

APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice Madhavan Nair, Mr. Justice Varadachariar, Mr. Justice Lakshmana Rao and Mr. Justice Stodart.

1938,
January 17.

BADEMIAN SAHEB AND ANOTHER (PETITIONER AND NIL),
PETITIONERS,

v.

P. M. JANKAN SAHEB (RESPONDENT), RESPONDENT.*

Civil Rules of Practice—Civil Procedure Code of 1882—Rules made under, but not re-enacted and published in accordance with procedure prescribed in Part X of the Code of 1908—Validity of—Code of Civil Procedure (Act V of 1908), sec. 157—Effect of.

The Civil Rules of Practice made under the Civil Procedure Code of 1882 but not re-enacted and published in accordance with the procedure prescribed in Part X of the Civil Procedure Code of 1908 are invalid if and in so far as they are inconsistent with any of the rules of the First Schedule of the latter Code.

Re The District Munsif of Tiruvallur(1) overruled.

PETITION under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif of Dharmapuri dated 10th February 1934 and passed in Interlocutory Application No. 71 of 1934 in Original Suit No. 117 of 1933.

This petition originally came on for hearing before VENKATARAMANA RAO J. who made the following

ORDER OF REFERENCE TO A BENCH :—

The order of the learned District Munsif is in accordance with Rules 114 to 120 of the Civil Rules of Practice but it is contended by Mr. C. S. Swaminathan that the said rules are

* Civil Revision Petition No. 1192 of 1934.
(1) (1911) I.L.R. 37 Mad. 17 (F.B.).

ultra vires as being in conflict with Order XX, rule 17, Civil Procedure Code, and as not having been framed in the manner and by the authority prescribed by the new Code for making valid new rules and for altering existing rules. When a question arose with reference to Rules 179 and 180 of the previous Rules of Practice, SADASIYA AYYAR J. in *Visvanadhan Chetty v. Arunachelam Chetti*(1) took the view that they were *ultra vires* under similar circumstances. As the question involved in this case affects the practice to be followed in the whole Presidency, I think it is desirable that this matter should be disposed of by a Bench. I accordingly refer this case to a Bench.

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Pursuant to the aforesaid order of reference the petition came on for hearing before BEASLEY C.J. and VENKATARAMANA RAO J. who made the following

ORDER OF REFERENCE TO A FULL BENCH :—

The question raised in this revision petition relates to the validity of certain Civil Rules of Practice made under the Code of Civil Procedure, 1882, but not re-enacted in accordance with the procedure laid down in Chapter X of the Code of 1908, and which are inconsistent with the rules in the First Schedule of the latter Code. The relevant provision on this matter is section 157 of the Code of 1908 in and by which the rules framed under the Code of 1882, "so far as they are consistent with this Code (1908), have the same force and effect as if they had been made under this Code and by the authority empowered thereby in such behalf". In *Re The District Munsif of Tiruvallur*(2) a Full Bench had to consider this question. The particular matter for consideration before them was whether the rules made by the Local Government under section 269 of the Code of 1882, though inconsistent with Order XXI, rule 43, of the Code of 1908, had any legal effect. They were of the opinion that the said rules not being inconsistent with the Code, as distinguished from the Orders in the First Schedule to the Code, were in force. The learned Judges seem to interpret "the Code" in section 157 as meaning "the

(1) (1920) I.L.R. 44 Mad. 100, 110 (F.B.).

(2) (1911) I.L.R. 37 Mad. 17 (F.B.).

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body of the Code". It is desirable to point out that "Code" has been defined in section 2 as including rules; and section 121 enacts "that the rules in the First Schedule shall have effect as if enacted in the body of the Code until annulled or altered in accordance with the provisions of this Part" (Part X). The Legislature, when it desires to draw a distinction between the body of the Code and the rules in the First Schedule expressly makes mention of the "body of the Code". (See sections 121 and 128.) In the Full Bench decision there is no discussion of the provisions of the new Code here adverted to by us, and the learned Chief Justice who delivered the leading judgment observed that the point was not free from doubt. Since this decision, whenever the question came up for decision, learned Judges who had to deal with it expressed a contrary view. In *Visvanadhan Chetty v. Arunachalam Chetti*(1) SADASIVA AYYAR J. observed that Rules 179 and 180 of the Civil Rules of Practice which were found inconsistent with the rules of the First Schedule were *ultra vires* "as not having been framed in the manner and by the authority prescribed by the new Code for the making of valid new rules and for altering existing rules". These have been since re-enacted in accordance with the procedure prescribed by the new Code. In *Dhanaraju v. Balakissendas Motilal*(2) TIRUVENKATACHARIAR J. held that Rule 184 of the Civil Rules of Practice was *ultra vires* as being inconsistent with Order XXI, rule 53, Civil Procedure Code. We may here mention that in *Venkataswami v. Venkataramana Rao*(3) a Division Bench (MADHAVAN NAIR and COENISH JJ.) was of the opinion that Rule 184 would be *ultra vires* but for section 51 of the Code. In a recent decision reported as *Murugappa Chettiar v. Ramasami Chettiar*(4) VENKATASUBBA RAO J. held that Rule 199 of the Civil Rules of Practice, to the extent to which it is opposed to and inconsistent with the provisions of the First Schedule, cannot take effect. He was of the opinion that *Re The District Munsif of Tiruvallur*(5) did not lay down any general rule. It seems doubtful if *Re The District Munsif of Tiruvallur*(5) can be distinguished on this ground. As the matter is one of considerable importance, affecting as it does the practice in the Presidency, and we feel doubt as to the

(1) (1920) I.L.R. 44 Mad. 100, 110 (F.B.).

(2) (1929) I.L.R. 52 Mad. 553 (F.B.). (3) (1934) I.L.R. 58 Mad. 285.

(4) (1935) 42 L.W. 564.

(5) (1911) I.L.R. 37 Mad. 17 (F.B.).

correctness of the decision in *Re The District Munsif of Tiruvallur*(1) we refer for the decision of a Full Bench the following question :—

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Are the Civil Rules of Practice made under the Code of 1882 but not re-enacted and published in accordance with the procedure prescribed in Part X of the Code of 1908 and inconsistent with any of the rules of the First Schedule of the latter Code valid and have they any legal effect?

Pursuant to the aforesaid order of reference the petition came on for hearing before the Full Bench constituted as above.

ON THE REFERENCE :

C. S. Swaminadhan for petitioners.—The petitioners filed a suit for the dissolution of a partnership and the taking of accounts. A preliminary decree was passed and a commissioner was appointed to take the accounts. At that stage the petitioners requested that the commissioner should inquire into certain transactions which were suppressed by the other side. This procedure is permitted by Order XX, rule 17, Civil Procedure Code. Rules 114 to 121 of the Civil Rules of Practice which deal with partnership suits do not permit of such a course being followed. Those rules were made under the Civil Procedure Code of 1882. According to section 157 of the present Code, rules framed under the old Code have the same force and effect as if they had been framed under the new Code provided they are consistent with the new Code. The word "Code" as defined in section 2 (1), Civil Procedure Code, includes rules. [Section 2 (16) of the Civil Procedure Code was also referred to.] Section 121, Civil Procedure Code, says that "the rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part". The other sections in that Part state how the rules may be annulled or altered. Rules 114 to 121 of the Civil Rules of Practice being inconsistent with Order XX, rule 17, Civil Procedure Code, are *ultra vires* and invalid. *Re The District Munsif of Tiruvallur*(1) was wrongly decided. [*Murugappa Chettiar v. Ramasami Chettiar*(2), *Venkataswami*

(1) (1911) I.L.R. 37 Mad. 17 (F.B.).

(2) (1935) 42 L.W. 564.

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v. *Venkataramana Rao*(1) and *Dhanaraju v. Balakissendas Motilal*(2) were referred to.]

N. C. Vijayaraghavachari for respondent.—Rules 114 to 121 of the Civil Rules of Practice were made under section 562 of the old Code. By section 157 of the new Code, the rules framed under the old Code continue to be in force if they are consistent with the new Code. The word "Code" refers to the body of the Code and not to the rules in the First Schedule of the Civil Procedure Code; *Re The District Munsif of Tiruvallur*(3).

[THE CHIEF JUSTICE.—In that case the Judges obviously overlooked section 2 (1), Civil Procedure Code.]

Cur. adv. vult.

LEACH C.J. The OPINION of the Court was delivered by LEACH C.J.—The petitioner filed a suit in the Court of the District Munsif of Dharmapuri for the taking of accounts of a partnership. A preliminary decree was passed on 9th October 1933 and the District Munsif appointed a commissioner to take the accounts. The plaint contained no allegation of irregularity or fraud, but during the taking of the accounts the petitioner wished to urge that certain transactions had been suppressed by the respondent and consequently asked that these matters should be inquired into. On objection being raised to this course, the petitioner applied to the Court for an order directing the commissioner to inquire into the alleged irregularities. By an order dated 10th February 1934 the District Munsif held that it was beyond the province of the commissioner or the Court to embark on an inquiry into these allegations. He considered that it was then too late. The petitioner had had an opportunity of inspecting

(1) (1934) I.L.R. 58 Mad. 285. (2) (1929) I.L.R. 52 Mad. 563 (F.B.).

(3) (1911) I.L.R. 37 Mad. 17 (F.B.).

the accounts and as no objection had been raised before the passing of the preliminary decree the petitioner must be deemed to have waived all objections. The petitioner thereupon applied to this Court for revision of the order. The matter came before BEASLEY C.J. and VENKATARAMANA RAO J. on 8th February 1937. Feeling some doubt as to the correctness of the decision of the Full Bench of this Court in *Re The District Munsif of Tiruvallur*(1) the following question was referred to a Full Bench of five Judges:—

“Are the Civil Rules of Practice made under the Code of 1882 but not re-enacted and published in accordance with the procedure prescribed in Part X of the Code of 1908 and inconsistent with any of the rules of the First Schedule of the latter Code valid and have they any legal effect?”

The Court as now constituted is called upon to give the answer.

The Civil Rules of Practice relating to suits for the dissolution of partnership and the taking of accounts are inconsistent with Order XX, rule 17, of the Code of Civil Procedure and it is this fact which has given rise to the question now under discussion. The Civil Rules of Practice require questions of irregularity or fraud to be raised and determined before the case is remitted to the commissioner for the taking of the accounts. Order XX, rule 17, of the Code of Civil Procedure, however, states that the Court may either by the decree directing an account to be taken or by any subsequent order give special directions with regard to the mode in which the account is to be taken and in particular may direct that in taking the account the books of account in which

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the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised. Therefore the Code allows questions of irregularity and fraud to be raised before the commissioner if the Court considers that this should be done. It is to be observed that the Civil Rules of Practice were framed under the Code of 1882 which did not contemplate a preliminary decree in a partnership suit.

In order to answer the question referred it is necessary to examine certain provisions of the Code of 1908. Section 2 (1) makes it clear that the "Code" includes the rules in the First Schedule. Therefore Order XX, rule 17, is as much a part of the Code as the sections forming the body of the Act. Section 121 states that the rules in the First Schedule shall have effect as if enacted in the body of the Code until annulled or altered in accordance with the provisions of Part X, which comprises sections 121 to 131. Under section 122 High Courts established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, may, from time to time, after previous publication, make rules regulating their own procedure, and the procedure of Civil Courts subject to their superintendence, and may by such rules annul, alter, or add to all or any of the rules in the First Schedule. Section 123 gives power to constitute a Rule Committee of the High Court and states how the Committee shall be composed. Section 124 requires the Committee to report to the High Court on any proposal to annul, alter or add to

the rules in the First Schedule or to make new rules and states that before making any rules under section 122 the High Court shall take such report into consideration. Section 126 says that the rules made under Part X shall be subject to the previous approval of the authority prescribed by the proviso to section 107 of the Government of India Act, 1915. So far as this Court is concerned the authority is the Local Government. Section 127 provides that the rules so made and approved shall be published in the Gazette of India or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule.

Section 157 stipulates that the rules made under the Code of 1882 shall, so far as they are consistent with the Code of 1908, have the same force and effect as if they had been made under the new Code, but such rules must not be inconsistent with the new Code. If they are inconsistent the old rules cease to have validity. When the Code of 1908 was enacted the Civil Rules of Practice then in force were not re-enacted and published in accordance with the provisions of Part X. No steps were taken under this Part and the validity of the present rules therefore depends entirely on the provisions of section 157. As that section limits the validity of the old rules to such rules as are consistent with the present Code, it follows that rules which insist on questions of irregularity and fraud being

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decided before the preliminary decree is passed in a partnership suit are invalid.

As I have indicated, this reference has been necessitated as the result of the decision in *Re The District Munsif of Tiruvallur*(1). That case was decided by WHITE C. J., MUNRO and SANKARAN NAIR JJ. The question there was whether the rules made by Government under section 269 of the Code of 1882 remained in force until rules were framed by the High Court under the new Code, though they might be inconsistent with Order XXI, rule 43, of the new Code. The Court held that they did remain in force ; and the reasoning given can be gathered from the following passage in the judgment of the learned CHIEF JUSTICE at page 20 of the report :

“ There is nothing in the Code of 1908, as distinguished from the Orders in the First Schedule to the Code, which is inconsistent with the rules issued under section 269, though there is an inconsistency between the rules and Order XXI, rule 43. But the High Court has power to alter the rules in the First Schedule. This being so, I do not think it follows that, because the rules made under the old section are inconsistent with the rules in the schedule they are not consistent with this Code within the meaning of section 157.

“ The point is not free from doubt, but until rules are made by the High Court, I think the rules made by Government under section 269 of the old Code are in force.

“ Section 157 is an enabling, not a repealing section. The rules have never been expressly repealed and I do not think we are bound to hold they are implicitly repealed by virtue of the words ‘ so far as they are consistent with this Code,’ which occur in section 157.”

The learned Judges obviously overlooked the fact that by virtue of section 2 (1) the rules in the First Schedule of the Code of 1908 are as much a

part of the Code as the sections themselves and it follows that if there is inconsistency between the old rules and the rules of the new Code the old rules must go.

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It is not necessary to refer in detail to the other cases mentioned in the order of reference. They have been sufficiently dealt with there. It is quite clear that *Re The District Munsif of Tiruvallur*(1) was wrongly decided and must be overruled. We accordingly answer the question referred in this way : The Civil Rules of Practice made under the Code of 1882 but not re-enacted and published in accordance with the procedure prescribed in Part X of the Code of 1908 are invalid if and in so far as they are inconsistent with any of the rules of the First Schedule of the latter Code.

[The civil revision petition came on for final hearing before the CHIEF JUSTICE and LAKSHMANA RAO J. after the expression of the aforesaid opinion of the Full Bench when the application for revision was allowed and the case remitted to the District Munsif to be dealt with in the light of the judgment of the Full Bench in the case.]

V.V.C.

(1) (1911) I.L.R. 37 Mad. 17 (F.B.).
