

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice
Kumaraswami Sastriyar and Mr. Justice Phillips.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
(REPRESENTED BY THE COLLECTOR OF TANJORE), DEFENDANT,
APPELLANT,

1915.
March 29 and
1916.
January 3.

v.

R. S. SIVAYANGAR AND TWO OTHERS (PLAINTIFFS),
RESPONDENTS.*

Criminal Procedure Code (Act V of 1898), sec. 88—Absconding person, a member of an undivided Hindu family—Undivided interest of his, in the family property, or any portion thereof whether liable to attachment under section 88.

The undivided interest of an absconding person who is a member of an undivided Hindu family in the family property or any portion thereof can be attached under section 88 of the Criminal Procedure Code (Act V of 1898).

Mussumat Golab Koonour v. The Collector of Benares and Raja Oodit Narain Sing (1847) 4 M.I.A., 246 and Juggmohun Bakshee v. Roy Mothooranath Chowdry (1867) 11 M.I.A., 223, followed.

Re Umayan (1903) 2 Weir's Cr. R., 43, approved.

Re Ohinniyar (1903) 2 Weir's Cr. R., 43, overruled.

SECOND APPEAL against the decree of J. S. GNANI NADAR, the Subordinate Judge of Negapatam, in Appeal No. 260 of 1911 preferred against the decree of G. J. QURASHI, the acting District Munsif of Tirutturaippundi, in Original Suit No. 47 of 1910.

The facts of the case necessary for this report appear from the Order of Reference to the Full Bench

The Government Pleader for the appellant (Crown).

S. T. Srinivasa Gopalachariyar and *N. Srinivasachariyar* for the respondents.

This Second Appeal coming on for hearing before SANKARAN NAIR and SPENCER, JJ., the following ORDER OF REFERENCE TO THE FULL BENCH was delivered by

SANKARAN NAIR, J.:—On account of the importance of the question and the conflicting decisions on the point in *Re Umayan*(1) and *Re Ohinniyar*(2) we refer to a Full Bench for decision the question :

* Second Appeal No. 203 of 1914 (F.B.).

(1) (1908) 2 Weir's Cr. R., 43.

(2) (1903) 2 Weir's Cr. R., 43.

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“Can the undivided interest of an absconding person who is a member of an undivided Hindu family in the family property or any portion thereof be attached under section 88 of the Code of Criminal Procedure?”

T. Narasimha Ayyangar for the Government Pleader for the Crown.

The reference is in consequence of two conflicting rulings, *Re Chinniyar*(1) and *Re Umayan*(2), the case in the footnote on the same page. Section 88 of the Criminal Procedure Code corresponds to section 4 of Bengal Regulation XI of 1796. Under that section it was held that the undivided share of a member of a joint Hindu family could be attached or sold by the Government. See *Mussumat Golab Koonwur v. The Collector of Benares and Raja Oodit Narain Sing*(3) and *Juggomohun Bukshee v. Roy Mothooranath Chowdry*(4). By virtue of section 88 and not by virtue of any rule of Hindu Law the Government becomes the owner of the attached property. There is nothing to show that property means only property which is in the physical possession of the accused.

Reference was also made to *Golam Abed v. Toolseeram Bera*(5).

S. T. Srinivasa Gopalachariyar (and *N. Srinivasachariyar*) for the respondents—Property means property belonging to the accused. In this case the property does not belong to him.

[WALLIS, C.J.—Why do you say property cannot mean interest in property?]

The penal law must be strictly construed. An unascertained share in property cannot be property within the meaning of the section. In the case of a coparcener it cannot mean anything else than separate property exclusively belonging to him.

[PHILLIPS, J.—You contend that property must mean tangible property.]

The provisions of Civil Procedure Code will not apply. The language of the Criminal Procedure Code is different. There is no definite property. The Civil Procedure Code contains definite provisions for attachment. Sections 386 and 514, Criminal Procedure Code may be referred to for the meaning of the word property.

(1) (1903) 2 Weir's Cr. R., 43.

(2) (1903) 2 Weir's Cr. R., 43.

(3) (1847) 4 M.I.A., 246 at p. 254.

(4) (1867) 11 M.I.A., 223 at p. 237.

(5) (1883) I.L.R., 9 Cal., 861.

In *High Court Proceedings No. 521 of 16th February, 1876(1)* and *The Queen-Empress v. Sita Nath Mitra(2)*, section 386, Criminal Procedure Code, has been construed to apply only to property belonging to the offender. Schedule V, form 6, Criminal Procedure Code, throws some light on the construction of the word property. It is "sole ownership" that is contemplated.

The cases referred to by the other side have reference to Dayabhaga law.

This Second Appeal coming on for hearing the following Opinion of the Court was delivered by

WALLIS, C.J.—We think the question must be answered in the affirmative. Mr. Narasimha Ayyangar has called our attention to two decisions of the Privy Council under Bengal Regulation XI of 1796 which apparently were not brought to the notice of the learned Judges who decided the cases mentioned in the reference. Under Regulation XI of 1796, section 4, the Magistrate was to order the attachment of any land or other real property held by the absentee, and under section 6 on failure of the absentee to attend within six months after the attachment the lands were to be at the disposal of the Governor-General in Council. It was held by the Privy Council in *Mussumat Golab Koomvur v. The Collector of Benares and Raja Oodit Narain Sing(3)* under the Regulation in a case from Benares governed by the Mitakshara law that the undivided interest of the defaulting member of the joint family passed to the alienee from Government and in *Juggomohun Buktshree v. Roy Mothooranath Chowdry(4)* their Lordships again took the view that the share of the defaulting member of the joint family was liable to confiscation.

The provisions of section 88 of the present Code of Criminal Procedure are wider than the Regulation in so far as they include moveable as well as immoveable property; but as regards procedure, they deal with the matter in greater detail specifying the manner in which each description of property is to be attached. What has to be attached under the section in a case such as this is the share of the defaulting member of the joint

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(1) 2 Weir's Cr. R., 442.

(2) (1898) 1 L.R., 20 Cal., 478. (3) (1847) 4 M.I.A., 246

(4) (1867) 11 M.I.A., 223 at p. 239.

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family, which is of course subject to the rights of the other members of the family and may be realized by a receiver in a suit for partition or otherwise. We are unable to agree with the observations of SUBRAHMANYA AYYAR, J., in *Re Chinniyar*(1) that a receiver cannot be appointed under the section to realize the share of the defaulting member, or that such an appointment would necessarily take the property out of the hands of the managing member. On the other hand we agree with COLLINS, C.J., and SHEPARD, J., in *Re Umagan*(2) that there is nothing in the language of section 88 to restrict the meaning of the word property and that it must include the rights and interests of persons who as members of an undivided family are jointly entitled to the property of the family.

C.M.N.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

APPAYYA SHETTY (THIRD DEFENDANT), APPELLANT,

v.

B. P. M. MAHAMMAD BEARI AND TWO OTHERS
(PLAINTIFF AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Landlord and tenant—Agricultural lease—Days of grace for payment of rent—Forfeiture clause for non-payment of rent after days of grace—Relief against forfeiture.

Courts in India have power to relieve against forfeiture for non-payment of rent even in cases where a period of grace is allowed for payment by the lease deed; and this rule applies equally to a lease (as in this case) for agricultural purposes.

Whether relief against forfeiture should in any particular case be given depends on the facts of that case.

Per SESHAGIRI AYYAR, J.—It is open to Courts to look at legislative provisions regarding the liability of other lessees and tenants as embodying the principles of justice, equity and good conscience.

Per NAPIER, J.—When the statute specifically excludes one transaction of the same class as that which is being dealt with from its purview, the doctrine cannot be applied. The Transfer of Property Act cannot be looked to for guidance in the matter of an agricultural lease.

(1) (1903) 2 Weir's Cr. L., 43.

(2) (1903) 2 Weir's Cr. R., 43

* Second Appeal No. 1989 of 1913.

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2 and 10.

29 M. L. J. 281