APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Venkatasubba Rao.

KUPPUSAMY AYYANGAR AND OTHERS (DEFENDANTS 1, 2 AND 11), APPELLANTS,

1926, November 12

v.

BAVASWAMI RAO AND OTHERS (PLAINTIFFS AND DEFENDANTS 3 TO 10, 12 AND 13), RESPONDENTS.*

Civil Procedure Code (XIV of 1882), ss. 458 and 459—New Code, 1908, O. XXXII, r. 11—Guardian ad litem*—Refusal to act as such, whether amounts to automatic removal—Order of Court, whether necessary—Execution proceedings—Notice served on guardian after refusal to accept but without removal by Court—Sale held, whether void for want of representation of minor in execution proceedings.*

The guardian *ad litem* of a minor duly appointed by the Court in a suit, by his declining to act as such, does not automatically cease to be the guardian, without an order of Court removing him from guardianship under sections 458 and 459 of the old Code, 1882, and the minor is consequently not unrepresented in the proceedings in the suit.

Where therefore a guardian *ad litem* appointed in a suit, declined to accept service of notice for the minor in the execution proceedings in the suit, but the Court did not remove him from guardianship and notice was again served on him as such,

Held, that a sale held in execution was not void on the ground that the minor was not legally represented in the proceedings.

C.M.As. Nos. 188 and 224 of 1920 and *Narendra Singh* v. *Chatrapal Singh*, (1926) 94 I.C., 340, referred to.

Krishna Pershad Singh v. *Moti Chand*, (1913) I.L.R., 40 Calc., 635 (P.C.), distinguished.

* Appeal No. 435 of 1922.

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APPEAL against the decree of C. V. VISWANATHA SASTRI, District Judge of East Tanjore at Negapatam, in O.S. No. 4 of 1922.

The material facts appear from the judgment.

T. Ranga Achariyar (with *V. N. Venkatavarada Ayyangar*) for appellants.—The finding of the lower Court on the question of fraud should not be accepted. There was no issue regarding fraud and the defendants were not called on to meet any issue of fraud. Mere suspicion of fraud is not proof of fraud when the defendants were not called on to meet such a case in the absence of an issue therefor.

The sale is not void on the ground that there was no representation of the minor in execution proceedings. Mere refusal of the guardian to act as such does not amount to a discontinuance of his office. The Court must pass an order removing him. It is so both under section 458 of the old Code (Act XIV of 1882) as well as under the new Code of 1908, Order XXXII, rule 11. Unless so removed, the minor is represented by the guardian on record. Removal by Court is necessary: see C.M.As. Nos. 188 and 224 of 1920 (per SPENCER and RAMESAM, JJ.), *Narendra Singh* v. *Chatrapal Singh*(1), *Venkata Chandrasekara Raz* v. *Alakarajamba Maharani*(2) and *Shambhu* v. *Kanhaya*(3). The decision in *Krishna Pershad Singh* v. *Moti Chand*(4) shows that want of representation of a minor by a guardian in execution proceedings is only material irregularity and is matter for an application under section 311, Civil Procedure Code (old Code). It is not a case of illegality making the sale void.

Sales are invalid, either void or voidable as against minors, in three classes of cases:—

(1) Where in a suit itself a decree is passed against a minor without being represented by a guardian or represented by a person who cannot in law be appointed a guardian. The sale held in execution is void in all proceedings.

(2) Where a decree is proper but in execution after the sole judgment-debtor dies, a minor is not joined as legal representative with a proper guardian; here also sale is void.

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(1) (1926) 94 I.C., 340. (2) (1899) I.L.R., 22 Mad., 187.
(3) (1922) I.L.R., 44 All., 619.
(4) (1918) I.L.R., 40 Calc., 685 (P.C.).

(3) Where there are several judgment-debtors and one of them dies, and some of the legal representatives only are brought on the record, the sale is not void but only voidable. The present case falls under the last class. Section 47, Civil Procedure Code, bars the suit, if the sale is void or voidable. If the sale is voidable, it should be avoided under section 47 or Order XXI, rule 90; if it is an illegality that vitiates the sale, section 47 will equally apply; in either case a suit is barred.

Order XXI, rule 22, requiring notice to legal representatives does not apply to this case because (1) all the three judgment-debtors were parties to the suit; (2) because proviso to rule 22 makes it unnecessary to give notice to legal representative, if notice had already been given to him; "same person" does not mean the same person in the same character. The plaintiff here is not even a legal representative of the deceased grandfather, as the plaintiff's father and uncle were alive. The sale is binding on the minor as he was represented in execution proceedings by his father.

The decree against the manager of a joint Hindu family is binding on the minors, even though the minors were parties to the suit but were not properly represented: see *Ganpat Lal* v. *Bindbasini Prashad Narayan Singh*(1). Though a karnavan is joined with anandravans in a suit, the former represents the latter; see *Vesu* v. *Kannamma*(2), *Ganapathy Mudaliar* v. *Krishnama Chariar*(3) and *Payidanna* v. *Lakshminarasamma*(4) are cases where a legal representative was not effectively brought on record.

Where some of the legal representatives are already on record you need not bring them once again as legal representatives; see *Narendra Singh* v. *Chatrapal Singh*(5).

The plaintiff's remedy was only to redeem in the prior mortgage suit. Being a decree under the Transfer of Property Act, it was a final decree for sale and should be executed; see *Mallikarjunadu Setti* v. *Lingamurti Pantulu*(6), *Ellarayyan* v. *Nagaswami Ayyar*(7). The plaintiff should seek his remedy in execution in that suit and a separate suit is not maintainable.

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(1) (1920) I.L.R., 47 Calc., 924 (P.C.). (2) (1926) 51 M.L.J., 282.
(3) (1918) I.L.R., 41 Mad., 403 (P.C.). (4) (1915) I.L.R., 38 Mad., 1076.
(5) (1926) 94 I.C., 840. (6) (1902) I.L.R., 25 Mad., 244 (F.B.).
(7) (1926) I.L.R., 49 Mad., 691.

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T. R. Ramachandra Ayyar (with *A. V. Viswanatha Sastri*) for respondent (plaintiff).—The minor is dropped out of the second notice; he was not made a party and served with notice. (1) If, in a suit, a minor is not represented by a guardian, the decree, etc., are void. (2) If even in execution proceedings a minor is not represented by a guardian, it is still void. The guardian having refused to act, the minor is no party at all. The decision of the Privy Council in *Krishna Pershad Singh* v. *Moti Chand*(1) does not mean that an application under section 311, Civil Procedure Code, was the only remedy. This decision is an answer to all those cases holding that removal of the guardian by Court is necessary under Order XXXII, rule 11, Civil Procedure Code. After the refusal by the guardian to act, there is no representation of the minor. See *Jangi* v. *Mt. Sundar*(2) and *Fatima Begum* v. *Hasan Khan*(3). In a money decree, a guardian appointed in the suit does not continue after decree, for purposes of execution. See *Salahuddin* v. *Afzal Begum*(4). The sale is void, if the minor is not represented in execution proceedings. See *Khairajmal* v. *Daim*(5) and *Raghunath Das* v. *Sundar Das Khetri*(6).

In *Raghunathaswami Iyengar* v. *Gopal Rao*(7), where the legal representative of a puisne mortgagee was not brought on record after proclamation and before sale, it was held that the sale was void and that a suit lies to set it aside. In *Rajagopala Aiyar* v. *Ramanuja Chariyar*(8), it was held that if there was no service of notice in execution proceedings, sale is void even though there were other judgment-debtors and need not be set aside by an application.

T. Rangachariar in reply.—There are two essentials to apply section 47, Civil Procedure Code, viz., (1) Question should relate to execution, etc., (2) Between parties to the suit. *Rajagopala Ayyar* v. *Ramanuja Chariar*(8). Of course if the decree itself is attached, a suit may lie.

The decision of the Privy Council in *Raghunatha Das* v. *Sundar Das Khetri*(6) does not apply here, as the Official

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(1) (1913) I.L.R., 40 Calc., 635 (P.C.).
(2) (1922) All. I.R., 416.
(3) (1922) I.L.R., 3 Lah., 417.
(4) (1924) 39 C.L.J., 590.
(5) (1905) I.L.R., 32 Calc., 206 at 312 and 314 (P.C.).
(6) (1915) I.L.R., 42 Calc., 72 (P.C.).
(7) (1921) 41 M.L.J., 547.
(8) (1924) I.L.R., 47 Mad., 288 (F.B.).

Assignee is not the legal representative of the insolvent judgment-debtor in a money decree.

An application under section 47, Civil Procedure Code, should have been made even if the sale were deemed to be void. The sale is not void but is only voidable and has to be set aside. There is no plea that notice was not issued to guardian on record but the only charge is that no fresh guardian was appointed on plaintiff's application or Court's own motion. The guardianship continues even after decree. See *Venkata Chandrasekhara Raz* v. *Alakarajamba Maharani*(1), C.M.A. 108 of 1920 and Order XXXII, rule 3.

The case in 39 C.L.J., 340, is wrongly decided and is contrary to *Venkatachandrasekhara Raz* v. *Alakarajamba Maharani*(1). *Ganpat Lal* v. *Bindbasini Prashad Narayan Singh*(2) is a direct authority on this point.

JUDGMENT.

VENKATASUBBA RAO, J.—The decree of the lower Court directs that the suit lands shall be partitioned into four equal shares and one of them shall be allotted and delivered to the plaintiff. The decree also gives the latter mesne profits. The first, second and eleventh defendants have filed this appeal.

The facts relevant for determining the points that arise in the appeal lie within a very narrow compass. I find it however necessary and useful, on account of the judgment of the lower Court and the arguments advanced, to refer to and state the facts of the case fully.

One Govindappa had two sons, defendants 12 and 13. The plaintiff is the son of the twelfth defendant. These formed members of a joint Hindu family and owned valuable land of the extent of about 340 acres. They

(1) (1899) I.L.R., 22 Mad., 187. (2) (1920) I.L.R., 47 Calc., 924 (P.C.).

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executed a simple mortgage (Exhibit B of 19th February 1898) in favour of defendants 1 and 2 and one Ramanathan Chetti, the deceased father of the fourth defendant, for securing repayment of Rs. 60,000. Previous to this mortgage a lease had been executed in favour of the eighth defendant for a period of five years (Exhibit A, 28th April 1897). On 31st July 1899, Annamalai Chetti, the agent of Ramanathan Chetti aforesaid, obtained a transfer of the lessors' interest in the lease (Exhibit C). On 4th May 1900 Ramanathan Chetti and the first defendant obtained an assignment of the lessee's (eighth defendant) interest (Exhibit F). The effect of these two assignments was to enable two of the mortgagees, the first defendant and Ramanathan Chetti, to get possession of the properties mortgaged to them by way of simple mortgage. I may mention in this connexion that the second defendant is a High Court Vakil and that the first defendant is his clerk. The next step taken by the mortgagees was to file a suit on 24th September 1900 in the Negapatam Sub-Court (Original Suit No. 38 of 1900) for the recovery of the amount due under Exhibit B. It is sufficient to say that on 19th June 1901 a decree was passed in this suit. Alongside of these events there was another set of transactions that I must now refer to. On 24th August 1898 Govindappa and one of his sons, the thirteenth defendant, executed in favour of Ramanathan Chetti and two others a promissory note for Rs. 200. A suit was filed (Small Cause Suit No. 2632 of 1899 in the Kumbakõnam Sub-Court) and a decree was obtained by the payees under the note against Govindappa, his sons, defendants 12 and 13, and his grandson, the present plaintiff. The decree is Exhibit D, dated 11th December 1899. It is worthy of note that the present second defendant acted as the vakil for the plaintiffs in that suit. The present

plaintiff being then a minor, an officer of the Court was appointed as his guardian *ad litem* in the suit (Exhibit D-1). The decree-holders got the decree transferred for execution on 25th January 1900 to the District Munsif's Court, Tiruvalur, then attached the judgment-debtors' equity of redemption in 33 items (suit items) out of 34 items mortgaged under Exhibit B, brought the said equity of redemption to sale and in the Court auction it was purchased by the ninth defendant, another clerk of the vakil, the second defendant, for Rs. 287-12-0. The date of this sale is 9th July 1901. It is admitted that the ninth defendant obtained this sale *benami* for defendants 1 and 2.

It is these transactions that took place between 1899 and 1901 that are now impeached by the plaintiff. The suit though filed in 1916 has been held to be in time as the plaintiff had only recently attained majority. The lower Court set aside the sale of the 9th July 1901 on the ground *inter alia* that it is vitiated by fraud. I gather that the learned Judge means that there was fraud on the part of the first and second defendants and Ramanathan Chetti. From my narrative, two facts emerge. Although the mortgage was a simple mortgage, two of the mortgagees contrived to get possession by taking an assignment of the lease from the eighth defendant. Next, without executing the mortgage decree, by an ingenious device the mortgagees not only got the equity of redemption sold but two of them became the purchasers of that equity. To complete my sketch, I must mention that on 29th March 1902 Ramanathan Chetti assigned his interest in the mortgage decree to defendants 1 and 2, the vakil and his clerk (Exhibit K). The result of these various complicated transactions is, that by 1902 the second defendant and his clerk managed to get practically an

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absolute title to the suit properties and also obtained physical possession. It would have been a straightforward course to execute the mortgage decree, but this was not done. The second defendant had recourse to every indirect method to get title to and obtain possession of the property. He was the vakil that appeared for the plaintiffs in the suit on the promissory note. The benami purchase by the ninth defendant is again very suspicious. It cannot be denied that the conduct of the second defendant has a very ugly look. There are other suspicious circumstances to which the plaintiff has referred us. There were several execution applications to execute the Small Cause decree and it was in pursuance of an order made on the last of them that the property was sold. In one of the prior applications, the decree-holders applied for leave to bid stating that they were prepared to purchase the property for Rs. 100. The District Munsif made an order to the effect that as the property was at least worth Rs. 24,000 leave to bid on the terms proposed could not be granted. This happened on the 7th of April 1900. Subsequently, the property was put to auction, and the highest bid was that of a thousand rupees. This was more than sufficient to pay off the decree amount but the decree-holders requested the Court to stop the sale and it was accordingly stopped. Having contrived to get the sale stopped on that occasion, they got the property sold again and it was at that sale that the ninth defendant purchased it benami for defendants 1 and 2 for Rs. 280 odd. The last execution application (the one which resulted in the sale is dated 18th March 1901) and in that the decree-holders made a false statement that on the previous occasion there was no bid made for the property at the sale. They thus concealed from the Court the fact that there had been a bid of a thousand

rupees for the property. The plaintiff suggests that the second defendant planned and carried out this fraud, sometimes keeping himself in the background. When in another connexion this matter came up before the High Court, SPENCER, J., referred to the act of the purchasers as a "trick played on the Court" and was of the opinion that the mortgagors were "cheated." In the judgment of the lower Court the learned Judge has characterized the conduct of the second defendant in strong terms and recorded a finding that he was a party to a fraud. I agree that it is impossible not to suspect fraud on the part of the first and second defendants, but the difficulty is that there was no issue regarding fraud and the defendants were not asked to meet any such issue. No application was made for amending the issues or raising a new issue. When the learned Judge was dealing with a mass of material which showed that the conduct of the second defendant was not above board, he overlooked the fact that he was not called on to try a case of fraud and unwittingly gave a finding that the sale was vitiated by the fraud of the first and second defendants. This finding, therefore, cannot be supported.

The facts that have a bearing on the real point to be decided in this appeal, I shall now proceed to state. When the decree-holders applied (as I have said) on 18th March 1901 for sale of the property, the executing Court made the following Order :—

"For sale of attached properties. Notice to 15th April."

Notice was taken out, but none of the defendants was served. The Court guardian of the present plaintiff (the third defendant in that suit) *declined to accept service.* The grounds of his refusal were, that he was an officer of the Kumbakōnam Court, that he was appointed guardian only for the suit and as execution

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was proceeding in a different Court another guardian should be appointed in his place for the minor. The return of the process-server and the endorsement of the Nazir are dated 15th April 1901. When the matter was taken up on that date by the Court, it passed the following Order :—

"Not served. Fresh notice to 30th instant."

We must take it that the words "not served" were intended to refer to all the defendants and that fresh notice was directed to be taken out as against all of them including the minor third defendant (the present plaintiff). It is difficult to say how the Court disposed of the objection of the Court guardian. From what appears on the record, it passed no orders in that respect with the result that the same person continued to remain on the record as the minor's guardian. When in the face of the process-server's endorsement the Court directed fresh notice to the minor defendant, it means and implies that the Court did not feel called upon to remove the guardian on the record and appoint another in his stead. This view receives support from the fact that in subsequent proceedings the minor is described as being represented by the same court-guardian. (See Exhibits II, II-A and 4.) For the plaintiff it is contended that subsequent to 15th April 1901 the proceedings were bad, because he was not represented on the record at all. It is urged that when the guardian *ad litem* declines to act, he automatically ceases to hold the office of guardian and from that moment the minor must be treated as unrepresented. In my opinion, this is the only contention that can be urged in the appeal having regard to the pleadings and the issues. Before dealing with this point, however, I must refer to another contention that has been raised. On the 30th of April the Court made the following

order:—"Served. Absent. Proclaim and sell. Sale 8th July." It is urged that the minor's guardian was not served at all and that the note of the Judge "served" is a mistake. Parts of the record were produced at the trial and they show that the adult defendants were served. There was no paper forthcoming to show that the minor was served. We are asked to infer from these facts that the Court's attention was not directed to the existence of the minor and that when it made a note "served," it had in mind only the major defendants. It seems to me that this is not a question raised in the suit and that we cannot properly go into it. The plaintiff's allegations in the plaint in this respect are—

(1) the Court guardian declined to act in the execution proceedings;

(2) that thereupon the Tiruvālūr Munsif's Court ordered the appointment of a fresh guardian;

(3) the decree-holders, however, wilfully omitted to get a fresh guardian appointed;

(4) irrespective of any order of the Court it was the duty of the decree-holders to have the minor properly represented on the record;

(5) omission in that respect renders the sale null and void.

(See paragraph 3 (*p*) of the plaint.)

The complaint thus is that no steps were taken to get a fresh guardian appointed. It is not suggested that notice was not properly served on the guardian on the record. The defect pleaded being want of a fresh appointment, the allegation implies that the proceedings were not defective in regard to the service of the guardian on the record. The issue framed accordingly reads thus:—

"Whether there has been no representation, at least no proper representation of the minor in the execution proceedings

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in S.C. No. 2632 of 1899 in the Tiruvālūr District Munsif's Court?"

This issue relates to representation only and raised no point regarding service of the notice. There is a presumption in favour of the regularity of the proceedings of a Court, but the plaintiff asks us to say that the Court made a wrong note that the parties were served when one of them was not and we are asked to say this, after the lapse of about twenty years from the date of the order. It is unsafe to surmise or speculate in a matter like this. When the defendants had no notice that they were to meet such a case the Court would not be justified in recording a finding in the absence of an averment and in the absence of an issue. In this case there can be no possible excuse for the plaintiff asking us to read more into his plaint than is actually alleged in it; for, when he applied to sue in *forma pauperis*, the High Court by its judgment, dated 14th October 1919, directed him to amend his plaint in such a manner as to make his allegations clear on the basis of which he contended that the sale did not affect his interest. The plaint, as I have shown, does not contain any allegation that the sale is bad on account of non-service of notice on his guardian on the record.

Having thus disposed of matters which, in my opinion, are irrelevant in this appeal, I shall now deal with the question of law raised, namely, whether when a guardian *ad litem* refuses to act, he by force of his own refusal ceases to be the guardian and the minor thereafter is unrepresented in the proceedings.

The provisions of law applicable are sections 458 and 459 of the Civil Procedure Code, 1882. They provide that if a guardian of a minor defendant fails to do his duty or if other sufficient cause is made to appear, the Court may remove him and if he is removed, the Court shall appoint a new guardian in his place. These

sections do not give any countenance to the idea that a guardian duly appointed, by his declining to act as such, automatically ceases to be a guardian. The provision in the present Code is even more explicit. Order XXXII, rule 11, reads thus:—

"Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit."

The only difference between the two provisions is this, that whereas the old Code does not expressly refer to the case of a guardian desiring to retire, the present Code contains an express provision in that respect. It says that if he desires to retire, the Court may permit him to do so. If the plaintiff's argument is correct, it is unnecessary for the Court to remove a guardian, whereas section 459 contemplates such removal. If a mere statement of a guardian that he declines to act results in an automatic removal, what is the effect of the section which says that the Court may remove him? Is the plaintiff in a case to judge for himself whether a guardian properly appointed has ceased to be such? Taking section 458 it may with equal reason be contended that when a guardian fails to do his duty, in that case also, by force of his own default he ceases to be a guardian. Is a plaintiff in an action to decide in each case at his peril, whether on the facts and in law, a guardian does or does not continue to act? This falls within the functions of the Court and is not left to be decided by one of the parties to the action.

In C.M.As. Nos. 188 and 224 of 1920, SPENCER and RAMESAM, JJ., took the same view. They observe:

"The third defendant's guardian applied under Order XXXII, rule 11 of the Civil Procedure Code, to retire on the ground that the minor had attained majority, but his discharge

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was not complete until the permission of the Court, which is part of the procedure prescribed by rule 11, was given. The sale was closed on the 4th of August 1919 and on the same day the Court passed an order, on the guardian's application, refusing to permit him to retire. The result was that he continued to represent the third defendant and the execution proceedings were not affected by any irregularity in the representation of the parties."

In *Narendra Singh* v. *Chatrapal Singh*(1), a Bench of the Allahabad High Court was of the same opinion. The learned Judges in that case held that a guardian *ad litem* does not cease to be a guardian merely because he expresses a desire to retire from his office and that it is open to the Court to permit, or to refuse to permit, him to retire.

In the present case, the Court guardian stated thus:

"As I was appointed guardian of the minor during the trial of the suit as an officer of this Court and as the decree has been sent to that Court for execution where proceedings are now being taken, I beg that another guardian may be appointed for the minor."

This is a mere suggestion to the Court and there is nothing in it to show that if the Court did not permit him to retire he would decline to act. It is not unlikely that the Court thought that the reason given was not a sufficient reason to permit the guardian to retire. There is thus absolutely no justification for holding that after the 15th April 1901 the plaintiff must be treated as having been unrepresented in the proceedings.

Krishna Pershad Singh v. *Moti Chand*(2), relied on by the plaintiff's learned vakil, is clearly distinguishable. In that case, it was held that the mother of the infant was competent to make an application on his behalf to set aside a sale when a Court guardian duly appointed who was on the record, refused to continue to act in that

(1) (1926) 94 I.C., 340. (2) (1913) I.L.R., 40 Calc., 635 (P.C.).

capacity. It is one thing to say that when the minor's interests are not being safeguarded, somebody other than the guardian on the record can take steps to protect those interests; but it is quite a different thing to hold that an order of Court made in the presence of a guardian not duly removed is invalid and of no effect, merely on the ground that the guardian had previously intimated that he was unwilling to act. This objection of the plaintiff therefore fails.

I may in conclusion say a word regarding the ground of fraud taken by the lower Court. The learned Judge is of the opinion that fraud was brought home to the first and second defendants and the sale is therefore invalid; but it must be borne in mind that the second defendant had, prior to the suit, parted with his interest in favour of a third party and that interest is now vested in the eleventh defendant. It is hardly proper to penalize the eleventh defendant for the fraud of the second defendant without giving the former a chance to meet a case of fraud.

In the result, the appeal is allowed and the suit is dismissed.

As regards costs, I do not think, in the circumstances, that I can allow the first and second defendants any costs. The order of the lower Court directing the first and second defendants to pay the plaintiff his costs of the suit is not disturbed. The suit is dismissed with costs throughout of the eleventh defendant (third appellant). Under Order XXXIII, rule 11, I direct that the plaintiff shall pay the Court fees payable to the Government on the plaint.

KRISHNAN, J.—I agree.

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The Memorandum of Objection is dismissed, but without costs.

K.R.