decision, on a matter that was not at all directly before us. This was in consequence of an entirely misleading and incorrect headnote in *Iswaram Pillai* v. *Sonnivaveru Taragan*(1). There was no discussion whatever before us as to the effect of a mere charge on property as enabling a third person not a party to the contract to sue. As the misleading *obiter dictum* has in one subsequent case at least, before a single Judge, been relied on, apparently with some success (vide Second Appeal No. 1192 of 1927) I am glad that the error should now have been traced to its source and pointed out.

G.R.

PRIVY COUNCIL.

KADIYALA VENKATA SUBAMMA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

KATREDDI RAMAYYA, SINCE DECEASED, AND OTHERS (DEFENDANTS), RESPONDENTS.

J.C.* 1932, January 12.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Executor—Will of Hindu—Will to which Hindu Wills Act (XXI of 1870) does not apply—Absence of Probate—Vesting of Property—Powers of executor—Probate and Administration Act (V of 1881), ss. 4 and 90.

In the case of a Hindu will to which the Hindu Wills Act, 1870, does not apply the estate of the testator vests in the executor, if he accepts office, from the date of the testator's death, and he has the powers of an executor under the Probate

(1) (1913) I.L.R. 38 Mad. 753.

* *Present*:—Viscount DUNEDIN, Sir LANCELOT SANDERSON and Sir GEORGE LOWNDES.

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and Administration Act, 1881, even though probate has not been obtained.

Observations in *Administrator-General of Bengal* v. *Premlal Mullick*, (1895) I.L.R. 22 Calc. 788 ; L.R. 22 I.A. 107, and *Kurrutulain Bahadur* v. *Nuzbat-ud-dowla Abbas Hossein Khan*, (1905) I.L.R. 33 Calc. 116 ; L.R. 32 I.A. 244, discussed.

APPEAL (No. 95 of 1929) from an order of the High Court (December 9, 1925) setting aside a decree of the Additional Subordinate Judge of Ellore (March 6, 1922) and remanding the suit for trial.

The order appealed from was made consequent upon a judgment of the Full Bench, dated March 21, 1925, delivered by KUMARASWAMI SASTRI J. (COUTTS TROTTER C.J. and PHILLIPS J. concurring), reported as *Ramiah* v. *Venkatasubbamma*(1). The judgment held that in the case of wills to which the Hindu Wills Act, 1870, does not apply, the estate vests in the executor, if he has accepted office, from the date of the death of the testator, and the executor has the powers given by the Probate and Administration Act, 1881, although probate has not been obtained.

The present appeal was in effect an appeal from that decision. The facts appear from the judgment of the Judicial Committee.

E. B. Raikes K. C., Narasimham and *W. Lakshmana Rao* for appellants.—The Probate and Administration Act, 1881, applies only where probate has been obtained; it is an enabling Act. That is indicated by the preamble. That section 4 applies only where a grant has been made is shown by the heading of Chapter II, of which it is the first section. An executor of a will made in the mufassal was merely a manager before the Act, and if his position was intended to be altered although probate was not granted the Act would have so provided. Section 12 by which probate validates the earlier acts of the executor is unnecessary if the view of the Full Bench is right. Sections 59 and 127 show that the Act is dealing

(1) (1925) I.L.R. 49 Mad. 261 (F.B.).

with cases in which probate has been granted. Section 92, sub-section 2, has been treated as against the appellants' contention, but its effect is merely to empower the Court when granting probate to remove restrictions in the will; the section in its present form was enacted in 1889 and was not intended to alter the law. Previous decisions of the High Courts of Madras and Bombay are against the appellants, but the decisions of the Calcutta High Court in *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu*(1) and *Sakina Bibee* v. *Mahomed Ishak*(2) are in their favour. The present question has not been directly before the Board but the appellants are supported by observations in the judgments in *Administrator-General of Bengal* v. *Premlal Mullick*(3) and *Kurrutulain Bahadur* v. *Nuzbat-ud-dowla Abbas Hossein Khan*(4). The judgment in *Meyappa Chetty* v. *Subramanian Chetty*(5), a Straits Settlements case, was regarded as being against the appellants, but it is submitted that it does not touch the present case.

[Reference was made also to *Fatma* v. *Shaik Essa*(6), *Shaik Moosa* v. *Shaik Essa*(7), *Ganapathi Aiyar* v. *Sivamalai Goundan*(8) and *Sir Mahomed Yusuf* v. *Hargovandas Jivan*(9)].

Subba Row for respondents was not called upon.

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The JUDGMENT of their Lordships was delivered by Sir GEORGE LOWNDES.—The appellants are beneficiaries under the will of one Madduru Venkata Subanna, who died on the 5th January 1917. He was a Hindu residing at Pedakapavaram, in the Kistna District of Madras. The respondent, Madduri Gangamma, is his widow, and was appointed (as is now admitted) executrix according to the tenor of the will, but has not obtained probate. The other respondents are a minor son, adopted by the widow, and various persons interested in the properties of the testator under alienations made by the widow purporting to act as his executrix.

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(1) (1897) I.L.R. 25 Calc. 103. (2) (1910) I.L.R. 37 Calc. 839.
(3) (1895) I.L.R. 22 Calc. 788; L.R. 22 I.A. 107.
(4) (1905) I.L.R. 33 Calc. 116; L.R. 32 I.A. 244.
(5) (1916) L.R. 43 I.A. 113. (6) (1883) I.L.R. 7 Bom. 266.
(7) (1884) I.L.R. 8 Bom. 241. (8) (1912) I.L.R. 36 Mad. 575.
(9) (1922) I.L.R. 47 Bom. 231.

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The suit out of which the appeal arises was instituted by the appellants to enforce their right to particular parcels of land which they alleged had been allotted to their shares under a family arrangement made shortly after the testator's death, or in the alternative for partition of the estate without regard to the alienations which, it was contended, the executrix had, in the absence of probate, no power to make, and which were further charged as fraudulent.

The trial Judge held against the appellants as to the family arrangement, and this is no longer in dispute. He was of opinion, however, that the alienations were incompetent, and he accordingly passed a preliminary decree in the appellants' favour, declaring the rights of the parties, and appointing a Commissioner to carry out the partition and to assess mesne profits. The Commissioner duly reported to the Judge, and eventually a final decree was made.

Appeals and cross-objections were filed against both these decrees by some of the respondents, and on the hearing in the High Court the following question, upon which the decision of the appeals turned, was referred to a Full Bench, viz. :—

"Whether an executor appointed by a will made in the mufassal of the Presidency has vested in him the estate of a testator and has all the powers of an executor as set out in the Probate and Administration Act, even though such executor does not obtain probate of the will, or whether his powers, unless he obtains probate, are only those of a mere manager as held in respect of executors previous to the Probate and Administration Act."

The reference was heard by the Chief Justice and two puisne Judges, who recorded their opinion that :

"In cases of Hindu wills to which the Hindu Wills Act does not apply the estate vests in the executor (who accepts office) from the date of the testator's death, and that the

provisions of the Probate and Administration Act are applicable, even though probate has not been obtained."

The appeals then came on again before the referring Judges who by their order of the 9th December, 1925, set aside the decrees of the trial Judge and remanded the suit for disposal on the basis of their judgment, with directions to try the question of the *bona fides* of the widow's alienations, and for that purpose to ascertain what debts were outstanding at the death of the testator.

From this order of remand the appellants have brought their appeal to His Majesty in Council, and the sole matter for the consideration of the Board is whether the judgment of the Full Bench, upon which the order under appeal rests, should be upheld.

The Hindu Wills Act (XXI of 1870) has no application to the present case, but the greater part of the Probate and Administration Act (V of 1881) applies to the wills of Hindus generally, and it is upon the terms of this Act that the result of the appeal turns.

The authorities have been discussed at length by KUMARASWAMI SASTRI J., who delivered the judgment of the Full Bench, and their Lordships think that nothing can be added by them to his careful examination of the case law on this subject. They will, however, refer later on to two decisions of the Board which have been relied upon by the appellants.

There has been a divergence of opinion between the High Courts of Madras and Bombay on the one hand, and of Calcutta on the other. It is the view of the former that has now prevailed, and their Lordships think that it is undoubtedly the right one.

The provisions of the Act directly in point are the first part of section 4 and sub-sections 1 and 2 of section 90, which run as follows :—

"Section 4. The executor or administrator, as the case may be, of a deceased person is his legal representative for all

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purposes, and all the property of the deceased person vests in him as such."

"Section 90. (1) An executor or administrator has, subject to the provisions of this section, power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under section 4.

"(2) The power of an executor to dispose of immovable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him, and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order. . . "

The reasoning of the Calcutta decisions as to the meaning of section 4 was based largely on the preamble, which showed that the object of the Act was to provide for grants of probate and letters of administration, and upon the heading of Chapter II, in which the section occurred, "of grant of probate and letters of administration", and it was thought to follow from this that "executor" in section 4 could only mean an executor to whom probate had been granted.

This argument was elaborated before their Lordships, and reference was made to other sections of the Act which, it was urged, contained the same implication, particular reliance being placed upon sections 12 and 59.

With regard to the first branch of the argument, their Lordships note that the wording of the opening paragraph of section 4 is identical with that of section 179 of the Succession Act of 1865, which occurs in a chapter bearing the same heading as that of Chapter II of the Act of 1881. But, so far as their Lordships are aware, it has never been held that section 179 of the Act of 1865 applies only to an executor who has proved the will.

Section 12 of the Probate and Administration Act no doubt implies that until probate is granted the will is not "established", and it validates all intermediate acts of the executor. It is contended for the appellants that this necessarily leads to the inference that before probate there is no valid will and no authority in the executor. This was the view taken by WEST J. in *Fatma* v. *Shaik Essa*(1), but which failed to find acceptance on appeal; *Shaik Moosa* v. *Shaik Essa*(2). It is, their Lordships think, based upon a misconception of the object of the section. Before the grant, it is obvious that in every case where either the will itself, or anything done under it by the executor, is challenged, proof of execution and capacity on the part of the testator, and of the appointment of the executor, would be required. The object of the section is only to get rid of this multiplication of proofs. Probate once granted authenticates the will against all the world; it affords a ready means of proof of the contents of the will (*see* sections 41 and 91 of the Evidence Act); and it is a complete answer by the executor to any challenge of his authority as such. The provisions of the section do not, in their Lordships' opinion, suggest that before probate the executor had no title, but are only intended to simplify the proof of his title as dating from the testator's death.

Section 59 merely amplifies the position by making probate conclusive of the executor's representative title against debtors of the estate, and provides for their indemnification on making payments to him. This again is only a matter of simplification of proof, with the necessary corollary protecting debtors who have paid on the faith of the probate.

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(1) (1883) I.L.R. 7 Bom. 266. (2) (1884) I.L.R. 8 Bom. 241.

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There can be no doubt that in England the title of an executor is derived from the will and not from probate, though it is probate alone which authenticates his right (*see* Williams on Executors, 12th edition, page 1226). Section 12 of the Probate and Administration Act is a reproduction of section 188 of the Succession Act of 1865, and it has always been recognized that the latter Act was largely based on English law. It is not suggested that this doctrine is for any reason inapplicable to the wills of Hindus, and their Lordships think that the material parts of sections 4 and 90, which are set out above, afford a strong indication in themselves that the Legislature intended to adopt it.

Section 4 makes no reference to probate, nor does the definition of "executor" in section 3 (again a reproduction from the Act of 1865) suggest that probate is any part of his title: he is merely the person to whom the testator has confided the carrying out of his dispositions.

So, too, section 90 (2) clearly conceives of an executor not clothed with probate being able to dispose of the property "vested in him under section 4". It makes such power subject to any restriction imposed by the will "unless probate has been granted", in which case the Court may relieve him from the restriction. In view of the terms of this section their Lordships think it would be impossible to hold that before probate nothing vested in the executor, and that he had no power of disposal at all.

Reference was made in argument to the terms of the original section 90, which was repealed in 1889, when the present section was substituted. It may well be that upon the old section the argument on behalf of the appellants would have had more force, but their Lordships have to interpret the Act as it has stood

since 1889, and they cannot attribute to section 4 a meaning based on the reading of the repealed section.

It only remains to consider whether the two decisions of this Board, to which allusion was made above, afford any support to the appellants.

In *Administrator-General of Bengal* v. *Premlal Mullick*(1), the executors of a Hindu testator, whose will was governed by the Hindu Wills Act of 1870, after obtaining probate, transferred to the Administrator-General "all estates, effects and interest vested in them by virtue of the probate." Such a transfer was authorized in the case of "any private executor" by section 31 of the Administrator-General's Act (II of 1874). The majority of the Judges before whom the case came in the Calcutta High Court held that the executors of a Hindu will, governed by the Act of 1870, were not within the purview of the section, and this was the only question before the Board.

The judgment was delivered by Lord WATSON, who in dealing with various portions of the Succession Act which were incorporated in the Hindu Wills Act, says :—

"It is sufficient for the purposes of this case to refer to two of these clauses. Section 181 is to the effect that probate can be granted only to an executor appointed by the will. Section 179 provides that the executor or legal administrator, as the case may be, of a deceased person, shall be his legal representative for all purposes, and that all the property of the deceased person shall vest in him as such."

He continues as follows, and it is this passage which is principally relied on in the present appeal :—

"It is not disputed that the immediate effect of the Act of 1870 was to place a Hindu executor who was in a position, and chose to take advantage of its provisions, on precisely the same footing as the executor of an Anglo-Indian

(1) (1895) I.L.R. 22 Calc. 788; L.R. 22 I.A. 107.

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testator, in so far as concerns the taking out of probate, and the vesting in him of the estate of the deceased. The will of the late Nundo Lal Mullick was executed in August 1889; and his executors therefore, on their obtaining probate, became immediately vested, by force of statute, with the whole estates which belonged to him at the time of his decease."

The question now before their Lordships as to the effect of the words of section 179 (reappearing in the present case as section 4 of the Probate and Administration Act) *unaccompanied by probate*, was clearly not under the consideration of the Board in the case cited, as the authority to transfer under section 31 of the Administrator-General's Act was expressly dependent upon the grant of probate, and their Lordships have no doubt that the words used by Lord WATSON were not intended to have the wider significance which the appellants seek to attribute to them.

In *Kurrutulain Bahadur* v. *Nuzbat-ud-dowla Abbas Hossein Khan*(1), the question considered by the Board was one of estoppel, affecting a Mahomedan will of which probate had been granted. Here again, therefore, the contention now raised as to the effect of sections 4 and 90 of the Act of 1881 standing alone, did not arise, and the only support that the appellants claim from it is derived from two sentences in the judgment which will be found on pages 256 and 257 of the report in the Indian Appeals. The first of these speaks of "the title thus conferred upon every executor who has obtained probate," and the second, of the trusteeship for the purposes of the will "created . . . by the will established by the probate." Their Lordships are unable to treat these isolated quotations as affording any support to the argument of the appellants. There is, they think, nothing in the judgment of Sir ARTHUR

(1) (1905) I.L.R. 33 Calc. 116, 128; L.R. 32 I.A. 244.

WILSON, read as a whole, to suggest that the vesting under section 4, or the power of disposal under section 90, is dependent upon the grant of probate.

For the reasons given their Lordships are of opinion that the order of remand made by the High Court on the 9th December 1925, was right, and that this appeal should be dismissed, and they will humbly advice His Majesty accordingly. The appellants must pay the costs of the respondents of the appeal.

Solicitors for appellants—*Douglas Grant & Dold.*

Solicitors for respondents—*Chapman Walker & Shephard.*

A.M.T.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Waller, Mr. Justice Jackson and Mr. Justice Krishnan Pandalai.

CHINTADA CHITTAYYA AND TWO OTHERS (PLAINTIFFS 1 TO 3), APPELLANTS,

1931, November 27.

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF KISTNA AND ANOTHER (DEFENDANTS 1 AND 2), RESPONDENTS.*

Madras Revenue Recovery Act (II of 1864)—Auction sale under—Confirmation of sale by Revenue Divisional Officer—District Collector's powers of revision—Madras General Clauses Act (I of 1891), sec. 3 (6)—Definition—Collector—Inapplicability to Madras Regulation VII of 1828 or Act II of 1864.

G was in arrears of revenue and his land was put up to auction by the revenue authorities and was purchased by C. The Revenue Divisional Officer confirmed the sale in C's favour.

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* Second Appeal No. 1938 of 1926.