

always been acted on. The weight due to that opinion and practice is not lessened by the fact that the decision in that case, so far as it relates to the right of appeal, has since been overruled in *Husananna v. Linganna*(1). No doubt, Parker, J., in that case expressed himself as inclined to take a different view, but we, however, are unable to do so.

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The objection that the Subordinate Judge had no jurisdiction therefore fails and his decision in the previous case must be held to be binding in the present suit.

The appeal fails and is dismissed with costs.

APPELLATE CIVIL.

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

SUBBARAYA PILLAI (PLAINTIFF) APPELLANT.

v.

VAITHILINGAM (DEFENDANT), RESPONDENT.*

1896.
September
8, 19.

*Trustee of composition deed—Managing member of a firm appointed as trustee—
Right of suit after dissolution of the firm.*

Certain traders having been adjudicated bankrupts in the Courts of Mauritius, the creditors agreed to a composition deed, which was sanctioned by the Court, whereby the present plaintiff therein described as the managing member of the firm of S. and Company was appointed trustee and his firm guaranteed the payment of a dividend of 50 per cent. The firm was subsequently dissolved and its assets were assigned to a third party. The plaintiff now sued to recover costs decreed to him in his capacity as trustee in various suits in Mauritius, and it was objected that he was precluded from suing by the dissolution of his firm and the assignment away of its assets:

Held, that the plaintiff was entitled to maintain the suit.

SECOND APPEAL against the decree of E. J. Sewell, Acting District Judge of Tanjore, in appeal suit No. 300 of 1894, confirming the decree of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, in original suit No. 21 of 1893.

The plaintiff sued to recover the costs incurred in suits brought by the defendant against him in the Courts in Mauritius and

(1) I.L.R., 18 Mad., 423.

* Second Appeal No. 720 of 1895.

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awarded to him by the final decrees of those courts. It appeared that the plaintiff had been the managing member of a firm now dissolved which carried on business as V. Subbarayan and Company and were creditors of Coo. Vaithilingam and his firm Coo. Vaithilingam and Company carrying on business in Mauritius. In 1887 the debtor and his partners were adjudicated bankrupts and Mr. G. Newton, the Accountant in Bankruptcy, was appointed receiver and manager of their respective estates, effects and properties. Exhibit C filed in this suit was a report of proceedings had in the Bankruptcy Court of Mauritius in this matter, and it appeared that at a meeting of creditors held in that court under the chairmanship of the Judge in bankruptcy, the following resolutions were passed:—

“First, that a composition of fifty cents in the rupees be accepted in full satisfaction of the debts, principal and costs, due to the creditors of the bankrupts, exclusive of all privileged costs and preferential claims which are to be paid in full and on condition that the two orders of adjudication in this matter, respectively, dated the 25th April last and 23rd May also last, be annulled by the court; second, that such composition be payable in eight equal monthly instalments to be paid one month after the date of the annulling by the court of the above orders of adjudication, the privileged costs lawfully incurred to be paid cash on the annulment of the orders of adjudication; third, that the security of V. Subbarayan and Company of Port Louis, traders, be accepted for the payment of the above composition and that, in consideration of such security all the joint and separate estate, effects and property both real and personal of the firm Coo. Vaithilingam and Company and of the individual members thereof, situate in Mauritius and in India be assigned to the said V. Subbarayan and Company, and fourth, that Naga Pillai Subbarayan, the managing member of the said firm, V. Subbarayan and Company, be appointed trustee to recover and realise all the estate, effects and property assigned as aforesaid and to carry out the above arrangement.”

A deed was drawn up to give effect to those resolutions and having been approved by all parties and duly executed by the receiver and manager, the insolvents and Subbarayan and Company, and also by the Judge in bankruptcy who sanctioned it, an order was made on the 22nd July by which it was, *inter alia*, ordered as

follows:—“It is further ordered that the orders of adjudication of
 “bankruptcy in this matter, dated, respectively, the 25th day of
 “April and the 23rd day of May last, be and the same are hereby
 “annulled, and it is further ordered that all the estate and property
 “of the bankrupts both in Mauritius and in India, and all the
 “books, papers and documents of the bankrupts be and the same
 “are hereby vested in Naga Pillai Subbarayan of Port Louis,
 “trader, managing member of the firm V. Subbarayan and Com-
 “pany, who is hereby appointed trustee to carry out the said com-
 “position with full power to recover and realise all the said estate
 “and property.”

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By the composition deed V. Subbarayan and Company to whom the official receiver and manager and the bankrupts assigned all the joint and separate estates, effects and properties, both real and personal of the said bankrupts, situate in Mauritius and in India, bound themselves jointly and in solido with the bankrupts to the payment of 50 per cent. and of the privileged costs and preferential claims as therein stated.

The firm of V. Subbarayan and Company, on the termination of the period of their partnership, entered into an agreement with Rayappan Appon, which was reduced to writing and filed in this suit as exhibit B, in July, 1891, whereby the firm conveyed and assigned to Rayappan Appon “all that the firm of V. Subbarayan
 “and Company could touch and receive at whatever title from
 “Coo. Vaithilingam and Company or from Coo. Vaithilingam
 “personally and principally all sums whatever in general that
 “could fall due to the said firm in connection with the law suits
 “which are actually pending before the tribunals of India and
 “which are instituted against Coo. Vaithilingam and Company
 “and against Coo. Vaithilingam personally by V. Subbarayan
 “acting for and in behalf of the firm V. Subbarayan and Com-
 “pany, because V. Subbarayan, as P. Kandasami in his capacity,
 “declares it in name only as of Coo. Vaithilingam and Company
 “and because all the sums paid by him in that capacity are coming
 “out of the funds belonging to the said firm of V. Subbarayan and
 “Company.”

In December of the same year, and on 29th March 1892, two other deeds were entered into between Naga Pillai Subbarayan as trustee of the above composition deed and Rayappan Appon of

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which the second containing a recital of the first was filed as exhibit A.

This document was in the following terms :—

“ Mr. Jean Baptist Rayappan Appon was only the guaranteed
“ cessionary of the rights of the society, V. Subbarayan and Com-
“ pany *versus* Mr. Co. Vaithilingam and Company and Co.
“ Vaithilingam in person ; and in order to facilitate the recovery
“ of the above-mentioned rights by the trustee of the arrangement,
“ Co. Vaithilingam and Company and Co. Vaithilingam in
“ person, the above-named Jn. Appon made over again to Mr. Naga
“ Pillai Subbarayan, trustee of the above-mentioned arrangement,
“ the rights yielded to himself, by virtue of a private deed, regis-
“ tered on the seventh of last December.

“ And now, the undersigned agree to annul purely and plainly
“ the above-mentioned private and registered deed of the seventh of
“ last December.

“ The parties do will and mean that things be put again in the
“ same state as before the signing of the mentioned private deed
“ as if this latter one were not made.

“ Mr. Naga Pillai Subbarayan, in his capacity as trustee, promises
“ and engages himself to do all diligence in India, in order to
“ realise and recover the rights given over to V. Subbarayan and
“ Company by Co. Vaithilingam and Company and Co. Vaithi-
“ lingam in person ; and he engages himself to make every settle-
“ ment with the above-mentioned Jn. Appon in order to cover him
“ and the other securities of V. Subbarayan and Company with all
“ the balances that could be due to him for all the sums guaran-
“ teed and paid by him to the creditors of V. Subbarayan and
“ Company.”

Various suits were brought in the Mauritius Court by the present defendant against the present plaintiff in his capacity as trustee and decrees for costs were given against the former. These decrees were unsatisfied and the present suit was brought to recover the amounts payable under them. It was objected by the defendant that the plaintiff had no right to sue by reason of the dissolution of the firm of Subbarayan and Company, and the assignment contained in exhibit B. This objection prevailed with the Subordinate Judge, who passed a decree dismissing the suit and his decree was confirmed by the District Court.

The plaintiff preferred this second appeal.

Krishnasami Ayyar and *Srinivasa Ayyangar* for appellant.

Sundara Ayyar and *Ramachandra Ayyar* for respondent.

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JUDGMENT.—The facts in this case have set out with sufficient accuracy by the Lower Appellate Court, but we are of opinion that some of the documents have been misconstrued, and the rights of the plaintiff have been misunderstood. We are clearly of opinion that the plaintiff is entitled to maintain this suit as trustee appointed by the Mauritius Court under its order of the 22nd July 1887. The District Judge has misunderstood the intention of the composition deed, exhibit C, and has not given due weight to the language and intention of the above order of the court, made with a view to effectually carry out the object of the compensation deed. We do not doubt but that Naga Pillai Subbarayan (the plaintiff) was nominated in exhibit C, as trustee in consequence of his being the managing member of the firm of V. Subbarayan and Company, who had undertaken to pay the creditors of the insolvents—Coo. Vaithilingam and Company—for whose benefit the estate of the insolvents was to be collected. But we find it difficult to understand what the courts below mean by holding that plaintiff was appointed a trustee in his capacity as manager of that firm.

If the intention was that the manager, for the time being, of that firm, should be *ex-officio*, trustee, it would have been easy to have said so; yet, if this is not the meaning, we are unable to attach any definite meaning to the expression. Exhibit C does not say that N. Subbarayan should be appointed in his capacity as managing member. It merely describes him as holding that position. The words are “that Naga Pillai Subbarayan, the managing member of the said firm, V. Subbarayan and Company, be appointed trustee,” &c.

That these words are merely descriptive appears even more clearly from the vesting order of the Court of Bankruptcy, dated 22nd July 1887. It runs: “It is further ordered that all the estate and property of the bankrupts both in Mauritius and in India . . . be, and the same are, hereby vested in Naga Pillai Subbarayan of Port Louis trader, managing member of the firm, V. Subbarayan and Company, who is hereby appointed ‘trustee’ to carry out the said composition with full power to recover and realise all the said estate and property.” The

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interposition of the plaintiff's address and of his description as a 'trader' between his name and the words 'managing member,' &c., seems to us to show clearly that the latter words are merely descriptive just as the word 'trader' undoubtedly is. It is, we think, this fundamental misconception that has led the courts below to misunderstand the plaintiff's position.

The arrangement evidenced by the above two documents is that V. Subbarayan and Company should pay the creditors of the bankrupts fifty per cent. of their debts, that, in consideration of this, the bankrupts assign their property for the benefit of V. Subbarayan and Company and the plaintiff is appointed by the court a trustee to collect the property of the bankrupts for the benefit of the firm of V. Subbarayan and Company and the property is 'vested' in him as such trustee. The Subordinate Judge thought that, as the plaintiff was suing for costs awarded against defendant after the date of the composition deed, the plaintiff as trustee could not sue for those costs, but the District Judge has pointed out that those suits were brought by the defendant against plaintiff for acts done by him as trustee and the costs were awarded to plaintiff as trustee. There is nothing to prevent the plaintiff from now suing as trustee to recover costs awarded to him in suits maintained by him as trustee, though those suits were maintained for the benefit of V. Subbarayan and Company and were financed by that firm. Plaintiff, no doubt, may be bound to account to the firm for such costs, but that cannot affect the plaintiff's right to recover them from the defendant in accordance with the decrees. If any of the costs were awarded, as the Subordinate Judge seems to think they were *to the firm*, the plaintiff alone could not sue for them, but we understand that this is not the case.

The District Judge has also, we think, misapprehended the effect of exhibit B. He rightly states that what may be called the legal estate of the bankrupts vested in the plaintiff, though their equitable estate vested in the firm of V. Subbarayan and Company, but when he adds that exhibit B assigns the whole estate both legal and equitable to Rayappan Appon and that the latter is, therefore, the only person entitled to maintain this suit, we think he misconstrues exhibit B. Exhibit B transfers to Appon all the interest which the firm of V. Subbarayan and Company had acquired in the estate of the bankrupts. It neither could nor

did transfer anything more. Plaintiff, as a member of the firm, assented to and admitted that he was bound by that document, but it did not, and could not, assign either the rights or the duties of the plaintiff as trustee.

Even if the plaintiff desired to do so, he could not delegate his rights or duties as trustee, but there is nothing to show that he attempted to do so.

The only effect of the document (exhibit B) is that Rayappan Appon, instead of the firm of V. Subbarayan and Company, thereby became the beneficiary for whom the plaintiff is to collect the bankrupt's assets, and to whom he must account for the same, or for other moneys received by him as trustee. Exhibit A shows that Appon and the plaintiff both correctly understood their respective rights, and the duty of plaintiff as trustee.

The result, then, is, that the plaintiff as trustee can maintain this suit. We may observe that the position which we have assigned to plaintiff is in harmony with that which held in the case reported in *Subbaraya v. Vythilinga*(1), a case arising out of the same transactions and practically between the same parties.

We set aside the decrees of the courts below and direct that suit be restored to the file of the Subordinate Judge, and be disposed of according to law. .

Plaintiff must have his costs in the Lower Appellate and in this court. The costs in the Subordinate Judge's Court will abide and follow the result.

APPELLATE CIVIL.

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

KONDAYYA CHETTI (PLAINTIFF), APPELLANT,

v.

NARASIMHULU CHETTI (DEFENDANT),

RESPONDENT.*

1896.
September
21, 22.
November
13.

Contract Act—Act IX of 1872, s. 122—Agency to sell, coupled with interest—Discretion as to price left with agent—Power of principal to impose limits as to price.

The defendant consigned goods to a firm in London for sale, and in respect of each consignment he received an advance from the plaintiff who was the

(1) I.L.R., 16 Mad., 85.

* Appeal No. 6 of 1896.