APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

1898.
January 20,
24, 25.
February 28.

IN APPEAL No. 66 OF 1896:—

MAHABALA BHATTA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

KUNHANNA BHATTA AND OTHERS (DEFENDANTS), RESPONDENTS.

IN APPEAL No. 42 OF 1897:—

MAHABALA BHATTA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

SUBBANNA BHATTA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 31—*Misjoinder—Tenants in common—Benami mortgage—Suit by some of the heirs of the real mortgagee—Evidence of benami—Limitation—Joinder of causes of action—Specific Relief Act—Act I of* 1877, *s.* 42.

In 1880 A and B jointly advanced moneys on the security of a usufructuary mortgage which was taken in the name of B. In 1884 A alone advanced moneys on the security of usufructuary mortgages which were likewise taken in the name of B. A died leaving three sons, of whom the plaintiffs were two. The plaintiffs having become divided from their brother now brought suits in 1894 against B and the mortgagors for a declaration of their rights to the mortgages and for possession of the documents and for rent of the land which had been collected by B. It appeared that there had been no denial of the plaintiffs' rights before 1889, that no rent had been collected for several years before suit, the mortgagors who had remained in possession as lessees after the execution of the mortgages having refused to attorn to B:

Held, (1) that the suits were not barred by Specific Relief Act, section 42, for want of a prayer for possession;

(2) that the suits were not barred by limitation save as to the claim for rent;

(3) that the suits were not bad for the non-joinder of the plaintiffs' brother;

(4) that the transactions having been proved to be benami in character, the plaintiffs were entitled to a declaration of their two-thirds right under the mortgages of 1884 and a like declaration as to half of the mortgage of 1880; and

(5) that the plaintiffs were entitled to possession of the mortgage documents of 1884 and the other documents connected therewith but not the others.

APPEALS against the decrees of U. Achutan Nayar, Acting Subordinate Judge of South Canara, in Original Suits Nos. 28 and

* Appeals No. 66 of 1896 and No. 42 of 1897.

MAHABALA BHATTA v. KUNHANNA BHATTA.

29 of 1894, in both of which the plaintiffs were two of the sons of one Ramayya Bhatta, who died leaving also a third son Subbanna Bhatta, who was not a party to the suit.

In the first case the defendants were a mortgagee and the two mortgagors of certain land. The plaint alleged that the mortgage, which was usufructuary and bore date the 25th of April 1884, was executed in the name of the first defendant as benamidar for the deceased Ramayya Bhatta, to secure repayment of Rupees 4,700, which had actually been advanced by him and not by the first defendant. It was further alleged that the mortgagors had rented the land from the mortgagee in his capacity as benamidar and that the plaintiffs were in possession by them as their tenants.

The plaint further alleged as follows :—

"After the death of plaintiffs' father, which took place in 1887, his brother-in-law, Kambar Subbanna Bhatta, got possession from the plaintiffs of the mortgage deed and other documents relating to the mortgaged property except the lease of 25th April 1884, and a receipt in connection therewith on pretence of settling the dispute between the plaintiffs on the one hand and their brother Subbanna Bhatta, since divided by a decree of Court, on the other, regarding the division of their property, and clandestinely made over the documents to his employer, the first defendant, who since September 1889 has begun to assert his own right and to influence the second and third defendants not to pay rents to the plaintiffs."

The cause of action was stated to have arisen at the last-mentioned date, and in bar of limitation the plaintiffs alleged in their plaint as follows :—

"Plaintiffs sued defendants Nos. 1 to 3 and others on 28th October 1889 in Original Suit No. 41 of 1889 on this Court's file on the same cause of action, and, though this suit was fully decreed by this Court, it was dismissed on 22nd February 1894 by the High Court on the technical ground of misjoinder in Appeal Suit Nos. 62 of 1892 and 72 and 73 of 1893. Plaintiffs are entitled to the benefit of section 14 of the Limitation Act."

The prayers of the plaint were for a declaration that the mortgage and lease deeds were obtained by the plaintiffs' father benami in the name of the first defendant, that the first defendant be ordered to hand over to the plaintiffs those documents and all others relating to the property, and that the defendants be decreed to pay to the plaintiffs their share of arrears of rent with mesne

profits and interest. On these averments and on the pleas raised by the defendants, the following issues were framed:—

"(1) Whether the suit is barred by limitation?

"(2) Whether the suit is opposed to section 42 of the Specific Relief Act?

"(3) Whether the registered usufructuary mortgage deed for Rs. 4,700, dated 25th April 1884, executed by defendants Nos. 2 and 3 as also the two leases, dated 25th April 1884 and 2nd October 1885, respectively, were really obtained by plaintiffs' father Ramayya Bhatta benami in the name of first defendant?

"(4) Whether the money, with which the mortgage was acquired, belonged to Ramayya Bhatta?

"(5) Whether the plaintiffs are entitled to recover possession of the documents stated in the plaint?

"(6) Whether the rent has been satisfied in the manner alleged by the second and third defendants? and

"(7) Whether the plaintiffs can maintain the suit without the junction of Subbanna Bhatta as party?"

On the first issue the Subordinate Judge held that the plaintiffs were not entitled to the deduction of time claimed; the second issue he decided in favour of the plaintiffs; and the third, fourth and fifth against them. The finding on the sixth issue was that defendants Nos. 2 and 3 had paid rent to defendant No. 1 as alleged by them, and in the result he passed a decree dismissing the suit against which the plaintiffs preferred Appeal No. 66 of 1896.

The second suit was brought against the same first defendant in respect of two similar mortgages taken in his name by the deceased Ramayya Bhatta on the 22nd of May 1880 and the 9th of June 1884 from defendant No. 10, who was the owner of the land and the chief defendant in this suit. The prayers in this suit were similar to those in the other. The material difference between the two suits was that the plaintiffs' father had advanced only Rs. 1,500 of the sum secured by the first of these mortgages. Similar issues were framed in this suit, which was likewise dismissed by the Subordinate Judge, and the plaintiffs preferred Appeal No. 42 of 1897 against the decree.

The Subordinate Judge gave his reasons for finding that the misjoinder of the plaintiffs' brother was fatal to the maintenance of the suits in his judgment in the second suit where he said:—

MAHABALA BHATTA v. KUNHANNA BHATTA.

"The non-joinder in the suit of plaintiffs' brother Subbanna Bhatta is said by the defendants to be fatal to the maintenance of the suit, but the plaintiffs say that he is not a necessary party having obtained a decree for partition against them. I think he is a necessary party to the suit. All that he has got by the decree in the partition suit is a declaration of his right to a share of the plaint property as against the present plaintiffs. Whether the present plaintiffs succeed or fail in this suit, he has his right to sue. If the plaintiffs had made him a party to this suit, a second suit by him might be avoided. To Original Suit No. 41 of 1889, which was dismissed by the High Court on the ground of misjoinder, all the three brothers were plaintiffs. Then the present plaintiffs did not think that the decree for partition obtained by him did disentitle him to be joined as a co-plaintiff with them. If the decree in the partition suit has not severed their interests as regards the plaint property, which I doubt, then the non-joinder of Subbanna Bhatta is fatal to the suit (*Arunachala* v. *Vythialinga*(1), *Dwarka Nath Mitter* v. *Tara Prosunna Roy*(2), *Balkrishna Moreshwar Kunte* v. *The Municipality of Mahad*(3) and *Alagappa Chetti* v. *Vellian Chetti*(4))."

Mr. *R. A. Nelson* and *Narayana Rau* for appellants.

Pattabhirama Ayyar, *Sundara Ayyar* and *Madhava Rau* for respondents.

JUDGMENT IN APPEAL No. 66 OF 1896.—The material allegations for the plaintiffs were, briefly, that their father Ramayya Bhatta obtained benami in the first defendant's name the usufructuary mortgage deed bearing date the 25th April 1884 for Rs. 4,700 due to him by the second and third defendants, that these defendants were, however, permitted to retain possession of the lands (mortgaged by them) as lessees under the lease granted to them at the time the mortgage was executed, that, subsequent to the plaintiffs' father's death, which took place in 1887, the first defendant, about September 1889, denied the right of the plaintiffs under the mortgage, and that he fraudulently obtained possession of the mortgage instrument and certain other documents from Kambar Subbanna Bhatta, the plaintiffs' maternal uncle, to whom the documents had been entrusted pending certain disputes between

(1) I.L.R., 6 Mad., 27.
(2) I.L.R., 17 Calc., 160.
(3) I.L.R., 10 Bom., 32.
(4) I.L.R., 18 Mad., 33.

the plaintiffs and their brother Subbanna Bhatta respecting the division of their property.

The plaintiffs asked for a declaration that the mortgage belonged to their father and prayed for the recovery of the instrument of mortgage and the other documents referred to and for their share of certain rents collected from, or payable by, the second and third defendants under the lease.

The second and third defendants admitted the title set up by the plaintiffs. But the first defendant denied that he was a mere benamidar, and averred that having paid the money himself, he was the real mortgagee. He also contended that the suit was unsustainable, since the plaintiffs' brother Subbanna Bhatta had not joined in it, and since the plaintiffs, though out of possession of the lands under mortgage, had omitted to claim possession thereof as they were bound to do under section 42 of the Specific Relief Act. The defendant further urged that the suit was barred by limitation.

The Subordinate Judge dismissed the suit having arrived at findings against the plaintiffs with reference to the questions of benami, non-joinder and limitation. But, in our opinion, the findings as to benami and non-joinder are wrong, and that as to limitation partly so. Having come to this conclusion, it will be convenient, first, to deal with the case on the merits and then to discuss the points of law raised.

The onus of showing that the transaction was benami was, no doubt, on the plaintiffs. But taking the evidence adduced in this suit and in the connected suits which were tried with it by consent of the parties, we have no doubt that the weight of evidence is decidedly in favour of the view that the case of the plaintiffs is true. The second and third defendants, as the plaintiffs' witnesses, fully support their case. No reason is suggested why these defendants should falsely espouse the plaintiffs' cause. Nor is there anything in the conduct of those defendants really detracting from their testimony. No doubt, after the plaintiffs' father's death, one year's rent was paid by the said defendants to the first defendant. That was, however, not in recognition of his title as the real mortgagee, for, as explained by them, it was not a voluntary payment.

Of the persons who attested the mortgage instrument, Narayana Kamti, who is to all appearance an independent witness, says that the document was executed for moneys belonging to the plaintiffs'

MAHABALA BHATTA v. KUNHANNA BHATTA.

father and that the sum of Rs. 624-8-0 recited in the document (exhibit I) as paid at the time of the execution, was paid by the plaintiffs' father The other attestors were called on behalf of the first defendant. Koragappa, one of them, said that he remembered nothing more about the matter than that one Akkari Banta got the mortgage executed for the first defendant. The evasive replies given by him in his cross-examination show that his evidence is worthless. Thimmappanna, who also stated that the first defendant was represented by Akkari Banta at the time of the execution of the document, is an equally unsatisfactory witness; and that appears to have been the opinion of the Subordinate Judge (Mr. Chandu Menon) before whom the witness gave his evidence, as the notes with reference to the witness's demeanour recorded in his deposition show. Ramayya Bhatta, another witness, whose evidence is similar to that given by Thimmappanna, is likewise untrustworthy. It is clear that there is considerable ill-feeling between the witness and at least one of the plaintiffs, and that the witness was among those who had caused the plaintiffs' mother to put forward an altogether untrue claim in the course of the partition suit instituted by the plaintiffs' brother Subbanna Bhatta, but which suit terminated in a compromise whereby a division was effected among the brothers. There is no doubt that the witness (Ramayya Bhatta) was present at the execution of the mortgage, since he wrote exhibit A in this case which came into existence at the same time as the mortgage instrument. But he was then on friendly terms with the plaintiffs' father to whom he was related, and the witness's presence on the occasion and the part he took in the transaction rather indicate that the party really interested in the transaction was the plaintiffs' father and not the first defendant. It is noteworthy that Akkari Banta referred to by the defendant's witnesses was not called.

Turning now to the important question of consideration for the mortgage, the Subordinate Judge himself says that the first defendant did not pay any portion of the amount. Though, as regards the comparatively small sum recited in the instrument as paid at the execution, a feeble attempt was made to prove that the first defendant paid it, yet, as regards the payment of the remaining large sum of Rs. 4,075, the first defendant failed to adduce any evidence whatever. Now, since it is the case of both the parties that the transaction was not a sham but that there was full

consideration for it, it is manifest that that consideration, not having come from the first defendant, must have come from some other person. That that person was the plaintiffs' father and none else is put beyond dispute by the testimony of Mahomed Beari, who, as one admittedly and most directly connected with the mortgage and the previous dealings which led to it, certainly knows the truth. According to his evidence the arrangement made about the bulk of the consideration in question was this:—At that time the second and third defendants owed Mahomed Beari a sum of Rs. 4,075; the latter owed to the plaintiffs' father over Rs. 5,000, and in consideration of the second and third defendants giving to the plaintiffs' father credit for Rs. 4,075 on account of the mortgage amount in question, Mahomed Beari gave up the claim he had against those defendants for the Rs. 4,075, the plaintiffs' father on his part giving up to that extent his claim against Mahomed Beari and executing a document for the remainder. If this were not the arrangement really made, and if, as alleged on behalf of the first defendant, the sum of Rs. 4,075 was paid by him to Kambar Subbanna Bhatta, how is it that not a scrap of evidence about it is forthcoming? and why has neither the first defendant nor Subbanna Bhatta ventured to go into the box to speak to such payment? So far as Subbanna Bhatta is concerned it is clear he would not go into the box, because he would be confronted with exhibit A in Appeal No. 42 of 1896, which completely negatives the truth of the story set up on behalf of the first defendant. We have no hesitation in saying that this exhibit is a genuine document. The two persons, whose attestations it bears, prove that it was written by Subbanna Bhatta himself throughout. That evidence is absolutely uncontradicted, and a comparison of the writing of the document with the writing of the unquestionable documents produced for comparison leaves no doubt that the exhibit in question was written by Subbanna Bhatta. We cannot, therefore, agree with the Subordinate Judge in holding that it is not genuine; and, as already observed, it disproves the defence and establishes the plaintiffs' case inasmuch as it is therein admitted in unequivocal terms that the mortgage in question was obtained benami in the name of the first defendant by the plaintiffs' father for money belonging to him. With such practically conclusive proof in favour of the plaintiffs it is scarcely necessary to refer to other less important circumstances which support our

MAHABALA BHATTA v. KUNHANNA BHATTA.

view and which are disclosed by some of the documents executed with reference to the transactions which preceded the mortgage in question. We would only add that the plaintiffs' case is not rendered improbable by the fact that first defendant and the plaintiffs' father were of different castes, since Subbanna Bhatta, through whom his brother-in-law, the plaintiffs' father, carried on his money dealings, was, at the execution of the mortgage and before and afterwards, the first defendant's shanbhogue or accountant, and it was not therefore unlikely that the first defendant was trusted in consequence of such connection between him and Subbanna Bhatta. As to the possession by the first defendant of the mortgage instrument and the other documents relating thereto, several witnesses on behalf of the plaintiffs prove that, shortly after the death of the latter's father owing to disputes between the brothers, those documents were handed over to Subbanna Bhatta for safe custody. He has not come forward to contradict this evidence; and he having subsequently become hostile to his nephews, it is to be inferred that he handed over the documents in question to his employer, the first defendant, and induced the latter to claim the mortgage right falsely as his own. We must, therefore, find that the first defendant was only a benamidar and that the real mortgagee was the plaintiffs' father.

We now pass to the points of law urged.

First, as to the objection of non-joinder which was strongly pressed. Now the present action is one founded on tort; and as the plaintiffs and their brother Subbanna Bhatta had become divided, their interest under the mortgage is not joint but separate being that of tenants in common. That tenants in common may, in such an action as the present, at their option either join or sever, seems to be clear law (Dicey on Parties, rule 80, paragraph 2). No doubt, according to the common law practice, when one tenant in common sued on a tort without joining other tenants in common as plaintiffs, objection on the score of non-joinder was allowed to be taken by way of a plea in abatement. If, however, such plea was not raised, he was entitled to proceed in the action. But then, if the subject matter of the claim was divisible, he could get his share and no more. Compare the opinion of the majority in *Deo d. Hellyer* v. *King*(1), though the dissenting Judge, Platt, B., went

(1) 6 Exch. Rep., 791 at p. 795.

further in that case and held that a tenant in common is owner of the whole estate in common with his co-tenants, and therefore as soon as he has proved his right to the possession in common with others and that the defendant having no such right is a wrong-doer, as against such wrong-doer he, the plaintiff, is entitled to recover possession of the whole. However this may be, there is no doubt that in the case of property indivisible one co-owner alone can recover it from a person that holds unlawful possession thereof. In *Broadbent* v. *Ledward*(1) a member of a club, who was as such proprietor of certain pictures jointly with other members who were not made co-plaintiffs in the action, recovered the pictures from one who had no right at all. Lord Denman, C.J., observed :—"It is "always unpleasant to defeat justice by adherence to technical "and arbitrary rules. In suing upon contracts the rule has cer- "tainly been that all the contracting parties must be joined as "co-plaintiffs, and advantage may be taken of the non-joinder "without a plea in abatement; but, as no express authority has "been shown by Mr. Wightman for the application of this rule "to the action of detinue, we shall decide against the defendant. "If any inconvenient consequence arises to the defendant from "detaining the property of joint owners, it might have been "avoided by giving it up to any one of them." Patteson, J., said :—"The rule as to the consequence of the non-joinder of "parties as plaintiffs in actions founded upon contract is not satis- "factory in principle, and ought not to be extended." Williams and Coleridge, JJ., concurred. The principle of these decisions is still applicable, and it is clear that one tenant in common can sue in tort without joining others—see *Roberts* v. *Holland*(2) cited for the plaintiffs.

It was contended, however, that the equity practice is different and ought to be followed in this country. It is no doubt true that the general rule in Chancery is that all persons interested should be parties, and that under the old practice it was open to a defendant to take objection on the ground of non-joinder of a tenant in common by way of demurrer (*Brookes* v. *Burt*(3)). But that rule is not, since the abolition of demurrers for want of parties, too inflexible to admit of qualifications. In *Wright* v. *Robotham*(4)

(1) 11 A. & E., 209, at pp. 212-13.
(2) [1893] 1 Q.B., 665.
(3) 1 Beav., 106.
(4) 33 Ch. D., 106.

MAHABALA BHATTA v. KUNHANNA BHATTA.

it was no doubt held by the Court of Appeal that one of two persons who had equal right to certain title-deeds could not recover them without the concurrence of the other. But there the defendant's possession was not unlawful, as Cotton and Lindley, L., JJ., took care to point out, implying thereby that their decision might have been different had the possession of the defendant been unlawful. Even in such a case the Court directed the deeds to be deposited in Court, the plaintiffs having liberty to inspect and make copies of them. And in *Foster* v. *Crabb*(1) cited in *Wright* v. *Robotham*(2), the decision of the Court of Common Pleas rests on the ground that the plaintiff did not show a better right than the defendant to the possession of the deed, the title to which was ambulatory between those who have an interest in and may have occasion to use it, and each is entitled to keep the deed from the other so long as he actually retains it in his custody and control but no longer. We see therefore that either at law or in equity, since the passing of the new rules of the Supreme Court whereby pleas in abatement and demurrer for want of parties were abolished, the remedy available when there is a defect of parties is, as pointed out by Jessel, M. R., in *Werderman* v. *Société Générale d'Electricité*(3), that provided by order XVI, rule 13, which empowers Courts to strike out or add parties so that the person who objects because of want of parties has nothing to do but to take out a summons asking that certain parties be added as necessary parties. It is necessary to observe that the above case was decided when the order corresponding to section 31 of the present Code of Civil Procedure did not contain the word "non-joinder." Notwithstanding the absence of these words the Court treated the order as comprehending cases of "non-joinder" as well as "mis-joinder." Turning now to section 31 of our Code which corresponds to order XVI, rule 13, as it stood at the time of the decision in *Werderman* v. *Société Générale d'Electricité*(3), and before it was amended by the addition of the word "non-joinder," we think a similar construction ought to be put on it and the section must be held to amount to a direction to the Court not to dismiss a suit on the ground of non-joinder. The reason for such a provision is obvious. The rule as to parties is for the purposes of justice and the Court has ample powers under section 32, Code of Civil Procedure, to

(1) 21 L.J., C.P., 189. (2) 33 Ch. D., 106.
(3) 19 Ch. D., 246 at p. 251.

add parties whenever they ought to have been made parties or whenever without them the Court could not deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

In the present case what the plaintiffs are entitled to in point of law is a declaration of their title to two-thirds of the mortgage debt. Their right is separate from that of Subbanna Bhatta who is entitled to the remaining one-third though the debt is the same. In these circumstances, Subbanna Bhatta is not an indispensable party whom the Court will insist upon being brought before it, for he will not be directly affected by any decree in this suit; nor, in our opinion, is he a necessary party, that is, though not likely to be affected directly by the decree, he is yet one who, as interested in the actual controversy, should be before the Court to enable it to adjudicate fully and finally as between the parties already before it. If he is made a co-plaintiff, no doubt, future litigation in the matter can be altogether prevented. But that can only be if he consents to be a co-plaintiff, which does not appear to be the case. If, however, he be made a co-defendant, it is difficult to see how that could stop further litigation. If the plaintiffs succeeded they could get relief only in respect of their shares, and Subbanna Bhatta would be at liberty to sue in respect of his share. But if the plaintiff fail upon the question of benami, it is doubtful whether the decision would be *res judicata* between the first defendant and the co-defendant Subbanna Bhatta (see *Nabin Chandra Mazumdar* v. *Mukta Sundari Debi*(1); but *contra Chandu* v. *Kunhamed*(2)). Even were this view wrong the first defendant might have moved the Court, if Subbanna Bhatta consented to be a co-plaintiff, to add him as such, and, if he did not, to make him a defendant. The omission to adopt this course could not for a moment be held to warrant a dismissal of the suit which has been fully tried and dealt with on the merits. Even at the present stage of the case we should and would have directed Subbanna Bhatta to be made a party if that would really serve the ends of justice. But, as shown already, we do not think it necessary that he should be brought on the record. He was himself one of the witnesses in the case and nothing was elicited from him to show that he raised any question affecting in the remotest degree the right of the plaintiffs

(1) 7 B.L.R., Appx., 38. (2) I.L.R., 14 Mad., 324.

MAHABALA BHATTA v. KUNHANNA BHATTA.

to obtain the reliefs claimed by them. The contention that the suit fails on the ground of non-joinder of Subbanna Bhatta must, therefore, be overruled.

The objection under section 42 of the Specific Relief Act also fails, as the evidence leaves no doubt that the second and third defendants have for several years before the suit withheld payment of rent and refused to attorn to the first defendant who cannot thus be taken to be in possession through them.

As to limitation, the claim as to declaration is not barred, as there is no evidence to show that there was any denial of the title of the plaintiffs before September 1889. Nor has that for the documents been shown to be out of time. But the claim for the rents received by the first defendant is barred.

As to the second and third defendants, their liability for rent under the lease cannot of course be gone into in this suit.

In reversal of the decree of the Subordinate Judge, there will be a decree for the plaintiffs declaring their two-thirds right under the mortgage of the 25th April 1884 and the leases, dated 25th April 1884 and 22nd October 1885, and for possession of those documents and those mentioned in the schedule annexed to the plaint. The rest of the claim is dismissed. The first defendant will pay the plaintiffs' costs throughout. The other defendants will bear their own.

JUDGMENT IN APPEAL No. 42 OF 1897.—The real question in this case is as to what interest, if any, the plaintiffs' father possessed under the usufructuary mortgages of the 22nd May 1880 and 9th June 1884 executed to his brother-in-law K. Subbanna Bhatta, the first defendant, by Mahomed Beari, the tenth defendant. Exhibit A in the present suit which, for reasons given in our judgment in Appeal No. 66 of 1896, we find to be a genuine document, is decisive of the matter, and according to it half out of the first named mortgage belonged to plaintiffs' father and out of Rs. 1,738-4-0, the amount of the second mortgage, Rs. 313-12-0 alone belonged to K. Subbanna and the remainder belonged to the plaintiffs' father, the mortgages and the leases connected therewith being taken in the name of the former, for the benefit of the latter also. In reversal of the Lower Court's decree there will be a decree declaring that the plaintiffs are entitled to two-thirds of half of the mortgage under date the 22nd May 1880, and to two-thirds of the mortgage under date the 9th June 1884, after

deduction of the sum of Rs. 313-12-0 from the mortgage amount and the same with regard to the leases connected therewith.

The plaintiffs are not entitled to the custody of the documents in preference to the first defendant and those claiming through him and who also possess an interest under those documents.

The question of the tenth defendant's liability for rent cannot be gone into in this suit.

The first defendant will pay the plaintiffs' costs throughout. The other parties will bear their own.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

ARAVAMUDU AYYANGAR (PLAINTIFF AND PETITIONER), APPELLANT,

v.

SAMIYAPPA NADAN (DEFENDANT No. 5 AND COUNTER-PETITIONER), RESPONDENT.*

1897. December 7, 9. 1898. April 4.

Limitation—Order to pay money—Money paid after due date.

When an order has been made for the payment of money in a suit on a certain date and the Court was closed on that date, a payment made on the following day would be a good payment for the purposes of the order.

APPEAL against the order of B. Macleod, Acting District Judge of Tinnevelly, in Appeal Suit No. 78 of 1895, reversing the decree of S. Mahadeva Sastri, Acting District Munsif of Satur, on Miscellaneous Petition No. 17 of 1895.

The petitioner was the plaintiff in Original Suit No. 669 of 1893. The facts of the case were stated by the District Judge as follows:—

"According to the terms of the decree in Original Suit No. 669 of 1893, the second instalment became payable on 6th January 1895. That day was a holiday and the Court re-opened after the Christmas holidays only on 8th January 1895. The judgment-debtor put in a memorandum asking for a chellan to enable him to deposit the money in the Taluk treasury on 8th January 1895.

---

* Appeal against Appellate Order No. 39 of 1897.