APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Pakenham Walsh.

1931, September 8.

AKELLA SURYANARAYANA RAO PANTULU GARU AND THREE OTHERS (DEFENDANTS FIVE TO SEVEN AND LEGAL REPRESENTATIVE OF SIXTH DEFENDANT), APPELLANTS,

v.

DWARAMPUDI BASIVIREDDI AND SEVEN OTHERS (PLAINTIFF AND DEFENDANTS ONE TO FOUR AND EIGHT TO TEN), RESPONDENTS.*

Contract—Charge created in favour of a third party—Third party's right to sue on same.

By a compromise entered into between the parties to a partition suit certain properties were allotted to certain branches to which were also allotted certain debts. It was stipulated that, until the debts mentioned therein were fully discharged, the properties allotted to the shares of the respective branches should be liable in the first instance, and that, "if any one sharer should fail to discharge the debts mentioned and consequently either obstruction is caused to the properties of the remaining sharers or the other sharers should be necessitated to discharge such debts, the sharer who has committed default should pay these amounts from and out of his properties as well as the losses sustained thereby together with interest to the sharers who have discharged those debts." In a suit by a creditor who was not a party to the compromise but whose debt had been directed to be paid as mentioned above, on a plea by him that the above recitals created a charge in his favour on the family properties,

held that the above recitals created neither a charge nor a trust in his favour but only a contract of indemnity among the parties to the compromise.

Held further that, even supposing a charge had been created in his favour, he being a stranger to the agreement, could not sue the parties to the same on foot of the agreement.

The headnotes in *Iswaram Pillai* v. *Sonnivaveru Taragan*, (1913) I.L.R. 38 Mad. 753, and *Subbu Chetti* v. *Arunachalam*

* Appeal No. 191 of 1929.

Chettiar, (1929) I.L.R. 53 Mad. 270 (F.B.), in so far as they state that an exception to the rule that a stranger to the contract cannot sue thereon exists in a case where a charge on immovable property is created in his favour by the contract, are misleading.

APPEAL preferred against the decree of the Court of Subordinate Judge of Cocanada in Original Suit No. 43 of 1925.

Advocate-General (*A. Krishnaswami Ayyar*) with *Y. Suryanarayana* and *V. Govindarajachari* for appellants.

T. R. Venkatarama Sastri with *T. Satyanarayana* for first respondent.

M. Appalachari for fourth and fifth respondents.

P. Somasundaram for fifth and sixth respondents.

Second, third, seventh, and eighth respondents were unrepresented.

Cur. adv. vult.

JUDGMENT.

JACKSON J.

JACKSON J.—Suit to recover Rs. 35,776-4-9 on the plea that the mortgages on the properties cited in schedule A of the plaint executed by defendants 1 and 2 in favour of defendants 5 to 7, as well as the attachment by eighth defendant, and court purchases by defendants 9 and 10 are subject to the first charge created in favour of plaintiff by the family partition deed of 9th January 1920, Exhibit O.

This family derives from one Basivireddi who died in 1915. He was a rich man and his son-in-law, Venkayya, the father of the plaintiff, left considerable sums in his hands, which he acknowledged by a pronote. After his death the estate was in the hands of a receiver who renewed the note. This is the basis of the plaintiff's claim and the reality of the debt is not now disputed. Issue 1 as to its validity was found in the affirmative by the lower Court and that finding stands.

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The question for our determination is whether this debt was secured in 1920 when the members of Basivireddi's family, who were involved in a partition suit, came to a compromise which was embodied in a decree (see order at foot of compromise, Exhibit O. The actual decree is not exhibited but is admitted).

In the compromise certain properties were given to certain branches to which also were allotted certain debts as set forth in paragraph 13 of the document, and then it was provided:

> "that until the debts mentioned above are fully discharged the properties allotted to the shares of the respective persons shall be liable in the first instance."

We prefer to read this as the similar deeds in the Madras Law Journal cases were read, simply as a contract of indemnity conferring no benefit upon the creditors; *T. A. Sesha Iyer* v. *S. N. Srinivasa Ayyar*(1) and *Imbichi* v. *Achampat Avukoya Haji*(2).

This finding rebuts the plaintiff's claim, and there is no real necessity for the appellant-defendants to fall back upon their second line of defence that, even supposing a charge had been created in his favour, plaintiff, as no party to that contract, cannot make it part of his cause of action. However, since the point has been fully argued, we will give our decision.

It is now recognized law that if A contract with B that B shall pay the debt owing by A to C, C cannot sue upon that contract alone unless he stand in the capacity of *cestui que trust*. The rule of Common Law laid down in *Tweddle* v. *Atkinson*(3) is that he must have been a party to the agreement and the rule of Equity in *Gandy* v. *Gandy*(4) is that he must stand as

(1) (1921) 41 M.L.J. 282.
(2) (1916) 33 M.L.J. 58.
(3) (1861) 1 B. & S. 393.
(4) (1885) 30 Ch. D. 57.

the beneficiary of a trust. It was formerly questioned how far that rule applied in India, and the matter came before a Full Bench of this Court in *Subbu Chetti* v. *Arunachalam Chettiar*(1) where the simple proposition was considered whether, if B promise A that B will pay the debt of A to C, C can sue B upon that promise.

The opinion of the Full Bench (page 287) is

"that where all that appears is that a person transfers property to another and stipulates for the payment of money to a third person, a suit to enforce that stipulation by the third party will not lie."

Consequently in this Presidency, at any rate, the law in India and in England is the same. C can only sue as a *cestui que trust.*

A cursory reading of the Madras Reports may suggest that another special exception has been approved by this Court, viz., the creation of a charge on immovable property by the contracting parties A and B.

In *Iswaram Pillai* v. *Sonnivaveru Taragan*(2) A contracted with B that B should pay C and C sued. Two grounds were taken: that C was a *cestui que trust* and that *Tweddle* v. *Atkinson*(3) did not apply to India as held in *Debnarayan Dutt* v. *Chunilal Ghose*(4). The discussion on the first ground proceeds to page 757 where it is held that no trust was created.

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On page 762 this result is reached, that unless the contract has been performed so that a trust has already been created, the suit cannot be maintained.

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The headnote runs:—

"*Held*, that C who was a stranger to the contract cannot sue B for the payment of his debt without joining A as a party.

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(1) (1929) I.L.R. 53 Mad. 270 (F.B.).
(2) (1913) I.L.R. 38 Mad. 753.
(3) (1861) 1 B. & S. 393.
(4) (1913) I.L.R. 41 Calc. 137.

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. . . *Khwaja Muhammad Khan* v. *Husaini Begam*(1) and *Debnarain Dutt* v. *Ramsadhan Mondol*(2), distinguished."

So far this is unexceptionable except that Ramsadhan should be Chunilal Ghose, and, as XLI Calcutta was published, a reference to a private magazine was unnecessary.

But then there is interpolated between these two passages a list of four exceptions as coming *per curiam*. Inasmuch as the whole judgment is *per curiam* this phrase is here otiose.

The second exception (b) is

"the creation of a charge on immovable property by the promisor . . . "

In the whole of this judgment a charge is only mentioned twice, once, the charge in *Debnarayan Dutt* v. *Chunilal Ghose*(3) which A erroneously thought he had given C when the debt originated and he deposited his patta with C, a matter which has no bearing on the legal question whatsoever, inasmuch as B is not concerned; and again at the end where *Khwaja Muhammad Khan* v. *Husaini Begam*(1) is held to refer to a specific charge for the benefit of a minor culminating in a trust. This suggestion of the headnote that C can sue B, if B has created a charge, is absolutely and entirely unwarranted by the judgment. It is a pure interpolation.

In *Subbu Chetti* v. *Arunachallam Chettiar*(4) the case in question was again the simple proposition of B contracting to pay the debt of A to C. The summary of the case-law on page 278 quotes the headnote to *Iswaram Pillai* v. *Sonnivaveru Taragan*(5) and the final decision on page 287 is that a person not a party to a contract cannot sue

(1) (1910) I.L.R. 32 All. 410 (P.C.). (2) (1913) 17 C.W.N. 1143.
(3) (1913) I.L.R. 41 Calc. 137. (4) (1929) I.L.R. 53 Mad. 270 (F.B.).
(5) (1913) I.L.R. 38 Mad. 753.

"unless the case falls within the exceptions indicated in the case above referred to." These exceptions were no material part of the question before the Bench, and the reference to them is merely by the way; in fact one might go far to seek a better illustration of an *obiter dictum*, yet the head-note details all these exceptions with no reference at all to *Iswaram Pillai* v. *Sonnivaveru Taragan*(1) as though they were the direct ruling of the Full Bench.

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Nothing so crude has ever been ruled by this Court as that C may sue where the contract of A and B charges the money to be paid out of some immovable property.

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If plaintiff is to succeed it would be necessary to find, in the terms of *Cunningham* v. *Foot*(2) upon the construction of the written instrument, that there is land, the trustee of the land, and the *cestui que trust* for whose benefit in this respect the land is to be held; and it cannot be said here that plaintiff is such *cestui que trust* under the terms of Exhibit O. Therefore the plaintiff cannot derive any title under that document so as to make it part of his cause of action.

The appeal must accordingly be allowed with costs throughout to the appellant payable by plaintiff-respondent. The suit is dismissed as against defendants 5 to 7, 8 and 10 with costs to defendants below.

PAKENHAM WALSH J.—I have had the advantage of perusing my learned brother's judgment and entirely agree with it. At the best, paragraph 13 of the compromise agreement, Exhibit O, is ambiguous and therefore the conduct of the parties to it can be looked at in order to see in what sense they understood its terms. Their subsequent conduct leaves no room for

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(1) (1913) I.L.R. 38 Mad. 753. (2) (1878) 3 App. Cas. 974, 984.

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doubt on the matter as pointed out by my learned brother. It is impossible also to see how the terms of the compromise were to be worked out if they created a first charge in favour of the creditors. The word "creditor" does not appear in the paragraph at all. The obligation to discharge the debts assigned to each member was a continuing one, and it is to be observed that according to the same paragraph 13,

> "if any one sharer should fail to discharge the debts mentioned above and consequently, *either* obstruction is caused to the properties of the remaining sharers *or* the other sharers should be necessitated to discharge such debts, the sharer who has committed default should pay these amounts from out of his properties . . . to the sharers who have discharged such debts."

So that, a mere obstruction, say the attachment of a sharer's land by the creditor, brings the clause into action, and yet we must suppose, if a first charge was created in favour of the creditor on the lands allotted to the sharer who was to discharge the debt, that the aggrieved co-sharer had only some sort of second charge which had to be deferred till the creditor worked out his first charge or was otherwise satisfied.

As my learned brother remarks we have authoritative interpretations of what such clauses in a partition deed mean in *T. A. Sesha Iyer* v. *S. N. Srinivasa Ayyar*(1) and *Imbiohi* v. *Achampat Avukoya Haji*(2). I have no hesitation in holding that no charge in favour of creditors was created by Exhibit O, and consequently the plaintiff's suit as regards the respondents must fail.

As a member of the Full Bench of this Court in *Subbu Chetti* v. *Arunachalam Chettiar*(3), I am much obliged to my learned brother for pointing out the error which has crept into an *obiter* remark in that

(1) (1921) 41 M.L.J. 282. (2) (1916) 33 M.L.J. 58.
(3) (1929) I.L.R. 53 Mad. 270 (F.B.).

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.