APPELLATE CIVIL.

Before Mr. Justice Varadachariar and
Mr. Justice Gentle.

DIRAVIYAM PILLAI AND ANOTHER (DEFENDANTS 1 AND 2), APPELLANTS,

1939, January 10.

v.

VEERANAN AMBALAM AND THIRTEEN OTHERS (PLAINTIFFS 2 TO 6 AND DEFENDANTS 3 AND 5 TO 13), RESPONDENTS.*

Hindu law—Joint family composed of brothers and their sons—Brothers entering into contract of sale of the properties of the family—Brothers adjudicated insolvents—Subsequent attachment of sons' interests in the property by creditor—Subsequent sale under orders of Insolvency Court by Official Receiver in favour of person with whom the contract of sale was entered into—Competition between him and attaching decree-holder in so far as the shares of the sons in family properties are concerned—Former entitled to preferential right on account of earlier contract of sale—Non-existence of distinction in such case between voluntary sale by brothers and sale made under orders of Court—Sons' coparcenary rights in the family property—If and when could be ignored—Proper interpretation of rule in Nanomi Babuasin's *case*(1).

Certain properties belonged to a joint Hindu family consisting of five brothers and the sons of four of them. On 24th July 1926 some of the brothers entered into a contract with X for the sale of the properties. The brothers were adjudicated insolvents on a petition presented by a creditor in June 1927. On 15th March 1930 the interests of the sons in the joint family properties were attached by a creditor who had obtained a decree for money payable by the five brothers personally and from out of the properties of the joint family in the hands of the five brothers and their sons. Under orders of the Insolvency Court passed on an application

* Appeal No. 101 of 1935.

(1) (1885) I.L.R. 13 Cal. 21 (P.C.).

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filed by X claiming specific performance, a sale deed was executed by the Official Receiver on 6th November 1931.

Held.—(i) The power of the brothers and of the Official Receiver as representing their estate to convey the interests of the sons in the joint family estate did not come to an end when the interests of the sons were attached because there was in existence, long prior to the attachment, a contract of sale entered into by the brothers at a time when the family was joint and they had the power to sell the full interest of the joint family in the suit properties. In such a case no distinction exists between a voluntary sale and one executed under orders of Court.

(ii) The proper interpretation to be given to the statement of the rule in *Nanomi Babuasin* v. *Modhun Mohun*(1) is that, to the extent required to satisfy the father's proper debts, the father and his creditors are entitled to ignore the sons' coparcenary rights in the family property.

Case-law reviewed and discussed.

APPEAL against the decree of the Court of the Subordinate Judge of Madura in Original Suit No. 90 of 1932.

T. M. Krishnaswami Ayyar and *N. Sivaramakrishna Ayyar* for appellants.

K. Rajah Ayyar for *V. Ramaswami Ayyar* for respondents 1 to 5.

A. Bhujanga Rao for respondents 13 and 14.

Other respondents were not represented.

VARADACHARIAR J.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This appeal arises out of a suit instituted by the predecessor in title of respondents 1 to 5 for obtaining a declaration that he was the full owner of the suit properties and for setting aside an order passed on 14th September 1931 dismissing a claim petition that he had filed. The suit properties belonged to a joint Hindu family which consisted of five brothers and the sons of four of them.

(1) (1885) I.L.R. 13 Cal. 21 (P.C.).

Defendants 3, 4, 5 and 6 in the present suit are four of the brothers; another brother Sundararaja Ayyar had died before suit. Defendants 7 to 12 are the sons of four of the brothers. The appellants who were defendants 1 and 2 in the lower Court had obtained a decree for money payable by the five brothers personally and from out of the properties of the joint family in the hands of the five brothers and their sons. In execution of that decree, the appellants attached the interests of the sons in the joint family properties. This attachment which was made on 15th March 1930 was advisedly limited to the interests of the sons, because, in the meanwhile, the five brothers had been adjudicated insolvents and their interests were being administered in insolvency. The present plaintiff's claim as against the attachment made by the appellants was based upon an alleged contract for the sale of the suit property to him for Rs. 30,000; it was stated that this contract had been entered into by defendants 3 and 4 and their deceased brother on 24th July 1926. It was the plaintiff's case that in pursuance of this contract a sum of more than Rs. 28,000 had been paid to the vendors even before 12th April 1927, the date fixed for the completion of the contract, that after the expiry of the time fixed the vendors had been delaying the execution of the sale deed on account of certain domestic reasons, that in June 1927 a creditor of the vendors presented a petition to adjudicate them insolvents, that accordingly the execution of the sale deed was further delayed and that finally under orders of the Insolvency Court, passed on an application filed by the plaintiff claiming specific performance, a sale deed was executed by the Official Receiver on 6th November 1931. The plaintiff further alleged

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that, even before he became aware of the presentation of the insolvency petition, he had paid to the vendors the balance still remaining due, that he had already been put in possession of the property and had been in enjoyment thereof, that the monies received by the vendors in pursuance of the contract of sale had been utilized by them for paying off family debts binding on the sons as well and that therefore the contract of sale and the sale deed subsequently executed by the Official Receiver were operative to vest in the plaintiff the whole interest of the joint family in the suit properties.

The appellants, who were the contesting defendants, disputed the truth of the alleged contract of sale and the payment of consideration therefor and the binding character of the sale as against the sons. This question of fact was made the subject of the first issue in the case. The appellants further contended that in any event the sale deed executed by the Official Receiver on 6th November 1931 could not affect the rights of defendants 7 to 12 and that the plaintiff could not accordingly object to the appellants' right to attach the interests of these defendants in the suit properties. This contention of law was raised by the third issue in the case. Two further questions arose in the course of the discussion of the rights of the parties in the lower Court as to the exact position of defendants 7, 8 and 9 and their interests in the suit properties. Defendants 7 and 8 had been impleaded in the insolvency proceedings and the creditor sought to have them also adjudicated insolvents, but by a consent order they were exonerated on their agreeing that their interests in the properties of the family might be vested in the Official Receiver appointed in the insolvency. The

plaintiff contended that in any event the interests of defendants 7 and 8 must be held to have passed under the sale deed executed by the Official Receiver. The ninth defendant instituted a suit for partition in 1928 but subsequently withdrew it, though the papers relating to the withdrawal are not on record. It has been contended on behalf of the appellants that, as a result of the filing of the plaint by the ninth defendant, he became separated in status from the rest of the family and that thereafter neither his father nor the Official Receiver in the insolvency had any right to convey his interest to the plaintiff. In answer to this contention, it has been urged that the admitted withdrawal of the partition suit must in the circumstances be deemed to have left the ninth defendant a member of the joint Hindu family and that accordingly his interest was effectually conveyed by the Official Receiver. The learned Subordinate Judge upheld the plaintiffs' contention on all the points above set out and passed a decree in the plaintiffs' favour. Hence this appeal by defendants 1 and 2.

The question of fact raised by the first issue may be very briefly disposed of.

[His Lordship discussed the evidence and confirmed the finding of the lower Court on the first issue and proceeded:]

The finding of the lower Court on the third issue was challenged by the learned Counsel for the appellants on the ground that, according to a long course of decisions in this Court, the power of the brothers and of the Official Receiver as representing their estate to convey the interests of the sons in the joint family estate must be deemed to have come to an end when the interests of the sons were attached

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by the present appellants in execution of their decree. In support of this contention reliance was placed upon the decisions in *Gopalakrishnayya* v. *Gopalan*(1), *The Official Receiver, Coimbatore* v. *Arunachalam Chettiar*(2), *Kanyaka Parameswaramma* v. *Venkataramayya*(3), *Palaniappa Chettiar* v. *Palani Goundan*(4) and *Official Receiver, East Godavari* v. *Imperial Bank of India*(5) and the observations in an unreported judgment of REILLY and ANANTAKRISHNA AYYAR JJ. which has been filed as Exhibit XXIV in this case. Reference was also made to the decisions of the Allahabad High Court in *Allahabad Bank Ltd., Bareilly* v. *Bhagwan Das Johari*(6), of the Bombay High Court in *Subraya* v. *Nagappa*(7) and of the Calcutta High Court in *Kamala Bala* v. *Surendra Nath*(8). Before considering the effect of these decisions and the reasoning on which they rest, we may point out that the present case differs from all of them in one important respect, namely, that there was in existence in this case, long prior to the attachment, a contract of sale entered into by the brothers at a time when the family was joint and they had the power to sell the full interest of the joint family in the suit properties. That this circumstance makes a very material distinction will appear when the authorities are examined.

The rights of a promisee under a prior contract of sale as against a subsequent attachment and the rights of a Court-auction-purchaser under that attachment have been considered in several decisions in this Court beginning as early as in *Savithri Ammal*

(1) (1926) I.L.R. 51 Mad. 342.
(2) (1933) 66 M.L.J. 412.
(3) (1936) 71 M.L.J. 294.
(4) (1936) 71 M.L.J. 541.
(5) (1935) I.L.R. 59 Mad. 296.
(6) (1925) I.L.R. 48 All. 343.
(7) (1903) I.L.R. 33 Bom. 264.
(8) A.I.R. 1937 Cal. 517.

v. *Ramasami*(1) and going down to *Veerappa Thevar* v. *Venkatarama Ayyar*(2). See *Bapineedu* v. *Venkayya*(3), *Venkata Reddi* v. *Yellappa Chetti*(4), *Veeraraghavayya* v. *Kamala Devi*(5) and *Sunkari Sitayya* v. *Mudaragaddi Sanyasi*(6). *See* also *Karalia Nanubhai* v. *Mansukhram*(7), *Madan Mohan Dey* v. *Rebati Mohan Poddar*(8), *Deoki Nandan Singh* v. *Saiyed Jawad Hussain*(9) and *Lakshman* v. *Ramchandra*(10). It was contended by Mr. Krishnaswami Ayyar, the learned Counsel for the appellants, that the course of decisions beginning with *Savithri Ammal* v. *Ramasami*(1) cannot be regarded as laying down good law in view of recent pronouncements of the Judicial Committee as to the effect of the last paragraph of section 54 of the Transfer of Property Act. He also contended that if, as laid down in the Madras decisions relating to the effect of the attachment on the father's power to sell the sons' interest, the father's power was at an end, the decisions dealing with the effect of an antecedent contract to sell can have no bearing on the decision of the present case. It accordingly becomes necessary to examine at some length the two sets of authorities above referred to. Though the sale deed was executed by the Official Receiver in this case, it must be taken that he had no larger power than the insolvents themselves would have had, and if, for any reason, the insolvents had lost the power to sell their sons' interests, the conveyance executed by the Official Receiver could have no greater effect; see *Sat Narain* v. *Sri Kishen Das*(11).

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(1) (1898) 8 M.L.J. 266.
(2) (1935) I.L.R. 59 Mad. 1.
(3) (1910) 21 M.L.J. 82.
(4) (1916) 5 L.W. 234.
(5) (1934) 68 M.L.J. 67.
(6) (1924) 46 M.L.J. 361.
(7) (1900) I.L.R. 24 Bom. 400.
(8) (1915) 21 C.W.N. 158.
(9) A.I.R. 1928 Pat. 199.
(10) (1931) 34 Bom. L.R. 117.
(11) (1936) I.L.R. 17 Lah. 644 (P.C.).

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The point for consideration therefore is whether, as a result of the attachment placed by the appellants on 15th March 1930 on the interests of the sons, the power of the fathers to sell the joint family property including the sons' interests for the satisfaction of debts binding on the sons *came to an end*.

It may be conceded that in some of the Madras decisions very general language has been used which almost seems to lay down the proposition contended for by Mr. Krishnaswami Ayyar; but on examination it will be found that in all those cases the question arose between the attaching creditor and the Official Receiver and all that was intended to be laid down by the learned Judges was that the attaching creditor was entitled to proceed to bring the sons' interest to sale and that the Official Receiver could not claim the proceeds of the sons' shares for the benefit of the general body of creditors. In *Gopalakrishnayya* v. *Gopalan*(1), where this question was considered for the first time in this Court, the learned Judges referred to *Allahabad Bank Ltd., Bareilly* v. *Bhagwan Das Johari*(2) as supporting their conclusion. The Allahabad decision only dealt with the question whether the interests of the sons in the joint family properties vested in the Official Receiver on the insolvency of the father. The learned Judges did not address themselves to the question whether, apart from the vesting of the sons' interest, the *power* to sell which the father has under the Hindu law passed to the Official Receiver and, if so, what the effect on it is of the attachment of the sons' interest. In the later decisions of this Court, which purported to follow *Gopalakrishnayya* v. *Gopalan*(1) and repeated

(1) (1926) I.L.R. 51 Mad. 342. (2) (1925) I.L.R. 48 All. 343

the language used in that case, reference has also been made to the decision of the Bombay High Court in *Subraya* v. *Nagappa*(1) and we think we are justified in holding that the Madras decisions, though using general language, only intended to adopt the view laid down in *Subraya* v. *Nagappa*(1).

The judgment of CHANDAVARKAR J. in *Subraya* v. *Nagappa*(1) was based upon the effect of section 276 of the Civil Procedure Code, 1882, corresponding to section 64 of the Code of 1908. The learned Judge observed that, as the effect of the attachment was to prevent the sons from alienating their shares, it must also be held to prevent the father from alienating the sons' shares for the satisfaction of the father's debts. With all respect, we venture to think that this reasoning is not reconcilable with the basis on which the father's power to sell joint family property for the discharge of his own proper debts is supported by the decisions of the Judicial Committee. CHANDAVARKAR J. regarded the father in such cases as merely exercising the power of alienation which the sons would have exercised in the discharge of their pious duty which they owed to him. He went on to add that the father "is virtually alienating the property for them (the sons) and on their behalf" and it was on this view that he based the further proposition that, as the attachment prevented the son from alienating his (son's) interest, it must equally be held to prevent the father from alienating the son's interest. The basis of the Privy Council decisions, if we may take *Nanomi Babuasin* v. *Modhun Mohun*(2) as typical of them, seems to us to be somewhat different. Their Lordships observed that the recognition of the father's

(1) (1908) I.L.R. 33 Bom. 264. (2) (1885) I.L.R. 13 Cal. 21 (P.C.).

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power to sell the sons' interest for the discharge of his own debts was destructive of the principle of independent coparcenary rights in the sons; they then proceed to state the position to be that the sons cannot set up their rights in the family property as against the father's alienation for an antecedent debt or against his creditors' remedies for their debts if not tainted with immorality. The proper interpretation of this statement of the rule seems to us to be that, to the extent required to satisfy the father's proper debts, the father and his creditors are entitled to ignore the sons' coparcenary rights in the family property. If this is the true view of the father's right, it seems to us, with all respect, open to question whether it can be said, as CHANDAVARKAR J. said in the Bombay case, that the father when he sells the family property for the discharge of his debts is merely exercising the power of sale possessed by the son himself. Except on this theory, it will be difficult to limit the father's power by reason of the statutory disability imposed by section 64 of the Code of Civil Procedure upon the son as a result of the attachment of the son's interest. We may also observe in this connection that the provision in section 53 of the Code of Civil Procedure, declaring that the property in the hands of a son which under the Hindu law is liable for the payment of the debts of the deceased father shall be deemed to be the property of the deceased which has come to the hands of the son, is more consistent with the view we have above indicated as to the basis of the decisions of the Judicial Committee relating to the father's power to sell joint family property. It is not however necessary for the purposes of this case to decide whether the view enunciated in *Subraya* v.

Nagappa(1) is to be followed or not. We have therefore thought it unnecessary to refer the case to a Full Bench and we propose to deal with the case on the footing that *Subraya* v. *Nagappa*(1) was rightly decided.

The result of the Bombay decision as well as of the decision of the Calcutta High Court in *Kamala Bala* v. *Surendra Nath*(2) is only to impose on the father in a case like the present the disability imposed upon the son by section 64 of the Code of Civil Procedure. We are not aware of any other rule of law which sets a limitation either on the son's power or on the father's power in circumstances like those of the present case. All that section 64 of the Code provides is that any private transfer by the judgment-debtor of the property attached shall be void as against all claims enforceable under the attachment. It will not be accurate to read section 64 as *putting an end* to the power of sale, because as between the transferor and the transferee the alienation will undoubtedly be operative. If the attaching creditor is paid off or for any reason the attachment ceases to subsist, the alienee's title will be unassailable. The only effect of section 64 is that such transfer shall not prejudice the rights of the attaching creditor.

If the above is the true position, the question arises whether, when a sale is made in pursuance of a contract entered into prior to the attachment, such conveyance is one contrary to the terms of section 64 at all. We cannot agree with Mr. Krishnaswami Ayyar that the uniform course of decisions on this point referred to already is in any way opposed to the recent decisions of the Privy Council as to the effect of section 54 of

(1) (1908) I.L.R. 33 Bom. 264. (2) A.I.R. 1937 Cal. 517.

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the Transfer of Property Act. The argument based on section 54 has been considered in many of the cases referred to. The question is not whether any *interest* has passed under the contract to sell. An attaching decree-holder attaches not the physical property but only the right of the judgment-debtor in the property. As explained in the decisions and recognised in section 40 of the Transfer of Property Act, the right of the judgment-debtor in the property is on the date of the attachment qualified by the obligation incurred by him under the earlier contract to sell and the attaching creditor cannot claim to ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor. Nor can it be said that the sale by the contracting parties executed in pursuance of a pre-existing contract to sell prejudices the attaching creditor, because the sale is merely the fulfilment of the obligation to which the judgment-debtor was already subject. The utmost that the attaching decree-holder will be entitled to, in such circumstances, is the payment of the balance of the purchase money, if anything remained due on the date of the attachment.

Mr. Krishnaswami Ayyar relied on the observations of Sir D. F. Mulla in the notes to section 40 of the Transfer of Property Act to the effect that the attaching decree-holder will not be bound by a conveyance even in pursuance of a pre-existing contract to sell; but the learned author draws a distinction between a conveyance voluntarily executed by the judgment-debtor in pursuance of a pre-existing contract and a conveyance executed by him under an order of Court in pursuance of a pre-existing contract. In the latter case, the author seems to think that the attaching creditor cannot object to the conveyance. If this

distinction is well founded, it is sufficient to support the decision of the lower Court in this case because the sale deed was executed in this case in pursuance of an order of Court. But we are inclined to agree with Mr. Krishnaswami Ayyar that there really ought to be no distinction between the two classes of cases, because in both the cases, the conveyance is really not voluntary but is only the fulfilment of an obligation already incurred; only we would also hold that such a conveyance is not in reality contrary to the attachment within the meaning of section 64 of the Civil Procedure Code.

Reliance was placed by the learned Counsel for the appellants on some observations of CUMING J. in *Taraknath Mukherji* v. *Sanatkumar Mukherji*(1). In one part of the judgment, the learned Judge seems to grant that the vendee will have a right to claim specific performance as against the Court-auction-purchaser. If that be the position, it is difficult to see the justification for his differing from the other decisions referred to already including the decision of the Calcutta High Court in *Madan Mohan Dey* v. *Rebati Mohan Poddar*(2). With all respect, we prefer to adopt the view of PEARSON J., the other learned Judge who took part in *Taraknath Mukherji* v. *Sanatkumar Mukherji*(1), and that is in accordance with the weight of authority, as we have already observed. Our attention was drawn by Mr. Krishnaswami Ayyar to the decision of the Judicial Committee in *Nur Mahomed Peerbhoy* v. *Dinshaw Hormasji Motiwalla*(3). We do not find anything in that judgment to help the appellants. Their Lordships merely leave the question open and they have not given any

(1) (1929) I.L.R. 57 Cal. 274. (2) (1915) 21 C.W.N. 158.
(3) (1922) 45 M.L.J. 770 (P.C.).

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indication that may be said even to throw doubt on the correctness of the decisions of the several High Courts on the point.

In the view above stated, the position when the Official Receiver executed the sale deed in favour of the plaintiffs on 6th November 1931 was that he merely carried out the contract entered into by the brothers on 24th July 1926, i.e., more than three years before the date of the attachment, and as the sale deed was executed in pursuance of an order of Court which was in effect a decree for specific performance, though passed by the insolvency Court, the weight of authority is clearly in favour of its having all the effect which a conveyance by the five brothers would have had. On the finding that the contract to sell was binding on the sons and that the consideration received for the sale had been utilised for the payment of antecedent debts, a sale by the five brothers would undoubtedly have been effective to convey the interest not merely of the brothers but also of all their sons who continued to remain joint with them.

In view of the dates of the various proceedings taken by the plaintiff a further question may arise whether the attachment placed by the appellants on 15th March 1930 could have any effect at all as against the plaintiff because though the sale deed was in fact executed on 6th November 1931, its execution was asked for by a petition dated 21st December 1928 and was ordered by the Court of first instance on 2nd December 1929 (Exhibit U). We are informed that the draft sale deed and the stamp paper for execution of the sale deed in accordance with this order were produced in Court as early as in January 1930, that in consequence of an order of stay the sale deed was not immediately executed and was executed only

after the decision of the appellate Court on 9th February 1931. The question arises whether on these facts, the sale deed should not be treated as one executed, if not on the date of the agreement, at least on the date of the presentation of the petition or, in any event, on the date of the first Court's order. The respondents' Counsel relied in this connection on the observations in *Jahar Lal Bhutra* v. *Bhupendra Nath Basu*(1) and *Bhaskar* v. *Shankar*(2). The learned Counsel for the appellants however rightly insisted that this point had not been raised in the lower Court and involved an examination of facts which do not appear on the record itself. We do not therefore pursue this question further.

We may here refer to one other contention of Mr. Krishnaswami Ayyar. At one stage during the execution of the money decree obtained by the appellants, the Official Receiver intervened with a claim petition. He contended that the appellants were not entitled to appropriate the proceeds of the sale of the shares of defendants 6 to 12 but that he himself was entitled to deal with those shares or with the proceeds thereof. This claim was dismissed by the Subordinate Judge's Court (*see* Exhibits XXIII and XXIII-A) and that order was confirmed on appeal by this Court, Exhibit XXIV. This Court, referring to a remark of the Subordinate Judge, observed : " If the learned Subordinate Judge means only that the Official Receiver's right of sale is extinguished, it is unobjectionable. " Mr. Krishnaswami Ayyar contends that this decision of this Court precludes the plaintiff from contending to the contrary because the plaintiff's title was derived under a sale deed executed by the Official Receiver

(1) (1921) I.L.R. 49 Cal. 495. (2) (1924) 26 Bom. L.R. 418.

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only subsequent to this date. We do not think that this contention is well founded. In the proceedings above referred to, the Official Receiver cannot in any sense be said to have represented the present plaintiff. In those proceedings, he figured as representing the general body of creditors and claimed that the proceeds of the sons' shares should be made available for their benefit. The present plaintiff on the other hand claimed under a contract which, if held binding on the estate, will be binding on the Official Receiver as well and include the whole interest in the suit items. Further, when the Official Receiver executed the sale deed it is not in the capacity of the representative of the general body of creditors or even in the exercise of the power possessed by him or by the insolvents to satisfy the general body of creditors that he acted. He was merely carrying out an obligation which prior to the insolvency had been incurred by the insolvents. We see no justification for holding that the order in the claim proceedings instituted by the Official Receiver precludes the present contention of the plaintiff. The effect of an order in claim proceedings is declared by Order XXI, rule 63, Civil Procedure Code. There is no justification for giving any greater effect to such an order.

In the above view, the decision of the learned Subordinate Judge on issue 3 must be affirmed and t will not be necessary to discuss the position of defendants 7 and 8 separately. We may however add that, even if a different view should be taken as to the power of the father or of the Official Receiver under the general law, it is no longer open to defendants 7 and 8, in view of the terms of the consent order, to assert that their interests in the family property did not vest in the Official Receiver. If they are precluded, the

judgment-creditor who seeks to attach their supposed interests in the family property must be held to be equally precluded.

As regards the position of the ninth defendant, the learned Counsel for the appellants contended that the observations in paragraph 42 of the lower Court's judgment must really be understood to be in his favour and he argued that the lower Court had somehow failed to give effect to them in framing its decree. We are unable to agree with this interpretation of the lower Court's observations. It is true that the learned Subordinate Judge set out the observations of their Lordships of the Judicial Committee in *Palani Ammal* v. *Muthuvenkatachala Moniagar*(1); but he was evidently of opinion that, in the circumstances of this case, the effect of the institution of the suit and its ultimate withdrawal was to leave the ninth defendant as a member of the joint Hindu family. It is unfortunate that we do not have the papers relating to the withdrawal. They were apparently not filed because the fact of withdrawal was not disputed. The appellants' learned Counsel argues that the observations in *Palani Ammal* v. *Muthuvenkatachala Moniagar*(1) throw on the plaintiff the onus of proving that the institution of the suit did not effect a severance and that, as the plaintiff has adduced no explanation for the institution of the suit, the ninth defendant must be held to have become divided in status. This seems to us to read too much into their Lordships' observations. Referring to *Kedar Nath* v. *Ratan Singh*(2), their Lordships said that they saw no reason to depart from the view there laid down and only added that the plaint so presented, even if withdrawn, would, unless

(1) (1924) I.L.R. 48 Mad. 254 (P.C.). (2) (1910) I.L.R. 32 All. 415 (P.C.).

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explained, afford evidence that an intention to separate *had been entertained*. This can hardly be read as laying down any rule of law or even a presumption. It only seems to suggest a possible inference of fact. It is not unlikely, as observed by the learned Subordinate Judge, that in this case the ninth defendant instituted the suit at a time when he thought that he would get some benefit out of it but that when he found that there would be nothing left after payment of the debt due by the family he did not think it worth while to proceed with the suit. These circumstances do not seem to us to warrant the conclusion that he became divided merely by the presentation of the plaint.

We agree with the findings of the lower Court on all the points raised and dismiss the appeal with costs of respondents 1 to 5.

G.R.

APPELLATE CIVIL.

1938, December 9.

Before Mr. Justice Wadsworth.

MUNUSAMI CHETTI AND FOUR OTHERS (DEFENDANTS), APPELLANTS,

v.

PERIYA KUPPUSAMI CHETTI AND TWO OTHERS (PLAINTIFFS), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 91—Suit by member of public for establishing public right of way and removal of obstruction which constitutes a public nuisance—Sanction of Advocate-General—Necessity of—Special damage not proved—Maintainability of suit.

An individual member of the public can maintain a suit for establishing a public right of way and for removal of an

* Second Appeal No. 1158 of 1934.