1954 *Present :* Gratiaen, J., and Fernando, A.J.

MUTHTHAL ACHY (Widow of Letchuman Chettiar) *et al.*, Appellants, *and* MURUGAPPA CHETTIAR, Respondent

S. C. 153—D. C. Colombo, 20,429

Evidence—Claim against a dead man's estate—Standard of proof required.

In a claim against the estate of a dead man the plaintiff based his claim on a witness's version of a conversation which allegedly took place between the witness and the deceased over 20 years before the trial commenced.

Held, that in a claim against a dead man's estate, though there is no rule of law that judgment cannot be obtained on the uncorroborated evidence of the claimant, it is the duty of the Court to scrutinise the plaintiff's case with " great jealousy ".

APPEAL from a judgment of the District Court, Colombo.

C. Thiagalingam Q.C., with *N. Nadarasa*, for the defendants appellants.

S. J. V. Chelvanayakam, Q.C., with *P. Navaratnarajah* and *C. Manohara*, for the plaintiff respondent.

Cur. adv. vult.

July 9, 1954. GRATIAEN, J.—

A wealthy Natucottai Chetty named Muttiah was the head of a joint Hindu family domiciled in South India. By his first marriage he had two daughters, one of whom was married to K. R. K N. L. Letchuman

Chettiar (hereinafter called "the deceased"). By his second marriage he had two grown-up sons (Nadarajah and Thiagarajah) and a minor son (Manickam). He finally married a woman named Sigappi, and by that union he had a daughter and a minor son (the plaintiff).

On 18th May, 1929, Muttiah decided to partition his estate among his four sons who were co-parcenary members with him of the joint family. An award P9 made by certain of his trusted neighbours made elaborate provision for this proposed separation. Clause 11 of the award provided that, as far as the plaintiff was concerned, "the properties and cash which the fourth share-holder minor Murugappah Chettiar *is to get* are to be held *to the order of his father Muttiah Chettiar*, which sum is to be enhanced profitably *and paid to him after his attainment of majority*".

The plaintiff was at this time only 17 months old. In accordance with the award P9, he became (although he was too young to appreciate the alteration in his status) the head of a new joint Hindu family consisting of himself, his mother and his sister. The legality of such a partition during the minority of one or more of the co-parcenary members is well recognised by the Mitakshara law, and clause 11, which I have previously quoted, was no doubt intended to meet the recommendation in the *Baudhayana* that "the shares of sons who are minors, together with the interest, should be placed under good protection until the majority of the owners"—*Mayne's Hindu Law (8th Ed.) sec. 476.*

Muttiah took early steps to implement the award P9. With regard to the plaintiff's share, he had himself registered in Colombo on 22nd May, 1929, as the proprietor of a new business under the vilasam "MR. M. M. MR.", and it is perfectly clear that he did so not for his personal advantage but in order to discharge the trust imposed on him for the benefit of the plaintiff and of the new family unit of which the plaintiff had become the sole co-parcenary member. The initial amount credited to the plaintiff in the firm's books was Rs. 181,962, i.e., his proportionate share of the proceeds of the partition.

Very shortly after the business of MR. M. M. MR. had commenced, Muttiah died in Colombo on 28th May, 1929, when the plaintiff, his mother and his sister were still in India. In consequence of this event, the plaintiff's mother became his natural guardian. Unfortunately, no express provision had been made in P9 as to who should succeed to the management of the plaintiff's affairs upon Muttiah's death until the plaintiff attained majority.

As to what took place immediately after the death of Muttiah is, on certain important matters, controversial. It has been sufficiently established, however, that out of the liquid assets of MR. M. M. MR., Vellasamy, a trusted servant of Muttiah who had been employed in Muttiah's own business for several years and had also become the senior kanakapulle of the new business, caused various sums amounting in the aggregate to Rs. 18,700 to be deposited in Colombo between 28th September, 1929 and 27th November, 1929 with Letchuman's firm

(K. R. KN. L.). The main dispute in this case relates to the circumstances in which those sums were deposited with K. R. KN. L., and, more particularly, the precise obligations undertaken by the deceased, as the sole owner of K. R. KN. L., in regard to the payment of interest on the amount so deposited. Before considering this vital issue, however, I shall refer to certain subsequent events the details of which are no longer controversial.

On 9th January, 1930, Vellasamy left Ceylon for India after severing his connection with the firm of MR. M. M. MR. and handing over all accounts-books and relevant documents to the plaintiff's eldest step-brother Nadarajah. In these books, the plaintiff was shown as a "creditor" of the firm in a sum of Rs. 181,962 (i.e., the original capital brought into the business); the firm of K. R. KN. L., on the other hand, was shown as a "debtor" in the sum of Rs. 18,700. After this date, Vellasamy ceased to have any business relationship with any member of Muttiah's family until 1947.

An incident of some importance took place ten years later. In February, 1940, the plaintiff's mother Sigappi drew a bill of exchange or "*undial*" in India for Rs. 5,000 on the deceased's firm K. R. KN. L. in Colombo in favour of a firm named V. R. K. R., with a direction that, when this sum was paid by K. R. KN. L., it should be *debited to the firm of MR. M. M. MR.* The explanation of this transaction, which was accepted by the learned judge, was that Sigappi had previously borrowed Rs. 5,000 from V. R. K. R. in India in order to meet the household expenses of the joint family consisting of herself, the plaintiff and her daughter. She accordingly arranged with the deceased (also in India) that his firm in Colombo should honour the "*undial*" and debit the payment against his outstanding account with MR. M. M. MR. The *undial* was in fact met on presentation as arranged, and Rs. 5,010.18 was debited as arranged in K. R. KN. L's books. *The person who actually received this payment in Colombo on behalf of V. R. K. R. was no other than Muttiah's former kanakapulle Vellasamy who had since joined V. R. K. R. in a similar capacity.*

On 19th February, 1942, the plaintiff (still a minor) was living in India under the care and protection of his mother Sigappi. Another debtor of MR. M. M. MR. was anxious to repay his debt in view of repeated demands by Sigappi. On legal advice, he obtained an order that the Secretary of the District Court of Colombo be appointed curator of the plaintiff's estate, so that someone would be in a position to give valid receipts for payments of this kind.

On 8th April, 1943, the deceased Letchuman also deposited Rs. 20,480·18 to the credit of the curatorship case. This amount represented, according to the deceased's books of accounts, the total sum due at that date (less Rs. 5·32) from the firm of K. R. KN. L. to the firm of MR. M. M. MR. in connection with the original deposits aggregating Rs. 18,700 made between September, 1929 and November, 1929. The small outstanding sum of Rs. 5·32 was shortly afterwards caught up in a payment of income tax by K. R. KN. L. on behalf of MR. M. M. MR., and the account of the transactions between these two firms was then closed.

All moneys credited to the curatorship case were withdrawn in due course by the plaintiff with his mother's formal consent during his minority.

Letchuman himself died on 18th March, 1945. According to his own books of account, he had long since completely settled his debt to the firm of MR. M. M. MR. Over three years later, however, i.e., on 1st December, 1948, the plaintiff (who was still a minor) sued the appellants (the heirs of the deceased) in the present action for the recovery of a further sum of Rs. 22,455·52 alleged to be still due to him in connection with the original deposit of Rs. 18,700 in 1929 (i.e., 19 years before the action commenced). The action was instituted through the plaintiff's next friend Vellasamy who had joined him as his attorney and kanakapulle in 1947.

The validity of the plaintiff's claim depends very largely, if not entirely, on the truth of Vellasamy's version of the terms on which sums aggregating Rs. 18,700 had been deposited with the defendants' firm K. R. KN. L. in 1929. According to Vellasamy, he decided, *on his own initiative*, to invest the assets of MR. M. M. MR. after the death of his employer Muttiah with various Chetty firms owned (except in two cases) by close relatives of Muttiah's family. He regarded these assets as the exclusive property of the plaintiff, and considered it his duty to promote the interests of the minor (who was powerless to protect himself) by entering into those transactions on the minor's behalf as a *negotiorum gestor*.

Vellasamy's version is that he directly (and on his own responsibility as the self-constituted agent of a 21-month old infant) contracted with the deceased Letchuman in connection with the deposits or loans which form the subject matter of this action; and that the deceased unequivocally agreed to repay the principal in due course *to the plaintiff* together with accrued compound interest calculated at "nadappu vattai" rates—that is to say, at "rates prevailing from time to time among the chettiar community, the interest being added to the principal from time to time according to the custom prevailing and calculated in the manner customary among chettiars in their dealings with one another".

The schedule annexed to the plaint sets out in detail the manner in which the plaintiff's claim was computed. It credits the deceased's account with the sum of Rs. 20,488·18 deposited on 8th April, 1943, in the curatorship case, but makes no allowance for the earlier payment in 1940, against Sigappi's *undial*.

The learned judge accepted Vellasamy's evidence as to the terms of his alleged agreement with the deceased in 1929, but directed (in favour of the appellant) that credit be given for the payment of Rs. 5,010·18 in 1940, as "this would be a reasonable charge which could be made against the joint family assets of the firm of MR. M. M. MR". In accordance with a reconstructed statement of account filed in Court, a decree was entered against the defendants jointly and severally for Rs. 16,658·17 together with legal interest from date of the decree until payment in full.

The main ground of appeal which was pressed before us relates to the issues of fact. It was also argued, as a matter of law, that the money deposited with deceased in 1929 was the money of Muttiah Chetty—so that, although it was no doubt invested for the ultimate benefit of the joint Hindu family of which the plaintiff was the sole co-parcenary member, the only person entitled to recover it from the deceased or his heirs was a duly appointed representative of Muttiah's estate.

In any view of the matter, it was an extremely difficult case to decide. The trial commenced on 13th December, 1949, before the (then) District Judge Mr. S. J. C. Schokman. After Vellasamy's cross-examination had been nearly completed, Mr. H. A. de Silva was appointed District Judge of Colombo, and the trial commenced afresh before him on 25th October, 1950, subject to an agreement that Vellasamy's previous evidence be incorporated in the new proceedings. After some further evidence of Vellasamy had been recorded, the trial was put off for 21st December, 1950. In the meantime, Mr. de Silva had ceased to function as District Judge, and the trial was resumed *de novo* before the learned Judge whose judgment is now under appeal. Vellasamy's evidence was once again recorded (subject to a similar agreement regarding the earlier proceedings). He was examined and cross-examined on 21st December, 1950. His cross-examination was resumed on 25th April, 1951, and concluded on 5th September, 1951. The case for the appellant was closed on 6th September, 1951. Eventually, judgment was delivered on 12th October, 1951. In the result, the learned judge was faced with the task of assessing the evidence of the chief witness who had testified before him on three dates covering a period of nearly 9 months, and of testing it in the light of his earlier evidence recorded before two other judges in December, 1949, and October, 1950. Having regard to these long delays, the advantage which a trial judge normally enjoys of forming his personal impression of a witness' credibility (based on demeanour) was considerably reduced.

Apart from these special considerations, the inherent difficulty in deciding the issues of fact in this litigation was more fundamental. The plaintiff based his claim on Vellasamy's version of a conversation which allegedly took place between him and the deceased man Letchuman over 20 years before the trial commenced. No independent witness was present at that conversation, and the suggested agreement was not contemporaneously or even subsequently reduced to writing. In addition, the Court was necessarily deprived of the advantage of hearing Letchuman's explanation of the circumstances in which his firm received the money, and the precise nature of his obligations in regard to the payment of interest. The situation therefore necessarily called for a very cautious judicial approach.

Jessell M. R. remarked, with reference to cases of this kind, "it is a rule of prudence that, sitting as a jury, we do not give credence to the unsupported testimony of the claimant, with a view, no doubt, of preventing perjury, and with a view of protecting a dead man's estate from unfounded claims"—*In re Finch, Finch v. Finch*[1]. These observations were at one time regarded as laying down a rule (equivalent to a rule of

[1] *(1883) 23 Ch. D. 267 at 269.*

law) that claims against a dead man's estate could never be maintained unless they were corroborated by independent evidence. But it is now recognised that the true principle is not so rigid. The Court's duty is to approach the case "*with great jealousy*, because the claim is brought forward against the estate of a deceased person when that person, who was a chief actor in the transaction impugned, was dead"—*per* Fry L. J. in *Re Gannett ; Gandy v. Macaulay* [1]. "The statement of a living man is not to be disbelieved because there is no corroboration, although in the necessary absence through death of one of the parties to the transaction, it is natural that in considering the statement of the survivor we should look for corroboration in support of it ; *but if the evidence given by the living man brings conviction to the tribunal* which has to try the question, then there is no rule of law which prevents that conviction being acted upon"—*per* Sir John Hannen in *Re Hodgson ; Beckett v. Ransdale* [2]. These views were adopted with approval in *Rawlinson v. Scholes* [3], and have also been acknowledged in Ceylon as prescribing the correct judicial approach to claims against the estate of a deceased person—*Velupillai v. Sidambaram* [4].

I find no indication in the judgment under appeal that the learned judge specially directed his mind to the standard of proof laid down by these authorities. Besides, his main reason for believing Vellasamy's evidence was that he considered it to be "corroborated" by certain entries in the deceased's books of accounts—whereas they are equally consistent with the view that Letchuman had in fact undertaken (and discharged) obligations less onerous than those imputed to him by Vellasamy.

As I read the judgment under appeal, the learned Judge's acceptance of the plaintiff's case was largely based on his objective assessment of Vellasamy's testimony, and not on his personal impression of the demeanour of the witness. In these circumstances, and in view of the non-direction to which I have previously referred, it is our duty to decide for ourselves whether Vellasamy's version can safely be acted upon in regard to two crucial issues—

(1) Was the money deposited with K. R. KN. L. in pursuance of a contract directly entered into *between Vellasamy and the deceased* ?

(2) If so, had the deceased bound himself *unconditionally* —i.e. even after the year 1933—to let the sum deposited accumulate at "nadappu vattai" rates of compound interest until repayment ?

As to the first question, one should, in my opinion, examine with considerable caution (and perhaps with strong suspicion) Vellasamy's assertion that he acted entirely on his own initiative in entering into a number of money-lending contracts for a minor's benefit without the prior authority of senior members of the child's family—particularly as, according to his version, the plaintiff's mother and eldest step-brother had themselves made conflicting claims to be entrusted with the funds

[1] *(1885) 31 Ch. D. 1 at 16.*
[2] *(1885) 31 Ch. D. 177 at 183.*
[3] *(1898) 15 T. L. R. 8.*
[4] *(1929) 31 N. L. R. 97 at 99.*

available. Vellasamy was not bound to the plaintiff by ties of kinship or even of race. His authority as the kanakapulle of MR. M. M. MR. had terminated on his master's death, and it seems inherently improbable that, if he had virtually defied the instructions of Sigappi and Nadarajah (who was still his employer in regard to other business affairs) he would have undertaken the functions of a gratuitous intermeddler. It is more natural to suppose that he would have left these important decisions to persons who were more closely concerned with the future management of the minor's affairs. There is no independent oral evidence to prove that the contemporaneous loans to other Chetty firms had also been directly negotiated by Vellasamy entirely on his own initiative. The fact that Rs. 18,700 was in fact handed over to K. R. KN. L. by Vellasamy in 1929 (or at least in pursuance of his instructions to the junior kanakapulle) has no doubt been sufficiently established, but that does not completely solve the issues which are more vitally controversial.

In regard to the defendant's claim to be credited at least with the amount paid on the *undial* in 1940 on Sigappi's directions, Vellasamy's partisanship and palpable lack of candour in the witness box also justify the criticism that his evidence on other important issues called for special vigilance—having regard particularly to the circumstance that the deceased was not available to give the Court his own explanation of these disputed matters.

It has not been suggested that Letchuman was a dishonourable man who could normally be disposed to fabricate his books of accounts in order to avoid liability to an infant to whom he was very closely connected by marriage. According to his books, he credited the firm of MR. M. M. MR. with "nadappu vattai" rates of interest until 1933, and thereafter only at the ruling Bank rates of interest. The learned judge regarded these earlier entries as strong corroboration of Vellasamy's version. To my mind, they are equally consistent with the theory that Letchuman had bound himself by contract (either with Vellasamy or with someone else) to pay compound interest in accordance with Chetty custom so long as he had the money invested with outsiders in the ordinary course of his money-lending transactions, *but not during periods when the money was merely lying idle in the Bank, owing to altered conditions, without profit to himself.* The learned judge was satisfied that during the latter period (i.e., after the year 1933) "Letchuman Chettiar had deposited large sums of money in the Bank, and was therefore paying interest at the rate at which he received it from the Bank". I find it very difficult to believe that, in these circumstances, Letchuman would have chosen to retain the money after 1933 on such unprofitable terms if he was still obliged to pay "nadappu vattai" rates of interest without any corresponding commercial advantage to himself.

Letchuman was in close touch with Sigappi in India throughout the relevant period, and it is significant that the *undial* transaction took place in consequence of an arrangement directly arrived at between them in India. If, therefore, the plaintiff's case is scrutinised with "great jealousy", we cannot reasonably rule out the possibility that the money was taken over by Letchuman in 1929 as the result of some agreement

arrived at after a family conference in India, and not (as Vellasamy alleges) in pursuance of a contract entered into in Colombo with a mere intermeddler. Again, although the original obligation (according to the debtor's own books) was to pay compound interest on the amount deposited, is it unreasonable to suppose that the terms were subsequently altered by mutual agreement within the family circle when conditions in the money market had so fundamentally changed in 1933 ? Letchuman did not lack the funds to return the money in 1933 ; nor was he under any proved necessity to retain it for his personal benefit. Sigappi who is still alive was not called by the plaintiff to state what she knew concerning the terms of the transaction.

It is a matter of common knowledge that it was customary for Chettiar moneylenders to pay each other " nadappu vattai " rates of interest on short-term accommodation loans received for the purpose of profitable investments by the borrower. It seems very unlikely, on the other hand, that a prudent chetty with business instincts characteristic of his race would bind himself to pay such onerous rates merely for the doubtful privilege of keeping the money in fixed deposit in a Bank.

The learned judge was not prepared to accept the 4th defendant's version of the transaction. It would therefore be improper for us, sitting in appeal, to take a contrary view. Let it then be assumed that this particular appellant had succumbed to the temptation to give false evidence in resisting what he perhaps believed to be an unfounded claim. Nevertheless, the real issue for decision was whether, in the circumstances of this case, the testimony of Vellasamy (the only surviving party to the alleged oral contract) was sufficiently convincing to justify a decree against the heirs of a man who had died some years before the action was instituted.

I am very conscious of the limits which necessarily circumscribe the right of an appellate tribunal to disturb the conclusions arrived at by a judge of first instance on questions of fact. In the present case, however, I am satisfied that it is our duty to set aside the judgment under appeal. The learned judge had not reminded himself of the special vigilance which ought to be exercised whenever a Court of law adjudicates upon belated claims against a dead man's estate. In addition, he paid insufficient attention to certain improbabilities inherent in Vellasamy's version. Finally, he has treated items of evidence as corroboration which were in truth corroborative only of matters which were not in controversy. Indeed, I take leave to doubt if Vellasamy's evidence would have brought *conviction* to the learned judge's mind if he had himself approached the case with " great jealousy " as he should have done. I would allow the appeal and make order dismissing the plaintiff's action with costs in both Courts. In the view which I have taken it is unnecessary to decide the question of law raised by Mr. Thiagalingam.

FERNANDO, A.J., agreed, adding certain additional reasons in support of the conclusion.

Appeal allowed.