

*V. C. Desikachariar* for appellant.

*Sivasami Ayyar* for respondent.

SUBBU-  
THAYAMMAL  
?.  
CHIDAM-  
BARAM  
ASARI.

JUDGMENT.—A Bench of this Court has decided in *Virasami Rowth v. Bodi Naikan*(1) that an order refusing to recognize the transferee of a decree passed under section 232 of the Code of Civil Procedure may, contest or no contest, for purposes of appeal, be regarded as an order passed under section 244 and is therefore appealable. That concludes the matter and this appeal is accordingly dismissed with costs.

## APPELLATE CIVIL.

*Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.*

KANTHŪ PUNJA (PLAINTIFF), APPELLANT,

*v.*

VITTAMMA AND OTHERS (DEFENDANTS),  
RESPONDENTS.\*

1901.  
August  
7, 8.

*Contract Act—Act IX of 1872, s. 45—Right of succession by legal representative — Aliyasantana law — Fund settled on marriage of husband and wife — Interest payable to both jointly — Death of husband — Claim by widow by right of survivorship — Right of husband's legal representative to his share.*

Upon the marriage of first defendant with K, a sum of money was settled by first defendant's mother, on first defendant or on K. This money was lent on mortgage, and by the terms of the mortgage, interest was payable by the mortgagors to first defendant and to her husband K, jointly, with the exception of that which would accrue in respect of the last year of the term, which, together with the principal sum secured by the mortgage, was to be paid to first defendant herself. K died, whereupon plaintiff, as K's legal representative, brought the present suit to recover the interest due under the mortgage :

*Held*, that plaintiff was entitled, under section 45 of the Contract Act, as the legal representative of K, to a moiety of the interest which had accrued since the death of K, first defendant being entitled to the other moiety, and that the right to the whole of the interest did not pass by survivorship to first defendant. The circumstance that K and first defendant intended to live and did in fact

(1) Appeal against Appellate Order No. 60 of 1899 (unreported)—see page 384—foot-note

\* Appeal No. 164 of 1900 against the decree of U. Achutan Nayar, Subordinate Judge of South Canara, in Original Suit No. 136 of 1898.

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live together as husband and wife under the Aliyasantana law was insufficient to raise the presumption of a contract that there was to be a right of succession by survivorship between K and first defendant in respect of the settled fund.

SEET for a declaration that plaintiff was entitled to recover the amount of a hypothecation bond executed by defendants Nos. 2 and 3 in favour of first defendant and her deceased husband, Koraga Chetti, and of interest due thereunder for 1897 and 1898 from defendants Nos. 2 and 3 by sale of the hypothecated property. Plaintiff was the legal representative of Koraga Chetti. The principal sum due under the mortgage was payable in 1905, and plaintiff prayed for a perpetual injunction restraining defendants Nos. 2 and 3 from paying the principal and future interest to first defendant. It was asserted in the plaint that Koraga Chetti had been the real manager of the family since 1894, up to which date his mother, the senior member, who was now disabled by infirmity, had been manager; that in the capacity of manager he held in his possession the savings and the family jewels, and that out of such funds had obtained the plaint bond in the name of himself and his wife to defraud the family. As the second and third defendants declined to accept a notice of demand sent by the plaintiff, and the first defendant set up her own title to the bond, the plaintiff brought the suit. The first defendant denied that the bond had been obtained out of family funds, that her husband held in his possession such funds or that he had been managing the family affairs since or before 1894. She averred that the consideration had been paid out of her private means, and acknowledged receipt of the interest for 1897 and 1898. She also pleaded that the suit was barred by section 43 of the Code of Civil Procedure. The second and third defendants supported the first defendant's contentions as to payment of consideration out of her private means and of the discharge for the interest for 1897 and 1898. By the terms of the bond interest was payable by the mortgagors (defendants Nos. 2 and 3) annually to both Koraga Chetti and his wife (first defendant) jointly, with the exception of that which would become due in respect of the last year of the term of mortgage, which interest, together with the principal due under the mortgage was payable to first defendant alone. The evidence established, in the opinion of the High Court, that the mortgage amount had been settled by first defendant's mother, on the occasion of first defendant's

marriage with Koraga Chetti, either on first defendant or on Koraga Chetti.

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The Subordinate Judge dismissed the suit on the ground that the plaintiff had not established that the mortgage money had been lent out of the funds of the plaintiff's tarwad.

Plaintiff preferred this appeal.

*K. Narayana Rao* for appellant.

*Sundara Ayyar* and *H. Narayana Rao* for respondents.

JUDGMENT.—We concur with the Subordinate Judge's finding that the evidence adduced on behalf of the plaintiff is not sufficient to establish that the principal of the mortgage bond was lent out of the funds of the plaintiff's tarwad. The evidence adduced on behalf of the first defendant coupled with the nature of the transaction evidenced by the mortgage bond, clearly establishes in our opinion that on the occasion of first defendant's marriage with Koraga Chetti, the nephew of the plaintiff, the sum of Rs. 4,000 in question was settled by the first defendant's mother either on the first defendant herself or on Koraga Chetti, but it is difficult to say upon which of the two it was really settled. But in the view which we take of the case it is immaterial upon whom it was really settled, or whether it was settled upon both jointly. Under the terms of the mortgage instrument which was executed by the mortgagors, the second and third defendants, in favour of both Koraga Chetti and first defendant, interest was payable annually to both Koraga Chetti and first defendant jointly except the interest for the last year of the term of mortgage which interest along with the principal of the mortgage debt, was payable to first defendant only. Whether the Rs. 4,000 in question belonged exclusively to first defendant or Koraga Chetti deceased, or to both jointly, the mortgage instrument operates in law as between the first defendant and Koraga Chetti as entitling both jointly to the interest payable under the mortgage bond, except the interest due for the last year of the term of the mortgage, and the first defendant alone to the said last year's interest and the principal of Rs. 4,000. Having regard to the decision of the Privy Council, *Jogeswar Navain Deo v. Ram Chund Dutt*(1), overruling the decision of this Court, *Vyidinada v. Nagammal*(2), we cannot accede to the contention of the learned

(1) L.R., 23 I.A., 37; 1 L.R., 23 Cal., 670.

(2) I.L.R., 11 Mad., 258.

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pleader for the first defendant that on the death of Koraga Chetti the right to the whole interest payable yearly passed by survivorship to the first defendant. In our opinion the interest accruing due since the death of Koraga Chetti belongs under section 45 of the Contract Act to the plaintiff as the legal representative of Koraga Chetti and to the first defendant and the two will be entitled each to a moiety of the interest. The circumstance that Koraga Chetti and first defendant meant to live and were living together as husband and wife under the Aliyasantana law is not sufficient to raise the presumption of a contract that there was to be a right of succession by survivorship between them in respect of this fund of Rs. 4,000. The payment, if it be a fact, to the first defendant alone of the interest for 1897-98 after notice from the plaintiff not to pay the interest to first defendant, cannot bind the plaintiff and he is entitled to be paid his share of interest for that year, viz., Rs 112-8-0, and both he and first defendant are jointly entitled to receive future interest and the first defendant alone the principal and the interest for the last year.

The decree will be modified by declaring that the plaintiff is entitled equally with the first defendant to the annual interest payable from 1898-99 to 1903-04 and to recover Rs. 112-8-0, as his share of interest for 1897-98. If the said amount of Rs. 112-8-0 with interest be not paid into Court by the second and third defendants on 8th February 1902, such portion only out of the mortgaged property as may be sufficient to realize the said amount, with interest till date of realization, shall be liable to be sold. The plaintiff and first defendant shall bear and pay costs proportionately both in the Original Court and in this Court. The decree appealed against is confirmed in other respects.