T. S. SWAMINATHAUDAYAR

v.

THE OFFICIAL RECEIVER OF WEST TANJORE.

1957

March 27.

(BHAGWATI, JAFER IMAM and A. K. SARKAR JJ.)

Partition Suit—Decree for owelty—Absence of express declaration of charge—Charge, if created by necessary implication—Priority.

Per BHAGWATI and IMAM JJ. A decree for payment of owelty money by one co-sharer to another in a Partition suit, even where it does not expressly declare a charge, creates one by necessary implication in favour of the latter or the property allotted to the former and such charge on lien has precedence over prior mortgagees of such property.

Shahebzada Mohommed Kazim Shah v. *R. S. Hill*, I.L.R. (1907) 35 Cal. 388 and *Poovanalingam Servai* v. *Veerai*, A.I.R. (1926) Mad. 166, referred to.

Consequently, in a case where the final decree in a Partition Suit passed by the High Court in appeal provided for payment of owelty money by one co-sharer to another and at the instance of the Official Receiver in Insolvency, in whom the estate of the former had vested, instead of expressly declaring a charge authorised him to pay the owelty from out of the sale proceeds of the property, the judgment-creditor of the co-sharer liable for owelty in respect of decrees previously obtained by him could claim no priority and the High Court, taking an erroneous view of the law and relying on a previous judgment of that Court passed in the creditor's appeals, set aside in appeals preferred by the Official Receiver the orders of the District Judge refusing his applications for refund of sale-proceeds deposited in Court to the credit of the decree-holder co-sharer and for restitution under s. 144 of the Code of Civil Procedure of the monies actually paid to him under the partition decree, the orders of the High Court must be set aside.

Per SARKAR J. Whether the final decree had or had not created a charge over the insolvent's share for such sums as it directed the Receiver in insolvency to pay to the co-sharer that could not affect the Receiver's liability to pay thereunder and while the decree subsisted he was not entitled to claim restitution of such monies as he had paid in terms thereof on the ground that no charge had been created nor any other claim to priority existed.

The rights of the co-sharer decree-holder who had obtained the decree against the Receiver himself stood on a different footing from those of a creditor of the insolvent and he could not, like the latter, be compelled to accept a dividend on the distribution of the insolvent's assets.

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CIVIL APPELLATE JURISDICTION : Civil Apppeals Nos. 251 to 253 of 1953.

Appeal from the judgment and order dated February 8, 1950, of the Madras High Court in A.A.O. Nos. 724 to 726 of 1945 preferred against the orders dated July 14, 1945, of the Court of the District Judge, West Tanjore in E.P. No. 35 of 1944 and E.A. Nos. 195 and 182 of 1944 respectively in E.P. 15 of 1940 in O.S. No. 22 of 1934 on the file of the Court of Sub-Judge, Kumbakonam.

N. S. Chonpakesa Aiyangar and *S. Subramanian*, for the appellant.

The respondent did not appear.

1957. March 27. The Judgment of the Court was delivered by

Bhagwati J.

BHAGWATI J.—These appeals with certificates of fitness under art. 133 of the Constitution raise an interesting question as to the equities arising out of a partition between the erstwhile members of a joint family.

A suit for partition of the properties belonging to a well known Odayar family in the West Tanjore District was filed in the Court of the Subordinate Judge of Kumbakonam (being Original Suit No. 22 of 1924). Amongst the parties to that suit were defendants Nos. 3 and 6, Balaguruswami Odayar and Swaminatha Odayar respectively, the former of whom is the natural father of the latter, who went by adoption into another branch of the family. Defendant No. 6 was entitled to a 4/15th share and defendant No. 3 was entitled to a 2/15th share in the properties belonging to the joint family. A preliminary decree for partition was passed on October 25, 1924. The defendant No. 3 became insolvent during the pendency of an appeal which was taken against that preliminary decree. The Official Receiver of West Tanjore who represented the branch of the 3rd Defendant was impleaded as a party to the suit on February 12, 1929. The final decree for partition was passed on September 26, 1932, by the Subordinate Court at Kumbakonam. Defendant No. 6 carried

an appeal to the High Court of Judicature at Madras being A. S. No. 60 of 1933 and the High Court ultimately passed a final decree on May 9, 1938.

Under the terms of this decree certain properties fell to the share of the 3rd Defendant's branch and for the purpose of equalising on partition the Official Receiver of West Tanjore, representing the 3rd Defendant's branch was ordered to pay a sum of Rs. 24,257-0-8 to the Defendant No. 6. This amount was to carry interest at 6 per cent. per annum from September 26, 1932, and there were various adjustments ordered *inter se.* It was further ordered that the Official Receiver of West Tanjore in whom the estate of the 3rd Defendant's branch was vested should sell such portions of the estate as were not subject to the charge for the maintenance of the 9th Defendant in order to pay off the amounts decreed to be paid by the third Defendant and should make payments on behalf of the 3rd Defendant's branch in accordance with the judgment therein.

The last direction was given by the High Court in C.M.P. No. 5697 of 1939 substituting the words "be at liberty" in paragraph 4(b) of the decree in A.S. No. 60 of 1933 by the words "be directed" and incorporating the words "third Defendant's Branch" wherever the words "third Defendant" had been used in that paragraph. The occasion for the giving of this direction was that after the final decree for partition had been passed by the High Court on May 9, 1938, the parties applied to the High Court to give directions for working out their rights *inter se.* When these directions came to be given the Official Receiver of West Tanjore was present in Court and stated to the Court that he had no objection to sell such portions of the estate as would be sufficient to pay off the amount declared due by the third Defendant's branch to the Defendant No. 6. It was in pursuance of such statement made by the Official Receiver of West Tanjore that the High Court did not declare a charge on the properties which had fallen to the share of the third

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Defendant's branch (as it was originally contemplated in the judgment) for the amount of Rs. 24,257-0-8.

The Official Receiver of West Tanjore had in the meanwhile sold on July 5, 1935, certain items of properties which had fallen to the share of the 3rd Defendant's branch and realised a sum of Rs. 8,250. On January 25, 1940. the Defendant No. 6 who is the appellant before us filed a petition under O. 21 r.11 Sub-r. (2) of the Civil Procedure Code being E.P. No. 15 of 1940 praying that the Court should direct the Official Receiver of West Tanjore representing the 3rd Defendant's branch (the respondent before us) to pay to him or to deposit into court Rs. 8,250 for the realization of Rs. 36,983-9-6 which was the amount due to him from the third Defendant's branch inclusive of interest as per the decree of the High Court dated May 9, 1938, in A.S. No. 60 of 1933. The respondent did not oppose this claim of the appellant at that stage. Two other decree-holders, one Thinnappa Chettiar and the other Palaniappa Chettiar had obtained decrees against Defendant No. 3 and Defendant No. 4 on promissory notes executed by the latter on date March 14, 1925 the decree in favour of Thinnappa Chettiar being dated August 15, 1929, and that in favour of Palaniappa Chettiar being dated July 17, 1928. On July 3, 1935, Thinnappa Chettiar filed a petition under O. 29. r. 11(2) 54, 62, 66, of the Civil Procedure Code being E. P. No. 25 of 1935 praying for the realisation of Rs. 35,224-2-6 by attachment and sale of immovable properties belonging to his judgment-debtor. On July 4, 1935, he attached the shares of the sons of the Defendant No. 3 and Defendant No. 4 in these immovable properties but in so far as the attachment was not levied the sales effected by the respondent on July 5, 1935, of the properties falling to the share of the third Defendant's branch were upheld. On September 30, 1935, Thinnappa Chettiar filed an application being E.A. No. 376 of 1935 under section 151 of the Civil Procedure Code praying that a sum of Rs. 6,600 realised after the order of attachment obtained by him as aforesaid be sent for from the respondent and paid to him by means

of a cheque. E. P. No. 25 of 1935 and E.A. No. 376 of 1935 were dismissed by the District Judge on August 14, 1937. Thinnappa Chettiar filed A.A.O. Nos. 349 & 350 of 1937 against these orders of the Dist. Judge and on August 10, 1939, the High Court holding that the leave of the Insolvency Court was not necessary before these proceedings in execution had been taken, remanded both E.P. No. 25 of 1935 and E.A. No. 376 of 1935 to the District Court for disposal according to law. The learned District Judge, in order to avoid conflict of decisions and to save difficulties of multiplicity of proceedings allowed the appellant to be made a party in E.P. No. 25 of 1935 and E. A. No. 376 of 1935 and Thinnappa Chettiar was made a party to the proceedings in E.P. No. 15 of 1940. The learned District Judge passed a comprehensive order in all these three matters, viz., E.P. No. 25 of 1935, E.A. No. 376 of 1935 and E.P. No. 15 of 1940 which came up for hearing before him. He held that even though the word charge, as such had not been used in the High Court's decree in A.S. No. 60 of 1933, the directions given by the High Court to the respondent, under the circumstances of the case, created a charge on the properties which fell to the share of the third Defendant's branch. This was the basis of the petition which had been filed by the appellant being E.P. No. 15 of 1940 and the learned District Judge observe, "This direction must be deemed to have been certainly made in favour of the 6th Defendant in order to see that he is paid the amount decreed in his favour by a Court Official who had the possession of the properties and with such guarantee the High Court probably thought that it was quite unnecessary to expressly state that a charge has been created over these properties."

The learned District Judge accordingly directed the respondent to deposit into Court to the credit of E.P. No. 15 of 1940 the sale proceeds in question, viz., Rs. 8,250, minus his legitimate expenses for payment to the appellant. E.A. No. 376 of 1935 was dismissed with costs of the respondent and E.P. No. 25 of 1935 was adjourned to January 21, 1942, for further pro-

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ceedings with regard to other lots of properties. Thinnappa Chettiar filed appeals against these orders being A.A.O. Nos. 229, 429 and 483 of 1942 in the High Court.

In the meanwhile, on January 9, 1942, the respondent deposited a sum of Rs. 5,200 in Court to the credit of the appellant's decree. On February 5, 1940, the learned District Judge made a further order allowing the respondent to sell the properties which he was directed to sell by the High Court's order dated May 9, 1938, in A.S. No. 60 of 1933, to pay the petitioner as directed by the High Court notwithstanding the attachment as was ordered in E.P. No. 25 of 1935 and free of that attachment. On May 11, 1942, a sum of Rs. 5,500 being the sale proceeds of certain properties belonging to the share of the 3rd Defendant's branch was adjusted by the appellant and on January 23, 1940, the respondent paid to the appellant a further amount of Rs. 26,966 adjusting a further sum of Rs. 11 for costs due by the appellant.

The High Court disposed of the A.A.O. Nos. 229, 429 & 483 of 1942 on November 5, 1943. It held that the procedure adopted by the learned District Judge of impleading strangers as parties to the execution petition and the execution applications before it could not be supported and ordered that the appellant and Thinnappa Chettiar should be deleted from the array, of parties in E.P. No. 25 of 1935, E.A. No. 376 of 1935 and E.P. No. 15 of 1940. It also held that no charge was created by the decree dated May 9, 1938, in A.S. No. 60 of 1933 in respect of the sum of Rs. 24,257-0-8 awarded to the appellant under the decree. It observed that "It is clear from the language used that the learned judges who disposed of A. S. No. 60 of 1933 did not intend to create a charge and the decree did not have the legal effect of creating a charge." In the result, the High Court ordered that the name of Thinnappa Chettiar should be struck out from the array of parties in E.P. No. 15 of 1940 and the name of the appellant should be struck out from the array of parties in E.P. No. 25 of 1935 and E.A. No. 376 of 1935 and further ordered that all the three

applications be remanded to the lower Court for disposal on the merits in the light of the observations contained in the order.

As a result of the decision of the High Court negativing the appellant's claim to priority, the respondent field on July 29, 1944, E.A. No. 182 of 1944, praying that the Court do issue a cheque for Rs. 5,200 deposited by him on January 9, 1942. On the 7th August, 1944, the appellant, in his turn, filed an Application being E.A. No. 195 of 1944 praying that the Court do issue a cheque for Rs. 5,200 deposited by the respondent as due to him under the decree dated May 9, 1938. While these applications were pending, the respondent filed a petition, being Execution Petition No. 35 of 1944, on September 27, 1944, under ss. 144 and 151 and O.21 r. 11 and 37 of the Civil Procedure Code praying that the Court do order payment by the appellant to him of (1) the sum of Rs. 5,200 deposited by him in Court on January 8, 1942, and claimed by him in E.A. No. 182 of 1944 ; (2) sale proceeds adjusted by the appellant on May 11, 1942, together with interest thereon at 6 per cent. per annum from May 11, 1942, aggregating to Rs. 6,283-12-0 ; (3) the amount paid on June 23, 1942, by the appellant being Rs. 26,966 and (4) the amount adjusted by the respondent for costs due by him on June 23, 1942, being Rs. 11, items 3 and 4 aggregating to Rs. 26,977 together with interest thereon from June 23, 1942, up to date at 6 per cent. per annum amounting to Rs. 3,722-13-6. Thus he claimed a sum of Rs. 42,183-9-6 in the aggregate from the appellant.

All these matters—E.A. No. 182 of 1944 and E.A. No. 195 of 1944 and E.P. No. 35 of 1944 were heard by the District Judge on July 14, 1945. The learned District Judge understood the order of the High Court dated November 5, 1943, to mean that the claim of the appellant to priority was still to be adjudicated upon. He stated that all that had been held by the High Court was that the decree in A.S. No. 60 of 1933 did not have the legal effect of creating a charge in favour of the appellant and the question whether the appellant was not entitled to priority in respect of

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his claim was not concluded by that decision, since it depended upon the circumstances and situation of parties in the first litigation itself (*i.e.*, O.S. No. 22 of 1924, Sub-Court, Kumbakonam and A.S. No.60 of 1933, High Court) and the reasons which then led the Official Receiver, who was present when the order was made in A.S. No. 60 of 1933 to submit that "he was prepared to sell such parts of the estate as might be necessary for satisfying the decree passed in favour of the appellant." On scrutinizing these facts, the learned District Judge came to the conclusion that in respect of the sums due to him under the partition decree, directed to be paid from the estate of the third Defendant's branch as equitable adjustment, the appellant had really a superior title and, assuming for a moment that the direction related instead to a specific item of immovable property, it was obvious that such an item would not have formed part of the estate in insolvency at all. In the result he held that the respondent was not entitled to restitution in respect of the payments made and the appellant was clearly entitled to such amounts, and also to the amount then in deposit since the estate in insolvency did not itself comprise these assets in the strict legal sense. The applications E.P. No. 35 of 1944 and E.A. No. 182 of 1944 were accordingly dismissed. E.A. No. 195 of 1944 was allowed and the appellant was declared entitled to the amount deposited in Court.

The respondent carried appeals to the High Court against these orders of the District Judge being A.A.O. Nos. 724, 725 and 726 of 1945. The High Court appreciated the force of the arguments advanced before it on behalf of the appellant but felt itself bound by the construction put upon the judgment and decree by the High Court on November 5, 1953, observing that even if that construction were not strictly binding on it as a decision on a pure question of law in the nature of a judicial precedent by another Division Bench of that Court would undoubtedly be, it would feel highly loath to deny it the respect to which it was entitled at its hands in the interests of judicial comity,

whatever be the construction which it would have imposed upon the same, had the question arisen for the first time before it. It, therefore, held that the appellant was debarred by the principles of constructive res-judicata from raising other grounds of priority or preference after remand which had no relation to the decree which was the basis of the E. P. No. 15 of 1940. The High Court also expressed the opinion that even assuming there was no res-judicata in his favour, the provisions of the Provincial Insolvency Act being what they were, the appellant could claim no priority if his position as a secured creditor as defined in s. (2) (e) of the Act could not be sustained. A further argument was advanced before the High Court and it was that a provision in a partition decree for a mere payment by one co-sharer to another of a sum of money for equalisation of shares *per se* constituted a charge by operation of law over the share allotted to the sharer made liable for the payment without any creation of charge by the Court by express language or necessary implication. The High Court refused to entertain that argument in view of the conclusion reached by it as above and also negatived the contention which was urged on behalf of the appellant before it that the provision for such payment in the partition decree was an "owelty provision" observing that all that was meant was equality and all that the expression "owelty provision" in the context implied was a provision for adjustment or equalization of shares and no more. The High Court accordingly came to the conclusion that the respondent was entitled to the restitution sought by him and allowed the appeals with costs before it and in the Court below. The order of the learned District Judge was set aside, and E. P. No. 35 of 1944 and E. A. No. 182 of 1944 were allowed and E. A. No. 195 of 1944 was dismissed.

The appellant applied for and obtained from the High Court certificates of fitness under Art. 133 of the Constitution and that is how these appeals are before us.

The principal question which arises for our determination in these appeals is what was the nature of

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the rights acquired by the appellant in regard to the payment of Rs. 24,257-0-8 and interest by the respondent as representing the 3rd Defendant's branch under the terms of the decree dated May 9, 1938, in A.S. No. 60 of 1933.

It must be remembered that the decree was one for partition of the properties belonging to the joint family of which the Defendant No. 3 and the appellant were coparceners. While effecting such a partition it would not be possible to divide the properties by metes and bounds, there being of necessity an allocation of properties of unequal values amongst the members of the joint family. Properties of a larger value might go to one member and properties of a smaller value to another and, therefore, there would have to be an adjustment of the values by providing for the payment by the former to the latter by way of equalisation of their shares. This position has been recognized in law and a provision for such payment is termed "a provision for owelty or equality of partition". The following passage from Story on Equity (Third Edition) page 277, para. 654, describes what happens on a partition :—

"In regard to partitions, there was also another distinct ground upon which the jurisdiction of courts of equity was maintainable, as it constituted a part of its appropriate and peculiar remedial justice. It is, that courts of equity were not restrained, as courts of law were, to a mere partition or allotment of the lands and other real estate between the parties according to their respective interests in the same, and having regard to the true value thereof ; but courts of equity might, with a view to the more convenient and perfect partition or allotment of the premises, decree a pecuniary compensation to one of the parties for owelty or equality of partition, so as to prevent an injustice or avoidable inequality."

Lawrence on Equity Jurisprudence (1929), Vol. II pp. 1227, 1228, s. 1147, also contains the following passage :—

"The ordinary method of partition is to decree a physical severance of the separate interests, no sa

being authorised unless a fair partition is otherwise impossible, or at least prejudicial. There was no power of judicial sale at common law. The Court ordering physical partition may make its decree effective by compelling mutual conveyances by the parties of their respective interests. Owelty of partition may be awarded to equalize the shares of the parties, and may be decreed to be a lien on the excessive allotment. Though only when necessary to a fair partition, and it should be employed as little as possible."

This position has been summarized in Freeman's Cotenancy and Partition (1886 Edition) page 676, para. 507, under the caption of "Owelty" :—

"*Owelty*" :—"When an equal partition cannot be otherwise made, courts of equity may order that a certain sum be paid by the party to whom the most valuable property has been assigned. The sum thus directed to be paid to make the partition equal is called "owelty". It is a lien on the property on account of which it was granted. "The law cannot contemplate the injustice of taking property from one person and giving it to another without an equivalent, or a sufficient security for it." The lien for owelty has precedence over prior mortgages and other liens existing against the cotenant against whom the owelty was awarded."

It is significant to note that this provision for owelty is construed as a lien which the co-sharer who is awarded owelty is deemed to acquire on an excessive allotment of property to the other co-sharer. Owelty in general and lien therefor are thus described in Corpus Juris Secundum, Vol. 68, s. 15 :—

"*Section* 15. *Owelty and Lien Therefor*

(a) In General.

(b) Liens.

(a) *In General.*

The parties to a voluntary partition may agree to pay owelty to equalise the shares allotted.

Owelty is the difference which is paid or secured by one coparcener or co-tenant to another for the purpose of equalizing a partition. The power to award

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owelty has, from the earlier times, been regarded as necessary to the act of partitioning property ; and the parties to a voluntary partition may agree to the payment of owelty in order to equalize the shares allotted ; and, where the matter of making the partition is delegated to commissioners, they have the power to award owelty as a necessary incident to the partition.

(b) *Liens.*

An agreement for owelty in a voluntary partition of land ordinarily creates a lien or charge on the land.

An agreement for owelty ordinarily creates a lien or charge on the land taken under the partition, and this lien may exist because of an express agreement between the parties providing for it or it may be implied in the absence of such express agreement."

It therefore follows that when an owelty is awarded to a member on partition for equalization of the shares on an excessive allotment of immovable properties to another member of the joint family, such a provision of owelty ordinarily creates a lien or a charge on the land taken under the partition. A lien or a charge may be created in express terms by the provisions of the partition decree itself. There would thus be the creation of a legal charge in favour of the member to whom such owelty is awarded. If, however, no such charge is created in express terms, even so the lien may exist because it is implied by the very terms of the partition in the absence of an express provision in that behalf. The member to whom excessive allotment of property has been made on such partition cannot claim to acquire properties falling to his share irrespective of or discharged from the obligation to pay owelty to the other members. What he gets for his share is, therefore, the properties allotted to him subject to the obligation to pay such owelty and there is imported by necessary implication an obligation on his part to pay owelty out of the properties allotted to his share and a corresponding lien in favour of the members to whom such owelty is awarded on the properties which have fallen to his share.

Not only is this the normal position on a partition decree where there is an unequal distribution of properties among the members of the joint family but even where an encumbrance has been created on a member's share before the partition is effected, the encumbrancer is postponed to the member to whom such owelty is awarded under the partition decree. A lien or a charge created in favour of a member in regard to such owelty obtains precedence over an encumbrance and there are authorities to show that such lien or charge has priority over an earlier mortgage.

The following passage from Mitra on the Law of Joint Property & Partition in British India, Second Edition, page 414, enunciates the above position :

"You will note that sums directed to be paid for the purpose of equalizing the values of the shares are in legal language called "owelty". The Commissioners have no authority without express authorization by the Court to award this compensation. (See Rule 14, O.XXVI, C.P. Code). Where in a suit for partition the decree of the Court declares that any sum of money should be paid as owelty by one co-sharer to another the court may direct such sum to be a charge on the share allotted. In such a case should the co-sharer before partition have created any mortgage in respect of his undivided interest prior to the partition, the charge for the owelty will have precedence over the mortgage. Shahebzada Mohammed Kazim Shah v. R. S. Hill (1907) I.L.R. Cal. . 388."

To the same effect is the passage in Mulla's Transfer of Property Act (4th Edition) at page 211 :

"The lien of a co-sharer for owelty money on partition is entitled to precedence over prior mortgagees of property allotted to the co-sharer who is liable to pay owelty."

Shahebzada Mohommed Kazim Shah v. *R. S. Hill* (1) was a case where the appellants had been awarded two sums of Rs. 37,000 and Rs. 9,500 by way of owelty on partition. At the date of the partition there was

(1) I.L.R. (1907) 35 Cal. 388, 392, 393.

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subsisting a mortgage on a portion of the property which was the subject-matter of partition and the question arose whether the amounts awarded by way of owelty on partition were entitled to priority over the mortgagees. It was observed by Maclean C. J. in his judgment :—

"Then arises the question of priority. To determine that question it becomes necessary to ascertain what was the substituted property which the mortgagor took under the partition. It is clear that all he took was the house No. 52-2 Park Street, subject to the charges of Rs. 37,000 and Rs. 9,500 in favour of the appellants ; and it can only be upon that, that the Roy mortgagees can rank as mortgagees, that is, upon No. 52-2 Park Street subject to the charges created by the decree."

Stephen J., who delivered a short but concurring judgment added :

"It is quite plain that the appellant's claim, which is a charge upon the property, constitutes a deduction from the corpus of the property and is not affected by any dealings with the possession of the property on which the decision of the Judge of the Court of the first instance is based."

There was no doubt on the facts of this case a charge expressly created in favour of the co-sharer who had been awarded owelty but that in our opinion does not make any difference to the position. The moment there is a provision for such owelty made in a partition decree, the member in whose favour that provision has been made is entitled to a lien or a charge over the property which has fallen to the share of the member to whom property of a higher value has been allotted. If such a lien or a charge is expressly declared, so far so good but even if it is not so expressly declared, there is by necessary implication the creation of a lien or a charge in his favour for the amount of such owelty.

This case was followed in *Poovanalingam Servai* v. *Veerai*(1) where Phillips J. observed as follows :

"There can be no doubt that in a partition suit all equities between the members of the coparcenary

(1) A.I.R. (1926) Madras 166.

should be worked out allotting to each member the share to which he is equitably entitled."

After quoting the passage from Freeman's Co-tenancy & Partition set out above, the learned Judge further observed :

"Even if there is no legal charge in the present case, yet on equitable principles such a charge can be enforced and when it comes to partitioning the property between two co-tenants, this equity should in my opinion be enforced."

The High Court in passing the order dated November 5, 1943, initially went wrong in holding that no charge was created in favour of the appellant under the terms of the decree dated May 9, 1938, in A.S. No. 60 of 1933. No doubt the legal advisers of the appellants were responsible for this result in so far as they invited the Court to construe the decree as creating an express charge in favour of the appellant. No such express charge could be spelt out of the terms of the decree and in so far as the High Court came to the conclusion that no such express charge was created in favour of the appellant, it was undoubtedly correct. But, at the same time, the High Court should have considered whether by reason of the provision for owelty contained in the terms of that decree, there was, under the circumstances, by necessary implication a lien or a charge created in favour of the appellant for the payment of the sum of Rs. 24,257-0-8 and interest out of the properties falling to the share of the third Defendant's branch and therein the High Court fell into an error.

This error was again repeated by the High Court while passing the orders under appeal in A.A.O. Nos. 724, 725 and 726 of 1945. The question which the High Court ought to have addressed to itself was whether in spite of the fact that no express charge was created in favour of the appellant under the terms of the decree dated the 9th May, 1938, in A. S. No. 60 of 1933 for the payment of Rs. 24,257-0-8 and interest out of the properties falling to the share of the 3rd Defendant's branch, there was by necessary implication a lien or a charge created for payment of that sum by reason

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of the provision for owelty having been made in favour of the appellant by way of equalization on partition. Even if no express charge was created there was in equity a lien or a charge created on the properties falling to the share of the third Defendant's branch and he did not acquire the properties which fell to his share on such partition irrespective of or discharged from the obligation to make payment of such sum out of the same. The appellant was, in our opinion, entitled to payment of the sum of Rs. 24,257-0-8 and interest out of the properties which fell to the share of the third Defendant's branch on partition and which came to the possession of the respondent by reason of the insolvency of Defendant No. 3.

This position was rightly appreciated by the learned Dist. Judge when he passed orders in favour of the appellant on July 14 1945. The following passage from his judgment, in our opinion, truly reflects the position as it obtained between the appellant and the respondent :

"When we scrutinize these facts, the conclusion is inevitable that the claim of the Respondent to the present amounts stands even higher than on the basis of the priority of a charge created in insolvency administration, whether by virtue of a "security", a charge created by an act of Court or a "lien" arising from the operation of any law or statute. In fact, it could be contended with great force that the estate in insolvency which vested in the hands of the Official Receiver consisted of certain immovable properties *minus* the sum directed to be paid to the present Respondent by the sale of available portions of the estate as undertaken by the Official Receiver himself. This was because O. S. No. 22 of 1924 on the file of the Kumbakonam Sub-Court was a suit of partition in which the present Respondent was a sharer and partner, exactly as the 3rd Defendant's branch represented another share. In decreeing the suit, equities arose for adjustment as between the several sharers, and it was found that the 3rd Defendant's branch was liable to the present Respondent in respect of certain overdrawals of the 3rd Defendant during

the minority of the Respondent, and for certain lease amounts due. The Official Receiver represented the 3rd Defendant's branch in the appeal, since the insolvency had supervened. The matter wold at once be cleared from difficulty if we assume that the decree had dealt with actual sums of money instead of immovable properties. It will be obvious, in such a case that the estate which would have vested in the Official Receiver after the Appellate decree, for administration in Insolvency, would be the amount or amounts assigned to the branches of the 3rd Defendant and plaintiff at partition, as shares, deducting amounts payable to other co-sharers including the present Respondent. Merely because the estates actually consisted of immovable properties while the claim of a co-sharer like the present Respondent to an adjustment on grounds of equity, was recognized in the form of a direction to pay, by sale of a necessary portion of the estate, the central fact of the situation is not changed. In other words, the present respondent cannot be really classed as a creditor of the insolvent's branch at all. In respect of the sums due to him under the partition decree, directed to be paid from the estates of the Plaintiff and 3rd Defendant as equitable adjustment, he has really superior title, and, assuming for a moment that the direction related instead to a specific item of immovable property, it is obvious that such an item would not have formed part of the estate in insolvency at all. As Mr. T. S. Krishnamurthi Ayyar for the Official Receiver has frankly conceded, it is a well-known principle that in suits for partition the shares are first assigned upon the simple basis of division for administrative convenience, claims *inter se* being worked out by specific directions for payment. Nevertheless, in law and in fact, the shares actually derived by the parties to the suit are those subject to or qualified by the directions made in adjustment."

If this was the true position as it obtained, and we are of the opinion that it was, then, the orders under appeal passed by the High Court were clearly wrong. There was no justification for the respondent to ask

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for a withdrawal of the sum of Rs. 5,200 which he had earlier deposited into Court on January 9, 1942, or for the restitution of the sums of Rs. 5,500 and Rs. 26,966 and Rs. 11 together with interest thereon as claimed. These monies had been paid by the respondent in pursuance of the directions contained in the decree dated May 9, 1938, in A. S. No. 60 of 1933 and they had been rightly paid by him and they could never be the subject-matter of any execution proceedings as initiated by him. Apart from the question whether s. 144 read with s. 151 of the Civil Procedure Code was at all applicable in the circumstances of this case, we are of the opinion that the claim made by the respondent for the aforesaid sums was absolutely unjustified. We are accordingly of the opinion that the orders passed by the High Court in A. A. O. Nos. 724, 725 and 726 of 1945 were wrong and should be reversed.

The respondent wrote on November 21, 1953, to the Registrar of this Court to say that none of the creditors had come forward to finance the defence of the appeals and the Insolvency Court, *i.e.*, the Sub-Court, Tanjore had ordered that the matters might be left undefended as the funds in the estate were insufficient to defend the appeals at the cost of the estate. He, therefore, requested that when the appeals were heard and decided a direction might be given by this Court that there should be no order for costs against him. We do not see how we can absolve the respondent from liability to pay the costs which must normally follow the event.

We accordingly order that the appeals will be allowed; the E. P. No. 35 of 1944 and E. A. No. 182 of 1944 will stand dismissed; E. A. No 195 of 1944 will be allowed; and the respondent will pay the appellants' costs of these proceedings throughout in this Court as well as in the courts below .

This separate Judgment of the Court was delivered by

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SARKAR J.—These appeals arise out of a judgment of the High Court at Madras setting aside a judgment of the District Judge of West Tanjore by which the learned District Judge disposed of three applications in certain execution proceedings. The facts leading to these applications were as stated hereunder.

There was a suit for the partition of properties belonging to a family of Odayars. The suit was numbered Suit No. 22 of 1924 of the court of the Subordinate Judge of Kumbakonam. There was a number of parties to this suit, but of these we are only concerned with two namely, Balagurusami, who was defendant No. 3 and Swaminathaudayar, who was defendant No. 6. Swaminathaudayar is the appellant before us. On October 25, 1924 a preliminary decree for partition was passed in this suit by the learned Subordinate Judge. One of the parties to the suit appealed from that decree to the High Court at Madras. While this appeal was pending in the High Court, Balagurusami was adjudicated insolvent and thereupon his assets including his share in the properties which were the subject matter of the partition suit became vested in the Official Receiver, West Tanjore (hereinafter referred to as the Official Receiver). The Official Receiver is the respondent in the appeals before us. On February 12, 1929, an order was made by the High Court in the appeal pending before it adding the Official Receiver a party to the partition suit. In due course the appeal was disposed of. The appeals before us are not concerned with the preliminary decree and no further reference to it will be necessary.

On September 26, 1932, a final decree for partition was passed by the learned Subordinate Judge to whom the matter had come back after the disposal of the appeal from the preliminary decree. The appellant before us was not satisfied with the final decree and he preferred an appeal from it to the High Court at Madras. That Appeal was marked A.S. No. 60 of 1933. The High Court passed its judgment and decree in that appeal on May 9, 1938, varying the decree of the lower court. It is necessary to refer to portions of this decree

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of the High Court because the question in this appeal will turn on them. The decree made the following provisions among others :

(1) The Official Receiver of West Tanjore as representing the branch of Balagurusami, the 3rd defendant do pay Rs. 24,257-0-8 to the appellant, the 6th defendant with interest at 6 per cent. per annum from September 26, 1932.

(2) The Official Receiver of West Tanjore in whom the 3rd defendant's estate is vested be directed to sell portions of it in order to pay off the amounts decreed to be paid by the 3rd defendant' s branch and shall make payments on behalf of the 3rd defendant's branch in accordance with the judgment herein.

Sometime prior to the passing of the final decree by the High Court on May 9, 1938, one Thinnappa, a creditor of the 3rd defendant, Balagurusami, who had obtained a money decree against him in 1929, applied in execution of that decree for attachment and sale of the shares of the sons of the 3rd defendant in the joint family properties. This application had been made on July 3, 1935, and marked E.P. No. 25 of 1935. An order for attachment was duly made in favour of Thinnappa and the attachment was levied on some of the properties on July 6, 1935. In the meantime, on July 5, 1935, the Official Receiver had sold some of the properties of Balagurusami's branch in the course of the administration in insolvency and had received Rs. 2,100 on July 5, 1935, and a further sum of Rs. 6,150 on July 18, 1935. On September 30, 1935, Thinnappa made an application which was marked E.A. No. 376 of 1935 for an order on the Official Receiver to bring into court for payment to him a sum of Rs. 6,600 out of the sale proceeds received by the Official Receiver as earlier mentioned. These two applications were dismissed by the learned District Judge, West Tanjore who heard them, on the ground that no leave had been obtained to proceed against the Official Receiver from the court in charge of the insolvency proceedings. Thinnappa appealed from this order of dismissal to the High Courtat Madras and the High Court set aside the order of dismissal and directed that the applications be heard on their

merits as it was of opinion that no leave to proceed against the Official Receiver was necessary as execution was sought against the sons of the insolvent. This order of the High Court was made on August 10, 1939. Before the two applications, however, could again be taken up by the District Judge of West Tanjore for hearing, the appellant before us on January 25, 1940, applied for an order on the Official Receiver to deposit into court the sum of Rs. 8,250 being the entire sale proceeds of some of the properties belonging to Balagurusami's branch received by him as earlier mentioned. This application was marked E.P. No. 15 of 1940. The learned District Judge of West Tanjore to whom the application had been made felt that the three applications, two by Thinnappa being E.P. No. 25 of 1935 and E.A. No. 376 of 1935 and one by the appellant being E.P. No. 15 of 1940, were best heard together and he thereupon on September 13, 1941, made certain orders whereby the appellant was made a party to the two applications by Thinnappa and Thinnappa was made a party to the application by the appellant.

The three applications thereafter came up for hearing together and were disposed of by one judgment passed by the learned District Judge of West Tanjore on December 23, 1941. It appears to have been contended before the learned District Judge on behalf of the appellant that he was entitled to the whole of the sale proceeds as the final partition decree of May 9, 1938, had created a charge in his favour on the properties which had been allotted under it to the Official Receiver as representing Balagurusami's branch while it appears to have been contended on behalf of Thinnappa that he had the first right to the sale proceeds by virtue of his attachment. The learned District Judge came to the conclusion that the decree of May 9, 1938, created a charge in favour of the appellant and in that view of the matter, he made an order directing the Official Receiver who was a party to all the three applications, to deposit into court to the credit of the appellant the said sale proceeds amounting to Rs. 8,250 after deducting thereout his expenses of the sale and dismissing Thinnappa's application

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E.A. No. 376 of 1935 for an order on the Official Receiver to bring into court for payment to him a sum of Rs. 6,600 out of the said sale proceeds. With regard to Thinnappa's application E.P. No. 25 of 1935, he adjourned it till January 21, 1942, for further proceedings with regard to other properties. As a result of the said judgment of the learned District Judge the position on December 23, 1941, was that the appellant was held to have a charge on the properties allotted to the Official Receiver as representing Balagurusami's branch for the amount directed to be paid to him by the decree of May 9, 1938. In view of this the Official Receiver on January 9, 1942, deposited in Court to the credit of the appellant a sum of Rs. 5,200 out of the said sale proceeds, being the proceeds of the sale of the properties over which the appellant had been held to have a charge. Basing himself upon the said finding of a charge in his favour the appellant made an application on March 19, 1942, which was marked E.A. No. 34 of 1942, for an order on the Official Receiver to sell the properties belonging to the branch of Balagurusami the insolvent for the purpose of paying off the said charge. On February 5, 1942, an order was made on this application giving leave to the Official Receiver to sell the properties and to pay the appellant his decretal amount out of the sale proceeds. It appears that thereafter in May and June, 1942 the Official Receiver paid various sums to the appellant in respect of the amount due to him under the decree either in cash or by adjustment, aggregating Rs. 32,477.

Thinnappa however was dissatisfied with the order of the learned District Judge of December 23, 1941, and he appealed from it to the High Court at Madras. There were in fact three appeals filed by him as the order covered three applications. These appeals were marked A.A.O. Nos. 229, 429 and 483 of 1942. On November 5, 1943, the High Court delivered judgment allowing these appeals. The High Court held that the procedure adopted by the learned District Judge in making the appellant a party to Thinnappa's two applications E.P. No. 25 of 1935 and E.A. No. 376 of 1935 and Thinnappa a party to the appellant's appli-

cation E.P. No. 15 of 1940 could not be supported. The High Court further held that the decree of May 9, 1938, did not create any charge on the properties of Balagurusami's branch in favour of the appellant. In this view of the matter the High Court made an order striking out the name of Thinnappa from E.P. No. 15 of 1940 and the name of the appellant from E.P. No. 25 of 1935 and E.A. No. 376 of 1935, and remanding all the three applications to the lower court for disposal on the merits in the light of the observations contained in the order.

In view of the aforesaid finding of the High Court that the appellant did not have the charge claimed by him, the Official Receiver felt that he was entitled to restitution from the appellant of the sum of Rs. 32,477 paid to him as earlier mentioned as a result of the finding of the learned District Judge of December 23, 1941, of the existence of the charge and also to withdraw the sum of Rs. 5,200 deposited in court to the credit of the appellant in similar circumstances. He, thereupon, on July 29, 1944, made an application, marked E.A. No. 182 of 1944, for an order that the sum of Rs. 5,200 deposited by him in court on January 9, 1942, to the credit of the appellant may be paid back to him and on September 27, 1944, made another application, marked E.P. No. 35 of 1944, for an order on the Appellant to pay back to him the said sum of Rs. 32,477 paid to the appellant in cash and by way of adjustment as earlier mentioned together with interest thereon amounting in the aggregate to Rs. 36,983/9/6. The appellant in his turn made an application on August 7, 1944, marked E.A. No. 195 of 1944, for payment to him of the said sum of Rs. 5,200 deposited by the Official Receiver in court on January 9, 1942, to his credit. These three applications were disposed of by the learned District Judge of West Tanjore by one judgment dated July 14, 1945. The learned District Judge was of the view that all that was held by the High Court in its judgment dated November 5, 1943, in the appeals marked A.A.O. Nos. 229, 429 and 483 of 1942 was that the final partition decree of May 9, 1938, did not have the legal effect of creating

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a charge in favour of the appellant but that the question whether the appellant was not entitled to priority in respect of his claim was not concluded by that judgment. In this view of the matter he went into the question of priority and found that the estate in insolvency which vested in the Official Receiver under the decree of May 9, 1938, consisted of certain immovable properties minus the sums directed to be paid under it and the Official Receiver was not, therefore, entitled to restitution in respect of the payments made by him to the appellant or to the amount in deposit in court, since the estate in insolvency did not comprise these monies in the strict legal sense. He, thereupon, dismissed the Official Receiver's application for refund from the appellant, being E.P. No. 35 of 1944, and his application to be repaid the monies deposited in court, being E.A. No. 182 of 1944, and allowed the appellant's application for payment to him of the sum of Rs. 5,200 deposited in court, being E.A. No. 195 of 1944. The appeals to us arise out of these applications.

The Official Receiver appealed from the said judgment of July 14, 1944, to the High Court at Madras and these appeals were marked A.A.O. Nos. 724, 725 and 726 of 1944. These appeals were decided by the High Court by its judgment dated February 8, 1950. The High Court held that the finding in the judgment dated November 5, 1943, that the appellant had no charge over the properties allotted to the branch of Balagurusami, might not be binding as a judicial precedent, but it had to be given effect to in the interests of judicial comity and that it had to be held that the appellant was not entitled to a charge. The High Court also held that the judgment dated November, 5, 1943, did not leave it open to the appellant to urge any other claim of priority as he had not done so on the earlier occasion in his application, being E.P. No. 15 of 1940. Therefore, the High Court came to the conclusion that the appellant was not entitled to any priority. The High Court further held that in view of the provisions of the Provincial Insolvency Act, the Appellant could claim no priority if his claim to a charge under the decree of May 9, 1938, failed

and that such claim failed as it had been rejected by the earlier judgment of the High Court dated November 5, 1943, which judgment had to be accepted for reasons already stated. Lastly, the High Court held that the reasoning of the District Judge of West Tanjore that what vested in the Official Receiver were certain immovable properties of the insolvent minus the sums directed by the decree of May 9, 1938, to be paid was much too artificial and was unsustainable. It held that the Official Receiver was entitled to refund from the appellant and to be paid out the monies deposited in court and that the appellant was not entitled to the latter sum. In view of these findings, the High Court allowed the appeals marked A.A.O. Nos. 724, 725 and 726 of 1945. From this judgment the appellant appealed to this Court and these are the appeals now before us for hearing.

In my view these appeals must be allowed. The decree of the High Court of May 9, 1938, directed the Official Receiver to pay monies to the Appellant. That decree is binding on the Official Receiver. The Official Receiver has to carry it out. He has carried it out and paid monies under it to the Appellant and deposited to this credit in court a sum of Rs. 5,200. The Official Receiver cannot be heard to say that the monies should be refunded to him because no charge had been created over the insolvent's estate in respect of them or because the appellant was not entitled for any other reason to a priority in payment. Whether a charge had been created or not, or a right to priority exists or not, is irrelevant. It is enough that there is a decree against the Official Receiver to pay the monies. In making the payment the Official Receiver has carried out his obligations under the decree. The decree stands and he has, therfore, no right to recover the payments made. The Official Receiver asked for the order for refund under s. 144 of the Code of Civil Procedure. But that section only applies where payments have been made under a decree which is varied or reversed. That is not the case here. Here the payments have been made in satisfaction of a decree which still stands and indeed is one which has never been attacked.

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It is again not a case where it could be said that the appellant is entitled only to a dividend in respect of the decretal claim in the distribution of the insolvent's estate. That might have happened if the appellant's was a creditor of the insolvent. Here however, he is a creditor of the Official Receiver himself. The Official Receiver, therefore, cannot claim either that the appellant should refund the payments made to him, so that the monies refunded along with other available assets of the insolvent may be distributed *pro rata* among the creditors of the insolvent, including the appellant.

The finding by the High Court in its judgment of November 5, 1943, that the appellant was not entitled to a charge and the acceptance of that finding by the judgment from which these appeals arise make no difference, for the right of the appellant to receive the monies or to retain what has been paid to him does not depend on the existence of a charge in his favour but on the existence of the decree. It is not necessary to decide the question whether the appellant has such a charge and I do not feel called upon to make any observation with regard to it. I wish, however, to say that the decision of November 5, 1943, has no operation by way of *res judicata* in favour of the appellant and against the Official Receiver. That decision was between Thinnappa and the appellant. Though the Official Receiver was a party to the proceeding in which the decision was given, the issue as to whether there was a charge in favour of the appellant or not was not between him and either the appellant or Thinnappa, nor was it necessary to decide an issue between the Official Receiver and the appellant as to the existence of the charge in order to give Thinnappa or the appellant the reliefs they respectively claimed.

The appeals should, therefore, be allowed with costs throughout, and I order accordingly.

Appeals allowed.