Abdul Kareem v. *Chukkun*(1), having proceeded on the same basis as the judgment in *Manikkam* v. *Tatayya*(2), should also be held to have been wrongly decided and we therefore refuse to follow it. It would lead to very serious consequences if we should allow the law of *benami* to have any operation with regard to suits and proceedings and records of Court and if only on that ground, it would be desirable to disallow any such contention. We are, however, fortified in that view by the actual terms of the statute; and therefore it follows that the applicant for execution in this case was wrongly granted execution of the decree.

This appeal should be allowed, and the respondent's petition for execution as well as that for bringing himself on the record as transferee decree-holder should be dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Srinivasa Ayyangar.

1924, October 22.

R. ARUNACHALA NAIDU, PETITIONER

v.

BALAKRISHNA & Co., RESPONDENTS. *

Civil Procedure Code (V of 1903), O. XLV, r. 7, provisos 1 and 2—Order to furnish security other than cash or Government bonds, when to be made—"Grant of certificate" in rule 7, meaning of.

An order to furnish security for the costs of the respondent in an appeal to the Privy Council, in a form other than cash or

(1) (1879) 5 C.L.R., 253. (2) (1898) I.L.R., 21 Mad., 388.

* Civil Miscellaneous Petition No. 337 of 1924.

ARUNACHALA NAIDU v. BALAKRISHNA & CO.

Government Bonds can be made only at the time of granting the certificate and not afterwards. "Grant of certificate" in rule 7 of Order XLV, Civil Procedure Code, means the judicial order for the issue of a certificate and not the formal issue of the certificate.

PETITION praying that in the circumstance stated in the affidavit filed therewith the High Court will be pleased to issue an order directing that the petitioner herein may be exempted from furnishing security in cash or Government security and that he may be permitted to offer immovable property as security for the costs of the respondents in C.M.Ps. Nos. 2962 and 2964 of 1924 on the file of the High Court for leave to appeal to His Majesty in Council against the decrees of the High Court in Appeals Nos. 5 and 6 of 1921, preferred against the decrees of the Court of the Subordinate Judge of South Malabar at Calicut, in O.S. Nos. 27 and 28 of 1919, respectively (the Privy Council Appeals having been consolidated as per order of this Court, dated 29th September 1924 and made on C.M.P. No. 966 of 1924).

The facts and arguments appear sufficiently from the judgments.

T. R. Ramachandra Ayyar and *S. Srinivasa Ayyar* for the petitioner.

C. V. Anantakrishna Ayyar for the respondents.

VENKATA-SUBBA RAO, J.

VENKATASUBBA RAO, J.—The petitioner applied for leave to appeal to His Majesty in Council and on the 29th of September 1924, the Court granted a certificate under the first part of rule 3 (1) of Order XLV, Civil Procedure Code. The order granting leave concluded thus :—

> "We therefore certify that as regards amount or value and nature, the case fulfils the requirements of section 110."

On the 7th of October 1924, the petitioner made the present application under the first proviso to rule 7 of

Order XLV, Civil Procedure Code, for being permitted to offer immovable property as security in the place of cash or Government bonds.

Proviso 1 runs thus :—

"Provided that the Court at the time of granting the certificate may, after hearing any opposite party who appears, order on the ground of special hardship that some other form of security may be furnished."

Under the proviso such an application can be made only at or before the time of making an order granting the certificate under rule 7 (1). But it was contended on behalf of the petitioner that section 7 (1) refers not to the granting of a certificate but to the actual issue of the document called the certificate. The Court directs its mind judicially to the question when it makes an order for the grant of the certificate but, if the argument which was advanced before us is correct, there is no provision relating to the passing of such an order. It is impossible to believe that the legislature has enacted several rules dealing with a subsidiary matter—the issue of a formal certificate—and has omitted to provide for what is really a matter of great importance, the making of an order. The question is not whether there may not be an instrument called a certificate as distinguished from the order granting a certificate. A formal document called a certificate may be issued, drawn up in conformity with the order made by the Court. But the Court applies its mind judicially to the matter when it makes the order granting the certificate. The necessary words may, with greater formality, be set forth in the instrument of certificate although such words are not present in the order itself. In this sense, there may be some distinction between the order granting the certificate and the formal certificate issued in pursuance of the order. But the real question is, what is it that

ARUNACHALA NAIDU v. BALAKRISHNA & Co.

VENKATA-SUBBA RAO, J.

is provided for in these various rules? Is it the order granting the certificate or is it the formal issue of the instrument of certificate? Rule 3 provides that the petition for appeal should state the grounds of appeal and pray for a certificate that either as regards amount or value and nature the case fulfils the requirements of section 110 or that it is otherwise (that is under section 109, sub-section *c*) a fit case for appeal to His Majesty in Council. What is the certificate that is contemplated here? Surely it cannot be said that it is not a judicial order certifying that the necessary requirements exist or the case is otherwise a fit one for appeal. How can it be contended that a formal certificate can come into existence without an order of the Court? Rule 6 says, when such certificate is refused, the petition shall be dismissed. When is the petition dismissed? It is when the Court refused to make the required order. If the contention pressed upon us is accepted, this rule becomes meaningless. Then rule 7 provides that when the certificate is granted the applicant shall do certain things. The word "granted" in rule 7 is the opposite of the word "refused" in rule 6. The scope of Order XLV is to provide for passing a judicial order granting a certificate or refusing a certificate. The granting of a certificate is treated as equivalent to allowing the petition and the refusal of a certificate, as equivalent to dismissing the petition. The scheme as well as the scope of Order XLV forbids us from upholding the contention of the petitioner's learned vakil. *Radhakrishn Das* v. *Rai Krishn Chand*(1) which was relied on, does not in the least support this curious contention. When there appeared to be some inconsistency between the order and the certificate, their Lordships considered themselves

(1) (1901) I.L.R., 23 All., 415; 28 I. A., 182.

bound to act upon the latter as being the more formal document, in the same way as Courts give effect to the terms of the decree as distinguished from the operative part of the judgment when there is a conflict between a judgment and a decree. That it could not have been the intention of the Judicial Committee to ignore or disregard the order, is apparent from their later decision in *Radhakrishna Ayyar* v. *Sundaraswamier*(1) where contrasting the order with the certificate which followed it, they referred to the former as the order embracing the actual certificate.

The object of the legislature in enacting the proviso in question is that the matter should be disposed of expeditiously. If the Court merely gives leave to appeal and says nothing more, the appellant is bound in the ordinary course to furnish security in cash or Government bonds. If, however, the appellant is desirous of furnishing a different kind of security, he must apply for a special order to that effect and obtain it simultaneously with the order granting the certificate. This ensures that subsequent to the granting of leave to appeal, no further time is taken up by another application being made. Proviso 2 to rule 7 aims also at the same result. It runs thus :—

"Provided further that no adjournment shall be granted to an opposite party to contest the nature of such security."

"Adjournment" referred to in this, is the adjournment of the petition for the grant of a certificate. The word "petition" is used in rule 2, rule 3, rule 5, and rule 7 and the petition that is throughout referred to, is the petition for the grant of a certificate. Rule 7 refers to the person applying by petition as "applicant" and in the two provisos to rule 7 the words "opposite

(1) (1922) I.L.R., 45 Mad., 475 (P.C.).

ARUNACHALA NAIDU v. BALAKRISHNA & Co.

VENKATA-SUBBA RAO, J.

party" are used to denote the person opposing the petition. The second proviso thus shows that it is only one hearing that is contemplated and that if a different form of security is to be permitted, it is to be done at the time of the granting of the certificate. For these reasons, I hold that the application before us is clearly incompetent and should be rejected. As my learned brother is of the opinion that the applicant should not be made to pay costs, the application will be dismissed without any order as to costs.

SRINIVASA AYYANGAR, J.

SRINIVASA AYYANGAR, J.—The point that has been argued in connection with this application is somewhat subtle and not altogether free from difficulty. The present petitioner before us applied for leave to appeal to His Majesty in Council from the judgment and decree of this Court in Regular Appeals Nos. 5 and 6 of 1921 and by order, dated the 29th day of September 1924, we granted leave and the order made by us granting such leave contained the necessary certificate as required by sections 109 and 110 of the Procedure Code. No application was made to us at or before the time of our making the said order, under the first proviso to rule 7 of Order XLV of the Procedure Code for leave to the petitioner to furnish instead of cash security the security of immovable property. The present application for that purpose has been made only on the 7th of October 1924. I have no doubt that the omission to apply for such an order at the time when leave was granted to the petitioner to appeal to His Majesty in Council was entirely due to the circumstance that the provisos in rule 7 of Order XLV of the Procedure Code and the other amendments carried out in the said rule by Imperial Act XXVI of 1920 were overlooked as they do not appear to have been incorporated in the editions of the Code of Civil

Procedure brought out even after 1920. In such a case therefore where the omission to apply for the relief was entirely due to a mistake of that nature, we should have been disposed to consider the application, if under the provisions of the law, we were entitled to do so. The application has been opposed on behalf of the respondent on the ground that under the express terms of the proviso to rule 7 the Court has jurisdiction to make an order changing the form of the security to be furnished, only at the time of granting the certificate. There is no question here of any extension of time limited for making any application. No doubt if an application was contemplated for the purpose of granting such a relief to an intending appellant to His Majesty in Council and if there was any period of limitation fixed for the making of such application and if the principle of section 5 of the Limitation Act could be made applicable to such an application, there would have been no difficulty. But no such separate application is contemplated or referred to in the Procedure Code, and there being no period of limitation prescribed for any such application, there is no room for the application of the principle of section 5 of the Limitation Act. A limitation with reference to time may in form be either by way of prescribing a period of limitation or by way of conferring or limiting the jurisdiction of the Court. It is a matter entirely of form, and the intention of the legislature has to be gathered only from the form adopted. In Order XX, rule 11 of the Procedure Code the Court is authorized at the time of passing the decree to make an order for the payment of the amount of the decree by instalments, and similarly in Order XXI, rule 11 the Court is empowered at the time of the passing of the decree on the oral application of the decree-holder to order

ARUNACHALA NAIDU v. BALAKRISHNA & Co.

SRINIVASA AYYANGAR, J.

immediate execution of the decree by the arrest of the judgment-debtor, if he is within the precincts of the Court. The proper construction of such provisions has been held to be that the power granted should be exercised, if at all, by the Court only at the time indicated. It may be that the reason may not be clear or satisfactory for the legislature having laid such limitations. But, however, that may be, the construction being clear, we have no right to seek to get behind the rule by any inquiry into the reason of the rule.

It follows therefore that the Court may make an order with regard to the form of the security to be furnished by the appellant at the time of granting the certificate, and not after the certificate has been granted. But Mr. Ramachandra Ayyar, the learned vakil for the petitioners, has argued that the certificate is a document in writing containing a definite statement to the effect that in the opinion of the High Court the matter is a fit one for appeal to the Privy Council; there is a form prescribed for such certificate and the expression "grant of a certificate" could therefore only mean the actual issue and delivery over of such a document in the prescribed form. He has also in this connection drawn our attention to the decision of the Privy Council in the case of *Radhakrishna Das* v. *Rai Krishn Chand*(1). In that case their Lordships of the Judicial Committee have undoubtedly drawn a sharp distinction between the certificate and the order for the certificate. The decision of their Lordships in that case undoubtedly lends considerable support to the contention on behalf of the petitioner. On behalf of the respondent we have also been referred to the

(1) (1901) I.L.R., 23 All., 415.

judgments of their Lordships in the case of *Radhakrishna Ayyar* v. *Sundaraswamier*(1) and also in the case of *Radhakrishna Ayyar* v. *Swaminatha Ayyar*(2) the same case when it came up before the Privy Council at an earlier stage. In the latter case the emphasis laid on the formal certificate issued by the Court would seem no doubt to support the contention for the petitioner, but the judgment in the former case where their Lordships referred to an order for certificate as a certificate and to there being two orders and to one of the orders embracing the actual certificate and so on, undoubtedly introduces an element of confusion. But it seems to me that in spite of the apparent confusion, it is possible to reconcile the judgment in the later case of *Radhakrishna Ayyar* v. *Sundaraswamier*(1) with the judgment in *Radhakrishna Das* v. *Rai Krishn Chand*(3). What the law requires is a certificate by the Court. Being a judicial order, no doubt, it has to be in writing; and there is also no doubt that the granting of a certificate is a judicial act.

The question then resolves itself into this. On a proper construction of rule 7 and the connected rule, when is the granting of the certificate by the Court—Is it at the time when the Court orders the certificate to be issued or is it at the time when the actual document called the certificate is issued by the Court or its officers? The case of *Radhakrishna Das* v. *Rai Krishn Chand*(3) is no decision on the construction of the expression "granting of the certificate." It merely draws a distinction between the certificate on the one hand and the order for the certificate on the other. That distinction is undoubtedly an important and material distinction. The case, however, of *Radhakrishna*

(1) (1922) I.L.R., 45 Mad., 475 (P.C.). (2) (1921) I.L.R., 44 Mad., 293 (P.C.).
(3) (1901) I.L.R., 23 All., 415 (P.C.).

ARUNACHALA NAIDU v. BALAKRISHNA & Co.

SRINIVASA AYYANGAR, J.

Ayyar v. *Sundaraswamier*(1), would seem to show that there is a certificate granted whenever there is a document signed by the proper authority in which the judgment of the Court with regard to either the value of the subject-matter or the fitness otherwise of the case for appeal to His Majesty in Council is set out. In the present case, however, the order of this Court, dated the 29th of September 1924 is not only in substance but in form such a certificate, and therefore it would seem to follow that the Court would have had power to make any order as regards the form of the security only at the time when the said certificate was given. But assuming for the sake of argument that in form the order of the Court, dated the 29th of September 1924 was not a certificate but was merely an order for the certificate, then we have to see whether on a proper construction the expression "at the time of granting the certificate" refers to the formal certificate or to the order for the certificate. Rule 2 of Order XLV prescribes a petition to be filed by the person intending to appeal to His Majesty's Council. Sub-clause 1 of rule 3 sets out that the prayer in the petition should be for a certificate either that, as regards the amount or value and nature, the case fulfils the requirements of section 110 or that it is otherwise a fit one for appeal to His Majesty in Council; and sub-clause 2 of rule 3 prescribes notice of the petition to the "opposite party." Rule 6 states that where such certificate is refused, the petition shall be dismissed; and rule 7 proceeds to lay down what the appellant should do where the certificate is granted.

The reference to the refusal of the certificate in rule 6 and the granting of the certificate in the

(1) (1922) I.L.R., 45 Mad., 475 (P.C.).

opening words of rule 7 would in such juxta-position undoubtedly seem to indicate that the grant or the refusal of the certificate takes place as the result of the disposal of the petition. The granting of the certificate being a judicial act, it ought more appropriately to refer only to the time when the decision of the Court is arrived at with regard to the grant or refusal and not to the time when the formal document is drawn up and issued.

Further on, in the same rule 7, the appellant is required to do and carry out certain matters relating to the appeal to the Privy Council within six weeks from the date of "the grant of the certificate." If the expression "grant of the certificate" means the actual issue of the formal document called a certificate, then the six weeks will have to be computed from such date. But I see no reason in any rule which may be supposed to prescribe that such six weeks should be computed only from the date of the issue of the formal certificate; because if the object of the rule prescribing a period is to avoid delay, then there is no reason whatever why the legislature should be deemed to have postponed the computation of the time from any date other than the date on which the Court to the knowledge of the petitioner grants his application for a certificate.

Further, the second proviso, also newly added to rule 7, lays down that no adjournment should be granted to any opposite party that appears for the purpose of objecting to the nature of the security. The expression "any opposite party that appears" would seem clearly to indicate any such party appearing on the notice to the opposite party referred to in rule 3 of the order, that is to say, in other words it is only any party that appears on the notice to show cause why leave should not be granted to the petitioner to appeal to the Privy

ARUNACHALA NAIDU v. BALAKRISHNA & Co.

SRINIVASA AYYANGAR, J.

Council that is allowed to object at the time with regard to the form or the nature of the security. This again would seem to contemplate beyond all doubt that the whole question with regard both to the granting or refusal of the certificate and the form or the nature of the security should be determined finally by orders made at the same time without any further delay.

It therefore follows that in the present case the certificate having already been granted, what the Court could have done if it was moved properly at the time of the granting of the certificate could not now be done. The petition therefore has to be dismissed, but in the circumstances of the case, it will be dismissed without any order as to costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers (and after finding)

Before Mr. Justice Phillips and Mr. Justice Odgers.

1924, December 19.

KRISHNA SASTRI AND 4 OTHERS (DEFENDANTS NOS. 4, 5, 6, 7 AND 8), APPELLANTS

v.

SINGARAVELU MUDALIAR AND 5 OTHERS (PLAINTIFF, DEFENDANTS NOS. 1 to 3 AND 1ST DEFENDANT'S LEGAL REPRESENTATIVE), RESPONDENTS.*

Service inam, enfranchisement of—Effect of, on title of grantee as against strangers—Adverse possession by strangers as against Government for sixty years.

An enfranchisement by Government of a service inam as distinguished from a personal inam confers a new title on the grantee indefeasible not only by the members of his own family but also by strangers even if the latter had held the office and the inam land before then. But it is open to the latter to prove that the land was not inam at all or that they had before the

* Second Appeals Nos. 287 and 288 of 1921.