

APPELLATE CIVIL—FULL BENCH.

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

1917,
August,
10, 13 and
24 November,
14 and 21.

VADDADI SANNAMMA (PETITIONER), APPELLANT,

v.

KODUGANTI RADHABHAYI AND TWO OTHERS
(RESPONDENTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 47, explanation—Abandonment of case against defendant properly impleaded, whether dismissal against such defendant—Madras Proprietary Estates Village Service Act (II of 1894), sec. 17—Madras Hereditary Village Offices Act (III of 1895), sec. 5—Service inam lands—Issue of inam title-deed therefor on one date with notification under section 17 of Madras Act II of 1894 enfranchising the lands at date subsequent to issue of deed—Mortgage of the lands in the interval, whether valid—Transfer of Property Act (IV of 1882), sec. 43, whether applicable to illegal transfers.

Held by the Full Bench:—Where a person has been properly impleaded as one of the defendants in a suit but the suit is dismissed as against him on account of the plaintiff's election to abandon his case so far as it affected that defendant, such a person is a 'defendant against whom a suit has been dismissed' within section 47, Civil Procedure Code.

Krishnappa v. Periasami (1917) I.L.R., 40 Mad., 964, distinguished.

An alienation of village service inam lands in a proprietary estate made after the grant of an inam title-deed of enfranchisement but before the date of the notification contemplated by section 17 of the Madras Act II of 1894 is invalid and inoperative on account of the prohibition contained in section 5 of the Madras Act III of 1895. The alienation being a prohibited and illegal one on the date on which it was made, the subsequent removal of the prohibition by the notification of enfranchisement of the service inam land does not render the alienation valid; section 43 of the Transfer of Property Act cannot be applied to make a transfer valid which on the date on which it was made was prohibited by a statute.

Narahari Sahu v. Korithan Naidu (1913) 24 M.L.J., 462 and *Sri Kakarlapudi Lakshminarayana Jagannada v. Sri Raja Kandukuri Balasurya Prasada Rao* (1915) 28 M.L.J., 650, followed.

Angannayya v. Narasayya (1908) 18 M.L.J., 241, overruled.

APPEAL against the Order of A. T. FORBES, the District Judge of Vizagapatam, in Appeal No. 414 of 1915, preferred against the

Order of N. RAMASWAMI, the District Munsif of Chodavaram, in SANNAMMA
Miscellaneous Petition No. 800 of 1915, in Execution Petition ^{U.} RADHABHAYI.
No. 241 of 1915, in Original Suit No. 384 of 1913.

The facts are given in the ORDER OF REFERENCE of ABDUR RAHIM, J.

Hon. Mr. B. N. Sarma for the appellant.

C. Rama Rao for Narayana Murti for the first respondent.

The other respondents did not appear.

This appeal came on for hearing in the first instance before ABDUR RAHIM and BAKWELL, JJ., who made the following ORDERS OF REFERENCE TO A FULL BENCH.

ABDUR RAHIM, J.—The lands to which the dispute relates appertain to a village service inam and are situate in a proprietary estate. The authorities having decided to enfranchise the inam, the inam title-deed was granted on 18th August, 1906 but the notification spoken of in section 17 of Madras Act II of 1894, fixed 1st April, 1911, as the date from which the enfranchisement would take effect. Between these two dates, i.e., on 23rd January, 1909, these lands described by the mortgagors as 'the enfranchised mirasi and inam lands belonging to us' were mortgaged to the appellant who subsequently in 1915 obtained an ordinary mortgage decree. The first respondent also had a mortgage on the same property and sued to enforce it making the appellant a party; but being advised that a mortgage of service inam lands was unenforceable, he gave up his claim on the mortgage and obtained a simple money decree against mortgagors, his suit being dismissed as against the appellant. The first respondent's decree was in 1914, i.e., before the decree of the appellant. The properties being attached in execution of the former money decree, the latter asked by a petition in the execution proceedings that the lands may be sold subject to his mortgage decree. That petition has been rejected and the appeal is against that order.

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The respondent has taken the preliminary objection that no appeal lies, contending that although the appellant was impleaded as a party to the suit and his name is borne on the decree, he is not 'a party to the suit in which the decree was passed' within the meaning of section 47 of the Code of Civil Procedure, inasmuch as he ceased to be a proper party when the respondent gave up his claims on the mortgage. This proposition

SANNAMMA is laid down by AYLING and KUMARASWAMI SASTRIYAR, JJ.,
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 ABDUR PHILLIPS, JJ., held otherwise in *M. Venkataswami v. K. Chidam-*
 RAHIM, J. *baram*—Second Appeal No. 888 of 1916(2) printed as a foot-
 note to this page. It seems to me with all respect that in
 the former decision sufficient effect has not been given to the
 plain language of the section which is made still clearer by the
 explanation attached to it. The explanation says 'For the
 purposes of this section, a defendant against whom a suit has
 been dismissed is a party to the suit.' Nor can it be said that
 it is the duty of a Court charged with execution of a decree to
 see that a defendant against whom the suit has been dismissed
 was properly made a party or not. Having in view however-
 the conflict of views expressed in *Krishnappa v. Periyaswamy*(1)
 and *M. Venkataswami v. K. Chidambaram*(2), the question
 should be solved by a Full Bench.

Upon the merits section 43 of the Transfer of Property Act
 has been invoked to validate the mortgage in favour of the
 appellant. But it has been ruled by this Court that that section
 has no application to alienations which are prohibited by law on
 the grounds of public policy. The matter is fully discussed by
 the learned Chief Justice in *Sri Kakarlapudi Lakshminarayana*

(1) (1917) I.L.R., 40 Mad., 964.

(2) (1918) I.L.R., 41 Mad., 420 (Footnote).

SADASIWA
 AYYAR AND
 PHILLIPS, JJ. JUDGMENT.—An important question of law as to the interpre-
 tation of section 47 of the Code of Civil Procedure (with the new
 explanation added by the Code of 1908) is involved in this appeal.
 The contention of Mr. Venkataramana Rao for the respondent is that
Krishnappa v. Periyaswamy(1) relied on by the appellant is opposed
 to the Full Bench decision in *Ramaswami Sastrulu v. Kameswa-*
ramma(2) and to the plain language of the explanation to section 47
 of the Code of Civil Procedure and ought not to be followed.

We agree with Mr. Venkataramana Rao's contention and we do
 not think that the anomaly pointed out at page 967 of *Krish-*
nappa v. Periyaswamy(1) is a sufficient reason for overriding
 the plain legislative provision which was apparently introduced into
 the new Code for the express purpose of enacting as law the views

(1) (1917) I.L.R., 40 Mad., 964.

(2) (1900) I.L.R., 23 Mad., 361.

Jagannada v. Sri Raja Kandukuri Balasurya Prasada Row(1) with which I respectfully agree. The same view of the law is expressed in *Narahari Sahu v. Korithan Naidu*(2), *Batchu Ramayya v. Dara Satchi*(3) and *Karri Ramayya v. Villoori Jagannadhan*(4), while a different view prevailed in *Angannayya v. Narasanna*(5). The decision in the last case is in direct conflict with the other decisions, all relating to alienations of service inam lands. And in my opinion the present case cannot be effectively distinguished from these by reason of the fact that on the date of the appellant's mortgage the inam title had been issued though the notification was not issued till long afterwards. When section 17 of Madras Act II of 1894 expressly says that the enfranchisement shall take effect only from the date of the notification, it seems to me that before that date the legal incidents attaching to the property including its inalienability remained unaltered. It could not be said that by issuing the title-deed the Government bound itself by way of contract to issue the notification, though the notification was certain to issue in ordinary course and in the latter sense it would be right to say that this expectation of the inam holder was not a 'mere possibility.' If the mortgagee could not rely on any contract in favour of the mortgagor, I find it still more difficult to say that the inam title-deed by itself created some sort of inchoate interest in the property free from all restraint of alienation,

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(1) (1915) 28 M.L.J., 650.

(2) (1913) 24 M.L.J., 462.

(3) (1913) 14 M.L.T., 430.

(4) (1915) 18 M.L.T., 360.

(5) (1908) 18 M.L.J., 247.

expressed in the decisions of the Bombay and Madras High Courts on the old section 244 (corresponding to the present section 47) and embodied in the Full Bench decision in *Ramaswami Sastrulu v. Kameswaramma*(1) and of overruling by statutory enactment the decisions contra of the other High Courts on the question whether a defendant whose name appears in the decree without having been struck off previously from the record is a party with respect to whom the prohibition of a separate suit enacted in section 47 (old section 244) applies notwithstanding that he had been exonerated by the decree passed in the suit without an adjudication on the controversial questions between him and the plaintiff.

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The second appeal is therefore dismissed with costs.

(1) (1900) I.L.R., 28 Mad., 361 (F.B.).

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although the Act says that the enfranchisement shall have no effect except from the date of notification. But as there is a conflict of decisions on the applicability of section 43 to village service inams I think this question also should be referred to the Full Bench.

I would therefore refer the following questions to a Full Bench for OPINION :

(1) Is a person who was impleaded as a defendant in a suit and against whom the suit is dismissed by the decree, a party to the suit in which the decree was passed within the meaning of section 47 of the Code of Civil Procedure, if the dismissal of the suit against him was due to the fact that at the trial the plaintiff abandoned that part of his claim by reason of which the defendant would be a proper party to the suit ?

(2) Is a mortgage of village service inam lands in a proprietary estate executed after the grant of the title-deed of enfranchisement but before the date of the notification contemplated under section 17 of the Madras Act II of 1894 valid and operative ?

BAKEWELL, J. BAKEWELL, J.—By section 17 of the Madras Proprietary Estates Village Service Act, 1894, the Government was empowered to enfranchise lands granted as remuneration of a village office from the condition of service, but 'such enfranchisement' was declared to 'take effect on or after the date fixed in the notification issued under section 19 for the levy of a village service cess.' That is to say the Government might perform the act constituting an enfranchisement but its operation was suspended until provision had been made for the remuneration of the services on which the land had been previously held. The holder of the office therefore retained the land on the former tenure until such provision had been made, but he acquired a further interest in the land which on the occurrence of the prescribed event would ripen into an absolute interest. In my opinion such an interest is assignable, and is not a mere possibility of a like nature with a chance of an heir-apparent succeeding to an estate or the chance of a relation obtaining a legacy on the death of a kinsman within the meaning of section 6 of the Transfer of Property Act, 1882, since it would become an absolute interest in the ordinary course of business.

In the present case the holder of the lands, after the execution of a deed of enfranchisement but before a notification had been

issued by Government for the levy of cess, purported to transfer by way of mortgage 'enfranchised mirasi and inam lands' held on service tenure, and I think that this was a transfer of the inchoate interest which I have described. The transfer could not operate to convey the subsisting interest in the lands in so far as it consisted of a service tenure (Madras Act III of 1895, section 5), but on the issue of the notification that interest became extinguished and the interest which passed under the mortgage became absolute, without any further act of the parties. The petitioner had therefore a valid security and was entitled to apply to the Court that an attachment of the lands should be declared subject thereto.

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The decree under which the attachment was issued contains the name of the petitioner as party defendant, and recites the plaintiff's claim as being for a sum due on a mortgage and the decretal portion directs that the suit be dismissed as against the petitioner. The petitioner was a proper party to the suit as framed and the form of the decree was due to the relinquishment by the plaintiff of his claim under his mortgage and his acceptance of a simple money decree. The case in my opinion falls precisely within the explanation to section 47 of the Code of Civil Procedure, and the petitioner was a party to the suit and this appeal accordingly lies.

Having regard to the differences of opinion mentioned by my learned brother, I agree that the questions framed by him should be referred to a Full Bench.

ON THIS REFERENCE—

Hon. Mr. *B. N. Sarma* for the appellant.—An appeal lies as I was a party to the suit; see explanation to section 47, Civil Procedure Code. There is no statutory prohibition on the Government from alienating their reversionary interest to come into effect from the date of the notification. That is the reason for the wording in section 17 of the Madras Act II of 1894. The prohibition is only on the service holder. The inam title-deed is equivalent to an assignment of the Government revenue in return for a quit-rent and the party can mortgage the same.

[*WALLIS, C.J.*—The inam title-deed does not purport to grant the reversionary interest of the Government, nor does

SANNANMA the deed purport to free from liability to service whatever was
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 RADHABHAYI. the service inam, viz., the melwaram or kudivaram or both.]

BAKEWELL, J. It has not been ascertained in this case whether kudivaram was also subject to service. If it was not so subject, it could have been validly alienated. Even supposing both the warams, i.e., the lands themselves were subject to service, there can be a valid mortgage of the lands as from the date of freedom from service; see section 43 of the Transfer of Property Act. *Narahari Sahu v. Korithan Naidu*(1) is against me and it is followed in other cases. *Angannayya v. Narasanna*(2) is in my favour.

P. Narayanamurti for the first respondent was not called upon.

The other respondents did not appear.

This appeal coming on for hearing the Court expressed the following OPINIONS:—

WALLIS, C.J. WALLIS, C.J.—I am clearly of opinion that, when a party has been properly impleaded as one of the defendants in a case and the case as against him would have proceeded to judgment but for the fact that the plaintiff elected to abandon part of his case and the suit was in consequence dismissed as against such defendant, he is 'a defendant against whom a suit has been dismissed' within the meaning of the explanation to section 47, Civil Procedure Code. The case which came before the Court in *Krishnappa v. Periyaswamy*(3), of a misjoinder of causes of action and of the plaintiff being required to proceed with one cause of action only and the suit being dismissed as against the defendants who had been joined in respect of the other cause of action only, may possibly stand on a different footing, as to hold that the cause of action which the Court was prohibited from trying may be gone into in execution by virtue of section 47, goes far to defeat the prohibition of joinder, and such a construction of section 47 should therefore be avoided if it is possible to do so. As that question is not before us, I express no opinion upon it, and will only say that the proper course in these cases appears to be for the Court to exercise the power, which it now has under Order I, rule 10 (2),

(1) (1913) 24 M.L.J., 462.

(2) (1908) 18 M.L.J., 247.

(3) (1917) I.L.R., 40 Mad., 964.

of ordering at any stage of the proceedings, the name of a defendant improperly joined to be struck out, instead of dismissing the suit as against him. That will, as held by the Full Bench in *Kamaswami Sastrulu v. Kameswaramma*(1), have the effect of taking him out of the operation of section 47 which ought not to apply to him seeing that he has no real concern with the suit. I would answer the first question in the affirmative.

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As regards the second question, under section 4 of the Madras Hereditary Village Offices Act, III of 1895, the word 'emoluments' includes 'lands and assignments of revenue payable in respect of such lands,' and according to the finding the emoluments in this case included both the lands and an assignment of revenue arising out of them. Under section 5 these emoluments are 'not liable to be transferred or encumbered in any manner whatsoever,' reproducing in substance the provisions of Regulation VI of 1831 which made such alienations null and void. Section 17 of the Madras Proprietary Estates Village Service Act, II of 1894, provides that:

"if the remuneration of a village office consists in whole or in part of lands, or assignments of revenue payable in respect of lands, granted or continued in respect of or annexed to such village office by the State, the Government may enfranchise the said lands from the condition of service by the imposition of quit-rent,—and such enfranchisement shall take effect from such date as Government may notify."

Government in this case issued an inam title-deed which recited that the inam consisted of an assignment of land revenue and commuted its right to resume the assignment in consideration of payment to Government of a quit-rent in addition to the existing jodi payable to the proprietor. It said nothing about the enfranchisement of the inam or the lands from the condition of service and they remained liable as before, and continued to form the emoluments of the village office until the issue of the notification which was after the date of the alienation now in question. The lands therefore continued subject to the prohibition against the incumbrance in any manner whatsoever, and the alienation in question was undoubtedly

(1) (1900) I.L.R., 23 Mad., 361 (F.B.).

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void at the time it was made. As pointed out in the ORDER OF REFERENCE, there is a conflict of decisions in this Court as to whether the subsequent enfranchisement has the effect of validating such alienations. In 1907 it was held by WHITE, C.J., and MILLER, J., in *Angannayya v. Narasayya*(1), that, though the transfer was null and void under Regulation VI of 1831, yet after enfranchisement the transferee was entitled under section 43 of the Transfer of Property Act to require that the transfer should operate on the alienable interest subsequently acquired by the transferor. No authority was cited, and the original illegality of the transfer was not referred to. On the other hand, in *Narahari Sahu v. Korithan Naidu*(2) it was held on similar facts by SUNDARA AYYAR and BENSON, JJ., that section 43 has no application to cases where the transfer is forbidden by law on grounds of public policy, referring to *Ramasami Naik v. Ramasami Chetti*(3). This case was approved and followed in *Batchu Ramayya v. Dara Satchi*(4) and *Karri Ramayya v. Villoori Jagannadhan*(5). The decision in *Ramasami Naik v. Ramasami Chetti*(3), on which reliance was placed, has since been followed in *Sri Kakarlapudi Lakshminarayana Jagannada v. Sri Rajah Kandukuri Balasurya Prasada Row*(6). We have not been referred to any English decisions pointing the other way, and on the whole I think the sound position for us to proceed on is that no equities arise out of a transaction which is prohibited by law on grounds of public policy. The present case no doubt differs from the earlier cases because the transfer by way of mortgage purported to be of 'enfranchised mirasi and inam lands' and was made after execution of the inam deed by which a quit-rent was imposed on the lands, a step which was intended to be followed, and was followed at an early date, by a publication of the notification enfranchising the lands. The transfer was none the less illegal when it was made, and on the whole I do not think there are sufficient reasons for departing from what I understand to be the general rule especially in the absence of English authority in point. In *Bettesworth v. Dean of St.*

(1) (1908) 18 M.L.J., 247.

(3) (1907) I.L.R., 30 Mad., 255.

(5) (1915) 18 M.L.T., 360.

(2) (1913) 24 M.L.J., 462.

(4) (1913) 14 M.L.T., 430.

(6) (1915) 28 M.L.J., 350.

Paul's(1), which is referred to by Lord MACNAGHTEN in *Tailby* v. *The Official Receiver*(2), where a covenant in a lease to renew for ninety-nine years which was lawful when made was rendered illegal by subsequent statutes, it was held by the House of Lords, that, as the statutes permitted leases for forty years, specific performance by executing a fresh lease for forty years might be decreed, but in that case the original agreement was lawful, and it does not cover the present case where the transaction was illegal at the time it was entered into. As regards the second question my answer is that the transfer was clearly illegal and inoperative when it was made and did not become operative on the subsequent enfranchisement of the lands.

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SADASIVA AYYAR, J.—I agree with my Lord in the answers to be given to the two questions referred to us.

SADASIVA
AYYAR, J.

KUMARASWAMI SASTRIYAR, J.—I agree.

KUMARA-
SWAMI
N.R. SASTRIYAR, J.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Ayling, Mr. Justice Coutts Trotter and
Mr. Justice Kumaraswami Sastriyar.*

PANDIRI VEERANNA (PLAINTIFF), APPELLANT,

v.

GRANDI VEERABHADRASWAMI *alias* VEERABHADRUDU
(SECOND DEFENDANT), RESPONDENT.*

1917,
September,
28,
October 1 and
1918,
February 20.

Limitation Act (IX of 1908), ss. 21 (2), 19 and 20—Partnership—Acknowledgment of liability or payment by one partner, when binding on others.

Direct evidence that one of several partners or co-contractors had authority to acknowledge liability or make payments so as to save limitation as against his partners or co-contractors is not necessary, but such authority can be inferred from surrounding circumstances such as the position of other co-contractors or partners.

Valasubramania Pillai v. S. V. R. R. M. Ramanathan Chettiar (1909) I.L.R., 32 Mad., 421 and *Shaik Mohideen Sahib v. The Official Assignee of Madras* (1912) I.L.R., 35 Mad., 142 at p. 145, considered.

(1) (1728) 1 Bro. P.O., 240.

(2) (1888) 13 A.C., 523 at p. 552.

* Appeal No. 843 of 1916.