well if the practice of this Court in future were not to make orders in this form, but to adopt the procedure which we have suggested.

We are therefore of opinion that this boy, Natha Venkatesa Perumal Chetty, is now a major.

N.R.

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## ORIGINAL SIDE—FULL BENCH.

*Before Sir Murray Coutts Trotter,* Kt., *Chief Justice, Mr. Justice Krishnan and Mr. Justice Beasley.*

1925, October 20.

RAJAH INUGANTI VENKATARAYANIM VARU *alias* VENKATARAMAYYA GARU (PLAINTIFF),

*v.*

W. H. NURSE (DEFENDANT).*

*Order VI-A, rule 62 of Original Side Rules—Suit on negotiable instrument by or against legal representatives of the original parties to the instrument—Summary procedure alone allowed by the rule.*

Rule 62 of Order VI-A of the Original Side Rules (Madras) is mandatory ; hence all suits on the Original Side of the High Court on bills of exchange, hundis and promissory notes whether by or against the original parties thereto or by or against their legal representatives must be laid only according to the summary procedure therein prescribed.

CASE referred to a Full Bench in C.S. No. 720 of 1925, Original Side, at the instance of SRINIVASA AYYANGAR, J.

Rule 62 of Order VI-A is given in the judgment.

The facts are given in the judgment.

*N. Chandrasekara Ayyar* for the plaintiff.—Rule 62 of Order VI-A of the Original Side Rules is mandatory and unlike

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* C.S. No. 720 of 1925.

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Order XXXVII of Civil Procedure Code gives no option to the plaintiff to bring a suit on a negotiable instrument in the ordinary form. The object of the rule being to expedite suits on all negotiable instruments, summary procedure alone is allowed whether the suits be by or against original parties to the instrument or by or against their legal representatives. Article 5 of the Limitation Act applies only to suits under Order XXXVII, Civil Procedure Code, and not to suits under Order VI-A of Original Side Rules. If there is any hardship, then leave to defend should ordinarily be given to the legal representatives. The English practice conforms to Order VI-A. See Bullen and Leake, Eighth Edition, pp. 7 and 126. *Millar and Co.* v. *Keane*(1), *Cockle* v. *Treacy*(2).

*K. S. Narayana Ayyangar* with *G. Ramakrishna Ayyar, amicus curiae.*—Rule 62 refers to Order XXXVII, Civil Procedure Code. Hence the rule must be interpreted as giving an option to the plaintiff to file a suit on a negotiable instrument either under the ordinary form or under the summary procedure. Though a form of summons as for summary procedure is given, no form of plaint as for a summary suit as required by rule 63-A is given. Till such a form is given the suit may be in ordinary form. Order VI-A of Original Side Rules is *ultra vires* in that it takes away the ordinary right of suit. If the object of the rule is expedition, it has not been achieved in that there is no enactment compelling summary suits on the Original Side to be brought within six months. Expediency and convenience point to inapplicability of Order VI-A to suits against guardians, managers, etc., especially in cases whether evidence is required to prove the liability of such defendants on the note or bill; *The Chartered Mercantile Bank* v. *Seconde*(3), *Remfry* v. *Shillingford*(4), *Bhupati Ram* v. *Sourendra Mohun Tagore*(5). These cases go to show that the summary procedure can be availed of only as against original parties and not against legal representatives. The English practice is different. See 1925 Annual Practice, p. 137; Byles on Bylls, 1923 Edition, p. 332.

*N. Chandrasekara Ayyar* in reply, relied on C.R.P. No. 868 of 1921 by AYLING, J. (unreported).

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(1) (1889) 24 Ir.R., 49. (2) (1896) 2 Ir.R., 267.
(3) (1869) 3 Beng. L.R. (O.C.J.), 146. (4) (1876) I.L.R., 1 Calc., 130.
(5) (1903) I.L.R., 30 Calc., 446.

JUDGMENT.

This reference has been necessitated by the judgment of DEVADOSS, J., in C.S. No. 877 of 1923 sitting on the Original Side of the High Court wherein the learned Judge held that under Order VI (*a*) of the High Court Rules of Practice a person suing on a negotiable instrument had an option to bring his suit in the ordinary form or under the summary procedure as he liked, the rules in the Order, though in form peremptory, being in reality only directory and not mandatory; and that a suit by or against the legal representative of a party to a negotiable instrument and not by or against a party himself should be brought as an ordinary suit and not as a summary suit.

On both the above points it seems to us with all respect that the learned Judge's views cannot be supported. Rule 62 of Order VI (*a*) says that the

> "procedure prescribed by Order XXXVII of the First Schedule of the Code of Civil Procedure, 1908, shall be followed in all suits on negotiable instruments with the modifications mentioned in this Order."

Order XXXVII, Civil Procedure Code, no doubt gives an option to bring such a suit either in the summary form or in the ordinary form; for rule 2 (1) thereof says:

> "all suits upon bills of exchange, hundis or promissory notes may in case the plaintiff desires to proceed hereunder, be instituted, etc."

Now it is in this very rule that Order VI (*a*) has introduced a modification; for rule 63 (*a*) thereof which corresponds to it has deleted the words "may, in case the plaintiff desires to proceed hereunder," which are the words giving the option and has substituted for them the word "shall." There can be no clearer indication than that of the object of the framers of the

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rules to take away the option and substitute for it a rigid rule requiring all suits on negotiable instruments to be brought in a summary manner. The form prescribed for the plaint under the rule, namely, Form No. 4 in Appendix B, Civil Procedure Code, is a form adapted only for summary suits and not for ordinary suits. The intention underlying the High Court's Rule was to expedite the disposal of all suits on negotiable instruments and the rule has had a salutary effect in that direction. The very object of the rule will be defeated if we are to hold that in spite of its language there is still an option left to a plaintiff suing on a negotiable instrument to bring his suit in the ordinary form. We hold there is no such option.

In this connexion it may be mentioned that it was feebly suggested that on the view we are taking, the rule would have to be treated as *ultra vires* because it is said that it takes away the ordinary right of suit from a litigant suing upon a negotiable instrument. That may be the effect of the rule but the High Court which framed the rule has full powers to frame rules for regulating its procedure under clause 37 of the Letters Patent under which this rule was framed; and the rule is purely one of procedure and does not affect any substantive rights of parties. This objection is therefore groundless.

The last question is whether suits on negotiable instruments brought not by or against parties to it but by or against their legal representatives are excluded from the scope of Order VI (*a*). On this point there is no difference between the rule under the Civil Procedure Code and the one in Order VI (*a*). They both refer to all suits on bills of exchange, hundis or promissory notes; there is no limitation that the suit should be by or against parties to the instrument. So long as the suit

can be properly described as a suit on a bill of exchange, hundi or promissory note, it can be, and in the High Court it must be, brought in the summary form. A suit on a negotiable instrument by or against a legal representative is still a suit on the instrument and will fall under Order VI (*a*). It is only if any other cause of action is added not based on the instrument that the suit may fall outside the scope of the Order ; if the liability sought to be enforced is solely under the instrument it would not matter whether it is sought to be enforced against a party to the instrument or a legal representative of such a party such as an executor, or administrator, or heir of his. The English practice is in accordance with this view ; there does not seem to be any proper reason to adopt a different rule here. Undoubtedly where summary suits are brought against executors, administrators, or other legal representatives who were not parties to the instrument, the rule as to granting leave to defendants will be liberally interpreted as the learned Judge observes. In such an action unconditional leave to defend will generally be given if the defendant has any reasonable ground for asking that the claim should be strictly proved. That removes any hardship that a legal representative defendant may be put to by the adoption of the summary procedure.

It is argued that summary procedure is not available where apart from the note sued on, other facts have to be proved to make the defendant liable as no evidence is taken in such suits, and *Remfry* v. *Shillingford*(1) and *Bhupati Ram* v. *Sourendra Mohun Tagore*(2) are cited in support of the contention. To meet the objection raised in these cases the law has been changed under the new Code of 1908 by adding to rule 2 (2) of

1 (1876) I.L.R., 1 Calc., 130. 2 (1903) I.L.R., 30 Calc., 446.

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Order XXXVII a provision which says that if leave to defend is not obtained "the allegations in the plaint shall be deemed to be admitted" making it unnecessary to prove them by evidence. The same rule applies under Order VI (a), for it adopts the rules of Order XXXVII unless modified by itself. These decisions are therefore of no force now.

We hold that suits on bills of exchange, hundis and promissory notes by or against legal representatives of parties can and must be brought in the High Court in the summary form.

The case will go back to the learned Judge on the Original Side for disposal. The costs of the reference will be costs in the cause.

N.R.

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## APPELLATE CIVIL—FULL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Krishnan and Mr. Justice Beasley.*

1925, October 27.

SUBBA RAO (DEFENDANT), APPELLANT,

*v.*

LAKSHMANA RAO AND ANOTHER (PLAINTIFFS), RESPONDENTS. *

*Easement by prescription—Assertion of ownership during statutory period—Assertion of ownership during prior legal proceedings—Effect of both on prescriptive easement.*

An easement by prescription is capable of being acquired only if the user during the statutory period had been with the *animus* of enjoying the easement as such in the land of another and not if the user had been in the consciousness of one's own ownership over the same.

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* City Civil Court Appeal No. 67 of 1922.