

JUDGMENT.—We cannot accede to the argument now urged before us that there was no order under section 282 of the Code of Civil Procedure against the appellant, and therefore no basis for a declaratory suit under section 283 of the Code of Civil Procedure. In accordance with the decision of the Full Bench we set aside the decree of the lower Appellate Court and remand the appeal for disposal on the merits. Costs will abide and follow the result.

KRISTNAM
SCORAYA
v.
PATHMA
BEE.

APPELLATE CIVIL —FULL BENCH.

*Before Sir Arnold White, Chief Justice, Mr. Justice
Subrahmania Ayyar and Mr. Justice Davies.*

THRIKAIKAT MADATEIL RAMAN (PLAINTIFF), APPELLANT,
v.
THIRUTHIYIL KRISHNEN NAIR AND OTHERS (DEFENDANTS
NOS. 1 TO 6, 8, 10, 11, 12, 14 AND 17 TO 27), RESPONDENTS.*

1905
March 20,
November 10.

Civil Procedure Code—Act XIV of 1882, s. 43 and s. 13, expln. II—Suit on one mortgage no bar to subsequent suit on another mortgage of same property.

A suit brought by A against B on an alleged mortgage, which was dismissed, is no bar to another suit by A against B on another mortgage in respect of the same properties under sections 43 and 13 of the Code of Civil Procedure.

Rangasami Pillai v. Krishna Pillai, (I.L.R., 22 Mad., 259) overruled.

Ramaswami Ayyar v. Vythinatha Ayyar, (I.L.R., 26 Mad., 760) followed.

Veerana Pillai v. Muthukumara Asary, (I.L.R., 27 Mad., 102) followed.

THE facts and the question raised are fully set out (by Subrahmania Ayyar and Benson, JJ.) in the following

ORDER OF REFERENCE TO A FULL BENCH.—The previous suit, Original Suit No. 91 of 1895, was brought on an alleged mortgage of 1860 by the plaintiff's predecessor to the tarwad of the defendants Nos. 1 to 13. That suit was dismissed on the ground that the mortgage sued on was not true. The present suit is brought on a mortgage of 1854. The lower Courts hold that the present suit is barred both under section 13 and under section 43 of the

* Second Appeal No. 1059 of 1901, presented against the decree of M.R. Ry. K. Krishna Rau, Subordinate Judge of Calicut, in Appeal Suit No. 618 of 1900, presented against the decree of M.R. Ry. M. Bubu Rau, District Munsif of Calicut, in Original Suit No. 976 of 1899.

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Civil Procedure Code and they rely on *Rangasami Pillai v. Krishna Pillai*(1). In *Ramaswami Ayyar v. Vythinatha Ayyar*(2) the decision in *Rangasami Pillai v. Krishna Pillai*(1) was regarded as inconsistent with the decision of the Privy Council in *Amanat Bibi v. Imdad Husain*(3) and subsequent decisions of this Court. But in a recent case in *Pelpaya Bhattathiripad v. Thambu Nair*(4) a Division Bench stated that *Rangasami Pillai v. Krishna Pillai*(1) was rightly decided. The decision in *Ramaswami Ayyar v. Vythinatha Ayyar*(2) was followed in *Veerana Pillai v. Muthukumara Asary*(5). In this conflict of decisions we refer for the decision of a Full Bench the following question:—

Whether the present suit is barred under section 13 or 43, Civil Procedure Code, or under both.

The case came on for hearing before the Full Bench constituted as above.

C. V. Anontakrishna Ayyar for *P. R. Sundara Ayyar* for appellant.

K. P. Govinda Venon for respondents Nos. 17 and 19 to 22.

The Court expressed the following

OPINION.—The contract on which the plaintiff sued in the present suit is distinct from that on which he sued in Original Suit No. 91 of 1895. In the suit of 1895 the plaintiff included the whole of the claim which he was entitled to make in respect of the alleged cause of action on which he sued (section 43). His claim in the present suit on the mortgage of 1854 is not a matter which might and ought to have been made a ground of attack in his previous suit on the alleged mortgage of 1860 (section 13, explanation II).

There is a strong body of authority to support this view. The law was exhaustively considered in *Ramaswami Ayyar v. Vythinatha Ayyar*(2). We agree with the decision in that case and with the decision in the later case of *Veerana Pillai v. Muthukumara Asary*(5), which followed *Ramaswami Ayyar v. Vythinatha Ayyar*(2).

Having regard to the current of authority we do not think the judgment in the case in *Rangaswami Pillai v. Krishna Pillai*(1) can be treated as binding.

(1) I.L.R., 22 Mad., 259.

(3) I.L.R., 15 Calc., 800.

(5) I.L.R. 27 Mad., 103.

(2) I.L.R., 26 Mad., 760.

(4) Second Appeal No. 446 of 1902 (unreported).

We are of opinion that the present suit is not barred under section 13 or section 43 of the Civil Procedure Code.

The appeal came on for final hearing in due course before Subrahmania Ayyar and Benson, JJ., when the Court delivered the following

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JUDGMENT.—In accordance with the decision of the Full Bench we set aside the decree of the Courts below and remand the appeal to the lower Appellate Court for disposal according to law. Costs in this Court will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

CHINNAM RAJAMANNAR AND ANOTHER (DEFENDANTS NOS. 1
AND 3), APPELLANTS,

v.

TADIKONDA RAMACHENDRA RAO AND ANOTHER (FIRST
PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

1905
September
26,
October
12, 13,
November 2.

Will, construction of—'Labham,' meaning of—Transfer of Property Act IV of 1882, s. 35 (b)—Exception not applicable where debt not the whole consideration—Probate and Administration Act V of 1881, ss. 123, 130, 131—Interest allowable on demonstrative legacies—Demonstrative legatee, right of to resort to general assets.

The word 'Labham' is generic and covers different kinds of profit and in its ordinary and comprehensive sense means profit, gain or income as opposed to the corpus yielding the same and includes interest and dividends and income from immoveable property, especially where other portions of the will show such to have been the intention of the testator.

The exception in paragraph (b) of section 135 of the Transfer of Property Act will apply only where the whole of the consideration for the transfer is a debt due by the transferor.

The rule that in the case of demonstrative legacies, the legatee is entitled to resort to the general assets on failure of the source intended will not apply where there are directions to the contrary by the testator.

* Appeal No. 67 of 1904, presented against the decree of M.R. Ry. I. L. Narayana Rao, Subordinate Judge of Kistna at Masulipatam, in Original Suit No. 9 of 1899.