
(1916) 11 MAD CK 0036
In the Madras High Court

Chettiar alias Vairavan Chettiar, Aramanai Rangasami
Chettiar, Govindasami Chettiar (dead) and Others and
Kolandavelu Udayan and Others

APPELLANT

Vs

Vaithilinga Mudaliar and Others
Srinivasa Aiyar and
Others Vs Vaithilinga Mudaliar and Others
Vaithilinga
Mudaliar and Others Vs Srirangathanni and Others
T.
V. Gopalasami Mudaliar Vs Vaithilinga Mudaliar and Others

RESPONDENT

Date of Decision : 15-11-1916

Acts Referred:

Citation : 41 Ind. Cas. 546

Hon'ble Judges : Walli, C.J;Burn, J

Bench : Division Bench

Judgement

1. These are appeals from the decree of the Subordinate Judge of Negapatam in a suit brought by the plaintiffs to recover the suit properties as next reversioners of the last male owner, whose widow died in 1902. The defendants relied on long possession under an adoption made by the widow in 1862 and pleaded that the suit was barred by limitation and res judicata. The Subordinate Judge overruled both pleas and gave the plaintiffs a decree against which several of the defendants have appealed. We propose to deal, in the first place, with Appeals Nos. 206 and 207 of 1908 filed by the 7th and 8th defendants, who are alienees from the heirs of the alleged adopted son. The main facts are not now in dispute, and may be briefly stated. Arunachala, the last male owner, died in 1849 leaving a widow, Chokkammal. In 1862, Chokkammal adopted one Alagasundara, a younger brother of her deceased husband. This adoption was afterwards impeached on the ground that Alagasundara was not given in adoption by his father who was dead at the date of the adoption and that consequently it was bad. Alagasundara was put in possession of the properties which had not been already alienated, with the exception of certain properties which were retained by Chokkammal for her maintenance, and continued in possession till he died in 1864 leaving a widow, Murugathal, the 4th defendant. Murugathal adopted one

Thiyagaraja who enjoyed the properties until 1876, when he appears to have been dispossessed by Arunachala's widow, Chokkammal. He died in 1881 leaving a widow who died in 1882. On her death his adoptive mother Murugathal, the 4th defendant, became his heiress and instituted Original Suit No. 9 of 1887 on the file of the Court of the Subordinate Judge of Negapatam against Chokkammal to recover the properties of which she had dispossessed him in 1876. In this suit it was held that the adoption on which Murugathal relied was invalid, on the ground that Alagasundara was an orphan at the date of his adoption in 1862, but that he and his heirs had acquired a title by adverse possession and a decree was accordingly given in her favour and affirmed by the High Court in Appeal No. 114 of 1890.

2. In this state of things Mr. A. Krishna-swami Aiyar for the appellants, the 7th and 8th defendants, alienees from the 4th defendant, contended that the suit was barred both by limitation and by *res judicata*, and also desired to raise the question of estoppel, but as there was no issue raising the question of estoppel as regards the properties concerned in these appeals and as the point was not taken in the Court below, we declined to go into it.

3. The question of *res judicata* was argued at great length on both sides and many cases were cited, but we think it may be disposed of very briefly. The suit of 1887 was a suit against the widow Chokkammal and was decided against her, as we understand the case, on the ground that she had been out of possession for more than twelve years from 1862 when she took Alagasundara in adoption and put him in possession, and that consequently her right to sue to recover possession became barred under Act IX of 1871 and her title became extinguished at the same time u/s 29 of that Act, and thereupon Alagasundara's heirs who were in possession acquired a title as against her, and became entitled to recover the properties from her within twelve years of her dispossessing them in 1876. In these circumstances, no question arose or can be said to have been decided in that suit as to the right of her husband's reversioners to sue after her death. The case is distinguishable from *Hurt Nath Chatterjee v. Mothurmchun Goswami* 20 I. A. 183. in which, after the death of the widow Pearimoni, Sampurna, one of the reversioners, brought a suit to recover possession of the estate from one Mothoor Mohan which was dismissed on the ground of limitation, a decision which their Lordships held to be *res judicata* in a subsequent suit by another reversioner against the same Mothoor Mohun. This decision, as we understand it, proceeded on the ground that Sampurna when she sued after the death of the widow to recover, as reversioner to her deceased father, the properties in possession of the defendant represented the estate, and a decision that was necessary for the decision of that suit was *res judicata* when the same question arose again in a suit by a subsequent reversioner.

4. Having disposed of the question of *res judicata*, we have next to consider the question whether the present suit should be held to be barred by limitation. Mr. A. Krishna-swami Aiyar who appeared for the appellants formally raised the

contention that the suit is barred under Article 108 of the Act of 1877 which was in force when it was brought, but in the state of the authorities in this Court, he rested his case mainly on the contention that it became barred under Article 129 of Act IX of 1871 which was in force in 1874, when the prescribed period of twelve years from the date of adoption expired without the adoption having been set aside.

5. Under Act XIV of 1859 in a suit by a reversioner to recover the estate from an alleged adopted son, time did not run against the reversioner until his right to possession accrued on the death of the widow, as held by the Privy Council in *Rajendro Nath Holdar v. Jogendro Nath Banerjee* 15 W. R. 41. This was the general Rule applied by Article 142 of Act IX of 1871 to suits for possession of immovables by reversioners of the last male owner entitled to succeed to the estate on the death of a Hindu female; but Article 129, which prescribed for suits to establish or set aside an adoption a period of twelve years from the date of adoption, was held in effect to have introduced an exception to the general Article 142 in cases where possession could not be obtained by the reversioner without successfully questioning an adoption. Articles 118 and 119 were substituted in the Act of 1877 for Article 129 of Act IX of 1871 : and, as is well known, there have been divergent decisions in India as to whether these Articles which speak of obtaining a declaration that an adoption is invalid or never took place or that it is valid merely reproduced the substance of Article 129 of the Act of 1871 or are limited to declaratory suits, as distinct from suits for possession which depend on the validity of an adoption, in which case the effect of the change as regards this latter class of suits was simply to restore the law as it was under the Act of 1859. The arguments for the first view are forcibly stated in the Full Bench judgment of the Bombay High Court in *Shrini as Murar v. Hanmant Chando* 24 B.K 260 and for the latter view in *Sir V. Bashyam Iyengar's* judgment in *Ratnamasari v. Akilandammal* 13 M. L. J. 27. His view has been accepted in this Court since the decision of the Privy Council in *Tirbhuwan Bahadur Singh v. Rameshar Bakhsk Singh* 33 I. A. 156. and is in accordance with the more recent pronouncement of their Lordships in *Muhammad Umar Khan v. Muhammad Niaz uddin Khan* 13 Ind. Cas. 344.

6. We have, therefore, only to deal with the contention that under Article 129 of the Limitation Act of 1871 both the widow Chokkammal and her husband's reversioners became barred and their title to the suit lands extinguished in 1874 when the period of twelve years from the date of the adoption expired, and the heirs of the adopted son acquired a title as against them. This question has been argued before us mainly with reference to the decisions of the Privy Council as to Article 129 and it is, therefore, necessary to examine carefully those decisions. In the first case in *Raj Bahadoor Singh v. Achumbit Lall* 6 C. L. R. 12. the widow in 1860 had executed a deed purporting to adopt two brothers and to make over her properties to them, but the gift was not to take effect until her death. Their Lordships held that this could not be treated as a serious attempt to adopt a son or sons as heirs to her husband. The question, therefore, as to Article 129 did

not arise, but their Lordships made certain observations which appeared to be susceptible of the meaning that Article 129 was no bar to suits for possession. In the next case, however, *Jagadamh.i Ohaodhrani v. Vakhina Mohun Roy Ghaodhri* 13 I. A. 84 their Lordships distinguished this case and pointed out that it was not a case in which the heir cannot possibly get at the ancestor's property without disturbance of a title and of possession founded on adoption to that ancestor," and they laid down in the clearest terms that in such cases Article 129 of Act IX of 1871 was a bar to the suit as follows:

The plaintiffs' Counsel were asked, but were not able, to suggest any principle on which suits involving the issue of adoption or no adoption must, if of a merely declaratory nature, be brought within twelve years from the adoption, while yet the very same issue is left open for twelve years after the death of the adopting widow, it may be fifty years more, if only it is mixed up with a suit for the possession of the same property. It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose language admits of it, is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute, so t(sic) at it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession.

7. In this passage their Lordships raised the question whether in the case of an adoption by the widow, it must have been questioned under the Act of 1871 within twelve years of the date of the adoption or might be questioned in a suit for possession after the death of the adopting widow, it may be, fifty years later; and they laid down that Article 129 struck at all suits in which the plaintiff could not possibly succeed without displacing an apparent adoption by which the defendant was in possession. This case seems to show that in their Lordships' opinion no suit could be brought, while the Act of 1871 was in force, for possession after the death of the widow, unless the adoption had been set aside within the time prescribed by Article 129. In that case, the adoptions in question were in 1853 and 1855 and the suits were brought by the persons who were the reversioners of the last male owner at the death of his surviving widow in 1868. Act IX of 1871 was in force when that suit was brought, but the same principles were apparently applied by their Lordships in a later case, *Mohesh Narain Munshi v. Taruck Nath Moitra* 6 Sar, P. C. J. 251. where the suit was brought after Act XV of 1877 had been substituted for Act IX of 1871. In that case, their Lordships considered it unnecessary to determine whether the defendant had been in possession of the estate from the date of the adoption through his adoptive mother and guardian or she herself had been in possession under a deed executed by her husband, They held it sufficient that the right of the defendant to the status of an adopted son of Shib Narain, the last male owner, had been openly and constantly asserted, not only in all actings connected with the estates, but also in his daily life in family with the plaintiff. They pointed out that twelve years from the date of the defendant's adoption expired in 1853 when

the plaintiff had come of age, and held that his suit became barred under Article 129 of the Act of 1871, and that the Act of 1877 could not revive his suit which had become barred under the Act of 1871.

8. The respondents, however, rely mainly on the more recent decision of the Privy Council in *Tirbhuwan Bahadur Singh v. Rameshar Bakhsh Singh* (5) and the main question in the case is as to the interpretation to be put upon that judgment. The estate which was the subject of the suit had been confiscated in 1858, and subsequently settled upon the widow of the last male owner in her own right and as her separate property. The defendant took possession after her death claiming that she had adopted him in 1858, and was sued for possession by the plaintiff who claimed to be the next heir of the lady under the Oudh Estates Act, 1869. The defendant pleaded that that Act did not apply, and that if it did, he as the adopted son was the next heir to the lady, and that at all events the plaintiff was not entitled to oust him from possession of the estate without having obtained a declaration that the adoption was invalid, and that a suit for such a declaration was barred. It may also be mentioned that, during the widow's lifetime and while Act IX of 1871 was in force, the defendant sought to recover possession of the estate from the widow on the footing of the adoption and the Judicial Commissioner in 1878 found against the adoption and dismissed his suit, a finding which their Lordships intimated at the close of the case was *res judicata* against him, though they did not rest their decision on that ground, but on the question of limitation, which had been mainly relied on in the argument. Mr. Cohen for the defendant-appellant relied on the cases to which we have referred, and contended that as the right to sue to set aside the defendant's adoption had become barred under Article 129 of the Act of 1871 while that Act was in force, the defendant had acquired a title within the meaning of Section 2 of the Act of 1877 which by the terms of the Section was not to be affected by the passing of that Act. Their Lordships disposed of this contention very briefly. Giving full effect", they said to the *Jagadamba* case (8), and the other cases which followed it, they do not think that the immunity, such as it is, gained by the lapse of twelve years after the date of an apparent adoption, amounts to acquisition of title within the meaning of Section 2 of the Act of 1877. Their Lordships think that the appeal may be disposed of on this short ground whether the alleged adoption was or was not an apparent adoption to which the ruling in the *Jagadamba* case (8) would apply if the Act of 1871 were now in force." This judgment is summarised in the head-note to the report in the *Indian Appeals Tirbhuwan Bahadur Singh v. Rameshar Bakhsh Singh* (5) as a decision that Act, IX of 1871 had no application to that case which was governed by the provisions of the Act 1877 which was in force when the suit was brought. It appears to contain an express ruling that the fact that a suit to set aside the defendant's adoption became barred under Article 129 of the Act of 1871 while that Act was in force, did not amount to an acquisition of title which would be protected by Section 2 of the Act of 1877, a ruling which if applicable would be fatal to the appellant. But as regards this question of acquisition of title their Lordships"

observations must be taken to have been made with reference to the case before them and are, in our opinion, inapplicable to a case like the present in which the heirs of the alleged adopted son claiming under him were in possession of the lands, which are the subject of these appeals, in" 1874 when the right to sue to set aside the adoption became barred under Article 129 of the Act of 1871 which was then in force. Section 29 of that Act provided that at the determination of the time hereby limited to any person for instituting a suit for possession of any land, his right to such land should be extinguished. To take, in the first instance, the case of the widow, Chokkammal, who in 1874 was the next heir of her husband, the last male owner, her right to sue for possession of these lands became barred in 1874 according to the decision of their Lordships in *Jagadamba Chaodhrani v. Dakhina Mohun Chaodhri* (8), when the period limited to her under Article 129 expired, and thereupon her right to these said lands became extinguished under the Section and the heirs of the adopted son, who were then in possession, acquired a title against her on the Strength of which they subsequently-recovered possession from the plaintiffs after she had ousted them in 1876. There was thus clearly an acquisition of title by the heirs of the adopted son at any rate against her while the Act of 1871 was in force, and the title so acquired was not to be affected by the enactment of Act XV of 1877.

9. The only other question then is, whether the suit for recovery of lands now in suit became barred while Act IX of 1871 was in force not only against the widow who was then the nearest heir, but also against all other heirs of the last male owner including the present plaintiffs; as, if it did, we think the effect of Section 29 was to confer upon the heirs of the adopted son, who were in possession when such suits became barred, a title against such heirs also which was not affected by the passing of Act XV of 1877. In our opinion, while Act IX of 1871 was in force, time ran against all the reversioners of the last male owner from the date of the adoption, and they all became barred on the expiry of that date. The object of the Legislature in that enactment was that all questions relating to adoption, including suits for possession of lands depending on questions of adoption, should be determined within twelve years and not after the death of the widow of the last male owner, it might be, fifty years later, as observed by their Lordships in *Jagadamba Chaodhrani v. Dakhina Mohun Chaodhri* (8). Further the point has been expressly decided in India in *Harnabh Pershad v. Mandil Dass* 14 Ind. Dec. 251. and the same view was taken by the Bombay High Court in *Shrinivas Murar v. Hammant Chavdo* (3) under the Act of 1877 which, in their opinion, reproduced Article 129 of the Act of 1871, and by Sir Subramania Aiyar in his Order of Reference in *Chiruvolu Punnamma v. Chiruvolu Perrazu* 29 M.K 390. Our attention has been called to the fact that in *Tirbhuwan Bahadur Singh v. Rameshar Bakhsh Singh* (5) as in the present case, the reversioners bringing the suit were not in existence when the twelve years limited under Article 129 expired, and reliance has been placed on that fact for the respondents. Their Lordships in their judgment make no reference to the fact that the plaintiffs, who were the nearest reversioners at the death of the widow,

were not the nearest reversioners when the period limited under Article 129 expired, and we do not think their judgment can be treated as proceeding on any such ground. What we understand their Lordships to have decided was that, although the right to sue to set aside the defendant's adoption became barred under Article 129 while the Act of 1871 was in force, that fact did not of itself and without possession confer title to the suit lands on the defendant, or prevent the plaintiff from suing for them when Act XV of 1877 was in force within the time limited by that Act. Their Lordships seem to have recognised that defendant had acquired an immunity from a suit by the plaintiff of the kind specified in Article 129 of Act IX of 1871, in other words, that the plaintiff's right to bring such a suit was barred. It may be that the provisions of the Act of 1871 were considered to involve some hardship to persons in the position of the present plaintiff, and that may have been the reason for altering those provisions by the Act of 1877, but Section 2 of the Act of 1877 expressly saved titles acquired under the repealed Act, and we are of opinion, for the reasons already given, that the title of the heirs of the adopted son and those claiming under them to the lands which are the subject of the appeals was among the titles so saved. Appeals Nos. 206 and 207 of 1908 are allowed and the suit dismissed as against the appellants therein with costs throughout.

10. The fourth defendant and some of the other defendants who are alienees from her have not appealed, but we think the suit against them ought also to be dismissed by us under Order XLI, Rule 33, Civil Procedure Code, for the reasons given by Subramania Iyer, J. in *Kulaikada Pillai v. Viswanatha Pillai* 15 M. L. J. 212. and in accordance with the recent decision in *Sabbarayalu Naidu v. Papammal* 29 Ind. Cas. 679 reported in 29 Ind Cas. 579. The point decided in *Kandasamy Chetty v. Annamalai Chetty* 28 M.K 67. does not arise and it is unnecessary to consider that decision now. The decree will be reversed and the suit dismissed against the 4th defendant and all the other defendants claiming under her as alienees, including the 5th defendant who has appealed on another point.

11. In Appeal No. 10 of 1909, the 14th defendant is the 1st appellant, and the appeal relates to the lands in the Ekabogam village of Keerandakudi included in schedule 10 of the plaint. The reversioners claim to recover the property on the ground that it was alienated by Chokkammal in 1855 and that the transaction is not binding on them. There is no doubt that the village did belong to the Kulikarai family and that it was purchased from some member of that family by Subba Chetty, a pre decessor-in-title of the 1st appellant. The case of the defendant No. 14 is that the purchase was effected during the lifetime of Chokkammal's husband, that is, prior to 1849. No sale-deed or other document of title is produced on behalf of the 1st appellant. The plaintiffs allege that the sale-deed from Chokkammal was produced during the litigation of 1857 between her and Murugathal. The records show that a cadjan sale-deed in favour of Subba Chetty by Chokkammal was exhibited in that case. The evidence for the plaintiff is that it was produced by the agent of the 14th defendant. The

Subordinate Judge has accepted the evident on the point and after examining it, we see no reason to dissent from the view he has taken. The probabilities are strongly in favour of the plaintiffs' case being true. In Original Suit No. 9 of 1887 on the file of the Court of the Subordinate Judge of Negapatam, Chokkammal was interested in showing that she had been dealing with her husband's property after his death and it was for (his purpose that Exhibit LXXXIV, the sale-deed in question, was produced in that suit Neither the list of documents, nor the judgment makes mention of the property covered by the deed. The matter wasim material as far as that suit was concerned. We think there can be no doubt that the witness who produced the document was the agent of the 14th defendant. It has, however, been urged that it is not proved that this gale-deed related to the lands now in question. On this point, there is the direct evidence of plaintiffs' witness No. 35. It is true that he was an agent of Chokkammal, but no one but a person in this position would have had any reason for perusing the document. It is admitted by one of the 1st appellant's own witnesses that Subla Chetty owned no land outside Keerandakudi. This indicates clearly that the sale-deed must refer to this village. If it is once shown to relate to this village, no dispute exists as to the land in suit being covered by this deed. It is noticeable that though the 14th defendant is able to produce kist receipts for some years beginning with 1857, he has filed none of a date earlier than 1855. The Subordinate Judge infers from his other findings that the 14th defendant is deliberately suppressing the document which he produced on behalf of Chokkammal in Original Suit No. 9 of 1587 on the file of the Court of the Subordinate Judge of Negapatam. The reversioners are not in a position to know details of a transaction which occurred so long ago. On the other hand, the 1st appellant who has special knowledge has failed to pat before the Court any definite information as to the origin of his title. Instead of furnishing any explanation as to the sale-deed produced by his agent, he has had recourse to a false denial of having produced any document at all. A good deal of oral evidence was given on both sides as to the possession between 1849 and 1855. The Subordinate Judge has rejected it. It has been rightly characterised as vague and unreliable. The Subordinate Judge has attached considerable importance to Exhibit K. This, however, only shows that in 1851 representatives of the Tiruvalur branch of the family treated the Keerandakudi lands as still forming part of the deceased Arunachala's estate. The omission of the land from the property sued for in Original Suit No. 9 of 1887 on the file of the Court of the Subordinate Judge of Negapatam is easily explained.

12. Murugathal was seeking to recover what she had been dispossessed of by Chokkammal and Murugathal had never had possession of Keerandakudi.

13. We think the plaintiffs have established that Subba Chetty did obtain a sale-deed from Chokkammal of the lands in question. The 1st appellant has failed to show that Subba Chetty had possession prior to 1855 and the documentary evidence points to his possession having begun subsequent to that date. The conduct of the defendant is also of importance and supports the plaintiffs'

contention. There is nothing in the defence evidence to rebut this presumption, which arises from the facts which the plaintiffs have established. Under the circumstances, we agree with the finding of the Subordinate Judge on the 18th and 19th issues. As regards the question of limitation which has been argued in the other appeals in the case, the heirs of the adopted son admittedly did not acquire title to the suit lands while the Act of 1871 was in force. In these circumstances, we are unable to distinguish this case from *Tirbhuwan Bahadur Singh v. Rameshar Bakhsh Singh* (5) the next recent decision of their Lordships, and following that case, we think the plea of limitation was rightly overruled. The appeal is dismissed with costs.

14. The nature of the claim in Appeal No. 11 of 1909 is similar to that in Appeal No. 10 of 1909. The plaintiffs assert a right as reversioners to recover some shares in Engan village on the basis that these were alienated by Chokkammal in 1855 to the predecessors-in-title of the appellants. The defendants allege that the property belonged by ancestral rights to the alleged vendees. The evidence in support of the plaintiffs' case is similar in kind to that produced in the last appeal. In Original Suit No. 9 of 1887 on the file of the Court of the Subordinate Judge of Negapatam two cadjan sale-deeds were produced in favour of Kumaraswami Udayar and Kathaperumal Udayar (Exhibits LXXXII and LXXXIII in that case). These individuals are stated to be the same as the persons so named for whom defendants claim ancestral rights. The documents are described as having been executed by Chokkammal on 18th December 1855. They were produced by a witness who is alleged to be the 20th defendant in the present suit. This is denied but the Subordinate Judge has found the fact proved, and we see no reason to dissent from his appreciation of the evidence on the point. The records do not indicate to what property the deeds related. On this point, the only evidence is that of plaintiffs' witness No. 35, but it is clear that his recollection is very defective. He speaks of one deed only and the consideration he mentions does not agree with that given in the list of Exhibits in Original Suit No. 9 of 1887 on the file of the Court of the Subordinate Judge of Negapatam. To show that Arunachella Mudaly had owned lands in the village, an admission by defendants' witness No. 40 is relied upon. He mentions Engan amongst several other villages which Arunachella "had", but gives no information as to the extent of his interest. The Subordinate Judge has treated Exhibit K as "very conclusive evidence" that the late Arunachella owned 4 velis in Engan and that those passed to his widow on his decease. As already stated, all that this Exhibit shows is that the representative of the Tiruvalur family asserted in Original Suit No. 1 of 1851 on the file of the Kumbakonam Dewaney Adawlet Court that 4 velis and odd in Engan had belonged to Arunachella. The suit was dismissed and there was no finding as to the ownership of the land. It does not appear that Chokkammal denied that she had any rights in the village, but as far as the merits of her defence were concerned the point was immaterial. This assertion by a stranger to the present proceedings can be of little or no weight as against the appellants. The oral evidence as to possession by Chokkammal has been rejected by the

Subordinate Judge as unworthy of credit. If the witnesses cannot be believed as to the fact of possession, still less can they be believed when they speak as to particulars such as the extent possessed. Even taking their statements as they stand," they do not agree with one another or with the claim put forward. The explanation tendered that the witness were agreed as to the shares owned by the Kulikarai family and differed only as to the extent is unacceptable. They were never asked anything about shares. Under the circumstances, there is no reliable evidence as to the extent of Arunachella's and Chokkamroal's interest in the village, assuming that they had some interest. Farther, we are unable to agree with the Subordinate Judge that Chokkammal is proved to have held any interest at all. The plaintiffs' case as to this rests on Exhibit K and the deposition of plaintiffs' witness No. 35, and for reasons already given, we do not consider that these form a sufficient basis for the finding. We are not satisfied that the sale deeds have been satisfactorily connected with land in this village. Even if they did relate to it, there is nothing to show that interest was conveyed. It is the weakness of the plaintiffs' case on these points that differentiates the claim in this appeal from that in Appeal No. 10 of 1909. We think the appeal should be allowed and the plaintiffs' claim to recover these properties dismissed with costs.

15. The 20th and 22nd defendants died after the appeal had been preferred and their representatives have not been brought on the record. It has been argued that as the appeal has abated as regards these appellants, the decree of the lower Court cannot be modified as far as their interests are concerned. The grounds of appeal in which the appellants have succeeded are common to all the appellants and we think the terms of Order XLI, Rule 4, of the CPC are wide enough to cover this case *Chintaman v. Gangabai* 5 Bom. L. R. 90. and enable this Court to set aside the decree as regards the whole of the plaintiffs' claim and not merely in respect of the interest of those appellants whose appeals have not abated. Any other conclusion would lead to "incongruity in judicial decisions on the same facts" vide *Dhuttaloor Subbayya v. Paidigantam Subbayya* 17 M. L. J. 119.

16. The appellants in Appeal No. 12 of 1909 are the representatives of the 12th defendant added as defendants Nos. 36 to 38. The subject-matter of the appeal is land in Kamalapuram village which was mortgaged by Chokkammal. It was brought to sale in execution of a decree obtained by the mortgagees and purchased by the decree-holders, who sold the property to the 12th defendant. The contentions of the appellants are two-fold. In the first place, they allege that the land never formed part of Arunachella Mudaly's estate; and, secondly, that if it did belong to him, the alienation by his widow is such as to be binding on the reversioners.

17. The Subordinate Judge rightly says that there is absolutely no direct evidence that Arunachella Mudaly ever possessed any land in the village. He bases his finding in favour of the plaintiffs on three documents. The first is Exhibit K. It is stated that land in Kamalapuram was claimed by the plaintiff in

Original Suit No. 1 of 1851 on the file of the Kumbakonam Dewaney Adawlet Court, i.e., the representative of the Tiruvalur branch of the family. From this fact, it is argued that Chokkammal was in possession of lands in Kamalapuram within two years of her husband's death. The Subordinate Judge finds that she had no private funds with which she could have made a purchase and that if she had bought the land with the income of her husband's estate, she would have placed this in her written statement in Original Suit No. 1 of 1851. There is, however, no ground for drawing this inference. On the claim which the plaintiff in that suit was putting forward, a plea of this kind would have been useless. If the plaintiff had succeeded in establishing that the family was undivided, Chokkammal would have lost the land whether she put forward this plea or not. If, on the other hand, Chokkammal succeeded in her general defence of division and adoption, the plea was unnecessary.

18. The next document is an extract from a sammathipatram, which is incorporated in paragraph No. 9 of the judgment of the Subordinate Judge of Negapatam in Original Suit No. 9 of 1887. The document was filed as Exhibit B in that suit for the purpose of proving that Chokkammal consented in 1862 to revenue registry being transferred from her name to that of Alagasundra Mudaly. She made an exception of five villages of which Kamalapuram is one. The whole of the document is not available and from the extract quoted there is nothing to show on what ground Chokkammal wished to retain the registry of the Kamalapuram lands in her own name. It is suggested for the appellants that this may well have been because she had acquired this property herself and that a recital to this effect may have appeared in an earlier portion of the document. The extract given cannot, in our opinion, be relied upon as establishing that the lands in question formed part of Arunachella Mudaly's estate. The last document on which the Subordinate Judge bases his finding is Exhibit M. This is an agreement between the late husband of the 9th defendant and the late father of the plaintiff as to their reversionary rights. Land in Kamalapuram is referred to therein. This agreement was executed in 1884 while Chokkammal still had an interest in the property. It cannot be assumed that because these persons chose to include this land as forming part of Arunachella's estate, it, therefore, did form part of it. Persons setting up to be reversioners are not unlikely to make their claims as extensive as possible by including whatever the female heir may have been in possession of. The Subordinate Judge has been influenced mainly by the inference he draws from Exhibit K and treats the other documents as corroborating that inference. It has been shown that the inference itself is unwarranted and the later documents of little weight. It has been suggested that it is unlikely that Chokkammal would have had savings so soon after her husband's death with which to make a purchase. The property was, however, of small value as is evidenced by the prices realized at much later dates, and we are unable to see that any inference against a self-acquisition can be drawn from these facts. The burden is on the plaintiffs to establish that Arunachella Mudaly owned lands in Kamalapuram during his lifetime. Diwan Ran Bijai Bahadur Singh

v. Indarpal Singh 26 I. A. 226 For reasons given above, we consider that this burden has not been discharged. No argument has been advanced on the basis of the property, if self-acquired---having been subsequently incorporated with the husband's estate. In view of the finding that the plaintiffs have failed in this part of the case, it is unnecessary to deal with the question of necessity for the mortgages executed by Chokkammal. We think this appeal must be allowed and the plaintiffs' claim to the 8th schedule lands dismissed with costs.

19. Appeal No. 15 of 1909 has been argued on the question of costs only. The additional Court-fee payable on account of the inclusion of the property in the suit is Rs. 25 and the additional Vakil's fees Rs. 33. The 5th defendant's liability for costs will not in any case exceed this amount. The suit as against the 5th defendant has been dismissed and the decree against him reversed, but his contention as to costs appears to be well-founded to the extent above indicated, and he was entitled to appeal as to this. His liability for costs would, in any event, be limited as stated above. The appellant will have proportionate costs of this appeal.

20. The appellants in Appeal No. 14 of 1909 are the plaintiffs in Original Suit No. 26 of 1905 on the file of the Court of the Subordinate Judge of Negapatam. Although our decision in Appeals Nos. 206 and 207 of 1908 governs this appeal, we think that as the questions involved have been argued before us, it is desirable that we should give findings on the questions raised. The grounds of appeal relate, firstly, to the findings of the Subordinate Judge as to the property comprised in the 9th to 14th schedules attached to the plaint. Mr. T. Rangachariar did not press the appeal as far as these items of property are concerned.

21. The second question concerns the rights of the (sic)st defendant. She is the widow of Bava Krishnaswamy Mudaly. He was a reversioner to the estate of the late Arunachella Mudaly and stood in the same degree of relationship as the plaintiffs to the last male holder. Under ordinary circumstances, the 1st defendant would be entitled to one fourth share of the estate recovered by the reversioners. The case of the plaintiffs appellants, however, is that Bava Krishnaswamy had severed his connection with his family by having renounced the world and entered the order of religious ascetics known as Tambirans." It is further alleged that by this act he forfeited all rights of property and all future rights of succession as a member of the secular family to which he belonged." It has not been disputed in appeal that Bava Krishnaswamy did enter the order of Sudra ascetics known as Tambirans. It is, however, clear on the authorities that the texts as to disinheritance applicable to a yathi or s(sic)ny(sic)si do not apply to a (sic)udra ascetic, unless a usage to this effect is established *Dharmapuram Pandora Sannadhi v. Virapandiyam* (sic)llai 8 Ind. Dec. 215; *Harish Chandra Roy v. Atir Mahmud* 18 Ind. Cas. 474. In the Court of first instance an attempt was made to prove that Bava Krishnaswamy belonged to a special class of Sudras who may according to some agamas be admitted into the order of sanyasis. This

contention was rejected by the Subordinate Judge and has not been advanced before us.

22. The Subordinate Judge has also found against the existence of any usage such as is referred to in the oases cited above. We agree with this finding. The 46th and 47th witnesses for the plaintiffs are both heads of Sudra mutts. The latter is Pandara Sannadi of the Dharmapuram Athinam which Bava Krishnaswamy joined. He admitted that he was unable to state positively what the custom is regarding property belonging to a Sudra ascetic prior to his admission to the order. He knew of no case in which a contention had been raised that a Tambiran could not succeed to property of his family. It may be noted that the case of Dharmapuram Pandara Sannadhi v. Virapandiyam Pillai 22 M.J 302. relates to this institution and that no attempt was made at that time to set up any special custom. Plaintiffs' witness No. 46 was unable to give any opinion without referring to the Shastras as to whether a Tambiran has rights to family property after becoming a Tambiran. This evidence, coming from the side of the plaintiffs and from persons holding the position these witnesses do, is a strong indication that no custom exists of the kind which the appellants seek to establish. Numerous instances appear in the evidence on both sides of dealings with family property of Tambirans which are inconsistent with their having lost their rights in it and with any consciousness on the part of those dealing with them that there was anything unusual in such transactions. In no case do they appear to have been questioned. As far as the evidence before us goes, we have no doubt that the plaintiffs have failed to establish that Sudra ascetics are by custom subject to the same disabilities as sanyasis. The appeal must be dismissed with costs of the respective respondents.

23. The only question argued in the memorandum of cross-objections filed by the 1st respondent in this appeal relates to costs. The 1st defendant has been directed to bear her own costs in the contest with the plaintiffs as to her husband's position. We see no reason to interfere with the discretion the Subordinate Judge has exercised in making this order. The memorandum of cross-objections is dismissed with costs.