APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Odgers.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT), APPELLANT,

1928, March 21.

v.

TRUSTEES OF SRI KUTTALANATHASWAMI TEMPLE (PLAINTIFFS), RESPONDENTS.*

Land revenue—Land classed as "temple poramboke" in settlement register, meaning of—Prerogative right of the Crown to assess lands to revenue.

In the absence of a statute or agreement to the contrary, the Government has a prerogative right to levy land revenue on all lands in the country. The description of a land as "temple poramboke" in a settlement register without describing the temple as its owner does not connote either that the temple is its owner or that the Government impliedly agreed not to levy any land revenue thereon for all time.

APPEAL against the decree of the Court of the Additional Subordinate Judge of Tinnevelly in Original Suit No. 20 of 1919.

In this case, the plaintiffs, trustees of Sri Kuttalanathaswami Temple, in Kuttalam, Tinnevelly District, sued the Government for a declaration that they were the absolute owners of several plots of land comprising Survey No. 482, free of assessment, for an injunction to restrain the Government from levying any assessment on any of them and for the refund of Rs. 48-15-5 alleged to have been illegally levied and collected from the plaintiffs in 1916 and 1917. The defendant, the

* Appeal No. 181 of 1924.

SECRETARY OF STATE FOR INDIA v. TRUSTEES OF SRI KUTTALA-NATHASWAMI TEMPLE.

Secretary of State, pleaded that the plaint temple was not the absolute owner of the survey number, that the survey number was temple poramboke, that the Government was entitled to issue inam pattas therefor, and to transfer the same to ayan and to levy assessment, when the inam pattas were tendered to and refused by the plaintiffs in 1908, and that the suit was barred by limitation. The Subordinate Judge held that the plaint temple was the absolute owner of all occupied land in the survey number and that as regards the rest of it, viz., a river and a road, though the plaintiffs were not the owners, they were entitled to the trees in the river bed and to certain customary rights of easement. He held that the suit for refund was barred under article 16 (2) of the Limitation Act. He accordingly restrained the defendant from interfering with the plaintiffs' absolute rights. The defendant preferred this appeal. Further facts appear from the Judgment.

The *Government Pleader* (*C. V. Ananthakrishna Ayyar*) for the appellant.—The suit being one for a declaration that the plaintiffs are entitled to the suit lands free from any liability to be assessed to land revenue, the plaintiffs have to show some statute or agreement to that effect between them and the Government, otherwise the suit lands are, like any other land in the country, subject to the prerogative right of the Crown to assess them to revenue. *Maharaja Dheeraj Raja Mahatab Chund Bahadoor* v. *The Bengal Government*(1), *Secretary of State for India* v. *Bai Rajbai*(2), *Vajesingji* v. *Secretary of State for India*(3), *Hanumanlu* v. *Secretary of State*(4), *Kelu Nair* v. *Secretary of State for India*(5), *Collector of Kristna* v. *Venkatapathi Razu*(6). Baden-Powell's Land Tenures, page 54; Madras Act III of 1905. The fact that the suit lands were classed as "temple poramboke" does not show that they are for all time free from liability to be assessed to land revenue. "Poramboke" does not mean that, but it means that for the reasons existing at

(1) (1849) 4 M.I.A., 466.
(2) (1915) I.L.R., 39 Bom., 625 (P.C.).
(3) (1924) I.L.R., 48 Bom., 613 (P.C.).
(4) (1913) I.L.R., 36 Mad., 373.
(5) (1925) I.L.R., 48 Mad., 586.
(6) (1912) M.W.N., 1242.

the time of the classification they are not fit to be assessed; see Wilson's Glossary for the meaning of the term and *Seshachala Chetty* v. *Chinnasami*(1) and *Secretary of State for India* v. *Raghunatha Tathachariar*(2). On a change of circumstances they can be transferred to "*ayan*" and be assessed. These lands are not now in the occupation of the temple but are in the occupation of others. Further the suit brought after six years after the levy of the assessment is barred by limitation, under article 120 of the Limitation Act; *Kodoth Ambu Nayar* v. *Secretary of State for India*(3). Fugitive acts of ownership do not give any prescriptive right; *The Taluk Board, Dindigul* v. *Venkataramier*(4). Plaintiffs who have been claiming ownership cannot be given any right of easement as the lower Court has done; *Subba Rao* v. *Lakshmana Rao*(5).

T. Ranga Acharya (with *P. N. Marthandam* and *N. Rama Ayyar*).—The suit lands have been classified as "temple porambokе" which shows that the temple is the owner and that they are not assessable to revenue at all—see Fifth Report for the meaning of "porambokе" and *Theiru Panditham* v. *Secretary of State for India*(6). This classification is evidence of an implied agreement between the plaintiffs and the Government not to assess the lands to revenue at any time, in accordance with ancient usages and rights. Once they are classed as porambokе they cannot thereafter be transferred to "*ayan*," and assessed; see Revenue Board's Standing Orders 15 (1), (2) and (23). The Inam Commissioner did not and could not issue inam title-deeds in cases of unassessable porambokes, such as temple porambokes; see rules 22 and 32 of Inam Commission Rules. Moreover, there is an admission of the Secretary of State in a previous litigation between these parties that these lands belong to the plaintiffs. This admission is binding, unless explained otherwise; *Chandra Kunwar* v. *Chaudhri Narpat Singh*(7).

The Government Pleader in reply.—The previous suit did not concern these lands and there is no admission that they were not liable to be assessed at any time. Porambokes also can be assigned and assessed; only they have to be transferred to "*ayan*" before assessment is levied; *Seshachala Chetty* v. *Chinnasami*(1); Board's Standing Orders, page 37; *Secretary of State for India* v. *Raghunatha Tathachariar*(2).

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(1) (1917) I.L.R., 40 Mad., 410 (F.B.). (2) (1915) I.L.R., 38 Mad., 108.
(3) (1924) I.L.R., 47 Mad., 572, 585 (P.C.).
(4) (1923) I.L.R., 46 Mad., 866. (5) (1926) I.L.R., 49 Mad., 820 (F.B.).
(6) (1898) I.L.R., 21 Mad., 433 (F.B.). (7) (1907) I.L.R., 29 All., 184 (P.C.).

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PHILLIPS, J.

JUDGMENT.

PHILLIPS, J.—This appeal relates to the Kuttalanathaswami temple at Kuttalam of which the plaintiffs (respondents) are the trustees. The suit is brought for a declaration that the plaint property belongs to the plaint temple and the Government has no right to levy any assessment on the same. The plaint property is Survey No. 482 of Kuttalam and the temple itself stands in this survey number. In 1874 the field was undivided and in the settlement register, Exhibit V, it is classed as poramboke while in the remarks column, is the word "pagoda". The field itself is about 27 acres in extent. In the Re-survey of 1908, the field has been subdivided into 51 subdivisions. The sites of the temple and of some mantapams and other buildings intimately connected with the temple have been left as poramboke, but in respect of the other subdivisions the Government (defendant) issued inam pattas, but these pattas were refused and accordingly ordinary assessment has been levied on these items. The respondents' contention is that the Government has no right to alter the classification of the land or to levy any assessment thereon, and this contention has been upheld by the lower Court. The temple claims the whole property as its own absolute property, but has no title-deed for the same. It is not easy to understand on what ground the Subordinate Judge has found ownership in the temple. The finding appears to be based on evidence of acts of ownership on the plaint property, but it is evidently not intended to be a finding that the plaintiffs have acquired a prescriptive right, for there is in the Judgment no reference to these acts having been continued for over 60 years. In this Court Mr. Rangachari for the respondents has not attempted to make out any prescriptive right, but

has based his argument on the ownership of the plaintiffs. It has long been recognized that the sovereign power is entitled to levy assessment on all lands within its territory. So long ago as 1850 in *Maharaja Dheeraj Raja Mahatab Chund Bahadoor* v. *The Bengal Government*(1), the principle was enunciated as being that

> "The ruling power is interested in a certain proportion of the produce of every beegah, except so far as it shall have transferred, relinquished or compounded its right thereto, and all persons claiming the benefit of such exemptions being bound to establish their respective claims and titles."

The same principle was affirmed in *Secretary of State for India* v. *Bai Rajbai*(2), where at page 646 it was observed with reference to inhabitants in some territory ceded to the Bombay Government that

> "The only legal enforceable rights they could have as against their new sovereign, were those, and only those, which that new sovereign, by agreement expressed or implied or by legislation, chose to confer upon them."

We therefore start in the case with an assumption that the defendant has a right to levy assessment on all lands within his jurisdiction, including the plaint property, unless it can be proved that either by statute or by agreement, the plaint property is exempt from liability. This principle was not disputed, and cannot be disputed, by the respondents, but it is contended that the evidence in the case is sufficient to prove an implied agreement between the Government and the plaintiffs (respondents) that the suit property is exempt from taxation. When we come to examine this evidence, it appears to be based upon the entry in the settlement register of 1874 in which Survey No. 482 is classed as poramboke and is said in the remarks column to be "pagoda poramboke." This seems to be a very slender basis for finding an

(1) (1849) 4 M.I.A., 466 at 497. (2) (1915) I.L.R., 39 Bom., 625 (P.C.).

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implied agreement not to levy assessment. Reliance is placed on a single observation in *Theivu Panditlian* v. *Secretary of State for India*(1), where "poramboke" is referred to as follows:

> "Poramboke . . . is land, which the Revenue officers at the settlement considered, was required for these public purposes and which should not therefore, at any time, be granted on patta, and on which it was for this reason useless to fix any assessment."

This observation merely relates to the opinion of the Revenue officers and is no authority for holding that by classifying a land as poramboke the Government relinquishes the right to levy assessment on it for all time. "Poramboke" is defined in Wilson's Glossary thus:

> "Such portions of an estate or village lands liable to revenue as do not admit of cultivation and are therefore exempt from assessment."

a definition which was accepted by this Court in *Seshachala Chetty* v. *Chinnasami*(2). That definition shows clearly that poramboke is liable to revenue, but that the right to levy assessment on it is given up by the Government for certain reasons; but it does not follow that, if those reasons cease to exist, or are held to be inadequate, the Government cannot levy assessment if it so chooses. It was sought to support this alleged prohibition of assessment by Board's Standing Order No. 15 which, while restricting the grant of poramboke land, recognizes that it may be assigned in certain cases. In the present case a large portion of Survey No. 482 has been occupied by private individuals unconnected with the temple, and has been utilized for purposes not intended to benefit the pagoda. Apparently in 1874 the Government considered that the whole of Survey No. 482 should be reserved for pagoda purposes, and in 1903, finding that this reservation of

(1) (1898) I.L.R., 21 Mad., 438 (F.B.). (2) (1917) I.L.R., 40 Mad., 410 (F.B.).

the whole extent was either impossible or undesirable, decided to convert the land from "poramboke" to "ayan" and grant inam pattas in respect thereof. Pattas were offered to the temple trustees free of assessment, and consequently revested in them rights, which possibly they had lost by adverse possession, and it appears that the action taken by the Government was wholly in the interests of the temple itself. This appears from Exhibit II, Board's Proceedings, dated 15th June 1907. The trustees, however, refused this generous offer and now sue to enforce their supposed rights.

The question then remains, can any agreement to forego assessment for all time be implied by the mere classification of the suit land as poramboke in 1874? The suggestion that the entry of the word "pagoda" in the remarks column means that the pagoda was the absolute owner of the poramboke must be rejected *in limine*. For instance, village site is classified as poramboke and also roads, channels, tanks, etc., and we get these words entered in the remarks column, which shows that the words are merely descriptive and confer no title. So far as village site is concerned, it was held in *The Taluk Board, Dindigul* v. *Venkataramier*(1), that such site was not vested in the villagers and that the Government could assign the same to other persons. That there was no agreement in 1874, or prior to it, is also clear from the inam settlement in 1864–65. A large extent of land (about 50 acres in extent) was confirmed as inam in favour of the plaint temple, but Survey No. 482 was not dealt with at that inam settlement. It appears from Exhibit II (paragraph 7 of Mr. Murdoch's letter, dated 30th March 1907) that a small portion of Survey No. 482 was classified as inam in

(1) (1923) I.L.R., 46 Mad., 866.

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1814 and this was not confirmed in the Inam Settlement of 1864–65. If, as contended, there really had been a grant of this Survey No. 482, whether before or after the advent of British rule, it is clear from the proceedings at the inam settlement that such grant was not recognized by the Inam Commissioner. That being so, it is impossible to presume from the classification of the land as poramboke in 1874 that there was an agreement by Government not to levy assessment on the land.

The only other evidence relied on by the respondents is Exhibit Q (1) and this is a written statement filed by the appellants in Original Suit No. 8 of 1902 in the Sub-Court of Tinnevelly in a suit between the present parties in respect of a certain land adjoining Survey No. 482, a dispute which was eventually compromised. The alleged admission is as follows :—

> " The only property to which the plaint temple is entitled is Survey No. 482, in Kuttalam village and the properties in dispute are situated outside the said survey number."

It is contended that this amounts to a clear admission that Survey No. 482 was the absolute property of the present plaintiffs. When the nature of the suit in which this written statement was filed is considered, it is evident that this so-called admission was merely a pleading that the suit properties were not the property of the temple and that the temple's rights were confined to Survey No. 482 which had been classed as temple poramboke at the previous settlement. There is no admission that the Government had given up its rights over Survey No. 482. There is only a mere pleading that the plaint property in that suit was distinct from Survey No. 482, to which the plaint temple was entitled. There is no admission that the temple was entitled to the whole of Survey No. 482, nor is there any admission that the manner in which it was entitled was such as to

deprive the Government of its prerogative of levying assessment. On this statement it is impossible to hold that the plaintiffs have established their ownership or any agreement by the Government not to levy assessment. That being so, the plaintiffs' whole suit must fail. It is therefore unnecessary to consider the argument put forward by the learned Government Pleader that the easement allowed by the lower Court for items 6, 7, 38, 50 and 51 must in any case be disallowed as the plaintiffs had not pleaded any easement right but only ownership, and it is conceded for the respondents that in view of the Full Bench ruling in *Subba Rao* v. *Lakshmana Rao*(1) this finding as to easement cannot be supported. The further question of limitation need not be discussed as, whether the suit is or is not within time, it must fail on its merits.

PHILLIPS, J.

The result is that the appeal must be allowed and the plaintiffs' suit dismissed with costs throughout.

The memorandum of objection which relates to items 6, 7, 38, 50 and 51 must also be dismissed with costs.

ODGERS, J.—This is a suit by two trustees of the Sri Kuttalanathaswami temple against the Secretary of State for a declaration that the plaint temple is entitled absolutely to certain properties free from assessment. The cause of action is said to have arisen in April 1916 when the Government began to set up a title to the sites in question.

ODGERS, J.

The survey number in dispute is 482 and its extent is 27 acres and odd. This is seen in Exhibit V which is the survey and settlement register of the village of Kuttalam of 1874 where the survey number is described as poramboke of 27·67 acres in extent, no pattadar's name, but the word "pagoda" appears in the remarks

(1) (1926) I.L.R., 49 Mad., 820 (F.B.).

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column. In 1905-06 as shown by Exhibit VI this number was subdivided into a number of smaller plots consisting for our present purpose of (1) poramboke which is the site of the temple buildings and (2) inams with regard to the temple curtilage. (See Exhibit VI, the Re-survey Register, pages 90 to 94.) In the remarks column, the subdivisions are very variously given as road, temple channel, matam, etc. With regard to the temple properties, the trustee of the temple is entered as the pattadar or inamdar. Inam deeds were offered to the trustees (Exhibit XVI) and refused (Exhibit III); the inam was cancelled by Government (Exhibit IV) and ordinary dry assessment was levied (Exhibit XX). It is contended for the temple that there is an implied lost grant whereby some Government or ruler at some time beyond the memory of man granted to this temple these 27 and odd acres to be held free of assessment. It is said that in 1874 by Exhibit V the whole acreage is included as temple poramboke and this constitutes a kind of agreement or contract by Government that they will waive assessment on the whole extent of 482 for ever. It is of course not contended that Government has levied any assessment on the lands actually occupied by the temple building or those used in connexion therewith. But it is said that as Exhibit V refers to the whole extent as temple poramboke, Government has no right to treat any part of No. 482 as assessable. As has been remarked, the entry in Exhibit V does not show any owner's name under the column headed "pattadar's name and number," but in column 15, the remarks column, appears the word "pagoda."

"Poramboke" is defined in Wilson's Glossary as

> "Such portions of an estate or village lands liable to revenue as do not admit of cultivation, and are therefore exempt from assessment, as sterile or waste land, etc."

This has been adopted judicially in *Seshachala Chetty* v. *Chinnasami*(1), which *inter alia* decided that excess nattam may be transferred to "ayan." As long ago as 1850 in *Maharaja Dheeraj Raja Mahatab Chund Bahadoor* v. *The Bengal Government*(2), it was held that exemption from assessment must be strictly proved and in *Sam* v. *Ramalinga Mudaliar*(3), it is said that

"all lands are liable to pay land revenue unless they are exempted by statute or by any binding engagement between the Government and the landowner. The British Government were not bound to recognize the revenue-free grants of the previous Governments, though in practice they did recognize them."

The same point of view is emphasized by the Privy Council in *Secretary of State for India* v. *Bai Rajbai*(4), where their Lordships say:

"The only legal enforceable rights they (i.e., ancestors of the plaintiffs) could have as against their new sovereign were those, and only those, which that new sovereign, by agreement expressed or implied or by legislation, chose to confer upon them."

See also *Vajesingji* v. *Secretary of State for India*(5), also a decision of the Privy Council, to the same effect and a decision of our own Court in *Hanumanlu* v. *Secretary of State*(6), where the learned Judges say

"If the plaintiff claims to hold the land free from the payment of such assessment as the Government may fix, he must show some grant exempting him from the payment of the ordinary assessment."

Section 2 (1) of Madras Act III of 1905 (The Madras Land Encroachment Act) declares that

"as to lands save also in so far as they are temple-site or owned as house-site or backyard they are and are hereby declared to be the property of Government."

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(1) (1917) I.L.R., 40 Mad., 410 (F.B.). (2) (1849) 4 M.I.A., 466 at 497.
(3) (1917) I.L.R., 40 Mad., 664 at 667.
(4) (1915) I.L.R., 39 Bom., 625 (P.C.). (5) (1924) I.L.R., 48 Bom., 613 (P.C.).
(6) (1913) I.L.R., 36 Mad., 373.

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Further

"the right of the Government to assess land to land revenue and to vary it is a prerogative right of the Crown to exact from a subject holding arable land, its share of the produce or the equivalent of such produce."

Kelu Nair v. *Secretary of State for India*(1). It seems therefore that the proceeding of Government under Exhibit VI was perfectly justified especially as Baden-Powell points out in his "Land Tenures", page 75, that the duration of a settlement is 30 years unless it can be said that the entry in the remarks column in Exhibit V is to be taken to establish either the recognition of a lost grant, i.e., a grant by some former ruler which has been lost or to evidence a contract or engagement by Government that it will always regard the whole extent of No. 482 as temple poramboke and therefore free from assessment. The remark "pagoda" seems to me merely to be a description of the poramboke just as one can have road or channel or cart-track poramboke and not to afford evidence of either a recognition of a lost grant or a present engagement on the part of Government. Reference has been made to *Theivu Pandithan* v. *Secretary of State for India*(2), to show the classification of land in Tinnevelly. The fourth division is "poramboke", i.e., unoccupied waste that is not cultivable or assessed. BENSON, J., then goes on to say:

"The poramboke is land required for village-site, threshing floors, roads, banks of tanks, channels, etc. This is land which the Revenue officers at the settlement considered was required for these public purposes, and which should not, therefore, at any time be granted on patta, and on which it was for this reason useless to fix any assessment."

The learned Judge therefore does not say that this decision of the Revenue officers was binding for all time

(1) (1925) I.L.R., 48 Mad., 536. (2) (1898) I.L.R., 21 Mad., 433 (F.B.).

and could not be reconsidered at the next settlement. Reference was made to *Secretary of State* v. *Ragunatha Tathachariar*(1), where SADASIVA AYYAR, J., points out that "poramboke" is often loosely used to mean whatever land does not yield revenue to Government and that a grant of poramboke must include unassessed waste which is not communal property. For the respondents much reliance has been placed on Exhibit Q-1 which is said to be an admission by Government of the absolute ownership of the temple in these lands. Exhibit Q-1 is a written statement of the Secretary of State in O.S. No. 8 of 1902 in the Court of the Additional Subordinate Judge at Tinnevelly. Paragraph 2 begins as follows :

> "The only property to which the plaint temple is entitled is Survey No. 482 in Kuttalam village and the properties in dispute are situated outside the said survey number and have always been at the disposal of Government."

It is said that that litigation concerned the claim of the temple to the exclusive possession of the well-known Kuttalam Falls. The question is, can these words be said to admit the absolute title of the plaintiffs to the whole of the extent of No. 482? In my opinion, they cannot. 482 was not in dispute in O.S. No. 8 and all that the words quoted can fairly be taken to mean is that any title which the defendants had in the lands adjoining the temple is confined to No. 482. In my opinion it only means that the rights of the plaintiffs are confined within the four corners of 482 which is a very different thing from meaning that they are entitled to the whole extent of 482. The learned Additional Subordinate Judge has taken a curious view. He relies on the admission in Exhibit Q-1 and the entry in Exhibit V and considers the subdivisions one by one and comes to

(1) (1915) I.L.R., 38 Mad., 108.

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the conclusion that with regard to the lands the temple has been exercising certain acts of ownership thereon and that they are therefore temple property. With regard to certain of the subdivisions representing a road, the learned Judge somewhat curiously holds that the road does not belong to the temple but that the trustees are entitled to a "special right" of holding booths, etc., on festive occasions. With regard to the river (subdivision 50) he holds that the bed of the river belongs to Government but that the temple has the right to the trees in the river bed and also the ownership of the revetment on the western bank, and the customary rights of worship and approach at the river. These he describes as peculiar rights. With regard to these so-called special particular rights, there can be no argument. Admittedly the temple has been doing certain acts with regard to the road and river in their assertions of their alleged right as owners. The rights reserved to them by the learned Additional Subordinate Judge can only be rights of easement. There is no issue as to any rights of easement and in the view I take on the main question, this discussion really does not arise. On that ground alone no such rights could be reserved to the plaintiffs on the facts and *Subba Rao* v. *Lakshmana Rao*(1) makes it perfectly clear that where a man exercises acts of ownership he cannot have the *animus* necessary for acquiring an easement by the doing of those acts. Again the acts of ownership attributed to the plaintiffs seem to me to be merely fugitive or intermittent and would not be such as to establish any effective possession as against the rights of Government. See *The Taluk Board, Dindigul* v. *Venkataramier*(2). It therefore seems to me that the

(1) (1926) I.L.R., 49 Mad., 820 (F.B.).
(2) (1923) I.L.R., 46 Mad., 866.

judgment of the learned Subordinate Judge is wrong and must be reversed.

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A memorandum of objections has been put in but was not argued by Mr. Rangachari who stated that it stood or fell with the decision in the main case. The appeal must therefore be allowed with costs here and below and the memorandum of objections dismissed with costs.

ODGERS, J.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Madhavan Nair.

HASSAN KUTTI BEARY (DEFENDANT), APPELLANT,

v.

JAINABHA (PLAINTIFF), RESPONDENT.*

1928, September 5.

Muhammadan Law—Marriage—Adult virgin of Shafi sect—Necessity of consent for marriage.

The consent of an adult virgin among the Shafi sect of Sunnis is essential for the validity of her marriage.

SECOND APPEAL against the decree of the District Court of South Kanara in Appeal Suit No. 396 of 1925 preferred against the decree of the Court of the District Munsif of Kasaragod in Original Suit No. 204 of 1925.

The following statement of facts is taken from the judgment of MADHAVAN NAIR, J:—

"This Second Appeal arises out of a suit instituted by the plaintiff for a declaration that she is not the properly wedded wife of the defendant and for an injunction restraining the latter from asserting his rights as her husband.

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* Second Appeal No. 934 of 1926.