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in proceeding with the trial of the claim of the applicant to apply the law of procedure in just the same manner and with the same effect as if the applicant were the plaintiff in a suit instituted by plaint in the ordinary way. In short the sections make the application, when numbered and registered, a regular suit for all purposes.

The former proceeding therefore was a suit within the meaning of Section 97, and liberty having been given on its withdrawal before decree to institute another suit, the present suit was well brought. Consequently the decree of the Lower Appellate Court is wrong and must be reversed, and the case remanded for the determination of the other questions raised in the appeal to that Court. The respondent must pay the costs of the appellant in this Court. The liability to the costs hitherto in the Lower Courts will abide the determination of the Lower Appellate Court.

Appellate Jurisdiction. (*a*)

Regular Appeal No. 80 *of* 1869.

Honorable D. ARBUTHNOTT, Collector and Agent to the Court of Wards, on behalf of the minor Zemindar of Gundamanaikanur and 3 others ... ... } *Appellants.*

OOLAGUPPA CHETTY... ... ... *Respondent.*

In a suit to recover, from the minor son of the late possessor of a Polliem of which the guardians of the minor were in possession by virtue of a fresh grant made by the Government to the minor after the death of his father the late possessor, money lent to the father of the minor to pay off arrears of peishcush for which the Polliem was about to be attached and for reproductive work done upon the land.

Held, that the income of the Polliem was not liable for the debt.

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THIS was a Regular Appeal against the decree of J. D. Goldingham, the Acting Civil Judge of Madura, in Original Suit No. 4 of 1868.

The plaint stated that the plaintiff and the late Zemindar of Gundamanaikanur filed a razinamah as plaintiff and defendant respectively in Original Suit No. 17 of 1863 on the file of the Civil Court of Madura. The razinamah provided

(*a*) Present: Scotland, C. J. and Holloway, J.

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that the said Zemindar should pay the plaintiff Rupees 32,259-2-5 in five instalments, with interest at 1 per cent. per mensem from the 26th April 1864; that the first instalment of Rupees 6,000 should be paid him on the 30th June 1865; that the balance should be paid him subsequently by four instalments; and that in default of payment of any one instalment, the entire sum, with interest, should be collected by Court precept and warrant issued against the Zemindar and his estate without reference to the subsequent instalments. The Zemindar having failed to act up to the razinamah, and the Court having by its order, dated the 11th December 1865, declined to execute the razinamah, the plaintiff brought the Original Suit No. 8 of 1866 on the file of this Court against the (deceased) Zemindar of Gundamanaikanur for the recovery of Rupees 39,678-11-11.

In the meanwhile the Zemindar died, but the Court directed plaintiff to bring a fresh suit after the heirs of the deceased were nominated. Plaintiff put in a motion giving the names of the deceased's heirs, and the Court passed an order on the 16th December 1867 directing him to file this plaint and take further proceedings. Hence this suit.

Plaintiff prayed that the principal Rupees 39,678-11-11 with subsequent interest from the 26th March 1866 aforesaid may be recovered to plaintiff from the defendants.

The written statement of the 1st defendant, the Agent of the Court of Wards, alleged that the estate of Gundamanaikanur was an unsettled Polliem for which no permanent sunnud had been granted. A sunnud-milkeut-istimrar was necessary to constitute a Zemindary hereditary property. The succession to the Zemindary entirely depended upon the will and pleasure of the ruling power; and the Government, in the exercise of this prerogative, had appointed the minor son of the deceased Poligar as his successor.

The minor Poligar, who succeeded to the Zemindary not on any hereditary right but on the will and pleasure of the Government, and the Polliem in which the deceased Poligar had only a life-interest, were not liable for the whole or any portion of the amount of the razinamah which was said to have been executed by the said deceased Poligar.

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The issues were—

1st. Whether or not the Zemindary or the income thereof is answerable to the debt.

2nd. Whether the minor is in any way answerable.

The following judgment was pronounced by the Civil Judge :—

The evidence adduced in this suit is conclusive in showing 1st, that the sum which the plaintiff seeks to recover is founded upon a *bonâ fide* debt incurred by the late Zemindar of Gundamanikanur, and 2nd, that the Zemindary itself is what is called an unsettled Polliem, that is to say, an estate held without sunnud, which under the terms of Regulation XXV of 1802 is necessary in order to constitute it hereditary property.

Plaintiff's contention is, in effect, that the revenues and the corpus are equally answerable ; that the succession to the Zemindary has continued from father to son in one family, and that even in the absence of a sunnud there is nothing in the descent of this particular property to exclude it from the operation of the general rule of Hindu Law as applicable to inherited property in general. In support of this contention, Sadr Court Appeal No. 140 of 1859 was referred to. This case however does not bear out the view taken of it by the plaintiff's vakil, for, though a plea, which is substantially the same as that set up by the 1st defendant, was rejected, it was rejected not because of its invalidity but because it had not been advanced in the Court below ; and the judgment, which was unfavorable to the defendant, proceeded upon entirely different grounds. On the contrary the course of decisions has been the other way. In Appeal Suit No. 11 of 1816, (*page* 141, *Volume I, Sadr Decisions*) it was held that a sunnud is necessary to constitute a Zemindary hereditary property, and in Appeal Suit No. 14 of 1817 (page 173) the rule was upheld, the Judges remarking "that succession to Zemindary tenures was not governed exclusively by the Laws of Inheritance, but that the ruling power created, tolerated, abolished, or disposed of those tenures as might be considered most expedient for the purpose of realizing the

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public revenue due from the lands." It may be doubted, however, that in these days such views would be acted upon. Later on in Regular Appeal No. 9 of 1867 (*page* 303, *Volume III, High Court Reports*) the same principle is maintained, Mr. Justice Holloway observing "that there is not a continuance of the previous estate in each successive holder, but a fresh estate created by the gift."

Whether or not the revenues of the Zemindary are answerable must, I think, depend mainly upon the character of the debt itself and the urgency of the late Zemindar's requirements, but it is not without great diffidence that I have come to this conclusion. In the case just quoted, there is a passage which tends to show that this point has not yet been finally settled. After remarking that the defendant could not be liable to the extent of the Polliem, Mr. Justice Holloway adds "whether its income would in the hands of the son be bound or not—it is not now necessary to consider." In a case differing materially in its facts, but from which principles applicable to the present suit or deducible (*Moore's Indian Appeals, Volume VI, page* 341) I gather that, notwithstanding the peculiarity of the law relating to these Zemindaries, circumstances might exist which would render the holder of the estate responsible for the debts of his father, and that the freedom from the obligation depends more on the nature of the debt than on the nature of estate itself, and this principle was to a certain extent recognized in High Court Regular Appeal No. 59 of 1866, but in every case the *onus* of proving the unexceptional character of the debt is declared to rest with the creditor.

It has been argued and with reason that the Zemindary being a separate acquisition, its incomes are not liable. The grantee is no doubt presumably entitled to enjoy all the benefits of the gift, to the reality as well as the shadow, and it is difficult to say how this can be done if the revenues were liable to be severed from the corpus. On the other hand it is not contended that the ruling power would exercise the right which the law has declared it to possess, in dealing with these properties otherwise than by continuing the succession in the same family, and it may therefore be fairly con-

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ceded, that if the object for which the debt was incurred tended to that result, it is one which might also be chargeable on the estate in the hands of a successor.

There is no doubt, as I have said before, of the unexceptional character of the loan made by the plaintiff. It is admitted by the widows of the late Zemindar (2nd and 3rd witnesses for plaintiff) who wish it to be repaid, and payment is only resisted by the Collector as Agent under the Court of Wards. The plaintiff's 4th witness, the late Zemindar's sumpraty, also deposes that the money was borrowed to consolidate the debts incurred for the payment of peishcush which had fallen into arrears, owing to disputes of between eight and nine years' standing between the Zemindar and the cultivators, and for the repairs of the anicut which has been the means of increasing the resources of the Zemindary; and he adds the loans were necessary as an order had been issued by the Collector for the attachment of the Zemindary. Had the Zemindary been attached and the whole or a portion sold to meet the Government demands against it, it is not difficult to say what effect this would have had upon the fortunes of the present proprietor.

Applying therefore the principles enunciated by the Lords of the Privy Council in the case of Hanuman Persah Panday to the case in issue, I think, that where, by means of a certain act done *bonâ fide*, an estate is preserved intact or its condition permanently improved the doer of that act ought not to suffer by the technicalities of the law, arising, I am given to understand, more by accident than design, which regulates the succession to that estate, and that in respect of the 1st issue, plaintiff is entitled to recover the sum sued for from the incomes of the Zemindary.

I am quite aware that a different view may be taken of this question on appeal, and I will therefore proceed to the disposal of the 2nd issue which otherwise would be rendered unnecessary. It is unquestionable that to the extent of the property inherited the minor Zemindar is answerable to the plaintiff's claim, but what this property amounts to, the Court has no present means of ascertaining. This knowledge is exclusively in the hands of the defendants, and it is from the 1st defendant especially that the Court must look to

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have the information supplied. That there was property to some value there is no doubt from the evidence of 1st defendant's 1st witness, he being the tahsildar of the taluq who took charge of it at the death of the late proprietor. This witness deposes that on referring to the statement prepared by him at the time, property valued at Rupees 315-5-9 was attached as well as certain other property to which no value was assigned, and then in cross-examination he states that this property consisted of Punnay lands, the palace, utensils, timber, chunam, bullocks, houses and cloths. He says also that there were outstanding balances due by the ryots, some of which have since been collected, and there is besides some evidence of there being a considerable sum of money available in the Government Treasury. Under these circumstances the Court will, at the time of execution pass such orders as may then appear necessary for the purpose of discovering the value of this property, but my decree now is that plaintiff be declared entitled to recover the sum sued for with further interest at $\frac{1}{2}$ per cent. per mensem till date of collection from the revenues of the Zemindary as well as from the private property inherited by the minor Zemindar, and that defendants do from the same source pay all costs incurred in this action.

The defendants appealed to the High Court against the decree of the Civil Court for the following reasons, namely:—

1. The said decree is contrary to law and the weight of evidence in the case.

2. The revenues of an unsettled Polliem are not liable in the hands of the holder thereof for the time being for the debts of a previous holder of the estate for whatever purpose contracted.

3. If liable at all, such revenues are only liable for debts contracted for the benefit of the estate; and the plaintiff has not proved that the debts, the subject of this suit, were of that nature.

The Government Pleader, for the appellants, the defendants.

Mayne and Scharlieb, for the respondent, the plaintiff.

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The Court delivered the following judgment:—

THE CHIEF JUSTICE.—This is a suit to enforce the payment of a debt due by the late possessor of the Polliem of Gundamanaikanur by the guardians of his minor son, and the Lower Court has found that the debt was incurred for money lent to pay off arrears of peishcush for which the Polliem was about to be attached, and for reproductive work done upon the land, and has decreed the liability of the defendants to pay the sum claimed from the revenues of the Polliem as well as from the private property of the late Poligar inherited by the minor.

The ground of appeal relied upon by the defendants is that so much of the decree as adjudges payment of the debt out of the revenues of the Polliem is wrong, the Polliem not being an estate of inheritance, but an estate which had been held by the minor's father and the possessors of it who preceded him for life only under grants made to them severally by the Government. This objection, I am of opinion, must prevail.

It has long been considered an established rule of Hindu Law in this Presidency that an heir is not liable to be sued for the debts of the person whose heir he is, except assets have come to his hands, that is, where he has acquired property by succession from the deceased debtor, and then only to the extent of such assets. Now clearly as respects the Polliem the defendant is not in that position. On the determination of the estate of his father by his death, the proprietary right to the Polliem reverted absolutely to the Government, and by their fresh grant to the defendant a newly created estate for life became vested in him. In this respect the present case differs from the cases of *Naraganty Lutchmidevammah* v. *Venganna Naidu* and *The Collector of Madura* v. *Veeracamu Ummal* cited in argument from 9, *Moore's Ind. App., pages* 66 *and* 446. They were cases of disputed title to Polliems which were it appears hereditary. The defendant therefore is not liable as the personal representative of his father by reason of his possession of the Polliem.

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So far the learned counsel for the respondent hardly contested seriously the non-liability of the defendants (the appellants). His main argument was that by the plaintiff's loan, the Polliem had been saved from confiscation and the grant of it secured to the minor, and that afforded an equitable ground for making the liability in the present case an exception to the general rule.

It does not appear to me that the necessary effect of enforcing the attachment would have been to deprive the minor of a grant from the Government. But even assuming that such would have been its effect, I can see no ground of equity upon which to rest the plaintiff's claim which is in effect to treat the debt as a charge upon the minor's estate. The plaintiff simply made the late Zemindar his sole debtor for advances to enable him to protect his life-interest by paying off the charge for arrears of peishcush. They stood in short in the relative positions of ordinary simple contract creditor and debtor. The principle recognized in the case of *Hanuman Persaud Panday* v. *Mussumat Babodi Munraj Koomveree*, 6, *Moore's Indian Appeals*, 412, to which the Court was referred has no application here. It relates to the power of a manager to encumber by a mortgage an existing estate, and here the only estate which could have been charged, if a lien had been created by the minor's father, terminated with his life.

For these reasons I am of opinion that the decree of the Lower Court must be reversed so far as it declares the liability of the defendants in respect of the revenue of the Polliem. In other respects the decree will stand affirmed. I think the appellants' costs should be paid by the respondent.

MR. JUSTICE HOLLOWAY.—The only question is whether the revenues of a Polliem not hereditary can be held liable for the debts of the previous holder.

The ground upon which it is sought to bind them is that the debts were incurred for the release of the estate from attachment. If this had been proved and the present holder had taken the estate through the borrower, there would be no doubt of the liability, and the reason would be

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that the successor takes both the rights and liabilities of him under whom he claims and must discharge the latter to the extent of the assets taken. It is unnecessary here to advert to any exceptions. The reason why this rule does not apply to the successor to a Polliem is that, as pointed out in *III, Madras High Court Reports*, 303, there is no continuance of the previous estate, the present holder does not succeed or to use the refreshing language of the English law, he is not in "in the per."

Mr. Mayne argued that, if the estate had been attached and sold, all chance of succeeding would have been cut off. This proposition I am not prepared to admit, but whether it be so or not such a possibility can have no effect upon a plain principle of the law of obligations. What the advance of money preserved, if indeed it preserved anything, was the estate of the then holder. It had and could have no connexion with an estate which had not then and might never have existence, since it depended wholly upon the will of others. There is nothing in the cases in 9, *Moore*, to the contrary. Whether rightly or wrongly the case at page 66 assumes the hereditary character of the Polliem, and the decision is only an authority for estates which go by descent. That this is not one is conceded. The case at page 446 is equally inapplicable, for the language of the Sadr Court at 454 must be taken to mean that the Government had no intention to resume, that their conduct of the suit in the Court below negatived such intention, that the only question which they intended to raise and did raise involved the assumption that the grant was to be continued unless there was a rule of Hindu law which would have worked an escheat if the estate had been hereditary. The Sadr Court and the Judicial Committee decided that there was no such rule, and the case has no bearing upon the present question.

The rule of law perfectly well established here is that a man must discharge the liabilities of him under whom he claims to the extent of the assets taken. It follows that the assets so taken are the only fund upon which the creditor has a claim, and the nature of the estate taken shows that its object matter is not assets, and for the simple reason that

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it was not taken from or through the debtor. I have no doubt that the decree of the Lower Court must be reversed so far as it seeks to fasten the debt upon the income of the Polliem.

The rents due to the deceased even if recovered after his death will of course be assets. So will all private property which has descended from the deceased to the minor.

Appeal allowed.

Appellate Jurisdiction. (a)

Referred Case No. 11 *of* 1870.

IYAHVIEN *against* CHITHAMBARIEN.

A Court of Small Causes has not power to do more in execution of a decree against a member of an undivided member of a Hindu family than issue process for the attachment and sale of the defendant's undivided right, title and interest in the family moveable property. It would be for the purchaser at such a sale to obtain a partition.

1870. *May* 16. *R. C. No.* 11 *of* 1870.

THIS was a case referred for the opinion of the High Court by M. Cross, the Judge of the Court of Small Causes at Negapatam, in Suit No. 667 of 1869.

The case stated was as follows:—

This is an application by plaintiff, in execution of his decree, to attach the undivided moveables of the defendant and his co-parceners and sell so much of them as will satisfy the decree, leaving to the defendant and his two co-parceners to adjust such sum in their accounts when they enter upon a division of their property.

Defendant is the junior member of an undivided family and this decree is against him only.

In the course of its execution plaintiff attached certain moveables to which the other co-parceners preferred a claim under Section 246, pleading that it was undivided property and could not be attached for satisfaction of a decree against a single co-parcener.

The Court held claimant's objection to be valid and allowed their claim leaving it optional with plaintiff to sell so much of defendant's third share in the family property as would adjust his claim.

(a) Present: Scotland, C. J. and Holloway J.