(1928) 04 MAD CK 0005

In the Madras High Court

Case No : Appeals No''s. 4, 6, 12, 13, 26, 42, 57, 79, 80, 106 and 109 of 1918

The Raja of Ramnad APPELLANT

Vs

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

Date of Decision : 26-04-1928

Acts Referred:
Transfer of Property Act, 1882 — Section 6(d)

Citation : (1928) 04 MAD CK 0005

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

Bench : Division Bench

Advocate : S. Srinivasa Ayyangar and A.C. Sampath Ayyangar, for the Appellant; A. Krishnaswami Aiyar and M. Patanjali Sastri, for the Respondent

Final Decision : Dismissed

Judgement

Phillips, J.—This suit is based upon three documents, Exhibits B, B-1 and B-2, executed in 1895 and 1896 respectively. These documents

evidence loans taken by the late Raja of Ramnad (hereinafter called the Raja) from the Plaintiff''s father and hypothecate certain jewels which had

previously been pledged to the fourth Defendant. Annamalai Chetti, certain allowances reserved for the Raja under the trust deed, Exhibit Q

executed by him on 12th July 1895 in favour of the third Defendant and in one case certain furniture. The Raja had become heavily indebted and

consequently executed the deed of trust, Exhibit Q, in order to secure the estate, namely the zamindari of Ramnad, for his minor son, the first

Defendant. Under this deed he handed over the whole of the zamindari to the third Defendant in trust and provided infer alia for the payment of his

debts then existing and for the 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 Raja borrowed further sums of money under the plaint documents,

Exhibits B series. Subsequently the trustee entered into an arrangement with the Plaintiff under Exhibit E on 16th January 1809 and undertook to

secure the debts due to the Plaintiff, not only those under Exhibits B series, but also those incurred prior to Exhibit Q by a mortgage of the

zamindari. This arrangement was approved by the Raja in Exhibit 0-1 and accordingly a mortgage deed, Exhibit N was executed on 6th July 1899.

the Plaintiff brought a suit on Exhibit N in 1900, and in 1902 the first Defendant brought a suit to set aside that mortgage and another mortgage

executed by the trustee to the Raja. These suits went on appeal to the High Court; (the judgment is reported in Subramanian Chettiar v. Rajeswara

Dorai ILR (1909) Mad. 490, and finally to the Privy Council Subramanian Chettiar v. Rajarajeeswara Dorai ILR (1915) Mad. 115 (P.C.). It was

there held that Exhibit N was not a valid mortgage and was not binding on the estate of the first Defendant 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 the first Defendant,

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.

2. Objection is taken in the first place to the consideration for Exhibits B series. Four items (Rs. 8,000, Rs. 4,000, 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 Raja that debts did exist, we have the further fact that at the time of the mortgage deed, Exhibit N, he again admitted liability for all these sums.

[After finding that first, second and fourth items were proved, his Lordship continued.] The third item of Rs. 15,000 is said to have been a time-

barred debt due by the Raja''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 Exhibits B series has been proved.

3. The next objection is that the suit is not maintainable because the Plaintiff had a remedy under Exhibit N as well as the remedy under Exhibits B

series, and, inasmuch as he filed a suit upon Exhibit N, he must be deemed to have elected his remedy and cannot therefore fall back upon the

alternative remedy. The fact that Plaintiff prosecuted appeals in the suit based upon Exhibit N, even after he filed his present suit, cannot affect the

question in any way; for his claim under Exhibit 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 Ayyangar 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 election under the provisions of the Transfer of Property Act, but cites three

cases to prove his proposition, namely, Sinnan Chetty v. Alagiri Ayyar ILR (1923) Mad. 852, Scarf v. Jardine (1882) 7 A.C. 345 and Taylor v.

Hamstead Colliery Co. [1904] 1 K.B. 838. 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 ILR (1923) Mad. 852 is a very similar case. Both these cases can be distinguished on the ground that the Plaintiff''s two remedies in

these 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; Exhibits B series and

Exhibit N ; and the Plaintiff''s remedy under each of them is distinct. Although he had agreed under Exhibit N to release his charge on the Raja''s

allowances given him by Exhibits 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 of 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

ILR (1916) All. 178 and also in Noble v, Ward (1866) L.R. 1 Exh. 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 the 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 Mussumui Gulab Koer v. Badsha Bahadur (1909) 10 C.L.J. 420 and Payana Reena

Saminathan v. Pana Lana Palaniappa (1913) 41 I.A. 142. In the present case therefore the Plaintiff having failed to eaforce his remedy under

Exhibit N, as that document was held to be invalid, is certainly entitled to fall back upon the original transaction, Exhibits B series. Appellant relies

on Morris v. Baron and Co. [1918] A.C. 1 but in that case Noble v. Ward (1866) L.R. 1 Exch. 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

terms. Taylor v. Hamstead Colliery Co. [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 therefore

the principle laid down in Har Chandi Lal v. Sheoraj Singh ILR (1916) All. 178, which confirms prior rulings in this Court such as Ramunni v.

Kerala Varma Valia Raja ILR (1891) Mad. 166, it must be held that the Plaintiff in the present suit can maintain his claim under Exhibits B series.

4. The next argument relates to the validity of the charge created by Exhibits B series on the allowance payable to the Raja under Exhibit 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 Exhibit N. On the second point it is argued that Exhibit N was not in itself void but was only voidable, but inasmuch

as it was held in the prior litigation that the trustee, third Defendant, was not competent to mortgage the estate as security for debts incurred by the

Raja after the settlement deed, Exhibit Q, and also that if Exhibit N were treated as a compromise; it was invalid for want of sanction, that portion

of Exhibit 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 Exhibit N, I have discussed above, and found that there was no rescission of the original contract. Because Exhibit 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 Exhibit Q is a mere

maintenance allowance and as such cannot be alienated because it comes within the provisions of Section 6(d) of the Transfer of Property Act,

being an interest in property restricted in its enjoyment to the owner personally; and reliance is placed on Subraya v. Krishna ILR (1923) Mad.

659 (F.B.). 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

Raja of Kalahasti v. Vevkatappa Nayanim Bahadur (1928) 27 L.W. 544 that, where an allowance had been decreed or settled by a compromise,

it was not a right coming within Section 6(d) of the Transfer of Property Act, but was alienable. In the present case it is doubtful whether the

allowance can in any way be termed a maintenance allowance. The Raja, prior to the Impartible Estates Act, was the absolute owner of the estate

and, when he made the alienation under Exhibit 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 Exhibit Q styled ""Reservation of Devasthanams, etc.,"" does not

take away from it 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 of this allowance which is in its nature an annuity reserved out of the

settlor''s own estate.

5. As mentioned, Exhibits B series hypothecated certain valuable jewels which had been pledged with the fourth Defendant, and it is argued that

after executing Exhibit Q the Raja had no power to hypothecate these jewels, as he had handed them over to the trustee under Exhibit Q. The

actual possession of the jewels was admittedly with the fourth Defendant and the Raja 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 paragraph 5 of Exhibit Q in support of his

case. The contention is that this equity of redemption comes with the words ""all securities for such claims, demands,"" etc., and inasmuch as the

Raja 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

recover possession of the jewels. Unless such possession was refused the Raja had DO right of suit and consequently it cannot be said that the

equity of redemption of these jewels passed to the trustee under Exhibit Q. That being so, he was within his rights in hypothecating, them to the

Plaintiff.

6. 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 Raja in the hands of Defendants 1 and 2.

Secondly he has directed the first Defendant to redeem the jewels pledged to the fourth Defendant and declared that in default of his doing so

within six months the Plaintiff is entitled to have the first Defendant''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 the first Defendant does not redeem the jewels the Plaintiff should deposit the pledge amount and the fourth Defendant

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 the fourth Defendant''s pledge although it would appear that the fourth

Defendant has acted somewhat rashly in selling these jewels without the leave of the Court while paragraph 5 of the lower Court''s decree was still

in force. The main contention of the first Defendant 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. 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 the fourth Defendant and subsequently hypothecated to the Plaintiff in 1895 and

1896. The debt due to the fourth Defendant on the pledge of the jewels is one specified in Exhibit Q as being payable by the trustee out of the

incomes and profits of the premises thereby assured. The Raja could therefore have enforced the payment of the fourth Defendant''s debt by the

trustee. The Raja hypothecated the jewels under Exhibits B-l 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 the fourth Defendant obtained a mortgage of the

estate as further security for his loan, Exhibit III, dated 28th September 1899. The Subordinate Judge has based his order on the principle in

Ascherson v. Tredegar Dry Dock and Wharf Co., Ltd. [1909] 2 Ch. 401 finding that the Plaintiff''s position is analogous to that of a surety who

has become liable for his principal''s debt and can enforce all the claims that the principal has against the creditor. As the Raja had a right to

enforce the payment of this liability, namely, the loan on pledged jewels, against the trustee 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 Raja''s right to enforce payment

of that debt against the estate in first Defendant''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. Lacey v. Hill (1874) L.R., 18 Eq. 182 Ascherson v. Tredegar Dry Dock and Wharf Co., Ltd.

[1909] 2 Ch. 401, and Wolmershausen v. Gullick [1893] 2 Ch. 514. 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 Mahmud v. Kalyan Das ILR (1895) All.

189, which contradicts this proposition in terms, for it is stated at page 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 Judge 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 the fourth Defendant and could enforce the fourth

Defendant''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 the fourth Defendant''s rights, as suggested by 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 Raja is a more plausible proposition. The Raja had, in effect, represented to the Plaintiff that the jewels were

unencumbered. In order to make that representation true the Raja had a right to compel the trustee to pay the fourth Defendant''s debt out of the

estate. Can the Plaintiff not be heard to say that inasmuch as he could enforce his claim against the Raja personally he must be able to enforce any

right which the Raja 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. In Ascherson v. Tredegar

Dry Dock and Wharf 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 re Raybould; Raybould v. Turner [1900] 1

Ch. 199, where 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 Raja the Plaintiff was entitled to have his debt secured on jewels unencumbered and the Raja 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 is 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 Raja 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

Krishnamurti v. The Bank of Burma ILR (1911) 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 Sub-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 first Defendant''s hands, he having obtained possession from the trustee.

7. 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 Raja acknowledged the suit debts within the periods of limitation. In Exhibit C-1, dated 15th April 1899, just six years before suit,

the Raja approved of what was done ""in settlement of the amounts due by me to Devakottah Ramanadham Chettiyar in the compromise of suit

No. 60 before the Madura Sub-Court (East)."", 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, Exhibits Y and Y-1, 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.

Appeal No. 79 of 1918.

8. In this appeal the Appellants are persons who attached the allowances payable to the late Raja and against whom a decree for refund to the

Plaintiff has been passed. The contention on their behalf is that the Raja 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. (Vicle In re Steel Wing

Company [1921] 1 Ch. 349. It has also been held that the partial transfer of a debt is valid in Appeal No. 53, etc., of 1919 in this Court, and this

objection must therefore be disallowed although there is a remark in Doraiswami Mudaliyar v. Doraiswami Ayyangar (1924) 48 M.L.J. 432 at

439 which throws some doubt upon this conclusion.

9. 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 appeal Nos. 4, 6, 12, 13, 42 and 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 these 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 plaint 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 first Defendant''s contention that his estate cannot be made liable for the suit debts.

10. 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) of the Court of Wards Act. This suit has, however, been brought under Order XXI, Rule 3, 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 and appears to be untenable. In fact, in Phul-kumari v.

Ghanshyam Misra (1907) ILR 35 Cal 202 (P.C.), 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.

11. The first Defendant has raised a further point with regard to the amount declared in the decree to be due by him to the fourth Defendant.

Apparently a statement was filed in Court by the seventy-fifth Defendant, representative of the fourth Defendant, on 28th July 1917, whereas the decree is dated 12th September 1917, and the first Defendant does not appear to have taken any objection to the same. It is rather late now to

object to the further statement put in in pursuance of the earlier one by the Plaintiff and fourth Defendant''s representative jointly, and it is in

accordance with the further statement that the lower Court has made its calculations. This contention must therefore fail.

12. All these appeals are therefore dismissed with costs.

Appeal No. 106 of 1918 and Memorandum of objections.

13. 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 that respect he was wrong and we therefore order that, so far as the first Defendant and the estate are concerned, interest

must be allowed at 12 percent from the date of the lower Court''s decree.

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

15. The memorandum of objections is dismissed with costs. In the appeal the Appellant will pay the costs of the Respondents except the first

Defendant and will get proportionate costs as against the first Defendant on the amount allowed.

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

17. In Appeal No. 26 of 1918 we certify costs for two counsel.

18. 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.

Odgers, J.

19. The main appeal argued was appeal No. 26 of 1918 by the first Defendant. The suit which was originally one brought as long ago as 1905

was by M.R.M.A. Subramaniam Chetty, the adopted son of Muthiah Chetty alias Ramanadhan Chetty, for moneys borrowed by the late Raja of

Ramnad who is the father of Defendants 1 and 2. The plaint as originally framed asked that these Defendants as representing the late Raja should

be ordered to pay the sum of Rs. 3,45,000 odd with subsequent interest out of the assets of the late Raja and that the properties in Schedule A

(jewels) should be produced by the fourth Defendant, 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 61 be ordered to produce the

sums taken by them from Court in order to be paid to the Plaintiff on account of the amounts due to him. By an amendment made in August 1917

a prayer was added in the alternative that the first Defendant as beneficiary under the settlement or deed of trust be ordered to pay to the fourth

Defendant''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 the fourth Defendant''s legal representatives the Plaintiff be declared to be entitled to realize the said amount

from the settled properties in default of the first Defendant as beneficiary under the settlement making the payment within such time as the Court

may fix.

20. 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.

21. The Subordinate Judge found on all points substantially in favour of the Plaintiff, though the latter has preferred appeal No. 106 which was

argued solely on a question of interest.

22. The facts leading up to the questions of law argued in the main appeal have been set out more than once, for instance, in the judgment of this

Court in Subra-manian Chettiar v. Rajeswara Dorai (1909) ILR 32 Mad. 490, which went to the Privy Council in Subramanian Chettiar v. Raja

Rajeswara Dorai (1915) ILR 39 Mad. 115 (P.C.). It is therefore sufficient for the present purpose to say that the first document with which we

are concerned in this case, is Exhibit Q, dated 12th July 1895, which is called the settlement or deed of trust, whereby the late Raja 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 rent, 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 the monthly

sum of Rs. 5,500 which appears in the second schedule 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 the third schedule to the document.

23. On 21st November 1895, 7th November 1896, and 24th November 1896 the late Raja executed three bonds Exhibits B, B(l) 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 (fourth Defendant) of Kanadukathan for Rs. 60,000. The document contains a list of these jewels and their value and says they

were delivered on the 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 abovementioned A. L. A. R. Ramaswami Chetty. The second

bond Exhibit B(I) recites Exhibit B ""executed to you by me....

24.on the pledge of my jewels which the trustees are bound to redeem on payment of money and return to me."" 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. 85,000

is to be repaid in monthly instalments of Rs. l,350 from the allowance of the late Raja. The suit is brought on these bonds. The next document is

Exhibit E, dated 16th January 1899, between the trustee Veukata Rangier and the Plaintiff. It recites Exhibit Q, the settlement, and also that the

late Raja borrowed subsequent loans from the Plaintiff''s father and it further recites that the Plantiff''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 Exhibit E to pay Rs. 1,79,000 odd which is the amount due to the Plaintiff up to the

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 trustee 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 Raja''s allowance and

withdraw the suit that had been instituted, viz., suit No. oO of 1897. On the trustee making a further payment of Rs. 1,25,000 the Chetty was to

release the late Raja from all obligations and relinquish and transfer to the trustee all the other securities given to the Chetty by the late Raja. The

clause concludes: ""I agree to sell the jewels only after giving intimation to you."" In pursuance of the aforesaid, on the 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

o(sic)d out of the total amount due, on demand with interest at 12 per cent from the 3rd July 1899, to 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 or charge on the Raja''s allowance shall cease and that on payment of the abovementioned sum of Rs. 1,81,000 odd and Rs.

1,25,000 (which was a subsequent debt) all debts other than the securities created by this document (Exhibit N) shall cease. The only other

document that, is necessary at present to refer to is Exhibit P, dated 13th July l899 which is a small loan of Rs. 30,000 secured on mortgage of

paddy. The mortgage Exhibit N was held by this Court and subsequently by the Privy Council to be invalid.

25. The following contentions were raised in this appeal:

(a) consideration under Exhibit B series, of which four items are impugned namely Rs. 8,000, Rs. 4,000, Rs. 15,000, and Rs. 15,000.

[After finding that items 1, 2 and 4 of the consideration were proved, His Lordship continued-]

26. As to the third sum, also Rs. 15,000 there is perhaps a little more difficulty. The Raja 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. (Page 710 of the ''Blue Book''; it appears in the Plaintiff''s accounts,

Exhibit H.) The contention is that the present first Defendant cannot be liable for a barred debt of his father included as it is in Exhibit 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 was liable for the

father''s debt in the hands of his successor who was 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 of the 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 Defendants'' side, Defendants 1 to 3

having withheld the accounts of the late Raja. In my opinion therefore all these sums must be allowed.

27. The second point argued is that the suit is not maintainable. The contention is that as the mortgage Exhibit N had been held as stated to be void

the Plaintiff has no right to revert to his original cause of action on the bonds, Exhibit B series; it is said that he might elect the remedy which he will

pursue and he having elected to proceed on the mortgage, Exhibit 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 me very doubtful if we have here really a

question of election as it is understood in equity. As pointed out in Halsbury, Volume 13, page 127, note (a), Questions of election proper arise

where the person electing has to choose between two things. No doubt the Plaintiff assumed that Exhibit 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 Aiyar (1923) ILR 46 Mad. 852, 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 proved 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 Jaw 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 disavowed 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 (page 350):

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

28. Lord Bramwell at page 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, moreover,

several cases on the other side which seems to me to decide conclusively in favour of the Respondent. Har Chandi Lal v. Sheoraj Singh ILR

(1916) All. 178, is a very strong case in 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 1891 the divided nephew mortgaged his

share to the same mortgagee and in 1887 the widow and nephew effected two mortgages to the same mortgagee of the entire mauza. Upon this, the mortgagee delivered up the mortgage deed of 1876 to the nephew. In 1896 the mortgagee brought a suit on the mortgages of 1887 and

obtained a decree against 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 three Defendants, having successfully maintained

that the transaction embodied in the two deeds of 1887 was not binding on Mussammat 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 the 13th November 1876.

29. 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 Exhibit N has been declared

void. That Exhibit N was held invalid for want of sanction is the alternative case stated by their Lordships in Subra-manian Chettiar v. Raja

Rajeswara Dorai ILR (1915) Mad. 115, when they say that

If on other grounds the deed of compromise (here marked as Exhibit N) could be supported, it is invalid in not complying with the condition

imposed by Section 462 of the CPC 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.

30. Reference may be made to another case in the Privy Council, Ganesh ROW v. Tuljaram Row (1913) ILR 38 Mad. 295 (P.C.), where it was

held 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, Mussumut Gulab Koer v. Badsha Bahadur (1909) 10 C.L.J. 420, where

Mr. Justice MUKERJEE 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 Payana Reena

Saminathan v. Pana Lana Palaniappa (1913) 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 The Honourable B. Rajarajeswara Sethupathi Avergal, alias Muthuramalinga Sethupathi Avergal Vs. Kuppuswami Aiyar and

Others, , 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.

31. 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 maintenance

allowance is illegal. We have already seen that an allowance was payable to the Raja under the terms of Exhibit Q. For this reliance is placed on

Subraya v. Krishna ILR (1913) Mad. 659, which is a a Full Bench decision of this Court holding that the personal right of a widow to future

maintenance is purely personal and within Section 6 of the Transfer of Property Act. As against this there is the consideration that the Raja 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 power to

make a reservation out of his own property in favour of himself. The consideration for these payments is set out in paragraph 23(11) of Exhibit Q

and it is impossible to say that an allowance of this kind or magnitude is on the same fooling as a mere maintenance allowance for a widow. There

is also the consideration that the allowance is a charge, for, the paragraph 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"" cf. per SESHAGIRI AYYAR, J., in Raja of Ramnad v. Sundara

Pandiya-swami Thevar (1911) 27 M.L.J. 694 approved by the Privy Council in Rajah of Ramnad v. Sundara Pandiyaswami Thevar ILR (1918)

Mad. 581 holding that the payment of an allowance was a charge. There is also a judgment of three learned Judges of this Court in Raja of

Kalahasti v. Venhatappa Nayanim Bahadur (1928) 27 L.W. 544 of which we were two, which seems to me to conclude the matter as far as we

are concerned. Mr. S. 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 laws 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 Doraiswami Mudaliar v. Doraiswami Aiyangar (1924) 48 M.L.J. 432. The ground for saying

that it is a partial assignment is that in Exhibit B only Rs. 1,350 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.

32. A more serious contention was raised that from the date of Exhibit N the lien on the allowance ceased and Mr. Srinivasa Ayyangar''s

contention was that the Plaintiff''s rights have gone even if the document be unenforceable provided the covenant 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, page 27, ""If then the contract exists . . . as well as express words,

of. also Lord ATKINSON, page 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.

33. Noble v. Ward (1866) L.R. 1 Exch. 117 and Noble v. Ward (1867) L.R. 2 Exch. 135 were 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

(page 13) ""all that . . . existed."" So Lord HALDANE (page 18). It was not decided by Noble v. Ward (1866) L.R. 1 Exch. 117 that the Statute

of Frauds prevents a parol agreement if it plainly purports, to do so from rescinding in its entirety a previous written contract. That case Noble v.

Ward (1867) L.R. 2 Exch. 135 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 Exhibit N and to have abandoned any other rights he might

have, should Exhibit 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.

34. 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 paragraphs 58, 60 and 61 of his judgment has held he is so entitled. Reference was made to

Exhibit III which was a bond of the 28th September l899 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 paragraph 61 of his judgment ""The

creditor is the fourth Defendant and the Plaintiff stands in the place of a surety."" Mohammad Mahmud Ali v. Kalyan Das ILR (1895) 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 Wharf 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 Raja had no right to hypothecate the jewels because they passed under

the deed of settlement. Beyond the words referred to already in Exhibit III the only words in Exhibit 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 Raja 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 (Exhibit AA) which was brought by a creditor against the late Raja and others the learned Subordinate Judge says:

The first Defendant as Plaintiff''s third witness says, '' the jewels were handed to the third Defendant by, the late A. L.A.R. Ramaswamy 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 Diwan

Trustee by discharging the debt of the third Defendant and redeeming the jewels. I believe that up to this moment the jewels are with Annamalai

Chettiar (third Defendant.) They have not been delivered to me.

35. There it seems that the Raja''s title to the jewels is recognized. This judgment was confirmed by the High Court in Exhibit AA-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 the third

Defendant and prior hypothecations to the fourth and fifth Defendants 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 Raja to borrow from the English lenders without being paid off as

provided in Exhibit N. As pointed out in Exhibit 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 Exhibit AA-2 as the

equity of redemption and this right is somewhat similar to the right possessed by a surety u/s 141 of the 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 Raja contracted with the Plaintiff that ""the estate should be unencumbered (Exhibit B-

l) whereby the trustee is bound to redeem on payment of money and return to me"" which means that the Raja 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 Raja,

and he can enforce his rights against the estate itself instead of going through or via the Raja. It is said on the other side that the trustee did not

contract to pay this S.A. Anna-malai Chetty''s debt and that the words ""as and when"" in paragraph 24 of Exhioit 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 are to be

made and that he is not bound to make the payment until demand is made or till required. Mr. A. Krishnaswami Ayyar referred to several cases on

executors or guardians as for instance Sanka Krishnamurthi v. The Bank of Burma ILR (1911) 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

Lacey v. Hill (1874) L.R. 18 Eq. l82 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 Wolmershausen v. Gullick [1893] 2 Ch., 514, and the principle already cited from Ascherson v. Tredegar

Dry Dock and Wharf Co., Ltd. [1909] 2 Ch. 401, may be applied in aid. The Raja could no doubt have called on the trustee to redeem and need

not have waited till Annamalai Chetty enforced his debt by a suit. In other words, he could have brought a quia timet action. As Lord. Justice

Warrington observed in British Union and National Insurance Go. 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 against the estate and I agree with the Subordinate Judge on this point.

36. The last point is as to limitation. It turns on the words in Exhibit C (I) a letter, dated 16th April 1899 from the Raja 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 the 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.

37. As to the cross Appeal of 106 of 1918 and the other appeals and memorandum of objections I agree with my learned brother for the reasons

he gives in his judgment, just delivered.

[The cases having been posted to be spoken to, the Court made the following]

ORDER:

Phillips, J.

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 Res

