Raman Nair v. *Vasudevan Namboodripad*(1), and *Gopalan Nair* v. *Kunhan Menon*(2), were cases of Kanom mortgages which were held to be anomalous mortgages and to have been governed by the usage of the district.

In *Visvalingam Pillai* v. *Palaniappa Chetty*(3), the principle underlying section 98 was expressly recognized. In *Srinivasa Ayyangar* v. *Radhakrishna Pillai*(4), the learned Judges impliedly held that, if the mortgage in question was not covered by section 58, there will be no right of redemption. *Hakeem Patte Muhammad* v. *Shaik Davood*(5) is an express decision on the point. *Badal Molla* v. *Chemai Mondal*(6) is another to the same effect.

I do not think that such a large number of decisions should be overruled. I am inclined to think that they rest upon the basis which was outlined by the Judicial Committee in *Pattabhiramier* v. *Vencatarao Naicken*(7). If in a given case, there is a likelihood of hardship, it is for the legislature to intervene.

I am therefore of opinion that *Hakeem Patte Muhammad* v. *Shaik Davood*(5) is right and that the mortgagor is not entitled to claim redemption in cases of anomalous mortgages.

K.R.

APPELLATE CIVIL FULL BENCH.

Before Sir John Wallis, C.J., Mr. Justice Coutts Trotter and Mr. Justice Krishnan.

JAINAB BIBI SAHEBA (FIRST DEFENDANT), APPELLANT,

v.

HYDERALLY SAHIB AND THREE OTHERS (PLAINTIFF AND DEFENDANTS NOS. 2 TO 4), RESPONDENTS.*

1920. March, 25.

Evidence Act (I of 1872)—Admissibility of evidence recorded in a previous proceeding—Consent of parties.

Evidence recorded in a previous judicial proceeding between the same parties is made admissible in a subsequent proceeding, by the consent of both parties.

Sri Rajah Prakasarayanim Guru v. *Venkata Rao* (1915) I.L.R., 38 Mad., 160, approved.

(1) (1904) I.L.R. 27 Mad., 26.
(2) (1907) I.L.R., 30 Mad., 300.
(3) (1898) 8 M.L.J., 113.
(4) (1915) I.L.R., 38 Mad., 667.
(5) (1916) I.L.R., 39 Mad., 1010.
(6) (1917) 40 I.C., 894.
(7) (1870) 13 M.I.A., 560.

* Appeal No. 3 of 1919.

JAINAB BIBI SAHEBA v. HYDERALLY SAHIB.

Ponnuswami Pillay v. *Singaram Pillay* (1918) I.L.R., 41 Mad., 731, overruled.

APPEAL from the decree of K. KRISHNAMACHARYA, Temporary Subordinate Judge, Masulipatam, in Original Suit No. 88 of 1916.

The plaintiff in the present suit is the brother of one Roshan Ali Sahib of Gudur, since deceased, and he brought the suit for recovery of one-fourth of the latter's properties at his death. First defendant is the daughter of the deceased Roshan Ali, second defendant is his sister and defendants Nos. 3 and 4 are his widows. Fourth defendant previously brought another suit for her one-sixteenth share of the deceased's properties and obtained a decree therein. The present plaintiff was fourth defendant in that suit, and asked for a decree for his share also, but as he did not pay the proper court fees in time he was referred to a fresh suit. The facts of the present suit are practically the same as those of the earlier suit, except that some more properties are claimed to belong to the deceased Roshan Ali.

In paragraph 9 of his judgment the learned Subordinate Judge says :

"In the present suit, the parties have agreed that the evidence oral and documentary, recorded in the former suit of the fourth defendant, Original Suit No. 24 of 1914, should be treated as evidence in this suit as well, as the main issue in the latter, i.e., that relating to the alleged Hibba of Roshan Ali, is the same as the main issue in the former and the evidence adduced in the former suit has to be recorded herein as well. Defendants Nos. 1 to 3 have, however, supplemented their above evidence in the former suit by some fresh oral and documentary evidence now, . . . while the plaintiff has contented himself with adducing some documentary evidence . . . ."

A preliminary decree was given for the one-fourth share of the plaintiff. First defendant appealed and one of the grounds of appeal was that

"The lower Court acted illegally in treating the evidence recorded in O.S. No. 24 of 1914 as evidence in this suit . . ."

The appeal coming on for hearing before OLDFIELD and KRISHNAN, JJ., their Lordships made the following

ORDER OF REFERENCE TO A FULL BENCH.

The greater part of the evidence in this case was taken in a previous judicial proceeding to which the same persons were

parties and in which the same main issues were raised. That evidence was admitted by the lower Court by consent. The first point taken here is that it was inadmissible. Authority on the question is conflicting in *Ponnuswami Pillay* v. *Singaram Pillay*(1), *Sri Rajah Prakasarayanim Garu* v. *Venkata Rao*(2) and *Krishna Reddy* v. *Sundara Reddy*(3). We therefore refer to a Full Bench the question whether such evidence is admissible.

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ON THIS REFERENCE—

P. Somasundaram, for the *Advocate-General*, for appellant. I submit that the evidence is inadmissible. Such evidence can be admissible only when it satisfies any of the provisions of section 33, Indian Evidence Act. Evidence taken in another case is hearsay: see Stephen's Digest of the Law of Evidence, *Ponnuswami Pillay* v. *Singaram Pillay*(1) is in my favour.

P. Narayanamurti for the first respondent. *Sri Rajah Prakasarayanim Garu* v. *Venkata Rao*(2) and *Krishna Reddy* v. *Sundara Reddy*(3) are both in my favour. See also *Ramaya* v. *Devappa*(4) and *Lakshman* v. *Amrit*(5) *Ex parte Bottomley*(6) and *Reg* v. *Bertrand*(7) were also referred to.

OPINION.

WALLIS, C.J.—The decision in *Ponnuswami Pillay* v. *Singaram Pillay*(1) that the consent of the parties to a suit cannot make admissible the evidence given in a previous judicial proceeding between the same parties where some of the issues were the same was based mainly on the provisions of sections 165 and 33 of the Indian Evidence Act. Section 165, which enables the presiding Judge to ask any questions, 'about any fact relevant or irrelevant' contains a proviso, 'that the judgment must be based on facts declared by this Act to be relevant and duly proved.'

WALLIS, C.J.

The effect of this section merely is that, while the presiding Judge in the course of the trial may ask questions about irrelevant

(1) (1918) I.L.R., 41 Mad., 731. (2) (1915) I.L.R., 38 Mad., 160.
(3) (1914) M.W.N., 931. (4) (1906) I.L.R., 30 Bom., 109.
(5) (1900) I.L.R., 24 Bom., 591. (6) [1909] 2 K.B., 14.
(7) (1867) L.R., 1 P.C., 520.

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facts, including under the scheme of the Act statements made to the witness by other parties or hearsay, he must base his judgment upon facts, which are relevant to the issues and are duly proved. It does not throw any light on the question, what facts should be considered to be duly proved. Section 33, which occurs under the heading 'Statements by persons who cannot be called as witnesses' provides that "evidence given by a witness in a judicial proceeding is relevant for the purpose of proving in a subsequent judicial proceeding the truth of the facts which it states" in the circumstances set out in the rest of the section. As pointed out in AMIR ALI and WOODROFFE'S Commentaries, the word 'relevant' as used in the Act is equivalent to 'having probative force', and the effect of the section is to make the evidence admissible in the circumstances specified, independently of the consent of the parties. Though differently worded this section has really much the same effect as Order XXXVII, rule 3, of the Rules of the Supreme Court, which enables the Court to order evidence taken in another case to be read. This is in accordance with the old Chancery practice which is stated as follows in Daniel's Chancery Practice, Chapter XII, section 2 (1), page 515:

"Evidence taken in another Court may be read in a cause on production of a copy of the pleadings if the two suits are between the same parties or their privies, and the issue is the same; and such depositions are admissible in evidence in the former cause," citing *Williams* v. *Williams*(1). Such orders are only made in cases similar to those specified in section 33, but if the Court could make such depositions admissible even without the consent of parties, the case for admitting them by consent is even stronger. Rules 1 and 18 of Order XXXVII, which require the examination of the witnesses to be viva voce in open Court, except in cases where proof is to be made by affidavit or evidence taken on commission to be admitted, and provide that these two modes of proof shall not be adopted except in the cases specified, both contain a saving clause enabling it to be done in any case by the consent of parties. This is a recognition of the principle that such matters may properly be regulated by the consent of the parties.

(1) (1864) 12 W.R., 663.

The admission by consent of evidence taken in other cases raising the same issues is of daily occurrence in England, and must now be taken to be the settled practice which is the law of the Court. If there is not much direct authority on the point, that would appear to be because it has never been seriously questioned. In *Conradi* v. *Conradi*(1), a divorce suit in which a new trial had been ordered, the question arose whether according to the practice of that Court the Judge's notes of the deposition of a witness at the earlier trial, who had since died, could be read at the second trial except by consent. Lord PENZANCE, who had been a Common Law Judge, observed that he had known of its having been made a condition of granting a new trial that the Judge's notes of the previous trial should be admitted. No such order could have been made except on the footing that the consent of the parties could render the evidence admissible.

There is in my opinion no sufficient reason for holding that a different rule is applicable in India where the practice in cases such as the present is scarcely less well established than in England, and is of such obvious convenience that very strong grounds should be shown for holding it inadmissible. The Indian Evidence Act, it is true, contains no express recognition of the practice, but, neither, so far as I can see, is any such express recognition to be found in Taylor on Evidence. The Indian statute and the English treatises both confine themselves to stating the well established rules of evidence, and do not deal with the question how far the strict requirements of the established rules may be departed from by consent in cases such as this. Far from the practice being opposed to public policy, evidence not taken before the Judge actually deciding the case has been made admissible in India by statute, as pointed out by SUNDARA AYYAR, J., in *Sri Rajah Prakasarayanim Garu* v. *Venkata Rao*(2) in cases where a suit is transferred from one Court to another and where there is a change of Judge in the trying Court owing to death, transfer or other cause. In these circumstances the practice seems to be in accordance with the principle embodied in the maxim '*Unusquisque potest re nuntiare juri pro se introducto*', seeing that it is not only not

(1) (1868) L.R., 1 P. & D., 514. (2) (1915) I.L.R., 38 Mad., 160.

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opposed to public policy but entirely in accordance with it. The trend of the Indian decisions which are referred to by SUNDARA AYYAR, J., is also in its favour, and the judgment of Sir LAWRENCE JENKINS, C.J., in *Ramaya* v. *Devappa*(1) is to the same effect. *Ponnuswami Pillay* v. *Singaram Pillay*(2) must be overruled and the question answered in the affirmative.

COUTTS TROTTER, J.

COUTTS TROTTER, J.—It is clear that in this country neither an omission by an advocate to object to the giving of irrelevant and inadmissible evidence, nor the failure of the tribunal to exclude it of its own motion, will validate a decree based on material which the Evidence Act declares to be inherently and in substance irrelevant to the issue. A wholly different question arises where the objection is not as to the nature and quality of the evidence in itself, but merely as to the mode of proof put forward. I agree that consent can cure what would otherwise be a defective method of letting in evidence in its substance and context relevant and germane to the issues; and that to hold otherwise would not only be contrary to the established practice both in England and in this country, but would prohibit litigants from adopting a method leading to the saving of time and expense, and in itself neither inconvenient nor unjust. I am of opinion, that *Sri Rajah Prakasarayanim Garu* v. *Venkata Rao*(3) was rightly decided, and that *Ponnuswami Pillay* v. *Singaram Pillay*(2) is contrary both to principle and practice.

KRISHNAN, J.

KRISHNAN, J.—This reference raises the question of the correctness of the ruling in *Ponnuswami Pillay* v. *Singaram Pillay*(2). The learned Judges who decided that case held on a construction of sections 33 and 165 of the Indian Evidence Act that in spite of the consent of parties the evidence given by a witness in a former proceeding was not admissible in a later proceeding between the same parties unless the

"conditions prescribed by section 33 of the Indian Evidence Act were found by the trial Judge to exist."

In arriving at this conclusion they expressly declined to follow an earlier ruling of this Court—*Sri Rajah Prakasarayanim*

(1) (1906) I.L.R., 30 Bom., 169. (2) (1918) I.L.R., 41 Mad., 731.
(3) (1915) I.L.R., 38 Mad., 160.

Garu v. *Venkata Rao*(1). With all respect to the learned Judges it seems to me that their view cannot be supported.

As pointed out in *Krishna Reddy* v. *Sundara Reddy*(2), the question involved here is one of mode of proof of relevant facts rather than one of the relevancy of the facts themselves. The former depositions were sought to be admitted as proof of facts relevant to the present case spoken to by the witnesses then. The primary rule to prove relevant facts by the evidence of witnesses is to call them before the trial Judge and examine them *vivo voce* in the manner stated in Chapter X of the Evidence Act. But that rule has several recognized exceptions, such as the examination of witnesses on commission, or the use of affidavits as evidence, the use of evidence taken by one Judge by another, as in cases where a suit is transferred from one Court to another or when there is a change of Judge in the trying Court. One of such exceptions recognized by law is the method of filing the record of evidence of a witness taken in a former judicial proceeding. This is allowed by section 33 of the Evidence Act, subject no doubt to certain restrictions and conditions. These limitations seem from their nature to be intended to protect the opposing party from being prejudiced by such admission as it may interfere with his right of cross-examination and of testing the credibility of the witness. I quite agree that if such evidence is to be admitted against the opposition of a party, the Judge should be satisfied that the conditions and restrictions imposed by section 33 are fully complied with; but I can see no difficulty in holding that a party may waive the benefit of those provisions which are intended for his benefit, at any rate in a civil suit where no question of public policy is involved whatever the position may be in a criminal trial. A civil suit is a proceeding *inter partes* and as parties can by consent settle its final result by having a consent decree passed, there is no reason why they should not be permitted to consent to treat something as evidence of a relevant fact which it may not otherwise be; and when the trial Judge has admitted and acted upon such evidence it is not only proper evidence but the parties ought not to be allowed to object to its admissibility in appeal.

(1) (1915) I.L.R., 33 Mad., 151. (2) (1914) M.W.N., 931.

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KRISHNAN, J.

This view is in accordance with rulings of our Court in *Sri Rajah Prakasarayanim Garu* v. *Venkata Rao*(1) and *Krishna Reddy* v. *Sundara Reddy* (2), and it has also the high authority of Sir LAWRENCE JENKINS in its favour. In *Ramaya* v. *Devappa*(3) that learned Judge says :

"Parties, if so minded, may ordinarily agree that evidence shall be taken in a particular way and it is common experience that parties do agree that evidence in one suit shall be treated as evidence in another. That is not a matter which can be said to affect the jurisdiction of the Court. It is merely that parties allow certain materials to be used as evidence which apart from their consent cannot be so used."

It is also in accordance with the established practice both here and in England and we should not lightly depart from such practice as it tends to the saving of time and expense. Again, where such evidence has been admitted and acted upon by the trying Judge without objection, it is clear from *Lakshman* v. *Amrit*(4) and the authorities cited in it that the Appellate Court should not allow any objection to be taken to the procedure.

The learned Judges in *Ponnuswami Pillay* v. *Singaram Pillay*(5) consider that what they call 'the stringent provisions' of section 165 of the Evidence Act, that is, the first proviso in it, prevent the views above stated from being taken. I agree with the learned Chief Justice that that section has really no bearing on the question before us.

The section is enacted to enable the presiding Judge to ask any question he pleases whether relevant or irrelevant and to order the production of any document or thing which he wishes to have. The provision relied on in *Ponnuswami Pillay* v. *Singaram Pillay*(5) is the proviso to that section ; and as such it has no general application but merely prohibits the Judge from basing his judgment on the facts so obtained by him unless they are relevant and duly proved. It comes into operation only when the Judge has acted under the section.

I therefore agree that our answer to the reference must be in the affirmative and that *Ponnuswami Pillay* v. *Singaram Pillay*(5) must be overruled.

M.H.H.

(1) (1915) I.L.R., 38 Mad., 160. (2) (1914) M.W.N., 931.
(3) (1906) I.L.R., 30 Bom., 109. (4) (1900) I.L.R., 24 Bom., 591.
(5) (1918) I.L.R., 41 Mad., 731.