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May 4.

R. VISWANATHAN

v.

RUKN-UL-MULK SYED ABDUL WAJID

(S. K. DAS, N. HIDAYATULLAH and J. C. SHAH, JJ.)

Foreign Judgment—How far binding—If affects properties outside jurisdiction of foreign Court—Proceedings in foreign Court—Natural justice, violation of—Proof—If "coram non judice"—Scope of enquiry—Hindu Law—Joint family property—Disposal by Will—Code of Civil Procedure, 1908 (Act V of 1908), s. 13.

One Ramalingam died at Bangalore leaving a will whereby he devised considerable immovable and movable properties in the States of Mysore and Madras. The executors applied for probate of the will and it was granted by the District Judge, Bangalore, Shri P. Medappa. Thereupon the sons of Ramlingam instituted two suits in the District Court, Bangalore and the District Court Civil and Military Station for possession of the immovable properties in Mysore and the movable properties devised by the will and a suit in the Madras High Court for possession of movable and immovable properties in Madras devised by the will. The movable included certain shares of the India Sugars and Refineries Ltd., a company with its registered office at Bellary in the State of Madras. The suits were based on the ground that all the properties were joint family properties and Ramalingam had no power to dispose of the property by his will. The Madras suit was stayed pending the disposal of the Bangalore Suits. The District Judge, Bangalore who tried the suit after the retrocession of the Civil and Military Station Bangalore, decreed the suit holding that the property devised by the will was of the joint family of Ramalingam and his sons and the will was on that account inoperative. The executors preferred appeals to the Mysore High Court which were heard by a Bench consisting of Balakrishanaiya and Kandaswami Pillai, JJ. Balakrishanaiya J., delivered a judgment allowing the appeals and Pillai J., delivered a judgment dismissing the appeals. Thereupon Balakrishanaiya J. referred the appeals to a Full Bench. The Full Bench consisting of P. Medappa, Acting C. J., Balakrishanaiya and Mallappa, JJ., allowed the appeals and dismissed the suit holding that the property was the self acquired property of Ramalingam and he could dispose it

of by his will. Thereafter, in the Madras suit the executors urged that the judgment of the Mysore High Court was binding upon the parties and the suit was barred as *res judicata*. The plaintiff contended that as to the immovables in Madras the Mysore Court could not and did not adjudicate upon their claim and that in any event the Mysore judgment which was a foreign judgment was not conclusive as the proceedings in the Mysore High Court were opposed to natural justice within the meaning of s. 13 of the Code of Civil Procedure because Medappa, Acting C. J., and Balakrishanaiya, J., showed bias before and during the hearing of the appeals and were incompetent to sit on the Full Bench and their judgment was *coram non judice*. The Trial Judge held that the judgment of Mysore High Court was *coram non judice* and was not conclusive under s. 13 of the Code and that all the properties movable and immovable disposed of by Ramalingam belonged to the joint family and he accordingly decreed the suit. On appeal the High Court held that it was not established that the Mysore Full Bench was *coram non judice*, that the properties in suit were joint family properties which Ramalingam was incompetent to dispose of by his will, that the Mysore judgment did not effect the immovable in Madras but it was conclusive with respect to the movables even outside the State of Mysore and accordingly modified the decree of the trial Court by dismissing the suit with respect to the movables which consisted mainly of shares of the India Sugars & Refineries Ltd.

Held (per Das and Shah, JJ.), that the Madras High Court was right in decreeing the plaintiffs' suit for possession with respect to the immovable property in Madras and dismissing it with respect to the movable property.

The judgment of the Mysore High Court was not conclusive between the parties in the Madras suit with respect to the immovable properties in Madras but was conclusive with respect to the shares of the Company in the State of Madras. A foreign Court has jurisdiction to deliver a judgment *in rem* which may be enforced or recognised in an Indian Court provided that the subject matter of the action is property, whether movable or immovable within the jurisdiction of that Court. The Mysore Courts were not competent to give a binding judgment in respect of the immovable property situate in the State of Madras nor did they in fact give any judgment with respect to immovable property outside Mysore.

But there is no general rule of private international law that a court can in no event exercise jurisdiction in relation

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to persons, matters or property outside its jurisdiction. The Mysore Courts were competent to give a binding judgment in respect of the shares. The claim in the Mysore suit was for the adjudication of title of the plaintiffs against the executors who had wrongfully possessed themselves of the shares. Though in dispute between the company and the share-holders the *situs* of the shares was the registered office of the Company in Bellary (outside the State of Mysore) the share certificates must be deemed to be with the executors. A decree could properly be passed by the Mysore Courts against the executors for the retransfer of the shares. The Mysore Courts were not incompetent to grant a decree directing the transfer of the shares and such decree was binding on the parties for the Madras suits.

It is not necessary for the conclusiveness of a foreign judgment that that judgment should have been delivered before the suit in which it is pleaded, is instituted.

The Madras High Court could not investigate the property of the procedure followed in the Mysore High Court in referring the case to the Full Bench and the judgment af the Full Bench was not exposed to the attack of want of competence because the case was referred after the two judges constituting the Bench, had delivered separate and final opinions of the points in dispute. Whether the procedure or a foreign Court which does not offend rules of natural justice is proper, is for the foreign court to decide and not for the court in which the foreign judgment is pleaded as conclusive.

To be conclusive a foreign judgment must be by a Court competent both by the law of the State which has constituted it and in an international sense, and it must have directly adjudicated upon the "matter" which is pleaded as *res judicata*. The expression "matter" is not equivalent to subject matter : it means the right claimed. To be conclusive the judgment of the foreign Court must directly adjudicate upon the matter. The Mysore judgment was conclusive only with respect to the matters actually decided by it. The suit as framed did not relate to succession to the estate of Ramalingam, nor did it relate to the personal status of Ramaligam and his sons. The dispute related primarily to the character of the property devised by the will and the Mysore Court held that the property devised under the will was self acquired property ; it did not purport to adjudicate on any question of personal status of the parties to the dispute before it.

It was not established that the judgment of the Mysore Full Bench was *croam non judice.* In view of cl. (d) of s. 13 a foreign judgment is not conclusive if the proceedings in which it was obtained are opposed to natural justice. A judgment which is the result of bias or of impartiality on the part of a judge, will be regarded as a nullity and the trial as *coram non judice.*

The Court will always presume, in dealing with the judgment of a foreign courts, that the procedure followed by that court was fair and proper and that it was not biased, that the court consisted of Judges who acted honestly and however wrong the decision of the Court on the facts or law appear to be, an inference of bias, dishonesty or unfairness will not normally be made from the conclusions recorded by the Court upon merits.

The estate devised under the will was the estate of the joint family of Ramalingam and his sons. The finding of the Madras High Court to this effect was supported by the evidence on the record. *Prima facie* the findings of the High Court are findings of fact, and the Supreme Court normally does not enter upon a reappraisal of the evidence, but in this case it entered upon a review of the evidence on which they were founded as the Mysore High Court had on the identical issue about the character of the property devised under the will of Ramalingam arrived at a different conclusion.

Per Hidayatullah, J.—The judgment of the Full Bench of the Mysore High Court was not *coram non judice* and was binding on the Madras High Court in so far as it negatived the right, of the coparcenary in the Kolar Gold field business and held it to be separate property of Ramalingam.

The question whether the Full Bench of the Mysore High Court had violated principles of natural justice during the hearing of the appeal, could not be considered by the Madras High Court as if it was sitting in an appeal over the Mysore High Court, and the refusal of the Mysore High Court to adjourn the hearing to enable the appellants to bring an outside counsel did not violate any principle of natural justice, as they had already three other counsel briefed in the appeals. In accordance with the practice of the Mysore High Court, the appeals had been properly referred to the full Bench by the Division Bench. A foreign Court will not lightly hold that the proceedings in another court were opposed to natural justice.

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The rule of law about judicial conduct is as strict as it is old. No Judge can be considered to be competent to hear a case in which is directly or indirectly interested. A proved interest in a Judge not only disqualifies him but renders his judgment a nullity. But nothing has been proved in the present case to establish this interest.

The objection to the jurisdiction of the Court in a foreign country on other than international considerations must be raised in the country where the trial took place. Objections to it internationally can be raised in the Court in which the judgment is produce. But, even if the objection to the jurisdiction be raised in the court where the judgment is produced, that court will consider in action *in rem*, whether the court has jurisdiction over the subject matter and the defendant and also in actions in *personam*, whether the jurisdiction was possessed over the subject matter and the parties. In dealing with the question of foreign judgments, Indian Courts have to be guided by the law as codified in this country. Section 13 of the Civil Procedure Code make a judgment conclusive as to any matter directly adjudicated between the same parties or between the parties under whom they or any of them claim litigating under the same title. There is no real difference in so far as competency of a foreign court goes between action *in rem* actions *in personam*. The subject matter of controversy in the Mysore Courts was the status of Ramalingam who was a subject and resident of Mysore State. His will made in that jurisdiction was admitted to probate there. His sons and other relatives who figured as parties and those in possession of the property were in that State. It is clear that the Mysore Courts were competent internally as well as internationally to decide about the status of Ramalingam or the rights in the Kolar Gold Fields business between these parties. The same questions were raised in the Madras suit. The question for determination was the effect of the Mysore judgment upon the suit in Madras in view of s. 13 of the Code. Section 13 of the Code contemplates both judgments *in rem* and judgments *in personam*. The matter relating to Hindu co-parcenary and the position of Ramalingam were really question of status. The Mysore Courts had directly adjudicated that Ramalingam was not carrying on the Kolar Gold Fields business as co-parcener but as his own separate business and this adjudication was binding on the parties in the suit at Madras. The decision of the Mysore High Court with respect of the status of Ramalingam *vis a vis* the Kolar Gold Field business must be regarded in the Madras suit as a conclusive adjudication. The Madras

Court could not try the question of Ramalingam's status *de novo* and that part of its decision, which went behind the adjudication of the Mysore High Court, was without jurisdiction. On this finding the immovable properties in Madras were also the separate properties of Ramalingam which he could dispose of by will, if they were the product of the Kolar Gold Field business. The only question that could be tried at Madras was whether they were. The Mysore Courts were competent to order the share scrips to be handed over to the successful party and if necessary to order transfer of the shares and its judgment in regard to them was binding in the Madras Courts.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 277 to 283 of 1958.

Appeals by certificate from the judgment and decrees dated December 15, and October 20, 1954, of the Madras High Court in Original Side Appeals Nos. 127, 153, 156 and 158 of 1953.

S. T. Desai and *B. R. L. Iyengar*, for the appellants in C. As. Nos. 277, 279, 281 and 282/58 and respondents Nos. 1 to 3 in C. A. No. 278/58.

M. C. Setalvad, Attorney-General of India, M.K. Nambiar, E. V. Mathew, J. B. Dadachanji, S. N. Andley, Rameshwar Nath and *P. L. Vohra*, for the appellants in C. As. Nos. 278, 280 and 283/58 and respondents in C. A. Nos. 277, 279, 281 and 282/58.

Ratna Rao and *K. R. Choudhry*, for the respondent No. 6 in C. A. No. 278/58.

B. R. L. Iyengar, for respondents in C. A. No. 280/58 and respondent No. 1 in C. A. No. 283/58.

S. Venkatakrishnan, for respondent No. 2 in C. A. No. 283/58.

1962. May 4. The Judgment of Das and Shah, JJ. was delivered by Shah, J., Hidayatullah, J. delivered a separate judgment.

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SHAH, J.—Ramalingam Mudaliar—a resident of Bangalore (in the former Indian State of

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Mysore)—started life as a building contractor. He prospered in the business and acquired an extensive estate which included many houses in the Civil and Military station at Bangalore, in Bangalore city and also in the towns of Madras, Hyderabad and Bellary. He dealt in timber, established cinematograph theatres, obtained a motor-car selling Agency and made investments in plantations and coffee estates. He set up a factory for manufacturing tiles, and later floated a sugar company. The Indian Sugars & Refineries Ltd., of which he became the Managing Agent and purchased a large block of shares. For some years before his death Ramalingam had taken to excessive drinking, and was subject to frequent coronary attacks. He became peevish and easily excitable and his relations with his wife and children were strained. Ramalingam felt great disappointment in his eldest son Vishwanatha who borrowed loans from money-lenders at exorbitant rates of interest, attempted to evade payment of customs duty, failsified accounts and otherwise exhibited "utter lack of business of capacity." Ramalingam had developed a violent antipathy towards a *sadhu* named Ramaling swami, but his wife Gajambal and his children persisted in attending upon the *sadhu* and visited him frequently. This led to frequent quarrels between Ramalingam and his wife and children. Ramalingam stopped the allowance for household expenses, and cancelled the power which he had given to his son Vishwanath to operate on the joint Bank account. Shortly thereafter, he left the family house. On June 2, 1942, his wife Gajambal presented a petition before the District Judge, Civil Station Banglore, for an order against Ramalingam for inquisition under the Indian Lunacy Act. On that application evidence was directed to be recorded and the District Judge called for a medical report as to the mental condition of Ramalingam.

In the meanwhile, Ramalingam executed his will dated September 10, 1942. By this will he made no provision for his eldest son Vishwanath, to each of other two sons and to Thygaraja, son of Vishwanath he gave immovable property valued at Rs. 55,000/-and shares of the value of Rs. 20,000/- in the Indian Sugars & Refineries Ltd. To his wife Gajambal he gave life interest in three houses then under construction with remainder in favour of Thygaraja, son of Vishwanath, and till the construction was completed a monthly allowance of Rs. 150/-. To five out of his nine daughters he gave cash and immovable property approximately of the value of Rs. 25,000/- each and to three others cash amounts varying between Rs. 5,000/- to Rs. 7,500/ and excluded Bhagirathi, his daughter, altogether from the benefit under the will. He also made provision for the marriage expenses for his unmarried daughters and provided for payment of Rs. 5,000/- to Mukti, daughter of Bhagirathi. Out of the remaining estate, he directed that Rs. 50,000/- be spent in erecting a Gynaecological ward in the Vani Vilas Hospital, Bangalore, and stop the balance of the estate be invested in a fund, the income whereof be applied "for encouragement and development of industries, education or medical research, diffusion of medical knowledge, including work in nutrition and dietry by the grant of scholarship etc." The executors of the will were A. Wajid (retired Revenue Commissioner of the Mysore State), Narayanaswamy Mudaliar and S. L. Mannaji Rao. Ramalingam died on December 18 1942, leaving him surviving three sons—Vishwanath, Swaminath and Amarnath—his widow Gajambal and nine daughters. The executors applied to the District Court, Civil & Military Station, Bangalore, for probate of the will dated September 10, 1942. The widow and children of Ramalingam entered caveat and the application was

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registered as Original Suit No. 2 of 1943. Mr. P. Medappa, who was then the District Judge dismissed the caveat and by his order dated Nov. 27 1943, granted probate of the will. An appeal against the order to the Court of the Resident in Mysore, was dismissed on July 5, 1944. Leave to appeal against that order to the Judicial Committee of the Privy Council was granted and a petition of appeal was lodged. But by order dated December 12, 1949, the Judicial Committee declined to consider the appeal on the merits, for, in the view of the Board, since the Civil & Military Station of Bangalore was before the hearing of the appeal retroceded to H. H. the Maharaja of Mysore and was within the jurisdiction of his State at the date of the hearing of the appeal. His Majesty-in-Council could not effectively exercise jurisdiction which was expressly surrendered and renounced. The order passed by the District Court granting probate accordingly became final and the validity of the will in so far as it dealt with property in the Civil & Military Station, Bangalore, is not liable to be challenged on the ground of want of due execution. Applications for probate of the will limited to property within the jurisdiction of the District Court, Bangalore and the Madras High Court were also filed and orders granting probate subject to the result of the proceedings before the Privy Council were made.

During the pendency of the probate proceedings, the sons of Ramalingam—who will hereinafter be collectively referred to as the plaintiffs—instituted three actions against the executors and other persons for establishing their title to and for possession of the estate disposed of by the will of Ramalingam. These actions were :

(1) Suit No. 56 of 1942/43 of the file of the District Court, Bangalore for possession of immovable properties in Bangalore and the

business carried on in the name of Ramalingam and also movables such as shares together with the profits and income accrued therefrom since December 18, 1942.

(2) Suit No. 60 of 1944 in the District Court, Bangalore Civil & Military Station for a decree for possession against the executors of immovable property within the territorial jurisdiction of that Court, and

(3) Suit No. 214 of 1944 in Madras High Court on its original side for a decree for possession of immovable properties in the town of Madras and also for a decree for a possession of "certain business" and movables in Madras including the shares of the India Sugars Refineries Ltd.

After the retrocession of the Military Station Bangalore in 1947 to the Mysore State, Suit No. 56 of 1942/43 was renumbered 61A of 1947 and was consolidated for a trial with Suit No. 60 of 1944. Hearing of Suit No. 214 of 1944 on the Original side of the Madras High Court was ordered to be stayed pending the hearing and disposal of the Mysore suits. In the three suits the plaintiffs claimed possession of the property devised under the will of Ramalingam dated September 10, 1942, on the plea that the property belonged to the joint-family of the plaintiffs and the testator, and the executors acquired under the will no title thereto because the will was inoperative. The suits were resisted by the executors principally on the ground that Ramalingam was competent to dispose of the estate by his will, for it was his self-acquisition. In the suit in the District Court at Bangalore they also contended that the Court had no jurisdiction to grant relief in respect of any property moveable or immovable outside the Mysore State. This plea was raised because in the plaint as originally filed the

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plaintiffs had claimed a decree for possession of the immovable property in the Province of Madras and also on order for retransfer of the shares which were originally held by Ramalingam in the India Sugars & Refineries Ltd., and which were since the death of Ramalingam transferred to the names of the executors. By an amendment of the schedule to the plaint, claim for possession of immovables situate within the jurisdiction of the Madras High Court but not the relief relating to the shares was deleted. The plea that the claim for possession of moveables outside the State of Mysore was not maintainable was apparently not persisted in before the District Court. The District Judge, Bangalore, held that the property devised by the will dated September 10, 1942, was of the joint-family of Ramalingam and his sons and the will was on that account inoperative. He accordingly decreed the suit for possession of the properties set out in the schedules and within his jurisdiction, and directed that a preliminary decree be drawn up for account of the management of the properties since the death of Ramalingam by the executors.

Appeals preferred by the executors against the decrees of the District Judge in the two suits to the High Court of Mysore were heard by Paramshivayya, C.J., and Balakrishanaiya, J. After the appeals were heard for some time, the hearing was adjourned for six weeks to enable the parties to negotiate a compromise. The plaintiffs say that it was agreed between them and the executors that the widow and the children of Ramalingam should take 3/5th of the estate covered by the will of Ramalingam executed on September 10, 1942, and that the remaining 2/5th should go to charity mentioned in the will and that in the event of the sons and widow of Ramalingam succeeding in the pending appeal in the Probate Proceedings before the Privy

Council, the 2/5th share should also be surrendered by the executors.

The appeals were then posted before a Division Bench of Balakrishanaiya and Kandaswami Pillai, JJ. Before this newly constituted Division Bench, a decree in terms alleged to be settled between the parties was claimed by the widow and sons of Ramalingam, but the Court by order dated March 15, 1949, declined to enter upon an enquiry as to the alleged compromise, because in their view the compromise was not in the interest of the public trust created by the will of Ramalingam. The appeals were heard and on April 2, 1949, the two Judges constituting the Bench differed. Balakrishanaiya, J., in exercise of the powers under s. 15(3) of the Mysore High Court Regulation 1884 referred the appeals to "a Full Bench for decision under section 15(3) of the High Court Act." The appeals were then heard by a Full Bench of Medappa, Acting C.J., Balakrishanaiya and Mallappa, JJ. For reasons which will be set out in detail hereafter, no arguments were advanced on behalf of the plaintiffs in support of the decree of the District Judge, and the appeals were allowed, and the plaintiff's suits were dismissed. An application for review of judgment was submitted by the plaintiffs on diverse grounds, but that application was also dismissed.

After the disposal of the suits in the Bangalore Court, in suit No. 214 of 1944 it was submitted before the Madras High Court by the executors that the judgment of the Mysore High Court dismissing plaintiffs' suit for possession of immovable properties and for an order for retransfer of shares of the India Sugars & Refineries Ltd., was *res judicata* between the parties and accordingly the suit filed by the plaintiffs in the Madras High Court be dismissed. The plaintiffs contended that as to immovables in Madras, the Mysore judgment was not conclusive because the Mysore Court was not competent to

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adjudicate upon the title of the plaintiffs to the Madras properties and that the Court did not, in fact, adjudicate upon the claim of the plaintiffs, and that, in any event, the judgment was not conclusive because Medappa, C.J., and Balakrishanayia, J., showed bias before and during the hearing of the appeals they were incompetent to sit in the Full Bench, and "their judgment was *coram non judice*".

On "the preliminary issue of *res judicata*", Rajagopalan, J., held that the Full Bench judgment of the Mysore High Court did not bar the hearing of the suit in regard to the immovable properties in Madras claimed by the plaintiffs for two resons (1) that the title to those properties was not, in fact, adjudicated upon by the Mysore Court, and (2) that the *lex situs* governed the immovable properties in Madras. The learned Judge also indicated the scope of the enquiry on the plea of conclusiveness of the foreign judgment raised by the executors. He observed that the Madras High Court not investigate the allegations made against the Judges of the Mysore High Court in the conduct of the appeal itself, or of the property or correctness of their decisions in the appeals or in the legal proceedings connected therewith, but two questions fell outside the purview of that rule; (a) whether Mr. Medappa had been and was using a motor car belonging to the estate in the hands of the executors, and (b) whether Mr. Medappa sent for L.S. Raju who was engaged to appear as counsel for the plaintiffs and attempted to dissuade him from conducting the case for the "plaintiffs' family". If these two allegations were established, observed Rajagopalan, J., they might possibly furnish proof that one of the Judges of the Mysore High Court who had heard the appeals was "interested" in the subject matter of suit itself and that would be a ground falling within the scope of exception (d) to s. 13 Civil Procedure Code. He accordingly ruled that the plaintiffs may

lead evidence on those two allegations but not as to the rest. Against the order, two appeals were preferred to the High Court under the Letters Patent, one by the plaintiffs and the other by the executors. The plaintiffs submitted that Rajagopalan, J., was in error in restricting the scope of the enquiry into the allegations of bias, interest and partiality. The executors contended that the judgment of the Mysore High Court was conclusive as to title to all properties movable and immovable belonging to the estate of Ramalingam and disposed of by the will and that no enquiry at all as to the allegation of bias and proof of interest, about the use by Mr. Medappa of a motor car belonging to the estate and the dissuasion by Mr. Medappa of Raju should be permitted. The High Court of Madras held that evidence about the attempts made to dissuade Raju from appearing for the plaintiffs was admissible, but not evidence relating to the use by Mr. Medappa of a motor car belonging to the estate. They observed that even if the "Mercedes car" of the estate was used by Mr. Medappa, the user was before he was appointed Judge of the Mysore High Court and the motor car had been sold away more than three years before the date on which Mr. Medappa sat in the Full Bench and it could not therefore be said that because he had used the car some years before the date on which he sat in the Full Bench, "he had so identified himself with the executors that in taking part in the hearing before the Full Bench," the proceeding was contrary to natural justice. They also held that the judgment of the Mysore High Court, unless the "plea *coram non judice*" was established, was conclusive as to all items of property in dispute in the suit, except as to the four items of immoveable property in Madras.

The suit was thereafter allotted to the file of Ramaswami, J., for trial was heard together with

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five other suits—Suits Nos. 91 of 1944, 200 of 1944, 251 of 1944, 274 of 1944 and 344 of 1946 all of which directly raised questions relating to the interest which the plaintiffs claimed in the estate devised under the will as members of a joint-family. By consent of parties, the evidence recorded in Suit No. 60 of 1944 and Suit No. 61A of 1947 of the file of the District Judge, Bangalore, was treated as evidence in these suits and proceedings and the record of the Mysore High Court in the civil suits and the printed record of the Privy Council in the probate preceedings and the record in the petition for a *writ of prohibition* filed in this Court restraining enforcement of the judgment of the Mysore Court were treated as part of the record of the suit.

In Suit No. 214 of 1944, three principal questions fell to be determined :

(1) whether the judgment of the Mysore High Court holding that the estate devised by Ramalingam by his will was his self-acquired property was conclusive as to title to properties movable and immovable, situate without the jurisdiction of the Mysore State;

(2) whether the proceeding in the Mysore High Court in which the judgment pleaded as conclusive was rendered, was vitiated because it was opposed to natural justice ; and

(3) whether by his will dated September 10, 1942, Ramalingam attempted to dispose of the estate which belonged to the joint-family of himself and his sons, the plaintiffs.

Ramaswami, J, did not expressly deal with the first question, presumably because (so far as he was concerned) it was concluded by the judgment

of the Division Bench in appeals against the interlocutory order relating to the scope of the enquiry in the suit, but on the second and the third questions he held in favour of the plaintiffs. He held that for diverse reasons the "Full Bench judgment of the High Court was *coram non judice*" and therefore not conclusive within the meaning of s. 13 of the Code of Civil Procedure, and that the evidence disclosed that the property movable and immovable set out in the scheduled to the plaint and the business conducted by Ramalingam belonged to the joint family of Ramalingam and his sons. He accordingly decreed the claim of the plaintiffs for possession of the property movable and immovable), set out in the Schedule to the plaint (except 1650 shares of the India Sugars and Refineries Ltd.) and directed an account of the management by the executors of the properties from the date of Ramalingam's death till delivery of possession of the properties to the plaintiffs. He also declared that the business carried on in the name of Oriental Films at 9 Stringers St., G. T. Madras, was the sole proprietary concern of the joint family and the profits realised from "Palmgrove" and Vegetable Oil Factory constituted the assets of the estate of Ramalingam "subject to such equities as might arise in favour of Narayanaswami Mudaliar on the footing of the doctrine of *Quantam Meruit* to be determined by the final decree or execution proceedings."

Against the judgment of Ramaswami, J. the executors appealed to the High Court. The High Court observed that the decision of the Mysore High Court could not "take effect in respect of the immovable properties situate in the State of Madras; but it could naturally affect the moveables situate there. In fact, the immovable properties in Madras State were not included in Mysore suits. It is therefore necessary for the members of

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Ramalingam's family to get rid of the decision of the Mysore High Court before they can have any chance of obtaining the movable properties of Ramalingam situate in the State." The High Court after an elaborate review of the evidence held that the estate which Ramalingam sought to dispose of by his will was joint-family estate, and he was on that account incompetent to dispose of the same, and the plaintiffs were entitled to the immovables in Madras, but as to movables the judgement of the Mysore High Court was conclusive there being no reliable evidence to establish the plea of "*coram non judice*". The High Court accordingly modified the decree of the trial Court. They confirmed the decree in so far as it related to immovables in Madras and dismissed it as to the rest. They further declared that the sale proceeds of a property called "Palmgrove"—which was excluded from the Schedule to the plaint in the Bangalore suit—"constituted the assets of the said joint family" and on that footing gave certain directions.

Against the judgment of the High Court modifying the decree of Mr. Justice Ramaswami two appeals—Nos. 277 and 278 of 1958—are preferred : Appeal No. 277 is by the plaintiffs, and Appeal No. 278 of 1858 is by the executors. The plaintiffs contend that the judgment of the Mysore Full Bench is not conclusive between parties in the Madras suit, for the Mysore Court was not a court of competent jurisdiction as to property movable and immovable outside the territory of the Mysore State, that the judgment was not binding because the Judges who presided over the Full Bench were not competent by the law of the Mysore State to decide the dispute and that in any event it "was *coram non judice*" because they were interested or biased and the proceedings before them were conducted in a manner opposed to

natural justice. On behalf of the executors, it is submitted that the judgment was conclusive as to the nature of "the Kolar Gold Fields business", which was found to be the separate business of Ramalingam, and the Madras High Court was only competent to decide whether the immovables in Madras were not acquired out of the earnings of that business.

Section 13 of the Code of Civil Procedure, Act V of 1908, provides :

> "13. A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—
>
> (a) where it has not been pronounced by a Court of competent jurisdiction ;
>
> (b) where it has not been given on the merits of the case ;
>
> (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable.
>
> (d) where the proceedings in which the judgment was obtained are opposed to natural justice ;
>
> (e) where it has been obtained by fraud ;
>
> (f) where it sustains a claim founded on a breach of any law in force in India."

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By that enactment a foreign judgment is made conclusive as to all matters directly adjudicated upon between the parties, except as to cases set out in cls.(a) to (f). The judgment of the Mysore High Court is, it is claimed by the plaintiffs not conclusive because—

(1) it has not been pronounced by a court of competent jurisdiction,

(2) that on the face of the proceeding it was founded on incorrect view of the international law, and

(3) that the proceeding in which the judgment was pronounced was opposed to natural justice.

The dispute in the appeal filed by the plaintiffs primarily relates to the shares of the India Sugars & Refineries Ltd, and movables in Madras. The judgment of the Mysore Court *qua* the immovables in Mysore has become final and is not and cannot be challenged in this Court. The Mysore High Court was competent to adjudicate upon title to immovables within the territory of the State of Mysore, in the suits instituted by the plaintiffs against the executors. In considering whether a judgment of a foreign Court is conclusive, the courts in India will not inquire whether conclusions recorded thereby are supported by the evidence, or are otherwise correct, because the binding character of the judgment may be displaced only by establishing that the case falls within one or more of the six clauses of s. 13, and not otherwise. The registered office of the India Sugars & Refineries Ltd., was in Bellary in the Province of Madras, and the *situs* of the shares which are movables—may normally be the place where they can be effectively dealt with (see *Erie Beach Co.* v. *Attorney-General for Ontario*(1) and *Brassard* v. *Smith*(2). The *situs* of the

(1) [1930] A.C. 161. (2) [1925] A.C. 372.

shares of the India Sugars & Refineries Ltd. may therefore be properly regarded as without the territorial jurisdiction of the Mysore Court at the date of the institution of the suit by the plaintiffs. Counsel for the plaintiffs submitted that the Courts in the Indian State of Mysore which *qua* the Courts in the Province of Madras prior to the enactment of the Constitution, were foreign Courts had no jurisdiction to adjudicate upon title to movables outside their territory, for the action to declare title to such movables and order for possession thereof was by the rules of private international law an action *in rem*, and the judgment of the Mysore Court was on that account a nullity. Counsel urged that the principle of submission to jurisdiction has no application in actions *in rem*, beacuse jurisdiction *in rem*, rests entirely upon presence actual or national of the *res* within the territory over which the Court has power. Counsel also urged that recognition of jurisdiction in transactions involving a foreign element depends upon the doctrine of effectiveness of judgments, and willingness of parties to submit to jurisdiction in actions *in rem* is irrelevant. Enlarging upon this theme, it was submitted that the shares of the India Sugars & Refineries Ltd. had at the material time a *situs* outside the jurisdiction of the courts of the Mysore State and by the rules of private international law, an action for adjudication of title to the shares being an action *in rem* the courts of the State of Mysore were incompetent to entertain a suit in which title to the shares was involved because they could not render an effective judgment for possession of those shares. On the assumption that in an international sense the Court of the District Judge, Bangalore, was incompetent to adjudicate upon title to the shares and the movables and to award possession thereof, it was urged that a suit for determination of title to and for possession of the shares and movables could be instituted in the Madras High Court alone and by

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their submission the plaintiffs could not invest the Court of the District Judge, Bangalore, with jurisdiction to adjudicate upon the conflicting claims of title to the shares. The argument therefore is that the action instituted by the plaintiffs in the District Court of Bangalore being an action *in rem* that Court was by the rules of private international law universally recognised, competent to adjudicate upon title only to property regarding which it could render an effective judgment, and as the plaintiffs claimed title to and possession of shares of the India Sugars & Refineries Ltd. and other movables outside the territory of Mysore the judgment of the Mysore High Court that the shares and the movable property were the self-acquisition of Ramalingam was not binding upon the parties, because the Mysore Court was not a Court of competent jurisdiction within the meaning of s. 13, Civil Procedure Code, 1908.

A judgment of a foreign court to be conclusive between the parties must be a judgment pronounced by a court of competent jurisdiction; and competence contemplated by s. 13 of the Code of Civil Procedure is in an international sense, and not merely by the law of foreign State in which the Court delivering judgment functions *Chormal Balchand* v. *Kasturhand* (1), *Panchapakesa* v. *Hussim*(2) and *Pemberton* v. *Highes* (3). It is necessary to emphasize that what is called private international law is not law governing relations between independent States : private international law, or as it is sometimes called "Conflict of Laws", is simply a branch of the civil law of the State envolved to do justice between litigating parties in respect of transactions or personal status involving a foreign element. The rules of private international law of each State must therefore in the very nature

(1) [1936] I.L.R. 63 Cal. 1083. (2) A.I.R. 1234 Mad. 145.
(3) [1899] 1 Ch. 781.

of things differ, but by the comity of nations certain rules are recognised as common to civilised jurisdictions. Through part of the judicial system of each State these common rules have been adopted to adjudicate upon disputes involving a foreign element and to effectuate judgments of foreign courts in certain matters, or as a result of international conventions.

Roman lawyers recognised a right either as a *jus in rem* or a *jus in personam*. According to its literal meaning "*jus in rem*" is right in respect of a thing, a "*jus in personam*" is a right against or in respect of a person. In modern legal terminology a right *in rem*, postulates a duty to recognise the right imposed upon all persons generally, a right *in personam* postulates a duty imposed upon a determinate person or class of persons. A right *in rem* is therefore protected against the world at large; a right *in personam* against determinate individuals or persons. An action to enforce a *jus in personam* was regarded as an action *in rem*. But in course of time, actions *in rem* and actions *in personam* acquired different content. When in an action the rights and interest of the parties themselves in the subject matter are sought to be determined, the action is *in personam*. The effect of such an action is therefore merely to bind the parties thereto. Where the intervention of the Court is sought for the adjudication of a right or title to property, not merely as between the parties but against all persons generally, the action is *in rem*. Such an action is one brought in the Admiralty Division of the High Court possessing Admiralty jurisdiction by service of process against a ship or cargo within jurisdiction. There is another sense in which an action *in rem* is understood. A proceeding in relation to personal status is also treated as a proceeding *in rem*, for the judgment of the proper court within the jurisdiction of which the parties are domiciled is by comity of

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nations admitted to recognition by other courts. As observed by Cheshire in his "Private International Law", Sixth Edition at page 109, "In Roman law an action *in rem* was one brought in order to vendicate a *jus in rem, i.e.*, a right such as ownership available against all persons, but the only action *in rem* known to English law is that which lies in an Admiralty court against a particular *res*, namely, a ship or some other *res*, such as cargo, associated with the ship." Dealing with judgment *in rem* and judgments *in personam*, Cheshire observes at page 653, "It (judgment *in rem*) has been defined as a judgment of a court of competent jurisdiction determining the status of a person or thing (as distinct from the particular interest in it of a party to the litigation); and such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided..... .....A judgment *in rem* settles the destiny of the *res* itself 'and binds all persons claiming an interest in the property inconsistent with the judgment even though pronounced in their absence'; a judgment *in personam*, although it may concern a *res*, merely determines the rights of the litigants *inter se* to the *res*. The former looks beyond the individual rights of the parties, the latter is directed solely to those rights.....A foreign judgment which purports to operate *in rem* will not attract extra-territorial recognition unless it has been given by a court internationally competent in this respect. In the eyes of English law, the adjudicating court must have jurisdiction to give a judgment binding all persons generally. If the judgment relates to immovables, it is clear that only the court of the *situs* is competent. In the case of movables, however, the question of competence is not so simple, since there would appear to be at least three classes of judgments *in rem*:

(a) Judgments which immediately vest

the property in a certain person as against the whole world.

These occur, for instance, where a foreign court of Admiralty condemns a vessel in prize proceedings.

(b) Judgments which decree the sale of a thing in satisfaction of a claim against the thing itself.

....

....

and (c) Judgments which order movables be sold by way of administration."

An action *in personam* lies normally where the defendant is personally within the jurisdiction or submits to the jurisdiction or though outside the jurisdiction may be reached by an order of the court. By s. 20 of the Mysore Code of Civil Procedure a general jurisdiction (subject to ss. 16 to 19 which deal with suits relating to immovable property and movable property under distraint and certain incidental matters) was conferred on Courts in respect of suits instituted within the local limits of whose jurisdiction—

(a) the defendant, or each of the defendants, were there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

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(c) the cause of action, wholly or in part arises.

These rules deal with the territorial jurisdiction of courts in respect of all suits other than those relating to immovable property or for recovery of movable property under distraint or attachment. But in their application they extend to all persons whether domiciled or not within jurisdiction. Section 20 of the Code extends the jurisdiction of the courts to persons or transactions beyond the territorial limits of the courts. Such jurisdiction *in personam* which transcends territorial limits is conferred on the courts by the law making authority of many States. In England, by Order XI, r. 1 of the Rules of the Supreme Court, discretionary jurisdiction *in personam* is exercisable by the courts by effecting service outside the jurisdiction of a writ of summons or notice of a writ of summons against an absent defendant in the classes set out therein.

A court of a foreign country has jurisdiction to deliver a judgment *in rem* which may be enforced or recognised in an Indian Court, provided that the subject matter of the action is property whether movable or immovable within the foreign country. It is also well settled that a court of a foreign country has no jurisdiction to deliver a judgment capable of enforcement or recognition in another country in any proceeding the subject matter of which is title to immovable property outside that country.

But there is no general rule of private international law that a court can in no event exercise jurisdiction in relation to persons, matters or property outside jurisdiction. Express enactment of provisions like s. 20, Civil Procedure Code, 1908 (V of 1908) and O. XI, r. 1 of the Supreme Court Rules in England, negative such an assumption.

The courts of a country generally impose a threefold restriction upon the exercise of their jurisdiction (1) jurisdiction *in rem* (binding not only the parties but the world at large) by a court over *res* outside the jurisdiction will not be exercised, because it will not be recognised by other courts; (2) The court will not deal directly or indirectly with title to immovable property outside the jurisdiction of the State from which it derives its authority; and (3) Court will not assist in the enforcement within its jurisdiction of foreign penal or revenue laws.

The suit filed by the plaintiffs was for possession of the estate disposed of by the will of Ramalingam. In paragraph 3 of the plaint in the Bangalore District Court suit (and that is the only foreign suit to which we will refer, because it is common ground that the averments in the two plaints—in the District Court at Bangalore and in the District Court, Civil Station Bangalore, which was consolidated for hearing with the Bangalore suit, were the same) it was averred "The plaintiffs and their father, the late V. Ramalinga Mudaliar, were members of the undivided Hindu joint family and the properties set out in the schedules among others belong to the said joint family. The said Ramalinga Mudaliar died on the 18th of December, 1942, and on his death the three plaintiffs herein have become entitled by survivorship to all the said properties." In paragraph 11, it was averred, "The plaintiffs state that as the properties set out are joint family properties the late Ramalingam had no disposing power in respect of them and any will alleged to have been executed by him is in any event void and inoperative in law, and not binding on the plaintiffs. It was then averred in paragraph 13, that the executors under the will of Ramalingam had entered upon the properties and business set out in the schedule purporting to be the executors

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under an alleged will of the said Ramalingam, and as the said will was, in any event invalid the defendants were in wrongful possession of the said properties and businesses and the plaintiffs were entitled to recover the same from the executors as the surviving members of the joint familyconsisting of themselves and their deceased father Ramalingam. By paragraph 22 they claimed among other reliefs, the following:

(a) that the executors be ordered to deliver possession of all the properties and businesses in their possession, management and control together with the profits and income accrued therefrom since 18th December, 1942,

(b) that defendants 17 and 18 (employees of Ramalingam) be ordered to deliver possession of the assets and capital together with the profits of the businesses of Kolar Gold Field contracts, military contracts and cinema business,

(c) that the executors and defendant 15 who are alleged to hold shares of the India Sugars & Refineries be ordered to retransfer the shares to the plaintiffs.

The plaintiffs in paragraph 19 averred, in impleading the India Sugars & Refineries Ltd., Bellary as Defendant No. 16 in the suit, that the company was impleaded "so give effect to an order of transfer of at least 19,000 shares from the names of defendants 1 to the plaintiffs.

The claim in suit was clearly for adjudication of title of the plaintiffs against persons who had wrongfully possessed themselves of their property. Manifestly, an action in personam is one brought in order to settle the rights of the parties as between

themselves and only between themselves and persons claiming through or under them whether it relates to an obligation or, as in the case of detinue, to chattels. A decision obtained in this suit is effective only as between the parties. By the Mysore Code of Civil Procedure the District Court of Bangalore was competent to entertain the suit for possession of immovable properties within the jurisdiction of that court and also for an order against the executors to retransfer the shares of the India Sugars & Refineries Ltd., to the plaintiff. The *situs* of the shares in any question between the Company and the holders thereof was the registered office of the Company in Bellary (outside the State of Mysore), but the share certificates must, on the case of the plaintiffs as set out in the plaint, be deemed to be with the executors and compliance with the decree, if any, passed against the executors for an order of retransfer could be obtained under the Code of Civil Procedure (see Order XXI, rr. 31 and 32 Mysore Civil Procedure Code). There is no rule of private international law recognised by the courts in India which renders the Bangalore Court incompetent to grant a decree directing retransfer of the shares merely because the shares have a *situs* in a dispute between the Company and the shareholders outside the jurisdiction of the foreign court: Counsel for the plaintiffs submitted that the Mysore Court was incompetent to deliver an effective judgment in respect of the shares, but by personal compliance with an order for retransfer judgment in favour of the plaintiffs could be rendered effective.

It is in the circumstances not necessary to express any opinion on the question whether on the principle of effectiveness is founded the conclusive character of a foreign judgment. On this question, text book writers disagree, and there is singular absence of even persuasive authority. Dicey maintained (see Dicey's Conflict of Laws, 7th Edition

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p. 17 Introduction) that the jurisdiction *in personam* of English courts rests upon the principle of effectiveness which he defined as follows :—

> "The courts of any country are considered by English law to have jurisdiction over (*i. e.*, to be able to adjudicate upon) any matter with regard to which they can give an effective judgment, and are considered by English law not to have jurisdiction over (*i. e.*, not to be able to adjudicate upon) any matter with regard to which they cannot give an effective judgment."

This principle received apparent approval in a dictum of Lord Merrivale, President of the Matrimonial Court in *Tallack* v. *Tallack* (1)—wherein it was observed at p. 221: "It is not clear that the judicial tribunals of the Netherlands are able to give effect at all to judgments of foreign courts even in personal actions against defendants living in Holland. But having regard to the terms of the Civil Code, and the evidence of Dr. Bisschop, I am satisfied that a decree of this Court purporting to partition the property of the respondent would be an idle and wholly ineffectual process." In *Tallacks* case, the court refused the petition of the husband for an order for settlement of the estate of the wife upon the children of the marriage after a decree for dissolution was passed, on the ground that to accede to it would be to extend the jurisdiction of the English Court against a defendent who was not at the material time domiciled within its jurisdiction, and who had appeared only to dispute the exercise of jurisdiction beyond territorial limits. This ground was sufficient to support the decision of the court and the observation about the principle of effectiveness were plainly unnecessary.

(1) (1927) P. D. 211.

Schmitthoff in "The English Conflict of Laws" 3rd Edition at page 425 observes:

> ".....the jurisdiction of the courts is not based upon considerations of actual or probable effect of their dicision. The argument from the effect of the judgment to the jurisdiction of the court represents an approach to the problem under investigation from the wrong end, in the same way as the argument from the effect of the choice of law to the choice itself is, in the words of Lord Russel, founded upon a fallactious basis."

Graveson in his "The Conflict of Laws" 4th Edition at p. 338 observes :

> "In the doctrine of effectiveness English jurists have sought to provide for the courts a reasonable and adequate theory to determine the exercise of jurisdiction. The reasonableness of the theory is assured by its practical basis; but its complete adequacy is refuted by the existence of English jurisdiction over defendants outside the jurisdiction in cases falling within Order 11 of the Rules of the Supreme Court. .....The basis of jurisdiction in the English conflict of laws is wider than, though it comprehends, the principle of effective enforcement of judgments. It lies in the administration of justice."

In an action *in personam* the court has jurisdiction to make an order for delivery of movables where the parties submit to the jurisdiction. A person who institutes a suit in a foreign court and claims a decree *in personam* cannot after the judgment is pronounced against him, say that the court had no jurisdiction which he invoked and which the court exercised, for it is well recognised that a party who is present within or who had submitted to jurisdiction cannot afterwards question it.

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We may briefly refer to cases on which counsel for the plaintiffs relied in support of his plea that the judgment of the Mysore High Court in so far as it relates to movables outside the State of Mysore was not conclusive between the parties in the Madras suit.

In *Messa* v. *Messa* (1) the judgment of the Alexandria Supreme Court relating to the validity of a will executed by one Bunin Menahim Messa was held not binding as a judgment *in rem* upon the parties to a litigation in Aden in which the defendants claimed to be executors under the will of the testator. The testator was not domiciled within the territory over which the Supreme Court of Alexandria exercised jurisdiction, and therefore the judgment though *in rem* was not held binding upon the executors. That case has no bearing on the contention raised by the plaintiffs. Nor is the opinion of the Judicial Committee in *Sardar Gurdayal Singh* v. *Rajah of Faridkote* (2) of any assistance to the plaintiffs. In that case it was observed that a money decree passed by a foreign court against an absent foreigner was by international law a nullity. Lord Selborne in that case at p. 185 observed :

> "Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over movables within the territory; and in question of status or succession governed by domicil, it may exist as to persons domiciled, or who when living were domiciled, within the territory. As between different

(1) I. L. R. (1938) Bom. 529. (2) [1894] L. R. 21 I. R. 171.

provinces under the sovereignty (e. g., under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign Court ought to recognise against foreigners, who owe no allegiance or obedience to the Power which so legislates.

In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced in absentem by a foreign Court, to the jurisdiction of which the Defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except (when authorised by special local legislation) in the country of the *forum* by which it was pronounced."

In *Castrique* v. *Imri* (1) a bill issued by the master of a British ship on the owner for costs of repairs and necessaries supplied, was dishonoured, and the endorsee a French subject sued the master in the Tribunal de Commerce at Havre. In meantime, the owner mortgaged the ship and became bankrupt. The Tribunal ordered the master to pay the sum due which was "privileged on the ship." In default of payment the ship was seized and detained. The judgment of the Tribunal was by the French law required to be confirmed by the civil court of the District and accordingly the Civil Court summoned the owner and the assignee in bankruptcy, but not the mortgagee and his assignee and in default of appearance decreed sale of the ship by auction. The consignee of the mortgagee Castrique then commenced an action in the "nature of replevy" of the ship and the court of appeal held—though erroneously—that the bill of the sale to

(1) (1870) 4 H. L. 414.

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Castrique not having been registered was invalid and he had no *locus standi* to maintain the action. The ship was then sold to a British subject, who brought it to Liverpool and registered it in his own name. Castrique then commenced an action in the Court of Common Pleas in conversion against the purchaser pleading that the sale in France was void. The House of Lords held that there was a judgment *in rem* in the French Court and the title of the purchaser to the ship could not be reagitated in the courts in England.

The proceeding in the French Court was manifestly one *in rem,* for it was to enforce a maritime lien, which by the French law was a proceeding *in rem,* and as the ship was in the French territorial waters, it must in the English Court be so treated and held. These cases do not support the plea that the judgment of a foreign court *qua* movables out side its jurisdiction will not be conclusive between the same parties in an action relating to those movables in an Indian Court.

The plea that conclusiveness of a foreign judgment set up as a bar where that judgment was delivered after the suit in which it is pleaded, was instituted is without substance. The language of s. 13 of the Code of Civil Procedure, 1908, is explicit: a foreign judgment is made hereby conclusive between the parties as to any matter directly adjudicated and it is not predicated of the judgment that it must be delivered before the suit in which it is set up was instituted. Section 13 incorporates a branch of the principle of *res judicata,* and extends it within certain limits to judgments of foreign courts if competent in an international sense to decide the dispute between the parties. The rules of *res judica* applies to all adjudications in a "former suit", which expression by the Explanation I to s. 11 of the Code of Civil Procedure denotes a "suit which has been decided prior to

the suit in question whether or not it was instituted prior thereto. This explanation is merely declaratory of the law: the decisions of the Courts in India prior to its enactment establish that proposition conclusively. (*Balkishan* v. *Kishan Lal* (1) *Beni Madho* v. *Inder Shahi*(2)). The dictum to the contrary in *The Delta* : *"The Erminia Foscolo* (3)" is not sufficient to justify a departure from the plain words of the Indian Statute.

One more ground of incompetence of the Mysore High Court to deliver the judgment set up as a bar to the trial of the Madras suit in so far as it relates to movable needs to be adverted to. It was submitted that Balakrishnaiya, J., was not competent to refer to a Full Bench the appeals for hearing, after judgments recording final opinions were delivered by him and by Kandaswami Pillai, J. To recapitulate the facts which are material on this plea: Appeals Nos. 104 and 109 of 1947-48 against the judgment of the District Judge, Bangalore, filed by the executors were heared by Balakrishanaiya and Kandaswami Pillai, JJ. The Judges after hearing arguments differed on almost every question raised in the appeals. Balakrishanaiya, J. was for reversing the judgment of the trial Court and Kandaswami Pillai, J., was for affirming the same. Balakrishanaiya J., observed in the concluding part of his judgment "In the result, I am of opinion that the judgments and decrees of the learned District Judge cannot be sustained and are liable to be set aside by dismissing the suits with costs throughout." After the opinion of Balakrishanaiya, J., was delivered Kandaswami Pillai, J., delivered his opinion. He observed, "In the result, the judgment and the decree in the suits have to be confirmed, and regular Appeals Nos. 104 and 109 of 1947-48 have

(1) (1888) I. L R. 11 All. 148. (2) (1909) I.L.R. 32 All. 67.
(3) L. R. (1876) P.D. 393, 404.

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to be dismissed with costs to be borne by appellants (defendants 1 to 3) from the estate of Ramalingam." Thereafter, Balakrishanaiya, J., referred the case to a Full Bench under s. 15(3) of the Mysore High Court Regulation of 1884, and signed his "judgment". The relevant statutory provisions then in operation relating to the procedure to be followed in the event of a difference between Judges constituting a Bench were these: Section 98 of the Mysore Civil Procedure Code provided:

> "(1) Where an appeal is heard by a Bench of two or more Judges the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.
>
> (2) Where there is no such majority which concurs in a Judgment varying or reversing the decree appealed from such decree shall be confirmed.

Section 15(3) of the Mysore High Court Regulation, 1884, as amended by Act XII of 1930, provided:

> "The decision of the majority of Judges comprising any Full Bench of the High Court or other Bench of the said Court consisting of not less than three Judges shall be the decision of the Court.
>
> When a Bench of the High Court consists of only two Judges and there is a difference of opinion between such Judges on any material question pending before it, such question shall be disposed of in the manner prescribed by Section 98 Civil Procedure Code or s. 429 of the Criminal Procedure Code as the case may be or at the discretion of either of the Judges composing the Bench it shall be

referred to a Full Bench and the decision of the majority of the Judges on such Full Bench shall be the decision of the High Court."

If Judges constituting the Bench differed and there was no majority concurring in varying or reversing the decree appealed from, the judgment had to be affirmed. But it was open to the Judges or either of them to refer under s. 15(3) of the Mysore High Court Regulation the questions on which there was a difference to a Full Bench. The true rule envisaged by s. 15(3) of the Mysore High Court Regulation is that the Court or the referring Judge shall set out the material questions on which there is a difference of opinion without expressing any opinion on the result of the appeal. The two Judges did disagree: they disagreed on almost every question which had a bearing on the claim made by the plaintiffs, and they delivered their separate opinions expressing their mutual dissent, and even incorporated in their respective opinions the final orders to be passed on their respective views in the appeals. In so doing the Judges committed a procedural irregularity; but, in our judgment, this procedural irregularity does not affect the competence of the Full Bench constituted to hear the reference under s. 15 (3). Balakrishanaiya, J., and Kandaswami Pillai, J., did deliver separate and self-contained opinions, setting out the final orders which in their respective opinions should be made in the appeals, but their intention was clear: they intended that in view of the difference of opinion (so expressed the case should go before a Full Bench, and Balakrishanaiya, J., passed an order for reference presumable with the concurrence of Kandaswami Pillai, J.

The decision of the Allahabad High Court in *Lal Singh* v. *Ghansham Singh* (1) does not assist the

(1) (1857) I.L.R. 9 All. 625 F.B.

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plaintiffs in support of the plea that the reference the Full Brench was invalid and the Mysore High Court was incompetent to hear the reference. In *Lal Singh's* case the majority of the Court held that "Where a Bench of two Judges hearing an appeal and differing in opinion have delivered judgments on the appeal as judgments of the Court without any reservation, they are not competent to refer the appeal to other Judges of the Court under s. 575 of the Civil Procedure Code (of 1882)." In that case, a reference was made on a difference of opinion between two Judges, but not a question of law. By s. 575(2), Civil Procedure Code, 1882, difference on a question of law being a condition of reference, the reference was manifestly incompetent; it was so pointed out by Brodhust, J., who was one of the Judges composing the original Bench of Judges who differed. There is, however, no such restriction in s. 15(3) of the Mysore High Court Regulation, 1884. Again, the principle of *Lal Singh's* case as broadly enunciated by the majority of the Court has not been approved in many later cases in other High Courts; for instance, *Karali Charan Sarma* v. *Apurba Krishna Bajpeyi* (1), *Umar Baksh* v. *Commissionor of Income Tax, Punjab* (2) and *Jehangir* v. *Secretary of State* (3). In these cases it was held that in each case the question is one of intention of the Judges differing in their opinions. The Mysore High Court held in *Nanjamma* v. *Lingappa* (4) that it is not illegal to refer a case under s. 15(3) of the Mysore High Court Regulation, 1884, after the Judges differing have recorded judgments including the final orders they are to make, and without any reservations. It was observed in the judgment of the Court "The long standing practice of this Court is that one of the Judges makes a reference by a mere record in the order

(1) (1930) I L.R. 58 Cal. 549. (2) (1931) I.L.R. 12 Lah. 725.
(3) (1903) 6 Bom. L.R. 131, 206. (4) 4 L.R. Mys. 118.

sheet after the judgements are separately pronounced." It appears therefore that there was a settled practice in the Mysore High Court to refer cases under s. 15(3) after delivering differing opinions including the final orders to be passed in the appeal on such opinions. In adjudging the competence of the foreign court it would not be open to us to ignore the course of practice in that court even if it be not strictly warranted by the procedural law of that State. Whether the procedure of the foreign court which does not offend natural justice is valid is for the foreign court to decide and not the court in which the foreign judgment is pleaded as conclusive. In *Brijlal Ramjidas* v. *Govindram Gordhandas Seksaria* (1) the judicial Committee in dealing with the authority of the Indore High Court to transfer proceedings from the District Court of Indore observed : "the question whether a foreign Court is the "proper Court" to deal with a particular matter according to the law of the foreign country is a question for the Courts of that country. There is no doubt that some Court in Indore was "a Court of competent jurisdiction." It was for the High Court of Indore to interpret its own law and rules of procedure, and its decision that the High Court was the "proper" Court must be regarded as conclusive." The Madras High Court could not therefore investigate the propriety of the procedure followed by the Mysore High Court referring the case to the Full Bench and the judgment of the Mysore Full Bench was therefore not exposed to the attack of want of competence because the case was referred after the two Judges constituting the Bench had delivered separate and complete opinions expressing their views on the points in dispute.

In the plaint in the Bangalore District Court suit the plaintiffs claimed possession of the proper

(1) (1947) L.R. 74 I.A. 203.

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ties set out in the schedule on the ground that those and other properties belonged to the joint family of which they and their father Ramalingam Mudaliar were members, and to which they were entitled by survivorship on the death of Ramalingam. In Schedule 'B' to the plaint the first item was the business at Kolar Gold Fields. The claim was decreed by the trial court but the High Court reversed the decree and dismissed the suit. The Attorney-General submits that the judgment of the Mysore High Court was conclusive between the parties in respect of all matters adjudicated thereby and the Madras High Court in considering the claim of the plaintiffs in the suit before it was debarred from investigating whether the Kolar Gold Fields business was the separate property of Ramalingam. The issue as to the ownership of the Kolar Gold Fields business being directly adjudicated upon by the Mysore High Court, which was competent in an international sense as well as according to the municipal law of Mysore in that behalf, it was submitted, that adjudication was conclusive between the parties in the Madras suit. Reliance in support of this submission was placed upon the definition of 'foreign judgment' in s. 2 (9) of the Civil Procedure Code, 1908, and the use of the expression 'matter' in s. 13 of the Code.

A foreign judgment is conclusive as to any matter directly adjudicated upon thereby; but it does not include the reasons for the judgment given by the foreign court. What is conclusive under s. 13 of the Code of Civil Procedure is the judgment, *i.e.*, the final adjudication, and not the reasons *Brijlal Ramjidas* v. *Govindram Gordhandas.* (1). Section 13 in essence enacts a branch of the rule of *res judicata* in its relation to foreign judgments, but not every foreign judgment is made conclusive in the Indian Courts by s. 13. To be conclusive,

(1) (1947) L.R. 74 I.A. 203.

a foreign judgment must be by a court competent both by the law of the State which has constituted it and in an international sense, and it must have directly adjudicated upon the "matter" which is pleaded as *res judicata*. The expression "matter" in s. 13 is not equivalent to subject matter; it means the right claimed. To be conclusive the judgment of the foreign Court must have directly adjudicated upon a matter, the adjudication must be between the same parties, and the foreign Court must be a court of competent jurisdiction. Story in his "Conflict of Laws", Eighth Edition at p. 768 s. 551 says "In respect to immovable property every attempt of any foreign tribunal to found a jurisdiction over it must be from the very nature of the case, utterly nugatory, and its decree must be for ever incapable of execution *in rem*." Similarly, Dicey in his "Conflict of Laws" 7th Edition, Rule 85, enunciates the rule as follows: "All rights over or in relation to an immovable (land) are (subject to the exceptions hereinafter mentioned) governed by the law of the country where the immovable is situate (ex situs)." The exceptions for the purpose of the present case are not material. In the comments under the Rule, Dicey states at p. 513:

> "The sovereign of the country where land is situate has absolute control over the land within his dominion: he alone can bestow effective right over it; his courts alone are as a rule, entitled to exercise jurisdiction over such land. Consequently, any decision by an English Court which ran counter to what the lex situs had decided or would decide would be in most cases a *brutum fulmen*."

In *Compandia de Mocambique* v. *British South C. De Souza* v. *Samb* (1). Wright, J., observed at p. 366: "The proper conclusion appears to be that,

(1) [1891] 2 Q.B. 358.

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speaking general, subject to qualifications depending on personal obligation, it is a general principal of jurisdiction that title to land is to be directly determined, not merely according to the law of the country, where the land is situate, but by the Court, of that country, and this conclusion is in accordance with the rule ordinarily adopted by the jurisprudence of other countries". Title to immovable property may therefore be determined directly or indirectly only by the law of the State, and by the courts of the State in which it is situate. A decision of a foreign Court directly relating to title to immovable property within its jurisdiction will of course be regarded between the same parties as conclusive by the Courts in India: but that decision is ineffectual in the adjudication of claims to immovables without the jurisdiction of that foreign Court, even if the foundation of title in both the jurisdictions is alleged to be identical. A foreign Court being incompetent to try a suit relating to immovable property not situate within its jurisdiction, the grounds on which its decision relating to title to immovable property within its jurisdiction is founded will not debar investigation into title to other property within the jurisdiction of the municipal courts, even if the latter properties are alleged to be held on the same title. Every issue and every component of the issue relating to title to immovable property must be decided by the Court within whose jurisdiction it is situate: to recognise the authority of a foreign court to adjudicate upon even a component of that issue would be to recognise the authority of that Court to decide all the components thereof.

In *Boyse.* v. *Colclough* (1) the Court of Chancery in England was called upon to consider the effect to be given to a decree of an Irish Court determining the validity of a will of one Colclough who died

(1) [1855] K. & J. 174 : 69 E.R. 396.

leaving lands in England and Ireland. The Court in Ireland in a proceeding relating to the will declared it invalid. The plaintiff to whom the estate was devised under the will by Colclough, thereafter filed a bill in the Court of Chancery in England insisting upon the validity of the will, and for a declaration that the immovables in England passed under and as devised by the will. The defendant insisted that the decree of the Court in Ireland was in regard to the validity of the will conclusive as the judgment was of a court of competent jurisdiction between the parties. Page Wood V. C. rejected the defendant's plea. He observed "The foreign Court in this case did not try and could not try the effect of the will of the testator on land in England. It is impossible that the question could even, in any shape be raised before that Court in that suit, or, I apprehend, in any suit. The Court had before it a certain alleged will, purporting to devise certain Irish estates, and it directed an issue to try the validity of that will. The issue was founded against the validity of the will and the Court then decided upon the only thing upon which it could decide, namely, that that instrument was not an operative devise of the Irish estates." This case was again brought before the Court, and the judgment is reported in (1855) K. & J. 502—69 E. R. 557. It was directed that to prevent misconception an order of the Court of Chancery in England, establishing the will should be expressly limited to the extent of the jurisdiction. In *Chockalinga* v. *Doraiswamy*(1) a dispute arose between two persons each of whom claimed the right to trusteeship of three religious endowments known as Chidambaram, Mailam and Alapakkam charities. Of the Chidambaram charities all the lands were in British India and the charities were to be carried out also in British India. In the Mailam charities the performance was to be in British India and Pondicherry (French

(1) (1927) I.L.R. 51 Mad. 720.

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territory), and a large majority of the immovable properties were in Pondicherry and only one in British India. In a suit filed in the Subordinate Judge's court at Pondicherry, the trial court held that the first defendant Doraiswamy could not act as trustee because the original trustee Murugayya had no power to appoint him. The Appellate Court reversed the decision and held that Doraiswamy was properly appointed. A suit was then instituted in the British Indian Court in which the question as to the right of Doraiswamy to function in respect of immovable property in British India was questioned. The Court held that to Alapakkam charities, neither the plaintiff nor the 1st defendant had any rights because by the deed of settlement the right of trusteeship descended to the sons of Murugayya. About the Chidambaram charities it was held by the court that the Pondicherry court had no jurisdiction as all the properties were situate in British India and "Charities were to be performed" in British India. About the Mailam charity, Kumaraswami Sastri, J., held that in respect of the property in British India the order was not binding, but having regard to the nature of the trust and the inexpediency of having separate management and appropriation of the income of the trust the British Indian Courts would be justified in upholding the claim of the trustee appointed by the Pondicherry court in respect of that charity. Srinivasa Aiyangar, J., held that as the Mailam charity had its "domicile" in the French territory, the decision of the French Court with regard to the appointment of the trustee, and recovery by him of the office of trustee was a decision of a Court of competent jurisdiction within the meaning of s. 13, Code of Civil Procedure. The judgment proceeded upon the theory of "domicil" of the trust which the learned Judge himself characterised as "inappropriate" but he held that "on a proper application and appreciation of principles of Private International Law" in disputes

relating to the office of trusteeship the court of competent jurisdiction within the meaning of s. 13 is the court which can be regarded as court of the situs of the trust. It is difficult to accept this view expressed by Srinivasa Aiyangar, J. It is, however, noteworthy that both the learned Judges held that the decision of the foreign court *qua* the Chidambaram and the Alapakkam trust was not binding on the Indian Courts.

The decisions in *Samson Ricardo and Johan Lewis Ricardo* v. *Garcias* (1), *Elizabeth Hendren* v. *Bathal Hendren* (2) and *Bank of Australia* v. *Nios* (3) on which the executors rely are not of cases in which an issue decided by the foreign court was regarded as conclusive in the trial of a suit relating to title to immovable property in England. The decision in *Dogliani* v. *Crispin* (4) also does not support the plea of the executors. In that case the judgment of a Portuguese Court holding that the defendant was the illegitimate son of one Henry Crispin and entitled according to the law of Portugal to inherit the property of Henry Crispin who was of a particular station in society (a plebian and not noble), and was domiciled in Portugal was held binding between the parties in an administration action in the Court of Probate in England between the same parties relating to Government of England Stock. The Court in that case was not called upon to decide any question of title to immoveables in England.

The rule of conclusiveness of a foreign judgment as enacted in s. 13 is somewhat different in its operation from the rule of *res judicata*. Undoubtedly both the rules are founded upon the principle of sanctity of judgments competently rendered. But the rule of *res judicata* applies to all matters

(1) ('845 12 Clark & Finnolly 367 : 8 E. R. 1450.
(2) ['844] 6 Q. B. 287 : 115 E. R. 311.
(3) [1851] 16 Q. B. 717 : 117 E. R. 1055
(4) L. R. ('8) 1. English & Irish Appeal Cases 30'.

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in issue in a former suit which have been heard and finally decided between the parties, and includes matters which might and ought to have been made ground of attack or defence in the former suit. The rule of conclusiveness of foreign judgments applies only to matters directly adjudicated upon. Manifestly, therefore, every issue heard and finally decided in a foreign court is not conclusive between the parties. What is conclusive is the judgment. Again, the competence of a Court for the application of the rule of *res judicata* falls to be determined strictly by the municipal law; but the competence of the foreign tribunal must satisfy a dual test of competence by the laws of the State in which the Court functions, and also in an international sense.

The submission of the Attorney-General that the claim made by the plaintiffs in the Mysore suits was one relating to succession to the estate of Ramalingam, and the decision of the Mysore Court which adjudicated upon the question as to the right to succession was conclusive as to all property—whether within or without jurisdiction—need not detain us. The suit as framed did not relate to succession to the estate of Ramalingam: the plaintiffs claimed that they had acquired according to the well-recognised rule relating to coparcenary property, an interest therein by birth, and that Ramalingam's interest in the property was on his death extinguished. Succession to the estate of a person is governed by the *lex situs* in the case of immovables, and in the case of movables by the law of his domicile, but these appeals raise questions not about the law applicable to the devolution of the estate, but about title which the testator could devise by his will. That title must be adjudicated upon in the case of immovables by the Courts of the country in which such immovables are situate and on evidence led in that court.

In considering whether the suit filed by the plaintiffs was one relating to succession, cases like *in the matter of the Hindu Womens' right to Property Act,* 1937(1), and *in the matter of the Federal Legislature to provide for the Levy of an Estate Duty in respect of property other than agricultural land, passing upon the death of any person* (2) which deal primarily with questions as to the power to legislate in respect of interest of a co-parcener in a joint Hindu family have little relevance.

The suits also did not relate to the personal status of Ramalingam and his sons. The plaintiffs claimed in the Mysore High Court that the will of Ramalingam was invalid, because he was under the Hindu Law, by which he was governed, incompetent to dispose of thereby the property of the joint family. The dispute related primarily to the character of the property devised by the will, and the Mysore High Court held that the property devised under the will was his self-acquired property: it did not purport to adjudicate upon any question of personal status of the parties to the dispute before it.

We may now consider the plea that "the judgment of the Mysore High Court was *coram non judice.*" It was urged that the Judges of the Mysore Court who constituted the Full Bench, were biased against the plaintiffs, that they were interested in the dispute before them and that they denied opportunity to the plaintiffs to defend the appeals. It was urged by the plaintiffs that Mr. Medappa who presided over the Full Bench had tried the probate proceeding in which the will of Ramalingam was upheld and in the judgment in that case had made severe strictures against "the family of the plaintiffs", and the witnesses appearing in support of the caveators' case, that Mr. Medappa was a close friend

(1) [1941] F. C. R. 12. (2) (1944) F. C. R. 317.

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of A. Wajid, the first executor under the will, that he had for many years before and after he became a Judge of the High Court used a motor car belonging to the estate in dispute and had attempted to dissuade Raju, advocate of the plaintiffs, from appearing for them in the suit relating to the estate. Against Mr. Balakrishanaiya, it was urged that he should not have sat on the Full Bench as he was to be examined as a witness in the matter relating to proof of the settlement of the dispute between the parties, that he had made up his mind and had delivered a judgment expressing a final opinion on the merits of the appeal and on that account was biased against the plaintiffs, and that he had in the course of the hearing of the appeals sitting with Kandaswami Pillai, J., made diverse observations indicating that he was not open to argument, reconsideration and independent conviction on the merits of the dispute. It was also urged that the proceedings in the Mysore High Court were conducted in an atmosphere of vindictiveness towards the plaintiffs and that observations made and orders were passed from time to time by Mr. Medappa and Mr. Balakrishanaiya at diverse stages of the hearing of the appeal which left no room for doubt that the two Judges were biassed against the plaintiffs and that they by their orders denied to the plaintiffs an opportunity of presenting their case before the Court.

Before we deal with the contentions it may be necessary to dispose of the contention advanced by the executors that it is not open in this suit to the plaintiffs to raise a contention about bias, prejudice, vindictiveness or interest of the Judges constituting the Bench. They submitted that according to recent trends in the development of Private International law a plea that a foreign judgment is contrary to natural justice is admissible only if the party setting up the plea is not duly

served, or has not been given an opportunity of being heard. In support of that contention counsel for the executors relied upon the statement made by the Editors of Dicey's "Conflict of Laws", 7th Edition Rule 186 at pp. 1010-1011 and submitted that a foreign judgment is open to challenge only on the ground of want of competence and not on the ground that it is vitiated because the proceeding culminating in the judgment was conducted in a manner opposed to natural justice. The following statement made in "Private International Law" by Chesire, 6th Edition pp. 675 to 677 was relied upon:

> "The expression 'contrary to natural justice has, however, figured so prominently in judicial statements that it is essential to fix, if possible, its exact scope. The only statement that can be made with any approach to accuracy is that in the present context the expression is confined to something-glaringly defective in the procedural rules of the foreign law. As Denman, C. J., said in an early case:
>
> > "That injustice has been done is never presumed, unless we see in the clearest light that the foreign law, or at least some part of the proceedings of the foreign court, are repugnant to natural justice: and this has often been made the subject of inquiry in our courts."
>
> In other words, what the courts are vigilant to watch is that the defendant has not been deprived of an opportunity to present his sides of the case. The wholesome maxim *audi alteram partem* is deemed to be of universal, not merely of domestic, application. The problem, in fact, has been narrowed down to two cases.
>
> The first is that of assumed jurisdiction over absent defendants a.....

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Secondly, it is a violation of natural justice if a litigant, though present at the proceedings, was unfairly prejudiced in the presentation of his case to the Court."

It is unnecessary to consider whether the passages relied upon are susceptible of the interpretation suggested, for private international law is but a branch of the municipal law of the State in which the court which is called upon to give effect to a foreign judgment functions and by s. 13 of the Civil Procedure Code (Act V of 1908) a foreign judgment is not regarded as conclusive if the proceeding in which the judgment was obtained is opposed to natural justice. Whatever may be the content of the rule of private international law relating to "natural justice" in England or elsewhere (and we will for the purpose of this argument assume that the plea that a foreign judgment is opposed to natural justice is now restricted in other jurisdictions only to two grounds—want of due notice and denial of opportunity to a party to present case) the plea has to be considered in the light of the statute law of India; and there is nothing in s. 13 of the Code of Civil Procedure, 1908, which warrants the restriction of the nature suggested.

By s. 13 of the Civil Procedure Code a foreign judgment is made conclusive as to any matter thereby directly adjudicated upon between the same parties. But it is the essence of a judgment of a Court that it must be obtained after due observance of the judicial process, *i.e.*, the Court rendering the judgment must observe the minimum requirements of natural justice—it must be composed of impartial persons, acting fairly, without bias, and in good faith, it must give reasonable notice to the parties to the dispute and afford each party adequate opportunity of presenting his case. A foreign judgment of a competent court is conclusive even if it proceeds on an erroneous view of the evidence or the law, if the minimum requirements of the judicial

process are assured : correctness of the judgment in law or on evidence is not predicated as a condition for recogniti on of its conclusiveness by the municipal court. Neither the foreign substantive law, nor even the procedural law of the trial need be the same or similar as in the municipal court. As observed by Charwell, J., in *Robinson* v. *Fenner*(1) "In any view of it, the judgment appears, according to our law, to be clearly wrong, but that of course is not enough : *Godard* v. *Gray* (2) and whatever the expression "contrary to natural justice", which is used in so many cases, means (and there really is very little authority indeed as to what it does mean), I think that it is not enough to say that a decision is very wrong, any more than it is merely to say that it is wrong. It is not enough, therefore, to say that the result works injustice in the particular case, because a wrong decision always does." A judgment will not be conclusive, however, if the proceeding in which it was obtained is opposed to natural justice. The words of the statute make it clear that to exclude a judgment under cl. (d) from the rule of conclusiveness the procedure must be opposed to natural justice. A judgment which is the result of bias or want of impartiality on the part of a Judge will be regarded as a nullity and the "trial *coram non judice*" (*Vassilades* v. *Vassilades* (3) and *Manik Lal* v. *Dr. Prem chand* (4)).

We may now deal with the diverse objections raised against the two Judges—Mr. Medappa and Mr. Balakrishanaiya—alleging bias and partiality against them and also against the court collectively. In proceeding to deal with evidence, it has to be remembered that we are dealing with the judgment of a foreign tribunal constituted according to the laws of the foreign State for hearing the appeal. We also cannot forget that the conduct of the plaintiffs and their lawyer may have

(1) [1913] 3. K. B. 835, 842.
(2) [1870] L.R. 6 Q. B. 139.
(3) A.I.R. 1945 P.C. 38, 40.
(4) [1957] S. C. R. 575.

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appeared to the learned Judges as asking for unreasonable indulgence if not offering deliberate obstruction, and that the Judges in passing the diverse orders on which the plea of bias, prejudice and interest were sought to be founded were primarily concerned with effective progress and disposal of the appeals.

It is somewhat unfortunate that all the material evidence which had bearing on the case as to the allegations of bias, prejudice interest and hostility has because of certain orders passed by the Madras High Court not came on the record. Again Raju, the advocate of the plaintiff could not be examined at the hearing of the suit as he was undergoing a long term of imprisonment and the commission issued by the Madras High Court to examine him as a witness could not be executed owing to, what Ramaswamy, J., in his characteristic style states, "interminable legal obstacles and conundrums which arose." For the examination of Mr. Medappa an order was made and commission was issued but the executors did not ultimately examine him. Mr. Balakrishanaiya was examined in Court but even his evidence was not full because of the order passed by Rajagopalan, J. restricting the scope of enquiry of conclusiveness laid down by him on the issue and which was confirmed by the Appellate Court. It may be recalled that the executors applied to the learned Judge for an order that the suit be heard on the preliminary issue, that it was "barred as *resjudicata* because of the judgment of the Mysore High Court" and for examination of witnesses in Bangalore on the plea set up by the plaintiffs of pronounced hostility and bias on the part of Mr. Medappa, and Mr. Balakrishanaiya. The learned Judge passed an order that on the allegation that had been made on the application against the two Judges of the Mysore High Court it was not permissible to embark upon an investigation relating to the manner in which the appeals were conducted

or with reference to their decisions in other legal proceedings connected or otherwise with the appeals that they eventually heard. But on the plea of bias, prejudice and hostality the evidence relating to the manner in which the proceedings were conducted by the Judges and various orders made were, in our judgment, material. Rajagopalan J. permitted evidence to be led on two matters only (1) that Mr. Medappa was using a motor car belonging to the estate of the deceased, and (2) that Mr. Medappa had sent for Raju, counsel for the plaintiffs and had attempted to dissuade him from taking up the case of the plaintiffs and appearing for the plaintiffs' family. In appeal against the order of Rajagopalan, J., the High Court of Madras held that the enquiry into the use of the "Mercedes car" belonging to the estate by Mr. Medappa was not permissible. The learned Judges observed: "It is not as if the plaintiffs have alleged that Medappa, C.J. had claimed the Mercedes car to be his own and was therefore, not a person competent to decide on the title to the properties under s. 13 (a). It was merely alleged that he used the car for himself and his wife and children. It was not even stated whether he had used the car free or for hire. There was no claim by the plaintiffs or others on Medappa, C.J., for any dues in respect of the alleged use of the car. The car itself was alleged to have been used in 1943-45 when Medappa, C. J., was District Judge, Bangalore Cantonment, and was hearing the probate application. It was sold away in 1945 or 1946, long before Medappa, C. J., sat on this Full Bench. It is too much to say that, from these facts C. J., would be *coram non judice,* or he had identified himself with the executors, and that his taking part in the Full Bench would be opposed to natural justice." These observations contained certain statements which are either *in exact* or not supported by evidence. According to the plaintiffs, Mr. Medappa became a Judge of the High Court at

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Mysore in 1944 and that is amply supported by evidence on the record. Again, our attention has not been invited to anything on the record that the "Merceds-car" was disposed of in the year 1945-46. But the evidence relating to the use of the motor car was excluded by this order.

About the attempts made by Mr Medappa to persuade Raju not to appear for the plaintiffs in the District Court, no direct evidence was led. The direct evidence about the alleged dissuasion of Raju could only be of Raju and Mr. Medappa, but this evidence has, because the parties did not choose to examine them, not come on the record. But some indirect evidence was sought to be led before the High Court about the alleged dissuasion. Raju had made an affidavit in June 1950 in this Court in certain proceedings taken by the plaintiffs for the issue of a writ of *prohibition* restraining execution of the decree passed in Appeals Nos. 104 and 109 of 1947-48 of the file of the High Court of Mysore on the ground that because Mr. Medappa and Mr. Balakrishanaiya who were members of the Bench were incompetent for diverse reasons to hear and decide the appeals, the judgment of the High Court was a nullity. In that affidavit Raju stated that he was an Advocate for the plaintiffs who had filed two suits against the executors of the estate of Ramalingam and that "during the later part of 1945 and the beginning of 1946," Mr. P. Medappa who was then a Puisne Judge of the High Court of Mysore, Bangalore, tried to dissuade him "from appearing for the family of Ramalingam and vehemently criticised the family members." This was not evidence on which the Court could act. Raju was alive and could be examined : the Court had not directed proof of any facts by affidavits, and the executors had no opportunity to cross-examine Raju on the statements made in the affidavit. Vishwanath the first plaintiff deposed

that sometime before the hearing of the appeals before the Full Bench of the Mysore High Court he was told by Raju that Mr. Medappa had tried to dissuade him from appearing for the plaintiffs in the District Court of Bangalore. He further stated that on July 25, 1949, during the course of the hearing of the appeals before the Full Bench Raju had stated in open Court that "he was not competent to take up the case on account of the dissuasion by the Chief Justice" and that "Chief Justice Medappa had sent for him and dissuaded him from appearing on behalf of Ramalinga's family. Thereupon Chief Justice Medappa felt upset and refused to hear" Raju. He also deposed that Mr. Puttaraj Urs (who was for some time a Judge of the Mysore High Court had told him that Raju had told Urs that Medappa had asked him Raju not to appear for the "plaintiffs" "family" and had sent for him and dissuaded him from appearing for Ramalinga's family. Elaborate argument were advanced before us as to the truth of the statements made by Vishwanatha and Puttaraj Urs. It was urged that the statement about the dissuasion of Raju was made for the first time in the Madras High Court on April 7, 1950, and that it was not made by Vishwanath in the Mysore Court or in the petitions to H. H. The Maharaja of Mysore for constituting "an ad hoc Bench" for hearing the appeals. It was pointed out that there were atleast two earlier occasions in the Madras High Court in which Vishwanath could have made the allegations relied upon by him in his affidavit dated April 7, 1950. Strong reliance was also placed upon a letter dated August 21, 1952, addressed by the 1st plaintiff Vishwanatha to the executor Abdul Wajid that the allegations made in Application No. 444 of 1950 and the affidavit filed in the Madras High Court that the Judges of the Mysore High Court were prejudiced and that Mr. Medappa had used the "estate

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motor-car" and had asked Raju not to appear for the plaintiffs had been put forth by him as their advocates told him that they were the only method of challenging the judgment of the Full Bench and that he had been assured that those allegations were true and that they would supply the evidence in support of these allegations and it was at their instance and believing their assurances that he incorporated the allegations in his affidavit. It was further stated that he was not able to find any credible evidence at that time to support these allegations and hence withdrew them all and proposed to let in no evidence on those allegations for the decision of the preliminary issue.

This question does not call for any detailed examination. There is no direct evidence about the alleged dissuasion of Raju by Mr. Medappa during the course of the hearing in the trial Court, and the indirect evidence is mostly hearsay and otherwise infirm. The evidence of Puttaraj Urs has little value: he has no personal knowledge about the attempted dissuasion of Raju by Mr. Medappa. He only relates what he heard from Raju. But the truth of the statement cannot be established by this indirect method. The evidence of Vishwanath as to what Raju told him before the hearing of the appeals is also of no value. About the incident which took place in the Court on July 25, 1949, there is the statement of Vishwanatha on the one hand which is contradicted by Abdul Wajid and Narayanaswamy, the two executors, and no questions in that behalf were asked to Mr. Balakrishanaiya. In this state of the record we do not think that we would be justified in disagreeing with the High Court that the case that Mr. Medappa persuaded Raju, counsel for the "plaintiffs, family" has not been proved.

We may, however, state that we are unable to accede to the contention raised on behalf of the

executors that the letter dated August 21, 1952, furnishes evidence that the allegation regarding dissuasion of Raju and about the use of the motor car of the estate was an after-thought and made by Vishwanatha at the instance of his advocate. This letter was written when Suit No. 214 of 1944 was pending in the High Court at Madras. In that suit the judgment of the Mysore High Court was challenged on the ground that the Judges who heard the appeals were interested and biassed, and liberty was reserved by Rajagopalan, J., to the plaintiffs to lead evidence on those two matters only. We are unable to believe that of his own accord Vishwanatha would address a letter to the executor Wajid and substantially destroy his case for setting aside the judgment of the Mysore High Court. Vishwanatha has stated in his evidence that he prepared the letter at the instance of Wajid to "prove his *bona fides* with Medappa." He stated that the letter was written at Bangalore in the office of one Subramaniam brother of the executor Narayanaswami in the presence of Wajid about 2 or 3 months prior to August, 1952, and that about that time there were "meetings and talks of compromise" and that Wajid had told him that the letter "was necessary to prove the *bona fides* with Medappa before reaching the compromise." Wajid has denied that he had persuaded Vishwanatha to write the letter. But the story about delivery of the letter at the residence of Wajid is highly improbable. Wajid says that the letter was delivered by hand by some unknown person at his place in his absence. This letter was followed by another letter addressed to Subramaniam brother of the executor Narayanaswami dated August 25, 1952, in which there is a reference to the letter dated August 21, 1952. This letter was addressed to S. N. Subramaniam brother of Narayanaswami, and recites that a copy of the letter addressed to Wajid dated

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August 21 1952, was sent to Subramaniam By that letter Viswanatha requested Subramaniam as a "well-wisher of the family" and a friend of his father "to take into consideration the plight in which the family was and to intercede" on their behalf "with the executor to secure as much benefit as possible by way of compromise." A photostat copy of this letter has also been produced by Wajid. Vishwanatha stated that even this letter was prepared at the instance of Wajid. He asserted that the first letter was prepared on the representation that it was to be shown to Mr. Medappa, and the second letter was composed by Wajid. Wajid, had denied the allegations. We do not think that Vishwanatha voluntarily wrote the two letters admitting that the allegations that Medappa was biassed against him and the ground for such allegations were invented shortly before April 7, 1950, at the instance of the lawyers of the plaintiffs.

Mr. Medappa did try the probate proceeding and dismissed the caveat filed by the plaintiffs but on that account we are unable to hold that he had any interest in the subject matter of the appeals or was biased against the plaintiffs. Our attention has not been invited to any part of the judgment in the probate proceeding which might supply any ground for inferring bias. Even though some of the witnesses in the probate proceeding and in the suit for declaration of title of the plaintiffs to the properties were common it would not be possible to infer bias merely from the circumstances that Mr. Medappa as District Judge tried the earlier suit in which the enquiry was strictly restricted to the validity of the will and he subsequently was a member of the Full Bench of the Mysore High Court which decided the question of title set up by the plaintiffs.

The plea that Mr. Medappa and Wajid were close friends does not appear to have been denied by the executors. In his affidavit filed in June, 1950, the first plaintiff Vishwanath alleged that Mr. Medappa was a friend of the executors, and that Mr. Medappa was the Chief Steward of the Turf Club and the first executor Wajid was the Secretary and that they were "intimate and bosom friends," Wajid did not deny these allegations. He merely stated that he "was once the Hony. Secretary of the Bangalore Race Club for about three months on account of the removal of the permanent secretary. As a stop-gap arrangement, (he) being a Committee Member was appointed to act as secretary for this short period. Mr. Justice P. Medappa was appointed by His Highness the Maharaja as a steward of the club", and submitted that "it was insulting and improper to suggest that a Judge was biassed because he came into social contact with other gentlemen of the State in the course of his public and social activities. In his affidavit dated July 5, 1950, Vishwanath stated that Mr. Medappa and Abdul Wajid have "been very intimate friends, and chums for over a decade."

Mr. Balakrishanaiya, it is true, did hear the appeals sitting with Chief Justice Paramshivayya. It is the plaintiffs' case that after hearing arguments for over a fortnight, Mr. Balakrishanaiya suggested that the parties should compromise the dispute. Mr. Balakrishanaiya has denied this statement ; he stated that the parties themselves decided to negotiate a com promise. Even if it be true that he suggested that the possibility of a compromise of the dispute be explored, bias on his part from that suggestion cannot be inferred. It is also true that sitting with Kandaswami Pillai, J., on March 15,1949, he declined to order an enquiry into the compromise set up by the plaintiffs on the ground that to record the compromise would "result in the entire

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intention of the testator being completely negatived." Assuming that the order was, in law, incorrect—on that question we cannot express any opinion—the making of this order will not justify an inference of bais on the part of Mr. Balakrishanaiya. It was also alleged against him that he had never "disguised his hatred" of the "widow and children of Ramalingam" and had "openly declared it by his frequent observations and interruptions in the course of the plaintiffs' counsel's arguments" (*vide* affidavit field in June 1950, in the proceedings in this Court for a *writ of prohibition*). It was further alleged in the affidavit of Vishwanath dated April 7, 1949, that Mr. Balakrishanaiya had from the beginning become "openly hostile and his hostility had become pronounced after the retirement of Chief Justice Paramshivayya." In the course of his cross-examination Mr. Balakrishanaiya denied the suggestion that he was hostile to the members of "the plaintiffs' family". As no enquiry was permitted to be made on these matters by the order of Rajagopalan, J., evidently all the material evidence is not before the Court. Vishwanath in his evidence has not spoken about the statements alleged to have been made by Mr. Balakrishanaiya from which bias may be inferred. We are unable to hold, therefore, on the plea of the plaintiffs that the conduct of Mr. Balakrishanaiya at the hearing of the appeal sitting with Kandaswami Pillai, J., supports the plea that he was biassed. The contention that after the plaintiffs had informed the Court Mr. Balakrishanaiya was to be examined as a witness in the compromise petition, the latter should not have set in the Full Bench has, in our judgment, no substance. The application for recording the compromise was disposed of on March 15, 1949, and the Court without enquiring into the truth or otherwise of the compromise set up, declined to permit such a compromise to be made a decree of the Court of the sole ground that it was "contrary

to the intention of the testator." There could, thereafter, be no scope for any enquiry into the truth of the plea set up by the plaintiffs about the compromise between them and the executors.

It would have been more consonant with justice if the application for recording a compromise was posted for hearing before a Bench of which Mr. Balakrishanaiya was not a member especially when the plaintiffs formally objected to him, but from the circumstance that of the bench as constituted he was a member, an inference of bias cannot be raised. Even according to Vishwanath, Mr. Balakrishanaiya stated that he was "sitting for hearing the appeals" with Kandaswami Pillai, J., because he was so directed by the Chief Justice, and that Mr. Balakrishanaiya gave Vishawanath liberty to move the Chief Justice for an order for constituting another Bench. Vishwanath says that he did go to see the Chief Justice but the Chief Justice ordered him out of his Chamber.

The last ground on which the plea of bias is set up is that Mr. Balakrishanaiya had delivered a judgment on the merits of the dispute and had incorporated therein the final order to be passed in the appeal, and thereafter he referred the case to the Full Bench and sat as a member of the Full bench after making up his mind on the merits of the appeals. This, it is contended, is opposed to natural justice. It was submitted that it is of the essence of a judicial trial that the Judge should be unbiassed and must have no predilections for either side, but Mr. Balakrishanaiya having made up his mind on the merits of the dispute of which fact the judgment delivered by him is strong evidence, he was incompetent to sit in the Full Bench for hearing the appeals.

Our attention was invited by the Attorney-General to a large number of decisions of the Courts

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in India and England in support of his plea that in the absence of a statutory provision a Judge is not prohibited from sitting in an appeal or in an application against his judgment. Our attention was also invited to a number of decisions of the Allahabad High Court in which it was held that in reference under s. 575 of the Code of Civil Procedure, 1882, the Judges differing should sit on the Bench together with other Judges and decide the appeal (*e.g., Rohilkhand and Kumaon Bank Ltd.* v. *Row* (1)) and also to the practice prevailing in certain Chartered High Courts of Judges presiding at the Sessions trial being associated at the hearing on a certificate granted by the Advocate-General under cl. 26 of the Letters Patent, e.g., *The King Emperor* v. *Barendra Kumar Ghosh* (2) and *Emperor* v. *Fateh Chand Agarwalla* (3), and to cases in which in appeals under cl. 10 of the Letters Patent of the Allahabad High Court Judges who decided the proceeding in the first instance sat in the Court of Appeal, e.g., *Lyell* v. *Ganga Dai* (4), *Daia Chand* v. *Sarfraz* (5), *Imam Ali* v. *Dasaundhi Ram* (6), *Nanak Chand* v. *Ram Narayan* (7), *Rup Kuari* v. *Ram Kirpa Shukul*(8) and *Kallu Mal* v. *Brown*(9), and also to the statutory provision of O.XLVII of the Civil Procedure Code of 1908 permitting review before the Judge who decides a suit or appeal. Reliance was also placed upon *R.* v. *Lovegrove* (10) in which it was held that on an application or appeal to the Court of Criminal Appeal (in England) there is a general rule no object on to the trial Judge sitting as a member of the Court to hear the application or appeal. It may appear, that in the absence of a statutory provision the fact that a judge sits in appeal or in an application against a judgment after

(1) (1884) I.L.R. 6 All. 468
(2) A.I.R. 1924 Cal. 75 257.
(3) (1916) I.L.R. 44 Cal. 477.
(4) (1875) I.L.R. I All 60.
(5) (1875) I.L.R. I All. 117.
(6) (1877) I.L.R. I All. 508.
(7) (1879) I.L.R. 2 All. 181.
(8) (1880) I.L.R. 3 All. 141.
(9) (1881) I.L.R. 3 All. 504.
(10) (1951) I All. E.R. 804.

he has decided the case would not by itself render the judgment of the Court invalid. In a strictly technical sense therefore it is true to say that a Judge is not incompetent to sit in an appeal or application against his own judgment. But the courts are not merely concerned to deal with cases in a rigid spirit of legalism. It is of the essence of a judicial trial that the atmosphere in which it is held must be of calm detachment and dispassionate and unbiassed application of the mind. It may be pertinent to observe that since the Federal Court was constituted and after this Court was invested with jurisdiction to try appeals there has occurred no case—our attention has not been invited to any—in which a Judge who had tried a case in the High Court or elsewhere sat in appeal against his own judgment sitting in the Federal Court or in this Court. The practices prevailing in the High Courts of including a Judge against whose judgment an appeal or proceedings in the nature of an appeal is filed, appears to have also fallen into desuetude and it is proper that it should. Whatever may have been the historical reasons in England and whatever may be the technical view as to the constitution of a Bench in which one or more Judges sit after they have expressed their opinion—not tentative but final,—the practice which permits a Judge to sit in appeal against his own judgment or in cases in which he had an opportunity of making up his mind and to express his conclusion *on the merits of the dispute* has little to commend itself for acceptance. We are therefore unable to agree that the circumstance that Mr. Balakrishanaiya delivered a final opinion in the appeals filed by the plaintiffs and thereafter sat in the Full Bench even after objection was raised by the plaintiffs to his participation may be discarded altogether from consideration in deciding whether in the light of other

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circumstances the plaintiffs had a fair trial and they were afforded an adequate opportunity of presenting their case before an unbiassed court. If the circumstances established by the other evidence disclose a *prima facie* case of bias, the fact that Mr. Balakrishanaiya notwithstanding the objection raised by the plaintiffs sat in the Full Bench after expressing his final opinion may have to be taken into account.

We may now proceed to deal with the grounds on which it is claimed on behalf of the plaintiffs they had no opportunity of being heard before the Full Bench of the Mysore High Court consisting of unbiassed Judges. The plaintiffs succeeded before the District Judge in establishing that the property disposed of by Ramalingam by his will dated September 10, 1942, was joint-family property. Against that decision appeals were filed in December 1947. The appeals were taken up for hearing in September 1948: and the hearing lasted more than a fortnight. On September 20, 1948, the Court adjourned the proceeding to enable the parties to negotiate a compromise. It is the plaintiffs' case that the dispute was settled, but that is denied by the executors. On November 22, 1948, according to the plaintiffs, the terms of compromise were to be filed in Court, but on that date one of the Judges—Mr. Paramshivayya —did not sit in Court because he was "compulsorily retired". Mr Medappa who was appointed Acting Chief Justice was admittedly a friend of Wajid, the principal executor under the will of Ramalingam. The plaintiffs say that Mr. Medappa was biassed against the members of their family and they were unwilling to have the appeal heard by Judges who had dealt with the case or were close friends of one of the parties. On January 5, 1949, the plaintiffs submitted an application requesting the Court to move the Government of Mysore to

constitute a special Bench. It was stated in that application that Mr. Balakrishanaiya would have to be a witness in the compromise petition; Mr. Kandaswami Pillai had delivered a judgment in a connected proceeding; and that other Judges had "dissociated themselves" from the case. This application was rejected on January 10, 1949, by Acting Chief Justice. Another application dated January 29, 1949, stating that the plaintiffs had approached the Government of Mysore to constitute an *ad hoc* special Bench to hear the appeals and praying that the hearing may be postponed was rejected on February 7, 1949, as "not maintainable". The appeals were then posted for hearing on February 14, 1949, but at the request of the executors the hearing was adjourned, the ground for adjournment being that their counsel was busy in a case posted on that date for hearing in a Court in Orissa. Another application dated March 7, 1949 for adjournment to enable the Government to consider the application for constituting a special *ad hoc* Bench was also rejected by order of the Acting Chief Justice on March 12, 1949. On March 15, 1949 the Court consisting of Mr. Balakrishanaiya and Mr. Kandaswami Pillai rejected the application for recording compromise set up by the plaintiffs. The appeals were then taken up for hearing. At that time another application for adjournment was made by counsel for the plaintiffs stating that the appeal against the order in the probate proceeding was pending before the Judical Committee and the decision in that appeal may be awaited: this application was rejected on the ground that a similar application previously made had been dismissed. It is the plaintiffs' case that Mr. Balakrishanaiya during the course of the hearing made observations from time to time that in his opinion there was no substance in the plaintiffs' case. Vishwanath in his affidavit dated April 7, 1950, has stated what according to him transpired in the Court:

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"9. Finding that any further argument before Mr. Justice Balakrishanaiya was practically useless, my counsel Mr. N. R. Raghavachariar left for Madras and my counsel Sri L.S. Raju filed a memo seeking for permission to retire as he could do no useful service to his clients in further addressing the Court in the circumstances mentioned."

"10. Objection was taken to this retirement by the other side and my counsel Sri L.S. Raju who had by that time discontinued addressing further arguments was asked whether he had my consent to retire. I was then present in Court and Sri L.S. Raju said that it is only at my instance, he was retiring."

"11. At this stage, Justice V. Kandaswami Pillai intervening stated that he was new to the case and that he has not made up his mind and requested my counsel Sri L.S. Raju to give the benefit of his arguments."

Vishwanath in the same affidavit also stated that Mr. Balakrishanaiya had been "openly hostile" to the plaintiffs. On this part of the case, by the order of Rajagopalan, J., no evidence was permitted to be given. The record, therefore, contains merely an assertion made by the plaintiffs and denial by the executors. After the judgment was delivered by the Court on April 2, 1949, Judges having differed the case was referred to a larger Bench. On June 23, 1949, the Registrar of the High Court notified that the appeals will be posted for hearing in the last week of July. It appears that on July 4, 1949, the plaintiffs submitted an application for adjournment stating that Sir Alladi Krishnaswami Ayyar, a leading member of the Madras Bar, who had argued the appeals at the earlier hearing and who was engaged to argue the appeals was unable to attend the Court

in the month of July, 1949, and requesting that adjournment be granted to enable him to appear and argue the appeals. This application was rejected by the Registrar of the High Court on some technical ground precise nature whereof it is not possible to ascertain from the record. Another application was submitted on July 18, 1949, accompanied by a letter from Sir Alladi Krishnaswami Ayyar stating that he was proceeding to Delhi to attend the meetings of the Constituent Assembly (of which he was a member) and was on that account unable to attend the hearing of the appeals in July 1949 : it was also stated in the application that the plaintiffs "were engaging" Mr. Sarat Chandra Bose—a member of the Calcutta Bar—to appear in the appeals, but he "found September convenient". This application was rejected as "belated", and also because the parties had been litigating ever since December 1942 and the objections of the executors were "entitled to consideration." On July 25, 1949, another application supported by an affidavit was filed for adjournment of the case and that an *ad hoc* Bench in which the Chief Justice and Mr. Justice Balakrishanaiya were not included be constituted. It appears that at the hearing of this application there were "angry scenes in Court between the Acting Chief Justice and L. S. Raju". In this affidavit dated April 7, 1950, Vishwanath has stated in paragraph 28, ".....the Officiating Chief Justice Mr. P. Medappa was very wild with me and rude. He threatened me and said that I should disclosed to him as to whom I consulted regarding this affidavit and if I did not do so, I will be sent to Jail. I was in a fix an in a state of terror and, when I said that among other counsels I consulted Sri L. S. Raju also, Sri P. Medappa turned round and said, "I am glad you mentioned it, I know what to do for him." In paragraph 29 Vishawanath stated : "Later on, the same day he asked Messrs. N. R. Raghavachariar and L. S. Raju

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to disclose what transpired between me and them in connection with the filing of the affidavit and they declined to do so on the ground that it would be breach of professional confidence." Then in paragraph 30, he stated : "In disgust and as he had other business, Mr. N. R. Raghavachariar left for Madras the same day filing a memo of retirement. Sri L. S. Raju also filed a memo of retirement." The order rejecting this application was pronounced in the afternoon of July 25, 1949, but the hearing of the appeal was taken up in the afternoon of July 25, 1949. In the affidavit dated April 11, 1950 filed in the Madras High Court by the executors in reply to the affidavit dated April 7, 1920, there was no denial of the allegations relating to what transpired in Court on July 25, 1949. The evidence of Mr. Balakrishanaiya—though the replies given are somewhat vague—gives some support to the story of what is described as "a stormy session" on July 25, 1949. Mr. Balakrishanaiya was asked by the plaintiffs whether he remembered that on the first day, *i e.*, July 25, 1949, it was a "very stormy session". The answer given was that he did "not understand". To the question whether "Medappa threatened the respondent to tell him the name of the advocate who drafted the affidavit", he answered "There was a question whether it was drafted by the party or with the aid of Counsel". The witness was then asked a composite question—"Did Medappa threaten him to put him in Jail? The storm means the storm of the session—the other colleagues were so distracted that they could not hear what was passing between Medappa and others?" No reply to first part of the question was apparently given. The answer recorded is, "So far we were concerned we were never distracted." It is true that the witness denied that Mr. Medappa had told the first plaintiff Vishwanath that when it was disclosed that Raju had drafted the affidavit Mr. Medappa stated he knew "what to do". When

the Court insisted on hearing the appeal on July 25, 1949, it appears, that Raju and N. R. Raghavachariar (who belonged to the Madras Bar) applied for leave to withdraw. On that application an order refusing leave to withdraw was, it appears, immediately recorded. The order declaring permission to retire from the case bears the date July 25, 1949, but for some reason not apparent from the record, it was pronounced on July 27, 1949. Arguments were heard on the 25th of July, 26th of July and 27th of July, 1949, and the Advocates of the plaintiffs were in the singular position of not knowing whether they did or did not continue to remain advocates for the plaintiffs. After the arguments of the executors, an application to enable the plaintiffs to secure the presence of Sir Alladi Krishnaswami Ayyar was made and was rejected, and "judgment was reserved" without hearing any arguments on behalf of the plaintiffs. Judgment of the Court which runs into thirty closely printed pages was delivered on July 29, 1949, at 4 p.m.

From a resume of what transpired since Mr. Medappa was appointed the Acting Chief Justice, it cannot be doubted that the Judges of the Mysore High Court were not willing to consider any request of the plaintiffs for formation of a Bench which did not include Mr. Medappa and Mr. Balakrishanaiya. Nor did they consider his applications for adjournment with sympathy. The attitude may appear to be somewhat rigid, but that attitude by itself may not justify an inference of bias.

The plaintiffs were since the appointment of Mr. Medappa as Acting Chief Justice making application after application for the constitution of a Bench in which Mr. Medappa and other Judges who had been at some time concerned with this case be excluded. But a litigant is not entitled to choose

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the personnel of the Court to hear his case, nor can he insist upon an adjournment of the case because the date fixed for hearing is not convenient to his counsel Convenience of counsel must subserve the larger interest of the administration of justice. It is true that where by a too strict observance of legal forms injustice has been done, by an apparently biassed tribunal, the decision may be declared "*coram non judice*" whether the decision is of the tribunal subordinate to the appellate jurisdiction of the court or of a foreign tribunal. But only facts proved in this case in support of the plea of bias are that Mr. Medappa was a close friend of the executor Syed Abdul Wajid, and Mr. Balakrishanaiya had expressed his view on the merits of the plaintiffs case. It would have been consistent with the dignity of the Court if Mr. Medappa and Mr. Balakrishanaiya had not sat in the Full Bench. But it cannot be forgotten that unless the Government of Mysore agreed to constitute an *ad hoc* Bench, there were no Judges in the Court who could form a Full Bench to hear the appeals. Mr. Puttraj Urs had recorded evidence in the suits out of which the appeals arose: Mr. Malappa was also concerned with some proceedings connected with the litigation and Mr. enkataramaiya the only remaining Judge had appeared as an Advocate for the plaintiffs. Mr. K. Kandaswami Pillai had retired. We may certainly not approve —if we are called upon to do so—of the incidents in Court at and before the hearing. But all these incidents may very well be the result of deliberate provocation given by the plaintiffs and their lawyer Raju, who appears to have attempted frequently to thwart the effective hearing of the appeals.

The High Court has carefully weighed the circumstances and has held that from the various pieces of conduct attributed to Mr. Medappa and Mr. Balakrishanaiya, an inference of bias may not

be made. We are dealing with the judgment of a foreign tribunal: however much we may regret the pronouncement of certain orders, especially orders declining to grant a reasonable adjournment to enable the plaintiffs' counsel to appear and argue the case, the constitution of the Bench and the manner in which the appeals were heard, it is difficult for us to disagree with the High Court and to attribute bias to the Judges, who constituted the Full Bench.

The plea of bias, of a foreign Court is indeed difficult to make out. The court will always presume, in dealing with the judgment of a foreign Court that the procedure followed by that Court was fair and proper, that it was not biassed, that the Court consisted of Judges who acted honestly, and however wrong the decision of the Court on facts or law may appear to be, an inference of bias, dishonesty or unfairness will not normally be made from the conclusion recorded by the Court on the merits. The party setting up a case that the judgment of a foreign court is not conclusive, because its proceeding was contrary to natural justice, must discharge this burden by cogent evidence, and we do not think that in this case such evidence has been led. The Judges had no pecuniary interest in the dispute. Bias in favour of the executors is sought to be inferred from close friendship of the Chief Justice with one of the defendants, and the expression of opinion by the other Judge on the merits—such expression of opinion being consistent with the practice prevailing in the Court—and refusal to grant facility to the plaintiffs to secure the presence of their chosen counsel. These grounds either individually or collectively do not justify us in inferring contrary to the view of the High Court that the Judges had forfeited their independence and impartiality and had acted not judicially but with bias.

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The last question which falls to be determined is whether the estate devised under the will dated September 10, 1942, was the joint family estate of Ramalingam and his sons. If the estate belonged to the joint-family, the will was undoubtedly inoperative. Certain facts which have a bearing on this question and which are mainly undisputed may be set out. Vydialingam was an employee in the Mysore Subordinate Judicial service and drew a monthly salary rising from Rs. 75/- to Rs. 125/-. He worked first as a translator in the Mysore Chief Court. In 1898 he was appointed Sheristedar of the District Court at Shimoga and was later transferred to Bangalore. One Loganathan Mudaliar, a building contractor carrying on business at Kolar Gold Fields, was a close friend of Vydialingam. In 1896, Loganathan fell ill and after his illness took a serious turn in 1898, he was unable to attend his business. Loganathan executed a will appointing Vydialingam and others as guardians of his children and also executors under his will, and died in 1900. Vydialingam was maintaining an account with the Cavalry Road Bank at Kolar Gold Fields since 1891. By 1895 substantial amounts were credited in that account of which the source could not be the meagre salary of Vydialingam. In the years 1896 and 1897, diverse amounts aggregating to the more than rupees one lakh were credited in that account. In May 1898 Vydialingam borrowed on his personal security from the Bank Rs. 2,000/- and gave it to Shanmugam, his eldest son. Shanmugam opened an account with the Cavalry Road Bank in October, 1899, by borrowing Rs. 25/-, but the entries in this account are few and for very small amounts. From the account maintained by the Mining Company it appears that the building construction work which was originally done by Loganathan, was later done by Shanmugam and since 1901 large amounts were paid to Shanmugam some of which were credited into the Cavalry Road Bank

account. Since July 1904 some books of account maintained in the name of Shanmugam for business, household and other expenses are available. About the year 1904, Devraj, the second son of Vydialingam, started attending to a building contractor's business at Gadag. Ramalingam after completing his training in the Victoria Jubilee Technical Institute at Bombay also took to that business. Vydialingam died in May 1905. He was then possessed of two houses which were orally directed by him to be given to Ramalingam. The three brothers continued to live jointly even after the death of Vydialingam and the household expenses were jointly incurred. In 1910 Ramalingam sold one of the two houses and received Rs. 4,000/-. On March 30, 1912, a deed of release was executed by Ramalingam and Devraj under which Devraj and Ramalingam each received Rs. 2,500/- and the Kolar Gold Fields business was thereafter carried on apparently as a partnership business between Shanmugam and Ramalingam. Manavalam, father-in-law of Devraj died in 1910, and Devraj migrated to Madras and settled down in that town to attend to the business of his father-in-law. Shortly after April 1912, Shanmugam proceeded to the United Kingdom. There is no clear evidence whether he took part in the business after he returned from his journey abroad. He continued to make withdrawals from his account in the business. By 1961, he had overdrawn an amount exceeding Rs. 35,000/- which was written off. Thereafter he ceased to have any interest in the business. Shanmugam died in 1924 and Devraj died in 1936.

It is the plaintiffs' case that Vydialingam was carrying on the business of a building contractor since about the year 1895 or 1896: into this business Shanmugam was first introduced and thereafter Devraj and Ramalingam. After the death of Vydialingam, according to the plaintiffs, this business was carried on by the three brothers till the

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year 1910 at different places. Devraj was attending to a branch of the business at Gadag: Ramalingam attended to the business at Kolar Gold Fields and also at Gadag. The plaintiffs claim that the business which was carried on by Ramalingam since the year 1916, was directly connected with the business which was inherited from Vydialingam by his sons and being in his hands ancestral business, the acquisitions out of the same were impressed with the character of joint-family property. They also claimed that Ramalingam disposed of two ancestral houses which he received and used the sale proceeds in conducting his business and also Rs. 12,500/- received from the Administrator-General as the Share, out of the estate of Loganathan, of his wife Gajambal who was the daughter of Loganathan. With this fund Ramalingam carried on the business of a building contractor in the conduct of which he was assisted by his sons and he acquired the estate in dispute. The case of the plaintiffs therefore was that Vydialingam was carrying on the business of a building contractor, that his sons assisted him in carrying on the business, that after his death the business which devolved upon his sons was carried on by them till 1910 when Devraj, the second son ceased to be interested therein. Then Shanmugam, the eldest son severed his connection in 1916 leaving Ramalingam to conduct the ancestral business alone.

The executors contended that Vydialingam did not carry on business of a building contractor, that Shanmugam started his own business as a building contractor sometime in 1898 and neither his father nor his brothers had any interest therein, and that for the first time, in 1912, in view of his impending departure for the United Kingdom, Shanmugam admitted Ramalingam into his business as a partner and ultimately in 1916, Ramalingam became the sole owner of the business, because

Shanmugam severed his interest therein. The case of the executors, therefore was that the business in the hands of Ramalingam had no connection with any ancestral business or estate received by Ramalingam from his father.

The trial Judge dealt with the question under five heads :—

Firstly, that Vydialingam carried on the business of a building contractor. He had left two houses which were unencumbered, and the contractor's business: these became joint-family estate in the hands of his son, and out of this estate Ramalingam's fortune was built:

Secondly, that after the death of Ramalingam, his three sons carried on a joint family business. This joint-family business was attended to by the three brothers at different places and that the joint acquisitions were divided sometime in the year 1910 and each brother received a share of Rs. 34,000/- odd, and out of the share received by Ramalingam, estate devised by the will was acquired :

Thirdly, that Ramalingam received a share of the ancestral estate of the value of Rs. 40,000/- and also Rs. 12,500/- as share of his wife out of the estate of Loganathan and the entire amount was invested in his business as a building contractor and out of this the estate in dispute was acquired :

Fourthly, that Ramalingam and his eldest son Vishwanath were actively associated in carrying on the building contractor's business and the acquisitions out of

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the business were joint-family estate : and

Fifthly, that Ramalingam had by his declarations impressed his acquisitions with the character of joint-family property and therefore the property was joint-family property.

He held on all the five heads that the property devised under the will of Ramalingam was joint-family property. In appeal, the High Court held that the case of the plaintiffs under the 4th and the 5th heads was not established. About the 3rd head the High Court held that there was no clear evidence that Ramalingam had received an ancestral fortune of Rs. 40,000/- or Rs. 12,500/- on behalf of his wife Gajambal from the estate of Loganathan. But the High Court held that Vydialingam was carrying on the business of a building contractor since the year 1896 and that in this business were associated his sons as they grew up; that the business was carried on in the name of Shanmugam because Vydialingam being a public servant could not carry it on in his own name; that after the death of Vydialingam this business was conducted as a joint-family business; that in the year 1910, Devraj who was attending to the Gadag Branch of the business left the family and commenced attending at Madras to the business of his father in-law who died about that time; and that Shanmugam ceased to have any connection with the business in 1916. The High Court summarised the conclusion as follows :—

"The business which Ramalingam subsequently extended was a business which-descended to him from his father, his two brothers having successively left it. It is probable though is not clearly proved—that Ramalingam put the money which is obtained by sale

of the house in Bangalore into business. He also put in the money he was paid under the release deed of 1912. Into the nominal partnership which he entered into with Shanmugam, he brought in as his capital a sum of Rs. 5,000/- representing a fragment of the old business. No less important, he also brought in the goodwill of the old business. At no time before the final few months preceding his death, when he had quarrelled with the members of his family, did Ramalingam, notwithstanding the claims he made in his will, and other documents, seek to exclude the members of family. He made no effort to keep distinct what were acquired with the aid of indubitably joint-family nucleus from what it might have been possible to contend were the result of his own unassisted exertions. Taking all the circumstances into account, we are of the opinion that the learned trial Judge was right in concluding that the properties which Ramalingam left behind must be treated as joint-family properties."

To establish their case the plaintiffs relied upon the evidence of five witnesses—Kuppuswamy Mudaliar, Sitharam Naidu, Varadaraja Mudaliar, Venugopala Mudaliar and Dharmalingam, some of whom had been examined before the Court of the District Judge, Bangalore. By their evidence it was sought to prove that Vydialingam did carry on in and before 1898 business as a building contractor at Kolar Gold Fields and that this business had on his death descended to his sons. The plaintiffs also relied upon extracts from the accounts of Ramalingam and Shanmugam with the Cavalry Road Bank at Nandidurg, and the extracts from the accounts of the Nandidurg Mining Company recording payments made from time to time to Shanmugam some of which were credited in the account of Vydialingam

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with the Cavalry Road Bank. Reliance was also placed upon the entries in the books of account maintained in the name of Shanmugam from the year 1904 showing receipts from Devraj at Gadag and amounts debited as sent to Devraj at Gadag, collection of rent from the houses credited in that account, expenses debited for purposes connected with building construction items showing that Devraj or Vydialingam had participated in those transactions and other entries of house-hold expenses showing that the account maintained in the name of Shanmugam was in truth the account of the joint-family. The plaintiffs also relied upon certain letters written by Ramalingam and Devraj which from their terms evidenced their case that they were not acting merely as agents of Shanmugam but as owners of the business. Reliance was also placed upon the testimony of one Masilamany Pillai, an Advocate (who later acted as a Judge of the Madras High Court), that in the arrangements made a few months before March 30, 1912, it was agreed that the good-will of the Kolar Gold Fields business was allotted to Ramalingam. The learned trial Judge accepted the evidence of all the witness whose testimony was relied upon by the plaintiffs and held that the extracts Vydialingam's account established that he was carrying on business as a building contractor, and the books of account maintained in the name of Shanmugam were family accounts.

In appeal, the High Court relied upon the evidence of only two of the five witnesses who deposed that Vydialingam was working as a building contractor. In the view of the High Court the evidence of Varadaraja Mudaliar and Sitharam Naidu but not of other witnesses was reliable. Witness Sitharam Naidu deposed that he was working as a building contractor since the year 1898 at

Kolar Gold Fields, that he had taken up a "tenement in the compound of Loganatha Mudaliar" and that he knew that Vydialingam was looking after the contract work of Loganath, that Vydialingam was assisted by his three sons, that Shamingam was doing business of a building contractor and was also helping his father Vydialingam. The witness was described by the High Court as a respectable person "not readily corruptible" and who "had no ascertainable motive for giving false evidence". Varadaraja Mudaliar deposed that he used to see Vydialinga Mudaliar when he (the witness) went to Oorgaum in 1898 to see his father-in-law who was a *Mistry* in the Oorgaum mines working under Loganath Mudaliar, that his father-in-law at first worked under Loganath and later under Vydialingam. The evidence of this witness was also accepted by High Court. The evidence of these two witnesses establishes that Vydialingam Mudaliar was conducting the business of a building contractor. There is also evidence that since the year 1898 Loganath was too ill to attended to his business and that he died in 1900. The testimony of the two witnesses Sitharam and Varadaraj is supported by entries in the account of Vydialingam with the Cavalry Road Bank. The account of Vydialingam with the Cavalry Road Bank was opened in 1891. Vydialingam was an Employee of the State of Mysore and the maximum salary that he ever drew was Rs.125/- p.m. Between the years 1891 and 1894 the entries in the bank account were for small amounts, the largest being Rs. 478/4/-. In the year 1895, there were two items each exceeding Rs. 1,000/- credited in that account, but in 1896, the items of credit and disbursement were very large : it appears from the entries in that account that in the years 1896-1897, amounts aggregating to Rs. One lakh and more were credited in the account of Vydialingam and large disbursements were also made from that account. The High Court observed, and in our judgment the

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High Court was right in its view that the transactions in the books were "to large to be referred to the emoluments of Vydialingam as Sheristedar. It is legitimate inference that he has been engaged in other business". The executors did not deny that an inference that Vydialingam was carrying on some business clearly arose from the entries in the books of account. But it was suggested that Vydialingam may have carried on the business of a money-lender and for that purpose he may have withdrawn funds from the Cavalry Road Bank and utilized them as his circulating capital for his money-lending transactions. It was asserted that Vydialingam was a Director of the Cavalry Road Bank and was on the account able to help himself to the funds of the Bank for his private business. But our attention has not been invited to any evidence on the record that Vydialingam was a director of the Cavalry Road Bank. The entries are of such large amounts and the credit and debit entries are so frequent that the inference that were made in the course of a money-lending business would be difficult to make. It also appears that Vydialingam had mortgaged his house in 1892 for Rs. 25,000/- in favour of Thirunaglingam Pillai and he discharged this mortgage by borrowing a loan of Rs. 3,000/- on the security of the house from Loganathan on August 31, 1892. The amount was repayable in monthly instalments of Rs. 50/-. Another deed encumbering his house was executed by Vydialingam in 1894 for repayment of Rs. 2,000/-. These two mortgages remained outstanding till 1903. We are unable to accept the theory that Vydialingam carried on money-lending business when his own house was mortgaged, and he had agreed to pay the dues by instalments. The Cavalry Road Bank account also shows entries for amounts brought from the Madras Bank. These show that Vydialingam had received cheques which were encashed with the Madras Bank and the amounts were received by him. These entries render the theory of a money-lending business improbable.

The entries in the bank account of Vydialingam support the case that he was carrying on a business, and the testimony of two witnesses Sitharam Naidu and Varadaraja Mudaliar clearly shows that this business was of a building contractor.

Before 1898, even according to the case of the executors, Shanmugam was not employing himself as a building contractor. The entries in his account with the Cavalry Road Bank are for very small amounts till April 1901, when, for the first time, Shanmugam borrowed Rs. 800/- on the security of jewels. In the account of the Mining Company also, there are no entries for any payments made to Shanmugam till 1901 for work done by him. The entries in the Cavalry Road Bank account therefore support the inference that Vydialingam was carrying on business and Shanmugam had no business of his own atleast till 1900.

The entries in the Cavalry Road Bank account for the period subsequent to 1900 also suggest that Vydialingam operated the account of Shanmugam. Part of the amounts received from the Mining Company account by Shanmugam for the work done was applied for satisfying loans borrowed by Vydialingam. It has also to be noted that in Shanmugam's account till 1901 no large amounts were credited. It appears from the account of the Mining Company that on January 18, 1901, he received Rs. 5,000/- by cheque and other large amounts within the next three months aggregating to nearly Rs. 7,500/- in cash and cheques. But the account of Shanmugam with the Cavalry Road Bank shows only a total credit of Rs. 780/- between October 1899 and April 1901 in the suspense account. No books of account about the construction work done in the name of Shanmugam are available for the period.

There are certain entries in the accounts of Vydialingam and Shanmugam which show interrelation between the two accounts. For instance,

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on January 9, 1904, according to the Mining Company's account Shanmugam was paid three amounts Rs. 36/-, Rs. 362/14/1 and Rs. 12,243/5/-. About this time Shanmugam was indebted to the Cavalry Road Bank in the sum of Rs. 3,400/- on promissory notes. On January 19, 1904, he paid Rs. 3,100/- into the Bank and partially satisfied this liability. Rs. 12,120/6/9 are found credited in the account of Vydialingam on January 23, 1904 and Rs. 12,000/- are withdrawn on January 29. There is no direct evidence to connect the payments made in the accounts of Shanmugam and Vydialingam with the amounts received by Shanmugam, but it would be a reasonable inference, having regard to the proximity of time, that it was out of the Amount of Rs. 15,900/- received by Shanmugam on January 19, 1904, that his liability for Rs. 3,100/- to the Cavalry Road Bank was discharged and an amount of Rs. 12,120/6/9 was paid into the Cavalry Road Bank and an amount of Rs. 305/- was utilized for satisfying the debts of Vydialingam in his personal account. There are also other entries disclosing interrelation between the accounts. Vydialingam borrowed Rs. 140/- on February 18, 1904, under promissory note dated February 18, 1904, and the identical amount is credited in the account of Shanmugam under the entry "Receipt from V. S. Vydialinga Mudaliar." The *Chitta* number under which amounts are credited and debited are identical. On December 1, 1904, Shanmugam received a cheque for Rs. 10,000/- from the Mining Company. The cheque was credited in the Cavalry Road Bank on 10-12-1904. On that day Shanmugam was indebted in the sum of Rs. 2,625/- in the promissory note account. On December 19, he withdrew a total amount of Rs. 8,733/2/0. The *Chitta* entry in that behalf is No. 113. On that very day there are two entries under Chitta No. 113 for payment of Rs. 1,050/- in Vydialingam's account. There are entries in Shanmugam's account with the Bank

showing debts made pursuant to directions given by Vydialingam. For instance, on March 25, 1903, Rs. 500/- are debited pursuant to directions given by Vydialingam. There are two similar debit entries pursuant to directions given by Vydialingam on April 4, 1903, and April 10, 1903, for Rs. 500/- each.

In Vydialingam's account on July 13, 1903 there is an entry of Rs. 280/- paid for cart hire. That is also indicative of the fact that he was carrying on the business of a building contractor, otherwise this entry is not capable of explanation. There are also entries in the account maintained in the name of Shanmugam showing expenses incurred by Vydialingam and Devraj for travelling in connection with the building of the 'English Church". On August 7, 1904, Rs. 20/- were debited as spent by Vydialingam for going to Madras. There is also a debit entry of Rs. 3/- dated July 26, 1904, for travelling expenses of Devraj and Shanmugam. The account maintained in the name of Shanmugam for the period prior to July, 1904, is not produced. The account is available till 1907 and then there is a break. There is an account book for 1910-11, but not for the period immediately before April 1, 1912, when a partnership was started between Ramalingam and Shanmugam. There are numerous entries in this account showing that large amounts were received from Gadag from Devraj and also for amounts sent to him. On May 5, 1905, an amount of Rs. 1,000/- was raised on a promissory note and sent to Devraj. On July 19, 1905, there was a remittance to Devraj by Shanmugam of Rs. 1,001/ 8/2. There is a similar remittance on September 17, 1905. On September 26, 1905, Rs. 100/- had been paid through Ramalingam. There are credit entries for large amounts received from Devraj. On May 27, 1907, Devraj remitted Rs. 7,000/-

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from Gadag to Kolar Gold Fields. It is unnecessary to examine all these entries. Also in the account in the name of Shanmugam there are several credit entries for house rent collected from tenants of the two houses which Vydialingam died possessed of, and debit entries for payment of municipal taxes. There are also in that account numerous entries for amounts collected by Ramalingam and paid into the account.

There are also four letters which throw some light on the connection of the three brothers with the Kolar Gold Fields business. On October 5, 1909, Devraj addressed a letter to Ramalingam enquiring whether the letter did go to Gadag and gave several directions with regard to business matters. There is another letter dated October 6, 1909, also written by Devraj to Ramalingam which states "Pariapa" (Shanmugam) has come from Bangalore and he expects you here as soon as you finish your work there." This letter also gives directions for procuring certain articles. There is a letter dated January 18, 1911, addressed by Ramalingam to Shanmugam. By the letter Ramalingam informs Shanmugam that the question of (departmental employment in the Nandidurg Mining Company was discussed and that it "was finally decided not to do so" and to have the sundry works carried on as usual. He then proceeds to state that the Oorgaum Gold Mining Company had temporarily stopped all operations for "some unknown reasons". Then there is a reference to the Electricity Department of putting in and concrete in "N's Bungalow". There is also reference to "drudging on with the drains and the compressor work we have been having." Regarding the Oorgaum Gold Mines, he says that all the "works on hand" in the mines had been completed and the prospects fo new work were gloomy. There is also a referenc

to the timber department. In the next letter dated February 11, 1911, addressed to Shanmugam, Ramalingam states that Mr. Bullen had sent for him and had enquired of him whether he would undertake some small building contract at Manigatha where they were prospecting for gold and further that he (Ramalingam) had agreed "to do the work and promised to be there to receive instructions." He also stated that he would return by the week-end after the arrangements were made and he would take leave of Messrs. Mcky & Cooke and tell them that Mr. Ramaiah will lookafter the business (during his absence). The letters do suggest that Ramalingam and Devraj were interested as owners in the business about which information was given to Shanmugam and they were not merely acting as his agents.

There are numerous entries in the General Account also indicting that these accounts are not in respect of the personal transactions of Shanmugam but they are the accounts of the family. Expenses of various members are debited in that account. They are found side by side with business expenses. The High Court was, in our judgment, right in holding that these were not the accounts of Shanmugam personally but were of the joint family.

The Attorney-General, however, says that certain circumstances relied upon by him conclusively establish that the business done by Shanmugam was his separate business. He points out that Vydialingam was a public servant and his service record showed that he was on leave only for short periods in the year 1898 and when he was posted at a considerable distance from Kolar Gold Fields, it would be impossible for him to attend at the latter place to any business requiring his continued attendance. But only a few extracts from the service record of Vydialingam have been

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printed in the record. Ext. 368 shows that Vydialingam drew a salary of Rs. 125/- for 20 days for working as Nazir and Sheristedar, and that he was transferred to the District Court of Shimoga in September, 1901. There is also an entry that Vydialingam was appointed Munsif for 12 days in June, 1900. Ext. 370 shows the amount of salary that Vydialingam drew from time to time. These documents do not show that it was impossible for Vydialingam to attend to the business. It is true that in the Mining Company's account payments made for construction work are debited till 1900 to Loganathan and after Loganathan's death to Shanmugam, but, evidently, Vydialingam being a public servant could not publicly appear as carrying on a building contractor's business and receive payments for the work done by him in his own name. The debit entries in the name of Shanmugam in the Mining Company's account are therefore not decisive, nor would they be sufficient to destroy the direct evidence of the two witnesses Sitharam Naidu and Varadaraja Mudaliar.

It was then urged that Cavalry Road Bank Account showed a payment of Rs. 2,000/- in May, 1898, to Shanmugam and that this account was returned to Vydialingam by Shanmugam in December 1902. From this it is urged that Shanmugam started business as a building contractor with the amount borrowed from his father Vydialingam and ultimately he repaid it after four years and seven months. But the evidence of the two witnesses Sitharam Naidu aud Varadaraja Mudaliar does establish that the business of building contractor was conducted by Vydialingam and that is amply corroborated by the entries in the Cavalry Road Bank account. The debit entry relating to payment of Rs. 2,000/- to Shanmugam from Vydialingam's account, and the credit entry for repayment by Shanmugam will not, in our

judgment, necessarily lead to the inference that this amount was borrowed by Shanmugam for starting his business as a building contractor. It was also urged that the account started in July 1904 and continued till the year 1912 was the private account of Shanmugam. We have already dealt with this question in dealing with the evidence of the plaintiffs and we are unable to hold, having regard to the numerous entries posted therein that the account was the personal account of Shanmugam.

It is also true that Vydialingam was indebted to Loganathan for amounts borrowed by him on the security of his two houses and that the debts were paid off in the year 1903. But having regard especially to the direct evidence supported by contemporaneous entries in the account books, an inference that Vydialingam did not carry on any business will not be justified.

Strong reliance was placed on certain recitals in two documents—a sale deed executed by Ramalingam for sale of the house inherited by him from Vydialingam, by deed dated July 27, 1910, and a deed of release executed on March 30, 1912, by the three brothers. It is urged that the recitals in these two documents completely destory the case that after the death of Vydialingam there was a subsisting joint family or that Ramalingam and Devraj had interest in the business carried on by Shanmugam. In the sale deed dated July 20, 1910, executed by Ramalingam in favour of Mandi Mohammad Hussain Saheb it was recited that Shanmugam and Devraj had acquired properties out of their own earnings and were in enjoyment thereof, but he (Ramalinga) had no property of his own earning and therefore Vydialingam had given oral directions that the immovable property belonging to Vydialingam should be in the possession or enjoyment of Ramalingam alone and that

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Shanmugam and Devraj should have no right therein and that in accordance with the directions and with the permission of his two brothers, Ramalingam was in possession and enjoyment thereof and that he conveyed one of the houses for Rs. 4000/- to the vendee and in order to prove that his aforesaid brothers had no right in the property, he had got them to attest the documents. The sale deed bears the attestations of Shanmugam and Devraj. There is another document dated March 30, 1912, which is calleda "Release Deed", between Shanmugam on the one hand and Devraj and Ramalingam Mudaliar on the other. The three brothers are described as doing business as building contractors. It is recited in that deed that in 1898 Shanmugam started life as a building contractor and merchant by his own exertions and without the use or aid of funds of the joint family to which he belonged and found his own "means of living" on the Kolar Gold Fields and elsewhere and by his own exertions he had made acquisitions described in the schedule annexed to the deed and that the same were his separate property. The deed also recited that before his death on May 3, 1905, Vydialingam had given directions for the disposal of the immovable and movable properties in favour of Ramalingam and accordingly the said properties had been appropriated first towards the discharge of his debts and thereafter the immovable properties had been taken over by Ramalingam and that "nothing in the nature of an undivided Hindu joint-family remained". The document then proceeded to recite that in consideration of a sum of Rs.2,500/- paid by Shanmugam to Devraj and another sum of Rs. 2,500/- paid to Ramalingam and his minor son Vishwanath, Devaraj and Ramalingam declared that they will not claim any "manner of right or title or interest in the property of Shanmugam" described in the schedule attached to the deed and agreed that they or any of them had never any

right, title or interest in the property and that if there was any such right it "shall be deemed to have been released, relinquished and quit claimed so that Shanmugam Mudaliar remain the sole and absolute owner thereof." In the schedule to the deed was described a bungalow at Robertsonpet and movables and outstanding of the value of Rs. 1,79,000/- . At the foot of the document were endorsed a receipt for Rs. 2,500/- by Devraj and another receipt for Rs. 2,500/- by Ramalingam. The Attorney-General contended that the admissions in these documents were unequivocal and destroyed the case of the plaintiffs, that there was any subsisting joint-family after the death of Vydialingam or that the business carried on by Shanmugam was joint-family business. Counsel submitted that the trial Judge had evolved a theory which was not supported by any pleading or evidence that the sale deed and the release deed were parts of a scheme of division of the property of the joint family of the three brothers.

It is true that the recitals in the sale deed show that the house sold by Ramalingam was given by Vydialingam to him under an oral direction and he dealt with that house on that footing. It is also true that in the "Release Deed" it has been recited that Shanmugam was carrying on business as a contractor since the year 1898 without the aid of any joint-family funds and that the acquisitions made by him were his self-acquired properties. The deed also recites that there was no joint-family property which remained to be divided. But these two documents cannot be regarded as decisive of the question whether Vydialingam was carring on the business of a building contractor and whether that business devolved on his three sons. The three brothers during the life time of Vydialingam were living jointly and the building contractor's business was being conducted during the life time of Vydialinga. We have already pointed out that

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the evidence shows that even before 1898 Vydialingam was carrying on a contractor's business. Both during the lifetime of Vydialingam and thereafter till 1910 the three brothers lived together and the entries in the General accounts maintained in the name of Shanmugam indicate that their expenses were jointly met. It also appears that the rent received from the houses which Ramalingam ultimately disposed of were taken into account and amalgamated with the family account. Large amounts were sent to Devraj and were also received from him. Ramalingam is also shown to have participated in the business of Shanmugam. It is true that the trial Judge made out a case of a partition of the joint-family estate in the year 1910 which after Devraj migrated to Madras, was given effect to in the deed of release dated March 30, 1912. This case does not find place in any pleading and is not supported by direct evidence. But the approach of the High Court to the evidence was different. In the view of the High Court the evidence indicated that the three brothers continued to carry on business as members of a Hindu joint-family which had devolved upon them from their father Vydialingam that the business was extended to different places such as Gadag, Calicut and others, that Shanmugam was after the death of Vydialingam also carrying on an independent business at Kalai in partnership with one Balakrishna and that the deed of release was in respect of the property which was claimed by Shanmugam as his separate property and not in respect of the joint-family property. Evidently, the recitals in the release deed were made for maintaining a record that Devraj and Ramalinga had no interest in the property of Shanmugam. Admissibility of evidence to contradict the recital that there was in fact no property of the joint-family is not precluded by s. 92 of the Indian Evidence Act, as the dispute in this suit does not arise between the parties to the documents but between persons who

claimed under Ramalingam the executant of the document.

The evidence of Masilamany Pillai who was examined on behalf of the plaintiffs in the District Court at Bangalore is in this context of some importance. The witness deposed that in 1912 he was consulted in connection with settlement of certain matters between Shanmugam Mudaliar and his two brothers, that he had discussions with Shanmugam and his lawyers regarding matters relating to the properties of the family and also in respect of the business in Kolar Gold Fields and that he had given advice after ascertaining from the three brothers several matters in respect of which a settlement had to be effected. He then stated that he had suggested that the release deed might be obtained from Devraj and Ramalingam releasing and relinquishing the claims if any they might have in respect of any property which were claimed by Shanmugam as his self acquisitions, but he had himself not drawn up the deed nor had seen it at any time. The witness then made a statement that at the interview it "was understood that goodwill of the Kolar Gold Fields contract business was to be given to Ramalingam Mudaliar." On this part of his evidence there was no cross-examination. This evidence is important in two respects (i) that the release deed was to be drawn up in respect of properties which were claimed by Shanmugam to be his self acquisitions, and (ii) that it was understood that the goodwill of Kolar Gold Fields business was to be of Ramalingam. If the Kolar Gold Fields business was the exclusive business of Shanmugam, which he had started, it is difficult to appreciate why the goodwill of that business should be given to Ramalingam when for a comparatively small amounts Ramalingam and Devraj were relinquishing all their interest which they may possibly have in that business, and in the earnings made by

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Shanmugam out of that business. The trial Court as well as the High Court have accepted this evidence.

The accounts of the family maintained in the name of Shanmugam immediately prior to April, 1912, have not been produced by the executors. It is true that it is their case that they did not find these account books when they took over the estate of Ramalingam, whereas the plaintiffs assert that the account-books were withheld by the executors because, if produced, they would have destroyed the defence raised by the executors. The High Court, on the evidence, was unable to raise any definite inference in regard to this matter. Admittedly, the executors had taken possession of the property of Ramalingam immediately after his death and it is somewhat surprising that no inventory of the property of books of account or documents of Ramalingam, if any, prepared at the time when the executors took possession of property should have been produced. The executors are men of considerable experience of business affairs and Wajid the principal executor was an officer holding a high office in public administration. They would certainly have realised the necessity of making an inventory of the documents and the property which they took in their custody. If the books of account immediately prior to 1st of April, 1912, had not come in their possession, the executors would have forthwith produced the inventory made by them at the time of taking over possession of the estate.

Even if we draw no adverse inference against the executors because they failed to produce the books of accounts immediately prior to April 1, 1912, there are other circumstances which support the inference raised by the High Court. The release deed does not take into account the business at

Gadag which was conducted by Devraj and in which Ramalingam assisted. As we have already pointed out for carrying on this business large amounts were sent from the family account. There is evidence that there were assets in that business. In the General Account there are certain entries in the accounts of Devraj which cannot be easily appreciated. After the entry dated 5th March, 1911, crediting Rs. 280/-, there are some debit entries under the date 31st March, 1911, the following four of which are for amounts of Rs. 1,000/- and more :—

Debit given by V. V. S. Mudaliar in connection with cheque.	...	Rs. 1,000-0-0
Debit S. R. B. cheque one		Rs. 15,000-0-0
Debit Electricity cheque one		Rs. 1,619-15-8
Debit Nandidurgam cheque		Rs. 9,322-12-6

Under the same date there are ten entries, of which the following four are for Rs. 2,000/ and more :—

Credit V. V. S. Moodr. given previously	...	Rs. 12,142-5-7
Credit	...	Rs. 2,000-0-0
Credit	...	Rs. 10,000-0-0
Credit	...	Rs. 10,000-0-0

As a result of these entries Rs. 28,085-11-6 stood debited and Rs. 25,689-11-4 stood credited in the account of Devraj. Counsel for the executors has not attempted to explain these entries. The trial Court thought that the credit entries represented payments made by Ramalingam to Devraj. There is no evidence in support of this view. The learned Judge appears to have thought that because

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the good will was agreed to be given to Ramalingam—that is how he read the evidence of Masilamany Pillai—Ramalingam became the owner of all its assets, and the account was since the date of the agreement in reality an account of Ramalingam. There is no warrant for this view. But the entries do show that large amounts were credited in the name of Devraj and debited at the end of the year. If these entries were in respect of the Gadag business, the inference that the deed of release was only in respect of the separate estate of Shanmugan may receive some support.

The conduct of Shanmugam subsequent to March 30, 1912, has also some bearing on this question. Shortly after the execution of the Release deed Shanmugam left for the United Kingdom and it is stated that he returned to India after more than a year. It does not appear that thereafter he took any interest in the Kolar Gold Fields business but he continued to make large withdrawals. In the books of account of the partnership between Shanmugam and Ramalingam an amount exceeding Rs. 34,000/- is initially credited to Shanmugam and Rs. 7,500/- to Ramalingam. But what the shares of the two partners in the business were is nowhere indicated. There is no deed of partnership, nor is any balance sheet drawn. There is no evidence of division of profits of the business. By 1916, Shanmugam had not only withdrawn the amount initially credited to him but he had withdrawn an additional amount of Rs. 35,538/12/-. He thereafter ceased to have any interest in the Kolar Gold Fields business and the amount overdrawn was written off debiting it to "premium account." This conduct may indicate that after March 30, 1912, Shanmugam had no interest in the business even though the books of account showed that it was a partnership business. Even if it be held that Shanmugam

was a partner in the business from April 1, 1910, to May 1, 1916, the inference is inevitable that the building contractors business carried on by Ramalingam thereafter was directly related the business inherited from Vydialingam. The circumstance that Shanmugam ceased to have any interest in the business, after overdrawing Rs. 35,000/-odd, also corroborates the testimoney of Masilamany Pillai that goodwill of the business was given exclusively to Ramalingam. From this evidence it is clear that Shanmugam was unwilling to continue the joint family business at Kolar Gold Fields and that he desired to secure an assurance from his brothers that they had no interest in his separate business at Kalai and acquisitions thereof and for that purpose, the "Release deed" was obtained from them.

The High Court held that the amount of Rs. 4,000/- received by Ramalingam by sale of the house and the amount of Rs. 2,500/- received from Shanmugam were put in the business by Ramalingam. Wajid deposed that the consideration received by sale of the house was given by Ramalingam to C. Savade & Co., and to his sister. In our view the High Court was right in holding that the testimony of Wajid who has deposed that he was present at the time when Rs. 500/- were given by Ramalingam to his sister is not reliable. Wajid was a stranger to the family and there was no reason why Ramalingam should if the story be true keep Wajid present at the time of handing an amount of Rs. 500/- to his needy sister. The story of Wajid that Ramalingam was carrying on business of a building contractor in the name of Rambal and Co., and that in that business he suffered loss is not supported by any independent evidence and does not carry conviction.

Having regard to all these circumstances we do not think that the recitals in the sale deed and

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the deeds of release are by themselves sufficient to justify this Court in refusing to accept the finding of fact recorded by the High Court on appreciation of evidence.

The High Court has held that the business which Ramalingam carried on since April 1, 1912, apparently in partnership with Shanmugam till 1916, and thereafter exclusively was directly connected with the business which devolved upon the three sons Vydialingam when he died in 1905. *Prima facie* the findings recorded by the High Court are findings of fact, and this Court normally does not enter upon a reappraisal of the evidence, but we have entered upon a review of the evidence on which they were founded, because the High Court of Mysore had on the identical issue about the character of the property devised under the will of Ramalingam arrived at a different conclusion.

A dispute with regard to the nature of the property called "Palm Grove" for the purpose of considering whether the judgment of the Mysore High Court is conclusive *qua* that property remains to be mentioned. It appears that at some time—about which there is no clear evidence—"Palm Grove" was agreed to be sold in plots by Ramalingam. In the suit, as originally filed in the Bangalore District Court "Palm Grove" was one of the properties in respect of which the plaintiffs made a claim. But that claim was withdrawn when the Madras properties were excluded, and no decision was therefore given by the District Judge in respect of the "Palm Grove" property. Before us no argument was advanced to show that during the life-time of Ramalingam this property had acquired the character of movable property so that the decision of the Bangalore Court would operate as conclusive in the Madras suit. The High Court of Madras rejected the contention of

the executors that it must be deemed to have acquired the character of movable property. Our attention is not invited to any material in support of the contention that it had acquired such a character.

Certain directions were, however, given by the learned trial Judge observing that "the proceeds realised from "Palm Grove' constitute the assets of Ramalingam subject to certain equities that may arise in favour of Narayanaswamy Mudaliar.....on the foot of the doctrine of *quantum meruit* to be determined in the final decree or in the execution proceedings." We need express no opinion as to the true import of this direction, for Narayanaswamy Mudaliar who was primarily concerned with the direction, did not prefer an appeal against that part of the decree, and counsel have not asked us to interpret that part of the decree. The High Court observed that in so far as the executors were concerned, all they can in reason ask is that such disbursements as being *bona fide* made should be regarded as properly debitable against the estate and that they should not be surcharged in respect of such payments, and accordingly they added a qualification that the executors need not pay such sums as they had *bona fide* made to Narayanaswami Mudaliar in respect of that transaction either on the basis of *quantum meruit* or as a partner of the business.

In that view of the case the decree passed by the High Court on the footing that the plaintiffs are entitled to the immovable properties in Madras and not the movables must be confimed.

The appeals therefore fail and are dismissed.

The High Court at Madras has held on the evidence, that the properties which were disposed of by Ramalingam by his will were not his separate

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estate but were joint family properties, whereas the Mysore High Court has taken a contrary view. We have on a review of the evidence agreed with the view taken by the Madras High Court. Evidently, as a result of the judgment of the Mysore High Court the heirs of Ramalingam have lost property of substantial value. We think that in the special circumstances of this case the plaintiffs should not be out of pocket in respect of the costs of this litigation. We therefore direct that all costs of the plaintiffs between advocate and client, in the suit, the appeals in the High Court and in this Court should come out of the estate in the hands of the executors.

The remaining appeals may now be dealt with briefly.

C. A. Nos. and 279, 280 of 1958

Appeals Nos. 279 and 280 of 1958 arise out of proceedings for revocation of probate granted by the Madras High Court. In T. S. O. No. 52 of 1944, Mr. Justice Chandrasekhara Aiyyar of the Madras High Court, by order dated July 17, 1944, granted probate to the executors under the will of Ramalingam dated September 10, 1943. The learned Judge expressly stated in the order that the probate granted by him was subject to the result of the appeal filed to His Majesty-in-Council against the order of the Resident's Court at Mysore. After the appeal to the Privy Council was disposed of for reasons set out in the principal judgment, by Petition No. 469 of 1953, the plaintiffs and Gajambal, widow of Ramalingam applied for revocation of the probate granted by the Madras High Court. This petition was heard together with Suit No. 214 of 1944. The learned trial Judge ordered that the probate granted on July 17, 1944, be revoked. Against that order an appeal was preferred by two of the executors to the High Court of Madras. In appeal, the High Court restricted the operation of the revocation in so far

as it affected the immovable properties in Madras and vacated the order in relation to the movables. Against the order passed by the High Court, two Appeals—Nos. 279 and 280 of 1958 have been filed. C. A. No. 279 of 1958 is filed by the sons and widow of Ramalingam, and they have claimed that the order of revocation made by Mr. Justice Ramaswami be confirmed. In Appeal No. 280 of 1958 filed by the executors it is urged that the order of revocation be vacated in its entirety. At the hearing of the appeals no substantial arguments were advanced before us. The executors did not contend that even if this Court holds, agreeing with the High Court of Madras that the will of Ramalingam was inoperative in so far it purported to dispose of the immovable properties of the joint family of Ramalingam and his sons at Madras the order granting probate in respect of the immovable property should still continue to operate. They have conceded before us that such an order revoking grant of probate when it has become infructuous because of a decision in a suit relating to title to the property affected thereby may properly be made in exercise of the powers under s. 263 (d) of the Indian Succession Act, 1925. The claim of the sons and the widow of Ramalingam for revocation of the order granting probate by the Madras High Court in its entirety cannot be sustained because, for reasons set out by this Court, they are unable to claim title to the movables of Ramalingam in Madras.

The appeals, therefore, fail and are dismissed with costs.

Civil Appeal No. 281 of 1958

This appeal arises out of a suit filed by the executors under the will of Ramalingam for a declaration that 2000 shares in the India Sugars &

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Refineries Ltd., standing in the name of Vishwanath, in truth, belonged to Ramalingam and that he purchased the same for himself and out of his self-acquisitions but *benami* in the name of Vishwanath, and accordingly under the will of Ramalingam they were entitled to those shares as part of the estate. Vishwanath resisted the suit contending that the shares belonged to the joint family consisting of Ramalingam and his sons and that on the death of Ramalingam, his sons as surviving coparceners became owners of the entire property of the joint family, including the shares. The trial Judge dismissed the suit filed by the executors. In appeal, the High Court of Madras held that the judgment of the Full Bench of the Mysore High Conrt dated July 29, 1949, was conclusive as between the parties as to title to those shares. The High Court accordingly allowed the appeal of the executors. Vishwanath has appealed against the decree of the High Court rejecting his claim.

For reasons set out in the principal appeals, we are of the view that the appeal must be dismissed. But we are of the view that the costs of Vishwanath as between the advocate and client of and incidental to the suit and the appeals in the High Court and in this Court should come out of the state of Ramalingam in the hands of the executors.

Civil Appeal No 281 of 1958

This appeal arises out of Suit No. 200 of 1944. The executors sued Gajambal, widow of Ramalingam for a declaration that 2695 shares of the India Sugars & Refineries Ltd. Standing in her name were purchased by Ramalingam *benami* out of his own funds and the same were his self-acquisition, and they as executors of the will of the Ramalingam were entitled to those shares under

authority vested in them under the will dated September 10, 1942. The executors prayed for a declaration that the shares were held *benami* by Gajambal for the benefit of Ramalingam as the true owner. Gajambal admitted that she held the shares *benami* but she contended that they did not belong to Ramalingam but to the co-parcenary of Ramalingam and his sons and on the death of Ramalingam the shares devolved upon the surviving coparceners and the executors had no title or right thereto. This suit was tried with Suit No. 214 of 1944. The trial Judge held that the shares belonged to the joint-family of Ramalingam and his sons and the executors acquired no right to the shares under his will. In appeal, the High Court agreed with the view of the trail Court as to the title to the shares, but, in their view, the judgment of the Mysore High Court in respect of movables including the shares in dispute was conclusive as to the rights between the parties. The High Court accordingly reversed the decree passed by the trial Court and decreed the suit of the executors. Against that decree Gajambal has preferred an appeal in this Court which is No. 282 of 1958.

For reasons set out in the judgement in the principal appeals, it must be held that the judgment of the Mysore High Court was conclusive as between the executors and Gajambal in so far as it related to title to the shares in dispute. The appeal therefore fails and is dismissed. But we are of the view that the costs of Gajambal between Advocate and client of and incidental to the suit and the appeals in the High Court and this Court should come out of the estate of Ramalingam in the hands of the executors.

Civil Appeal No. 283 of 1958

This appeal arises out of a suit relating to an immovable property, Nos. 1 and 2 Waddels Road,

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Kilpauk, Madras. Of this property, the second respondent T. A. Ramchandra Rao was the former owner. There were court proceedings in Civil Suit No. 10 of 1940 filed by Gajambal against T.A. Ramchandra Rao, and a compromise decree was passed in that suit and pursuant to that compromise, T. A. Ramchandra Rao sold the property to Gajambal by deed dated August 7, 1940. The executors of the estate of Ramalingam filed Suit No. 91 of 1944 in the High Court of Madras against Gajambal and T. A. Ramchandra Rao for a declaration that the Waddels Road property formed part of the estate of Ramalingam and that Gajambal was merely a benamidar for Ramalingam, and for an order for possession of the property from Gajambal and T. A. Ramchandra Rao and for mesne profits at the rate of Rs. 50/- per mensem from the date of Ramalingam's death till the date of delivery of possession to the executors. Gajambal contended that the property belonged to her and that it was acquired by her out of her own funds. T.A Ramchandra Rao denied the title of the executors and also liability to pay mesne profits. The suit was also tried with Suit No. 214 of 1944. The trial Court decreed the suit in favour of the executors but he declared that the property belonged to the sons of Ramalingam and they were entitled to possession and mesne profits. Against the decree passed by the trial Court the executors preferred an appeal to the High Court. The appeal was dismissed.

In this appeal filed by the executors the principal ground set up in the Memo of appeal is that the sons of Ramalingam were not parties to the suit, and no decree directing the executors to deliver possession to the sons of Ramalingam could be passed.

In the principal appeals 277 and 278 of 1958, we have held that the executors did not obtain any

title to the immovable properties in Madras which were sought to be disposed of under the will of Ramalingam. It is true that to Suit No. 91 of 1944, the sons of Ramalingam were not parties. But as on the view taken in the principal appeals, the executors acquired no title to the property in suit —that being the property belonging to the joint family to which Ramalingam belonged—interference with the decree passed by the High Court will not be called for.

Counsel for the executors has advanced no argument in support of the appeal. We may observe that T. A. Ramchandra Rao has set up a certain arrangement between him and Gajambal relating to his right to occupy the Waddels Road premises free of payment of rent, and it is his case that this arrangement was confirmed after issues were framed in Suit No. 91 of 1944 between himself and Vishwanath. T.A. Ramchandra Rao, it appears, did not prefer any appeal before the High Court of Madras against the decree passed by the trial Judge nor did he attempt to prove the agreement set up by him. He has not preferred any appeal against the decision of the High Court to this Court. We dismiss the appeal filed by the executors. We may observe that for the purpose of deciding this case it is unnecessary to consider whether the arrangement set up by T. A. Ramchandra Rao is proved. The executors will pay the costs of the first respondent Gajambal in this appeal.

HIDAYATULLAH, J.—One Ramalingam, a prosperous contractor and businessman, died on December 18, 1942. Three months before his death, he executed on September 10, 1942, the last of his many wills. By that will, he cut off his eldest son, Viswanathan and a daughter, Bhagirathi, completely from any benefit, gave some immovable property and shares to his widow, small bequests to

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his other daughters, his grandson, Tyagaraja, son of Viswanathan and his grand daughter from Bhagirathi. From the residue of his vast estate, he directed that Rs. 50,000/- be spent over a ward in a hospital and the rest be applied for certain charitable purposes of a public nature. He appointed three executors: (1) A. Wajid (a retired official of Mysore State), (2) Narayanaswamy Mudaliar and (3) S. L. Mannaji Rao. For sometime before his death, his relations with his family were estranged and the latter had gone to the length of starting proceedings on June 2, 1942, under the Lunacy Act in the District Court, Civil and Military Station, Bangalore, against him. Some evidence was recorded in that case, and medical experts were examined. After the death of Ramalingam, the executors applied for probate of the will in the District Court, Civil and Military Station, Bangalore. This was Suit No. 2 of 1943. It was heard by Mr. P. Madappa, who granted probate of the will on November 27, 1943. Two appeals filed against the decision (R. A. Nos. 1 and 2 of 1944) were dismissed by the Court of the British Resident Mysore on July 5, 1944. A further appeal to the Privy Council was admitted, but it was later declared by the Judicial Committee to have become incompetent due to the Constitutional Changes in which the Civil and Military Station was handed back to the Mysore State. (P. C. Appeal No. 53 of 1948 decided on December 12, 1949). Meanwhile applications for probate were also filed in the District Court, Bangalore and the Madras High Court, some of the properties affected by the will being situated, in these jurisdictions. Probates were granted but subject to the decision of the appeal before the Privy Council.

We now come to other suits, some proceeding from the sons and widow of Ramalingam and some, from the executors of his will. They were filed in

the Mysore State and in the High Court of Madras. Two suits were filed by the sons of Ramalingam in the District Court, Bangalore and in the District Court, Civil and Military station, Bangalore respectively. The first was Civil Suit No. 56 of 194[illegible], and the second civil suit No. 60 of 1944. These were suits for possession of properties, movable and immovable, together with the business of Ramalingam within the jurisdiction of these two Courts, on the averment that Ramalingam belonged to a Hindu coparcenary, and was carrying on the family business started with the family funds. These suits were directed against the executors and diverse persons said to be in possession of the properties. The plea of the executors *per contra* was that these were the personal properties and business of Ramalingam, over which he had full disposing power. The two suits were later consolidated and were decided in favour of the sons of Ramalingam by the District Judge. A third suit was filed by the sons of Ramalingam in the Madras High Court (O. S.), and was numbered C. S. No. 214 of 1944 for possession of properties, both movable and immovable, said to be situated in Madras. A detailed reference will be made later to these properties.

In addition to these suits many suits were filed by the members of the family and the executors of the will in the Madras High Court (O.S.). These were C. S. Nos. 200 of 1944, 203 of 1945, 274 of 1944, 344 of 1946 and 91 of 1944. To these suits it is not necessary presently to refer. In all these other suits in Madras, the claim was for possession of some specific property either under the will or on the averment that it belonged to a joint family. Leaving out of account the suits concerning specific properties for the present, the net position was that C. S. No. 56 of 1942 and C. S. No. 60 of 1944 related to properties in Mysore State, and C. S. No. 214 of 1944 in the Madras High Court related to

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properties, movable and immovable, in Madras. In both, the main issue to be tried was whether Ramalingam died a member of a coparcenary, possessed of joint family property and joint family business.

The consolidated suit in the Court of the District Judge, Bangalore, was decided first and it was held that the properties were joint and that the will was incompetent. Two appeals were then filed in the Mysore High Court, R. As. Nos. 104 and 109 of 1947-48. The appeals were first placed before Paramasiviah, C. J., and Balakrishaniah, J. They were adjourned at one of the earlier hearings, as a compromise was contemplated. Later, the parties were at issue as to whether a compromise took place. According to the executors, none took place; but according to the family, it did take place. The appeals were then fixed for September 23, 1948. On September 22, 1948, Paramasiviah, C. J., suddenly retired, and Mr. P. Medappa was appointed Chief Justice. The appeals were then placed before Balakrishaniah and Kandaswami Pillai, JJ., and the question of compromise was raised. The High Court, however, did not enquired into the matter, since it was of opinion that the compromise, if any, could not be recorded. This was on March 15, 1949. After the appeals were heard, the two learned Judges differed, and they pronounced separate judgments on April 2, 1949. Balakrishaniah, J., was for allowing the appeals, and Kandaswami Pillai, J., for dismjssing them. According to the Code of Civil Procedure in force in Mysore State, the judgment of the District Court would have been confirmed, unless a Judge of the Division Bench or both the Judges referred the case under s. 15 (3) of the Mysore High Court Regulation, 1884. Balakrishaniah, J., referred the appeals to a Full Bench.

The Mysore High Court then consisted of five Judges. Of these, one learned Judge had appeared in the case and wished to be left out. Of the remaining four, Balakrishaniah, J., had already heard the appeals before, and expressed his judgment on the facts and the law involved in them. There remained three other Judges.—The Chief Justice, who had decided the probate case and had passed some strictures against the family in his judgment, Puttaraja Urs, J. (who was appointed in place of Kandaswami Pillai, J.), who had recorded the evidence in C. S. No. 60 of 1944 between 1945-47 and Mallappa, J., had almost no connection with the case. The Full Bench that was constituted to hear the appeals then was composed of the Chief Justice, Balakrishaniah, J., and Mallappa, J. This Full Bench heard the appeals or rather the arguments on behalf of the executors, since the family took no part in the hearing and their counsel withdrew. The appeals were allowed by the Full Bench, Mallappa, J., pronouncing the judgment, with which the other learned Judges agreed. This was on July 29, 1949, the hearing having concluded on the 27th July, that is two days before. Civil Petitions Nos. 61, 62, 49 and 50 of 1949-50 were filed to obtain a review, but were dismissed by the Full Bench on November 10, 1949.

Thus finished the Mysore part of the litigation. Before the Full Bench in the Mysore High Court heard the appeals, fruitless efforts were made by the sons of Ramalingam to induce the Maharaja to appoint *ad hoc* Judges to hear the appeals. Requests were made by them to the Chief Justice to grant them time, so that the State authorities might be moved against and also to adjourn the appeals on other grounds. The sons of Ramalingam said that they were anxious to secure the services of outside counsel to argue the appeals, but the requests were

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rejected. These are all matters of record, and there is no dispute about facts. It was alleged in the Madras suit that there were unpleasant scenes between Medappa, C. J., and one Raju, counsel for the appellant, about which I shall say something later, as the facts are in dispute. In short, the appeals were allowed, and the two suits were dismissed.

This is a convenient stage to refer to the pleas raised in the Mysore suits and the reliefs claimed therein. In this connection, we need refer only to C. S. No. 56 of 1942. The case of the sons of Ramalingam was that Ramalingam received his father considerable paternal estate, both movable and immovable. The immovable property was sold and with the proceeds of the sale and other ancestral assets, several businesses were started by him commencing with the business of a building contractor in Kolar Gold Fields. He prospered in this joint family business, and all the properties were acquired from this nucleus and were joint family properties, and even if there was any separate property it was thrown into the common stock and became joint family property. Possession was thus claimed of all the properties in the Schedules to the plaint including *inter alia* :

Schedule A : (1) Houses Nos. 1 and 2, Waddells Road, Madras (Item 13)

(2) Palm Grove, Madras (Item 18)

(3) 18566 shares—India Sugars and Refineries, Ltd., in the name of Ramalingam (Item 22)

(4) 1000 shares of the Indian Sugars and Refineries, Ltd., in the name of A. Wajid (Item 24)

Schedule B : (1) Kolar Gold Field business (Item 1)

(2) Vegetable oil building contract (Item 5)

(3) Oriental Films (Item 6).

The executors denied that there was any ancestral nucleus or property or funds or business from which the estate was built up. They denied the existence of a joint family business. According to them, Ramalingam by his unaided enterprise carried on business for over 26 years and acquired all the properties in which no other member of the family had any share. Later, the plaint was amended to exclude the immovable properties outside the State of Mysore. Suitable issues were framed to cover these allegations and counter-allegations and all of them were finally decided in favour of the executors. The District Judge decreed the suit, but it was held by the Full Bench that none of the properties was acquired with the aid of joint family nucleus, and that the Kolar Gold Field business was the private business of Ramalingam. The decree of the District Judge, who had ordered possession of the properties in favour of the family, was reversed.

The suit in the Madras High Court had been stayed to await the dicision of the Mysore suits. In that suit, possession of the movable and immovable properties in Madras was claimed. The immovable properties were :

(1) House No. 1, Weddells Road, with land.

(2) House No. 3, Weddells Road, with land etc.

(3) Some parcels of land.

(4) House No. 14, Monteith Road, Madras.

The movable properties were :

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(1) Assets of Oriental Films, Madras.

(2) 18366 shares of Indian Sugars and Refineries Ltd., Hospet.

(3) 1000 shares of Indian Sugars and Refineries Ltd., Hospet.

(4) Balance of the amount for building constructed for the Mysore Vegetable Oil Co., Madras.

It was stated in the plaint that since the executors had objected to the jurisdiction of the Mysore Courts to entertain the claim in respect of the properties situated in Madras, another suit was being filed. The same pleas about the joint family, its nucleus, its family members were raised. The defence was also the same. When the judgment of the Mysore High Court was relied upon by the executors as conclusive on the point of jointness of the family, its nucleus and the joint character of the Kolar Gold Field business, the sons of Ramalingam alleged that the judgment was not in accordance with the rules of natural justice, that the decision was *coram non judice,* and that the Chief Justice and Balakrishniah, J., were not competent Judges, due to their bias and interest, to sit on the Bench. In the course of numerous affidavits, the eldest son, Vishwanathan, made several allegations showing the interest and prejudices of Medappa, C. J., his conduct in and out of Court, and the violation of the rules of natural justice by the Full Bench, over which he presided. Similarly, the presence of Balakrishniah, J., who had already given one judgment in the case and had attempted a compromise between the rival parties, was alleged to render him incompetent to sit on the Full Bench. On the other side, the executors claimed that the Mysore High Court had finally decided the issue of jointness in relation

to all property, movable and immovable. They claimed that in this suit the questions of jointness of the family, the character of the Kolar Gold Fields business and the absence of nucleus must be taken to have been conclusively decided in the Mysore suits and appeals, and could not be reopened. The sons of Ramalingam denied that the Mysore Court was a Court of competent jurisdiction, in so far as the property in Madras was concerned. In short, the executors claimed that the Mysore judgment, in so far as any matter decided therein, was conclusive, while the family maintained that it was not a Court of competent jurisdiction and the judgment was itself *coram non judice,* and had been rendered by violating the principles of natural justice. The first fight thus was under s. 13 of the Code of Civil Procedure.

Though numerous facts were alleged to show bias and interest on the part of the Chief Justice, the parties went to trial on one allegation only. The allegations against Medappa, C. J., were ; (a) that he was a close friend of A. Wajid, (b) that he had decided the probate case, had heard the witnesses now relied upon and had already formed pronounced opinions about them and his judgment in the probate case was in danger of being annulled by the decision of the District Judge under appeal before him, as the latter had held the family and the properties to be joint, (c) that when he was a District Judge, he was using a car belonging to the executors and was thus under their obligation and also interested in them, and (d) that he had tried to dissuade Mr. Raju, counsel for the sons of Ramalingam, from conducting this case. Rajagopalan, J., who heard the suit in the earlier stages, selected from the allegations two which, according to him, if established, wer capable of establishing an 'interest' and a 'bias' in Meddappa, C. J. He declined to frame issues about

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the other allegations. The two selected allegations were the use of the car and the attempt to dissuade Mr. Raju. Rajagopalan, J., also held that the judgment of the Mysore High Court, did not constitute *res judicata* at least in respect of the immovable property in Madras, (a) because this question was not considered by the Mysore High Court due to amendment of the plaint, and (b) because the Mysore Court had no jurisdiction to try it.

Against the decision of Rajagopalan J., both sides appealed. The executors were aggrieved by the decision about *res judicata* and the enquiry into the conduct of the Chief Justice, and the sons of Ramalingam, by the restricted enquiry into the conduct of the Chief Justice. The Divisional Bench, which heard the appeal, agreed with Rajagopalan, J., about *res judicata*, and affirmed that part of his order. The Divisional Bench held that the incident of the use of the car was too old, even if true, to show interest and was not relevant. The issue regarding the dissuation of Mr. Raju was allowed to stand.

The allegations against Balakrishniah J., were that he had suggested the compromise when sitting with Paramasiviah, C. J., and had discussed, the terms, that he had thus rendered himself a witness, that he made strong remarks against the family during the hearings of the appeals when sitting with Kandaswami Pillai, J., and the same were expressed in his judgment dated April 2, 1949, and that he showed his bias by awarding costs not out of the state but against the sons of Ramalingam. He was said to be incompetent to sit on the Full Bench in view of his judgment already pronounced. There were general allegations about the refusal to adjourn the hearing at the request of the sons of Ramalingam, and even when Sir Alladi Krishanaswami

Ayyar, the senior counsel, was to be absent on public work in the Constituent Assembly.

The parties then went to trial before Ramaswami, J. More affidavits and counter-affidavits were filed. Though fresh evidence was also led in this suit, by consent of parties the evidence recorded in the two Mysore suits was treated as evidence in this suit. The records of these suits and of the Privy Council were also marked by consent. The executors asked that the question of the application s. 13 of the Code of Civil Procedure be tried as a preliminary issue. This was declined and a Letters Patent Appeal and one to this Court also failed. The affidavit filed in this Court were also marked in the case.

Among the witnesses examined in the case were Viswanathan, the eldest son of Ramalingam, and Puttaraja Urs, J., for the plaintiffs, and Abdul Wajid, Narayanaswami Mudaliar and Balakrishniah, J., for the other side, Medappa, C.J., and Raju were cited but were not examined. After a protracted trial, Ramaswami, J., held that the judgment of the Full Bench of Mysore was *coram non judice* and that the judgment was thus not conclusive under s. 13 of the Code of Civil Procedure. He further held that the properties in suit were those of a joint family. The claim of the sons of Ramalingam, was thus decreed, and possession was ordered against the executors and also accounts. Ancillary orders were passed in the other suits already mentioned, which were tried along with the main suit, C. S. No. 214 of 1944.

The executors appealed under the Letters Patent. The Divisional Bench upheld the findings about the joint family, but reversed those about the Mysore judgment being *coram non judice.* As a result the Mysore judgment was held to bind the

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Madras Courts in respect of the movables but not in respect of the immovable property in Madras. From the judgment of the Divisional Bench, Civil Appeals Nos. 277 and 278 of 1958, have been filed respectively by the sons of Ramalingam and the executors. The sons of Ramalingam raise the issue that the judgment of the Full Bench of the Mysore High Court was *coram non judice* and not conclusive in respect of immovables, while the executors claim that it is conclusive in respect of any matter decided by it, particularly about the Kolar Gold Fields business being the private business of Ramalingam, contending that the only point that was open for decision in the Madras High Court was whether any item of property was acquired without the funds of that private business.

Though these appeals were argued at considerable length the points were only two. They are : I. the application of s. 13 of the Code of Civil Procedure from these view points, *viz.*, (1) violation of the principles of natural justice, (2) bias and interest of some of the Judges constituting the Full Bench, (3) competence of the Mysore Courts as to the controversy between the parties and the extent of that competence ; and II. whether Ramalingam died in the jointness and whether the estates left by him including his businesses belong to the joint family, the sons of Ramalingam being the survivors.

Section 13 of the Code of Civil Procedure reads :

> "13. A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of

them claim litigating under the same title except—

(a) where it has not been pronounced by a Court of competent jurisdiction ;

(b) where it has not been given on the merits of the case ;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of British India in cases in which such law is applicable ;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice ;

(e) where it has been obtained by fraud ;

(f) where it sustains a claim founded on a breach of any law in force in British India."

It will thus be seen that the case was sought to be brought under cls. (a), (c) and (d) of the section by the sons of Ramalingam, while the executor deny the allegations and claim the benefit of the opening words. I shall, therefore, take up these matters first and shall consider the evidence before deciding how far, in law, the judgment is conclusive, if at all, I shall follow the same order which I have set out.

The first head is whether during the hearing of the appeal by the Full Bench the principles of natural justice could be said to have been violated. This question divides itself into two parts. The first part concerns the actual hearing and the second the composition of Benches. The first contention is that the Full Bench did not give a fair hearing and

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compelled the case of the sons of Ramalingam to go unheard. This was said to have arisen from the refusal to adjourn the appeals as requested by the sons of Ramalingam. Now, such a question can hardly be considered by another Court not hearing, an appeal but deciding whether the conduct of the Judges of foreign Court who heard the appeal, amounted to a violation of the principles of natural justice, unless an extremely clear and strong case is made out. The conduct of a case is a matter ordinarily for the Court hearing it. All that is stated is that the sons of Ramalingam were hustled and not granted some adjournments, when they asked for them. Whether a particular prayer for adjournment ought to have been granted is hardly a question for another Court to decide. In this case the conduct of the sons of Ramalingam cannot be said to be entirely correct. It is matter of record that from the moment the names of the Judges of the Full Bench were announced they had no desire to have the case heard and decided by them. Admittedly, they made applications to the Maharaja and Dewan for the appointment of *ad hoc* Judges. The attempt to get the appeals adjourned was based on two reasons : firstly to avoid the presiding Judges, or at least two of them, and secondly, to enable Sir Alladi Krishnaswami Ayyar to appear for them. The attempt to secure adjournments were not only to suit their senior counsel but also to play for time to get other Judges appointed, if possible. As to the senior counsel, it is enough to say that there were other counsel in the case, but the sons of Ramalingam asked them to withdraw from the case. This was not done *bona fide* but merely to force the Court to grant an adjournment it had earlier refused. In my judgment, the sons of Ramalingam had long notice of the date of hearing, and if they wished to engage other counsel, they had ample time and opportunity to do so. It was argued that the appeals were adjourned once

by the Full Bench to accommodate counsel for the executors, but when Sir Alladi asked for an adjournment, it was refused. It was said that this showed a double standard. It is common knowledge that an adjournment is sometimes given because it is asked betimes but not another, if delayed. All Courts do that. Perhaps, the Full Bench might well have granted an adjournment for a short time specially as the sons of Ramalingam were nervous about the result of their appeals. But I do not consider that I shall be justified in reaching the conclusion that by the refusal, the principles of natural justice were violated, when I notice that three other counsel were already briefed in the appeals and one of them had argued them before the Divisional Bench, I am thus of opinion that it cannot be held that the principles of natural justice were violated so as to bring the judgment within the ban of cl. (d) of s. 13 of the Code.

The next question is the composition of the Full Bench, apart from the conduct of the Judges. Here, the objection is that Balakrishniah, J., was incompetent to sit on the Bench after his views already expressed in his dessenting Judgment. Now, it is clear that the two learned Judges who had heard the appeals, had differed and had delivered separate judgments. It was contended that Balakrishniah, J, was incompetent to make the reference, because no sooner Kandaswami Pillai J., delivered his, than the judgment of the District Judge, with whom he agreed, stood confirmed by virtue of s. 98 of the Code of Civil Procedure in force in Mysore State. In other words, Balakrishniah, J., had missed his chance to make a reference, because he had already delivered his judgment and the other Judge having delivered his, the result under the Code follow. The action of Balakrishniah, J., taken under s. 15(3) of the

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Mysore High Court Regulation, 1884, was said to be too late to arrest the consequences of s. 98. In my opinion, this argument has no substance whatever, and I think that it would not have been arguable if there was no authority to support it. I do not think it necessary to enter into the niceties of the question when is a judgment final, that is to say, whether on pronouncement by the Judge or on his signing it. The very interesting argument of the counsel for the sons of Ramalingam may be left to be decided in a better case. If the argument is accepted, some curious results will follow. Either, Balakrishniah, J., had to make a reference without waiting for his brother Judge to deliver his judgment or to lose his right because no sooner Kandaswami Pillai, J., read his judgment to the end than the judgment of the District Judge would be confirmed. In fact, whoever delivered the judgment first would lose his turn to make a reference. It is obvious that Balakrishniah, J., would wait in common courtesy for his brother Judge to deliver his judgment before making the reference. The judgment of Balakrishniah, J., ends with the order of reference and then follows his signature. What happened really does not appear from the record but is contained in affidavits, which, to my mind, should not have been read in this connection. It is obvious that the reference was made before the judgment was perfected by the signature. No doubt, there is a rulling of the Allahabad High Court in *Lal Singh* v. *Ghansham Singh* (1), but the practice of the Mysore High Court was authoritatively established by a Full Bench decision of that court in *Nanjamma* v. *Lingappa* (2). In view of the *cursus curiae* thus laid down, the Allahabad view, even if right, cannot be applied. In my opinion, the appeal stood properly referred to the Full Bench.

(1) (1887) I.L.R. 9 All 625. (2) (1949) 4 D.L.R.Mysore 118.

The next contention is that Balakrishniah, J., sat on the Full Bench after expressing his view on the merits of the appeals in a long and considered judgment. It was contended that this deprived the sons of Ramalingam was of a proper hearing before a Judge who had not made up his mind already. There is considerable room for doubt on this point. There have been several cases before, in which Judges who have made a reference to a larger Bench have sat on the Bench, even though they had earlier expressed an opinion. Some of them have also changed their views later. Here again, the practice of the Court must receive some attention. The learned Attorney-General drew our attention to three cases of the Mysore High Court in which precedents are to be found. He also drew our attention to cases from the other High Courts in India and of some Courts abroad. In some of the foreign cases, judges have sat in a Bench hearing case, after decision by them, in appeal or re-hearing. Of course, one need not go so far as that in our country, though in cases under cl. 26 of the Letters Patent of the Chartered High Court, Judges who have presided over Sessions Trial have sat at re-hearing after the certificate of Advocate-General. Examples of both kinds of cases are to be found in the Law Reports: See *Emperor* v. *Fatehchand Agarwalla* (1), *Emperor* v. *Barendra Kumar Ghose*(2). The learned Attorney-General drew our attention to the Encyclopedia of Laws and precedents (1906) Vol, 23, p. 588 and American Jurisprudence (1958), Vol. 30A, p. 76, para 187 and *William Cramp & Sons* v. *International Curtis Marine Turbine Co.*(3)and *Rex* v. *Lovegrove* (4). In some of the earliar cases the practice was quite common due to the smallness of number of Judges: See, for example, *Rohilkhand & Kumaon Bank* v. *Row* (5), *The Queen Empress* v. *Saminda Chetti* (6), *Seshadri*

(1) (1917) I.L.R.44 Cal. 477.
(2) A.I.R. 1924 Cal. 257.
(3) (1912) 57 L. Ed. 1003.
(4) [1951] 1 All. E.R. 804.
(5) (1884) 6 All. 469.
(6) (1883) I.L.R.7 Mad. 274.

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Ayyangar v. *Nataraja Ayyar* (1). There is no law to prohibit this, and in a small Court with limited number of Judges, this may be unavoidable. It is not to be expected that *ad hoc* Judges would be appointed every time such a situation arises. But what we have to guide ourselves by is the practice obtaining in the Courts with which we are dealing. If the practice there was common and inveterate no litigant can be said to apprehend reasonably that he would not get justice. There are no less than four cases of the Mysore High Court in which a similar procedure was followed, in addition to those already cited. In my opinion, in view of the strength of the Court and the practice in vogue, the Judgment of the Full Bench cannot, on the circumstance, be described as against the principles of natural justice.

The next contention in support of the plea that the decision of the Mysore High Court was *coram non judice* and against the principles of natural justice charges the learned Chief Justice and Balakrishniah, J., with unjudicial conduct and prejudice and the former with interest in the executors. It is convenient to take the allegations against the Chief Justice and Balakrishniah, J., separately.

As regards the Chief Justice, it will be recalled evidence was allowed to be led only on the question of dissuading Mr. Raju from appearing in the case. But no direct evidence was led. What transpired between the Cheif Justice and Mr. Raju (If something did transpire) could only be deposed to by one of them. None else was present at that meeting, and neither was examined in the case. Mr. Raju had by then been imprisoned after trial and conviction for an attempt on the life of Chief Justice, and was not available for examination. It seems

(1) (1898) I L.R. 21 Mad. 179.

that no serious effort was made to get his testimony, and it is now said that 'legal difficulties' prevented his examination. But whatever the difficulties, the record shows that the sons of Ramalingam voluntarily gave up Raju as a witness, and now it is too late for them to complain of 'legal difficulties.' Nor can they for that reason make the worse appear the better reason. The other also gave up Medappa C. J. Indirect evidence was, of course, sought to be led, but it does not help either party, and the party which must fail must obviously be the party which made the allegation. Here, the sons of Ramalingam suffer from another disability. Viswanathan himself wrote letters to say that the allegations were false, and were made under advice, referring most probably to Mr. Raju. No doubt, these admissions were sought to be withdrawn but only when confronted with the letters, though Viswanathan, at first, denied their existence. The explanation was that these letters were written under the pressure of Wajid. In view of the basic fact that the allegation itself was not proved by evidence, it is pointless to decide whether the letters were written under undue pressure. I can only say that if Wajid's evidence appeared to be untrue in part, Viswanathan impressed me even less. The fight over the dissuading of Mr. Raju thus, at best, ended in a stalemate, if not wholly against the sons of Ramalingam.

Having failed to establish the only issue which was specifically raised, there was an attempt to revive the allegations on which evidence was not allowed. Reference was made in this connection to certain passages in the cross-examination of Wajid and the evidence of Viswanathan. This was on the use of a car belonging to the estate by Mr. Medappa some years before, when he was the District Judge. The foundation of

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this allegation was in affidavits sworn by Viswanathan, who seems to have begun each day of hearing with an affidavit. These affidavits were denied by the other side through Wajid's affidavits. This vehement war of affidavits only resulted in the interested testimony of Viswanathan, on the one side, and Wajid, on the other. The matter has thus to be examined carefully. The evidence was not related to any specific issue, there being none raised in the caset. Most of the evidence was in affidavits, which do no appear to have been ordered and could not, for that reason, be read as evidence. Such evidence as there was, was highly interested and uncorroborated from any independent source. The affair was extremely old even if true, to establish an interest, such as would disqualify a Judge from hearing the case. In these circumstances, it is evident that the case alleged, cannot be held to have been established.

Next was the allegation of friendship between Medappa, C.J., and A. Wajid and Manaji Rao. Manaji Rao faded out as an executor, and took hardly any interest in his duties as such, and cannot, therefore, be said to have been a potent factor to interest Medappa, C. J. In support of his allegation that Medappa, C. J., and A. Wajid were great friends, Viswanathan swore a few affidavits. A fairly long affidavit (No. 440 of 1950) in the High Court was reproduced in its entirety by Ramaswami, J., in his Judgment. Some other affidavits were sworn in this Court when certain proceedings for a writ of prohibition were started, and they were also read in the High Court and were read to us. Making a selection from these affidavits the allegations may be stated briefly as follows : Medappa, C. J., was the Chief Steward of the Bangalore Race Club and A. Wajid, his Secretary, that A. Wajid was visiting Medappa, C. J., at the latter's house when the probate case was going on and that they were great friends. It was also alleged that Chief Justice

Medappa's attitude during the probate case was extremely hostile to the family, which was later reflected in the judgment of that case, and that Medappa, C. J., was extremely worth, when Viswanathan asked him not to sit on the Full Bench and the Chief Justice forced Viswanathan to disclose the name of the counsel who had advised the move and said that he would see what to do with him. All these allegations were denied by A. Wajid both in affidavits and in his oral testimony. Balakrishniah, J., was questioned about what happened in the Court and gave evasive replies.

The rule of law about judicial conduct is as strict, as it is old. No Judge can be considered to be competent to hear a case in which he is directly or indirectly interested. A proved interest in a Judge not disqualifies him but renders his judgment a nullity. There is yet another rule of judicial conduct which bears upon the hearing of case. In that, the Judge is expected to be serene and even-handed, even though his patience may be sorely tried and the time of the Court appear to be wasted. This is based on the maxim which is often repeated that justice should not only be done but should be seen to be done. No litigant should leave the Court feeling reasonable that his case was not heard or considered on its merit. If he does, then justice, even though done in the case, fails in the doing of it.

Can we say that Medappa, C. J., was so interested as to be disqualified, or that he acted in a manner that his conduct in Court was a denial of justice ? Apart from the fact that A. Wajid denied familiarity, though not acquaintance with Medappa, C. J., there are no instances of undue leaning in favour of the executors. What happened in the case was engineered by Mr. Raju, as the letters of Viswanathan himself suggested. The family which

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did not know how to get on the right side of a father, however obdurate, acted in much the same way with the Court. Their conduct on and from the announcement of the Full Bench was calculated to exasperate and annoy any Judge, who held his own reputation dear. Of course, the more Medappa, C. J., showed irritation, the more Raju and his clients got publicity value, which they hoped to exploit with the Maharajah. In my opinion, the conduct of the sons of Vishwanathan was studied and designed to further their move for a different Bench. If we leave out of consideration the dissuading of Raju, as to which also there is no evidence, and the use of the estate car, about which also there is no evidence, there remains a vague allegation of deep friendship denied on the otherside and not proved otherwise by independent evidence. I say independent evidence, because the evidence of Puttaraja Urs, J., about the conversation between him and Medappa, C.J., about this case cannot be said to be disinterested because the witness had his own grievance against the Chief Justice, which he was ventilating to all and sundry. He even went to the length of reporting to the Chief Justice of India. I am not required to pronounce upon the truth or otherwise of Puttaraja Urs, J's personal aspersions on Medappa, C.J., but is it obvious that he cannot be regarded as a witness who can be trusted to have taken no sides. That leaves only the fact that Medappa, C. J., had heard and decided the probate case against the family. But I do not think that this circumstance was enough to disqualify him from sitting on a Bench to hear a case in which more evidence has been led. This happens frequently in all Courts.

The same conclusion is also reached, when one examines the allegations about the conduct of Balakrishniah, J. There too, the allegations are in affidavits. These allegations are that Balakrishniah, J., made hostile remarks against the case of the sons of Ramalingam, while hearing the appeal with

Kandaswami Pillai, J. If every remark of a Judge made from the Bench is to be construed as indicating prejudice, I am afraid most Judges will fail to pass the exacting test. In the course of arguments, Judges express opinions, tentatively formed, sometimes even strongly; but that does not always mean that the case has been prejudged. An argument in Court can never be effective if the Judges do not sometimes point out what appears to be the under lying fallacy in the apparent plausibility thereof, and any lawyer or litigant, who forms an apprehension on that score, cannot be said to be reasonably doing so. It has frequently been noticed that the objection of a Judge breaks down on a closer examination, and often enough, some Judges acknowledge publicly that they were mistaken. Of course, if the Judge unreasonably obstructs the flow of an argument or does not allow it to be raised, it may be said that there has been no fair hearing.

The remarks of Balakrishniah, J., which have been quoted in the case do not bear that suggestion. He seemed to have formed opinions as the arguments proceeded, and if he had kept them to himself, there would have been no complaint. It is because they were expressed that there is one. No doubt, he expressed his opinion in the judgment and then sat on the Full Bench. But I have explained already that due to the retirement of Kandaswami Pillai, J., the incompetence of one other learned Judge who had acted as a lawyer, the choice was between him and Puttaraja Urs, J. Perhaps that would have been equally objected to on the other side, as subsequent events disclosed. In any case, there was to be a rehearing, and if the Chief Justice, included Balakrishniah, J., following the inveterate practice of his Court, it is too much to say that the judgment was *Coram non judice*, or the principles of natural justice were violated. The further contention that Balakrishniah, J., had

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rendered himself a witness because the terms of compromise were discussed before him, loses all significance in the face of the order that the compromise, if any, could not be recorded in the interest of the estate.

On a review of these allegations, I am not satisfied that the sons of Ramalingam have made an acceptable case. It cannot, therefore, be said that cls. (a) and (d) of S. 13 are applicable, and that the judgment of the Mysore Full Bench is not conclusive. I should not be taken to hold the view that the hearing was without incident, or that the conduct of these two Judges was always correct. But all the facts are overlaid with exaggeration and perjury, and no definite conclusion can be reached. I am, however, quite clear that the evidence falls far short of that degree of proof which would entitle another Court to say of a foreign judgment that it was *coram non judice* or that it had been rendered violating the principles of natural justice.

I shall next consider the competence of the Mysore Courts and the extent of the conclusiveness of the judgment of the Full Bench under s. 13 of the Code of Civil Procedure. To decide these points, it is necessary to examine critically the pleas in the cases in the Mysore Courts and the decision on those pleas. In so far as the decision is concerned, I shall confine myself to the judgment of the Full Bench, for its is only the final judgment, which can be considered conclusive.

The suits were filed on identical pleas. Two suits were necessary, because the property was situated in the jurisdiction of two different Courts. In any event, both the suits were consolidated after the return of the Civil and Military Station to the Mysore State. The suits were filed for declaration that the properties were joint family

properties, that Ramalingam had no right to dispose of the same by a will, and for possession and accounts. As against this, the executors had contended that the properties were self acquired. The basis of the claim of the sons of Ramalingam was contained in the following paragraph :

> "The said V. Ramalinga Mudaliar came into possession of movable and immovable properties including some houses in Arunachala Mudaliar Road, Civil and Military Station, Bangalore, which had belonged to his father, Vaidyalinga Mudaliar. The said properties were sold of by Ramalinga Mudaliar and the sale-proceeds were invested in several businesses. In or about the year 1928 the first plaintiff (Vishwanathan) joined his father and actively assisted him in the several businesses of the family. Apart from the fact that there was a nucleus of ancestral property with which the businesses were carried on, the plaintiff submit that the adult members of the family, *viz.*, the first plaintiff and late Mr. V. Ramalinga Mudaliar were actively associated with the family businesses and that all the properties were treated by Ramalinga Mudaliar as family properties."

In dealing with the case, the Full Bench gave the following findings :

> (1) That Vaidyalinga Mudaliar who was away in Shimoga and Mysore working as District Sheristadar had nothing to do with the contract business at the Kolar Gold Field Mines ;
>
> (2) That Shanmuga borrowed Rs. 2000/- on a pronote, in which his father joined, from a Bank and did business with it successfully ;

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(3) That this money was returned by Shanmuga to his father ;

(4) That the other brothers, acknowledged in writing that they had no title or interest in the business of Shanmuga which were his self acquisitions ;

(5) That Ramalingam joined Shanmuga as a partner and later brought out his interest;

(6) That Ramalingam did not come into possession of any movable property of his father ;

(7) That even if Ramalingam sold the houses left to him by the father they were his exclusive properties bequeathed to him by Vaidyalingam whose self-acquisitions they were ;

(8) That the claim of the sons of Ramalingam that the properties were acquired with the aid of the joint family nucleus and that were joint family properties was disproved.

In the result, it was that the business and possessions were not of those of a joint family but the separate properties of Ramalingam.

The question whether these finding or any of them are conclusive in the subsequent litigation in Madras has been raised in connection with the 18366 shares of the Indian Sugars and Refineries Ltd., by the sons of Ramalingam, who seek to avoid the Mysore judgment and in respect of the immovable property in Madras by the executors who claim the benefit of the same under s. 13 of the Code of Civil Procedure. Though the question is mainly one of interpretation of s. 13, the arguments were reinforced by reference to Books on Private International Law and cases decided by English Courts.

The law as contained in s. 13 has been the result of an evolution. In the Code of Civil Procedure 1887, the subject of foreign judgments was a part of the law of *res judicata*. It was enacted in s. 14 that,

> "No foreign judgment shall operate as a bar to a suit in British India—
>
> (a) if it has not been given on the merits of the case ;
>
> (b) if it appears on the face of the proceedings to be founded on an incorrect view of international law or any law in force in British India ;
>
> (c) if it is in the opinion of the Court before which it is produced contrary to natural justice ;
>
> (d) if it has been obtained by fraud ;
>
> (e) if it sustains a claim founded on a breach of any law in force in British India."

That the section was to take its colour from the preceding section (13) which dealt with *res judicata* is made obvious by the VIth Explanation to the latter section, which read :

> "Where a foreign judgment is relied on, the production of the judgment duly authenticated is presumtive evidence that the Court which made it had competent jurisdiction, unless the contrary appears on the record ; but such "presumption may be removed by proving the want of jurisdiction."

There was one other section (s. 12), which laid down the circumstances for the application of the doctrine of *Lis Alibi Pendens*, with which we are not concerned.

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In the Code of 1882, an Explanation was added to s. 14 by Act VII of 1888 (s. 5) that the Courts in British India must examine, in a suit based on a foreign judgment of any foreign Court in Asia and Africa (excepting a Court of Record established by Letters Patent of Her Majesty or any predecessor of Her Majesty or a Supreme Consular Court established by an Order of Her Majesty in Council) the merits of that judgment when it was pleaded as a bar in a suit before the British Indian Courts. This was obviously done to prevent the judgments of the Courts of Indian States to be placed on an equal footing with those in European Countries. The Governor-General in Council was, however, given the power to declare which Courts in the Indian States could have their decrees executed in British India as if they were decrees passed by a British Indian Court. Some Indian States were so declared, and it is interesting to know that Mysore State was one of them.

In the Code of 1908, with which we are concerned, the ban against the judgments of Indian States was removed and s. 14 was re-enacted as s. 13, and Explanation VI was re-enacted with slight modifications of language as s. 14. The change between the old s. 14 which worded in a negative way and s. 13, which states affirmatively that a foreign judgment shall be conclusive is significant, and lies in the fact that during this time there was a corresponding advance in the theories of Private International law in England. But this much is evident that in dealing with the question of foreign judgments in India, we have to be guided by the law as codified in our Country. That law attaches a presumption (though rebuttable) of the competency of the Court, which pronounced the foreign judgment. It makes it (a) conclusive (b) as to any matter thereby directly adjudicated between the same

parties or between parties under whom they or any of them claim litigating under the same title. The conditions precedent are contained in six clauses of which the first clause is that it must be pronounced by a Court of competent jurisdiction.

It may be mentioned at this stage that s. 41 of the Indian Evidence Act provides that a final judgment, order or decree of a competent Court in the exercise of probate, matrimonial, admiralty or insolvency jurisdictions shall be relevant and also conclusive proof as to certain legal character. The contention on behalf of the executors has been that s. 41 of the Indian Evidence Act provides the rules for judgments *in rem*, while s. 13 of the Code of Civil Procedure provides for judgments *in personam* and the only judgments *in rem* are those mentioned in s. 41. To this argument, I shall come later.

The first point to decide is whether the Mysore Courts were competent to decide the controversy which they decided. What is meant by competency can be looked at from two points of view. There is the internal competency of a court depending upon the procedural rules of the law applicable to that Court in the State to which it belongs. There is also its competency in the eye of international law. The competency in the international sense means jurisdiction over subject-matter of the controversy and jurisdiction over the parties as recognised by rules of international law. What is meant by competency in this context was stated by Blackburn, J., speaking for the Judges in answer to the question referred by the House of Lords in *Castrique* v. *Imrie* (1). Relying upon Story's Conflict of Laws, the learned Judge observed:

> "We may observe that the words as to an action being *in rem* or *in personam*, and the common statement that the one is binding on

(1) (1870) L.R. 4 H. L. 414.

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third persona and the other not, are apt to be used by English lawyers without attaching any very definite meaning to those phrases. We apprehend the true principle to be that indicated in the last few words quoted from *Story*. We think the inquiry is, first, whether the subject-matter was so situated as to be within the lawful control of the State under the authority of which the Court sits; and secondly, whether the sovereign authority of that State has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world."

Story's exact words are to be found in para. 586 of his Book, and this is what the learned author said:

> "In order however to found a proper ground of recognition of any foreign judgment in another country, it is indispensable to establish that the Court pronouncing judgment should have a lawful jurisdiction over the cause, over the thing, and over the parties. If the jurisdiction fails as to either it is... treated as a mere nullity, having no obligation, and entitled to no respect beyond the demestic tribunals. And this is equally true, whether the proceedings lie *in rem* or *in personam* or *in rem* and also *in personam*".

The opinion expressed by Story here is, in its turn, based on that of Boullenois in his *Traite et de la Personnalite et de la Realite des Lois Coutumes ou Status*, (1766) Vol. I, pp. 618-620.

The law stated by Blackburn, J., has been universally accepted by all the Courts in the English speaking countries and it was quoted with

approval recently by the Privy Council in *Ingenohl* v. *Wingh On & Co.* (1). No distinction in approach to the question of competence is made between cases *in rem* and *in personam*. In *Pemberton* v. *Hughes* (2). Lindley, M. R., stated the law relating to competency to be this:

> "Where no substantial justice, according to English notions, is offended, all that the English courts look to is the finality of the judgment and the jurisdiction of the court, in this sense and to this extent—namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the court had jurisdiction in this sense and to this extent, the courts of this country never enquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantail injustice, according to English notions, has been committed.
>
> There is no doubt that the courts of this country will not enforce the decisions of foreign courts which have no jurisdiction in the sense above explained—*i.e.*, over the subject-matter or over the persons brought before them: *Schibsby* v. *Westenholz* (3): *Rousillon* v. *Rousillon* (4); "*Price* v. *Dewhurst*(5) *Buchanan* v. *Rucher* (6) *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (7). But the jurisdiction which aline is important in these matters is the competence of the Court in an inter-national sense—*i.e.*, its territorial competence over the subject-matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as meterial by the courts of

(1) A.I.R. 1928 P.C. 83. (2) (1899) 1 Ch. 781.
(3) (1870) L R 6 Q.B. 155. (4) 1880) 14 Ch. D. 351.
(5) (1838) 4 My. Cr. 76. (6) (1808) 9 Est. 192,
(7) [1894] A. C. 670.

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this country. This is pointed out by Mr. Westlake (International Law, 3rd ed. s. 328) and by Foote (Private International Jurisprudence, 2nd ed. p. 547), and is illustrated by *Vancuelin* v. *Bouard* (1)...

It may be safely said that, in the opinion of writers on international purposes, the jurisdiction or the competency of a Court does not depend upon the exact observance of its own rules of procedure...

A judgment of a foreign court having jurisdiction over the parties and subject-matter—*i.e.*, having jurisdiction to summon defendant before it and to decide such matters as it has decided—cannot be impeached in this country on its merits: *Castrique* v. *Imprie* (2) (*in rem*); *Godard* v. *Gray* (3) (*in personam*); *Messine* v. *Petrococchino* (4) (*in personam*). It is quite inconsistent with those cases and also with *Vanquelin* v. *Bouard* (1) to hold that such a judgment can be impeached here for a mere error in procedure. And in *Castrique* v. *Imprie* (2) Lord Colonsay said that no inquiry on such a matter should be made."

The dictum of Lindley, M. R., goes a bit too far in reducing internal want of jurisdiction to nothing. It may be that the judgment of the foreign Court may be a nullity, and it would be too much to say that full faith should be given to such a judgment. Indeed, in England, this part of dictum was not applied; *Papdopoulos* v. *Papadopoulas* (5). That apart, in my opinion, the above passage admirably sums up the law connected with the competency of the foreign Court. Mere irregularities of procedure in the exercise of jurisdiction by

(1) (1863) 15 C.B. (N.S.) 341. (2) (1870) L.R. 4 H.L. 414.
(3) (1870) L.R. 6 Q. B. 139. (4) (1872) L.R. 4 P.C. 144.
(5) [1930] P. 55.

the foreign Court are not enough: See *Ashbury* v. *Ellis* (1); but a total want of internal jurisdiction may have to be noticed if pleaded in answer to the foreign judgment. There is no real difference in so far as competency goes between actions *in rem* and actions *in personam*. In some actions in personam, the necessity of jurisdiction over any particular thing may not arise. This is always necessary in judgments *in rem* relating to immovable property. Besides this a judgment *in personam* binds only the parties, while a judgment *in rem* seeks to bind others also. Thus, the objection to the jurisdiction of the Court in a foreign country on other than international considerations, must be raised in that country. This is settled in *Vanquelin* v. *Bouard* (2). Objections to it internationally can be raised in the Court in which the judgment is produced. But even if the objection to the jurisdiction be raised in the Court where the judgment is produced, that Court will consider in actions *in rem* whether the foreign Court had jurisdiction over the subject-matter and the defendant and also in actions *in personam*, whether the jurisdiction was possessed over the subject-matter and the parties. In the approach there is no difference. In the latter class, of cases, the English Courts consider the defendant bound where :—

(1) he is the subject of the foreign country in which the judgment has been obtained:

(2) he was resident in the foreign country when the action began ;

(3) he, in the character of plaintiff, has selected the *forum* in which he is afterwards sued;

(1) [1893] A.C. 339, 344. (2) (1863) 15 C.B. (N.S.) 341.

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(4) he has voluntarily appeared ;

(5) he has contracted to submit himself to the *forum* in which the judgment was obtained.

I leave out the sixth ground added by *Becquet* v. *MacCarthy* (1), as it has not been universally endorsed and has been said to go to the verge of the law.

In addition to these, the English Courts take into consideration the conduct of the party raising the objection against the foreign judgment. If he, has plaintiff, invoked the jurisdiction of the foreign Court, he cannot be allowed to complain against the judgment on the ground of competence. This was laid down in very clear terms by Blackburn, J., in *Schisby* v. *Westenholz* (2) as follows :

> "Again we think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him."

The contrary case is *General Steam Navigation Co.* v. *Guillon*(3), where the conduct of the defendant was not held binding. Recently, in *Harris* v. *Taylor* (4), appearance conditionally by a defendant in a foreign Court to object to jurisdiction was considered not to be the sort of conduct to bind him, but in *Travers* v. *Holley*(5), Denning, L. J. (as he then was), has made certain *obiter* remarks against the last case. Since I am not concerned with the conduct of a defendant before a foreign Court but that of a plaintiff, I need not refer to these cases in detail.

(1) (1831) 2 B. & Ad. 951. (2) (1870) L. R. 6 Q. B 155,
(3) (1843) 11 M. & W. 877. 894. (4) [1915] 2 K.B. 580,
(5) [1953] P. 246,

Applying these tests to find out if the Mysore Courts were competent to deal with the case both internally and internationally, it is clear that they were. The subject of the controversy was the status of Ramalingam, a subject and resident of Mysore State. His will made in that jurisdiction was admitted to probate there. His sons and other relatives who figured as parties and those in possession of the property were in that State. The property which was the subject of dispute, including the Kolar Gold Fields business situated in Mysore State, but excluding the shares in the Indian Sugars and Refineries Ltd., (Which are disputed as to their *situs*) was also in Mysore. The sons of Ramalingam themselves commenced the two suits and invoked the jurisdiction of the Mysore Courts. They claimed that the Kolar Gold Fields business belonged to a joint family and not to Ramalingam alone. They in fact, succeeded at first, but lost on appeal. In view of these considerations and applying the dicta of Blackburn, J., and Lindley, M. R., the conclusion is inescapable that the Mysore Courts were competent internally as well as internationally to decide about the status of Ramalingam and the rights to or in the Kolar Gold Fields business between these very parties. It may be mentioned here that the competence is to be judged in relation to the subject matter of the suit in the foreign Court and not in relation to the subject-matter of the suit in another country where the judgment is produced. *Ex facie,* the Mysore Court exercised no jurisdiction in respect of the properties in Madras. They were never the subject-matter of the Mysore suits and that subject-matter is wholly irrelevant when considering the competency of the Mysore Court. What has to be considered is the effect of the Mysore judgment upon the litigation in Madras in view of s. 13 of the Code. If, then, the Mysore Courts were Courts of competent jurisdiction, the question, is how far are the

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judgments conclusive. The properties, with which we are concerned, are the 16,000 odd shares of the Indian Sugars and Refineries Ltd., and the immovable properties in Madras. The executors claim that in respect of the shares there is a decision between the parties and in respect of the immovable property, no question of status of Ramalingam or the ownership of the Kolar Gold Fields business can be reconsidered in view of the Mysore judgment while the other side seeks to avoid the judgment altogether.

Numerous cases from English Law Reports and some standard text-books on the subject of Private International Law or, as it is sometimes called, the Conflict of law, were cited in support by the rival parties. It may, however, be said at the start that the treatment of the subject in India is somewhat different from that in England. In our country, the binding force of a judgment arises partly from adjective law and partly from the law of evidence. The Subject of *res judicata*, which is based upon a rule of public policy as expressed in Coke on Littleton as *interest rei publicae ut sit finis litium* is mainly to be found in the Code of Civil Procedure, while the evidentiary value of Judgments is dealt with in the Indian Evidence Act. In England, the subject of *res judicata* is mainly dealt with as part of the law of evidence, and a former judgment is said to create an estoppel by record. The subject of the conclusiveness of foreign judgments is dealt with in India in the law of procedure, while in England it is dealt with as a part of Private International Law. This law is not to be taken as a kind of law binding upon the States of the world arising out of a *communis consensus* of the States. There is no such consensus, though reciprocal laws exist. Each Country decides for itself how far the foreign judgments will be received. A foreign

judgment receives different treatment in different parts of the world. Apart from reciprocity between different Countries which have agreed to be mutually bound, there are numerous approaches to the problem. In some Countries, direct enforcement of such judgments, if registered in the Country of origin, is permitted in the same way as in ss. 44 and 44A of our Code of Civil Procedure. In others, the judgments (unless reciprocal agreements exist) must be sued upon. There too, the question arises whether the original cause of action merges in the judgment—*transitu in rem judicatum*, or survives. In some Countries like France, the judgment of a foreign Court is subjected to scrutiny, while in some of the Nordic Countries, the judgment has no value. In *Tallack* v. *Tallack* (1) jurisdiction was refused, because the judgment of the English Court would not have bound the parties in the foreign Country. Numerous rules have been evolved in England and the English speaking Countries, mainly by Judges, which show the extent to and the conditions under which the judgments is received. In America, the Restatement has done much to simplify the subject, but even so, it has proved inadequate. The subject has been made so complicated that one learned author has been provoked to say.

> "In one respect the law of Conflict of Laws is nothing but an unmitigated nuisance, serving no useful purpose whatever." (Leflar —The Law of Conflict of Laws (1959) para 8 of Introduction).

The salient point of English law on the subject may be stated to be that all judgments are divided into two broad categories—judgments *in rem* and judgments *in personam*. The best defin-

(1) (1927) P. 211.

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defitions of these terms are to be found in Halsbury's Laws of England, Vol. 22, p. 742, para 1605, which reads:

> "A judgment *in rem* may be defined as the judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing, as distinct from the particular interest in it of a party to the litigation. A judgment *in personam* determines the rights of the parties *inter se* to or in the subject matter in dispute, whether it be corporeal property of any kind whatever, or a liquidated or unliquidated demand, but does not affect the status of either persons or things, or make any disposition of property, or declare or determine any interest in it except as between the parties litigents. Judgments *in personam* include all judgments which are not judgments *in rem* but, as many judgments in the latter class deal with the status of persons and not of things, the description '*judgments inter partes*' is preferable to 'judgment *in personam*'.

The definition of Halsbury is merely a restatement of a definition given by Bowers, and it has been accepted and applied by Evershed, M. R., in *Lazarus-Barlow* v. *Regents Estates Co. Ltd.* (1). Such judgments, says Phipson on Evidence, 8th Edn., p.401, are conclusive in the case of judgments *in rem* against parties or their privies or strangers, and in the case of judgments *in personam*, against the parties and their privies only. In the matter of foreign judgments, the rule about judgments *in rem* has been somewhat reduced in its extent in one direction and extended in another in recent years in England. In the matter of

(1) (1949) 2 K.B. 465, 475.

status, it has been extended to give more and more faitn to foreign decrees but in the other direction, it has been curtailed. In respect of things and determinations of rights or title to things (excluding immovable property as to which I shall say something later) judgments *in rem* are now confined to Admiralty actions. There is, however, a remnant in respect of movables, which is represented in the three rules of Westlake (s. 149) which are:

(a) judgments which immediately vest the property in a certain person as against the whole world;

(b) judgments which decree the sale of a thing in satisfaction of a claim against the thing itself; and

(c) judgments which order movables to be sold by way of administration.

This distinction is summed up by Holmes, C. J., in *Tyler* v. *Judges of the Court of Registration* (1), as follows:

> "If the technical object of the suit is to establish a claim against some particular person, with a judgment which generally in theory, at least binds his body, or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defence, the action is in personam, although it may concern the right to, or possession of, a tangible thing.....If on the other hand the object is to bar indifferently all who might be minded to make an objection of any sort against the right sought to be established, and if any one in the world has a right to be heard on the strength of alleging facts which, if true show an inconsistent interest, the

(1) (1900) 175 Mass. 71.

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proceeding is *in rem*.....All proceedings, like all rights, are really against persons. Whether they are proceedings or rights in rem depends on the number of persons affected." (Cheatham—Cases and Materials on Conflict of Laws, p. 168).

This classic exposition, which has evoked the admiration of every text-book writer and also the Privy Council in *Ingenohl* v. *Wing On & Co.* (1) sums up in an admirable manner the distinction between the two kinds of judgments.

I shall now follow up and analyse the application of these principles in England and America where the law is almost the same, and then show how the subject has been treated in the India Statutes. In dealing with this subject, I shall not enter upon two subjects. They are the reciprocal arrangements and Arbitral awards, which are two classes apart. The first condition of recognition of a foreign judgment is, of course, the competency of a foreign Court, about which I have said much already. The next condition is the absence of fraud of collusion. Further still, the judgment which is propounded must not offend the public policy of English law, or must not be contrary to the principles of natural justice. Barring these, the judgments of foreign Courts are received in actions based on them and given effect to under certain conditions arising from whether they are *in rem* or *in personam*. I have shown already that the judgments *in rem* are concerned with *res*. But the word "res" is given a very large meaning. Lord Dunedin in *Salvesan* v. *Administrator of Austrian Property* (2) observed :

"The other point on which I want to say a few words is the question of what is a judg-

(1) A.I.R. 1928 P.C. 83. (2) (1927) A.C. 641, 662.

ment *in rem*. All are agreed that a judgment of divorce is a judgment *in rem*, but the whole argument of the judges in the Court of Sessions turns on the distinction between divorce and nullity. The first remark to be made is that neither marriage nor the status of marriage is, in the strict sense of the word, a *res*, as that word is used when we speak of a judgment *in rem*. A *res* is a tangible thing within the jurisdiction of the Court, such as a ship or other chattel. A metaphysical idea, which is what the status of marrige is, is not strictly a res, but it, to borrow a phrase, savours of a *res*, and has all along been treated as such. Now, the learned Judges make this distinction. They say that in an action of divorce you have to do with a res, to wit, the status of marriage, but that in an action of nullity there is no status of marriage to be dealt with, and therefore no *res*. Now it seems to me that celibacy is just as much as status as marriage."

See also the observations of Lord Haldane at pp. 652-653.

Commenting upon that case, Cheshire (*op. cit. sup*) says at p. 657:

"Thus the word *res* as used in this context includes those human relationships, such as marriage, which do not originate merely in contract, but which constitute what may be called institutions recognised by the State."

In the same way, adoptions in foreign Countries which were not recognised in England at one time are now being recognised. See Dicey's Conflict of Laws, 7th Edn., p. 460, particularly p. 461, where Dicey's Original view is shown to be obsolete. The subject of adoption is being treated

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as in *pari materia* with legitimation. Cheshire's views expressed in his book (pp. 442-443) show that on the analogy of a case like *In re Goodman's Trusts* (1) they are being equated. Cheshire then observes in forceful language:

> "The genius and expansion of the common law would indeed wither away if the traditional practice were to be abandoned of applying the principles already established for one type of case to another type substantially similar in nature."

He then concludes that the existence of Y's status as fixed by the law of the domicile common to him and his adopter must on principle be recognised in England. In England, judgments *in personam* which are ancillary to such judgments *in rem* were considered binding at one time, see *Phillips* v. *Batho* (2); but the view has since changed somewhat.

As regards the extent of conclusiveness of foreign judgments, the subject again gets divided into two parts. Judgments *in rem*, according to Foote on Private International Law, 5th Edn., p. 625, are received in respect of any matter decided by them. The following passage gives his views:

> "Accepting then, as incontrovertible the principle that a foreign judgment *in rem* is conclusive in all Courts and against all parties, it remains to consider to what its conclusiveness has been held to extend. As to the fact directly adjudicated upon there can be no doubt; but there is often difficulty in applying the principle to facts inferentially decided, as well as to the grounds, expressed or implied, of the foreign decision. The safest expression of the English law on the subject appears to be that the truth of every fact,

(1) (1881) 17 C.H.D. 266. (2) (1913) 3 K.B. 992.

> which the foreign Court has found, either as part of its actual adjudication or as one of the stated grounds of that decision, must be taken to be conclusively established."

He, however, adds that the foreign Court will not be taken as having established any fact which it has not expressly found as laid down in the judgment relied on. Short of this, not only the actual decree but every adjudicative fact is treated as conclusively decided. Rattigan in his Private International Law at p. 268 observes:

> "This conclusiveness extends to every fact which the foreign Court has found, either as part of its actual adjudication or as one of the stated grounds of its decision."

Dicey in his Conflict of Law, 7th Edn. (Rule 183) states the law in concise form:

> "A foreign judgments is conclusive as to any matter thereby adjudicated upon and cannot be impeached for any error either.
>
> (1) of fact
>
> (2) or of law".

In so far as judgment *in personam* are concerned, any of the matters decided *inter partes* are binding on the parties and privies, though not on strangers. This follows from the rule now firmly grounded that a foreign judgment well be examined from the point of view of competence but not of its errors, subject, of course, to there being no fraud, collusion, breach of the principles of natural justice or of public policy of England or a wrong apprehension of the law of England, if that law be involved. From the conclusiveness of foreign decrees, it may be said

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here that the penal laws of another Country or judgments involving a penal decree are excluded. It is customary to quote Chief Justice Marshall's famous *dictum* in the *Antelope* (1): "The Courts of no country execute the penal laws of another." The same is the position of decrees, orders or judgments in matters of taxation and penalties under taxing laws. The American Courts follow in these respects the law in England, and Goodrich in his Conflict of Law, p. 603, sums up the American approach in one pithy sentence:

> "A valid foreign judgments should be recognized and given effect in another State as a conclusive determination of the rights and obligations of the parties. This is the modern doctrine."

He adds further:

> "On principle, the foreign judgment should be conclusive. The judgment has determined that, under the law of the State where it was rendered, the plaintiff has or has not certain rights, and that the defendant is or is not under certain corresponding legal obligations. Those rights and obligations exist in the State where the judgment was rendered so long as the judgment remains in force. When such a judgment is presented for recognition and enforcement in another State, it ought to be treated no less favourably than any suit founded upon foreign operative facts."

Indeed, there is now a liberal approach in respect of immovable property outside the jurisdiction. At p. 217, Goodrich has cited instances of recognition of foreign judgments in respect of matters which, normally, would not come within the jurisdiction of the Court. He says:

(1) (1825) 10 Wheat 1f, 123. 6 L. Ed. 268.

"Plaintiff asks defendant, who is before the Court, be compelled to execute in plaintiff's favour a conveyance of land which lies outside the State. Is there any defect in jurisdiction because the land is in another State? It is clear that the Court could not make its decree operate directly to convey the land nor could it effectively authorize a master appointed by the Court to make the decree if the defendant were unable or unwilling to do it. "But if, at the situs of the land a deed executed elsewhere will be recognized as effective, the Court may order defendant, who is before it, to execute a deed conveying the land. This power has been exercised by the Court even since the time of the historic litigation between *Penn* v. *Baltimore* (1), and is recognized in innumerable decisions."

The same views have been expressed by Stumberg in Conflict of Laws (2nd Edn.), p. 69, Nussbaum in his Principles of International Law (1943), pp. 299, 235 and others.

In India, the law as to conclusiveness of judgments is contained in ss. 40-44 of the India Evidence Act and ss. 11-14 of the Code of Civil Procedure. Section 41 of the former makes certain special kinds of judgments conclusive, while s. 11 makes judgments in India and s. 13 makes foreign judgments conclusive under certain conditions. I shall first analyse the sections in the Indian Evidence Act. Section 40 makes the existence of a judgment etc. which by law prevents any Court from taking cognisance of a suit or holding a trial, a relevant fact when the question is whether such Court ought to take cognisance of such suit or hold such trial. This enables a judgment, order or decree, whether of a Court in India or a foreign Court,

(1) (1750) 1 Ves. Sen. 444.

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to be propounded for the particular purpose mentioned. Section 42 next mentions that judgments etc. other than those mentioned in s. 41, are relevant if they relate a matters of public nature relevant to the enquiry, but such judgments, etc., are not conclusive proof of what they state. The illustration shows what is meant by matters of a public nature. Section 43 then lays down that judgments etc., other than those mentioned in ss. 40, 41 and 42, are irrelevant unless the existence of such judgments etc., is a fact in issue or is relevant under some other provision of the Evidence Act. Section 44 says lastly that any party to a suit or other proceeding may show that any judgment etc., which is relevant under ss. 40, 41 or 42 and which has been proved by the adverse party was delivered by a Court not competent to deliver it or was obtained by fraud or collusion. Section 41 which I left out, provides for relevancy of certain kinds of judgment and for their conclusiveness. It reads :

> "A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing is relevant. Such judgment, order or decree is conclusive proof—
>
> that any legal character which it confers, accrued at the time when such judgment, order or decree came into operation :
>
> that any legal character to which it declares any such person to be entitled, accrued to

that person at the time when such judgment, order or decree declares it to have accrued to that person:

that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property."

The judgments mentioned in this section are called judgments *in rem*. As far back as *Yarakalamma* v. *Ankala* (1) distinction was made between judgments which bound only the parties to it and judgments which bound also strangers. The terms of Roman Law which divided law into *quod ad res pertinet* and *quod ad personas pertinet* furnished the root, and this classic distinction has been taken as the foundation. In *Kanhya Lal* v. *Radha Charan*(2) Peacock, C.J., gave a list of judgements *in rem*, and that list has been followed in framing s.41. The list of such judgments is much longer in Taylor on evidence, and the present day Private International Law includes all question of status within it. Sir James Stephen is reported to have said that he included only those judgments to which conclusiveness could be given from the point of view of the law of evidence and the conclusiveness attaches as to a given matter of fact relevant to the issue, which may be proved from the judgment. That there may be other provisions, of some other law which may also attach conclusiveness to judgment etc., of some other kinds goes without saying. Section 41 does not prohibit the making of other laws. The

(1) 2 M.H.C.R. 276. (2) (1867) 7 W.R. 338.

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provisions of s. 11 of the Code of Civil Procedure, for example, go much farther than s. 40 or s. 41 of the Indian Evidence Act. Section 40 touches only the fringe of the law of *res judicata*; but provision for that has been made more exhaustively in s. 11 of the Code of Civil Procedure. The difference between provisions in the law of evidence and the law of procedure is that one deals with the question of proof and the other, with a bar of suit. A fact which can be proved from a judgment made conclusive for that purpose need not be proved afresh. The proof of the judgment is enough. But a second suit can only be barred on the principle of *res judicata* if the law says so; and this bar is regarding the adjudication of a controversy decided before. It is not possible to add to the list of subjects mentioned in s. 41 of the Indian Evidence Act, except by legislation. Conclusiveness there attaches only to the subjects mentioned therein, and a fact established by a judgment of a competent Court on any of the subjects is taken to be proved, and established in all subsequent proceedings and does not require to be proved again. The Judicial Committee in *Appa Trimbak* v. *Waman Govind* (1) did not extend the principle of s. 41 to a case of adoption and a former judgment on the question of adoption was considered under s. 11 of the code and not under s. 41 of the Indian Evidence Act. The former judgment was not accepted under s. 11 of the Code as it did not come within its terms, and the fact was allowed to be proved *de novo*. The reason given for the non-applicability of s. 41 was said to be that the decisions on adoption were excluded by Sir Barne Peacock in *Kanhya Lal* v. *Radha Charan* (2) and also in s. 41.

From the above, it follows that conclusiveness, from the point of view of the law of

(1) A.I.R. 1941 P.C. 85. (2) (1867) 7 W.R. 338.

evidence, will attach to a judgment, order or decree, only if it falls within the categories mentioned in s. 41. Once a judgment etc. falls within it, the law dispenses with the proof of the fact and the conclusion of the former judgment etc., about the legal character which it confers or declares, together with the declarations of property arising from that legal character, is final. In my opinion, the conclusiveness under s. 41 of the Indian Evidence Act cannot be claimed in this case for the Mysore judgment in view of the enumeration of certain jurisdictions in the section, bacause the status of being joint or separate in relation to a Hindu coparcenery property is not one of the legal characters mentioned in it.

The question thus to consider is whether s. 13 of the Code of Civil Procedure is confined to those judgments, which do not fall within s. 41, or in other words, to judgments *in personam* as contended by the learned Attorney-General. There is nothing in the language of s. 13 to suggest this, as the section provides a general rule about foreign judgments and makes them conclusive between the same parties or between parties under whom or any of them claim litigating under the same title. From the mention of parties and their privies, it does appear as if the section is confined to judgments *inter partes*, to borrow the language of Halsbury. But a comparison of the terms of the section with those of ss. 40-44 of the Indian Evidence Act discloses a different meaning. Section 41 speaks of a competent Court, and s. 44 allows the question to be raised whether the judgment was obtained by fraud or collusion. But ss. 40-44 of the Indian Evidence Act do not contain certain provisions which are contained, in s. 13 as conditions precedent to the conclusiveness of foreign judgment. It is inconceivable that a foreign judgment *in rem* of

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the class mentioned in s. 41 of the Indian Evidence Act was intended to operate as conclusive, even though it was opposed to the principles of natural justice or though it was not given on the merits of the case or if it was founded on an incorrect view of international law or the law of India, or was in breach of any law in force in India. The existence of such prior conditions in s. 13 of the Code and their absence in the Evidence Act compel one to hold that both judgments *in rem* and judgments *in personam* are contemplated by s. 13 of the Code. The only difference is that while the Code makes foreign judgments conclusive *inter partes*, s 41 makes certain determinations described there as conclusive proof even against strangers. But such determinations, if found to foreign judgments, must also comply with the conditions stated in s. 13 to merit conclusiveness, and a foreign judgment will fail to bar a suit if those conditions are not also fulfilled. It is from this standpoint that I shall consider these appeals, because, in my opinion, no other approach is admissible.

The judgment of the Mysore High Court cannot be brought within the terms of s. 41 of the Indian Evidence Act except in so far as it would have, if the probate granted by the Mysore Court had been cancelled. Such an eventuality has not taken place, and I need not consider it, because even there, some difficulties are possible. Here, the judgment of the Mysore High Conrt was given between the self-same parties, who are litigating under the same title in Madras. The executors rely here, as they did in Mysore, on the will of Ramalingam, and the sons of Ramalingam rely on his being a member of coparcenery. The will is effective or ineffective if it disposes of the separate property of Ramalingam or the property of a

coparcenery. These titles were finally decided in respect of the properties in Mysore including the business of Ramalingam and the properties, movable and immovable, in Mysore State. No decision was given in respect of the property in Madras. The matter relating to Hindu coparcenery and the position of Ramalingam were really questions of status, and why this is so I shall now explain.

Ordinarily, a judgment upon status is considered to be a judgment *in rem*; see the classic definition of a judgment *in rem* in Smith's Leading Cases which has stood unchanged through the many editions. There is, however, no settled definition of 'status'. Paton in his jurisprudence (1946) at p. 256 quoting the analysis of Dr. Allen (Legal Duties) says:—

> "Status may be described as the fact or condition of membership of a ground of which the powers are determined extrinsically by law; status affecting not merely one particular relationship, but being a condition affecting generally though in varying degree a member's claims and powers."

Dr. Allen calls it,

> "the condition of belonging to a particular class of persons to whom the law assign certain peculiar legal capacities or incapacities or both."

Dr. Allen also adds:—

> "We must—distinguish three quite separate things:*Status* the condition which gives rise to certain capacities or incapacities or both; *Capacity* the power to acquire and exercise rights, and the *rights* themselves which are acquired by the exercise of capacity."

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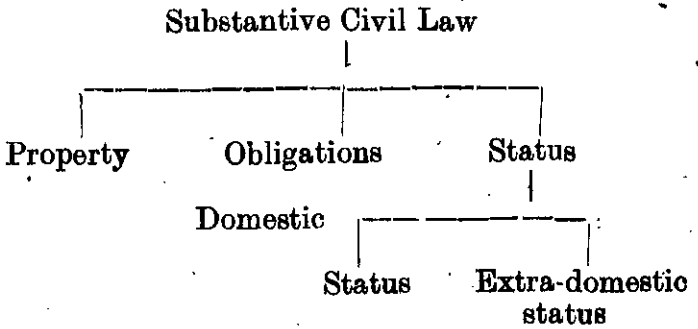
Thus status leads to capacity, and capacity to rights and to rights can be said to be embedded in status and to spring from it. Scrutton, L. J., in *In re Luck's Settlement Trusts* (1) said: "Status is in every case the creature of substantive law."

According to Salmond, the aggregate of man's proprietory rights constitutes his *estate* his *assets* or property. The sum total of his personal rights, on the other hand, constitutes his status. According to him, substantive Civil Law is thus divided:—



Domestic status, as he explains in an appendix to his Book is—

> "the Law of family relations, and deals with the nature acquisition and loss of all these personal rights, duties, liabilities and disabilities which are involved in domestic relations."

The conflict of law ordinarily recognises status created by the law of another country. See In re *Luck's Settlement Trusts*(1) at p. 891 and *Salvesan* v. *Administrator of Austrian Property*(2). In the domain of Domestic Status (barring marriage) there is no element of contract, and Maine says in Ancient Law "the movement of progressive secirties has hitherto been a movement *from status* to *contract*". Hollond in

(1) (1940) 1 Ch. 864, 890. (2) [1927] A.C. 641, 662.

his Jurisprudence gives sixteen instances of status and includes in them *'patria potestas'* which brings the matter very near a *Karta* of a joint Hindu family.

All the above definitions have been judicially noticed and applied by the Australian High Court in the exposition of s. 35 of the Judiciary Act, 1903, which allows an appeal to be brought without leave from any judgment of the Supreme Court of a State which "affects the status of any porson". In *Daniel* v. *Daniel*(1) Griffith, C. J. defined status to be:—

> "a condition attached by law to a person which confers or affects or limits a legal capacity of exercising some power that under other circumstances he could not or could exercise without restriction".

In *Shanks* v. *Shanks* (2) this definition was accepted and in *Ford* v. *Ford* (3) all the definitions considered by me were referred to among others and the analysis of Dr. Allen was approved.

It must therefore follow that where the source of rights is birth and the domestic relationship leads to rights but not to proprietorship of property the rights can only be said to arise from status. A coparcener in a Hindu coparcenery cannot be admitted by contract. The right is obtained by birth. Even an infant *"en ventre sa mere"* is in Hindu Law relating to a coparcenery born for many purposes. His rights are thus determined by status. In early laws there is always an emphasis on rights following on birth and writers of Jurisprudence have commented that in such societies there is always difficulty in rising above birth. No doubt the words status and estate had a common origin but in course of time they have acquired different legal meanings. See Pollock and Maitland History of English Law, Vol. II, 1st Edn.

(1) (1906) 4 C.L.R. 563, 566. (2) (1942) 65 C.L.R. 334.
(3) (1947) 73 C.L.R. 524.

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pp.10 and 78. In the law of Hindu Coparcenery, there is no ownership of properity apart from the coparcenery and the rights in the property are such as are determined by status. Where domestic relationship determines the status and the status, the rights all disputes and claims can only be based on status and not on proprietorship. Inheritance thus depends on domestic status, and in the same way survivorship the right to share partition and maintenance are the aspects of domestic status. In this sense, a coparcenery is nothing more than a kind of corporation not arising from contract but status and any matter relating to coparcenery is first a question of status and only when the status is established that a source of material rights comes into being.

If the matter had rested with the application of modern theories of Private International Law I would have been tempted to characterise the decision of the Mysore High Court as partly *in rem* and partly *in personam*, that dealing with the question of joint or separate acquisition of the Kolar Gold Fields business by Ramalingam as involving decision arising out of status and thus in rem. Such composite actions are not unknown. Story has adverted to them in a passage I have cited earlier and the Court of Appeal in England in *In re Trepca Mines Ltd.* (1) found the action to be partly in rem and partly *in personam*. The decision of the Mysore High Court was one on status and savoured of a decision in rem. Limited as the Judicial approach is by the existence of s. 41 of the Indian Evidence Act and the Judicial Committee in *Appa Trimback's* case (2), I venture to express this opinion. Private International Law today is developing by reciprocity and more and more kinds of judgments are being received as conclusive, which twenty years ago were not consi-

(1) (1960) 1. W. L. R. 1273. (2) A.I.R. 1941 P.C. 524.

dered as conclusive. If we do not give faith to foreign judgments on the subject of adoption family status and questions arising from such domestic relations, other Countries will also follow suit about our judgments. It will be quite amazing if a judgment on adoption in Ceylon (for example) is not considered binding in this Country and vice versa. Adoption is not one of the subjects mentioned in s. 41, and if treated as a decision on status and thus in rem will be conclusive between the same parties and their privies under s. 13. The same must be said of judgments on joint family status or the position of any particular member vis a vis the family. To treat judgments in this manner accords with the modern notions of Conflict of Laws.

Even if the subject be viewed from the angle of a judgment *in personam,* it is obvious that "the matter" decided be the Mysore High Court was whether Ramalingam was a member of a coparcenery and acquired the Gold Kolar Fields business and other properties as such member. That was the *res* decided, the destination of the properties being ancillary to this main decision.

It was argued on the basis of ruling of the Judicial Committee in *Brijlal Ramjidas* v. *Govindram Gordhandas Seksaria*(1) that the words "judgment" in s. 13 of the Code means "an adjudication by the foreign Court upon the matter before it" and not the reasons for judgment. The words of the section are "directly adjudicated thereby." What was meant by the Privy Council was that the *adjudicative* part of the judgment is conclusive and this part of the Mysore High Court judgment is that Ramalingam was not carrying on the Kolar Gold Fields business as a coparcener but independently. If that was not the adjudicative part there was very

(1) (1947) L. R. 74 I.A. 203, 210.

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little else. The language of s. 13 speaks not of the judgment but "matter thereby directly adjudicated upon" and the word "any" shows that all the adjudicative parts of the judgment are equally conclusive in the sense in which Foote and Rattigan and other have described them.

It was argued that the subject-matter of the suit in Madras was immovable property over which the Mysore Court did not and could not exercise jurisdiction. Reference was made to Decey's Conflict of *Laws and Castrique* v. *Imrie* (1) to show that only the Courts of the Country where immovable property is situated have jurisdiction and the *lexsitus* is applicable. In *Cartrique* v. *Imrie* (1) the question really was whether the sale of chattal (a ship) in satisfaction of a claim against the chattal itself was binding on certain parties who had not submitted to the jurisdiction of the French Courts and it was held that a judgment ordering such sale was a judgment *in rem* if the chattal at that time was in the territory of the foreign State. The ship in question had taken provision on board for which payment was demanded and the action in the French Tribunals was taken against the Commander Benson who was required to pay *'par privilege sur ce Navire'*. Of course the owner Clause or Castrique the purchaser did not appear before the French Tribunal but jurisdiction of the French Tribunals was founded on the presence of the ship in French waters at Havre. Such question can hardly arise in respect of immovable property because the courts of the Country where immovables are situated can alone have the jurisdiction and no foreign Court can decide the dispute or enforce it effectively.

Apart from the fact that even in England the distinction between real and personal property has not been adhered to when the English Courts

(1) (1870) L.R. 4 H.L. 414.

specify immovable property for purposes of Private International Law it is obvious that the distinction does not come within s. 13 of the Code. If the Mysore High Court purported to decide about immovable property in Madras or the law applicable to the family was different I would have at once agreed with the argument. But the argument confuses the jurisdiction and the law, on the one hand with "the matter decided" on the other. The rule in *British South Africa Company* v. *Companhia De Mocambique* (1) that court can entertain actions in respect of immovables which are situated in a foreign country does not prevent in India under s. 13, the conclusiveness *inter partes* of a judgment as to any matter adjudicated thereby. That is quite a different affair if the adjudication is about proprietorship based on status. The rule in the above case would have made the decree of the Mysore High Court a nullity if the Mysore High Court had decided as issue about immovable property in Madras. But the Mysore High Court did not decide any such question. It decided a question of the status of Ramalingam and the ownership of the Kolar Gold Fields business with complete jurisdiction between the same parties litigating under the same title. That decision must be viewed in the Madras suit as a conclusive adjudication. The Madras Court could not decide the question of the ownership of the Kolar Gold Fields business *de novo* and as ancillary to that decision determine the right to the property in Madras. Of course the Madras Court was free to try other questions and consider other defences such as why the judgment of Mysore High Court was not applicable to the properties before it; but the fundamental question of ownership of the Kolar Gold Fields business, it could not try over again. In my opinion, even the evidence led

(1) [1893] A.C. 602.

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in the Madras suit to reopen that question was inadmissible though evidence to prove bias interest etc. on the part of the learned Judges was properly allowed to be led. It was not open to the Madras High Court to try the question of Ramalingam's status *de novo* and that part of the decision must be treated as without jurisdiction. I am therefore not entering into that question nor considering the evidence.

Before I consider the question of the shares of the Indian Sugar and Refineries Ltd., Madras I wish to refer to a case of the Privy Council on which great reliance has been placed. That case is reported as *Maqbul Fatima* v. *Amir Hasan*(1). The judgment that is printed in the All India Reporter is of the Allahabad High Court which the head note says was "confirmed by" the Privy Council. I shall content myself with citing the headnote :

> "A obtained judgment in the sub Court Bareilly (British Indian Court) declaring his title to the properties of the deceased situate within the jurisdiction of that Court. Subsequently B instituted a suit against A in Rampur, a Native State for recovery of possession of the properties of the deceased situate within the Native State. Thereupon A filed the present suit for a declaration that the Judgment of the Bareilly Court would operate as *res judicata* in the Rampur Court and for a perpetual injunction restraining B from proceeding with the suit therein. The High Court held that as the Court in British India were not competent to try suits with respect to property situate in Native State the judgment of the Bareilly Court would not operate as *res judicata*.

(1) A.I.R. 1916 P.C. 136.

> It being urged that under s. 13 Civil P.C. the rule contained in which was alleged to apply in Rampur the Judgment of the Bareilly Court was conclusive between the parties the High Court held that it was only in proceedings on foreign Judgment that the question of the effect of foreign Judgment could properly arise."

The second reason given by the High Court was quite sufficient and valid. There was no need to decide the first point which was for the Rampur Courts to decide. The High Court however, went further and decided whether their judgment would be res judicata under s. 13 of the Code of Civil Procedure (as applied in Rampur which the High Court presumed was the same as in British India) in Rampur State and came to the conclusion that the words "directly adjudicated thereby" meant the actual decretal part of their judgment. This question was not for the High Court to decide but for the Rampur Court.

I may mention here this suit which was filed for an injunction was one of a kind resorted to in the seventeenth Century of which the Reports do not exist apart from Lord Nottingham's manuscripts to be found in 3 Swanston 603607(46) which seems to have long ago fallen in desuetude. No wonder the Privy Council judgment was :

> "Their Lordships do not see their way to reverse the decision appealed from and will humbly advise His Majesty to dismiss the appeal. As the respondents have not appeared there will be no order as to costs."

It only remains to consider the argument in relation to the shares of the Indian Sugars and Refineries Ltd. It was contended that the shares must

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be deemed to be situated where they could be effectively dealt with and that was Madras, where the Head Office of the Company was situated. Learned counsel relied upon some English cases in support of his contention. It is not necessary to refer to those cases. The *situs* of shares between the Company and the shareholders is undoubtedly in the Country where the business is situated. But in a dispute between rival claimants both within the jurisdiction of a Court over shares the Court has jurisdiction over the parties and the share scripts which are before the Court. The Mysore Court was in this position. Between the rival claimants the Mysore High Court could order the share scrips to be handed over to the successful party and if necessary could order transfer of the shares between them and enforce that order by the coercive process of the law. It would be a different matter if the Company refused to register the transfer and a different question might then have arisen; but we are told that the Company has obeyed the decision and accepted the executors as the shareholders. The judgment of the Mysore Court on the ownership of the shares is ancillary to the main decision. It is therefore not necessary for me to consider the argument of Mr. Desai that jurisdiction attaches on the principle of effectiveness propounded by Dicey, but which has been criticised by the present editors of his book and by Cheshire. In my opinion, this controversy does not arise in this case, which must be decided on the plain words of s. 13 of the Code of Civil Procedure.

For the reasons above given I would dismiss the appeal of the sons of Ramalingam (Civil Appeal No. 277 of 1958) and allow that of the executors (Civil Appeal No 278 of 1958), dismissing C. S. No. 214 of 1944 with costs throughout. In the light of what I have decided I would have considered the

remaining appeals and passed appropriate orders therein; but this is unnecessary as my brethren take a different view in the two main appeals.

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BY COURT: In view of the majority Judgment, there will be decree in terms as stated in the Judgment of the majority.

KHARDAH COMPANY LTD.

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May 4.

v.

RAYMON & CO. (INDIA) PRIVATE LTD.

(B. P. SINHA, C. J., K. SUBBA RAO, N. RAJAGOPALA AYYANGAR, J.R. MUDHOLKAR and T. L. VENKATARAMA AIYAR, JJ.)

Forward Contract—Contract for sale of goods—Government notification forbidding forward contracts other than non-transferable specific delivery contracts—Validity of the contract—Clause providing for arbitration—Clause, if valid even if contract were invalid—Parties appearing before arbitrator—Estoppel—Forward Contracts (Regulation) Act, 1952 (74 of 1952), ss. 2 (c) (f) (i) (m) (n), 15(1), 17, 18(1).

On September 7, 1955, the appellant company entered into a contract with the respondents for the purchase of certain bales of jute cuttings to be delivered by the respondents in equal instalments every month in October, November and December, 1955. Under cl. 3 of the agreement the sellers were entitled to receive the price only on their delivering to the buyers the full set of shipping documents. Clause 8 conferred on the sellers certain rights against the buyers such as the right to resell if the latter refused to accept the documents. Clause 14 provided that all disputes arising out of or concerning the contract should be referred to the arbitration of the Bengal Chamber of Commerce. As the respondents failed to deliver the goods as agreed the appellants applied to to the Bengal Chamber of Commerce for arbitration. The respondents appeared before the arbitrators and contested the claim, but an award was made in favour of the appellant. Thereupon the respondents filed an application in the High Court of Calcutta under s. 33 of the Arbitration Act, 1940,