regard to Appeal Suit No. 10 of 1935, the appeal in the partition suit, it is most desirable that it should be disposed of as quickly as possible and there must therefore be a direction that it be heard during the first week of February peremptorily.

STODART J.—I agree with my Lord the CHIEF JUSTICE.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Cornish.

BAVA C. VAITHILINGA MUDALIAR (SECOND RESPONDENT), APPELLANT,

1936, March 25.

v.

THE BOARD OF CONTROL, SRI THYAGARAJASWAMI DEVASTHANAM, TIRUVARUR, BY THE PRESENT PRESIDENT K. MANATHURAINATHA DESIKAR, AND ANOTHER (PETITIONER AND FIRST RESPONDENT), RESPONDENTS.*

Scheme suit—Decree in—Provision in scheme part of—Executable, if—Removal of trustee in event of his committing breach of trust or failing to perform his duties—Power of—Reservation to Court as part of a scheme of—Permissibility—Remedy in such a case.

A provision in a scheme decree is inexecutable, whether the provision is directory or declaratory.

The preponderance of judicial opinion in the Madras High Court is against the view to the contrary held in *Vythilinga Pandara Sannadhi* v. *The Board of Control, Sri Thiagarajaswami Devasthanam, Tiruvarur*, (1931) 61 M.L.J. 904.

Per CORNISH J.—There cannot be reserved to the Court as part of a scheme for a charitable trust a power to remove a

* Appeal Against Order No. 160 of 1931.

VAITHILINGA MUDALIAR v. BOARD OF CONTROL, SRI THYAGARAJASWAMI DEVASTHANAM, TIRUVARUR.

trustee in the event of his committing a breach of trust or failing to perform his duties. The only remedy available is a suit to remove him or to have the scheme modified.

Veeraraghavachariar v. *Advocate-General, Madras,* (1927) I.L.R. 51 Mad. 31 (F.B.), applied.

APPEAL against the order of the Court of the Subordinate Judge of Tiruvarur, dated 4th September 1930 and made in Execution Petition No. 56 of 1930 in Original Suit No. 125 of 1921 on the file of the Court of the Subordinate Judge of Negapatam.

S. Panchapagesa Sastri for appellant.

R. Sundaralingam and *A. V. Viswanatha Sastri* for respondents.

Cur. adv. vult.

JUDGMENT.

VENKATASUBBA RAO J.

VENKATASUBBA RAO J.—The question raised in this appeal is whether the provisions in a scheme decree are executable. I have repeatedly held that they are not, but, as in two cases decided by RAMESAM J. and my learned brother a different view has been expressed, I have considered the matter carefully and anxiously in the light of the long and learned arguments which have been addressed to us. The difficulty, in my opinion, arises from the differing view-points as regards the meaning and scope of what is generally termed a scheme suit. As I observed in *Ranganatha Thathachariar* v. *Krishnaswami Thathachariar*(1) decided by OLDFIELD J. and myself, what the plaintiff in a scheme suit prays for is a scheme and, when the decree frames a scheme, there

(1) (1923) I.L.R. 47 Mad. 139.

remains nothing further to obtain by way of execution. I distinguish there the other classes of suits from scheme suits in this respect. In a money suit, for example, the successful plaintiff obtains a decree for money, that is to say, a decree directing the opposite party to pay him the money, but in a scheme suit the decree that is passed is not that a scheme shall hereafter be settled, but the decree itself embodies the scheme. Let us suppose that for endowing a hospital a testator has left property. The Court is invited to frame a scheme and it does so. In the scheme are set forth the duties of the various functionaries and bodies. The treasurer, let us say, it provides, shall keep the accounts in such and such a manner; he shall remit the monies received on such and such dates to the bank. Then, let us suppose there is another provision which says that the members of the Governing Board shall retire annually by rotation. It will be seen that the provisions I have indicated are of a directory as distinguished from a declaratory nature. Let us examine the argument that any provision in a scheme, provided it is directory, must be enforced in execution. In the case supposed, if the person happening to be the treasurer, say a hundred years after the settling of the scheme, fails to keep the accounts in the manner specified or makes default in the remitting of the monies to the bank, the erring treasurer, according to the argument, is to be proceeded against in execution of the decree. Again, if a member of the Governing Board due to retire fails to do so and continues on it with the consent of his fellows, the proper way, according to this argument, of enforcing compliance with

VAITHILINGA MUDALIAR v. BOARD OF CONTROL, SRI THYAGARAJA-SWAMI DEVASTHANAM, TIRUVARUR.

VENKATASUBBA RAO J.

the scheme is to execute the decree under the Code. A position that leads to such anomalies I find it difficult to accept. Again, as a necessary corollary, to be logical, if these are matters to be decided in execution, section 47 of the Code bars a regular suit. Further, as I observed in the same case, I fail to see how a scheme or constitution embodied in a decree stands on a different footing from a scheme contained in a will or in an instrument of dedication.

The true distinction is, not whether a provision in a scheme decree is directory or declaratory, but whether the provision sought to be executed is or is not in what is really the scheme part of the decree. To this distinction both REILLY J. and myself have adverted in *Ramacharyulu* v. *Narasimha Suryanarayana*(1). There, both of us point out that the proper way of dealing with the matter is first to separate the scheme part from the rest of the decree and that, when that is done, no provision in the scheme part is executable, whether it is directory or declaratory.

The Courts sometimes insert in schemes framed by the decree what is known as a *liberty clause*. In virtue of the liberty so reserved, a party may, in accordance with, and subject to the terms of, the scheme, approach the Court, invoking its aid in regard to matters covered by the liberty clause, which may provide for matters of various types. When the trustees feel a doubt as to the proper interpretation of a clause or as to their duties in any emergency not foreseen, the liberty clause may

(1) 1933 M.W.N. 183.

confer upon them the right to seek advice from Court. Again, in the matter of carrying out the existing provisions of a scheme framed, power may be conferred upon a party (he may be a trustee, treasurer, secretary or worshipper—it makes no difference) to approach the Court invoking its aid. In such cases, the Court intervenes not by way of executing the decree but by reason of its respect for the decree which has settled the constitution. When the Court, acting under the liberty clause, intervenes to give effect to a provision in a scheme, it does undoubtedly, according to the dictionary meaning of the word, "execute", carry out that provision ; but the execution with which we are concerned is not that kind of execution but "execution" under the Code of Civil Procedure.

Veeraraghavachariar v. *Advocate-General, Madras* (1) shows definitely when a "liberty clause" can be regarded as *intra vires* and when as *ultra vires*. Provided that the clause does not contravene the principles formulated in that decision, it can be taken advantage of ; on the other hand, if it does contravene, it is perfectly worthless and must be ignored.

I have now stated what in my opinion the correct principle is, on which the matter rests. My view receives support from a considerable body of authority ; in fact it has been adopted by several Benches of this Court ; *Sivan Pillai* v. *Venkateswara Aiyar* (2) (SPENCER and MADHAVAN NAIR JJ.), *Brahmayya* v. *Venkatasuryanarayanamurthy* (3) (DEVADOSS and WALLER JJ.),

(1) (1927) LL.R. 51 Mad. 31 (F.B.). (2) (1925) 22 L.W. 796.
(3) (1925) 50 M.L.J. 409.

Abdul Hakim Baig v. *Burramiddin*(1) (DEVADOSS and WALLACE JJ.), *Sivaram Dubai* v. *Rajagopala Misra*(2) (REILLY and ANANTAKRISHNA AYYAR JJ.) and *Vythelinga Mudaliar* v. *Mahadeva Iyer*(3) (JACKSON J. and myself). Therefore, both on principle and on authority, I must hold that a provision in a scheme decree is inexecutable. It is on this ground that I primarily rest my judgment.

Granting for a moment that a directory provision in a scheme decree is executable, I fail to see how the present application can lie. The provision that is sought to be executed runs thus :

> " The trustees of the respective kattalais shall hand over all the cash proceeds of their property to the treasurer."

It is said that here is a mandatory injunction directed against the trustees and that Order XXI, rule 32, Civil Procedure Code, applies. But what is the nature of the injunction ? Under it, the trustees are bound to hand over the cash proceeds to the treasurer, that is to say, such proceeds as they have collected. But the complaint now is that the trustee in question has failed to make the collections. That being so, Order XXI, rule 32, which relates to the execution of a decree for injunction, is inapplicable.

The lower Court has, however, by way of what is known as equitable execution, appointed a receiver. Here again, the question arises, which is the direction that the trustee has infringed ? The object of appointing the receiver was to collect the outstandings due to the trust, but, as

(1) (1925) I.L.R. 49 Mad. 580. (2) (1930) I.L.R. 54 Mad. 315.
(3) A.I.R. 1926 Mad. 659

I have already said, the decree does not expressly enjoin on the trustee the duty of making such collections. Where then is the clause which is of a directory nature that can be executed? The application for execution, in whatever way it may be construed, is, in my opinion, utterly misconceived.

In the view I have taken, it is unnecessary to express any opinion upon the question, whether or not the parties are the representatives of the judgment-creditors and the judgment-debtors respectively for the purpose of section 47.

In the result, the appeal is allowed, but in the circumstances each party will bear his costs.

CORNISH J.—I agree. The preponderance of judicial opinion in this High Court is against the view held in *Vythilinga Pandara Sannadhi* v. *The Board of Control, Sri Thiagarajaswami Devasthanam, Tiruvarur* (1) that a direction in a charity scheme is capable of being executed as a decree; and I think that the preponderating opinion should prevail. Upon this view of the case there is nothing to justify the order made by the lower Court appointing a receiver. Clause 26 of the scheme, which enables the Court to frame rules for the regulation of the conduct and duties of the treasurer and superintendent, does not concern the conduct of the kattalai trustees. And clause 27, which gives the parties or the Board of Control liberty to apply to the Court for any modification of the scheme, cannot, I think, be stretched into meaning that the duties which the trustees are directed by the scheme

(1) (1931) 61 M.L.J. 904.

VAITHILINGA MUDALIAR v. BOARD OF CONTROL, SRI THYAGARAJA-SWAMI DEVASTHANAM, TIRUVARUR.

CORNISH J.

to perform may be taken away from a trustee and conferred on a receiver upon a mere application to the Court. In *Veeraraghavachariar* v. *Advocate-General, Madras*(1) the Full Bench laid down the principle that in a scheme suit the Court should only give liberty to apply for directions in respect of such matters which it thinks advisable not to finally determine at the time but which should be left to future decision. And it rules that this liberty to apply for directions must not be used to effect that which can only be done by means of a suit under section 92, Civil Procedure Code. It is obvious that according to this principle there cannot be reserved to the Court as part of a scheme for a charitable trust a power to remove a trustee in the event of his committing a breach of trust or failing to perform his duties. The only power that exists for the removal of the trustee of a charitable trust (apart from the provisions of the Hindu Religious Endowments Act) is contained in section 92 of the Code of Civil Procedure, and removal can only be effected by means of a suit instituted in accordance with that provision. No doubt on the institution of such a suit it would be open to the Court to appoint a receiver of the trust property pending the determination of the suit. In the present case, the scheme does not profess to reserve any power to the Court to displace a trustee; but what the Court has done is to appoint a receiver for an indefinite period to carry out the duties of the recalcitrant trustee. This is virtually a suspension of the trustee from his office. The objection to this course was indicated in *Vythilinga Pandara*

(1) (1927) I.L.R. 51 Mad. 31 (F.B.).

Sannadhi v. *The Board of Control, Sri Thiagarajaswami Devasthanam, Tiruvarur*(1), which the lower Court has taken to justify it. Indeed, it is difficult to understand why in such circumstances the trustee should be continued in his useless office. But, apart from the question of the merits of the lower Court's order, I think it must be held that there is no short-cut to a remedy by application to the Court where a trustee refuses to carry out his duties under the scheme, but that the only remedy available is a suit to remove him or to have the scheme modified.

A.S.V.

APPELLATE CIVIL

Before Mr. Justice Burn and Mr. Justice K. S. Menon.

JAGADISAN PILLAI (PETITIONER), APPELLANT,

v.

NARAYANAN CHETTIAR AND FOUR OTHERS (RESPONDENTS 1 AND 3 to 6), RESPONDENTS.*

1935, November 1.

Indian Limitation Act (IX of 1908), art. 182 (5)—Application in accordance with law—Insolvent judgment-debtor whose property has vested in Official Receiver—Execution petition filed against—Application in accordance with law, if—Provincial Insolvency Act (V of 1920), sec. 28 (2)—Effect of—Arts. 181 and 182 of Limitation Act—Applicability of—Decree capable of execution—Laches of decree-holder in applying for execution—Order exonerating defendant from liability under decree subsequently set aside—Capable of being relied upon as affording fresh starting point for limitation in such a case, if.

An execution petition cannot, by reason of section 28 (2) of the Provincial Insolvency Act, be filed without the leave of the

(1) (1931) 61 M.L.J. 904.

* Appeals Against Orders Nos. 463 and 484 of 1933.