

that the loss occasioned by the breach of trust in that case was a "consequence" within the meaning of section 179 of the Criminal Procedure Code sufficient to give jurisdiction and quoted *Queen-Empress v. O'Brien*(1) and *Langridge v. Atkins*(2) as authority. But the bulk of the judgment of both the learned Judges was devoted to the effect of the want of a certificate and with all respect we do not feel compelled to treat this as a considered ruling on the point binding upon us.

These are all the cases to which we are referred: and we do not think their effect would justify our adopting a different interpretation of section 179 of the Criminal Procedure Code and section 405 of the Indian Penal Code to that which a careful consideration of the sections themselves seems to indicate.

We set aside the order of the Sub-Divisional Magistrate, and direct the discharge of the petitioners.

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## APPELLATE CIVIL.

*Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.*

G. SESHAMMA (DEFENDANT), APPELLANT,

v.

B. V. SURYANARAYANA AND ANOTHER (PLAINTIFF'S  
LEGAL REPRESENTATIVES), RESPONDENTS.\*

1913.  
October 28.

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*Civil Procedure Code (Act XIV of 1882), sec. 373—Legal Representative—Abatement of suit—Withdrawal of suit with permission to bring a fresh one—Its effect on the representative not on record.*

When a suit has abated against a defendant by reason of his legal representative not having been brought on the record within the time allowed by law and when the plaintiff thereupon withdraws his suit with permission to bring a fresh one, such a permission can only empower him to bring a fresh suit against those defendants who were on the record on the date of the withdrawal and not against the legal representatives of a defendant who was dead at the time of the withdrawal and whose said representatives had either not been brought on the record or had been removed from the record by an appellate order which set aside the order of the First Court bringing them on the record.

*Perumal v. Karuppan* (1911) 21 M.L.J., 574, dissented from.

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(1) (1897) I.L.R., 19 All., 111.

(2) (1913) I.L.R., 35 All., 29.

\* Appeal Against Order No. 280 of 1912.

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v.  
SUREYA-  
NARAYANA.

APPEAL against the order of A. L. HANNAY, the District Judge of Vizagapatam, in Appeal No. 884 of 1911, preferred against the order of P. NARAYANA RAO NAYUDU, the District Munsif of Vizianagram, in Original Suit No. 828 of 1910.

One Gade Sitaramadoss deceased, executed the suit mortgage-deed to the Bulusu Appaya Garu on 26th April 1903. In execution of a decree of the Court of District Munsif of Vizianagram, in Original Suit No. 524 of 1903, obtained by a stranger the equity of redemption in the mortgaged property was sold and the defendant's husband became the auction-purchaser. The plaintiff instituted Original Suit No. 162 of 1905 for the mortgage-money against the widows of the mortgagor and the defendant's husband, the auction-purchaser. The suit was decreed, on a preliminary point. The decree was reversed by the Appellate Court and the suit remanded for trial on the merits; the appellate judgment was dated 30th March 1907. The defendant's husband died on 8th April 1907. His legal representative was not brought on record within the period of six months allowed by law. Long after the expiry of the period prescribed, *i.e.*, on 29th February 1908, plaintiff applied for the legal representative, *viz.*, the present defendant to be brought on record. The then District Munsif excused the delay and allowed the application on 29th June 1908. This order was appealed against and in appeal was set aside. The parties who thus stood on record were only the widows of the mortgagor. The widows of the mortgagor were not necessary parties at all to the previous suit, as the relief prayed was for money by sale of the hypotheca and the other property of the auction-purchaser. The mortgagor's widows had no interest in the hypotheca, as it had been sold away in Court auction to the defendant's husband long before. Seeing that the suit, if prosecuted in the absence of the auction-purchaser's representative would be of little avail, plaintiff moved the Court for permission to withdraw the suit and file another on the same cause of action. The then District Munsif granted the leave asked for and plaintiff filed the present suit, dropping the widows of the mortgagor and impleading as the sole defendant, the widow and legal representative of the auction-purchaser whom he had failed to bring on record in the previous suit. The leave granted to institute

a fresh suit was long after the expiry of six months from the date of the death of the auction-purchaser.

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The Court of First Instance held that this suit could not be maintained against the defendant, the previous suit having abated as against her husband who died more than six months prior to the granting of the permission to bring a fresh suit. The Lower Appellate Court reversed the decree of the Lower Court and remanded the suit for disposal upon the merits.

The defendant appealed against the order of remand.

*T. Rangachariyar* for the appellants.

*S. Srinivasa Ayyangar* for the respondents.

JUDGMENT.—We are of opinion that, when a suit has abated against a particular defendant by reason of his legal representatives not having been brought on the record within the time limited by law and when the plaintiff thereupon withdraws his suit with permission to bring a fresh suit, such a permission can only empower him to bring the fresh suit against those defendants who were on the record on the date of the withdrawal and not against a defendant who had ceased to be on the record or against the legal representatives of a defendant who was dead at the time of the withdrawal and whose said representatives had either not been brought on the record or had been removed from the record by an appellate order which set aside the order of the First Court bringing them on record.

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AYYAR AND  
SPENCER, JJ.

As regards *Perumal v. Karupan*(1), the learned Judges were no doubt (if we may say so with respect) right in saying that the cause of action in that case survived as against the defendants other than the deceased defendant and hence a new suit would be under the permission granted under section 373 as against the other defendants. But in so far as that decision holds that even against the legal representatives of a defendant who was dead at the time of the withdrawal with permission to bring a fresh suit, the new suit would be sustainable, we respectfully dissent therefrom, the learned Judges themselves having evidently arrived at their conclusion after much hesitation.

Further the modifications made by the new Civil Procedure Code in the language of old sections 373 and 368 [Order XXXIII,

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rule 1 and clause (2) of Order XXII, rule 4] seem to make the matter quite clear and to prevent the bringing of the fresh suit as against a defendant who was not on the record at the time of the withdrawal.

We therefore reverse the learned District Judge's order and restore the Munsif's decision with costs in this and in the Lower Appellate Court in favour of the appellant.

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## APPELLATE CIVIL.

*Before Sir Charles Arnold White, Kt., Chief Justice, Justice  
Sir Sankaran Nair and Mr. Justice Oldfield.*

1913.  
October.  
22 and 24.

THE SECRETARY TO THE COMMISSIONER OF SALT,  
ABKĀRI AND SEPARATE REVENUE, REVENUE  
BOARD, MADRAS (REFERRING OFFICER),

v.

MRS. E. M. ORR AND THE BANK OF MADRAS (THE EXECUTANT  
AND EXECUTEE OF THE DOCUMENT IN QUESTION).\*

*Indian Stamp Act (II of 1899), sec. 2 (17), and arts. 40 and 64—Mortgage-deed—  
Hypothecation, letter of, accompanying a bill of exchange.*

Where a document ran as follows:—"The executant being desirous of carrying on her deceased husband's business of which she is now the owner declares a trust in favour of the Bank of Madras in respect of machinery, plant, fixture and furniture and stock-in-trade in consideration of advances of money to be made by the Bank from time to time not exceeding in all Rs. 4, 50,000 for the purpose of financing the business. All such advances carry interest at the rate of 6 per cent. per annum. The trustee has got full power to use, employ, sell or exchange or otherwise deal with the trust property in the ordinary course of business but should make good the property that may be sold with other goods of a similar nature and value; any goods so substituted shall be included in the security. The trustee may retain in his hands the sum of Rs. 20,000 annually in trust to pay and apply the same in payment of sums advanced by the Bank:"

*Held*, that the document created a trust in express language in respect of the machinery, etc., in or upon the business premises of the firm and that the object of the instrument was to give the Bank some rights by way of security and it was a mortgage-deed for the purpose of the Stamp Act.

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\* Referred Case No. 5 of 1913.