APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice Seshagiri Ayyar.

A. C. CHIDAMBARA MUDALIAR (PLAINTIFF), APPELLANT IN BOTH,

v.

N. KRISHNASAMI PILLAI AND TWELVE OTHERS (DEFENDANTS), RESPONDENTS.*

1914. November 24, 25 and 26 and December 7.

Hindu law—Will—Co-executors—Probate obtained by one executor—Subsequent application by the other co-executor for joint probate—Compromise between co-executors—Mortgage of estate by one executor to the other—Renunciation of executorship—Validity of compromise—Action of executor without probate, validity of—Probate and Administration Act (V of 1881), ss. 2, 4, 82 and 92, applicability of, to all Hindus—Executor, trustee of charities under the will—Claims of trustee against trust estate—Charge—Suit—Limitation Act (IX of 1908), art. 120—Suit for account and for scheme, against trustee—Right of trustee as defendant to equities in such suit—Decree in favour of trustee as defendant—Civil Procedure Code (Act V of 1908), sec. 92.

Assuming that an executor is competent in law to compromise the claims of his co-executor against the testator's estate, it is essential that the compromise should be entered into *bona fide* and for the benefit of the estate.

Per WALLIS, C.J.—The Probate and Administration Act does not say that section 82 is to apply only to cases of Hindus governed by the Hindu Wills Act, but section 2 provides that Chapters II to XIII which include section 82, are to apply to every Hindu.

Per SESHAGIRI AYYAR, J.—It is not incumbent on an executor of the will of a Hindu to obtain probate before acting as an executor.

Section 82 of the Probate and Administration Act is no bar to an executor acting as a representative of a Hindu testator's estate, because a co-executor had alone obtained probate of the will in his name.

Section 92 of the said Act should be confined to cases where probate is compulsory before dealing with the property.

An executor, who was appointed trustee of a charity under a will and who had claims against the estate in respect of his administration, has no charge on the estate in respect of such claims but should bring his suit within six years under article 120 of the Limitation Act. But when a suit was brought against him for an account, if he was under a liability to account to the trust at the date of the suit, he would be entitled to all the equities flowing from the taking of the account and a decree could be passed in such suit in his favour for the amount that might be found due to him from the estate, though a suit by the trustee for the same might be barred by limitation.

* Appeals Nos. 106 and 107 of 1911.

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APPEALS against the decrees of A. RAMASWAMI SASTRIYAR, the Temporary Subordinate Judge of Trichinopoly, in Original Suits Nos. 45 of 1908 and 31 of 1909, respectively.

These are two appeals in two suits which were tried together in the lower Court. The first of these suits was brought to recover money on a mortgage-bond executed by the first defendant. The circumstances under which the mortgage-bond was executed were these. The plaintiff and the first defendant were appointed executors under a will, dated 4th January 1897, of a Hindu testator named Nagu Pillai. The plaintiff alone applied for and obtained probate of the will in 1899. In 1901, the first defendant filed an application in the District Court for the issue of a probate to both the executors in supercession of the previous probate and alleged in the petition that the plaintiff had not rendered an account of his administration within one year as required by the Probate and Administration Act. The Court directed the plaintiff to submit his accounts and appointed a Commissioner to examine the same; the Commissioner made a report which was unfavourable to the plaintiff. The plaintiff and the defendant subsequently entered into a compromise under which the first defendant executed a mortgage of the properties of the estate to the plaintiff in satisfaction of certain claims set up by the plaintiff against the estate, and the plaintiff was to renounce his executorship and deliver certain properties belonging to the estate in his possession over to the first defendant. The Court accepted the compromise and passed an order in the probate proceedings in accordance therewith. The plaintiff brought the present suit to recover the amount due on the mortgage executed to him by the first defendant. The defendants contended that the compromise was illegal, that the mortgage was invalid as the first defendant was not competent to execute it under sections 82 and 92 of the Probate and Administration Act, and that the mortgage was not binding on the estate as it was not executed *bona fide* in the interest of the estate. The other connected suit was instituted by two persons under section 92 of the Civil Procedure Code for removal of both the executors who were appointed trustees by the will in respect of certain charities created by the will, and for a scheme and for accounts against the trustees in respect of their administration. One of the defendants-trustees claimed a certain sum of money as due to him

from the estate, but a suit for the same would have been barred by limitation if he had brought a suit therefor; but the trustee as defendant claimed credit for the same as a matter of equity arising out of his liability to account in the suit, and set up also a right to a charge on the estate properties in respect of his claim. The other facts appear from the judgments of the High Court.

Appeal No. 106 *of* 1911.

C. V. Ananthakrishna Ayyar for the appellant.

V. C. Seshachariar and *C. Krishnamachariar* for the first respondent

K. Bhashyam Ayyangar for the second respondent.

C. Padmanabha Ayyangar for the ninth respondent.

S. Srinivasa Ayyangar for the respondents Nos. 10 and 11.

Appeal No. 107 *of* 1911.

C. V. Ananthakrishna Ayyar for the appellant.

S. Srinivasa Ayyangar for the respondents Nos. 1 and 2.

V. C. Seshachariar and *C. Krishnamachariar* for the third respondent.

WALLIS, C.J.—These are appeals from a judgment in two suits which were tried together. One was a suit by Chidambara Mudaliar, one of the executors of the deceased Naga Pillai, on a mortgage for Rs. 6,500 executed by the first defendant, another of the executors in favour of four persons, who it is alleged transferred it to the plaintiff. The mortgage, as found by the Subordinate Judge was really executed by the first defendant, as executor of the deceased under his will Exhibit OO *benami* for the plaintiff in the following circumstances: the plaintiff, though it was unnecessary for him to do so, thought proper to obtain probate of the will, Exhibit EE, from the District Court of Trichinopoly and for some time administered the estate under the grant. In January 1901 the first defendant, the son of the deceased who had come of age, presented a petition (Civil Miscellaneous Petition No. 183 of 1901) for the issue of probate to him along with the plaintiff, and alleged therein that the plaintiff had failed to file in Court within one year the accounts required of him as executor under the Probate and Administration Act V of 1881. The plaintiff then filed certain accounts which were referred to a Commissioner by

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an order made on the above petition under what provision of law does not appear as the accounts required by the Probate and Administration Act are filed merely for the information of all concerned and to enable them to take proceedings against the executor if the occasion calls for it. On the 8th July 1901 the Commissioner presented a report (Exhibit XI) in which he stated that the plaintiff had not kept proper accounts, that his management had been fraudulent, and that he was unfit to continue as executor. On the 11th February 1902, the first defendant and the plaintiff, as petitioner and counter-petitioner in Civil Miscellaneous Petition No. 83 of 1903 already mentioned, presented a petition of compromise (Exhibit XIII) stating that it had been agreed that the first defendant should accept the plaintiff's accounts showing Rs. 6,686 as due to him from the estate, and should execute a mortgage of the estate for that amount in the plaintiff's favour and that the plaintiff should renounce the executorship and hand over certain articles. The mortgage (Exhibit LL), which is that now sued on, was executed by the first defendant on 14th April 1902, and on 22nd April 1902 the parties presented a further petition (Exhibit PP) stating that the mortgage had been executed and that the plaintiff was willing to renounce the executorship and to comply with the other terms mentioned in the petition and praying the Court to pass orders in accordance with the compromise. On this the Court passed the following Order: "Accepted and ordered in terms of the petition."

The Subordinate Judge had held, in my opinion rightly, that this mortgage is not binding on the estate. The objection taken is that it was executed after the grant of probate to the plaintiff and before the grant to the first defendant. Now section 82 of the Act provides that after a grant of probate no other than the person to whom the same shall have been granted shall have power to act as representative of the deceased until such probate is recalled or revoked; and it is contended that, though it was not obligatory on the executors of the will to have taken out probate, yet one of them having done so the terms of the section expressly prohibit the other executor to whom probate had not been granted from acting as the representative of the deceased and that the fact of probate having been subsequently granted to such executor is not sufficient by virtue of section 1 to

validate acts done by him in express disobedience to section 82. The Act does not say that this section is only to apply to cases governed by the Hindu Wills Act XXI of 1870, but (section 2) that chapters II to XIII which include this section are to apply to every Hindu, and I do not think it is open to us to refuse to apply to provisions of the section on grounds of real or supposed inconvenience. On the other hand it may be said that the balance of convenience is in favour of the section being applicable. There is however a more serious objection to the mortgage. In face of the Commissioner's report (Exhibit XI), which must have been known to the first defendant, as it was obtained at his instance, the compromise by which the plaintiff's claim against the estate for Rs. 6,686 cannot be said to have been entered into bona fide in the interests of the estate and would appear to have been entered into by the first defendant mainly with the object of getting the plaintiff to withdraw in his favour from the office of executor. It appears not to be free from doubt whether an executor can enter into a compromise with his co-executor at all. See *Cook* v. *Collingridge*(1) and *De Cardova* v. *De Cardova*(2), and the strong language of the Court of Appeal; *In re Fish*(3), as to such settlements between trustees. Assuming however that a co-executor has such a power as held by KEKEWICH, J., in *In re Houghton*(4), it is essential that the compromise should be a bona fide one and I do not think that the compromise above referred to can be considered to be a bona fide one or in any way binding upon the estate. As regards the order made by the District Judge accepting the compromise, it does not appear that the true facts were then brought to his notice or how, on a petition for the grant of probate to an additional executor, he had jurisdiction to sanction a compromise between two executors imposing a heavy burden on the estate. It was then contended that the plaintiff was entitled to a charge on the estate for the sums found due to him in the account taken in the suit. An executor however has only a right of retainer and no charge on properties not in his possession which at one time formed part of the estate—*Peary Mohun Mukerjee* v. *Narendra Nath Mukerjee*(5). This case is also authority for the

(1) (1822) Jac. 607; s.c.; L.J. Ch. 74; s.c., 23 R.R., 155.
(2) (1879) 4 A.C., 692. (3) (1893) 2 Ch., 413.
(4) 1904) 1 Ch., 622. (5) (1910) I.L.R., 37 Calc., 229.

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position that such a claim by a plaintiff is governed by article 120 and is therefore barred. I think that the Subordinate Judge should have dismissed the plaintiff's suit on the mortgage and that it must now be dismissed and his appeal must be dismissed with costs throughout. The amount allowed in that suit will be allowed in the account taken in the other suit and included in that decree.

The connected suit was instituted under section 92 of the Civil Procedure Code with the requisite permission for the removal of the defendant, the plaintiff in the other suit, from the position of trustee of the charities created by the will, and also prayed for an account against him which was ordered. The account was taken in the connected suit which was tried with this suit, with the result that a sum of over Rs. 300 was found due to the defendant, and a decree for that amount was given him in the connected suit. There is no appeal against that decree, but the appellant contends that a large sum ought to have been found due to him and it is urged in reply that, as his claim against the trust is barred by limitation, no decree can be given by him in the suit under section 92 of the Code of Civil Procedure for the amount found due to him on taking the account. We are unable to agree with this contention. Though the appellant's right to sue is barred his claim is otherwise unaffected and it would not be right to remove him from the office of trustee without providing for payment to him in the account which has been taken as between him and the trust at the instance of the plaintiffs, more especially as in the connected suit we have held that the mortgage by which he sought to secure his claim against the estate is not binding on it. There is moreover no reason why a decree for the amount found due should not be given against the estate. As regards the particular items I agree with the judgment about to be delivered. No order as to costs. The memorandum of objections is dismissed with costs.

Appeal No. 106 *of* 1910.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—One Naga Pillai made a will on the 4th January 1897 and died two days after. The plaintiff in this case was appointed one of the executors. The will provided that the first defendant who was then a minor should be co-executor, after coming of age, with the plaintiff. The testator

after providing for certain legacies, directed the founding of a feeding house. Immediately after his death the genuineness of the will was questioned. The plaintiff applied for probate in the District Court of Trichinopoly. It was opposed, but he succeeding in obtaining an order for its grant in July 1897. There was an appeal against the order to the High Court. The probate was actually granted to him only in November 1899.

The first defendant attained majority in 1897 and, in January 1901, he applied for the issue of a joint probate to himself and the plaintiff in supersession of the one granted to the plaintiff (ZZ): one of the grounds for recalling the original grant is contained in paragraph 8 of the petition which alleged that the plaintiff had not rendered any account of his administration. This petition was opposed by the plaintiff (AAA). The District Judge directed the plaintiff to furnish a detailed account of the estate. On this being done, the first defendant was permitted to state his objections. A commissioner was afterwards appointed to examine the accounts. His report is Exhibit XI, dated the 8th July 1901. This was not favourable to the plaintiff: while its consideration was pending before the District Judge, the plaintiff and the first defendant filed a razinamah (Exhibit PP) in Court. This was accepted by the District Judge on the 22nd April 1902. It was agreed to in this compromise that certain articles in the possession of the plaintiff should be handed over to the first defendant, that the plaintiff should renounce his rights to the joint executorship with the first defendant, and that, in consideration of these terms and of the allegation that the plaintiff had spent monies on behalf of the estate, a mortgage on the trust property should be executed by the first defendant in favour of certain nominees of the plaintiff for the sum of Rs. 6,686. The deed of mortgage was actually executed on the 14th April 1902, eight days prior to the acceptance of the compromise by the Court. (See Exhibit LL).

Plaintiff now sues on this mortgage to recover from the first defendant personally and on the liability of the mortgaged trust properties the amount due to him. The other defendants are the widow, the daughter's sons, and the alienees of some of the mortgaged properties. The first defendant impeaches the mortgage on various grounds. The principal question for decision in this appeal is whether the mortgage is binding on the trust.

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Mr. S. Srinivasa Ayyangar argued that an executor is not competent to compromise the claim of his co-executor and that the mortgage is invalid upon that ground. Mr. Anantakrishna Ayyar relied upon the decision of KEKEWICH, J., in *In re Houghton*(1), and argued that a bona fide composition of the claim of a co-executor stands on the same footing as that of a stranger. This case has neither been followed, nor cited with approval in any of the subsequent cases. The learned Judge bases his conclusion upon the decision of the Court of Appeal in *In re New, In re Leaves and In re Morley*(2). I have read that case carefully and I do not find any support for the proposition laid down by KEKEWICH, J., in that case. The point considered related to the jurisdiction of the Court of Chancery to sanction transactions entered into by trustees which were beyond the powers conferred by the deed of trust but which were for the obvious advantage of the *cestui que trust*. Lord Justice ROMER says at page 545, "of course the jurisdiction is one to be exercised with great caution, and the Court will take care not to strain its powers. It is impossible, and no attempt ought to be made, to state or define all the circumstances under which, or the extent to which, the Court will exercise the jurisdiction; but it need scarcely be said that the Court will not be justified in sanctioning every act desired by trustees and beneficiaries merely because it may appear beneficial to the estate; and certainly the Court will not be disposed to sanction transactions of a speculative or risky character. But each case brought before the Court must be considered and dealt with according to its special circumstances." I do not think this statement of the law supports the view of KEKEWICH, J. On the other hand, the observations of Sir BARNES PEACOCK in *De Cardova* v. *De Cardova*(3) are distinctly against his view. Moreover, the decision of KEKEWICH, J., was under section 21 of the Trustees Act (56 & 57 Vict., c. 53) of 1893, and the pronouncement regarding common law rights is only an obiter dictum. There is nothing in section 92 of the Probate and Administration Act V of 1881 to enable an executor to compromise the claim of the co-executor. Chapter VI dealing with the powers of an executor is silent on the question. I have therefore

(1) (1904) 1 Ch., 622. (2) (1901) 2 Ch., 534.
(3) (1879) 4 A.C., 692.

come to the conclusion that it is not competent under the Act to one executor to compound the claim of his co-executor. Further, in this case, the compromise cannot be said to have been entered into bona fide. I have referred to the circumstances which existed at the time of the razinamah, and they show that the first defendant was anxious to secure powers to himself, and that the plaintiff wanted to get money. Neither of them seems to have had the interests of the trust in his mind. Consequently, if an application were made to a Court to sanction the arrangement, it should have been rejected. The recording by the District Judge of the compromise should not be construed as giving his sanction for it.

Mr. Srinivasa Ayyangar also argued that as probate was taken out by the plaintiff, the first defendant had no status as executor until he was recognised as such by the order of the Court on the 22nd April 1902, and that the mortgage of the 14th April was *ultra vires* of his powers. Under section 4 of the Probate Act, the property of the testator vests in the executors. It was pointed out in *In re Pauley and London and Provincial Bank*(1), that the estate of the deceased vests in all the executors and not only in those who have proved the will or acted in the administration of the estate. Further it is settled law that it is not incumbent on an Hindu executor to obtain probate before acting, although there is nothing to prevent him from taking out probate. Under these circumstances, I cannot agree that section 82 of the Act is a bar to the first defendant acting as representative of the deceased, because the plaintiff had alone obtained probate of the will. Section 92 which empowers only persons who have proved the will or taken out administration to act on behalf of all the executors should be confined to cases where probate is compulsory before dealing with the property. The result of acceding to the contention of Mr. Srinivasa Ayyangar will be this—whereas if no probate had been taken, every Hindu executor can deal with the property of the deceased, the fact that one of them obtains a probate will compel the executor that has not joined in the original application, to apply himself to the Court, if he wants to exercise the powers vested in him. I do not think the language of sections 82 and 92 of the Probate and

(1) (1900) 1 Ch., 58.

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SESHAGIRI AYYAR, J.

Administration Act compels us to give our sanction to such an anomalous position.

On the view that I have taken that the mortgage deed was not executed bona fide and for the benefit of the estate and that it is not competent to one executor to compromise the claims of his co-executor, this appeal fails and the appeal and the suit on the mortgage should be dismissed with costs throughout.

Appeal No. 107 *of* 1911.

This appeal is connected with Appeal No. 106 of 1911. In the present case two plaintiffs representing the public sued under section 92 of the Code of Civil Procedure for the removal of the two executor trustees appointed under the will of Naga Pillai, for an account of the estate and for settling a scheme. The Subordinate Judge settled a scheme for the management and directed the new trustees to discharge the debts payable to the plaintiff (appellant) in the connected appeal. There is no contest now regarding the scheme. But the first defendant (plaintiff in the connected suit) has appealed claiming larger sums of money than has been decreed to him. The plaintiffs have preferred no appeal against the direction to pay the appellant. Before settling the amount due to the appellant, we have to deal with the objection raised by Mr. Srinivasa Ayyangar that, as the claim of the appellant was barred, he is not entitled to any relief in the suit. By Exhibit QQ, dated the 22nd of April 1902, the first defendant ceased to be an executor to the estate of Naga Pillai. It was competent to the Court to revoke the probate granted to him under section 50 of the Probate Act for failure to exhibit an inventory. This was done; but the order says nothing about the right of trusteeship: although for good cause shown, a trustee can be removed from his office, it does not appear that the mind of the District Judge was directed towards this question. Certainly, it was not competent to the co-trustee to purchase the appellant out.

This appellant was a creditor of the estate and he spent his own monies on behalf of the estate. It must be taken that these claims were barred by limitation at the date of the present suit. Mr. Anantakrishna Ayyar's contention is that the appellant has a charge upon the property and has twelve years to enforce that charge under article 132 of the Limitation Act.

This contention is opposed to the decision cited by him—*Peary Mohu Mukerjee* v. *Narendra Nath Mukerjee*(1). It was pointed out in that case that an executor creditor should bring his suit within six years of the accrual of the cause of action, under article 120 of the Limitation Act. There are numerous Indian and English authorities enunciating the same view. No doubt, if he had the estate in his possession, he might claim a right of retainer and might claim a lien upon it. This was laid down in *Trevor* v. *Hutchins*(2), *In re Rhoades*(3) and *Pulman* v. *Meadows*(4). But the appellant had no property of the trust in his possession at the time of the suit. Consequently if he filed a suit for the amounts due to him, he would have been barred by limitation. Does the fact that an account is claimed against him enable him to get a decree for monies actually due? Mr. Srinivasa Ayyangar contended that this is in the nature of a cross claim by the appellant and that he is not entitled to a decree. The question is not covered by any authority. It is true that the remedy to recover the money is barred by limitation. As was pointed out by Mr. Justice PENTIFEX in *Nursing Doyal* v. *Hurryhur Saha*(5): "If the creditor had a lien on the goods of his debtor on a general account, he would be entitled to hold the goods for a debt, the recovery of which was barred by the Limitation Act." I think this principle extends to all cases where there is liability to account whether there is a subsisting lien or not. As I said before, the appellant has not been shown to have ceased to be a trustee, and under section 92, he is liable to be called upon to render an account. He cannot escape liability on the ground that he was not administering the estate from April 1902. If he was under this liability at the time of the suit, he is in equity entitled to the monies that he may be found to have spent on behalf of the trust. I have been able to find only one case as having any bearing on the present discussion and that is *McLaren* v. *Public Trustee, In re Robinson*(6). In that case one of the *cestui que trust* was wrongly overpaid by the executor. In dealing with the claim made by the other *cestui que trust* for recovering it, WARRINGTON, J., held that the suit was barred by

(1) (1910) I.L.R., 37 Calc., 229.
(2) (1896) 1 Ch., 844.
(3) (1899) 2 Q.B., 347
(4) (1901) 1 Ch., 233.
(5) (1880) I.L.R., 5 Calc., 897.
(6) (1911) 1 Ch., 502.

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limitation, but pointed out that in an administration action the bar of limitation will be of no avail. The principle of the decision seems to be that although the remedy by suit may be barred, so long as the right to account subsists between the parties, limitation cannot be pleaded to defeat the adjustment which the right to account gives. In analogy of this case, I hold that as the appellant was under a liability to account to the trust at the date of the suit, he was entitled to all the equities flowing from the taking of the account. The liability should not be separated from the right. Moreover, the plaintiffs in this case have not objected to the decree which has been given in appellants' favour for a portion of the amount sued for and the reasoning of *Kandasamy Chetty* v. *Annamalai Chetty*(1), which precludes the agitation of a question in partial bar of a claim applies. I would therefore disallow the respondent's contention.

The appellant is entitled to the payment of the amount decreed from out of the corpus of the trust estate.

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice Seshagiri Ayyar.

1914. December 9, 10 and 15.

VENKATACHALAM CHETTY (FIRST DEFENDANT), APPELLANT,

v.

A. N. R. M. NARAYANAN CHETTY AND SIX OTHERS (PLAINTIFF NOS. 1 TO 5 AND DEFENDANTS, NOS. 4 AND 5), RESPONDENTS.*

Limitation Act (IX of 1908), art. 89—Agent's liability to principal, suit on—Limitation—Agency, termination of—Indian Contract Act (IX of 1872).

Money is moveable property within the meaning of article 89 of the Limitation Act.

Asghar Ali Khan v. *Khurshed Ali Khan* (1902) I.L.R., 24 All., 27 (P.C.), followed.

Article 89 applies to suits by a principal against an agent for moveable property received by the latter and not accounted for and time begins to run

(1) (1905 I L.R., 28 Mad., 67.

* Appeal No. 184 of 1912.