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decided by the Privy Council, cannot inherit as a sapinda. He is, therefore, one of the remoter kinsmen. As not belonging to the same gotram as his maternal uncle, he is not—in the stricter sense in which the term is used by the Mitákshará, Smriti Chandrika and other writers—one of the samanodakas, and he is there properly a mere Bandhu, and it is notorious that this is the popular designation of the relationship throughout Southern India. As a Bandhu he is entitled before any more remote relative, and necessarily before one who is no relative.

Following the decision of the Privy Council in *Gridhari Lal Roy* v. *The Government of Bengal*, I would confirm the decision of the Civil Judge and dismiss this appeal.

APPELLATE JURISDICTION (*a*)

Special Appeal No. 23 *of* 1871.

RANI KATTAMA NÁCHIÁR.....*Special Appellant.*

BOTHAGURUSAMI TEVAR.....*Special Respondent.*

Plaintiff, the Zamindárni of Shivaganga, sued to remover two villages which she alleged formed part of the Shivaganga Zamindári. The villages originally belonged to Pitchama Náchiár, mother of the present defendant, Bothagurusámi Tevar, the ex-Zamindár of Shivaganga. In 1856 they were purchased by the Court of Wards on behalf of Bothagurusámi who was then a minor, with part of the rents and profits of the Zamindári, and in 1860 were given by him to his mother. In 1864 Bothagurusámi was ousted by a decree of the Privy Council and became liable to the present plaintiff for the mesne profits of the Zamindári. In the account taken of mesne profits due, the amount expended on the purchase of these villages was excluded by plaintiff's consent from the sum debited to the ex-Zamindár. Plaintiff now sued Pitchama Náchiár, and, she dying, the suit was continued against Bothagurusámi, as her representative. *Held*, that the plaintiff was not entitled to maintain the suit. The decree of the Privy Council did not directly give the plaintiff a right to maintain the suit, for the adjudication of the Zamindári, related only to the permanently settled estate acquired under the Istimrári Sannad of the Madras Government; and even if it could be said to include the village in dispute, process of execution would under Section 11, Act XXIII of 1861, be the plaintiff's only remedy. There was but one ground upon which the suit could be supposed to lie, namely, the existence of the relation of trustee and beneficiary between the Collector and the plaintiff at the time of the purchase, and such relation did not exist.

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THIS was a Special Appeal against the decision of J. D. Goldingham, the Civil Judge of Madura, in Regular Appeal No. 92 of 1869, reversing the Decree of the Court of the Principal Sadr Amin of Madura in Original Suit No. 38 of 1868.

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

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The plaintiff in this suit sought to recover from the defendant the villages of Arasakulam and Korisakulam permanently settled, and paying in the Shivaganga Zamindári a quit rent of Rupees 279-4-9 to Government, and Rupees 2,964-12-5 as arrears of rent of the said two villages for Faslis 1273 to 1276.

The plaint stated that the said villages were held on Darmasanam tenure and formed part of the Shivaganga Zamindári, from the revenues whereof they were purchased in 1856 by the Court of Wards who had the management of the same, although they were bestowed on the defendant by the ex-Zamindár in 1860; that the plaintiff wanted to take possession of the villages, but was prevented by the defendant. Hence the suit.

The defendant denied the plaintiff's right to the villages in question, and pleaded that her claim to the produce of Faslis 1273 and 1274 was barred by the Law of Limitation.

The Principal Sadr Amin found that the villages were purchased from the mesne profits to which the plaintiff was entitled under a decree of the Privy Council, and that her claim for the profits of Faslis 1273 and 1274 was barred by the Law of Limitation, and, under this view, awarded the villages to the plaintiff with the profits of the same for Faslis 1275 and 1276, and from 1277 till the date of delivery the value being determined at the time of executing the decree.

From this decree the defendant appealed.

The Civil Judge, reversing the decree of the Principal Sadr Amin, said in his judgment:—

"The villages, the subject of this suit, were purchased in the year 1855 by the agent to the Court of Wards, out of the revenues of the Shivaganga Zamindári, for the deceased defendant, Pitchama Náchiár at the express desire of the ex-Zamindár, her son and present representative. They were next made over to the ex-Zamindár in 1859, when he attained his majority and was put in possession of the Zamindári, and in 1860 they were formally made over by him

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to his mother the said defendant. In 1864 the ex-Zamindár was ousted by the decree of the Privy Council, and in 1865 an account, Exhibit C, was prepared by this Court shewing the sums due to the plaintiff as mesne profits. In this account the amount expended on the purchase of these villages was excluded by plaintiff's consent from the sums debited to the ex-Zamindár, and the question now is whether she is entitled to recover them from Pitchama Náchiár. The Principal Sadr Amin has decreed in plaintiff's favor, but I am clearly of opinion that his decree cannot be sustained.

Referring to the decree in question, I find that plaintiff was declared entitled to recover the Zamindári and such sums as might be found due upon account from the death of Angamuttu Náchiár. Now it is admitted that these villages did not form part of the corpus of the Zamindári, and as for the sums due on account of mesne profits, their amount was determined by an order of the Court passed in execution. All that plaintiff was entitled to in respect of this transaction was the amount of the purchase money, and her having waived her right to it then, under, perhaps, a mistaken impression, does not give her power now to come down upon Pitchama Náchiár. Had the villages formed part of the Zamindári, the case would of course have been different, but, as the matter stands, I cannot see how Pitchama Náchiár can be compelled to make restitution. The gift was complete in itself at the time in question, for the ex-Zamindár had divested himself of all right to the property; and having been made when he was apparently their rightful owner, it cannot be impeached on the ground of fraud, nor does the fact of the donee being his mother in any way affect the question.

It seems clear to me that the decree of the Lower Court is wrong and must be reversed—All costs being borne by the plaintiff."

The plaintiff preferred a Special Appeal on the ground that the village, being admittedly purchased for the Zamin of Shivaganga by the Court of Wards from its proceeds while under their management, formed a part of the Zamin, and fell with it to the plaintiff's hereditance.

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Karunakara Menon, for the special appellant, the plaintiff.

The Acting Advocate-General, for the special respondent, the defendant.

The Court delivered the following judgments:—

SCOTLAND, C. J.—This is a suit by the Zamindárni of Shivaganga to recover two villages, together with mesne profits from Fusly 1273 to Fusly 1276. The Lower Appellate Court, reversing the decree of the Court of First Instance, held that the plaintiff had no title to the villages and dismissed the suit, and whether the Court was wrong in so deciding is the question for determination in the Special Appeal.

The facts are,—that the villages are held on Darmasanum tenure and were the property of the now defendant's deceased mother, against whom the suit was originally brought, when in 1855 they were sold in execution of a decree. At that time her son (the defendant) was a minor under the guardianship of the Court of Wards, and the Zamindári of Shivaganga was managed by the Collector, in his capacity of Agent of the Court of Wards, for the defendant's benefit as the rightful owner in succession to his father; whose proprietary title, as the heir of the plaintiff's father, had been declared valid by a then subsisting decree of the Civil Court of Madura passed in 1847. At the request of the defendant and with the sanction of the Court of Wards, the Collector purchased the villages in dispute for Rupees 12,165, out of the accumulated savings from the income of the Zamindári in his charge. In 1859 the defendant's minority ceased and he was put in possession of the Zamindári and the said villages: and in the same year his right as heir to the Zamindári was upheld by a decree of that Court in a suit brought by the present plaintiff to eject him, which decree was affirmed in an appeal to the Sadr Court. In 1860 he made a complete gift of the villages to his mother, and from that time she continued in the enjoyment of them as owner until her death, which has taken place since the institution of the present suit. She

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was succeeded by her son, who was then made defendant in the suit. In 1863 the decrees against the plaintiff were reversed on appeal to the Privy Council and, by the order of Her Majesty in Council, the plaintiff was declared, as against the defendant, entitled to recover the Zamindári, and it was directed that an account should be taken of the rents and profits of the Zamindári received by the defendant, or by his order, or for his use since the death of Angamuttu Náchiár, and that the amount found due should be paid by the defendant. In execution of that order the plaintiff was put in possession of the property forming the Zamindári estate granted by the Istimrári Sannad, and an account was taken of the mesne profits and the amount due to the plaintiff ascertained. But on the taking of such account no claim was made by the plaintiff, nor was any sum allowed to her on account of the purchase money of the villages in dispute.

There can be no doubt that the order does not directly give the plaintiff a right to maintain the suit, for, in the first place, it is clear that the adjudication of the Shivaganga Zamindári relates only to the permanently settled estate acquired by Gauri Vallabha Tevar under the Istimrári Sannad granted by the Madras Government. And in the next place, if it could be said to include the villages in dispute, process of execution would, under Section 11, Act XXIII of 1861, be the plaintiff's only remedy for their recovery.

There is, it appears to me, but one ground upon which the suit could be supposed to lie, and that is the existence of the relation of trustee and beneficiary between the Collector and the plaintiff at the time of the purchase. If that had been established, then I have no doubt the plaintiff would have had a right to maintain the suit upon the ground of a resulting trust, attaching to the villages by operation of law, in the hands of both the defendant and his mother.

But I think that the relation of trustee and beneficiary necessary to give rise to such a trust, cannot be said to have existed in regard to the fund applied to the purchase of the villages. At the dates of the purchase by the Collector and the gift to the defendant's mother, the decrees declaring the

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defendant's right to the Zamindári and the funds held in trust by the Collector were in force : and this alone would, probably, have been a ground for deciding against the existence of such a relation. But supposing the reversal of those decrees by the Privy Council to exclude them altogether from consideration, I think the decree of the Privy Council is itself fatal to the maintenance of the suit upon the ground of the existence of such a relation of trustee and beneficiary and resulting trust in favor of the plaintiff. The adjudication thereby made as to the right of the plaintiff to and the liability of the defendant for the mesne profits of the Zamindári from Angamuttu's death, in effect determined the relation between them to be that of judgment-creditor and debtor for such sum as should be found due on the taking of an account. Assuming, therefore, what at present is not apparent in the record, that none of the rents and profits due before the death of Angamuttu went to make up the fund applied to the purcharse of the villages, I think that such a relation and trust is quite incompatible with the decree, and that the plaintiff's only right under it was to make the amount of the purchase money a part of the debt due on account of mesne profits and enforce payment against the defendant as a judgment debtor.

For these reasons I am of opinion that the decree of the Lower Appellate Court should be affirmed and the appeal dismissed, but without costs.

INNES, J.—I concur. We must look in this case to what was taking place not at the time of the gift, but at the time of purchase. The purchase was in 1855, and it is clear that there was then no *lis pendens*, for the present defendant (the ex-Zamindár) then held possession of the Zamindári as the persen who had successfully resisted the various claims made to the estate which had been disposed of unfavourably to the claimants by unappealed decrees of the Sadr Court; and the litigation which sprung up again in 1860 took the form of a fresh suit, not of a continuation of the former proceedings.

I would not, however, be understood as saying that if this had been a case of *lis pendens*, that circumstance would

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necessarily have conferred on plaintiff the right to the specific property into which the funds have been converted. There were, further, no circumstances in the case to give rise to the relation of trustee and beneficiary between the Court of Wards who acted for the ex-Zamindár, then a minor, and the plaintiff, the person who was eventually declared to be the rightful successor. But even assuming that the principles laid down in *Taylor* v. *Plumer* (3, M. & S., 574) could be applied by holding that the plaintiff has a right to follow the specific property into which the purchase money has been converted, it seems that the plaintiff's remedy, if indeed she can now recover at all, is in execution and not by separate suit, for her right to recover must rest upon the villages representing mesne profits which she is entitled to recover, she must execute that decree to enable her to recover them I agree in dismissing the Special Appeal without costs.

Appeal dismissed.

APPELLATE JURISDICTION *(a)*

Special Appeal No. 273 *of* 1871.

LATCHMANA RAU SAIB, by his mother and guardian SUNDARA BAYI SAHIBA... ... ... } *Special Appellant.*

RAGUNATHA RAU and another... *Special Respondents.*

The Court of First Instance refused to grant plaintiff's application to be allowed to examine 2nd defendant as a witness on her behalf, thinking the grounds of such application insufficient for the exercise of its discretion under Section 162 of the Civil Procedure Code. On the adjourned date of hearing plaintiff failed to produce any other witness and the suit was dismissed under Section 148. On Regular Appeal, the Civil Judge considered that the Court of First Instance ought not to have refused plaintiff's application, but held that the refusal was a final order not open to question in appeal. On Special Appeal, *Held*, that the Civil Judge was wrong on the latter point. That if the plaintiff had been prevented from examining the 2nd defendant on insufficient grounds, she had not committed default under Section 148; that the decree on the finding of the Civil Court was not maintainable without enabling plaintiff to examine 2nd defendant and that that finding was conclusive in the Special Appeal. The decrees of both the Lower Courts were consequently set aside and the case remanded.

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THIS was a Special Appeal against the decision of C. G. Plumer, the Acting Civil Judge of Chittur, dismissing Regular Appeal No. 124 of 1870, presented against the decree

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