

(1928) 04 MAD CK 0054
In the Madras High Court

S.A. Rajamier

APPELLANT

Vs

M.R.M.A. Subramaniam Chettiar and Others

RESPONDENT

Date of Decision : 26-04-1928

Acts Referred:

Citation : AIR 1928 Mad 1201

Hon'ble Judges : Phillips, J;Odgers, J

Bench : Full Bench

Judgement

Phillips, J.—This suit is based upon three documents, Exs. B, B-1 and B-2 executed in 1895 and 1896 respectively. These documents evidence loans taken by the late Rajah of Ramand (hereinafter called the Rajah) from the plaintiff's father and hypothecate certain jewels which had previously been pledged to defendant 4, Annamalai Chetti, certain allowances reserved for the Rajah under the trust-deed, Ex. Q executed by him on 12th July 1895 in favour of defendant 3 and in one case certain furniture. The Rajah has become heavily indebted and consequently executed the deed of trust, Ex. Q in order to secure the estate, namely the zamindari of Ramnad, for his minor son, defendant 1. Under this deed he handed over the whole of the zamindari to defendant 3 in trust and provided inter alia for the payment of his debts then existing and for payment of certain allowances to himself and to other members of his family. The allowances to the Raja consisted of a monthly payment of Rs. 5,500 and an annual payment of Rs. 10,000 for Dasara and these allowances were to be paid by the trustee out of the rents, income and. profits of the estate. After executing this trust-deed the Rajah borrowed further sums of money under the plaint documents, Ex. B series. Subsequently the trustee entered into an arrangement with the plaintiff under Ex. E on 16th January 1899 and undertook to secure the debts due to the plaintiff, not only those under Ex. B series, but also those incurred prior to Ex. Q by a mortgage of the zamindari. This arrangement was approved by the Rajah in Ex. C-I and accordingly a mortgage-deed, Ex. N, was executed on 6th July 1899. The plaintiff brought a suit on Ex. N in 1900 and in 1902 defendant 1 brought a suit to set aside that mortgage and another mortgage executed by the trustee to

the Rajah.

2. These suits went on appeal to the High Court: the judgment is reported in *Subramaniam Chettiar v. Rajeswara Dorai* [1909] 32 Mad. 490 and finally to the Privy Council *Subramaniam Chettiar v. Rajeswara Dorai* AIR 1915 P.C. 33. It was then held that Ex. N was not a valid mortgage and was not binding on the estate of defendant 1 so far as the debts incurred after the date of the trust-deed were concerned. After the dismissal of his suit in the first Court the plaintiff filed the present suit on 15th April 1905 and has obtained a decree. A number of appeals have been filed against that decree, but the main appeal is No. 26 of 1918 filed by defendant 1, and in his appeal memorandum he deals with practically the whole of the case. Various objections to the decree have been put forward and I propose to deal with them in the order in which the learned vakil for the appellant has argued them.

3. Objection is taken in the first place to the consideration for Ex. B series. Four items (Rs. 8,000, Rs. 4,000, and Rs. 15,000 and Rs 15,000 respectively), are objected to. These sums formed part of the consideration for the suit documents and apart from the recital in the documents by the Rajah that debts did exist we have the further fact that at the time of the mortgage-deed Ex. N, he again admitted liability for all these sums. Against this, the appellant relies on certain statements in the deposition of the Rajah in O.S. No. 60 of 1897 and also on his deposition in 1903, Ex. Y-I. The accounts produced by the plaintiff are in accordance with his claim and defendant 1 has failed to produce the estate accounts which according to him would disprove the case. Although the Rajah did state in his deposition that these sums were not actually money borrowed by him, yet in another part of his deposition he stated that all the sums included in the documents were due by him. On this somewhat discrepant evidence the appellant's case relies, and certainly in so far as the items of Rs. 8,000 and Rs. 4000 and the 2nd item of Rs. 15,000 are concerned his case is very weak. The 3rd item of Rs. 15,000 is said to have been a time-barred debt due by the Rajah's father. This debt was apparently not paid when the estate was under the management of the Court of Wards after the Raja's father's death, but it does not follow that the amount was not really due. The Raja's agreement to pay the barred debt of his father is not illegal, for the whole estate in his hands would have been liable for his father's debt. There was, therefore, a moral obligation to pay the amount and even if there was no fresh consideration at the time of the acknowledgment of the debt the debt would not be illegal. It is also very possible that the repayment of this debt formed part of the consideration for advancing the new loan. In these circumstances I must agree with the learned Subordinate Judge that full consideration for Ex. B series has been proved.

4. The next objection is that the suit is not maintainable because the plaintiff had a remedy under Ex. N as well as the remedy under Ex. B series,, and, inasmuch as he filed a suit upon Ex. N, he must be deemed to have elected his remedy and cannot, therefore, fall back upon the alternative remedy. The fact that the

plaintiff prosecuted appeals in the suit based upon Ex. N, even after he filed his present suit, cannot affect the question in any way; for his claim under Ex. N having been negatived in the trial Court, he had to pursue his present remedy in order that he might not be met by a plea of bar by limitation. Mr. Srinivasa Aiyangar has not clearly stated the nature of the so-called doctrine of election upon which he relies, for he admits that he does not rely on the doctrine of the election under the provisions of the Transfer of Property Act, but cites three cases to prove his proposition: namely, *Sinnan Chetty v. Alagiri Ayyar* AIR 1924 Mad. 438, *Scarf v. Jardine* [1882] 7 A.C. 345 and *Taylor v. Hamstead Colliery Co* [1904] 1 K.B. 838.

5. *Scarf v. Jardine* [1882] 7 A.C. 345 is a case where the plaintiff was dealing with a partnership after one of the partners had withdrawn but without notice of the withdrawal. The plaintiff had therefore a remedy either against the new firm with which he actually transacted business or against the retiring partner and his firm. He chose to enforce his claim against the new firm and proved his debt against that firm in bankruptcy. Having done so it was held that he could not also prosecute his claim against the retiring partner. *Sinnan Chetty v. Alagiri Ayyar* AIR 1924 Mad. 438 is a very similar case. Both these cases can be distinguished on the ground that the plaintiff's two remedies in those suits were based upon one and the same transaction and it was held that having enforced one remedy he could not enforce the second remedy arising out of the same transaction. The present case is very different. Here we have two independent transactions, Ex B series and Ex. N and the plaintiff's remedy under each of them is distinct. Although he had agreed under Ex. N to release his charge on the Rajah's allowances given him by Ex. B series, yet it is quite clear from the language of that document that it was not his intention to rescind the earlier transaction altogether but in consideration for certain promises he accepted a new security. That subsequent transaction having been found to be invalid, he was thrown back on his original remedy, and that he is entitled to do so there is distinct authority in *Har Chandi Lal v. Sheoraj Singh* AIR 1916 P.C. 68 and also in *Noble v. Ward* [1865] 1 Ex. 117. In the former case the Privy Council decided that even when the "first mortgage had been actually surrendered and a fresh mortgage executed in its place and the fresh mortgage had been partially enforced, yet when a portion of a later mortgage was found to be invalid the mortgagee was held to be entitled to fall back upon the earlier mortgage which he had actually surrendered. A similar principle is to be found in *Mt. Gulab Koer v. Badsha Bahadur* [1909] Cri.L.J. 420 and *P.R. Saminathan v. Palaniappa* [1914] 41 I.A. 142. In the present case therefore the plaintiff having failed to enforce his remedy under Ex. N, as that document was held to be invalid, is certainly entitled to fall back upon the original transaction, Ex. B series.

6. Appellant relies on *Morris Momi v. Bron* [1918] A.C. 1 but in that case *Noble v. Ward* [1865] 1 Ex. 117 was not dissented "from, but distinguished on the ground that it was a case of intention to vary and not to rescind a contract, whereas a definite intention to rescind was found in the former case. Here we have merely

a variation in the security and the release of one security on condition that another security should be substituted cannot be held to evidence an intention to rescind the original contract, which was a contract to pay back certain money, but only an intention to vary the term. *Taylor v. Hamstead Colliery Company* [1904] 1 K.B. 838 is not at all relevant here, for it relates to the option granted under the provisions of a special statute, namely, the Workmen's Compensation Act, and can have nothing to do with "any general principle of election. Adopting there fore the principle laid down in *Har Chandi Lal v. Sheoraj Singh* AIR 1916 P.C. 68 which confirms prior rulings in this Court such as *Ramunni v. Keralah Varma Valia Rajah* [1892] 15 Mad. 166 it must be held that the plaintiff in the present suit can maintain his claim under Ex. B. series.

7. The next argument relates to the validity of the charge created by Ex. B series on the allowance payable to the Rajah under Ex. Q, and it is contended (1) that the allowance being a maintenance allowance cannot be alienated and (2) that the charge upon this allowance was specifically released by the provisions of Ex. N. On the 2nd point it is argued that Ex. N was not in itself void but was only voidable but inasmuch as it was held in the prior litigation that the trustee, defendant 3 was not competent to mortgage the estate as security for debts incurred by the Raja after the settlement deed Ex. Q and also that if Ex. N were treated as a compromise it was invalid for want of sanction, that portion of Ex. N, therefore, which related to the plaint debts was void as being beyond the powers of the trustee. As to whether the former contract was rescinded by Ex. N, I have discussed above, and found that there was no rescission of the original contract. Because Ex. N was incapable of being enforced, the condition expressed in it that the Raja released his right to his allowance must disappear with the rest of the contract. As regards the first point it is contended that the allowance of Rs. 5,500 per month which is provided for in Ex. Q is a mere maintenance allowance and as such can-not be alienated because it comes within the provisions of Section 6 (d), T.P. Act, being an interest in property restricted in its enjoyment to the owner personally; and reliance is placed on *Subraya v. Krishna* AIR 1924 Mad. 22. In that case it was observed that every case, must be determined on its own facts and it was held that on the facts of that particular case a certain allowance for maintenance allotted to a widow was a right within Section 6 (d). On the other hand it was held by a Full Bench in Appeal No. 58 of 1919 etc. (unreported) that, where an allowance had been decreed or settled by a compromise, it was not a right coming within Section 6 (d), T. P. Act, but was alienable. In the present case it is doubtful whether the allowance can in any way be termed a maintenance allowance. The Rajah prior to the Impartible Estates-Act, was the absolute owner of the estate and, when he made the alienation under Ex. Q and reserved an allowance of Rs. 5,500 per mensem for himself, this allowance was a reservation of his own. property. The fact that it is not mentioned in Clause 5 of Ex. Q, styled "Reservation of Devasthanams-----" etc., does not take away from its character of a reservation. The income of the estate belonged to the settlor and when he executed the trust-deed so much of the

income as amounted to Rs. 5,500 per mensem was distinctly reserved for his own use in addition to a sum of Rs. 10,000 per annum on account of Dasara. There can therefore be no objection to his alienation out of the settlor's own estate.

8. As mentioned, Ex. B series hypothecated certain valuable jewels which had; been pledged with defendant 4 and it is argued that after executing Ex. Q, the Rajah had no power to hypothecate these jewels, as he had handed them over to the trustee under Ex. Q. The actual possession of the jewels was admittedly with defendant 4 and the Rajah possessed only the equity of redemption. The property therefore did not actually pass to the trustee and the appellant is constrained to rely on the language of para. 5 of Ex. Q in support of his case. The contention is that this equity of redemption comes within the words "all securities for such claims, demands," etc., and inasmuch as the Rajah had a right to bring a suit to recover these jewels that right must be deemed to be a claim or demand which was assigned by him to the trustee. This is straining the language of the clause very considerably for what the Raja possessed was the right to pay a certain sum of money and recovers possession of the jewels. Unless such possession was refused the Rajah had no right of suit and consequently it cannot be said that the equity of redemption of these jewels passed to the trustee under Ex. Q. That being so, he was within his rights in hypothecating them to the plaintiff.

9. Having found on this point in favour of the plaintiff, the only question that remains for decision is the nature of the remedy which should be allowed. The Subordinate Judge has decreed the plaint amount as against the assets, if any, of the late Rajah in the hands of defendants 1 and 2. Secondly he has directed defendant 1 to redeem the jewels pledged to defendant 4 and declared that in default of his doing so within six months the plaintiff is entitled to have defendant 1's estate sold for his debt. A further relief is given against a large number of defendants in respect of the late Raja's allowance which had been drawn by them from Court towards the debts due to them. There is also another provision that if defendant 1 does not redeem the jewels the plaintiff should deposit the pledge amount and the defendant 4 should produce the jewels. Since this appeal was filed, the jewels have been, sold and this portion of the decree cannot be enforced, and the plaintiff does not seriously press for the establishment of his right to redeem defendant 4's pledge although it would appear that defendant 4 has acted somewhat rashly in soiling these jewels without the leave of the Court, while para. 5 of the lower Court's decree was still in force. The main contention of defendant 1 is that the decree making his zamindari liable for the plaintiff's debt is wrong and the plaintiff is not entitled to any charge against the estate.

10. In order to decide this point it is necessary to consider the facts which induced the Subordinate Judge to give such a decree. The jewels were admittedly pledged to defendant 4 and subsequently hypothecated to the plaintiff

in 1895 and 1896. The debt due to defendant 4 on the pledge of the jewels is one specified in Ex. Q as being payable by the trustee out of the incomes and profits of the premises hereby assured. The Rajah could therefore have enforced the payment of defendant 4's debt by the trustee. The Rajah hypothecated the jewels under Exs. B-1 and B-2. He recited in the documents that the trustees were bound to redeem the hypothecated jewels and return them to him. This recital is to be found in both the exhibits B-1 and B-2 and is in effect a representation that the jewels were free from encumbrances when they were hypothecated to the plaintiff. Subsequently defendant 4 obtained a mortgage of the estate as further security for his loan Ex. 3, dated 28th September 1899. The Subordinate Judge has based his order on the principle in *Ascherson v. Tredegar Dry Dock and Warf Co. Ltd.* [1909] 2 Ch. 401, finding that the plaintiff's position is analogous to that of a surety who had become liable for his principal's debt and can enforce all the claims that "the principal has against the creditor. As the Rajah had a right to enforce the payment of this liability, namely, the loan on pledged jewels, against the trustees and the estate in his hands, so the plaintiff, as a person who is liable to pay the pledge debt before he can enforce his charge on the jewels themselves, is subrogated to the Rajah's right to enforce payment of that debt against the estate in defendant 1's hands. It is well-settled law that a "surety is entitled to be indemnified against liability as well as against loss incurred on behalf of his principal: *Lacoy v. Hill* [1874] 18 Eq. 182, *Ascherson v. Tredegar Dry and Warf Co. Ltd.* [1909] 2 Ch. 401 and *Wolmershausen v. Gullick* [1893] 2 Ch. 514.

11. In order, to apply the same principle here it is necessary to hold that the plaintiff's position is analogous to that of a surety; and the appellant relies on a dictum in *Muhammad Mamud Ali v. Kalyan Das* [1896] 18 All. 189, which contradicts this proposition in terms, for it is stated at p. 193 that a puisne encumbrancer is not in a position analogous to a surety, but the position that we have in this case was not under consideration by the learned Judges and the observation is couched in general terms. Admittedly if the plaintiff redeemed the pledge of the jewels, he would step into the shoes of defendant 4 and could enforce defendant 4's rights against the estate but until he does exercise his right of redemption it is difficult to see how he can be deemed to be subrogated to defendant 4's rights, as suggested by the plaintiff's vakil; but the case put forward by the plaintiff that he is entitled to subrogation not to the prior encumbrancer, but to the Rajah is a more plausible proposition. The Rajah had, in effect, represented to the plaintiff that the jewels were unencumbered. In order to make that representation true the Rajah had a right to compel the trustee to pay defendant 4's debt out of the estate. Can the plaintiff now be heard to say that inasmuch as he could enforce his claim against the Rajah personally he must be able to enforce any right which the Rajah had against the estate? None of the reported cases relied on is quite analogous to the present one, but they are all somewhat similar, and must be examined in order to see if the principles contained therein can be extended to the facts in this case.

12. In *Ascherson v. Tredegar Dry Dock and Warf Co. Ltd.* [1909] 2 Ch. 401, a certain company had given a guarantee to a bank, and one of the directors of the company who joined in the guarantee died, and upon his death the total liability on the guarantee was ascertained by the bank as on that date and the deceased's estate was held liable to make good the amount jointly with the other directors of the company. The executors accordingly sued to enforce the guarantee given to the bank by the other directors, and the claim was allowed because it was a claim which could have been enforced by the bank itself and the executors of the deceased were given the advantage of that security. An assignee of the right to proceed against sureties has been held entitled to sue on such assignment, even before he has been made to pay any amount, the right of suit arising when he becomes liable to such payment, *British Union and National Insurance Co. v. Rawson* [1916] 2 Ch. 476 and again in *In re Raylould Raybould v. Turner* [1900] 1 Ch. 199 when the trustee of an estate had been held liable for damages caused to an adjoining owner that adjoining owner was allowed to recover the amount of his damages not from the trustee but from the estate in the hands of the trustee on the ground that the trustee was entitled to be indemnified out of the assets of the estate. These rights are all recognized as equitable rights and it cannot be gainsaid that the plaintiff's rights in the present case are somewhat analogous to the rights considered therein, although, possibly, it may be necessary to extend the principle somewhat to make it applicable here. As against the Rajah, the plaintiff was entitled to have his debt secured on the jewels unencumbered and the Rajah was entitled to compel the trustee to redeem the encumbrances upon the jewels out of the income of the trust property in the estate. It was therefore equitable that the plaintiff should be allowed to enforce the rights of his debtor in order to secure his money. It is true that the plaintiff is not himself liable to pay any debt, but he has to redeem the pledge debt before he can enforce his hypothecation and in that sense there is a liability upon him which has been imposed by the omission of the Rajah to enforce the payment of this debt by the trustee. I do not therefore, think that it would be straining the principle of cases I have cited above to apply it to the plaintiff here. The same principle has been adopted in this presidency in *Sanka Krishnamurthi v. Bank of Burma Ltd.* [1911] 35 Mad. 692 where a creditor was allowed to proceed directly against the assets of a minor which would have been available in the guardian's hands for the payment of the suit debt. I must, therefore agree in the conclusion arrived at by the learned Subordinate Judge and find that plaintiff is entitled to proceed against the estate of his mortgagor in the hands of the trustee, and consequently against that estate in defendant 1's hands, he having obtained possession from the trustee.

13. The objection taken that the suit is barred by limitation as having been brought more than six years from the date of the suit documents is met by the plea that the Rajah acknowledged the suit debts within the period of limitation. In Ex. C-1 dated 15th April 1899 just six years before suit, the Rajah approved of what was done

in settlement of the amounts due by roe to Devakottah Ramanadhan Chettiar in the compromise of suit No. 60 before the Madura Sub-Court (East).

14. The contention that the word " settlement " means payment cannot be accepted for a moment. The circumstances of the case as disclosed by the evidence show that there was no payment and that the word " settlement " merely means an arrangement and, therefore, this document is a clear acknowledgment of the debts now sued on. This being just six years before suit, it is unnecessary to consider the other documents, Exs. Y and Y-I, which are also relied on by the plaintiff as acknowledgments. The suit is clearly not barred by limitation. On all these points, therefore, the appeal fails and must be dismissed with costs.

A.S. 79 of 1918.

15. In this appeal the appellants are per-eons who attached the allowances payable to the late Rajah and against whom a decree for refund to the plaintiff has been passed. The contention on their behalf is that the Rajah was not in a position to transfer a part only of his allowance. The transfer of a part of a debt was not recognized in English Common Law, but the assignment of a part of a debt was always held to "be good in equity and was deemed to pass the property in that portion of the debt. In enforcing such claim it would be necessary to implead the owner of the other portion of the debt, but apart from that there is no objection in equity to enforcing a claim for part payment of a debt: vide *In re Steel Wing Co.* [1921] 1 Ch. 349. It has also been held that the partial transfer of a debt is valid in Appeals. 58 etc. of 1919 in this Court, and this objection must therefore be disallowed although there is a remark in *Doraisami Mudaliar and Thangavelu Mudaliar and Co. Vs. M. Doraiswami Iyengar and Others*, , which throws some doubt upon this conclusion.

16. A further contention raised by these appellants, who support the appellant in Appeal No. 26 of 1918 in his main contentions, is that, if his contention that the estate is not liable for the suit debt is upheld, the burden cast upon them will be very much increased if the charge upon the allowances alone is upheld. These appellants and also the appellants in Appeals Nos. 4, 6, 12, 13, 42, 57 of 1918 who stand in the same position are not made parties to his appeal by the appellant in Appeal No. 26 of 1918 and it is contended that unless that appeal is allowed in toto in which case it would not affect the interests of those other appellants, relief cannot be given in respect only of the charge against the Ramnad estate. The only answer that the appellant in Appeal No. 26 can give to this contention is that those other appellants must pay what they have drawn and, therefore, cannot be affected in any way by the denial of the plaintiff's claim against the estate. This is true to a certain extent, but the appellants would be entitled to contribution from the other properties given as security for the plaintiff's debt and to that extent they would be injured. That being so, it would be inequitable to grant such relief to the appellant in Appeal No 26 as would damnify persons who were not made parties to his appeal and this is a further

ground for rejecting defendant 1's contention that his estate cannot be made liable for the suit debts.

17. The appellant in Appeal No. 57 of 1918 is a minor under the Court of Wards and he urges as a further ground of appeal that no notice was given to him as provided in Section 49 (1), Court of Wards Act. This suit has, however, been brought under Order 21, Rule 63, to set aside the order of Court dismissing the plaintiff's claim petition and it must be deemed to be a continuation of those proceedings and therefore no fresh notice to the appellant is necessary. The argument that a suit may be a continuation of the prior proceedings when the claim is allowed but is not such continuation when the claim is dismissed, is based on no recognized principle. In fact in *Phul Kumari v. Ghansham Misra* [1908] 35 Cal. 202, for the purpose of Court-fee a similar suit was deemed to be a continuation of the prior proceedings when the suit was brought after the claim petition had been dismissed.

18. Defendant 1 has raised a further point with regard to the amount declared in the decree to be due by him to defendant 4. Apparently a statement was filed in the Court by defendant 75, representative of defendant 4, on 28th July 1917, whereas the decree is dated 12th September 1927 and defendant 1 does not appear to have taken any objection to the same. It is rather late now to object to the further statement put in pursuance of the earlier one by the plaintiff and defendant 4's representative jointly, and it is in accordance with the further statement that the lower Court has made its calculation. This contention must therefore fail.

19. All these appeals are therefore dismissed with costs.

Appeal Suit No. 106 of 1918 and Memorandum of Objections.

20. There remains Appeal No. 106 of 1918, and this relates to the interest disallowed by the lower Court. The Subordinate Judge has disallowed interest on the plaint amount from the date of the plaint to the date of the decree and has done this because he holds that the plaintiff is responsible for the very long delay that has taken place in the disposal of this suit. In this respect we are not prepared to interfere with his discretion. He has, however, allowed only six per cent interest from the date of the decree to the date of payment but as the contract was to pay interest at the rate of 12 per cent we think in this respect he was wrong and we therefore order that, so far as defendant 1 and the estate are concerned, interest must be allowed at 12 per cent from the date of the lower Court's decree.

21. With this modification the appeal is dismissed with costs.

22. The memoranda of objections are dismissed with costs. In the appeal the appellant will pay the costs of the respondents except defendant 1 and will get proportionate costs as against defendant 1 on the amount allowed.

23. Time for payment of the decree amount six months from this date.

24. In Appeal No. 26 of 1918 we certify costs for two counsels.

25. In Appeal No. 79 of 1918 there will be no order as to costs as they are said to have been paid already by the appellant.

26. Appeals Nos. 4, 6, 12, 13, and 26, 42, 57, 79, 80, 106 and 109 of 1918.

Odgers, J.

27. The main appeal argued was appeal No. 26 of 1918 by defendant 1. The suit which was originally one brought as long ago as 1905, was by M.R.M.A. Subramaniam Chettiar, the adopted son of Muthiah Chetty alias Ramanadhan Chetty, for moneys borrowed by the late Rajah of Ramnad who is the father of defendants 1 and 2. The plaint as originally framed asked that these defendants as representing the late Rajah should be ordered to pay the sum of Rs. 3,45,000, and odd with subsequent interest out of the assets of the late Rajah and that the properties in Schedule A (jewels) should be produced by defendant 4, the pledgee, and that these and the properties in Schedule B (furniture) be ordered to be sold and the sale proceeds credited to the amount due to the plaintiff. It was also prayed that defendants 3 and 5 to 51 be ordered to produce the sums taken by them from Court in order to be paid to the plaintiff on account of the amount due to him. By an amendment made in August 1917 a prayer was added in the alternative that defendant 1 as beneficiary under the Settlement or deed of trust be ordered to pay to defendant 4's legal representatives the amount now due on account of the debt of Rs. 60,000 and interest thereon from out of the settled properties or that on payment by the plaintiff to defendant 4's legal representatives the plaintiff be declared to be entitled to realize the said amount from the settled properties in default of defendant 1 as beneficiary under the settlement making the payment within such time as the Court may fix.

28. The other connected appeals are principally by the creditors who have been ordered to restore "the sums drawn by them from Court towards satisfaction of decree debts due to them.

29. The Subordinate Judge found on all points substantially in favour of the plaintiff, though the latter has preferred appeal No. 106 of 1918 which was argued solely on a question of interest.

30. The facts leading up to the question of law argued in the main appeal have been set out more than once for instance, in the judgment of this Court, in Subramaniam Chettiar v. Rajeswara Dorai [1909] 32 Mad. 490, which went to the Privy Council in Subramaniam Chettiar v. Rajeswara Dorai AIR 1915 P.C. 33. It is therefore sufficient for the present purpose to say that the first document with which we are concerned in this case is Ex. Q dated 12th July 1895 which is called the settlement or deed of trust whereby the late Rajah of Ramnad being desirous of settling his properties for the benefit of his heir-apparent and also to provide for his own maintenance and that of the other members of the family, appointed a trustee Rao Bahadur Venkatarangier to whom the settlor conveyed the entirety

of his estate or zamindari together with outstanding debts, arrears of rant etc due, owing or payable to the settlor and all rights to. prosecute any suit. The settlor, however, reserved the Devasthanams, Chatrams, and Kattalais situate within his zamindari and rights to prosecute suits etc., in respect of the same. He also reserved the right of residence for himself and members of the family in the estate palaces and directed the trustee to pay to the settlor at the end of a year the sum of Rs. 50,000 and after the expiry of two years a further like sum and annually Rs. 10,000 for the Dasara in addition to monthly sum of Rs. 5,500 which appears in the Schedule 2 to the document. The trustee was to make the several payments mentioned in the document "as and when the same shall be required. " The plaintiff's father's debt of Rs. 1,30,000 appears in Schedule 3 to the document.

31. On 21st November 1895, 7th November 1896, and 25th November 1896, the late Rajah executed three bonds, Ex. B, B-1, and B-2, in favour of the plaintiff's father. The first of these is secured on jewels worth Rs. 2,09,000 odd which the borrower had pledged with S. A. Annamalai Chetty (defendant 4) of Kanadukathan for Rs. 60,000. The document contains a list of these jewels and their value and says they were delivered on 21st April 1893 to A.L.A.R. Ramaswami Chetty of Devakottah and also recites that the jewels have „been pledged to "S. A. Annamalai Chetty of Kanadukathan" with the knowledge of "or" "through" the above mentioned A.L.A.R. Ramaswami Chetty. The second bond Ex. B (1) recites

Exhibit B executed to you by me * * * * * on the pledge of my jewels which the trustees are bound to redeem on payment of money and return to me.

32. This is therefore a second mortgage secured on the same jewels and also on the allowance i. e., Rs. 5,500 a month provided in the trust deed. The third bond for Rs. 35,000 is to be repaid in monthly instalments of Rs. 1,350 from the allowance of the late Rajah. The suit is brought on these bonds. The next document is Ex. B dated 16th January 1899 between the trustee Venkatarangier and the plaintiff. It recites Ex. Q the settlement and also that the late Rajah borrowed subsequent loans from the plaintiff's father and it further recites the plaintiff's father had agreed to relinquish and transfer in favour of the trustee the securities held by the former for the above said loans. It was just about this time that negotiations for what has been called the English loan were proceeding and it was important that the estate on the security of which the English loan was to be advanced should be as unencumbered as possible. The trustee therefore agrees in this Ex. K to pay Rs. 1,79,000 odd which is the amount due to the "plaintiff up to 13th January 1899, the balance of Rs. 2,75,000 odd being due for subsequently contracted loans. Various payments are agreed to be made by the trustees in case the English loan is obtained, and the trustee further agrees that as soon as it is obtained he will effect a mortgage of all the immovable properties vested in him by the settlement deed and that the mortgage shall contain certain covenants inter alia the payment of instalments of Rs. 50,000 every year. On

such payments being made the Chetty was to relinquish his security on the Rajah's allowance and withdraw the suit that had been instituted, viz., Suit No. 60 of 1897. On the trustee making a further payment of Rs. 1,25,000 the Chetty was to release the late Rajah from all obligations and relinquish and transfer to the trustee all the other securities given to the Chetty by the late Rajah. The clause concludes: "I agree to sell the jewels only after giving intimation to you." In pursuance of the aforesaid, on 6th July 1899 the trustee purported to effect a mortgage in favour of the plaintiff for Rs. 4,73,000, odd. This document contains a promise to pay the sum of Rs. 1,81,000 odd out of the total amount due, on demand with interest at 12 per cent from 3rd July 1899 to the date of payment. The important clause is Clause 12 which provides that "except as hereunder provided the Chetty's existing rights shall not be affected" but that from the date of the document his lien on charge on the Rajah's allowance shall cease and that on payment of the above mentioned sum of Rs. 1,81,000 odd and 1,25,000 (which was a subsequent debt) all debts other than the securities created by this document (Ex. N) shall cease. The only other document that is necessary at present to refer to is Ex. P dated 13th July 1899 which is a small loan of Rs. 30,000 secured on mortgage of paddy. The mortgage of Ex. N was held by this Court and subsequently by the Privy Council to be invalid.

33. The following contentions were raised in this appeal.

(a) Consideration under Ex. B series of which four items are impugned namely Rs. 8,000, Rs. 4,000, Rs. 15,000 and Rs. 15,000. It is contended that as regards the first it was a gift. It appears to have been paid to plaintiff 1 for the construction of a house which the Raja says in his evidence in suit No. 60 of 1897 to have not yet been constructed. On the other hand later on in his deposition the Rajah said he did not give any money to plaintiff 1 for building the house. It appears as an amount given for "building the house in Ramnad." In the plaintiff's accounts at p. 34 of the documents and also p. 710 of the printed records in A.S. 106 of 1923 (O.S. No. 6 of 1922), Rs. 4,000 stands on the same footing. The Rajah said in the same deposition

Rs. 4,000 was given to the plaintiff's agent as Dhanam for the construction of a house for him.

34. The truth is these two sums seem to have been drawings on a credit arranged with the plaintiff's father. If they were presents it is rather remarkable that the Rajah should make presents with money provided by his principal creditor. The oral evidence seems to be unreliable and in his evidence in A.S. No. 106 of 1923 given in 1903 the Rajah appears to have a clearer impression of what took place than he had in the evidence given in 1898. In my opinion, the appellant must fail as regards these two sums.

35. As to the 4th item that must also be disallowed. Some mutual arrangement is spoken to by the Rajah in his deposition in the 1897 suit by which this Rs. 15,000 was paid as consideration for the grant of a certain village. See p. 709 of

the printed records in O.S. No. 106 of 1923 (O.S. 6 of 1922). In the absence of the production of account books on the appellant's aide to which the Subordinate Judge makes reference it is impossible to say that those sums which appear in the books of the plaintiff and which there is absolutely no reason to suspect can be disallowed.

36. As to the third sum, also Rs. 15,000 there is perhaps a title more difficulty. The Rajah in his deposition says that the plaintiff put it to him that he should discharge this sum as a moral debt since it was due by his father. (P. 710 of the Blue book.") It appears in the plaintiff's accounts, Ex. H. The contention is that the present defendant 1 cannot be liable for barred debt of his father included as it is in Ex. B (1). But the answer to that seems to be as follows This is an impartible zamindari and prior to the Impartible Estates Act the whole estate is liable for the father's debt in the hands of his successor who is bound to pay from the assets of the father in his hands. The argument on the other side seems to rest on a misconception of the effect of Section 25, Contract. Act, that the debt must be that of the promisor himself. There is also the fact that payment of a barred debt may be consideration for fresh transactions and very likely formed an item of consideration in the present instance. The Subordinate Judge disallowed this objection and observed that there is absolutely no evidence on the defendant's-side, defendants 1 to 3 having withheld-the accounts of the late Rajah. In my opinion therefore all these sums must be allowed.

37. The second point argued is that the suit is not maintainable. The contention is that as the mortgage Ex. N had been. held, as stated, to be void, the plaintiff hag no right to revert to his original cause of action on the bonds Ex B series. It is said that he must elect the remedy which he will pursue and he having elected to proceed on the mortgage Ex. N, he cannot now turn round and maintain this suit on his original cause of action- The contention on behalf of the appellant is definitely put on the doctrine-of election. It seems to be very doubtful if we have here really a question of election as it is understood in equity. As pointed out in Halsbury, Vol. 13, p. 127, note (a), questions of election proper arise where the person electing has to choose between two things. No doubt the plaintiff assumed that Ex. N was a good and valid document in his favour. He brought his suit on that. The document was held invalid and he then proceeds with his suit on the bonds. This seems to me an entirely different proposition from the doctrine of election either as set forth in the Transfer of Property Act or that which has prevailed in English Courts of Equity mostly in connexion with Wills. The appellant relies on the case *Sinnan Chetty v. Alagiri Iyer* AIR 1924 Mad. 438, which decided that the plaintiff could after judgment elect to look only to his chance of obtaining satisfaction by execution or by proof and must give up-his claim to the property. In the case cited, the plaintiff had elected to give up his rights to a certain ring when he had petitioned against the defendant in insolvency on the ground of the balance between the two debts (i. e.,) on the amount owing to the plaintiff by the defendant plus the value of the ring detained by the defendant. This refers to a doctrine peculiar to Bankruptcy law

and appears to me to have no application to the present case. Reliance is also placed on *Scarf v. Jardine* [1882] 7 A.C. 345 where the plaintiff was held to have disallowed his action on estoppel against a retired partner by suing the new firm with which he had actually dealt. The goods in question were supplied by the plaintiff in ignorance of the change in the partnership and the new firm had become insolvent. The firm had been dissolved by the retirement of one partner and a new partnership had been constituted with the second of the old partners and a third person. Lord Selborne said (p. 350):

Put it as I can I am unable to understand how there could have been a joint liability of the three.

38. Lord Branwell at p. 365 puts it on the ground that otherwise two actions for the same debt would lie against the partner Rogers who was a partner in both the firms. This appears to me to turn on the special law applicable to partnership and the choice to a creditor who has no notice of dissolution to sue either the old or new firm. It seems to me that it is not a case of election as understood in equity at all. There are more- over several cases on the other side which seem to me to decide conclusively in favour of the respondent. *Har Chandi Lal v. Sheoraj Singh* AIR 1916 P.C. 68, is a very strong case of the Privy Council. There was a mortgage of 1876. The mortgagor died leaving a widow and a separated nephew who was the owner of the one-sixth of the mauza that had been mortgaged in 1876., In 1879 and 1881 the divided nephew mortgaged his share to the same mortgagee and in 1887 the widow and the nephew effected two mortgages to the same mortgagee of the entire mauza. On appeal by the widow it was held by the High Court that the deeds of 1887 were not binding on her. The mortgagee appealed to the Privy Council during which the widow died. It was held that the intention of the mortgagee after the two deeds of 1887 was to accept a new security extending to the whole mauza in lieu of the security of 1876. The intention, however, of the mortgagee was entirely frustrated by the" fact that the two deeds were held not binding on the widow and the Privy Council said:

It does not appear to their Lordships to be consistent with equity or good conscience that the-first 3 defendants, having successfully maintained that the transaction embodied in the two deeds of 1887 was not binding on Mt. Nandan and consequently did not bind them as heirs of Jai Chand should now claim the benefit of such transaction as a release of the mortgage of 13th November 1876.

39. It seems to me that the defendants here are in exactly the same position. They have had the benefit of the plaintiff's money, Plaintiffs have failed to recover in their mortgage suit on account of certain considerations for which they were in no way responsible and it seems to me that it would be equally against equity and good conscience if defendants were allowed to say now that the plaintiff cannot recover on foot of these bonds. The remedy now sought by the plaintiff really arises because the more recent cause of action namely that on Ex. N has been declared void. That Ex. N was held invalid for want of sanction is the alternative case stated by their Lordships in *Subramaniam Chettiar v. Raja*

Rajeswara Dorai AIR 1915 P.C. 33 when they say that

if on other grounds the deed of compromise-(here marked as Ex. N) could be supported, it is invalid in not complying with the condition imposed by Section 462, Civil P.C., applicable when, the compromise was made.... In the present case the leave of the Court was not obtained, and in the absence of such leave the compromise cannot be supported.

40. Reference may be made to another case" in the Privy Council *Ganesh Row v. Tuljaram Rao* [1913] 36 Mad. 295, where it was held that a certain agreement and satisfaction entered thereunder were not binding on the plaintiff who was remitted to his original rights under the decrees in a partition suit. Other cases on the point were cited, namely, *Mt. Gulab Koer v. Badsha Bahadur* [1909] Cri.L.J. 420, where Mukerjee, J., held a party is not always bound to make his election when two remedies are open to him. It depends on whether the remedies are inconsistent, election being the choice between the two or more co-existing and inconsistent remedies and in *Payna Reena Saminathan v. Bua Lana Palaniappa* [1914] 41 I.A. 142 an appeal from the Supreme Court of Ceylon, it was said that even the same transaction may furnish different causes of action and a second action can be maintained. In that case certain promissory notes were sued on and the suit failed owing to some material alteration in the documents. It was held that a subsequent suit could be maintained to recover the consideration for the notes. So also in *Raja Rajeswara Sethupathi v. Kuppuswami Iyer* AIR 1921 Mad. 394; it was held that if a compromise is set aside the parties are remitted to their original rights as they stood before the compromise was effected. I therefore think the point fails.

41. The third point argued for the appellant is on the subject of the charge on the allowances. It is first said that the mortgage of a maintenance allowance is illegal. We have already seen that an allowance was payable to the Rajah under the terms of Ex. Q. For this reliance is placed on *Subraya v. Krishna* AIR 1924 Mad. 22 which is a Full Bench decision of this Court holding that the personal right of a widow to future maintenance is purely personal .and within the Section 6. (d), T. P. Act. As against this there is the consideration that the Rajah was before the Impartible Estates Act, the full owner of the property over which he had full powers of disposition and he had therefore full powers to make a, reservation out of his own property in favour of himself. The consideration for these payments are set out in para. 23 (11) of Ex. Q and it is impossible to say that an allowance of this kind or magnitude is on the same footing as a mere maintenance allowance for a widow. There is also the consideration that the allowance is a charge, for the para. 23, whereby the allowances were made payable contains the words by with and out of the rents, income and profits of the premises hereby assured of per Seshagiri Iyer, J., in *Rajarajeswara Dorai alias Muthuramalinga Dorai Avergal Rajah of Ramnad Vs. V. Sundarapandiaswami Thevar*, approved by the Privy Council in *Rajah of Ramnad v. Sundara Pandiyasami Tevar* AIR 1918 P.C. 156, holding that the payment of an allowance

was a charge. There is also a judgment of three learned Judges of this Court in Appeals No. 58, 59 etc. of 1919, of which we were two which seems to me to con-elude the matter as far as we are concerned. Mr. Srinivasa Ayyangar tried to distinguish that decision from the present case by saying that here the allowance was not fixed by a decree. I am unable to see any" valid distinction in law between an allowance which is fixed by covenant and becomes a charge on the estate and such an allowance which has been confirmed by a decree. It is also said that here there was a partial assignment which is invalid and reliance was placed on the decision of Ramesam, J., in Doraisami Mudaliar and Thangavelu Mudaliar and Co. Vs. M. Doraiswami Iyengar and Others, . The ground for saying that it is a partial assignment is that in Ex. B only Rs. 1350 was assigned. With respect to the learned Judge of this Court who decided otherwise as far as we are concerned we are concluded by our judgment in the Full Bench case already referred to.

42. A more serious contention was raised that from the date of Ex. N the lien on the allowance ceased and Mr. Srinivasa Ayangar's contention was that the plaintiff's rights have gone even if the document be unenforceable provided the contention to release is clear and unequivocal. Reference was made to the case of Morris v. Baron and Co. [1918] A. C. 1. That was a case under the Statute of Frauds in which it was held that although one part of the transaction was invalidated by the statute the latter did not affect the other part. The case I think clearly proceeded on the construction of the Statute of Frauds. See Lord Dunedin p. 27. "If then the contract exists...as well as express words"" of. also Lord Atkinson p. 35. Lord Finlay stated the question as being whether the respondents could make a valid claim to have goods delivered under their option while refusing to observe their part of the bargain. Noble v. Ward [1865] 1 Ex. 117 was also referred to and is fully discussed in the opinion of the Lords. Lord Finlay said it does not lay down as a matter of law that the parties cannot agree to rescind a written agreement which the law requires to be in writing by the substitution for it of another agreement not in writing and therefore unenforceable and again he said (p. 13) "all that...existed." So Lord Haldane (p. 18). It was not decided by Noble v. Ward [1865] 1 Ex. 117 that the Statute of Frauds prevents parol agreement if it plainly purports to do so from rescinding in its entirety a previous written contract. That case Noble v. Ward [1865] 1 Ex. 117 again turned on the requirements of the Statute of Frauds. It is difficult to see here that any clear and unequivocal release in the sense that plaintiff must be taken to have confined his remedy entirely to Ex. N and to have abandoned any other rights ha might have should Ex. N. prove abortive-we come back again to the point of election previously considered. It is highly improbable that this should have been plaintiff's intention and it is impossible to believe that it was.

43. A much more serious question arises on the paragraphs of the amended plaint already referred to above as to whether the plaintiff is bound to redeem the jewels and hand them over in payment of the plaintiff's debt. The plaintiff in fact wants to be subrogated to the rights of the trustee as regards the jewels and

the Subordinate Judge in paras. 58, 60 and 61 of his judgment has held he is so entitled. Reference was made to Ex. 3 which was a bond of 28th September 1899 "by the trustee to Annamalai Chetty binding himself to pay the sum of Rs. 1,15,000 which is the sum of Rs. 60,000 plus interest. There is certainly no reference to the jewels in that document and it is impossible to my mind to say that there is reference to them by implication in the words "undermentioned Ramnad Samasthanam etc." The argument for the appellant turns largely on the reference by the Subordinate Judge in his judgment to the question of suretyship. The Judge observes in para. 61 of his judgment.

The creditor is defendant 4 and the plaintiff stands in the place of surety.

Mahamod Mamud Ali v. Kalyan Das [1896] 18 All. 189 was quoted for the proposition that the position of a puisne encumbrancer who redeems a prior mortgage is not analogous to that of a surety who pays a debt due by his principal and acquires the benefit of the security held by the creditor against the principal. Reference was also made to Ascherson v. Tredegar Dry Dock and Warf Co. Ltd. [1909] 2 Ch. 401 which held that a surety can in equity sue to compel the principal debtor to relieve him of his liability by paying off the debt. It was also said that the Rajah had no right to hypothecate the jewels because they passed under the deed of settlement. Beyond the words referred to already in Ex. 3 the only words in Ex. Q which are relied on for this purpose are "the rights to prosecute suits or other proceedings." It is said that the jewels must be included in these because it is possible that the Rajah might have a cause of action against one or more of the pledgees. It seems to me a most far fetched and preposterous suggestion that in a document which has been obviously drafted by solicitors and is intended to provide for every kind of contingency one should have to seek for a conveyance of jewels in general words of this description which to my mind cannot refer to the jewels at all. It seems to me that the language of the document is perfectly clear against the appellant and secondly the conduct of the parties is just as clear because in the judgment of the Subordinate Court of Madura in O.S. No. 72 of 1900 (Ex. A-A) which was brought by a creditor against the late Rajah and others the learned Subordinate Judge says:

Defendant 1 as plaintiff 3's witness says:

The jewels were handed over to defendant 3 by the late A.L.A.R. Ramaswami Chetty. I did not include the jewels as one of the properties I intended to pass to my son. The jewels were to be given to me. That is the duty of the Dewan Trustee by discharging the debt of defendant 3 and redeeming the jewels. I believe that up to this moment the jewels are with Annamalai Chettiar (defendant 3). They have not been delivered to me.

44. There it seems that the Rajah's title to the jewels is recognized. The judgment was confirmed by the High Court in Ex. A-A (2) where the learned Judges held that the plaintiff is entitled to enforce his hypothecation of the jewels

which are the subject of a prior pledge to defendant 3 and prior hypothecation to defendants 4 and 5 by the sale of his equity of redemption. It would seem most improbable that the plaintiff here should give up his lien on the jewels in order to allow the Rajah to borrow from the English lenders without being paid off as provided in Ex. N. As pointed out in Ex. AA (2) it seems to me that the plaintiff here has two remedies. He can either redeem as a subsequent hypothecatee and if he does, take the benefit of the securities. This seems to have been referred to in the judgment Ex. AA (2) as the equity of redemption and this right is somewhat similar to the rights possessed by a surety u/s 141, Contract Act. This section refers to the state of things existing at the time when the contract of suretyship is entered into, so that as seen from illustration (c) the surety has no interest in any security subsequently acquired by the creditor. Secondly the Rajah contracted with the plaintiff that the estate should be unencumbered (Ex. B-1),

whereby the trustee is bound to redeem on payment of money and return to me, which means that the Rajah intended apparently to take advantage of the benefit of the covenant to redeem, so that; it seems that as hypothecatee the plaintiff can be subrogated to the rights of the Rajah and he can enforce his rights against the estate itself instead of going through or via the Rajah. It is said on the other side that the trustee did not contract to pay this S. A. Annamalai Chetti's debt and that the words "as and when" in para. 24 of Ex. Q give the trustee a discretion to pay or not as he pleases. This, to my mind, is most certainly not the case. The reference here is to the order in which the payments are to be made, and that the trustee is bound to make the several payments detailed there is no doubt, but only as to the time at which such payments be made and that he is not bound to make the payment until demand is made or till required.

45. Mr. A. Krishnaswami Iyer referred to several cases on executors or guardians, as for instance Sanka Krishnamurthi v. The Bank of Burma [1911] 35 Mad. 692 where it was held that the creditors of the business had no right of direct recourse against the minor or his estate, but as the guardian is entitled to indemnity for liabilities properly incurred out of the assets of the minor embarked in the business, the creditors of the business are entitled to proceed directly against such assets. So in Lacoy v. Hill [1874] 18 Eq. 182, it was held that any one in equity having a right to be indemnified has a right to have a sufficient sum set apart for that purpose. This was approved in Wolmershunsen v. Gullick [1893] 2 Ch. 514, and the principle already cited from Ascherson v. Tredegar Dry Dock and Warf Co. Ltd. [1909] 2 Ch. 401 may be applied in aid. The Rajah could no doubt have called on the trustee to redeem and need not have waited till Aanamalai Chetty enforced his debt by a suit. As Lord Justice Warrington observed in British Union and National Insurance Co. v. Rawson [1916] 2 Ch. 476 the Court of equity has in many cases ordered the person indemnified to pay the debt against which the indemnity has been given though nothing had been paid

by the person indemnified. It therefore seems to me clear that the plaintiff has his right of action in the estate and I agree with the Subordinate Judge on this point.

46. The last point is as to limitation. It turns on the grounds in Ex. C (1), a letter dated 15th April 1899 from the Rajah to the trustee in which he expressed his approval of all that the trustee has done in settlement of the amounts due by him to the Chetty in the compromise of suit No. 60, the settlement here must mean arrangement and not payment; it means that the amount due was settled and provision for payment was made. The point fails. This appeal must therefore be dismissed with costs.

47. As to the Cross-Appeal No. 106 of 1918 and the other appeals and memo of objections I agree with my learned brother for the reasons he gives in his judgment just delivered.

48. And the cases having been posted to be spoken to this day the Court made the following

ORDER

Phillips, J.

49. In view of the objections that have been raised to the draft decree it is necessary to further explain the intention of the Court in the judgment. So far as Appeal No. 106 of 1918 is concerned it appears that the 49th respondent was an unnecessary party as the lower Court has found that he was not liable to repay any amount. It is admitted that no relief was claimed against him and that his name was included in the appeal by mistake. As he has had to come to Court to answer the appeal owing to appellant's fault he is entitled to some costs. We think in the circumstances that he should get half his costs in that appeal. So far as the other respondents are concerned their costs will be apportioned in accordance with the, amounts claimed.

50. The other question that is raised is with reference to the provisions of the lower Courts' decree regarding the jewels. These jewels having been sold defendant 4 had realized his money out of the sale and it is therefore useless to make any provision in the decree for what is to be done in case these jewels are redeemed either by defendant 1 or by the plaintiff. It is necessary therefore to strike out para. 2 of the decree up to the words "till date of realization". Clauses 5 and 6 must also be struck out.

51. The appellant in Appeal No. 4 of 1918 is reported to have died before the appeal came on for hearing. As the appeal was dismissed with costs the order will stand.

Odgers, J.

52. I agree and I have nothing to add.