Privy Council Appeal No. 145 *of* 1920.

Sri Rajah Vatsavaya Venkata Subhadrayyamma Jagapati Bahadur Garu - - - - *Appellant*

v.

Sri Poosapati Venkatapati Raju Garu and others - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 5TH MAY, 1924.

Present at the Hearing:

LORD ATKINSON.
LORD SHAW.
LORD BLANESBURGH.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD ATKINSON.]

The suit out of which this appeal has arisen was instituted in the Court of the Subordinate Judge of Vizagapatam on the 4th April, 1913, by the plaintiff—the present appellant—the widow of the Rajah of Tuni deceased, who died in the year 1911, against the six respondents named to recover the sum of Rs. 1,68,629 and to obtain a declaration that this sum was well charged upon a certain sum of money received by the respondents, under a certain decree dated the 12th March, 1913, styled a compromise decree, made in a suit, No. 18 of 1903, and also for payment of three thirty-seconds of what remained of the sum received under such compromise after payment of the sum of Rs. 1,68,629. The Subordinate Judge, on the 6th December, 1915, made a decree in favour of the appellant, the plaintiff in the suit, for the sum of Rs. 1,91,058, and also made the declaration asked for to the effect that this sum was well charged on the sum paid to the respondents in pursuance of the

compromise decree. The learned Subordinate Judge decided against the appellant on the other matters claimed, and no appeal has been taken by her against this decree on these latter matters. An appeal was, however, taken by the defendants to the High Court of Judicature at Madras. That Court pronounced a decree dated the 21st March, 1918, reversing the decree of the Subordinate Judge and dismissing the appellant's suit with costs. From this latter decree, the appellant has appealed to this Board.

The original suit No. 18 of 1903 was decided by the first Court against the respondents 2 to 4 in 1908, and they preferred an appeal to the High Court, which was numbered Appeal No. 114 of 1909.

In 1913 a compromise petition was filed in the above Appeal No. 114 of 1909 in the High Court, and on the 12th March, 1913, a decree was passed in accordance with the compromise by which the 1st respondent in this appeal was to receive a sum of Rs. 250,000 on behalf of and for the benefit of all the respondents, the 2nd respondent was to receive an annuity of Rs. 2,400, respondents 3 and 4 were to receive an annuity of Rs. 866-10-8 each, and the 1st respondent was to get a house for and on behalf of all the respondents.

Since the admission of this appeal the appellant and respondents Nos. 3 and 4 have entered into a compromise which has been recorded, and by an Order of His Majesty in Council leave was given to withdraw the appeal as against these respondents Nos. 3 and 4 and to proceed as against the other respondents on the terms, that even if the appellant should be successful in this appeal, costs in the Courts below should not be claimed by her against the respondents Nos. 3 and 4. This appeal is accordingly now proceeded with against respondents Nos. 1, 5 and 6 alone.

On the hearing of the appeal before this Board, Counsel on behalf of the appellant abandoned all claim for a decree against any of the respondents of a personal nature, and also abandoned all claim to a decree for payment of three thirty-seconds of the sum received on the compromise, and has confined the relief he asks for to having it declared that a sum of Rs. 92,000 with the accruing interest thereon, at the rate specified, is well charged upon the sum of 2½ lakhs received by the respondents in the compromise. Though this is the sole relief asked for, the facts upon which the appellant depends are of a somewhat complicated nature, and must unavoidably be unravelled at some length in order to be adequately weighed and considered and the correct conclusion drawn from them. The Maharajah of Vizianagram, who owned an estate of that name, died on the 22nd May, 1897, having made a will by which he devised this estate to one Raja Chitti Babu for life. This devisee may for convenience sake be styled the tenant for life, as he would be in England, though that is not, in strictness, according to Indian law, his true position. The testator made no disposition of the absolute interest in his estate. As to that he died intestate. Ramachandraraju, respondent 2, claimed to be the heir of the deceased Maharajah, as his nearest

agnate, and by the joint operation of the Hindu law and the Maharajah's will claimed to be entitled to the absolute interest on the aforesaid estate subject to the life interest of the so-called tenant for life. He was confronted, however, with this difficulty in asserting his claim, namely, the fact that the mother of the deceased Maharajah contended falsely, as Ramachandraraju alleged, that she had adopted the tenant for life as the son of her deceased son, and that this adoption defeated Ramachandraraju's title, as it undoubtedly would have done, if the adoption was validly made. In this state of things Ramachandraraju resolved to assert his title, and thus to test in a court of law the validity of the alleged adoption of the tenant for life.

He was, however, a poor man. He apparently realised that the suit would be an expensive one, and that it would be absolutely necessary for him to induce some persons to advance to him the money necessary and sufficient, to prosecute the suit. To effect this purpose he took a step, the object of which is not very apparent and the result of which has undoubtedly proved embarrassing. The day before he instituted the suit to establish his title, namely, on the 12th July, 1903, he executed a deed of trust, by which, after reciting the death of the Maharajah, the making of his will, the devise to the tenant for life, the pretended adoption by the testator's mother, and alleging that it was necessary for him to take proceedings, he appointed Poosapati Venkatapatiraju Garu, (hereinafter referred to as the original trustee), trustee of all the property in which he, Ramachandraraju claimed to have a vested interest in remainder as heir of the deceased Maharajah in trust to administer the fifteen-sixteenths of the same for his, the settlor's, own benefit, and one-sixteenth of the same for the benefit of two persons named, namely, respondents Nos. 5 and 6 in the present suit.

There is nothing to show that these two latter beneficiaries were in any way connected with the settlor or had any claim upon his bounty. The provision thus made for them was, as far as can be seen, a voluntary gratuitous gift. It is plain that the property thus put in trust by this deed was all the property the settlor would have been entitled to as heir of the deceased Maharajah had there been no adoption of the tenant for life, or had that adoption been invalid. Each one of these three beneficiaries, the settlor and respondents 5 and 6, had interests in the litigation identical in character though not in equal value, in this sense that each would gain his share if the suit should succeed, and each would lose everything if it should fail. In addition, powers were, by the trust deed, conferred upon the trustee and upon the settlor respectively, which were both wide and important. The words conferring them run thus :—

> " Therefore you (*i.e.*, the Trustee) should not only manage the trust property subject to the arrangements I may make regarding the consideration for your trouble, etc., and other matters, but also full authority is given you to conduct suits, etc., either jointly with me or separately, and

to manage it in such a way as you may think fit for the preservation of the properties."

Having regard to this last provision it is clearly the view of their Lordships that the trustee would have been acting within his express powers, if, having money of his own at his command, he thought proper to advance it, or some of it, to finance the contemplated litigation directed to secure and preserve the trust property for the purpose of the trust, by establishing that the alleged adoption never took place or was invalid and that therefore the settlor was the lawful heir of the deceased Maharajah, and in the event of that suit being successful would have been entitled to a lien on the property gained for the sum advanced. And their Lordships further think that if the trustee, not having money of his own available, borrowed money from a third party for the purposes above mentioned and actually used it to promote those purposes, then, in case the litigation were successful, the person who advanced the money would be entitled to stand towards the trust property in the place of the trustee and be entitled to a similar lien on that property. Their Lordships are further of opinion that if the settlor, with the assent and concurrence of the trustee, borrowed money absolutely necessary to finance the suit, from a third party for the purposes above mentioned and so applied it, then, in the event of the litigation being successful, the person who advanced the money would be equally entitled standing in the shoes of the settlor to a lien on the property preserved for the trust by his outlay.

The contemplated suit was, on the 13th July, 1903, commenced in the District Court of Vizianagram. Its number in that Court was O.S. No. 18 of 1903. The plaintiffs in it were the original trustee and the three beneficiaries, namely, the settlor as to fifteen-sixteenths of the trust property and respondents 5 and 6 as to one-sixteenth of it. These three beneficiaries were the absolute owners in equity of the trust estate if the adoption proved invalid. The relief prayed for was (1) That it might be declared that the settlor as the nearest heir of the late Maharajah, was entitled to the vested remainder in the estate of Vizianagram after the demise of the present zemindar (*i.e.*, the tenant for life). The settlor and these two beneficiaries were therefore in the position of joint adventurers in this litigation, in which success would bring much gain for each, and failure absolute and complete loss to each. The efforts these adventurers made to obtain the necessary funds to prosecute the suit, of which they themselves were entirely destitute and were unable to supply, are detailed by the witness Lakshmi, the private secretary of the Rajah of Tuni, from whom the necessary funds were ultimately obtained. The evidence of this witness, which, save as to one matter to be mentioned presently, is practically uncontradicted, is of the utmost importance. He said a body of people came to have an interview with the Rajah of Tuni, his master. That the original trustee, the settlor, and two beneficiaries, respondents 5 and 6, and the two sons of the settlor, were members of this body, that they asked the Rajah of Tuni to help them in the suit O.S.

No. 18, 1903, in the Vizagapatam District Court, that they represented that other persons who had promised to assist them had failed them, that a vakil then named (since deceased) had told them that the settlor had a good case, represented that unless the Rajah of Tuni advanced money to finance the suit the settlor would lose it, and that if he succeeded in the suit the Rajah of Tuni would gain as well as the whole Kshatriya Community. That the original trustee and respondents 5 and 6 joined in making these requests, they were asked to sign the (*sic*) agreement. The trustee said the second defendant (*i.e.*, the settlor) was a poor man, that he was plaintiff in the suit, that they were conducting the litigation for him; that fearing that he might collude with the Vizianagram estate, they got the trust deed, and so (*i.e.*, in consequence) the settlor only must enter into the agreement and that a draft of Exhibit A (*i.e.*, the agreement of the 22nd May, 1906) was produced, but the witness does not know who drew it. These two beneficiaries, respondents Nos. 5 and 6 in the present suit, filed, on the 21st July, 1913, two written statements. They are identical in terms. They both deny that they had anything to do with the negotiations which lead up to the agreement of the 22nd May, 1906, or with those which lead up to that of the 14th August 1907. As to the first of these negotiations, they do not specifically deny a single statement deposed by the witness Lakshmi, who knew them all, the original trustee, the settlor, his two sons, Nos. 3 and 4, as well as Nos. 5 and 6 and said they all came to his master in a body.

Nos. 5 and 6 do not assert they did not interview the Rajah of Tuni on the occasion named. They do not deny that advances of money were prayed for from the Rajah and obtained, nor explain how it was that as the advance of money to conduct the suit just instituted would, if successful, have secured to them one-sixteenth of the trust estate, they took no part in the negotiations to obtain the necessary money to finance their own suit. They were not examined as witnesses in the suit out of which this appeal has arisen. They were important witnesses if their allegations were true. It appears to their Lordships that there is only one rational explanation of their absence from the witness chair, namely, their well-grounded fear of cross-examination. If their statements be true, the evidence of Lakshmi must be a wicked and deliberate concoction. Their Lordships do not think it is that. They think it is a truthful account of what took place in his presence; they accept it and rely upon it, while they look upon the statement of Nos. 5 and 6 in reference to the negotiations, out of which the agreement of the 22nd May, 1906, sprang, as wholly unreliable.

Upon this supposition it is well to consider what was in reality the true nature and effect of the arrangement come to by all the parties concerned on the occasion of this visit to the Rajah of Tuni. The suit recently started dealt with the whole *trust* property. The negotiation to have such a suit financed necessarily dealt with the whole trust property. The settlor could, prima facie, by signing the

agreement for himself alone only bind his own interest in the trust property. That would not have sufficed, and therefore when, of the three beneficiaries only one signed the agreement designed to affect the whole trust property and by its very terms did so, this one must, in the circumstances already detailed have signed it not only for himself, in his own right, but as agent, accredited in that behalf, of his co-beneficiaries. In all the transactions which succeeded, the advancing of the money, the accounting for the money, and the direction of the steps to be taken in the suit, the two beneficiaries do not appear to have taken any independent or active part. From May, 1906, onward, the settlor was regarded as the manager the *dominus litis* in the whole business. He was never removed from his position, his authority to act as the agent of his co-beneficiaries never questioned or withdrawn. These two co-beneficiaries of the settlor make in their written statements, the case that they are not parties to the agreement of the 22nd May, 1906, or that of the 14th August, 1907, and are therefore not bound by either. If by this they mean that they have not each by his own hand signed and thus executed them, it is true; but if it means that those agreements were not signed by the settlor as the accredited agent of his co-beneficiaries and on their behalf, it is in their Lordships' view quite untrue. As this point was never made until over Rs. 100,000 had been advanced by the Rajah to finance the suit, in which they were co-plaintiffs, it is in addition dishonest.

The original trustee, Poosapati Venkatapatiraju, died during the progress of this suit No. 18, 1903, and his nephew, the present respondent No. 1, was by a deed, dated the 17th December, 1906, appointed a trustee in his place, and accordingly added as a plaintiff in that suit.

It was contended by Mr. Upjohn on behalf of the appellant that the agreement of the 14th August, 1907, was not a substitution for the earlier agreement of the 22nd May, 1906, but a supplement to the latter. It is therefore necessary to examine the provisions of both to determine whether the earlier agreement is superseded by the second or only added to by it. The parties to the first are the Rajah of Tuni of the first part and the settlor and his two sons, respondents 3 and 4, of the second part. The word "we" is used throughout this agreement as well as throughout that of the 14th August, 1907, to indicate, it appears to their Lordships, all the plaintiffs in the suit not merely the settlor and his two sons, the executing parties to the agreement in each case. The Rajah by the earlier agreement undertook to advance at most Rs. 1,50,000 to finance the suit started by the settlor, O.S. No. 18, 1903, in consideration for which, if the suit should be successful, three-sixteenths of the moveable and immoveable property in dispute should by sale deed be conveyed to him, the Rajah. Should the whole of this sum not be needed for, or not be actually applied to financing the suit in the lower Court, the unexpended balance should be deposited with a person interested in both the Rajah and the settlor to be spent by the latter in financing the suit in the Appellate Court on appeal from the District Court.

Then follows a paragraph, No. 3, clearly providing that the Rajah was not to be bound to advance the large sum of one lakh for the above-mentioned purpose, but that if he did not want to spend the money claimed to conduct the suit in all the three Courts, he should only be bound to advance Rs. 50,000 for the prosecution of the suit in the original Court and was not to be bound to spend anything more than that. A further provision then followed to the effect that though the Rajah might only finance the suit in the original Court and should refuse to make further advances, and they (*i.e.*, the plaintiffs) should be obliged to get financial help elsewhere and conduct the appeals themselves, they should, as soon as they should get possession sell to the Rajah by means of a sale deed, only one-third of the property agreed to be sold to him (*i.e.*, one-third of three-sixteenths) namely one-sixteenth of the property recovered by the Rajah's conducting the suit in all the Courts and would put the Rajah in possession of the same. It is then further provided that should the Rajah not like to take this sale deed they and their heirs should be bound to pay the Rajah the amount spent in the lower Court with interest at 2 per cent. per mensem from the date of the judgment of that Court, on the security of the property proposed to be sold to him. It was evidently contemplated by the plaintiffs in the suit and the parties to the agreement, that the suit might be compromised, while it was in the Appellate Court, as in fact it, subsequently, was, and accordingly elaborate provisions are introduced into the agreement dealing with that event and purporting to fix and determine what the rights of the respective parties should be, if the contemplated compromise should take place.

The first provision is to the effect that should this compromise take place while the Rajah was spending money financing the suit, then prima facie the plaintiffs should pay to him the sums so spent by him with interest at 1 per cent. per mensem from the respective dates at which the said sums were spent. It is then provided that these sums should be derived out of the moveable and immoveable property obtained by the plaintiffs from the compromise, and further that out of the remnant which should remain of the moveable and immoveable property after deducting the principal and interest so paid, the parties designated should be bound to give the Rajah a three thirty-second share. Here are introduced some immaterial and, for the purpose of the matter criticised, irrelevant provisions, and then follow the clauses, which it may be best to quote, *in extenso* :—

> " It is agreed that we should not compromise or withdraw this suit without your consent ; that, in case you think that, under the then existing circumstances, it is better to compromise, we should consent to it ; that, when we represent to you that it is better to compromise, you should consent to it ; and that out of the amount that may be got in the said compromise we should pay you the amount advanced by you with interest at 1 per cent. per mensem from the respective dates of advance of the several sums and also give you three thirty-seconds of the property remaining after deducting

the aforesaid. It is further agreed that, soon after the suit is disposed of, we should execute documents in your favour as per all the above-mentioned terms and that, as soon as we get possession of the property, we should put you in possession of the property as per those documents. We and our heirs are bound by the aforesaid conditions and we execute this agreement with our free consent."

The Rajah then made the advances necessary for financing this suit. In the agreement of the 14th August, 1907, it is stated he had advanced sums up to Rs. 71,500 in all, yet it is contended by respondents 5 and 6 in their written statements that they are not liable for, nor is their share of any property liable to be charged with, any portion of this sum given to their own agent to finance their own suit, which it is inconceivable, they did not know had been so advanced and applied. If the agreement of the 14th August, 1907, only supplemented but did not supersede the earlier one of May, 1906, it may well be that under the latter the Rajah would have been entitled, in the event of the suit being successful, to a lien on the property recovered in the successful suit. This point does not appear to have been specifically raised in this appeal and need not be dealt with. The sum of Rs. 71,500 so advanced was found to be insufficient, for the prosecution of the suit O.S. No. 18 of 1903, and a second agreement dated the 14th August, 1907, between the settlor and his two sons, respondents Nos. 3 and 4 and the Rajah of Tuni was entered into by which the Rajah undertook to advance a sum not exceeding Rs. 200,000 for its further prosecution.

This agreement contained many special provisions with which it is necessary to deal at some considerable length for reasons which will presently appear. In it after reciting at considerable length some of the steps which had already been taken in the suit, the insufficiency of the advances, and the kindness of the Rajah in undertaking to advance two lakhs of rupees including the sum of Rs. 71,500 which he had already, under the previous agreement advanced it provided that as soon as the financed suit was decided in favour of the plaintiffs in that suit, they, the plaintiffs, would in addition to the three-sixteenths portion of the property recovered in the suit already agreed to be sold to him, sell to him another one-sixteenth, making together one-quarter of that property, and also a garden and a strip of quarry land therein described. It is then further provided that in respect of the monies portion of these two lakhs, advanced from time to time, detailed receipts of the Vakil's day fees, etc., printing, stamps, house rents should be furnished to him the Rajah, that is, as regards the whole of the balance accounts of receipts and expenses it should be furnished to him for the sums so ascertained, and for which sum receipts should be given by the settlor, and that with respect to the money that might again be required the Rajah should, at the request of the settlor, advance the money, looking into accounts and getting detailed vouchers for money spent,

and then settle accounts without giving room for any disputes.

By the figures mentioned in paragraph 2 of the agreement it is shown that a sum of Rs. 87,500 was then due to the Rajah, and it is again provided that out of the balance remaining after deducting this sum, the plaintiffs should on the receipt of the settlor receive the sums required thereafter for the expenses in the original Court on furnishing to the Rajah as above stated accounts of receipts and disbursement of the money already received by the settlor, and further that the Rajah, on the rendering to him of the debtor and credit accounts as stated, would within a week of his being applied to for money required for the suit pay the same.

In paragraph three of the agreement there are further provisions for the advance of money to finance the suit in the Appellate Court on accounts being rendered in the manner thereinbefore described. There is then a provision that if a decree in the suit should be given in favour of the plaintiffs one-quarter of the property for which the decree would be passed should by sale deed be conveyed to the Rajah.

And then come the three paragraphs dealing with a compromise of the suit upon the construction of which the High Court have mainly, if not entirely, founded the judgment and decree appealed from. These paragraphs run thus—

> "10. We shall not compromise with the defendant, or file razinamah or withdrawal without your consent.
>
> "11. It is agreed that, if Mr. Krishnaswami, Ayyar, High Court Vakil, who is working on our behalf in this suit advises us from the then existing circumstances of this suit, that it would be better for us to compromise, we should agree to it and compromise or withdraw the suit.
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> "12. Moreover, out of the moveable and immoveable properties that may be obtained by such compromise, etc., we shall first pay to you the principal money advanced by you together with interest at Re. 1-0-0 (one rupee) per cent. per mensem from the respective dates, and out of the moveable and immoveable properties that remain after so giving away (to you) we shall at once execute and give you a proper sale-deed and place in your possession three thirty-seconds of a share. All of us and our heirs are liable to you and your family members according to all the aforesaid terms and are also bound to give effect to them without fail. This agreement is executed with our whole hearted consent."
>
> (Signed) POOSAPATI RAMACHANDRA RAJU.
> POOSAPATI RAMA RAJU.
> POOSAPATI BUCHI APPALA RAJU *alias* ACHARYA RAJU.

This agreement and the previous one of 1906 are, in the main, constructed on similar lines. The maximum sum to be advanced under the first was Rs 1,500.00 and that under the second Rs. 2,00,000 but the distinguishing feature of the second is that strict accounts of the sums advanced and spent are to be kept, receipts given for those sums when received, all disbursements duly vouched, advances of further sums required and asked are only to be made when those receipts and vouchers have been given. There is nothing whatever to indicate that the entire trust

property as distinct from the settlor's share of it is not dealt with. Nothing to suggest that the authority already conferred upon the settlor by the negotiation out of which the first agreement to act in the matter of obtaining funds to finance the pending action had been either limited or revoked. In the absence of any provision indicating that result it must, in their Lordships' view, be held that this authority was continued. Death has been very busy with the chief actors in this business. Krishnaswami the vakil mentioned in the attestation clause, died in the year 1911, as did also the Rajah of Tuni who is succeeded and represented by his widow. The settlor died immediately after the forwarding of the appeal to this Board and he is succeeded by his two sons. The widow, according to her counsel, does not claim that the sum of Rs. 92,000 due to her is a debt due on a loan. Neither does she claim to get specific performance of any contract giving her any property obtained by the compromise. She merely claims a lien on the sum of Rs. 2,50,000 paid under the compromise, for the sum of Rs. 92,000 for principal with interest on the sum she and her husband have advanced to finance the suit. This amount is admitted to be due. The Rajah of Tuni, seeing from such accounts as were furnished to him that very large sums, as he thought extraordinarily, large sums, had been paid to two vakils engaged for the plaintiffs in the suit No. 18 of 1903, objected to those items, and contended that these vakils had promised to act gratuitously, and that the sum paid should be recovered by action at law. He was proved to be wrong in this. It was shown that these vakils had not undertaken to work for nothing, but in addition to this he insisted that these alleged disbursements should, like every other disbursement, be vouched. In making this demand, he was, in their Lordships' view, perfectly justified by the terms of the agreement of 1907.

The Dewan of the Rajah of Tuni wrote to the settlor a letter dated the 19th January, 1908, stating that from the last credit and debit account sent by the latter on the 6th instant and from the like accounts sent earlier, it was seen that a sum of Rs. 10,450 was entered as day fees to Mr. R. Ry Bhupatiraju Raju and another sum of Rs. 2,165 was entered as fees to his brother contrary to the original arrangement, and that this sum should be recovered and expended for the future costs of the suit. It is then added: "In your credit and debit accounts you have not given details regarding some items. I shall write a letter soon about them. As soon as further money is required I shall send it as if this account of credits and debits had been settled." On the 28th January, 1908, the Rajah writes by this same Dewan the promised letter to the settlor. It deals with numerous items of the debit and credit accounts furnished by the latter, covering the period from May, 1906 to January, 1907, and dealing with an expenditure of Rs. 49,017.10.7, including a sum of Rs. 35,000 entered as given for pleaders' fees and lodging expenses, house rents, typing charges, costs of stamps, amounts deposited in Court, interest said to have

been paid by the settlor, expenses of clerks, &c. After this enumeration the following passages are to be found in the letter, " You have not, as per your agreement, yet sent the receipts and vouchers in token of the said sum having been paid to and received by the Madras vakils (already named). Please send the receipts and vouchers at once. You have also not given details regarding the amounts debited under lodging expenses and other sundry expenses, salaries, stamps, typing charges and rents. Please write details as to what period they were paid for and for what items they were paid and to whom they were paid."

A number of items including the vakils' fees appearing in the second credit and debit account for the period from January to August, 1907, are specifically mentioned, and it is expressly stated that the settlor has not sent receipts and vouchers from the persons to whom the sums mentioned are in the accounts stated to have been paid, and that unless the settlor sends these receipts and vouchers it is not possible for the Rajah of Tuni to settle the settlor's account of credits and debits, and that, moreover, he has not given details of the sums taken credit for. A number of small items are then dealt with and the settlor is informed that unless he furnishes details of these sums and receipts for them it is not possible to include them in the credit and debit account and to settle that account. The accounts covering the period from August, 1907, to the end of December of that year including credits and debits for a sum of Rs. 36,141.0.8 are then dealt with.

Credit is taken in this account for a sum of Rs. 27,000 stated to have been paid to the vakils already named. It is complained that vouchers are not sent for these alleged payments. The same applies to many named sums for which no details or vouchers have been given. Then came the following passages :—

> " Therefore, not only should you immediately send us the receipts and vouchers for vakils' fees and other items in respect of the three accounts of credits and debits, but also you should immediately furnish us with details for the items which bear no details. Though we had often requested your officials to furnish us with details, vouchers and receipts for the sums debited and though they promised to do so they have not as yet sent the same.
>
> " Though we had sent monies from time to time owing to confidence in you and on account of the urgent telegrams sent by you and your men for money stating that the suit will be spoiled, without your furnishing us then and there full particulars for the items in your credit and debit accounts and without sending us the receipts and vouchers for the several items ; you have not sent us up to date proper explanation for the items of credit and debit. This is not proper."

These demands made by the Rajah through his Dewan are not extravagant or unreasonable in their nature. They are not only those which he was by the letter of his agreement of the 14th August, 1907, entitled to make, but such as according to business methods and practices he would be entitled to make in any business transaction such as he had embarked upon.

On the same date, the 28th January, 1908, a letter is written to the settlor on behalf of the Rajah of Tuni by apparently another dewan referring to the credits taken for the sums paid to the two vakils, and winding up thus :—

> " If, before you spend this money, you give proper particulars for such of the items as regards which no details were given or with regard to which there are disputes in the credit and debit accounts sent by you, and also send receipts and vouchers for the remaining items, namely, fees for Madras vakils, etc., we shall verify them, and if we find them correct and proper, we shall send money if any more money is still wanted for the purpose of this suit.
>
> " Please to consider."

On the 14th February, 1908, the settlor replies to the Rajah's frequent demands for vouchers. In justice to the settlor the pregnant and important portions of this letter are set out especially that portion of it dealing with his excuse or rather justification for not furnishing to the Rajah the vouchers demanded. After praising himself for the way he has conducted the litigation and dwelling upon the difficulties he, the writer, had to encounter, he writes :—

> " While such is the case and while not even a half of the amount agreed to be expended for the suit has yet been spent and while you are liable yet to pay the entire amount for the expenses of the suit and though the arrangement is that you should not fail to spend the amount required for expenses in this Court, and though you are fully aware of the fact that, in the event of your failing to do so, the agreement would be cancelled you have, without sending money when required by us, written this letter concocting false and unnecessary reasons. I do not know what reply you expected to be given thereto. For the money spent previously, the necessary explanations, accounts of credit and debit and receipts bearing my signature have been sent. You need not question about accounts settled already nor is there any necessity for it. The last explanation and credit and debit accounts have been already sent. Without questioning it then, you are questioning it now entertaining something in your mind. If you wish to know the details hereof, I have no objection. Everything is clear from the accounts already furnished. When credit and debit accounts have been sent under my signature and on my responsibility I do not see proper reasons for the transaction being stopped."

This really means that no vouchers should be required or are needed for any items of expenditure entered in the credits and debits accounts he has seen fit to forward. It does not appear to their Lordships that matters of business are ordinarily conducted with such *uberrima fides* in accounting parties ; but however that may be it is not the manner in which by the letter and spirit of the agreement of the 14th August, 1907, the Rajah was entitled to have their business conducted and in which the settlor was to conduct it. The letter winds up thus :—

> " If you do not send money I shall take it that the agreement has not been acted up to and make other arrangements and conduct the suit as far as possible. Therefore I have made this fact known to you.
>
> " Please to consider."

The vouchers demanded were in fact never sent to the Rajah of Tuni. This letter, in their Lordships' view, amounts to a refusal to send them, coupled with an intimation that if money be not sent, though they should not be furnished in the first instance, he, the settlor, would treat the contract of the 14th August, 1907, as at an end and make other arrangements. The settlor was by the terms of this contract bound to send vouchers of his disbursements whether demanded by the Rajah or not. The course he adopted amounted to a distinct breach of that contract, a violation of the obligations it imposed upon him. On the 21st February, 1908, the Rajah of Tuni replied to this letter of the 14th of that month. His reply contains the following passages :—

> " We think that, having received so much money from us, you have, with some evil intention, written to us thus when the matter is about to terminate. According to the terms of the agreements you should furnish us with proper vouchers, receipts, and accounts for the total sum of about one lakh and odd sent to you previously. By merely stating that you have written and given explanations already and that you have sent receipts to the effect that you have received the sums sent to you from time to time, you cannot be deemed to have acted according to the terms of the agreement. You have acted in violation of the terms of the agreement and the oral conditions and in an unbusinesslike way. We are even now ready to send to you future money for just and necessary expenses."

The Rajah of Tuni never was furnished with even these vouchers. Not having been furnished with them he did not advance any more money to the settlor. He was, in their Lordships' view, amply justified by the provision of the agreement of 1907 in taking that course. The settlor being bound to furnish these vouchers, the Rajah might, if he wished, have taken this refusal to do so as a repudiation by the settlor of his contract, and have elected to treat the contract as at an end, but he did not do so; on the contrary he states explicitly in this last letter that if the vouchers justifiably demanded were not sent and on examination found correct, he would not send any more money which might be needed for the conduct of the suit. The agreement of the 14th of August, 1907, has not been put an end to, it still exists. It is hardly necessary to point out that a party to a contract cannot put an end to it simply by committing a breach of it. The High Court had apparently supposed that this agreement no longer existed and were led into error thereby, since the Rajah never elected to treat the settlor's breach as a repudiation of the contract terminating it, as he might have done.

The only remaining point to be dealt with is the construction put at pages 299 and 300 of the record on the last three paragraphs of the agreement of the 14th of August, 1907. The judgment of the High Court runs thus :—

> " The real difficulty arises from the use of the words ' moveable and immoveable properties obtained by *such* compromise ' in clause 12 of Exhibit B 1. In clause 9 a right is given to a twelfth of the property in case the whole of the expenses for the litigation in the first Court is borne by the

lender. The clause says, "It has been agreed that you should without fail meet all the expenses incurred in the Original Court." Then comes clause 10 which prohibits any compromise without the consent of the lender. Clause 11 stipulates for an enforceable compromise in case Mr. Krishnaswami Ayyar gave his assent to it. Then follows the expression in clause 12 which we have quoted. The words 'such compromise' can only refer to a compromise to which either the plaintiff's husband consented or which was brought about on the advice of Mr. Krishnaswami Ayyar. It is not disputed that in the present case the compromise which came into existence was not due to either of these two causes. The argument that although a compromise may be otherwise brought about, it was open to the plaintiff's husband to have accepted such a compromise because the provision for his assent and for Mr. Krishnaswami Ayyar's advice was for his benefit, does not meet the difficulty. The lien which is claimed is in respect of a property got under a particular compromise. Whatever may be the personal rights against the debtor, treating the money advanced as a loan, in order that the lien may fasten upon the compromise amount, it must have relation to the two contingencies provided for in the agreement. The specific property or the identifiable property on which the lien is sought to be attached is not the property which the parties contemplated by the agreement. We may state at once that we are in entire agreement with the contention of the learned vakil for the Respondent that the mere fact that only Rs. 93,000 out of the contemplated 2 lakhs was advanced would not derogate from the lien if it otherwise existed. . . . . But as we pointed out, the identity of the property is wanting as clause 12 creates a charge only on property secured by a compromise effected in one of the two ways suggested in the previous clauses. In this view our conclusion is that no lien was created over the money given by the plaintiff's husband. The theory that a lien on specific property would attach itself to the substituted property contemplates that the contract creating the original lien subsists. Granting for argument's sake that the lien on the compromise amount contemplated in clauses 10 and 11 will fasten itself upon the new compromise amount, the fact that before that compromise was affected, the parties had broken off relations would render this impossible.

The High Court treat the agreement embodied in paragraph 12 of the agreement of the 14th August, 1907, as one of those agreements dealing with property which at the time the contract was made was non-existent, which might never come into existence, but which, when it did come into existence would be operated upon by the agreement made before it existed. Their Lordships are not at all convinced that is the true view to take of this agreement of 1907 which must be considered as a whole. The main purpose and objects of its provisions are to finance a suit brought to establish title to an existing thing, an estate extending over a large portion of the earth's surface.

The point in controversy was not the existence or non-existence of that thing, but which of two adverse claimants was entitled to a vested interest in it, subject to a life estate in one of them. The fruits of success in this action which would be gathered in by a decree would be this vested remainder. The fruit of it which would be gathered in by a compromise might be something different, but in essence the same. What the agreement really does is to provide that the fruit, which may be either moveable

or immoveable property, shall be divided in certain shares between the parties to the agreement. The terms of the compromise might have been that one half, or some other portion of the trust property, had to be given to the defendant by the plaintiffs, or that jewels which had been the property of the defendant for years might be given to the plaintiffs: the two lakhs of rupees that he has given might all then have been in existence and in the defendants' possession, for years. No proof was given that the tenant for life was not possessed of this 2½ lakhs of rupees, kept in his safe, or packed in his money bags long before the year 1907. On the face of clause 12 its language points rather to existing things than to non-existing things, and the agreement embodied in it is entirely different in its nature and character from an agreement assigning for a certain sum what, for instance, some relative might leave a contracting party, but who might never leave him anything whatever. In India, of course, champerty or maintenance is not illegal. In *Glegg* v. *Bromley* [1912], 3 K.B., 479, 490, Mr. Justice Parker, as he then was, stated the law upon this point, as was his custom, with great clearness and precision. In that case, according to the head note, one Mrs. G. was plaintiff in an action against one H. for false representation. She was also plaintiff in an action for slander against Lady Bromley. She was at the time greatly indebted to her husband, and she executed in his favour a deed of assignment whereby, after reciting that he had requested her to give him further security, which she had agreed to do, she assigned to him, "all that the interest sum or premises that she is or may become entitled under or by virtue of any verdict, compromise or agreement which she may obtain or to which she may become a party in or consequent upon the said action (*i.e., Glegg* v. *Bromley*) or otherwise howsoever, under or by reason of the same to hold the same . . . subject to redemption on payment of the money due to him." Both actions proceeded, that against H. resulting in a verdict for the defendant, with costs amounting to £218. That against Lady Bromley resulted in a verdict for the plaintiff Mrs. G. for £200 with costs. H. then took garnishee proceedings against Lady Bromley to attach this sum of £200, and Mrs. G.'s husband also claimed it under his assignment. It was held that the assignment was not an assignment of a mere expectancy or of a cause of action, but was an assignment of property that is of the fruit of an action as and when recovered, and that it was consequently not void under 13 Ez. c. 5.

There is no distinction, and can be no distinction on this point between the fruits of an action which the plaintiff gets by compromise and the fruits he would receive by a decree or verdict in his favour. At page 490 Mr. Justice Parker is reported to have said :—

> "It is to be observed that an equitable assignee of a chose in action whether it is legal or equitable could institute proceedings and maintain proceedings for its recovery. The question was whether the subject-matter of the assignment was in the view of the Court property with an incidental remedy for its recovery or was a bare right to bring an action either at law

> or in equity. With regard to the assignments of future property they stand I think, on a totally different footing. Nothing passes, even in equity until the property comes into present existence. Only when this happens can the assignment attach and an interest pass . . . . . Even a solicitor who is conducting an action or suit may take a mortgage on the fruits for the purpose of securing the payment of his proper costs. He may not be able to purchase an interest in such fruits because of the doctrine of champerty."

In their Lordships' view the agreement embodied in paragraph 12 of the agreement of the 14th August, 1907, is an agreement by the plaintiffs to assign to others part of the fruits they may acquire in an action at law and therefore perfectly legal. Besides if even the money given to the plaintiffs in the compromise was a non-existing thing at the date of the agreement and only came into existence at the date of the compromise decrees the agreement of 14th August, 1907, which is still in existence, not terminated as the High Court erroneously supposes attaches to the things so coming into existence subsequently

It is not very clear what the High Court means by the words "identity of the property" in the last of these passages. If the consent to the compromise by the two persons named in paragraph 12 of the agreement had the effect of transfusing into the property the parties might receive under it some quality, or attached to it some quality, then this language might be appropriate enough, but obviously their consent, if given, could not have any such effect. The property mentioned in paragraph 12 is of a universal and not of a special character.

The words are "moveable or immoveable property" which may be obtained by such compromise. That includes almost every conceivable kind of property, and the words of this paragraph would be satisfied if half the estate sued for, or another estate or the jewels of the tenant for life deposited in his safe, and the money packed in his money bags had been awarded under the compromise.

In the construction of written or printed documents it is legitimate in order to ascertain their true meaning, if that be doubtful, to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply. The litigation which was to be compromised was instituted in the year 1903. It had hung fire for four years when this agreement of the 14th August, 1907, was executed. The decision of the case in the original Court was not made till the year 1908. The appeal to the High Court was not lodged till the year 1909, and the compromise was not decreed till the 12th May, 1913. The plaintiffs in the suit and presumably their vakil knew all about these delays. The Rajah of Tuni, when he became a party to the agreement of 22nd May, 1906, must have also become aware of the negotiations out of which that agreement sprung and by the agreement itself of these delays ; unless these persons were all devoid of intelligence they must, thus forewarned, have anticipated that somewhat similar delays might occur in the

future, and yet they are by the High Court taken to have provided expressly and with clearness that, unless the Rajah of Tuni if not the vakil also lived long enough to be able to consent and to consent to the compromise referred to in the clause, no compromise could be arrived at.

For in paragraph 10 it is expressly provided that the plaintiffs in the suit will not make any compromise "without your consent" which means of course the Rajah of Tuni's consent. In their Lordships' view, having regard to the above-mentioned fact, the construction of these three clauses, 10, 11 and 12 of the agreement of the 14th August, 1907, which would make the giving of the consent of the Rajah of Tuni, and of the vakil named, a condition precedent which must be performed before any compromise could be validly made, is not their true construction. Both these men died in the year 1911. Having regard to the uncertainty of human life, which contracting parties when providing for possible future events must be presumed to bear in mind, it would be unbusiness-like and indeed irrational, if not absurd, for the parties in August, 1907, to have entered into such a contract as the High Court have construed this contract to be. Whereas it would be quite businesslike, quite rational and perhaps prudent for them to have entered into it if the things required to be done under it should only be required to be done where it was possible to do them. In their Lordships' view it is reasonably certain that parties to this agreement intended that this is what it should mean, and that therefore a term must be implied to exist in it, to the effect that the consent mentioned should be given when possible, and that the giving of consent of the Rajah himself to a compromise accepted by his representatives was not such a condition precedent when it had become impossible for himself to give it. Their Lordships are therefore of opinion that the decree appealed from was erroneous and should be reversed with costs and the decree of the Subordinate Judge should be restored and they will humbly advise His Majesty accordingly.

The first, fifth and sixth respondents must pay the costs of the appeal.

In the Privy Council.

SRI RAJAH VATSAVAYA VENKATA
SUBHADRAYYAMMA JAGAPATI BAHADUR GARU

v.

SRI POOSAPATI VENKATAPATI RAJU GARU
AND OTHERS

DELIVERED BY LORD ATKINSON.

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