sons to that extent were not liable but that they were liable for the balance of the deficiency as they had not shown that they were not under a pious obligation in respect of it. This decision lends additional support to the conclusion arrived at by HORWILL J. in *Muthusami Servai* v. *Mytheen Pichai Rowther*(1). In our opinion the decision of HORWILL J. is correct and the decree of the lower Court exempting defendants 2 and 3 from liability is right.

This civil revision petition is dismissed with costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Abdur Rahman.

SANKARALINGAM PILLAI AND TWO OTHERS (DEFENDANTS 8 TO 10—RESPONDENTS 8 TO 10), PETITIONERS,

1938, April 22.

v.

ARUMUGAM PILLAI AND ANOTHER (PETITIONER—TRANSFEREE-DECREE-HOLDER AND ELEVENTH RESPONDENT—PLAINTIFF), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXI, r. 16—Money decree—Executability of—Decree-holder becoming one of judgment-debtors—Effect—Merger—Doctrine of—Applicability of.

A, as the assignee of a promissory note, obtained a decree against the executants of the note and B, the payee and the assignor, a Hindu female. B died and A and defendants 8 to 10, her reversionary heirs, became entitled each to a fourth share of the property held by her. The question was whether the decree became inexecutable against defendants 8 to 10 in virtue of the doctrine of merger.

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(1) (1937) 1 M.L.J. 231.

* Civil Revision Petition No. 1126 of 1933.

SANKARA-LINGAM v. ARUMUGAM.

Held that the decree did not become inexecutable in its entirety but that it became inexecutable to the extent of the one-fourth share of A and that defendants 8 to 10 could be proceeded against for three-fourths of the amount of the decree.

There was no complete merger in the case so as to render the decree inexecutable in its entirety. But there was a merger to the extent to which A had become partially liable under the decree and it should be treated as satisfied to the extent of A's share.

Subramanian Chetty v. *Kasi Chetty*(1) and *Asia Bibi* v. *Malik Aziz Ahmad*(2) followed.

Md. Abdul Kadir v. *Abdul Kadir*(3) treated as having been overruled by *Subramanian Chetty* v. *Kasi Chetty*(1).

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Tuticorin, dated 1st March 1933 and made in Execution Application No. 844 of 1932, Small Cause Suit No. 522 of 1930.

V. Mahadeva Sastri for petitioners.

S. Theagaraja Ayyar for *A. Swaminatha Ayyar* for first respondent.

Second respondent was not represented.

VENKATASUBBA RAO J.

The JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—This revision petition has been referred to a Bench as it raises an important question of law. The plaintiff, as the assignee of a promissory note, obtained a decree against defendants 1 to 6, the executants of the note (with whom we are not concerned), and the seventh defendant, the payee and the assignor, a Hindu female. The seventh defendant died and the plaintiff and defendants 8 to 10, her reversionary heirs, became entitled each to a fourth share of the property held by her. The plaintiff then transferred the decree to the petitioner in the lower Court,

(1) A.I.R. 1927 Mad. 937. (2) (1931) I.L.R. 54 All. 448.
(3) A.I.R. 1926 Mad. 1141; 51 M.L.J. 443.

who applied for execution; but nothing turns upon the transfer, as the transferee stands in the shoes of the plaintiff. The question to decide is, has the decree become inexecutable in virtue of the doctrine of merger? The Court below has allowed execution and its order is challenged here by defendants 8 to 10.

Order XXI, rule 16, Civil Procedure Code, has been relied upon by their learned Counsel, but there can be no doubt that the provision does not in terms apply. It enacts that where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others. True, this rule applies whether the transfer has been effected by operation of law or by act of parties. To give an example of the former class of transfer, let us suppose that A obtains a decree against X and Y. A dies and X as his heir becomes under the law the assignee of the decree. The rule enacts that the decree should be deemed extinguished and that X should not be permitted to execute it as against Y. But the case in hand is the converse of the illustration just put. If in the example given above X dies and A as his heir becomes liable under the decree (which is very different from becoming entitled to the rights under the decree), the section in terms, it is obvious, does not apply. Here there has been no transfer of the decree and what is equally patent there has been no transfer in favour of one of the judgment-debtors—that being what the rule cited above contemplates. But apart from the letter of the section, there is a principle which it embodies, namely, where the decree-holder's right and the judgment-debtor's liability become united in one and the same individual, it stands to reason that the decree should be treated as satisfied. The question then is, whether there has been

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such a merger in the case as to render the decree inexecutable. As has been pointed out by SULAIMAN C.J. and YOUNG J., *complete merger* involves the co-extensiveness of the right and the liability; *Asia Bibi* v. *Malik Aziz Ahmad*(1). Let us now look at the position that has resulted from the death of the seventh defendant. The plaintiff has remained the judgment-creditor, but who are those that have become the judgment-debtors? The plaintiff himself and defendants 8 to 10. In other words, the plaintiff holds a decree against himself and three other persons. To the extent to which the plaintiff has become partially liable under the decree, to that extent there has undoubtedly been a merger. But the consequences of a *partial* merger are totally different from those of a *complete* merger. Let us again take an example. A obtains a decree against X for Rs. 300; X dies, leaving A, B and C as his heirs, each being entitled to an equal third of his estate. The true position then is, that A has a decree against A, B and C; the decree is extinguished to the extent of A's share but he can execute it against B and C to the remaining extent of Rs. 200. This is in consonance with reason and justice, but the learned Counsel for defendants 8 to 10 contends, on the authority of *Md. Abdul Kadir* v. *Abdul Kadir*(2) decided by MADHAVAN NAIR J., that the decree has become inexecutable in its entirety. That is a decision we are unable to follow, as it ignores the distinction between a partial and a complete merger. Indeed, this case must be treated as having been overruled by a later Bench decision, *Subramanian Chetty* v. *Kasi Chetty*(3) to which MADHAVAN NAIR J.

(1) (1931) I.L.R. 54 All. 448, 450.
(2) A.I.R. 1926 Mad. 1141; 51 M.L.J. 443. (3) A.I.R. 1927 Mad. 937.

was a party. The learned Judges there purport to distinguish the earlier case; but, as has been pointed out in *Asia Bibi* v. *Malik Aziz Ahmad*(1) already referred to, it is difficult to discover on what basis the decision has been distinguished. The later ruling is clearly opposed to the earlier one and in our opinion lays down the correct principle. The Allahabad High Court in the decision already cited has discussed the matter clearly and adopted the same view.

But adopting the same principle, the Allahabad case and the Madras Bench case have applied it differently. In the former, the decree has been treated as having become satisfied *pro tanto*; in the latter, the judgment-creditor has been directed to execute his decree in its entirety against the entire property both in his possession and in the possession of the other heirs. In our opinion, the more logical course is that adopted in the Allahabad case. In so far as the judgment-creditor and the judgment-debtor happen to be the same person, to that extent it is reasonable and correct on principle to hold that the decree is satisfied. In the ultimate result it makes no difference or, to be more accurate, it ought to make no difference, which of these two methods in the process of execution is adopted; for it must be noted that the real rights of parties can be worked out only in a suit for contribution. Let us suppose, for instance, that A obtains a decree against B the principal debtor and C the surety. A transfers the decree to C, which thereupon must be treated as having become satisfied for the purpose of execution. But that does not prevent C from pursuing his remedy against B by a suit for contribution.

(1) (1931) I.L.R. 54 All. 448.

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In the result, we must hold that the decree has become inexecutable to the extent of the one-fourth share of the plaintiff. Defendants 8 to 10 can be proceeded against for the three-fourths of the amount of the decree that has been passed. The execution petition will therefore be remitted to the lower Court for being dealt with in the light of our judgment.

We direct that each party shall bear his costs both here and in the Court below.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Abdur Rahman.

1938, May 2.

VEDAKANNU NADAR (DEFENDANT), PETITIONER,

v.

GNANAYYA NADAR (FIRST PLAINTIFF), RESPONDENT.*

Provincial Small Cause Courts Act (IX of 1887), sch. II, art. 28—Scope and applicability of.

Article 28 of the Second Schedule to the Provincial Small Cause Courts Act contemplates a suit between rival claimants to the property of an intestate. There must be a claim made by an heir as such, which claim is resisted by another person advancing a similar claim; otherwise the article does not apply.

Samu Asari v. *Anachi Ammal*(1) *and Rethinasami* v. *Nataraja*(2) disapproved.

Chhedi v. *Gulabo*(3) and *Tika Sahu* v. *Chirkat Sahu*(4) followed.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court

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* Civil Revision Petition No. 1004 of 1934.

(1) (1925) 49 M.L.J. 554. (2) A.I.R. 1933 Mad. 346.

(3) (1905) I.L.R. 27 All. 622. (4) (1914) 19 C.W.N. 614.