paid it to the Government is entitled to recover it from the intermediate tenure-holder because the latter as between himself and the landlord, is the person who ought to bear the burden of the tax. The cesses and dues contemplated in article 13 are payments which a person is entitled to as representing his interest in certain immoveable property and not because he possesses some interest in immoveable property. We are fortified in this conclusion by the rulings in *Zemindar of Tarla* v. *Latchiah*(1).

The preliminary objection prevailing, the second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Chief Justice, and Mr. Justice Phillips.

DANAKOTI AMMAL AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

BALASUNDARA MUDALIAR AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1911. August 1, 2, 3.

Hindu Law—Adoption, validity of—Sapinda, consent of, obtained for consideration—Indian Evidence Act (I of 1872), section 32, sub-sections 3 and 5—admissibility of statement made by deceased person.

Where under the Hindu Law, the consent of a sapinda is required to validate an adoption by a widow and that consent is obtained in exchange for a valuable consideration the transaction will vitiate the adoption.

Rami Reddi v. *Rangamma*, [(1901) 11 M.L.J., 20], followed.

Srinivasa Ayyangar v. *Rangasami Ayyangar*, [(1907) I.L.R., 30 Mad., 450], distinguished.

A statement made by a deceased sapinda admitting that he had received a sum of money in connection with an adoption was sought to be proved in order to invalidate the adoption:

Held, that the statement was admissible under section 32, sub-section 3 of the Indian Evidence Act, it being a statement made against his pecuniary or proprietary interest:

Held also, that the statement was admissible under section 32, sub-section 5, as it related to the existence of a relationship; and this notwithstanding that the relationship was not in dispute at the time when the statement was made.

(1) (1903) 13 M.L.J., 211 and Second Appeal No. 10 of 1907.

* Appeal No. 212 of 1907.

WHITE, C.J., AND PHILLIPS, J.

DANAKOTI AMMAL v. BALA-SUNDARA-MUDALIAR.

APPEAL against the decree of V. VENUGOPAL CHETTI, the District Judge of Chingleput, in Original Suit No. 20 of 1906, dated the 23rd day of September 1907.

The facts of this case are set out in the judgments below.

T. R. Ramachandra Aiyar for second appellant and *N. Rajagopalachari* for appellants.

C. V. Anantakrishna Aiyar for respondents.

The CHIEF JUSTICE.—This is an appeal from a decree declaring an adoption invalid and not binding on the reversioners. The plaintiffs are the reversioners. The first defendant is the widow who adopted. The second defendant is the adopted son; and the third defendant, now deceased, is the *sapinda* whose consent was essential to the validity of the alleged adoption. The appeal was argued on that assumption.

The *factum* of the adoption is not denied and the question we have to consider is, is the adoption valid in law? It is impeached on various grounds in paragraph 14 of the plaint. It is said that "the consent of the third defendant was procured corruptly and improperly by paying him a bribe of . . . one thousand rupees." It is also said that "the consent of the third defendant was further procured by representing to him falsely that the first defendant had already authority from her son."

Those are the only two grounds which were seriously argued before us and so I need not refer to the other grounds on which the plaintiffs in their plaint impeach the adoption.

The written statement of the defendants Nos. 1 and 2 denies the allegations in the plaint and says that there was no such arrangement as is set up in the plaint with reference to payment and that no payment was made. It denies that the third defendant was induced to give his consent by a false representation.

The first issue is general: "Whether the adoption of the second defendant by the first defendant is valid and binding." The second issue is "whether the adoption of the second defendant is invalid for all or any of the reasons alleged in paragraph 14 of the plaint."

There is no suggestion to be found either in the issues or in the pleadings as to the case which was sought to be made on behalf of the appellants in the argument on appeal. The case sought to be made was assuming the money to have been paid to the third defendant, the circumstances in which it was paid were

such as not to invalidate the adoption. I think it is at any rate doubtful whether having regard to the pleadings and the issues it was open to Mr. Ramachandra Aiyar to argue that case. However, perhaps it might come in under the general language of the first issue whether the adoption is valid. At any rate we allowed him to argue it and that being so, I propose to deal with it in due course. . . .

First, as regards the findings of fact in this case—as I have said, the adoption is impeached on two grounds: first, that the consent was purchased, and secondly that it was procured by misrepresentation of fact. I take the first ground first—the alleged purchase of the consent. As to this there is a direct conflict of evidence. The consent is contained in a registered document, Exhibit I, which is dated March 29, 1901. That document contains no reference to the payment of any money, but, of course, it is not to be expected that a transaction of that sort, if it took place, would be recorded in the document. The actual deed of adoption is also registered (Exhibit II). That is dated, May 10th.

The plaintiff's first and second witnesses give a circumstantial account of the payment of a sum of Rs. 1,000 to Kandasamy, the third defendant—the party whose consent was essential to the validity of the adoption. According to their evidence, this payment was made at the time the deed of consent was written and they say, that they actually saw the money paid. There are some discrepancies in their evidence no doubt, as the learned District Judge himself points out. The Judge had an opportunity of considering their demeanour and he comes to the conclusion that they were witnesses of truth and I am not disposed to say that he was wrong in his conclusion. The testimony of these two witnesses is corroborated by certain documentary evidence. We have a notice, dated April 20th, which is Exhibit CC in the case. This is a notice from the plaintiffs to the third defendant; in which they state expressly that the third defendant, with a view to defraud the plaintiffs, had received Rs. 1,000 from the natural father and the adoptive mother and had executed to the latter a deed of authority to adopt. To that notice there is a reply, dated April 25th (Exhibit DD). In this reply the third defendant states that he received Rs. 1,000 in connection with this transaction.

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Now, the third defendant, as I have said, is dead and it was argued that this statement, as a statement by a deceased person, was not admissible. No objection was taken in the court below to the admissibility of this statement and the question of its admissibility was not made one of the original grounds of appeal in the appeal to this court. A supplemental ground of appeal was lodged by the defendants. I think the statement as to the circumstances in which the third defendant received the Rs. 1,000 may be said to be a statement made against his pecuniary or proprietary interest within the first branch of sub-section 3 of section 32 of the Evidence Act. Whether it falls within the second branch of the sub-section I need not discuss. It may be that the maximum *ex turpi causa non oritur actio* would apply and that a suit for damages by a party to the transaction would not lie.

I think the statement also falls within sub-section 5 of section 32 and that it is admissible under that sub-section. The statute law of India, which is perhaps somewhat wider than the English law with regard to this matter, runs thus, "when the statement relates to the existence of any relationship." I think this statement relates to the existence of the relationship by adoption. It is true that the status of adoption had not been created at the time the statement was made, but I see no reason for restricting the language to cases of that sort as we are invited to do on behalf of the appellants. Supposing the *factum* had not been admitted and the question for us to determine was, was there an adoption *in fact*, I do not think it could be argued that this statement did not relate to the existence of relationship by adoption. It seems to me it is equally admissible when it relates to a circumstance which is relied upon by one of the parties as going to show that though the adoption took place in fact it was not a valid adoption in point of law. It was contended that the statement was inadmissible under sub-section 5, because it was not made before the question in dispute was raised. I think there is nothing in that objection. The statement relates to a question of fact, namely, whether Rs. 1,000 was in fact paid to the third defendant. That statement was made by the plaintiffs. It was accepted by the third defendant at the time it was made. It was not denied by anybody. True, the question which afterwards arose between the parties was a question whether in the events which happened the adoption was valid.

But I do not think that prevents the statement of fact—which is contained in Exhibit DD being one made before the question in dispute arose within the meaning of section 32, sub-section 5. I therefore think that the statement in Exhibit DD is admissible in evidence for the purpose of showing that Rs. 1,000 was received by the third defendant in connection with his consent to the adoption.

Then we have in evidence certain notices which were sent the day before the adoption was made. They are Exhibits B and C. B is a notice from the plaintiffs to the first defendant. There the payment of the Rs. 1,000 is alleged. There is a similar notice from the plaintiffs to the natural father of the second defendant, which also alleges payment of Rs. 1,000 to the third defendant. It was suggested in reply that the terms of the letters were such that one would not expect an answer to be given. The fact that no answer was sent may not be very strong evidence, but it is evidence which to some extent at any rate corroborates the oral testimony which the Judge believed. Then there is another document in evidence and that is an account (Exhibit T). That is an account which purports to be an account kept by the third defendant of his dealings with the natural father of the second defendant. The first item is "Cash received in the matter of adoption, Rs. 1,000." It is under date March 29, which is the date of the registered deed of consent. It is said on behalf of the appellants that this account was written up at a subsequent period and consequently was not evidence under section 32. The circumstances in which this account was made out appears from the evidence of the fifth witness for the plaintiffs (page 99). He speaking of the third defendant says: "He used to ask me to enter payments made to him on slips of paper. He could write, but his hand was shaky as he was old. Once he asked me to enter them all in a book. I did so. Exhibit T is that book. The whole of it is in my writing." So Exhibit T is clearly not the statement as made by a deceased person, but an account made up from statements made by him contemporaneously, I think it may be taken, with the dates affixed to the various entries and subsequently reduced to the form of an account by this fifth witness for the plaintiffs. The "slips of paper" are not in evidence but we have the evidence of the witness that the slips were copied into the account. There may be some doubt as to whether Exhibit T is admissible in evidence under

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section 32. But, even assuming it is not admissible under section 32, there is, it seems to me, abundant evidence to justify the findings of the District Judge that the payments were, in fact, made.

On behalf of the defendants, various witnesses were called, who denied that payment of the money was made. These witnesses the Judge disbelieved.

I do not think it is necessary to discuss certain evidence which was adduced with reference to money lending transaction on the part of the third defendant. It was sought to show in support of the plaintiff's case that the money lending transactions were of a character which were beyond the means of the third defendant unless he had special funds to fall back upon; and it was suggested that Rs. 1,000 supplied these funds. On the other hand, it was argued that he had, independently of any alleged payment of the Rs. 1,000 to him, funds wherewith to carry on the transactions. I need not discuss the evidence as to that because, as I have said, I think that the District Judge was right in his conclusion, on the direct evidence, with reference to this transaction.

I think it is established that the plaintiffs proved that the consent of the third defendant to the adoption was purchased by the payment of a sum of money and that the District Judge's finding of fact with regard to this was right.

Then, as regards the alleged misrepresentation, there is a recital in Exhibit I, which is a document giving consent, executed to the first defendant by the third defendant, stating "In the will executed by your son prior to his death, permission is given to you to adopt a son." The first witness for the plaintiffs and also the second witness for the plaintiffs speak to a statement to this effect having been made to the third defendant when he was asked to give his consent and the Judge believed them. I see no reason to differ from his conclusion as regards this. There is also evidence that the will (Exhibit I) is not genuine, and if it is established that the will is not genuine, the statement of fact in Exhibit I in a sense, at any rate, is a false statement. We have in Exhibit EE, which is the judgment in certain litigation before a District Judge, a finding that the will was "quite unreliable." Then we have the evidence of the first witness for the defence, who in cross-examination said "I wrote the will. The court held it to be not

genuine"; as to that, there was no re-examination. Therefore, we have the evidence that the statement was made and evidence that the statement was in a sense, false.

I do not propose to consider whether this, standing alone, would be sufficient to vitiate the adoption—that is to say, whether, on this misrepresentation alone, the case would fall within the principle of the decision in *Subrahmanyam* v. *Venkamma*(1) which was affirmed by the Privy Council in *Venkamma* v. *Subramaniam*(2).

The only other question which remains for consideration is the question of law which was raised in the manner stated at the beginning of this judgment. The question which has been argued is, "does a payment to a party, whose consent is essential for the validity of an adoption invalidate the adoption?" Mr. Anantakrishna Aiyar submitted the proposition that any money payment (or I suppose any valuable consideration) given in order to procure the assent and accepted as a consideration for the consent would vitiate the consent because it would prevent the party who was entrusted with the duty of consenting or of declining to consent from exercising a *bonâ fide* independent judgment in the matter.

I am not prepared to say that this proposition is too broadly stated. It seems to me in accordance with the decisions of the Privy Council and of this court. In the well-known Râmnâd case—*The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*(3)—I find this statement of the law. Their Lordships were considering the question of consent by a father-in-law. With reference to that, they say: "All that can be said is, that there should be such evidence of the assent of kinsmen as suffices to show, that the act is done by the Widow in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. In this case no issue raises the question, that the consents were purchased, and not *bonâ fide* attained." It is true their Lordships were considering the transaction from the point of view of what was done by the widow rather than from the point of view of what was done by the party who received the money or the consideration and on the strength thereof gave his consent. But the language of the judgment certainly suggests an antithesis between a purchased consent and good faith, and implies that the

(1) (1903) I.L.R., 26 Mad., 627. (2) (1907) I.L.R., 30 Mad., 50 [P.C.].
(3) (1868) 12 M.I.A., 397 at p. 442.

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two are irreconcilable. Then their Lordships go on, in a passage which, I think, has been described in a later judgment of the Privy Council, perhaps not very clearly stated, and which, I confess I feel some difficulty in following, in these words: "The rights of an adopted Son are not prejudiced by any unauthorised alienation by the Widow which precedes the adoption which she makes; and though gifts improperly made to procure assent might be powerful evidence to show no adoption needed, they do not in themselves go to the root of the legality of an adoption." The phrase "adoption needed" seems to require explanation. The other reports of this case have been referred to and the same phraseology appears. Possibly, what their Lordships meant to lay down was this, that from the point of view of the widow the making of a payment by the widow did not go to the root of the legality of the adoption.

I do not think they intended to suggest that the receipt of a gift by the party entrusted with the duty either of giving or withholding his consent did not go to the root of the legality of an adoption.

Then in *Vellanki Venkata Krishna Rāo* v. *Venkatarāma Lakshmi*(1) which was a decision of the Privy Council on the question of the validity of an adoption their Lordships in discussing the question of motive, make these observations: "Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and that all which this committee in the former case intended to lay down was, that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband." The reference to the "family council" seems inconsistent with the argument put forward on behalf of the appellants that this consent could be purchased. Then we have the Berhampur case reported in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*(2).

(1) (1876) I.L.R., 1 Mad., 174 at pp. 190 and 191.
(2) (1876) I.L.R., 1 Mad., 69 at p. 82.

There we find a passage in the judgment of their Lordships which is of importance with reference to the question of discretion. "It is admitted on all hands that an authorisation by some kinsman of the husband is required. To authorise an act implies the exercise of some discretion whether the act ought, or ought not, to be done. In the present case there is no trace of such an exercise of discretion." So far as I can see, in the case now before us, there is no trace, of an exercise of discretion. The consent apparently was given, because certain parties were willing to pay Rs. 1,000 for the purpose of procuring the same. Then there is another case which has an important bearing on this question and that is the case of *Rami Reddi* v. *Rangamma*(1). There Mr. Justice BASHYAM AYYANGAR declined to argue that in the circumstances in which the consent was given in that case, the adoption was valid. The circumstances apparently were that the party whose consent was required took a gift from the widow, who adopted, in the shape of land which formed part of the estate of her deceased husband. It may possibly be that the head-note to the case which simply says: "The consent of a sapinda given for a consideration received is not sufficient to support an adoption," is too wide, having regard to the actual facts in that case. Then we have a decision of SUBRAMANIA AYYAR and MOORE, JJ., in *Venkatakrishnamma* v. *Annapurnamma*(2), the question raised in that case being whether the consent of every *sapinda* was necessary. There their Lordships observe: "It would seem only reasonable to say that when a *sapinda* refuses to assent but withholds his grounds for such refusal, he must be held to be precluded from relying on the refusal as in any way affecting the adoption. The propriety of this view will be clearer still if we remember the reason of the rule which compels a widow, desirous of making an adoption but possessing no authority from her husband in regard to it, to obtain the assent of his sapindas. The reason is the presumed incapacity of a woman for independent action in such a matter. And as the position of the sapindas in cases like this is, according to the Judicial Committee, similar to that of a family council that has to decide upon the expediency of substituting an heir by adoption to the deceased husband on a

(1) (1901) 11 M.L.J., 20.
(2) (1900) I.L.R., 13 Mad., 486 at p. 489.

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fair consideration of the question [*Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narasayya*(1)] a *sapinda* who, like the appellant, refuses to give his reasons for the opinion why such an heir should not be substituted while other sapindas decide otherwise, cannot be held to exercise properly the discretion confided to him." It is to be observed that it is not the discretion "vested in" him but discretion confided "to" him which indicates that the discretion to be exercised is, I do not say, that of a trustee, but partaking to some extent, of the nature of the discretion which a trustee is called upon to exercise.

There is another case, *Murugappa Chetti* v. *Nagappa Chetti*(2)—another decision by SUBRAMANIA AYYAR, J., sitting with SANKARAN NAIR, J. There the Court held that the receipt of money by the natural father in consideration of giving his son and the payment of such by the adoptive father, though illegal and opposed to public policy, do not make the adoption invalid, as the gift and acceptance of the boy is a distinct transaction clearly separable from the illegal agreement and payment. With regard to the point we are now considering we find this passage "It is scarcely necessary to say that a gift or acceptance from motives of a questionable character by a person competent of his own choice to give or accept is distinguishable from the case of acceptance by a widow acting under the authority of a sapinda given for corrupt consideration. In the latter case the adoption fails because of the absence of *bonâ fide* authority to take, such authority being an essential constituent of a good adoption by a widow not empowered by her husband to make one." The decision which is reported in *Srinivasa Ayyangar* v. *Rangasami Ayyangar*(3) is distinguishable on the ground that the party who gave the consent did not get any thing for himself but merely protected himself from the loss which he would have incurred if he had not been able to make special arrangements in connection with the adoption. That case, I think, is clearly distinguishable from *Rami Reddi* v. *Rangamma*(4), and I do not think it conflicts with the general proposition which Mr. Anantakrishna Ayyar submitted.

I do not think it is necessary for me to consider the question whether any distinction is to be drawn between a case where, as

(1) (1876) L.R., 4 I.A., 1 at p. 14. (2) (1906) I.L.R., 29 Mad., 161 at p. 164.
(3) (1907) I.L.R., 30 Mad., 450. (4) (1901) 11 M.L.J., 20.

in *Rami Reddi* v. *Rangamma*(1) the money comes from the estate of the deceased husband of the widow and a case where the money is forthcoming from some independent source, because as I have said, I am prepared to hold that the proposition which has been stated is a correct exposition of the Hindu Law with regard to this matter.

I think the decree of the District Judge was right and that this appeal should be dismissed with costs.

PHILLIPS, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar.

J. CHINA PITCHIAH (THIRD DEFENDANT), APPELLANT,

v.

T. PEDAKOTIAH AND THREE OTHERS (PLAINTIFF AND DEFENDANTS FIRST AND SECOND), RESPONDENTS.*

1911. August 10.

Transfer of Property Act (IV of 1882), section 53—Mortgage in fraud of creditors, validity of.

A, being in insolvent circumstances, mortgaged certain property to *B*, there having been a failure in payment of part of the consideration money., *C* holding a money decree against *A*, impeached the mortgage as fraudulent:

Held, that the fact that the mortgage was for an amount larger than was really paid, was no reason for not upholding it to the extent that it was supported by a debt existing at the date of the mortgage and that *A* was entitled to a decree for the amount actually paid by him.

Chidambaram Chettiar v. *Sami Aiyar*, [(1907) I.L.R., 30 Mad., 6], distinguished.

Ishan Chunder Das Sarkar v. *Bishu Sardar*, [(1897) I.L.R., 24 Calc., 825], followed.

SECOND APPEAL [under Order XLI, Rule 11 of the Code of Civil Procedure (Act V of 1908)], presented against the decree of A. N. ANANTARAMA AIYAR, the Temporary Subordinate Judge of Guntur, in Appeal No. 241 of 1907, against the decree of P. C. TIRUVENKATACHARLU, the District Munsif of Ongole, in Original Suit No. 160 of 1906.

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(1) (1901) 11. M. L. J. 20.

* Second Appeal No. 272 of 1911.