of the Revenue Court or of the District Court as the case may be must stand.

The appellant having succeeded in the main, he is entitled to his costs, and we fix the Advocate's fee in each case at Rs. 10.

The appellant is entitled to the refund of the Court fee paid on the memoranda of Second Appeals under section 13 of the Court Fees Act.

N.S.

APPELLATE CIVIL—FULL BENCH.

Sir Lionel Leach, Chief Justice, Mr. Justice Krishnaswami Ayyangar and Mr. Justice Patanjali Sastri.

SIVAPRASAD SOWCAR (PLAINTIFF), APPELLANT,

v.

SEKHARAMANTRI NARASIMHAMURTHY (DEFENDANTS), RESPONDENTS.*

1939, October 11, and November 24.

Madras Survey and Boundaries Act (IV of 1897), ss. 11 and 12—Order of survey officer or appellate authority under—Effect of, on continuity of adverse possession held by unsuccessful party—Unsuccessful party remaining in possession of disputed area after adverse order—Effect.

An order of a survey officer under section 11 of the Madras Survey and Boundaries Act (IV of 1897) or of the appellate authority under section 12 of the Act, in itself has not the effect of causing a break in the continuity of the adverse possession held by an unsuccessful party so as to preclude his making use of the period of his prior possession to make up the period of twelve years required by the Indian Limitation Act to complete his title. If the unsuccessful party remains in

* Second Appeal No. 863 of 1935.

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adverse possession of the disputed area for over twelve years his title is good irrespective of any order passed under the Act.

The majority decision in *Ramamurthi* v. *Gajapatiraju*(1) overruled and the observations in *Achutharamayya* v. *Soorappayya*(2) disapproved.

APPEAL against the decree of the Court of the Subordinate Judge of Vizagapatam in Appeal Suit No. 203 of 1934 preferred against the decree of the Court of the District Munsif of Vizagapatam in Original Suit No. 174 of 1931.

The appeal came on for hearing when the Court (KRISHNASWAMI AYYANGAR and SOMAYYA JJ.) referred the following question for the opinion of a Full Bench :

" Whether the order of a survey officer under section 11, or of the appellate authority under section 12, of the Madras Act (IV of 1897) has the effect of causing a break as on the date of the order, in the continuity of the adverse possession held by the unsuccessful party, so as to preclude his making use of the period of his prior possession to make up the period of twelve years required by the Limitation Act to perfect a title by adverse possession ? "

B. V. Ramanarasu for appellants.

Y. Suryanarayana for first respondent.

Other respondents were not represented.

Cur. adv. vult.

OPINION.

LEACH C.J.

LEACH C.J.—A person named Kantimahanti Appalanarasayya obtained a decree against one Sekharamantri Appalaswami and in execution of that decree attached immovable property belonging to the latter in Allipuram, a suburb of Vizagapatam. The

(1) (1932) I.L.R. 56 Mad. 366. (2) (1938) 2 M.L.J. 894.

property was sold at a court-auction on 7th January 1916 and the decree-holder became the purchaser, the sale certificate being issued to him on 2nd July 1920. Appalanarasayya took no steps to gain possession of the property which remained with the judgment-debtor. In the year 1922 a re-survey of all the properties lying within the boundaries of Vizagapatam took place. The property which was the subject of the court-auction was registered as Survey No. 967. Notwithstanding that Appalanarasayya had made no attempt to obtain possession of this property, he claimed it as his, and although the survey officer's order has not been produced, it would appear that he was registered as the owner and Appalaswami as the owner of an adjoining area marked as Survey No. 999. The Court has been given to understand that before the sale Appalaswami was the owner of both the areas. The survey officer's order was passed under the provisions of section 11 of the Madras Survey and Boundaries Act, 1897. An appeal from the order was preferred under the provisions of section 12 of the Act and the appellate authority passed an order in these terms :

> "The complaint in respect of Survey Nos. 967 and 999 relate to wrong registration and as such does not fall within the scope of the Boundary Dispute Act IV of 1897. The present registry in the names of Kantimahanti Appalanarasayya and Sekhara Mahanti Appalaswami, respectively is confirmed."

It is common ground that there was no dispute as to the boundaries of the respective properties. The only dispute was whether Appalanarasayya or Appalaswami's name should be registered as the owner of Survey No. 967.

In 1926 Appalanarasayya mortgaged Survey No. 967 to the appellant in the appeal out of which this

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reference arises. The appellant filed Original Suit No. 299 of 1927 of the Court of the District Munsif of Vizagapatam to enforce his mortgage. He obtained a decree and the property was sold by the Court on 6th July 1929, the purchaser being the appellant to whom a sale certificate was granted on 10th October 1929. Appalaswami, who was in possession and had remained in possession throughout, refused to deliver the property to the appellant and Appalaswami's possession having been established the appellant's application was dismissed. Within one year of the order of dismissal the appellant instituted the present suit in the Court of the District Munsif of Vizagapatam for a decree for possession. At the date of the suit Appalaswami had been in adverse possession of the property continuously for fifteen years, unless the orders passed under the Madras Survey and Boundaries Act, 1897, operated to create in law a break. The District Munsif dismissed the suit holding that the orders passed in the survey proceedings did not disturb the continuity of Appalaswami's possession. On appeal the Subordinate Judge concurred in this decision. A second appeal was then filed to this Court and came before KRISHNASWAMI AYYANGAR and SOMAYYA JJ. In view of the conflict which exists in the authorities the learned Judges have referred the following question to a Full Bench :—

"Whether the order of a Survey Officer under section 11, or of the appellate authority under section 12, of the Madras Act (IV of 1897) has the effect of causing a break as on the date of the order, in the continuity of the adverse possession held by the unsuccessful party, so as to preclude his making use of the period of his prior possession to make up the period of twelve years required by the Limitation Act to perfect a title by adverse possession ?"

This Bench has been constituted to answer the question.

Before turning to the authorities it is necessary to examine in some detail the provisions of the Madras Survey and Boundaries Act, 1897. That Act has been replaced by the Madras Survey and Boundaries Act, 1923, but as the survey proceedings took place under the old Act regard can only be had to the provisions of the former Act. I may in passing mention that, so far as this case is concerned, there is no material difference between the two Acts. The Act of 1897 was an Act relating to survey of lands and settlement of boundary disputes and its provisions can only have application to such matters. Section 11 (1) provided that if, at the time of survey, a boundary was undisputed the survey officer might order that the boundary should be laid down as pointed out by the registered holder or his agent. Sub-section 2 said that, if the registered holder was not present, or if the boundary was disputed, the survey officer should order it to be laid down, as nearly as might be, in accordance with the village records, or as ascertained from the village officers and from such other evidence as the survey officer might be able to procure. Sub-section 3 said that the order passed by the survey officer in the case of any dispute under sub-section 2 should be recorded in writing and the purport thereof communicated forthwith to the parties to the dispute, a copy of the order being furnished to them on their application and at their cost. Sub-section 4 said that, when the survey of a village or other defined local area forming part of the land under survey had been completed in accordance with the orders passed under sub-sections 1, 2 and 3, the survey officer should notify the fact as soon as practicable thereafter.

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Section 12 provided for appeals against orders under section 11. Sub-section 3 of that section said that the order of the survey officer, or, in the event of an appeal being filed, the decision of the appellate authority should be final, and there should be no further appeal from such decision. But section 13 allowed the matter to be carried further by a suit. It said that any party to a boundary dispute before the survey officer, and any party to an appeal preferred under section 12 or to whom notice of such appeal was given, and any person claiming under any such party who deemed himself aggrieved by the order of the survey officer, or by the decision of the appellate authority, as the case might be, might, subject to the provisions of the Indian Limitation Act, institute within a period of one year from the date of such order or decision, a suit to establish the right which he claimed "in respect of the boundary of the property surveyed", provided that, subject to the result of the suit, if any, the order or decision should be conclusive. To this section was added an explanation in these words:

> "Where parties litigate *bona fide* in respect of boundaries of property claimed in common for themselves and others, all persons interested in such boundary dispute shall, for the purpose of this section, be deemed to claim under the parties so litigating."

There was no provision in the Act for the decision of any question of title unless it was in respect of land involved in a boundary dispute. If there was a boundary dispute the Act provided the machinery for its settlement and the survey officer's order demarcating the boundaries was final subject to an appeal under section 12 or to the decision in a suit under section 13. When it was a matter of a boundary dispute the survey

officer had to decide where the boundary should lie and if he decided that the piece of land in dispute fell within the boundary of one of the opposing parties his order did affect the title to that particular piece of land. Where there was no boundary dispute, but in making the survey the survey officer found that two persons were claiming title to the same holding, he would for the purposes of the register have to decide whose name should be inserted therein as the owner, but this in itself did not mean that the Act empowered the survey officer or the appellate authority to decide who was in law entitled to the property under survey. I can find no provision in the Act which can be read as operating in such circumstances to prevent A, when B had been registered as the owner of a holding, from instituting a suit in a Court of competent jurisdiction to establish his title as the true owner.

In *Kuppuswami Iyer* v. *Venkataswami*(1) COUTTS TROTTER and RAMESAM JJ. held that, where the survey officer had found that the plaintiffs were in possession and no suit had been filed under section 13 of the Act of 1897, the plaintiffs were entitled to a decree for possession, even though the defendants had as a matter of fact been in possession for over the statutory period of twelve years, part of which was before and the remainder was subsequent to the decision of the survey officer. COUTTS TROTTER J. had no doubt that the survey officer's order was wrong, but he considered that the case was governed by the decision of the Full Bench of this Court in *Muthammal* v. *The Secretary of State for India*(2). I am unable to share the opinion that the Full Bench decision had application. In the Full Bench case WALLIS C. J. and AYLING

(1) (1922) 16 L.W. 99. (2) (1914) I.L.R. 39 Mad. 1202,

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and SESHAGIRI AYYAR JJ. applied the doctrine of *res judicata* in these circumstances. A boundary settlement officer had decided under the Boundaries Act of 1860 that certain land did not fall within the boundaries of a mitta and had never formed part of the mitta. No suit was brought by the mittadar to contest this finding under section 25 of the Act. The Full Bench considered that the ground of the decision as well as the actual decision was *res judicata* in a subsequent suit instituted by the mittadar to recover the lands as having formed part of the mitta or in the alternative for a deduction of the *peshkash* of the mitta. This dispute can only be regarded as a boundary dispute and the decision of the Full Bench is not in point in the present case, nor was it in point in *Kuppuswami Iyer* v. *Venkataswami*(1). The Privy Council in *Radhakrishna Ayyar* v. *Sundaraswamier*(2) held, in a case arising out of the Madras Estates Land Act of 1908, that the doctrine of *res judicata* did not apply to a suit under that Act, although the Board recognized that a statute might embody a special rule which operated as a bar to the same question being re-agitated in subsequent proceedings, and some day *Muthammal* v. *The Secretary of State for India*(3) may have to be reconsidered in the light of the ruling of the Privy Council in the case under the Madras Estates Land Act, but it is not necessary to dwell on the question here. Before leaving *Kuppuswami Iyer* v. *Venkataswami*(1) I may mention that in his judgment in that case RAMESAM J. indicated that in his opinion the decision in *Muthirulandi Poosari* v. *Sethuram Aiyar* (4), to which I shall next refer, did not

(1) (1922) 16 L.W. 99.
(2) (1922) I.L.R. 45 Mad. 475 (P.C.).
(3) (1914) I.L.R. 39 Mad. 1202.
(4) (1919) I.L.R. 42 Mad 425. (F.B.).

prevent a plea of adverse possession being raised subsequent to the decision of the survey officer.

In *Muthirulandi Poosari* v. *Sethuram Aiyar*(1) WALLIS C.J. and AYLING and KUMARASWAMI SASTRI JJ. held that an order passed by a survey officer under section 11 of the Act of 1897 on a dispute arising between two parties with regard to the boundary of a certain property was conclusive as to the rights of the parties if not set aside either on appeal or by a suit brought within the year and it was none the less so, because the unsuccessful party who was in possession on the date of the order was not subsequently ousted from possession. The dispute merely related to the boundary of the two holdings and therefore fell within the four corners of the Act. The statement that the decision was none the less conclusive as to the rights of the parties because the unsuccessful party who was in possession at the date of the order was not subsequently ousted from possession carried the decision no further. The Court was not considering whether one of the parties had obtained a title to an area by adverse possession.

In my opinion the correct view of the scope of the Act was taken by REILLY and ANANTAKRISHNA AYYAR JJ. in *Azhagaperumal Pillai* v. *Rasa Pillai*(2). There it was said that the decision of a survey officer for the planting of stones for the demarcation of the boundary does not *ipso facto* dispossess any party, nor make any legal break in existing possession so as to render ineffective for purposes of limitation any adverse possession running at the date of the decision. In that case it was argued that the judgment in *Muthirulandi Poosari* v. *Sethuram Aiyar*(1) ran contrary,

(1) (1919) LL.R. 42 Mad. 425 (F.B.). (2) (1931) 62 M.L.J. 399.

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but this argument was rejected by the learned Judges and the opinion of RAMESAM J. in *Kuppuswami Iyer* v. *Venkataswami*(1) was accepted as supporting their decision.

There are two cases which conflict with the decision in *Azhagaperumal Pillai* v. *Rasa Pillai*(2). The first is *Ramamurthi* v. *Gajapatiraju*(3) and the second is *Seetharamaraju* v. *Narayanaraju*(4). In the first case, in the course of a survey a dispute arose whether a certain field lying wholly within the boundaries of a zamindari should be demarcated as an inam or as part of the ryoti land of the zamindari. The zamindar claimed the land as ryoti land and the inamdar as his mirasi inam. The survey officer demarcated the land as mirasi inam and his decision was upheld on appeal. The zamindar did not file a suit under section 13 of the Act but in a suit brought subsequently by the inamdar against the zamindar the question of title was raised. The appeal was heard by WALLER and KRISHNAN PANDALAI JJ. WALLER J. was of the opinion that the dispute was a boundary dispute within the meaning of the Act, that the survey officer had jurisdiction to decide the dispute and that as the zamindar did not file a suit within a year under section 13 to get the decision set aside it had conclusively decided that the land was Government service inam and not part of the zamindari. KRISHNAN PANDALAI J. held that the Act did not preclude the institution of the suit. He observed:

"In my opinion when two people dispute title to an ascertained and definite piece of land or to subordinate interests therein, the dispute cannot in any proper sense be described as a boundary dispute though, as a result of the disputed

(1) (1922) 16 L.W. 99.
(2) (1931) 62 M.L.J. 399.
(3) (1932) I.L.R. 56 Mad. 366.
(4) (1934) 40 L.W 536.

title being settled, the boundaries of the property of one or other of the disputants may be accordingly shifted. If there was a real boundary dispute I can understand that a question of title depending solely on the boundary may become concluded—as a necessary logical consequence but not by virtue of the Act. But, if there was no such dispute, it cannot be inferentially introduced into a dispute about title and then held to be inferentially decided under the Act so that the question of title becomes concluded by a further inference. There was, in my opinion, no boundary dispute in the proper sense before the Assistant Superintendent of Survey and his order, Exhibits G and XXIII, being one on a matter beyond his jurisdiction could not become conclusive under the Madras Survey and Boundaries Act.

As the result of the disagreement the appeal was referred to a third Judge, WALLACE J., who agreed with WALLER J. WALLACE J. refused to accept the argument that there could not be a boundary dispute unless there was a dispute between two estates or between Government and an estate regarding the physical boundary of some piece of land contiguous to both, that is, a dispute as to "when, where and how" the boundary between both should run, but that, if the dispute involved on one side or the other the whole of the contestant's property, there could not be any boundary dispute, because the boundary of the disputed portion was not itself in dispute. The learned Judge said that he could see no principle in such a contention. I cannot agree. In my opinion the judgments of WALLACE and WALLER JJ. are contrary to the scheme and the provisions of the Act. The Act was never intended to vest in the survey officer or in the appellate authority power to decide a pure question of title when the boundaries were accepted by both sides, which was the case in *Ramamurthi* v. *Gajapatiraju*(1).

(1) (1932) I.L.R. 56 Mad. 366.

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The decision in *Seetharamaraju* v. *Narayanaraju*(1) was given by BUTLER J. who followed *Ramamurthi* v. *Gajapatiraju*(2). These two cases, therefore, stand or fall together.

The only other case which calls for mention is *Achutharamayya* v. *Soorappayya*(3). There, WADSWORTH J. endeavoured to reconcile the two conflicting views but I consider that they are too divergent for reconciliation. The learned Judge read the judgment of the Full Bench in *Muthirulandi Poosari* v. *Seithuram Aiyar*(4) as laying down the rule that the survey officer's decision under section 11 of the Act of 1897 is conclusive as to the rights of the parties, but he said that it was apparent that the survey officer's decision could only be final to the extent to which it purported to decide those rights. If the survey officer decided that the unsuccessful claimant was not in possession, the learned Judge considered that it would not be open to the unsuccessful claimant to contend that he had acquired a title by adverse possession. On the other hand, if the survey officer merely on a consideration of the documentary evidence of ownership gave an adverse finding regarding title, WADSWORTH J. saw no reason why that finding should bar the unsuccessful claimant from contending in subsequent proceedings that at the time of the survey officer's order he had trespassed successfully on the land in question and that his unlawful possession continued and was openly hostile to the real owner, taking into consideration possession before and after the survey officer's order. The governing factor was what the survey officer actually decided; the unsuccessful claimant could not go behind that. I have already indicated what

(1) (1934) 40 L.W. 536.
(2) (1932) I.L.R. 56 Mad. 366.
(3) (1938) 2 M.L.J. 894.
(4) (1919) I.L.R. 42 Mad. 425 (F.B.).

my reading of the Act is and I cannot regard these statements of WADSWORTH J. as embodying a correct interpretation of the law.

The answer which I give to the reference is that an order of the survey officer under section 11, or of the appellate authority under section 12 of the Act, in itself had not the effect of causing a break in the continuity of the adverse possession held by the unsuccessful party so as to preclude his making use of the period of his prior possession to make up the period of twelve years required by the Limitation Act to complete his title. If the unsuccessful party remained in adverse possession of the disputed area for over twelve years his title was good irrespective of any order passed under the Act. As my learned brothers are in agreement with me, the majority decision in *Ramamurthi* v. *Gajapatiraju*(1) and the decision of BUTLER J. in *Seetharamaraju* v. *Narayanaraju*(2) must be overruled. It follows that the observations of WADSWORTH J. in *Achutharamayya* v. *Soorappayya*(3) which are in conflict with the answer given to the reference should also be disregarded.

The costs of the reference will be made costs in the appeal.

PATANJALI SASTRI J.—I agree with the judgment of my Lord and have nothing material to add.

KRISHNASWAMI AYYANGAR J.—After the fuller and more elaborate discussion of the question before the Bench as now constituted, I feel that the opinion expressed by my Lord is the better and sounder one. In the order of reference I had expressed an inclination in favour of the other view which on further consideration, I agree, is not maintainable on general principles

(1) (1932) I.L.R. 56 Mad. 366. (2) (1934) 40 L.W. 536.
(3) (1938) 2 M.L.J. 894.

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no less than on the language of the statute. It is difficult to support a view of the law which attributes to the decision of a survey authority a higher efficacy than that which is annexed to the decision of a civil Court of competent jurisdiction as per *Subbaiya Pandaram* v. *Mahammad Mustapha Marcayar*(1). To have this consequence, language must be much more clear than what we have. I may add that my former inclination towards the opposite construction was in a large measure the outcome of the limitation imposed on me as a member of a Division Bench, bound by the opinions expressed by other Benches and the legal consequences which might be regarded as flowing out of them. I now feel no doubt that the correct decision is the one now given expression to by my Lord, and I have no hesitation in preferring it to the other.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice Burn and Mr. Justice Mockett.

1939, December 15.

IN RE ANNAMALAI MUDALI (PRISONER), ACCUSED.*

Code of Criminal Procedure (Act V of 1898), ss. 342 and 537—Duty of Court to put questions to accused under section 342—Omission to comply strictly with the provisions of that section—If Illegal under section 537 of the Code.

It is the duty of the Court under section 342, Criminal Procedure Code, to be satisfied either by the statements of the accused or by his answers to questions or by both, that he explains or has an opportunity to explain circumstances from which hostile inferences may be drawn against him. When

(1) (1923) I.L.R. 46 Mad. 751 (P.C.).

* Referred Trial No. 140 of 1939.