judgment. It appeared that two payments aggregating Rs. 16,200-11-6 were made to the plaintiff after the death of the late zamindar and out of his estate. These sums had been applied by the plaintiff towards the discharge of a debt due to him from Thanga Nachiar and not of that of the late zamindar; these debts, theretofore treated in his accounts as one entire demand, being split into two with the object of effecting this appropriation. It was sought to be proved by the plaintiff that it was agreed between him and Thanga Nachiar or her agent that the payments should be appropriated in the above manner. The Subordinate Judge held that such an agreement if it were made in fact was opposed to the principles of the Hindu law and would have the effect of defrauding the reversionary heirs, and accordingly held that the payments should be treated as made in discharge of the husband's debt.

In the result the Subordinate Judge passed a decree for the plaintiff that the defendants do pay him Rs. 19,106-1-4 within six months and in default that the property in question be sold.

Against this decree the plaintiff and defendants respectively preferred an appeal and took objection under Civil Procedure Code, section 561, on grounds which appear sufficiently for the purposes of this report from the judgment of the High Court.

*Subramanya Ayyar, Bhashyam Ayyangar and Desikachariar* for appellants.

*Parthasaradhi Ayyangar, Srirangachariar, Bhashiachariar and Thiruvengkatachariar* for respondents.

MUTTUSAMI AYYAR, J.—This is an appeal from the decree of the Subordinate Judge's Court of Madura (East), in so far as it disallows appellant's claim upon the hypothecation bond Z, dated the 8th July 1888. Respondents object to the decree so far as it allows his claim under section 561 of the Code of Civil Procedure. The plaintiff claimed Rs. 39,013-3-5, as principal and interest, simple and compound, due under exhibit Z, but the decree awarded Rs.

(1) I.L.R., 7 All., 333.

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19,106-1-4 only. The contention on appeal is that the difference, viz., Rs. 19,900 and odd, has been improperly disallowed, and the objection taken by respondents is that the bond Z is not binding on the estate.

The five issues upon which the parties proceeded to trial are set forth in paragraph 5 of the original judgment, and the Subordinate Judge decided the first, second, fourth and fifth in appellant's favour, but on the third issue he upheld respondents' contention and credited to the debis sued for two sums of money, viz., Rs. 3,905-3-6 and Rs. 12,295-8-0. Whether the Subordinate Judge was right in doing so is what we have to determine in this appeal.

Appellant is a money-lender in the District of Madura. The first respondent is the mother of the last male owner of the hypothecated property, and she succeeded to it on the death of his widow, Thanga Nachiar. The second and third respondents are the half-brothers and the reversionary heirs of the late male owner Secmai-chami *alias* Sivagyana-swami Taver.

Sivagyana Taver, commonly called the Pandalkudi Zamindar, borrowed from the appellant from time to time various sums of money. He borrowed first Rs. 6,761-5-0 on a promissory note dated the 21st October 1884. On diverse occasions he since obtained loans from the appellant on 48 letters (F1 to F48) which, on a settlement of accounts made on the 27th April 1887, resulted in a balance in his favour to the extent of Rs. 17,542-14-7. The Subordinate Judge has found that on the last mentioned date the debtor consolidated the two debts, executed the promissory note C and took back the prior promissory note and the 48 letters. Subsequently, Mangalasami Taver, his agent, borrowed Rs. 1,800 upon the authority conveyed by Sivagyana Taver by yadasts S to S6. On the 29th November 1887 the debtor died leaving him surviving a widow named Thanga Nachiar, the first respondent, his mother, and the second and third respondents, his divided step-brothers, Kottaisami Taver and Pandi Dorai. Thanga Nachiar desired, on her husband's death, to enter into possession of his estate, but her attempt was resisted by the other members of the family who wished the Court of Wards to take up its management on plea of the widow's youth and sex. Their opposition, however, failed, and the Court of Wards declined to supersede the widow who assumed management in March 1888. During this quarrel she had occasion to borrow from time to time and the appellant accommodated her with loans and

as is alleged, probably took her side. She also borrowed monies for other purposes, and her own debts were considerable. On the 5th July 1888, she executed the hypothecation bond Z in favour of the appellant for Rs. 30,740-7-10, which was made up of Rs. 24,304-3-7 due under exhibit C, of Rs. 1,800 borrowed under yadasts (S series) and of Rs. 4,636-4-3 interest due thereon. The hypothecation bond provided for interest on the consolidated amount at 12 per cent. per annum, and in default of payment, for consolidating the interest and the principal at the end of each year. It is in evidence that Sivagyana Taver's estate yielded Rs. 30,000 or Rs. 32,000 a year, that the peishcush, cesses and poruppu amounted to about Rs. 14,000, that the cost of establishment was about Rs. 5,000, that the cost of repair and contingent charges amounted to Rs. 1,000, that the amount paid to the first defendant on account of her maintenance was Rs. 1,800 a year, and that the widow's net income was about Rs. 10,000 a year. She had to incur an expenditure of Rs. 6,000 or Rs. 7,000 in connection with the dispute about her management. It is also in evidence that she made payments to a large extent on account of her personal debts and placed part of the collection of her estate in view to their discharge under the direct and immediate control of the creditor.

Among the sums of money so paid to and appropriated by the appellant there are admittedly two payments, viz., (1) 12,295-8-0, (2) Rs. 3,905-3-6, which require to be noticed. The first item of payment represents the sale-proceeds of Sivagyana's jewels and the second item represents the produce of a decree in favour of Sivagyana realized after his death by his widow. It was conceded by the appellant's pleader that at the date of appropriation the appellant was aware that the first item was made up of the sale-proceeds of Sivagyana's jewels. There is also reason to think that, in the circumstances of the case, the creditor had means of knowledge as regards the nature of the second item. Upon these facts the Subordinate Judge has held that the two items formed part of the *corpus* of Sivagyana's estate and that they ought to have been appropriated by the appellant to the debt due by the estate on the hypothecation bond. He discusses the question in paragraphs 22 to 27 of original judgment, and I agree in the conclusion at which he has arrived. The hypothecation debt was a charge on the estate, whilst it is not proved for the appellant that monies borrowed by Thanga Nachiar were mostly other than her personal debts. This being so,

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what was recovered on account of the estate and what was realized by the sale of part of it ought to have been applied in its reduction, as the reversioners would otherwise be defrauded.

In the case before us the creditor knew that the monies formed part of the estate, and the Subordinate Judge finds, and properly, I think, that the appropriation was the result of collusion between the widow's agent and the creditor. The splitting of the debts referred to by the Subordinate Judge in paragraph 25 of his judgment lends material support to this view of the facts. Moreover, the decision of the Subordinate Judge is in accordance with the principle laid down by the Privy Council in *Hurro Nath Rai Chowdhri v. Ramlhir Singh*(1). I disallow the first contention in appeal.

Another contention in appeal is that the Subordinate Judge ought to have awarded interest on the amount decreed from the date of plaint to date of realization, and I am of opinion that it must be upheld. Appellant is entitled to interest on the amount decreed at the contract rate from the date of plaint to that of the decree, and at 6 per cent. per annum from the date of decree to that of realization. The decree appealed against must be modified as indicated above with reference to interest and confirmed in other respects. The costs will be proportionately assessed.

As regards the memorandum of objections, respondents object to the whole decree.

The first ground of objection is as to the correctness of the Subordinate Judge's finding on the first issue and he deals with it and the second and fourth issues in paragraphs 6 to 21 of his judgment. I agree in the conclusions at which he has arrived. During the argument, respondents' pleader pressed on us four objections to the finding, viz., (i) that there was a considerable interval of time between the date on which document C was drawn up and the date on which it was signed by Sivagyana; (ii) that the evidence of plaintiff's second witness Somasundaram so far as it explains the delay is contradictory; (iii) that several others who might have been called as witnesses have not been called; and (iv) that a sum of Rs. 1,800 was twice included in the amount of debt entered in document Z. As to the first objection the evidence of Somasundaram affords satisfactory explanation. Although he made two conflicting statements, he made the second

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(1) I.L.R., 18 Cal., 311; s.c. L.R., 18 I.A., 1.

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statement of his own accord and corrected the first, and there is no sufficient reason to think that the discrepancy is not due to defective memory consequent on lapse of time. There is further the evidence of plaintiff's fourteenth witness as to the execution of C and it corroborates that of the second witness. It is true that certain persons who might have been called as witnesses have not been called. But taking the evidence as a whole it is so cogent and varied that it is not possible to come to any other finding than that to which the Subordinate Judge has come. The objection as to Rs. 1,807 being included twice over has no foundation in fact, and the appellant's pleader has shown by reference to the accounts that it is founded on a misconception of certain entries in exhibit 000. As regards the contention that there was no necessity for the execution of the mortgage, there is evidence that the creditor insisted on the payment of Sivagyana's debts due on the estate. Under Hindu law, a widow is at liberty to sell a portion of the estate to pay those debts, as the heritage she or any heir is entitled to consists of Sivagyana's property less his debts, or is the aggregate of his property and his debts which are in the first instance payable out of it. A mortgage therefore in lieu of the sale of part of the estate is an act ordinarily beneficial to the reversioners unless special circumstances show that the intention was otherwise. The rate of interest provided by the mortgage is 12 per cent. per annum, and the provision for annual rests is what her husband had entered into in some of instruments executed by him. As Thanga Nachiar was a young widow, she might have hoped to live long and to pay the interest every year as soon as her own debts were paid off. It must be remembered that she died in October 1889 while the document Z was executed in July 1888.

It is next contended that she was bound to apply the income of her husband's estate first in discharge of his debts instead of executing the mortgage. The net income is, under Hindu law as administered in this Presidency, her own exclusive property as widow, and she is not bound either to save or apply it for the benefit of the reversioners. She is no doubt bound to pay her husband's debts from it, because she had taken charge of the whole property left by him whilst her right of inheritance extends only to the property as diminished or affected by his debts. As between her and the reversioners she is entitled to say, "I will pay my husband's debts by the sale of his property and take the residue,

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“and I desire to keep the net income derived from it and to spend “or invest it as I please.” I do not, however, desire to be understood as holding that she is entitled to ignore the charges which are legally payable out of the gross income such as the peishoush and maintenance due to other members of the family and thereby add to the debt left by the husband so as to prejudice the reversion. Applying these principles to the case before us, I am of opinion that the gross income less the charges she is legally bound to pay from it is her exclusive property as between her and the reversioners. Another objection taken to the decree is that a personal decree has been passed against the first defendant. This is founded on a misconstruction of the decree which only purports to give her the option of paying the decree amount within six months if she desires to prevent the creditor from bringing the property to sale.

I would dismiss the memorandum of objections with costs. The decree should, however, be so varied as to grant the six months from the date of the appeal instead of the original decree.

SHEPARD, J.—By the decree in this case there is made payable to the plaintiff the sum due on the footing of the bond executed by the widow on whose death the defendants came into possession less the sum of Rs. 16,200-11-6 which is found to have been received by the plaintiff. The plaintiff appeals against the decree on the ground that this deduction ought not to have been made and also on the ground that interest up to the date of realization is not provided for. The defendants object to the whole decree on several grounds. They contend that the whole basis of the suit is false, that the widow was under no necessity to execute the bond, that the bond comprises sums not really due and that interest at the contract rate ought not to have been allowed. The contention of the defendants which goes to the root of the whole decree forms the subject of the first and second issues. The debt secured by the widow's bond was made up of two sums, one a sum claimed in respect of a promissory note alleged to have been made by her late husband Sivagyanam, the other consisting of monies advanced to the widow herself. As to the former there is a mass of evidence, oral and documentary, brought before the Subordinate Judge to prove the promissory note was made by the late Sivagyanasamy under the circumstances described. That evidence was accepted by the Judge, and there really was no attempt to meet it by counter-evidence. The evidence as to the hand-writing of



Sivagyanasamy stands uncontradicted. I see no reason to think that the Judge was wrong in his finding on the first issue with regard to the promissory note. It was not denied that the other sums which make up the consideration for the bond were advanced to the widow, but it was said that they had been paid off on a settlement of accounts between her and the plaintiff. This contention founded on a misconception of the evidence was sufficiently disposed of during the argument. The more substantial contention was that the widow was under no necessity to hypothecate the property in which she enjoyed only a limited interest. Sivagyanasamy died on the 29th November 1887. The bond was executed on the 5th July 1888. At the former date the treasury of Sivagyanasamy was empty. On the 30th June 1888 there is evidence to show that about Rs. 21,000 remained in hand including the mohathala account. It also appears from the evidence that the gross income of the estate was between 32 and 39 thousand rupees. The particular income for the year succeeding Sivagyanasamy's death is not stated. Assuming that it was about Rs. 35,000 gross, the net available income for the widow would seem to have been about Rs. 11,000. With this income the widow had to face the debt due under the promissory note exceeding Rs. 24,000 in amount. There is evidence which the Judge believes that the plaintiff pressed for the payment of this debt as well as the small advances made by him to the widow. Under these circumstances it seems to me the finding that the hypothecation was made in good faith and under pressure of necessity is fully justified. Nor do I think that the Judge was wrong under the circumstances mentioned by him (paragraph 20) in allowing compound interest. These observations dispose of the defendants' objections. I think they should be dismissed with costs.

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The plaintiff's appeal relates firstly to the sum allowed to the defendants on account of monies belonging to the estate of Sivagyanasamy which are found to have come into the hands of the plaintiff. The Judge has proceeded on the authority of the decision in *Hurro Nath Rai Chowdhri v. Randhir Singh*(1). There can be no doubt that the plaintiff was well aware that the monies received by the sale of the jewels as well as those realized by the decree were part of the estate which the widow took from her

(1) I.L.R., 18 Calc., 311; s.c. L.R., 18 I.A., 1.

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husband. His object clearly was, as the Judge finds, to secure himself with regard to the sums he had advanced to the widow personally, and to throw the whole burden of the other debts on the estate. It was argued here that the former debts were also binding on the reversioners, but that was not the contention in the court below. Then it was said that the appropriation was the result of an arrangement between the widow and the plaintiff. It appears to me that the Judge was right in holding that the plaintiff ought to have applied the two sums, which came to his hands, to the liquidation of the husband's debt.

No reason was given for refusing interest from the date of the suit till the date of decree and thereafter till realization. The decree should be modified by allowing the agreed rate till date of decree and further interest at 6 per cent. till realization. In other respects I would dismiss the appeal with proportionate costs.

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## APPELLATE CIVIL.

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

NARASIMHA CHARYULU AND OTHERS (DEFENDANTS),  
APPELLANTS,

v.

APPA RAU (PLAINTIFF), RESPONDENT.\*

*Stamp Act—Act I of 1879, s. 51 (a)—Allowance for spoiled stamps—Whether applicable to ordinary use in which a mistake has been made.*

Section 51 (a) of the Stamp Act, which permits an allowance being made for spoiled stamps, applies only to cases of accidental spoiling of the paper of which the stamp is made, and does not cover cases of the use of the paper in an ordinary way, in which a mistake has been made.

APPEAL against the decree of M. B. Sundara Rau, Subordinate Judge of Ellore, in original suit No. 28 of 1892.

The defendants in this suit executed a mortgage deed in favour of the plaintiff's father, since deceased, conveying certain immovable property to him as a security for a loan of Rs. 12,000, it being provided that "the sum of Rs. 12,000 should be repaid "in twenty-four annual instalments, commencing with the 30th

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\* Appeal No. 58 of 1894.