APPELLATE CIVIL.

Before Sir William Phillips, Kt., Officiating Chief Justice and Mr. Justice Srinivasa Ayyangar.

RAJAGOPALA NAIDU (PLAINTIFF), APPELLANT IN BOTH APPEALS,

1927, October 31

v.

SUBBAMMAL AND ANOTHER (DEFENDANTS), RESPONDENTS IN BOTH.*

Civil Procedure Code, sec. 98.—Appeal heard by two judges of High Court—Judges agreeing on certain matters and differing as to rest—Form of decree in appeal.

On the hearing of an appeal from the mufassal, two judges of the High Court composing the bench agreed (*a*) to vary the lower Court's decree as regards certain items argued in the appeal, and (*b*) to confirm the lower Court's decree as regards some other items but (*c*) differed as to the rest.

Held, that the decree to be passed on the appeal under section 98, Civil Procedure Code, should not be one confirming, as a whole, the lower Court's decree but must be one, in part, in accordance with the agreement of the two judges as to the items agreed upon, and in other respects confirming the decree of the lower Court. Appeal No. 223 of 1920 (unreported), followed. *Punjab Akhbarat & Press Co., Ltd.* v. *C. M. G. Ogilvie*, (1926) I.L.R., 7 Lah., 179, dissented from.

APPEALS against the decrees in Original Suits Nos. 62 of 1918 and 38 of 1920 on the file of the Subordinate Judge's Court of Mayavaram.

The plaintiff in this case charged the first defendant who was the trustee of his estate under a deed of trust executed by the plaintiff's deceased father, with various acts of mismanagement of the trust estate and claimed to recover from the first and other defendants some immovable properties alleged to belong to him and also damages. The first defendant denied the mismanagement and prayed for the dismissal of the suit.

* Appeals Nos. 339 and 459 of 1923.

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The Court of First Instance allowed in part some of the charges and disallowed the rest. The plaintiff filed this appeal and the first defendant filed a memorandum of objections. In the appeal, several items of charge were argued and the two learned judges (PHILLIPS, Officiating Chief Justice and SRINIVASA AYYANGAR, J.) agreed with the finding of the trial Court as to some and agreed to modify the amount of damages payable by the first defendant as regards all other charges but one. The one charge in which they differed related to the question whether the first defendant was in the circumstances of the case justified in filing and conducting Original Suit No. 139 of 1910 on behalf of the plaintiff with a view to recover some immovable properties alleged to belong to the plaintiff. That suit was dismissed as well as the appeal and second appeal therefrom. The trial Court held that the costs incurred by the first defendant in connexion with that litigation were properly debited against the estate. In the appeal, SRINIVASA AYYANGAR, J., agreed with the lower Court. Following *Subramania Iyer* v. *Subba Naidu*(1) and *Turner* v. *Hancock*(2), he *held* "that a trustee was entitled to be reimbursed the moneys which he spends on litigation which he *bona fide* believes to be in the interests of the *cestui que trust*, provided he has not been guilty of serious laches or misconduct . . . even though such expenses might have been avoided if the trustee had exercised due care and attention." PHILLIPS, Officiating Chief Justice, held that "the first defendant was not justified as trustee in bringing this suit and when the suit was dismissed he was still less justified in preferring an appeal and a second appeal and that he was not acting *bona fide* in the interests of the *cestui que trust*." His Lordship therefore disallowed the first defendant the costs of that suit which had been charged by him against the estate. Owing to this difference of opinion, the appeals were posted for hearing as to the form of the decree that should be passed in the case:—

T. V. Muthukrishna Ayyar (with *K. Narasimha Ayyangar*), for respondent.—If the two judges composing the Bench differ even on some points, the result under section 98 (2), Civil Procedure Code, is to confirm the lower Court's decree; for there is no concurrence of the two judges to vary or reverse the decree of the lower Court within the meaning of clause (2); which

(1) (1913) 25 M.L.J., 452. (2) (1882) L.R., 20 Ch.D., 303.

means varying or reversing the decree as a whole; and there is also no single opinion of the two judges on the whole appeal within the meaning of clause (1).

[PHILLIPS, Offg. C.J.—Why not the decree be partly in accordance with the opinion in which we both agree as to certain items, and the rest being confirmatory of the lower Court's decree?]—

The appeal cannot be taken as several appeals, one in regard to one item. If there is no agreement between the two judges on any of the points argued in the appeal, the rule provided by the second clause must be the governing rule; i.e., confirmation of the lower Court's decree must be the rule and its modification or reversal must be the exception; *Manavikraman Thirumalpad* v. *The Collector of the Nilgiris*(1) and *Punjab Akhbarat and Press Co., Ltd.* v. *C.M.G. Ogilvie*(2). The Calcutta case of *Krishen Doyal* v. *Irshad Ali*(3), is not approved of in the above Madras case.

[*V. K. Srinivasa Ayyangar* (with *C. S. Venkatachari*) for the appellant, at this stage referred to Appeal No. 223 of 1920 in support of the above view of PHILLIPS, Offg. C.J.]

That case does not notice the Madras case.

V. K. Srinivasan Ayyangar for appellant was not called upon.

JUDGMENT.

PHILLIPS, Offg. C.J.

PHILLIPS, Offg. C.J.—I have had the advantage of having read the judgment about to be pronounced by my learned brother, in which I concur and will only briefly give my reasons:—

In this case we are agreed in respect of the major portion of the suit claim but have differed in respect of one item. It is now contended for the respondents that under section 98 (2) of the Code of the Civil Procedure the decree appealed from must be confirmed. This contention is based on the language of that section which says,

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(1) (1918) I.L.R., 41 Mad., 913. (2) (1926) I.L.R., 7 Lah., 179.
(3) (1915) 22 C.L.J., 525.

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PHILLIPS, OFFG. C.J.

"Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed."

This is a possible interpretation of that section and has been adopted by the Lahore High Court in *Punjab Akhbarat and Press Co.* v. *Ogilvie*(1). A contrary view was taken by myself and VENKATASUBBA RAO, J., in Appeal No. 223 of 1920 (unreported). To accept the respondent's contention would lead to extraordinary results. I may cite an instance of what might happen. The plaintiff files a suit for 10 lakhs including one claim amounting to 9½ lakhs and another to half a lakh. On the facts his suit is dismissed by the trial Court. In appeal two judges of this Court agree in finding that upon the facts the plaintiff is entitled to a decree for 9½ lakhs, but in respect of the remaining half a lakh there is a difference of opinion. If respondent's contention is correct, the plaintiff's suit would have to be dismissed and inasmuch as no substantial question of law is concerned he would have no right of appeal to the Privy Council. He will thus be deprived of a sum of 9½ lakhs to which two judges of this Court had decided that he was entitled. If therefore, any other interpretation of the section is possible, I think it must be adopted in preference. If we read section 98 (1), I think that the interpretation in Appeal No. 223 of 1920 is clearly the right one. Section 98 (1) reads,

"Where an appeal is heard by a Bench of two or more judges, the appeal shall be decided in accordance with the opinion of such judges or of the majority (if any) of such judges."

Unless the word "opinion" is to be interpreted as meaning the opinion of the judges on the whole case and is not to mean opinion on each of the questions in

(1) (1926) I.L.R., 7 Lah., 179.

issue, it cannot be said that there is no opinion of such judges, when their opinion is in agreement on all questions but one. I see no reason why we should restrict the meaning of the word "opinion" in this manner, for obviously each judge must form an opinion on each question in issue, and when the opinions of the two judges coincide on any question, the decree may be in accordance with that opinion. In respect of the larger portion of the claim before us our opinion is identical and therefore the appeal must be decided accordingly. In respect of the remaining matters we hold different opinions and then the provisions of section 98 (2) become applicable. As there is no majority in respect of the remaining matter the decree must be confirmed. Where there is a concurrent opinion of both the judges, the decree must be in accordance with that opinion. In this view the decree of the lower Court will have to be varied in accordance with our joint opinion and in other respects confirmed.

SRINIVASA AYYANGAR, J.—After the Officiating Chief Justice and myself delivered our respective judgments in these appeals Mr. T. V. Muthukrishna Ayyar on behalf of the respondents raised an important point with regard to the decretal order to be passed as the result of our findings. He contended that on a proper construction of section 98 of the Code of Civil Procedure the proper order to be passed is that both the appeals should be rejected and dismissed and the decision of the lower Court confirmed.

The suits from which these appeals have arisen have been for an account as against an agent and for payment to the plaintiff of what may be found due on the taking of such accounts. The view taken by the lower Court with respect to various separate items of charges had to be canvassed and though I agreed with the learned

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Officiating Chief Justice in respect of nearly all the matters, I took a different view with regard to a single charge relating to the expenses in connexion with a particular litigation.

The argument was that where an appeal is heard by a Bench of two judges, unless both of them agree with regard to every point and the final order to be passed either varying or reversing the decree, the decree of the lower Court should be confirmed, or in other words, that though both the judges should agree to vary the decree in respect of most matters the mere fact that they are unable to agree with regard, it may be, to a comparatively trivial item, still, effect should not be given to their decision even in respect of matters in which they are agreed.

The first observation that falls to be made with regard to such a contention is that it is thoroughly illogical and altogether unreasonable. But if, however, it should turn out that such is the result on a proper construction of the statutory provision in section 98, no doubt it cannot be helped and it must ultimately be left to the legislature to amend it so as to make it logical and reasonable. The question, therefore, is whether the construction contended for is the correct one. The learned vakil for the respondents has referred in support of his argument to the decision of the Full Bench of this Court in *Manavikraman Thirumalpad* v. *The Collector of the Nilgiris*(1). We have carefully examined the same and if we should have come to the conclusion that there was in that case a decision with regard to the matter which can be regarded as binding on us, we should in the view we have taken have felt compelled to refer the matter to the reconsideration of

(1) (1918) I.L.R., 41 Mad., 943.

the Court constituted by a larger number of judges. Though in that case there is an expression of opinion by, at any rate, two of the learned judges in favour of the view now contended for, we are unable to regard such opinion as a decision in the case. The Letters Patent Appeal before the learned judges in that case was dismissed on the ground that no appeal lay, and further with regard to the main matter in controversy there was an agreement arrived at and therefore the *dicta* of the two learned judges were entirely *obiter*. There is no other reported case in Madras to which our attention had been called.

One other case that was cited by the learned vakil for the respondents and strongly relied upon was *Punjab Akhbarat and Press Co., Ltd.* v. *C. M. G. Ogilvie*(1). There is no doubt that the construction now contended for, regarding section 98, Civil Procedure Code, found acceptance with the learned judges in that case. We cannot, however, regard it as binding on us.

The only other reported case that has been referred to in this connexion is *Krishen Doyal* v. *Irshad Ali*(2). There is an expression of opinion by MUKERJEE, J., in his judgment in that case which is against the contention now put forward on behalf of the respondents. But beyond the mere expression of opinion there is not, even by that learned Judge, any detailed examination or statement of the grounds. It follows therefore that it is necessary for us to subject the terms of the section to a close and critical examination with regard to the argument advanced.

Apart from the proviso to section 98 there are two clauses. The first clause is

"Where an appeal is heard by a bench of two or more judges, the appeal shall be decided in accordance with the

(1) (1926) I.L.R., 7 Lah., 179. (2) (1915) 22 C.L.J., 525.

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opinion of such judges or of the majority (if any) of such judges ".

And the second clause is

" Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed ".

The thing that strikes one reading both the clauses side by side is that the expression used in the first clause is "opinion" and in the second clause the expression is "judgment". The provision in the first clause is to the effect that where two or more judges hear an appeal, the appeal should be decided in accordance with the opinion of such judges or of the majority, if any, of such judges. By contradistinction to "majority" in the latter part of the clause we must take it that the expression "opinion of such judges" has reference to unanimity of opinion. The word used in the clause is "opinion" and not "judgment" because when the Court is constituted by two or more judges, the opinions of the judges cannot always be the judgment of the Court. And the first clause therefore merely directs that the disposal of the appeal, that is to say, the effective judgment of the Court, shall be in accordance with the opinion of the judges or a majority of them whenever there is a majority. If there are only two judges, there is no question of majority or minority. Therefore it follows that when there are only two judges hearing the appeal, the disposal of the appeal should be in accordance with the opinion of both the judges. That clearly means that the judgment of the Court in that case shall be in accordance with what both the judges may concur in and agree to. If both the judges do not arrive at the same opinion with regard to any one particular matter in appeal, it follows that the opinion of one or the other of them cannot properly be described

as the "opinion of such judges"; and therefore the result would be that the judgment of the Court in such cases would not cover or comprehend any matters in which each of the judges takes a different view, but will cover and comprehend all matters in which there is an agreement of opinion. If there are three or more judges and the majority of the judges concur in certain opinions, then the decision should be according to such opinions. If for instance there are four judges and in respect of some matters three of them agree and in respect of other matters they are divided equally, two holding one view and the other two taking another view, the appeal is directed to be decided according to the opinion of the majority of the judges in respect of matters with regard to which they concur. That seems to be the reason why the clause speaks of the decision of the appeal and only of the opinion of the judges.

The second clause provides for cases where there is no such majority. The expression "majority" in the second clause undoubtedly includes unanimity, and the clause states that where there is no such unanimity or majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed. The clause does not speak of or refer to the majority concurring in a judgment to confirm the lower Court's decision because according to the scheme of the clause that is the residuary result, if there should be no concurrence with regard to varying or reversing. The expression that is used in the second clause is "judgment" and not "opinion" because the section speaks of varying or reversing a decree and it has therefore to be a judgment of the Court and not merely the opinion of the judges.

Further the other word in the clause namely "concur" in the expression "concur in a judgment"

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really indicates by reference to the terms of the previous clause I, that it is by the concurrence in opinion that the judgment of the Court results and thus therefore we arrive at a concurrence in a judgment.

Having regard to the context, the word "judgment" in this clause should be construed merely as referring to the final decision or in other words to the decretal portion.

The matter might also be tested in a slightly different manner. I have already referred to the fact that the expression "majority" must necessarily be regarded as including unanimity of opinion. If so, if two judges should agree that in respect of certain matters a decree appealed from should be varied or reversed, can it be said that there is no majority which concurs in a judgment varying or reversing? No doubt if the use of the word "judgment" in the second clause in contradistinction to the opinion of the judges in the first clause, should be entirely ignored, then there might be some room for such a contention. If the expression "majority" in the second clause should be limited only to cases where there is a majority and therefore a dissenting majority, then the *reductio ad absurdem* would be that even if three judges sit together and concur in a judgment varying or reversing a decree, the decree should only be confirmed because it is not a mere majority that is in favour of varying or reversing.

The only reasonable construction therefore, having regard to all the terms employed in both the clauses, is that if a bench of two judges should be of the same opinion with regard to varying or reversing a decree with respect to certain matters, there is such a concurrence in a judgment varying or reversing the decree appealed from and therefore the contingency does not arise whereon alone the decree appealed from should be confirmed in its entirety. The opinions of the judges

therefore being contained in the judgments respectively delivered by them, the judgment or decision should be regarded to be confined to and made to comprehend all matters with regard to which they agree to reverse or modify the decree appealed from.

I find that in an unreported case, Appeal No. 223 of 1920, my learned brother and Justice VENKATASUBBA RAO have arrived, even though without any elaborate discussion, at the same view and conclusion with regard to the contention now raised before us.

I have therefore the less hesitation in following the decision in that case. A decree will therefore be drawn up in these appeals varying the decree appealed from in the manner and to the extent both of us have agreed.

[The preceding and subsequent portions of this judgment are not published as they deal with facts.]

N.R.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Srinivasa Ayyangar.

THE MADURA, ETC., DEVASTHANAMS (PLAINTIFFS), APPELLANTS,

v.

THE MADURA MUNICIPAL COUNCIL (DEFENDANT), RESPONDENT.*

1928, Jan. 30.

Madras District Municipalities Act (V of 1920), s. 93 (1)—Profession tax—Devastanam funds, investment of—Interest from investment—Devasthanam, whether liable for profession tax—Professional income, meaning of.

Section 93 (1) of the District Municipalities Act, 1920, deals in its first part with the class of persons to be taxed; the latter

* Second Appeal No. 705 of 1925