

Muddana Adenna and ors. Vs. Muddana Subbanna and ors.

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Court : Chennai

Decided On : Nov-18-1924

Reported in : 91Ind.Cas.202

Judge : Ramesam and ;Venkatasubba Rao, JJ.

Appellant : Muddana Adenna and ors.

Respondent : Muddana Subbanna and ors.

Judgement :

Ramesam, J.

1. This appeal arises out of a suit for partition. Defendants Nos. 1, 2 and 4 are the appellants.

2. The relation between the parties is shown in the following pedigree:

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Lakshmayya. Ramanna Subbanna Adenna

(alleged to (plaintiff) (1st defendant)

have adopted | |

5th defendant), Veerayya |

M. Subbamma (5th defendant). |

(6th defendant) |

||

Naganna |

Predeceased son |

M. Hanumayamma |

(7th defendants). |

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|||

2nd defendant. Narasayya 4th defendant

(3rd defendant).

3. The parties belong to the Kamma sect of the Sudra caste. They belong to a village, Enamadala, in the Narasaraopet taluk of the Guntur District. The family is admittedly a rich family. There were originally four brothers. The eldest of them, Lakshmayya, was said to have divided himself from the family long ago. (D.W.--30 years according to Ex. XLVI). It is admitted in the plaint that the other three brothers remained undivided till 1908. The eldest of them, Ramanna, had a son, Naganna, who died in about April 1908 leaving his widow, the 7th defendant. Up to this event, the members of the family were living in the most friendly terms, according to both sides. It is said for the plaintiff that misunderstandings arose on the death of Naganna followed by that of his infant daughter. This is denied bys

the defendants who say that, up to Ramanna's death, the brothers continued to be on the most amicable terms. Ramanna died on 27th October 1908.

4. On the 13th November 1908, the village officers sent Ex. II, a pouthi report, in which they reported that the deceased Ramanna adopted the son of his brother Subbanna and willed away the whole of his property to him. It also mentions that the, deceased and his brothers were divided. Though the date of the Will is mentioned as 25th October 1908, neither the date of the adoption nor the date of division was mentioned. It may be observed that, if a pattadar dies, the village officers have to report the name of the heir of the pattadar so that his name may be entered in the revenue accounts. If the deceased left an adopted son, the son stands in the place of his father, whether the family is divided or undivided; there is no purpose in mentioning the division and as all the property is ancestral property, also the Will is redundant to confer title to the son and is void for any other purpose. Exhibit II was received at the Tahsildar's office on the 26th November, and on the 30th the Tah-sildar passed an order that the adopted son's name should be included. There is nothing to show that notice was given to the 1st defendant before the report was sent or the order was passed. At the same time it is conceded for the 1st defendant that the adoption of Veerayya (5th defendant) was openly set up on the last day of the funeral ceremonies of the deceased (called pedda dinam or big day)(vide Ex. XXXV, deposition of 1st defendant), The 1st defendant sent a petition '10 or 15 days afterwards' (see Ex. XXXV). This petition was destroyed in the Kotappakonda riots but it must have been sent prior to 6th January 1909 (Ex. LXII, para. 8). On 2nd April 1909, the 1st defendant sent two petitions, one for himself and the other on behalf of his son Narasayya (now the 3rd defendant)(Ex. IV).

5. In these petitions, the 1st defendant set up that the deceased Ramanna adopted Narasayya, as a counter blast to the adoption of Veerayya reported by the village officers. The Divisional Officer to whom Ex. IV was sent, called for a report from the Tahsildar and passed the proceedings Ex. IV (a), recognizing the adoption of Veerayya. Before Ramanna's death all the four brothers filed a suit as reversioners for declaration in respect of some property of their gnatis and got a decree. While the matter was pending in appeal, Ramanna died and the appellant

in the case applied for bringing, on record, Veerayya as the legal representative of the deceased (8th March 1909). This was opposed by Narasayya but the Court passed orders bringing Veerayya's name on the record, without expressing any opinion in favour of either adoption on the ground that the appellant chose him and did so at his risk. The order was dated 6th January 1910 (Ex. VI). It may be observed that the right of Ramanna as reversioner survives to his three brothers who are in the same decree and not to a son. The order was unnecessary.

6. Narasayya immediately filed a suit O.S. No. 38 of 1910, in the Subordinate Court of Guntur for a, declaration of his adoption and partition on that footing. The present plaintiff and his son (the rival adoptee) pleaded the adoption of the latter, and issues were framed with reference to both the adoptions. The rank and position of the parties in that suit and in this suit may be shown as follows:

The Subordinate Judge who tried that suit found the adoption of Narasayya false. He also found that the Will, adoption and division set up by Subbanna and Veerayya also false. But as a result of the first finding he dismissed the suit. It may be observed that, even if Narasayya's adoption was false, he would be entitled to a share in the family property by reason of his admitted relationship as the son of Adenna, but the Subordinate Judge, refused to give a decree for the smaller share (Ex. LXII, dated 11th August 1913). There was an appeal to the District Court of Guntur which was disposed of on 29th November 1919, (LXII(a)). The District Court agreed with the Subordinate Court as to the truth of Narasayya's adoption but also refused to grant a decree, to Narasayya for the smaller share to which, he was entitled. There was no second appeal to the High Court.

7. If the District Court was willing to grant a decree to the plaintiff for the smaller share to which the plaintiff was certainly entitled, the District Court would have had to express its findings on the truth of the division, adoption and Will set up by Veerayya and his father. In my opinion, the grounds on which the Courts then refused to grant a decree to Narasayya for such share as he was certainly entitled to are unsatisfactory. However this may be, the fact remains, and thereby the District Court was not put to the necessity of expressing findings on the division, adoption and Will relied on by Veerayya. The result is the Subordinate Judge's

finding on these matters was set at large and the present litigation became, necessary. This suit was filed on 19th August 1920 (O.S. No. 16 of 1921).

8. The plaintiff claimed a one third share, making his son 5th defendant and alleging his adoption. If the adoption is false, he is entitled to a half share (along with his son) and naturally they would have had to sue for the half share. By the course he actually took, he was able to raise the issues relating to his son's adoption and Ramanna's division and Will and he was able to sue with a smaller Court-fee. The defendants Nos. 1 to 4 denied the division, adoption and Will, and the 5th defendant supported his father (the plaintiff). The findings on the issues in the former litigation are not *res judicata* because they were set at large by the District Court. When the suit came on for trial, the 5th defendant examined nine witnesses and the 1st defendant one witness. Of the nine witnesses examined, by the 5th defendant only four. (1 to 4) give evidence on the main issues. The parties agreed that the oral and documentary evidence in the former suit should be treated as evidence in this case and all the depositions and documents were exhibited in this case. Much of the documentary evidence thus consists of the old depositions and is really oral evidence. There is, of course, this difference that, while the former Subordinate Judge had an opportunity of observing the demeanour of the witnesses, the present Subordinate Judge had not, and for this reason the judgment of the present Subordinate Judge has not the weight which it is always usual to attribute to the opinion of the Trial Judge. Another circumstance in favour of the conclusion of the former Subordinate Judge is that it was expressed (in 1913) at a time much nearer to the events that happened and his opinion is entitled to some weight on this ground also. According to the observations of the Privy Council in *Midnapur Zemindari Co., Ltd., v. Naresh Narayan Roy* 64 Ind. Cas. 231 : 48 I.A. 49 : 48 C.P 460 : 14 L.W. 265 : 30 M.L.T 279 : A.I.R. (1922) (P.C.) 241 those who question his conclusion must 'displace' his reasons. I do not mean to say that the judgment in O.S. No. 38 of 1910 is *res judicata* and I am not oblivious to the fact that the judgment in O.S. No. 16 of 1921 is the judgment appealed against and the appellant before us has to show that it is erroneous. But, it seems to me that he can well rely on the fact that the former Trial Judge who had the same issues and who saw the demeanour of the witnesses, came to a conclusion in his favour, and urge his reasons. However, this

may be, we have to go into, the whole case fully.

9. Narasayya's adoption has been found to be false and does not concern us. The points that have to be found now are (1) division, (2) Ramanna's adoption of Veerayya and (3) Ramanna's Will.

10. The learned Judge then dealt with these three questions of fact and finding against the division, adoption and Will and proceeded:

I have no hesitation in disbelieving the Will and with it the adoption and division. It seems to me that the appreciation of the evidence by the Subordinate Judge who tried in 1913, is preferable to that of the

11. present Subordinate Judge. On the 8th issue the learned Vakil for the respondents repeated the contention in the Court below which was found against them by the Subordinate Judge. The contention is opposed to the pleadings and the footing on which the whole oral evidence on both sides was adduced from 1909 to 1921 see also Rangasami Naidu v. Sundararajulu Naidu 35 Ind. Cas. 52 : 31 M.L.J. 472 and Kaveramma v. Vishnu Kunkullayya 49 Ind. Cas. 263.

12. The result is that the plaintiff and his son are together entitled only to a decree for half of the suit properties.

13. The only other point argued before us relates to the plaintiffs claim to the properties in Schedules G-1 and G-2. These are debts due to the family and said not to have been accounted for by the 1st defendant. The defendants Nos. 1 to 4 plead that items Nos. 2 and 3 of G-1 were assigned to others and the amounts raised by the assignment were utilized for family purposes. The assignments are true but the evidence adduced by the defendants falls far short of what is required to prove that the proceeds were utilized for the purposes of the family. Their defence fails on the merits.

14. In para. 8 of the written statement, the defendants pleaded that the claim in respect, of Schedules G-1 and G-2 was barred by limitation. The plaintiff-respondent urges that the question of limitation is not made the subject of an issue and he will be prejudiced if it is allowed to be raised at this stage. We think that the

plea was intended to be considered under the 4th issue. But to avoid any prejudice to the plaintiff, we have exhibited in appeal the plaint, the written statements in O.S. No. 38 of 1910 and the grounds of appeal and the memorandum of objections to the District Court in the appeal against the decree in that suit (Exs. LXXIV series). These are all the papers required by him.

15. Though, according to our finding arrived at in the earlier part in this judgment the family continued to be undivided till the death of Ramanna, hostilities began immediately afterwards. Exhibit VIII is a registered notice issued by the 5th defendant to Adenna calling on him to account for the debts and other properties (said to be left undivided) but it never reached him. In O.S. No. 38 of 1910 written statements were filed by the present plaintiff and his son in which they plead to division during the lifetime of Ramanna and that they thereafter had lived and messed separately (Ex. LXII). In my opinion, the family became divided in status by 24th August 1910, if not earlier. Exhibit LXIX is the schedule of debts filed by the present plaintiff and his sons (as defendants No. 1 to 3) in O.S. No. 38 of 1910. The items in Schedules G-1 and G-2 are included in this list. Adenna denied his liability to account for these debt's and the point was considered by the then Subordinate Judge under the 6th issue. More than three years having elapsed since 24th, August 1910, the defendants Nos. 1 to 4 contend that the suit in respect of these items is barred by limitation. No such question arises in respect of the rest of the properties which are the subject of this suit as a Receiver was appointed in the former suit and took possession of the lands and, realized debts due to the family.

16. The plaintiff replies that he was litigating in respect of these items bona fide in the former suit and the time taken by him in the former suit, namely, 24th August 1910 to 29th November 1919, must be deducted. He relies on *Nrityamoni Dassi v. Lakhan Chunder Sen* 33 Ind. Cas. 452 : 43 C.P 660 : 30 M.L.J. 529 : 20 C.W.N. 522 : (1916) 1 M.W.N. 332 : 3 L.W. 471 : 18 Bom. L.R. 418 : 24 C.I.J. 1 : 20 M.L.T. 10. In that case, the plaintiffs in the later suit had asked for an adjudication of their rights in the earlier proceedings before Mr. Justice Henderson. The learned Judge passed an order in their favour, but it was set aside in appeal. The present case differs from the case just cited as the Subordinate Judge who tried the former suit

(O.S. No. 38 of 1910) did not give a decree in favour of defendants Nos. 1 and 3 then (same as plaintiff and 5th defendant), nor did they ask for one, though they had no objection to a division into three shares. The High Court Lakhan Chunder Sen v. Madhusudan Sen 35 C.K 209 : 7 C.L.J. 59 : 3 M.L.T 90 : 12 C.W.N. 326 excluded the time between the decree of Henderson, J., and its reversal. The Privy Council affirmed the decree of the High Court. It is not clear whether they intended to apply Section 14 of the Limitation Act, or meant to agree with the conclusion of the High Court, that the case fell 'within the principle laid down by the Judicial Committee in the cases of Rane Surnomoyee v. Shooshee Mokhee. Burmonia 12 M.I.A. 211 : 11 W.R.P.C. 5 : 2 B.L.R. (P.C.) 10 : 2 Suth. P.C.J. 173 : 2 Sar. P.C.J. 424 : 20 E.R. 331 : 1 Ind. Dec. (N.S.) 489 and Prannath Roy Chowdry v. Rookea Begum 7 M.I.A. 323 : 4 W.R.P.C. 37 : 1 Suth. P.C.J. 367 : 1 Sar. P.C.J. 692 : 19 E.R. 331. 'It is not also clear whether the Judicial Committee would have excluded the period during which the first suit was pending before Henderson, J., if its exclusion also became necessary to save the second suit from being barred by limitation. The case of Nrityamoni Dassi v. Lakhan Chunder Sen 33 Ind. Cas. 452 : 43 C.P 660 : 30 M.L.J. 529 : 20 C.W.N. 522 : (1916) 1 M.W.N. 332 : 3 L.W. 471 : 18 Bom. L.R. 418 : 24 C.I.J. 1 : 20 M.L.T. 10 was followed by this Court in Kunhi Kuttiali v. Kunhammad 73 Ind. Cas. 139 : 44 M.L.J. 179 : A.I.R. (1923) (M.) 347. In this case also the plaintiff, the manager of a mosque in the later suit claimed as 1st defendant to the earlier suit, certain sums due to him from the mosque and obtained a relief on that footing. The order was reversed on appeal. He then filed a later suit and succeeded. The present case differs from Nrityamoni Dassi v. Lakhan Chunder Sen 33 Ind. Cas. 452 : 43 C.P 660 : 30 M.L.J. 529 : 20 C.W.N. 522 : (1916) 1 M.W.N. 332 : 3 L.W. 471 : 18 Bom. L.R. 418 : 24 C.I.J. 1 : 20 M.L.T. 10 and Kunhi Kuttiali v. Kunhammad 73 Ind. Cas. 139 : 44 M.L.J. 179 : A.I.R. (1923) (M.) 347 as no express claim for division was made by plaintiff and his sons in O.S. No. 38 of 1910, nor was a decree made in their favour. The appellant refers to the decision in Muthu Korakkai Chetty v. Mahamad Madar Ammal 54 Ind. Cas. 66 : 43 M. 185 : 26 M.L.T. 459 : 38 M.T.J. 1 but that was not a decision on Section 14 of the Limitation Act. I agree with my learned brother (to whose judgment I am indebted in this matter) in respect of Schedule G-1. The claim for G-1 is barred by limitation except as to item No. 1 of Schedule G-

1. The Subordinate Judge gave a decree in terms that may be characterized as vindictive. The plaintiff claims the amount due in respect of the four items of Schedule G-1 after calculating compound interest at 12 per cent, with rests at every three years. There is no justification either for the rate of 12 per cent. or for calculating compound interest. The ends of justice will be satisfied if the principal amounts carry interest at 6 per cent. per annum from 24th August 1910, up to the date of decree of the Court below and at 6 per cent, per annum on the aggregate amount. The plaintiff and his son (5th defendant) are entitled to a half share as to item No. 1 of Schedule G-1 so calculated. The defendant's claim to the moneys in Schedule 1 fails.

17. The decree of the Court below will be modified accordingly.

18. The memorandum of objections fails relating to Schedule G-2. It fails and is dismissed with costs. It was not even argued on the merits.

19. The order of the lower Court about costs is set aside and the plaintiff and the 5th defendant will be liable to pay the costs of the defendants Nos. 1 to 4, such costs being calculated on one-sixth of the suit properties in the lower Court. In appeal the appellants will give and pay proportionate costs.

Reilly, J.

20. I agree that the partition, adoption and Will set up in the plaint have not been proved and that, therefore, Subbanna (plaintiff) and his son Veerayya (defendant No. 5) are together entitled to half of the family property and not each to one-third as found by the Sub-ordinate Judge, and that the preliminary decree made by the Subordinate Judge must be modified accordingly. Regarding the claims of Subbanna and Veerayya to the items in Schedule G-1 of the plaint or to those in Schedule G-2 which are the subject of the memorandum of objections filed in this case by Subbanna, I think it is clear that in respect of all the items but one their claims are time-barred.

21. In O.S. No. 38 of 1910, Narasayya (the present defendant No. 3) sued for partition asserting that he had been adopted by Ramanna. By their written

statements in that suit filed on 25th August 1910, Subbanna and Veerayya set up as in the present case a partition two months before Ramanna's death, the adoption of Veerayya and the Will, Ex. 1, and also alleged that Adenna (the present defendant No. 1) had been collecting family debts transferring some to other persons and getting renewals in favour of himself, his relations and others and that there were 46 items of outstandings which they specified to be brought into the hotchpot by Adenna: they stated that if that were done they had no objection to partition on the principle of one-third to Subbanna, one-third to Veerayya and one-third to Adenna; otherwise they prayed that the suit might be dismissed. On 29th November 1911, Adenna filed a list of 29 outstandings due to the family which included none of the items now in question except Item No. 1 of Schedule G-1 and in effect denied that there were any other outstandings or amounts to be accounted for by him. According to Subbanna and Veerayya they had been tenants-in-common with Adenna from August 1908, the date of the partition set up by them, and in any case that must have been their position from the date when they put in their written statements in O.S. No. 38 of 1910. When on 29th November 1911, Adenna denied his liability in respect of all the items with which we are concerned except one, we find a 'demand and refusal' from which, in accordance with *Yerukola v. Yerukola* : (1922)42MLJ507 time would have begun to run against Subbanna and Veerayya but for the fact that O.S. No. 38 of 1910 was then pending. On 11th October 1913, O.S. No. 38 of 1910 was dismissed. On Issue No. 6 the Subordinate Judge found that Adenna had to account for Items Nos. 2, 3 and 4 of the present Schedule G-1. But he dismissed the whole suit. Therefore, at least from 11th October 1913, time began to run against Subbanna and Veerayya in respect of the unadmitted items.

22. Narasayya appealed to the District Court in A.S. No. 110 of 1914 against the dismissal of O.S. No. 38 of 1910. Subbanna and Veerayya as respondents in that appeal put in a joint memorandum of objections in which they stated that the Subordinate Judge's findings against Veerayya's adoption, the partition before Ramanna's death and the Will were wrong and unnecessary and that his findings about the liabilities and outstandings of the family were not entirely correct; but they contended that the Subordinate Judge having found against Narasayya's adoption 'rightly dismissed plaintiff's suit but erred in disallowing costs to them.'

Their cross-appeal, therefore, was only in regard to costs--as is shown also by its valuation. Adenna also put in a memorandum of objections in regard to the findings against him about the family's liabilities and outstandings; but that was superfluous as there was no decree nor appeal in respect of them. There was no dispute about these matters between Narasayya and his father Adenna, and the Subordinate Judge was convinced that it was Adenna who got the plaint in O.S. No. 38 of 1910 filed. The appeal and memorandums of objections were dismissed by the District Judge on 29th November 1919. It is contended that while A.S. No. 110 of 1914 was pending, Suhbanna and Veerayya were prosecuting their claims in respect of the unadmitted items now in question within the meaning of Section 14 of the Limitation Act. I do not think they were doing anything of the sort. They were resisting Narasayya's claim to one-third of the family property on the ground of his adoption and they were prosecuting their own claim for costs. In regard to the unadmitted items in dispute between them and Adenna, they had got no decree and they did not pray for one on appeal. They did not even pray for the partition decree to which they were entitled. So far as those proceedings were concerned, they were content, if they got their costs, to leave matters as they were left by the Subordinate Judge's decree dismissing O.S. No. 38 of 1910. They now rely on the judgment of the Privy Council in *Nrityamoni Dassi v. Lakhan Chunder Sen* 33 Ind. Cas. 452 : 43 C.P 660 : 1916 30 M.L.J. 529 : 20 C.W.N. 522 : (1916) 1 M.W.N. 332 : 3 L.W. 471 : 18 Bom. L.R. 418 : 24 C.I.J. 1 : 20 M.L.T. 10 as showing that time did not run against them while A.S. No. 110 of 1914, was pending. What happened in the litigation which led to that decision in effect was that C sued B in ejectment for possession of a share of certain property making M also a defendant: M supported C and also claimed for himself a share of the property an executable decree for possession was made in favour of C for his share and in favour of M for his share: on appeal the decree, so far as it was in favour of M, was reversed on the ground that no such decree could be made in favour of M as a defendant in. an ejectment suit: M then instituted another suit for partition and recovery of his share; unless he could exclude the period from the date of the previous decree in his favour to its reversal on appeal, his suit was out of time and the Trial Judge found that he could not exclude it and that his suit was barred; on appeal from that decision it was decided by the High Court that M's

right of action was suspended while the decree in his favour was in force and, therefore, that his suit was in time though it was remarked that it was very doubtful whether the case came within Section 14 of the Limitation Act; their Lordships of the Privy Council on further appeal approved of the appellate decision of the High Court, but expressed no opinion whether the case came within Section 14 of the Limitation Act or not. They said limitation would 'without doubt remain in suspense whilst the plaintiffs were bona fide litigating for their rights in a Court of Justice' and they also remarked that the original decree made in favour of M was 'an effective decree made by a competent Court and was capable of being enforced until set aside.' If their Lordships were not of opinion that the case came within Section 14 of the Limitation Act, it is difficult to see under what provision or principle of law applicable, to this country they acted. For myself I see no difficulty in bringing the case within Section 14 of the Act. But assuming for the moment that that case was decided on some principle independent of the Limitation Act, how does it help Subbanna and Veerayya to exclude the period during which A.S. No. 110 of 1914 was pending? During that time they certainly had no effective decree in their favour. Nor can it be said that they were 'bona fide litigating for their rights' in respect of the claims now in question. On the contrary they acquiesced in the dismissal of O.S. No. 38 of 1910 and did not ask that anything further should be done in respect of these claims. Moreover, in the litigation ending in *Nrityamoni Dassi v. Lakhan Chunder Sen* 33 Ind. Cas. 452 : 43 C.P 660 : 1916 30 M.L.J. 529 : 20 C.W.N. 522 : (1916) 1 M.W.N. 332 : 3 L.W. 471 : 18 Bom. L.R. 418 : 24 C.I.J. 1 : 20 M.L.T. 10 while the original decree in favour of M stood he could not have taken any other proceedings for the same relief. But once M No. 38 of 1910 had been dismissed there was nothing at all to prevent Subbanna and Veerayya or either of them suing for their shares in the items now in question, in my opinion it is clear that while A. Section No. 110 of 1914 was pending they were not prosecuting their claims in respect of these items within the meaning' of Section 14 of the Limitation Act. If their Lordships of the Privy Council intended in *Nrityamoni Dassi v. LcJchan Chunder Sen* 33 Ind. Cas. 452 : 43 C.P 660 : 30 M.L.J. 529 : 20 C.W.N. 522 : (1916) 1 M.W.N. 332 : 3 L.W. 471 : 18 Bom. L.R. 418 : 24 C.I.J. 1 : 20 M.L.T. 10 to apply any principle outside the scope of that section--and they neither say so nor to my mind is it necessary so to interpret their judgment--the

position and conduct of the party in whose favour they applied it were so different from those of Subbanna and Veerayya that the decision is of no assistance to them. Their Lordships do not lay down in that decision that limitation is suspended in respect of a plaintiff's claim for the period during which he is engaged in litigation about some connected matter and nothing less would save the claims of Subbanna and Veerayya in respect of the items now in question.

23. Another case has been referred to, viz., Kunhikuthali v. Kunhammad : AIR1923 Mad278 In the litigation out of which that case arose two out of six karnavans or trustees of a mosque in North Malabar instituted a suit, O.S. No. 579 of 1910, in the District Munsif's Court praying that Kunhammad who had been kariasthan or manager of the mosque might be restrained by an injunction from interfering with the affairs of the mosque, that a Receiver might be appointed and that Rs. 1,000 or the amount found due from him by the Court might be recovered from Kunhammad. They made Kunhammad defendant No. 1 in the suit and impleaded the other four karnavans also as defendants. The injunction appears to have been made, and a Receiver was appointed. On an issue framed as to whether Kunhammad owed money to the mosque or the mosque to Kunhammad the District Munsif found that, as Kunhammad contended in his written statement, over Rs. 3,000 was due to him. This amount the Receiver was directed to pay to him, and towards it the Receiver actually paid Rs. 1,500. Against the District Munsif's decree two appeals were filed. It has been suggested that Kunhammad himself filed one of the appeals; but from the printed papers in Kunhi Kutiali v. Kunhammad : AIR1923 Mad278 to which I have referred, it does not appear who the appellants were. At any rate it is clear that Kunhammad did not appeal against the District Munsif's decree so far as it declared that money was due to him, and directed the Receiver to pay it. On the contrary, as appears from the judgment of the learned Chief Justice and Wallace, J., he was prosecuting his claim to the money diligently in the appellate proceedings--that is, he was defending the decree which he had obtained, from attack. But the result of the appeals was that O.S. No. 579 of 1910, was dismissed on the ground that two of the karnavans alone could not maintain that suit. Kunhammad then instituted a suit for the balance of the sum already found by the District Munsif to be due to him, giving credit for the amount which had been paid to him by the Receiver. This suit was out of time

unless the, period occupied by O.S. No. 579 of 1910, and the appeals from it could be excluded. The learned Chief Justice and Wallace, J., decided that the whole of that period could be excluded under Section 14 of the Limitation Act because Kunhammad, though a defendant in O.S. No. 579 of 1910, had been prosecuting his claim to the money in question with due diligence and in good faith in that litigation, I think; that when the facts of that case are examined it becomes quite clear that it does not help Subbanna and Veerayya in the present case. They had got no decree in their favour in O.S. No. 38 of 1910, and they asked for none on appeal in respect of the items now in question. On the contrary they acquiesced in the dismissal of O.S. No. 38 of 1910, and were content to let their claims to the items now in question drop. That having been the attitude they chose to take up with regard to those items, it appears to me impossible to find that they can now successfully contend that time ceased to run against them while A.S. No. 110 of 1914, was pending merely because they were parties to that appeal and it concerned some other matters connected with their family and with the proposed partition with which they did not wish then to proceed. I find that while A.S. No. 110 of 1914 was pending, Subbanna and Veerayya were not prosecuting any claims in respect of the items now in question, that time ran against them continuously from 11th October 1913 and that when the present suit was instituted on 19th August 1920, their claims to share in these items were barred.

24. In regard to Item No. 1 of Schedule G-1, I agree with the order proposed by my learned brother. In respect of the other items in Schedule G-1 the appeal must, in my opinion, be allowed; and the memorandum of objections in respect of the items in Schedule G-2 must be dismissed.

25. I agree also with my learned brother in regard to costs.

26. This appeal having been posted to be spoken to this day, the Court (Ramesam and Venkatasubba Rao, JJ.) added the following to the above