APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Venkatasubba Rao.

RANGANATHA THATHACHARIAR (FIRST RESPONDENT), APPELLANT,

1923, March 21.

v.

KRISHNASWAMI THATHACHARIAR AND NINE OTHERS (PETITIONERS 1 TO 4, 2, 3, 5, 6, 7 AND 8TH RESPONDENTS), RESPONDENTS.*

Appeal, right of—Suit and decree for scheme of administration of a temple—Order of Court to fill up vacancy amongst trustees in accordance with scheme—Appealability of—Order not one in execution, nor between parties, within section 47, Civil Procedure Code—Order, a judicial order.

Where a plaint prayed only for the settlement of a scheme for the administration of a temple and a decree was passed settling a scheme which *inter alia* provided methods for the appointment of the first set of trustees and for filling up the future vacancies amongst the trustees,

Held that after the framing of such a decree which granted the prayer in the plaint there was nothing more to be done by way of executing the decree. Hence an order by the Court directing the proper authorities under the scheme to fill up a vacancy amongst the trustees is not one passed in execution and is therefore not appealable, though the order passed by the Judge is a judicial one and not one passed by him as a *persona designata*.

Nor is the order passed one between the parties or their representatives within section 47, Civil Procedure Code.

APPEAL against the order of R. GOPALA RAO, Subordinate Judge of Chingleput, in M.P. No. 164 of 1921, in Original Suit No. 11 of 1907.

This was an appeal filed against the order of the Subordinate Judge of Chingleput, under the following

* Civil Miscellaneous Appeal No. 360 of 1922.

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circumstances. Original Suit No. 11 of 1907 was filed in the District Court of Chingleput for settling a scheme for the administration of Sri Devarajaswami Temple at Conjeeveram. A decree was passed by the District Court settling a scheme which was afterwards amended by the High Court in Appeal Suit No. 212 of 1909. The decree so amended provided for the appointment (*a*) of the first set of trustees, (*b*) of a Board of supervision over the trustees, (*c*) for the method of filling up of any vacancy amongst the trustees by certain persons mentioned in the scheme, (*d*) for the appointment of a treasurer and (*e*) for the preparation of annual budgets. One of the trustees originally appointed was said to have resigned his place and this petition, now under appeal, was presented to the lower Court by some worshippers interested in the temple, to give directions for filling up the vacancy. The trustee who was alleged to have resigned opposed the petition on the ground that he did not really resign his place, that a letter of resignation which he had intended to send was not sent by him but was surreptitiously taken from him by somebody and sent to the Board of supervision and that, on knowing the same, he withdrew his so-called resignation. The Subordinate Judge held that the letter of resignation was really sent by the trustee, that the withdrawal was ineffectual as there was no provision in the scheme allowing the withdrawal and as it was sent more than a month after the resignation by which time the resigning trustee ceased to be a trustee according to the provisions of the scheme. As the remaining trustees did not fill up the vacancy within 3 months from the date of the resignation, the lower Court directed in accordance with the scheme, the Board of Supervision, to fill up the vacancy. Thereupon the trustee who was said to have resigned filed this appeal. The scheme framed by the High Court is fully

set out in *Veeraraghava Thatha Chariar* v. *Srinivasa Thatha Chariar*(1).

N. Chandrasekara Ayyar for respondent took a preliminary objection that no appeal lay against the order—(1) as the order was not one passed in execution, (2) as it was not one between parties to the suit and (3) as the order was passed by the Subordinate Judge not as a Court but as a *persona designata*.

C. Krishnamachari for appellant.—An appeal lies for the following reasons. The order is one passed in execution—see *Prayag Doss Ji Varu, Mahant* v. *Tirumala Srirangacharlavaru* (2), *Damodarbhat* v. *Bhogilal* (3). He distinguished *Lokasikhamani Mudaliar* v. *Thiagaroya Chettiar*(4). Every time a vacancy occurs the decree is executable. Matters like this are treated in England as executable under the decree framing the scheme. See Tudor on Charities, page 379, and Lord Romilly's Act. The order must be deemed to be one passed between the parties to the suit, as other persons also can execute such decrees. See *Swaminatha Mudaliar* v. *Kumaraswami Chettiar* (5). The lower Court acted only as a Judge; *Ramaswami Goundan* v. *Muthu Velappa Gounder* (6), *Venkatarama Aiyar* v. *Janab V. Hamid Sultan Maracayar* (7), *National Telephone Company, Limited* v. *Postmaster-General* (8) and *Balakrishna Udayar* v. *Vasudeva Ayyar* (9).

N. Chandrasekara Ayyar for respondent.—As the prayer in the plaint was only for the settlement of a scheme and as that was granted by the decree there was nothing more for the plaintiff to execute and hence there is no appeal; see *Lokasikhamani Mudaliar* v.

(1) (1912) 23 M.L.J., 134.
(2) (1905) I.L.R., 28 Mad., 319.
(3) (1900) I.L.R., 24 Bom., 45.
(4) (1917) M.W.N., 420.
(5) (1923) 44 M.L.J., 282.
(6) (1923) 44 M.L.J., 1.
(7) (1923) 44 M.L.J., 161.
(8) [1913] A.C., 546.
(9) (1917) I.L.R., 40 Mad., 793 (P.C.).

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Thiagaroya Chettiar (1), *Janakirama Reddi* v. *Thiruvenkada Ramanuja Chari* (2). The trustees or other persons such as members of the Board of Supervision or the treasurer to be appointed under the scheme after it is framed can in no sense be regarded as parties to the original suit; nor can they be regarded as their representatives. He explained and distinguished the cases quoted by the appellant. Independently of Lord Romilly's Act, a scheme once framed can be modified in England by a new bill: see *Attorney-General* v. *The City of London* (3), and Tudor on Charities, page 198. The lower Court acted only as a *persona designata*.

OLDFIELD, J.

OLDFIELD, J.—This appeal is against an order passed by the Subordinate Judge's Court, Chingleput, on a petition presented to it under clause (10) of the scheme sanctioned by the decree in A.S. No. 212 of 1909 (on the file of the High Court) for the management of one of the Conjeeveram temples. That petition was presented on the assumption that a vacancy had occurred among the trustees under the scheme and that as it has not been filled by either of the two agencies primarily responsible for filling it, the lower Court must in accordance with the scheme do so. The lower Court held after enquiry that—the point disputed before it—a vacancy had occurred, and directed that it should be filled in the manner provided by the rules framed by the High Court. No more need be said to show that there is no question of failure on the part of the lower Court to exercise jurisdiction or of interference with its action by way of revision. The question is then only of interference as we are asked to interfere in the exercise of our appellate powers and we have

(1) (1917) M.W.N., 420. (2) (1907) 2 M.L.T., 94.
(3) (1790) 3 Bro. C.C., 171; 1 Ves., 243.

accordingly to decide whether an appeal against the lower Court's disposal lies, respondents contending that it does not.

That, it is conceded, depends first on whether the position of the District Court under the scheme, clause (10), is that of a *persona designata* and not of a Court which will, in case its order is appealable under any appropriate provision of law, be subject to our appellate jurisdiction. The test to be applied has been considered fully in a recent decision, *Ramaswami Goundan* v. *Muthu Velappa Goundar* (1), which was followed in *Venkatarama Aiyar* v. *Janab V. Hamid Sultan Maracayar* (2) and there is no necessity to add anything to that statement of the law, except that no distinction can be drawn between the interpretation of an Act, which was then in question and that of the scheme before us. There is accordingly first the consideration that as the procedure to be followed in the Court's exercise of the power conferred by the scheme is not specified therein, the applicability of its ordinary judicial procedure must be presumed and also, as follows from *National Telephone Company, Limited*, v. *Postmaster General* (3), of the law relating to appeals from its ordinary decisions. And next when in accordance with the course taken by the Privy Council in *Balakrishna Udayar* v. *Vasudeva Ayyar* (4) we refer to the position occupied by the Court under clauses of the scheme other than that now under construction, for instance, clauses (13), (48), and (61) and find that its functions thereunder are clearly judicial we must take the same view of the function with which we are now concerned.

If, however, the Court was in this matter acting judicially it is still as respondents contend necessary to

(1) (1923) 44 M.L.J., 1.
(2) (1923) 44 M.L.J., 161.
(3) [1913] A.C., 546.
(4) (1917) I.L.R., 40 Mad., 793 (P.C.).

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see whether its order was one against which under the ordinary law an appeal will lie and that, it is not disputed, depends on whether its order was a "decree" within the meaning of section 2 (2) of the Code of Civil Procedure or more particularly whether it was the determination under section 47 of a question relating to the execution of a decree.

That it was so is alleged on the short ground that the order was passed to give effect to the scheme and that the scheme was prescribed in and is part of the decree. But first that takes no account of the requirement of the latter section that the question determined shall be one arising between the parties to the suit or their representatives. For, in the present case, of the parties to the lower Court's order some at least, respondents 5 to 8, were impleaded only in their capacity as members of the Board of Supervision, which was created only under the decree in O.S. No. 11 of 1907 and of them, 6, 7 and 8th respondents were certainly not parties in any sense and were not even connected with the community to which the plaintiffs therein belonged or with them, even in the representative capacity, in which they sued on behalf of the Thathachar family. And generally it is clear that this requirement of section 47 cannot be regarded as necessarily fulfilled by every Court's order made under the scheme, for it is obvious that this would not be so in the case of an order under clause (48) or clause (61) for the removal from office of a person, who until his appointment had had no connection with the institution and was a stranger to the suit.

There is, moreover, a further and equally substantial objection to the appellant's contention that the question determined by the lower Court does not relate to the execution of a decree. For the relief asked for in O.S. No. 11 of 1907 was simply the framing of a scheme; and,

when that had been done in the decree passed there was no further relief asked for or granted, in respect of which execution could be taken out. That having been the scope of the suit and the decree, there is no ground for the suggestion which in fact appellant's contention involves, that the decree anomalously must be regarded as executable in perpetuity on every occasion on which deviation from the scheme is alleged. True, the scheme provides for the Court's intervention on such occasions. But to assume that it will intervene by way of execution will be to beg the question in issue; and it is material that there is no such explicit provision for enforcement of the scheme in execution as was contemplated in a case to be referred to, *Prayag Doss Ji Varu, Mahant* v. *Tirumala Srirangacharlavaru* (1) the only provision for future control over the trust being general, in clause (64) for the making of rules by the District Court and in clause (65) for the modification by the High Court of the scheme itself.

It is useless, in view of the distinctive characteristics of the Indian law of religious endowments and Indian procedure relating to execution, to refer to English practice or decisions. Appellant relies first on the decision just referred to as enunciating the general principle that directions in a scheme can be enforced in execution by persons interested; but the preceding and succeeding contexts make it clear that the Court was really only formulating a provision in the scheme it was framing. *Damodarbhat* v. *Bhogilal* (2) referred to in the decision just noticed, is no doubt in appellant's favour to the extent that the Court was prepared to treat persons, who had been parties to the decree and who failed to submit accounts in accordance with the scheme prescribed in it,

(1) (1905) I.L.R., 28 Mad., 319. (2) 1900) I.L.R., 24 Bom., 45.

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as in contempt and to compel them to do so by imprisonment or attachment of their property. But this authority was merely mentioned and distinguished in *Lokasikhamani Mudaliar* v. *Thiagaroya Chettiar*(1) and it does not seem to have ever been followed. It is moreover material that in it as appears from *Damodar* v. *Bhat Bhogilal*(2) the taking of accounts was a relief asked for specifically in the suit and granted independently of the framing of a scheme in the Court of first instance, and as there is nothing to show that this part of the decree was altered in appeal, that fact may afford an explanation for the High Court's conclusion. Here when the relief asked for and granted was the scheme alone, there is no reason for holding that the further remedy provided in the scheme need or can be asked for in execution of the decree or that the order granting or refusing it is appealable as one passed under section 47.

On the ground that no appeal lies, the appeal must be dismissed with costs.

VENKATASUBBA RAO, J.

VENKATASUBBA RAO, J.—I entirely agree.

When a suit is instituted in the words of section 92, Civil Procedure Code, to obtain a decree settling a scheme and a decree is passed embodying a scheme the relief sought must so far as the suit is concerned, be regarded to have been finally given and there remains nothing to obtain by way of execution. In a suit for money the decree directs payment of it by the defendant to the plaintiff. To realize the money it may be necessary to execute the decree. Similarly in suits for specific moveables, for recovery of immoveable property, to enforce specific performance of a contract, etc., what is awarded by the decree has to be realized in execution. But where the relief asked is that a scheme may be

(1) (1917) M.W.N., 420. (2) (1898) I.L.R., 22 Bom., 493.

settled by the decree and a scheme has been so settled by the decree, the plaintiffs have obtained all that they have asked and the scheme that is framed by the Court is similar in this respect to a scheme settled out of Court or a scheme contained in a will or an instrument which has made the dedication.

The argument that the application in question was an application in execution, was possible because the particular clause in the scheme under which the application was made, directed an application to the Court and the Court is defined in the scheme as either the Subordinate Court having jurisdiction over the temple or the District Court of Chingleput. But most of the clauses in the scheme make no reference to the Court at all. And can it be contended with any show of reason that the provisions of those clauses can be enforced in execution of the decree? For instance clause (25) of the scheme provides that the trustees shall annually before a certain date prepare a budget for the following year. In the preparation of the budget the trustees are directed to have regard to the custom of the institution. If the budget is not prepared or, in the preparation of it, the custom is disregarded, is the remedy to be by way of execution of the decree? The dereliction or non-compliance may occur fifty or hundred years after the passing of the decree. Clause (42) says that the treasurer shall not keep with him more than Rs. 200 in cash. If he disobeys this direction, how can it be enforced in execution? Clause (54) again provides that the opinion of the Board of Supervision shall be determined by the majority of its members. If the Board on any particular occasion gives effect to the view of the minority, I fail to see how the relief can be got in execution. Dealing with the last mentioned instances, it is obvious that neither the treasurer nor the members of the Board may

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happen to be parties to the suit; most likely they may not. It is impossible to conceive how an execution application lies.

The Court to which the application in question was made happens to be the Court which has jurisdiction to execute the decree passed in the suit. But this is a mere accident. The scheme might have provided that the application was to be made to another Court, a Court not having jurisdiction to execute the decree. As a matter of fact, clause (63) of the scheme provides for an application to the High Court of Madras for disposal of surplus funds and similarly clause (65) contemplates an application also to the High Court for the modification of the scheme. Surely if such applications are made by no stretch of imagination can they be described as execution applications.

Now turning to authority, the only case which may seem to support the contention of the appellant is *Damodarbhat* v. *Bhogilal*(1). But I think it may be distinguished in the manner suggested by my learned brother; if however the case can be said to decide that a decree settling a scheme may be executed, I respectfully dissent from it. *Prayag Doss Ji Varu*, *Mahant* v. *Tirumala Srirangacharlavaru*(2) does no more than merely cite *Damodarbhat* v. *Bhogilal*(1). The question did not arise and the Court was merely concerned with the actual terms of the scheme to be sanctioned. Some reliance was next placed upon *Swaminatha Mudaliar* v. *Kumaraswami Chettiar*(3) decided by SPENCER, J. and myself. The question that arose was whether a decree could be executed by persons other than those on the record. In holding that it could be, we merely reproduced an observation occurring in the judgment in

(1) (1900) I.L.R., 24 Bom., 45. (2) (1905) I.L.R., 28 Mad., 319.
(3) (1923) 44 M. L. J., 282.

Prayag Doss Ji Varu, Mahant v. *Tirumala Srirangacharlavaru*(1) to the effect that persons interested (that is other than those who are on the record) may enforce in execution the directions in a scheme. We were dealing with the question as to who could execute a decree and we held that persons not parties to the suit could also execute it. We were concerned only with the first words of the sentence quoted and we did not intend to decide (and of course there was no occasion for it) whether or not a scheme decree is capable of execution.

I also agree that the Court exercised its powers as a Court of law and not as a *persona designata*: but the appeal was filed and justified on the footing that the order related to execution and could be questioned in appeal under section 47, Civil Procedure Code, and we were not asked to interfere with the order in the exercise of our powers of revision or of superintendence.

With these observations, I agree that the appeal should be dismissed with costs.

N.R.

(1) (1905) I.L.R., 28 Mad., 319.