which the Code has expressly limited those powers, there is no reason to curtail them.

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LAKSHMANA RAO J.—I agree with my Lord the CHIEF JUSTICE and have nothing to add.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice, Mr. Justice Varadachariar and Mr. Justice Mockett.

RAMACHANDRA NAIDU AND THREE OTHERS (APPELLANTS 1 TO 4), APPELLANTS,

1937, December 15.

v.

VENGAMA NAIDU (DEAD) AND EIGHTY-TWO OTHERS (RESPONDENTS 1 TO 8, 11, 13, 14, 16 TO 47, 49 TO 58, 60 TO 86, 88 TO 90 AND 94 AND LEGAL REPRESENTATIVES OF RESPONDENTS 1, 34 AND 35), RESPONDENTS.*

Part performance—Doctrine of—Applicability—Maintenance decree—Charge on properties created by—Alienees of portion of properties charged—Agreement between them and decree-holder widow for release of properties in their possession on happening of certain events—Events contemplated not happening but widow receiving a portion of amount payable to her under agreement—Applicability of doctrine of part performance in such a case so as to debar assignee of decree from widow from executing decree against properties in hands of alienees—Alienees taking with notice of agreement—Civil Procedure Code (Act V of 1908), O. XLI, r. 2 proviso—Appellate Court deciding case upon a point taken by itself—Opportunity to party affected to meet the point—Necessity.

In 1890 a Hindu widow obtained a decree against her stepsons, R and another, for maintenance then due and for future maintenance. The maintenance was made a charge on

* Letters Patent Appeal No. 292 of 1927.

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the family properties. In 1894 the widow entered into an agreement with V and P, purchasers of R's half share in 393 acres of the family lands from one K who had himself purchased the same from R and was a defendant in the widow's suit. Under the agreement V and P were to pay the widow a sum of Rs. 1,400 in satisfaction of her claim for future maintenance against the properties in their hands. Of the Rs. 1,400 a sum of Rs. 1,000 had already been paid. The agreement provided that when the balance of Rs. 400 had been received and the widow had realised the amount representing the arrears of maintenance at the date of the agreement, she was to execute a formal release of the charge created by the decree on R's half share in the family properties. The arrears were not realised and consequently the agreement was renewed in 1903 and again in 1906. The effect of each of those documents was that if V and P paid the balance of Rs. 400 with interest and the widow was able to realise from other properties the amount due to her as arrears of maintenance at the date of the document, she would execute the contemplated release and that in the meantime, she would not take steps in execution of the decree against the properties in the possession of V and P. The agreements were not recorded under the provisions of Order XXI, rule 2, of the Code of Civil Procedure and the events contemplated by the agreement never happened. In 1908 the widow assigned her decree to the plaintiffs. A few days prior to the said assignment V sued for a decree for specific performance of the agreement of 1906, the last renewal of the agreement of 1894. His suit was dismissed by the trial Court and its dismissal was affirmed in appeal. Pending a second appeal to the High Court the widow died and the plaintiffs were added as parties. The High Court held that the plaintiffs as assignees of the maintenance decree were not the legal representatives of the widow, and being assignees an action for specific performance did not lie. The plaintiffs, as assignees of the maintenance decree, instituted proceedings in execution, obtained an order for the sale of R's interest and purchased the same at the Court auction. They then instituted the suit out of which the Letters Patent Appeal arose against, *inter alia*, transferees from V and P, for partition of the properties and for possession of their half share. The trial Court dismissed the suit. On appeal to the High Court the learned Judges who heard the appeal concurred in the view that the

doctrine of *lis pendens* applied to the alienations and that the agreement of 1894 and its subsequent renewals did not operate to bar the execution of the widow's decree. But while one of them held that the suit could be maintained as framed, the other learned Judge considered that, as the plaintiffs had taken an assignment of the decree with full knowledge of the agreement of 1894 and its subsequent renewals, it was a fraud on the alienees to enforce the maintenance decree and held that the doctrine of part performance applied and on that basis refused the plaintiffs the reliefs they sought, but instead granted them a money decree for Rs. 400 with interest from 1894. The Letters Patent Appeal was preferred against the judgment of the latter learned Judge.

Held by the Full Bench :—(i) The doctrine of part performance had no application to the case.

All that had happened was that an agreement was entered into by the widow with the original alienees under which she undertook to release the properties with which they were concerned on certain events happening. Until they happened —and they never did happen—the properties remained charged. The fact that the widow received Rs. 1,000 out of the Rs. 1,400 did not entitle V and P to a release.

(ii) The fact that the plaintiffs took with notice of the agreement of 1894 did not disentitle them to execute the decree.

The plaintiffs were the assignees in law of the widow's decree and they were entitled to execute it against the family properties, notwithstanding that they had passed into the hands of the defendants. They did execute the decree and in the execution proceedings they bought in the half share of R. Consequently they possessed R's half interest in the family estate.

While it is open to an appellate Court to decide a case on any rule of law which it considers applies, it is not entitled to decide a case on a point taken by itself without giving the parties to the appeal an opportunity of meeting it.

APPEAL under Clause 15 of the Letters Patent preferred against the judgment of VENKATASUBBA RAO J. in Appeal Suit No. 110 of 1923 (Original Suit No. 45 of 1917, Sub-Court, Trichinopoly).

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The Letters Patent Appeal arose out of a difference of opinion between KRISHNAN and VENKATASUBBA RAO JJ. who heard and disposed of Appeal Suit No. 110 of 1923.

The facts of the case, the points on which there was difference of opinion between KRISHNAN and VENKATASUBBA RAO JJ. and the arguments of Counsel in the Letters Patent Appeal appear from the judgment in the Letters Patent Appeal.

T. M. Krishnaswami Ayyar and *M. S. Vaidyanatha Ayyar* for appellants.

K. S. Krishnaswami Ayyangar and *K. V. Sesha Ayyangar* for respondents.

Cur. adv. vult.

JUDGMENT.

LEACH C.J.

LEACH C.J.—In Original Suit No. I of 1889 of the District Court of Trichinopoly a Hindu widow, one Venkalakshmi Ammal, sued her step-sons, Venkatarama Ayyar and Ramarathnam Ayyar, for maintenance, and on 2nd September 1890 obtained a decree which applied to the maintenance then due and to future maintenance. The maintenance was made a charge on the family properties. The decree was not expressed in precise terms, but it was held in subsequent execution proceedings that the decree did in fact give a charge on the family properties and this question must be regarded as having been finally decided. On 13th November 1888 Ramarathnam sold his half share in 393 acres of the family lands to one Krishna Ayyar, who was the twenty-first defendant in the widow's suit. On 27th November 1888 Krishna Ayyar sold his interest in these properties to Vengama Naidu and Perumal Naidu.

Between 7th December 1888 and 2nd June 1890 Vengama Naidu and Perumal Naidu under thirteen deeds disposed of their interest in the properties to various people. On 27th September 1908 the widow assigned her decree to the plaintiffs in the suit out of which this appeal arises. As assignees of the decree the plaintiffs instituted proceedings in execution and obtained an order for the sale of Ramarathnam's interest. At the Court auction they purchased Ramarathnam's interest. On 14th September 1915 the plaintiffs filed a suit in the Court of the District Munsif of Kulittalai for partition of the properties and for possession of their half-share. The District Munsif's Court had no jurisdiction to try the suit because of its value and the plaint had to be returned for filing in the Court of the Subordinate Judge. This was done and the suit was numbered as Original Suit No. 45 of 1917. There were 101 defendants, of whom 98 were sued as alienees under transfers executed after 7th December 1888.

In 1894 the widow entered into an agreement with Vengama Naidu and Perumal Naidu under which they were to pay her a sum of Rs. 1,400 in satisfaction of her claim for future maintenance against the properties in their hands. Of the Rs. 1,400 a sum of Rs. 1,000 had already been paid. The agreement provided that when the balance of Rs. 400 had been received and the widow had realised the amount representing the arrears of maintenance at the date of the agreement she was to execute a formal release of the charge created by the decree on Ramarathnam's half share in the family properties. The arrears were not realised and consequently the agreement was renewed in

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1903 and again in 1906. The original agreement has not been put in evidence, but the agreements of 1903 and 1906 have been and are marked as Exhibits XVIII and XVIII (*a*) respectively. The agreement of 1903 reads as follows :—

> "If according to what you have executed and given, you pay with interest the sum of Rs. 400 which is the balance due after deducting the amount of Rs. 1,000 received from you, I shall, as soon as the whole of the decree amount due up to this day is realised, cause the plaintiff in the said suit to execute and deliver a memorandum of release in your favour to the effect that the liability for the decree of the lands purchased by you from Krishna Ayyar has been given up. I shall not attach the said lands and proceed in execution for the amounts due under the said decree."

This document was signed by one P. Ramaswami Ayyar as the agent of the widow. That he had the authority to sign is not in question. The agreement of 1906 is in similar terms, but instead of the words "as soon as the whole of the decree amount due up to this day is realised", we have the words "after the realization of the entire balance of the decree". There can be no doubt that the effect of each of these documents was this : If Vengama Naidu and Perumal Naidu paid the balance of Rs. 400 with interest and the widow was able to realise from other properties the amount due to her as arrears of maintenance at the date of the document she would execute the contemplated release ; in the meantime she would not take steps in execution of the decree against the properties in the possession of Vengama Naidu and Perumal. These agreements were not recorded under the provisions of Order XXI, rule 2, of the Code of Civil Procedure, and, therefore, cannot be regarded as adjustments of the decree.

On 17th September 1908, that is, two days before the assignment by the widow of her decree in favour of the present plaintiffs, Vengama Naidu instituted Original Suit No. 406 of 1908 in the Court of the District Munsif of Kulittalai for a decree for specific performance of the agreement of 1906, the last renewal of the agreement of 1894. On 14th August 1911 the District Munsif dismissed the suit. An appeal followed to the Subordinate Judge of Trichinopoly, who held that the suit was premature and accordingly dismissed the appeal. A second appeal was then filed in this Court. The widow died during the pendency of the appeal and the present plaintiffs were added as parties. This Court held that the plaintiffs, as assignees of the maintenance decree, were not the legal representatives of the widow, and being assignees an action for specific performance did not lie. This judgment was delivered on 12th March 1915.

Returning now to the suit out of which this appeal arises, the Subordinate Judge accepted the contention that the doctrine of *lis pendens* applied to the alienations and therefore regarded them as being subject to the charge in favour of the widow. But he dismissed the suit on the broad ground that there were enough equities with the alienee defendants to override all consequences arising from the operation of the doctrine of *lis pendens*. This judgment was delivered on 21st August 1922. An appeal was filed against this decision in this Court and it came before KRISHNAN and VENKATASUBBA RAO JJ. on the 6th and the 14th of September and on the 1st and the 8th October 1926. After the arguments had closed

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judgment was reserved and was delivered on 5th November 1926. VENKATASUBBA RAO J. agreed that the doctrine of *lis pendens* did apply and accepted the contention that the agreement of 1894 and its subsequent renewals did not operate to bar the execution of the widow's decree. The learned Judge, however, laid great stress on the fact that the plaintiffs had taken the assignment of the decree with full knowledge of the agreement, and considered that in these circumstances it was a fraud on the alienees to enforce the maintenance decree. He also held that the doctrine of part performance applied and on this basis refused the plaintiffs the reliefs they sought, but instead granted them a money decree for Rs. 400 with interest from 1894. KRISHNAN J. considered that the suit could be maintained as framed and relied on the decision of this Court in *Krishna Aiyar* v. *Savurimuthu Pillai*(1). In that case, a Full Bench consisting of ABDUR RAHIM, OLDFIELD and SESHAGIRI AYYAR JJ. held that a decree which had been satisfied was still capable of execution so long as the satisfaction was not reported to and certified by the Court. The only remedy for a judgment-debtor who is called upon to pay in execution proceedings, having already paid out of Court, is an action for damages against the decree-holder, but when the decree has been executed by an assignee no action for damages will lie against the assignee, notwithstanding that he has taken the assignment with notice of the fact that the decree has been satisfied. KRISHNAN J. also accepted the application of the doctrine of *lis pendens*.

(1) (1918) I.L.R. 42 Mad. 338.

It falls to be observed that the doctrine of part performance on which VENKATASUBBA RAO J. relied was not raised in the pleadings, was not made the subject of an issue and was not raised in the course of the arguments. KRISHNAN J. added a note to his judgment, after he had perused that of VENKATASUBBA RAO J., and there pointed out that this was an entirely new question which was not raised by the parties and not argued at the Bar. While it is open to the Court to decide a case on any rule of law which it considers applies, it is not entitled to decide a case on a point taken by itself without giving the parties to the appeal an opportunity of meeting it. Order XLI, rule 2, of the Code of Civil Procedure says that the appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal, but the appellate Court in deciding the appeal shall not be confined to the ground of objection set forth in the memorandum of appeal or taken by leave of the Court under the rule. There is, however, this important proviso. The Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground. With great respect, I consider that before VENKATASUBBA RAO J. based his decision on the doctrine of part performance he should have given the plaintiff's Advocate an opportunity of stating his views on the question.

As the doctrine of part performance was relied on by VENKATASUBBA RAO J. and has been made the subject of argument before us, I will express

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my views on the question. The widow had obtained a decree for maintenance and the amount she was entitled to receive by way of maintenance was made a charge on the family properties. If her step-sons did not pay what was due as maintenance she was entitled to proceed against those properties, notwithstanding that they had passed or that some of them had passed into other hands. It was open to her to agree with the alienees to release the properties in their hands from the charge, but until there was a release by her, valid in law, the properties remained charged. In this case all that had happened was that an agreement was entered into by the widow with the original alienees under which she undertook to release the properties with which they were concerned on certain events happening. Until they happened—and they never did happen—the properties remained charged. The fact that the widow received Rs. 1,000 out of the Rs. 1,400 did not entitle Vengama Naidu and Perumal Naidu to a release. Therefore I fail to see how the doctrine of part performance can have any application whatsoever. VENKATASUBBA RAO J. also considered that the present action constituted a fraud on the alienees. There was here clearly no fraud. The plaintiffs took with notice of the agreement of 1894, but that did not disentitle them to execute the decree. They were at full liberty to do so.

I have already mentioned that it was accepted by the trial Court and by KRISHNAN and VENKATASUBBA RAO JJ. on appeal that the doctrine of *lis pendens* applied. It was suggested at one stage in the arguments before us that this view

was wrong, but when it was pointed out to the learned Advocate for the respondents that the question had been raised in the execution proceedings to which the present parties or their representatives were parties and there decided, he very properly did not press the point. It is clear that it was raised in the execution proceedings and there finally decided and consequently the argument is not open to the defendants in this Court. The same remarks apply to a suggestion which has been made that the agreement of 1894 and its subsequent renewals operated to prevent the widow proceeding in execution against the properties in the possession of the alienees. This question was also raised in the execution proceedings and there also decided. Therefore the position is this. The plaintiffs are the assignees in law of the widow's decree and they were entitled to execute it against the family properties, notwithstanding that they had passed into the hands of the defendants. They did execute the decree and in the execution proceedings they bought in the half-share of Ramarathnam. Consequently they now possess Ramarathnam's half interest in the family estate. It has been suggested that section 91 of the Indian Trusts Act applies, but it is clear that it does not. The decision in the suit for specific performance entirely disposes of this argument.

The appeal will be allowed and the case remanded to the trial Court for disposal on the merits. The appellant will be entitled to costs here and before the Division Bench. He will also be entitled to a refund of the court-fee paid on the appeal as well as on the Letters Patent Appeal.

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A regrettable feature of this case is the tremendous delay which has taken place. The suit was filed as long ago as 1915 and an appeal lay direct to this Court. As I have pointed out, the learned trial Judge delivered judgment on 21st August 1922. An appeal was filed in that year to this Court and it came before KRISHNAN and VENKATASUBBA RAO JJ. in September and October 1926. The learned Judges disagreed and in accordance with the practice of this Court which then ruled it was necessary that the appeal should be heard by a Full Bench. It has taken eleven years for this to happen. The appeal has been in this Court from 1922 until now, a total period of fifteen years. But for the fact that these dates appear on the record I should not have believed it possible that there could be such delay. The fact that the number of parties is large and that some of them died and their legal representatives have had to be brought on the record can be no justification for this great delay. The delay is so great that it would appear to amount to a scandal, and I have directed that a full inquiry be made into the matter.

VARADACHARIAR J.—I agree.

MOCKETT J.—I agree.

A.S.V.