DAMAGE BOOK

Text problem book

UNIVERSAL
LIBRARY
OU_166628
UNIVERSAL
LIBRARY

INDIAN CASES

CONTAINING

FULL REPORTS OF DECISIONS

OF

The **PRIVY COUNCIL,** the High Courts of **ALLAHABAD, BOMBAY, CALCUTTA, LAHORE, MADRAS, PATNA** and **RANGOON,** the Courts of the Judicial Commissioners of **CENTRAL PROVINCES, OUDH** and **SIND**

REPORTED IN

The following 29 Legal Periodicals:

Allahabad (1) Indian Law Reports, (2) Law Journal, (3) Law Reporter Allahabad; **Bombay** (1) Indian Law Reports, (2) Law Reporter; **Calcutta** (1) Indian Law Reports, (2) Law Journal, (3) Weekly Notes; **Lahore** (1) Indian Law Reports, (2) Law Journal, (3) Punjab Law Reporter; **Madras** (1) Indian Law Reports, (2) Law Journal, (3) Law Weekly, (4) Weekly Notes; **Nagpur** (1) Law Reports, (2) Law Journal; **Oudh** (1) Cases, (2) Law Journal, (3) Weekly Notes; **Patna** (1) Indian Law Reports, (2) Cases, (3) Law Reporter, (4) Law Times; **Rangoon** (1) Indian Law Reports, (2) Burma Law Journal; **Sind** Law Reporter;—Criminal Law Journal and All India Reporter,

WITH

A large number of extra Rulings not reported elsewhere.

VOLUME 92, 1926.

Founded by
Shahab-ud-Din Chaudhri, B.A., LL.B., M. L. C.,
Now President, Legislative Council, Punjab.

EDITORS ... { **Z. K. CHAUDHRI, B.A., LL.B., Bar-at-Law.**
N. H. CHAUDHRI, B.A., LL.B., Pleader.

PRINTED AND PUBLISHED BY THE MANAGER,
AT THE "LAW PUBLISHING PRESS," LAHORE.

CONSOLIDATED

Comparative Tables showing seriatim the Volumes and Pages of all Indian Law Journals and Reports for the period specified at the top of each table, with the corresponding Volumes and Pages of Indian Cases.

48 I. L. R., ALLAHABAD SERIES, FOR JANUARY-FEBRUARY, 1926.

Page.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	Page.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.
1	Shiva Nath Prasad v. Tulsui Ram ...	89 480	67	Bishnath Singh v. Basdeo Singh ...	88 484
4	Faqir Chand v. Sant Lal ...	89 291	70	Nageshar Rai v. Nand Lal ...	88 908
6	Kashi Prasad v. Mathura Prasad ..	89 286	73	A. L. Browne v. H. A. Pearce ..	89 882
9	Jagannath Prasad v. Jugal Kishore	89 492	77	Tajammul Husain v. Banwari Lal ..	88 752
12	Jogamaya Dasi v. Tulsa ..	89 444	81	Darshan Das v. Bikramajit Rai ..	89 953
17	Muhamdi Begam v. Tufail Hasan	92 260	88	Fateh Singh v. Gopal Narain Singh	89 1013
19	Zorawar Singh v. Bhagwan Singh ..	89 427	94	Agha Husain v. Qasim Ali ...	89 1018
23	Emperor v. Kamlapati Panth ...	91 51	97	Makundi Singh v. Parbhu Dayal ..	90 2
27	Zahur Ahmad v. Taslim-un-nissa ...	89 404	104	Kehri Singh v. Thirpal ...	92 282
31	Bhakta Shiromani v. Sital Nath ..	88 1018	121	Sultan Begam v Sarvi Begam ...	90 274
34	Shiam Lal v. Radha Ballabh ...	88 822	126	Kishan Dei v. Sheo Paltan .	90 358
44	Brij Raj v. Ram Sarup ..	90 749	140	Emperor v. Ram Harakh Pathak ..	90 913
58	Muhammad Shafiq-Ullah Khan v. Nuh-ul lah Khan ...	88 954	145	Ram Kunwar v. Govind Ram .	92 414
60	Kanhaiya Lal v. Bhagwan Das ..	89 1053	150	Mulraj v. Indar Singh ...	92 471

24 ALLAHABAD LAW JOURNAL, FOR JANUARY-FEBRUARY, 1926.

1	Kuar Mata Prasad v. Kuar Nageshar Sahai ..	91 370	97	Jawahir Singh v. Udai Parkash ..	93 216
13	Ram Pratab Chamria v. Durga Prasad Chamria ..	92 633	100	Maharaj Bahadur Singh v. Seth Hukum Chand	93 219
21	Mahadeo Sahu v. Sarju Prasad Tewari ..	91 871	105	Lal Chand Marwari v. Ramrup Gir	93 280
26	Narain Das v. Ram Chandra ...	90 116	112	Ghurahu Das v Shakalraj Das ...	91 59
30	Amir Ahmad v. Emperor ...	91 47	116	Bakhtawar v. Sunder Lal ...	90 992
33	Sourendra Mohan Sinha v. Hari Prasad Sinha ..	91 1033	120	Ahmad Husain Khan v. Hardial ...	90 243
48	Bansilal Abirchand v. Ghulam Mohbub Khan ...	92 760	122	Dwarka Prasad v. Makund Sarup ...	90 290
52	Lal Bahadur Lal v. Kamleshar Nath ..	90 988	125	Jeut Koeri v. Mathura Koeri	90 787
56	Ram Sarup v. Gaya Prasad ...	90 180	128	Amir Hasan Khan v. Emperor ...	91 37
63	Jagat Narain Lal v. Hawaldar ...	90 287	129	Gulab Dei v. G. I. P. Railway ...	90 99
65	Pirthi Nath v. Kunji Kunwar ..	89 369	130	Bachan Singh v. Bijai Singh ..	90 238
67	Kedar Nath v. Bismillah Begam ..	90 72	133	Akbar Ali v. Raja Bahadur ...	91 34
69	Fatima-ul-Hasna v. Baldeo Sahai ..	93 24	137	Sheo Prasad v. Naraini Bai ...	90 938
80	Sultan Muhammad Khan v. Emperor ...	90 926	148	Emperor v. Bhima ...	91 53
83	Bisheshar Prasad Pandey v. Raghubir ..	90 353	149	Bachan v. Raghunath ..	92 264
88	Ahmad Husain v. Muhammad Qasim Khan ...	90 80	150	Panna Lal v. Emperor ...	91 40
91	Dip Prakash v. Bohra Dwarka Prasad ...	90 83	151	Debi Din v. Emperor ..	91 959
			153	Daud Khan v Emperor ...	91 49
			155	Munir v. Emperor ...	91 533
			161	Kashi Prasad v. Emperor ...	92 588
			162	Kadhori v. Emperor ...	92 452
			163	Ram Sarup v. Emperor ..	92 426
			165	Shyam Sunder Sinha v. Emperor ...	*To be printed.*
			167	Sumaria v. Emperor ...	91 882
			168	Raghunath Kandu v. Emperor ...	91 888

24 ALLAHABAD LAW JOURNAL, FOR JANUARY-FEBRUARY, 1926—concld.

170	Kalka v. Ranjit Singh ...	91	704	224	Emperor v. Daulat Singh ...	92	743
171	Khamani v. Emporer ...	92	584	225	Mohammad Ayub v. Surajpal Singh	91	783
173	Abdul Hafiz Khan v. Emperor .	92	441	227	Lallan Misir v. Ram Richcha ..	93	690
176	Abdullah v. Badr-ul-Islam ...	91	634	228	Emperor v. Kesar ..	92	591
178	Chhidda v. Emperor ...	92	463	230	Jalal Uddin v. Emperor ...	92	857
180	Ram Nath v. Emperor ..	94	897	235	Gopal Das v. Baij Nath ...	91	930
185	Mittar Sain v. Data Ram ...	90	1000	239	Faujdar Mahto v. Emperor ...	91	815
208	Kallu v. Emperor ...	91	808	241	Radha Kishun v. Kashi Nath ...	92	510
210	Kishen Prasad v. Kunj Behari Lal	91	790	244	Muhammad Ibrahim v. Ram Chandra ..	92	514
215	Bahadura v. Emperor ...	92	460	248	Kunwar Chiranjit Singh v. Har Swarup ...	94	782
216	Banwari v. Emperor ...	91	814				
217	Banwari Lal v. Jhunka ..	92	454				
221	Qazi Fariduddin v. Emperor ..	94	894				

50 I. L. R., BOMBAY SERIES, FOR JANUARY FEBRUARY, 1926.

1	India Spinning and Weaving Co., Ltd. v. Climax Industrial Syndicate ..	91	847	69	Parashuram Shamdasani v. Tata Industrial Bank ..	91	153
32	Leoh Moses v. Solomon ...	92	367	84	G. I. P. Railway Co., Ltd. v. Chandulal Sheopratap ...	92	548
34	Emperor v. Byram Nowroji Gamadia ..	91	949	87	Commissioner of Income Tax, Bombay v. Sanjana & Co. Ltd. ...	92	517
42	Emperor v. Nathu Kasturchand Marwadi	86	66	91	Vishwanath Shamba Naik v. Ramkrishna ...	92	537
49	Raghunath Rithkaran v. The Imperial Bank of India, Ltd. ..	91	342	107	Chunilal Mokamdas v. Mrs. E. Christopher ..	92	368
56	Emperor v. Dawood Kazi ...	93	225	111	Emperor v. Ramnath Mahabir ...	93	690

28 BOMBAY LAW REPORTER, FOR JANUARY-FEBRUARY, 1926.

1	Bai Shanta v. Umrao Amir Malek ..	93	151	141	Framroz Eduljee Dinshaw v. Mahomed Essa ..	94	21
11	Mabel Panton v. Administrator General of Bombay ...	93	161	143	Navanitlal Hurjivandas v. Purshottam Hurjivan ..	94	11
25	Jamshedji v. Secretary of State for India ...	93	184	148	Purshottam Hurjivan v. Navanitlal Hurgovandas ...	94	15
46	Bapu Hambira Patil v. Shankar Bahu Patil ...	93	213	158	Emperor v. Shafi Ahmed Nabi Ahmed ..	92	212
49	Kasamkhan Ahmedkhan v. Kaji Abdulla ...	93	135	161	Saklat v. Bella ...	92	200
60	Kasamkhan Ahmedkhan v. Kaji Isub ..	93	127	173	Vaithialinga Mudaliar v. Srirangath Anni ...	92	85
64	Lambodar Dhonddeo Deo v. Dharanidhar Ganesh Deo ...	93	195	187	Homeshvar Singh v. Jugal Kishore Marwari ...	90	596
67	Collector v. Manager, Kurla Estate	93	142	193	Farid-un-nisa v. Mukhtar Ahmed ...	89	649
71	Krishnaji Vishram Nadkarni v. Gangaji Ambaji Metry ...	93	123	204	Soundara Rajan v. Natarajan ...	92	289
73	Bhimanna Kumaji v. Venichand Fattechand ...	93	215	211	Bansilal Abirchand v. Ghulam Mahbub Khan ..	92	760
75	Husensaheb Gajbarsaheb v. Hasansaheb Sayad Abdul ..	93	218	217	Ram Protap v. Durga Prosad ...	92	633
78	Husseinsaheb Haidarsaheb v. Babaji Dhonddev ...	93	222	226	Jagjivandas Jamnadas v. Nagar Central Bank Limited ..	93	619
79	Emperor v. Kazi Dawood Kazi ..	93	225	232	Girdhardas Coorji v. Kerawala Karsandas & Co. ...	93	622
89	Ravishankar Jagjivan v. Savailal Krishnalal ...	93	240	237	Indaji Majaji v. Cooverji Nowroji Gamadia ...	93	852
92	Emperor v. Fakirbhai Nathubai ...	93	244	243	Von Wulfing v. Jivandas & Co. ..	93	857
95	Emperor v. Umaji Krishnaji Sonavni ...	93	159	264	Mahomedalli Allabux v. Jafferbhoy Abdullahbhoy Lalji ...	93	918
98	*In re* Ishvarlal Maneklal Trivedi ...	93	158	272	Emperor v. Abasbhai Abdul Hussein ..	93	967
99	Emperor v. Tarak Das Gupta ..	93	247	281	Emperor v Kutubuddin Khan Ashraf Khan ...	93	881
102	Emperor v. Dorabshah Bomanji Dubash ..	93	232	288	*In re* Mahomed Azam ...	93	891
111	Emperor v. Ramnath Mahabir ..	93	690	291	Emperor v. Framji Bomanji Banaji	93	896
115	Emperor v. Harjivan Valji ...	*To be printed.*		293	Emperor v. Achaldas Jethamal ..	93	703
126	Mrs. Flora Sassoon v. Ardeshir H. Mama ...	*To be printed.*		297	Emperor v. Pandu Ramji ...	93	992
				298	Emperor v. Maridas Lazar ...	93	1051
138	Pestonji Shapurji v. Jamshedji Nowroji ...	94	9	300	Emperor v. Shankar Narayan Gosavi ..	93	1053

28 BOMBAY LAW REPORTER, FOR JANUARY-FEBRUARY, 1926- concld.

302	*In re* Mangru Feku Momin ..	*To be printed.*		309	Shankarlal Purshottam Gor v Dakor Temple Committee ...	94	47
305	Narayan Govind Deshspande v. Dhondo Krishna Tathe ..	94	76	328	Rachel Benjamin v. Benjamin Solomon Benjamin ..	94	59
307	Rupchand Ganesh v. Bhogilal Ratanchand ..	94	72	317	Vasantrao Govindrao Prabhakar v. Nanabhai Sadanand ...	94	96

53 I. L. R., CALCUTTA SERIES, FOR JANUARY-FEBRUARY, 1926.

1	Bhupendra Narayan Singh v. Madar Buksh ..	92	681	88	Bansilal Abirchand v. Ghulam Mahbub Khan ...	92	760
6	Bhupendra Narayan Singh v. Narapat Singh ..	90	607	95	Chandi Charan Mitra v Ashutosh Lahiri ..	94	684
14	Bidyadhar Bachar v. Manindra Nath Das ..	89	726	101	Reference from the Munsif, 4th Court, Habiganj, *In re* ...	89	289
34	Meher Bano Khanum v. Secretary of State for India ...	89	997	103	Bhagat Brothers, Ltd., *In re* ...	88	905
42	Naresh Chandra Bose v. Krishna Bhabini Dasi ..	94	997	115	Counsel v. Sukumari Devi ...	91	417
46	Forbes v. Ali Haidar Khan ..	90	308	123	Barber v. Debenham .	90	4
51	Dwijendra Nath Mullick v. Gopiram Gobindaram ...	89	200	129	Samserali Hazi v. Emperor ..	94	736
65	John Batt & Co. (London), Ltd. v. Kanoolal & Co. ...	95	21	132	Nagendra Nath Palit v. Rabindra Nath Deb ...	94	212
76	Emperor v. Isabella Coal Company	89	789	157	Kabatulla v. Emperor ..	90	542
				163	Ramkumar Sewchand Roy v. Nanuram Poddar ...	94	657

43 CALCUTTA LAW JOURNAL, FOR JANUARY-FEBRUARY, 1926.

1	Bansilal Abirchand v. Ghulam Mahbub Khan ...	92	760	108	Debendra Nath Sinha v. Nagendra Nath Sinha ..	95	245
8	Homeshwar Singh v. Jugal Kishore Marwari ..	90	596	110	P Banerjee v. Bepin Behary Ghose	95	79
14	Ram Protap Chamria v. Durga Prosad Chamria ..	92	633	113	Beni Madhab Sapui v. Jadu Nath Sapui ..	94	907
23	Saklat v. Bella ..	92	200	116	Sivadas Dutta v. Birendra Krishna Dutta .	94	844
37	R. M. Watson v. F E. Watson ..	94	528	126	Jatindra Chandra Banerjee v. Muralidhur	94	873
41	Vernon Milward Bason v. A. H. Skone	94	532	132	Rahimuddi Meaji v. Amina Bibi ...	94	920
45	Port Canning and Land Improvement Co. Ltd. v. Achhiruddi Mollah ..	92	37	135	Beni Madhab Mukhopadhya v. Sarbananda Barman ...	95	130
51	Kuar Mata Prasad v. Kuar Nageshar Sahai ...	91	370	142	Sarajubala Roy Chowdhurani v. Kamini Kumar Chowdhury ..	94	811
67	Shafi Ahmed Nabi Ahmed v. Emperor ..	92	212	146	Gnanada Gobindo Choudhuri v. Nalini Bala Debi ...	94	837
70	S. Soundara Rajan v. C. M. Natarajan ...	92	289	152	Radha Nath Dutt v. Chandra Kumar Dutt	91	718
79	Superintendent and Rememberancer of Legal Affairs v. Kiran Bala Dasi ..	93	73	155	Jamini Mohan Sarkar v. Nagendra Nath Pal	89	1000
83	Nagendra Nath Roy v. Jugal Kishore Roy ..	90	281	171	Hem Chandra Jelia v. Satya Kinkar Sen	91	935
94	Gopiram Bhotica v. Bisseswar Dutt	93	81	176	Samserannessa v. Abdus Samad ..	93	1018
100	Mahomed Rafique v. Emperor ...	93	70	180	Mohendra Nath Roy v. Nabadwip Chandra Nandy .	94	5
104	Santosh Kumar Roy v. Rakhal Chandra Hazra ...	94	740	184	Lal Mea v Emperor ..	93	1038
				187	Sudhir Chandra Dass v. Indumati Chaudhurani ..	94	616
				202	Victor v. King-Emperor ..	93	961

30 CALCUTTA WEEKLY NOTES, FOR JANUARY, 1926.

169	Rajendra Narain Dhanj Deo v. Kumar Ganganand Singh ...	89	737	186	*In the matter of* Rajendra Kumar Dutta ...	94	893
173	*In re* Gopaldas Aurora ...	94	793	190	Superintendent and Rememberancer of Legal Affairs v. Sader Saik ...	91	701
176	Jorina Aktar Khatun v. Hafizuddin Khan ..	90	633	192	Kalidas Raha v. Deodhari Mistri ..	*Not reportable.*	
180	Upendra Mohan Roy Chowdhury v. Narendra Mohan Roy Chowdhury	90	878	193	Kondapalli Vijayaratnam v. Mandapaka Sudarsana Rao ...	89	733
183	Low & Co. v. Hazarimull Babu ..	94	786	196	Hashmat Ali v Nasib-ul-Nisa ...	88	114

30 CALCUTTA WEEKLY NOTES, FOR JANUARY, 1926—concld.

199	Official Trustee of Bengal v. W. G. Bowden ...	94	857
204	Taraprosad Sau v. Madhu Sudan Giri ..	91	12
209	Gopiram Behariram v. Agents, East Indian Ry. and O. & R Ry. ...	94	762
214	Sachindra Lal Mitter v. Panchanon Mitter ...	94	871
215	Valliant v. Eleazar ..	87	513
218	Maung Bya v. Maung Kyi Nyo ..	90	198
228	Radha Kissen Goenka v. Thakursidas Khemka ..	93	60
231	Prosonna Kumar De v. Ananda Chandra Bhattacharjee ...	93	86
233	Surendra Narain Sinha v. Bejoy Singh Deodhoria ...	89	785
236	Satya Neranjun Shaw v. Karnani Industrial Bank, Ltd. ...	93	56
238	Hari Mati Dasi v. Hari Dasi Dasi ..	88	1041
240	Mohammad Keshab v. Emperor ...	91	703
242	Baijnath Singh v. Vally Mahomed Hajee Abba ...	86	332
248	Lucia Jacob v. David Alexander Wills ...	89	824
254	Brajaballav Ghose v. Akhoy Bagdi	93	115
259	Ramanuj Rai v. Dakshineswar Rai	93	101
263	Srinath Bhattacharya v. Jatindra Mohan Chatterji ...	89	892

7 I. L. R., LAHORE SERIES, FOR JANUARY-FEBRUARY, 1926.

1	Nand Kishore v. Sultan Singh ...	93	1007
4	Khizar Hayat v. Allah Yar Shah ...	93	1009
10	Kamir v. Mewaz ...	93	1011
12	Sunder Singh v. Ram Nath ...	93	1013
15	Crown v. Raj Pal ...	93	1052
17	Relu Mal v. Ahmad ..	92	947
21	Mir Dad v. Crown ..	*To be printed.*	
30	Tara Singh v. Crown ..	94	131
32	Crown v. Piara Singh ...	94	129
35	Rang Ilahi v. Mahbub Ilahi ...	94	25
40	Roshan v. Nigahia ...	94	27
42	Rugh Nath Dass-Ram Sarup v. Sulzer Bruderer & Co. ...	92	712
50	Sheru v. Crown ...	94	406
55	Lal Chand v. Hans Kumar ..	92	651
61	Jawahar Singh v. E. D. Sassoon & Co ..	94	377
65	Chet Singh v Crown	94	401
70	Ghulam Jannat v. Crown ...	94	403
73	Qaim v. Nura ..	94	422
77	Fitzholmes v. Crown ..	*To be printed.*	
80	Bhika Ram v. Crown ...	94	414
84	Rannun v. Crown ...	94	901

8 LAHORE LAW JOURNAL, FOR JANUARY, 1926.

1	Abdul Khaliq v. Fateh Mohammad	93	334
3	Budhu Mal v. Gokal Chand ...	92	1015
7	Dhani v. Biru ...	93	337
10	Narain Singh v. Mohan Singh ...	93	340
13	Punjab Akhbarat & Press Co. Ltd. v. Ogilvie ...	93	344
32	Ralla Singh v. Bishna ...	93	355
35	Shankar Das v. Shambu Nath ...	93	351
39	Singh Ram v. Kala ..	92	1012
43	Wali Shah v. Bihari Lal ...	93	369
47	Abdul Satar v. Udha Lal ..	93	695
51	Jagat Singh v. Crown ..	*To be printed.*	

49 I. L. R., MADRAS SERIES, FOR JANUARY-FEBRUARY, 1926.

1	Hope Prudhomme & Co. v. Hamel and Horley, Ltd. ..	88	307
18	Adusumilli Gopala Kristnayya v. Adivi Lakshmana Rao ...	*To be printed.*	
22	The Commissioner of Income Tax, Madras v. Krishna Chandra Gajapathi Narayana Deo ...	91	940
29	Rukku Shetti v. Ramachandraya ...	92	342
38	Sait Siva Pratapa Bhattadu v. A E. L. Mission ...	*To be printed.*	
49	Mahammad Raza Saheb Belgami v. Sadasiva Rao ..	92	918
71	Kuppu Mudali, *In re* ..	90	659
74	Gam Mallu Dora v. Emperor ..	90	297
98	Janakiram Chetty v. Nagamony Mudaliar ...	93	662
116	Ayiswaryanandaji Saheb v. Sivaji Raja Saheb	92	928

50 MADRAS LAW JOURNAL, FOR JANUARY-FEBRUARY, 1926.

1	Surendra Mohan Sinha v. Hari Prasad Sinha ...	91	1033
18	Kuar Mata Prasad v. Kuar Nageshar Sahai ...	91	370
34	Palaniappa Chettiar v. Rajeswara Sethupathi Avl ...	92	366
36	Akella Kesavaramayya v. Visamsetti Venkataratnam ...	92	626
39	Bulkee Bee v. Kaka Hajee Muhammad Ummar ...	93	99
42	Ramaswami Goundan v. Alagia Singaperumal Kadavul ..	92	823
44	Kandasami Chetty, *In re* ...	92	862
46	Karnam Venkatsubba Rao v. Adinarayana Rao ...	92	472
48	Narayanaswami Pillai v. Gopalakrishna Naidu ..	92	483
49	Pazhaniandy Tarakan v. Murukappa Tarakan	92	124
51	Arumuga Padayachi, *In re* ...	91	1000
54	Addepalli Venkata Gurunadha Ramaseshiah v. Akella Kesava Ramiah ...	92	973
59	Raja Rajeswara Muthuramalinga Sethupathi Avergal v. Secretary of State for India in Council ...	92	311

59 MADRAS LAW JOURNAL, FOR JANUARY-FEBRUARY, 1926—concld.

63	Commissioner of Income Tax, Madras v. Krishna Chandra Gajapathi Narayana Deo	91	940
67	Mahadeva Aiyar v. Ramakrishna Reddiar	92	653
72	Vadrevu Viswasundara Rao Bahadur v. Vannam Paidigadu	91	485
75	Venkatanarasimha Rao v. Hemadri Suryanarayana	92	802
77	Krishnamachariar v. Municipal Council, Srirangam	91	933
79	Alagirisami Pillai v. Lakshmanan Chetty	92	1021
90	Muthuvenkatarama Reddiar v. Official Receiver of South Arcot	92	398
94	Rukmani Ammal v. Muthurama Reddi	92	747
97	Vasireddi Sree Chandra Mouleswara Prasada Bahadur v. Rameswara Somayajulu	92	402
100	Parasurama Mudaliar v. Muthuswami Pillai	91	313
102	Veerasami Mudali v. Venkatachala Mudali	92	20
107	Mulkoori Gavariah v. Chenna Sariah	*To be printed.*	
112	Kancherla Pushkaramba v. Nagaratnamma	*Not reportable*	
114	Pokala Mahalakshmi Ammal, *In re*	94	337
116	Ayyaru Pillai v. Varadaraja Pillai	92	770
118	Lajwanti v. Safa Chand	88	198
120	Ghulam Rasul Khan v. Secretary of State for India in Council	86	654
125	Koyyalamudi Subanna v. Koduri Subarayudu	92	805
136	Subhan Ali v. Imami Begam	88	347
144	Imani Satyanarayana v. Devarakonda Satyanarayanamurthi	92	85
145	Mulugu Chengayya v. Aruvela Devasanamba Garu	92	720
148	Venkata Siva Rao v. Chittoori Rama Krishnayya	92	790
150	Manepalli Satyanarayanamurthi v. Thommandra Erikalappa	92	962
153	Parakkat Devaswom v. Venkatachellam Vadhyar	92	709
157	Rathan Singh v. Commissioner of Income Tax	92	1051
161	Rajagopala Pandarathar v. Tirupathia Pillai	95	12
172	Unnamalai Ammal v. Abboy Chetty	92	524
176	Commissioner of Income Tax, Madras v Messrs King and Partridge	92	913
180	Chittammal v. Ponnuswami Naicker	92	573
183	Sundaram Aiyar v. Thiyagaraja Pillai	*Not reportable.*	
190	Venkatesam Chetty v. Mothichand Gulabchand	93	293
191	Rajendra Narain Dhanj Deo v. Kumar Gangananda Singh	89	737
200	Kaliakkal v Palani Koundan	92	533
205	Sethu Konar v. Ramaswami Konar	94	526
208	Nidavolu Atchutam v. Ratnaji	92	977
213	Govindan Nair v. Kanhirthotikayil Ithalutty	94	557
215	Pattanayya v. Pattayya	92	782
221	Rajagopalachariar v. Sami Reddi	93	49
228	Kathamuthu Pillai v. Subramaniam Chettiar	94	561
232	Arunachalam Chetty v. Abdul Subhan	93	356
234	Kandalinga Mudaliar v. Shanmuga Mudaliar	92	989
237	Solayappa Naicker v. Shunmugasundaram Pillai	93	3
239	Official Receiver, Tanjore v. Sankara Aiyar	93	271
242	Cheggammull Sowcar v. Desur Manicka Mudaliar	94	384
251	Kandala Thiruvenkatacharlu v. Altoo Sahib	94	458

23 LAW WEEKLY, FOR JANUARY-FEBRUARY, 1926.

1	Shafi Ahmad v. Emperor	92	212
3	Bansilal Abirchand v. Ghulam Mahbub Khan	92	760
9	Bhupendra Narayan Singh v. Madar Buksh	92	681
10	Bohisetti Mamayya v. Official Receiver, Guntur	92	726
13	Ravipati Ramaiah v. Ravipati Lakshmi Narayana	91	660
16	Pazhaniandy Tarakan v. Murukappa Tarakan	92	124
19	Nomula Ramayya v. Nadipineni Appayya	91	452
22	Trustees, Parakkat Devaswom v. Venkatachalam Vadhyar	92	709
26	Swaminatha Odayar v. Thiagarajaswami Odayar	92	846
29	Kommineni Appalaswamy v. Kommineni Simhadri Appadu	92	844
31	Municipal Council, Tuticorin v. Shunmugha Moopanar	92	610
36	Thanappa Chetty v. Esuf Khan Sahib	92	753
16	Nowroji Rustomji Wadia v. Government of Bombay	90	48
51	Motilal Itchhalal Gandhi v. Haji Moosa Haji Mahomed	88	440
56	Arumuga Padayachi, *In re*	91	1000
58	Zamorin Raja Avl., Calicut v. Venkatagiri Pattar	92	245
63	Lakshmana Aiyar v. Sankarapandiam Pillai	93	276
69	Chidambaram Chettiar v. Parvathi Achi	93	16
75	Mahabir Prasad Tewari v. Jamuna Singh	92	31
80	Akella Ramasomayajulu v. Official Receiver, Godaveri at Rajahmundry	92	249
81	Sankaranarayana Reddi v. Koppaya Reddi	91	973
85	Vadappalli Varadacharyulu v. Khandavilli Narasimhacharyulu	92	615
87	Subbain Goundan v. Sennimalai Goundan	92	400
90	Vellayan Ambalam, *In re*	91	960

23 LAW WEEKLY, FOR JANUARY-FEBRUARY, 1926—concld.

92	Muthuveeraswami Nayudu v. Annamalai Chettiar ...	91	1056
94	Chittammal v. Ponnuswamy Naicker ...	92	573
99	Kaliba Sahib v. Subbaroya Aiyar...	92	621
101	Kaliappa Goundan, *In re* ..	92	750
103	Venkata Siva Rao v. Rama Kristnayya ...	92	790
105	Govindoss Chathurbhujadoss & Co. v. Sukdevadoss Ramprasad ...	93	169
138	Sura Lakshmiah Chetty v. Kothandarama Pillai ..	88	327
145	Ramachandra Aiyar, Official Receiver, Tanjore v. Sankara Aiyar	93	271
149	Seetharama Naidu v. Govindasami Chettiar ...	92	976
151	Muhammad Yakub Sahib v. Mahaboo Bi Bi ..	94	756
157	Banjoisi Narasamma v. Banjoisi Sarasamman ...	92	61
161	Pachayappa Chetti v. Sivakami Ammal ...	91	671
168	Unnamali Ammal v. Abboy Chetty	92	524
172	Kunwar Chiranjit Singh v. Har Swarup ...	94	782
175	Kuppuswamy Mudaliar v. Chokkalinga Mudaliar ...	91	454
178	Nagalla Kotayya v. Koganti Kottappa ..	90	551
182	Noorbhai v. Karuppan Chetti ...	*Not reportable.*	
186	Rama Vadhyar v. Krishnan Nair ...	93	20
193	Nidavolu Atchutam v. Ratnaji ...	92	977
199	Mahadeva Aiyar v. Ramakrishna Reddiar ..	92	653
205	Sankaran v. Vattkkiniyedath Kirangat Manakkal Sreeduaran ...	90	316
210	Muthayan Chettiar v. Panchavarna Nadar ...	93	641
212	Komaraswami Chetti v. Sundara Mudaliar ..	92	724
213	Vuyyuru Lakshma Reddi v. Alla Virareddi ...	86	957
215	Muthuswami Aiyyar & Sons v. Ramalinga Mudaliar ..	94	334
219	Mahalakshmi Ammal v. Venkata Naicker ..	93	446
220	Lal Bahadur v. Ambika Prasad ...	91	471
227	Kaliakkal v. Palani Koundan ...	92	533
233	Kesavalu Naicker v. Corporation of Madras ...	92	1053
240	Dost Muhammad Khan Sahib v. Kadir Batcha Sahib ...	92	950
262	Meer Mahomed Noorulla v. Mari Nanjappa Nainivaru ...	93	259
265	Dharman v. Zamindar of Ettiyapuram ...	93	14
267	Rathan Singh v. Commissioner of Income Tax to the Government of Madras ...	92	1051
272	Mathilda Sice v. Fritz Gaebele ...	*To be printed.*	
277	Komirisetti Satyanarayana v. Veeranki China Venkatarao ...	*To be printed.*	
285	Vemulapalli Seetharamamma v. Maganti Appiah ..	92	827
296	[illegible] Pillai v. Ramaswamy Thevan	91	1024
300	[illegible] Aiyar v. Official Receiver, Tanjore ...	93	877
305	Gutha Viraraghavayya v. Vemulapalli Ramakotayya ...	*To be printed.*	
308	Muthuraman Chettiar v. Uppaluru Seetharamayya ..	91	985
311	Arunachallam Chetty v. Abdul Suban ...	93	356
314	Venkata Gurunadha v. Kesava Ramiah ...	92	973
319	Doraiswami Aiyar v. Balasundaram Aiyar ..	94	420
320	Proprietor of Pedamamidipalli v. Ryots of Pedamamidipalli ..	94	164
327	Sanjivi Reddy v. Koneri Reddi ..	93	8
336	Shanmugha Velayuda Mudaliar v. Collector of Tanjore .	93	639
339	Ramanathan Chettiar v. Kanagasabapathy Chettiar ...	94	955
349	Natesa Pathar v. Ganapathi Subbu Pathar ..	94	68
353	Kasi Aiyar v. Official Receiver, Tanjore ...	93	914
361	Guduthuru Thimmappa v. Balakrishna Mudaliar ..	92	915
364	Kaki Narasamma v. Kaki Venkataraju ...	93	686
367	Rangayya Naidu v. Basana Simon	94	639

(1926) MADRAS WEEKLY NOTES, FOR JANUARY-FEBRUARY.

1	Narayana Iyengar v Thippayya ...	92	847
2	Meer Mohammad Noorulla Sahib v. Mari Nanjappa Nainivaru .	93	259
4	Meenakshisundara Nachiar v. Veerappa Chettiar ..	92	838
5	Suppu Chetti v. Arunachalam Chettiar ...	*Not reportable.*	
6	Ramaswmy Chetty v. Chengalroya Pillai ...	94	892
7	Imani Satyanarayana v. Devarakonda Satyanarayanamoorthy ..	92	85
8	Rajamanicka Chetty v. Venkataramana Rao ...	93	84
9	Butchiraju v. Seetharamayya ...	93	955
11	Vaithilinga Mudaliar v. Srirangath Anni ..	92	85
22	Soundararajan v. Natarajan ...	92	289
27	Subramaniam Chetty v. Ramaswami Chetty ...	91	11
29	Venkataswami v. Kotilingam ...	91	1051
32	Hanmant Rao v. Emperor ...	89	843
33	Bhadrayya v. [illegible]	91	1017
34	Kuppuswami [illegible] v. Chockalinga Mudaliar ...	91	454
36	Subbramaniam Patter v. Velu Nair	92	481
38	Gonnabathula Thammayya v. Gonnabathula Chinnayya ..	92	594
40	Kasturi Narasimha Suryanarayana v Achuthana Lakshminarasimham	91	924
44	Neelam Venkataratnamma v. Venjamoori Narasimhacharyulu ...	92	470
45	Ramu Chetty v. Panchammal ...	92	1028

(1926) MADRAS WEEKLY NOTES, FOR JANUARY-FEBRUARY—concld.

48	Venkatarama Iyer v. Sundaram Iyer	92	1045	129	Arunachalam Chetty v. Abdul Suban Sahib ...	93	356
49	Surendra Mohan Sinha v. Hari Prasad Sinha ...	91	1033	131	Proprietor of Kalagampudi v. Ryots of Kalagampudi ...	94	164
62	Shafi Ahmed v. Emperor ..	92	212	135	Numula Ramayya v. Nadipineni Appayya ..	91	452
63	Muthu Veerappa Chettiar v. Sivagurunatha Pillai ...	92	603	137	Madura Hindu Premanent Fund Ltd. v Kamakshi Ammal ..	94	487
64	Pasumarti Seethanna v Thammandra Yasikalappa ..	91	765	140	Swaminatha Odayar v. Thiagarajaswami Odayar ..	92	846
66	Manem Ayyanna v. Pulavarti Veerabhadram ...	91	771	141	Akella Kesavaramayya v. Visamsetti Venkataratnam ...	92	626
68	Tulasidass Govindjee v. Madhavadass Laljee ...	92	570	143	Bulkee Bee v. Kaka Hajee Muhammad Ummar Shaib ...	93	99
69	Raja Rajindra Narain Dhanj Deo v. Kumar Gangananda Singh ..	89	737	145	Chiranjit Singh v. Har Swarup	94	782
73	Natarajan v. Muthiah Chetty ...	95	972	146	Kandasami Chetty v. Emperor ..	92	862
81	Ramalinga Mudaliar v. Arunachala Mudaly ..	93	338	147	Arumuga Padayachi v. Emperor ...	91	1000
83	Kuar Mata Prasad v. Kuar Nageshar Sahai ...	91	370	149	Venkata Gurunadha Ramaseshiah v. Kesaya Ramiah ...	92	973
94	Vasudevan v. Arunachala Iyer ..	93	1	152	Lakshmana Aiyar v. Sankarapandiam Pillai ..	93	276
96	Ram Pratab Chamria v. Durga Prasad Chamria ..	92	633	156	Chidambaram Chettiar v. Parvathi Achi ...	93	16
101	Nag Kuer v. Sham Lal Sahu ..	92	274	159	Ramachandra Aiyar v. Sankara Aiyar .	93	271
106	Venkatachariar v. Pachayappa Chetty ...	92	516	162	Seetharama Naidu v. Govindasami Chettiar ...	92	976
108	Bansilal Abirchand v. Ghulam Mahbub Khan ...	92	760	163	Banjoisi Narasamma v. Banjoisi Sarasamman ...	92	61
112	Thirumalachariar v. Atimoola Karayalar ..	92	776	165	Muthu Pillai v. Alagirisami Pillai ..	91	961
114	Poovanalingan Servai v. Veerayi ..	92	1055	167	Govinda Pillai v. Ramanathan Chettiar ..	91	714
116	Kuchu Iyer v. Vengu Ammal ..	93	360	169	Akella Ramasomayajulu v. Official Receiver, Godaveri at Rajahmundry ..	92	249
117	Ramasami Goundan v. Alagia Singaperumal Kadavul ...	92	823	169	Tiruvangalath Nellyoton Paidal Nayar v. Emperor ..	92	624
118	Ramaswami Iyengar v. Raghava Iyengar ...	92	1046	172	Chittammal v. Ponnuswamy Naicker ..	92	577
120	Muthuveeraswami Nayudu v. Annamalai Chettiar .	91	1056	174	Angadi Mallappa v. Neelana Gowdra Kare Gowd ...	93	625
121	Chittammal v. Ponnuswamy Naicker ..	92	573	178	Kaliba Sahib v. Subbaroya Aiyar..	92	621
123	Kaliba Sahib v. Subbaroya Aiyar	92	621	180	Munuswamy Pillai v. Madhi Hussain Khan Sahib ..	94	453
124	Bohisetti Mamayya v. Official Receiver, Guntur ...	92	726	182	Visvanatha Mudali v. Doraiswamy Mudali .	91	193
126	Ravipati Ramaiah v. Ravipati Lakshmi Narayana ...	91	660	192	Chinnatha Rowther v. Karunji Andi	93	644
128	Deputy Collector, Cocanada v. The Maharaja of Pittapur ..	93	651				

9 NAGPUR LAW JOURNAL, FROM JANUARY TO MARCH, 1926.

1	Narayandas v. Pandurang ..	93	212	22	Shanker Rao v. Pandurang .	92	646
3	Ramchandra v. Lakshman	92	803	34	Purushottam v. Sahu ..	91	295
7	Narayandas v. Radhabai ...	93	196	40	National Stores v. Ramsaran ..	94	380
11	Khurshid Begam v. Abdul ...	92	913	43	Bhagwan v. Emperor ..	94	408
17	Shanker v. Vithaldas ..	*To be printed.*		45	Ramu v. Puna ...	94	326

22 NAGPUR LAW REPORTS, FOR JANUARY-FEBRUARY, 1926.

1	[illegible] v. Emperor ..	91	242	14	Asabi v. Kanhyalal ..	94	754
5	[illegible] v. Jagannath ..	92	121	17	Sheosingh v. Kalusingh	80	734
11	Temple of Sri Ramchandra of Khamlia v. Kanhaiyalal ..	*To be printed.*		19	Piluram v. Mahadeo	91	290
				23	Purushottam v. Sahu Gond ..	91	295
13	Maruti v. Ukarda ..	94	741	28	Padman Singh v. Subransai ...	94	791
				30	Samsherkhan v. Abdul Sattarkhan...	94	70

29 OUDH CASES, FOR JANUARY-FEBRUARY, 1926.

1	Girdhari Lal v. Emperor ...	86	993
7	Karya Singh v. Shiva Ratan Singh	86	913
10	Uma Nath Bakhsh Singh v. Janki Bakhsh Singh ...	86	864
14	Maharaj Din v. Balbhaddar Prasad ..	85	481
15	Gaya Prasad v Jagan Nath ..	86	932
18	Mathura Prasad v. Kunwar Bahadur Singh ...	87	284
21	Kandhai Lal v. Anantu ...	87	172
23	Munnu Lal v. Hirde Ram ..	86	1008
24	Lalta Prasad v. Maharaj Bahadur ..	87	316
26	Ahmad Mirza Beg v. Allahabad Bank Ltd., Lucknow ..	94	317
31	Ram Parkash v. Janki Prasad ...	88	203
37	Qudratullah Khan v Gulqandi ..	89	570
44	Newal Kishore v Emperor ...	89	147
51	Achal Singh v. Shaghunath Kuar Babuain ..	90	470

13 OUDH LAW JOURNAL, FOR JANUARY-FEBRUARY, 1926.

1	Abdul Ghani v. Mustafa Husain ...	93	645
6	Sheo Nandan v. Hira Lal .	92	217
10	Rais-un-nisa v. Zorawar Sah	92	675
15	Saheb Din Raghubar Dayal v. East Indian Railway	93	22
19	Kuar Mata Prasad v. Kuar Nageshar Sahai ...	91	370
37	Abhaidat Singh v. Ragho Indar Partab Sahi ..	91	976
42	Parbhu v. Puttu	95	995
49	Peoples Industrial Bank Allahabad v Mahesh Charan Sinha ..	93	631
53	Karingan v. Harihar Dutt ...	92	34
55	Gopal Das v. Ram Phal ..	92	685
61	Sidheshwar v. Ganga Sagar ..	*To be printed*	
69	Mukta Prasad v. Emperor ..	94	193
95	Sukh Lal v. Murari Lal ...	95	1019
109	Sheo Ram v. Tula ..	93	1023
111	Raghubar Singh v. Gokaran ...	93	833
115	Secretary of State for India in Council v. Har Charan Das ...	91	927
121	Gajraj Singh v. Nanhu Singh ..	91	942
124	Sarju v. Sheoraj	94	179
126	Pirtha Singh v. Mohammad Ali Mohammad Khan .	94	188
132	Ganga Bakhsh Singh v. Maula Bakhsh Singh ...	92	612
138	Chandoo v. Murli Dhar ..	92	732
144	Manni Lal v Sajjad Husain ..	93	272
146	Ram Adhin v. Riasat Ali ..	95	463
147	Amina Bibi v. Kalka Singh .	95	486
149	Bishwanath Prasad v. Abdus Samad Khan ...	94	788
152	Gur Prasad v. Sitla Dei ...	94	796
154	Tullu v. Thakurain Srimati Indar Kuar ...	93	873
160	Ram Prasad v. Khusal Singh ..	*To be printed.*	
166	Masih Uddin Ahmad v. Munir Ahmad .	91	1020
167	Faqir Mohammad Khan v. Shambhu Dat ..	91	1014
170	Ram Dayal v. Nisar Husain Khan..	91	1031
172	Hasib-un-nisa v. Bishnath ..	91	867
174	Kunwar Lal Bahadur v. Beni Madho ...	91	1043
176	Manzur Husain v Vikalat Fatima...	91	1016
178	Hasan Baqar v. Sheo Narain Singh ...	91	917

*3 OUDH WEEKLY NOTES, FOR JANUARY-FEBRUARY, 1926.

145	Bengal North Western Railway v. Bansi Dhar ..	92	603
156	Saheb Din Raghubar Dayal v. East Indian Railway Company, Limited .	93	22
160	Emperor v. Parakh ...	92	744
165	Shafi Ahmed Nabi Ahmed v. Emperor ...	92	212
168	Chiranjit Singh v. Har Swarup ...	94	782
171	Mathura Prasad v. Emperor ..	93	66
176	Dubri v. Ram Naresh Singh ..	93	297
181	Phuljhari v. Har Prasad ...	93	378
186	Mahadeo Prasad v. Ram Phal ..	92	685
191	Mahabir v. Ram Saran Singh ..	93	108
195	Ummatul Fatima v. Ali Akbar ...	95	271
198	Jhalri v. Rama Bharose Pandey ..	93	53
201	Bilodar v. Emperor ..	93	145
204	Ram Nath v. Emperor ..	93	252
210	Dilawar Khan v. Kulsum Bibi .	93	62
213	Sitla Bakhsh Singh v. Gulab Singh	93	927
217	Dasrath v. Sandala ...	93	310
222	National Bank of Upper India, Lucknow v. Dina Nath Sapru ..	95	234
228	Mahomed Saadat Ali Khan v. Kuer Lal ..	93	912
231	Ramdei v. Jhunni Lal ...	95	596
233	Ram Suchit v. Kalaka Prasad ..	93	951
237	People's Industrial Bank Ltd., Allahabad v. Mahesh Charan Sinha ...	93	631
241	Raghubar Singh v. Gokaran ..	93	833
245	Ganpat Sahai v. Koshalendra Pratab Sahi ...	93	962
248	Sukh Lal v. Murari Lal ...	95	1019
260	Parbho v. Puttu ...	95	995
267	Ram Shankar Singh v. Lal Bahadur Singh ...	92	637
274	Sheo Ram v. Tula ..	93	1023
277	Devendra Nath v. Ram Rachpal Singh ...	93	302
279	Yusuf Khan v. Riyasat Ali ...	93	446
284	Haidari v. Nariandra Bikramjit Singh ..	93	677

*NOTE.—Decisions of the Board of Revenue, U. P. not printed in Indian Cases.—[*Ed.*]

5 I. L. R., PATNA SERIES, FOR JANUARY-FEBRUARY, 1926.

1	Aditya Prasad Singh v. Ram Narayan Das ..	87	531
8	Subedar Rai v. Rambilas Rai ...	90	817
13	Rajendra Narayan Bhanja Deo v. Commissioner of Income Tax, B. & O. ...	91	288
20	Ambika Prasad Singh v. Commissioner for Income Tax, Bihar and Orissa ...	93	999
23	Khudi Rai v. Lalo Rai ..	93	1001
25	Siban Rai v. Bhagwat Dass ..	92	219
33	Daroga Gope v. Emperor ...	88	1045
40	Peari Dai Debitors v. Naimish Chandra Mitra ..	90	822
46	Bibi Wajihunnissa Begum v. Babu Lal Mahton ...	90	871
58	Hira Bibi v. Ram Hari Lall ...	89	659
63	Jagwa Dhanuk v. Emperor ...	93	884
80	Midnapur Zamindari Co., Ltd. v. Ram Kanai Singh Deo Darpa Saha	91	169
96	Mahanth Tokh Narayan Puri v. Ram Rachhya Singh ..	90	806
106	Agent of the Bengal-Nagpur Railway Company, Limited v. Hamir Mull Chagan Mull ..	90	374
110	Ramchandra Modak v. Emperor ...	93	963
118	Great Indian Peninsula Railway v. Datti Ram ...	90	812
128	Radhe Lal v. East Indian Railway Company, Limited ..	90	680
135	Sourendra Mohan Sinha v. Hari Prasad ..	91	1033
157	Sib Sahai Lal v. Sir Bijai Chand Mahtab	90	862

(1926) PATNA CASES, FOR JANUARY-FEBRUARY.

1	Sri Sri Baidyanath Jiu v. Har Dutt Dwari ...	94	826
4	Sheikh Abdul Ghaffar v. Mrs. F. B. Downing ...	94	841
9	Bibi Hafsa v. Kaniz Fatima .	96	3
11	Uma Jha v. Chetu Mandar ..	95	187
13	Ramyad Dusadh v. Emperor ...	95	273
16	Mahari Dhangar v Baldeo Narain ..	90	657
19	Sib Sahai Lal v. Sir Bijai Chand Mahtab ..	90	862
24	Sheikh Mabub Bakhsh v. Mahmudan ...	93	273
29	Ramdhani Singh v. Kewal Mani Bibi ...	90	929
34	Kuldip Singh v. Kumar Kamakhya Narain Singh ...	93	300
37	Badri Narayan Singh v. Mahanth Kailash Gir ...	93	303
40	Hansraj Sangechi v. Jogesar Prasad	88	1020
42	Malik Mukhtar Ahmad v. Wasi Ahmad Khan ..	93	289
44	Madaran Kassab v. King-Emperor	86	964
49	Ram Golam Sahu v. Chintaman Singh ..	93	939

7 PATNA LAW TIMES, FOR JANUARY-FEBRUARY, 1926.

1	Sadhu Sao v. Awadh Bihari Saran Singh ..	89	802
4	Diljan Ali v. Akhtari Begum ...	88	1035
9	Sheikh Imdad Ali v. Nand Kumar Lal	88	478
11	Asharfi Dhimar v. Muhammad Dindalal ..	88	989
14	Jamal Momim v. King-Emperor ...	86	153
19	Raja Rajendra Narain Bhanj Deo v. Kumar Ganganand Singh ...	89	737
22	Lekhraj Mahton v. Jang Bahadur Singh ..	89	822
25	Sham Narayan Singh v. Basdeo Prasad Singh ..	88	537
27	Nazirul Hassan v. Abdul Wahab Khan ...	89	811
30	Badri Gope v. King-Emperor ...	93	146
35	Tulshi Prasad Ram v. J. A. W. Wilson ...	90	74
36	Ram Saran Singh v. Mohammad Jan Khan ..	89	706
39	Bibi Hajo v. Har Sahay Lal ...	89	992
42	Sir Rameshwar Singh Bahadur v. Durga Mandar ..	90	454
45	Sudha Krishna Mukerji v. East Indian Railway Company ...	90	1
47	Sahdeo Singh v. Kishun Behari Pandey ..	90	559
49	Sheodhari Rai v. Jhingur Rai ...	88	993
52	Ram Chandra Singh v. Jang Bahadur Singh ...	90	553
57	Radhe Lal v. East Indian Railway	90	680
61	Ramjee Prasad v. Bishundutt ..	90	244
65	Gokul Tatwa v. King-Emperor ...	89	1030
67	Haro Mandal v. Dhiranath Das ...	90	691
71	Prasana Kumar Banerji v. Kaleyan Charan Mandal ..	90	352
73	Kesho Prasad Singh Bahadur v. Lakhnath Roy ..	89	21
75	Garbhu Mahton v. Bibi Khudaijatunnissa .	89	170
79	Jang Bahadur Singh v. King-Emperor ...	93	40
82	Bhimnath Misra v. Jaggarnath Prasad ...	89	814
87	Bambhadur Lal v. Gangora Kuer ...	89	232
90	G. I. P. Railway Co. v. Rameshwar Prasad ..	90	687
95	Sadho Saran Pande v. Subhadra ...	89	195
97	Sourendra Mohan Sinha v. Hari Prasad ...	91	1033
111	Jogindra Narayan Chaudhuri v. Chinai Muhammad Sircar ...	89	275
114	Ranjit Narayan Singh v. Ram Bahadur Singh ...	94	593
124	Rai Kashinath Singh Bahadur v. Kailas Singh ..	89	236
127	Lachman Sahay v. Gauri Charan Mahton	94	556
129	Debi Prasad Dhandhaya v. Mahesh Lal ...	89	32
134	Raghunandan Thakur v. Babu Kishundeo Narain Mahta ..	*To be printed.*	
136	Thakur Sao v. Abdul Aziz ...	91	41
138	Kawleshwar Lal v. Satya Brata Banarji .	90	194
140	East Indian Railway Co. v. Goberdhan Das ...	90	790

1	Jowanda Mal v. Emperor ..	91	33
2	Akbar Ali v. Raja Bahadur ...	91	34
4	Emperor v. Syed Khan ...	91	36
5	Amir Hasan Khan v. Emperor ..	91	37
6	Harihar Dat v. Maksud Ali ..	91	38
7	Data Ram v. Emperor .	91	39
8	Panna Lal v. Emperor ..	91	40
9	Thakur Sao v. Abdul Aziz ..	91	41
11	Emperor v. Param Sukh ...	91	43
15	Amir Ahmad v. Emperor	91	47
17	Daud Khan v. Emperor . .	91	49
18	*In re* Ayyaperumal Pillai ..	91	50
19	Kamlapati Punth v. Emperor	91	51
21	Emperor v. Chet Khan ..	91	53
21	Emperor v. Bhima .	91	53
22	Yamunabai v. Emperor .	91	54
23	Nazar Muhammad Khan v. Hara Singh Bedi .	91	55
24	Sham Sunder Lal v. Emperor .	91	56
26	Feroze v. Emperor ..	91	58
27	Ghurahu Das v. Shakalraj Das ..	91	59
29	Beli v. Emperor ..	91	61
30	Pavakkal v. Athappa Goundan	91	62
32	Hyder v. Emperor ..	91	64
33	*In re* Manargan ...	91	65
35	Jairaj Singh v. Bansi ..	91	67
37	Jamna v. Emperor . .	91	69
38	Ismail v. Emperor	91	70
40	Nathoomal v. Emperor	91	72
43	Lachmi Kuer v. Partab Narain	91	75
44	Rampratab Marwari v. Satif .	91	76
44	Abdul Wahab v Emperor . .	91	76
46	*In re* Vodde Subbigadu ...	91	78
49	Rupan Singh v. Emperor ..	91	225
57	Bhulan v. Emperor	91	234
60	Kudaon v. Emperor ..	91	236
62	Sheo Shankar v. Emperor ...	91	238
64	Samundar v. Emperor ...	91	240
65	Chainu v. Emperor ..	91	241
66	Mahadeosingh v. Emperor ...	91	242
68	Nago v. Atmaram ..	91	244
69	*In re* Bhau Vyankatesh Chakorkar	91	245
71	Bajirao v. Dadibhai .	91	247
73	Abdullah v. Emperor .	91	249
74	Ritha v. Emperor ..	91	250
75	Jawala Singh v. Madan Gopal ...	91	251
76	Selvamuthu v. Chinnappan Chettiar ..	91	252
77	Ahmed v. Emperor ...	91	253
80	Hamid Ali Bepari v. Emperor ...	91	256
81	Public Prosecutor, Madras v. Kimidi Annam Naidu ...	91	385
83	Fateh Bahadur v. Abdul Raheem	91	387
84	*In re* Appaswamy Iyer ...	91	388
87	Ghaza Ali v. Emperor ...	91	391
88	Abdul Ali Sahib v. Amiruddin ...	91	392
89	Vishnoo Nainaram v. Dipchand Sitaldas ...	91	393
90	*In re* Dyta Seetharamayya ...	91	394
90	Emperor v. Radho .	91	394
91	Ramakrishna Iyer v. Sithai Ammal	91	395
95	Denepudi Narasayya v. Chiguluri Venkiah ...	91	399
97	Ramachandran Servai v. President, Union Board	91	529
98	Emperor v. Qadir Bakhsh Shah ...	91	530
100	*In re* Peramasami Ragudu ..	91	532
101	Munir v. Emperor ...	91	533
104	Fazal Ahmad v. Abdullah Khan ...	91	536
105	Ramaswami Chettiar v. Ramanathan Chettiar ...	91	537
107	Bahri v. Emperor ..	91	539
107	Devasikamani Mudaliar v. Narayana Prasad ...	91	539
108	Ramaswami v. Emperor ...	91	540
109	Ahmad v. Emperor ..	91	541
110	Ismail Sha v Emperor ...	91	542
111	Emperor v Subrao Sesharao .	91	543
112	Alia v. Emperor ..	91	544
113	Piru Rama Hawaldar v. Emperor	91	689
114	Hurmat Ali v. Emperor ..	91	690
114	Emperor v. Abdul Gani Bahadurbhai .	91	690
121	Chogatta v. Emperor ..	91	697
123	Emperor v. Chand Mahaboob ..	91	699
125	Superintendent and Remembrancer of Legal Affairs, Bengal v. Sader Saik ...	91	701
126	Marudayya Thevar v Shunmugasundara Thevar ...	91	702
127	Mohamad Keshab v. Emperor ...	91	703
128	Kalka v. Ranjit Singh ...	91	704
129	Thomas James Henry Arnup v. Kedar Nath Ghosh ..	91	801
132	Qadir Bakhsh v. Emperor ...	91	804
133	Shaikh Garib Haji v. Muchiram Sahu ...	91	805
134	Nazir Singh v. Emperor ...	91	806
136	Kallu v. Emperor ..	91	808
137	Rameswar Singh v. Emperor ...	91	809
139	Lahanu Manaji v. Emperor ...	91	811
140	Pakhar Singh v. Emperor ...	91	812
142	Banwari v. Emperor ...	91	814
142	Chhakauri Lall v. Ishar Singh ...	91	814
143	Faujdar Mahto v. Emperor ...	91	815
145	Ram Pada Chatterjee v. Basanta Baishnabi ..	91	881
146	Sumaria v. Emperor ...	91	882
147	Prafulla Kumar Roy v. Emperor ..	91	883
150	Emperor v. Karim Rajmahamad ...	91	886
152	Raghunath Kandu v. Emperor ...	91	888
153	Smith v. Emperor ...	91	889
158	Dip Singh v. Emperor ..	91	891
159	Maharani Dassi v. Commissioner of Police, Calcutta ...	91	895
160	Kutta Bella Ravat v. Emperor ...	91	896
161	Sheosatyanarayanlal v. Emperor ..	91	915
165	Gamadia v. Emperor ..	91	949
170	Lal Singh v. Emperor ..	91	954
175	Debi Din v. Emperor ..	91	959
176	*In re* Vollayan Ambalam ..	91	960
177	Emperor v. Mohit Kumar Mukerjee	91	993
181	Wasudeo v. Emperor ...	91	997
182	Birendra Nath Chatterjee v. Umananda Mukherjee ...	91	998
184	*In re* Arumuga Padayachi ...	91	1000
185	Hanmantrao v. Emperor ...	91	1001
186	Harnam Singh v. Emperor ...	91	1002
186	Diwan Dhimar v. Emperor ...	91	1002
190	Abdulla v. Emperor ..	91	1006
191	Kashi Ram Khosla v. R. L. Diskshit	91	1007
192	Gahra v. Emperor ..	91	1003
193	Abdullah v. Emperor ...	92	145

27 CRIMINAL LAW JOURNAL, FOR JANUARY-FEBRUARY, 1926—concld.

210	Vishwanath Prasad Pandey v. Emperor	92	162
211	Abdul Qadir v. Emperor	92	163
212	Bajirao v. Dadibai	92	164
215	Partap Singh v. Emperor	92	167
217	Rahimbeg v. Emperor	92	169
218	Ram Charan v. Emperor	92	170
220	Uttim Singh v. Judhan Rai	92	172
222	Bhagirathi v. Emperor	92	174
223	Pali v. Emperor	92	175
225	Hashmat Hussain v. Emperor	92	209
228	Shafi Ahmad Nabi Ahmad v. Emperor	92	212
229	Akbar Ali v. Emperor	92	213
230	*In the matter of* K. M., First Grade Pleader	92	214
231	Tulsi v. Emperor	92	215
232	Amiruddin v. Emperor	92	216
233	Hari Singh v. Emperor	92	217
235	Siban Rai v. Bhagwat Dass	92	219
238	Lachhman Singh v. Emperor	92	222
239	Surendra Nath Banerjee v. Shashi Bhushan Sarkar	92	223
240	Miran v. Emperor	92	224
241	Pohla v. Emperor	92	417
243	Kishanchand v. Emperor	92	419
247	Daya Ram v. Emperor	92	423
248	Momoon v. Ibrahim	92	424
249	Qaim Din v. Emperor	92	425
250	Ram Sarup v. Emperor	92	426
251	Gulabchand Rupji v. Emperor	92	427
252	Kallu v. Emperor	92	428
253	Champa Devi v. Pirbhu Lal	92	429
254	Nga Wa Gyi v. Emperor	92	430
257	Woodward v. Emperor	92	433
263	Keramat Mandal v Emperor	92	439
265	Abdul Hafiz Khan v Emperor	92	441
266	Khijruddin v Emperor	92	442
274	Ratan Mani v. Hans Ram	92	450
275	Bhola v. Emperor	92	451
276	Kadhori v. Emperor	92	452
277	Keramat Mandal v. Emperor	92	453
278	Banwari Lal v. Jhunka	92	454
280	Thokala Seshamma v. Yellaturi Venkamma	92	456
283	Madat Khan v. Emperor	92	459
284	Bahadur v Emperor	92	460
285	Teja Singh v. Emperor	92	461
286	Chandiram v. Emperor	92	462
287	Chhidda v. Emperor	92	463
289	Ram Karan v. Emperor	92	577
296	Khamani v. Emperor	92	584
297	Indar Singh v. Emperor	92	585
299	Wasal v. Emperor	92	587
300	Kashi Prasad v. Emperor	92	588
300	Emperor v. Gulab	92	588
301	Krishna Gopal v. Emperor	92	589
302	L. A. Morrison v. H. M. Crowder	92	590
302	Emperor v. Ghulam Mohammad	92	590
303	Emperor v. Kesar	92	591
303	Kalap Nath v. Emperor	92	591

ALL INDIA REPORTER, FOR JANUARY-FEBRUARY, 1926.

Privy Council.

1	Chiranjit Singh v. Har Swarup	94	782
2	Man Singh v. Nawlakhbati	94	830
9	Lal Chand Marwari v. Mohant Ramrup Gir	93	280
13	Maharaj Bahadur Singh v. Seth Hukum Chand	93	219
16	Jawahir Singh v. Udai Parkash	93	216

Allahabad High Court.

1	Kishan Dei v. Sheo Paltan	90	358
7	Mitar Sain v. Data Ram	87	724
17	De Mello v. New Victoria Mills Co., Ltd.	90	287
18	Jorhawan v. Municipal Board, Gorakhpur	88	814
20	Mohamdi Begam v. Tufail Hasan	92	260
21	Dwarka Prasad v. Makund Sarup	90	290
22	Hasan Ali v. Emperor	84	729
27	Kamalapatti Panth v. Emperor	91	51
29	Basanti Bai v. Nanhe Mal	89	357
30	Kanhaiya Lal v Bhagwan Das	89	1053
33	Mula v. Emperor	90	150
34	Kumari v. Adit Misir	89	379
35	Agha Husain v. Qasim Ali	89	1018
36	Brij Raj v. Ram Sarup	90	749
41	Pirthi Nath v. Kunji Koer	89	369
43	Tajammul Husain v. Banwari Lal	88	752
44	Brij Behari Lal v. Emperor	88	724
45	Bijai v. Narain	88	592
46	Ahmad Husain v. Muhammad Qasim Khan	90	80
47	Bankey Lal Kapoor v. Allahabad Bank Ltd.	88	848
48	Shafiq Ullah Khan v. Nuhullah Khan	88	954
50	Nathu Lal v. Raghubir Singh	89	946
55	Hafiz Zahur Ahmad v. Taslim-un-nissa	89	404
57	Ram Harakh Pathak v. Emperor	90	913
58	Bisheshar Prasad Pandey v. Raghubir	90	353
62	Ram Kuer v. Govind Ram	92	414
64	Jai Narain Singh v. Mandhai Singh	88	535
65	Lakhan Singh v. Babu Ram	88	1021
66	Bhagwan Rai v. Jaddu Raj Rai	88	746
67	Nageshwari Rai v. Nand Lal	88	908
68	Het Ram v. Dat Prasad Singh	88	829
70	Jagamaya Dasi v. Tulsa	89	444
71	Dip Prakash v. Dwarka Prasad	90	83
75	Meharban Singh v, Panna Lal	89	617
77	Shankar Kurmi v. Md. Moqim Ali Khan	88	927
79	Piare Lal v. Sri Thakurji	88	964
82	Komil Prasad v. Bharat Indu	89	466
83	Srilal Goaika v. Kesho Das	87	368
85	Bhagwan Din v. Sri Kishen	89	161
87	Zahid Ali v. Sukhu Lonia	89	509
89	Jagannath Prasad v. Jugul Kishore	89	492
90	Ballabh Das v. Sri Kishen	89	586
93	Begam Sultan v. Sarvi Begam	90	274
95	Sheo Prasad v. Naraini Bai	90	938
101	Lakshmi Flour Mills Co., *In the matter of*	89	994

ALL INDIA REPORTER, FOR JANUARY-FEBRUARY, 1926—contd.

Allahabad High Court—concld.

102	Mulraj v. Indar Singh ...	92	471
103	Misri v. Rajmati ...	89	849
111	Megh Baran Singh v. Rama Das ..	89	956
113	Kehri Singh v. Thirpal ..	92	282
119	Sahu Banarsi Prasad v. Kuer Manmohan Lal ...	89	288
120	Harakh Sonar v. Gopi Kishun ...	89	134
122	Ram Sarup v. Emperor ...	92	426
122	Browne v. Pearce ...	89	882
124	Narain Das v. Ram Chander ...	90	116
126	Mahadeo Prasad v. Harbans Singh ..	89	179
127	Abdullah v. Badr-ul-Islam ..	91	934
128	Darshan Das v. Bikramajit Rai ...	89	953
130	Channu Dutta Vyas v. Swami Gyannandji Maharaj ..	90	976
131	Muhammad Yusuf Khan v. Mahadeo Prasad ...	89	131
136	Bishnath Singh v. Basdeo Singh ...	88	484
136	Beti Bai v. Tantya Singh ...	89	574
140	Bir v. Gajadhar ...	89	19
141	Kashi Prasad v. Emperor ...	92	588
142	Shiam Lal v. Jotia ...	89	383
142	Ahmad Husain Khan v. Hardial ...	90	243
143	Amir Ahmad v. Emperor ..	91	47
144	Muhammad Rahim v. Emperor ..	89	1025
145	Kashi Prasad v. Mathura Prasad ...	89	286
146	Gulab Dei v. G. I. P. Railway ..	90	99
147	Emperor v. Param Sukh ...	91	43
152	Shabhar Hussain v. Abbas Ali ...	90	324
153	Chunni v. Baldeo Singh ...	89	89
155	Reoti Ram v. Lachman Prasad ...	89	402
156	Kedar Nath v. Bismillah Begam ..	90	72
157	Ghurahu Das v. Shakalraj Das ...	91	59
157	Faqir Chand v. Sant Lal ..	89	291
158	Jagat Narain Lal v. Hawaldar ..	90	287
159	Harihar Dat v. Maksud Ali ...	91	38
160	Debi Din v. Emperor ...	91	959
161	Muhammad Abdul Hamid Khan v. Uda ...	90	996
161	Habib Buth v. Samuel Fitz & Co. Ltd. ...	89	22
164	Babu Ram v. Ram Sarup ...	89	410
165	Jairaj Singh v. Bansi ...	91	67
166	Roshan Lal v. Maharaj Prasad ..	89	344
167	Emperor v. Bhima ..	91	53
168	Miran v. Emperor ..	92	224

Bombay High Court.

1	India Spinning and Weaving Co. Ltd. v. Climax Industrial Syndicate ..	91	847
13	Kishenprasad & Co. Ltd. v. Rajaram Ramharakh ..	94	570
18	Parashuram D. Shamdasani v. Tata Industrial Bank ..	91	153
21	Rupchand v. Jankibai ..	91	817
26	Hanmavva v. Venkappa ...	91	305
28	Pudumjee & Co. v. Moos ..	91	334
31	Mayashankar v. Burjorji ...	91	978
33	Dodbasappa Dharmappa v. Pradhanappa Venkappa ...	91	426
39	Gulabchand Ramsukh v. Ramsukh Rampratap ...	91	294

Bombay High Court—concld.

40	Rachappa Chanbasappa v. Ningappa Kasappa ..	91	349
42	Sevadasji Chandradasji v. Municipal Corporation for the City of Bombay ..	94	654
43	Chandulal Maganlal v. Motilal Harilal ...	92	545
44	Collector v. Ramchandra Harischandra ..	91	300
46	Emperor v. Chand Mahaboob ...	91	699
47	N. H. Moos v. Government of Bombay ...	91	357
49	Gangaram Hari Teli v. Ganesh Pandurang Ghanekar ...	91	318
50	Haji Rehemtulla v. Secretary of State ...	92	351
51	Usuf Dadabhai v. Chand Mahomed	91	299
52	Giriappa Subanna v. Govindrao Ganrao ...	91	314
54	Vishveshwar Subrao Kulkarni v. Sadashiv Venkatramanayya Harite	93	930
55	Ramchandra Trimbak v. Dattu Rama Patil ..	91	347
57	B. N. Gamadia v. Emperor ..	91	949
62	Emperor v. Subrao Sesharao ..	91	543
63	Devji Padamsey v. Thommadra Erikalappa ...	92	555
64	Emperor v. Piru Rama Havaldar ..	91	689

Calcutta High Court.

1	Pryag Kumari Debi v. Siva Prosad Singh ..	93	385
56	Shundi Bibi v. Mobarak Ali ..	87	94
57	Nandalal Rai v. Mukundalal De ...	89	24
59	Dwijendra Nath v. Gopiram Govindram ..	89	200
65	Sarat Kamini Dasi v. Nagendra Nath Pal ..	89	1000
73	Rakhal Chandra Bardhan v. Prosad Chandra Chatterjee ..	90	229
80	Rajendra Nath Datta v. Bhabini Dasi ...	87	811
82	Husena Banoo v. Brojendra Kishore Roy ...	89	373
83	Hara Mohan Saha v. Sudhanshu Bhusan Pal ...	85	1002
85	Ram Sundar Das v. Satindra Mohan Tagore ...	89	190
86	Tara Prasanna Sinha v. Jnanendra Narayan ...	88	1039
87	Nalini Ranjan Sen Gupta v. Corporation of Calcutta ..	89	781
89	Emperor v. Mohit Kumar Mukerjee	91	993
92	Durga Ram Das v. Bharat Ram Das	85	739
95	Niranka Sashi Roy v. Swarganath Banerjee ..	90	121
97	Jotindra Nath Roy v. Narayan Das Khetry ...	90	901
100	Adam Sajan & Co. v. Asutosh Bandopadhya ...	86	1046
102	Rash Behary Karury v. Corporation of Calcutta ..	87	970

ALL INDIA REPORTER, FOR JANUARY-FEBRUARY, 1926—contd.

Lahore High Court.

1	Habib, *In the matter of* ...	89	833
4	Hari Singh v. Emperor ...	92	217
6	Buta Singh v. Jagu .	89	884
7	Dhanpat Rai v. Gopal Kuar ..	90	1052
9	Kishen Chand v. Nank Chand ...	89	973
10	Natha Singh v. Sundar Singh ...	92	258
11	Kanshi Ram v. Prem Singh ..	89	879
12	Allah Wasai v. Emperor ...	89	457
13	Ismail v. Ibrahim ...	89	995
14	Hussain Bakhsh v. Sarbuland ...	92	268
16	Nur Hussain Shah v. Hussain Bibi	89	429
19	Haq Dad v. Crown ..	90	927
20	Eclipse Motor Car Co. v. Mr. H. O. Warburton ...	89	721
21	Devi Chand v. Jai Chand ...	90	1047
23	Pars Ram v. Tehu —	89	960
24	Firm Jai Singh Diyal Singh v. Narmal Das ...	92	235
25	Daulat Bam v. Ghulam Fatima ...	89	953
26	Gopi Chand v. Kirpa Ram ..	90	1030
27	Hari Kishen v. Mulkh Raj ..	89	857
28	Ismail v. Crown ..	91	70
30	Mohammad Akram v. Mula Singh ..	89	414
31	Ram Rakni v. Daulat Ram ..	90	1056
31	Samail v. Haji . .	89	378
32	Budhu Ram v. Kalu Ram ..	91	30
33	Feroze Din v. Ghulam Fatima ..	89	434
34	Begam Bibi v. Bulaqi Shah . .	90	1050
35	Harbhagwan v. Taja ..	89	596
37	Girdhta Mal v. Muhammad Khan	90	41
39	Padmun v. Achhar ...	89	792
40	Firm of Hira Singh Pritam Singh v. Secretary of State ..	90	1054
41	Khem Chand v. Narain Das Sethi ...	89	1022
43	Kesho Das v. Tulsi Dass ..	89	229
45	Sohan Singh v. Emperor ...	89	513
47	Firm Bhogi Lal v. Amar Nath . .	90	1012
47	Mamrez v. Emperor ...	89	390
48	Mohar Singh v. Emperor ...	88	456
49	Dhawa v. Emperor . .	89	961
50	Sawan Singh v. Emperor ..	89	705
51	Muhammad Sadiq v. Emperor ..	89	458
52	Ahmad Gul v. Rahim Khan ..	89	831
54	Mohammad v. Emperor ...	89	252
60	Hazara Singh v. Emperor ..	90	153
61	Babo v. Emperor ..	89	1027
62	Ramsaran Dass v. Firm Ram Lal-Ram Labhaya ..	89	479
62	Sundar Singh v. Bhan Singh .	90	1032
63	Said Nur v. Emperor ...	89	718

Madras High Court.

1	Visvanatha Mudali v. Doraiswami Mudali	91	193
6	Valluru Appalasuri v. Sasapu Kannamma Nayuralu ...	90	881
12	Vuppulury Somasundaram v. Bhimisetti Kondayya ..	91	443
18	Veeraswami Mudali v. Venkatachala Mudali ..	92	20
20	Shuja-ul-mulk v. Umir-ul-umra ..	91	597
29	Ramaswami Reddi v. Rajagopala-chariar ...	91	270

Madras High Court—contd.

31	Muhammad Sahib v. Alagappa Chettiar ...	90	1042
33	Muthukaruppa v. Sivabhagyath-ammal ...	90	880
35	Ramaswami Chettiar v. Lodd Govindass ..	91	612
37	Samu Asari v. Anachi Ammal ..	91	561
39	Muhammad Batcha Sahib v. Arunachalam Chettiar ..	90	875
42	Ranganatha Aiyar v. Srinivasa Aiyengar ...	90	1037
46	Deivachila Aiyangar v. Venkata-chariar .	88	967
50	Periamurugappa Asari v. Manicka Chetty ..	87	213
51	Salakshi Ammal v. Doraimanikka Nadan ...	90	829
54	Kambhotlu v. Ashreff Husain . .	89	945
55	Venkatacharyulu v. Venkatasubba Rao ..	90	725
57	Madura Devasthanam v. Sundaram Annavi ...	91	525
59	E. C. Kent v. E. E. L. Kent ...	90	669
62	Ayyanna v. Pulavarti Veerabhad-ram ...	91	771
64	Durga Bai Ammal v Ramanatha Rao .	91	566
65	Subramania Aiyar v. Shanmugam Chettiar . .	92	566
66	Guntur Narasimham v. Nyapati Narayan Rao Garu .	92	405
72	Sankaralinga Mudaliar v. Official Receiver of Tinnevelly ..	92	504
78	Chinna Vavanan v. Chettiappa Chetti	91	16
81	Venku Shettithi v. Ramachand-rayya ...	92	342
84	Ayiswaryanandaji Saheb v. Sivaji Raja Saheb ...	92	928
96	Lakshmi Ammal, *In re* ...	91	729
101	Krisknaswami Bhagapathar v. Thirumalai Iyer ..	90	410
109	Pachaiyappa Chetti v. Sivakami Ammal ...	91	671
112	Narayanasami Pillai v. Gopala-krishna Naidu ...	92	483
113	Vaithilinga Mudaliar v. Chidam-baram Pillai ..	91	720
114	Mahadeva Iyer v. Ramakrishna Red-diar ...	92	653
117	Pasumarti Seethanna v. Thammandra Yasikalappa . .	91	765
118	Narasimha Mudali v. Narayanasami Chetty . .	92	333
119	Srinivasa Rao v. Kanaparthi Ven-katanarasamma ..	91	727
120	Govindaswami Pillai v. Doraiswami Mudali ..	91	181
122	Prathipati Suryanarayana v. Prathi-pati Seshayya ...	90	813
123	Kallukutt Parambath Perachan v. Putem Peetikakkal Kuttiali ...	91	144
125	Secretary of State v. Sreeramamur-thi ...	91	179
126	Khajamyan Rowther v. Appavu Pillai ...	90	642

ALL INDIA REPORTER, FOR JANUARY-FEBRUARY, 1926—contd.

Madras High Court—contd.

128	Radhakrishna Aiyar v. Vinayakaswamiar ..	91	98
128	Alapati Ramaswami v. Dasari Venkatanarayana ..	92	330
130	Sivan Pillai v. Venkateswara Ayyar	92	556
132	Gopalakrishna Konar v. Vilanga Konar ..	90	819
133	Muthu Veerappa Chettiar v Sivagurunatha Pillai ..	92	603
133	Kommareddi Ramachandrayya v. Vodury Venkataratnam ...	92	800
135	Kamaya Ban[illegible] Naicker v. Vadamalai Trivanatha Sundaradoss Theaver ..	92	415
135	Murugappa Chettiar v. L. K. S. S. Firm .	90	721
136	Periakaruppa Thevan v. A. Kaniyolaswamigal ..	91	1027
138	Karipineni Rajayya v. Kalapatpu Annapurnamma ...	92	308
139	Marudayya Thevar v. Shanmugasundara Thevar ..	91	702
140	Trustee of the Vizianagaram Estate v. Paila Achanah ...	91	280
141	Nagala Kotayya v. Koganti Kotappa ...	90	551
143	Marath Veetil Kalliani Amma v. Cochin Sircar ...	91	316
144	Metta Rama Bhatlu v. Metta Annayya Bhatlu ..	90	605
146	Naiwalt Sulaiman Ali Khan v. Venkatanaryana Garu ...	91	166
146	Munuswami Nayakar v. Abdul Azeez Sahib ..	91	724
148	Tulasidass Govindjee v. Madhavadass ...	92	570
149	Maharajah of Jeypore v. Sobha Sundar Dalai ..	91	576
150	Official Assignee of Madras v. Zamindar of Odayarpalayam ...	90	1054
150	Kunnath Packi v. Kunnath Muhammad ...	91	638
152	Payida Ramakrishnayya v. Barrey Nagarazu ..	91	608
152	Krishna Jute & Cotton Mills Co., Ltd. v. Municipal Council, Vizianagram ..	91	297
154	Khazi Muhammad Khan, *In re* ...	*Not reportable.*	
154	Devaguptapu Narasimham v. Devaguptapu Chendramma ...	92	321
155	Chockalingam Pillai v. Pichappa Chettiar ..	92	599
156	Nallakakhan Ambalam v. Kallalagar Devasthanam ...	91	319
157	Vasireddi Sree Chandra Mouleswara Prasad Bahadur v. Yadavalli Kameswara Somayajulu ...	92	402
159	Kaman Mada v. Malli ...	91	302
160	Muthia Chettiar v. Venkatasubbarayulu Naidu ...	90	1033
161	Popakannu Errappa Reddi v. Peddamuniswami Setti ...	91	264
162	Arumuga Thambiran v. Namasivaya Pandara Sannadhi ...	91	109

Madras High Court—concld.

164	Govindaswami Pillai v. Ramanathan Chettiar ...	91	714
165	Ramaswami Chettiar v. Ramanathan Chettiar ..	91	537
166	Sriranga Narayana Jeer v. Ahobila Jeer .	91	651
168	Veerannan Ambalam v. Ayyachi Ambalam ..	92	968
173	Venkataranga Aiyar v. Ramasamy Aiyar ..	93	670
175	Gandha Korliah v. Janoo Hassan ..	91	780
177	Vemulamanda Bhadrayya v. Penumetcha Jaggaraju ...	91	1017
178	Sinna Karuppan v. Muthiah Chettiar ...	92	373
179	Subramanian Chetty v. Ramaswami Chetty .	91	11
181	Kuppuswami Mudaliar v. Chockalinga Mudaliar ...	91	454
183	Suggusetty Subbayya v. Irugulapati Gangayya ..	92	687
183	Peramasami Rayudu, *In re* ..	91	532
184	Thutta Venkataswami v. Vissamsetti Kotilingam ...	91	1051
186	Poovanalingam Servai v. Veerayi ...	92	1055
187	Alaga Pillai v. Ramaswami Thevan ..	91	1024
189	Chandayya Hegde v. Kaveri Hegdathi	92	390
190	Mahalinga Naicker v. Vellàya Naicker ...	92	412
191	Venkataratnamma v. Narasimhacharyulu ...	92	470

Nagpur Judicial Commissioner's Court.

1	Sheosatyanarayanlal v. Emperor ..	91	945
5	Nagarmal v. Abdul Rahman ...	89	941
6	Jairam v. Laxman ...	91	971
9	Mahadeo v. Shioram ...	90	51
10	Balwantrao v. Farid Sahib ...	89	216
10	Onkar v. Dhansingh ...	90	963
15	Ganpati v. Salu ...	89	345
17	Nizamuddin v Jamma ...	88	693
20	Mira Moti Ju Deo v. Janki ..	89	926
21	Premsukhdas v. Peerkhan ...	95	979
25	Nathu v. Sheosa ...	89	636
29	Ratanlal v. Govinda ...	90	349
31	Lalchand v. Narhar ..	89	896
31	Bhau v. Syed Chand ...	87	921
33	Rajaram v. Ramchandra ...	89	944
35	Gokul v. [illegible] ..	90	76
37	Shankar [illegible] ...	89	782
40	Dattu v. Bhaoosingh ...	88	235
44	Bulakichand v. Amiralli ..	87	12
48	Jirabai v. Ramdularibai ...	89	991
49	Choturam Bhikraj v. Narayan ...	90	210
50	Anandrao v. President, Municipal Committee, Nagpur ..	89	929
51	Mahamad Niyajuddin Khan v. Jethu ..	87	823
52	Bisan Singh v. Fatechand ...	89	829
53	Ramprasad v. Emperor ...	88	178

ALL INDIA REPORTER, FOR JANUARY-FEBRUARY, 1926—contd.

Nagpur Judicial Commissioner's Court—concld.

55	Dattatraya v. Amrit ...	89	763
57	G. I. P. Railway Co. v. Radhakisan Jaikisan ...	90	135
60	Trimbak v. Sitaram Maharaj Sansthan ..	89	1016
61	Shiosahai Sonar v. Ramkrishna ..	92	62
62	Govindrao v. Sarjabai ...	89	872
64	Sarjabai v. Yadeosa ...	90	58
65	Udairam v. Thakur Prasad ...	89	933
66	Secretary and President Municipal Committee, Nagpur v. Devidas ..	88	480
67	Bruel & Co. v. Kesheorao ...	89	446
68	Kanhairam v. Kalicharan ...	91	218
71	Chunnilal v. Kishandas Ramdas ..	89	407
73	Fakira Sambhaji Kunbi v. Emperor	87	918
75	Shanker Rao v. Raghunathrao ...	89	331
75	Dulichand v. Sonai ...	90	239
77	Janki Sethani v. Seth Laxmi Narayan ..	89	129
79	Lal Chand v. Emperor ...	89	974
79	Chimashani v. Venkatrao ...	92	841

Oudh Chief Court.

1	Mohammad Jaimur Khan v. Raghunath Singh ..	91	1015
2	Achal Singh v. Shagunath Kuer ...	90	470
12	Rudra Partab Singh v. Suraj Kuer	91	617
13	Sajjad Ali Khan v. Jagat Bahadur	90	371
15	Ambika Prasad v. Athar Ali ...	89	182
16	Dwarka Das v. Agent E. I. Ry. Company ...	94	672
17	Jagan Nath Singh v. Jag Jewan Das ...	91	93
17	Jagmohan Singh v. Sheo Mangal Singh ...	90	332
18	Sajjad Husain v. Mul Chand ..	90	951
19	Ram Harakh v Salik Ram ...	89	332
20	Sitla Bux Singh v. Ram Newaz ...	90	741
22	Makhdum Thater v. Emperor ...	87	595
22	Ramcharan v. Sartaji ...	90	766
24	Jamna Pershad v. Ramlal ...	90	327
26	Hasnu Khan v. Emperor ...	89	241
27	Sheo Darshan v. Emperor ..	90	159
27	Sri Ram v. Suraj Bali ...	88	507
28	Maqbul Husain v. Estate of Ch. Shafiq-uz-zaman ...	89	225
31	Haidri Khanam v. Ahmad Ali ..	90	430
32	Zuhara Begam v. Mashuq Fatima...	88	175
33	Bhagwati Prashad v. Lall Bahadur	90	404
34	Chandra Pal Singh v. Bishan Singh	87	1053
35	Gobind Prasad v. Narbhir Singh ...	90	577
36	Chutkan v. Emperor ...	90	444
37	Hari Kishen Dass v. Maiku Lal ...	87	959
38	Narain Das v. Debi Din Singh ...	90	566
39	Swami Dayal v. Maqsood Husen ..	88	141
40	Thakurian v. Tota Ram ..	*To be printed.*	
41	Lachhman Das v. Bhagirath ...	90	487
43	Harkishan Das v. Sundro Bibi ...	89	424
44	Secretary of State for India v. Bishan Narain Bhargava ...	90	524
45	Sher Khan v. Misri Lal ...	89	107
46	Ram Prasad v. Paul Brothers ..	90	381

Oudh Chief Court—concld.

49	Hira Lal v. Mangal Dei ..	88	511
49	Tawakkul Khan v. Md. Mehdi Ali Khan ...	90	375
53	Bhagan v. Sukhdeo Singh ...	89	662
53	Raza Husain Khan v. Subhani ...	90	595
55	Ghuttur Singh v. Phulang Singh ..	90	119
56	Tirbhawan Dutt Pande v. Ram Piare ...	88	65
57	Emperor v. Md. Shafi ...	90	536
59	Sitapat Ram v. Mahabir Prasad ..	87	438
59	Bunyad Singh v. Naubut Singh ...	90	613
61	Maharji v. Raghoman ..	89	476
62	Baijnath v. Ramdas Sahu ...	90	321
63	Sukhpat Lal v. Emperor ...	89	972
64	Santu Chamar v. Arjun Misra ..	88	542
64	Inder Kuer v. Mohammad Taqi ..	90	505
68	Agent, Rohilkand-Kumon Railway v. Gauri Lal ...	90	46
68	Har Pershad v. Sheoshanker ...	90	679
69	Kalka Singh v. Jagwant Kunwar ...	89	722
72	Kalka Singh v Bishunath Singh ..	89	221
74	Abdul Rahman Khan v. Noor Jahan	89	359
75	Amna Khatun v. Md. Wali ..	88	481
76	Ahmad Hasan v. Kodi Lal ..	90	351
77	Abhaidat Singh v. Ragho Indar Partab Sahai ...	91	976
79	Baboo Lal v. Mirza Md. Askari ...	89	578
80	Gajadhar v. Aulad Husain ..	90	373

Patna High Court.

1	Baijnath Rai v. Mangla Prasad Narayan Sahi ..	90	732
5	Pershad Tewari v. Emperor ..	90	661
9	Tarni Singh v. Satnarain Maharaj	90	895
14	Rameshwar Singh v. Durga Mandar ...	90	454
16	Aghori Koeri v. Kishundeo Narayan Mahta ...	88	397
17	Ramchandra Singh v. Jang Bahadur Singh ..	90	553
20	Badri Chaudhry v. Emperor ...	92	874
23	Lekhraj Mahton v. Jang Bahadur Singh ...	89	822
25	Faujdar Rai v. Emperor ...	90	445
27	Anant Potdar v. Mangal Potdar ...	91	483
28	Raj Kishore Lal v. Alam Ara Begum ...	90	62
29	Ram Charan Singh v. Emperor ...	89	153
29	Shamsher Narain Singh v. Mohammad Sale ..	90	329
31	Hari Sankar Rai v. Tapaikuer ...	88	923
32	Kishore Ahir v. Emperor ..	88	864
33	Baijulal Marwari v. Thakur Prasad Marwari ...	90	262
34	Ram Saran Singh v. Mohammad Jan Khan ...	89	706
36	Barhamdeo Rai v. Emperor ...	90	439
37	Jagdip Singh v. Harku Singh ...	89	863
40	Radhe Lal v. East Indian Railway ...	90	680
42	Bibi Wajibunnissa Begum v. Babu Lal Mahton ...	90	871
47	Rameswar Narayan Singh v. Mahabir Prasad ...	90	325
49	Ganesh Lall v. Bisesar Pandey ..	88	820

ALL INDIA REPORTER, FOR JANUARY-FEBRUARY, 1926—concld.

Patna High Court—concld.

51	Harbans Narain Singh v. Mohammad Sayeed ...	90	295
53	Gokul Tatwa v. Emperor ...	89	1030
54	Keshub Prasad Singh v. Harihar Prasad Singh ...	90	703
55	Asharfi Dhimar v. Muhammad Dindalal ...	88	989
57	Harnandan Das v. Atul Kumar Prasad ..	90	158
58	Emperor v. Phagunia Bhuian ..	89	1013
61	Chakauri Lal v. Deo Chand Mahton	90	273
62	Bibi Hajo v. Har Sahay Lal .	89	992
64	Gobinda Bauri v. Kristo Sardar .	90	489
67	Nandan Singh v. Siaram Singh ..	89	151
68	Debi Dayal Singh v Gango Kuer ...	89	1020
70	Sobhit Mallah v Emperor ...	90	160
71	Sadhu Sao v. Awadh Bihar Saran Singh ...	89	802
73	Laurentius Ekka v. Dukhi Koeri ...	92	179
76	Sheo Dani Kuer v. Ramji Upadhya	90	757
77	Nathan Prasad Shah v Kali Prasad Shah ...	90	785
80	Prasanna Kumar Banerji v. Kalyan Charan Mandal ..	90	352

Rangoon High Court.

1	Ma Than v. Mg. Ba Gyaw ..	93	124
2	Maung Po Toke v. Maung Po Gyi	92	112
3	Rainey v. Burma Fire & Marine Insurance Co , Ltd. ..	91	622
4	Maung Shwe Ye v. Maung Po Mya..	91	684
7	Maung Kyi Oh v. Maung Kyaw Zan ...	93	119
9	Kalenther Ammal v. Ma Mi ..	92	125
10	Ma Sein Bye v. S. R. M. M. R. M. Chetty Firm ..	91	663
13	Emperor v. Mg. San Nyein ..	93	79
14	China and Southern Bank, Ltd. v. Te Thoe Seng ...	92	233
17	Halima Bee Bee v. Khairunnissa Bee Bee ..	91	644

Rangoon High Court—concld.

19	Ma Pan v. Maung Ne U ...	91	639
23	Maung Po San v. Maung Po Thet ...	91	653
25	Municipal Corporation of Rangoon v. M. A. Shakur ...	91	550
31	Punushwami v. Veeramuthu ...	91	676

Sind Judicial Commissioner's Court.

1	Emperor v. Nabu ..	90	434
4	Jivraj Lakhamal v. Dinanth & Co...	93	214
5	Deomal v. Khanoomal Jothmal ...	89	335
6	Kharas v. Bawanji Narsi .	92	394
8	Himalaya Assurance Co. Ltd. v. Assudamal Harbhagwan Das ...	88	878
9	Japan Trading Co., Ltd. v. Secretary of State ...	91	145
15	Pevandbai v. Thaoomal Panjoomal ..	88	744
17	Pursu v. Emperor ..	89	259
18	Moolchand Kishindas v. Thakuribai	*To be printed.*	
19	Assanmal Chatumal v. Dilbar ..	89	159
20	Tulsidas Keshowdas v. Ramzan Abdulla ...	89	238
22	Naraindas v. Khatanmal ...	88	916
26	Khimanmal Tejumal v. Lalchand Ghanomal ...	89	609
27	Mulchand Sobhraj v. Radhakishin Parumal ...	90	932
31	Official Receiver v. Naraindas-Lotaram ...	89	493
34	Chotumal Bulchand v. Lilaram Lakhmichand ...	90	64
35	Khushiram Tejbhandas v. Jhalibai ...	89	342
37	Jan Muhomed v. Ghulam Rasul Khan ...	89	104
40	Firm of Madhowji Thawor v. Yar Hussain Hydar Dasti ..	88	980
42	Devibai v. Dayabhoy Motilal ...	89	164
48	Emperor v. Dodo ...	89	451

Alphabetical List of Cases reported in Volume 92 of Indian Cases with references to the Volumes and Pages of other Law Journals and Reports.

An asterisk (*) denotes cases not reported yet elsewhere.

Names of cases reported.	Where reported.	Page.
Abdul Bari Mallick v. Emperor ...	42 C. L. J. 585; A. I. R. 1926 Cal 157; 27 Cr. L. J. 375; 30 C. W. 644	887
Abdul Hafiz Khan v. Emperor ..	L. R. 6 A. 203 Cr.; 24 A. L. J. 173; 27 Cr. L. J. 265; A. I. R. 1926 All. 188 ..	441
Abdul Majid v. Wahidullah ..	A. I. R. 1926 All. 284 ...	496
Abdul Qadir v. Emperor ...	27 Cr. L. J. 211 ..	163
Abdul Qadir v. Ilahi Bakhsh ..	A. I R. 1926 Lah. 251 ...	769
Abdul Qadir v. Ilahi Bakhsh ..	*Lahore High Court ...	791
Abdul Rahiman Sahib & Co. v. Shaw Wallace & Co.	21 L. W. 516; A. I. R. 1925 Mad. 736 ..	620
Abdul Wahed Khan v. Tamijannessa Bibi ..	A. I. R. 1926 Cal. 679 ..	905
Abdullah v. Emperor ...	A. I. R. 1924 All 233; 27 Cr. L. J. 193 ..	145
Adam Sardar v. Bisweswar Das ..	A. I. R. 1926 Cal. 681 ...	601
Addepalli Kondayya v. Yandru Veeranna ..	A. I. R. 1926 Mad. 543 ...	672
Addepalli Venkata Garunandha v. Akella Kesava Ramiah ..	50 M. L. J. 54; 23 L. W. 314, (1926) M W. N. 149; A. I. R 1926 Mad. 417 ..	973
Ah Khaung v. Emperor ..	4 Bur. L. J. 143; A. I. R. 1925 Rang 363; 27 Cr. L. J. 336 ..	752
Ahmad Baig v. Model Mill, Nagpur, Ltd. ..	A. I. R. 1926 Nag. 262 ...	25
Ahmun Zaida v. Gurdas Ram ..	A. I. R. 1926 Lah. 225 .	656
Aishan v. Municipal Committee, Lahore ...	*Lahore High Court ...	526
Ajo Mian v. Emperor ...	6 P. L. T 626; A. I. R. 1925 Pat. 696; 27 Cr. L. J. 353 ...	865
Akabai v. Narayan ..	A. I. R. 1926 Nag. 251 ..	36
Akbar Ali v. Emperor ...	7 L. L. J. 520; A. I. R. 1925 Lah. 614; 27 Cr L. J 229 .	213
Akella Ramasomayyagulu v. Official Receiver, Godavari ...	23 L. W. 80; (1926) M. W N. 169; A. I. R. 1926 Mad. 360 ...	249
Alagirisami Pillai v. Laksmanan Chetty ...	50 M. L. J. 79; A. I. R. 1926 Mad. 371 ...	1021
Alampath Krishnan v. Municipal Prosecutor, Cunnanore ...	23 L. W. 413; 27 Cr. L J. 361; A. I. R. 1926 Mad. 430 ...	873
Alapati Ramaswami v. Dasari Venkataranayana ..	(1925) M. W. N. 781; A. I. R. 1926 Mad. 128 ...	330
Alella Kesavaramayya v. Visamsetti Venkatanarasimha ..	(1926) M. W. N. 141; 50 M. L. J. 36; 23 L. W. 678; A. I. R. 1926 Mad. 452 ..	626
Alice Georgina Skinner v. Mukarram Ali Khan ...	L. R. 5 A. 607 Civ.; A. I. R. 1925 All. 77 ..	330
Allahabad Bank Ld. v. Bhagwan Das Johari ..	24 A. L. J. 323; A. I. R. 1926 All. 262 ...	309
Allah Bakhsh v. Municipal Committee, Rohtak .	A. I. R. 1926 Lah. 223 ..	966
Amiruddin v. Emperor ..	40 C. L. J. 306; A. I. R. 1925 Cal. 217; 27 Cr. L. J. 232 ...	216
Anandrao v. Daulat ...	22 N. L. R. 37; A. I. R. 1926 Nag. 274 ...	909
Appajee Pillai v. Manika Mudali ..	21 L. W. 652 ...	30
Arshed Ali v. Emperor ...	30 C. W N. 166; 27 Cr. L. J. 378 ...	890
Arshad Ali v. Zorawar Singh ..	8 L. L. J. 60 ...	986
Arunchellam Chettiar v. U. Po Lu ...	4 Bur. L. J. 91; A. I. R. 1925 Rang. 266; 3 R. 318 ...	631
Asa Nand v. Mahmud ...	7 L. L J 542 ...	241
Asanalli Nagoor v. Mahadu Meera ..	22 L. W. 820; A. I. R. 1926 Mad. 259 ...	491
Aswap Ali Bepari v. Dula Mia ...	A. I. R. 1926 Cal. 580 ...	843
Ata Husain v. Mustafa Husain ...	*Allahabad High Court ...	546
Atma Ram v. Nanak Chand ...	A. I. R. 1926 All. 274 ...	571
Attar Singh v. Kirpa Singh ...	A. I. R. 1926 Lah. 175 ...	297
Ayiswaryanandaji Saheb v. Siwaji Raja Saheb ...	A. I. R. 1926 Mad. 84; 49 M. L J. 568; 49 M. 116 ..	928

Ayyaru Pillai v. Varadaraja Pillai ...	50 M. L. J. 116; A. I. R. 1926 Mad. 431 .	770
Babu v. Emperor ..	24 A. L. J. 280; 27 Cr. L. J. 313; A. I. R. 1926 All. 276 .	697
Bachan v. Raghunath ..	24 A. L. J. 149; 48 A. 221, A. I R. 1926 All. 304 ...	264
Badri Choudhry v. Emperor ...	6 P. L. T. 620, A. I. R. 1926 Pat. 20; 27 Cr. L. J. 362 .	874
Badri Sahu v. Peare Lal Misra ..	6 P. L. T. 859; A. I. R. 1926 Pat. 140; (1926) Pat. 137 ...	350
Bago v. Roshan Beg ..	*Lahore High Court	484
Bahadura v. Emperor ...	24 A. L. J. 215; 27 Cr. L. J. 284; A. I. R. 1926 All. 304 ...	460
Baijnath Singh v. Hari Prasad Bal ..	A. I. R. 1924 Pat. 628; (1924) Pat. 209; 7 P. L. T. 353 ..	326
Baikuntha Nath De v. Shaik Hari ...	A. I. R. 1926 Cal. 592 ...	899
Baikuntha Nath Kar v. Adhar Chandra Pain .	A. I. R. 1926 Cal. 653 ..	727
Bajirao v. Dadibai ...	27 Cr. L. J. 212; A. I. R. 1926 Nag. 286 ...	161
Bajrang Bali v. Mahrajia ...	*Oudh Chief Court ...	832
Balaram Manjhi v. Jagannath Manjhi ..	A. I R. 1925 Pat. 760 ..	684
Baldeo Kurmi v. Kashi Chamar ...	24 A. L. J. 337; A I. R. 1926 All. 312 ..	995
Baldeo Singh v. Gulab ...	*Oudh Chief Court ..	237
Balshet Mahadshet Yekawde v. Hari Baburao Rane..	27 Bom. L. R. 1487; A. I. R. 1926 Bom. 119 ..	542
Bangshi Badan Haldar v. Ratan ...	*Calcutta High Court ..	961
Banjoisi Narasamma v. Banjoisi Sarasamman ..	23 L. W. 157; (1926) M. W. N. 163; A. I. R. 1926 Mad. 353 ..	61
Bantu v. Lehna Das ..	*Lahore High Court .	723
Banwari Lal v Jhunka ..	27 Cr. L. J. 278; 24 A. L. J. 217; A. I R. 1926 All. 229 ...	454
Banu Mal v. Paras Ram ..	7 L. L. J. 397; A I R. 1925 Lah 610 ..	254
Barati v. Surit ...	A. I R. 1926 Nag. 277 ..	916
Barkat v. Relu Mal ..	7 L. L. J 509; A. I R. 1925 Lah. 627 ..	178
Barkat Bibi v. Abdul Aziz ...	2 L. C. 186 ..	46
Barkoo v. Atmaram ...	*Nagpur Judicial Commissioner's Court ...	818
Basant Rai Bhandari v. Salik Ram ..	A. I. R. 1926 Oudh 288 ...	519
Bashir Ahmad v. Zobaida Khatun ..	3 O. W. N. 105; A. I. R. 1926 Oudh 186	265
Bashirulla Bhuiya v. Meajan ..	A. I. R. 1926 Cal. 690 ...	593
Batisa Kuer v. Raja Ram Pandey ..	(1925) Pat. 343; A. I. R. 1926 Pat. 192; 7 P. L. T. 393 ...	177
Batuk Nath v. Jugal Kishore ...	24 A L. J. 281; A. I. R. 1926 All. 285 ...	551
B. N. Ry. Co. v. Makbul ...	A. I. R. 1925 Pat. 755; (1926) Pat. 74; 27 Cr. L. J. 313; 7 P. L. T. 343 ..	697
Bengal North-Western Ry. v. Bansi Dhar ...	3 O. W. N. 145; A. I. R. 1926 Oudh 218 ..	603
Beni Ram v. Emperor ...	27 Cr. L. J. 310; A. I. R. 1926 All 237 ..	694
Bhagat Singh v. Mathra ...	*Lahore High Court ...	982
Bhagirathi v. Emperor ...	30 C. W. N. 142; 27 Cr. L. J. 222; A. I. R. 1926 Cal. 550 ..	174
Bhagwandas-Paras Ram v. Jado Nath ..	A. I. R. 1926 Lah. 236 ..	898
Bhagwati Dayal v. Dhan Kunwar ...	24 A. L. J. 331; A. I. R. 1926 All. 311 ...	1027
Bhagwati Singh v. Gurcharan Dube ...	L. R 5 A. 647 Civ.; A. I. R. 1925 All. 96 ...	332
Bhatu Ram Modi v. Fogal Ram ..	(1925) Pat. 357; 5 Pat. 223; A. I. R. 1926 Pat. 141; 7 P. L. T. 340 ...	629
Bhola v. Emperor ...	27 Cr. L. J. 275 ...	451
Bhunjanga Rao v. Periyathambi Goundan ...	*Madras High Court ...	1047
Bhupendra Narayan Singh Bahadur v. Madar Bakhsh Sheikh ...	A. I. R. 1925 P. C. 297; 23 L. W. 9; 52 I. A. 439; 53 C. 1 P. C. ...	681
Bibi Khodaijatul Kobra v. Harihar Missir ...	4 Pat. 688; 7 P. L. T. 333; A. I. R. 1926 Pat. 209 ..	900
Bishen Singh v. Wasawa Singh ...	A. I. R. 1926 Lah. 177 ...	317
Bohisetti Mamayya v. Official Receiver, Guntur ...	23 L. W. 10; (1926) M. W. N. 124; A. I. R. 1926 Mad. 338 ...	726
Bombay Baroda & Central India Ry. v. Gulabbhai Bhagwandas ...	A. I. R. 1926 All. 296 ...	532
Bulli Mal v. Jhabba ...	A. I. R. 1925 Lah. 504; 7 L. L. J. 280 ...	569
Buta v. Ghulam Muhammad ..	A. I. R. 1926 Lah. 247 ...	725
Cecil Cole v. Nanalal Moraji Dave ...	26 Bom. L. R 880; A. I. R. 1925 Bom. 18; 49 B. 172 .	191
Chamari Singh v. Public Prosecutor, Gaya ..	4 Pat. 484; A. I. R. 1925 Pat. 677; 27 Cr. L. J. 371; 7 P. L. T. 372 ..	883

Champa Devi v. Pirbhu Lal ...	27 Cr. L. J. 253; 24 A. L. J. 329; A. I. R. 1926 All. 287	429
Chan Elliam v. Neo Thein Theong ..	A. I. R. 1925 Rang. 361; 4 Bur. L. J. 138 ...	786
Chandayya Hegde v. Kaveri Hegadthi ..	19 M. L. J. 727; A. I. R. 1926 Mad. 189	390
Chandiram v. Emperor ...	27 Cr. L. J. 286 ..	462
Chandoo v. Murlidhar	13 O. L. J. 138; A. I. R. 1926 Oudh 311 ...	732
Chandra Kumar Guha v. Elahi Buksha ...	A. I. R. 1926 Cal. 667 ...	616
Chandra Mouleswara Prasada v. Yadavalli Kameswara ..	(1925) M. W. N. 776; 22 L. W. 833; 50 M. L. J. 97; A. I. R. 1926 Mad. 157	402
Chandrabhaga Bai v. Bakaram ...	A. I. R. 1926 Nag. 276	735
Chandrabhan Prakashnath v. E. I. Ry. Co. ...	21 A. L. J. 305, A. I. R. 1926 All. 290 ..	622
Chandrika Prasad v. Nazir Husain ..	A. I. R. 1926 Oudh 306 ...	681
Chandulal Maganlal v. Motilal Harilal ..	27 Bom. L. R. 1192; A. I. R. 1926 Bom. 43 ..	545
Chet Ram v. Haicho ..	2 L. C. 178 ..	35
Chhidda v. Emperor ..	24 A. L. J. 178; 27 Cr. L. J. 287, A. I. R. 1926 All. 225 ..	463
Chimashani v. Venkatrao ...	8 N. L. J. 135; A. I. R. 1926 Nag. 79 ...	841
China v. Te Thoe Seng ..	3 R. 477; A. I. R. 1926 Rang. 14 ..	233
Chintalapati Butchi Seetayya Garu v. Gollavilli Appadu ...	A. I. R. 1926 Mad. 526 ...	814
Chiragh Din v. Emperor ...	7 L. L. J. 621, 27 Cr. L. J. 330	746
Chiranji Lal v. Shib Lal	A. I. R. 1926 Lah. 242 ..	994
Chittammal v. Ponnusami Naicker	23 L. W. 94; (1926) M. W. N. 121 & 172; 50 M. L. J. 180; A. I. R. 1926 Mad. 363 ..	573
Chockalingam Pillai v. Pichappa Chettiar ..	22 L. W. 579, (1925) M. W. N. 802; A. I. R. 1926 Mad. 155	599
Chunilal Mokamdas Marwadi v. Christopher ..	27 Bom. L. R. 1462; A. I. R. 1926 Bom. 65, 50 B. 107 ..	368
Commissioner of Income Tax v. Lucknow Ice Association ..	A. I. R. 1926 Oudh 191 .	257
Commissioner of Income-Tax, Bombay v. M. H. Sanjana & Co. ...	27 Bom. L. R. 1471; A. I. R. 1926 Bom. 129; 50 B. 87 ...	517
Commissioner of Income Tax, Madras v. Messrs. King & Partrige ..	50 M. L. J. 176; 49 M. 296; A. I. R. 1926 Mad. 368 ...	943
D. R. K. Saklat v. Bella ..	23 A. L. J. 1016; A. I. R. 1925 P. C. 298; 49 M. L. J. 821; 13 O. L. J. 23, 30 C. W. N. 289; 28 Bom. L. R. 168; 3 R. 582 **P. C.** ...	200
Darbari Mal-Ram Sahai v. Secretary of State ...	6 L. 499; A. I. R. 1926 Lah. 116 ..	312
Dawlat v. Kashirao ...	A. I. R. 1926 Nag. 280 ..	822
Daya Ram v. Emperor ...	6 L. 489; 27 Cr. L. J. 247; A. I. R. 1926 Lah. 83 ..	423
Deo Kali v. Ranchoor Bux ..	A. I. R. 1926 Oudh 253; 13 O. L. J. 208 ..	19
Devji Padamsey v. Thommadra Erikalappa ...	27 Bom. L. R. 1494; A. I. R. 1926 Bom. 63 ...	555
Dhana Mohammad v. Nastulla Molla ..	A. I. R. 1926 Cal. 637 ...	948
Dhanpat Rai v. Kahan Singh ...	2 L. C. 107 ...	479
Dhanrajgirji Narasinggirji v. Tata Sons Ltd. ...	26 Bom. L. R. 858; A. I. R. 1924 Bom. 473; 49 B. 1 ..	225
Digambar, *In re* ...	A. I. R. 1926 Nag. 306 ...	525
Din Mohammad v. Matab Bibi ...	A. I. R. 1926 Lah. 203 ..	252
Dittu Ram v. Nawab ...	7 L. L. J. 448; A. I. R. 1925 Lah. 639 ...	272
Diwan Chand v. Emperor ...	27 Cr. L. J. 333; A. I. R. 1926 Lah. 227 ...	749
Doraswami Nadar v. Joseph L. Mother ..	A. I. R. 1926 Mad. 319 ...	119
Dost Muhammad v. Kadar Batcha ...	23 L. W. 240; A. I. R. 1926 Mad. 466 ...	950
Duma Toma Rumav v. Nathu Farsha Kurel ..	27 Bom. L. R. 249; A. I. R. 1925 Bom. 431 ..	16
Durga Bai, *In the matter of* ...	24 A. L. J. 310; A. I. R. 1926 All. 301 ..	482
Durga Prosad Lahiri Choudhuri v. Ratan Mahommed Sarkar ...	*Calcutta High Court ...	897
Dwarka v. Emperor ...	27 Cr. L. J. 313 ...	855
East Indian Railway v. Firm Baldeo Gutain ...	*Allahabad High Court ..	1007
Emperor v. Daulat Singh ..	24 A. L. J. 224; 27 Cr. L. J. 327 ...	743
——— v. Ghulam Mohammad ...	A. I. R. 1925 Lah. 510; 7 L. L. J. 331; 27 Cr. L. J. 302 ...	590
——— v. Gulab ...	27 Cr. L. J. 300 ...	588
——— v. Kesar ...	27 Cr. L. J. 303; 24 A. L. J. 228; A. I. R. 1926 All. 226 ..	591

Emperor v. Manant K. Mehta ..	27 Bom. L. R. 1343; 49 B. 892; A. I. R. 1926 Bom. 110; 27 Cr. L. J. 305 ..	689
——— v. Mathro ...	27 Cr. L. J. 309; A. I. R. 1926 Sind 101 ...	693
——— v. Maung Than Gyaung ...	A. I. R. 1925 Rang. 375; 4 Bur. L. J. 145; 3 R. 514; 27 Cr. L. J. 312	854
——— v. Nga Tun Maung ...	A. I. R. 1925 Rang. 362; 4 Bur. L. J. 169; 27 Cr. L. J 337 ..	849
——— v. Tej Ram ...	27 Cr. L. J. 360 ...	892
Fateh Mahommed v. Mitha ..	*Lahore High Court ..	479
Fatehchand v. Parbati Bai ..	18 S. L. R. 85; A. I. R. 1925 Sind 269 ...	196
Fazlar Rahman v. Abdul Samad ...	*Calcutta High Court ...	960
Firm Bihari Lal-Jai Narain v. Har Narain Das ...	*Lahore High Court ..	674
Firm Budhu Mal-Parma Nand v. Gokal Chand ..	8 L. L. J. 3; 7 L. 113 ...	1015
Firm Jai [illegible] v. Nrmal Das ...	7 L. L. J. 553; A. I. R. 1926 Lah. 24 ..	235
Firm of [illegible] : v. Ghulam Mahbub Khan ...	A. I. R. 1925 P. C. 290; 49 M. L J. 806; 43 C. L J. 1; 23 L. W. 3; 24 A. L. J. 48; (1926) M. W. N. 108; 28 Bom. L. R. 211; 53 C. 88; 30 C. W. N. 577 **P. C.** ..	760
Firm of Ram Prosad-Ram Kissen v. Haro Kumar Basak ..	*Calcutta High Court ..	298
Fulchand Mohanlal v. Harilal Nansa .	27 Bom. L R 1503; A. I. R. 1926 Bom. 69; 50 B. 124 ..	549
Gajanan Narayan Patkar v. Jivangiri Chamelgiri .	27 Bom. L. R. 1165, A I. R. 1926 Bom. 131	527
Ganga Bakash Singh v. Maula Bux Singh ...	13 O. L J. 132 ..	612
Ganga Pra[illegible] v. B. B. & C. I. Ry. ...	24 A. L. J. 328 ..	522
Ganpat Rai v. Kani Ram-Munna Lal ..	24 A. L. J. 283; A. I. R. 1926 All 293 ..	535
Gaura Telin v. Shriram Bhoyer ...	A. I. R. 1926 Nag. 265 ..	926
Gauri Shankar v. Bhairon Pershad ..	A. I. R. 1926 Oudh 207 ..	17
Gauri Shankar v. Decruze ..	3 O. W. N. 378 ..	673
Ghissu v. Amir Ali Khan ..	*Allahabad High Court ..	555
Gobind Lal Dutt v. Official Assignee, Calcutta ..	29 C. W. N. 163; A. I. R. 1925 Cal. 291 ...	563
Gokul Das v. Nathu ...	24 A L. J. 291 ...	492
Gonnabathula Thammayya v. Gonnabathula Chinnayya ...	22 L. W. 752; (1926) M. W. N. 38; A. I. R. 1926 Mad. 282 ...	594
Gopal v. Collector of Aligarh ...	*Allahabad High Court ..	134
Gopal v. Krishnarao ..	*Nagpur Judicial Commissioner's Court .	678
Gopal Chandra Banerjee v. Bhutnath Sasmal ...	42 C. L. J. 520; A. I. R. 1926 Cal. 312 ...	411
Gopal Chandra Das v. Satya Bhanu Goshal ...	A. I. R. 1926 Cal. 634 ...	963
Gopilal Bhawaniram v. Pandurang ...	A. I. R. 1926 Nag. 241 ...	640
Govinda Nadan v. Ramasami Chettiar . .	(1925) M. W. N. 927; A. I. R. 1926 Mad. 224; 23 L. W. 573 ..	106
G. I. P. Railway v. Kunj Behari Lal ..	A I. R. 1926 All. 228 ..	993
G. I. P. Ry. Co v. Chandulal Sheopratap ..	27 Bom. L. R. 1500; A. I. R. 1926 Bom. 138; 50 B. 84 ..	548
Guduthuru Thimmappa v. Balakrishna Mudaliar ..	23 L. W. 361; 50 M. L. J. 298; A. I. R. 1926 Mad. 427 ...	915
Gulabchand Rupji v. Emperor ...	27 Bom. L. R. 1039; A. I. R. 1925 Bom. 467; 49 B. 799; 27 Cr. L. J. 251 ...	427
Guntur Narasimham v. Nyapati Narayanarao Garu ...	22 L. W. 592; A. I. R. 1926 Mad. 66 ..	405
Haji Rahmatulla v. Secretary of State for India ...	27 Bom. L. R. 1507; A. I. R. 1926 Bom. 50 ..	351
Hakim Din v. Qutab Din ...	A. I. R. 1926 Lah. 211 ...	264
Hari Singh v. Emperor ...	7 L. L. J. 576; A. I. R. 1926 Lah 4; 27 Cr. L. J. 233 ..	217
Hashmat Hussain v. Emperor ...	7 L. L J. 96; 27 Cr. L. J. 225 ...	209
Hazura Mal-Lal Chand v. Rang Ilahi ..	*Lahore High Court ..	273
Hem Chandra Sen v. Girish Chandra Saha ...	*Calcutta High Court ...	107
Hitendra Singh v. Maharajadhiraj of Darbhanga ...	(1925) Pat. 359; A. I R. 1926 Pat. 147; 7 P. L. T. 392 ...	626
Hussain Bakhsh v. Sarbuland ..	7 L. L. J. 548; 6 L. 536; A. I. R. 1926 Lah. 14 ...	268
Ibrahim v. Shah Mahomed ...	*Lahore High Court ...	263
Imam Ali v. Emperor ...	27 Cr. L. J. 338; A. I. R. 1926 Lah. 212 ...	850
Imani Satyanarayana v. Devarakonda Satyanarayana Murte ..	50 M. L. J. 144; (1926) M. W. N. 7; A. I. R. 1926 Mad. 428 ..	85
Indal v. Debi ..	A. I. R. 1926 Nag. 174 ...	683
Indar Singh v. Emperor ...	27 Cr. L. J. 297; 24 A. L. J. 270; A. I. R. 1926 All. 302 ...	585

Indarpal Singh v. Kalloo ..	*Oudh Chief Court ...	670
Indian Vacuum Brake Co., Ltd. v. E. S. Luard ...	42 C. L. J. 543; A. I. R. 1926 Cal. 152; 53 C. 306 ..	1008
Ishar Das-Dharam Chand, *In the matter of*	A. I. R. 1926 Lah. 168 ..	249
Ishwar Das v. Emperor ...	27 Cr. L. J. 344; A. I. R. 1926 Oudh 290 ..	856
Isram v. Gangia ...	*Nagpur Judicial Commissioner's Court ..	295
Iswor Sant v. Torendra Nath Kuila ...	42 C. L. J. 560; A. I. R. 1926 Cal. 163 ..	981
Jagrup Singh v. Indrasan Pande ...	24 A. L. J. 325; A. I. R. 1926 All. 216 ...	1
Jahangir v. Ram Harakh ..	13 O. L. J. 243 ..	262
Jai Narain v. Jafar Beg ...	24 A. L. J 355 ...	1017
Jalaluddin v. Emperor ...	24 A. L. J. 230; 27 Cr. L. J. 345; A. I. R. 1926 All. 271 ...	857
Jamshedji Naoroji Gamadia v. Maganlal Bankeylal & Co. ...	27 Bom. L. R 514; A. I. R. 1925 Bom. 314 ...	9
Jang Bahadur v. Jagat Narain ..	A. I. R. 1926 Oudh 318 ...	906
Jasoda Koer v. Janak Missir ..	4 Pat. 354; A. I. R. 1925 Pat. 787 ...	1034
Jeobaran Singh v. Ramkishun Lal ...	4 Pat 503; A. I. R. 1925 Pat. 623; 27 Cr. L. J. 359 ...	871
Jeomal v. Emperor ...	27 Cr. L. J. 326 ..	742
Jethanand Tekchand v. Secretary of State for India ...	*Sind Judicial Commissioner's Court ...	371
Jitendra Nath Chatterjee v. Jasoda Sahun .	(1925) Pat. 353, A. I. R. 1926 Pat. 122; 7 P. L. T. 299 ...	617
Jiwa Ram v. Jhanda Singh ..	1 L. C. 43 ..	346
Jotsing Harising Advani v. Secretery of State for India ..	A. I. R. 1926 Sind 130 ..	331
K. Venkat Reddiar & Co. v. Desikachariar ...	22 L. W. 490; A. I. R. 1925 Mad. 1279 ...	354
K. M. First Grade Pleader, *In the matter of* ..	A. I. R. 1924 Mad. 479; (1924) M. W. N. 5; 27 Cr. L. J. 230 **F. B.** ..	214
Kadhori v. Emperor ..	L. R. 6 A. 216 Cr; 24 A. L. J. 162; 27 Cr. L. J. 276; A. I. R. 1926 All. 193 ...	452
Kala Gella v. Shivji ..	*Sind Judicial Commissioner's Court ..	493
Kala Khan v Nathu Khan ...	A I R. 1926 Lah. 229	990
Kalap Nath v. Emperor ...	27 Cr L. J. 303; 24 A. L. J. 203; A. I. R. 1926 All. 288 ...	591
Kalenther Ammal v. Ma Mi ...	3 R. 474; A. I. R. 1926 Rang. 9 ..	125
Kaliani Anni v. Thirumalayappa Mudaliar ..	*Madras High Court ..	355
Kaliappa Goundan v. Maniam Sellappa Goundan ..	23 L W 101; A. I. R. 1926 Mad. 296, 27 Cr. L. J. 334 ...	750
Kaliba Sahib v. Subbaraya Ayyar ...	23 L. W. 99; (1926) M. W. N. 123 & 178; A. I. R. 1926 Mad. 365 ..	621
Kalka Prasad v Panna ...	A I R. 1926 All. 233 ...	3
Kalliakkal v. Palani Koundan ..	23 L W. 227; 50 M L. J. 200; (1926) M. W. N. 245; A. I R. 1926 Mad. 412 ..	533
Kallu v. Emperor ...	27 Cr. L. J. 252; A I. R. 1926 Lah. 240 ...	428
Kallu Mal v. Partab Singh .	A. I. R. 1926 Oudh 301 ...	787
Kandasami Chettiar v. G. F. F. Foulkes ..	A. I. R. 1926 Mad. 396	100
Kandasami Chetty, *In re* .	50 M. L. J. 44; (1926) M. W. N. 146; 27 Cr. L. J. 350; A. I. R. 1926 Mad. 346 ...	862
Kaniza v. Hasan Ahmad Khan ..	3 O. W. N. 114; A. I. R. 1926 Oudh 231	82
Kankai v. Tikaram ..	A. I. R. 1926 Nag. 239 ..	80
Kannammal, *In re* ...	23 L. W. 384; 27 Cr. L. J. 311; A. I. R. 1926 Mad. 570 ..	695
Kannuri Venkata Siva Rao v. Chittoori Rama Krishnayya ..	(1925) M W. N. 874; 23 L. W. 103; 50 M. L. J. 144; A. I. R. 1926 Mad 246 ...	790
Kanshi Ram v. Muhammad Abdul Rahman ..	6 L. L. J. 336; A. I R. 1925 Lah. 216	403
Kanshi Ram v. Prabh Dial-Arjan Dass & Co. ...	7 L. L. J. 457; A. I. R. 1925 Lah. 618 ...	259
Karingan v Harihar Dutt ..	3 O W. N 58; 13 O. L. J 53 ...	34
Karipineni Rajayya v. Kalpatapu Annapurnamma ...	22 L. W. 828; A I. R 1926 Mad. 138 .	308
Kashi Prasad v. Emperor ..	24 A. L. J. 161; A. I. R. 1926 All. 141; 27 Cr. L. J. 300 ..	588
Kehri Singh v. Thirpal ...	L. R. 6 A. 213 Rev.; 23 A. L. J. 965; A. I. R. 1926 All. 113; 48 A. 104	282
Keramat Mandal v. Emperor ...	42 C L J. 528; 27 Cr. L. J. 277; A. I R. 1926 Cal. 147	453
Keramat Mandal v. Emperor ...	42 C. L. J. 524; 27 Cr. L. J. 263; A. I. R. 1926 Cal. 320 ...	439
Kesavalu Naicker v. Corporation of Madras ...	23 L W. 233; 50 M. L. J. 301; A. I. R. 1926 Mad. 381 ...	1053

Kesheo v. Jagannath ...	A. I. R. 1926 Nag. 81: 22 N. L. R. 5 ...	121
Kesheorao v. Marotirao ...	8 N. L. J. 227; A. I. R. 1926 Nag. 139 ..	102
Khamani v. Emperor ...	L. R 6 A. 207 Cr; 24 A. L. J. 171; 27 Cr. L. J 296; A. I. R. 1926 All. 306 ..	584
Kharas, R. P. v. Bhawanji Narsi ...	A. I. R. 1926 Sind 6 ...	394
Khazan Singh v. Umrao Singh ..	A. I. R. 1925 All. 44; L. R. 5 A. 609 Civ. ...	335
Khem Karan Das v. Baldeo Singh ...	A. I. R. 1926 All. 282 ...	1046
Khijiruddin v. Emperor ...	42 C. L. J. 504; 27 Cr. L. J. 266; A. I. R. 1926 Cal. 139; 53 C. 372 ..	442
Khoday Gangadara Sah v. Swaminadha Mudaliar ...	22 L. W. 679; A. I. R. 1926 Mad. 218 ..	112
Khurshed Meerza v. Faizuddin Ali ...	*Calcutta High Court ..	902
Khurshid Begam v. Abdul Rashid ..	9 N. L. J. 11; A. I. R. 1926 Nag. 234 ..	913
Kidar Nath v Bhikham Singh ..	*Oudh Chief Court	679
Kisan v. Jasodabai ...	A. I. R. 1925 Nag. 298 ...	530
Kishanchand v. Emperor ...	27 Cr. L. J. 243 ..	419
Komarasami Chetti v. Sundar Mudaliar ..	23 L. W. 212 ...	724
Kommareddi Ramachandrayya v. Vodury Venkataratnam ...	22 L. W. 582; (1925) M. W. N. 804; A. I. R. 1926 Mad. 133 ..	600
Kommineni Appalaswamy v. Kommineni Simhadri Appadu ..	23 L. W. 29; A. I. R. 1926 Mad. 384 ...	844
Koyyalamudi Chinnayya v. Koyyalamudi Mangamma	*Madras High Court ..	661
Koyyalamudi Subbanna v. Koduri Subbarayudu ..	50 M. L. J. 125; A. I. R. 1926 Mad 390 ...	805
Krishna Gopal v Emperor	27 Cr. L. J. 301 ...	589
Kuthalinga Mudaliar v. Shanmuga Mudaliar ..	50 M. L. J. 234; 23 L. W. 373; (1926) M. W. N. 274; A. I R. 1926 Mad. 464 ..	989
L. A. Morrison v. H. M Crowder ...	27 Cr. L. J. 302 ..	590
Lachhman Singh v. Emperor ..	7 L L. J 582; 27 Cr. L. J. 238; A. I. R. 1926 Lah 143 ...	222
Lachhman Singh v Ram Das ...	*Lahore High Court ..	949
Ladha Singh v Sundar Singh ...	*Lahore High Court ...	762
Lakshmi Chand v. Mukta Parshad ...	8 L L. J. 67 ...	1006
Lal Chand v. Huns Kumar ...	7 L. L. J. 590; A. I R. 1926 Lah. 108; 7 L. 55	651
Lalchand Deomal, *In re* ...	A I. R. 1925 Sind 259 ..	1016
Lalit Kumar Sen v. Emperor ...	42 C. L. J. 551; A. I. R. 1926 Cal. 174; 27 Cr. L. J. 382 ..	894
Lallu Singh v. Gur Narain ...	*Allahabad High Court ...	768
Lalman v. Shiam Singh ..	24 A. L. J. 288; A. I. R. 1926 All. 291 ...	608
Langley Billimoria & Co. v. Lakhmichand-Gopaldas .	*Sind Judicial Commissioner's Court ..	621
Laurentius Ekka v Dhuki Koeri ...	4 Pat. 766; A. I. R. 1926 Pat. 73; 7 P. L. T. 362 ..	179
Laxman Bhikaji v Secretary of State for India ...	27 Bom. L. R. 463; A. I. R. 1925 Bom. 365; 49 B. 554 ...	110
Leoh Moses v. Solomon Judah Meyer ...	27 Bom. L. R. 1460; A. I. R. 1926 Bom. 139; 50 B. 32 ...	367
Local Government v. Doma Kunbi ...	27 Cr. L. J. 339 ...	851
M. S. S. Chettyar Firm v. Ma Tin Tin ...	A. I. R. 1925 Rang. 349; 4 Bur L. J. 179 ...	677
Ma Me Mya v. Ma Min Zan ..	A I. R. 1925 Rang. 320; 3 R. 490; 4 Bur. L J. 159 ..	368
Ma Shewe U v. Ma Shin ..	A. I. R. 1925 Rang. 381; 4 Bur. L. J. 146 ...	775
Ma Tok v. Ma Yin ...	3 R. 77; A. I R 1925 Rang. 228 ..	489
Madat Khan v. Emperor ..	7 L L. J. 628; 27 Cr. L. J. 283; A. I. R. 1926 Lah. 221 ...	459
Mahabir Prasad Tewari v. Jamuna Singh ...	A. I. R. 1925 P. C. 234; (1925) M. W. N. 738; 23 L. W. 75 P. C. ...	31
Mahadeo Prasad v. Anandi Lal ...	47 A. 90; 22 A. L. J. 887; L. R. 5 A. 749 Civ.; A. I. R. 1925 All. 60 ...	348
Mahadeo Prasad v. Ram Phal ...	3 O. W. N. 186; 13 O. L. J. 55; A. I. R. 1926 Oudh 258 ...	685
Mahadeva Iyer v. Ramkrishna Reddiar ...	23 L. W. 199; 50 M. L. J. 67; A. I. R. 1926 Mad. 114; (1925) M. W. N. 707 ...	653
Mahalinga Naicker v. Vellaya Naicker ...	22 L. W. 794; (1925) M. W. N. 884 A. I. R. 1926 Mad 190 ...	412
Mahammad Raza Saheb Belgami v. Sadasiva Rao ...	49 M. 49, A. I. R. 1926 Mad. 297 ..	918
Maharaj Dhiraj of Darbhanga v. Commissioner of Income Tax ...	6 P. L. T. 355; 2 Pat. L. R. 212 Cr.; (1925) Pat. 49; A. I. R 1925 Pat. 313 ..	338
Maharaj Din v. Bhairon ...	A. I. R. 1926 All. 290 ...	473

Mahipal Singh v. Sarjoo Prasad ..	3 O. W. N 100; A. I. R. 1926 Oudh 141 ...	99
Mahomed Ghaus v. Mahomed Ali Shah ...	A. I. R. 1926 Lah. 188 ...	294
Mahomed Siddiq v Li Kan Shoo ...	A. I. R. 1925 Rang 372; 4 Bur. L. J. 154 ...	766
Mahtab Shah v. Ali Haidar Shah ...	6 L. 338; A. I. R. 1925 Lah. 429; 7 L. L. J. 190 ..	709
Manavikrama Zamorin Raja of Calicut v. Venkatagiri Pattar ...	23 L. W. 58 ..	245
Manepalli Satanarayanamurthi v. Thommandra Erikalappa ...	50 M. L. J. 150; 23 L. W. 396; (1926) M. W. N. 282 A. I. R. 1926 Mad. 410 ..	962
Mansaram v. Rudhu ..	A. I. R. 1926 Nag. 289 ..	708
Maqsud Ali v. Abdullah ...	L. R. 6 A. 112 Civ.; A I. R. 1925 All. 312 ...	468
Marotrao v. Municipal Committee, Nagpur ...	A. I. R. 1926 Nag. 281 ..	716
Masala v. Emperor ...	27 Cr. L. J. 358 ...	870
Mattapalli Venkataratnam v. Veppu Sitaramayya ...	A. I. R. 1926 Mad. 305 ...	314
Maung Ba Thein v. Ma Than Myint ...	3 R. 483, A. I. R. 1926 Rang. 49 ...	253
Maung Han v. Ko Oh ...	A. I R. 1925 Rang. 366; 4 Bur. L. J. 180 ..	688
Maung Mya Din v. Maung Ye Gyi ...	A. I. R. 1925 Rang. 350; 4 Bur. L. J. 136 ...	719
Maung Po Seik v. U Nandiya ...	A. I. R. 1925 Rang. 374; 4 Bur. L. J. 178 ...	667
Maung Po Toke v. Maung Po Gyi ...	3 R. 492; A. I. R. 1926 Rang. 2 ...	142
Maung San Pwe v. Hamadanee ...	A. I. R. 1925 Rang 382; 4 Bur. L. J. 166 ...	777
Maung Sein Htin v. Chee Pan Ngaw .	3 R. 275; A. I. R. 1925 Rang. 275 ..	270
Maung Set Khaing v. Maung Tun Nyein ...	A. I. R. 1925 Rang. 221; 4 Bur. L. J. 69; 3 R. 82 ...	512
Maung Than v. Zainat Bibi ..	3 R. 488; A. I. R. 1926 Rang. 50	208
Maung Tun v. Emperor .	A. I R. 1925 Rang. 353; 4 Bur. L. J. 172; 27 Cr. L. J. 318 ..	702
Mayappa Chettiar v. Kolandaivelu Chettiar ...	*Madras High Court ...	715
McDonnell v. Emperor ..	A. I. R. 1925 Rang. 345; 4 Bur. L. J. 117; 3 R. 524; 27 Cr. L. J. 321 .	737
Meenakshisundara Nachiar v. Veerappa Chettiar ..	(1926) M. W. N. 4 ...	838
Mg Po Kin v. Mg. Po Oh ...	A. I. R. 1925 Rang. 373; 4 Bur. L. J. 160 ...	736
Miran v. Emperor ...	23 A. L. J. 1027; A. I. R. 1926 All. 168; 27 Cr. L. J. 240 ...	224
Mohammadi Begam v. Tufail Hasan ...	23 A. L. J. 888; A. I. R 1926 All. 20; 48 A. 17 ...	260
Mohan Singh v. Nathu Mal ..	*Lahore High Court ..	299
Momoon v. Ibrahim .	A. I. R. 1926 Sind 143; 27 Cr. L. J. 248 ..	424
Moolji Murarji Sunderji v. Pinto ..	*Sind Judicial Commissioner's Court ...	667
Moti Mal-Ram Sarup v. Daulat Ram ...	A I R 1926 Lah 231 ...	296
Mughees-ud-din v. Emperor ..	27 Cr. L J. 382; A. I. R. 1926 Lah. 236 ...	894
Muhammad v. Muhammad Ali ..	A. I. R. 1926 Lah 243 ..	289
Muhammad Abdul Gaffur v. Muhammad Samsuddin ...	47 M. L. J. 730; A. I. R. 1925 Mad. 297 ...	139
Muhammad Afzal v. Muhammad Mahmud ...	24 A. L J 307 ...	840
Muhammad Ibrahim v. Ram Chandra	24 A. L. J 244; A I. R 1926 All. 289 ...	514
Muhammad Ibrahim v Yado ..	A. I R. 1926 Nag. 238 ...	553
Muhammad Ismail v. Vahiduddin ...	24 A L J. 311, A. I. R. 1926 All. 270 ...	503
Muhammad Mohideen Maracayar v. Ramanadhan Chettiar ..	22 L W. 872; A. I. R. 1926 Mad. 217 ..	597
Muhammad Zakaria v Kishun Narain ...	A. I R. 1926 All. 265 ...	644
Mukand Lal v. Lorindi Bai ..	7 L. L. J. 198 ..	131
Mul Chand v. Emperor ..	27 Cr. L. J. 377; A. I. R. 1926 Lah. 250 ..	589
Mulai Rai v. Emperor ...	24 A. L J. 314; 27 Cr. L. J. 351; A. I. R. 1926 All. 277 .	863
Mulraj v. Indar Singh ...	A. I. R. 1926 All. 102; 48 A. 150 ...	471
Mulugu Chengayya v. Aruvelu Devasanambagaru...	50 M. L. J. 145; 23 L. W. 390; (1926) M. W. N. 289, A. I R. 1926 Mad. 406 ...	720
Mumtaz Ali v. Allah Banda ...	*Allahabad High Court ...	600
Municipal Committee, Ferozepore v. Milkhi Ram ..	A. I R 1925 Lah. 505; 7 L. L. J. 358 ...	602
Municipal Committee, Taran Taran v. Mul Raj ...	*Lahore High Court ...	765
Municipal Council, Cochin v. Pratath Bavu Devussi ..	22 L. W. 671; A. I. R. 1926 Mad. 235 ...	18
Municipal Council, Tuticorin v. Shunmugha Moopanar ..	(1925) M W. N 880; 23 L. W. 31; A. I. R. 1926 Mad. 251; 49 M. 219 ...	610
Municipality of Tando Adam v. Khair Mahomed ..	A I. R. 1925 Sind 260 ...	1019
Munshi Ram v. Bhagwan Das ..	7 L. L. J 596; A. I. R. 1926 Lah. 152 ...	595
Murad Bibi v Amir Hamza ...	*Lahore High Court .	278
Murli Das v. Achut Das	5 L. 105; A. I. R. 1924 Lah. 493 ..	138

Mustaqimuddin v. Emperor ..	24 A. L. J. 327; 27 Cr. L. J. 377; A. I. R. 1926 All. 297 ...	889
Muthu Veerappa Chettiar v. U. K. Sivagurunatha Pillai ...	22 L. W. 617; 49 M. L. J. 697; (1926) M. W. N. 63; A. I. R. 1926 Mad. 133; 49 M. 217 ...	603
Muthuvenkatarama Reddiar v. Official Receiver, South Arcot ...	50 M. L. J. 90; 49 M. 227; A. I. R. 1926 Mad. 350 ...	398
Nachiappa Chettiar v. Mahomed Sabir Khan ...	A. I. R. 1925 Rang. 303; 4 Bur. L. J. 135 ..	370
Nag Kuer v. Sham Lal Sahu ...	A. I. R. 1925 P. C. 257; 23 A. L. J. 1045; (1926) M. W. N. 101; 7 P. L. T. 275; 23 L. W. 628 P. C. ...	274
Nanak Chand v. Ram Prasad ...	A. I. R. 1926 All. 250 ...	316
Nand Ram v. Ishar ..	7 L. L. J. 600 A. I. R. 1926 Lah. 128 ..	597
Narain Das v. Emperor ..	27 Cr. L. J. 325 ...	741
Narain Das v. Saraj Din ..	A. I. R. 1926 Lah. 238 ...	980
Narasimha Mudali v. Potti Narayanasami Chetty ..	22 L. W. 637; 49 M. L. J. 720; A. I. R. 1926 Mad. 118 ...	333
Narasimham v. Chendramma ...	49 M. L. J. 547; 22 L. W. 669; A. I. R. 1926 Mad. 154 ..	321
Narayan v. Dhudabai ...	21 N. L. R. 38; A. I. R. 1925 Nag. 299	663
Narayanaswami Iyengar v. Thippayya ...	(1926) M. W. N. 1; 23 L. W. 382; A. I. R. 1926 Mad 366 ...	847
Narayanaswami Pillai v. Gopalakrishna Naidu ...	(1925) M. W. N. 780; 22 L. W. 618; A. I. R. 1926 Mad. 112; 50 M. L. J. 48 ..	483
Natha Singh v. Sunder Singh ..	7 L. L. J. 559; A. I. R. 1926 Lah. 10 ...	258
National Bank of India v. Lakhpat Rai ..	2 O. W. N. 508; A. I. R. 1925 Oudh 483 ..	144
National Bank of Upper India v. Bansi Dhar ..	3 O. W. N. 83; A. I. R. 1926 Oudh 248 ...	94
Naunihal Singh v. Alice Georgina Skinner ...	23 A. L. J. 691; A. I. R. 1925 All. 707; 47 A. 803 ...	63
Nazar Shah v. Emperor ...	27 Cr. L. J. 334 ...	750
Neelam Venkataratanamma v. Vinjamoori Varaha ...	49 M. L. J. 756; (1926) M. W. N. 44; A. I. R. 1926 Mad. 191 ..	470
Nga Wa Gyi v. Emperor —	3 R. 55; A. I. R. 1925 Rang. 219; 4 Bur. L. J. 23; 27 Cr. L. J 251 ...	430
Nidavolu Atchutam v. Ratnaji ...	23 L. W. 193; 50 M. L. J 208; (1926) M. W. N. 258; 49 M. 211; A. I. R. 1926 Mad. 323 ...	977
Nihal Singh v. Secretary, Gurdawara Guru Tegh Bahadur ...	A. I. R. 1926 Lah. 228 ...	731
Nilkanth v. Gajanan ...	A. I. R. 1926 Nag. 248 ...	364
Noor Din v. Sulakhan Mal ...	A. I. R. 1926 Lah. 230 ...	759
Official Receiver v. Lachmibai ..	A. I. R. 1926 Sind 140 ...	5
Official Receiver, Tanjore v. Nagaratna Mudaliar ...	49 M. L. J. 643; (1925) M. W. N. 907; A. I. R. 1926 Mad. 194 ...	497
Pakkir Mahamud v. Pichai Thevan ..	*Madras High Court ...	465
Pal Singh v Ganga Singh ..	2 L. C. 194 ...	42
Palaniappa Chettiar v. Rajarajeswara Sethupathi ..	22 L. W. 858; 50 M. L. J. 34; A. I. R. 1926 Mad. 243; 49 M. 208 —	366
Pali v. Emperor ...	7 L. L. J. 256; 27 Cr. L. J 223 ...	175
Pancham Lal v. Muhammad Yaqub ...	24 A. L. J. 313; A. I. R. 1926 All 294 ..	558
Pandurang v. Sambhasheo ...	21 N. L. R. 159; A. I. R. 1926 Nag 200 ...	47
Pandurang Govind Fate v. Maifuzbhai ...	A. I. R. 1926 Nag. 257 ..	40
Parakh v. Emperor ...	3 O. W. N. 160; A. I. R. 1926 Oudh 202; 27 Cr. L. J. 328 ...	744
Parbodh Singh v. Bodh Raj ..	7 L. L. J. 414; A. I. R. 1925 Lah 603 ..	195
Parmeshar Lall v. Emperor ...	4 Pat. 472; A. I. R. 1925 Pat. 678; 27 Cr. L. J. 373 ...	885
Partap Singh v. Emperor ..	27 Cr. L. J. 215; 7 L. 91 ...	167
Parumal Thawerdas v. Makhan ...	A. I. R. 1926 Sind 113 ...	575
Parvatibai Trimbakrao v. Vishvanath Khanderao Raste ...	27 Bom. L R. 1509 A. I. R. 1926 Bom. 90 ..	4
Pattamayya v. Pattayya ...	50 M. L. J. 215, (1926) M. W. N. 262; A. I. R. 1926 Mad. 453 ...	782
Pazhaniandy Tarakan v. Murukappa Tarakan ...	23 L. W. 16; 50 M. L. J. 49; A. I. R. 1926 Mad. 367 ...	121
Pearey Lal v. Allahabad Bank Ltd ...	24 A. L. J. 334; A. I. R. 1926 All. 244 ...	14
Peria Nambi Srinivasachariar v. Kuna Ramasamy Naicker ...	A. I. R. 1926 Mad. 509 ...	526

Peyyety Gopalam Garu v. Adusumilly Gopalakrishnayya ..	*Madras High Court ...	416
Pohla v. Emperor ...	7 L. L. J. 442; 27 Cr. L. J. 241 ..	417
Pohumal v. Karachi Port Trust ...	A. I. R. 1925 Sind.221; 18 S. L. R. 106 ...	206
Pooranalingam Servai v. Veerayi ...	22 L. W. 782; (1926) M. W. N. 114 A. I. R. 1926 Mad. 186 ..	1055
Port Canning and Land Improvement Co. v. Heirs of Bahir Molla ...	43 C. L. J. 45, A. I. R. 1926 Cal. 693 ..	37
Pothi Annapurnayya v. Pothi Nagaratnamma ...	A. I. R. 1926 Mad 591 ...	730
Prag Devi v. Nathu Mal ..	7 L. L. J. 230 ...	183
Prabhudayal v. Lalta Das ..	A. I. R. 1926 Oudh 293 ...	764
Prayaga Doss Jeevaru v. Pachella Doraiswami Iyengar ...	23 L. W. 520 ..	899
Punjab Commercial Syndicate v. Punjab Co-operative Bank Ltd. ...	6 L. 512; A. I. R. 1926 Lah. 96 ...	322
Puran v. Emperor ...	27 Cr. L. J. 383; A I. R. 1926 All. 298 .	895
Puran Chand v. Emperor ..	*Lahore High Court ..	991
Qaim Din v. Emperor ...	7 L. L. J. 223; 27 Cr. L. J 219 ...	425
Qamar Jahan Begam v. Munney Mirza ..	12 O. L. J. 313; 2 O. W. N. 413; A. I. R. 1925 Oudh 613 ..	559
Racharla Narayanappa v. Kondigi Bheemappa ...	A. I. R. 1926 Mad. 491 ..	541
Radha Kishen-Chuni Lal v. Ahsa Mal-Ishar Das ...	7 L. L. J. 603; A. I. R. 1926 Lah. 91 ..	705
Radha Kishun v. Kashi Nath ...	24 A. L. J. 241; A. I. R. 1926 All. 266 ..	510
Raghubir Singh v. Nathu Mal ..	*Allahabad High Court ..	1013
Raghunath Das-Ram Sarup v. Sulzer Bruderer & Co. ..	7 L. L. J. 611; 7 L. 42; A. I. R. 1926 Lah. 125	712
Rahimbeg v. Emperor ..	7 N. L. J. 208; A. I. R. 1925 Nag. 154; 27 Cr. L. J. 217 ..	169
Raisun Nisa v. Zorawar Sah ...	3 O. W. N. 121; 13 O. L. J. 10; A. I. R 1926 Oudh 228 ..	675
Rajeswari Muthuramailinga v. Secretary of State for India ...	50 M. L. J 59; A. I. R. 1926 Mad. 341 ..	311
Ram Badan Upadhiya v Sankatha Misra ...	*Allahabad High Court ...	1030
Ram Bhaj v. Duni Chand ..	A. I. R. 1926 Lah. 240 ...	813
Ram Charan v Emperor ...	24 A. L. J. 317; 27 Cr L. J. 370 ...	882
Ram Charan v. Emperor ...	5 L. 416; A. I. R. 1925 Lah. 185; 27 Cr. L. J. 218 ...	170
Ram Karan v. Emperor ...	7 L. L. J 371; A. I. R. 1925 Lah. 483; 2 L. C. 197; 27 Cr. L. J. 289 ..	577
Ram Kuer v. Govind Ram ...	A. I. R 1926 All. 62; 48 A. 145 ...	414
Ram Kumar Das v. Harnarain Das ..	*Calcutta High Court ...	104
Ram Labhaya v Kartar Singh ..	7 L. L. J. 466; A. I. R. 1925 Lah. 651 ..	261
Ram Nath Singh v. Gajadhar Lal .	A. I. R. 1926 All. 300 ..	478
Ram Newaz v. Nankoo . .	A. I. R. 1926 All. 283 ...	401
Ram Pher Singh v Sheo Saran Singh ...	3 O. W. N. 138; A. I. R. 1926 Oudh 196 ...	757
Ram Protap Chamria v. Durga Prosad Chamria ...	3 O. W. N 127; A. I R. 1925 P. C. 293; 49 M. L. J. 812; 43 C. L. J. 14; 24 A. L. J. 13 (1926) M. W. N. 96; 3 Pat L. R. 330; 28 Bom. L. R. 217; 53 C. 258 **P. C.** ...	633
Ram Saran Das v. Girdhari Lal ..	24 A L. J. 286; A. I. R. 1926 All. 305 ...	567
Ram Sarup v. Emperor ...	24 A. L. J. 163; A. I. R. 1926 All. 122; 27 Cr. L. J. 250; 48 A. 230	426
Ram Shankar Singh v. Lal Bahadur Singh ...	3 O. W. N. 267; A. I. R. 1926 Oudh 277; 13 O. L. J. 216 ..	637
Rama Rao v. Rangaswamy Rao ...	A. I. R. 1926 Mad. 419 .	98
Ramakka v. Negasam ...	47 M. 800; 48 M. L. J. 89; A. I. R. 1925 Mad. 145 ...	792
Ramasami Goundan v. Alagia Singaperumal Kadavul	22 L. W 701; (1926) M. W. N. 117; 50 M. L. J. 42; A. I. R. 1926 Mad. 280 ..	823
Ramaswami Aiyangar v. T. Raghava Aiyangar ..	(1926) M. W. N. 118 ...	1046
Ramchandra v. Lakshman ...	9 N. L. J. 3; A. I. R. 1926 Nag. 298 ...	803
Ramdhani Muchi v Khakshardas Tati ..	A. I. R. 1926 Cal. 677 ..	1031
Rampal Singh v. Rajrang Singh ...	3 O. W. N. 73; A. I. R. 1926 Oudh 211 ..	126
Ramu Chetty v. Panchammal ...	(1926) M. W. N. 45; A. I. R. 1926 Mad. 402 ...	1028
Ranzor Singh v. Secretary of State for India ...	*Lahore High Court ..	319
Ratan Mani v. Hans Ram ...	27 Cr. L. J. 274 ...	450
Rathan Singh v. Commissioner of Income Tax, Madras	50 M. L. J. 157; 23 L. W. 267; A. I. R. 1926 Mad. 462 ...	1051
Ratilal v. Rughnath Mulji ...	*Sind Judicial Commissioner's Court ..	378

Relu Mal v. Ahmad ...	7 L. 17; A. I. R. 1926 Lah. 183 ..	947
Rishi Kesh Law v. Sons and Heirs of Shamsher Khan ...	*Calcutta High Court. ...	48
Roshan Lal v. Rustomji ...	A. I. R. 1926 Lah. 249 ..	669
Rudan Singh v. Kalka Singh ...	A. I R 1926 Oudh 309 ...	903
Rudrappa v. Mariappa ...	A. I R. 1926 Mad. 490 ...	385
Rukmani Ammal v. Muthuswami Reddi ...	50 M. L. J. 94; 27 Cr L. J. 331 ..	747
Ruldu Ram v. Surain Singh ...	7 L. L. J. 618; A. I. R. 1926 Lah. 120 ..	531
Rustom K. Sidhva v. Indian Merchants Association ..	*Sind Judicial Commissioner's Court ...	374
S. C. Mitra v. Nawab Ali Khan ..	2 O. W. N. 920; A. I. R. 1926 Oudh 153 ..	50
Sadasheo v. Bapu ...	A. I. R. 1926 Nag. 162 ..	33
Sadasheo v. Karim ..	A. I. R. 1926 Nag. 267 ..	241
Saghru Mal-Har Charan Dass v. Dhanpat Rai-Diwan Chand ..	7 L L J. 420; A. I R. 1925 Lah. 596 ..	198
Sahai Mistri v Satali Darji ..	*Patna High Court ...	133
Sikharam v. Sheoram ...	21 N. L. R. 189; A. I. R. 1926 Nag. 229 ...	334
Sankaralinga Mudaliar v. Official Receiver, Tinnevelly	49 M L. J. 616; (1925) M. W. N. 832; A. I. R. 1926 Mad. 72 ..	504
Sant Sahai v. Chhutai Kurmi ...	3 O. W. N. 65; A I. R. 1926 Oudh 199 ...	23
Sarda Bux Singh v Kandhia Bux ...	*Oudh Chief Court ...	665
Sartaj Koer v. Mahadeo Bux ...	A. I. R. 1926 Oudh 332 ...	657
Sasi Bhusan Mallick v Sedananda Mallick ..	*Calcutta High Court ...	845
Satheppa Chettiar v Muthusami Pillai ..	A. I R. 1926 Mad. 537 ...	393
Savarese v Wakf Estate of Ismail Ahmad Mada .	A. I. R. 1925 Rang. 376; 4 Bur. L. J. 157 ..	771
Seetharamma Naidu v. Govindasami Chettiar ..	23 L. W. 149; (1926) M. W. N. 162; A. I. R. 1926 Mad. 352 ..	976
Sekkhu Mustabu v. Nani ..	A. I. R. 1926 Mad. 536 ...	377
Shafi Ahmad-Nabi Ahmad v. Emperor ...	A. I. R. 1925 P. C. 305; 49 M. L. J 834; 23 L. W. 1 (1926) M. W. N. 62; 43 C. L. J. 67; 3 O. W. N. 165; 28 Bom. L. R. 158; 27 Cr. L. J. 228; 30 C. W. N. 557 **P. C.** ...	212
Shaikh Karim v. Emperor ...	27 Cr. L. J. 319; A. I R 1926 Nag. 279 ...	703
Shakur, M. A. v. Municipal Corporation, Rangoon ...	A I. R. 1925 Rang. 367; 4 Bur. L. J. 161 ..	780
Shankar v. Pandurang ...	9 N. L. J. 22 ...	646
Shankar Bakhsh v. Taluqdei ..	3 O. W. N. 375 ..	722
Sheikh Badel v. Abdul Rahim ..	A. I. R. 1926 Nag. 273 ...	785
Sheo Charan Singh v. Kishno Kuer ..	6 P. L. T. 860; A. I R. 1926 Pat. 146 ..	2
Sheo Nandan v. Hira Lal ...	13 O. L. J 6; A I. R. 1926 Oudh 226 ...	247
Sheosahai v Ramkrishna ...	A. I. R. 1926 Nag. 61 ..	62
Shib Narain v. Gajadhar ...	24 A L. J. 260 ...	772
Shidraj Bhojraj Desai v. Renaki Konda Mahar ...	27 Bom. L. R. 1490; A. I. R. 1926 Bom. 140 ..	554
Shiva Aithala v. R...raya Aithala	49 M. L. J. 719; A. I. R. 1926 Mad. 233 .	523
Shri Goverdhanlalji Maharaj v. Shri Chandra-prabhavati ...	27 Bom. L R 1496; A. I. R. 1926 Bom. 136 ..	552
Shunkar v. Mahadei ..	13 O L. J 241 ...	46
Siban Rai v. Bhagwat Das ...	6 P. L. T. 833; 27 Cr. L. J. 235; 5 Pat. 25; A. I. R. 1926 Pat 176 ...	219
Sidik v. Emperor ...	27 Cr. L. J. 332 ..	748
Singh Ram v. Kala ...	8 L. L. J. 39; A. I. R. 1926 Lah. 244; 7 L. 173...	1012
Sinna Karuppan v. Muthiah Chettiar ..	22 L W. 816; A. I. R. 1926 Mad. 178 ..	373
Sinnanna Kone v. Muthupalani Chetti ...	A. I R. 1926 Mad. 378 ...	352
Sita Ram v Nanak Chand ..	A. I. R. 1926 Lah. 182	313
Sital Prasad Singh v. Jagdeo Singh ...	4 Pat. 294; A. I. R. 1925 Pat. 577; 7 P. L. T. 415 ..	474
Sitapat Rai v. Mohammad Asghar ...	A. I. R. 1926 Oudh 193 ...	29
Siteswar Roy v. Tepua Barman ...	A. I. R. 1926 Cal 589 ...	908
Sivan Pillai v. Venkateswara Iyer ...	22 L. W. 796; A. I. R 1926 Mad. 130 .	556
Soundara Rajan v. Natarajan ...	A. I. R. 1925 P. C. 244; L. R. 6 A. (P. C.) 180; 23 A. L. J. 1010; 48 M. 906; 49 M. L. J. 836; 43 C L. J. 70; 28 Bom. L. R. 204; (1926) M. W. N. 22; 30 C. W. N. 434; 52 I. A. 310 **P. C.** ...	289
Sri Kishen v. Chandra Sekhar Baksh Singh ..	*Allahabad High Court ...	353
Srinivasa Chetti v. Chenna Chetti ...	23 L. W 705 .	251
Sripati Dutta v. Bibhuti Bhusan Dutta ...	53 C. 319; A. I. R. 1926 Cal. 593 ...	940
Subbiah Goundan v. Sonnimalai Goundan ...	23 L. W. 87 ...	400
Subramania Aiyar v. Krishna Iyer ..	(1925) M. W. N. 887; A I. R. 1926 Mad. 211 ..	833
Subramania Iyer v. Shunmugam Chettiar ..	49 M. L. J. 363; 22 L. W. 538; A. I. R. 1926 Mad. 65 ...	566

Subramaniam Patter v. Velu Nair ...	49 M. L. J. 717; 22 L. W. 749; (1926) M. W. N. 36; A. I. R 1926 Mad. 249 ..	481
Suggusetty Subbayya v. Irugulapati Gangayya ...	22 L. W. 827; A. I. R 1926 Mad. 183 ...	687
Sukhdeo v. Ram Dulari ..	A. I. R. 1926 Oudh 313 ...	825
Sukhdeodas Ram Prosad v. Jaintilal Jamunadas ...	A. I R 1926 Cal. 697 .	392
Sultan Abdul Kadir v. Mohammad Esuf ...	23 L. W. 468 .	396
Surendra Nath Banerjee v. Shashi Bhusan Sarkar ..	42 C. L J 127; 52 C. 959, 27 Cr. L. J. 239; A. I. R. 1926 Cal 437 ..	223
Surendra Nath Das Gupta v. Satyendra Nath ...	*Calcutta High Court ..	544
Suryabhan v Renuka .	8 N L. J. 232; A I. R. 1926 Nag. 84 ...	118
Susil Chandra Guha v. Gouri Sundari Devi ..	*Calcutta High Court ...	946
Swaminatha Odayyar v. Thiagarajaswami Odayar ...	23 L W 26, (1926) M. W N. 140 ...	846
Tadepalli Subba Rao v Motamari Lakshminarayana ..	22 L W. 389; A. I. R. 1925 Mad. 1214 ..	593
Tahilram Tarachand v. Vassumal Deumal	A. I. R 1926 Sind 119 .	562
Taj Mohammad v Farid Khan ...	*Lahore High Court .	779
Tapiram v. Jugalkishore ...	21 N. L. R 169; A I R. 1926 Nag. 209 ..	305
Taramonee Choudhurani v Sheikh Elim .	A. I. R. 1926 Cal. 582 ..	714
Tarkeshwar Prasad Tewari v. Devendra Prasad Tewari .	3 Pat. L R. 270; 7 P. L. T. 267; A. I R. 1926 Pat 180 ...	184
Teja Singh v. Emperor ...	7 L. L. J. 631; 27 Cr. L. J. 285 ..	461
Thakar Singh v. Indar Singh ..	*Lahore High Court .	721
Thakur Singh v. Sonkuar ..	*Nagpur Judicial Commissioner's Court ..	824
Thamaya Bangaruswami v. Thirunathasundra Doss ..	(1925) M. W. N 779, A. I. R. 1926 Mad. 135, 23 L W. 406 ..	415
Thanappa Chetty v. Esuf Khan Sahib ..	23 L. W. 36	753
Tharamal Parkam Kalpathoor v. Uruppoyil Ambu ..	49 M. L J 699; (1925) M. W. N. 917, A. I. R. 1926 Mad. 260 ...	109
Thirumalachariar v. Athimoola Karayalore ...	22 L. W. 695; (1926) M. W. N. 112, A. I. R. 1926 Mad. 256 ..	776
Thirumalai Pillai v. Arunachella Padayachi .	A I. R. 1926 Mad. 540	520
Thokala Seshamma v. Yellaturi Venkamma ..	22 L. W. 863; 27 Cr. L. J. 280; A. I. R. 1926 Mad. 238 ..	456
Tikaram v. Narayan ...	A. I. R. 1926 Nag 246 ...	44
Tiruvangalath Nellyoton Paidal Nayar, *In re* ...	22 L W. 691; (1926) M. W. N. 169; A. I. R. 1926 Mad. 225 ...	624
Trustees, Parakkat Devaswom v. Venkatachalam Vadhayar ..	23 L. W. 22; 50 M. L. J. 153; A. I. R. 1926 Mad 321 .	709
Tukaram v. Chintaram ...	20 N. L. R. 17; A. I R. 1924 Nag. 91 .	327
Tulsi v. Emperor	7 L L J. 389; A. I. R. 1925 Lah. 599; 27 Cr. L J 231	215
Tulasidass Govindjee v. Madhavadass Lalajee ..	22 L. W 642, (1925) M W N. 68, A. I R. 1926 Mad 118 ..	570
Umasasi Debi v Akrur Chandra Mazumdar ...	30 C. W. N. 160; A I. R. 1926 Cal. 542; 53 C 297 ..	984
Umrao Singh v. Beni Prashad-Mehr Chand ...	*Lahore High Court . .	839
Unnamalai Ammal v. Abboy Chetty ...	23 L. W. 168, 50 M L. J. 172 ...	524
Uttim Singh v. Judhan Rai ...	3 Pat. 288; A. I. R. 1924 Pat. 589; 27 Cr. L. J. 220; 7 P. L. T. 288 ...	172
Vadapalli Varadacharyulu v. Khandavilli Narasimhacharyulu ...	(1925) M. W. N. 886; 23 L. W. 85; A. I. R. 1926 Mad 258 ..	615
Vaithi Matharan v. Narayanaswami Iyer ...	22 L. W. 673; A. I R. 1926 Mad 210; 27 Cr. L J. 343 .	855
Vaithialinga Mudalliar v. Srirangath Anni ...	A. I R. 1925 P. C. 249; L. R. 6 A (P. C) 169, 49 M. L J. 769; 42 C. L J 563; 48 M. 883; 30 C. W. N. 313; 28 Bom L. R. 173; (1926) M. W. N 11; 52 I. A. 322 **P. C.** .	85
Vallabhdas Tulsidas v. Nagardas Juthabai ..	23 Bom. L. R. 1213 ..	143
Veeranan Ambalam v. Ayyachi Ambalam .	22 L. W. 772; (1925) M W. N. 857; 49 M. L. J. 791; A. I. R. 1926 Mad 168 ...	968
Veerappa Chettiar v. Sundaresa Sastrigal ...	49 M L J. 368; 48 M 676; 22 L. W. 606; A. I. R 1925 Mad 1201 ..	300
Veeraswami Mudali v. Venkatachala Mudali ..	22 L. W. 118; (1925) M W N. 763; A. I. R. 1926 Mad 18; 50 M. L J. 102 ...	20
Veeraswami Pillai v. Chidambaram Chettiar ...	*Madras High Court ...	819
Vemulapalli Seetharamamma v. Maganti Appiah ..	23 L W 285; (1926) M. W. N. 238; A. I. R. 1926 Mad. 457 ...	827

Vencatachariar v. Bontham Pachayappa Chetty ...	22 L. W. 698; (1926) M. W. N. 106; A. I. R. 1926 Mad. 250 ...	516
Venkata Narasimha Rao v. Hemadu Suryanarayana ..	50 M. L. J. 75; 23 L. W. 409; A. I. R. 1926 Mad. 325 ...	802
Venkatarama Aiyar v. Sundaram Aiyar ...	(1926) M. W. N. 48 ..	1045
Venkatasubba Rao v. Adinarayana Rao ...	22 L. W. 631; 50 M. L. J. 46; A. I. R. 1926 Mad. 227 ...	472
Venku Shettithi v. Ramachandrayya ...	49 M. L. J. 634; 22 L. W. 885; (1925) M. W. N. 866; A. I. R. 1926 Mad. 81; 49 M. 29 ...	342
Venugopal Nayudu, *In re* ..	27 Cr. L. J. 384 ...	896
Vepuri Subbayya v. Secretary of State for India ..	*Madras High Court ..	78
Vinayak v. Kaniram ...	A. I. R. 1926 Nag. 293 ..	810
Virappa Govindappa Konraddi v. Basappa Virbhadrappa ...	27 Bom. L. R, 1511; A. I. R. 1926 Bom. 139 ...	354
Vishvanath Shamba Naik v. Ramkrishna Martoba Kasbekar ..	27 Bom. L. R. 1478; A. I. R. 1926 Bom. 86; 50 B. 94 ..	537
Vishvanathbhat Annabhat v Mallappa Ningappa ...	27 Bom. L. R. 1103; 49 B. 821; A. I. R. 1925 Bom. 514 ...	628
Vishwanath Prasad v. Emperor ..	27 Cr. L. J. 210; A. I. R. 1926 Nag. 98 ..	162
Vithoba v. Sadasheo ...	A. I. R. 1926 Nag. 253 ...	58
W. & T. Avery Ld. v. Kessoram Poddar ..	30 C. W. N. 152; A. I. R. 1926 Cal. 481 ...	1001
Wasal v. Emperor ...	A. I. R. 1925 Lah. 495; 7 L. L. J. 277; 27 Cr. L. J. 299 .	587
Washihan v. Mir Nawab Ali ...	3 Pat. 1018; A. I. R. 1925 Pat. 138; 7 P. L. T. 421 ...	133
Wilayati Begam v. Jhandu Mal-Mithu Lal ..	24 A. L. J. 349; A. I. R 1926 All. 286 ...	897
Woodward v. Emperor ...	A. I. R. 1925 Sind 233; 18 S. L. R. 199; 27 Cr. L. J. 257 ..	433
Yado v. Ambashankar ...	A. I. R. 1926 Nag. 260 ...	75
Yasin Bibi v. Munwar Hussain ...	22 A. L. J. 700; A. I. R. 1924 All. 799; 46 A. 743; L. R. 5 A. 524 Civ. ..	345
Yusif Mahbub & Co. v. Salloh Mahomed ...	*Sind Judicial Commissioner's Court ..	387
Zukoobai v. Bhalsingh ..	8 N. L. J. 205; A. I. R. 1926 Nag. 155 ...	74

Table showing seriatim the pages of Volume 92 of Indian Cases and the corresponding Pages of other Law Journals and Reports.

An asterisk (*) denotes cases not reported yet elsewhere.

Page	Names of cases reported.	Where reported.
1	Jagrup Singh v. Indrasan Pande	24 A. L. J. 325; A. I. R. 1926 All. 216.
2	Sheo Charan Singh v. Kishno Kuer ..	6 P. L. T. 860; A. I. R. 1926 Pat. 116.
3	Kalka Prasad v. Panna ..	A. I. R. 1926 All. 233.
4	Parvatibai Trimbakrao v Vishvanath Khanderao Raste ..	27 Bom. L. R. 1509; A. I. R. 1926 Bom 90
5	Official Receiver v. Lachmibai	A. I. R. 1926 Sind 140.
9	Jamshedji Naoroji Gamadia v. Maganlal Bankeylal & Co.	27 Bom. L. R. 514; A. I. R. 1925 Bom. 314.
14	Pearey Lal v. Allahabad Bank, Ltd.	24 A. L. J. 334, A. I. R. 1926 All. 244.
16	Duma Toma Rumav v. Nathu Farsha Kurel ..	27 Bom. L. R. 219, A. I. R 1925 Bom 431.
17	Gauri Shankar v. Bhairon Pershad	A. I. R. 1926 Oudh 207
18	Municipal Council, Cochin v. Pratath Bavu Devassi	22 L. W. 671, A. I. R. 1926 Mad. 230
19	Deo Kali v. Ranchoor Bux ..	A. I. R 1926 Oudh 253, 13 O. L. J. 208
20	Veeraswami Mudali v Venkatachala Mudali ..	22 L. W. 148; (1925) M. W. N. 763, A. I. R. 1926 Mad. 18, 50 M. L. J. 102
23	Sant Sahai v. Chhutai Kurmi	3 O. W. N. 65, A. I. R. 1926 Oudh 199.
25	Ahmad Baig v. Model Mill, Nagpur, Ld.	A. I. R. 1926 Nag. 262.
29	Sitapat Ram v. Mohammad Asghar ..	A. I. R 1926 Oudh 193.
30	Appajee Pillai v. Manika Mudali ..	21 L. W. 652.
31	Mahabir Prasad Tewari v. Jamuna Singh ..	A. I. R. 1925 P. C. 234; (1925) M. W. N. 738; 23 L. W. 75 **P. C.**
33	Sadasheo v. Bapu ..	A. I. R. 1926 Nag. 162.
34	Karingan v. Harihar Dutt ...	3 O. W. N. 58; 13 O. L. J. 53.
35	Chet Ram v. Ilaicho ..	2 L. C. 178.
36	Akabai v. Narayan ...	A. I. R. 1926 Nag. 251.
37	Port Canning and Land Improvement Co. v. Heirs of Bahir Molla ..	43 C. L. J. 45; A. I. R. 1926 Cal. 693.
40	Pandurang Govind Fate v. Maifuzbhai ..	A. I. R. 1926 Nag. 257.
42	Pal Singh v. Ganga Singh ..	2 L. C. 194.
44	Tikaram v. Narayan ...	A. I. R. 1926 Nag. 246.
46	Barkat Bibi v Abdul Aziz ...	2 L. C. 186.
46	Shunkar v. Mahadei ..	13 O. L. J. 211.
47	Pandi [illegible] v. Sambhasheo ...	21 N. L. R. 159; A. I. R. 1926 Nag. 200.
48	Resh Kesh Law v. Sons and Heirs of Shamesher Khan ...	*Calcutta High Court
50	S. C. Mitra v. Nawab Ali Khan ..	2 O. W. N. 920, A. I. R. 1926 Oudh 153.
58	Vithoba v. Sadasheo ...	A. I. R. 1926 Nag. 253.
61	Banjoisi Narasamma v. Banjoisi Sarasamman ...	23 L. W. 157, (1926) M. W. N. 163, A. I. R. 1926 Mad. 353.
62	Sheosahai v. Ramkrishna ..	A. I. R. 1926 Nag. 61.
63	Naunihal Singh v. Alice Georgina Skinner ...	23 A. L. J. 691; A. I. R. 1925 All. 707; 47 A. 803.
74	Zukoobai v. Bhalsingh ..	8 N. L. J. 205; A. I. R. 1926 Nag. 155.
75	Yado v. Amba Shankar ...	A. I. R. 1926 Nag. 260.
78	Vepuri Subbayya v. Secretary of State for India ..	*Madras High Court.
80	Kankai v. Tikaram ...	A. I. R. 1926 Nag. 239.
82	Kaniza v. Hasan Ahmad Khan ..	3 O. W. N. 114; A. I. R. 1926 Oudh 231.
85	Imani Satayanarayana v. Devarakonda Satyanarayana Murte ..	50 M. L. J. 144; (1926) M. W. N. 7; A. I. R. 1926 Mad. 428.
85	Vaithialinga Mudalliar v. Srirangath Anni ...	A. I. R. 1925 P. C. 249; L. R. 6 A. (P. C.) 169; 49 M. L. J. 769; 42 C. L. J. 563; 48 M. 883; 30 C. W. N. 313; 28 Bom. L. R. 173; (1926) M. W. N. 11; 52 I. A. **322 P. C.**
94	National Bank of Upper India v. Bansi Dhar ...	3 O. W. N. 83; A. I. R. 1926 Oudh 248.
98	Rama Rao v. Rangaswamy Rao ...	A. I. R. 1926 Mad. 419.

99	Mahipal Singh v. Sarjoo Prasad ...	3 O. W. N. 100; A. I. R. 1926 Oudh 141.
100	Kandasami Chettiar v. G. F. F. Foulkes ...	A. I. R. 1926 Mad 396.
102	Kesheorao v. Marotirao ...	8 N. L. J. 227; A. I. R. 1926 Nag. 139.
104	Ram Kumar Das v. Haranarain Das ..	*Calcutta High Court.
106	Govinda Nadan v. Ramasami Chettiar ...	(1925) M. W. N. 927; A. I. R. 1925 Mad. 224; 23 L. W. 573.
107	Hem Chandra Sen v. Girish Chandra Saha ...	*Calcutta High Court.
109	Tharamal Parkam Kalpathoor v. Uruppoyil Ambu ..	49 M. L. J. 699; (1925) M. W. N. 917; A. I. R. 1926 Mad. 260.
110	Laxman Bhikaji v. Secretary of State for India ..	27 Bom. L. R. 463; A. I. R. 1925 Bom. 365; 49 B. 554.
112	Khoday Gangadhar Sah v. Swaminadha Mudaliar ...	22 L. W. 679; A. I. 1926 Mad. 218
118	Suryabhan v. Renuka ...	8 N. L. J. 232; A. I. R. 1926 Nag. 84.
119	Doraswami Nadar v. Joseph L. Mother ...	A. I. R. 1926 Mad. 319.
121	Kesheo v. Jagannath ..	A. I. R. 1926 Nag. 81; 22 N. L. R. 5.
124	Pazhaniandy Tarakan v. Murukappa Tarakan ...	23 L. W. 16; 50 M. L. J. 49; A. I. R. 1926 Mad. 367.
125	Kalenther Ammal v. Ma Mi ...	3 R. 474; A. I. R. 1926 Rang. 9.
126	Rampal Singh v. Rajrang Singh ..	3 O. W. N. 73; A. I. R. 1926 Oudh 211.
131	Mukund Lal v. Lorindi Bai ..	7 L. L. J. 198.
133	Washihan v. Mir Nawab Ali ..	3 Pat. 1018; A. I. R. 1925 Pat. 138; 7 P. L. T. 424.
133	Sahai Mistri v. Satali Darji ..	*Patna High Court.
134	Gopal v. Collector of Aligarh ...	*Allahabad High Court.
138	Murli Das v. Achut Das ..	5 L. 105, A. I. R. 1924 Lah. 495.
139	Muhammad Abdul Gaffur v. Muhammad Samsuddin	47 M. L. J. 730; A. I. R. 1925 Mad. 297.
142	Maung Po Toke v. Maung Po Gyi ..	3 R 492; A. I. R 1926 Rang. 2.
143	Vallabhdas Tulsidas v. Nagardas Juthabhai ..	23 Bom. L. R. 1213.
144	National Bank of India v. Lakhpat Rai ...	2 O. W. N. 508; A. I. R. 1925 Oudh 483.
145	Abdullah v. Emperor ..	A. I. R. 1924 All. 233; 27 Cr. L. J. 193.
162	Vishwanath Prasad v. Emperor ..	27 Cr. L. J. 210; A. I. R. 1926 Nag. 98.
163	Abdul Qadir v. Emperor ..	27 Cr. L. J. 211.
164	Bajirao v. Dadibai ...	27 Cr L. J. 212; A. I. R. 1926 Nag. 286.
167	Partap Singh v. Emperor ..	27 Cr. L. J. 215; 7 L. 91.
169	Rahimbeg v. Emperor ..	7 N. L. J. 208; A. I. R. 1925 Nag. 154; 27 Cr. L. J. 217.
170	Ram Charan v. Emperor ...	5 L. 416; A. I. R. 1925 Lah. 185; 27 Cr. L. J. 218.
172	Uttim Singh v. Judhan Rai ...	3 Pat. 288; A. I. R. 1924 Pat. 589; 27 Cr. L. J. 220; 7 P. L. T. 288.
174	Bhagirathi v. Emperor ...	30 C. W. N. 142; 27 Cr. L. J. 222; A. I. R. 1926 Cal. 550.
175	Pali v. Emperor ...	7 L. L. J. 256; 27 Cr. L. J. 223.
177	Batisa Kuer v. Raja Ram Pandey ..	(1925) Pat. 343; A. I. R. 1926 Pat. 192; 7 P. L. T. 393.
178	Barkat v. Relu Mal ...	7 L. L. J. 509; A. I. R. 1925 Lah. 627.
179	Laurentius Ekka v. Dhuki Koeri ...	4 Pat. 766; A. I. R. 1926 Pat. 73; 7 P. L. T. 362.
183	Prag Devi v. Nathu Mal ...	7 L. L. J. 230.
184	Tarkeshwar Prasad Tewari v. Devendra Prasad Tewari ..	3 Pat. L. R 270; 7 P. L. T. 267; A. I. R 1926 Pat. 180.
191	Cecil Cole v. Nanalal Moraji Dave ..	26 Bom. L. R. 880; A. I. R. 1925 Bom. 18; 49 B. 172.
195	Parbodh Singh v. Bodh Raj	7 L. L. J. 414; A. I. R. 1925 Lah. 603.
196	Fatehcand v. Parbati Bai ..	18 S. L. R. 85; A. I. R. 1925 Sind 269.
198	Saghru Mal-Har Charan Dass v. Dhanpat Rai-Diwan Chand ...	7 L. L. J. 420; A. I. R. 1925 Lah. 596.
200	D. R. K. Saklat v. Bella ...	23 A. L. J. 1016; A. I. R. 1925 P. C. 298; 49 M. L. J. 821; 43 C. L. J. 23; 30 C. W. N. 289; 28 Bom. L. R. 161; 3 R. 582 **P. C.**
206	Pohumal v. Karachi Port Trust ..	A. I. R. 1925 Sind 221; 18 S. L. R. 106.
208	Maung Than v. Zainat Bibi ..	3 R. 488; A. I. R. 1926 Rang. 50.
209	Hashmat Hussain v. Emperor ..	7 L. L. J. 96; 27 Cr. L. J. 225.
212	Shafi Ahmad-Nabi Ahmad v. Emperor ...	A. I. R. 1925 P. C. 305; 49 M. L. J. 834; 23 L. W. 1; (1926) M. W. N. 62; 43 C. L. J. 67; 3 O. W. N. 165; 28 Bom. L. R. 158; 27 Cr. L. J. 228; 30 C. W. N. 557 **P. C.**
213	Akbar Ali v. Emperor ...	7 L. L. J. 520; A. I. R. 1925 Lah. 614; 27 Cr. L. J. 229.

214	K. M. First Grade Pleader, *In the matter of* ...	A. I. R. 1924 Mad. 479; (1924) M. W. N. 5; 27 Cr. L. J. 230 **F. B.**
215	Tulsi v. Emperor ...	7 L. L. J. 389; A. I R. 1925 Lah. 599; 27 Cr. L. J. 231.
216	Amiruddin v. Emperor ..	40 C. L. J. 306; A. I. R. 1925 Cal. 217; 27 Cr. L. J. 232.
217	Hari Singh v. Emperor ..	7 L. L. J. 576; A. I. R. 1926 Lah. 4; 27 Cr L J. 233
219	Siban Rai v. Bhagwat Dass ..	6 P. L. T. 833; 27 Cr. L. J. 235; 5 Pat. 25; A. I. R. 1926 Pat. 176.
222	Lachhman Singh v. Emperor ...	7 L. L. J. 582; 27 Cr. L. J. 238; A. I. R. 1926 Lah. 143.
223	Surendra Nath Banerjee v. Shashi Bhushan Sarkar .	42 C. L. J. 127; 52 C. 959; 27 Cr. L. J. 239; A. I. R. 1926 Cal. 437.
224	Miran v. Emperor ...	23 A. L. J. 1027; A. I. R. 1926 All. 168; 27 Cr. L. J. 240.
225	Dhanrajgirji Narasinggirji v. Tata Sons, Ltd. ...	26 Bom. L R. 858; A. I. R. 1924 Bom. 473; 49 B. 1.
233	China v. Te Thoe Seng ..	3 R. 477; A. I. R. 1926 Rang. 14.
235	Firm Jai Singh-Diyal Singh v. Narmal Das .	7 L. L J. 553; A. I. R. 1926 Lah. 24.
237	Baldeo Singh v. Gulab ...	*Oudh Chief Court.
241	Asa Nand v. Mahmud .	7 L. L. J. 542.
241	Sadasheo v. Karim . .	A. I. R. 1926 Nag. 267.
245	Manavikrama Zamorin Raja of Calicut v. Venkatagiri Pattar . .	23 L. W. 58.
247	Sheo Nandan v. Hira Lal ...	13 O. L. J. 6; A. I R. 1926 Oudh 226.
249	Akella Ramasomayyagulu v. Official Receiver, Godavari ..	23 L. W. 80; 1926 M. W. N. 169; A. I. R. 192, Mad. 360.
249	Ishar Das-Dharam Chand, *In the matter of* ...	A. I. R. 1926 Lah. 168.
251	Srinivasa Chetti v. Chenna Chetti ..	23 L. W. 705.
252	Din Mohammad v. Matab Bibi ..	A. I. R. 1926 Lah. 203
253	Maung Ba Thein v Ma Than Myint ..	3 R. 483; A I. R. 1926 Rang. 49.
254	Banu Mal v. Paras Ram ...	7 L. L. J. 397; A. I. R. 1925 Lah. 640.
257	Commissioner of Income-Tax v. Lucknow Ice Association ...	A. I. R. 1926 Oudh 191.
258	Natha Singh v. Sunder Singh .	7 L. L. J. 559; A. I. R. 1926 Lah. 10.
259	Kanshi Ram v. Prabh Dial Arjan Das & Co. ..	7 L. L. J. 457; A. I. R. 1925 Lah. 618
260	Mohamdi Begam v. Tufail Hasan . .	23 A. L. J. 888; A. I. R. 1926 All. 20; 48 A. 17.
261	Ram Labhaya v. Kartar Singh ...	7 L. L. J. 466, A. I. R. 1925 Lah 651.
262	Jahangir v. Ram Harakh ...	13 O. L. J. 243.
263	Ibrahim v. Shah Mahomed ...	*Lahore High Court.
264	Bachan v. Raghunath ...	24 A L. J. 149; 48 A. 224; A. I. R. 1926 All. 304.
264	Hakim Din v. Qutab Din ..	A. I. R. 1926 Lah. 211.
265	Bashir Ahmad v. Zobaida Khatun ..	3 O. W. N. 105; A. I. R. 1926 Oudh 186.
268	Hussain Bakhsh v. Sarbuland . .	7 L. L. J. 548; 6 L 536; A. I. R. 1926 Lah. 14.
270	Maung Sein Htin v. Chee Pan Ngaw ...	3 R. 275; A. I. R. 1925 Rang. 275.
272	Dittu Ram v. Nawab ...	7 L. L. J. 448; A. I. R. 1925 Lah. 639.
273	Hazura Mal-Lal Chand v. Rang Lahi ..	*Lahore High Court.
274	Nag Kuer v. Sham Lal Sahu ...	A. I. R. 1925 P. C. 257; 23 A L. J. 1045; (1926) M. W. N. 101; 7 P. L. T. 275; 23 L W. 628 **P. C**
278	Murad Bibi v. Amir Hamza ..	*Lahore High Court.
282	Kehri Singh v. Thirpal ...	L. R. 6 A. 213 Rev.; 23 A. L. J. 965; A. I. R. 1926 All. 113; 48 A. 104.
289	Muhammad v. Muhammad Ali ...	A. I. R. 1926 Lah. 243.
289	Soundara Rajan v. Natarajan ...	A. I. R. 1925 P. C. 244; L. R. 6 A. (P. C.) 180; 23 A. L. J. 1010; 48 M. 906; 49 M. L. J. 836; 43 C. L. J. 70; 28 Bom. L. R. 204; (1926) M. W. N. 22; 30 C. W. N. 434; 52 I. A. 310 **P. C.**
294	Mahomed Ghaus v. Mahomed Ali Shah ...	A. I. R. 1926 Lah. 188.
295	Isram v. Gangia ..	*Nagpur Judicial Commissioner's Court.
296	Moti Mal-Ram Sarup v. Daulat Ram ..	A. I. R. 1926 Lah. 231.
297	Attar Singh v. Kirpa Singh ...	A. I. R. 1926 Lah. 175.
298	Firm of Ram Prosad-Ram Kissen v. Haro Kumar Basak ..	*Calcutta High Court.
299	Mohan Singh v. Nathu Mal ...	*Lahore High Court.

300	Veerappa Chettiar v. Sundaresa Sastrigal ..	49 M. L. J. 366; 48 M. 676; 22 L. W. 603; A. I. R. 1925 Mad. 1201.
305	Tapiram v. [illegible] ..	21 N. L. R. 169; A. I. R. 1926 Nag. 209.
308	Karipineni Rajayya v. Kalpatapu Annapurnamma ..	22 L. W. 828, A. I. R. 1926 Mad. 13.
309	Allahabad Bank, Ld. v. Bhagwan Das Johari ..	24 A. L. J. 323; A. I. R. 1926 All. 262.
311	Rajeswari Muthuramalinga v. Secretary of State for India	50 M. L. J. 59; A. I. R. 1926 Mad. 341
313	Sita Ram v. Nanak Chand	A. I. R. 1926 Lah. 182.
314	Mattapalli Venkataratnam v. Veppa Sitaramayya ..	A. I. R. 1926 Mad. 305.
316	Nanak Chand v. Ram Prasad .	A. I. R. 1926 All. 250.
317	Bishen Singh v. Wasawa Singh	A. I. R. 1926 Lah. 177.
319	Ranzor Singh v. Secretary of State for India	*Lahore High Court.
321	Narasimham v. Chendramma	49 M. L. J. 547; 22 L. W. 669; A. I. R. 1926 Mad. 154.
322	Punjab Commercial Syndicate v. Punjab Co-operative Bank, Ltd.	6 L. 512; A. I. R. 1926 Lah. 96.
326	Baijnath Singh v. Hari Prasad Bal .	A. I. R. 1924 Pat. 628, (1924) Pat. 209; 7 P. L. T. 353.
327	Tukaram v. Chintaram	20 N. L. R. 17; A. I. R. 1924 Nag. 91.
330	Alice Georgina Skinner v. Mukarram Ali Khan	L. R. 5 A. 607 Civ.; A. I. R. 1925 All. 77.
330	Alapati Ramaswami v. Dasari Venkataranayana .	(1925) M. W. N. 781, A. I. R. 1926 Mad. 128.
332	Bhagwati Singh v. Gurcharan Dube	L. R. 5 A. 647 Civ.; A. I. R. 1925 All. 96.
332	Darbari Mal-Ram Sahai v. Secretary of State .	6 L. 499; A. I. R. 1926 Lah. 116.
333	Narasimha Mudali v. Potti Narayanasami Chetty .	22 L. W. 637; 49 M. L. J. 720; A. I. R. 1926 Mad. 118.
334	Sakharam v. Sheoram .	21 N. L. R. 189; A. I. R. 1926 Nag. 229.
335	Khazan Singh v. Charao Singh ..	A. I. R. 1925 All. 41; L. R. 5 A. 609 Civ.
338	Maharaj Dhiraj of Darbhanga v. Commissioner of Income Tax ..	6 P. L. T. 355, 2 Pat. L. R. 242 Cr., (1925) Pat. 49, A. I. R. 1925 Pat. 313
342	Venku Shettithi v. Ramachandrayya ...	49 M. L. J. 634, 22 L. W. 885; (1925) M. W. N. 866; A. I. R. 1926 Mad. 81; 49 M. 29.
345	Yasin Bibi v. Munwar Hussain ...	22 A. L. J. 700; A. I. R. 1924 All. 799; 46 A. 743; L. R. 5 A. 521 Civ.
346	Jiwa Ram v. Jhanda Singh ...	1 L. C. 43.
348	Mahadeo Prasad v. Anandi Lal ...	47 A. 90; 22 A. L. J. 887; L. R. 5 A. 749 Civ.; A. I. R. 1925 All. 60.
350	Badri Sahu v. Peare Lal Misra ...	6 P. L. T. 859, A. I. R. 1926 Pat. 140; (1926) Pat. 137.
351	Haji Rahmatulla v. Secretary of State for India ..	27 Bom. L. R. 1507; A. I. R. 1926 Bom. 50.
352	Simmanna Kone v. Muthupalani Chetti ...	A. I. R. 1926 Mad. 378.
353	Sri Kishen v. Chandra Sekhar Baksh Singh ..	*Allahabad High Court.
354	K. Venkat Reddiar & Co. v. Desikacharlar ...	22 L. W. 490; A. I. R. 1925 Mad. 1279.
354	Virappa Govindappa Konraddi v. Basappa Virabhadrappa . .	27 Bom. L. R. 1511; A. I. R. 1926 Bom. 139.
355	Kaliani Anni v. Thirumalayappa Mudaliar ..	*Madras High Court.
361	Jotsing Harising Advani v. Secretary of State for India . .	A. I. R. 1926 Sind 130.
364	Nilkanth v. Gajanan ..	A. I. R. 1926 Nag. 248.
366	Palaniappa Chettiar v. Rajarajeswara Sethupathi	22 L. W. 858, 50 M. L. J. 34; A. I. R. 1926 Mad. 243; 49 M. 208.
367	Leoh Moses v. Solomon Judah Meyer ..	27 Bom. L. R. 1460; A. I. R. 1926 Bom. 139; 50 B. 32.
368	Ma Me Mya v. Ma Min Zan ...	A. I. R. 1925 Rang. 320; 3 R. 490; 4 Bur. L. J. 159.
368	Chunilal Mokamdas Marwadi v. Christopher ...	27 Bom. L. R. 1462; A. I. R. 1926 Bom. 65; 50 B. 107.
370	Nachiappa Chettiar v. Mahomed Sabir Khan .	A. I. R. 1925 Rang. 303; 4 Bur. L. J. 135.
371	Jethanand Tekchand v. Secretary of State for India	*Sind Judicial Commissioner's Court.
373	Sinna Karuppan v. Muthiah Chettiar ...	22 L. W. 816; A. I. R. 1926 Mad. 178.
374	Rustom K. Sidhva v. Indian Merchants Association	*Sind Judicial Commissioner's Court.
377	Sekkhu Mustabu v. Nani . .	A. I. R. 1926 Mad. 536.
378	Ratilal v. Rughnath Mulji ...	*Sind Judicial Commissioner's Court.
385	Rudrappa v. Mariappa ..	A. I. R. 1926 Mad. 490.
387	Yusif Mahbub & Co. v. Salloh Mahomod ...	*Sind Judicial Commissioner's Court.
390	Chandayya Hegde v. Kaveri Hegadthi ..	49 M. L. J. 727; A. I. R. 1926 Mad. 189.
392	Sukhdeodas Ram Prosad v. Jaintilal Jamunadas ...	A. I. R. 1926 Cal 697.
393	Satheppa Chettiar v. Muthusami Pillai ..	A. I. R. 1926 Mad. 537.
394	Kharas, R. P. v. Bhawanji Narsi ..	A. I. R. 1926 Sind 6.
396	Sultan Abdul Kadir v. Mohammad Esuf ..	23 L. W. 468.

398	Muthuvenkatarama Reddiar v. Official Receiver, South Arcot ...	50 M. L. J. 90; 49 M. 227; A. I. R. 1926 Mad. 350.
400	Subbiah Goundan v. Sonnimalia Goundan ..	23 L. W. 87.
401	Ram Newaz v. Nankoo ..	A. I R. 1926 All. 283.
402	Chandra Mouleswara Prasada v. Yadavalli Kameswara ...	(1925) M. W. N. 776; 22 L. W. 833; 50 M. L. J. 97; A. I. R. 1926 Mad. 157.
403	Kanshi Ram v. Muhammad Abdul Rahman ...	6 L. L. J. 336; A. I. R. 1925 Lah. 216.
405	Guntur Narasimham v. Nyapati Narayanarao Garu ..	22 L. W. 592; A. I. R. 1926 Mad. 66.
411	Gopal Chandra Banerjee v. Bhutnath Sasmal ..	42 C. L. J. 520; A. I. R. 1926 Cal. 312.
412	Mahalinga Naicker v. Vellaya Naicker ...	22 L. W. 794; (1925) M. W. N. 884; A. I. R. 1926 Mad. 190.
414	Ram Kuer v. Govind Ram ..	A. I. R. 1926 All. 62; 48 A. 145.
415	Thamaya Bangaruswami v. Thirunathasundra Doss	(1925) M. W. N. 779; A. I. R. 1926 Mad. 135; 23 L. W. 406.
416	Peyyety Gopalam Garu v. Adusumilly Gopalakrishnayya ...	*Madras High Court.
417	Pohla v. Emperor ...	7 L. L. J. 442; 27 Cr. L. J. 241.
419	Kishanchand v. Emperor ...	27 Cr. L. J. 243.
423	Daya Ram v. Emperor ...	6 L. 489; 27 Cr. L. J. 247; A. I. R. 1926 Lah. 83.
424	Momoon v. Ibrahim ...	27 Cr. L. J. 248; A. I. R. 1926 Sind 143.
425	Qaim Din v. Emperor ...	7 L L. J. 223; 27 Cr. L. J. 249.
426	Ram Sarup v. Emperor ...	24 A. L. J. 163; A. I. R. 1926 All. 122; 27 Cr. L. J. 250; 48 A. 230.
427	Gulabchand Rupji v. Emperor ...	27 Bom. L. R. 1039; A. I. R. 1925 Bom. 467; 49 B. 799; 27 Cr. L. J. 251.
428	Kallu v. Emperor ..	27 Cr. L. J. 252; A. I. R. 1926 Lah. 240.
429	Champa Devi v. Pirbhu Lal ...	27 Cr. L. J. 253; 24 A. L. J. 329; A. I. R. 1926 All. 287.
430	Nga Wa Gyi v. Emperor ...	3 R. 55; A I. R. 1925 Rang. 219; 4 Bur. L. J. 23; 27 Cr. L. J. 254
433	Woodward v. Emperor ...	A. I. R. 1925 Sind 233; 18 S. L. R. 199; 27 Cr. L. J. 257.
439	Keramat Mandal v. Emperor ...	42 C. L. J. 524; 27 Cr. L. J. 263; A. I. R. 1926 Cal. 320.
441	Abdul Hafiz Khan v. Emperor ...	L. R. 6 A. 203 Cr; 24 A. L. J. 173; 27 Cr. L. J. 265; A. I. R. 1926 All. 188.
442	Khijiruddin v. Emperor ...	42 C. L J. 504; 27 Cr. L. J. 266; A. I. R. 1926 Cal. 139; 53 C. 372.
450	Ratan Mani v. Hans Ram ...	27 Cr. L. J. 274.
451	Bhola v. Emperor ..	27 Cr. L. J. 275.
452	Kadhori v. Emperor ..	L. R. 6 A. 216 Cr.; 24 A. L. J. 162; 27 Cr. L. J. 276; A. I. R. 1926 All. 193.
453	Keramat Mandal v. Emperor ...	42 C. L. J. 528; 27 Cr. L. J. 277; A. I. R. 1926 Cal. 147.
454	Banwari Lal v. Jhunka ...	27 Cr. L. J. 278; 24 A. L. J. 217; A. I. R. 1926 All. 229.
456	Thokala Seshamma v. Yellaturi Venkamma ...	22 L. W. 863; 27 Cr. L. J. 280; A. I. R. 1926 Mad. 238.
459	Madat Khan v. Emperor ...	7 L. L. J. 628; 27 Cr. L. J. 283; A. I. R. 1926 Lah. 221.
460	Bahadura v. Emperor ...	24 A. L. J. 215; 27 Cr. L. J. 284; A. I. R. 1926 All. 304.
461	Teja Singh v Emperor ...	7 L L. J. 631; 27 Cr. L. J. 285.
462	Chandiram v. Emperor ...	27 Cr. L. J. 286.
463	Chhida v. Emperor ...	24 A. L. J. 178; 27 Cr. L J. 287; A. I. R. 1926 All. 225.
465	Pakkir Mahamud v. Pichai Thevan ...	*Madras High Court.
468	Maqsud Ali v. Abdullah ..	L. R. 6 A. 112 Civ.; A. I. R. 1925 All. 342.
470	Neelam Venkataratanamma v. Vinjamoori Varaha ...	49 M. L. J. 756; (1926) M. W. N. 44; A. I. R. 1926 Mad. 191.
471	Mulraj v. Indar Singh ..	A. I. R. 1926 All. 102; 48 A 150.
472	Venkatasubba Rao v Adinarayana Rao ...	22 L. W. 631; 50 M. L. J. 46; A. I. R. 1926 Mad. 227.
473	Maharaj Din v. Bhairon ...	A. I. R. 1926 All 290.
474	Sital Prasad Singh v. Jagdeo Singh ...	4 Pat. 294; A. I. R. 1925 Pat. 577; 7 P. L. T. 415.
478	Ram Nath Singh v. Gajadhar Lal ...	A. I. R. 1926 All. 300.
479	Dhanpat Rai v. Kahan Singh ..	2 L. C. 107
479	Fateh Mahomed v. Mitha ...	*Lahore High Court.

481	Subramaniam Patter v. Velu Nair ..	49 M. L. J. 717; 22 L. W. 749; (1926) M. W. N. 36; A. I. R. 1926 Mad. 249.
482	Durga Bai, *In the matter of* ...	24 A L J 310 A. I R. 1926 All. 301.
483	Narayanaswami Pillai v. Gopalakrishna Naidu ...	(1925) M. W. N. 780; 22 L W. 618; A. I. R. 1926 Mad. 112; 50 M L. J. 48.
484	Bago v. Roshan Beg ...	*Lahore High Court.
489	Ma Tok v. Ma Yin ...	3 R. 77; A I. R. 1925 Rang 228.
491	Asanalli Nagoor v. Mahadu Meera ...	22 L. W. 820; A. I R. 1926 Mad. 259.
492	Gokul Das v. Nathu ...	24 A. L. J. 291.
493	Kala Gella v Shivji ...	*Sind Judicial Commissioner's Court.
496	Abdul Majid v. Wahidullah ...	A. I. R. 1926 All. 284.
497	Official Receiver, Tanjore v. Nagaratna Mudaliar ...	49 M. L. J. 643; (1925) M. W. N. 907; A. I. R. 1926 Mad. 194.
503	Muhammad Ismail v. Vahiduddin ..	24 A. L. J. 311; A. I. R. 1926 All. 270.
504	Sankaralinga Mudaliar v. Official Receiver, Tinnevelly	49 M. L. J. 616; (1925) M. W. N. 832; A. I. R. 1926 Mad. 72.
510	Radha Kishun v. Kashi Nath ..	24 A. L. J. 241; A. I. R. 1926 All. 266.
512	Maung Set Khaing v. Maung Tun Nyein ...	A. I. R. 1925 Rang. 221; 4 Bur. L. J. 69; 3 R. 82.
514	Muhammad Ibrahim v Ram Chandra ...	24 A. L J. 244; A. I. R. 1926 All. 289.
516	Vencatachariar v. Bontham Pachayappa Chetty ..	22 L. W. 698; (1926) M. W. N. 106; A. I. R. 1926 Mad. 250.
517	Commissioner of Income-Tax, Bombay v. M. H. Sanjana & Co. ...	27 Bom. L. R. 1471; A. I. R. 1926 Bom. 129; 50 B. 87.
520	Thirumalai Pillai v. Arunchella Padayachi ...	A. I. R. 1926 Mad. 540.
522	Ganga Dhar-Baij Nath v. B B. & C. I Ry. ...	24 A. L. J. 328.
523	Shiva Aithala v. Rangappaya Aithala ...	49 M. L. J 719; A. I. R. 1926 Mad. 233.
524	Unnamalai Ammal v. Abboy Chetty ..	23 L. W. 168; 50 M. L. J. 172.
525	Digambar, *In re* .	A. I. R. 1926 Nag. 306.
526	Peria Nambi Srinivasachariar v. Kuna Ramasamy Naicker ...	A. I. R. 1926 Mad. 509.
526	Aishan v. Municipal Committee, Lahore ..	*Lahore High Court
527	Gajanan Narayan Patkar v. Jivangiri Chamelgiri ...	27 Bom. L. R 1465; A. I. R. 1926 Bom. 131.
530	Kisan v. Jasodabai ..	A. I. R. 1925 Nag. 298.
531	Ruldu Ram v. Surain Singh ..	7 L. L. J. 618; A. I. R. 1926 Lah. 120.
532	Bombay Baroda & Central India Ry. v. Gulabbhai Bhagwandas ...	A. I. R. 1926 All. 296.
533	Kalliakkal v. Palani Koundan	23 L. W. 227; 50 M L. J. 200; (1926) M. W. N. 245; A. I. R. 1926 Mad 412.
535	Ganpat Rai v. Kani Ram-Munna Lal ..	24 A. L. J. 283; A. I. R 1926 All. 293.
537	Vishvanath Shamba Naik v. Ramkrishna Nartoba Kasbekar ...	27 Bom. L. R. 1478; A. I. R 1926 Bom. 86; 50 B. 94.
541	Racharla Narayanappa v. Kondigi Bheemappa ...	A. I. R. 1926 Mad. 494.
542	Balshet Mahadshet Yekawde v. Hari Baburao Rane	27 Bom. L. R. 1487; A. I. R. 1926 Bom. 119.
544	Surendra Nath Das Gupta v. Satyendra Nath ..	*Calcutta High Court.
545	Chandulal Maganlal v Motilal Harilal ..	27 Bom. L. R 1492; A. I. R. 1926 Bom. 43.
546	Ata Husain v Mustafa Husain ...	*Allahabad High Court.
548	G. I. P. Ry. Co. v. Chandulal Sheopratab ...	27 Bom L. R. 1500; A. I. R. 1926 Bom. 138; 50 B. 84
549	Basant Rai Bhandari v. Salik Ram ...	A. I. R. 1926 Oudh 288.
549	Fulchand Mohanlal v. Harilal Nansa ...	27 Bom. L. R. 1503; A. I. R. 1926 Bom. 69; 50 B. 124.
551	Batuk Nath v. Jugal Kishore ...	24 A. L. J. 281; A. I. R. 1926 All. 285.
552	Shri Goverdhanlalji Maharaj v. Shri Chandraprabhavati ...	27 Bom. L. R. 1496; A. I. R. 1926 Bom. 136.
553	Muhammad Ibrahim v. Yado	A. I R. 1926 Nag. 238.
554	Shidraj Bhojraj Desai v. Renaki Konda Mahar .	27 Bom. L. R. 1490; A. I. R. 1926 Bom. 140.
555	Ghissu v. Amir Ali Khan ...	*Allahabad High Court.
555	Devji Padamsey v. Thommadra Erikalappa ..	27 Bom. L. R. 1494; A. I. R. 1926 Bom. 63.
556	Sivan Pillai v. Venkateswara Iyer	22 L. W. 796; A. I. R. 1926 Mad. 130.
558	Pancham Lal v. Muhammad Yaqub ...	24 A. L. J. 313; A. I. R. 1926 All. 294.
559	Qamar Jahan Begam v. Munney Mirza ..	12 O. L. J. 313, 2 O. W. N. 413; A. I. R. 1925 Oudh 613.
562	Tahilram Tarachand v. Vassumal Deumal ..	A. I. R. 1926 Sind 119.
563	Gobind Lal Dutt v. Official Assignee, Calcutta	29 C. W. N. 163; A I. R. 1925 Cal 291.
566	Subramania Iyer v. Shunmugam Chettiar ...	49 M. L. J. 363; 32 L. W 533; A. I. R. 1926 Mad. 65.
567	Ram Saran Das v. Girdhari Lal	24 A. L. J. 286; A. I. R. 1926 All. 305.

569	Bulli Mal v. Jhabba ...	A. I. R. 1925 Lah. 504; 7 L. L. J. 280.
570	Tulasidass Govindjee v. Madhavadass Lalajee ..	22 L. W. 642; (1926) M. W. N. 68; A. I. R. 1926 Mad. 148.
571	Atma Ram v. Nanak Chand ...	A I. R. 1926 All. 274.
573	Chittammal v. Ponnusami Naicker ...	23 L. W. 94; (1926) M. W. N. 121 & 172; 50 M. L. J. 180; A. I R. 1926 Mad. 363.
575	Parumal Thawerdas v. Makhan ...	A. I. R. 1926 Sind 113.
577	Ram Karan v. Emperor ...	7 L. L J. 371; A. I. R. 1925 Lah. 483; 2 L. C. 197; 27 Cr. L. J. 289.
584	Khamani v. Emperor ...	L. R. 6 A. 207 Cr.; 24 A. L. J. 171; 27 Cr. L. J. 296; A. I. R. 1926 All. 306.
585	Indar Singh v. Emperor ...	27 Cr. L. J. 297; 24 A. L. J. 270; A. I. R. 1926 All. 302.
587	Wasal v. Emperor ...	A. I. R. 1925 Lah. 495; 7 L. L. J. 277; 27 Cr. L. J. 299.
588	Kashi Prasad v. Emperor ...	24 A. L. J. 161; A. I. R. 1926 All. 141; 27 Cr. L. J. 300.
588	Emperor v. Gulab ...	27 Cr. L. J. 300.
589	Krishna Gopal v. Emperor ...	27 Cr. L. J. 301.
590	L. A. Morrison v. H M. Crowder ...	27 Cr. L. J. 302.
590	Emperor v. Ghulam Mohammad .	A. I. R. 1925 Lah. 510; 7 L. L. J. 331; 27 Cr. L. J. 302.
591	Emperor v. Kesar ...	27 Cr. L. J. 303; 24 A. L. J. 228; A. I. R. 1926 All. 226.
591	Kalap Nath v. Emperor ...	27 Cr. L. J. 303; 24 A. L. J. 292; A. I. R. 1926 All. 288.
593	Bashirulla Bhuiya v. Meajan ..	A. I. R. 1926 Cal. 690.
593	Tadepalli Subba Rao v. Motamari Lakshminarayana ...	22 L. W. 389; A. I. R. 1925 Mad. 1214.
594	Gonnabathula Thammayya v. Gonnabathula Chinnayya ...	22 L. W. 752; (1926) M. W. N. 38; A. I. R. 1926 Mad. 282.
595	Munshi Ram v. Bhagwan Das ...	7 L. L. J. 596; A. I. R. 1926 Lah. 152.
597	Muhammad Mohideen Maracayar v. Ramanadhan Chettiar ...	22 L. W. 872; A. I R. 1926 Mad. 217.
597	Nand Ram v. Ishar ...	7 L L J. 600; A. I. R. 1926 Lah. 128.
599	Chockalingam Pillai v. Pichappa Chettiar ...	22 L. W. 579; (1925) M. W. N. 802; A. I. R. 1926 Mad 155.
600	Mumtaz Ali v. Allah Banda ...	*Allahabad High Court.
601	Adam Sardar v. Bisweswar Das ...	A. I. R 1926 Cal. 684.
602	Municipal Committee, Ferozepore v. Milkhi Ram ...	A. I. R. 1925 Lah. 505; 7 L. L. J. 358.
603	Muthu Veerappa Chettiar v. U. K. Sivagurunatha Pillai ...	22 L W. 617; 49 M. L. J. 697; (1926) M. W. N. 63; A. I R. 1926 Mad. 133; 49 M. 217.
603	Bengal North-Western Ry. v. Bansi Dhar ..	3 O. W. N 145; A. I. R. 1926 Oudh 218.
608	Lalman v. Shiam Singh .	24 A. L J 288; A. I R 1926 All. 291.
610	Municipal Council, Tuticorin v. Shunmugha Moopanar	(1925) M. W. N. 880; 23 L. W. 31; A. I. R. 1926 Mad. 251; 49 M. 219.
612	Ganga Bakhsh Singh v. Maula Bux Singh ...	13 O. L. J. 132.
615	Vadapalli Varadacharyulu v. Khandavilli Narasimhacharyulu ...	(1925) M. W. N. 886; 23 L. W. 85; A. I. R. 1926 Mad. 258.
616	Chandra Kumar Guha v. Elahi Buksha ...	A. I. R. 1926 Cal. 667.
617	Jitendra Nath Chatterjee v. Jasoda Sahun ..	(1925) Pat. 353; A. I. R. 1926 Pat. 122; 7 P. L T. 299.
620	Abdul Rahiman Sahib & Co. v. Shaw Wallace & Co. ...	21 L. W. 516; A. I. R. 1925 Mad. 736.
621	Langley Billimoria & Co. v. Lakhmichand-Gopal-Das ..	*Sind Judicial Commissioner's Court
621	Kaliba Sahib v. Subbaraya Ayyar ...	23 L. W. 99; (1926) M. W. N. 123 & 178; A. I. R. 1926 Mad. 365.
622	Chandrabhan Prakashnath v. E. I. Ry. Co. ...	24 A. L. J. 305; A I R. 1926 All. 299.
624	Tiruvangalath Nellyoton Paidal Nayab, *In re* ...	22 L. W. 691; 1626 M. W. N. 169; A. I. R. 1926 Mad. 225.
626	Hitendra Singh v. Maharajdhiraj of Darbhanga ...	(1925) Pat. 359; A. I. R. 1926 Pat. 147; 7 P. L T. 392.
626	Alella Kesavaramayya v. Visamsetti Venkatanarasimha ...	(1926) M. W. N. 141; 50 M L. J. 36; 23 L. W. 678; A. I. R. 1926 Mad. 452.

628	Vishvanathbhat Annabhat v. Mallappa Ningappa ...	27 Bom. L. R. 1103; 49 B. 821; A. I. R. 1925 Bom. 514.
629	Bhatu Ram Modi v. Fogal Ram ..	(1925) Pat. 357; 5 Pat. 223; A. I. R. 1926 Pat 141; 7 P. L. T. 340.
631	Arunchellam Chettiar v. U Po Lu ...	4 Bur. L. J. 91; A. I. R. 1925 Rang. 266; 3 R 318.
633	Ram Protap Chamria v. Durga Prosad Chamria ...	3 O. W. N. 127; A. I. R. 1925 P. C. 293; 49 M. L. J. 812; 43 C. L. J. 14; 24 A. L. J. 13; (1926) M. W. N. 96; 3 Pat. L. R. 330; 28 Bom. L. R. 217; 53 C. 258. P. C.
637	Ram Shankar Singh v. Lal Bahadur Singh ...	3 O. W. N. 267; A. I. R. 1926 Oudh 277; 13 O. L. J. 216.
640	Gopilal Bhawaniram v. Pandurang ...	A. I. R. 1926 Nag. 241.
644	Muhammad Zakaria v. Kishun Narain ...	A. I. R. 1926 All. 268.
646	Shankar v. Pandurang ...	9 N. L. J. 22
651	Lal Chand v. Huns Kumar ...	7 L. L. J. 590; A. I. R. 1926 Lah. 108; 7 L. 55.
653	Mahadeva Iyer v. Ramkrishna Reddiar ..	23 L. W. 199; 50 M. L. J. 67; A. I. R. 1926 Mad. 114; (1925) M. W. N. 707.
656	Ahmun Zaida v. Gurdas Ram ...	A. I. R. 1926 Lah. 225.
657	Sartaj Koer v. Mahadeo Bux ...	A. I. R. 1926 Oudh 332.
661	Koyyalamudi Chinnayya v. Koyyalamudi Mangamma ...	*Madras High Court.
663	Narayan v. Dhudabai ..	21 N. L. R. 38; A. I. R. 1925 Nag. 299.
665	Sarda Bux Singh v. Kandhia Bux ..	*Oudh Chief Court.
667	Maung Po Seik v. U Nandiya ...	A. I. R. 1925 Rang. 374; 4 Bur. L. J. 178.
667	Moolji Murarji Sunderji v. Pinto ...	*Sind Judicial Commissioner's Court.
669	Roshan Lal v. Rustomji ...	A. I. R. 1926 Lah. 249.
670	Indarpal Singh v. Kalloo ...	*Oudh Chief Court.
672	Addepalli Kondayya v. Yandru Vecranna ...	A. I. R. 1926 Mad. 543.
673	Gauri Shankar v. Decruze ...	3 O. W. N. 378.
674	Firm Bihari Lal-Jai Narayan v. Har Narain Das ...	*Lahore High Court.
675	Raisun Nisa v. Zorawar Sah ...	3 O. W. N. 121; 13 O. L. J. 10; A. I. R. 1926 Oudh 228.
677	M. S. S. Chettyar Firm v. Ma Tin Tin ...	A. I. R. 1925 Rang. 349; 4 Bur. L. J. 179.
678	Gopal v. Krishnarao ...	*Nagpur Judicial Commissioner's Court.
679	Kidar Nath v. Bhikham Singh ...	*Oudh Chief Court.
681	Bhupendra Narayan Singh Bahadur v. Madar Bakhsh Sheikh ...	A. I. R. 1925 P. C. 297; 23 L. W. 9; 52 I. A. 439; 53 C. 1 P. C.
681	Chandrika Prasad v. Nazir Husain ...	A. I. R. 1926 Oudh 306.
683	Indal v. Debi ...	A. I. R. 1926 Nag. 174.
684	Balaram Manjhi v. Jagannath Manjhi ...	A. I. R. 1925 Pat. 760.
685	Mahadeo Prasad v. Ram Pasi ..	3 O. W. N. 186; 13 O. L. J. 55; A. I. R. 1926 Oudh 258.
687	Suggusetty Subbayya v. Irugulopati Gangayya ..	22 L. W. 827; A. I. R. 1926 Mad. 183.
688	Maung Han v. Ko Oh ...	A. I. R. 1925 Rang. 366; 4 Bur. L. J. 180.
689	Emperor v. Manant K. Mehta ...	27 Bom L. R. 1343; 49 B. 892; A. I. R. 1926 Bom. 110; 27 Cr. L. J. 305.
693	Emperor v. Mathro ...	27 Cr. L. J. 309; A. I. R. 1926 Sind 101.
694	Beni Ram v. Emperor ...	27 Cr. L. J. 310; A. I. R. 1926 All. 237.
695	Kannammal, *In re* ...	23 L. W. 384; 27 Cr. L. J. 311 A. I. R. 1926 Mad. 570.
697	Babu v. Emperor ...	24 A. L. J. 280; 27 Cr. L. J. 313; A. I. R. 1926 All 276.
697	B. N. Ry. Co. v. Makbul ...	A. I. R. 1925 Pat. 755; (1926) Pat. 74; 27 Cr. L. J. 313; 7 P. L. T. 343.
702	Maung Tun v. Emperor ...	A. I. R 1925 Rang. 353; 4 Bur. L. J. 172; 27 Cr. L. J. 318.
703	Shaikh Karim v. Emperor ...	27 Cr. L. J. 319; A. I. R. 1926 Nag. 279.
705	Radha Kishen-Chuni Lal v. Ahsa Mal-Ishar Das ...	7 L. L. J. 603; A. I. R. 1926 Lah. 91.
708	Mangaram v. Budhu ...	A. I. R. 1926 Nag. 289.
709	Mahtab Shah v. Ali Haidar Shah ...	6 L. 338; A. I. R. 1925 Lah. 429; 7 L. L. J. 190.
709	Trustees, Parakkat Devaswom v. Venkatachalam Vadhayar ..	23 L. W. 22; 50 M. L. J. 153; A. I. R. 1926 Mad. 321.
712	Raghunath Das-Ram Sarup v. Sulzer Bruderer & Co. ...	7 L. L. J. 611; 7 L. 42; A. I. R. 1926 Lah. 125.
714	Taramonee Choudhurani v. Sheikh Elim ...	A. I. R. 1926 Cal. 582.

715	Mayappa Chettiar v. Kolandaivelu Chettiar ...	*Madras High Court.
719	Maung Mya Din v. Maung Ye Gyi ...	A. I. R. 1925 Rang. 350; 4 Bur. L. J. 136.
720	Mulugu Chengayya v. Aruvelu Devasanambagaru ...	50 M. L. J. 145; 23 L. W. 390; (1926) M. W. N. 289; A. I. R 1926 Mad. 406.
721	Thakar Singh v. Indar Singh ..	*Lahore High Court.
722	Shankar Baksh v. Taluqdei ..	3 O. W. N. 375.
723	Bantu v. Lehna Das	*Lahore High Court.
724	Komarasami Chetti v. Sundar Mudaliar ...	23 L. W. 212.
725	Buta v. Ghulam Muhammad ...	A. I. R. 1926 Lah. 247.
726	Bohisetti Mamayya v. Official Receiver, Guntur ...	23 L. W. 10; (1926) M. W. N. 124; A. I. R. 1926 Mad. 338.
727	Baikuntha Nath Kar v. Adhar Chandra Pain ...	A. I. R. 1926 Cal. 653.
730	Pothi Annapurnayya v. Pothi Nagaratnamma .	A. I. R. 1926 Mad. 591.
731	Nihal Singh v. Secretary, Gurdawara Guru Tegh Bahadur ...	A. I. R. 1926 Lah. 228.
732	Chandoo v. Murlidhar ..	13 O. L. J. 138; A. I. R. 1926 Oudh 311.
735	Chandrabhaga Bai v. Bakaram ..	A. I. R. 1926 Nag. 276.
736	Mg. Po Kin v. Mg. Po Oh ...	A. I. R. 1925 Rang. 373; 4 Bur. L. J. 160.
737	McDonnell v. Emperor ...	A. I. R. 1925 Rang. 345; 4 Bur. L. J. 147; 3 R. 524; 27 Cr. L. J. 321.
741	Narain Das v. Emperor ..	27 Cr. L. J. 325.
742	Jeomal v. Emperor ..	27 Cr. L. J. 326.
743	Emperor v. Daulat Singh ...	24 A. L. J. 224; 27 Cr. L. J. 327.
744	Parakh v. Emperor ...	3 O. W. N. 160; A. I R. 1926 Oudh 202; 27 Cr. L. J. 328.
746	Chiragh Din v. Emperor ..	7 L. L. J. 621; 27 Cr. L. J. 330.
747	Rukmani Ammal v. Muthuswami Reddi ...	50 M. L. J. 94; 27 Cr. L. J. 331.
748	Sidik v. Emperor ..	27 Cr. L. J. 332.
749	Diwan Chand v. Emperor ...	27 Cr. L. J. 333; A. I. R. 1926 Lah. 227.
750	Kaliappa Goundan v. Maniam Sellappa Goundan ..	23 L W. 101; A. I. R. 1926 Mad. 296; 27 Cr. L. J. 334.
750	Nazar Shah v. Emperor ...	27 Cr. L. J. 334.
752	Ah Khaung v. Emperor ...	4 Bur. L. J. 143; A. I. R. 1925 Rang. 363; 27 Cr. L. J. 336.
753	Thanappa Chetty v. Esuf Khan Sahib ...	23 L. W. 36.
757	Ram Pher Singh v. Sheo Saran Singh ...	3 O. W. N. 138; A I. R. 1926 Oudh 196.
759	Noor Din v. Sulakhan Mal ..	A. I. R. 1926 Lah. 230.
760	Firm of R. B. Bansilal Abirchand v. Ghulam Mahbub Khan ...	A. I. R. 1925 P. C. 290; 49 M. L. J. 806; 43 C. L. J. 1; 23 L. W. 3, 24 A. L J. 48 (1926) M. W. N. 108; 28 Bom. L. R. 211; 53 C. 88; 30 C. W. N. 577 P. C.
762	Ladha Singh v. Sundar Singh ...	*Lahore High Court.
764	Prabhudayal v. Lalta Das ...	A. I. R. 1926 Oudh 293.
765	Municipal Committee, Taran Taran v. Mul Raj ..	*Lahore High Court.
766	Mahomed Siddiq v. Li Kan Shoo ...	A I. R 1925 Rang 372; 4 Bur. L. J. 154
768	Lallu Singh v. Gur Narain ...	*Allahabad High Court.
769	Abdul Qadir v. Ilahi Bakhsh ...	A. I. R. 1926 Lah. 251.
770	Ayyaru Pillai v. Varadaraja Pillai ..	50 M L. J 116; A. I. R. 1926 Mad. 431.
771	Savarese v. Wakf Estate of Ismail Ahmed Mada ...	A. I. R. 1925 Rang 376; 4 Bur. L. J. 157.
772	Shib Narain v. Gajadhar ...	24 A L. J. 260.
775	Ma Shewe U v. Ma Shin ..	A I. R. 1925 Rang. 381; 4 Bur. L. J. 146.
776	Thirumalachariar v. Athimoola Karayalor ...	22 L. W. 695; (1926) M. W. N 112; A. I. R. 1926 Mad. 256.
777	Maung San Pwe v. Hamadanee ...	A. I. R. 1925 Rang. 382; 4 Bur. L. J. 166.
779	Taj Mohammad v. Farid Khan ...	*Lahore High Court.
780	Shakur, M. A. v. Municipal Corporation, Rangoon ..	A. I. R. 1925 Rang. 367; 4 Bur. L. J. 161.
782	Pattamayya v. Pattayya ...	50 M. L. J 215; (1926) M. W. N. 262; A. I R. 1926 Mad. 453.
785	Sheikh Badal v. Abdul Rahim ...	A. I. R. 1926 Nag 273.
786	Chan Elliam v. Neo Thein Theong ..	A. I. R. 1925 Rang. 361; 4 Bur. L. J. 138
787	Kallu Mal v. Partab Singh ..	A. I. R. 1926 Oudh 301.
790	Kannuri Venkata Siva Rao v. Chittoori Rama Krishnayya ..	(1925) M. W. N. 874; 23 L. W. 103; 50 M. L. J. 148; A. I. R. 1926 Mad. 216.
791	Abdul Qadir v. Ilahi Bakhsh ...	*Lahore High Court.
792	Ramakka v. Negasam ..	47 M. 800; 48 M. L. J. 89; A. I. R. 1925 Mad. 145.
796	Marotrao v. Municipal Committee, Nagpur ..	A. I. R. 1926 Nag. 281.

800	Kommareddi Ramachandrayya v. Vodury Venkataratnam ...	22 L. W. 582; (1925) M. W. N. 804; A. I. R. 1926 Mad. 133.
802	Venkata Narasimha Rao v. Hemadu Suryanarayana ...	50 M. L. J. 75; 23 L. W. 409; A. I. R. 1926 Mad. 325.
803	Ramchandra v. Lakshman ..	9 N. L. J. 3; A. I. R. 1926 Nag. 298.
805	Koyyalamudi Subbanna v. Koudri Subbarayudu ...	50 M. L. J. 125; A. I. R. 1926 Mad. 390.
810	Vinayak v. Kaniram ...	A. I. R. 1926 Nag. 293.
813	Ram Bhaj v. Duni Chand ...	A. I. R. 1926 Lah. 240.
814	Chintalapati Butchi Seetayya Garu v. Gollavilli Appadu ...	A. I. R. 1926 Mad. 526.
818	Barkoo v. Atmaram ..	*Nagpur Judicial Commissioner's Court.
819	Veeraswami Pillai v. Chidambaram Chettiar ..	*Madras High Court.
822	Dawlat v. Kashirao ...	A. I. R. 1926 Nag 280.
823	Ramasami Goundan v. Alagia Singaperumal Kadavul ..	22 L. W. 701; (1926) M. W. N. 117; 50 M. L. J. 42; A. I. R. 1926 Mad. 280
824	Thakur Singh v. Sonkuar ..	*Nagpur Judicial Commissioner's Court.
825	Sukhdeo v. Ram Dulari ...	A. I. R. 1926 Oudh 313.
827	Vemulapalli Seetharamamma v. Maganti Appiah ..	23 L. W. 285; (1926) M. W. N. 238; A I. R. 1926 Mad. 457.
832	Bajrang Bali v. Mahrajia ..	*Oudh Chief Court
833	Subramania Aiyar v. Krishna Iyer ..	(1925) M. W. N. 887; A. I. R. 1926 Mad. 211.
838	Meenakshisundara Nachiar v. Veerappa Chettiar ...	(1926) M. W. N. 4.
839	Umrao Singh v. Beni Prashad-Mehr Chand ..	*Lahore High Court.
840	Muhammad Afzal v. Muhamn ad Mahmud ...	24 A. L. J. 307.
841	Chimashani v. Venkatrao ...	8 N. L. J. 135; A. I. R. 1926 Nag. 79.
843	Aswap Ali Bepari v. Dula Mia ...	A. I. R. 1926 Cal. 580.
844	Kommineni Appalaswamy v. Kommineni Simhadri Appadu ...	23 L. W. 29; A. I. R. 1926 Mad. 384.
845	Sasi Bhusan Mallick v. Sadananda Mallick ...	*Calcutta High Court.
846	Swaminatha Odayar v. Thiagarajaswami Odayar ...	23 L. W. 26; (1926) M. W. N. 140.
847	Narayanaswami Iyengar v. Thippayya ...	(1926) M. W. N. 1; 23 L. W. 382; A. I. R. 1926 Mad. 366.
849	Emperor v. Nga Tun Maung ...	A. I. R. 1925 Rang. 362; 4 Bur. L. J. 169. 27 Cr. L. J. 337.
850	Imam Ali v. Emperor ..	27 Cr. L. J. 338; A. I. R. 1926 Lah. 212.
851	Local Government v. Doma Kunbi ...	27 Cr. L. J. 339.
854	Emperor v. Maung Than Gyaung ...	A. I. R. 1925 Rang 375; 4 Bur. L. J. 145; 3 R. 514; 27 Cr. L. J. 342.
855	Vaithi Matharan v. Narayanaswami Iyer ...	22 L. W. 673; A. I. R. 1926 Mad. 210; 27 Cr. L. L. J. 343.
855	Dwarka v. Emperor ...	27 Cr. L. J. 343.
856	Ishwar Das v. Emperor ...	27 Cr. L. J. 344; A. I. R. 1926 Oudh 290.
857	Jalal Uddin v. Emperor ..	24 A. L. J. 230; 27 Cr. L. J. 345; A. I. R. 1926 All. 271.
862	Kandasami Chetty, *In re* ..	50 M. L. J. 44; (1926) M. W. N. 146; 27 Cr. L. J. 350; A. I. R. 1926 Mad. 346.
863	Mulai Rai v. Emperor ..	24 A. L J. 314; 27 Cr. L. J. 351; A. I. R. 1926 All. 277.
865	Ajo Mian v. Emperor ...	6 P. L. T. 626; A. I. R. 1925 Pat. 696; 27 Cr. L. J. 353.
870	Masala v. Emperor ...	27 Cr. L. J. 358.
871	Jeobaran Singh v. Ramkishun Lal ..	4 Pat. 503; A. I. R. 1925 Pat. 623; 27 Cr. L. J. 359.
873	Alampath Krishnan v. Municipal Prosecutor, Cunnanore ...	23 L. W. 413; 27 Cr. L. J. 361; A. I. R. 1926 Mad. 430.
874	Badri Choudhry v. Emperor ...	6 P. L. T. 620; A. I. R. 1926 Pat. 20; 27 Cr. L J. 362.
882	Ram Charan v. Emperor ...	24 A. L. J. 317; 27 Cr. L. J. 370.
883	Chamari Singh v. Public Prosecutor of Gaya ..	4 Pat. 484; A. I. R. 1925 Pat. 677; 27 Cr. L. J. 371; 7 P. L. T. 372.
885	Parmeshar Lall v. Emperor ...	4 Pat. 472; A. I. R. 1925 Pat. 678; 27 Cr. L. J. 373.
887	Abdul Bari Mallick v. Emperor ..	42 C. L J 585; A. I. R. 1926 Cal. 157; 27 Cr. L. J. 375; 30 C. W. N. 644
889	Mul Chand v. Emperor ..	27 Cr. L. J. 377; A. I. R. 1926 Lah. 250.

889	Mustaqimuddin v. Emperor ..	24 A. L. J. 327; 27 Cr. L. J. 377; A. I. R. 1926 All. 297.
890	Arshed Ali v Emperor	30 C W N. 166; 27 Cr. L. J. 378.
892	Emperor v. Tej Ram .	27 Cr. L. J. 380.
894	Lalit Kumar Sen v. Emperor ...	42 C. L. J. 551; A. I. R. 1926 Cal. 174; 27 Cr. L. J. 382.
894	Mughees-ud-din v. Emperor ...	27 Cr. L J. 382; A. I. R. 1926 Lah. 236.
895	Puran v. Emperor .	27 Cr. L. J 383; A. I. R. 1926 All. 208.
896	Venugopal Nayudu, *In re* ...	27 Cr. L. J. 381.
897	Durga Prosad Lahiri Choudhuri v. Ratan Mahommed Sarkar ...	*Calcutta High Court.
897	Wilayati Begam v Jhandu Mal-Mithu Lal ...	24 A. L. J 349; A. I. R. 1926 All. 286.
898	Bhagwandas-Paras Ram v. Jado Nath ..	A. I. R. 1926 Lah. 236.
899	Prayaga Doss Jeevaru v. Pachella Doraiswami Iyengar ...	23 L. W. 520.
899	Baikuntha Nath De v. Shaik Hari ...	A. I. R 1926 Cal. 592.
900	Bibi Khodaijatul Kobra v. Harihar Misser ..	4 Pat. 688, 7 P. L. T. 333; A. I. R. 1926 Pat. 209.
902	Khurshed Meerza v. Faizuddin Ali ...	*Calcutta High Court.
903	Rudan Singh v. Kalka Singh ...	A. I. R 1926 Oudh 309.
905	Abdul Wahed Khan v. Tamijannessa Bibi ...	A I R. 1926 Cal 679
906	Jang Bahadur v. Jagat Narain ..	A. I. R. 1926 Oudh 318.
908	Siteswar Roy v. Tepua Borman ..	A. I. R. 1926 Cal. 589
909	Anandrao v. Daulat ...	22 N. L. R 37; A I. R. 1926 Nag. 274.
913	Khurshid Begam v. Abdul Rashid	9 N. L J. 11; A I. R 1926 Nag. 234.
915	Guduthuru Thimmappa v. Balakrishna Mudaliar ..	23 L W. 361; 50 M. L J. 298; A. I. R. 1926 Mad 427.
916	Barati v. Surit ...	A. I. R. 1926 Nag 277.
918	Mahammad Raza Sahab Belgami v. Sadasiva Rao ..	49 M. 49; A I R. 1926 Mad. 297.
928	Gaura Telin v. Shriram Bhoyer ...	A. I. R. 1926 Nag. 265
928	Ayiswaryanandaji Saheb v. Siwaji Raja Saheb ...	A. I. R. 1926 Mad. 84; 49 M. L. J. 568; 49 M. 116.
940	Sripati Dutta v. Bibhuti Bhusan Dutta ...	53 C. 319; A. I. R. 1926 Cal. 593.
943	Commissioner of Income Tax, Madras v. Messrs. King & Partrige ...	50 M. L. J. 176; 49 M. 296; A. I. R. 1926 Mad. 368.
946	Susil Chandra Guha v. Gouri Sundari Devi ...	*Calcutta High Court
947	Relu Mal v. Ahamad ...	7 L 17; A I. R. 1926 Lah. 183.
948	Dhana Mohammad v. Nastulla Molla ...	A. I. R. 1926 Cal. 637.
949	Lachhman Singh v. Ram Das ..	*Lahore High Court.
950	Dost Muhammad v. Kadar Batcha ...	23 L. W. 240; A I R. 1926 Mad. 466.
960	Fazlar Rahman v. Abdul Samad ..	*Calcutta High Court
961	Bangshi Badan Haldar v. Ratan ..	*Calcutta High Court.
962	Manepalli Satanarayanamurthi v. Thommandra Erikalappa ...	50 M. L. J. 150; 23 L. W. 396; (1926) M. W. N 282; A. I. R 1926 Mad. 410.
963	Gopal Chandra Das v. Satya Bhanu Ghoshal ..	A. I. R. 1926 Cal. 634.
966	Allah Bakhsk v. Municipal Committee, Rohtak ...	A. I. R. 1926 Lah. 223.
968	Veeranan Ambalam v. Ayyachi Ambalam ..	22 L. W. 772; (1925) M. W. N. 857; 49 M. L. J. 791; A. I. R. 1926 Mad. 168.
973	Addepalli Venkata Garunadha v. Akella Kesava Ramiah ..	50 M. L. J. 54; 23 L. W. 314; (1926) M. W. N. 149; A. I. R 1926 Mad 417.
976	Seetharama Naidu v Govindasami Chettiar ..	23 L. W. 149; (1926) M. W. N. 162; A. I. R. 1926 Mad. 352.
977	Nidavolu Atchutam v. Ratnaji ...	23 L W. 193; 50 M. L. J. 208; (1926) M. W. N. 258; 49 M. 211; A. I. R. 1926 Mad. 323.
980	Narain Das v. Saraj Din ..	A I. R. 1926 Lah. 238.
981	Iswor Sant v. Torendra Nath Kuila ...	42 C. L J. 560; A. I. R 1926 Cal. 163.
982	Bhagat Singh v. Mathra ..	*Lahore High Court.
984	Umasasi Debi v. Akrur Chandra Mazumdar ...	30 C W. N. 160; A. I. R. 1926 Cal. 542; 53 C. 297.
986	Arshad Ali v. Zorawar Singh ...	8 L. L J. 60.
989	Kuthalinga Mudaliar v. Shanmuga Mudaliar ...	50 M. L J. 234; 23 L. W. 373; (1926) M. W. N. 274; A. I. R 1926 Mad. 464.
990	Kala Khan v. Nathu Khan ..	A I R. 1926 Lah. 229.
991	Puran Chand v. Emperor ..	*Lahore High Court.
993	G. I. P. Railway v. Kunj Behari Lal ...	A. I. R. 1926 All. 228.

994	Chiranji Lal v. Shib Lal ..	A. I. R. 1926 Lah. 242.
995	Baldeo Kurmi v. Kashi Chamar ...	24 A. L. J. 337; A. I. R. 1926 All. 312.
1001	W. & T. Avery Ld. v. Kessoram Poddar ...	30 C. W. N. 152; A. I. R. 1926 Cal. 481.
1006	Lakshmi Chand v. Mukta Parshad ...	8 L. L. J. 67.
1007	East Indian Railway v. Firm Baldeo Gutain ...	*Allahabad High Court.
1008	Indian Vacuum Brake Co. Ltd. v. E. S. Luard ...	42 C. L. J. 543; A. I. R. 1926 Cal. 152; 53 C. 306.
1012	Singh Ram v. Kala ...	8 L. L. J. 39; A. I. R. 1926 Lah. 244; 7 L. 173.
1013	Raghubir Singh v. Nathu Mal ..	*Allahabad High Court.
1015	Firm Budhu Mal-Parma Nand v. Gokal Chand ...	8 L. L J. 3; 7 L. 113.
1016	Lalchand Deomal, *In re* ..	A. I. R. 1925 Sind 259.
1017	Jai Narain v. Jafar Beg ...	24 A. L. J. 355.
1019	Municipality of Tando Adam v. Khair Mahomed ..	A. I. R. 1925 Sind 260.
1021	Alagirisami Pillai v. Lakshmanan Chetty ..	50 M. L. J. 79; A. I. R. 1926 Mad. 371.
1027	Bhagwati Dayal v. Dhan Kunwar ...	24 A. L. J. 331; A. I. R. 1926 All. 311.
1028	Ramu Chetty v. Panchammal ...	(1926) M. W. N. 45; A. I. R. 1926 Mad. 402.
1030	Ram Badan Upadhiya v. Sankatha Misra ...	*Allahabad High Court.
1031	Ramdhani Muchi v. Khakshardas Tati ..	A. I. R. 1926 Cal. 677.
1034	Jasoda Koer v. Janak Missir ...	4 Pat. 394, A. I R. 1925 Pat. 787.
1045	Venkatarama Aiyar v. Soundaram Aiyar ...	(1926) M. W. N. 48.
1046	Ramaswami Aiyangar v. T. Raghava Aiyangar ...	(1926) M. W. N. 118.
1046	Khem Karan Das v. Baldeo Singh ...	A. I. R. 1926 All. 282.
1047	Bhunjanga Rao v. Periyathambi Goundan ..	*Madras High Court.
1051	Rathan Singh v. Commissioner of Income Tax, Madras	50 M. L. J. 157; 23 L. W. 267; A. I. R. 1926 Mad. 462.
1053	Kesavalu Naicker v. Corporation of Madras ..	23 L. W. 233; 50 M. L. J. 301; A. I. R. 1926 Mad. 381.
1055	Pooranalingam Servai v. Veerayi ...	22 L. W. 782; (1926) M. W. N. 114; A. I. R. 1926 Mad. 186.

TABLE

OF

Cases Applied, Approved, Considered, Disapproved, Dissented from, Distinguished, Explained, Followed, Not Followed, Overruled and Relied upon In Volume 92 of Indian Cases, 1926.

A

Page.

Abdul Hakim Khan Chaudhuri v. Elahi Baksha Saha, 85 Ind. Cas. 103; 52 C. 43; 29 C. W. N. 138; A. I. R. 1925 Cal. 309 *(Followed)* .. 963

Abdul Rahman Shah v. Shahana, 58 Ind. Cas. 748; 1 L. 339; 82 P. W. R. 1920; 1 L. L. J. 188 *(Relied on)* .. 802

Abid Ali v. Arabunnissa, 1 O. C. 75 *(Followed)* 265

Aduram Haldar v. Nakuleswar Rai Chowdhury, 49 Ind Cas. 137; 29 C L. J. 48 *(Relied on)* ... 544

Ahmad Raza Khan v. Ram Lal, 26 Ind. Cas. 922; 13 A. L. J. 204; 37 A. 203 *(Relied on)* ... 99

Aizunnissa Khatoon v. Karimunnissa Khatoon, 23 C. 130; 12 Ind. Dec. (N. S) 87 *(Dissented from)* ... 82

Alice Georgina Skinner v. Mukarram Ali Khan, 92 Ind. Cas. 330; A. I R. 1925 All. 77; L. R. 5 A. 607 Civ. *(Not followed)* .. 566

Anantarama Aiyar v. Yusufji Oomer Sahib, 36 Ind. Cas. 903; 31 M. L. J. 133; (1916) 2 M. W. N. 236 *(Relied upon)* ... 5

Andukuri Venkatarama Das v. Pachigolla Gavarraju, 70 Ind. Cas. 677; 43 M. L. J. 153 at p. 156; (1922) M. W. N. 305; 16 L. W. 228; A. I. R. 1922 Mad. 173; 31 M. L. T. 154 *(Distinguished)* 472

Arumugam Chetty v. Muthu Koundan, 52 Ind. Cas. 525; 42 M. 711; 9 L. W. 565; (1919) M. W. N. 409; 37 M. L. J. 166; 26 M. L. T. 96 *(Relied on)* .. 85

Arunachalam Chettiar v. Rajeswara Setupati, 71 Ind. Cas. 257; 15 L. W. 63; (1921) M. W. N. 873; 30 M. L. T. 84; 42 M. L. J. 74; A. I. R. 1922 Mad. 55 *(Distinguished)* ... 354

Arura v. Bur Singh, 84 Ind. Cas. 67; 5 L. 371; A. I. R. 1925 Lah. 31 *(Relied on)* .. 260

Asutosh Goswami v. Upendra Prosad Mitra, 38 Ind. Cas. 17; 21 C. W. N. 564; 24 C. L. J. 467 *(Relied on)* ... 960

Attra v. Mangal Singh, 65 Ind. Cas. 264; 2 L. 300; 4 L. L. J. 1; 27 P. L. R. 1922; A. I. R. 1922 Lah. 43 *(Followed)* 762, 791

Aulia Khan v. Kanshi Ram, 17 Ind. Cas. 677; 45 P. R. 1913; 25 P. W. R. 1913; 145 P. L. R. 1913 *(Not followed)* ... 762

Authikesavaloo Naicker v. Shah Abdulla, 29 Ind. Cas. 62; 2 L. W. 479; (1915) M. W. N. 337 *(Relied on)* .. 405

Ayisa Umma v. Puthiyadurayil Kumna Chumkandi Abdulla, 76 Ind. Cas. 126; (1923) M. W. N. 670; A. I. R. 1924 Mad. 178; 19 L. W. 613 *(Relied on)* ... 782

B

Badcock v. Hunt, (1889) 22 Q. B. D. 145; 58 L. J. Q. B. 134; 60 L. T. 314; 37 W. R. 205; 53 J. P. 340 *(Explained and distinguished)* ... 361

Bai Balagavri v. Motilal Ghelabai, 72 Ind. Cas. 224; 47 B. 523; 25 Bom. L. R. 199; A. I. R. 1923 Bom. 247 *(Distinguished)* ... 785

B—contd.

Page.

Bai Diwali v. Umedbhai Bhulabhai Patel, 36 Ind. Cas. 564; 40 B. 614; 18 Bom. L. R. 773 *(Relied on)* ... 640

Bai Somi v. Chokshi Ishvardas Mangaldas, 19 B. 245; 10 Ind. Dec. (N. S) 166 *(Relied on)* ... 251

Balakrishna Aiyar v. Muthuswami Aiyar, 3 Ind. Cas. 878; 32 M. 271; 5 M. L. T. 145; 19 M. L. J. 70 *(Distinguished)* ... 364

Balkaran Upadhya v. Gaya Din Kalwar, 24 Ind. Cas. 255; 36 A. 370; 12 A. L. J. 635 *(Distinguished)* .. 330

Balkishen Das v. Bedmati Koer, 20 C. 388; 10 Ind. Dec. (N. S.) 263 *(Relied on)* ... 709

Balwant Singh v. Rev. Rockwell Clancy, 14 Ind. Cas. 629; 34 A. 236; (1912) M. W. N. 462; 11 M. L. T. 344; 9 A. L. J. 509; 15 C. L. J. 475; 16 C. W. N. 577; 23 M. L. J. 18; 14 Bom. L. R. 422; 39 I. A. 109 (P. C.) *(Distinguished)* 524, 720

Bapu Ammal v. Govinda Padiyachi, 7 M. L. J. 261 *(Followed)* ... 373

Barada Kinkar Chowdhury v. Nabin Chandra Datta, 4 Ind. Cas. 408; 11 C. L. J. 83; 14 C. W. N. 465 *(Followed)* ... 782

Bavah Meah Saib v. Khajee Meah Saib, 4 M. H. C. R. 218 *(Relied on)* .. 915

Bepin Behari Saha v. Abdul Barik, 35 Ind. Cas. 613; 44 C. 950; 21 C. W. N. 30; 24 C. L. J. 446 *(Relied on)* .. 802

Bhagwan Sahai v. Narsingh Sahai, 3 Ind. Cas. 615; 31 A. 612; 6 A. L. J. 871 *(Relied on)* ... 672

Bhagwat Prasad Tewari v. Muhammad Shibli, 66 Ind. Cas. 892; 20 A. L. J. 270; A. I. R. 1922 All. 110 *(Relied upon)* .. 493

Bhaishankar Nanabhai v. Municipal Corporation of Bombay, 31 B. 604; 9 Bom. L. R. 417 *(Followed)* ... 790

Birendra Ghose v. Emperor, 7 Ind. Cas. 359; 37 C. 467; 14 C. W. N. 1114; 11 Cr. L. J. 453 *(Relied upon)* ... 419

Bisheshar Singh v. Ram Daur Singh, A. W. N. (1887) 302 *(Followed)* ... 373

Bishun Prashad Pathak v. Sashi Bhusan Misra, 73 Ind. Cas. 294; A. I. R. 1923 Pat. 133; 2 Pat. L. R. 17 *(Distinguished)* ... 723

Bomadevara Naganna Naidu Bahadur v. Ravi Venkatapayya, 76 Ind. Cas. 594; 46 M. 895; (1923) M. W. N. 554; 21 A. L. J. 726; A. I. R. 1923 (P. C.) 167; 33 M. L. T. 262; 45 M. L. J. 657; 25 Bom. L. R. 1290; 18 L. W. 913; 28 C. W. N. 568; 39 C. L. J. 312; 50 I. A. 301 (P. C.) *(Distinguished)* ... 352

Brij Indar Singh v. Kanshi Ram, 42 Ind. Cas. 43; 45 C. 94 at p. 106; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 169; 127 P. L. R. 1917; 44 I. A. 218 (P. C.) *(Relied on)* ... 1031

B—concld.

Page.

British & Beningtons Limited v. N. W. Cachar T'ea Co. Ltd., (1923) A. C. 48; 92 L. J. K. B. 62; 128 L. T. 422; 28 Com. Cas. 265 (*Followed*) .. 962
Brojender Coomar Roy, *In re*, B. L. R. Sup. Vol. 728; 7 W. R. 529 (*Followed*) .. 1031
Brojendro Coomar Roy v. Madhub Chunder Ghose, 8 C. 343; 4 Ind. Dec. (N. S.) 219 (*Relied on*) ... 792

C

Central Bank of India v. Nadirshaha Mehta, 79 Ind. Cas. 445; A. I. R. 1924 Sind 13 (*Relied upon*) . 667
Champsey Dossa v. Gordhandas Kessowji, 40 Ind. Cas. 805; 19 Bom. L. R 381 (*Followed*) .. 112
Chandan Singh v. Laxman, 90 Ind. Cas. 949, 21 N. L. R. 98; A. I. R. 1925 Nag. 438 (*Distinguished*) . 785
Chhajju Ram v. Neki, 72 Ind. Cas. 566; 49 I. A. 144; 30 M. L. T. 295; 26 C. W. N. 697; 41 P. L. R. (P. C.) 1922; 3 P. L. T. 435; A. I. R 1922 P. C. 112; 16 L. W. 37; 17 P. W. R. 1922; 3 L 127; 43 M. L. J 332; 24 Bom. L R. 1238; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459 (P. C.) (*Followed*) ... 1013
Chhajmal Das v. Sirya, A. W. N. (1906) 251; 3 A. L. J. 625 (*Not followed*) .. 3
Chundeechurn Dutt v. Eduljee Cowasjee Bijnee, 8 C. 678; 11 C. L. R. 225; 4 Ind. Dec. (N. S.) 437 (*Relied on*) ... 653
Chunilal Fulchand v. Mangaldas Govardhandas, 16 B. 592; 8 Ind. Dec. (N. S.) 874 (*Followed*) . 465
Clayton's case, (1816) 15 R R. 161; 1 Mer. 572; 35 E. R. 781 (*Distinguished*) . 947
Committee of Management of Hyderabad v. Ramchand Gownkiram, 87 Ind Cas. 258; 16 S. L. R. 98 at p. 101; A. I. R. 1923 Sind 1 (*Explained and distinguished*) .. 361
Constable v. Nicholson, (1863) 32 L. J. C. P. 240 at p. 244; 14 C. B. (N. S.) 230; 11 W. R. 698; 143 E. R. 434; 135 R. R. 672 (*Relied on*) ... 465
Corea v. Appuhamy, (1912) A. C. 230; 81 L. J. P C. 151; 105 L. T. 836. (*Relied on*) .. 99
Cory Brothers and Company Limited v. The Owners of the Turkish Steamship "Mecca", (1897) A. C. 286; 66 L. J. P. C. 86; 76 L. T. 579; 45 W. R. 667 (*Followed*) ... 947
Cotton v. Vogan, (1896) A. C. 457; 65 L. J. Q. B. 486; 74 L. T. 591; 61 J. P. 36. (*Followed*) 610

D

Davood Mohideen Rowther v. Jayarama Iyer, 62 Ind. Cas. 284; 44 M. 937; 40 M. L. J. 38; 13 L. W. 281; (1921) M. W. N. 43; 29 M. L. T. 78. (*Followed*) ... 20
Devasigamony v. Sethuratna Iyer, 87 Ind. Cas. 363; A. I. R. 1925 Mad. 1034. (*Followed*) .. 100
Devata Sri Ramamurthi v. Venkata Sitarama Chandra Row, 22 Ind. Cas. 279; (1914) M. W. N. 95. (*Relied on*) .. 20
Dhulabhai Dabhai v. Lala Dhula, 64 Ind. Cas. 115; 46 B. 28; 23 Bom. L. R. 777; A. I. R. 1922 Bom. 137. (*Relied on*) ... 663
Dinobundhoo Nundee v. Keshub Chunder Ghose, 3 W. R. Mis. 25. (*Relied on*) ... 792
Doraisami v. Chidambaram Pillai, 75 Ind. Cas. 46; 47 M. 63; 45 M. L. J. 413; 18 L. W. 577; 33 M. L. T. 25; (1923) M. W. N. 817; A. I. R. 1924 Mad. 130. (*Not followed*) ... 308

D—concld.

Page

Drobomoyi Gupta v. Davis, 14 C. 323; 7 Ind. Dec. (N. S.) 214. (*Distinguished*) 963
Durbar Khachar v. Khachar Harsur, 32 B. 348; 10 Bom. L. R. 297. (*Distinguished*) . 787
Durga Shanker v. Ram Prasad, 14 C. P. L. R. 151 at p. 152. (*Relied on*) ... 305

E

East Indian Railway Company v. Fazal Elahi, 85 Ind Cas. 474; L. R. 6 A. 59 Civ.; A I. R. 1925 All. 273; 47 A. 136 (*Not followed*) .. 603
——— v. Nathumal Behari Lal, 39 Ind. Cas. 130; 39 A. 418; 15 A. L. J. 321 (*Not followed*) ... 603
Eastern Shipping Co. v. Quah Beng Kee, (1924) A. C. 177; 93 L. J. P. C. 72; 130 L. T. 462; 40 T. L R 109. (*Relied on*) .. 715
Emperor v. Allahdad Khan, 19 Ind. Cas. 332; 11 A L J. 442; 14 Cr. L. J. 236; 35 A. 358. (*Followed*) .. 441
——— v. Anappa Bharamgauda, 9 Bom. L. R 347; 5 Cr. L J. 323. (*Relied upon*) 419
——— v. Balaram Das, 71 Ind. Cas 685; 49 C 358; A. I R. 1922 Cal. 382; 24 Cr. L J. 221. (*Relied upon*) ... 167
——— v. Ganga Prasad, 29 A. 685; 4 A L J. 605; 6 Cr. L. J. 197; A. W. N. (1907) 235. (*Relied on*) ... 429
——— v. Satyendra Nath Roy, 57 Ind. Cas. 277; 1 P. L. T. 379; (1920) Pat. 225; 21 Cr. L. J. 613. (*Dissented from*) ... 896

F

Fazal v. Mangaldas, 66 Ind. Cas. 726; 46 B. 499 at p. 502; 23 Bom L R. 1144; A. I. R. 1922 Bom. 393. (*Followed*) ... 9
Firm Balram Dass-Fakir Chand v. Great Indian Peninsula Railway Company, 88 Ind. Cas. 559; 23 A. L. J. 645; L. R. 6 A. 340 Civ., A. I. R. 1925 All. 562; 47 A. 724. (*Followed*) ... 1007
Frost v. Knight, (1872) 7 Ex. 111; 41 L. J. Ex. 78; 26 L. T. 77; 20 W. R. 471. (*Followed*) ... 333

G

Gadi Neelaveni v. Mavappareddi Gari Narayana Reddi, 53 Ind. Cas. 847; 43 M. 94; 37 M. L. J. 599; 26 M. L. T. 377; 10 L. W. 603; (1920) M. W. N. 19. (*Relied on*) ... 615
Gajadhar Pande v. Jadubir Pande, 85 Ind. Cas. 31; 22 A. L. J. 980; L. R. 5 A. 780 Civ.; A. I. R. 1925 All. 180; 47 A. 122. (*Distinguished*) ... 316
Ganapathi Brahmayya v Kurella Ramiah, 54 Ind. Cas. 45; 43 M. 141; 10 L. W. 476; 38 M. L. J. 123. (*Doubted*) ... 112
Gandla Pedda Naganna v. Sivanappa, 26 Ind. Cas. 232; 38 M 1162 at p. 1170; 16 M. L. T. 310; 27 M. L. J. 520. (*Followed*) ... 982
Ganga Ram v. Natha Singh, 80 Ind. Cas. 820; 5 L. 425; A. I. R. 1924 P. C. 183; 22 A. L. J. 688; 47 M. L. J. 64; 20 L. W. 101; 26 Bom. L. R 750; 10 O. & A. L. R. 771; 35 M. L T. 141; (1924) M. W. N. 599; 2 Pat. L. R. 257; 11 O. L. J. 534; 6 L. L. J. 551; 51 I. A. 377; 1 L. C. 446; L. R. 5 A. (P. C.) 133; 6 P. L. T. 97; 1 O. W. N. 469; 29 C. W. N. 558 (P. C.). (*Followed*) ... 762
Garuda Sanyasayya v. Nerella Muthemma, 48 Ind. Cas. 740; 9 L. W. 1; 35 M. L. J. 661; 25 M. L. T. 86. (*Distinguished*) ... 950

G—concld.

Page.

Gauri Shanker Singh v Sheo Nandan Misra, 78 Ind. Cas. 911; 46 A. 384; 22 A. L. J. 369; A. I. R. 1924 All. 543; L. R. 5 A. 306 Civ. (*Followed*) ... 85

Ghulam Jilani v. Imdad Husain, 4 A. 357; A. W. N. (1882) 67; 2 Ind. Dec. (N. S.) 979. (*Not followed*) ... 313

Ghulla Singh v. Sohan Singh, 69 Ind. Cas. 818; 3 L. 280; A. I. R. 1922 Lah. 219; 4 L. L. J. 500. (*Relied upon*) ... 966

Glegg v. Bromley, (1912) 3 K. B. 474; 81 L. J. K. B. 1081; 106 L. T. 825. (*Followed*) ... 973

Glyn Mills Co. v. East and West India Dock Co., (1882) 7 A. C. 591 at p. 614; 52 L. J. Q. B. 146; 47 L. T. 309; 31 W. R. 201. (*Relied upon*) ... 206

Gobind Das v. Rup Kishore, 77 Ind Cas. 409; 4 L 367; 6 L. L. J. 25; A. I. R. 1924 Lah. 65. (*Followed*) . 566

Gomathi Ammal v. Kupputhayi Ammal, 14 M. L. J. 175. (*Followed*) .. 355

Gopal Rai Phul Chand v. G. I. P Railway Co., 82 Ind. Cas. 313; 46 A. 837; A. I. R. 1924 All 621; L. R. 5 A. 575 Civ. (*Not followed*) 603

Gopal Singh v. Bhaga, 69 Ind. Cas. 365; A. I. R. 1924 Lah 296. (*Construed*) . 966

Gopala Krishnier v. Ganapathy Aiyar, 58 Ind. Cas. 124; 12 L. W. 772 at p. 775; (1920) M. W. N. 478. (*Distinguished*) ... 950

G. I. P. Railway Co. v. Firm Bhola Nath-Debi Das, 70 Ind. Cas. 854; 45 A. 56; A. I. R. 1923 All. 79 (*Not followed*) .. 603

Grish Chunder Lahiri v. Shashi Shikhareswar Roy, 27 C. 951 at p. 967; 27 I. A. 110; 4 C. W. N. 631; 10 M. L. J. 356; 2 Bom. L. R. 709; 7 Sar. P. C. J. 687; 14 Ind. Dec. (N. S.) 622 (P. C.). (*Relied on*) ... 139

Gulzari Lal v. Latif Husain, 35 Ind. Cas. 27; 38 A. 181; 14 A. L. J. 84. (*Followed*) .. 282

Gurdit Singh v. Charan Das, 72 Ind. Cas. 797; A. I. R. 1922 Lah. 415. (*Relied upon*) .. 966

H

Hakim Lal v. Mooshahar Sahu, 34 C. 999 at p. 1018; 11 C. W. N. 889; 6 C. L. J. 410. (*Relied upon*) ... 5

Hamid Husain v. Kubra Begam, 44 Ind. Cas 728; 44 A. 332; 16 A. L. J. 132. (*Followed*) 913

Hanuman Kamat v. Hanuman Mandur, 19 C. 123; 18 I. A. 158; 6 Sar. P. C. J. 91; 9 Ind. Dec. (N. S.) 527 (P. C.). (*Followed*) .. 787

Har Prasad v. Tajammul Husain, 44 Ind. Cas. 720; 16 A. L. J. 239. (*Not followed*) ... 995

Hari Ram v. Indraj, 69 Ind Cas. 167; 44 A. 730; 20 A. L. J. 631; A. I. R. 1922 All. 377; 9 O. & A. L. R. 123. (*Relied on*) ... 260

Harvey v. Shelton, (1844) 7 Beav. 455; 49 E. R. 1141; 13 L. J. Ch. 466; 64 R. R. 116. (*Relied on*) .. 792

Hasan Premji v. Jerbai, O. C. J. Appeal No. 41 of 1920 decided by Macleod, C. J. and Shah, J. on December 17, 1920 (unrep.). (*Followed*) 225

Hemanta Kumari Debi v. Midnapore Zemindari Co., 53 Ind. Cas. 534; 47 C. 485; 37 M. L. J. 525; 17 A. L. J. 1117; 24 C. W. N. 177; (1920) M. W. N. 66; 27 M. L. T. 42; 11 L. W. 301; 46 I. A. 240; 22 Bom. L. R. 488 (P. C.). (*Relied on*) .. 553

H—concld.

Page.

Hiradevi Bai v. Gadigi Muddappa, 6 M. H. C. R. 117 (*Relied on*) .. 106

Hnin Yin v. Than Pe, 44 Ind Cas. 337; 9 L. B. R. 92; 19 Cr. L. J. 321; 11 Bur. L. T. 58. (*Relied upon*) ... 748

Hunoomanpersaud Panday v. Babooee Munraj Koonweree, 6 M. I. A. 393; 18 W. R. 81*n*; Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147. (*Relied on*) 378, 827

Husenuddin Nurddin v. Dulakshidas Kesavlal, 77 Ind. Cas. 474; A. I. R. 1923 Bom. 299. (*Not followed*) ... 566

I

Indramani Dasi v. Surendra, 64 Ind. Cas. 852; 35 C. L. J. 61; A. I. R. 1922 Cal. 35. (*Relied on*) .. 497

Irulappan Servai v. Veerappan, 69 Ind. Cas. 918; 42 M. L. J. 113; 15 L. W. 99; (1922) M. W. N. 67; 31 M. L. T. 71. (*Not followed*) .. 976

Ishrappa Ganap Hegde v. Krishna Putta Shankar Hegde, 67 Ind. Cas. 833; 24 Bom. L. R. 428; 46 B 925; A. I. R. 1922 Bom. 413. (*Relied on*) ... 663

Isuri Prasad Singh v. Umrao Singh, 22 A. 234; A. W. N. (1900) 46; 9 Ind. Dec. (N. S.) 1187. (*Relied on*) ... 429

Iswar Datt Upadhiya v. Mahesh Datt Upadhiya, 89 Ind. Cas 114; 23 A. L. J. 862; L. R. 6 A. 451 Civ.; A. I. R. 1925 All. 747. (*Followed*) ... 1

J

Jadubir v. Gajadhar, 75 Ind. Cas. 785; 21 A. L. J. 809; A. I. R. 1924 All. 169; L. R. 5 A. 53 Civ. (*Distinguished*) ... 316

Jagannath v. Dibbo, 1 Ind. Cas. 818; 6 A. L. J. 49 at p. 51; 31 A. 53. (*Followed*) .. 471

Jagannath Khan v. Bajrang Das Agarwala, 62 Ind. Cas. 97; 48 C. 61. (*Distinguished*) .. 948

Janoothassan v. Mahamad Ohuthu, 82 Ind. Cas. 425; 47 M. 877; 47 M. L. J. 356; 20 L. W. 677; A. I. R. 1925 Mad. 155. (*Followed*) ... 491

Janoothassan v. Mahamad Ohuthu, 82 Ind. Cas. 425; 47 M. 877; 47 M. L. J. 356; 20 L. W. 677; A. I. R. 1925 Mad. 155. (*Relied on*) .. 491

Javerbhai Jorabhai v. Gordhan Narsi, 28 Ind. Cas. 442; 17 Bom. L. R. 259 at pp. 265, 266; 39 B. 358. (*Relied on*) .. 640

Jivan Bhaga v. Hira Bhaiji, 12 B. 363; 6 Ind. Dec. (N. S.) 726. (*Distinguished*) 759

Jivan Bhaga v. Hira Bhaiji, 12 B. 363; 6 Ind. Dec. (N. S.) 726. (*Followed*) .. 398

Jogendra Nath v. Baladeb Das, 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735. (*Relied on*) ... 99

Joshi Sahib Prakash v. Jhinguria, 78 Ind. Cas. 416; 46 A. 144; A. I. R. 1924 All. 446. (*Relied on*) ... 615

Jumo Allarakhio v. Emperor, 34 Ind. Cas. 649; 9 S. L. R. 223; 17 Cr. L. J. 233. (*Relied upon*) 419

Jurugumilli Brahmayya v. Chellaghali Achiraju, 70 Ind. Cas. 615; 45 M. 716; (1922) M. W. N. 280; 31 M. L. T. 91; 43 M. L. J. 229; A. I. R. 1922 Mad. 373. (*Relied on*) ... 814

Jwala Singh v. Teja Singh, 71 Ind. Cas. 801; A. I. R. 1924 Lah. 273. (*Not followed*) . 762

Jyoti Prakash Nandi v. Mukti Prakash Nandi, 81 Ind. Cas. 734; 51 C. 150; A. I. R. 1924 Cal. 485. (*Relied on*) ... 497

K

Page.

Kalliani Amma v. Matathil Veetil Achuthan Nair, 53 Ind. Cas. 239; 10 L. W. 174; (1919) M. W. N. 573; 37 M L. J. 309. (*Followed*) .. 415

Kalyan Singh v. Raja, 3 Unreported Decisions, p. 343. (*Followed*) ... 1046

Kamakshi Achari v. Appavi Pillai, 1 M. H. C. R. 448. (*Distinguished*) ... 968

Kambam Bali Reddy v. Emperor, 22 Ind. Cas. 756; 37 M. 119; 15 Cr. L. J. 180. (*Followed*) .. 851

Kamruddin Hyder v. M. N. Mitter, 89 Ind. Cas. 277; 52 C. 342; A. I. R. 1925 Cal. 735. (*Followed*) ... 563

Kannusami Pillai v. Jagathambal, 46 Ind. Cas. 265; 41 M. 701 at p. 702, 1918 M. W. N. 497; 24 M. L. T. 46; 8 L. W. 145; 35 M. L. J. 27. (*Not followed*) ... 800

Kannusami Thonjirayan v. Muthusami Pillai, 38 Ind. Cas. 194; (1917) M. W. N. 5; 5 L. W. 250. (*Relied on*) .. 342

Kanshi Ram v. Sharf Din, 66 Ind. Cas. 161; A. I. R. 1922 Lah. 356. (*Followed*) ... 723

Kanwar Ranzor Singh v. Chippal, 37 P. R. 1900; P. L. R. 1900 p. 303. (*Followed*) ... 526

Karim Bakhsh v. Idu Shah, 40 Ind. Cas. 381; 4 O. L. J. 334. (*Distinguished*) ... 665

Karim Buksh v. Queen-Empress, 17 C. 574; 8 Ind. Dec. (N. S.) 922 (F. B.). (*Relied on*) ... 885

Karsan Sadashiv Patil v. Gatlu Shivaji Patil, 19 Ind. Cas. 442; 37 B. 320; 15 Bom. L. R. 227. (*Followed*) ... 112

Karumbar Pandrapandaram v. Audimula Ponnapundaram, 3 Ind. Cas. 725; 33 M. 262; 6 M. L. T. 261 (*Followed*) ... 800

Kedar Nath v. Shanker Lal, 78 Ind. Cas. 934; 36 A. 303; 22 A. L. J. 185; A. I. R. 1924 All. 514; L. R. 5 A. 80 Civ. (*Distinguished*) ... 553

Khiarajmal v. Daim, 32 C. 296; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734 (P. C.). (*Followed*) .. 832

Khulna Loan Co., Ltd. v. Jnanendra Nath Bose, 45 Ind. Cas. 436; 22 C. W. N. 145 (P. C.). (*Followed*) ... 847

Khushalchand v. Nandram, 12 Ind. Cas. 572; 13 Bom. L. R. 977; 35 B. 516. (*Distinguished*) ... 803

Kona Thimma Reddi v. Secretary of State for India, 78 Ind. Cas. 91; 47 M. 325; 19 L. W. 59; 46 M. L. J. 60; (1924) M. W. N. 146; A. I. R. 1924 Mad. 523. (*Followed*) .. 790

Krishna v. Subbanna, 7 M. 564; 8 Ind. Jur. 504; 2 Ind. Dec. (N. S.) 975. (*Followed*) ... 364

Krishna Mohun Basak v. Kunjo Behari Basak, 9 C. L. R. 1. (*Relied on*) ... 792

Krishna Variar v. Kunji Torbanar, 3 M. L. J. 190. (*Not followed*) ... 373

Krishnabai v. Manohar, 30 B. 593 at p. 597; 8 Bom. L. R. 671. (*Followed*) ... 785

Krishnaswamy Naidu v. Chengalroya Naidu, 76 Ind. Cas. 836; 47 M. 171; 18 L. W. 870; 45 M. L. J. 813; 33 M. L. T. 207; A. I. R. 1924 Mad. 114. (*Relied on*) .. 615

Krishnayyar v. Venkayyar, 6 M. 81; 2 Ind. Dec. (N. S.) 334. (*Relied on*) ... 770

Kundan Lal v. Jagan Nath, 30 Ind. Cas. 92; 37 A. 649; 13 A. L. J. 908. (*Not followed*) .. 947

Kunhi Amma v. Ammu Amma, 16 Ind. Cas. 178; 36 M. 591; (1912) M. W. N. 1233; 24 M. L. J. 559. (*Relied on*) ... 390

Page.

Lachmi Narain v. Nirotam Das, A. W. N. (1906) 272; 29 A. 69; 3 A. L. J. 688. (*Followed*) .. 3

Lakshmindrathirtha Swamiar v. Raghavendra Rao, 59 Ind. Cas. 287; 43 M. 795 at p. 798; 12 L. W. 139; 39 M. L. J. 174; (1920) M. W. N. 568; 28 M. L. T. 269. (*Followed*) ... 483

Lal Singh v. Emperor, 91 Ind. Cas. 954; 5 L. 396; A. I. R. 1925 Lah. 19; 27 Cr. L. J. 170. (*Distinguished*) .. 167

Lallabhai Vajeram v. Bai [illegible]ri, 18 B. 59; 9 Ind. Dec. (N. S.) 548. [illegible] ... 802

Lekh Ram v. Ramji Das, 57 Ind. Cas. 215; 1 L. 234 (*Followed*) .. 624

Lokasikhamani Mudaliar v. Thingaroya Chettiar, 38 Ind. Cas. 415; 5 L. W. 596, (1917) M. W. N. 420. (*Followed*) ... 556

Lord Rivers v. Adams, (1878) 3 Ex. D. 361; 48 L. J. Ex. 47; 39 L. T. 39; 27 W. R. 381. (*Relied on*) .. 465

Luckmee Chund v. Zorawar Mull, 8 M. I. A. 291 at p. 307; 1 W. R. P. C. 35; 1 Suth. P. C. J. 425; 1 Sar. P. C. J. 763; 19 E. R. 541. (*Relied on*) .. 915

Lutchmeeput Singh v. Sadaulla Nushyo, 9 C. 698; 12 C. L. R. 382; 5 Shome L. R. 27; 4 Ind. Dec. (N. S.) 1115. (*Relied on*) .. 465

M

Maddever, *In re*, Three Towns Banking Co. v. Maddever, (1884) 27 Ch. D. 523; 53 L. J. Ch. 998; 52 L. T. 35; 33 W. R. 286. (*Relied on*) 405

Madhavrao Waman Soundalgekar v. Raghunath Venkatesh Deshpande, 74 Ind. Cas. 362; 50 I. A. 255; 25 Bom. L. R. 1005; (1923) M. W. N. 689; A. I. R. 1923 P. C. 205; 33 M. L. T. 389; 47 B. 798; 28 C. W. N. 857; 20 L. W. 248; 47 M. L. J. 248 (P. C.). (*Distinguished*) ... 247

Mahomed Ghouse Sah v. Thimma Setti, 1 Mysore L. J. 90. (*Followed*) ... 112

Majju v. Teja Singh, 44 Ind. Cas. 844; 29 P. R. 1918; 114 P. W. R. 1918; 118 P. L. R. 1918. (*Distinguished*) ... 297

Mangal Naran v. Emperor, 87 Ind. Cas. 424; 49 B. 450; 27 Bom. L. R. 355; A. I. R. 1925 Bom. 268; 26 Cr. L. J. 968. (*Followed*) ... 851

Manghi Ram v. Firm of Ram Saran Das Maman Chand, 26 Ind. Cas. 415; 23 P. R. 1915; 35 P. W. R. 1915; 100 P. L. R. 1915. (*Distinguished*) ... 674

Manji v. Ghulam Muhammad, 57 Ind. Cas. 207; 1 L. 249. (*Followed*) .. 297

Manji v. Ghulam Muhammad, 61 Ind. Cas. 415; 2 L. 73; 3 L. L. J. 75. (*Followed*) . 297

Mannox v. Greener, (1872) 14 Eq. 456 at p. 462; 27 L. T. 408. (*Followed*) .. 516

Mannu v. Tulshi, 64 Ind. Cas. 958; 20 A. L. J. 39; A. I. R. 1922 All. 33. (*Relied upon*) ... 493

Manorath Das v. Ambica Kanta Bose, 1 Ind. Cas. 57; 9 C. L. J. 443; 13 C. W. N. 533. (*Relied on*) .. 770

Mata Din v. Ahmad Ali, 24 Ind. Cas. 874; 1 O. L. J. 263. (*Distinguished*) ... 665

Mayer Alderson and Burgesses of Southmolton v. Attorney-General, (1854) 5 H. L. C. 1 at p. 31; 10 E. R. 796; 23 L. J. Ch. 567; 18 Jur. 435; 101 R. R. 1. (*Followed*) .. 516

Mohammad Abdullah Khan v. Bank Instalment Company Ltd., 2 Ind. Cas. 379; 31 A. 495; 6 A. L. J. 611. (*Distinguished*) ... 687

M—concld.

Mohammad Mondul v. Nafur Mondul, 26 C. 820; 3 C. W. N. 770; 13 Ind. Dec. (N. S.) 1125. (*Relied on*) .. 827

Moonshee Buzloor Ruheem v. Shumsunissa Begum, 11 M. I. A. 551; 8 W. R. P. C. 3; 2 Suth. P. C. J. 59; 2 Sar. P. C. J. 259; 20 E. R. 208. (*Followed*) .. 913

Moti Singh v. Maghar, 11 Ind. Cas. 880; 22 P. R. 1912; 163 P. W. R. 1911; 244 P. L. R. 1911. (*Followed*) .. 299

Motilal Pratabchand v. Surajmal Joharmal, 30 B. 167; 6 Bom. L. R. 1038. (*Explained*) ... 273

Muhammad Abdul Gaffur Rowther v. Hamida Beevi Ammal, 52 Ind. Cas. 505; 42 M. 661; (1919) M. W. N. 484; 25 M. L. T. 242; 36 M. L. J. 456. (*Distinguished*) ... 354

Muhammad Abdul Majid v. Muhammad Abdul Aziz, 19 A 155; 24 I. A. 22; 7 Sar. P. C. J. 111; 9 Ind. Dec. (N. S.) 103 (P. C.). (*Followed*) 314

Muhammad Habibullah v. Mushtaq Husain, 37 Ind. Cas. 684; 14 A. L. J. 1183; 39 A. 95. (*Relied upon*) ... 5

Muhammad Mosam Khan v. Bakhtawar, 70 P. R. 1895. (*Followed*) .. 526

Muhammad Sajjad Ali Khan v. Muhammad Ishaq Khan, 54 Ind. Cas 504; 42 A. 154; 1 U. P. L. R. (A.) 168; 18 A. L. J. 83. (*Followed*) 1027

Mul Chand v. Mukta Prasad, 10 A. 83; A. W. N. (1887) 287; 6 Ind. Dec. (N. S.) 56. (*Distinguished*) .. 803

Muniappa Naik v. Subramania Ayyar, 18 M. 437; 5 M. L. J. 60; 6 Ind. Dec. (N. S.) 654. (*Followed*) .. 833

Municipal Committee, Chiniot v. Bashi Ram, 69 Ind. Cas. 895; A. I. R. 1922 Lah. 170. (*Relied upon*) ... 966

Municipal Committee of Delhi v. Devi Sahai, 62 P. R. 1907; 105 P. L. R. 1908; 147 P. W. R. 1907. (*Followed*) ... 765

Muppavaraju Venkata Radha Krishna Rao v. Venthurumilli Venkatarao, 84 Ind. Cas. 965; (1924) M. W. N. 922; 47 M. L. J. 552; 20 L. W. 711; 35 M. L. T. 135; A. I. R. 1925 Mad. 229; 48 M. L. J. 713. (*Followed*) ... 1045

Muthaya Shetti v. Kanthappa Shetti, 45 Ind. Cas. 975; (1918) M. W. N. 334; 34 M. L. J. 431; 7 L. W. 482; 23 M. L. T. 291. (*Relied on*) ... 342

Muthukaruppan Samban v. Muthu Samban, 25 Ind. Cas. 772; 38 M. 1158; 1 L. W. 754; 16 M. L. T. 344; (1914) M. W. N. 768; 27 M. L. J. 497. (*Relied on*) .. 478

Muthusami Chetty v. Chinnammal, 24 Ind. Cas. 320; 26 M. L. J. 517. (*Followed*) ... 504

N

Nabu Bepari v. Sheikh Mahomed, 5 C. W. N. 207. (*Distinguished*) .. 98

Nachimuthu Chetty v. Andiappa Pillai, 42 Ind. Cas. 708; 6 L. W. 630; (1917) M. W. N. 778. (*Followed*) ... 626

Nagappa Pillai v. Arunachalam Chetty, 85 Ind. Cas. 1016; 47 M. L. J. 876; A. I. R. 1925 Mad. 281. (*Followed*) ... 968

Nagindas Bhukandas v. Ghelabhai Gulabdas, 56 Ind. Cas. 449 & 450; 44 B. 673; 22 Bom. L. R. 322. (*Dissented from*) ... 673

Nagindas Maneklal v. Mahomed Yusaif Mitchela, 64 Ind. Cas. 923; 46 B. 312; 23 Bom. L. R. 1094; A. I. R. 1922 Bom. 122. (*Relied upon*) .. 378

N—concld.

Naina Muhammad Rowther v. Abdul Rahaman Rowther, 72 Ind. Cas. 207; 46 M. 135; (1922) M. W. N. 845; 17 L. W. 188; 32 M. L. T. 82; A. I. R. 1923 Mad. 257. (*Followed*) .. 396

Nalannad v. Kambirampore Ravuni Nair, 84 Ind. Cas. 973; 47 M. L. J. 686; (1924) M. W. N. 792; 20 L. W. 876; 35 M. L. T. 127; A. I. R. 1925 Mad. 260. (*Not followed*) ... 827

Namberumal Chetty v. Kotayya, 21 Ind. Cas. 773; 14 M. L. J. 498. (*Relied on*) ... 674

Nanda Kumar v. Ram Jiban, 23 Ind. Cas. 337; 41 C. 990; 18 C. W. N. 681; 19 C. L. J. 457. (*Followed*) .. 317

Natarajula Naicker v. Subramanian Chettyar, 69 Ind. Cas. 939; 45 M. 778; (1922) M. W. N. 450; A. I. R. 1922 Mad. 181; 16 L. W. 705; 43 M. L. J. 695. (*Followed*) ... 626

Nathu v. Shadi, 29 Ind. Cas. 495; 37 A. 522; 13 A. L. J. 714. (*Not followed*) ... 265

Natla Bapiraju v. Puran Achutha Rajajee, 5 Ind. Cas. 456; 20 M. L. J. 337; (1910) M. W. N. 549; 7 M. L. T. 176. (*Followed*) ... 112

Nepal Rai v. Debi Prasad, 27 A. 447; 2 A. L. J. 105; A. W. N. (1905) 40. (*Followed*) ... 624

Nilkanth v. Yeshwant, 65 Ind. Cas. 331; 18 N. L. R. 134; A. I. R. 1922 Nag. 248. (*Dissented from*) ... 803

Nilmoni Chowdhuri v. Basanta Kumar Banerjee, 29 Ind. Cas. 814; 19 C. W. N. 865. (*Relied upon*) ... 5

Niranjan v. Gajadhar, 30 A. 133; 5 A. L. J 71; A. W. N. (1908) 45. (*Followed*) .. 995

Nritia Gopal Singh v. Chandi Charan Singh, 10 C. W. N. 1088; 4 Cr. L. J. 215. (*Followed*) ... 164

O

Official Assignee of Madras v. Annapurnammal, 20 Ind. Cas. 901; 14 M. L. T. 150. (*Relied upon*) ... 5

——— v. Sambanda Mudaliar, 60 Ind. Cas. 205; 43 M. 739; 39 M. L. J. 345; 28 M. L. T. 258. (*Relied upon*) .. 5

P

Pachkauri Lal v. Mul Chand, 66 Ind. Cas. 503; 44 A. 554; 20 A. L. J. 437; A. I. R. 1922 All. 279. (*Followed*) .. 1015

Panchanada Velan v. Vaithinatha Sastrial, 29 M. 333; 16 M. L. J. 63. (*Followed*) ... 352

Panchanan Basu v. Chandi Charan Misra, 6 Ind. Cas. 443; 37 C. 808; 14 C. W. N. 874. (*Relied on*) .. 553

Pandiri Bangaram v. Karmoory Subbaraju, 8 Ind. Cas. 388; 34 M. 159; 8 M. L. T. 285. (*Followed*) ... 471

Pansulari Venkataswami v. Mentana Ramachandra Raju, 18 Ind. Cas. 520; 38 M. 138; 24 M. L. J. 298; 13 M. L. T. 218; (1913) M. W. N. 285. (*Distinguished*) ... 973

Parbati v. Baij Nath Pathak, 16 Ind. Cas. 406; 35 A. 3; 10 A. L. J. 300. (*Followed*) .. 479

Parkodi Achi, *In re*, 68 Ind. Cas. 444; 45 M. 246; 14 L. W. 624; 41 M. L. J. 587; (1921) M. W. N. 854; 30 M. L. T. 88; A. I. R. 1922 Mad. 211. (*Followed*) ... 624

Pearl Mill Co. v. Ivy Tannery Co., (1919) 1 K. B. 78; 88 L. J. K. B. 134; 120 L. T. 28; 24 Com. Cas. 169. (*Relied on*) ... 333

P—contd.

Page.

Pooley v. Harradine, (1857) 110 R. R. 666; 7 E. & B. 431; 26 L. J. Q. B. 156; 3 Jur. (N. S.) 488; 5 W. R. 405; 119 E. R. 1307. (*Relied upon*) ... 667
Prohlad Chandra Das v. Biswa Nath Bera, 82 Ind. Cas. 411; 51 C. 972; 28 C. W. N. 894; 40 C. L. J. 79, A. I. R. 1924 Cal. 1047. (*Distinguished*) .. 973

Q

Queen-Empress v. Adam Khan, 22 A. 106; A. W. N. (1899) 211; 9 Ind. Dec. (N. S.) 1100. (*Not followed*) ... 895
——— v. Bisheshar, 16 A. 124; A. W. N. (1894) 10; 8 Ind. Dec. (N. S.) 80. (*Dissented from*) ... 885
——— v. Mastana, 11 P. R. 1899 Cr. (*Followed*) ... 170
——— v. Virappa Chetti, 20 M. 433; 1 Weir 233; 7 Ind. Dec. (N. S.) 307. (*Followed*) 818

R

R. v. DeBerenger, (1814) 3 M. & S. 67; 105 E. R. 536; 15 R. R. 415. (*Relied upon*) .. 419
— v. Gurney, (1869) 11 Cox C. C. 414. (*Relied upon*) .. 419
— v. Murphy, (1838) 8 C. & P. 297. (*Relied upon*) ... 419
— v. Parsons, (1762) 1 Bl. W. 392; 92 E. R. 222. (*Relied upon*) ... 419
Rabindra Chandra Chatterjee, *In re*, 67 Ind. Cas. 985; 49 C. 850; 35 C. L. J. 520; A. I. R. 1922 Cal. 484. (*Followed*) ... 896
Radha Churn Chukerbutty, *In re*, 10 C. W. N. 1059; 4 C. L. J. 229; 4 Cr. L. J. 160. (*Dissented from*) ... 896
Radhakisan Hakumji v. Balwant Ramji, 7 B. 530; 8 Ind. Jur. 146; 4 Ind. Dec. (N. S.) 357. (*Distinguished*) ... 759
R... v. Udechand, 11 C. P. L. R. 65. (*Relied on*) ... 305
Raghunathaswami Iyengar v. Gopaul Rao, 68 Ind. Cas. 667; 41 M. L. J. 547. (1921) M. W. N. 732; 15 L. W. 123; A. I. R. 1922 Mad. 307. (*Not followed*) .. 308
Ragunath Das v. Sunder Das Khetri, 24 Ind. Cas. 304; 42 C. 72; 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 150; 16 M. L. T. 353; (1914) M. W. N. 747; 16 Bom. L. R. 814; 20 C. L. J. 555; 13 A. L. J. 154; 41 I. A. 251 (P. C.). (*Relied on*) .. 308
Raj Kumari Debi v. Barkatulla Mandal, 12 Ind. Cas. 161; 39 C. 278; 14 C. L. J. 407; 16 C. W. N. 6. (*Followed*) ... 961
Raja of Ramnad v. Venkatarama Iyer, 69 Ind. Cas. 923; 45 M. 890; 16 L. W. 274; (1922) M. W. N. 501; 31 M. L. T. 158; 43 M. L. J. 264; A. I. R. 1923 Mad. 6 (F. B.). (*Relied on*) ... 976
Rajah of Ramnad v. Venkataramaiyer, 69 Ind. Cas. 923; 45 M. 890; 16 L. W. 274; (1922) M. W. N. 501; 31 M. L. T. 158; 43 M. L. J. 264; A. I. R. 1923 Mad. 6. (*Followed*) .. 412
Rajah of Venkatagiri v. Mukku Narsaya, 7 Ind. Cas. 202; 37 M. 1; 8 M. L. T. 258; (1910) M. W. N. 369. (*Followed*) ... 963
Rajah of Vizianagram v. Rajah Setrucherla Somasekharaz, 26 M. 686; 13 M. L. J. 83. (*Followed*) ...1056

R—contd.

Page.

Rajangam Ayyar v. Rajangam Ayyar, 69 Ind. Cas. 123; 46 M. 373; 31 M. L. T. 136; 4 U. P. L. R. (P. C.) 85; 16 L. W. 615; A. I. R. 1922 P. C. 266; 27 C. W. N. 561; 44 M. L. J. 745; 37 C. L. J. 435; 21 A. L. J. 460; 50 I. A. 134 (P. C.). (*Relied upon*) .. 1028
Ram Bharos v. Baban, 22 Ind. Cas. 734; 36 A. 129; 15 Cr. L. J. 158; 12 A. L. J. 106. (*Followed*) ... 895
Ram Bilas Singh v. Ramyad Singh, 58 Ind. Cas. 303; 5 P. L. J. 622; 1 P. L. T. 535; 2 U. P. L. R. (Pat.) 228. (*Relied upon*) ... 378
Ram Chandra v. Muhammad Nur, 73 Ind. Cas. 656; 21 A. L. J. 485; 45 A. 545; A. I. R. 1923 All. 591. (*Distinguished*) ... 316
Ram Charan v. Lakhi Kanta, 7 B. L. R. 704; 16 W. R. 1 (*Followed*) ... 960
Ram Lal Singh v. Hari Charan Ahir, 5 Ind. Cas. 999; 37 C. 194; 11 C. L. J. 410; 11 Cr. L. J. 348. (*Relied upon*) .. 855
Ram Narayan Rai v. Ram Devi Rai, 63 Ind. Cas. 282; A. I. R. 1923 Pat. 98; 6 P. L. J. 680; (1922) Pat. 129. (*Not followed*) ... 980
Ram Nundun Singh v. Janki Koer, 29 C. 828; 29 I. A. 178; 7 C. W. N. 57; 4 Bom. L. R. 664; 8 Sar. P. C. J. 351 (P. C.). (*Relied on*) . 126
Ram Prasad v. Rahat Bibi, 33 Ind. Cas. 622; 18 C. C. 367. (*Followed*) ... 265
Ram Singh v. Mathura, 14 Ind. Cas. 599; 34 A. 354; 9 A. L. J. 308; 13 Cr. L. J. 247. (*Distinguished*) ... 588
Ramachandra Iyer v. Perameswaram Munbi, 50 Ind. Cas. 693; 42 M. 360; 36 M. L. J. 396; 25 M. L. T. 304; 9 L. W. 492; (1919) M. W. N. 370. (*Relied on*) .. 950
Ramakka v. Nagesam, 92 Ind. Cas. 13; 47 M. 800; 48 M. L. J. 89; A. I. R. 1925 Mad. 145. (*Relied on*) ... 193
Ramakrishna Pillai v. Balakrishna Aiyar, 62 Ind. Cas. 712; 41 M. L. J. 60; 13 L. W. 541; (1921) M. W. N. 646. (*Relied upon*) ... 300
Ramamirtha Ayyan v. Gopala Ayyan, 19 M. 433; 6 M. L. J. 207; 6 Ind. Dec. (N. S.) 1007. (*Followed*) ... 479
Ramanadan Chetti v. Pulikuti Servai, 21 M. 288; 8 M. L. J. 121; 7 Ind. Dec. (N. S.) 559. (*Followed*) 20
Ramanathan Chettyar v. Kalimuthu Pillay, 18 Ind. Cas. 189; 37 M. 163; 24 M. L. J. 619. (*Relied on*) .. 491
Ramasawmi Chettiar v. Oppilamani Chetti, 4 Ind. Cas. 1009; 33 M. 6; 6 M. L. T. 269; 19 M. L. J. 671. (*Relied on*) .. 709
Ramgulam Singh v. Sheo Deonarain Singh, 51 Ind. Cas. 152; 4 P. L. J. 287. (*Not followed*) 802
Ratan Chand Jawala Das v. Asa Singh Bagha Singh, 62 Ind. Cas. 898; 4 L. L. J. 217; A. I. R. 1922 Lah. 188. (*Relied on*) ... 674
Ratan Chand-Jwala Das v. Asa Singh-Bagha Singh, 59 Ind. Cas. 669; 3 U. P. L. R. (L.) 3; 26 P. W. R. 1921; 31 P. L. R. 1919. (*Relied on*) 674
Ratan Lal v. Birjbhukan Saran, 61 Ind. Cas. 774. (*Distinguished*) ... 787
Ratnam Pillai v. Nataraja Desikar, 84 Ind. Cas. 200; 46 M. L. J. 341; 19 L. W. 367; (1924) M. W. N. 361; A. I. R. 1924 Mad. 615; 34 M. L. T. 31. (*Relied on*) .. 520
Reference under Court Fees Act, 29 M. 367; 16 M. L. J. 287. (*Followed*) ... 624

R—concld.

Page.

Rerigate Rural District Council v. Sutton District Water Co., (1908) 99 L. T. 168; 72 J. P. 301; 6 L. G. R. 936. (*Followed*) ... 58

Richards v. Starck, (1911) 1 K. B. 296; 80 L. J. K. B. 215; 103 L. T. 813; 27 T. L. R. 29. (*Followed*) 968

Rudrappa v Narsingrao, 29 B. 213; 7 Bom. L. R. 12. (*Followed*) ... 58

R[illegible] v. Krishnaswami, 75 Ind. Cas. 189; [illegible] W 237; (1923) M W. N. 664; 47 M. 139; A. I. R. 1924 Mad. 369. (*Followed*) ... 556

S

Sabapathy Chetty v. Ponnusawmy Chetty, 28 Ind. Cas. 365. (*Followed*) ... 524

Samia Pillai v. Chockalinga Chettiar, 17 M. 76; 4 M. L. J 8; 6 Ind. Dec. (N. S.) 52. (*Relied on*) 709

Sankaralinga Nadan v. Rajeswara Dorai, 31 M 236; 12 C. W. N. 946; 4 M. L T. 101; 18 M. L. J. 387; 10 Bom. L. R. 781; 8 C. L. J. 230; 35 I. A. 176 (P. C.) (*Distinguished*) ... 311

Sankaranaryanam Pillai v. Rajamani, 83 Ind. Cas. 196; 47 M. 462; 46 M. L. J. 314; 34 M. L. T. 152; A. I. R. 1924 Mad. 550; 20 L. W. 357. (*Followed*) ... 524

Sankunni v. Ikkora Kutti, 52 Ind. Cas. 989; (1919) M. W. N. 570; 10 L. W. 155; 37 M. L. J. 209. (*Followed*) .. 968

Sarup Narain v. Sheo Shankar Lal, 42 Ind. Cas. 416; 4 O. L. J. 522. (*Followed*) . 317

Sasibhushan Mookerjee v. Radhanath Bose, 25 Ind. Cas. 267; 19 C W. N. 835, 20 C. L. J. 433. (*Relied on*) 544

Sasti Charan Nundi v. Annapuruna, 23 C. 699; 12 Ind Dec. (N. S.) 465. (*Dissented from*) .. 984

Sat Narain v. Behari Lal, 84 Ind. Cas. 883; 23 A. L J. 85; 47 M. L. J. 857; 10 O & A. L. R. 1332; A. I. R. 1925 (P. C.) 18; (1925) M. W. N. 1; L. R. 6 A. (P. C.) 1; 26 P. L. R. 81; 27 Bom. L. R. 135; 21 L. W. 375; 1 L. C 500; 1 O. W. N. 916; 6 L. 1; 29 C. W. N. 797; 52 I. A. 22 (P. C.) (*Followed*) 309

Satis Chandra Chakrabarti v. Ram Dayal De, 59 Ind. Cas. 143; 48 C. 388; 32 C. L. J. 94; 24 C. W. N. 982; 22 Cr. L. J 31. (*Relied on*) 429

Satyendra Nath Sen v. Narendra Nath Gupta, 81 Ind. Cas 867; 39 C. L. J 279; A. I. R 1924 Cal. 806. (*Relied upon*) . 493

Secretary of State for India v. Mathurabai, 11 B. 213; 7 Ind. Dec (N. S.) 600. (*Distinguished*) .. 465

Seshamma Shettati v. Chickaya Hegade, 25 M. 507; 12 M. L. J. 119. (*Distinguished*) ... 963

Sevak Jeranchod Bhogilal v. Dakore Temple Committee, 87 Ind. Cas. 313; 49 M. L. J 25; 23 A. L. J. 555; A. I. R. 1925 (P. C.) 155; L R. 6A. (P. C.) 117; (1925) M. W. N. 474; 2 O. W. N. 535; 41 C. L. J. 628; 22 L. W. 246; 27 Bom. L. R. 872 (P. C.). (*Followed*) .. 556

Sevugan Chetty v. Krishna Aiyangar, 13 Ind. Cas. 268; 36 M. 378; 10 M. L. T. 377; 22 M. L. J. 139. (*Relied on*) .. 330

Seymour v. Pickett, (1905) 1 K. B. 715; 74 L. J. K B. 413; 92 L. T 519; 21 T. L. R. 302. (*Followed*) ... 947

Shankar Bharati v. Narasinha Bharati, 69 Ind. Cas. 80; 47 B. 106; 24 Bom. . R 925; A. I. R. 1922 Bom. 383. (*Followed* 1027

Shankar Sahi v. Baichu Ram, 86 Ind. Cas. 769; 47 A. 381; 23 A. L J. 204; L. R. 6 A. 214 Civ.; A. I. R. 1925 All. 333. (*Distinguished*) ... 378

S—contd.

Page.

Shanmuga Mudaliar v. Kumaraswami Mudali, 90 Ind. Cas. 420, 21 L. W. 403; A. I. R. 1925 Mad. 870; (1925) M. W. N. 655; 48 M. 661. (*Dissented from*) ... 968

Sharada Moyee Burmonee v. Wooma Moyee Burmonee, 8 W. R. 9. (*Followed*) .. 833

Sharpe v. Wakefield, (1891) A. C. 173; 60 L. J. M. C. 73, 64 L T. 180; 39 W. R. 551; 55 J. P. 197. (*Followed*) ... 1031

Sheikh Muhammad v Habib Khan, 67 P. R. 1905; 113 P. L. R. 1905; 94 P. W. R. 1905. (*Followed*) 1012

Shiva Nathaji v. Joma Kashinath, 7 B 341; 7 Ind. Jur. 656; 4 Ind. Dec. (N. S.) 229. (*Followed*) ... 40

Sita Ram v. Raja Ram, 12 P. R 1892. (*Followed*) 252

Sita Ram v Ram Lal, 18 A. 440; A. W. N. (1896) 162; 8 Ind. Dec. (N. S.) 999. (*Followed*) ... 20

Sitaramaswamy v. Dulla Lakshmi Narasamma, 48 Ind. Cas. 840; 41 M. 510; 8 L. W. 21. (*Distinguished*) ... 946

Sivakolundu Pillai v. Ganapathy Iyer, 37 Ind. Cas. 964; (1917) M. W. N. 89. (*Followed*) .. 833

Smith v. Lion Brewary Co., (1911) A. C. 150; 80 L. J. K B. 566; 104 L. T. 321; 75 J. P. 273; 55 S J 269; 27 T. L. R. 261; 5 Tax. Cas. 568. (*Relied on*) ... 943

Sofaoll Khan v. Woopean Khan, 9 W. R. 123. (*Followed*) . 58

Sonba v. Ganesha, 17 Ind. Cas. 887; 8 N. L. R. 182. (*Distinguished*) ... 803

Sowbagia Ammal v Manika Mudali, 42 Ind. Cas. 975; 33 M. 601; 22 M. L. T. 386; (1917) M. W. N 782; 6 L W. 701. (*Relied on*) .. 497

Sreenath Das v. Ghanashyam Naik, 46 Ind. Cas. 534; 3 P L J. 465 (*Followed*) ... 317

Sri Krishna Doss v. Chandook Chand, 4 Ind. Cas. 509; 32 M. 334; 5 M. L. T. 125; 19 M. L. J. 307. (*Relied on*) ... 20

Srinivasa Row v. Pichai Pillai, 21 Ind. Cas. 629; 38 M 650; 25 M. L. J. 567. (*Relied upon*) ... 300

Strong & Co. Ltd. v. Woodfield, (1906) A. C 448; 75 L. J. K B. 864; 95 L. T. 241; 22 T. L. R. 754 (*Relied on*) ... 943

Subbaiya Pandaram v. Muhamad Mustapha Maracayar, 74 Ind. Cas. 492; 47 M. 751; 21 A. L. J. 730; A I. R. 1923 P C. 175; 45 M. L. J. 588; 25 Bom. L R. 1275; 18 L. W. 903; (1924) M W. N. 65; 28 C W N. 493; 2 Pat. L. R. 104; 33 M. L. T. 285; 40 C. L. J. 20; 50 I. A. 295 (P. C.). (*Relied on*) ... 342

Subhadrayamma v. Venkatapati, 80 Ind. Cas. 807; 48 M. 230; A. I. R 1924 P C. 162; 47 M. L. J. 93; 26 Bom. L. R. 786; 20 L. W. 298; (1924) M. W. N. 607; 29 C. W. N. 57; L. R. 5 A. (P C.) 147 (P. C.). (*Followed*) ... 973

Subrahmania Pathar v. Narayana Nayar, 24 M. 130. (*Relied upon*) ... 394

Subramania Chettiar v. [illegible] Chettiar, 30 M. 268; 2 M. L. T. 189. [illegible] ... 782

Subramania Chettiar v. Raja of Ramnad, 43 Ind. Cas. 187; 41 M. 327; 6 L. W. 762; (1917) M. W. N. 872; 34 M. L. J. 84. (*Relied on*) ... 497

Subramanian v. Lutchman, 71 Ind. Cas 650; 50 I. A. 77; A. I. R. 1923 P. C. 50; 44 M. L. J. 602; 32 M. L. T. 184; 25 Bom. L. R. 582; 1 R. 66; 2 Bur. L. J. 25; 38 C. L. J. 41; 18 L. W. 446; (1923) M. W. N. 762; 28 C. W. N. 1; 50 C. 338 (P. C.) (*Followed*) ... 948

S—concld.

Page.
Subrao Mangesh v. Mahadevi Bhatta, 21 Ind. Cas. 330; 38 B. 105 at p. 110; 15 Bom. L. R. 848. (*Dissented from*) ... 504
Sundaresam Chettiar v. Viswanatha Pandara Sannadhi, 72 Ind. Cas. 103; 45 M. 703; 31 M. L. T. 66; 16 L. W. 83; 43 M. L. J. 147; (1922) M. W. N. 444; A. I. R. 1922 Mad. 402. (*Relied on*) ... 481, 520
Sundaresam Chettiar v. Viswanatha Pandara Sannadhi, 72 Ind. Cas. 103; 45 M. 703; 31 M. L. T. 66; 16 L. W. 83; 43 M. L. J. 147; (1922) M. W. N. 444; A. I. R. 1922 Mad. 402. (*Followed*) ... 483
Sunder Lal v. Raghunandan Prasad, 83 Ind. Cas. 413; 3 Pat. 253; 5 P. L. T. 135; A. I. R. 1924 Pat. 465. (*Dissented from*) .. 504
Surjumull Murlidhar Chandick v. Ananta Lal Damani, 74 Ind. Cas. 1029; 46 M 948; 45 M. L. J. 399; 18 L. W. 485; (1923) M. W. N. 743; A. I. R. 1924 Mad. 352. (*Relied upon*) . 1046
Syed Ahmad v. Emperor, 22 Ind. Cas 163; 35 A. 575; 11 A. L. J. 933; 15 Cr. L. J. 19. (*Followed*) .. 441
Syud Mahomed Hossein v. Shaikh Montogul Haq, 18 W. R. 440. (*Distinguished*) ... 493

T

Tajbi Abalal v. Mowlakhan Alikhan, 29 Ind. Cas. 603; 41 B. 485; 19 Bom. L. R. 300. (*Followed*) .. 82
Tanguturi Sriramulu v. Nalam Krishna Row, 25 Ind. Cas. 1001; 38 M. 585; (1914) M W. N. 646; 16 M. L. T. 303; 27 M. L. J. 589; 15 Cr. L. J. 673. (*Distinguished*) .. 748
Thadi Ramamurthi v. Moola Kamiah, 24 Ind. Cas. 667; 16 M. L. T. 123; (1914) M. W. N. 733. (*Followed*) ... 504
Thakur Prasad v. Fakir Ullah, 17 A. 106; 5 M. L. J. 3; 22 I. A. 44; 6 Sar. P. C. J. 526; 8 Ind. Dec. (N. S.) 393 (P. C.). (*Relied on*) .. 802
Tafaluddi Peada v Mahar Ali Shaha, 26 C. 78; 13 Ind. Dec. (N. S.) 654. (*Followed*) .. 948
Tula Ram v. Tulshi Ram, 60 Ind. Cas. 3; 42 A. 559; 18 A. L. J. 699. (*Relied upon*) .. 378

U

Udhasing v. Emperor, 35 Ind. Cas. 670; 10 S. L. R. 69 at p. 71; 17 Cr. L J. 366. (*Relied upon*) .. 419
Uma Charan Chakrabarti v. Nibaran Chandra Chakrabarti, 75 Ind. Cas. 2; 37 C. L. J. 452; A. I. R. 1923 Cal. 389. (*Followed*) 560
United Telephone Co. v. Donohoe, (1886) 31 Ch. D. 399; 55 L. J. Ch. 480; 54 L. T. 31; 34 W. R. 326. (*Distinguished*) .. 562
Upendra Nath Nag Chowdhry v. Bhupendra Nath Nag Chowdhry, 9 Ind. Cas. 582; 13 C. L. J. 157. (*Distinguished*) .. 940
Usher's Wiltshire Brewary Co. v. Bruce, (1915) A. C. 433; 84 L. J. K. B. 417; 112 L. T. 651; 6 Tax Cas. 399; 59 S. J. 144; 31 T. L. R. 104. (*Relied on*) ... 943

V—concld.

Page.
Vaidyanatha Ayyar v. Swaminatha Ayyar, 82 Ind. Cas. 804; 47 M. 884; 47 M. L. J. 361; 35 M. L. T. 189; A. I. R. 1924 P. C. 221; (1924) M. W. N 749; 10 O. & A. L. R. 1076; 26 Bom. L. R. 1121; 20 L. W. 803; 22 A. L. J. 983; 40 C. L. J. 454; 29 C. W. N. 154; 51 I. A 232; 26 P. L. R. 1; L. R. 6 A. (P. C.) 17; 1 O. W. N. 617 (P. C.) (*Relied on*) .. 950
Vaithinatha Aiyar v. Thayagaraja Aiyar, 68 Ind. Cas. 631; 41 M. L. J. 20 at p. 29. (*Followed*) ... 516
Varada Pillai v. Jeevarathnammal, 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 46 I. A. 285; 2 U. P. L. R. (P. C.) 61; 22 Bom. L. R. 414 (P. C.). (*Followed*) ... 99
Vasudevan Nambudri v. Mammod, 22 M. 212; 8 Ind. Dec. (N. S.) 151. (*Distinguished*) .. 968
Velayutha Muppan v. Subramanian Chetti, 18 Ind. Cas. 498; 24 M L J. 70; 13 M. L. T. 207; (1913) M. W. N. 136 (*Followed*) ... 833
Vembu Iyer v. Srinivasa Iyengar, 17 Ind. Cas. 609; 23 M. L. J. 638 at p. 646; 12 M. L. T. 547. (*Relied on*) .. 827
Venkata Jagannadha v. Veerabhadrayya, 61 Ind. Cas. 667; 44 M 643; 41 M. L J. 1; 34 C. L. J. 16; 14 L. W. 59; (1921) M. W. N. 401; 30 M. L. T. 11; 26 C. W. N. 302; A. I. R. 1922 P. C. 96; 48 I. A. 244 (P. C.). (*Relied on*) ... 472
Venkateswara Aiyar v. Somasundram Chettiar, 44 Ind. Cas 551; 7 L. W. 280; (1918) M. W. N. 244. (*Relied on*) .. 405
Venkati Rama Reddi v. Pillati Rama Reddi, 38 Ind. Cas 707; 40 M. 204; 31 M. L. J. 690; 4 L. W. 465; 20 M. L. T. 450; (1917) M. W. N. 112. (*Followed*) .. 479
Vishnu Vishvanath Ninkar v. Ramchandra Sadashiv Ninkar, 73 Ind. Cas 1017; 25 Bom. L. R. 508; A. I. R. 1923 Bom. 453. (*Distinguished*) ... 378

W

Walkar v. Frobisher, (1801) 6 Ves. Jur. 70; 31 E. R. 943; 5 R. R. 223. (*Relied on*) .. 792
Wallingford v Mutual Society, (1880) 5 A. C. 685; 50 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81. (*Distinguished*) ... 968
Wazir v. Girdhari, 71 Ind. Cas. 847; A. I. R. 1923 Lah. 311. (*Followed*) ... 980
William Cecil Keymer v. Emperor, 22 Ind. Cas. 145; 36 A. 53; 12 A. L. J. 1; 15 Cr. L. J 1. (*Followed*) .. 895
Williams v. Millington, (1788) 2 R. R. 724; 1 H. Bl. 81; 126 E. R. 49. (*Relied upon*) ... 394
Williams & Co., *In re*; Official Receiver, *Ex parte*, (1913) 2 K. B. 88; 82 L. J. K. B. 459; 108 L. T. 585; 20 Manson 21; 57 S. J. 285; 29 T. L. R. 243. (*Followed*) ... 620
Wilmott v. Barber, (1880) 15 Ch. D. 96; 43 L. T. 95; 28 W. R. 911. (*Followed*) ... 1017
Wolmershausen v. Gullick, (1893) 2 Ch. 514; 3 R. 610; 68 L. T. 753. (*Relied on*) 715
Zain-ul-Abdin Khan v Muhammad Asghar Ali Khan, 10 A. 166; 15 I. A. 12; 5 Sar. P. C. J. 129; 6 Ind. Dec. (N. S.) 112 (P. C.). (*Followed*) ... 803

Z

Zohra v. Mangu Lal, 28 A. 753; 3 A. L. J. 569; A. W. N. (1906) 223 (F. B.). (*Followed*) .. 282

INDIAN CASES
1926.
VOLUME 92.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1628 OF 1924.
December 11, 1925.
Present:—Mr. Justice Walsh and
Mr. Justice Kanhaiya Lal.
JAGRUP SINGH—PLAINTIFF—APPELLANT
versus
INDRASAN PANDE AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Pre-emption Act (XI of 1922), s. 12 (3)—Person "claiming pre-emption," meaning of—Vendee, or intended vendee, whether included.

The vendee, or proposed vendee, or contemplated vendee, or intended vendee, is a person "claiming pre-emption" within the meaning of the clause "more persons than one of the same class claiming pre-emption" in s. 12 (3) of the Agra Pre-emption Act. [p. 1, col. 1.]

Iswar Datt Upadhiya v. *Mahesh Datt Upadhiya*, 89 Ind. Cas. 114; 23 A. L. J. 862; L. R. 6 A. 451 Civ.; (1925) A. I. R. (A.) 747, followed.

The ordinary meaning of "to pre-empt" is to purchase in preference to others, that is to say, even of the whole world, and pre-emption is the effect of the purchase. The vendee, if he is successful in the end over other competitors, does in fact pre-empt and is, therefore, properly spoken of as a person claiming pre-emption. [p. 1, col. 2.]

Second appeal from a decree of the Additional Subordinate Judge, Azamgarh, dated the 30th July 1924.

Mr. *P. L. Banerji*, for the Appellant.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—This appeal raises a simple question of law on the construction of s. 12 sub-s. (3) of the new Pre-emption Act. That question is this. The sub-section providing that in a case "where there are more persons than one of the same class claiming pre-emption," is the vendee, or proposed vendee, or contemplated vendee, or intended vendee, a person claiming pre-emption within the meaning of the section. In the case of *Iswar Datt Upadhiya* v. *Mahesh Datt Upadhiya* (1) a Division Bench of this Court, including one member of the Court now sitting, has decided that question in the affirmative. Nothing is more important in connection with this question and with the new Act than that the decisions of this Court should be consistent, and, unless there were some very strong reasons compelling us to take a different view, we should prefer to follow the view taken in the case just cited. In that case for some reason the respondents were unrepresented, and it might be said that that fact, to some extent, detracts from the authority of the decision because the appeal was allowed in their absence. But in this case the respondents have had the advantage of Dr. Sen to represent them and we do not think that anything could be said on behalf of the other view which has not already been said. We agree with the decision, however, on this further ground. The ordinary meaning of "to pre empt" is to purchase in preference to others, that is to say, even of the whole world, and pre-emption is the effect of the purchase. The vendee, if he is successful in the end over other competitors, does in fact pre-empt and is, therefore, properly spoken of as a person claiming pre-emption. It has been pointed out to us on behalf of the appellant that whereas "the right of pre emption" is spoken of in other parts of the Act, in this particular sub-section the word used with reference to what is being claimed is simply pre-emption. We are further of opinion that this interpretation satisfies another test, namely, the true construction of s. 10 where it is quite obvious that the expression "equal" or "inferior" right of pre-emption is used with reference to the vendee. We can understand how it was that the Courts below came to the decision they did. The authority to which we have referred had not then been reported. It

(1) 89 Ind. Cas. 114; 23 A. L. J. 862; L. R. 6 A. 451 Civ.; (1925) A. I. R. (A.) 747.

has been found that the plaintiff is related to one of the vendors and the husband of the other vendor within four degrees. The *wajib ul-arz* filed shows that the property in question was obtained by one of the vendors and the husband of the other vendor from their fathers respectively, who were own brothers. The appeal must be allowed and the suit decreed subject to the condition that the plaintiff is required to pay Rs. 1,320, on account of the sale consideration, found by the Courts below, within two months from this date. If such payment is made he will get his costs here and hitherto including fees in this Court on the higher scale from the defendant vendee. If he fails to pay, his suit shall stand dismissed with costs here and below, including fees in this Court on the higher scale.

N. H. *Appeal allowed.*

PATNA HIGH COURT.

CIVIL REVISION No. 95 OF 1925.

June 4, 1925.

Present:— Justice Sir John Bucknill, KT.

SHEO CHARAN SINGH—DECREE-HOLDER—PETITIONER

versus

KISHNO KUER AND ANOTHER—JUDGMENT-DEBTORS—OPPOSITE PARTY.

Civil Procedure Code (Act (V of 1908), O XXI, rr. 66, 72—Execution of decree—Sale—Decree-holder, whether bound to bid up to any fixed sum.

There is no legal necessity for a bidder at an auction-sale, whether he be the decree-holder or an outsider, to purchase the property at the full price at which it may have been valued in the sale proclamation. On the contrary, the value of the property is really only that which it will actually fetch, assuming that there is no fraud or malpractice with regard to the bidders and that the sale has been reasonably and properly made public. [p. 2, col. 2.]

Application against an order of the District Judge, Gaya, dated the 16th February 1925, against that of the Munsif, First Court, Gaya.

Mr. *Brij Kishore Prasad*, for the Petitioner.

Mr. *Siva Nandan Rai*, for the Opposite Party

JUDGMENT.

Bucknill, J.—This is an application in civil revisional jurisdiction made to this Court under somewhat curious circumstances.

The applicant obtained a decree for rent against the opposite party here in the Court of the Munsif of the first Court of Gaya. Having obtained his decree he then applied for execution. It would seem that there were four properties which were put up for sale and the Court allowed the decree-holder (that is, the applicant here) to bid for the properties at the sale. There seems no doubt that the valuation which was put on the properties was, that the first was put at Rs. 46, the second at Rs. 1,470, the third at Rs. 3,075 and the fourth at Rs. 55. There is nothing on the record or before me to indicate in any way that the sale proclamations were not duly published and in fact on the 21st January last the sale was proceeded with. It would appear from the record that there were other bidders besides the decree-holder. Now the Munsif made a curious order on the 22nd of January, that is to say, the day after the sale. He placed in his order-sheet the following words :—

"Decree-holder did not bid for the valuation fixed by the Court. The case is dismissed, *vide* order passed on the sale proclamation."

When we turned to the sale proclamation we saw that the note or order there reads :

"The decree-holder does not wish to bid up to the value fixed by the Court. The property on sale is 28·45 acres *nakli*, *bhaoli* and *belagan* lands. The decree is for Rs. 566-9. He wants to purchase the property for a nominal value. This cannot be allowed ; as the decree-holder does not care to bid for more, so I dismiss the case."

Now it is very difficult to see how on the language of these two orders it was really altogether open to the Munsif to adopt the course which he did. I do not know that there is any legal necessity for a bidder at an auction-sale, whether he be a decree-holder at whose instance the property being sold is being put up for sale or whether he be an outside person, to purchase the property at the full price at which it may have been valued in the sale proclamation. On the contrary it would seem that after all the value of the property which is thus put up to auction is really only that which it will actually fetch at that auction assuming, of course, that there is no fraud or malpractice with regard to the bidders and that the sale has been reasonably and properly made public. I have no doubt that there is a good deal of force in what is

urged by the learned Vakil who appeared for the opposite party, namely, that owing to there being a number of sales conducted on the same day it was not very feasible for the Munsif to have recorded at great length his reasons for his order in the order-sheet. There is nothing except the suggestion contained in the order which is endorsed on the sale proclamation where the Munsif says that the decree-holder wants to purchase the property for a *nominal* value which leads one to suppose that there was anything improper or wrong in the way in which the sale had been made public or in the way in which the bids took place. On the other hand, there is certainly this to be said in favour of the Munsif's view, namely, that so far as the second property was concerned the amount which was in fact bid was a very trifling one compared with the value which was put upon the property in itself. In that instance it will be observed that whilst the value was Rs. 1,470 the price bid was Rs. 232. As regards the third property put up for sale the difference was very much worse; for, there, whilst the value was Rs. 3,075 the bid for it was Rs. 231. What I think the Munsif should have done was to have expressed his views as to the unsatisfactory nature of the sale in clearer terms and to have given his reasons which ought to be substantial ones for declining to proceed with the sale. I do not think that the reasons which he has given are good reasons for dismissing the execution case; for, so far as we can see, the decree-holder had done nothing really wrong in refusing to bid up to the total value which had been fixed on the property. I think the Munsif's order should have been, after having set out his reasons, to have ordered that there should be an issue of a fresh sale proclamation under circumstances of proper publicity which would ensure that at the next auction when the property should be put up for sale there should be suitable bidders. Under such conditions no doubt the properties would fetch whatever they were really worth and what the public was ready to pay for them. It may be said with regard to the 1st and 4th properties that the prices which were offered were substantially equivalent to the prices at which the two properties were valued and that is certainly so. At the same time these two properties are of very little account aggregating just Rs. 101 in value. It does not, therefore, seem desirable to split these two properties away from the other two or to regard the two properties entirely separately.

I should mention that after the decision by the Munsif it would seem that the decree-holder preferred some sort of appeal to the District Judge of Gaya. What exactly happened before the District Judge it is difficult to understand. From the order-sheet of the 5th February there seems to be a note by the *serishatadar* saying that the order complained of is not appealable (*vide* O. XLIII, r. 1 and s. 104, C. P. C.) On the same day the District Judge minutes: "put up in presence of Pleader." No date is mentioned as to when it should be put up. But on the 16th February we get an order of the District Judge "Pleader absent. File." Whether this is tantamount to the dismissal of the appeal or whether this is tantamount to the adjournment of it I do not know. However, to my mind the conclusion is after all the same, for although the matter has come up to this Court by way of complaint against what appears to have been the *serishtadar's* order of the 5th February, there is also a complaint quite clearly made that the order which the Munsif passed on the 22nd January was illegal. I have no hesitation in coming to the conclusion that the order which was passed by the Munsif on the 22nd January is an unsatisfactory one.

It must be set aside and the Munsif ordered to re-instate; the execution case, to direct that a new sale proclamation shall be issued and that such precautions should be taken with regard to the publicity of the conditions under which the sale will be held so as to ensure that a reasonable and proper sale will be held upon the date fixed. There will be no order for costs in this application.

Z. K. *Order accordingly.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1642 OF 1925.

December 11, 1925.

Present:—Mr. Justice Sulaiman.

KALKA PRASAD—PLAINTIFF—APPELLANT

versus

PANNA—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 175, 182—District Judge, order of—Appeal, third, to High Court whether lies.

Section 182 of the Agra Tenancy Act only allows a second appeal to the High Court and not a third appeal.

Therefore, no appeal lies to the High Court from an order passed by the District Judge on an appeal from an appellate order of a Collector.

Lachmi Narain v. *Nirotam Das*, A. W. N. (1906) 272; 29 A. 69; 3 A. L. J. 688, followed.

Chhajmal Das v. *Sirya*, A. W. N. (1906) 254, 3 A. L. J. 625, not followed.

Second appeal against a decree of the District Judge, Jhansi, dated the 22nd of August 1925.

Mr. *S. N. Varma*, for the Appellant.

JUDGMENT.—This purports to be an appeal from an order passed by the District Judge on an appeal from an appellate order of a Collector. Thus it is a third appeal to the High Court. Section 182 of the Agra Tenancy Act only allows a second appeal to the High Court and not a third appeal. Section 175 bars all appeals which are not provided for. It is, therefore, clear that the appeal does not lie.

The learned Vakil for the appellant relies on the case of *Chhajmal Das* v. *Sirya* (1) where a learned Judge of this Court entertained a third appeal. That case was contrary to the decision in *Lachmi Narain* v. *Nirotam Das* (2) reported in the same volume at page 251, and must be deemed to have by implication been overruled by the decision of the Bench in the case of *Lachmi Narain* v. *Nirotam Das* (3) reported in the same volume at page 272. As no appeal lies, this appeal is accordingly dismissed under O. XLI, r. 11

N. H. *Appeal dismissed.*

(1) A. W. N. (1906) 254; 3 A. L. J. 625.
(2) A. W. N. (1906) 251, 3 A. L. J. 623.
(3) A. W. N. (1906) 272; 29 A. 69; 3 A. L. J. 688.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 150 OF 1924.
September 1, 1925.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

PARVATIBAI TRIMBAKRAO PATVARDHAN—PLAINTIFF—APPELLANT

versus

VISHVANATH KHANDERAO RASTE—DEFENDANT—RESPONDENT.

Hindu Law—Adoption—Agreement between adoptive and natural fathers reserving right of making Will to adoptive father, legality of.

An agreement between the adoptive father and the natural father of the minor about to be adopted, made at the time of adoption, whereby full powers are reserved to the adoptive father to dispose of the family properties by Will, is not valid according to the Hindu Law and is not binding on the adopted son. [p. 4, col. 2.]

First appeal from the decision of the First Class Subordinate Judge at Poona, in Suit No. 1021 of 1921.

Mr. *P. B. Shingne*, for the Appellant.

Mr. *G. N. Thakor*, (with him Mr. *W. B. Pradhan*), for the Respondent.

JUDGMENT.—The plaintiff sued to recover Rs. 6,580 with costs of the suit and future interest at six per cent from the estate of the deceased testator Rao Badadur Khanderao Vishwanth Raste in the hands of the defendant. The plaintiff claimed this amount as the arrears of annuity of Rs. 400 a year payable to her under the Will of her deceased father.

The claim has been dismissed by the lower Court on various grounds, and we think that this appeal can be disposed of in a very simple manner.

The defendant was adopted in 1896, and Ex. 82, the *tharavpatra*, was executed at the time as constituting an agreement between the natural father of the defendant, who was then a minor, and the adoptive father. One clause of the agreement was to this effect that the adoptive father had made a Will; that the adopted boy should act up to the terms of the Will, and in case the adoptive father made other Wills, the adopted son should behave according to the terms of the other Wills. That clause in effect gave the adoptive father an absolute right to dispose of all his property even after the adoption in any way he pleased. The Will under which the plaintiff claimed was made after the adoption. At that time the joint family consisted of adoptive father and the adopted son, and according to Hidnu Law the father would have no power to make dispositions by Will of the joint family property.

We do not think an agreement of this nature is in consonance with the principles of Hindu Law with regard to agreements which can be made at the time of the adoption between the adoptive father and the natural father of the boy taken in adoption. The result of such an agreement would be that the adopted son would lose his right in his natural family, and would either acquire no rights at all, or would only acquire rights which were liable to be defeated, in his new family. The appellant being aware of the difficulty of the

tharavpatra endeavoured to rely upon the payments made to her by the adoptive father before he died. Such payments, which, as a matter of fact, were not disputed by the adopted son and had never been disputed since the death of the adoptive father, could only be considered as gifts *in præsenti* of certain cash, and could not possibly constitute a claim to anything in the nature of any annuity.

We agree with the Judge that Ex. 82 offended against the law of minors and the general principles of Hindu Law as regards adoption. We, therefore, dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

JUDICIAL MISCELLANEOUS APPLICATION No. 329 OF 1923.

September 22, 1925.

Present:—Mr. Rupchand Bilaram, A. J. C.

OFFICIAL RECEIVER—APPLICANT

versus

LACHMIBAI—OPPONENT.

Provincial Insolvency Act (V of 1920), ss. 53, 54, difference between—Encumbrance created within two years of adjudication—Consideration—Good faith—Burden of proof

Where an incumbrance created by an insolvent within two years of his adjudication is challenged in the Insolvency Court the onus lies on the incumbrancer to prove both good faith and valuable consideration. [p. 6, col 1.]

Official Assignee of Madras v. *Annapurnammal*, 20 Ind. Cas 901; 14 M L. T. 150, *Anantarama Aiyar* v *Yussufji Oomer Sahib*, 36 Ind Cas. 903, 31 M. L. J 133; (1916) 2 M. W. N 236, *Official Assignee of Madras* v. *Sambanda Mudaliar*, 60 Ind. Cas. 205, 43 M 739, 39 M L. J. 345; 28 M. L. T. 258, *Nilmoni Chowdhuri* v *Basanta Kumer Banerjee*, 29 Ind. Cas. 814; 19 C W. N. 865 and *Muhammad Habibullah* v. *Mushtaq Husain*, 37 Ind. Cas. 684, 14 A. L. J. 1183, 39 A. 95, relied upon.

There is a radical difference between s. 53 and s. 54 of the Provincial Insolvency Act. Under s. 54 the Court is not concerned with the motive of the transferee but only with that of the debtor. It is he who is said to have given the preference and whether the transferee acted in good faith or not is immaterial. Where, however, the three months' limitation contemplated by s. 54 has expired, it is open to the transferee to prove that whatever the motive of the transferor may have been, he on his part acted in good faith. And where the consideration of the transfer is a past debt the transferee stands in a better position than otherwise. He has his own interests to serve and owes no duty to the other creditors to protect their interests. He is in the absence of any statutory limitation imposed by the Law of Bankruptcy, as much at liberty to secure the payment of his debt by superior diligence as by accepting a voluntary preference provided he goes no further than what is necessary to serve his own purpose [p. 8, col. 1.]

Hakim Lal v. *Mooshahar Sahu*, 34 C. 999 at p. 1018; 11 C W. N. 889; 6 C. L. J. 419, relied upon.

Official Assignee of Bengal v. *Yokohama Specie Bank, Ltd*, 87 Ind. Cas. 392; 29 C. W. N. 374, (1925) A. I. R. (C.) 640, referred to.

Application under s. 53 of the Provincial Insolvency Act.

Mr. *Dingomal Narainsing*, for the Official Receiver.

Mr. *Kimatrai Bhojraj*, for the Alienee.

Mr. *Srikishendas H. Lulla*, for the Insolvent.

JUDGMENT.—The Official Receiver has applied under s. 53 of the Provincial Insolvency Act for annulment of a mortgage-deed executed by the two insolvent brothers Valabdas and Sunderdas on the 1st September 1921 in favour of their paternal aunt Lachmibai. The two brothers belong to Shikarpur. They carried on business at Karachi with the aid of *gumashtas* in the firm name of Naraindas-Sunderdas; Naraindas being their father who died in 1916. The deed recites that Jamnadas husband of the mortgagee had an account with the firm of Naraindas Sunderdas; on which a sum exceeding Rs. 14,000 was due to him and that he had advanced a further sum of Rs. 10,000 to the two brothers on 28th March 1921 and the two brothers had by a letter dated 17th May 1921 agreed with Jamnadas to mortgage to him a half undivided share in their residential house at Shikarpur in the sum of Rs. 24,000 made up of the two sums of Rs. 14,000 and 10,000 and that Jamnadas having died on 25th May 1921 the mortgagors had in consequence of the arrangement made with Jamnadas executed the mortgage-deed in favour of his widow and legal representative.

The two brothers were adjudicated as insolvents on 11th December 1922 in pursuance of an application presented to this Court on 31st October 1922 by one of the creditors of the insolvents. The incumbrance purported to have been created by the mortgage-deed, assuming it to have been in pursuance of the letter dated 17th May 1921, is within two years of the order of adjudication.

Section 53 of the Provincial Insolvency Act is a re-enactment *ipsissimis verbis* of s. 36 of the Provincial Insolvency Act of 1907 and the exception contained in s. 36

of the old Act in favour of "an incumbrancer in good faith and for valuable consideration" and a similar exception contained in s. 55 of the Presidency Towns Insolvency Act have been the subject of judicial interpretation. It has been consistently held by the different High Courts that where an incumbrance made within two years of adjudication is challenged in the Insolvency Court the onus lies on the incumbrancer to prove both good faith and valuable consideration, *cf. Official Assignee of Madras* v. *Annapurnammal* (1), *Anantarama Aiyar* v. *Yussufji Oomer Sahib* (2), *Official Assignee of Madras* v. *Sambanda Mudaliar* (3) and *Nilmoni Chowdhuri* v. *Basanta Kumer Banerjee* (4), *Muhammad Habibullah* v. *Mushtaq Husain* (5).

It has not been seriously disputed that the same considerations apply to s. 53 and that it is for the opponent to prove both valuable consideration and good faith in order to entitle him to succeed.

The evidence of the consideration for the deed appears to be fairly strong and conclusive.

The insolvents carried on their business with the aid of *gumashta* and maintained regular books of account. They have produced their books from *Sambat* 1974 onwards. These books show large sums of money due to Jamnadas from time to time. The balances due to him when the account books of *Sambats* 1974, 1976, 1977 and 1978 were closed and fresh account books kept were Rs. 16,956-12-9, Rs. 14,725-0-6, Rs.13,887-8-6 and Rs.15,195-7-9 respectively. No amounts appear to have been withdrawn by Jamnadas in *Sambat* 1974 or the year 1921. There are corresponding entries in the account books kept by Jamnadas himself. Exhibits 16 to 18 are the entries in his books. Exhibit 19 is a *Vatak* or memo. of account prepared by the insolvents' *gumashtas* and handed over to Jamnadas in the usual course of business and prove a similar indebtedness of the insolvents to Jamnadas. No evidence has been called in rebuttal to prove that about Rs. 15,000 were not due to Jamnadas by the insolvents' Karachi firm.

(1) 20 Ind. Cas. 901; 14 M. L. T 150.
(2) 36 Ind. Cas. 903, 31 M. L. J. 133, (1916) 2 M. W. N. 236.
(3) 60 Ind. Cas. 205; 43 M. 739, 39 M. L J 345; 28 M. L. T. 258.
(4) 29 Ind. Cas. 814; 19 C W. N 865
(5) 37 Ind. Cas. 684; 14 A. L. J. 1183; 39 A. 95

It would also appear that Jamnadas had a banking account with the firm of Pirbdas Kanayalal of Shikarpur who had a branch firm in Bombay as well. Another Shikarpuri firm carrying on business at Bombay in the name of Tejbhandas Thoriomal had a branch firm at Karachi of the same name. A sum of Rs. 10,000 was paid by the firm of Pirbdas-Kanayalal at Bombay to the firm of Tejbhandas Thariomal of Bombay on behalf of and under instructions from Jamnadas. The Karachi branch firm of Tejbhandas-Thariomal appear in their turn to have paid the Rs. 10,000 to the insolvents on 28th March 1921. Harbhagwandas the Manager of the Bombay Branch of Pirbdas Kanayalal has produced an entry from *sahi* book of his firm of the payment of Rs. 10,000 to the firm of Tejbhandas Thariomal on account of Jamnadas and duly signed by him. The Manager partner of Pirbdas Kanayalal Shikarpur has produced a debit entry Ex. 9-1 from his Shikarpur books showing that Rs. 10,000 were duly debited to Jamnadas' account in their books. Pahlajrai, the present Manager of the Karachi branch of Tejbhandas Thariomal, has put in an entry from his cash book of the payment of Rs. 10,000 to the insolvents' firm which is signed by their *gumashta* Gobindo, and has also produced the letter, Ex. 13, given by Jamnadas to them, authorising them to pay Rs. 10,000 to the insolvents. The insolvent Valabdas has explained that this sum of Rs. 10,000 was an advance to the insolvents and not to their firm. It was, therefore, credited in their *gharoo* (private) books as paid to them by Jhamnadas and then transferred by them in their capital account in the shop books as an advance fromthem. Exhibits 22 to 25 are entries in the insolvents *gharoo* books. Exhibits 26 and 27 are the corresponding entries in their firm books. The sum of Rs. 10,000 was indubitably paid by the insolvents to their firm as part of the capital and had been duly accounted for. It has not been shown that the insolvents had any other source where from to bring the Rs. 10,000. I, therefore, hold that the mortgage deed is for valuable consideration.

An attempt was made on behalf of the opponent to prove that at the time of the further advance of Rs. 10,000 the insolvents had agreed to execute a deed of mortgage in favour of Jamnadas. The only evidence on this point is the statement of

the insolvent Valabdas. I have no hesitation in holding that his evidence on this point is false. There is no mention of the alleged oral agreement in the letter, Ex. 7-2, which is said to have been given by him to Jamnadas on 17th May 1921. The whole tenor of this letter shows that there could have been no oral agreement between the parties to create a mortgage prior to this letter. It recites that a sum of Rs. 15,000 or 16,000 were due by the insolvents' firm to Jamnadas and that the insolvents had taken from him a further sum of Rs. 10,000 which he had sent for from the firm of Pribdas Kanayalal at Bombay through Tejbhandas Thariomal and that about Rs. 25,000 or 26,000 plus interest were due by them and then it recites as follows:

"On account of the same we have undertaken to mortgage with you without possession the half portion of our house for Rs. 24,000 in words twenty four thousand. Whenever you choose deed will be executed in your favour and registered. We have agreed to execute for a period of five years. The interest will be paid at the rate of 8 annas per cent., per mensem. Therefore, this *chit* is given to you in writing."

If there was a prior oral agreement one would have found specific mention of it in this letter. There is no mention of this oral agreement in the mortgage deed either. The explanation of Valabdas as to the reason why he did not pass this writing in favour of Jamnadas at the time of the advance is preposterous. He states that at that time it was arranged that insolvents were to give in mortgage to Jamnadas such of their properties as he might select and it was only after Jamnadas made his selection that he passed the letter Ex. 7-2. Jamnadas was their uncle and knew all about their property and this delay of about one month and 24 days to make the selection is unaccountable.

It would appear from the evidence that the insolvents were in financial difficulties from the end of 1920. They traded in piecegoods and had bought both on the sterling and rupee basis large quantities of cloth for forward delivery at a time when the exchange had risen to over 2 shillings to the rupee. In December 1920 the exchange dropped down to 1 shilling 5 pence thereby seriously affecting the insolvents. The price of cloth purchased on the rupee basis had also gone down to a certain extent through other causes.

In December 1920 they sold some of their property to Pirbdas Kanayalal to keep them going and it appears that in March 1921 they either borrowed from Jamnadas the sum of Rs. 10,000 or appropriated to themselves this sum which had been paid to them by Tejbhandas Thariomal on account of Jamnadas, and used this amount for the same purpose. They evidently expected the exchange to go up and the prices to rise. They appear to have taken some deliveries of piecegoods upto April 1921 though such deliveries were not so brisk. The exchange instead of showing any improvement grew from bad to worse and in May 1921 Messrs. Kahn and Kahn through whom the insolvents had imported large quantities of piecegoods fixed the exchange in respect of all the insolvents goods at 1 shilling $3\frac{3}{8}$ pence. The fixing of the exchange by Messrs. Kahn and Kahn deprived them of all chances of reducing their estimated losses by a rise in exchange. The estimated loss due to Messrs. Kahn and Kahn at this date was about a lac of rupees. They had other losses to pay. Their attempts to execute certain transfers in favour of their relations and particularly their submitting to an award in favour of their mother followed by a consent decree which is the subject matter of another application appear to be all subsequent to this date. I am of the opinion that the promise if any made by the insolvents to Jamnadas to secure his claim was made in May 1921 and not at the time of alleged advance of Rs. 10,000.

I entertain some doubts if Ex. 7-2 is the letter handed over by Valabdas to Jamnadas at the time it purports to have been written. It refers to a half share of the house being given in mortgage. The insolvents owned at that time the whole house. The award transferring half of this house to their mother is dated July 1921. No explanation has been offered why the insolvents agreed in May 1921 to mortgage only a half share of the house to Jamnadas unless it be assumed that before this letter was given the insolvents had agreed to give the other half to their mother. The opponent has relied on a recital made in the alleged Will of Jamnadas Ex. 7-1 which is said to have been made on 21st May 1921 about the writing given to Jamnadas. This genuineness of this Will is being litigated in another Court and I do not propose to

discuss the evidence as to its genuineness in the present proceedings. Clause 5 of this Will assuming it to be genuine does not give the purport of the letter passed in favour of Jamnadas and is inconclusive. It is not necessray for the purpose of this case to hold definitely if Ex. 7-2 is the letter given to Jamnadas. Whether the insolvents promised on the 17th May 1921 with Jamnadas that he would secure to him the re-payment of the debt already advanced or if Ex. 7-2 has been substituted for another after the death of Jamnadas. It would equally appear that there was no obligation on the insolvents to execute the mortgage-deed in favour of their aunt on the 1st September 1921 and its execution without any pressure from the aunt amounts to fraudulent preference within the meaning of s. 54 of the Act. If the petition for insolvency had been filed within three months of this date, I would have had no hesitation in declaring it to be void. Different considerations however arise in the circumstances of the present case. There is a radical difference between ss. 53 and 54. In s. 54 the Court is not concerned with the motive of the transferee but only with that of the debtor. It is he who is said to have given the preference and whether the transferee acted in good faith or not is immaterial. Where, however, the three months' limitation contemplated by s. 54 has expired, it is open to the transferee to prove that whatever the motive of the transferor may have been, he on his part has acted in good faith. And where the consideration of the transfer is a past debt, the transferee stands in a better position than otherwise. He has his own interests to serve and owes no duty to the other creditors to protect their interests. He in the absense of any statutory limitations imposed by the Law of Bankruptcy, is as much at liberty to secure the re-payment of his debt by superior diligence as by accepting a voluntary preference provided he goes no further than what is necessary to serve his own purpose. See the observations of Mukerji, J., in *Hakim Lal* v. *Mooshahar Sahu* (6). What then are the limitations imposed by the Law of Bankruptcy on the rights of the creditor to secure to himself the re-payment of a past debt? Where he has secured an advantage by his superior diligence, it would appear that he cannot be deprived of such advantage either under s. 53 or s. 54 of the Act. Where he has not secured it by such superior diligence but has accepted a preference voluntarily made by his debtor, he may not retain it, if an insolvency petition is filed for the adjudication of the debtor within three months of such preference. It would, therefore, follow that if the three months have elapsed, it is open to the creditor to say that in accepting such preference he has only secured to himself his own interests, and to rely on the presumption arising therefrom to prove his good faith. The onus then shifts on to the Official Receiver to prove other circumstances to warrant an inference that the act of the creditor in accepting a preference was an act of bad faith according to the Law of Bankruptcy. On behalf of the Official Receiver an attempt was made to show that there were other circumstances in the present case to rebut the inference arising in favour of the opponent as a creditor. In the first place it was said that the property mortgaged to him was substantially the whole of the property by the insolvents, and it was urged that as such it was an act of bankruptcy and void as not having been accepted in good faith. Reliance was placed on the recent case of the *Official Assignee of Bengal* v. *Yokohama Specie Bank Ltd.*, (7). Though I afforded an opportunity to the Official Receiver after he had closed his case to prove that this property was substantially the whole of the insolvents' property, he has failed in his attempt. Admittedly the insolvents had another property at Karachi which was mortgaged by them with Messrs. Tattersall & Co. for Rs. 16,000 on the 22nd February 1922. They had a certain amount on stock-in-trade, and it was open to the Official Receiver to show what its value was. He has not done so. The insolvents have, on the other hand, put in certain statements to prove that they took delivery of a considerable quantity of piecegoods after the mortgage-deed. The opponent is a woman, and it cannot be assumed without further proof that she knew that her nephews were [illegible] to her all that they possessed. If Ex. 7-2 is genuine, and the mortgage-deed was executed in pursuance of the promise made by the insolvents to Jamnadas, it would appear that at that time the insolvents possessed one more immoveable

(6) 34 C. 999 at p. 1018; 11 C. W. N 889; 6 C. L. J. 410.

(7) 87 Ind. Cas. 392; 29 C. W. N. 374; (1925) A. I. R. (C.) 640.

property which they mortgaged with Messrs Hiranand Naraindas for Rs. 15,000 and had also other considerable assets.

It is no doubt true that after May 1921, the insolvents at no time possessed sufficient assets to pay off their creditors in full, and though I have a shrewd suspicion that the object of the insolvents to attempt to carry on their business for over a year after they were to their knowledge hopelessly gone, was to benefit some of their relations and to make it difficult for the Official Receiver to take possession of all the property which would otherwise have been available for distribution, I find it difficult to hold that the incumbrance in favour of the opponent falls within the principle enunciated in the Calcutta case.

It was further alleged on behalf of the Official Receiver that as the opponent had no issue, the object of the mortgage-deed was to secure to the insolvents the advantage of the transfer, the opponent holding the property on their behalf as a *benamidar*. A considerable amount of argument was addressed at the Bar with regard to the validity of the alleged Will of Jamnadas, and especially the provision in respect of "*dharam*". It is however not necessary for me to go into the question either of the validity of the Will or of the bequest to "*dharam*" as it would appear that the possession of the opponent *de hors* the Will is even better. As a Hindu widow she is entitled to an absolute estate in the cash left by her husband. I am not, however, prepared to hold in the absence of any evidence on the point that the mortgage-deed was executed in favour of the opponent as a *benamidar* for the insolvents. Admittedly Jamnadas has left two brothers who are both alive, and it cannot now be said whether on her death, the property left by her would vest in the insolvents or in the brothers of Jamnadas. This will depend on who are alive at the time the inheritance opens up on her death. It is to be regretted that I should have arrived at this conclusion which deprives the creditors of their right to claim a rateable distribution out of the half share of the residential house mortgaged to the opponent. The conduct of the insolvents in continuing to carry on their business from certain *mala fide* motives requires a separate consideration and cannot be made a ground for setting aside the incumbrance in the absence of proof of bad faith on the part of the opponent. This application, therefore, fails and is dismissed. In the circumstances of this case; I make no order as to costs. If the Official Receiver wishes to appeal against this decision, I shall readily grant him the required permission.

P. B. A. *Application dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 95 OF 1924.

February 27, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

JAMSHEDJI NAOROJI GAMADIA—DEFENDANT—APPELLANT

versus

MAGANLAL BANKEYLAL & CO.—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 178 Shares handed over for purpose of raising money—Pledge of shares—Misrepresentation, shares obtained by—Pledgee, rights of—Fraud, meaning of—"Goods," whether includes share certificates

A person who without enquiry takes from another an instrument signed in blank by a third party and fills up the blanks cannot, even in a case of a negotiable instrument, claim the benefit of being a purchaser for value without notice so as to acquire a greater right than the person from whom he himself received the instrument. [p. 12, col. 2]

France v. *Clark*, (1884) 26 Ch D 257, 53 L. J. Ch. 585, 50 L T 1; 32 W. R 466, referred to

The obtaining of goods or documents by fraud of which the proviso to s 178 of the Contract Act speaks must mean obtaining possession by such a trick or fraud as excludes real consent and, therefore, cannot be the foundation of any other contract. [p. 13, col 1]

Defendant No. 1 who was a partner in a firm which had been dissolved represented to defendant No. 2 that his liabilities in respect of his partnership in the dissolved firm did not exceed a certain sum and induced defendant No 2 to enter into a partnership with him for the purpose of starting a new business. Defendant No. 2 handed over shares in certain companies to defendant No. 1, together with transfer forms with blank transfers duly signed by him, and authorized the first defendant to borrow money on the shares for the purpose of the new business to be started by them. The first defendant pledged the shares with the plaintiff and utilized the proceeds to discharge his liabilities as a partner in the dissolved firm In a suit by the plaintiff to enforce the pledge of the shares

Held, (1) that the first defendant having been authorized by the second defendant to pledge the shares it could not be said that he had obtained possession of the shares by means of an offence or fraud; [*ibid*]

(2) that at the most it could only be said that the first defendant induced the second defendant to negotiate with him with regard to starting a new business by misrepresenting the amount of his liabili-

ties in his old business and that such a misrepresentation would enable the second defendant to avoid the agreement to start a new business and to recover the shares entrusted to the first defendant for the purpose of raising money for that business; [*ibid*]

(3) that the misrepresentation, however, had not the effect of rendering the pledge of the shares with the plaintiff before the rescission of the contract invalid and that the plaintiff was, therefore, entitled to enforce his pledge [*ibid*]

Per *Coyajee, J*.—The term "goods" used in s 178 of the Contract Act is wide enough to include share certificates [p 13, col 2.]

Fazal v *Mangaldas*, 66 Ind Cas 726, 16 B 489 at p 502, 23 Bom. L. R. 1144, (1922) A I R (B) 303, followed.

Appeal from the decision of Mr. Justice Kemp.

Mr. *Kanga*, Advocate-General, (with him Mr. *Khergamvalla*), for the Appellants.

Sir *Thomas Strangman*, (with him Mr. *Kania*, for Respondent No 1

JUDGMENT.

Macleod, C. J.—The plaintiffs filed this suit seeking to recover the sum of Rs. 26,671-9-0 from the first defendant, and praying for a declaration that the pledge of the shares mentioned in Ex. E to the plaint was binding on the second defendant, and that the second defendant had no right to prohibit the transfer of the said shares to the name of the plaintiffs. They also prayed that they might be authorised to sell the shares mentioned in Ex. D and appropriate the net proceeds towards part satisfaction of the decree to be passed in their favour.

Plaintiffs alleged that the first defendant had borrowed certain amounts from them on security of certain shares. On April 12, 1921, it was found that Rs. 38,000 were due by the first defendant and the first defendant passed a writing to the plaintiffs whereby he promised to pay the plaintiffs the said sum of Rs. 38,000 on demand with interest, and gave details of the shares which were to remain as security. Thereafter the plaintiffs had received a certain amount of interest on certain shares and also sold certain shares under the instructions of the first defendant. On making up the account the amount of Rs. 26,671-9-0 was found due to the plaintiffs against which the plaintiffs had in their possession the shares mentioned in Ex. D to the plaint, out of which fourteen shares of the Emperor Edward Mills and one share of the Nagpur Mills stood in the name of the second defendant. The plaintiffs had in their possession the share certificates and transfer forms signed by the second defendant, who had given notice to the companies concerned not to transfer the shares to any other person. The first defendant had failed to pay the sum of Rs 26,671-9-0, and hence the suit was filed claiming the relief abovementioned.

The first defendant filed a written statement asking for an account but at the hearing he admitted the claim.

The second defendant in his written statement alleged that in April 1920 the first defendant had induced him to join the first defendant in cotton business as financing partner, representing that he only owed Rs. 16,000 on the transaction of the Firm of Framroze Boga & Co. of which he had been a partner and which had been dissolved. Relying on the representation the second defendant agreed to become a partner with the first defendant upon the terms of two writings dated April 24, 1920, and as the second defendant had not sufficient cash it was arranged that he should hand over to the first defendant certain shares with blank transfers signed by him on which the first defendant should be at liberty to borrow money for the purposes of the said business. The aggregate value of the shares was Rs. 2,03,839 and amongst them were fourteen shares of the Emperor Edward Mills and one share of the Nagpur Mills. Thereafter the second defendant discovered that the first defendant's liabilities in the Firm of Framroze Boga & Co., far exceeded Rs. 16,000 and that he had employed the money raised on the security of the said shares of the second defendant in paying off those liabilities. When the second defendant threatened the first defendant with proceedings he executed a writing in favour of the second defendant, on May 20, 1920 and on January 28, 1921, executed a [illegible] of his property known as the "Bha[illegible]ilding" to secure re-payment of one *lakh*.

Accordingly the second defendant contended that the first defendant had obtained possession of the said shares by means of an offence and fraud, so that the pledge of the shares in favour of the plaintiffs by the first defendant was not valid and binding on the second defendant

By way of counter-claim he prayed that the plaintiffs might be ordered to return the shares to him.

The following issues were raised at the trial:—

(1) Whether the suit shares were handed over to the first defendant under the cir-

cumstances mentioned in para. 3 of the written statement ?

(2) Whether the first defendant obtained possession of the shares by means of an offence and fraud ?

(3) Whether the pledge alleged by the plaintiffs was valid and binding on the second defendant ?

(4) Whether second defendant was entitled to his counter-claim?

The Trial Judge believed the story of the second defendant that first defendant told him that the liabilities of the old firm amounted to Rs. 16,000 only, but was of the opinion that the second defendant was willing that the money to be raised on pledge of the shares was to be utilised in paying off that liability besides helping to start the new business

On the second issue he decided that the first defendant obtained the shares by a material misrepresentation of fact, but that as the interests of a *bona fide* pledgee under s. 178 of the Indian Contract Act had intervened, the second defendant could not be placed in the *status quo ante*. Consequently he held that the pledge was valid and binding on the second defendant who was entitled to redeem the shares on payment of the amount for which they were pledged.

A fifth issue had been raised whether the second defendant had not ratified all the acts of the first defendant whereby he was estopped from disputing his liability to the plaintiffs.

The Judge held that the mere fact that he took further security from the first defendant did not amount to a ratification.

The second defendant has appealed.

His main ground of appeal was that the learned Judge should have held that the first defendant had obtained possession of the shares from the appellant by means of an offence or fraud.

He contends that first defendant falsely represented that his old debt was only Rs. 16,000 and that if he had known that the debt amounted to a very much greater sum he would not have given the first defendant the shares to pledge.

What the appellant's case against the first defendant was on January 25, 1921, is made clear from his Solicitors' letter of date, Ex. No. 2. After referring to the writing of April 24, 1920, whereby first defendant agreed to execute a mortgage in respect of two of his properties in favour of the second defendant whenever called upon to do so for securing the moneys to be advanced and the fact that second defendant handed over certain shares with blank transfer forms signed by him to enable the first defendant to raise moneys thereon for financing the new business which was to be started, he complains that the moneys so raised were utilised for liquidating the private debts of the first defendant in abuse of the confidence reposed on him by the second defendant without his knowledge and consent so that the new business was never started. On second defendant discovering this he wanted to prosecute the first defendant but he promised to redeem the shares very shortly. As the first defendant had neither redeemed the shares nor executed the mortgage though he had given a fresh writing on August 10, 1920 (Ex. 2), he was called upon to redeem the shares within twenty-four hours or pay the value thereof and in default proceedings either civil or criminal would be taken against him. There is no suggestion in that letter that the original intention was that first defendant should pay off old debts to the extent of Rs. 16,000 out of the amount borrowed on the shares or that second defendant would be entitled to give notice to the different companies not to register any transfers.

In his evidence the second defendant said :—

"Framroze Boga was dissolved in April 1920. First defendant proposed I should finance his business after the dissolution. I said I had shares and he could raise money on them to continue a business with me as partner. He said the existing liabilities were Rs. 16,000. *My shares were not to go towards that.* I would not have given those shares to the first defendant if I had known the liabilities were Rs. 80,000. About August 1920 I came to know he had raised monies on my shares and used them for his own purposes. Then I got the writing of August 10, 1920, executed by first defendant. I also got the first defendant to execute a promissory note for Rs. 1,30,000 on April 30, 1920. On January 28, 1921, I took a second mortgage of the first defendant's Bombay building. I threatened first defendant with legal proceedings (that was by the letter of January 25, 1921), and he gave me the second [illegible] "

On [illegible] 1920, the second defendant had given the first defendant a writing Ex. F, authorising him to borrow monies on the

shares given to him either by making *badlas* or by overdrawing monies by depositing the said shares with some Bank or with big *Shroffs*.

Cross-examined about that document he said :—

"I did not understand when I signed it that I was giving first defendant unreserved liberty to pledge. The letter is plain enough. I say it did not authorise first defendant to pledge the shares for any purpose he wanted. First defendant said he had to discharge liability of Rs. 16,000 and he wanted money for that also. The shares of value of those I deposited were to finance this business also. First defendant got these shares from me by fraud *viz.*, obtaining them for partnership and thus misapplying them."

It is difficult owing to these contradictory statements to arrive at any satisfactory conclusion whether first defendant was authorised or not to spend out of the monies borrowed on the shares, Rs. 16,000 or any other sum towards discharging his own liabilities. It is true that there is some foundation for the allegation to this effect of the second defendant in the writing Ex. 6 given by the first defendant to the second defendant on April 24, 1920, but against that there is the statement of the second defendant in his evidence that his shares were not to be used by the first defendant for raising money to pay off his own liabilities. The first defendant said he did not tell the second defendant his private liabilities were Rs. 16,000. Second defendant did not ask what were the liabilities of the firm the first defendant was continuing. The shares were not given for the new business. They were given so that he could raise margin money. Second defendant had given him shares before by way of margin money. On his own confession the first defendant was guilty of misappropriation of the monies borrowed on the shares. The second defendant's case cannot stand higher than this : "I know the first defendant wished to wind up his old business He told me the liabilities of that business were Rs. 16,000 and I was willing that monies should be raised to pay off those liabilities and provide the capital for our partnership business. If I had known that first defendant's liabilities were Rs. 80,000 I would not have consented to start a new business with him, and I would not have handed over the shares."

But in my opinion the case set up in Ex. 2 is the right one and that the second defendant gave the shares to the first defendant to raise money thereon for the new business.

The question, therefore, is, as propounded by the Advocate-General whether the persons who advanced money to the first defendant on the shares standing in the name of the second defendant were bound to make inquiries as to the first defendant's title to deal with the shares, or whether the second defendant by putting into the hands of the first defendant his shares with blank transfers signed by him was estopped from disputing the title of a holder of the shares and transferees who received them in good faith from the first defendant and advanced money to the first defendant on security of the shares.

It is impossible to lay down any general rule. The answer to the question must depend on the facts of the case. The decision in *France* v. *Clark* (1) is not of much assistance. France, the registered holder of certain shares, deposited the certificates with Clark as security for £. 150 and gave him a blank transfer signed by himself. Clark deposited the shares and the transfer with a third party as security for £. 250. The third party filled in the transfer in his own name and sent it in for registration. It was held he had no title against France except to the extent of what was due from France to Clark. A person who without inquiry takes from another an instrument signed in blank by a third party and fills up the blanks cannot, even in the case of a negotiable instrument, claim the benefit of being a purchaser for value without notice so as to acquire a greater right than the person from whom he himself received the instrument. Clark was regarded in the light of an equitable mortgagee of the shares. The documents themselves showed that Clark was not the owner and there was no evidence of a mercantile usage that the holders of such documents were treated as having the right to transfer. Blank transfers with share certificates were not negotiable instruments. In this case the first defendant was the agent of the second defendant to raise money on the shares. I cannot agree with the learned Judge when he says the first defendant was a principal. The letter of

(1) (1884) 26 Ch. D. 257; 53 L. J. Ch. 585; 50 L. T. 1; 32 W. R. 466.

April 24, 1920, is clearly an authority to the first defendant to raise money on the shares on behalf of the second defendant, the moneys to be utilised according to the terms of Ex 2 in the business to be started by defendants Nos. 1 and 2 as partners. The first defendant being authorised to pledge the shares it cannot be said that he had obtained possession of them by means of an offence or fraud. At the most it may be said that he induced the second defendant to negotiate with him with regard to starting a new business by misrepresenting the amount of his liabilities in his old business. Such a misrepresentation would enable the second defendant to avoid the agreement to start the new business and to recover the shares entrusted to the first defendant for the purpose of raising money for that business. The question whether the pledge of the shares before the rescission of the contract would be invalid is considered by Messrs. Pollock and Mulla in their notes to s. 178 of the Indian Contract Act, at page 639. The authors think that the use of the term "fraud" in juxtaposition to offence would seem to indicate that it is confined to the substantive wrong of deceit. If possession of goods obtained under a contract voidable on the ground of fraud is possession obtained by fraud a pledge by the possessor could be invalid even before the rescission of the contract although an out and out sale would be valid under s. 108. I agree with their conclusion that it was not the intention of the Legislature to depart from the Common Law, and that the obtaining of goods or documents by fraud of which the proviso to s. 178 speaks must mean obtaining possession by such a trick or fraud as excludes real consent and, therefore, cannot be the foundation of any contract. The fraud, if any, committed by the first defendant was not committed in obtaining possession of the shares but in his disposition of the moneys obtained by pledging them.

Even assuming that the pledgee on being asked to lend money on the shares with blank transfers standing in the name of the second defendant was put on inquiry with regard to the title of the first defendant, he would have been shown the letter of authority signed by the second defendant.

I think, therefore, the decision of the learned Judge was right and that the appeal should be dismissed with costs.

Coyajee, J.—I agree in holding that the pledge of the share certificates created by the first defendant in favour of the plaintiffs is valid: s. 178, Indian Contract Act. The term "goods" used in that section is very wide (s. 76 of the said Act), sufficiently wide to include share certificates [*Fazal* v. *Mangaldas* (2).] In my opinion the evidence in this case which is fully discussed in the judgment of the learned Chief Justice, makes it clear that the first defendant had not obtained those certificates from the second defendant by means of "fraud" within the meaning of that expression as used in the proviso to s. 178. The proviso, it would seem, does not exclude from the operation of the section the case of goods obtained under a contract voidable on the ground of fraud. For it would be anomalous that although a person who has obtained possession of goods under a contract voidable at the option of the other party to it can transfer full ownership of these goods before the contract is rescinded (Exception 3 to s. 108), he cannot make a valid pledge at all of the same goods.

In this case the second defendant handed over the share certificates and transfer forms duly signed to the first defendant on April 24, 1920. On that day two documents (Ex. E and Ex. No. 6) were exchanged between them. The one passed by the second defendant gave the first defendant authority to raise moneys on the pledge of those certificates in language both plain and wide. It says :—'I authorise him and give my consent to borrow monies either by making *badlas* or by overdrawing monies by depositing the said shares with some Bank or big *shroffs*." The material statements in the other document are:—"With regard to the cotton brokerage business which I have been carrying on...in the name of Messrs. Framroze Boga and Company and with regard to the current business of the said brokerage which I have taken upon myself in the said firm you have this day (given) to me certain shares...to enable me to borrow monies thereon...For the monetary assistance which you have given to me I bind myself to make an agreement with you as soon as the accounts of my old customers are settled." The agreement here referred to was a contemplated partnership agreement between the parties. It seems to me that the effect of the evidence of the second defendant read with these documents and with his attor-

(2) 66 Ind. Cas. 726; 46 B. 489 at p. 502; 23 Bom. L. R. 1144; (1922) A. I. R. (B.) 303.

ney's letter of January 25, 1921, (Ex. No. 2), is this: Not that the pledge of the share certificates was unauthorised, but that the monies so borrowed were wrongly applied by the first defendant to unauthorised uses. But with this the plaintiffs have no concern. They have acted in good faith in making the loan on the pledge of the share certificates.

In my opinion the decree of the learned Judge is right and this appeal must fail.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 170 OF 1925.

December 3, 1925.

Present:—Mr. Justice Mukerji.

PEAREY LAL—PURCHASER—APPELLANT

versus

THE ALLAHABAD BANK LTD., MEERUT—DECREE HOLDER AND *Babu* BAIJNATH PRASAD AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O XXI, r 58—Money-decree—Attachment of property—Objection by transferee from judgment-debtor—Decision, finality of—Appeal, whether lies—Property attached being decree in favour of judgment-debtor, effect of—Execution of decree—Insolvent judgment-debtor—Question of title between scheduled creditors decision of—Revision—Provincial Insolvency Act (V of 1920), s. 50.

Where an objection is raised by a transferee from the judgment-debtor to attachment of the property in execution of a money-decree, and the question arises whether the transfer in favour of the objector is good or not, the question relates to the title to the property sought to be attached, and comes within the purview of O. XXI, r. 58, C. P. C, and the decision is final, subject to the result of any suit that might be instituted, and is not open to appeal. The fact that the property attached is a decree makes no difference. [p. 15, col. 1.]

There is nothing in s 50 of the Provincial Insolvency Act which says that any question of title raised between two scheduled creditors will be decided by the Insolvency Court, and a decision of such question by the Execution Court is not open to revision. [p 15, col. 2.]

Execution first appeal from a decree of the Subordinate Judge, Meerut, dated the 12th of December 1924.

Dr. *K. N. Katju*, for the Appellant.

Mr. *Shambhu Nath Seth* for Mr. *P. L. Banerji*, for the Respondent.

JUDGMENT.—This is an execution first appeal and has arisen under the following circumstances. A certain suit No. 428 of 1922 was instituted by two persons Baij Nath and Murli Dhar against one Ganeshi Lal as defendant No. 1 and the Allahabad Bank Ltd., as the defendant No. 2. The suit of Baij Nath and Murli Dhar was decreed for a sum of about Rs. 8,000 against Ganeshi Lal but it was dismissed as against the Bank. The Bank was awarded costs to the amount of Rs. 513-12. The decree was passed on the 27th of March 1923. On the 12th of May 1924 the Allahabad Bank applied for the attachment of the decree obtained by Baij Nath and Murli Dhar against Ganeshi Lal in order to realise the money due to the Bank. Previous to this application for attachment, by a sale-deed dated the 6th of February 1924 Baij Nath and Murli Dhar had sold the decree held by them against Geneshi Lal to the appellant, Pearey Lal. Ganeshi Lal was declared an insolvent. Pearey Lal as a transferee of the decree obtained by Baij Nath and Murli Dhar against Ganeshi Lal got himself entered in the schedule of creditors. The Allahabad Bank had a debt payable by Ganeshi Lal which arose out of a different transaction and in that capacity the Bank was also entered in the schedule of creditors of Ganeshi Lal.

The Allahabad Bank in their application mentioned the fact that Baij Nath and Murli Dhar had sold their decree to Pearey Lal and that Pearey Lal had obtained an entry into the schedule of creditors of Ganeshi Lal. The Bank asserted that the transfer to Pearey Lal by Baij Nath and Murli Dhar was a fictitious one and prayed that the decree might be attached and the Insolvency Court might be requested to send the money that may be due on account of the decree of Baij Nath and Murli Dhar in Court for payment to the Bank.

Pearey Lal raised two objections. First, he said the question of title as between the Bank and Pearey Lal should be settled by the Insolvency Court and secondly he said that he was a *bona fide* transferee for value and the decree was not attachable as the property of Baij Nath and Murli Dhar. The Court below has found both the points against Pearey Lal and hence the appeal.

A preliminary objection has been taken by Mr. Seth that the appeal is incompetent inasmuch as the objection of Pearey Lal was one that fell within the purview of O. XXI, r. 58 of the C. P. C. and the order

of the Court below was final subject to the result of any suit that Pearey Lal might bring to prove his title.

Dr. Katju maintained that the appeal was maintainable under s. 47 of the C. P. C. and in case the Court should hold otherwise he requested that his appeal might be treated as a petition in revision.

On the question as to whether an appeal lies or not I am clear that no appeal lies. The position is this. *A* (the Bank) has obtained a decree against *B*. (Baij Nath and Murli Dhar) for money. In execution of that decree *A* attaches a certain property (in this case a decree) belonging to *B*. Before the attachment *C* (Pearey Lal) has obtained a sale-deed in his favour in respect of the property attached The question has arisen as to whether *C's* title is good or whether the transfer in *C's* favour is fictitious. The question has been raised by a person who is not a party to the decree. The question to be litigated is as to title to the property sought to be attached. In my opinion the case comes clearly within the purview of O. XXI, r. 58 of the C. P. C., and the decision is final subject to the result of any suit that may be instituted. Dr. Katju's contention is that the property to be attached being a decree Pearey Lal, the moment he obtained an assignment of it, in his favour, became a legal representative of the judgment-debtor and that, therefore, the case fell within the purview of s. 47 of the C. P. C. He conceded that if the property attached had been anything but a decree O. LVIII, r. 21 would have applied. I do not see how the case can come within the purview of s 47 merely because the property to be attached happens to be a decree. Further, the question to be decided is not one relating to the execution, discharge or satisfaction of the decree. It is whether the sale-deed on foot of which Pearey Lal claims to be a representative is a fictitious one or not. This question has nothing to do with the execution, discharge or satisfaction of the decree which was passed in favour of the Allahabad Bank and against Baij Nath and Murli Dhar.

I hold that no appeal lies.

Considering the appeal as a petition in revision, I have to see whether the Court below had any jurisdiction or not to decide the question, that is to say, whether the Court below or the Insolvency Court should have decided the question whether Allahabad Bank was entitled to attach the decree passed in favour of Baij Nath and Murli Dhar, in spite of the supposed transfer of it by the debtors in favour of Pearey Lal. Dr. Katju has pointed out s. 50 of the Provincial Insolvency Act as authorising the Insolvency Court to dispose of the question. That section simply says that in certain cases at the instance of a receiver or a creditor the Insolvency Court may order the expungement of an alleged creditor's name from the schedule of the reduction of the amount of the debt due to him. But there is nothing in the section which says that any question of title raised between two scheduled creditors will be decided by the Insolvency Court. I hold that the Court below had the jurisdiction.

Such being my finding it is clear that I need not go into the merits of the appeal.

I have however heard Dr. Katju on the merits also and find myself in agreement with the finding of the Court below.

The Bank's case as made out in their petition of objection dated the 29th of June 1925 (page 7 of the Paper Book) was to the effect that the Bank's debtors had no means whatsoever, except the decree against Ganeshi Lal, by which to pay the debt due to the Bank, *vide* para 3. The witness that was examined on behalf of Pearey Lal stated that he had not seen Baij Nath at Meerut since the sale deed was executed in favour of Pearey Lal and he was unable to say whether Baij Nath had left Meerut for good or not. Baij Nath executed the sale-deed for himself and as an attorney for Murli Dhar. Evidently, therefore, Murli Dhar was not at Meerut. This circumstance must have weighed greatly with the Court below as it weighs with me. The debtors of the Bank have left the town having sold their valuable decree for Rs. 8,000 for the small sum of Rs. 300. Dr. Katju told me that the receiver had declared a dividend of only Rs 400 and odd in favour of Pearey Lal. His argument is that this was the only sum recoverable under the decree of Baij Nath and Murli Dhar from the Insolvency Court. But I am not aware whether there are or not other assets of Ganeshi Lal to be realised. Some explanation ought to have been offered in the Court below as to why the valuable decree for Rs. 8,000 was sold almost for a song. I agree with the Court below that the transfer in favour of Pearey Lal was a fictitious one.

The appeal fails on each and every point and it is hereby dismisssd with costs which will include Counsel's fees in this Court on the higher scale.

N. H. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 233 OF 1923.

November 13, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

DUMA TOMA RUMAV AND OTHERS—DEFENDANTS—APPELLANTS

versus

NATHU FARSHA KUREL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Specific performance—Option to obtain property on payment of certain sum within period mentioned, nature of—Consideration, absence of—Offer, whether can be accepted after death of party to whom offer is made.

Defendants' predecessor agreed with the plaintiffs' predecessors that the latter could, within a period of ten years from the date of the agreement, tender a certain sum of money and demand conveyance of certain property from the former. In a suit for specific performance of the agreement by the plaintiffs against the defendants :

Held, (1) that if the agreement was to be treated as a contract it was unenforceble as being without consideration ;

(2) that if the agreement amounted to a mere offer, not having been accepted by the persons to whom it was made in their lifetime, it could not be accepted by their successors-in-interest after their death, and was not, therefore, capable of being sued upon.

Second appeal from a decision of the Assistant Judge, Thana, in Appeal No. 205 of 1921, confirming that of a decree of the Subordinate Judge, Bassein, in Civil Suit No. 143 of 1920.

Mr. *R. W. Desai*, for the Appellants.

Mr. *G. S. Rao*, for the Respondents.

JUDGMENT.

Macleod, C. J.—In this suit the plaintiffs sued for specific performance of the contract for sale of the suit land by the 1st defendant's brother Juzia which the plaintiffs said was entered into on December 5, 1910, by Juzia Rumav on the one hand and on the other by Farsha Degu Kurel, father of plaintiffs Nos. 1 and 2, and Simav Ina, husband of plaintiff No. 3 and brother of plaintiff No. 4, both dead at the time of the suit. The terms of the document on which the plaintiffs relied are set out at page 2 of the print. The effect of that document was that Farsha and Simav could within a period of ten years from the date of the document tender Rs. 1,500 and demand a conveyance from Juzia. There are two ways in which the document can be read ; (1) as an offer by Juzia which was to remain open for ten years acceptable by Farsha and Simav at their option ; or (2) as an agreement by Juzia that he would hold the property for ten years at the disposal of Farsha and Simav and to sell to no one else. The latter would be a contract and the first would be an offer. If the document amounts to a contract then there was no consideration proceeding from Farsha and Simav for the agreement by Juzia to sell the property to no one else during the ten years. Therefore, the contract would be unenforceable as being without consideration. But if the document amounts to a mere offer to Farsha and Simav that a conveyance would be given on their tendering Rs. 1,500 within ten years, it would remain an offer and would not become a contract until the offer was accepted. Then the question would arise whether the offer made to Farsha and Simav could be accepted by their legal representatives. No authority has been shown to us for such a proposition, and it seems to me uncontestable that if *A* makes an offer to *B* and nothing further is done before *B* dies, *B*'s representatives could not claim to have a right to accept the offer made by *A* to *B*. On this ground it seems to me that the representatives of Farsha and Simav, who are the present plaintiffs, are either suing on a contract without consideration or are claiming a right to sue for a declaration that they are entitled to accept an offer made to their ancestors, which is not a right recognised in law. It seems to me, therefore, that the suit should have been dismissed and accordingly we make that order with costs throughout.

Crump, J.—I concur.

Z. K. *Suit dismissed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 305 OF 1924.

November 5, 1925.

Present:—Mr. Justice Ashworth and Mr. Justice Raza.

GAURI SHANKAR—PLAINTIFF—APPELLANT

versus

BHAIRON PERSHAD—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s 65 (e)—Mortgage—Mortgagee empowered to obtain possession of portion of mortgaged property on payment of certain amount to third person—Possession obtained on payment of larger amount—Mortgagor, whether liable for excess amount paid—Interest, covenant providing for payment of, up to certain date—Mortgagee, whether entitled to interest after date fixed.

Where a mortgage-deed empowers the mortgagee to obtain possession of a portion of the mortgaged property from a third person on payment of a certain sum of money, and the mortgagee, in order to obtain possession of the property, is compelled to pay a larger amount of money than is mentioned in the mortgage-deed, the mortgagor is bound to bear the whole of the expenses incurred by the mortgagee in obtaining possession of such property [p 18, col 1]

Where a mortgage-deed expressly provides that interest shall not be payable to the mortgagee after a certain date, the mortgagee is not entitled to interest after such date. [p 18, cols 1 & 2]

Second appeal against the judgment and decree of the Sub-Judge, Unao, dated the 12th April 1924, modifying that of the Munsif, North Unao, dated the 29th March 1923.

Mr. *Bishambhar Nath Srivastava*, for the Appellant.

Mr. *H. N. Misra* for Dr. *J. N. Misra*, and Mr. *Surrendra Nath Srivastava*, for the Respondents.

JUDGMENT.—This is the plaintiff's appeal. The plaintiff sued for redemption of a 2-annas share in the village of Jindaspur on payment of the sum of Rs. 500 principal money secured by a mortgage-deed dated the 26th of August 1862. The Court of first instance gave the plaintiff a decree for redemption but required him to pay in addition to the Rs. 500, principal sum, the sum of Rs. 419-9-0 which had been expended by the mortgagee in getting possession from a prior mortgagee. It refused to credit the mortgagee with interest after the date mentioned in the mortgage-deed as that up to which interest would be payable by the mortgagor. On appeal the Subordinate Judge upheld the first finding of the original Court but allowed interest for a period subsequent to that just mentioned. The plaintiff appeals against the decision of the lower Appellate Court on both grounds.

Four persons originally held 16-annas in village Jindaspur. On the 25th of June 1859, two of them Mohan Lal and Beni Prasad mortgaged the whole 16 annas to Raja Tej Kishen for Rs. 450. It is not disputed that they were in a position to mortgage the whole 16 annas. Now one of the four persons Mohan Lal was recorded as owner of 10-annas share out of the 16-annas share from before this mortgage. His 10 annas share was confiscated in 1860 by Government for rebellion and granted to Ram Ghulam. There is evidence on this record, namely Ex. V to show that the confiscation had the effect of Government acquiring not only the equity of redemption but absolute rights in the 10-annas share. It is a *qanungo's* report. Accordingly Ram Ghulam acquired an unincumbered share in 10 annas share. On the 26th of August 1862 another of the four persons Beni who was recorded as owner of a 2 annas share [illegible] his 2 annas share to Ram Ghulam for Rs. 500. It is this mortgage of which redemption is being asked in the present case. The mortgage-deed records that the mortgagor was leaving Rs. 56-4 with the mortgagee for redemption of the 2-annas share from Raja Tej Kishan. In pursuance of this deed Ram Ghulam attempted to redeem the property from Raja Tej Kishan's transferee by offering the Rs. 56-4 and brought a redemption suit to that effect. It was held by the Assistant Collector of Unao under a judgment dated the 16th of May 1878 that he could only redeem 2 annas share by paying up the total sum for which the whole 16-annas share had been mortgaged to Raja Tej Kishen. In that suit he had made one of the present plaintiffs, namely, Gauri Shankar, who is the son of Beni, the mortgagor, a co-plaintiff. The lower Courts held that under the mortgage-deed in suit the mortgagor in effect gave a warranty to the mortgagee that he would get possession of the 2-annas payment of Rs. 56-4 and that as the mortgagee had to pay Rs. 450 the mortgagee is entitled to get the difference between the two sums in addition to the mortgage-money. The first question that arises in this appeal is whether they were correct in so holding.

Whatever was the contention for the appellant-mortgagor in the lower Court, we

find that in the Court of first appeal his contention was that Ram Ghulam having obtained from Government 10 annas out of the 16-annas originally mortgaged was bound to contribute to that extent himself in redemption of a prior mortgage for Rs. 450. We are, however, satisfied that this objection fails for the following reason: Ram Ghulam obtained the property from Government free of incumbrance. The burden, therefore, of the whole of the mortgage was thrown on the 6-annas of which the equity of redemption remained with the mortgagors. Accordingly the contention in the lower Appellate Court failed. In this Court it has been urged that both Beni and Ram Ghulam well understood the facts of the case and that Rs. 56 4 would not suffice to redeem the original mortgage. It is said that the agreement was that Ram Ghulam should redeem the whole mortgage but only held Beni liable for two-sixteenth of it. With this argument we do not agree We construe the mortgage-deed to mean, as urged by the defendants, that the mortgagor covenanted that the mortgagee should get possession of the 2-annas on payment of Rs. 56-4. The mortgagee has failed to get possession of that owing to a decision of a Court with the correctness of which we are not concerned. The curious thing about this decision of 16th May 1878 is that the Court only decreed possession of 2 annas on payment of Rs. 450 and not possession of the 6-annas share remaining to the mortgage. This decision appears to us to be an accident which could not be foreseen by the parties to the mortgage and both on the interpretation which would give to the mortgagee and on the principle underlying s. 65 (*e*) of the Transfer of Property Act, we consider that the mortgagor is bound to bear the whole expenses incurred in obtaining the promised possession of the property.

The appellant also appeals against the lower Court's decision that he must pay interest after the date up to which the deed recites that interest shall be paid and urged that the decree of the Court of first instance on this point should be restored. The lower Court has cited certain rulings which have again been relied on by the respondents' learned Counsel in this case. The language of the mortgage deed is quite clear, namely, that interest shall be payable at a certain rate so long as possession is not obtained by the mortgagee up to 8 years and that after 8 years the only remedy of the mortgagee was to sue for foreclosure. The rulings quoted to us are all to be distinguished from the present case. They were based on deeds which had no express provision that interest should cease at a certain date but only provided that interest was payable until the date on which sale or foreclosure could be claimed. In the face of the clear language of the deed we agree with the Court of first intstance that no interest could be decreed after the 8 years.

Accordingly we allow this appeal in part and dismiss it in part and restore the decree of the Court of first instance. The parties will get their costs in this Court according to their success and failure and the defendant will get whole costs in the lower Appellate Court.

Z. K. *Appeal partly allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 849 OF 1922.

March 26, 1925.

Present:—Mr. Justice Phillips.

MUNICIPAL COUNCIL, COCHIN REPRESENTED BY THE CHAIRMAN—DEFENDANT No. 1—APPELLANT

versus

PRATATH BAVU DEVUSSI AND ANOTHER—PLAINTIFF AND DEFENDANT No. 2—RESPONDENTS.

Madras District Municipalities Act (V of 1884), s. 261—Suit against Municipal Council for declaration of title to land—Notice, whether necessary—Madras Survey and Boundaries Act (IV of 1897), s 13, applicability of—Dispute as to boundaries, absence of—Adverse possession—Sweeping land, effect of.

Defendant Municipality sent a notice to the plaintiff informing him that he had no right to a certain piece of land and that he should establish his right by suit. The plaintiff thereupon instituted a suit against the Municipality for a declaration of his title to the land:

Held, that the suit was not one on account of any act done by the Municipality within the meaning of s. 261 of the Madras District Municipalities Act and that no notice was, therefore, necessary to be served on the defendant under that section [p. 19, col 1.]

In order to apply the provisions of s. 13 of the Madras Survey and Boundaries Act, it is necessary to show that there was a dispute before the boundary was settled, or an appeal was preferred from the settlement of the boundary. The meaning of the section is that when there has been a dispute between parties as to a certain boundary line and that dispute has been settled by a competent officer, that decision is binding and can only be set aside by taking

appropriate steps for that purpose within a certain time. [p. 19, cols. 1 & 2]

The act of sweeping a piece of land occasionally does not amount to adverse possession against the true owner. [p. 19, col 2.]

Second appeal against a decree of the Court of the District Judge, South Malabar, in A. S. No. 129 of 1921, preferred against that of the Court of the Subordinate Judge, Cochin, in O. S. No. 14 of 1918.

Mr. *A. V. K. Krishna Menon*, for the Appellant.

Mr. *T. A. Ananta Iyer*, for the Respondent.

JUDGMENT.— This is an appeal against a decree declaring plaintiff's right to certain land in Cochin Municipality. The District Judge has found that the land is used as a right of way, that it belongs to the plaintiff and that recently the Municipality interfered with his possession and that consequently he is entitled to the declaration sued for.

The main objection taken is that no notice of this suit was given to the Municipality under s. 261 of the District Municipalities Act of 1884 but inasmuch as this is a suit for declaration of title to immoveable property, it is difficult to see how it can be treated as a suit "on account of any act done by the Municipal Council." No doubt in the plaint, the cause of action is stated to be the putting and beating of gravel on the plaint site but if one looks into the facts it appears that the plaint has not been accurately drafted and the real cause of action is the notice sent by the defendant informing the plaintiff that he had no right to the property and that he should establish his right by a suit. In that view I do not think this is a case which can come under s. 261 of the District Municipalities Act. In this connection I may refer to *President of the Taluk Board, Sivaganga* v. *Narayanan* (1) and also *Syeed Ameer Sahib* v. *Venkatarama* (2) and *Govinda Pillai* v. *Taluk Board, Kombakonam* (3).

The next objection is that the suit is barred by limitation by reason of the provisions of s. 13 of the Survey and Boundaries Act. In order to apply the provisions of this section, it is necessary to show that there was a dispute before the boundary was settled or an appeal preferred from the settlement of the boundary. In fact it means that when there has been a dispute between the parties as to a certain boundary line and that dispute has been settled by a competent officer, that decision is binding and can only be set aside, by taking appropriate steps within a certain time. In the present case there does not appear to have been any dispute at all. In fact the District Judge finds that notice of the settlement of the boundary is not proved to have been served upon the plaintiff. This objection must also fail.

The District Judge has found that the property belongs to the plaintiff and that the only act of adverse possession by the Municipal Council has been the act of sweeping the land occasionally and that cannot be said to be adverse possession as against the real owner. There is no other reason for not accepting his finding in accordance with which his decree is right.

The appeal is, therefore, dismissed with costs.

V. N. V.
Z. K. *Appeal dismissed.*

(1) 16 M. 317; 3 M. L. J. 12; 5 Ind. Dec. (N. S.) 928.
(2) 16 M. 293, 5 Ind. Dec. (N. S.) 913.
(3) 4 Ind. Cas. 32; 32 M. 371; 19 M. L. J. 333; 4 M. L. T. 209.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 310 OF 1924.
November 6, 1925.
Present :—Mr. Justice Raza.

DEO KALI AND ANOTHER—DEFENDANTS—APPELLANTS
versus
RANCHOOR BUX AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Reversioner, transfer by, during lifetime of widow, validity of—Reversioner accepting transfer from other reversioner—Estoppel—Evidence Act (I of 1872), s. 115.

A transfer made by a next reversioner during the lifetime of a Hindu widow who is in possession of her deceased husband's estate is inoperative under the Hindu Law, as during the widow's lifetime a reversioner has no interest in the estate capable of transfer but merely an expectancy. [p. 20, col 2]

Where, therefore, a reversioner of a deceased Hindu accepts a mortgage of certain property forming part of the estate of the deceased from some other reversioners, he is not estopped from subsequently contending that he has a share in the property which was mortgaged to him, inasmuch as the mortgage is a void transaction and no estoppel can arise out of such a transaction. [*ibid*]

Appeal against a decree of the Second Additional Subordinate Judge, Gonda, dated the 15th April 1924, upholding that of the

Munsif, Gonda, dated the 19th April 1923.

Mr. *S. M. Ahmad*, for the Appellants.

Mr. *Makund Behari Lal*, for the Respondent.

JUDGMENT.—This is a defendants' appeal arising out of a suit for possession of a certain property specified in the plaint. The parties are the descendants of one Kashi Ram. Kashi Ram had four sons, namely, Ratan Din Manodut, Siridat and Acharji. Ranchur Bakhsh plaintiff is one of the two sons of Sri Dat Deokali defendant No. 1 is the son of Mandat and Suraj Bakhsh defendant No. 2 the son of Acharji. Chhatarpal defendant No. 3 is the brother of the plaintiff. The plaintiffs' case was that Ratan Din was owner of the plots in suit, that he died childless about 30 years ago and was succeeded by his widow *Musammat* Biranji, that she also died in 1912 leaving the parties as her nearest reversioners and that the plaintiff was entitled to a one-fourth share, but was in possession of a one-sixth share only. He, therefore, claimed a one-twelfth share over and above the share already possessed by him. The suit was contested by the defendants Nos. 1 and 2 on various grounds. The claim was decreed by the first Court and the defendants' appeal was dismissed by the Court of first appeal. It was held that Ratan Din was the owner of the plots in suit but after his death *Musammat* Biranji had been in possession of the land in suit till 1912. It was pleaded by the contesting defendants in respect of two plots Nos. 22 and 622 that the plaintiff had taken a mortgage of the plots from them and was, therefore, estopped from denying their title so far as these plots were concerned. The lower Courts rejected the defence holding that there was no estoppel in the circumstances of the case. The contesting defendants have now appealed to this Court. Their learned Counsel has confined his arguments to the question of estoppel only. He contends that the plaintiff cannot question the right of the appellants in respect of plots Nos. 22 and 622 as he had taken a mortgage of those plots from the appellants. I am not prepared to accept the contention. It was a simple mortgage and was executed by Deokali appellant No. 1 on 30th May 1904. *Musammat* Biranji died in April 1912. It is clear that the mortgage was void as Deokali as the reversioner of *Musammat* Biranji had no rights to mortgage the plots in dispute in her lifetime.

As pointed out by their Lordships of the Privy Council in the case of *Harnath Kuar* v. *Indar Bahadur Singh* (1) "a transfer made by a next reversioner during the lifetime of the widow is inoperative under the Hindu Law, as at its date he has no interest capable of transfer but merely an expectancy."

It is true that as between a mortgagor and his mortgagee neither can deny the title of the other for the purposes of the mortgage but the present suit is not a suit based on or connected with the mortgage. In my opinion the plaintiff is not estopped from questioning the validity of the mortgage in the present suit. No other point was argued in this appeal.

The appeal fails and must be dismissed. I dismiss this appeal and order the contesting appellants to pay the costs of the contesting respondents.

The decree of the lower Court is confirmed in all respects.

Z. K. *Appeal dismissed.*

(1) 71 Ind. Cas. 629; 9 O L. J. 652. (1922) A I. R. (P. C.) 403; 9 O & A. L. R. 270; 44 M. L. J. 489; 37 C L. J. 346, 45 A 179; 27 C. W. N. 949, 50 I. A 69; 18 L W. 383, 26 O. C 223; 33 M. L. T. 216; 5 P. L. T 281, 2 Pat. L. R. 237 (P. C.).

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 923 OF 1923.

August 18, 1925.

Present:—Mr. Justice Jackson.

VEERASWAMI MUDALI—PLAINTIFF—PETITIONER

versus

P. R. VENKATACHALA MUDALI AND OTHERS—DEFENDANTS NOS. 1 TO 5—RESPONDENTS.

Specific Relief Act (I of 1877), s. 9—Tenant, dispossession of—Summary suit by landlord against trespasser, maintainability of—Revision—Interference by High Court—Civil Procedure Code (Act V of 1908), s. 115.

A plaintiff who seeks possession summarily under s. 9 of the Specific Relief Act must show that at the date of the suit he is entitled to such relief. A landlord, therefore, cannot bring a suit in ejectment under this section where his tenant has been dispossessed by a third party. [p. 21, col 2.]

Ramanadan Chetti v. *Pulikuti Servai*, 21 M. 288; 8 M. L. J 121; 7 Ind. Dec. (N. S.) 559, *Sita Ram* v. *Ram Lal*, 18 A. 440; A. W. N. (1896) 162; 8 Ind. Dec. (N. S.) 999 and *Davood Mohideen Rowther* v. *Jayarama Iyer*, 62 Ind. Cas. 284; 44 M. 937; 40 M. L. J 38; 13 L. W. 281; (1921) M. W. N. 43; 29 M. L. T. 78, followed.

The High Court will not ordinarily interfere by way of revision with a decree under s. 9 of the Specific Relief Act. Where, however, the remedy under the

section is clear, the parties will not necessarily be driven to another suit. [p. 21, col 1.]

Devata Sri Ramamurthi v. *Venkata Sitaramachandra Row*, 22 Ind. Cas. 279; (1914) M. W. N. 95, *Sri Krishna Doss* v. *Chandook Chand*, 4 Ind Cas. 509; 32 M. 334; 5 M. L. T. 125; 19 M. L. J. 307, relied on.

Petition, under s. 112 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise a decree of the Court of the District Munsif, Poonamalle, in O. S. No. 475 of 1922.

Mr. *K. Rajah Iyer*, for the Appellant.

Mr. *B. Somayya*, for the Respondents.

JUDGMENT.—Plaintiffs in two connected suits Nos. 475 and 476 of 1922 on the file of the Court of the District Munsif of Poonamalle brought under s. 9 of the Specific Relief Act were unsuited on the ground that on the date of the suits, the plaint lands although trespassed upon by defendants were leased to others and, therefore, only their lessees and not plaintiffs themselves were entitled to sue. This petition is brought in order to revise that decision.

Plaintiffs have their remedy by way of suit and in such circumstances this Court will not ordinarily interfere by way of revision, *Devata Sri Ramamurthi* v. *Venkata Sitaramachandra* (1). But if the remedy is clear, the parties will not necessarily be driven to another suit, [*Sri Krishna Doss* v. *Chandook Chand* (2).] Therefore, the question for determination in this case resolves itself into whether there is clear authority supporting or contravening the decision of the District Munsif.

There has been sharp divergence of judicial opinion upon the point as was clearly revealed when it came before a Full Bench of the Allahabad High Court. Blennerhassett, J., could see no reason why a landlord who has put a tenant in possession should not himself sue to eject a trespasser. Edge, C. J., affirmed as prevailing all the world over that when a man creates a tenancy under him which entitles the tenant to the exclusive use of the property the man creating the tenancy cannot have any right to actual possession so long as the tenant is entitled to possession. It was accordingly held with the concurrence of four other Judges that in these circumstances plaintiffs might be entitled to a declaratory decree that the trespasser could not interfere with his right to receive rent; and a decree to be put into possession of the rents; but so long as he did not himself possess the right to enjoy physical possession, he could not eject the trespasser [*Sita Ram* v. *Ram Lal* (3).]

Two years later the question came before a Bench of this Court, which assumed it to be an elementary rule that a plaintiff who seeks possession must show that at the date of the suit he was entitled to such relief [*Ramanadan Chetti* v. *Pulikutti Servai* (4).]

So far the law on the matter was clear and the next Madras ruling [*Jagannatha Charry* v. *Rama Rayer* (5)] hardly affected the previous decisions, for it was held that the landlord must be entitled to possession at the time of suit, and he was so entitled in that case because the lease had terminated immediately after the dispossession of the tenant by a third person and the tenant was no longer interested in the matter. But unfortunately the head-note to this ruling is drafted as if affirming that a landlord can always bring a suit for possession when his tenant has been dispossessed by a third party. For this unqualified statement there might seem at first to be better authority in *Rangaswamy Iyengar* v *Krishna Govindan* (6) when Sankaran Nair, J., sitting alone does appear to allow a landlord to sue for physical possession of property of which his tenant had been dispossessed. But though that is the effect of the judgment, the reasoning proceeds on the assumption that it is only a question of receiving rent, a matter about which as Sir John Edge showed in *Sita Ram* v. *Ram Lal* (3) there is no difficulty. An earlier Madras case is cited [*Innasi Pillai* v. *Sivagnana Desikar*(7)] which also is entirely confined to the question of rent; and before concluding Sankaran Nair, J., makes it clear that he is not differing from *Ramanadhan Chetty* v. *Pulikutti Servai* (4). It is not an easy judgment to understand, but it is no authority for holding that the landlord can sue in these cases.

In *Krishna Nambudri* v. *Secretary of*

(1) 22 Ind. Cas. 279; (1914) M. W. N. 95.

(2) 4 Ind. Cas. 509; 32 M. 334, 5 M. L. T. 125; 19 M. L. J. 307.

(3) 18 A. 440. A. W. N. (1896) 162, 8 Ind Dec. (N. S) 999.

(4) 21 M. 288; 8 M. L. J. 121, 7 Ind. Dec. (N. S) 559.

(5) 28 M. 238.

(6) 8 Ind. Cas. 844; (1910) M. W. N. 838; 9 M. L. T, 210

(7) 5 M. L. J. 95.

State (8), Wallis, J., and Abdul Rahim, J., re-affirmed [*Ramanathan Chetty* v. *Pulikutti Servai* (4)] and its statement of the elementary rule.

Thus it may be said that at this date there was no real difference of opinion and the ruling of the Allahabad High Court Full Bench prevailed.

In *Ambalavana Chetty* v. *Singaravelu Odayar* (9) a plaintiff who had long been out of possession seems to have suggested that if his tenant had been in possession (which was not the fact) there would be no bar of limitation. His plea was rejected on the facts but his hypothesis was fully discussed by Sundara Iyer, J., who has assembled the various rulings on the point.

His Lordship says that it is held that the landlord where his tenant is ousted by a trespasser may sue under s. 9 of the Specific Relief Act in *Rangaswami Iyengar* v. *Rama Rayer* (6) and *Innasi Pillai* v. *Sivagnana Desikar* (7). But as shown above none of these cases is real authority for that broad proposition. He [illegible] that *Ramanathan Chetty* v. [illegible] (4) and *Krishnan Nambudri* v. *Secretary of State* (8) are against him, but on the whole is inclined to hold that the landlord has a cause of action (page 155*). This opinion it may be noted is *obiter* and is not very strongly expressed.

In 1914 it was held in *Somai Ammal* v. *Vellayya Sethurangam* (10) that if a landlord had given a lease to a tenant the landlord might eject a trespasser in order to put his tenant into possession. The tenant in that case "had not been put in possession at all, but was anxious to obtain possession." Such a case seems to proceed on the assumption that the landlord has a right to immediate possession in order to fulfill his contract and the elementary rule in *Ramanathan Chetti* v. *Pulikutti Servai* (4) would not then be infringed. It is not as though only the tenant had the right of immediate possession.

In *Tiruvengada Konan* v. *Venkatachala Konan* (11) it was ruled that though a landlord is not entitled to immediate or *khas* possession, he may obtain a decree for the possesion of the reversion and for formal possession. This ruling practically follows *Sita Ram* v. *Ram Lal* (3). It also questions whether the *obiter dictum* in *Ambalavana Chetty* v. *Singaravelu Odayar* (9) is not too broadly stated. In 1916 the question came before Oldfield, J., and Phillips, J., *Kathiri Mutte* v. *Kutti Chekkutti Mudaliar* (12). They held that a landlord could sue to enable himself to fulfil his contract to give or restore possession to his tenant. Of course, if the ruling stopped at the words "to give" it would merely re-affirm *Somai Ammal* v. *Vellayya Sethurangam* (10) but the addition of the words "to restore" opens up the whole question and in effect this is a ruling contrary to *Ramanathan Chetty* v. *Pulikutti Servai* (4) Oldfield, J., begins by remarking that the exposition of the law in (*Ambalavana Chetty* v. *Singaravelu Udayan*) (9) is consistent with the decisions in *Narainasawmy Naidu Garu* v. *Yerramali Ramkrishnayya* (13) and *Somai Ammal* v. *Vellayya Sethurangam* (10). The former merely states what is more elaborately developed in the latter ruling that a landlord can sue in order to fulfil his contract to put his lessee in possession. Of course, the broader proposition in *Ambalavana Chetty* v. *Singaravelu Udayan* (9) that he can sue whenever his tenant is dispossessed is not inconsistent with these rulings. Then Old Field, J., finds that the rulings admit exceptions to the general rule; though it seems that they establish only one exception, if it can indeed be called an exception. This rule is that on the date of the suit the landlord must show that he has a right to be in possession. If he has never put his tenant in possession and has to get possession in order to do so, he has a right to be in possession and his suit is not in contravention of the rule. But when it is also claimed that after a landlord has put his tenant into possession and that tenant has been dispossessed, the landlord may sue to restore his possession, it is not to set up an exception to the rule, it is to negative the rule altogether. Oldfield, J., proceeds that he cannot follow *Krishna Nambiar* v. *Secretary of State* (8) in so far as it rules that a landlord cannot give or restore. *Krishna Nambiar* v. *Secretary of State* (8) is not concerned with the question whether he can give; but it certainly rules that he cannot restore and in declining to follow

(8) 4 Ind Cas. 30, 19 M L J 347; 5 M L. T. 213.
(9) 15 Ind Cas 146, (1912) M W N 669
(10) 26 Ind. Cas. 317, 29 M L J 233, (1915) M. W. N. 12, 16 M. L. T. 532; 1 L W 1047
(11) 32 Ind. Cas. 198; 39 M. 1042; 30 M. L. J 258.
(12) 39 Ind. Cas. 425; 5 L W. 330; (1917) M. W. N. 339.
(13) 5 Ind Cas. 479; 33 M. 499; (1910) M. W. N. 221 and 280

*Page of 15 Ind. Cas.—[*Ed.*]

this ruling Oldfield, J., is maintaining the opposite and overruling *Ramanathan Chetti* v. *Pulikutt Servai* (4). No doubt his Lordship seeks to distinguish this ruling by finding on the facts that the trespasser colluded with the tenant and is, therefore, (see concurring judgment of Phillips, J.,) only the licensee of the tenant against whom the landlord can have no cause of action during the continuance of the lease. But in *Ramanathan Chetty* v. *Pulikutti Servai* (4) although it was alleged in the plaint that the tenant and trespasser had colluded there is no finding to that effect or any mention of collusion in the body of judgment, when their Lordships lay down the elementary rule they are not considering collusion.

Kathiri Kutti Musalier v. *Chek Kutti Musalier* (12) must be taken as contrary to *Ramanathan Chetti* v. *Pulikutti Servai* (4) in fact Phillips, J., practically states, as much in his concluding sentence.

The whole question was then reviewed by Wallis, C. J., in *Davood Mohideen Rowther* v. *Jayarama Iyer* (14). The principle underlying the rule is fully explained and the three ruling cases *Ramanathan Chetti* v. *Pulikutti Servai* (4) *Krishnan Nambiar* v. *Secretary of State* (8) *Sita Ram* v. *Ram lal* (3) are approved. The acceptance of the *obiter dictum* in *Ambalavana Chetty* v. *Singaravelu Odayar* (9) as authority is depreciated with an expression of regret that *Sita Ram* v. *Ram Lal* (3) was not brought to the notice of the learned Judge. The learned Chief Justice even goes so far as to find that the landlord cannot sue in order to fulfil his contract, at page 940* differing from the view already expressed by Sadasiva Iyer, J, in (*Somai Ammal* v. *Vellayya Sethuranaga* (10) which view Sadasiva Iyer, J., re-affirms in a dissenting judgment in this case; [*Udoy Kumar Dass* v. *Katyani Debi* (15)] it is held that the veiw of Sundara Iyar, J, in (*Ambalavelu Chetty* v. *Singaravelu Udya* (9) cannot be justified on principle and is opposed to what [illegible] Lord Alverstone, C. J., as [illegible] doctrines [*Walter* v. *Yalden* (16).]

I think it clear from the above examination of the authorities that the view of the learned District Munsif is well-supported and there is no justification for revision. I consider that the question is concluded by *Sita Ram* v. *Ram Lal* (3) *Ramanathan Chetty* v. *Pullikutti Servai* (4) *Davood Mohideen Rowther* v. *Jayaram Iyer* (14). The petition is dismissed with costs.

V. N. V. *Petition dismissed.*

Z. K.

(14) 62 Ind. Cas. 284; 44 M. 937; 40 M L J 38, 13 L. W. 281; (1921) M. W. N. 43; 29 M L. T. 78

(15) 69 Ind. Cas 126; 49 C 948 at p. 964; 35 C. L J 292; (1922) A. I R (C) 87.

(16) (1902) 2 K. B 304; 71 L. J. K. B 693; 87 L. T. 97; 51 W. R 46; 18 T L R. 668

*Page of 44 M.—[*Ed.*]

OUDH CHIEF COURT.

FIRST EXECUTION OF DECREE APPEAL No. 74 OF 1924.

November 23, 1925.

Present:—Mr. Justice Hasan and Justice Raza.

SANT SAHAI—APPLICANT—APPELLANT

versus

CHHUTAI KURMI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 148—Limitation Act (IX of 1908), s. 6—Mortgage—Redemption suit—Decretal amount determined by Trial Court enhanced by Appellate Court—Restitution—Application by mortgagee for recovery of mesne profits, whether application for execution—Minority of applicant—Limitation, extension of

Where in pursuance of a decree for redemption passed by a Trial Court, the plaintiff pays the amount mentioned in the decree and obtains possession of the mortgaged property, but the amount payable under the decree is subsequently enhanced by the Appellate Court, an application by the mortgagee to recover mesne profits from the mortgagor by way of restitution for the period between the date on which possession of the mortgaged property was taken by the mortgagor and the date on which he paid the difference between the decretal amount payable under the decree of the Trial Court and that payable under the decree of the Appellate Court, is an application for execution within the meaning of s 6 of the Limitation Act and the mortgagee is entitled to the benefit of the provisions of that section [p 24, cols. 1 & 2]

[Case-law discussed]

Appeal against an order of the Subordinate Judge, Fyzabad, dated the 22nd September 1924.

Mr. *H. K. Ghosh*, for the Appellant.

Messrs. *H. Husain* and *Niamatullah*, for the Respondents.

JUDGMENT.—This is an appeal from the decree of the Subordinate Judge of Fyzabad, dated the 22nd September 1924. The facts are few and simple. On the 12th August 1911 the respondents brought a suit for redemption of a usufructuary mortgage dated the 22nd August 1903 against the appellant. In defence the appellant claimed money due under two deeds of further

charge also as the price of redemption. The Trial Court rejected the respondents' claim and decreed redemption on payment of Rs. 11,329-7. This amount was paid within the time fixed by the redemption decree together with a certain amount of costs and the respondents entered into the possession of the mortgaged property on the 25th August 1912. On an appeal to the late Court of the Judicial Commissioner of Oudh the decree of the Trial Court in the matter of the amount redemption money was varied in favour of the appellant and the respondents were ordered to pay the sum of Rs. 12,119-15-3 to the appellant for the purpose of redeeming the mortgaged property. On the 12th November 1913 the respondents paid the difference between the two sums of money payable under the decree of the Trial Court and the decree of the Judicial Commissioner's Court.

The application, out of which this appeal arises, was made on the 28th May 1923 by appellant for the purpose of recovering Rs. 2,665 from the respondents as mesne profits, by way of restitution, for the period between the dates of the two deposits already mentioned. The application was made under s. 44 of the C. P. C. To save limitation the appellant claimed the benefit of s. 6 of the Indian Limitation Act, 1908, for the reason that at the time from which the period of limitation was to be reckoned he was a minor. One of the pleas in defence to the appellant's claim was that the provisions of s. 6 of the Indian Limitation Act were inapplicable because the appellant's application was not "an application for execution of a decree," to which those provisions apply. The Court below has accepted this plea and dismissed the application.

We are of opinion that the appeal succeeds. We are unable to discover any reason in principle for entertaining the view that an application made for restitution under s. 144 of the C. P. C. is not an application for the execution of a decree. This is particularly true in a suit founded on a mortgage to which the provisions of O. XXXIV of the C. P. C. apply. The decree in a suit for redemption, as the present suit was, enures to the benefit of the mortgagor and the mortgagee alike. Such a decree imposes an obligation on the mortgagor in favour of the mortgagee for payment of the mortgage-money and in the event of payment the mortgagor enters into possession when the mortgage is usufructuary and in default the mortgagee is given the right to bring the property to sale in satisfaction of the mortgage-money. The final decree, therefore, which the Court of the Judicial Commissioner passed imposed the liability of payment of a further sum of money on the mortgagor before he was entitled to take possession. This obligation on the part of the mortgagor created a corresponding right in favour of the mortgagee to remain in possession until full payment as directed by the final decree was made. We, therefore, have no hesitation in holding that the present application is in substance an application made for seeking the aid of the Court in working out the final decree.

The right of restitution arises under a decree of the Court of Appeal which decree has varied or reversed the decree of the Court of first instance. Restitution is thus a benefit which would only accrue by executing the decree of the Court of Appeal. Under the old C. P. C. an application made under s. 583 of that Code was treated by their Lordships of the Privy Council as an application for execution in *Prag Narain* v. *Kamakhia Singh* (1). A Divisional Bench of the High Court at Allahabad in the case of *Jiwa Ram* v. *Nand Ram* (2) has expressed the opinion that the law as enacted in s 144 of the new Code is different from what it was in s. 583 of the old Code. With great respect we are unable to agree with that opinion. It is true that the words "execution" and "to execute" were used in s 583 of the old Code and are not used in s. 144 of the new Code, but this change, in our opinion, makes no difference in substance. Those words, it appears to us, were superfluous and the law remains the same in spite of their disappearance. As we have said before, an application for restitution is the same thing as an application for execution of a decree passed in appeal when that decree varies or reverses the decree of the Court of first instance. The view taken in the Allahabad case seems to be shared by some of the Judges of the High Court at Patna [see *Balmakunda Marwari* v. *Basanta Kumar Dassi* (3) and

(1) 3 Ind Cas 798; 31 A. 551; 10 C. L. J. 257; 11 Bom. L. R. 1200; 6 M. L. T. 303; 14 C W. N. 55; 19 M. L. J. 599; 13 O. C. 180; 36 I. A. 197 (P. C.).

(2) 66 Ind. Cas. 144, 44 A. 407; 20 A. L. J. 226; (1922) A. I. R (A) 223.

(3) 78 Ind Cas 200; 3 Pat. 371; (1924) Pat. 33, 5 P. L. T. 145; (1925) A. I. R. (Pat.) 1.

Krupasindhu Roy v. *Balbhadra Das* (4) and also by the late Chief Court of the Punjab in *Ram Singh* v. *Sham Parshad* (5). With regard to these cases we content ourselves with quoting a passage from the judgment of Macleod, C. J., in the case of *Hamidalli* v. *Ahmedalli* (6) and say respectfully that we entirely agree with the opinion expressed in that quotation, which is as follows:—"No doubt, as mentioned by Mr. Mulla in his Code of Civil Procedure, last edition, page 315, a different view has "been taken by the High Court of Patna and the Chief Court of the Punjab. With all due respect to the learned Judges of of those Courts, it appears to me that the decision I have referred to is correct, and that an application for restitution cannot be treated as anything else than an application for execution of the decree of the Appellate Court. It is the decree of the Appellate Court which entitles the sucessful appellant to get back something which he had been deprived of by the decree of the lower Court, under which the then successful party had actually received possession. In order, therefore, to get back what he has lost, the successful appellant must apply for execution of the order which entitles him to get back that possession." In *Kurgondiganda* v. *Ninganganda* (7) it was held that the provisions of s. 6 of the Indian Limitation Act applied to an application made under s. 144 of the C. P. C., inasmuch as that was an application for execution of a decree. Another case decided by the Bombay High Court on the same lines is *Shivbai* v. *Yesu* (8). We wish to emphasize that the view which we are taking is supported by the authority of the opinion of Sir Dawson, Miller, C. J., of the Patna High Court in the case of *Basanta Kumari Dassi* v. *Balmakund Marwari* (9). Our opinion is further fortified by the decision of a Bench of the Madras High Court in the case of *Sumasundaram Pillai* v. *Chokkalingam Pillai* (10). The same view seems to have been taken by the Calcutta High Court in *Madan Mohan Dev* v. *Nogendra Nath Dey* (11) and *Gangadhar Marwari* v. *Lachman Singh* (12).

On the gounds stated above, we allow this appeal, set aside the decree of the lower Court and, as the decision of that Court had proceeded on a preliminary point we remand the case under O. XLI, r. 23, of the C. P. C., with directions that the case be re-entered in the proper register to its original number and disposed of according to law. The appellant will be entitled to his costs in this Court in all events. The costs in the lower Court will abide the result.

Z. K. *Appeal allowed.*

(4) 47 Ind Cas. 47; 3 P L J 367
(5) 44 Ind Cas. 301; 67 P. R. 1918; 36 P. W R. 1918; 15 P. L. R. 1918.
(6) 62 Ind. Cas. 233; 45 B. 1137; 23 Bom. L. R. 480.
(7) 41 Ind. Cas. 238; 41 B. 625, 19 Bom. L. R 638.
(8) 48 Ind. Cas. 130; 43 B. 235; 20 Bom. L. R. 925.
(9) 72 Ind Cas. 912; 2 Pat. 277; (1923) Pat. 1; (1923) A. I. R. (Pat.) 371; 1 Pat. L. R. 338.
(10) 38 Ind. Cas. 806, 40 M. 780; 5 L. W. 267.
(11) 39 Ind. Cas. 640; 21 C. W. N. 541.
(12) 6 Ind Cas. 125; 11 C. L J. 541.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 14 OF 1925.
June 30, 1925.
Present:—Mr. Findlay, Officiating J. C.
Mirza AHMAD BAIG AND OTHERS—DEFENDANTS—APPELLANTS
versus
MODEL MILL NAGPUR, LTD.—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 100—Charge, oral, legality of—Bona fide *purchaser for value, whether affected*—Benami *transaction—Proof, nature of*

A charge may be created orally in India. If it is in writing the document creating it must be registered. [p 27, col 1.]

A charge cannot be enforced against a *bona fide* purchaser for value and the absence of the publicity which is secured by registration cannot in the case of an oral charge prejudice the right of third parties dealing with the property for value in good faith. [*ibid.*]

In view of the extraordinary prevalence of *benami* transactions in India, even a slight quantity of evidence may suffice to prove it. [p 27, col 2]

Appeal against a decree of the Sub-Judge, First Class, Nagpur, dated the 31st October 1924, in Civil Suit No. 192 of 1923.

Mr. *V. N. Herlekar*, for the Appellants.

Mr. *M. B. Kinkhede*, R. B, for the Respondent.

JUDGMENT.—The plaintiff-respondent, the Model Mills Nagpur, Limited, sued the defendant appellants in the Court of the Subordinate Judge, First Class, Nagpur, for possession of a house situated on the outskirts of Nagpur and for damages thereanent.

The first three defendants are real brothers; the defendants Nos. 4 and 5 are

the minor sons, and defendant No. 6 the minor daughter of defendant No. 1; defendant No. 7 is the minor daughter of defendant No. 2; and defendant No. 8 is the mother-in-law of defendant No. 2.

By a registered sale-deed, dated the 27th of January 1923 (Ex. P-2), the first seven defendants sold the house in suit to the plaintiff Company. The plaintiff's case, further, was that after the execution of the sale-deed the first seven defendants being the vendors, requested the Managing Director of the Model Mills, Sir M. B. Dadabhoy to allow them to occupy the premises on sufference for a period of two months only, which was to expire on the 31st of March 1923. This was permitted. On 10th March 1923 registered notices were sent to the first three defendants requiring them to vacate the premises by the date in question, and holding them liable for damages if they failed to do so. Defendants Nos. 1 and 2 wrote in reply to say that they had already surrendered the house, while defendant No. 3's notice came back endorsed as refused. The plaintiff's case further was that the first three defendants and defendant No. 8 had colluded and that the latter defendant had been dishonestly set up to obstruct the plaintiff from getting possession, the object being to obtain further money in respect of the sale transaction out of the Company. Possession of the house was accordingly claimed, as well as damages for seven months from the 1st of April to the 31st of October 1923.

Defendants Nos. 1, 2, 4, 5 and 6 admitted the execution of the sale-deed and stated that they have no interest therein. The case proceeded *ex parte* against defendant No. 3, while as regards the minor defendant No. 7 her father defendant No.2 refused to act as guardian *ad litem* and accordingly defendant No. 8 was so appointed. The real contesting defendants, *i. e.*, defendants Nos. 7 and 8, took up the following position.

Their defence was that defendants Nos. 1, 2 and 3 had no right to sell the property in suit, that the defendants Nos. 7 and 8 each had interest in it, that the house site was bought by defendant No. 3 and the late Hamidabibi, wife of defendant No. 2, by a sale-deed dated the 27th of October 1919, and that they had built the house thereon. Further, it was alleged that for the construction of the house the defendant No. 8 and *Musammat* Rahanibibi, the mother of the first three defendants had each advanced Rs. 6,000 on the understanding that the entire premises should remain in their possession as a sort of a possessory mortgage till the re-payment of the whole amount. Further pleas as regards the shares of the various defendants in the property were offered, which it is unnecessary to consider at present.

In the first Court the original Judge who dealt with the case, gave a finding as regards the alleged advance of Rs.12,000 by the defendant No. 8 and Rahanibibi. This finding was that the alleged contract of possessory mortgage, not being in writing and registered, could not be proved by oral evidence. The Subordinate Judge who finally dealt with the case found that the sale in favour of the plaintiff had been duly proved and that consideration had passed. He also held that Hamidabibi had been a mere *benami* purchaser of the site and had no real interest therein or in the house in suit. As regards defendant No. 8, she was also held to have no interest in the house in suit. It was further held that the plaintiff Company had no knowledge whatever of defendant No. 8 having any right or interest in the property when the sale-deed in its favour was executed. Again, it was held that defendants Nos. 1, 2 and 3 were the sole owners of the house and that the names of the minor defendants were only included in the sale-deed in order to avoid future trouble. Other incidental findings were given which need not be repeated here.

On appeal the first position taken up was that the lower Court was wrong in excluding the evidence as to the alleged advance of Rs. 12,000 by defendant No. 8 and Rahanibibi. It is now urged that defendant No. 8 had never claimed mortgage interest in the house. It is not easy to see how this position can now be consistently taken up, in view of the latter portion of para. 2 of these defendants' written statement on the record. The language used in this written statement was inartistic from the legal point of view ; but if it can fairly be construed at all, it certainly implies that a mortgage like lien existed on the property. It is urged that the right the defendant No. 8 claimed to have over the property might be described as a charge, and I have been referred to the fact that under the Transfer of Property Act there is no pro-

vision prescribing a definite mode in which a charge should be created; but it seems to me perfectly immaterial, however, for the purposes of the present case to go into this question, for the simple reason, that a charge cannot be enforced against a *bona fide* purchaser for value. That is indeed the reason why in law in this country a charge may be created orally, although, if it is in writing, the document in question must be registered. Thus, the absence of the publicity which is secured by registration cannot in the case of an oral charge prejudice the right of third parties dealing with the property for value in good faith. On this part of the appeal, therefore, my finding is that on the pleadings made by the defendants in the lower Court, that Court was correct in its excluding the oral evidence as to the alleged agreement with reference to defendants No. 8 remaining in possession of the house until the money alleged to have been advanced by her for the purchase was refunded. If, on the other hand, it had been permissible to regard this alleged agreement as constituting a charge, the appellants would be no further than before, so long as the lower Court's finding that the Model Mills Company had no notice of defendant No. 8's claim to the house stands good. No document is in existence in imposing any species of lien or charge on the estate, and clearly, therefore, from this point of view defendant's only remedy in this connection is against her alleged debtors, to whom she had advanced the money in question.

I next pass to the second ground of appeal, which is to the effect that the lower Court was wrong in holding that Hamidabibi was a mere *benami* purchaser of the site of the house in question and that she had no interest therein. In para. 2 of the plaintiff's written statement, dated the 7th of March 1924, it was admitted that the sale-deed of 27th January 1923 contained the name of Hamidabibi, wife of Hafizulla Baig. It is unfortunate that this sale-deed has not been available in the case, but the plaintiff's sale-deed (Ex. P. 2) recites the fact that the purchase was made in the joint names of defendant No. 3 and of defendant No. 2's wife Hamidabibi.

Incidentally, I may observe here that much has been made by Counsel for the appellants of the fact that one of the most important witnesses in this case is Sir M. B. Dadabhoy, a gentleman occupying a high position in Indian society, and it has been suggested that his evidence requires careful scrutiny. I fully concur that this gentleman's evidence must receive the same scrutiny as that of any other witness. But even so, I cannot see the slightest reason for supposing, as has been suggested by the appellants, that he has been influenced in his attitude as a witness by the idea, he is said to have entertained, that the present suit was nothing more or less than an attempt at blackmail or, as I have preferred to say, an attempt by private individuals to obtain more money in respect of the sale transaction out of a wealthy Company. For my own part, I do not see a shadow of ground for suspecting, in the least, the *bona fides* of any part of the evidence of this witness. He states that on making enquiry with reference to the defendant's title, defendant No. 2 informed him that his wife's name had been recorded for the simple reason that he himself was then in Government service and as such was prohibited by rules applicable to him from ordinarily acquiring immoveable property. When to this all important admission by the defendant No 2 is added the fact that none of the first three defendants entered the witness-box, there is not, in my opinion, the slightest reason for doubting the correctness of the lower Court's finding on issue No 2 (*a*) and (*b*) to the effect that the site of the house was purchased, in reality, by the three brothers, defendants Nos. 1, 2 and 3 and that Hamidabibi was a mere *benami* purchaser.

The principles enunciated by their Lordships of the Privy Council in *Mohammed Mahbub Ali Khan* v. *Bharat Indu* (1) are fully applicable to a case like the present. In view of the extraordinary prevalence of *benami* transactions in India, even a slight quantity of evidence may suffice to prove it. In this case we have the all important admission of defendant No. 2 himself made to Sir M. B. Dadabhoy to the effect stated above. In this connection I think this statement combined with the fact that defendant No. 2 was a Government servant sufficiently establishes the point, especially as the defendant has not gone into the witness-box on the other side. I may add on this question, *viz*, with reference to the money required for the purchase of the site that in the defendants' lengthy written statement

(1) 53 Ind. Cas. 54; 23 C. W. N. 321; (1919) M. W. N. 507 (P. C.).

no mention was made of the fact that Hamidabibi had advanced the money for the site. This story seems to have been developed for the first time by defendant No. 8 when examined as D. W. No. 1. Her story then was that she advanced Rs. 300 and Azizualla advanced the other Rs. 300. The very flimsy evidence of this witness and of Wazirkhan (D. W. No. 3) is, in my opinion, wholly insufficient to establish this story of how the consideration for the purchase of the house site was obtained, and I do not think that it could, with any safety, be accepted.

The third ground of appeal is to the effect that the lower Court should have held that the plaintiff Company purchased the house with full knowledge of defendants Nos. 7 and 8's rights. For my own part, I find it impossible on the evidence on record to admit that this supposition is even a reasonable one *a priori*, much less that it has been established by the evidence on record. It is perfectly clear that Sir M. B. Dadabhoy, a lawyer himself, made every possible enquiry before launching into the purchase. In this conection the evidence of the prior mortgagee Narayan is highly important. His enquiries, before he had advanced money on the property, had also led him to the same conclusion, *i.e* ,that the defendants Nos. 1 to 3 were the owners of the property. It would be the last thing in the world which a business Company like the plaintiff one would do to embark on a purchase of this sort without making adequate enquiry, and I cannot find any reason whatever for holding that the plaintiff Company had any notice whatever of defendant No. 8 having any interest in the house.

The 4th ground of appeal is to the effect that the lower Court ought to have held that defendant No. 2 was not the guardian of defendant No. 7 and that the alleged sale in favour of the plaintiff was not for the benefit of the minor and was not binding on her. On this point I have little or nothing to say. I fully concur with the finding of the lower Court on issues Nos. 5 and 6 which relate to this ground of appeal. It is indeed suggestive of the fact that there is collusion between all the defendants that the second defendant should in the present suit have refused to act as a guardian for his own daughter. This step has presumably been taken with the object of supporting the plea that defendant No. 7's interest was adverse to that of defendant No. 2. But the position is absurd on the face of it and requires no elaboration. The property in question clearly belonged to the first three defendants and it is, moreover, in evidence that the heavy prior mortgage in favour of P. W. No. 8 and another has been cleared off as a result of the present sale.

The 5th ground of appeal was not argued in detail. So far as the finding on issue No. 8 is concerned, no discussion is required. As regards the applicability of s. 41 of the Transfer of Property Act to the case I concur with the lower Court's finding. This matter is, in reality, linked with the question of whether there has been a collusion between defendant No. 8 and the defendants Nos. 1 to 3. In a matter of this sort collusion cannot, as a rule, be proved by specific and direct evidence but can only be inferred from the general circumstances of the case. For my own part, I think all the circumstances are redolent of suspicion of collusion and fully warrant the presumption that there has been such collusion. Sir M. B. Dadabhoy's evidence is of value in this connection. It is apparent that in a fruitless attempt he made to get the defendants to vacate the house, Sir M. B. Dadabhoy had spoken with defendant No. 8 through a window and it is significant that defendant No. 8 as D W. No 1, in cross-examination, practically admitted the fact This same defendant (No. 8) had on this occasion informed Sir M. B. Dadabhoy that they would vacate the house when defendant No. 2, who was presumably away on tour, had returned. I utterly disbelieve the evidence of *Musammat* Najmunnisa Indeed, her evidence, read in itself, is to be disbelieved on the face of it. Her cock and bull story that she had been on bad terms with the first three defendants for a year and a half and that they had vacated the premises, is directly contradicted by Sir M B. Dadabhoy's evidence, who saw defendant No 3 there during the time in question. In this connection the intrinsic improbability of defendant No. 8's story is apparent on the face of it. Her husband, and Excise Inspector, who drew Rs. 150 a month, died 20 years ago, and she alleges that he left Rs. 15,000 to Rs. 20,000 in cash and ornaments behind him. She cannot even tell the name of the Bank in which some of this money is said to be deposited The evidence, in short, proves that this woman has been living with the other defendants for many years past and

has been in constant and close touch with them. It is impossible to suppose that she was not fully aware of the sale transaction from the very first and it is clearly impossible to suppose that there has not been direct and deliberate collusion between the first three defendants and herself. If the evidence of Ramchandra (P. W. No. 3), Sir M. B. Dadabhoy (P. W. No. 7) and Narayan (P. W. No. 8) be read together, the statements of these witnesses seem to me to fully warrant the presumption of collusion. From defendant No. 8's talk with Sir M. B. Dadabhoy at the house it is noticeable that she did not even then lay any claim to the house in suit and only gave an evasive reply that possession would be given when defendant No. 2 returned. Defendant No. 8 indeed alleges that on this occasion she told the Model Mills people, who had come to take possession, that she would not vacate the house because she and defendant No. 7 were interested therein, but I find it impossible, for one moment, to accept this story.

Holding, as I do, like the lower Court, that all these defendants have been colluding together, the first three defendants are also liable on account of mesne profits as claimed. I can, in short, see no reason for differing from the findings of fact arrived at by the lower Court. The case seems to me a very clear one, in which defendants Nos. 1 to 3 and defendant No. 8 have at the last moment elaborated between them a conspiracy with the object of defeating the plaintiff's claim, or at least of inducing the plaintiff to make a further payment so as to obtain the acquiescence of defendant No. 8 to the Company's entry into the house. As already shown, the theory of mortgage or of charge is in any event utterly unavailable to defendant No. 8 in the present case as an answer to the plaintiff's claim to enter as a purchaser for value. Similarly, in view of the finding as regards collusion, the defendants Nos. 1 to 3 as well as defendant No. 8 are clearly liable for mesne profits to the plaintiff.

The result is that the appeal is dismissed. The appellants must bear the respondent's costs. Costs in the lower Court as already ordered.

An application has also been filed by the plaintiff under s. 152 of the C. P. C. to the effect that there has been an arithmetical or clerical mistake in the decree of the lower Court, which shows the fee as Rs. 304, whereas it ought to be Rs. 344. This is clearly so and the corresponding correction will be made in the decree.

G. R. D. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST EXECUTION OF DECREE APPEAL No. 56 OF 1925.

October 26, 1925.

Present:—Mr. Ashworth, A. J. C., and Mr. Neave, A. J. C.

Babu SITAPAT RAM—JUDGMENT-DEBTOR—APPELLANT

versus

Mirza MOHAMMAD ASGHAR AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Execution of decree—Proclamation of sale—Application of decree-holder relating to property to be proclaimed for sale, decision of—Appeal, absence of—Judgment-debtor, whether bound.

An application by a decree-holder in respect of the property which should be proclaimed for sale in execution of the decree must be decided by the Execution Court, and the order of the Execution Court deciding such an application, if not objected to by way of appeal, must be held to be binding on the judgment-debtor during the subsequent stages of the execution proceeding. [p. 30, col. 1.]

Appeal against an order of the Subordinate Judge, Fyzabad, dated the 25th May 1925.

Messrs. *Wasi Hasan* and *J. Jackson*, for the Appellant.

Mr. *H. K. Dhaon* and *Niamatullah*, for the Respondents.

JUDGMENT.—This appeal arises out of an application made by the appellant to the Subordinate Judge of Fyzabad in the course of execution proceedings. The appellant executed a mortgage of certain property and in the mortgage it was mentioned that he had acquired the property under a certain Will. The mortgagee obtained a decree for sale of the property mortgaged and applied in execution for sale. The execution of the decree was transferred from the Court where the decree was obtained to another Court. Before the sale proclamation was issued the decree-holder applied that he had come to the conclusion that the Will only gave the mortgagee a life-interest. Accordingly he asked that a life-interest and not an absolute title to the property should be put up for sale. This application was granted after notice had been given to the judgment-debtor and he

had failed to appear. This was on the 14th February 1923. The sale was postponed for various reasons and ultimately the 20th April 1925 was fixed. On the 18th April the present appellant filed objections to the sale taking place. Amongst other was the objection that the order of the Court allowing a life-interest only to be sold was *ultra vires*. The lower Court decided that it was not competent to go into the question of the validity of the order which was by a predecessor-in-office, hence this appeal.

We are of the opinion that the decision of the lower Court is correct. It is not necessary for us to decide whether the Court was originally correct in allowing the application of the decree-holder for sale of the life-interest only. The matter was settled by an order of the Court having jurisdiction. Any application by a decree-holder in respect of the property which shall be proclaimed for sale is rightly one to be decided by the Execution Court. That Execution Court may decide it rightly or wrongly. It may even decide that it has jurisdiction, where, on a proper view of the law, it might be held that it had no such jurisdiction. The time for appealing against the decision has gone by and it must stand as a final decision. Accordingly we see no reason to interfere with the decision of the lower Court and this appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 480 OF 1922.

October 29, 1924.

Present:—Mr. Justice Devadoss.

APPAJEE PILLAI—PLAINTIFF—APPELLANT

versus

MANIKA MUDALI—DEFENDANT—RESPONDENT.

Promissory note, suit on—Consideration alleged by plaintiff, disproof of, effect of—Procedure.

In a suit on a promissory-note plaintiff stated that cash consideration had passed at the time of the execution of the promissory-note. The defendant's plea was that the pro-note was executed as a sort of security for his good conduct in connection with a partnership which was being carried on between him and the plaintiff's brother. The Trial Court found that no cash consideration had passed and that the story of the defendant was true, the pro-note having been executed as security for accounting for sums drawn by the defendant as a partner.

Held, that on the finding of the Trial Court the suit was bound to be dismissed and that that finding could not be construed as declaring the contingent liability of the defendant at the time of the settlement of accounts.

Second appeal against a decree of the Court of the Subordinate Judge, Vellore, in A. S. No. 136 of 1921, preferred against a decree of the Court of the District Munsif, Tirupathur, in O. S. No. 361 of 1919.

Mr. *K. V. Sesha Iyengar* for Mr. *V. C. Seshachariar*, for the Appellant.

Mr. *A. Suryanarayana*, for the Respondent.

JUDGMENT.—The only point urged in this second appeal is that the Subordinate Judge's finding is not a legal finding. The suit is on a promissory-note. The plaintiff stated that cash consideration passed, at the time of the execution of the promissory-note. The defendant's plea was that no cash consideration passed at the time, but it was executed, as a sort of security, for his good conduct, in connection with the partnership which was being carried on between him and the brother of the promisee of the promissory-note. The Subordinate Judge found that no cash consideration passed and the story of the defendant is true. Mr. Sesha Iyengar wants to build an argument upon the last but one sentence of his judgment.

"The result is inevitable that the promissory-note Ex. A, renewing Ex. B is also a security merely for accounting for sums drawn by defendant as a partner."

From this, he wants to argue that the Subordinate Judge found that there was a contingent liability, arising at the time of the settlement of accounts. I am not prepared to agree with him. All that the Subordinate Judge was required to find was whether the story of the plaintiff was true or false and he distinctly held that the case of the plaintiff was not true and the case of the defendant was substantially true. That being so, it is unnecessary to consider the decisions in *Sri Ram* v. *Sobha Ram-Gopalrai* (1) and *Vishnu Ramchandra Joshi* v. *Ganesh Krishna Sathe* (2), relied upon by Mr. Sesha Iyengar.

The second appeal fails and is dismissed with costs.

V. N. V.

Z. K. *Appeal dismissed.*

(1) 67 Ind. Cas 513, 44 A. 521; 20 A. L. J. 315; 4 U. P. L. R. (A.) 153, (1922) A. I. R. (A.) 21?

(2) 63 Ind. Cas. 673, 45 B. 1155; 23 Bom. L. R. 488.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

July 21, 1925.

Present:—Lord Shaw, Lord Carson, Sir John Edge and Mr. Ameer Ali.

MAHABIR PRASAD TEWARI—APPELLANT

versus

JAMUNA SINGH AND ANOTHER—RESPONDENTS.

Ejectment—Jus tertii, *plea of, whether can be taken.*

In an action of ejectment the defendant is entitled to plead in defence the right of some one having a superior or equal title with the plaintiff to the property in dispute, but if he fails to prove satisfactorily that the parties whom he has put forward are entitled to the property in preference to the plaintiff the plaintiff would be entitled to a decree. [p. 33, col. 2]

Appeal from the Patna High Court (Sir Dawson Miller, C. J. and Mr. Justice Ross) in Appeal No. 54 of 1921, dated 16th March 1922 and printed as 66 Ind. Cas. 88.

Mr. *E. B. Raikes*, for the Appellant.

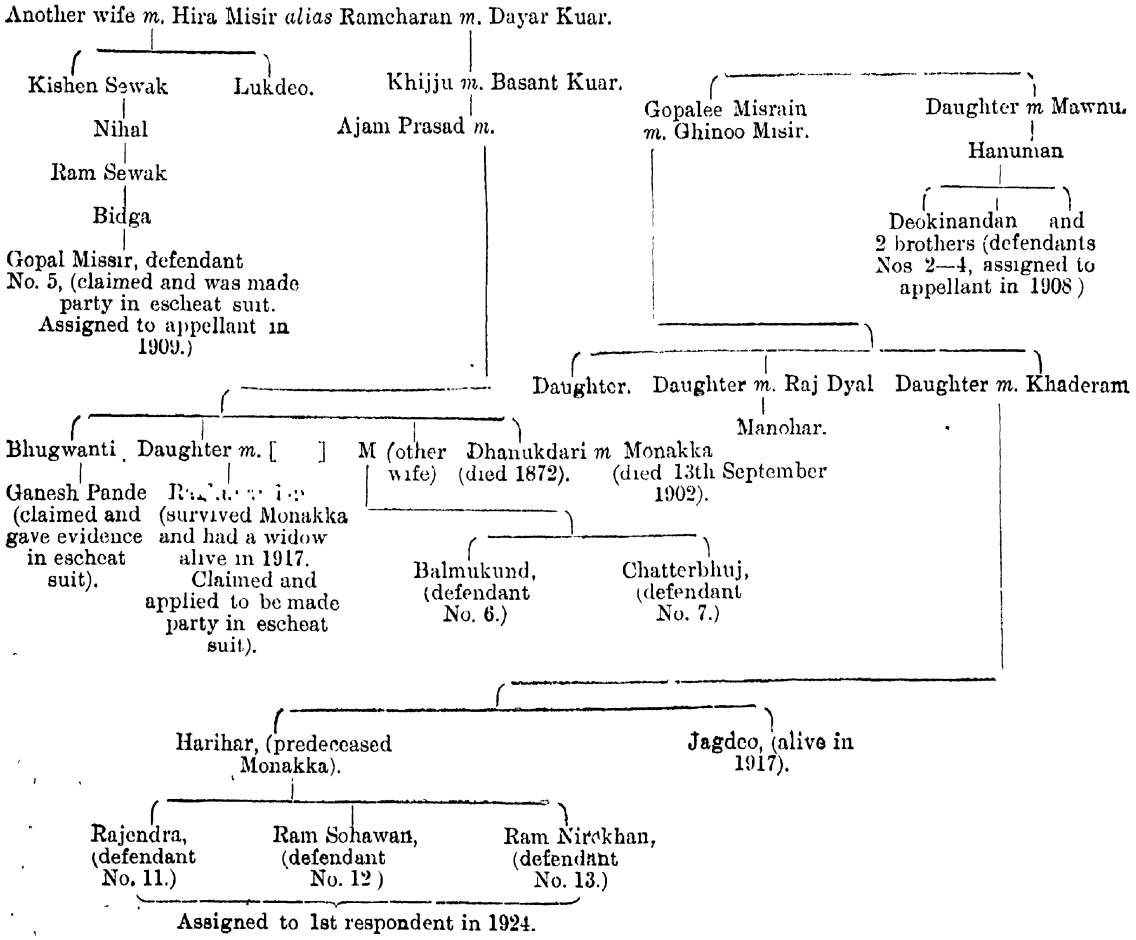
Mr. *B. Dube*, for the Respondents.

JUDGMENT.

Ameer Ali.—This appeal arises out of a suit brought by the plaintiff Jamuna Singh in the Court of one of the Subordinate Judges at Patna for possession of a property called *Mouza* Bariarpur in that District. He claims to have acquired his title by purchase from his assignors, defendants Nos. 11, 12 and 13.

The property in dispute, though of comparatively small value has already been the subject of a series of litigations.

The following pedigree will give a general idea of the various parties whom the plaintiff has impleaded in the case:—



N. B.—The name of Raghunandan's father does not appear in the Record He had two wives, one of whom was the sister of Dhanukdari and mother of Raghunandan, the other wife being the mother of Balmukund and Chatterbhuj (defendants Nos. 6 and 7).

The *Mouza* Bariarpur belonged originally to one Dhanukdhari Missir, who died, it is alleged, some 50 years ago, leaving him surviving a widow named Monakka Kaur. As Dhanukdhari left no issue, his widow succeeded to the estate and held possession until her death in 1902. She appears to have created in her lifetime a *zur-i-peshgee* lease in respect of part of the property in favour of the 9th defendant.

The plaintiff alleges that on Monakka's death there were no agnatic relations of Dhanukdhari. He has, however, as he says, made all persons claiming reversionary rights through females parties to the suit. His case is that among them his vendors, namely, Rajendra, Ram Sohawan and Ram Nirekhan, who have assigned to him their rights in the property in question, are preferentially entitled to the succession of Dhanukdhari.

The 1st defendant, Mahabir Prasad Tewari, the present appellant before the Board, on the other hand, alleges that Monakka before her death made a Will in his favour and devised to him the property in suit, and that he obtained possession of the same, which he has retained until now. It appears that he obtained on the 16th April, 1903, Probate of the Will shortly after the death of Monakka from the Court of the District Judge of Patna. It is not disputed, however, that the devise by Monakka was invalid.

The first defendant's real case is that at the time inheritance to Dhanukdhari's estate opened, on the death of Monakka, the preferential heir to his succession was his agnatic relation Gopal Misser. His place is shown in the pedigree. Gopal Misser is still alive, and the appellant has obtained from him an assignment of his rights and interests. The appellant has also purchased, it appears, the right and interests, if any, of several of the other defendants.

In 1903 a suit was brought by the Secretary of State for the possession of *Mouza* Bariarpur on the allegation that Dhanukdhari had died without leaving any heir, that Mahabir, the appellant, had no title to the property and that it had accordingly escheated to the Crown. It is alleged by the appellant that this suit was really prompted by defendant No. 9.

A number of person, almost all of whom have been made defendants in this action, came forward as claimants in the suit of the Secretary of State. The suit was finally dismissed by the High Court of Calcutta on the 14th May, 1908.

Soon after its dismissal the appellant brought a suit against Adit, the 9th defendant, for redemption of the usufructuary mortgage created by Monakka. The appellant based his right to redeem on the assignment to him by Hanuman (whose name will be found in the pedigree) of his rights and interests in the property, and the first Court made a decree in his favour in these terms:—

"In accordance with my decision of the other issues I hold that the plaintiff will get a declaration that he is the proprietor of the disputed *Mouza* Bariarpur as mentioned in the plaint and that the defendant No. 1 will be declared to be *zarpeshgidar* of the *mouza*, and it will also be declared that the plaintiff will get *khas* possessson of the disputed *mouza* on payment of Rs. 200, as stipulated in the 2nd *ticca patta* (dated 1st September 1902)."

The Subordinate Judge held in effect that the assignment by Hanuman, whom he considered to have a preferential reversionary right, entitled the defendant to redeem the property from Adit. This view appears to have been accepted by the High Court, and the decree of the first Court was affirmed. On an appeal to this Board it was declared that Rajendra and his two brothers were preferentially entitled. The decrees of the Courts in India were reversed and the appellant's suit for redemption was dismissed [*Adit Narayan Singh* v. *Mahabir Prasad Tiwari* (1)]

The present suit by the plaintiff was brought on the 8th September 1914. It was dismissed by the Subordinate Judge on the 31st October 1917, on the ground that he (the plaintiff) had failed to prove that his vendors were preferential reversioners. In the meantime, as already stated, it had been declared by the Board on the 18th January 1921, that the plaintiff's vendors had the preferential right, and the High Court has accordingly upheld the claim, and made a decree in favour of the plaintiff.

Counsel for the appellant admits that in face of the ruling by the Board he could

(1) 60 Ind. Cas. 251; 48 I. A. 86; 40 M. L. J. 270; (1921) M. W. N. 153; 19 A. L. J. 208; 2 P. L. T. 97; 33 C. L. J. 263; 29 M. L. T. 240; 6 P. L. J. 140; 23 Bom. L. R. 692; 25 C. W. N. 842; 14 L. W. 20 (P. C.).

not impugn the reversionary right of the plaintiff's vendors, but he contends that the defendant is in posseseion and in order to eject him the plaintiff must show that there is no other reversionary heir in the same degree or nearer than his assignors whose title he (the defendant) can urge against the plaintiff's claim for ejectment. In other words, the action being one of ejectment the defendant is entitled to plead in defence the right of some one else equally entitled with the plaintiff's vendors. Mr. Justice Bucknill of the High Court of Patna in his careful judgment has shown that the defendant had failed to prove satisfactorily that the parties whom he had put forward were entitled to the property in preference to the plaintiff's vendors.

The evidence on which the appellant relied has been read to their Lordships, and Mr. Raikes has put before the Board every point in support of his case. Their Lordships, however, see no reason to differ from the High Court. They will humbly advise His Majesty that the appeal should be dismissed with costs.

Z. K. *Appeal dismissed.*

Solicitors for the Appellants:—Messrs. *Watkins* and *Hunter.*

Solicitor for the Respondents:—Mr. *W. How Daney.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS JUDICIAL CASE No. 46 OF 1925.

October 10, 1925.

Present:—Mr. Findlay, Officiating J. C.

SADASHEO—APPELLANT

versus

BAPU—RESPONDENT.

Limitation Act (IX of 1908), s 5, scope of—Extension of time for appeal—Counsel's wrong advice, effect of.

A party in whose favour a decree or order is passed should not be deprived of the advantage of his vested right in the same unless there has been on his part some conduct raising an equity against him or there has been some inevitable accident. [p 34, cols 1 & 2]

Dattatraya Sitaram v. *Secretary of State for India*, 60 Ind Cas. 714; 45 B 607; 23 Bom. L R. 89, *Shib Dayal* v. [illegible] *Prasad*, 63 Ind. Cas. 812; 44 A. 636; 20 A. L. J. 674; (1922) A I R (A) 490 and *Vaithyanatha Aiyar* v. *Govindaswamy Odayar*, 62 Ind. Cas. 795; 41 M L. J. 65; 13 L. W. 522; (1921) M. W. N. 338, referred to.

It is not each and every mistake of a Counsel which *per se* is to be considered a sufficient ground for giving his client the benefit of s 5 of the Limitation Act [p. 34, col. 2.]

A mistaken advice of a Counsel that an appeal lay from an order dismissing an application for the amendment of a decree, causing a *bona fide* wrong impression on the client and a delay in the filing of an appeal from another appealable order in execution proceeding, cannot furnish a sufficient ground for condoning the delay under s. 5 of the Limitation Act. [p. 33, col. 2, p 34, col. 2.]

Appeal against the orders of the Court of the Additional District Judge, Nagpur, dated the 6th November 1924, and 18th December 1924, in Execution Case No. 7 of 1924.

Mr. *M. B. Kinkhede*, R. B., for the Appellant.

Mr. *R. N. Padhe*, for the Respondent.

ORDER.—The only question with which I am at present concerned is whether the present appeal which purports to be one against orders in Execution Case No. 7 of 1924 in the Court of the Additional District Judge, Nagpur, is barred by limitation or not. Admittedly, on the face of things, the present appeal is barred by some 147 days but the appellant's case is that he should be given the benefit with reference to s. 5 of the Limitation Act of the period from 6th January 1925 to 15th August 1925 during which he was *bona fide* pursuing a wrong remedy in First Appeal No. 3 of 1925.

The facts of the case are sufficiently clear from my judgment in the latter appeal and need not be repeated here. Reliance on behalf of the appellant has been placed on the following decisions:—

Shib Dayal v. *Jagannath Prasad* (1), *Vaithyanatha Aiyar* v. *Govindaswami Odayar* (2) and *Nagindas Motilal* v. *Nilaji Moraba Naik* (3).

In the first quoted of these cases the learned Justices held that an honest mistake on the part of a litigant caused by erroneous advice given to him by his Vakil in the district, by reason of which an appeal was not filed until it was barred by limitation, was a good ground for the application of s. 5 of the Indian Limitation Act. In that case it was laid down that, although the primary principle in dealing with this matter must be that the proposed respondent to an appeal has a right to hold his

(1) 63 Ind Cas 812; 44 A. 636; 20 A. L. J. 674; (1922) A I R. (A.) 490.

(2) 62 Ind. Cas 795; 41 M. L. J. 65; 13 L. W. 522; (1921) M W. N. 338

(3) 80 Ind. Cas. 852; 26 Bom. L. R. 335, 43 B 412; (1921) A. I. R. (B.) 309.

judgment and that such right ought not to be interfered with after the lapse of the prescribed time unless there are special circumstances for doing so, yet in each case in India the question must be considered on its merits. In this particular case the deciding factor was that the legal profession in the District Court was not in such a state of efficiency as to make it expedient to resile from the degree of the latitude which the Allahabad High Court had hitherto allowed to litigants in this matter. In the Madras Law Journal case quoted a delay due to an error on the part of the Vakil in not filing an application with regard to the legal representative with a shorter period which had recently been introduced by an Amending Act, was condoned. The decision in the case of *Nagindas Motilal* v. *Nilaji Moruba Naik* (3) ran on similar lines. An analogous decision is to be found in *Dattatraya Sitaram* v. *Secretary of State for India* (4). Special weight has also been laid on the decision of their Lordships of the Privy Council in *Brij Indar Singh* v. *Kashi Ram* (5). In that case however, the question concerned was one of whether the delay due to an application for review of judgment should have been condoned or not.

On behalf of the respondent reliance has been placed on a decision of Prideaux, A J. C., in *Ishwardas* v. *Bismilla Khan* (6) Obviously, however, in that case there had been gross negligence on the part of the Pleader concerned. In *Padamraj Phulchand* v. *Metsvice Bhashan Kesha Ltd.*, (7) by Prideaux and Kinkhede, A. J. Cs., it was held that where an application for leave to appeal to the Privy Council was made 29 days beyond time and the party concerned alleged that he was misled by the advice of his Counsel who was not aware of the reduction in limitation brought about by Act XXVI of 1920, there was no cause for condoning the delay.]

In a case like the present, therefore, the principle from which we must start is that the respondent in the present case has a vested right in the order of the lower Court in his favour which it is now sought to attack and he should not be deprived of this advantage unless there has been on his part some conduct raising an equity against him, or unless there has been some inevitable accident. Now it cannot be said that the mistake of the appellant committed presumably on the advice of his Counsel in seeking to attack by way of an appeal the order dated 22nd October 1924, which was in reality an order dismissing an application for amendment of a decree, was a mistake of such a nature as to amount to an inevitable accident. I cannot find in the circumstances of the present case any such special features as would permit of my holding in the appellant's favour in this connection.

In the present instance the execution proceedings were stayed while the application for amendment of the decree was under consideration. Immediately the execution proceedings restored, it was open to the appellant to have appealed against the orders of 6th November 1924 and 18th December 1924. Instead of doing this he deliberately chose to pursue the remedy of appealing against the order dismissing an application for amendment of the decree. It is not each and every mistake of a Counsel which *per se* is to be considered a sufficient ground for automatically giving his client the benefit of s. 5 of Indian Limitation Act. The present case does not seem to me to be one in which there are any sufficient grounds for exercising my judicial discretion in the way I am asked to by the appellant. For the above reasons, therefore, I am unable to condone the delay, which has occurred in filing the present appeal and it is dismissed as time-barred. Appellant must bear respondent's costs. I fix Rs. 30 as Pleader's fees.

G. R. D. *Appeal dismissed.*

(4) 60 Ind. Cas. 744; 45 B. 607; 23 Bom. L. R. 89.
(5) 42 Ind. Cas. 43; 45 C. 94; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 169; 127 P. L. R 1917; 44 I. A. 218 P. C.
(6) 72 Ind Cas. 158; (1923) A. I. R. (N.) 133.
(7) 78 Ind. Cas. 154; (1924) A. I. R. (N.) 279.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL NO. 319 OF 1924.
November 9, 1925.
Present:—Mr. Justice Missra.
KARINGAN—DEFENDANT NO. 2—APPELLANT
versus
HARIHAR DUTT *alias* BHOLA—PLAINTIFF, RAJA RAM—DEFENDANT NO. 1—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), s. 39 (2)—

Joint holding—Partition, suit for, whether maintainable.

Section 39 (2) of the U. P. Land Revenue Act does not mean that no division of a tenancy holding held by two or more tenants should be effected. it merely says that if such a partition has been arrived at and the distribution of land has taken place it shall not be recorded in the revenue papers until the consent of the land-holder has been obtained. The section is no bar to a claim by one of several joint tenants to get his share in a cultivatory holding divided by means of a partition suit filed in a Civil Court.

Second appeal against the judgment and decree of the District Judge, Gonda, dated the 23rd April 1924, confirming that of the Sub-Judge, Bahraich, dated the 29th October 1921.

Mr. *H. K. Ghosh*, for the Appellant.

Mr. *Aditya Prosad*, for the Respondents.

JUDGMENT.—This is a second appeal arising out of a suit for partition of a certain cultivatory holding in village Jaitapur, District Gonda. The plaintiff and defendants Nos. 1 and 2 are co-sharers in the said holding each owning one third. Both the Courts below have granted to the plaintiff a decree for partition in respect of one-third share in the said land.

The only point that has been argued before me is a point of law that a cultivatory holding could not be partitioned without the consent of the landlord, which has not been obtained in this case. I was referred to cl. (2) of s. 39 of the Land Revenue Act (III of 1901) which runs as follows: —"No division of a holding occupied by two or more tenants, and no distribution of the rent payable in respect thereof, shall be recorded, unless the consent of the land-holder and of all the tenants concerned has been attested before a Revenue Court or the *kanungo*."

The argument put forward is precisely the same which was put forward before the learned District Judge and I fully agree with the view taken by him. Section 39, cl. (2) does not mean that no division of the holding held by two or more tenants should be effected, it only says that if such a partition has been arrived at and the distribution of land has taken place it shall not be recorded in the revenue papers until the consent of the land-holder has been obtained. It is clear that this provision of law is intended for the purpose of protecting the rights of the land-holder. Any partition of a cultivatory holding should not obviously be binding upon the landlord if effected without his consent. The liability for the payment of rent among the tenants cultivating a particular holding is a joint one and they are not entitled to convert their joint liability into a separate liability without the consent of the landlord. This, however, does not mean that the tenants cannot partition their holding among themselves. As an illustration a similar case of a partition among the co sharers of a village possessing proprietary rights styled as an "imperfect partition" might be quoted. The co-sharers in such a case partition their joint proprietary holding and distribute the land revenue among themselves, though their liability for the Government revenue still continues to be a joint one. I, therefore, am of opinion that s. 39, cl. (2) cannot be construed as a bar to the claim of the plaintiff-respondent to get his share in the cultivatory holding divided by means of a partition suit filed in a Civil Court. It is, however, clear that no such partition could be recorded in the revenue papers until the landlord had given his consent to it.

The appeal fails and is, therefore, dismissed with costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2112 OF 1923.

January 8, 1924.

Present:—Mr. Justice Campbell.

CHET RAM—PLAINTIFF—APPELLANT

versus

Mussammat ILAICHO AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Suit for possession against several defendants as trespassers, dismissal of—Appeal, second—Death of respondent—Legal representatives not brought on record—Abatement, extent of.

Plaintiff sued for possession of certain property on the allegation that the defendants were in possession of it as trespassers. The defendants claimed to be in possession of the property as the reversioners of the last male-holder. The suit was dismissed by the Trial Court and the dismissal was upheld by the lower Appellate Court During the pendency of a second appeal by the plaintiff in the High Court one of the defendants-respondents died and his legal representatives were not brought upon the record within the prescribed period

Held, that inasmuch as the relief sought against the defendants in the plaint was joint and indivisible, the appeal must be held to have abated *in toto* and that it was not open to the plaintiff to urge that as the defendants claimed to be in possession as the reversionary heirs of the last male-holder the appeal

should be held to have abated only with regard to the deceased respondents' share in the estate of the last male-holder according to the pedigree-table set up by the defendants.

Second appeal from a decree of the District Judge, Hoshiarpur, dated the 4th July 1923, reversing that of the Munsif, First Class, Kangra, dated the 10th November 1922.

Lala *Mehar Chand Mahajan*, for the Appellant.

Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—In this case the plaintiff sued for possession of land and houses alleged to have been sold to him by *Musammat* Ilaicho and of which he asserted that defendants Nos. 2 to 5 were in possession as trespassers. These defendants were Gurdas subsequently deceased, his son Ram Dev, his grandson Dasaundhi Ram and his nephew Ram Lal. The suit was dismissed and the dismissal was upheld by the learned District Judge. The plaintiff came to this Court in second appeal joining as respondents *Musammat* Ilaicho, Dasaundhi Ram, Ram Dev and Ram Lal. Dasaundhi Ram is dead leaving Ram Dev his uncle as his legal representative. The appeal, however, has already been dismissed against Ram Lal by another Judge of this Court.

A preliminary objection is raised that the appeal cannot proceed against Ram Dev since the decree in favour of the defendants other than *Musammat* Ilaicho was joint and the plaint alleged them to be in possession jointly as trespassers.

The learned Vakil for the plaintiff-appellant resists this contention stating that the finding of the Court below was that these defendants were reversionary heirs of Phillo the deceased husband of *Musammat* Ilaicho and in possession of the land in suit rightfully in that capacity, and that a certain pedigree table set forth in the lower Appellate Court's judgment is correct. He argues that, according to this pedigree table, the shares of each of the defendants can be ascertained and separated, and that the appeal can proceed against Ram Dev for half the land in suit.

Authority, however, is against this pro position. The situation is precisely the same as if the appeal had abated against Ram Lal and there is a case practically on all fours decided recently by a Division Bench of this Court. It is Civil Appeal No. 1776 of 1917 which is printed as *Sardara* v. *Allayar* (1). In that case the appeal had abated against one of several defendants-respondents and the position taken up by the plaintiff-appellant was that the defendants were all trespassers and were all in occupation of the land in suit. The learned Judges refused to listen to an argument that, because the defendants owned other land in well defined ancestral shares, it must be taken that they also held this land in accordance with the same ancestral shares. That position, they remarked, was contradictory to the suit as framed and after considering a large number of previous decisions of the Chief Court and of this Court the learned Judges decided that since the relief sought was joint and indivisible against all the defendants respondents the inevitable consequence of the abatement of the appeal against one of them was the complete abatement against all.

The situation is very similar in the present case. The defendants were alleged in the plaint to be trespassers and to be in possession of the land in suit jointly. Together with Gurdas his son and his grandson were impleaded as defendants and to assert now that the defendants were in possession in definite shares according to their position in the pedigree table is contradictory to the suit as framed.

For this reason and because no relief is claimed against *Musammat* Ilaicho I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 73 Ind Cas 604; (1923) A. I. R. (L.) 132.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 34 OF 1924.

October 31, 1925.

Present:—Mr. Findlay, Officiating J. C.

Musammat AKABAI AND ANOTHER—APPELLANTS

versus

NARAYAN—RESPONDENT.

Guardians and Wards Act (VIII of 1890), ss. 25, 47 Civil Procedure Code (Act V of 1908), O. XLIII, r. 1 (d)—Ex parte *order under s. 25—Application to cancel order, refusal of—Appeal against refusal order, maintainability of.*

The appellant was ordered under s. 25, Guardians and Wards Act, to produce a minor child in Court with a view to its being restored to the custody of its guardian. The order was passed *ex parte*, the appellant being absent. On the next date of the hearing of the case, the minor was not produced, but the Court was asked to cancel its previous order. The Court refused to do so, and the appellant appealed against this later order:

Held, that no attempt having been made to set aside

the previous order as an *ex parte* order, no appeal lay from the later order as it was in reality a consequential order following on the earlier order.

Appeal against an order of the District Judge, Nagpur, dated the 15th August 1925, in Miscellaneous Judicial Case No. 16 of 1925.

Mr. *B. V. Pradhan*, for the Appellants.

Mr. *G. R. Deo*, for the Respondent.

JUDGMENT.—This is an appeal against an order passed by the District Judge, Nagpur, on the 15th August 1925, in Miscellaneous Judicial Case No. 16 of 1925. The present appellants were on the 23rd July ordered to produce the minor child Tara aged seven years in Court with a view to her being restored to the custody of her father. That order was passed *ex parte*, the present appellants being absent. On the 15th August 1925, the next date of hearing, the minor was not produced, but the District Judge was asked to cancel his order of the 23rd July 1925. This the District Judge refused to do, particularly in view of the present appellants' contumacy in not having obeyed the previous order for the production of the minor child in Court. It was only apparently as a consequence of an order of this Court dated the 7th September 1925, that the child was produced at a later hearing of the case, *viz.*, on the 19th September 1925, in the Court of the District Judge.

What is now urged is that the minor should not be handed over in the custody of her father until the objections of the present appellants to this course have been considered and adjudicated upon. It seems to me that the appellants have mistaken their remedy in this connection. The order of the 23rd July 1925 was an order passed *ex parte*. It was open to the appellants to have applied for setting aside that order and that they did not do. The District Judge's order of the 15th August 1925 was in reality a consequential order following on the earlier order of the 23rd July 1925, and I do not think that, in the circumstances, any appeal lies, against the order of the later date mentioned. Even if I could regard the present appeal as an application for revision of the order of the 23rd July 1925, a course which would involve much straining of the actual legal position, I should not have been prepared to interfere in view of the fact that there was obvious contumacy and direct disobedience of the order of the District Judge for the production of the minor. It may of course be that the District Judge may still be prepared to consider any objections which may be urged to the handing over of the custody of the minor *pendente lite* to her father (respondent). That is a matter within his discretion, but so far as the present appeal is concerned it seems to me that it is bound to fail and it is dismissed accordingly. Appellant must bear respondent's costs. Pleader's fees Rs. 20.

N. H. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 960 OF 1923.

May 29, 1925.

Present:—Justice Sir Ewart Greaves, Kt., and Mr. Justice Mukerji.

THE PORT CANNING AND LAND IMPROVEMENT COMPANY, LIMITED—PLAINTIFFS—APPELLANTS

versus

HEIRS OF LATE BAHIR MOLLA AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 46, Sch. III, Art 2 (b)—Limitation Act (IX of 1908), s. 14—Proceedings under s 46, nature of—"Agreement" in s 46 (7), meaning of—Suit to recover rent accruing due during pendency of proceedings—Limitation

Proceedings under s 46 of the Bengal Tenancy Act are proceedings not merely for ejectment, but to have a fair and equitable rent assessed by the Court. If the tenant refuses to accept the agreement filed under the provisions of the section, it is then that a suit for ejectment under the section can be commenced. [p. 38, col 2.]

The word "agreement" in sub-s. (7) of s. 46 of the Bengal Tenancy Act refers not to the agreement mentioned in the previous sub-sections but to the agreement arrived at between the landlord and the tenant when the Court has fixed the fair and equitable rent and the tenant has elected to pay that rent and not to be ejected from the holding [p. 39, col 1.]

The rent accruing due during the pendency of proceedings under s. 46 of the Bengal Tenancy Act is not suspended by virtue of the proceedings, and a suit after the termination of such proceedings to recover such rent is governed by Art 2 (*b*) of Sch. III to the Bengal Tenancy Act and the period of limitation provided in that Article is not extended by the operation of s. 14 of the Limitation Act. [p. 39, col. 2]

Appeal against a decree of the District Judge, 24-Parganas, dated the 27th November 1922 affirming that of the Subordinate Judge, Third Court of that District, dated the 26th January 1921.

Mr. *Rom Chandra Mazumdar*, Babus *Khetra Mohan Ghose* and *Rama Prosad Mukherjee*, for the Appellants.

Babu *Sisir Kumar Ghosal*, for the Respondents.

JUDGMENT.

Greaves, J.—This is an appeal by the plaintiffs against a decision of the learned District Judge of 24-Parganas, affirming a decision of the Subordinate Judge of the Third Court of Alipur. The suit out of which this appeal arises was brought by the Port Canning and Land Improvement Company, Ltd., as landlords to recover from the defendants who were non-occupancy *raiyats* rent for a period of seven years from 1320 to 1326.

There is no dispute with regard to the years 1323 to 1326 inclusive. But the dispute between the parties is as to whether or not the rent for the years 1320, 1321 and 1322 is barred by limitation. The appellants contend that their claim for these three years is not barred and they say that this is so because during these years they were prosecuting a claim under the provisions of s. 46 of the Bengal Tenancy Act. These proceedings were commenced on the 28th of March 1913. Now, the suit under s. 46 was dismissed by the first Court, and by the lower Appellate Court. But on appeal to this Court the claim for enhancement was allowed on the 24th of June 1919, this Court holding in second appeal that the appellants were entitled to have a fair and equitable rent fixed by the Court. The matter was sent back to the first Court for the fixing of a fair and equitable rent and when this was fixed there was an appeal against the first Court's decision and the fair and the equitable rent was not finally fixed until some time in the year 1923. The present suit was commenced on the 14th April 1920, rent being claimed at the old rate as, for the reasons which I have stated, the fair and equitable rent directed to be fixed by this Court on the 24th June 1919 had not at that time been determined. But the appellants say that it was necessary for them to commence their suit claiming rent at the old rate, as they did, because if they had left the matter to run any further, in their view the land was not sufficient in value to realize the decree for rent which they ultimately would obtain. It thus appears that the appellants support their claim for the rent for the three years 1320, 1321 and 1322 on the ground that, they say, their claim for the rent must be deemed to have been in suspense from March 1913 until June 1919 when the s. 46 case was in progress and they say they could not really have brought their suit during these years as rent was not fixed and finally determined.

The defendants on the other hand contend that by virtue of the provisions of Art 2 (*b*) of the Third Schedule to the Bengal Tenancy Act the rent for these three years is not now recoverable.

Article 2 (*b*) provides that the period of limitation for the recovery of an arrear of rent in other cases not provided by the previous sub-section is three years from the last day of the agricultural year in which the arrear fell due. The respondents further contend that proceedings under s. 46 are merely proceedings for ejectment and it has been held in various cases of this Court that during the pendency of a suit for ejectment the claim for rent is not in abeyance by reason of the suit. Now, in my view it is not right to say that the proceedings under s. 46 are merely proceedings for ejectment for I think they are proceedings not merely for ejectment but to have a fair and equitable rent assessed by the Court. If the tenant has refused to accept the agreement filed under the provisions of s. 46 it is then alone that a suit for ejectment under that section can be commenced. There is nothing, therefore, I think, in this point.

But the real difficulty appears to be whether there are any provisions of the Limitation Act which provide for the suspension of the rent during the pendency of the s. 46 proceedings unless there is to be found some such provision in the Limitaiion Act then the provisions of Art. 2 (*b*) of Sch. III of the Bengal Tenancy Act must operate. Now, it seems to me that the only section of the Limitation Act which could be applicable is s. 14 of that Act which provides that in computing the period of limitation prescribed for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceedings whether in a Court of first instance or in a Court of Appeal against the defendant, shall be excluded where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it. Now, the real question, therefore, is whether the proceedings under s. 46 of the Bengal Tenancy Act can be treated as proceedings founded upon the same cause of action as the claim in this suit. This really depends, I think, upon the construction to be put on the

word "agreement" in sub-s. (7) of s. 46 of the Bengal Tenancy Act Section 46, sub s. (1) provides that no suit for ejectment shall be instituted against a non-occupancy *raiyat* unless the landlord has tendered an agreement to pay an enhanced rent and the tenant within three months before the institution of the suit has refused to execute it. Sub-s. (2) provides that a landlord tendering an agreement may file it in the office of the Court for service on the *raiyat* and that it shall be served forthwith and that such service shall be deemed to be a tender. The "agreement" referred to in sub-ss. (1) and (2) of course is not strictly an agreement as has been pointed out by this Court in the case of the *Port Canning and Land Improvement Company, Ltd.* v. *Nayan Chandra Paramanik* (1). But it really is an offer made to the tenant which the tenant can refuse or reject as he likes. Then sub-s. (3) provides that if a *raiyat* on whom an agreement has been served executes it and within one month from the date of the service files it in the office from which it issued it shall take effect from the commencement of the agricultural year next following. Sub-section (4) refers to the same agreement and provides for notice to the landlord in the event of the agreement having been executed by the *raiyat*. Sub-section (5) again refers to the same agreement and provides that if the *raiyat* does not execute and file the agreement under sub-s. (3) the tenant shall be deemed to have refused to execute it. Sub-section (6) again refers to the same agreement and provides that if the *raiyat* refuses to execute the agreement the Court has to determine a fair and equitable rent for the holding. Then we come to sub-s. (7) which provides that if the *raiyat* agrees to pay the rent determined by the Court under sub-s (6) he is to be entitled to remain in occupation of this holding at the rent fixed by the Court for a term of five years from the date of the agreement. Does the word "agreement" in sub-s. (7) refer to the same agreement which is mentioned in the first six sub-sections, or is it something else? It is suggested that the agreement mentioned in sub-s. (7) is the agreement arrived at between the parties when Court has fixed a fair and equitable rent and the *raiyat* has agreed to pay the same. The conclusion that I have come to is this that upon a true construction of sub-s. (7) that is the meaning of the word "agreement" in that section; and I have arrived at this conclusion for two reasons. First of all, because it seems very strange that if the agreement referred to in sub-s. (3) is the same agreement as is referred to in sub. s. (7) the agreement in one case is to take effect from the commencement of the agricultural year next following and in the other case from the date of the agreement itself. It is certainly somewhat curious that there should be this difference in time from which the agreement is to take effect if the agreement referred to in sub-s. (7) is the same agreement as is mentioned in sub s. 3. The second ground is this—sub-section (7) provides that if a *raiyat* agrees to pay the enhanced rent fixed by the Court he is entitled to remain in occupation for a term of five years from the date of the agreement. If the agreement there is to be construed as the agreement filed by the landlord under the provisions of sub-s. (2) one might arrive at this extraordinary result—that a tenant would get no period of term at all if the proceedings under s. 46 had been sufficiently protracted. In any case it seems to me that he would never get the full term of five years mentioned in the sub section because in this reading of the "agreement" the time occupied in s. 46 proceedings would have to be deducted from the period of five years mentioned in sub-s. (7). For these reasons I think upon the true construction of sub s. (7) the word "agreement" therein is not the agreement mentioned in the previous sub-sections but the agreement arrived at between the landlord and the tenant when the Court has fixed the fair and equitable rent and the tenant has elected to pay that rent and not to be ejected from the holding.

In this view, therefore, in my opinion the limitation is not saved by virtue of the provisions of s. 14 of the Limitation Act, as it cannot be said that s. 46 proceedings are founded upon the same cause of action as the proceedings in the present suit. I do not see any other section of the Limitation Act under which the limitation can be saved.

We have been referred to various cases. The learned Judge in the Court below has relied on the case of *Watson & Co.* v. *Dhonendra Chandra Mukerji* (2). But I do not think that that case is really decisive of the question that arises in this suit. A reference

(1) 45 Ind. Cas. 234; 22 C. W. N. 558; 28 C. L. J. 87.

(2) 3 C. 6; 2 Ind. Jur. 209; 1 Ind. Dec. (N. S.) 596.

to the judgment at page 12* makes it clear that the reason of that decision was that the claim in that suit was barred by limitation on the ground that according to the decision of the Court the defendants still continued to be tenants of the *zemindar* under their *patni* lease even though the *zemindar* had denied the existence of this lease. Therefore it could not be contended that the claim for rent was in suspense during the pendency of the litigation with regard to the lease. The case that seems more nearly applicable to the facts of the present case is the decision in *Hem Chunder Choudhury* v. *Kali Prosanno Bhaduri* (3). Then there had been a suit for enhancement of rent and the Judicial Committee held that the fact that a suit for enhancement of rent had been brought by the plaintiff within the period covered by the rent suit and in the enhancement suit the plaintiff had claimed enhanced rent for the years covered by the rent suit stayed the operation of the Law of Limitation. Their Lordships say at page 11† that the appellants claimed the arrears of 1298 in that enhancement proceedings but this claim was then disallowed as premature, that they are not now entitled to the benefit of the decree for enhancement and to recover the arrears of the enhanced rate. It, therefore, appears that in that case the claim in the rent suit was expressly and exactly covered by the claim in the enhancement suit which for the reasons I have indicated is not the case here.

One cannot help sympathising with the position of the landlord in the present case. But in the circumstances it is clearly impossible for them to claim rent at the old rate during the pendency of the enhancement proceeding. The result may, therefore, be that in this state of circumstances the landlord cannot recover the full benefit of the decree for enhancement which he obtained in proceedings under s. 46 of the Bengal Tenancy Act But that is a question for the Legislature and not for us. We can administer the law as we find them and as we understand them.

In the result the appeal fails and is dismissed with costs

Mukerji, J.—I agree.

Z. K. *Appeal dismissed.*

(3) 8 C. W. N. 1; 30 I. A. 177; 30 C 1033; 8 Sar. P. C. J 529 (P C).

*Page of 3 C.—[*Ed.*]

†Page of 8 C. W. N.—[*Ed.*]

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 379 OF 1924.

July 13, 1925.

Present:—Mr. Findlay, Officiating J. C.

PANDURANG GOVIND FATE—DECREE HOLDER—APPLICANT

versus

MAIFUZBHAI—OBJECTOR—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, r 58—Erroneous view of law—Objection proceedings, order in—Revision.

If a Court, upon an erroneous view of the scope of a section of the C. P. C, applies it to a case to which it has no application, the Court acts without jurisdiction and the High Court would interfere with its decision in revision. [p. 42, col 1]

Shiva Nathaji v *Joma Kashinath*, 7 B. 311, 7 Ind Jur 656, 4 Ind. Dec. (N. s) 229, followed

The mere fact that the unsuccessful party in objection proceedings under O. XXI, r 58 of the C P. C. has to file a separate suit under r. 63 of the Order and the onus of proof will be on him, does not afford sufficient ground as to why the High Court should revise the order in those proceedings [p. 42, col 2.]

Application for revision against an order of the Second Class Subordinate Judge, Nagpur, dated the 17th October 1924, in Execution Case No. 119 of 1922.

Mr. *M. R. Bobde*, for the Applicant.

Mr. *A. V. Wazalwar*, for the Non-Applicant.

ORDER.—The applicant (decree-holder) Pandurang Govind Fate has applied in revision against an order in execution of the Subordinate Judge, Second Class, Nagpur, under which certain moveable property, which had been attached, was released on an objection filed under O. XXI, r. 58, C. P. C., by the non-applicant Maifuzbhai. The latter filed an objection to the attachment on the ground that the property in question was already in his possession in the capacity of a *supratdar* under a decree passed in Civil Suit No. 27 of 1922, in which the decree-holder was also the same as the present applicant. The grounds of the application are firstly, that the objector, on his own allegations, had no *locus standi* under O. XXI, r. 58, to maintain the objection, and that the lower Court acted illegally and without jurisdiction in having released the property from attachment. It is secondly urged that, in any event, the lower Court failed to take notice of the fact that the present decree-holder pleaded that the property attached in the present proceedings was not the same as that attached in Suit No. 27 of 1922, and that the order releasing the property was, in any event, premature, as the

lower Court failed to give an opportunity to the present applicant to produce evidence on the above question of fact.

On the application for revision coming on for hearing, the Pleader for the non-applicant raised an objection that a remedy by way of revision did not lie in the circumstances of the present case and it will be accordingly convenient, first of all, to deal with this point. On behalf of the non-applicant it has been pointed out that O. XXI, r. 63, provided a special remedy by way of suit for any party [illegible] by an order passed under r. 60 or r. 61 of O. XXI, C. P. C. Reliance has been placed in this connection upon the decisions, amongst others, in *Gopal Das* v. *Alaf Khan* (1), *J. J. Guise* v. *Jaisraj* (2) and *Shiva Nathaji* v. *Joma Kashinath* (3). The decision in *J. J. Guise* v. *Jaisraj* (2) is directly to the point. Burkitt, J. remarked at page 407* thereof as follows :—

"The learned Counsel for the applicants admits that they have open to them a remedy by way of suit in which they can question the decision of the Subordinate Judge so far as it is injurious to them. Admittedly they have not availed themselves of that remedy, and, therefore, adopting and acting on the precedents above cited, I think that this Court should not grant to them the extraordinary remedy by way of revision for which they have applied. For this reason, I think this application should be rejected."

In *Debi Das* v. *Ejaz Husain* (4), Knox, J., referred to *J. J. Guise* v. *Jaisraj* (2) just quoted and remarked as follows :—

"What was laid down in that case was that this Court should not grant the extraordinary remedy by way of revision when a remedy by way of suit lies open. Ordinarily, I am prepared to subscribe to that, but in this matter each case must be judged upon the circumstances peculiar to it The subject-matter is valued at Rs. 40. The decree-holder is purporting to act under a decree which he obtained on 17th November 1902. The application for execution, which has in no way been traversed, shows that his path in execution has been a very thorny one. I have held that the order complained of was an order entirely without jurisdiction, and, therefore, it appears to me most consonant with equity to place the parties as far as possible in the position they occupied before the judgment-debtor moved the Court to pass the order which it had no jurisdiction to pass."

Knox, J., thus in the case in question was not prepared to lay down an absolute rule that when an express remedy by way of suit or otherwise was provided for, no application for revision could, in any event, lie, and he held that in such a matter each case must be judged upon the circumstances peculiar to it.

The question of the exercise of the extraordinary jurisdiction of the High Court under s. 662 of the old C P. C. was considered most elaborately in *Shiva Nathaji* v. *Joma Kashinath* (3) by a Full Bench and the following principle was, amongst others, laid down at page 372* thereof :—

"Where a decree or order of a Subordinate Court is declared by the law to be, for its own purposes, final, or conclusive, though in its nature provisional, as subject to displacement by the decree in another more formal suit, the Court will have regard to the intention of the Legislature that promptness and certainty should, in such cases, be in some measure accepted instead of juridical perfection. It will rectify the proceedings of the inferior Court where the extrinsic conditions of its legal activity have plainly been infringed; but where the alleged, or apparent, error consists in a misappreciation of evidence, or misconstruction of the law, intrinsic to the inquiry and decision, it will respect the intended finality, and will intervene peremptorily only when it is manifest that, by the ordinary and prescribed method, an adequate remedy, or the intended remedy, cannot be had."

On behalf of the applicant reliance has been placed on the remarks of Hallifax, A J. C, in *Ramchandra Fate* v. *Shridhar* (5). The learned Additional Judicial Commissioner therein held that, even though a remedy by regular suit was open to the applicant in that case, yet he was prepared to interfere on the ground that the slower remedy by regular suit would leave the applicant suffering injustice and undue hardship, and that this ground

(1) 11 A. 383; A. W. N. (1889) 151; 6 Ind. Dec. (N. S.) 672.
(2) 15 A 405; A. W. N (1893) 172; 7 Ind. Dec. (N. S) 979.
(3) 7 B. 341, 7 Ind Jur. 656, 4 Ind. Dec. (N. S) 229.
(4) 28 A. 72; A. W N (1905) 191; 2 A L J. 749.
(5) 65 Ind Cas. 351; 18 N. L. R. 71 at p. 72; (1922 A I R (N) 115.

*Page of 15 A.—[*Ed.*]
*Page of 7 B.—[*Ed.*]

alone was sufficient to call for the exercise of the revisional powers of the Court in his favour. Each case of this sort must, however, be judged on its merits, and I am not prepared to admit that the present applicant is likely to suffer exceptional hardship or injustice, even though it were to be held that the present application by way of revision did not lie. It is unnecessary, therefore, to discuss in the present case the question as to whether I should be prepared to accept fully the standard laid down by the learned Additional Judicial Commissioner in the case quoted in this connection.

I turn next to the principle enunciated in the *Shiva Nathaji* v. *Joma Kashinath* (3) quoted above, a decision which has been followed in many other later cases, and is quoted, with approval, in *Brajabala Devi* v. *Gurudas Mundle* (6). It becomes, therefore, necessary to consider whether the lower Court was correct or not in holding that r. 58 of O. XXI, C. P. C., covered the case of the present objector. If a Court, upon an erroneous view of the scope of a section of the C. P. C., applies it to a case to which it has no application, such a Court would act without jurisdiction, and, [illegible] the principle laid down in *Shi* [illegible] v. *Joma Kashinath* (3) quoted above, this Court would, in the circumstances, be prepared to interfere. Now the applicant's position in this connection is that the objector as a mere *supratdar* had no *locus standi* with regard to the objection he filed to the attachment. It is suggested in this connection that he was in possession only on behalf of the judgment-debtor. Were this so, the Court would undoubtedly have acted without jurisdiction. I am, however, not prepared to assent to this proposition. The *supratdar* was, to all intents and purposes, in possession of the property on behalf of the Court and practically held the position of a Receiver. Therefore, in the present case I do not think that any application for revision can lie, and I fully accept the above quoted principle.

The other grounds for interference, *viz.*, that the lower Court erred materially in not taking further evidence and investigating the question as to whether the property in each attachment was the same, do not seem to me to be such as would justify interference on the revisional side in this Court. Rightly or wrongly, the Judge of the lower Court, on the evidence before him, has held that the property was the same. The mere fact that if the applicant has to file a separate suit under O. XXI, r. 63, C. P. C., in this connection and that the onus of proof will be on him in this connection, seems to me to afford no sufficient ground as to why this Court should exercise its revisional jurisdiction in such a matter. If such a consideration were to afford the guiding principle in the question as to whether an application of this sort lies under s. 115, r. 63 of O. XXI, might as well not be on the Statute book at all, because parties aggrieved by an order passed under r. 60 or r. 61 of O. XXI would very naturally choose the cheaper and more speedy remedy of revision.

Holding, as I do, therefore, that the lower Court did not act without jurisdiction, I do not think the present application for revision can be entertained on the other allegations made therein. The applicant must seek his remedy by way of separate suit in the way provided for in the C. P. C. The application for revision is accordingly dismissed. The applicant must bear the non-applicant's costs. Pleader's fees Rs. 15.

N. H. *Application dismissed.*

(6) 33 C. 487; 3 C. L. J. 293.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2268 OF 1924.

March 21, 1925.

Present:—Mr. Justice Abdul Raoof.

PAL SINGH—PLAINTIFF—APPELLANT

versus

GANGA SINGH AND ANOTHER—

—DEFENDANTS—RESPONDENTS.

Appeal, second—Mortgage or sale—Question of fact.

The question whether a certain transaction is a mortgage or a sale is a question of fact and cannot be agitated in second appeal.

Second appeal from a decree of the District Judge, Amritsar, dated the 13th August 1924.

Bakhshi *Tek Chand*, for the Appellant.

Lala *Kidar Nath Chopra*, for the Respondent.

JUDGMENT.—This is a second appeal in a suit for pre-emption. The following facts will disclose the nature of the question to be decided:—

One *Musammat* Ram Kaur, widow of

Jawand Singh, inherited some land from her husband as a life-tenant. She applied to the Collector to sell 49 *kanals*, 6 *marlas* for Rs. 2,000, to one Dharam Chand, a non-agriculturist. The application was rejected on the 8th of February 1921. Thereupon by a deed dated the 11th of June 1921, she made a mortgage without possession in favour of Ganga Singh in respect of 39 *kanals*, 11 *marlas* for Rs. 1,100. The following conditions were entered in the deed:

(1) The mortgage was not to be redeemed for 20 years, and

(2) interest was to be paid at Rs. 2 per cent. per mensem. On the same date the mortgaged land was leased to the mortgagee for 20 years, the rent reserved being Rs. 40 per annum. The land revenue Rs. 12-0-9 was to be paid out of this yearly rent.

The plaintiff Pal Singh, a reversioner of Jawand Singh, sued for pre-emption on the allegation that, though the deed of the 11th of June 1921, on the face of it purported to be a mortgage-deed, the transaction was really a sale and that the form of the mortgage was adopted in order to defeat the right of pre-emption. A declaration was also claimed by the plaintiff to the effect that the alienation being without consideration and necessity shall not affect his reversionary rights. This latter relief was refused and no question as to it arises now. The claim for pre-emption was decreed by the Trial Court which was of opinion that the transaction was really a sale. On appeal the learned District Judge took a different view on the evidence and having found that the transaction really was one of a mortgage and not that of a sale dismissed the claim of the plaintiff.

This second appeal was preferred by the plaintiff and has been argued before me by Mr. Tek Chand, his learned Counsel. The chief contention put forward before me is that the conditions entered in the mortgage deed are such and the amount of the mortgage money would be so much at the end of 20 years that no reasonable person would think of redeeming the property. His contention is that, according to the condition relating to interest, the accumulated amount at the end of 20 years would come to Rs. 5,280. Thus along with the principal amount of Rs. 1,100 the total sum payable by the mortgagor for the redemption of the property would come to Rs. 6,380. The learned Counsel further contends that the fact that a *patta* was given to the mortgagee for 20 years clearly shows that it was intended to place the alienee in possession from the very beginning as a vendee. The total amount of rent for 20 years at the rate of Rs. 40 per annum would be Rs. 800. Out of this Rs. 240-15-0 would have to be deducted on account of revenue for 20 years. Thus the net total rent for 20 years would be Rs. 559-1-0. If this amount is deducted from Rs. 6,380 the balance left is Rs. 5,820-15-0. It is further argued that, according to the evidence on the record, the highest market value of the land at the date of the transaction was Rs. 50 a *kanal*. Thus the price of 39 *kanals*, 11 *marlas* or putting it roughly as 40 *kanals* would be Rs. 50 × Rs. 40 equal to Rs. 2,000. It is contended by the learned Counsel that no one would think of redeeming the land of the value of Rs. 2,000 by paying Rs. 5,820-15-0. The argument is plausible and had it been possible for me to interfere with a finding of fact recorded by the lower Appellate Court I might have agreed with the learned Counsel as to the effect of the evidence but the learned District Judge has found in unmistakable terms that the intention of the parties was to effect a mortgage. This is purely a question of fact and the finding of the learned District Judge is conclusive in second appeal. There are numerous rulings to be found reported in the various volumes of the Punjab Record in which it is laid down that the question whether a certain transaction is a mortgage or sale is a question of fact, see for instance *Sunder Das* v. *Dhanpat Rai* (1), *Ahmad Khan* v. *Alam Khan* (2) and *Kapur Chand* v. *Chet Ram* (3). Moreover, having regard to the fact that the deed on the face of it is a mortgage-deed, the mortgagor can redeem the mortgage if he likes and as long as there is a right of redemption it is impossible to say that a sale has taken place and the mortgagor cannot recover possession of the land on payment of the redemption money. It is not a question of the construction of a document which may be treated as a question of law. The question of intention is purely a question of fact, and I am constrained to hold that the findings of the lower Appellate Court are

(1) P. R. 1907; 104 P. L. R. 1908, 127 P. W. R 1907.

(2) 37 Ind. Cas. 297; 120 P. L. R 1916; 115 P. W R. 1916.

(3) 80 Ind. Cas. 494; (1924) A. I. R (L.) 260, 5 L. L J. 541.

binding on this Court, and there is no room for interference in second appeal.

The result is that the appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 421 OF 1924.
September 14, 1925.

Present:—Mr. Findlay, Officiating J. C.

TIKARAM—APPELLANT

versus

NARAYAN AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch III, para 11—Decree transferred to Collector for execution—Collector, jurisdiction of—Civil Court, powers of—Execution of decree—Property misdescribed in warrant of attachment—Auction-sale, validity of—Knowledge of parties.

No sooner is an order for transfer of a decree for execution to the Collector made than he is seized of the case and not on the date such order reaches him. Any transfer of the attached property subsequent to the date of the order of transfer during the pendency of the proceedings before him is void. [p 45, cols. 1 & 2]

During the period the Collector has jurisdiction the Civil Court ceases to have any power to act in execution of the decree transferred [p 45, col 1]

A mere misdescription in a warrant of attachment of property does not invalidate the auction sale and is merely an irregularity if the parties knew what had been attached and had been actually sold [p. 45, col. 2.]

Appeal against a decree of the Additional District Judge, Nagpur, dated the 12th July 1924, in Civil Appeal No. 38 of 1924.

Mr. *V.V. Kelkar*, for the Appellant.

Mr. *M. D. Khandekar*, for the Respondents.

JUDGMENT.—The plaintiff Narain Teli sued the defendants Ganpati and Tikaram in respect of a mortgage-deed dated 3rd October 1921 executed by Ganpati for Rs. 300 of which Rs.85-8-0 was due on a previous mortgage. Tikaram was joined in the suit as he was alleged to have purchased the mortgaged subject which consisted of a half share in absolute occupancy field No. 62 in *Mouza* Kesori, Nagur. Tikaram's defence in the first Court rested amongst other grounds on the contention that the mortgage was void having been executed, while Collector's proceedings were pending thereanent.

The Subordinate Judge held that the mortgage-deed in suit was not void under Sch. III para. 11 of the C. P. C. The field we are concerned with is admittedly No. 62 but the Subordinate Judge found that in the Schedule attached to the warrant of attachment the number of the field was given as No. 63 On 30th September 1921 the decree was ordered to be transferred to the Collector and before him steps were taken as regards field No. 62 which was admittedly in the judgment-debtor's possession. The Subordinate Judge accordingly held that there having been no attachment of field No. 62, there would *a fortiori* be no valid sale thereof. The Collector's proceedings, therefore, being without jurisdiction, could not affect the validity of the mortgage-deed in suit executed on 3rd October 1921 and decree in favour of the plaintiff was granted accordingly.

The defendant Tikaram appealed against this decision and the Additional District Judge, Nagpur, held that although the order of transfer to the Collector was passed by the Executing Court on 30th September 1921 the proceedings did not reach the Collector till 16th November 1921; he accordingly held that the Collector was not seized of the proceedings on 3rd October 1921. On these and connected findings he dismissed the appeal.

The first point for decision in this appeal concerns the last mentioned finding. Reference has been made in this connection by the Pleader for the appellant to the phraseology of para. 1 of Sch. III of the C. P. C, *viz.*, "Where the execution of a decree has been transferred to the Collector under s. 68, ... "
as well as to the initial portion of para. 11 idem.

It is urged in view of these provisions that the Collector must be considered to have been seized of the case as from the date 30th September 1921 the date on which the order of transfer was passed and that in view of this fact the mortgage in suit was void under para. 11, Sch. III referred to above. An exactly similar point was considered by Hallifax, A. J. C., in *Narayan* v. *Vithu* (Second Appeal No. 573 of 1922, decided on 26th June 1924) where the learned Additional Judicial Commissioner remarked as follows:—

"This view also I am unable to accept. At the moment a Civil Court transfers a decree to another Court, whether it be another

Civil Court or the Collector, it ceases to have any power to act in execution of that decree. But it cannot possibly be said that there is an interval, varying with the length of time the papers happen to take to reach the other Court, during which no Court has any jurisdiction. The possession of rights or powers does not depend upon knowledge of them. The Collector's position in this matter is exactly analogous to that of an heir to an estate, who has full power to deal with it from the moment of the death of the person he succeeds though he may not hear of it for months, and any alienation of his property by another during those months is no less invalid because he was not aware of his rights."

I find myself in complete agreement with this view. Clearly during the period from 30th September 1921 to 16th November 1921 either the Executing Court or the Collector had jurisdiction and the question for decision is which was seized of the case. I am aware of the decision of West, J., in *Mahadaji V. Karandikar* v. *Hari D. Chikne* (1), but for my own part I entertain no doubt that during the period the Collector has jurisdiction, the jurisdiction of the Civil Court is to all practical purposes excluded, *cf.*, *Madho Prasad* v. *Hansa Kuar* (2). The question before me, however, is as to from what date the Collector had jurisdiction for the purpose of the applicability of para. 11 of the said Schedule. It cannot be denied that, if there had been no ministerial or office delay in forwarding the case to the Collector and if Form C had been sent to him on 30th September 1921 or the following day, he would have had jurisdiction forthwith and para 11 would have applied. Now, having regard to the obvious principle underlying the said provision, I am satisfied that the desirability provided for therein must have been intended by the Legislature to have had effect from the date the order of transfer to the Collector was passed. From that date the Executing Court may be regarded as ceasing to exercise jurisdiction for all practical purpose. The initial language of para. 11 is significant in this connection. It is—

"So long as the Collector can exercise jurisdiction."

Potentially in the present case the Collector could exercise jurisdiction from 30th September 1921 although actually he did not do so till 16th November 1921. Two decisions of this Court have been quoted on behalf of respondent *viz.*, *Sonba* v. *Ganesha* (3) and *Harlal* v. *Narayan* (4). The first decision does not deal with the exact point involved in this case and in the second one there was a mere remark by Hallifax, A. J. C., that the original proceedings "began on 2nd June 1917 when the Form C was received by the Collector." The same learned Additional Judicial Commissioner in the unreported case quoted above has given a more considered finding on the point involved, a finding with which I agree and the remark relied on by respondent in the 18 N. L. R. case quoted was a mere *obiter* which I do not regard as necessarily conclusive.

I am, therefore, of opinion that the present mortgage as having been executed during the pendency of the Collector's proceedings was void provided that the property sold therein was legally sold.

On the remaining point for decision as to whether it was Ganpati's field which was attached, I think the appeal must go back to the lower Appellate Court for a fresh decision on the merits. The real point for decision in this connection has been missed entirely by the Additional District Judge. That point is—was it applicant's field which was actually attached or not? There may have been only a misdescription of it in the warrant. A mere misdescription would not necessarily invalidate the sale and would amount to a mere irregularity if the parties concerned knew what had been attached and had been actually sold.

The judgment and decree appealed against are accordingly reversed and the appeal will go back to the lower Court for a fresh decision in accordance with the above remarks. Appellant will receive a certificate for refund of Court-fees. Other costs of this appeal will follow the event.

N. H. *Decree reversed.*

(1) 7 B, 332; 4 Ind. Dec (N. s) 224.
(2) 5 A. 314; A. W. N. (1883) 53, 3 Ind Dec (N. S.) 349.
(3) 17 Ind. Cas. 887, 8 N. L. R. 182.
(4) 64 Ind. Cas. 420; 18 N. L. R. 152; (1922) A. I. R. (N.) 267.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 352 OF 1924.
March 26, 1925.
Present:—Mr. Justice Martineau.
Musammat BARKAT BIBI—
DEFENDANT—PETITIONER
versus
ABDUL AZIZ—PLAINTIFF, ABDUL KARIM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115—Revision, ground for—Error of law—Burden of proof, wrong decision on question of.

The giving of an erroneous decision on a point of law is not an irregularity or an illegality in the exercise of jurisdiction and does not justify interference in revision.

A decision on a question of onus cannot be attacked in revision.

Petition for revision against an order of the Senior Subordinate Judge, Gujranwala, dated the 25th January 1924.

Maulvi *Ghulam Mahy-ud-Din*, for the Petitioner.

Shaikh *Niaz Muhammad*, for the Respondents.

JUDGMENT.—The plaintiff sues for money due on a *hundi* drawn by the defendant in his favour. He had transferred the *hundi* to a certain firm, which, on failing to recover the money, through the Bank, returned the *hundi* to the plaintiff, with the Bank's note as to non-payment.

The Trial Court placed the onus of proving consideration for the *hundi* on the plaintiff, and found that he had not discharged it, and also held that the plaintiff could not sue on the *hundi* without its being re-endorsed to him by the firm to which he had transferred it. The Senior Subordinate Judge, to whom the plaintiff appealed, held that the onus should have been on the defendant to prove that there was no consideration for the *hundi*, and also held that the plaintiff could maintain the suit on the *hundi*. He, therefore, remanded the case for re-trial. The defendant has applied to this Court for revision.

There is, in my opinion, no ground for interference in revision, even supposing that the lower Appellate Court's decisions on the two points above mentioned were wrong, as the giving of an erroneous decision on a point of law is not an irregularity or illegality. *Karimullah* v. *Krimon* (1) is moreover an authority for the view that a decision on a question of onus cannot be attacked in revision. I dismiss the application with costs.

Z. K. *Application dismissed.*

(1) 15 Ind. Cas. 839; 102 P. R. 1912; 207 P. L. R. 1912; 213 P. W. R. 1912.

OUDH CHIEF COURT.

CIVIL APPLICATION No. 159 OF 1925.
November 25, 1925.
Present:—Mr. Justice Raza.
SHUNKAR—PLAINTIFF—APPELLANT
versus
Musammat MAHADEI—DEFENDANT—OPPOSITE PARTY.

Mortgage—Mortgage of tenancy rights, whether void ab initio.

A mortgage of his tenancy lands by a tenant-at-will is not void *ab initio*.

Ram Autar v. *Ram Asre*, 66 Ind. Cas. 680; 8 O. L. J. 414 and *Bhairon* v. *Balak*, 68 Ind. Cas. 558; 9 O L. J. 331; 4 U. P. L. R (O.) 88; (1922) A. I. R. (O.) 287, referred to.

Application for revision, under s. 25, Act IX of 1887, against a decree of the Munsif, Qaiserganj, as Judge Small Cause Court, Qaiserganj at Bahraich, dated the 30th May 1925.

Mr. *Moti Lal Saksena*, for the Appellant.

Mr. *Ram Shankar*, for the Opposite Party.

JUDGMENT.—The defendant's husband Bhola (since deceased) executed the deed in question in favour of the plaintiff for Rs. 73 on the 10th June 1917. The deed in suit is alleged to be a mortgage-deed by which 10 *bighas* 10 *biswas* tenancy land was transferred to plaintiff to secure payment of Rs. 73. The bond provided that the money borrowed would be re-paid on *Baisakh Sudi Puranmashi* 1327 *Fasli* and that should the money be not re-paid till the end of 1327 *Fasli* the creditor would be entitled to continue in possession. The deed in suit was described as a mortgage-deed. It appears that the plaintiff remained in possession of the tenancy during the lifetime of Bhola. He was, however, dispossessed by the defendant from the land after the death of Bhola in July 1922. He brought the present suit on the 20th March 1925 to recover Rs. 73 with interest, total Rs. 100. He prayed for a simple money-decree against the defendant.

The claim was resisted by the defendant on various grounds.

The learned Munsif framed several issues and rejected the claim holding that the

mortgage in suit being a mortgage of tenancy land was void *ab initio*.

The plaintiff applied in revision under s. 25 of the Small Cause Courts Act.

The applicant's learned Counsel has referred to the rulings in *Ram Autar* v. *Ram Asre* (1) and *Bhairon* v. *Balak* (2). The ruling in *Bhairon* v. *Balak* (2) is an authority for the proposition that a mortgage by a tenant-at-will is not void *ab initio*.

The deed in suit purports to be a mortgage-deed but it was not registered as required by law (see s. 59 of Act IV of 1882). The plaintiff himself has prayed for a simple money-decree on the basis of the deed. It is to be determined if he can sue for the money on the basis of the deed and if his claim is within time. The point of limitation was not considered or decided by the learned Munsif though he had framed an issue on that point.

The application is allowed the suit is remanded to the Court below with direction to re-instate it under its original number and to dispose of it after determining the remaining points involved in the manner required by law. Costs here and hitherto will abide the result.

Z K.

Application allowed.

(1) 66 Ind. Cas 680, 8 O L. J 414.
(2) 68 Ind. Cas. 538; 9 O L. J. 331; 4 U. P. L. R. (O.) 88; (1922) A. I. R. (O) 287.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 9-B OF 1923.

April 3, 1924.

Present:—Mr. Kotval, A. J. C.

PANDURANG—APPELLANT

versus

SAMBHASHEO—RESPONDENT.

Execution of decree—Assignment of [illegible] cation by assignee for execution of decree [illegible] f —Re-assignment in favour of decree-holder, effect of —Assignment by decree-holder in favour of third person—Second assignee, whether entitled to execute decree—Res judicata.

An assignee of a decree made an application for being substituted in place of the decree-holder and for execution of the decree. The application was dismissed as the assignee produced no evidence to prove the assignment. A subsequent application for execution made by the assignee was dismissed on the ground of *res judicata*. Thereafter the assignee transferred his rights under the assignment back to the decree-holder, who then assigned the decree to a third person and the latter made an application for execution of the decree

Held, that by the re-assignment of the decree in favour of the decree-holder, the latter obtained no better right to execute the decree than the assignee himself possessed and that consequently the second assignee was in no better position than the original assignee or the decree-holder and was not entitled to execute the decree. [p. 48, col. 2]

Miscellaneous appeal against the judgment of the Additional District Judge, Amraoti, dated the 7th of February 1923, remanding the case by Munsif, Kelapur, dated the 6th of November 1922.

Mr. *V. V. Chitale*, for the Appellant.

Mr. *M. R. Bobde*, for the Respondent.

JUDGMENT.—Madhanna and Markandi obtained a money decree against Pandurang in Civil Suit No. 359 of 1917. On the 15th August 1921 they assigned this decree to Tukaram. Tukaram applied to be substituted in place of the decree holders and for execution of the decree. This application was dismissed as Tukaram produced no evidence to prove the assignment. Tukaram made a second application for execution which was dismissed on the ground of *res judicata*. Thereafter Tukaram transferred his rights under the assignment back to the decree-holders Madhanna and Markandi. Madhanna and Markandi then assigned the decree to Sambhashiva and Raghoba. The proceedings out of which this appeal arises were taken by Sambhashiva and Raghoba for execution of the decree. The Original Court dismissed the application on the ground of *res judicata*. The lower Appellate Court set aside that order and directed the execution to proceed. The judgment-debtor appeals.

It is admitted in this Court that if Tukaram had transferred the decree to a third party instead of re-transferring it to the decree-holders such third party would have been bound by all the disabilities of Tukaram and could not have executed the decree.

The lower Appellate Court in this connection writes:—

"The question of the principle of *res judicata* as being applicable to the present case is the preliminary point on which the decision of the lower Court is based. The lower Court has not decided the case on its merits. The main question in this case is whether by the transfer dated the 11th July 1922 the original assignment in favour of Tukaram had become extinguished, or, the re-transfer dated the 11th July 1922

clothed the original decree-holders with the rights of mere transferees from Tukaram. I should think that the original assignment dated the 15th of August 1922 became [illegible] by means of the re sale or re-transfer by Tukaram in favour of Madhanna and Markandi the original decree-holders. The lower Court has not cited any authority nor has the Pleader for the respondent in this Court shown me any law on the subject whereby the transfer by Tukaram did not result in extinguishing the assignment in favour of Tukaram. When under the re-sale the decree-holders Madhanna and Markandi became entitled to execute the decree afresh, it seems to me that the only result that could ensue from the re-transfer was the [illegible] of the assignment in favour of Tukaram which was dated the 15th of August 1921. In this view the principle of *res judicata* would not apply even though the motive of the several assignments be what it is suspected to be. In short the present appellant cannot be held to be a representative of Tukaram and be bound by what orders had been passed against Tukaram. I hold, therefore, that the applicant is entitled to execute the decree and that the question on the merits should have been tried by the lower Court."

It is not easy to follow what the lower Appellate Court means unless it be supposed to hold what it has not anywhere said that in spite of the assignment by the decree-holders their right to execute the decree continued to exist in a state of suspense. The argument advanced by the learned Pleader for the respondents is that all that the Court decided in the two proceedings taken by Tukaram in execution was that Tukaram was not the assignee of the decree-holders. That being so, the actual assignment upon which Tukaram's applications were based must be treated as ineffectual or non-existent and the decree-holders' original right to the decree continued to exist as if no assignment had been made and he was competent to assign it to the respondents. The subsequent re-transfer by Tukaram to the decree-holders, it is said, was a superfluity. I cannot accept this argument which amounts to this, that an assignment valid in all respects and treated as such by the parties thereto may be nullified by the assignee's failure to produce evidence in proof of it when he applies for execution. The decree-holders had parted with all their rights and had no dormant or suspended right which could be said to have been revived. The assignment in favour of Tukaram remained in force as between the parties thereto in spite of the decisions in proceedings taken by Tukaram, and it must be held that whatever right the decree-holders acquired subsequent to the transfer to Tukaram was acquired by them only as Tukaram's transferees and there was not any right in suspense which had revived. It is, as I have said above, admitted that if Tukaram had transferred his right under the assignment to a person other than the decree-holders, that person could not have been entitled to execute the decree because of the decision against Tukaram in the proceedings taken by him. I see no reason why the fact that Tukaram's transferees are the decree-holders should make any difference. I hold that the decree-holders as the transferees of Tukaram were in no better position than Tukaram and were debarred from executing the decree. That being so, their transferees also have no right to execute the decree. I set aside the order of the lower Appellate Court remanding the case for further trial and restore the order of the first Court. The respondents will pay the appellant's costs in all Courts and bear their own. Pleader's fee Rs. 25.

Z. K. *Order set aside.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2076 OF 1923.

June 23, 1925.

Present:—Mr. Justice Chakravarti.

Raja RISHI KESH (RISHI CASE IN *Vakalatnamah*) LAW—PLAINTIFF —APPELLANT

versus

SONS AND HEIRS OF SHAMSHER KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Cess (Amendment) Act (IV of 1910), ss. 52, 52A—Notice that tenure has been included within zemindari, *publication of, proof of—Notice published before passing of Amending Act of 1910, whether can be proved by certificate granted subsequently—Cess, liability to pay.*

The publication of the notice mentioned in s 52 of the Bengal Cess (Amendment) Act must be strictly proved before the liability of the holder of a tenure in respect of a cess can arise. [p. 49, col 1.]

A certificate given by the Collector in accordance

with the provisions of s. 52A of the Bengal Cess (Amendment) Act that a notice under s 52 of the Act has been duly published, is conclusive proof of the fact that the publication was made. It is immaterial that the certificate refers to a publication which took place before the passing of the Bengal Cess (Amendment) Act IV of 1910 which added s 52A to the Bengal Cess (Amendment) Act The Amending Act only provides the method of proving the publication of the notice It creates no new right nor does it affect any existing right A notice published before the passing of the Amending Act, may, therefore, be proved by the production of a certificate from the Collector given after the passing of the Amending Act that the publication had been duly made.

Appeal against a decree of the Subordinate Judge, First Court, Midnapur, dated the 3rd January 1923, affirming that of the Munsif, Third Court, Midnapur, dated the 20th December 1921.

Mr. *Narendra Chandra Bose* and Babu *Nalin Chandra Paul*, for the Appellant.

JUDGMENT.—This is an appeal by the plaintiff and arises out of suit for recovery of cesses from the holders of a rent-free tenure. The plaintiff's case was that he was made liable for the payment of cesses for the rent-free tenure held by the defendants and had paid the same, that he now brought the suit for the recovery of the amount so paid, that the inclusion of this rent-free tenure within the *zemindari* of the plaintiff was duly published by the Collector under s 52 of the Cess Act on the 29th of June, 1908, and that after the publication of the notification the defendants became liable to pay the cesses to the plaintiff. The defendants in the suit denied the publication of the notification, under s. 52. It appears from the case of *Ashanulla Khan Bahadur* v. *Trilochan Bagchi* (1) that the publication of such notice should be strictly proved before the liablity of the defendants can arise. To obviate the difficulty of proving such Notification Act IV of 1910 (B. C.) added s. 52A to the Cess Act which runs as follows :—" Whenever any notice has been duly published under s. 52, the Collector shall sign a certificate to that effect, and such certificate shall be conclusive proof that the publication has been duly made." It appears that in compliance with this section the Collector of Midnapore signed a certificate on the 28th of November 1921. The plaintiff in order to prove the due publication of the notification under s. 52 produced the certificate so signed by the Collector and contended that this certificate should be accepted as the conclusive proof of the fact that the notification under s. 52 was published on the 29th of June 1908.

The Courts below have held that this certificate by the Collector is not sufficient in law for proving the publication of the notification under s. 52, because the publication was made before the amending Act came into operation. As there was no other independent evidence in proof of the fact of the publication the plaintiff's suit was dismissed by both the Courts below.

The learned Advocate for the appellant has contended that this was not the case of giving any retrospective effect to any enactment. Under s. 52A the Collector may sign a certificate at any time after the publication of the certification under s. 52 of the Cess Act. The certificate produced in the case proves that notice under s. 52 was published on the 29th of June 1908. The amending Act only provides the method of proving the publication made ; it creates no new right nor does it affect any existing right. There is nothing in s. 52A which prevents the Collector from signing a certificate at any time after the publication has been made. When such a certificate is given according to s. 52A such a certificate will prove conclusively that the publication was made. This certificate proves conclusively the publication on the 29th of June 1908. The liability of the defendants is established when such a publication is proved and the certificate proves that publication.

I think, therefore, the contention of the appellant must prevail and it should be held that the plaintiff has conclusively proved by the production of the certificate that the notification under s. 52 was published on the 29th of June, 1908.

The judgments of the Courts below are set aside and the case is sent back to the Court of first instance for the trial of the suit on the merits. The plaintiff will get the costs of this appeal. Costs of the lower Courts will abide the result.

Z. K. *Appeal decreed*; *Case remanded*.

(1) 13 C. 197; 6 Ind. Dec. (N. s.) 630.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 64 OF 1925.
October 5 & 13, 1925.
Present:—Mr. Hasan, J. C.

S. C. MITRA, LIQUIDATOR BANK OF OUDH LTD., LUCKNOW—(NOW IN LIQUIDATION)—APPLICANT
versus
Thakar NAWAB ALI KHAN AND OTHERS—OPPOSITE PARTY.

Companies Act (VII of 1913), s. 235—Directors of Company, decision of—Imprudent act—Personal liability of Directors, when arises—Personal gain acquired by Director—Refund—Managing Director, duties of—Act inspired by personal motives—Liability.

Directors of a Company acting within their powers and with reasonable care, and honestly in the interests of the Company, are not personally liable for losses which the Company may suffer by reason of their mistakes or errors of judgment. [p. 57, col. 1]

Facts which show imprudence in the exercise of powers conferred upon the Directors of a Company will not subject them to personal responsibility; the imprudence must be so great and manifest as to amount to gross negligence, as for example where the Directors are cognizant of circumstances of such a character, so plain, so manifest, and so simple in operation, that no man with any ordinary degree of prudence acting on his own behalf would have entered into such a transaction as the Directors have entered into. But if the Directors are authorized to do an act in itself imprudent, they are not to be held responsible for the consequences of doing it. [p. 56, col. 2, p. 57, col. 1.]

In respect of duties which, having regard to the exigencies of business and the Articles of Association, may properly be left to some other official, the Directors are, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly. [p. 57, cols. 1 & 2]

The Directors must, however, observe good faith towards their share-holders and towards those who take shares from the Company and become co-adventurers with themselves and others who may join them. The maxim *caveat emptor* has no application to such cases, and Directors who so use their powers as to obtain benefits for themselves at the expense of the share-holders, without informing them of the fact, cannot retain those benefits and must account for them to the Company so that all the share-holders may participate in them. [p. 57, col. 2]

The mere fact that the Directors of a Company carrying on a banking business allow advances to be made on the strength of a promise by the debtor to execute a mortgage instead of the mortgage itself, does not amount to an act of misfeasance on the part of the Directors so as to make them personally liable to the extent of the amount of the advances. [p. 56, col. 2]

Where the Directors of a Bank permit a depositor to make an over-draft and one of the Directors who is a creditor of such depositor receives a portion of the amount represented by the over-draft in payment of the debt due to him by the depositor, such Director cannot be allowed to retain the amount to the detriment of the share-holders and the creditors of the Bank and is liable to refund it to the Bank. [p. 57, col. 2.]

The duties of a Managing Director are of a higher standard than of an ordinary Director, and where by any act of the Managing Director which is inspired by motives of personal gain the Bank suffers loss, the Managing Director is liable to make good such loss [p. 58, col. 1]

[Case-law discussed]

Application under sections 195, 215 and 235 of the Indian Companies Act.

Messrs *S. N. Roy*, *K. P. Misra* and Ch. *Haidar Husain*, for the Applicant.

Mr. *H. K. Ghosh*, for Opposite Parties Nos. 1, 7 and 9.

JUDGMENT.

(*October 5, 1925*)—These proceedings originated in summons issued under s. 235 of the Indian Companies Act, 1913, on an application presented by one Mr. S. C. Mitra, who was appointed liquidator by a resolution of the share-holders dated the 15th September 1923 of the Company called the Bank of Oudh Limited. The array of the respondents to the liquidator's application is as follows:—

1. Thakur Nawab Ali Khan, *taluqdar* of Akbarpur, district Sitapur.
2. Lala Jai Ram Das, merchant, proprietor of Lyallpur Sugar Company.
3. Raja Hukum Tej Protap Singh, Raja of Pratapner.
4. Kunwar Shri Krishna.
5. Lala Jagmohan Lal Rastogi.
6. Kalidas Kapur.
7. Lala Bhola Nath Mehrotra, *rais*.
8. Mr. F. A. Labantik, Engineer.
9. Babu Manohar Lal Gupta.
10. Mr. Jang Bahadur Sinha, merchant.
11. Kunwar Sarup Narain, *zemindar*.

To this were added Mr. C. S. Oehme and Pandit Ramnath Dave under the order of the Court dated the 14th April 1925.

The Company was incorporated on the 25th October 1920 and the Bank was floated sometime in February 1921. The last-mentioned respondent, Pandit Ramnath Dave, was appointed Manager of the Bank by a resolution passed at a meeting of the Board of Directors held on the 6th November 1920. He occupied that position till the date of liquidation. The other respondents were the Directors of the Bank and the respondents Lala Jagmohan Lal and Babu Jang Bahadur Sinha were also Managing Directors. The following table will show at a glance the date on which each of the respondents joined the Board of

Directors and also the date on which he ceased to be a Director.

No.	Name of the Director.	Date of appointment	Date of resignation.
1	Thakur Nawab Ali Khan .. .	19th February 1921	April 1923
2	L Jairam Das	do	Continued till the date of liquidation.
3	Raja Hukam Tej Protap Bahadur Singh	do	April 1922.
4	Kunwar Sri Krishna	19th December 1921	Continued till the date of liquidation
5	Lala Jagmohan Lal	do.	do.
6	Kalidas Kapur	do.	March 1922.
7	Lala Bhola Nath Mehrotra	31st March 1922	16th November 1922.
8	Mr. E. A. Labanti	do	Continued till the date of liquidation.
9	Babu Manohar Lal Gupta	14th October 1922	do.
10	Babu Jang Bahar Sinha .. .	19th February 1921	12th August 1921
	Again	4th October 1922	14th March 1923
11	Kunwar Sarup Narain	5th December 1922	Continued till the date of liquidation.
12	Mr. C. I. S. Oehme	19th February 1921	12th July 1921

Lala Jagmohan Lal held the office of the Managing Director from the 19th December 1921 and continued to hold it till the date of liquidation. Babu Jang Bahadur Sinha was the M .:' .- Director from the 19th February 1921 till the 12th August 1921. The respondent, Raja Hukam Tej Protap Bahadur Singh, died during the pendency of these proceedings and no steps have been taken to bring on the record any of his legal representatives. Service of summons could not be effected, in spite of strenuous efforts, on the respondent, Kunwar Sri Krishna. Mr. Oehme lives for some time past at Rangoon. He has appeared neither personally nor through any Pleader of the Court. I have thought it advisable to conclude these proceedings by treating Raja Hukam Tej Protap Bahadur Singh, Mr. Oehme and K. Srikrishna as no party to the application and have given liberty to the liquidator to take any legal action he may deem fit as against these persons hereafter. It is also necessary to mention that one Babu Peare Lal Bhargava was also a Director of the Bank from the date of its incorporation till about the middle of July 1921 when he died.

The liquidator claims compensation from the respondents for their acts of misfeasance and breach of trust in respect of the following four transactions:—

1. Over-draft without any security allowed to Mr. E. A. Labanti to the extent of Rs. 91,516 between the 4th March 1921 and the 20th September 1921.

2. Over-draft without any security allowed to Mr. E. A. Labanti from the 20th September 1921 to the 7th July 1922 to the extent of Rs. 41,393-15-4.

3. Over-draft without any security allowed to Messrs Labanti and Co., Limited of Lucknow from the 21st October 1921 up to the 12th June 1922 to the extent of Rs. 4,303-5-6.

4. Over-draft without any security allowed to the Upper India Investment Limited (now in liquidation) from the 19th April 1922 up to the 6th February 1923 to the extent of Rs 28,927-5 0.

The ground on which the liquidator seeks to make the respondents personally liable for the sums of money mentioned above together with interest thereon is stated in a somewhat cryptic form in para. 7 of the application. That paragraph is as follows:—

"7. That the transactions detailed in para. 5 of the application are on the face of them so reckless and extravagant in their nature as lead the applicant to infer either fraud or gross and wilful negligence on the part of the persons concerned in the management of the aforesaid Bank and are nothing short of breach of trust on the part of the Directors of the Bank during whose tenure of office the aforesaid transactions were entered upon."

The respondents have generally denied that they are guilty of any act of misfeasance or breach of trust of fraud or gross and wilful negligence. They have also pleaded ignorance of the transactions which form the subject-matter of the charges stated in the liquidator's application and good faith. One of the respondents, Thakur Nawab Ali Khan, has also

put forward bar of limitation to the applicant's claim. Some of the respondents have entered the witness-box and given evidence in relation to the subject-matter of the charges. They are Thakur Nawab Ali Khan, Lala Jagmohan Lal, Babu Bhola Nath Mehrotra, Mr. E. A. Labanti, Babu Manohar Lal Gupta, Babu Jang Bahadur Sinha and Pandit Ramnath Dave.

No material facts are in dispute in these proceedings. The controversy relates to the inferences and the legal consequences which may flow from the admitted or proved facts. It is proved by the books of the Bank in the possession of the liquidator and shown to the respondents at the trial that the over-drafts as stated in the liquidator's application were, as a matter of fact, made and no argument was addressed to me by or on behalf of any one of the respondents, challenging the accuracy of the proof just now mentioned. The exact nature and specific details of these transactions will, however, be stated by me in the course of this judgment.

It will be convenient to take up first the over-draft transaction with Mr. E. A. Labanti. In this connection the earliest document on the record is the copy of a letter dated the 14th July 1921 addressed by Mr. Labanti to the Manager of the Bank. This copy has been accepted by both sides as admissible evidence in the case. I think it necessary to incorporate the whole of that letter in this judgment.

"0142-15-21 14th July 1921.

"*Confidential.*

"The Manager, Bank of Oudh Ltd., Lucknow.

"Dear Sir,

"In continuation of our verbal conversation, we beg to submit this our application for a loan of rupees one and-a-half *lakhs* on the security of our buildings and lands, valued at rupees three *lakhs*, for which a true copy of the valuation certificate is herewith enclosed. We may here also mention that, though our property has been valued at three *lakhs* by Messrs. Lane Brown and Hewlett, Government Valuators, the property is worth very much more.

"The mortgage to be in the first case for one year, or three years. We give below a list of our creditors, with the approximate sums due them, from which it will be seen that you will only have to pay the decreed amount No. 1 on the list, as the remainder item No. 2 to No. 6 will not be paid in cash as they have agreed to deposit their respective amounts with your Bank on a fixed deposit account.

"List of creditors is as follows:-

		Rs.	a.	p.
1.	Decree Mortgage	43,000	0	0
2.	Babu Triloki Nath Bhargava ...	45,000	0	0
3.	Babu Peari Lal Bhargava ...	22,000	0	0
4.	Mr. C. S. Pandya ...	13,000	0	0
5.	Pandit Kandhya Lal...	6,000	0	0
6.	Mr. J. B. Sinha ...	8,000	0	0
	Total Rs. ..	1,37,000	0	0

"There is another mortgage of rupees fifty thousand on our property, which mortgage will fall due on the 13th of November 1921 and which when due will have to be taken over by your Bank, bringing the total amount due to rupees two *lakhs*.

"As the matter is most urgent, we shall thank you for an immediate reply if possible.

"Thanking you in anticipation."

(Exhibit L.).

From the dates given in the liquidator's application and stated by me in an earlier portion of the judgment it will be seen that advances to Mr. Labanti had commenced on the 4th March 1921, that is to say, 4 months 10 days earlier than the letter of the 14th July 1921. The reasonable inference is that the transaction with Mr. Labanti was in course of negotiation before the formal application for the loan above referred to was made by Mr. Labanti. As to when, by whom and in what circumstances the advances prior to the 14th July 1921 were sanctioned the record of the case is absolutely silent. In this state of evidence the only proper conclusion seems to me to be that the advances were permitted in anticipation of the settlement with Mr. Labanti.

It appears from the minute of the proceedings of a meeting of the Board of Directors that a notice was issued on the 29th July 1921 for a Board's meeting to be held on the 30th July 1921. Item No. 3 of that notice was as follows:—

"To dispose of the application of Messrs. Labanti and Co., for an advance of Rs. 1,50,000 by mortgage over his *kothi*." This notice is contained in Ex. 3. On it are endorsed the following remarks relevant to the question under consideration

made by the Director, Babu Jang Bahadur Sinha:—

"If the transaction be considered sound by the co-directors and if the Bank can afford the loan may be sanctioned. This will better the situation of the Bank as 5 per cent. commission will be a substantial earning and will cover the preliminary and other expenses" The proposed meeting did not come off until the 12th August 1921. At this meeting the following gentlemen were present:—

Mr. C. S. Oehme.
Mahant Sant Rain Das.
Raja Pratap Ner.

The resolutions passed at that meeting and which have a bearing on the present case, were as follows:—

"Resolved that the Manager be directed to correspond with Messrs. Ram Chandra Ram Saran to inquire if they are agreeable to take payment of the first mortgage just now and the second one subsequently.

"Resolved that the Manager may take the agent of the mortgagee to the undersigned to discuss the matter." The "undersigned" was Mr. C. Sandford Oehme (Ex. 3). It is agreed that the mortgages mentioned in these resolutions related to Mr. Labanti's property.

The proceedings of the meeting of the Board of Directors dated the 19th December 1921 supply the next relevant matter. At this meeting the following Directors were present:—

Raja Hukum Tej Protap Singh.
Mahant Sant Rain Das.
Thakur Nawab Ali Khan.

Lala Jagmohan Lal was appointed a Director and also a Managing Director of the Bank and the sixth resolution passed at that meeting was—

"Resolved that the undersigned Directors disapprove of the manner in which Messrs. Labanti and Co.'s transaction has been done in utter disregard of the directions laid down in the Board's meeting dated 12th August 1921 but as the money has already been advanced to them a mortgage-deed with sufficient and proper security should be executed by Messrs. Labanti and Co, and the Managing Director be requested to see to its completion." It is agreed that "Messrs. Labanti and Co." is a mistake for Mr. E. A. Labanti (Ex. 3). Having regard to the dates of the over-draft transactions with Mr. Labanti it will be seen that the first series of over-drafts aggregating to Rs. 91,516 had already been completed and a portion of the second had also been perfected before the meeting of the 19th December 1921 was held.

From a perusal of the minutes of an extraordinary general meeting of the shareholders of the Bank (Ex. 4) held on the 3rd October 1922 it appears that a resolution was passed that "a commission be appointed to investigate the affairs of the Bank and report at the next meeting" . . . . The commission consisted of the following gentlemen:—

"J. B. Sinha (Jang Bahadur Sinha).
N. K. Shavaksha.
Mr. Murari Lal Bhargava, and
B. Manohar Lal."

At this meeting the following gentlemen amongst others were present:—

Thakur Nawab Ali Khan.
Mr. E. A. Labanti.
Kunwar Shri Krishna.
B. Bhola Nath Mehrotra.
B. Manohar Lal Gupta.
B. Jang Bahadur Sinha, and
Babu Jagmohan Lal.

On the following day, that is the 4th October 1922, a meeting of the Board of Directors was held. At this meeting a resolution was passed requesting the Managing Director, that is Lala Jagmohan Lal, to afford every facility to the commission in the matter of the investigation of affairs of the Bank. An other resolution passed was "that a suit be at once filed against Mr. E. A. Labanti and P. A. Labanti and Co. for the recovery of the money due to the Bank from them. In this connection the Directors thankfully accept the offer of a temporary advance of the following items from the under-noted Directors with a view to enable the Bank to proceed with the case."

		Rs.
"1.	Thakur Nawab Ali Khan ...	500
2.	Raja Sahab Partapner (*i. e.* Raja Hukum Tej Pratap Bahadur Singh). ...	750
3.	L. Manohar Lal Gupta ...	250
		Rs. 1,500"

Finally the following resolution appears in the proceedings:—"On proposal being put up by L. Manohar Lal Gupta it was resolved that the Managing Director be requested to resign his position in view of the affairs of the Bank and he may

also be requested to refund the salary he has so far received in view of the circumstances of the Company and that he may be retained as a Director to render his assistance to the future administration by his past experience and knowledge of the affairs of the Bank. Lala Jagmohan Lal kindly having consented to the terms of this resolution, it was further resolved to send him a letter of thanks on behalf of the Board for his ready acceptance of the proposal." To my mind the idea underlying this resolution is that as the Bank was fast approaching the state of bankruptcy it was considered advisable to dispense with the services of a Salaried Managing Director.

It was assumed at the hearing, and I think rightly that one of the matters with which the commission was charged was an inquiry into the over-draft advances to Mr. Labanti. It is unfortunate that the record of these proceedings is wholly silent as to the result of the inquiry, if any. The first and the only report of the Directors was published on the 21st June 1922. The report is signed by Kunwar Shri Krishna, Jagmohan Lal and E. A. Labanti as Directors. To this report is also attached "balance-sheet of the Bank of Oudh, Limited, Lucknow as at 31st March 1922." This sheet is again separately signed by the three Directors mentioned above and also by Ramnath Dave, the manager. It also bears the certificate of the auditors. Basant Ram and sons (Ex. A2). The report together with the balance-sheet was intended to be presented at an ordinary general meeting of the share-holders to be held on the 8th July 1922. This proposed meeting was not held, however, until the 19th November 1922. At this meeting amongst others, the following gentlemen were present:—

Mr. E. A. Labanti.
Lala Jagmohan Lal, and
Kanwar Shri Kirshna (Ex. 4).

In relation to the Directors' report the following resolution was passed:— "That the balance-sheet be and is hereby passed and adopted subject to the auditors' report read by the chairman before the meeting." Now in this balance-sheet on the side of the assets are mentioned several debts including the following:

	Rs.	a.	p.
1. Debts considered good in respect of which the Bank has no security other than debtors' personal security ...	1,18,974	10	7
2. Of the above debts due from a Director ...	1,35,133	14	10
3. Bad or doubtful debts...	*Nil.*		

In respect of the second entry the following statement appears in the report:—

"It would be further observed from the balance-sheet before you that a sum of Rs. 1,35,133-14-10 is shown as due from one of the Directors of the Bank. As a matter of fact this sum was advanced to the gentleman long before he was elected as Director which was on the 1st March 1922 (the last day of the period under report) and the sum had to be shown in the balance-sheet to fulfil the requirements of the Indian Companies Act." It is agreed in these proceedings that the second entry in the balance-sheet and the statement in the report relate to the over-draft transactions of Mr. E. A. Labanti.

Now some more facts must be stated in relation to the transactions discussed in the preceding paragraphs. A portion (that is Rs. 48,300) of the first series of the over-drafts was subsequently secured by an assignment to the Bank of a fourth mortgage in respect on the Labanti buildings by the mortgagee Babu Trilokinat Bhargava. This Babu Trilokinath Bhargava is the same gentleman who is mentioned at No. 2 of the list of creditors given in Mr. Labanti's letter of the 14th July 1921 already quoted and it is agreed that the debt shown opposite to his name in the said list was the sum due to him under the mortgage just now mentioned. The mortgage was transferred by the Bank to a firm of the name of Baldeo Das Balgobind in satisfaction of a claim arising out of a deposit standing in the books of the Bank in favour of the firm. The entry dated the 9th July 1922 shows that there was a credit balance for a sum of Rs. 32,890 in favour of the firm. It also appears from the evidence of Lala Jagmohan Lal that one Pandit Achuta Ram, the treasurer of the Bank, had deposited a sum of Rs. 15,000 with the Bank as security for the discharge of the duties of the office which he held. When Achuta Ram resigned his appointment he asked the Bank for the return of his security deposit. The Bank was unable to do so. To settle this transaction the firm gave a hand-note

to Achuta Ram for Rs. 15,000 and the Bank set off that amount as against the price of the mortgage In other words the Bank sold the mortgage to the firm for the credit balance of the 19th July 1922 and this amount of Rs. 15,000. The result was that the balance due to the Bank from Mr. E. A. Labanti in respect of the first series of the over-draft was Rs. 91,516 minus Rs. 48,300, that is Rs. 48,216 A suit for the recovery of this balance was instituted by the Bank in the Court of the Subordinate Judge of Lucknow against Mr. E. A. Labanti and a decree was obtained for Rs.48,000 odd. Several attempts in execution of the decree were made to realize the amount due thereunder but all have failed and no action has been taken in respect of the second series of the over-drafts. Finally on the 14th July 1925 during the pendency of these proceedings Mr. E. A. Labanti applied to the Court of the District Judge of Lucknow for a declaration of his insolvency.

One word as to the nature of the advances made by the Bank to Mr. Labanti. Out of the total sum of the two series of the over-drafts, Rs. 41,393-15-4 was paid by the Bank to Mr. E. A. Labanti personally and to persons holding cheques drawn by him. The figure just now mentioned also includes interest on those advances. This is proved by the entries in the books of the Bank now in the possession of the liquidator. An abstract of those books has been prepared and filed in these proceedings. The rest of the money covered by the over-drafts was dealt with in the following manner :—Mr. E. A. Labanti's creditors absolved him from liability for their claims and in lieu thereof accepted from the Bank fixed deposit receipts for the sums of money due to them from Mr. Labanti Amongst these creditors were Babu Jang Bahadur Sinha and Babu Peare Lal Bhargava (now deceased). Both of them were Directors of the Company. They are both mentioned in the list of creditors as given in Mr. Labanti's letter dated the 14th July 1921. It is agreed that these two gentlemen received fixed deposit receipts from the Bank for Rs. 7,630 and Rs. 21,227-10-9 respectively. The receipts for the debts of Babu Peare Lal Bhargava were issued in the names of his son, brother and nephew. Babu Jang Bahadur Sinha realised in cash from the Bank Rs. 2,370-7-6 on the 2nd May 1922, Rs 2,439-13 3 on the 17th November 1922 and Rs.3,034-0-6 on the 7th January.1922 on his fixed deposit receipts as they fell due.

As to the mortgage security offered by Mr. Labanti in his letter of the 14th July 1921 it is enough to say that no mortgage was ever executed. It appears from the evidence that at an early stage of the transaction a draft of the proposed deed of mortgage was prepared and even a stamp of the requisite value was purchased. Mr. Labanti says that the mortgage-deed was not executed for the reason that the Bank had no funds large enough to fulfil the the agreement for the loan of Rs. 1,50,000. On the other hand, Ramnath Dave says that Mr. Labanti refused to execute the promised mortgage. In this conflict of evidence I am prepared to accept the statement of Ramnath Dave as more reliable because it is consistent with admitted facts and probabilities of the case. It appears from the proceedings of the meetings of the Board of Directors, to which reference has already been made, that the Board was always anxious to complete the mortgage transaction and I see no reason whatsoever why the Directors should have refused to get it through for the sums that they had already advanced to Mr. Labanti even if they had no money to make up the total of Rs. 1,50,000. Mr. Labanti has filed certain documents showing that he called upon the Bank to complete the loan of Rs. 1,50,000 and to have the mortgage executed. I prefer to take the view that after having received nearly all which the Bank had promised to advance, Mr. Labanti invented excuses to extricate himself from the performance of his part of the transaction.

At the conclusion of the proceedings before me Mr. Labanti personally and also through his Counsel, Mr. K. P. Misra, agreed that an order of payment of the sum of Rs. 76,593-15-4 due from him to the Bank may be made against Mr. Labanti in these proceedings. This concludes the narrative of the events so far as the charge founded on the over-draft transactions of Mr. Labanti is concerned.

Now I come to the charge of the over-draft of Rs. 23,927-5 allowed to the Upper India Investment Limited (now under liquidation) between the 9th April 1922 and the 6th February 1923. The Managing Director of the Investment Company was Kunwar Shri Krishna. The money covered by the over-draft was paid in cash under cheques issued by Kunwar Shri Krishna and as we have seen before he was also

one of the Directors of the Bank from the 19th December 1921 to the 15th September 1923. The overdraft was, therefore, made while Kunwar Shri Krishna was the Director of the Bank and the Managing Director of the Investment Company. It also appears from the evidence that Jagmohan Lal's brother, Balgobind, was one of the Directors of the Upper India Investment Limited. This Balgobind was one of the partners of the firm Baldeo Das and Balgobind, whose dealing with the Bank has already been mentioned in this judgment. Baldeo Das is the father of Lala Jagmohan Lal. In his evidence in these proceedings Lala Jagmohan Lal says that the firm is owned by Balgobind alone and that he has no interest in that firm. It would be a severe strain on my credulity if I were to accept the truth of Lala Jagmohan Lal's version of his relationship with the firm. He admits that his father, brother and he constitute a joint Hindu family: they all live in one and the same house and mess together. He also admits that there has been no partition. My finding, therefore, is that he is a partner in the firm of Baldeo Das and Balgobind.

The third charge relates to the overdraft of Rs. 4,303-5-6 allowed to Messrs. Labanti & Co., Limited. On the statement of Mr. E. A. Labanti in the witness-box it is quite clear to me that the loan advanced by the Bank to Messrs. Labanti & Co., was settled by a cheque issued by Mr Labanti on his separate account with the Bank and the subsequent entry in the books of the Bank as against Messrs. Labanti & Co., was due to the mistake that some cheques issued by Mr. Labanti on his personal account were thrown into the account of the Company. At the hearing no argument was addressed to me as regards this overdraft. This charge, therefore, fails altogether.

I now proceed to record my conclusions of facts as regards the two charges of overdrafts allowed to Mr. E. A. Labanti discussed in the preceding portions of this judgment. Mr. Labanti's letter dated the 14th July 1921 clearly contained an offer of a mortgage of the Labanti buildings in consideration of a loan of Rs. 1,50,000 to be advanced by the Bank. Though there is no clear record of a formal acceptance of the said offer by the Bank but from the conduct of the parties concerned it is amply manifest to me that the offer was accepted by the Board of Directors as a whole. Thus there was a complete contract between Mr. Labanti and the Directors of the Bank in respect of the transaction of the loan of Rs. 1,50,000 by the Bank to Mr. Labanti in consideration of Mr. Labanti giving a mortgage of the Labanti buildings as a security for the loan. All the Directors of the Bank at the time when Mr. Labanti opened the negotiations were a party to this contract. Indeed the advances were made to Mr. Labanti even previous to the offer and I hold that they were made with the consent of all the Directors then on the Board in anticipation of the contract. I further hold that all the subsequent advances which constitute the two series of over-drafts under consideration were made within the knowledge of the Board of Directors as it stood from time to time and the contract mentioned above was accepted by the Board as sufficient security for the advances. The Directors were all along confident, and they had no reason to be otherwise, that Mr. Labanti would perform his part of the contract by executing the promised mortgage. The confidence thus reposed was abused and the mortgage was never executed. The substance of the charge against the Directors is, therefore, this that they allowed the advances to be made to Mr. Labanti on the strength of his promise to execute the mortgage instead of the mortgage itself.

The Bank Company was formed and formally incorporated without any Articles of Association. Thus there were no limitations to and restrictions on the powers of the Directors beyond what may arise out of their duties imposed generally by the law applicable to the case. It follows that lending money on the security of the contract mentioned above was not *ultra vires* of the Directors. It is quite clear that if Mr. Labanti had executed the mortgage which he had offered to do the present application could never have been filed.

The foregoing conclusions and observations naturally lead to the consideration of the law applicable to the subject in hand. It appears to me to be settled law that Facts which show imprudence in the exercise of powers conferred upon Directors will not subject them to personal responsibility, the imprudence must be so great and manifest as to amount to *crassa negligentia*, as for example, if they were cognizant of circumstances of such a character, so plain,

so manifest, and so simple in operation, that no men with any ordinary degree of prudence acting on their own behalf, would have entered into such a transaction as they entered into. But if they are authorised to do an act in itself imprudent, they are not to be held responsible for the consequences of doing it. Nor are they liable for mere errors of judgment." This is a quotation from the Law of Banking by Heber Hart. Reference is made therein to *Overend Gurney & Co.* v. *Gibb* (1), *Hunt's case* (2) and *London Financial Association* v. *Kelk* (3). I have read the reports of these cases and have found that they fully support the view expressed in the quotation given above. The principle was again stated by Lindley, M. R. in the case of *Lagunas Nitrate Company* v. *Lagunas Syndicate* (4) in these words:

"The third principle is that the Directors of a Company acting within their powers, and with reasonable care, and honestly in the interest of the Company, are not personally liable for losses which the Company may suffer by reason of their mistakes or errors of judgment". In the recent case of *In re City Equitable Fire Insurance Company Limited* (5), Romer, J., in an exhaustive judgment if I may respectfully say so, expounded the law bearing on the subject under consideration. It will be sufficient to quote from the head-note of the report:

"In discharging those duties a Director (*a*) must act honestly, and (*b*) must exercise such degree of skill and diligence as would amount to the reasonable care which an ordinary man might be expected to take, n the circumstances, on his own behalf. But, (*c*) he need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience, in other words, he is not liable for mere errors of judgment; (*d*) he is not bound to give continuous attention to the affairs of his Company; his duties are of an intermittent nature to be performed at periodical Board meetings, and at meetings of any committee to which he is appointed, and though not bound to attend all such meetings he ought to attend them when reasonably able to do so; and (*e*) in respect of all duties which having regard to the exigencies of business and the Articles of Association, may properly be left to some other official, he is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly."

By applying the law enunciated in the preceding paragraph to the conclusions of fact already stated I must hold that the liquidator's application in respect of the charges in the matter of over-drafts to Mr. Labanti fails as against the Directors as a body.

There is, however, one aspect of the case arising out of the charge in relation to the over-drafts mentioned above which requires special consideration, we have seen that amongst the creditors of Mr. Labanti who accepted fixed deposit receipts from the Bank in lieu of their claims against him was Mr. Jang Bahadur Sinha. It is admitted that on the dates on which he accepted those receipts he was one of the Directors of the Company. It is also admitted that he cashed three of those receipts out of the funds of the Bank. The aggregate amount of the money which he thus received was the sum of Rs. 7,844-5-3. Obviously he cannot be allowed to retain this money to the detriment of the share-holders and the creditors of the Company. In *Alexander* v. *Automatic Telephone Company* (6), Lindley, M R. said:—

"The Court of Chancery has always exacted from Directors the observance of good faith towards their share-holders and towards those who take shares from the Company and become co-adventurers with themselves and others who may join them. The maxim "*caveat emptor*" has no application to such cases and Directors who so use their powers as to obtain benefits for themselves at the expense of the share-holders, without informing them of the fact, cannot retain those benefits and must account for them to the Company, so that all the share-holders may participate in them. *Gilbert's case* (7) is only one of many instances illustrating this principle."

Mr. Jang Bahadur Sinha has argued that he was not a Director of the Company when he cashed two of the three fixed deposit receipts on the 7th January 1922 and the 2nd May 1922 and consequently he is not liable for the sums received by him on those

(1) (1872) 5 E. & A. App. Cas 480; 42 L. J. Ch. 67.
(2) (1868) 37 L. J. Ch. 278; 16 W. R. 472.
(3) (1884) 26 Ch. D. 107, 53 L. J. Ch. 1025; 50 L. T. 492.
(4) (1899) 2 Ch. 392, at p 422 68 L. J. Ch. 699; 48 W. R. 74; 81 L. T. 334; 15 T. L. R. 436.
(5) (1925) 1 Ch. 407.
(6) (1900) 2 Ch. 56, 69 L. J. Ch. 428, 48 W. R. 546; 82 L. T. 400; 16 T. L. R 339.
(7) (1870) 5 Ch. 559; 18 W. R. 938.

two dates. But he was a Director from the beginning up to the 12th August 1921 when he was also a Managing Director. He was again a Director from the 4th October 1922 to the 14th March 1923. He thus stood in a fiduciary relationship to the Bank when he took the fixed deposit receipts from the Bank. The fact that he was not a Director on the 7th January 1922 and the 2nd May 1922 did not relieve him of the obligations which arose out of his fiduciary relationship with the Company. The trust continued—see the observations of Lord Chancellor Eldon in the case of *James Ex parte* (8). Mr. Jang Bahadur Sinha must, therefore, pay back the sum of Rs.7,844-5-3 to the liquidator.

It now remains to dispose of the charge relating to the over-draft allowed to the Upper India Investment Limited. The question of this over-draft does not seem to have been ever placed before the meeting of the Director. There is no trace of it in any record of the Company. The books of the Bank merely show that such an over-draft was made. Knowledge of it is not brought home to the Directors as a body. On the principles already stated, I cannot hold them personally liable for this over-draft transaction.

The case as against Lala Jagmohan Lal, however, in relation to this charge stands on a different footing. We have seen that Lala Jagmohan Lal was the Managing Director of the Bank during the whole of the period when the over-draft was allowed. His duties were, therefore, of a higher standard than of an ordinary Director. There is a circumstance in this case which induces me to hold that Lala Jagmohan Lal was guilty of breach of trust in the matter of this over-draft. In allowing it he was clearly impelled by motives of personal gain. That circumstance, as already adverted to, is that his brother, Balgobind, with whom, according to my finding Lala Jagmohan Lal is joint in business, was one of the Directors of the Upper India Investment. Lala Jagmohan Lal allowed, in my opinion, this over-draft to be made to the Upper India Investment for the reason that his brother was a Director of that Company and dishonestly concealed the transaction from the Directors of the Bank. I entirely reject his evidence that he had no knowledge of the transaction. I, therefore, hold that Lala Jagmohan Lal is liable to compensate the Bank for the loss which the Bank has suffered in consequence of this over-draft.

(8) (1803) 7 R. R. 56 at p. 67; 8 Ves. Jun. 337; 32 E. R. 385.

The plea of limitation was raised by Thakur Nawab Ali Khan. The liquidator's application as against Thakur Nawab Ali Khan has been rejected by me on merits. It is, therefore not, necessary to decide the plea of limitation.

The result is that on the agreement of the parties I order that Mr. L. A. Labanti shall pay the sum of Rs. 76,593-15-4 with interest at 6 per cent. per annum from this date till the date of payment to the liquidator. I also order Mr. Jang Bahadur Sinha to pay to the liquidator the sum of Rs. 7,844-5-3 with interest at 6 per cent. per annum from this date till the date of payment and also proportionate costs. I further order that Lala Jagmohan Lal shall pay to the liquidator the sum of Rs. 28,927-5-0 with interest at 6 per cent. per annum from this date till the date of payment and also proportionate costs.

(October 13, 1925).—In the interests of justice and with the consent of Mr. Roy, Pleader for the liquidator, I direct that the payments under this decree shall first be made in Court and the liquidator shall be entitled to recover them on furnishing security to the satisfaction of the Court. This direction shall be incorporated in the decree.

Z. K. *Application allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 178-B OF 1924.

July 11, 1925.

Present:—Mr. Findlay, Officiating J. C.

VITHOBA—PLAINTIFF—APPELLANT

versus

SADASHEO—DEFENDANT—RESPONDENT.

Construction of Statute—Principles applicable—C. P. Tenancy Act (XI of 1898), s 47—"Held land continuously," meaning of—Forcible dispossession of tenant by landlord—No acquiescence by tenant—Tenancy whether determined

It is an elementary principle of interpretation that the plain intention of the Legislature as expressed by the language employed is to be accepted and given effect to [p 59, col 2.]

If the language admits of more than one construction, the meaning is to be sought not in the wide sea of speculation and surmise but from such conjectures as are drawn from the words alone or something contained in them [*ibid.*]

Rerigate Rural District Council v. *Sutton District Water Co.*, (1908) 99 L. T. 168; 72 J. P. 301; 6 L. G. R. 936, followed.

The words "held land continuously" as used in s. 47 of the C. P. Tenancy Act of 1898 imply "held as a tenant," but not necessarily "occupied or cultivated." The requirement of s. 47 is not actual continuous possession as a matter of fact but continuously holding as a tenant. [p. 60, col. 1.]

If a tenant is ejected under a decree of a Court, there is a lawful ejectment and clear break in the tenancy, but the mere fact of a forcible or unlawful ejectment does not necessarily break the tenancy although the tenant may have been temporarily out of possession. [*ibid.*]

The mere ejectment of a tenant does not necessarily determine his tenancy which can only be ended in certain express ways, such as those enunciated in s. 111 of the Transfer of Property Act. [p. 60, col 2.]

Rudrappa v. *Narsingrao*, 29 B. 213; 7 Bom L. R. 12 and *Sofaoll Khan* v. *Woopean Khan*, 9 W. R. 123, followed.

A forcible ejectment of a tenant by the landlord cannot determine the tenancy unless there has been a subsequent acquiescence in the ejectment on the part of the tenant. [p. 60, col. 1.]

Appeal against a decree of the Additional District Judge, Amroati, dated the 17th March 1924, in Civil Appeal No. 145 of 1923.

Sir *H. S. Gour*, for the Appellant.

Sir *B. K. Bose* and Mr. *M. R. Bobde*, for the Respondent.

JUDGMENT.—The plaintiff-appellant Vithoba came to Court alleging that he was a tenant of five fields in *Mouza* Inzasan (Yeotmal), from which he had been illegally ejected by his landlord (defendant No. 1), the *Izardar* of the village. He claimed that under s. 47 of the Berar Alienated Villages Tenancy Law, 1921, he was a permanent tenant and consequently came to Court praying for a declaration to this effect and for a decree putting him in possession.

The first Court held that the suit was not maintainable, the plaintiff having been put out of possession on the 1st of January 1922 when the said law came into force. The lower Appellate Court also dismissed the present appellant's appeal on the view—a perfectly correct one that s. 74 could not apply to the case as the ejectment had taken place before the law in question came into force. Similarly, from the other points of view the Additional District Judge held that as the plaintiff was not a tenant at the commencement of the law within the meaning of s. 47 (1), his suit was bound to fail.

The question involved in this second appeal is not free from difficulty. There can be no doubt but that if the view taken by the two lower Courts be correct, a most anomalous state of matters would arise. The appeal, I may say, has been argued practically on the basis that the surrender has not been proved and that there was, in fact, an improper ejectment by the landlord about the 25th of May 1921. Even so, the contention offered on behalf of the respondents (defendants) has been that for the plaintiff to be declared a permanent tenant under s. 47 two conditions have to be fulfilled, *viz.*,

(1) that he was holding the land when the law came into force on the 1st of January 1922, and

(2) that his possession went back to before the 1st of June 1895.

Admittedly, the second condition has been fulfilled, but the case for the respondents has been that as the plaintiff was ejected on the 25th of May 1921, he cannot be said to have been holding the land on the date the Berar Alienated Tenancy Law of 1921 came into force.

As pointed out above, a curious and anomalous state of matters would arise if the respondents' contention in this case were correct. There can be little doubt, in my opinion, but that the intention of the framers of this piece of legislation was to protect precisely such cases as the present one. The law, no doubt, went further than that, because s. 75 provided even for the re-instatement of a tenant who had been ejected on or after the 1st of January 1916 under a decree or order of a Civil Court. It would be curious indeed if the intention of the Legislature had been to interfere even in the latter case but to refrain from interfering in the case of an illegal ejectment by the landlord himself on the date prior to the law coming into force but after the first day of January 1916. Whatever the intention of the Legislature may have been, however, in this connection the question I have to decide is whether on a reasonable construction of s. 47 the plaintiff can fall thereunder. It is an elementary principle of interpretation that the plain intention of the Legislature as expressed by the language employed is to be accepted and given effect to. If it admits of more than one construction the meaning is to be sought not in the wide sea of speculation and surmise but from such conjectures as are drawn from the words alone or something contained in them: *Rerigate Rural District Council* v. *Sutton District Water Co.* (1).

(1) (1908) 99 L. T. 168; 72 J. P. 301; 6 L. G. R. 956.

Turning to s. 47, the phraseology at once strikes one as significant, the essential words used being: "A tenant, . . . who, at the commencement of this law, has either by himself . held land continuously from a date previous to the first day of June 1895,". The decision of this appeal really depends on the construction to be put on the words "has held land". It is significant that the terminology employed is not occupied or cultivated: *cf.*' in this connection ss. 8, 9 and 11 of the Agra Tenancy Act, and *cf.* Agarwala's Agra Tenancy Act at page 63 ' The phrase, to my mind, used in the Act seems to imply "has held as a tenant but is not necessarily occupying or cultivating." As I read s. 47, the requirement thereof is not actual continuous possession as a matter of fact, but continuously holding as a tenant. If a tenant is ejected under a decree of a Civil Court, there is a lawful ejectment and a clear break in the tenancy. But on the other hand, the mere fact of a forcible or unlawful ejectment does not necessarily break the tenancy although the tenant may have been temporarily out of possession.

Of course, if there were evidence that the tenant had acquiesced in his ejectment or had failed to take steps to recover possession, then there would have been on his part an acquiescence in the ejectment. In the present case this cannot be predicated of the present plaintiff-appellant because it is clear from the evidence: *cf.* Ex. P-7, P-8 and P-9, that he had presumably in good faith, initially pursued a wrong remedy by application to the Revenue Officer under s. 74 (1), which clearly did not apply in the circumstances of the case. The application to the Revenue Officer was only finally disposed of on the 23rd of July 1923 and meanwhile the plaintiff had filed the present suit on the 4th of April 1923. There is not the slightest ground, therefore, for holding that there was any acquiescence on the part of the tenant in his ejectment. I may say that there had been, in fact, two applications to the Revenue Officers; the first on 22nd November 1921 (*cf.* Ex. P-8) which was rejected on the 1st of June 1922 while the final application to the Special Revenue Officer was dismissed, as already said, on the 23rd of July 1923 (*cf.* P-9).

Looking at the question more generally, I am unable to see that, in the circumstances of the present case, the tenancy can be said to have terminated. The mere ejectment of a tenant does not necessarily determine his tenancy which can only be ended in certain express ways: *cf.*, in this connection s. 111 of the Transfer of Property Act, and *cf.*, also *Rudrappa* v. *Narsingrao* (2) and *Sofaoll Khan* v. *Woopean Khan* (3). The surrender in this case has not been proved and the fact that there was a forcible ejectment has practically been admitted. In such circumstances the landlord was guilty of trespass and such an act could not, in my opinion, determine the tenancy, unless there was any evidence of subsequent acquiescence therein on the part of the plaintiff. In the present case, as I have shown, all the evidence is that the plaintiff has been having vigorous recourse to any and every relief which was, in his opinin, open to him. The present suit was filed within two years of the ejectment (*cf.* s. 76 of the Law) and it was, therefore, within time. My reading of s. 47, sub-s. (1), therefore, is that the words "held land continuously" have been deliberately used as opposed to "cultivated or possessed" with the express intention that the section would still cover a case like the present, where there has been an illegal disturbance of possession, in which the tenant has not acquiesced. I am unable to see that the forcible dispossession, which occurred, necessarily determined the tenancy being in existence, I find that the plaintiff appellant is entitled to be declared a permanent tenant of the fields in suit.

The judgment and decree of the lower Appellate Court is, therefore, reversed and in its place a decree will issue declaring the plaintiff-appellant to be a permanent tenant of the fields in suit and ordering him to be put in possession thereof. The defendants-respondents will bear the plaintiff-appellant's costs as well as their own in all three Courts.

N. H. *Decree reversed.*

(2) 29 B. 213; 7 Bom. L. R 12
(3) 9 W. R 123.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 543 AND 1067 OF 1922.

March 24, 1925.

Present:—Mr. Justice Phillips.

IN S. A. No. 543 OF 1922.

BANJOISI NARASAMMA—DEFENDANT—APPELLANT

versus

BANJOISI SARASAMMAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 97, 98, 103—Specific Relief Act (I of 1877), s 9—Decree for possession—Execution of decree—Obstruction—Order removing obstruction—Suit to set aside order—Limitation—Partition suit—Practice—Shares of all parties, determination of, whether necessary

There is nothing in r 97 of O XXI of the C P C which prevents its being applicable to a decree for possession passed under s 9 of the Specific Relief Act. Such a decree does not purport to decide any question of title but it declares the plaintiff's possessory right and is a conclusive determination of that right. Where, therefore, obstruction is offered to the delivery of possession in execution of such a decree, an order removing the obstruction falls within the purview of r 98 of O. XXI, and is conclusive unless set aside in a suit brought in accordance with the provisions of r 103 of O XXI [p 61, col 2; p. 62, col. 1]

Obiter dictum—For the application of r. 97 of O XXI of the C P C. it is not necessary that the person making the obstruction should be physically present at the spot [p 62, col 1]

Ordinarily in partition suits it is the practice to declare the shares of all the parties to the suit and to give a decree accordingly. This is to avoid multiplicity of litigation, and that is the reason why all the sharers have to be made parties in such suits It is not, however, incumbent upon the Court in all circumstances to give a decree in favour of all the co-sharers in a partition suit [*ibid*]

Where in a partition suit the plaintiff's claim to a specific share in the property in dispute is negatived, and there is no issue for determination of the shares of the defendants *inter se*, the shares of the defendants *inter se* should not be determined in the suit [p. 62, col. 2.]

Second appeal against a decree of the District Court, Bellary, in A. S. No. 94 of 1921, preferred against that of the Court of the District Munsif, Bellary, in O. S. No. 159 of 1920.

Messrs. *S. Doraswamy Iyer* and *A. Raghunatha Rao*, for the Appellant.

Mr. *B. Somayya*, for the Respondents.

JUDGMENT.

IN S. A. No. 1067 OF 1922.

The plaintiff and defendants Nos. 1 and 2 are sisters, and plaintiff brings this suit to recover her one-third share in the suit house which has been found to belong originally to plaintiff's father. In 1918 the 1st defendant who appears to have been in possession of the suit house brought a suit under s. 9 of the Specific Relief Act against her sister the 2nd defendant. In executing the decree she obtained, obstruction was caused and she came into Court with an application under O. XXI, r. 97, C. P. C. in which the plaintiff and her alleged tenant were counter-petitioners. An enquiry was held and finally an order was passed in E. A. No. 599 of 1918 which runs as follows :—

"The obstructor did not intervene in that suit. Now she has been evidently set up by her defeated sister. Remove obstruction and deliver." The obstructor can only refer to the plaintiff, the second counter-petitioner, and by the use of the word "obstructor" the District Munsif must be deemed to have found that she was the person who caused obstruction, otherwise the word would be meaningless. It would appear, therefore, from his order that he held that the plaintiff caused obstruction and he passed an order which would appear to be under O. XXI, r. 98. As the plaintiff has failed to bring her suit within one year from the date of that order, the lower Appellate Court has dismissed it as barred by limitation.

In appeal it is urged that the order directing removal of obstruction was not passed, under O. XXI, r. 98 because the plaintiff did not actually obstruct but obstructed through her tenant who was the first counter-petitioner in the application. There is no evidence to support the contention. I think in the face of the order defining the plaintiff as the obstructor, it is unnecessary to consider that question here.

It was then contended that the order could not have been passed under O. XXI, r. 98 because the decree passed under s. 9 of the Specific Relief Act is not a decree for possession within the meaning of r. 97. Reliance is placed upon an old case *Gobind Chunder Bagdee* v. *Gobind Ghose Mundul* (1) but that case was not one under the Specific Relief Act nor under the present C. P. C. I can see nothing in the rule (r. 97) which prevents its being applicable to a decree for possession under the Specific Relief Act. That decree for possession undoubtedly declared the plaintiff's possessory right. It did not purport to decide the title, but it confirmed the lesser right in the plaintiff and it was a conclusive determination of that right. I see no reason why O. XXI, should not be applied in this case. Conse-

(1) 7 W. R. 171.

quently it must be held that the order of the District Munsif was passed under r. 98 and, therefore, the plaintiff's present suit is barred by limitation.

There are observations in *Mancharam* v. *Fakirchand* (2) and in *T. C. Bose* v. *R. O. Chowdury* (3) which go to show that the person obstructing under O. XXI, r. 97 must be physically present on the spot. In neither of the cases was this observation necessary for the determination of the suit, and in one case there was a conflict of opinion. Reading O. XXI, rr. 97 and 98, etc., we find no reference to the present obstructor, but only reference to the person obstructing or resisting execution. With all respect, therefore, if those two cases intended to lay down that O. XXI, r. 97 is inapplicable to a case in which the obstructor was not actually present, I think it goes too far but, in view of the finding in this case that the plaintiff did obstruct, it is not really necessary to determine the question.

The plaintiff's appeal (S. A. No. 1067 of 1922), therefore fails and is dismissed with costs of the first defendant.

T. C. Bose v. *O. R. Chowdury* (3).

IN S. A. No. 543 OF 1922.

The first defendant also filed an appeal against the portion of the decree which declares that the second defendant is entitled to one-third share in the suit property. Ordinarily in partition suits, it is the practice to declare the shares of all the parties to the suit and to give a decree accordingly. This is to avoid multiplicity of litigation and that is the reason why all the sharers have to be made parties in such suits, but I do not think that it is laid anywhere that in all circumstances must a decree be given in favour of all the co-sharers. *Ashidbhai* v. *Abdulla* (4) is a clear authority to the contrary; but reliance is placed on a decision of this Court in Second Appeal No. 1493 of 1920. The point was not really considered in that case but the suit was remanded for fresh disposal on the ground that the parties to the suit were entitled to obtain their shares although they were not members of a joint Hindu family. The question whether the circumstances must justify a refusal of such relief to the defendant was not considered at all. In the present case the plaintiff's claim to one-third share has been dismissed and apparently there are now only two other sharers entitled to the property and it is not clear what the respective shares are. The second defendant in filing a written statement only claimed one-third share on the assumption that one-third of the property would be allotted to the plaintiff. That not having been done, the right of the other two sharers may be altered. I think therefore that there should be no decision of this question in this suit because the question has not been put in issue and there has been no determination of the share of the two remaining sisters. I would, therefore, allow the appeal and set aside that portion of the decree leaving the second defendant to establish her right by a fresh suit if so desired.

In the circumstances I make no order as to costs in this appeal (Second Appeal No. 543 of 1922).

V. N. V. *Appeal allowed.*
Z. K.

(2) 25 B. 478; 3 Bom. L. R 58
(3) 82 Ind. Cas 865; (1924) A. I. R. (R.) 261; 3 Bur. L. J. 71.
(4) 31 B. 271; 8 Bom. L. R. 758.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 2 OF 1925.
October 2, 1925.
Present:—Mr. Hallifax, A. J. C.
SHEOSAHAI—PLAINTIFF—APPELLANT
versus
RAMKRISHNA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Partition—Reference to arbitration—Parties, joint possession of—Prayer for leaving out portion of property, effect of—C. P Tenancy Act (I of 1920), ss 2 (11), 4, Sch. II, Art. 1—Absolute occupancy tenant—Suit for possession—Limitation.

A reference to arbitration for partition of property amounts to letting in of all parties to joint possession of the property to be partitioned.

A pleading in a reference to arbitration for partition that a certain part of the property must, because of a previous decision or for any other reason, be allotted to one share or the other, or must be left out of consideration in the division, can scarcely be called a withdrawal of that part of the property from the scope of the arbitration. At the most it is an attempt to withdraw that property from the scope of the arbitration, that is to say, an admission that it is included in it.

Obiter.—Section 2 (11) and s. 4 of the C. P. Tenancy Act of 1920 make it clear that the word "tenant" in Art. 1 of Sch. II does include an absolute occupancy tenant and the limitation for a suit by such a tenant for possession of his holding is two years and not twelve years from the date of such dispossession or exclusion from possession.

Appeal against a decree of the Additional District Judge, Bilaspur, dated the 25th September 1924, in Civil Appeal No. 105 of 1924.

Mr. *M. R. Bobde*, for the Appellant.

Mr. *G. R. Deo*, for the Respondents.

JUDGMENT.—It has been held proved in the lower Appellate Court that Shioshankar joined in referring the dispute in regard to the division of the family property to the *Mahasabha* in 1921. That was a letting in of the plaintiff Shiosahai to joint possession of all the property to be divided, which joint possession continued at least till the delegates of the *Mahasabha* made their award on the 3rd of February 1922.

The award has been held to be invalid for various reasons, but that does not matter. While the arbitrators were deliberating with the consent of Shioshankar about what portion of certain property was to be allotted to Shiosahai and what was not, Shiosahai cannot be said to have been excluded from possession of any part of that property, because Shioshankar was admitting all along that that part of it might be allotted to him. As the award was given on the 3rd of February 1922 and Shiosahai filed his suit on the 1st of September 1923 well within two years, it cannot be held barred by time under Art. 1 of Sch. II of the Tenancy Act, 1920, unless the particular piece of property in dispute, the absolute occupancy holding, can be shown to have been excluded from the property with which the delegates of the *Mahasabha* had to deal.

The only evidence of its exclusion, which it was for the plaintiffs to prove, is to be found in a written pleading put in by Shioshankar before the arbitrators on the 30th of May 1921 in which he urged that the matter of these fields and of some mango trees and a certain house had already been decided (*tasfiya ho chuka hai*), though the matter of certain other fields had not. A pleading in a partition suit that, a certain part of the property must, because of a previous decision or for any other reason, be allotted to one share or the other, or must be left out of consideration in the division, can scarcely be called a withdrawal of that part of the property from the scope of the suit. At the most it is an attempt to withdraw that property from the scope of the suit, that is to say, an admission that it is included in it.

It is further pleaded that the suit is within time for the reason that the word *tenant* in Art 1 of Sch. II of the Tenancy Act, 1920 does not include an absolute occupancy tenant, and that the limitation for a suit by such a tenant for possession of his holding is twelve years. In view of the ruling in *Ragho* v. *Sadoo* (1) which on all points except that of limitation is confirmed by the Tenancy Act of 1920, I am strongly inclined to the opinion that it was the intention of the Legislature to make the limitation for a suit by an absolute occupancy tenant twelve years. But it is beyond doubt that if that intention existed it has not been expressed in the Act. Section 2 (11) and s. 4 of that Act make it clear that the word *tenant* in Art. 1 of Sch. II does include an absolute occupancy tenant. The question does not, however, arise, as the suit was brought within two years of the exclusion from possession.

The decree of the lower Appellate Court must be set aside and that of the first Court restored. That, however, would entail the making of a fresh division of these fields, which was done in 1922. The parties have agreed, therefore, that that partition of 1922 shall hold good and each party shall take the half then allotted to it. The decree will accordingly order that the defendants are to hand over to the plaintiff the half of the fields in dispute that was allotted to his share in 1922, in the arbitration that began in 1921. All the plaintiff's costs in all three Courts will be paid by the defendants. The Pleader's fee in this Court will be fifty rupees. *Decree set aside.*

N. H.

(1) 5 Ind. Cas. 428; 6 N. L R. 6

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEALS NOS. 86 AND 494 OF 1922.

March 27, 1925.

Present :—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

NAUNIHAL SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

ALICE GEORGINA SKINNER AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 134, 140, 148—Adverse possession during tenure of life-tenant

—Remainderman, whether affected—Mortgage—Transfer by mortgagee—Redemption suit by remainderman —Limitation.

Article 134 of Sch. I to the Limitation Act deals with transfers of property which has been mortgaged. The Article does not specifically require that the property should have been mortgaged with possession The suits referred to in the Article being, however, suits for possession, it must be assumed that when such a suit is brought the defendant transferee is in possession Therefore, the transfer which he has taken must have been one which placed him in possession and consequently where the transferor is a mortgagee he must have been in possession of the mortgaged property at the time he made the transfer It is not, however, necessary that the possession which the transferor had at the time of the transfer must have been acquired under the mortgage originally made in his favour Even if the mortgage was a simple mortgage and the mortgagee subsequently gets possession of the mortgaged property otherwise, as for example, by purchase in execution of a simple money-decree obtained against the mortgagor by another creditor, the Article will still apply if it is established that at the time the transfer is made the mortgagee was in possession, no matter under what title. The Article is designed for the protection of a transferee who has been led by a mortgagee to believe that he is acquiring not merely mortgagee rights but a full proprietary title [p 68, col 2; p 69, col. 1]

No act of a life-tenant can be binding upon the remainderman who does not claim under the life-tenant but under an independent title [p 71, col. 2]

Per *Kanhaiya Lal, J*—Under Art. 140 of Sch. I, to the Limitation Act, a remainderman or devisee can sue for possession of immoveable property devised to him within twelve years from the date when his estate falls into possession [p 73, col 1]

Once a person enters into possession of property as a tenant for life he cannot hold adversely to the remainderman Similarly adverse possession for any length of time against a tenant for life is ineffectual against the reversioner or remainderman whose right to possession only accrues on the death of the tenant for life. [*ibid*]

Article 134 of Sch. I to the Limitation Act allows only a period of 12 years for a suit to recover possession of immoveable property mortgaged and subsequently transferred by the mortgagee for a valuable consideration to be computed from the date of such transfer. It applies to cases where the mortgagee purports to transfer what he is not competent to alienate, that is an interest greater than that of a mortgagee, and it presupposes a mortgage with possession or followed by possession as a necessary incident or ingredient of it because a mortgagee who is not in possession cannot transfer possession to another or give what he does not possess. If the mortgagee acquires possession in some other capacity, the transfer of possession will be deemed to have been made in the capacity in which it was (rightly or wrongly) acquired and such acquisition cannot be attributed to the mortgage, where the mortgage itself is a simple mortgage or a mortgage not entitling the mortgagee to possession by virtue of its incidents or terms [p 73, cols. 1 & 2.]

The object of Art. 134 is to protect transferees for value who have purchased an interest larger than that possessed by the transferor and have been allowed to remain in possession and enjoyment of such larger interest for a period of more than 12 years. In the matter of mortgaged properties so transferred, it controls Art. 148 in the same way as it controls Art. 140 If the mortgaged property is in the possession, not o the mortgagee, but in that of a transferee from him who claims to have purchased a larger interest therein for consideration, then neither Art. 148 nor Art. 140 of Sch. I to the Limitation Act will enable the mortgagor or a reversioner or a remainderman to redeem the property after the possession of the transferee has lasted for more than 12 years. A remainderman who sues for the redemption of a mortgage cannot escape the consequences which Art 134 prescribes. [p 74, col. 1]

First appeals from a decision of the Sub-Judge, Muzaffarngar at Meerut, dated the 20th of January 1923.

Munshi *Girdhari Lal Agarwala* and Munshi *Bhagwati Shankar*, for the Appellants.

Messrs. *B. E. O'Connor*, *Nehal Chand*, Babu *Lalit Mohan Banerjee* and Pandit *Naramadeshwar Prasad Upadhiya*, for the Respondents.

JUDGMENT.

Lindsay, J.—Both these appeals arise out of a suit for redemption brought by Alice Georgina Skinner in the Court of the Subordinate Judge. This lady died after the decision in the Court below and is now represented by her executor, Mr. J. R. R. Skinner.

The suit was filed on the 11th May 1920 and the mortgage of which redemption was sought was executed by the plaintiff's father Thomas Skinner, on the 1st September 1863, to secure a loan of Rs. 50,000 which he took from a firm of money-lenders, Lakhmi Chand and Gobind Das, who were popularly known as the Seths of Muttra. Since the date of the mortgage the mortgaged property has passed into the hands of many persons, the result being that the plaintiff found it necessary to implead over 80 defendants. The learned Subordinate Judge has passed a preliminary decree for redemption, dated the 31st January 1923, by which he directs the plaintiff to pay a sum of Rs. 1,09,641-11-8.

The suit was not decreed in full, for the Subordinate Judge was of opinion that the plaintiff was not entitled to recover possession of [illegible] one of the items of property mortgaged. And as regards another item named Daula Rajpura which at the time the suit was brought was in the possession of the Nawab of Pahasu, the Subordinate Judge declared that the suit had abated. The Nawab died during the pendency of the suit and the plaintiff failed to make his legal representative a party to the suit within the time limited by law.

In the Appeal No. 86 of 1924 the memo-

randum of appeal contains the names of 34 appellants but at the hearing only two of these have been represented before us, namely, Kunwar Naunihal Singh and Nawab Mukarram Ali Khan who is the successor-in-interest of the Nawab of Pahasu above mentioned. Mr. Girdhari Lal Agarwala has filed *vakalatnamas* which authorize him to appear on behalf of these two appellants, he has no authority to act for the other appellants and so in disposing of F. A. No. 86 of 1924 it is necessary to consider only the cases of these two persons.

Mr. Girdhari Lal also represents the appellants in F. A. No. 494 of 1922 which has been heard along with F. A. No. 86 of 1924.

It may be mentioned here that the peculiar and irregular procedure adopted by the Subordinate Judge in disposing of the suit has created considerable embarrassment.

On the 23rd of February 1922 after having disposed of the main issues in the case, he passed an order directing accounts to be taken in order to enable him to ascertain the sum payable by the plaintiff for redemption of the mortgage. There could, of course, be no objection to his passing an interlocutory order for the taking of accounts but he embodied this order in the form of a decree which is printed at pages 35 *et seq* of the record. Subsequently, after taking an account, he passed a preliminary decree for redemption on the 20th January 1923, (See pages 46 *et seq* of the record). The law does not contemplate procedure of this sort in a suit for redemption. The learned Subordinate Judge seems to have thought he was dealing with a suit for account in which it was his duty to pass a preliminary decree in accordance with the provisions of O. XX, r. 13, of the C. P. C. but that was not so.

This irregularity was brought to the notice of another Bench of this Court which decided that the two decrees drawn up in the Court below should be dealt with as if they constituted one decree only, namely, a preliminary decree for redemption, and so we have treated these two appeals accordingly.

I proceed now to mention the questions which arise here for decision in Appeal No. 86 of 1924 as between the plaintiff-respondent and the two appellants on whose behalf the appeal has been argued and I take up first the case of Kunwar Naunihal Singh. This defendant, when the suit was brought, was in possession of five items of the mortgaged property which the plaintiff was seeking to recover. They are items Nos. 1 to 5 in the Sch. A attached to the plaint and are called Gangola, Salehpur, Neknampur, Ghori Bachhera and Sunphera.

The defences raised by Naunihal Singh were :

(1) that the plaintiff had no title to maintain the suit for redemption ;

(2) that these five villages had since the year 1872 been in the adverse possession of him and his predecessor-in-title ;

(3) that he had purchased these villages in good faith and for a consideration of Rs. 1,77,000 from the Nawab of Rampur and was protected by s. 41 of the Transfer of Property Act, and, further that in no case could the plaintiff recover possession without payment of this purchase-money ;

(4) that, in any event, the plaintiff was liable to pay the full sum due on the mortgage in suit amounting to about 17 lakhs of rupees, and that the plaintiff was not entitled to demand any account of the profits for the period during which he (Naunihal Singh) was in possession.

The Subordinate Judge held that the plaintiff had a good title to maintain the redemption suit. He held further that the suit was not barred by limitation as adverse possession could not run against the plaintiff before the 1st December 1919 when the plaintiff's estate in the mortgaged property fell into possession on the death of the previous life-tenant. And, lastly, he found that Naunihal Singh was liable to submit to a decree for redemption after an account had been taken of the profits for the period during which the mortgagees or those who derived title from them had been in possession of the property.

Now in this Appeal No. 86 of 1924 three substantial points have been argued on behalf of the appellant Naunihal Singh. One of these relates to the title of Alice Georgina Skinner and her right to maintain the suit. Another relates to the question of limitation which has been raised here in a new form. The third concerns the mortgage account, the argument being that it has not been properly calculated by the Court below. Before I proceed to discuss these matters it is necessary to say something of the history of the Skinner family and of the Skinner estate which has been the subject of much litigation. A good

deal of that history will be found in the report of a case decided by their Lordships of the Privy Council in the year 1913. See *Richard Ross Skinner* v. *Naunihal Singh* (1). Naunihal Singh, who was a party to that litigation, is the same gentleman who is one of the appellants in the present case. Thomas Skinner, who was the owner of the mortgaged property now in suit and who made the mortgage of the 1st September 1863 now sought to be redeemed, was the father of Alice Georgina Skinner, the present plaintiff. He died in November 1864 leaving three sons and three daughters. By his Will, dated the 22nd October 1861, he made certain dispositions of his estate which afterwards gave rise to a good deal of controversy. This Will was construed in the Privy Council case cited above, and to put the matter briefly, it was held that the effect of the Will was to create a succession of life-estates in favour of the testator's three sons, and that in default of lawful male issue born to any of these sons, the estate was to go over to the daughters. The three sons of Thomas Skinner are all dead. The eldest of them, Thomas Brown Skinner, died on the 3rd July 1900, the second, Richard Ross Skinner, who was the plaintiff in the suit which came before the Privy Council in the case mentioned above, died on the 15th August 1913. The third son was George Corbyn Skinner who died on the 1st December 1919. On this latter date the only surviving daughter of Thomas Skinner was Alice Georgina who was the plaintiff in the present suit. Both the other sisters died in the lifetime of their brothers. It follows then that on the death of the third son, George Corbyn Skinner, the sole surviving sister, *i. e.*, Alice Georgina, acquired an absolute estate in the property of her father, Thomas Skinner, provided that on that date there were no legitimate male issue of any of the three brothers in existence.

It has not been suggested that either of the two elder brothers left any such issue but it was pleaded by Naunihal Singh and some of the other defendants that George Corbyn Skinner left two legitimate sons still in existence in whose presence Alice Georgina could have no right to the estate. It was further pleaded by these same defendants that Alice Georgina was not the daughter of Thomas Skinner. This latter plea, however, was easily disposed of and the Subordinate Judge had no difficulty in finding that the plaintiff was Thomas Skinner's daughter. This matter has not been argued before us. As regards the other plea it is admittedly the fact that there are in existence two sons of George Corbyn Skinner. The plaintiff's case is that they are illegitimate, and the Subordinate Judge found that they were. We have heard arguments here relating to this point, and we agree with the Subordinate Judge. Some of the evidence led by the plaintiff upon this issue was of little value but there is the statement of a witness Christopher, a missionary, who deposed that the two sons left by George Co er were born out of wedlock. knew George Corbyn Skinner l with him at the time these s .m. His evidence appears to u conclusive of the matter and it h been rebutted. This part of the case is accordingly at an end and agreeing with the Court below I find that Alice Georgina Skinner was the lawful owner of her father's estate at the time she brought the suit and was entitled to maintain the suit for redemption.

The next question to be discussed is that of limitation. In the 17th ground taken in the memorandum of appeal the plea is raised that the suit is barred under Art. 134 of the Schedule to the Limitation Act (IX of 1908) which provides a period of 12 years for a suit brought to recover possession of immoveable property which has been mortgaged and afterwards transferred by the mortgagee for valuable consideration. In cases to which the Article applies time begins to run from the date of the transfer, that is to say, the transfer, by the mortgagee. According to the case for Naunihal Singh he is such a transferee having in the year 1901 purchased the five villages which he claims, from the Nawab of Rampur for a sum of Rs. 1,77,000. It is stated that in the year previous (1903) the Nawab bought these properties from the Seths of Muttra, the representatives of the mortgagees who advanced the money under the deed of the 1st September 1863, now in suit. It is to be observed here that this Article was not pleaded in the Court below. There the defence of limitation was raised upon the ground of adverse possession pure and simple, and was

(1) 19 Ind. Cas. 267; 35 A. 211; 40 I. A. 105; 11 A. L. J. 494; 25 M. L. J. 111; (1913) M. W. N. 500; 13 M. L. T. 488; 17 C. L. J. 555; 15 Bom. L. R. 502; 17 C. W. N. 853 (P. C.).

rightly overruled by the Subordinate Judge on the ground (*inter alia*) that no adverse possession could begin to run against the plaintiff who was not entitled to possession before the 1st December, 1919, the date on which her last surviving brother, George Corbyn Skinner, died.

The plaintiff being a remainderman under her father's Will was entitled to plead Art. 140 of the Schedule to the Limitation Act and to say that she had the right to sue for recovery of the estate at any time within 12 years from the date it fell into possession. The suit was filed less than six months after that date. The Subordinate Judge was never called upon to consider the terms of the Art. 134 and although it is true that a plea of limitation can be raised at any time, it was with some hesitation that I consented to its being raised here, on the ground that the appellant Naunihal Singh had not for the purposes of this appeal printed the necessary documents upon which he relies for proof of the facts which he must establish in order to support the plea under Art. 134. However, as there could be no doubt as to those facts and as the necessary documents had been printed before in the case of *Richard Ross Skinner* v *Naunihal Singh* (1) which, as has been said, was decided by the Privy Council in the year 1913, we allowed the point to be argued. Those documents or some of them at any rate are referred to in their Lordships' judgment, and I shall have occasion later on to draw attention to what was there said concerning them.

I shall now set out the facts and quote from the documents which are translated and printed in the paper-book of F. A. No. 127 of 1907 *Naunihal Singh* v. *Richard Ross Skinner*. At page 1A of this book we have the mortgage-deed of the 1st September 1863, executed by Thomas Skinner. This is the mortgage of which redemption is now being sought. The deed is a hypothecation bond which recites that eighteen villages belonging to the mortgagor are being offered as security for a loan of Rs. 50,000. As a matter of fact only seventeen villages are named. The eighteenth which was probably meant to be included in the security was Mauza Audhel, which was subsequently included in a later mortgage-deed presently to be mentioned. By this deed of the 1st September 1863 the mortgagor undertook to pay the mortgage debt in full, principal and interest, at the end of December 1863, and he covenanted that if he failed to discharge the debt as stipulated, he would put the Seths (the mortgagees) in possession who would then be able to realize and apply the income of the mortgaged estate under their own superintendence and management. Thomas Skinner died towards the end of 1864, and, following the narrative of events in the Privy Council judgment above referred to, it appears that the Court of Wards took possession of the estate and held it till the year 1867 when possession was handed over to the eldest son, Thomas Brown Skinner, who then proceeded to deal with the estate as if he were the absolute owner which he was not for reasons already stated. On the 10th November 1867, Thomas Brown Skinner executed a mortgage for Rs. 50,000 in favour of the Seths. Out of this sum Rs. 43,294-14-3 were due on the mortgage of the 1st September 1863 executed by his father. The balance he took in cash for the purpose of discharging certain debts which he owed. The same property was mortgaged as was described in the earlier deed—the eighteen villages which were all mentioned by name and included Audhel, the village which had been omitted in the document of 1863.

It is important to notice the conditions of this mortgage for it was provided that the names of the mortgagees were to be entered in the revenue papers and it was further provided that the entire income of the mortgaged property was to be paid direct into the treasury of the mortgagees. It was declared that the mortgagees were to appoint a treasurer and two peons at the cost of the mortgagor and that the money which was collected from the villages was to be deposited with the treasurer without any diminution. Directions were then given regarding the application of the income after it had been so received in deposit. After payment of Government revenue, *patwari's* fees and the usual village expenses, the balance was to be applied in payment of the interest on the mortgage-money, the salaries of the two peons and the treasurer appointed by the mortgagee and the salaries of the mortgagor's own servants and *karindas*. If any surplus remained after providing for these charges, it was to be applied in reduction of the principal sum. Another provision was that if any of the *karindas* of the mortgagor acted

against the wishes of the mortgagees, he was to be dismissed on a complaint being made by the treasurer. It is not necessary to refer to any of the other terms of this document, but it will be observed that the result of the arrangements just mentioned was to put the mortgagees in complete control of the revenues of the mortgaged estate as effectively as if they had been put in actual physical possession and it was no doubt for this reason that it was stated in the Privy Council judgment that this mortgage of 1867 executed by Thomas Brown Skinner was a mortgage with possession. What their Lordships say with reference to this transaction is :

"At that time there was due on the mortgage for Rs. 50,000 granted by his father, Thomas Skinner, a sum of Rs. 43,000. The mortgagees were placed in possession by him (Thomas Brown Skinner). and he also himself borrowed further sums in that year, in 1869 and in 1872, and granted mortgages over the properties therefor.

The next thing to be noticed is that on the 20th December 1872, Seth Lachman Das, who was then the representative of the mortgagees purchased in execution of simple money decrees obtained by other creditors five of the villages which he held in mortgage. The sale certificates are all printed in the paper-book of F. A. No. 127 of 1907, pages 13 A *et seq.* Those five villages were Nekanampur, Ghori Bachhera, Sunpehra, Gangola and Salehpur. In the certificates the property acquired by purchase is the "[illegible]'s equity of redemption" in all five villages. The judgment-debtor was Thomas Brown Skinner. We hear nothing more of these properties until we come to the 26th December 1898, on which date Seth Lachman Das made a mortgage in favour of the Nawab of Rampur to secure a debt of 15 lakhs of rupees. This was a mortgage with possession and among the items of property mortgaged were the five villages mentioned above. There can be no doubt that in the mortgage-deed these villages were described by the Seth as being his own property. He distinctly calls them his own and says he is mortgaging them with all the proprietary and *zemindari* rights, and in the schedule attached to the mortgage he sets out the value of each village and says that all five are worth Rs. 1,78,100. That is obviously a valuation of the proprietary rights. This document of mortgage is to be found at page 17-R. of the paper-book of F. A. No. 127 of 1907.

Then we come to a document, dated the 24th September 1903, at page 29-R of the same record. This is a conveyance by the Seth of certain of the properties already [illegible] to the Nawab. It seems that [illegible], being unable to keep down the interest on the mortgage-debt, determined to sell the property or most of it in satisfaction of the debt. The property conveyed included the five villages of which we have been speaking and so they passed to the Nawab of Rampur. On the 11th April 1904 the Nawab conveyed these villages to Naunihal Singh for a sum of Rs. 1,77,000. The deed is printed at page 35-R of the printed record of F. A. No 127 of 1907 and in it the Nawab, after reciting the conveyance made to him by the Seth, describes himself as the absolute owner. These then are the facts upon which Naunihal Singh relies in support of his plea of limitation raised under Art. 134 and the question is whether he is entitled to the benefit of that Article. In my opinion he is.

It has been argued before us that Art. 134 cannot apply because the mortgage of 1863 was not a mortgage with possession and because the mortgagees did not obtain possession under that mortgage but under the later and independent mortgage of 1867 executed by Thomas Brown Skinner. According to this argument Art. 134 must be so read as to mean that the property which has been mortgaged must have been, in the first instance, mortgaged with possession and that the transfer referred to must be a transfer made by a mortgagee who has acquired possession under the mortgage. I cannot construe the Article in this way. It deals with transfers of property which has been mortgaged. The Article does not say "mortgaged with possession." I agree, of course, that the suits referred to in the Article being suits for possession, it must be assumed that when such a suit is brought the defendant-transferee is in possession. I also think it reasonable to hold that the transfer which he has taken must have been one which placed the transferee in possession and that consequently where the transferor is a mortgagee he must have been in possession of the mortgaged property at the time he made the transfer. But I am not prepared to accept the argument that the possession which the transferor has at the time of the transfer must necessarily have

been acquired under the mortgage originally made in his favour. It seems to me that even if the mortgage was a simple mortgage and if the mortgagee subsequently gets possession of the mortgaged property, otherwise, as for example, by purchase in execution of a simple money-decree obtained by another creditor, the Article will still apply if it is established that at the time the transfer is made the mortgagee was in possession, no[t] matter under what title. The Article is designed for the protection of a transferee who has been led by a mortgagee to believe that he is acquiring not merely mortgagee rights but a full proprietary title. To quote the words of theirLordships of the Privy Council in *Radanath Das* v. *Gisborne & Co.* (2), in [c]onstruing the [s]egnate section under the old Act XIV of 1859 "purchaser must mean some person who purchases that which is *de facto* a mortgage upon a representation made to him and in the full belief that it is not a mortgage but an absolute title."

If that is so, I fail to see why it should make any difference to the purchaser (now the transferee) whether the possession which his transferor has at the time of the transfer arose directly out of the mortgage or was, prior to the date of transfer, acquired in some other way. The possession is there and is the principal factor in determining the belief of the transferee that his transferor is giving him a full proprietary title. The transferor could not very well purport to confer such a title if he were not in actual possession I do not see why the transferee should be bound to inquire how that possession was obtained, for under the law as it now stands the transferee is not required to show *bona fides*, which was necessary under the law as it was when the case of *Radanath Doss* v. *Gisbornes Co. &* (2) was decided. The alteration in the law appears to have been made advisedly in order to exclude the notion that absence of notice of the real owner's claim was necessary to enable a purchaser to claim the protection of this Article. But I am told that this Court has decided in favour of the interpretation of Art. 134 relied upon by the learned Counsel for the plaintiff-respodent, and I am referred to the Bench decision in the case of *Ram Piari* v. *Budhsain* (3). I cannot accept the argument. At page 167* of the report after referring to the purpose of Art 134, the learned Judges say that the transfer referred to in Art. 134 is a transfer with possession or followed by possession as a necessary incident or ingredient of it, and they cite another judgment of this Court in support of this observation: *Husaini Khanam* v. *Husain Khan* (4). This observation is in my judgment no authority for the proposition now put forward. The "transfer" to which reference is made is obviously the transfer made by the mortgagee, and, as I have already indicated, I agree that the mortgagee when he comes to make the transfer, must be in a position to hand over possession, which he cannot do unless he has got it himself. But the observation cannot be deemed to embrace the transfer made to the mortgagee in the first instance and to mean that the mortgage must have been a mortgage with possession under which the mortgagee entered either at the time the mortgage was granted or subsequently.

But, apart from this, let us see how the matter stands in this case. How did the mortgagees, whose representative afterwards sold to the Nawab of Rampur, obtain possession of these five villages.

It is said that they acquired it under the mortgage executed by Thomas Brown Skinner in 1867 and also under the purchases in execution made in the year 1872 and not under the mortgage of 1863 made by Thomas Skinner.

I do not think this statement is borne out by the facts. I have already pointed out that in the deed of 1863 the mortgagor covenanted to hand over possession in case he failed to discharge the entire mortgage-debt by the end of December of that year. There can be no doubt that the debt was not so discharged, for it is proved that in 1867, when Thomas Brown Skinner executed his mortgage, there was still outstanding a sum of Rs. 43,000 odd on the earlier mortgage in respect of which the mortgagees were entitled to take possession. Thomas Brown Skinner, to secure this debt and a further loan of Rs. 6,000 odd, makes the mortgage of the 10th November 1867 and places the mortgagees in complete control of the income of the mortgaged property, and I recall here what their Lordships of

(2) 14 M. I. A. 1; 6 B. L. R. 530, 15 W. R. P. C. 21; 2 Suth. P. C. J. 397; 2 Sar. P. C. J. 636; 20 E. R. 687 (P. C.).

(3) 61 Ind. Cas. 546; 43 A. 164; 18 A. L. J. 995; 2 U. P. L. R. (A.) 332.

(4) 29 A. 471; (1907) A. W. N. 133, 4 A. L. J. 375.

*Page of 43 A.—[*Ed.*]

the Privy Council said regarding this arrangement. They said that the mortgagees were placed in possession by him (*i. e.*, Thomas Brown Skinner). If this is so, did the mortgagees take possession under the mortgage of 1863 or the mortgage of 1867? That they were entitled to have possession under the earlier mortgage is clear. Is it to be said then that notwithstanding this the mortgagees' possession was acquired not under the earlier, but under the later mortgage, a transactien quite independent of the first? That was evidently not the opinion of their Lordships of the Privy Council. At page 225 of the report in *Richard Ross Skinner* v. *Naunihal Singh* (1) they say

"But the case, in their Lordships' view, stands in a very different position with regard to the rights of mortgagees and their successors under mortgages granted, not by the appellants' brother, but by the appellant's father, Thomas Skinner. With regard to the appellant's brother, it is decided by this judgment that the estate which he possessed was that of a tenant for life, and that mortgages proceeding in respect of debts incurred by him could not affect the estate beyond his life. Even if it be supposed that after he, Thomas Brown Skinner, came into possession he granted mortgages in renewal of those granted by his father and the outstanding rights of the mortgagees could not in justice or equity be prejudiced thereby. To do so would be to operate a substantial defeat of the rights of those mortgagees and to imply, what certainly never was the intention of any of the parties to the transaction, that by the renewal of a mortgage by a person with a limited interest in the estate the intention was to operate a [illegible] of debts effectually secured upon [illegible] right."

It seems to me, therefore, that the mortgage of 1863 being still alive in 1867 and the mortgagees being under that mortgage entitled to get possession, the possession delivered by Thomas Brown Skinner in 1867 must be referred to that right and the mortgagees were, therefore, in possession of the mortgaged property from that time under Thomas Skinner's mortgage of 1863 and quite apart from such possession as was subsequently gained by the auction-purchases in 1872 under the decrees obtained against Thomas Brown Skinner.

In this view, therefore, even if the construction of Art. 134 propounded by the learned Counsel for the plaintiff-respondent be accepted, the conditions necessary to give the purchaser the protection of Art. 134 are fulfilled. I have referred to the sale of the mortgaged property to the Nawab of Rampur in 1903 and to the sale by him to Naunihal Singh in 1904. When Seth Lachman Das sold to the Nawab in 1903 he was in possession of these five villages and had been so for over thirty years. He purported to convey an absolute title to the Nawab, and no doubt believed that he had a right to do so on the understanding, mistaken though it was, that he had acquired the proprietary right by the purchase of Thomas Brown Skinner's equity of redemption in the year 1872. That the Nawab gave valuable consideration for the sale is clearly established, as is also the fact that in the following year, 1904, Naunihal Singh paid the Nawab Rs. 1,77,000 for the full proprietary interest in these villages. For these reasons I hold that the plea of limitation raised under Art. 134 must prevail and that Naunihal Singh is not liable to be ejected now in a suit for redemption of the mortgage of 1863.

It may be noted here that this plea of limitation was not available to Naunihal Singh in the suit which Richard Ross Skinner brought against him in 1906 and which was decided by their Lordships in the year 1913. By that time the period of twelve years, reckoning from the date of the sale by the Seth to the Nawab of Rampur (the 24th September 1903) had not expired.

The appeal of Naunihal Singh must, therefore, be allowed and the decree of the lower Court reversed in so far as it awards the possession of the five villages Gangola, Salehpur, Neknampur, Ghori Bachhera and Sunpehra to the plaintiff. The decision relieves me from the duty of examining the other question which was argued on behalf of the appellant Naunihal Singh, namely, the question of how the account on the mortgage should be taken. As Naunihal Singh is found to be entitled to retain possession of these five villages, he has no interest in the amount which the plaintiff is liable to pay.

As regards the other appellant Nawab Mukarram Ali Khan, who is represented by Mr. Girdhari Lal Agarwala, all that need be said is that he is entitled to no relief under this appeal. He claims to be entitled to retain possession of one item of the mort-

*Page of 35 A.—[*Ed.*]

gaged property only, *viz.*, Mauza Daula Rajpura, and as things stand at present, he has got what he wanted, for the suit, in so far as it concerns this village, has been declared by the Subordinate Judge to have abated. I have already mentioned that no other appellants except these two have been represented before us in this appeal (*i. e.*, F. A. No. 86 of 1924).

IN F. A. No. 494 OF 1922.

This appeal is without substance and must fail. The appellants are three of the defendants. Gobind Sarup, nand Sarup and Chand Sarup. They are in possession of a 10-*biswa* share of Mauza Mathurapur, one of the mortgaged items which they claim to have acquired as auction-purchasers in execution proceedings. To explain the nature of the defence set up by these persons it is necessary to state the following facts: Richard Ross Skinner. who had sued for redemption in 1906, died on the 15th August 1913, a few months after the decision of their Lordships of the Privy Council Their Lordships had directed the suit of Richard Ross Skinner to be remitted to the High Court to be dealt with upon the footing that the rights under the mortgages granted by Thomas Skinner should be satisfied by payment being made to the mortgagees or their successors. On such payment being made within a time to be fixed, Richard Ross Skinner was to be given a decree for possession; on failure to pay, his suit was to be dismissed. Before the investigation necessary to give effect to these orders could be held, Richard Ross Skinner died and having left no legal representatives who could continue the claim, the suit abated. An attempt was made by his brother, George Corbyn Skinner, to get leave to continue the suit but this failed for the reason that his title as a life-tenant was quite independent of that which his brother had held. Having failed in this attempt, George Corbyn Skinner brought in his own right a suit for redemption which never reached the stage of decision owing to his death on the 1st December 1919.

Now in the suit which was brought by George Corbyn Skinner these three appellants in F. A. No. 494 of 1922 were impleaded as defendants. In the course of that suit a compromise was effected between George Corbyn Skinner and these defendants in accordance with which apparently they were allowed to retain possession of a 10-*biswa* share in Mouza Mathurapur, one of the items of property mortgaged. In the present suit they set up this compromise as a bar to the claim of the plaintiff in respect of this property. The Subordinate Judge overruled this defence being of opinion that no agreement entered into between George Corbyn Skinner and these defendants could bind the plaintiff in the present action. This was without doubt a correct decision, for Georga Corbyn Skinner being only a life-tenant no act of his could be binding upon the plaintiff in the present suit. She was not claiming under George Corbyn Skinner but under an independent title.

The appellants seek to raise this plea again in appeal, but for the reason just given, it cannot succeed. First Appeal No. 494 of 1922, therefore, fails. The result, therefore, is as follows.

First Appeal No. 86 of 1924 succeeds so far as the claim of Kunwar Naunihal Singh is concerned and the decree of the lower Court is reversed to this extent that it is declared that the suit of the plaintiff fails and is dismissed with respect to the five villages Gangola, Salehpur. Neknampur, Ghori Bachhera and Sunphera. The decree of the Court below will be amended accordingly. As regards costs I decline to make any order in favour of Kunwar Naunihal Singh either here or in the Court below. He has succeeded on a plea of limitation which was not raised in the Trial Court and in this Court he failed to have translated and printed the evidence by which he sought to support the plea of limitation raised here. In other respects F. A. No 86 of 1924 fails and is dismissed with costs in this Court against the answering respondent (the plaintiff) including fees on the higher scale. First Appeal No. 494 of 1922 fails and is dismissed with costs.

Kanhaiya Lal, J.—I agree generally with the conclusions at which my learned brother has arrived and only wish to add a few observations in regard to the precise bearing of Arts. 134 and 140 of the Indian Limitation Act on the subject-matter in issue in these appeals. The mortgage sought to be redeemed was effected by Thomas Skinner on the 1st September 1863 in favour of the firm of Seth Lakshmi Chand and Seth Govind Das of Muttra for Rs. 50,000. The mortgage money was re-payable with interest at Re. 1 per cent. per mensem by the 31st December 1863 and in case of default it was to bear interest at 1½ per cent. per mensem from the date of its

execution. There was a further covenant that the interest shall be regularly paid every half year and that similar payments will be made towards the principal year after year till the entire mortgage money was paid up ; and that if the mortgagor failed to pay the principal and interest from the profits of his property, as provided in the mortgage-deed, he shall put the mortgagees in possession and occupation of the hypothecated villages so that they might recover the principal and interest by taking the property under their own management and supervision. In other words, the mortgage was a simple mortgage convertible into a usufructuary mortgage on the happening of a certain contingency.

Thomas Siknner died in November 1864 leaving a Will, cls. 4 and 5 of which provided that his private *zemindari* which had been granted to him by the Government as a reward for the services rendered during the rebellion of 1857, and all villages, houses and other property added by him from time to time to the original grants, shall on his demise descend to his eldest son, Thomas Brown Skinner, and to his lawful male children according to the law of inheritance and in the event of the eldest son, Thomas Brown Siknner, dying without lawful male children, the same shall descend to the next male heir of the testator; and should all his sons die without lawful male children, it shall descend to his female children or in the event of their death, to the female children born in wedlock of his sons in succession.

By virtue of this Will Thomas Brown Skinner took possession of the estate from the Court of Wards which had meanwhile taken charge of it. On the 10th November 1867 he executed a mortgage in favour of the Muttra firm, the proprietor whereof was now Seth Govind Dass, for Rs. 50,000 out of which Rs. 43,294-14-3 were credited on account of principal and interest due to the said firm on account of a previous mortgage and the balance was taken by him in cash for his own purposes. The same property which had been previously mortgaged was hypothecated again and it was provided that the mortgagors shall get the name of the mortgagee entered in the revenue papers in respect of the mortgaged villages and that the *karindas* and servants of the mortgagor shall make collections and assessment in respect of the same of their own authority, but a treasurer and two peons shall be appointed on behelf of the mortgagee to supervise the collections and take charge of the money so realized, to be applied after payment of the Government revenue, the *patwari's* fee and the village expenses besides the cost of collection including the salary of the treasurer and peons of the mortgagee, in the reduction of the principal and interest due on the mortgage. There was a further provision that the accounts of the debt and the receipts and disbursements of the mortgaged villages shall be made up six monthly and that if any of the *karindas* and servante of the mortgagor acted against the wishes of the mortgagee, he shall be liable to dismissal and the mortgagee shall have power to make collections and assessment on his own account.

In 1872 and 1873 Seth Lachman Das, the successor of the mortgagee, purchased some mortgaged villages in execution of certain decrees for money held by other persons against Thomas Brown Skinner and believing himself to have become thereby the absolute owner of those villages and to be competent to deal with them as if they were his own property, he, on the 26th December 1898, as the surviving member of the family of the mortgagee, mortgaged the said villages along with other properties with the Nawab of Rampur. On the 24th September 1903 he sold the same to the Nawab of Rampur who in turn sold five of the villages now in dispute on the 11th April 1904 to Naunihal Singh defendant for a sum of Rs. 1,77,000, describing himself as the absolute owner of the properties conveyed

It is urged on behalf of Naunihal Singh that he was a transferee in good faith and for consideration from the Nawab of Rampur, who had purchased from Seth Lachmi Das the absolute rights he claimed to have acquired at the auction-sales aforesaid and that he is protected by Art. 134 of the Indian Limitation Act from being made liable to a claim for redemption in respect of the [illegible] of the 1st September 1863. Meanwhile Thomas Brown Skinner died without leaving any male issue. In 1906 a suit was brought by Richard Ross Skinner for the possession of the estate which was in the hands of transferees, and it was held by their Lordships of the Privy Council eventually, on a construction of the Will of Thomas Skinner, that Thomas Brown Skinner had only a life-estate and that the

mortgage granted by Thomas Skinner was ineffectual to convey or give any right over any estate except the tenancy for life of which Thomas Brown Skinner was possessed. Their Lordships remanded the suit for determining the amount of the mortgage money due under the mortgage granted by Thomas Skinner. But before the suit could be re-heard Richard Ross Skinner died without leaving any male issue and as he too had only a life-interest in the estate his suit abated. A fresh suit for redemption was then brought by George Corbyn Skinner, the next son and heir of Thomas Skinner, but he too died before the decision of the suit. The present suit was then filed by Alice Georgina Skinner, the daughter and next heir of Thomas Skinner, for the redemption of the mortgage of the 1st September 1863 and it is evident that, but for Art. 134 of the Indian Limitation Act, the suit would be within time under Art. 148 read with Art. 140 of that Act. As between the transferees and the present plaintiff no question of adverse possession can arise, because under Art. 140 of the Indian Limitation Act a remainderman or devisee can sue for possession of immoveable property devised to him within 12 years from the date when his estate falls into possession. Once a person enters as a tenant for life he cannot hold adversely to the remainderman. An adverse possession for any length of time against a tenant for life is similarly ineffectual against the reversioner or remainderman whose right to possession only accrues on the death of the tenant for life.

Article 134, however, allows only a period of 12 years for a suit to recover possession of immoveable property mortgaged and subsequently transferred by the mortgagee for a valuable consideration to be computed from the date of such transfer. It applies to cases where the mortgagee purports to transfer what he is not competent to alienate, that is, an interest greater than that of a mortgagee, and it presuposes a mortgage with possession or followed by possession as a necessary incident or ingredient of it, because a mortgagee who is not in possession cannot transfer possession to another or give what he does not possess. If the mortgagee acquires possession in some other capacity, the transfer of possession will be deemed to have been made in the capacity in which it was (rightly or wrongly) acquired and such acquisition cannot be attributed to the mortgage where the mortgage itself is a simple mortgage or a mortgage not entitling the mortgagee to possession by virtue of its incidents or terms.

In this case the villages in question were purchased by Seth Lachmi Das at auction sales in execution of certain decrees for money against Thomas Brown Skinner who was afterwards found to have had only a life-interest therein. It is stated on behalf of mortgagee that he got possession after the auction-purchases in 1872, but the plaintiff states (para. 8 of the plaint) that the mortgagee used to manage the property and make collections under the usufructuary mortgage effected by Thomas Brown Skinner on the 10th November 1867 in lieu of the moneys due on the mortgage of the 1st September 1863, and certain other mortgages, and inasmuch as the mortgage of the 10th November 1867, cannot be deemed to operate beyond the lifetime of Thomas Brown Skinner, the possession of the mortgage must be deemed to have continued after his death under the mortgage of the 1st September 1863 now sought to be redeemed. There was a provision in the mortgage-deed of the 1st September 1863 entitling the mortgagee to obtain possession if the principal and interest due thereon were not regularly paid. During the previous litigation which went up to the Privy Council it does not appear to have been disputed that the mortgagee was placed in possession of the mortgaged property by Thomas Brown Skinner under the mortgage of the 10th November 1867 and as that mortgage failed to be operative beyond the life time of Thomas Brown Skinner who died in 1900, it follows that the possession of the disputed villages *qua* the mortgagee's interest must be deemed to have been held after that date under the mortgage of the 1st September 1863, which it sought to re-pay. The mortgagee, however, believed himself to have acquired the interest of the mortgagor by his purchases at auction sales of 1872 and 1873 in execution of the decrees for money held by certain other persons against Thomas Brown Skinner; and the real position of the rights of the parties was not discovered till the correct construction to be placed on the Will of Thomas Skinner was determined by their Lordships of the Privy Council on the 4th March 1913. Till then the period of limitation allowed by Art. 134 of

the Indian Limitation Act for a suit for possession of immoveable property mortgaged and then transferred by the mortgagee to another person for valuable consideration had not expired in respect of the transfer made by Seth Lachhman Das of what was described as an absolute right in favour of the Nawab of Rampur or that made by the latter in favour of Naunihal Singh. The object of Art. 134 is to protect transferees for value who have purchased an interest larger than that possessed by the transferor and have been allowed to remain in possession and enjoyment of such larger interest for a period of more than 12 years. In the matter of the mortgaged properties so transferred, it controls Art. 148 of the Indian Limitation Act in the same way as it controls Art. 140. If the mortgaged property is in possession not of the mortgagee but in that of a transferee from him who claims to have purchased larger interest therein for consideration, what a man is not allowed to do under Art. 148 of the Indian Limitation Act, he cannot be allowed to do under Art. 140 after such possession has been held for more than 12 years. The question is not free from difficulty but in view of the equities of the case and the long and continuous litigation which the transferee had to face both before his possession of 12 years was completed and after it there is no ground for allowing the remainderman to oust him after such period has expired. It may be that Richard Ross Skinner was suing for possession of the disputed property as much in his own interest as that of his successors, but the order refusing to allow substitution after his death was not challeged and allowed to become final and a remainderman who sues for the redemption of the mortgage cannot escape the consequences which Art. 134 prescribes.

In regard to the other matters raised in either of these appeals I have nothing to add to the decision of my learned colleague with which I am in agreement. I agree, therefore, in the order proposed.

Z. K. *Decree modified.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 229 OF 1924.

September 5, 1925.

Present:—Mr. Kotval, A. J. C.

Musammat ZUKOOBAI—DEFENDANT—APPELLANT

versus

BHALSINGH—PLAINTIFF—RESPONDENT.

Set-off—Contribution, suit for—Rent-decree paid off by co-tenant—Suit to recover share of other co-tenant—Demands arising out of different transactions, whether can be set off—Plaintiff managing tenancy lands as agent subsequent to period included in rent-decree, effect of.

Plaintiff and defendant were co-tenants of certain occupancy fields. The landlord sued them for arrears of rent in respect of certain years and obtained a decree which the plaintiff paid up. Plaintiff then sued the defendant to recover the latter's share of the decretal amount. The defendant admitted liability in respect of the amount claimed but resisted the claim on the ground that the plaintiff was the manager of the tenancy lands and was liable to account for the profits thereof up to the date of the institution of the suit and could not, therefore, sue to recover what could only be an item of debt against the defendant in the account to be rendered by the plaintiff. It was found that if the plaintiff was managing the tenancy lands as the defendant's agent such management commenced after the expiry of the years in respect of which the rent-decree satisfied by the plaintiff had been obtained by the landlord.

Held, that the defendant could not insist on having a demand not arising out of the agency treated as a debit item in any account that the plaintiff might have to render in respect of his agency, nor could the defendant claim an equitable set-off in respect of such demand, since the demands of the plaintiff and the defendant had not arisen out of the same transaction. [p. 75, cols. 1 & 2]

Second appeal against a decree of the District Judge, Nimar, dated the 8th of March 1924, arising out of the decision of the Munsif, Seoni Malwa, dated the 6th of October 1923.

Mr. *M. R. Bobde*, for the Appellant.

Mr. *S. B. Gokhale*, for the Respondent.

JUDGMENT.—(*September 2nd, 1925*). —The plaintiff and the defendant are co-tenants of certain occupancy fields. The landlord sued them for arrears of rent for the last *kist* of *Sambat* 1971, both *kists* of 1972 and 1973 and the first *kist* of 1974 and obtained a decree which the plaintiff paid up by instalments between the 10th February and 1st May 1920. The plaintiff sues the defendant for half the amount with interest. The defendant admitted her liability for half the rent but resisted the claim on several grounds of which the one now material is that the plaintiff was the manager of the fields, that he was as such liable to account for

their profits up to the date of the institution of the suit and that he could not sue to recover what could only be an item of debt against the defendant in the account to be rendered by him. The plaintiff denied that he was in possession or that there were any profits up to the year 1977. He admitted that he was liable to account for the profits of 1977 and subsequent years but denied that he was bound to treat the payment as an item of debit in an account of the profits. It has been found that up to *Sambat* 1976 the fields were with a stranger who had been put in possession by the defendant's husband and the plaintiff and that there were no profits therefrom prior to that year.

The Trial Court found that the plaintiff was not the manager and that he could sue for half the decretal amount paid by him without accounting for the profits subsequent to 1976 and decreed the claim. The lower Appellate Court has not given any specific finding that the plaintiff was not the manager but has upheld the Trial Court's decision. The defendant appeals.

The sole question in appeal is whether the plaintiff could only recoup himself by debiting the amount to the defendant in an account of the profits or recover it by a separate suit. If the plaintiff was the manager on behalf of the defendant it is not disputed that he could not sue separately for the amount paid by him on defendant's behalf. It is, however, contended that this item has nothing to do with the question of accountability as a manager.

It is clear from the facts of the case that up to the year 1976 the plaintiff was not and could not have been the manager, for the land having been put in possession of a third party for the satisfaction of a debt by the consent of the plaintiff and the defendant's husband there was nothing to collect as income and nothing to manage. No importance can be attached to the casual statement in the plaintiff's evidence that he "managed the lands" since the date of the award. We do not know what the exact vernacular word used by the plaintiff which has been translated as "managed" was. In any case it cannot be construed to mean that he was managing the lands as the agent of the defendant. Assuming that after 1976, the plaintiff was acting as the agent of the defendant in the management of the land the defendant cannot insist on having a demand not arising out of the agency treated as a debit item in any account that the plaintiff has to render. Nor can she claim an equitable set-off in respect of it since the demands of the plaintiff and the defendant cannot be said to have arisen out of the same transaction. She could only make a counter-claim which she has not done here.

The decision of the lower Courts is correct. The appeal is dismissed with costs.

(*September 5, 1925.*)—The respondent files a cross-objection with regard to the interest which is disallowed by the lower Appellate Court. He contends that as he alleged in the plaint that a demand of the amount claimed was made from the defendant and that it was not taken notice of by her and as the defendant did not deny the allegation she must be taken to have admitted it. The plaint states that demand was made several times but gives no dates. The plaintiff, however, files a postal acknowledgement of an alleged notice which is not denied. This is dated the 25th August 1922. The suit was filed on the 8th February 1923. The plaintiff may, therefore, be allowed interest for the period between these two dates. No interest after the institution of the suit was asked for and none was allowed in the Trial Court. The decree of the lower Appellate Court will be modified by adding interest from the 25th August 1922 to the 8th February 1923 at 1 per cent. per mensem on Rs. 542-12-9. Costs of the objection will be paid and received according to failure and success.

Z. K. *Decree modified.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 4 OF 1925.

July 28, 1925.

Present:—Mr. Findlay, Officiating J. C.

YADO AND OTHERS—DEFENDANTS—APPELLANTS

versus

AMBASHANKAR—PLAINTIFF—RESPONDENT.

Cause of action—"Completed" and "continuous" causes of action—Prospective damages—Damages as mesne profits, when recoverable.

There is a distinction between a completed cause of action which may yet produce damage in future and a continuous cause of action from which continuous damage steadily flows. [p. 76, col. 2.]

The term "prospective damages" is applied to the damages which are awarded to a plaintiff not as a

compensation for the ascertained loss which he has sustained at the time of commencing his action but in respect of loss which, it may reasonably be anticipated, he will suffer thereafter in consequence of the defendant's act or omission [p. 77, col. 1.]

A plaintiff is entitled to have prospective damages assessed only when the cause of action is complete. In the case of a continuous cause of action a suit for damages will lie every time damages accrue from the act, but prospective damages are not recoverable, for the cause of action is not the act but the damage arising therefrom. [p. 77, cols. 1 & 2.]

A suit, therefore, for mesne profits as damages against a trespasser in respect of agricultural land is premature if it is brought before the end of the agricultural year when the crops are gathered. [p. 76, cols 1 & 2.]

Appeal against a decree of the District Judge, Nagpur, dated the 16th December 1924, in Civil Appeal No. 192 of 1924.

Mr. *D. W. Kathale*, for the Appellants.

Mr. *A. V. Wazalwar*, for the Respondent.

JUDGMENT.—The plaintiff-respondent Ambashankar sued the defendant-appellants Yado, Chimna and Govinda in the Court of the first Subordinate Judge, Nagpur, for Rs. 3,000 damages in respect of his having been forcibly dispossessed of certain *sir* fields on the 18th of June 1924. He claimed Rs 3,000 damages on the ground that this would have been the net profit he might have obtained from the fields by self-cultivation in the *Fasli* year 1334.

The only ground we are now concerned with relates to a plea raised on behalf of the defendant-appellants that the agricultural year for which the plaintiff had taken the lease had not ended when the present suit was filed, and the crops in question had not even been gathered. The Judge of the first Court only took up the question of the prematurity of the suit and came to the conclusion that the plaintiff's claim was nothing more than one for the recovery of mesne profits, brought in consequence of ejectment from immoveable property, that the suit was an ordinary one under Art. 109 of the First Schedule of the Limitation Act, that time thereunder ran until the cause of action was complete, and that the profits had, therefore, not accrued due. He accordingly dismissed the plantiff's suit. The plaintiff appealed to the Court of the District Judge, Nagpur, and this Judge reversed the finding of the first Court on the question of the prematurity of the suit and remanded for the case for re trial to the first Court The defendants have now come up on appeal against the judgment of the District Judge remanding the case.

The view taken by the lower Appellate Court was that it was open to the plaintiff to sue for compensation for having been deprived of profits which he would have derived from the fields, even although the *Fasli* year 1334 had not expired. The District Judge regarded the suit, not as one for mesne profits but as one for damages for trespass upon land and he further held that in the circumstances of the case the plaintiff was entitled to claim prospective damages.

The question involved in this appeal is not free from difficulty, but in connection with the matter of damages it is necessary to distinguish between a complete cause of action which may yet produce fresh damage in the future, and continuous cause of action from which [illegible] steadily flows. Best, J., [illegible] v. *Mellish* (1) remarks as follows :—

"When the cause of action is complete, when the whole thing has but one neck, and that neck has been cut off by the act of the defendant, it would be most mischievous to say—it would be increasing litigation to say—you shall not have all you are entitled to in your first action, but you shall be driven to bring a second, a third, or a fourth action for the recovery of your damages."

In such a case obviously, prospective damages can be allowed. The cause of action is thereon, so to say, complete and concluded, and the obvious undesirability in such a case of driving the plaintiff to a fresh suit for each and every result which arises from the completed cause of action needs no emphasis. Here, however, in the present instance a trespass commenced in June 1924 and continues from day to day, we thus find a cause of action which is not complete; the cause of action, so to speak, continues and goes *de die in diem*. Assuming the defendants to have been trespassers, for all one knows they might have repented of their wrongful action long before the crop was due to be reaped. The inconvenience which would result from allowing in a case like the present damages, which are undoubtedly based on the calculation that the fields will yield a normal crop at a date after the suit was filed, is too obvious to require emphasising. How can we be sure that some natural calamity might not occur in the meantime, which would

(1) (1824) 2 Bing. 229 at p 240, 130 E R 291; 9 Moore 435; 3 L J. C. P. 265; Ry. & Moo. 66; 1 C. & P. 241; 27 R. R. 331.

totally destroy the crop, whether it was in the possession of the rightful owner or of the trespasser? In *Byjnath Pershad* v. *Badhoo Singh* (2) Bayley and Macpherson, JJ. held that where the amount of mesne profits cannot be ascertained till after the end of the year, the cause of action does not arise till then. At page 202 of the same volume [*Koomaree Dossee* v *Bama Soondaree Dossee* (3)] Phear and Hobhouse, JJ., came to a somewhat opposite conclusion but the circumstances of that case were highly peculiar. There the defendant had cut down all the fruit-bearing and timber trees on the piece of land in dispute and had carried away or destroyed by brick-making all the fertile soil. The defendant, in short, had not only caused damage to the plaintiff in respect of past time but had also rendered it probable in the highest degree that she would be a loser in her possession of the land in future time. The circumstances of that case were thus undoubtedly unique and not at all parallel to those of a case like the present which is a normal one of a trespasser entering upon the land, sowing it and hoping to reap the crop.

The learned District Judge has relied on certain remarks made in Mayne on Damages, 9th Edition, page 453, and on Halsbury's Laws of England, Vol. X, page 306. There Halsbury defines "prospective damages" as follows:—

"The term 'prospective damages' is applied to the damages which are awarded to a plaintiff, not as compensation for the ascertained loss which he has sustained at the time of commencing his action, but in respect of loss which it may reasonably be anticipated he will suffer thereafter in consequence of the defendant's act or omission."

At page 310* of the same volume, however, the following remarks occur:—

"A cause of action in respect of which a plaintiff is entitled to have the prospective damages assessed must be distinguished from a continuing cause of action, that is to say, a cause of action which arises from the repetition or continuance of acts or omissions of the same kind as that for which the action has been brought. Similarly, where the damage consequent on an act or omission rather than the act or omission itself is actionable, then, as the action is only maintainable in respect of the damage, or is not maintainable until the damage is sustained, an action will lie every time damage accrues from the act. In this case, prospective damages are not recoverable; for the cause of action is not the act, but the damage arising therefrom."

These remarks are, in my opinion fully applicable to the circumstances of the present case.

I have been referred by the Pleader for the respondent to *Ramasami Reddi* v. *Authi Lakshami Ammal* (4). Abdur Rahim and Ayyar, JJ., therein held that a suit for mesne profits by a plaintiff who had been kept out of possession by the defendant, does not, for purposes of limitation, fall within Art. 109 of the Limitation Act, when no profits have been actually received by defendant, and that such a suit is one for damages under Art. 39. I do not see that this case has any direct bearing on the question which is before me, *viz*, whether or not the plaintiff in the present case is entitled to sue for prospective damages, which is, in effect, what he has chosen to claim in the present case. If any damages or loss had been caused to the plaintiff by the time of his bringing the suit, he would have been entitled to claim these in the plaint and he would further have been entitled eventually under O. XX, r. 12 (c), C. P. C., to mesne profits even in the future He has, however, deliberately chosen not to pursue this course but has claimed a lump sum of damages which are admittedly based, and can only be based, on the assumption that if he had been in possession of the land in this particular year, he would have reaped an average crop therefrom. For the reasons given above I am of opinion that this has, in reality, amounted to a suit for prospective damages and these, as I have already shown, the plaintiff is not entitled to claim in the circumstances of the case. The cause of action was not over and done with, it was still continuing from day to day even after the suit was filed, and it is difficult to understand why the plaintiff deliberately took this mistaken course of action.

For the result the plaintiff has only himself to blame. The judgment and decree of the lower Appellate Court are

(2) 10 W. R. 486; 2 B. L. R. S. N 16; 1 Ind. Dec. (N. S.) 1021.

(3) 10 W. R. 202.

*Page of Halsbury's Laws of England.—[*Ed.*]

(4) 8 Ind. Cas. 162; 34 M. 502; (1910) M. W. N. 614; 9 M. L. T. 35.

accordingly reversed and instead a decree will issue dismissing the plaintiff's suit, the plaintiff-respondent must bear the defendant-appellants' costs in all three Courts.

G. R. D. *Decree reversed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 393 OF 1922.

April 1, 1925.

Present:—Mr. Justice Ramesam.

VEPURI SUBBAYYA—PLAINTIFF No. 1—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF KISTNA—DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Water rights—Natural stream flowing into tank—Permanent system of irrigation—Persons irrigating lands from tank, rights of.

A natural stream passing through a jungle area fell into a tank and then flowed out in a defined channel into a second tank, the water of which had been used by the plaintiff for more than 60 years for the irrigation of his lands. The outlet from the first tank had fallen into disrepair several years ago and the Government then proposed to repair the breach in such a manner as to stop the flow of the water from the first tank into the channel which conducted the water into the second tank from which the plaintiff had been irrigating his lands ;

Held, (1) that the channel system of the two tanks having formed a permanent feature of the irrigation system of the country and not being intended to be temporary and the plaintiff having utilized water for the use of his fields for more than 60 years he was entitled to the continuance of that flow into the second tank, [p. 79, col. 2.]

(2) that the Government were entitled to repair the breach in the outlet from the first tank inasmuch as there was nothing to show that in spite of the lapse of many years since the date of the breach the Government had at any time abandoned the idea of restoring the breach or that they intended the state of disrepair to be permanent ; [*ibid.*]

(3) that the repairs must, however, be carried out in such a manner as not to interfere with the usual supply of water necessary to irrigate the plaintiff's lands from the second tank. [*ibid.*]

Second appeal against a decree of the Court of the Subordinate Judge, Kistna at Ellore, in A. S. No. 318 of 1920, preferred against that of the Court of the Additional District Munsif, Ellore, in O. S. No. 13 of 1920, (O. S. No. 917 of 1916, Principal District Munsif's Court, Ellore).

Mr. *B. Somayya*, for the Appellant.

The Government Pleader, for the Respondents.

JUDGMENT.—The plaintiff is the appellant before me. The 1st respondent is the Secretary of State for India. The plaintiff is the owner of certain *inam* survey fields in the village of Vemulapalli, namely, Nos. 89, 97, 98, 100, 103 and 104. These lands are irrigated by the water of a tank called Mukkuvanigunta which is situated in Survey No. 101. The plaintiff is the owner of the tank and also of Survey No. 102. The tank was filled by the water of a channel, which takes its rise from the hills near Gopavaram. Gopavaram is the village immediately north of the village of Ganapavorigudem and the latter village is immediately north of Vemulapalli. All the three villages originally belonged to a *zemindar*, but some time before the middle of the last century the *zemindari* ceased to exist and all the villages passed to the Government. The channel takes a definite shape according to the old survey plan of 1864 (Ex. XI) in the field marked No. 34 and described as a jungle. It then passes through the village of Ganapavarigudem until it reaches a tank called Jangamgunta which was in the field No. 45 of that plan. It escapes through a southern outlet of the said tank and ultimately falls into Mukkuvanigunta belonging to the plaintiff.

The District Munsif found that the whole course of the channel as described by me above was a natural stream and had existed for more than 70 years. The outlet of Jangamgunta through which the water of the channel continues to flow southwards was breached. The District Munsif found that the breach had existed for over 60 years from sometime prior to the vesting of the properties in the Government.

The Subordinate Judge on appeal also found that the portion of the channel south of Jangamgunta and north of Mukkuvanigunta had been existing during the last 60 or 70 years. An examination of the whole record shows that it is impossible to say when the channel and two tanks began to exist in the form in which they now exist. All that can be said is that they must have existed in this shape for more than 70 years and have become a permanent topographical feature. After the breach of the southern outlet of Jangamgunta, that tank lost its original shape: so far as the western side is concerned no water could be stored in it, but on the western side a pond was formed which

formed the irrigation source to the lands of Ganapavarigudem. This state of things, namely, the tank being in a state of disrepair, (the breach of the southern outlet not being repaired) must have led to the flow of more water into Mukkuvanigunta than was originally intended; but that it did flow and was utilized by the plaintiff for the irrigation of Survey Nos. 89, 97, 98, 100, 103 and 104 for more than 60 years is found by the Courts below and cannot be now questioned in second appeal. I am not satisfied with the evidence that it was utilised for the irrigation of Survey No. 102 for a similar period as the appellant claimed before me and this is the finding of the Courts below. The plaintiff has, therefore, acquired an easement by which he is entitled to supply of enough water for the irrigation of his said lands (excluding Survey No. 102).

It has been suggested by the learned Government Pleader that the plaintiff could not acquire an easement as the portion of the channel beyond Jangamgunta carried only the surplus waters of that tank and he relied on *Wood* v. *Waud* (1), *Arkwright* v. *Gell* (2), *Chamber Colliery Co.* v. *Hopwood* (3), *Mason* v. *Shrewsbury and Hereford Railway Company* (4) and *Burrows* v. *Lang* (5). But I do not think these cases apply. I have already observed that the channel was really a small natural stream and though Jangamgunta tank is probably an artificial formation, it does not mean that the channel south of it is artificial and consisted only of the surplus waters of the tank, for, before the formation of the tank, the natural stream must have continued to flow southwards. The effect of the tank could be only to dam up the waters until they reached a certain height and then to permit their escape. But even if it were not so, I think the principle of the decision in *Ramessur Persad Narain Singh* v. *Koonj Behary Pattuk* (6) applies. The channel system and the two tanks having formed a permanent feature of the country and not being intended to be temporary and the plaintiff having utilised the water for the use of his fields for more than 60 years he is entitled to the continuance of that flow. In making this observation, I do not mean to say that the Government is not entitled to repair the breach at A. Though this breach is continued for more than 60 years, I do not think it can be said that the Government at any time abandoned the idea of restoring the breach or that they intended the state of disrepair to be permanent. The tank was not shown in Ex. A, the survey plan of 1896, but the corresponding Diglott Register Ex. B shows that Survey No. 44/3 and Survey No. 45 corresponded to the old Survey No. 45 and were described in the last column as Jangamgunta. I think the Government are entitled to repair their tank and their channel and there is no duty on them to leave them as they existed in recent times. It is also unnecessary for me to discuss the effect of *Fischer* v. *Secretary of State for India* (7), for, though the Government have got the right of repairing their own channels and tanks, they cannot do this so as to prejudice existing rights, but so long as the plaintiffs' right of irrigating his *inam* lands already mentioned is amply protected, it seems to me that a Court has no right of dictating to Government in what manner they shall carry out the repairs. Nor is the plaintiff entitled to insist that the outlet of the repaired tank should be at the exact identical spot where it existed before.

I am not satisfied that this is a case in which it is enough to simply declare the plaintiff's right to obtain enough of water for irrigating 20 acres of land under Mukkuvanigunta; I think it is necessary to add an injunction to the declaration granted by the Subordinate Judge, though I cannot agree with the District Munsif that it need be in the very wide terms granted by him. I direct the modification of the decree of the Subordinate Judge by granting, in addition to the declaration given by him, an injunction directing the 1st defendant to carry out his works in such a manner as not to interfere with the usual supply of water necessary to irrigate 20 acres of land belonging to the plaintiff under Mukkuvanigunta.

(1) (1849) 3 Ex 748; 18 L. J. Ex 305; 13 Jur. 472, 154 E. R. 1047; 77 R. R. 809.
(2) (1839) 5 M. & W. 203; 2 H. & H. 17; 8 L. J. Ex. 201; 52 R. R 671; 151 E. R. 87.
(3) 1886) 32 Ch. D. 549; 55 L. J. Ch. 859; 55 L. T 449; 51 J. P. 164.
(4) (1871) 6 Q. B. 578 at pp. 584 587; 40 L. J. Q. B. 293; 25 L. T. 239; 20 W. R. 14.
(5) (1901) 2 Ch. 502; 70 L. J. Ch. 607; 49 W. R. 564; 84 L. T. 623; 17 T. L. R. 514.
(6) 4 C. 633; 6 I. A. 33; 3 Sar. P. C. J. 856; 3 Ind. Jur. 179; 2 Shome L. R. 194; 2 Ind. Dec. (N. s.) 402 (P. C.).
(7) 2 Ind. Cas. 325; 32 M. 141; 5 M. L. T. 149; 19 M. L. J. 131.

Each party to bear its own costs in this Court. The order of the Courts below will stand.

V. N. V.
Z. K. *Decree modified.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 294 OF 1924.
July 11, 1925.

Present:—Mr. Findlay, Officiating J. C.

Musammat KANKAI—PLAINTIFF—APPELLANT

versus

TIKARAM—DEFENDANT—RESPONDENT.

Landlord and tenant—Tenancy, benami, *whether legal—Holding cultivated by real tenant* - Benamidar, *disappearance of—Abandonment—Landlord, whether can forfeit tenancy.*

Though a contract of tenancy is a personal one, a recorded tenant may hold land *benami* for some other person, and if there are circumstances to show the landlord knew that the recorded tenant was merely a *benamidar*, he cannot treat the holding as abandoned if the *benamidar* disappears and the land is cultivated by the person for whom he was a *benami*. [p. 81, col. 2]

Appeal against a decree of the District Judge, Bhandara, dated the 7th April 1924, in Civil Appeal No. 86 of 1923.

Mr. *J. C. Ghose*, for the Appellant.

Mr. *V. D. Kolte*, for the Respondent.

JUDGMENT.—The plaintiff-respondent Tikaram, the *zemindar* of *Mouza* Kirnapur (Balaghat), sued the defendant-appellant *Musammat* Kankai for her ejectment from an occupancy holding situated in *Mouza* Jamrhi, his case being that the tenant of the holding in question was one Mahipal Lala who had abandoned it in the year 1922 23. The Subordinate Judge found that *Musammat* Kankai had been in possession of the land but that the Court of Wards had made Mahipal Lala tenant thereof. Mahipal Lala, however, had never cultivated the land and in Suit No. 96 (copy of judgment being Ex. D. 5) *Musammat* Kankai had obtained a decree against Mahipal Lala to the effect that she was the tenant of the land in question. The finding in that suit was that Mahipal Lala, when the land was brought to sale for arrears of rent, had bought it on behalf of the plaintiff and that the transaction was, in fact a *benami* one. The first Court accordingly dismissed the suit of the plaintiff.

The plaintiff appealed to the Court of the District Judge, Bhandara, who reversed the judgment and decree of the first Court. The learned District Judge gave a definite finding to the effect that he had agreed with the Judge of the first Court that the facts and the circumstances proved in the case clearly showed that the defendant was in possession of the land in suit all along and that Mahipal Lala, who was her former servant, was "nominally the recorded tenant of the land." The learned District Judge seems to have been influenced by the result of the Suit No. 8 of 1919 between Mahipal Lala and Bajirao, the son of *Musammat* Kankai. In that suit Bajirao had admitted that Mahipal Lala was the tenant of the land, but pleaded that he had obtained a lease thereof for an indefinite period. The Additional Subordinate Judge, who had dealt with this case, held that there had been a lease for one year only and accordingly passed a decree in favour of Mahipal Lala.

In the peculiar circumstances of this case I do not think much significance can be attached to the admission then made by Bajirao that Mahipal Lala was the tenant of the holding. That admission certainly cannot bind the present appellant *Musammat* Kankai. The judgment in Suit No. 96 of 1921 (Ex. D. 5), it is needless to say, is not *res judicata* in the present case, but it is nevertheless of great importance. That suit was allowed to proceed *ex parte* by the then defendant Mahipal Lala and *prima facie* satisfactory evidence was given to the effect that *Musammat* Kankai and not Mahipal Lala was the real tenant of the land in question. It is true that in the present case the defendant-appellant was foolish or ill-advised enough to offer a stupid plea to the effect that Mahipal Lala had obtained a lease of the land fraudulently. But it seems to me perfectly clear on the finding, not only of the first Court but also of the lower Appellate Court, that Mahipal Lala was, in fact, holding the land *benami* on account of the present defendant-appellant. The learned District Judge himself remarked as follows:—

"Although there is nothing to show who actually paid rent for the holding, I agree with the learned Subordinate Judge in holding that the facts and the circumstances proved in the case clearly show that the defendant-respondent was in possession of the land in suit all along and that Mahipal

Lala who was her former servant was nominally the recorded tenant of the land."

In spite of this finding the learned District Judge went on to hold that there was no evidence to show that *Musammat* Kankai was ever the real tenant of the land. It is not easy to understand on the findings of the learned District Judge who was the real tenant, because he has already held in his judgment that Mahipal Lala was only the nominal tenant, by which, it must be presumed, he meant that Mahipal Lala was holding the tenancy *benami* on account of *Musammat* Kankai. On the view taken by the District Judge, however, he came to the conclusion that tenancy being a personal contract and no such contract having existed between *Musammat* Kankai and the landlord, the latter was entitled entirely to disregard her and to accept Mahipal Lala's implied surrender of the land.

For my own part, in the present case it seems to me that one cannot overlook the significance of the judgment and decree in Suit No. 96 of 1921 (Exs. D.-5 and D.-6), which definitely settle that *Musammat* Kankai as against Mahipal Lala was the tenant of the land in question. In *Kuthaperumal Rajali* v. *Secretary of State for India* (1). Ayyar and Wallis, JJ., remarked as follows:—

"The leading authority opposed to this view is *Nand Kishore Lal* v. *Ahmad Ata* (2). The decision in that case that a *benamidar* is entitled to sue for land in his own name is based on the view that the legal estate is vested in him. Where the legal estate is vested in the *benamidar*, he is in fact a trustee and as such entitled to sue, but we do not think that the effect of a purchase of land *benami* according to the practice in this country is in all cases to vest the legal estate in the *benamidar* and constitute him a trustee. For instance where, as often happens, land is purchased *benami* in the name of an infant son it seems impossible to hold that the land is vested in him as trustee. In the present case it is found that the *benamidar* was a peon in the service of the real purchaser, and we do not think that the mere fact that he bid at the auction, and that the grant was made by Government in his name made him a trustee so as to entitle him to sue."; *cf.* also *Petherpermal Chetty* v. *Muniandy Servai* (3).

In the present case it seems to me that it is, in reality, the plaintiff-respondent who has attempted to obtain an unfair advantage out of the *benami* transaction. Mahipal Lala has disappeared and knowing all these circumstances the plaintiff disturbed the long continued possession of *Musammat* Kankai or of her son on her behalf. A somewhat similar case is that in *Radha Bullub Gossain* v. *Kishen Gobind Gossain* (4) and in the present case it seems to me that the real tenant of the land is undoubtedly *Musammat* Kankai and that she was not liable to ejectment. It is true that the contract of tenancy is a personal one: *cf.* *Sarjerao* v. *Tukaram* (5) and *Saiyad Noor* v. *Ramji Patil* (6), but in the present case Mahipal Lala seems to have been nothing more than an *alias* for *Musammat* Kankai.

Nor can it be argued with any degree of plausibility that the landlord was unaware of the real position. The defendant and plaintiff are related. The plaintiff lives close by the village in question and must have seen Bajirao cultivating the greater part of the land for many years, in other words he must have been perfectly aware of the *benami* nature of the transaction so far as the formal entry of Mahipal Lala as tenant is concerned. It seems to me, in the circumstances, therefore, quite unreasonable to urge that Mahipal Lala having disappeared the plaintiff-respondent was entitled to eject *Musammat* Kankai from the land. It is absurd to suppose that the plaintiff was not aware of the result of Suit No. 96 of 1921 already referred to.

For these reasons I am of opinion that *Musammat* Kankai was the real tenant of the land and that the landlord must have been well aware of the *benami* transaction under which Mahipal Lala's name was inserted as nominal tenant instead of the name of *Musammat* Kankai, and further it seems to me that it would be contrary to both law and equity to allow the landlord now to take advantage of this *benami* transaction in the way he desires to do.

The judgment and decree of the first Court will accordingly be restored and those

(1) 30 M. 215 at pp. 247, 248; 17 M. L. J. 174.
(2) 18 A. 69; A. W. N. (1895) 160; 8 Ind. Dec. (N S.) 751.
(3) 35 C. 551 at p. 558; 12 C. W. N 562; 5 A. L. W. 290; 7 C. L. J. 528; 11 Bur. L. R. 108; 10 Bom. L. R. 590; 18 M. L. J. 277; 4 M. L. T 12; 4 L. B. R. 266; 35 I. A, 98 (P. C).
(4) 9 W. R. 71.
(5) 46 Ind. Cas. 244; 14 N. L. R. 107.
(6) 19 C. P. L. R. 158.

of the lower Appellate Court will be reversed and a decree will issue dismissing the plaintiff's suit. The plaintiff-respondent will bear the defendant-appellants' costs in all three Courts.

G. R. D. *Decree reversed.*

OUDH CHIEF COURT.

FIRST CIVIL APPEAL No. 17 OF 1924.
November 24, 1925.
Present:—Mr. Justice Ashworth and Mr. Justice Raza.
Musammat KANIZA AND OTHERS—PLAINTIFFS—APPELLANTS
versus
HASAN AHMAD KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Marriage with wife's sister—Issue, whether legitimate—Child born six months after fasid marriage—Presumption of legitimacy—Evidence Act (I of 1872), s. 112, application of.

Muhammadan Law does not place union [illegible] Law does, in two categories, valid and [illegible] in three catagories of void *ab initio* (*batil*) forbidden but not entirely void if consummated (*fasid*), and lastly valid. [p. 83, col 1]

Under the Muhammadan Law, the marriage of a man to a sister of his existing wife, is *fasid* but not *batil*. Such a marriage, though invalid for certain purposes, is valid for the purpose of legitimatizing the issue. [p. 82, col 2.]

Tajbi Abalal v. *Mowlakhan Alikhan*, 29 Ind Cas 603, 41 B. 485, 19 Bom. L. R. 300, followed.

Aizunnissa Khatoon v *Karimunnissa Khatoon*, 23 C. 130, 12 Ind. Dec. (N. S) 87, dissented from.

Under the presumption of Muhammadan Law, in the case of a *fasid* marriage, a child born on the expiry of six months of *copula* is to be regarded as legitimate. [p 84, col. 1.]

Section 112 of the Evidence Act cannot be held applicable to marriages under the Muhammadan Law. At any rate the section cannot have any application to a *fasid* marriage under that law. [p 83, col. 2.]

First appeal from the judgment and decree of the Subordinate Judge, Gonda, dated the 24th of November 1923.

Messrs. *M. Wasim* and *Mahomed Ayub*, for the Appellants.

Messrs. *Naimullah* and *Niamatullah*, for the Respondents.

JUDGMENT.—This first appeal is a plaintiff's appeal. It arises out of a suit brought by *Musammat* Kaniza alleged daughter and *Musammat* Chinka alleged widow of one Abdul Sattar Khan against Abdul Razzak Khan nephew of the deceased. The parties are *Sunnis (Hanafis)*. The plaint only set up any title on behalf of plaintiff No. 2 in default of the claim of plaintiff No. 1 succeeding in part or in whole. We shall decree the claim of the plaintiff No. 1 in part. So far, therefore, as the lower Court has dismissed the claim of plaintiff No. 2 that decision must be upheld and her appeal dismissed. The case set up for plaintiff No. 1, that is the daughter, is that by a custom in the family of the deceased the daughter succeeds to her father's estate to the exclusion of any collateral, and alternatively that in the absence of any such custom under ordinary Muhammadan Law the daughter is entitled to succeed to a moiety as against the nephew. The lower Court dismissed the plaintiff's suit on the ground that her mother was not the legally wedded wife of the deceased, and that the plaintiff although a daugther of the deceased was illegitimate. It also held that there was not evidence to support the allegation of the custom set up.

It is common ground that the deceased was married to *Musammat* Mehrbibi the sister of *Musammat* Chinka, the mother of the plaintiff No. 1, and that he contracted a second marriage with *Musammat* Chinka. In the lower Court it was maintained that the deceased had divorced *Musammat* Mehrbibi before he married *Musammat* Chinka, but this plea was rejected by the lower Court and the finding to this effect is not impugned in this appeal. It was urged, however, and is urged in this appeal, that notwithstanding that the deceased married *Musammat* Chinka without first divorcing her sister the plaintiff under s. 112 of the Evidence Act and under Muhammadan Law is to be regarded as a legitimate daughter. Section 112 of the Evidence Act provides that

"Any person born during the continuance of a valid marriage between his (or her) mother and any man...shall be conclusive proof that he or she is the legitimate son or daughter of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he or she could have been begotten."

For the respondent it is urged that under Muhammadan Law the marriage of a man to a sister of his existing wife is invalid. For the appellants it is urged that such a marriage, though invalid for certain purposes is valid under Muhammadan Law for the purpose of legitimatizing the issue. In the case of *Aizunnissa Khatoon* v. *Karimunnissa Khatoon* (1) it was held by a Bench of the Calcutta

(1) 23 C. 130; 12 Ind. Dec. (N. S.) 87.

High Court that under the Muhammadan Law marriage with the sister of a wife who is legally married is void, and that the children of such marriage are illegitimate and cannot inherit. This decision was considered and dissented from by a Bench of the Bombay High Court, *Tajbi Abalal* v. *Mowla Khan Alikhan* (2) It was there held that, Muhammadan Law does not place unions as English Law does in two categories, valid, and invalid, but in three catagories of void *ab initio* (*batil*) fobidden but not entirely void if consummated (*fasid*) and lastly valid. The Calcutta ruling was considered in Ch. VII of Vol. II of Ameer Ali's Muhammadan Law, 4th Edition, and reasons were set forth at length for holding that the decision of the Calcutta High Court was wrong. The Bombay ruling agrees with Mr. Ameer Ali. The Calcutta ruling is also held to be incorrect by Mr. Tyabji on page 162 of the 2nd Edition of his Principles of Muhammadan Law. The effect of the Bombay ruling is succinctly expressed by Mr. Ameer Ali in the following words :

"There is a great difference between a marriage which is void *ab initio* (*batil*) and one which is invalid (*fasid*). If a man were to contract a marriage with a woman related to him within the prohibited degrees, the marriage would be void *ab initio*. Under the Hanafi Law, the children of such an union would not have the status of legitimacy unless the man was wholly unaware of the relationship or he was the subject of *ghurur* or deception. For example, if a man were to marry a woman related to him within the prohibited degrees, on the representation that she was not so related, and the marriage was consummated, the issue of such an union would be legitimate.

"But it is different in the case of an invalid marriage. An invalid marriage is one where the parties do not labour under an inherent incapacity or absolute bar or where the disability is such as can be removed at any time. The issue of such unions are legitimate.

"'An invalid marriage' says the *fatawai alamgiri* is like a valid marriage in some of its effects, one of which is the establishment of parentage."

"In these cases the six months will run from a *copula* and not from marriage."

The last line of this passage refers to the rule of Muhammadan Law that a child born after the lapse of six months from marriage, or in the case of a *fasid* marriage, from *copula*, will be deemed legitimate even though conception may have taken place before marriage. We are not disposed to re-hearse again the arguments respectively in favour of the divergent views of the Calcutta and Bombay High Courts. We consider that the argument set up by the Bombay High Court and by the authorities quoted against the Calcutta view, hold the field and that the Bombay ruling should be followed supported as it is by the views of the eminent authorities mentioned.

We may now consider the application of of s. 112 of the Evidence Act In the case of *Hajira Khatun* v. *Amina Khatun* (3), Mr. Justice Daniels expressed the opinion that s. 112 was applicable to Muhammadans. The contrary view was taken by Mr. Stanyon in a case of the Nagpur Judicial Commissioner's Court, *Zakirali* v. *Sograbi* (4). Here it is contended that s. 112 is applicable, and that "valid" in that case means any marriage which is not *batil* or void *ab initio*. We are of the opinion that s. 112 of the Evidence Act cannot be applicable in any way to a marriage which according to the Bombay ruling mentioned above is neither void *ab initio* (*batil*) nor absolutely void but is *fasid*, *i. e.*, irregular, inasmuch as s. 112 is based on a division of marriages merely into two catagories, and cannot be applicable to Muhammadan Law which according to the Bombay ruling divides marriages into three catagories In any case we hold that if s 112 can be held applicable, then we should have to construe the word "valid" in the section as "flawless" so that the presumption would not apply to *fasid* marriages.

The lower Court followed the Bombay ruling as we propose to do and not the Calcutta ruling, but it held that the plaintiff No. 1 was born before the expiration of six months from the marriage of the deceased to her mother, and that, therefore, she could not be held to be the daughter of *Musammat* Chinka Neither in that Court nor in this Court does it appear to have been urged that even if she could be held to be the daughter of *Musammat* Mehrbibi it would not be sufficient for her claim to the property, and so it is unnecessary for us to consider this point of view. Five witnesses for the plaintiff deposed that the plaintiff No. 1 was born in *Baisak*, that is April-May of the year 1908.

(2) 39 Ind. Cas. 603; 41 B. 485; 19 Bom. L. R. 300.

(3) 73 Ind. Cas. 983; (1923) A. I. R. (A.) 570.

(4) 43 Ind. Cas. 883; 15 N. L. R. 1.

This evidence was not impugned by cross-examination, but the lower Court disbelieved it in the face of an admission by *Musammat* Chinka made in former criminal proceedings. These proceedings were brought by Abdul Sattar against his nephew under s. 498 of the Indian Penal Code by way of prosecution of that nephew for his having eloped with *Musammat* Mehrbibi. *Musammat* Chinka was examined in that case and deposed as follows:—

"I cannot count. Four months ago I gave birth to a daughter. Ten months ago I was married to Abdul Sattar. I do not know the month that the daughter was born."

Now this evidence would make the plaintiff No. 1's birth to have occurred in September or October, that is to say within six months of Abdul Sattar's marriage with her mother. An additional reason for the Subordinate Judge rejecting the evidence of the five witnesses for the plaintiff was that their evidence was clearly false evidence so far as they asserted the fact of a divorce between Abdul Sattar Khan and *Musammat* Mehrbibi. We are not disposed to agree with the lower Court on this finding. It may be mentioned that the Subordinate Judge who wrote the judgment appealed against was not the Judge who heard the evidence. We are, therefore, in as good a position as he was to express an opinion on the veracity of the witnesses. The statement of *Musammat* Chinka in the criminal proceedings cannot be regarded as an admission. She has not the status of a plaintiff in the case, and her statement cannot bind her daughter as an admission. The only way in which that statement was admissible in evidence was as rebutting *Musammat* Chinka's evidence in this case. We are prepared to exclude her evidence, but there still remains the evidence of the five witnesses for the plaintiff. No attempt was made as already remarked, to impugn this evidence by cross-examination. It may be that these witnesses gave false evidence in support of the divorce of *Musammat* Mehrbibi, but as the case stands we think that their evidence must be accepted as to the month of birth of the plaintiff No. 1. Accordingly our finding is that the plaintiff No. 1's legitimacy must be held to be proved under the presumption of Muhammadan Law that in the case of a false marriage a child born on the expiry of six months of *copula* is to be regarded as legitimate.

We now come to the question of the custom. The *wajib-ul-arz* provides that a son and daughter will share equally. There is no specific provision that a daughter in the absence of a son will exclude a collateral, but it is urged that this must be inferred from the fact that a daughter shares with a son to the exclusion of collaterals. We agree with the lower Court that the inference would be a dangerous one. It may well be that there is a custom to give a daughter a half share with her brother, but it does not follow that the daughter should have the whole inheritance in the absence of a brother. Under ordinary Muhammadan Law she will be entitled to one half as against a collateral. She will not, therefore, be in a worse position than that if she had a brother. We do not think it safe to infer that she should be in a better position.

We agree with the lower Court that the plaintiff No. 1 has failed to prove the custom set up by her. We also find nothing in the *wajib-ul-arz* that would support the plea of plaintiff No. 2 that a widow without children, *i. e*, legitimate children, will have preference to a collateral, a point which was remarked above, would only arise if the plaintiff No. 1's claim were to be ejected *in toto*. In consequence of the above findings we dismiss the appeal of plaintiff No. 2 with costs. We allow the appeal of plaintiff No. 1 in part and direct a decree to be drawn up securing the plaintiff No. 1 a half share in the property in suit. The plaintiff No. 1 is awarded half costs in both Courts, inasmuch as her claim has been allowed for half the property.

It may be remarked that before arguments in this appeal the plaintiffs Nos 1 and 2 had arrived at a compromise with defendant No. 1, one of the nine persons substituted for the original defendant Abdul Razzak, who died before the hearing of this appeal, whereby the defendant No. 1 agreed that the plaintiffs Nos. 1 and 2 should get a decree for one-third of the 8-annas share of Abdul Razzak. On our finding the plaintiff No. 2 is entitled to nothing, and the plaintiff No. 1 is entitled to one-half of the 8-annas share as against all the defendants. We are unable in our decree to give any effect to this compromise. The compromise states that the defendant No. 1 was entitled under a deed of gift to one-third of the property Abdul Razzak, but we do not know whether the other defendants would admit this. In

any case under our finding the plaintiff No. 1 gets one half of the property of Abdul Razzak which is more than one-third. She cannot, therefore, suffer from our disregarding the compromise. On the other hand the defendant No. 1 has given up all that he says that he is entitled to. He, therefore, cannot complain of the decree.

N. H. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL APPEAL NO. 184 OF 1924.

September 24, 1925.

Present:—Mr. Justice Phillips and Mr. Justice Ramesam.

IMANI SATYANARAYANA AND OTHERS—DEFENDANTS NOS. 2 TO 5—APPELLANTS

versus

DEVARAKONDA SATYANARAYANA MURTE AND ANOTHER—PLAINTIFF AND DEFENDANT NO. 1—RESPONDENTS.

Hindu Law—Debt, antecedent—Mortgage-debt of father—Personal liability barred—Sons, whether bound.

Any prior mortgage-debt due by a Hindu father is valid and binding on the sons as an antecedent debt whether the personal liability of the father is or is not barred.

Gauri Shanker Singh v *Sheo Nandan Misra*, 78 Ind. Cas. 911; 46 A. 384; 22 A. L. J. 369; (1924) A. I. R. (A.) 513; L. R. 5 A. 306 Civ., followed

Arumugam Chetty v. *Muthu Koundan*, 52 Ind. Cas. 525; 12 M. 711; 9 L. W. 565; (1919) M. W. N. 409, 37 M. L. J. 166; 26 M. L. T. 96, relied on.

Appeal against a decree of the Court of the Subordinate Judge, Kistna at Ellore, dated the 13th December 1923, in O. S. No. 93 of 1922.

Messrs. *A. Krishaswamy Iyer* and *V. Govindarajachari*, for the Appellants.

Mr. *N. Rama Rao*, for the Respondents.

JUDGMENT.—This is an appeal against a decree on a mortgage executed by the first defendant, father of defendants Nos. 2 to 5. The mortgage was executed in order to discharge a prior mortgage-deed executed by the first defendant in 1906, Ex. B, the suit mortgage, being Ex. A, dated 10th October 1915. The Subordinate Judge has given a decree, holding that the mortgage, having been executed to discharge an antecedent debt of the father, is binding upon the sons' shares, and he relies on the Full Bench decision of this Court in *Arumugam Chetty* v. *Muthu Koundan* (1).

(1) 52 Ind. Cas. 525; 12 M. 711; 9 L. W. 565; (1919) M. W. N. 409; 37 M. L. J. 166; 26 M. L. T. 96.

For the appellants it is contended that the decision is not applicable, because in the present case a portion of the previous debt could only be enforced as a mortgage debt and not as a personal debt of the father. This question has not been considered in the lower Court and it is not at all clear whether the personal liability is barred or not in respect of the first three instalments. Whether it is barred or not, however, the case can be disposed of on another [illegible] has definitely been held in *Gauri Shanker Singh* v. *Sheo Nandan Misra* (2), that a [illegible] whether the personal liability is barred or not, is an antecedent debt binding on the sons' shares. This same principle has been adopted in *Arumugam Chetty* v. *Muthu-Koundan* (1), and although it may be said that in that case the personal liability had not been barred and that, therefore, the decision is not strictly in point, yet in view of the form of the questions propounded by the Referring Bench it is clear from the judgment that the first of the questions was dealt with as a general question, and in effect the decision of the Full Bench is that any prior mortgage-debt due by the father is valid as an antecedent debt, and this decision is not qualified by any expression of opinion that the mortgage-debt must also be enforceable as a personal liability.

We, therefore, follow these two cases and dismiss the appeal with costs.

Time for redemption is extended to three months from this date.

V. N. V. *Appeal dismissed.*

N. H.

(2) 78 Ind. Cas. 911; 46 A. 384; 22 A. L. J. 369, (1924) A. I. R. (A.) 513; L. R. 5 A. 306 Civ.

PRIVY COUNCIL.

CONSOLIDATED APPEALS FROM THE MADRAS HIGH COURT.

April 2, 1925.

Present:—Lord Shaw, Lord Carson, Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.

VAITHIALINGA MUDALIAR AND OTHERS—APPELLANTS

versus

SRIRANGATH ANNI AND OTHERS—RESPONDENTS.

Hindu Law—Widow, position of—Decree obtained against widow, whether binding on reversioners—Adverse possession against widow, whether adverse to reversioner—Limitation Act (IX of 1871), Sch. II, Art. 139, application of.

A Hindu widow in possession of the estate of her deceased husband represents the estate in suits brought by her or against her for possession of the estate or any part of it, and she and the reversioners are equally bound by any final decree which a Court makes in such a suit provided that the suit was fought out according to law and was not collusive or fraudulent. [p. 88, col. 1.]

Article 129 of Sch. II to the Limitation Act of 1871 applied to all suits in which the plaintiff could not succeed without displacing an apparent adoption by virtue of which the defendant was in possession and where, before the repeal of that Act, the defendant's title had, owing to the afflux of time, become unassailable, the repeal of that Act would not revive the right of any reversioner to the estate to question the validity of the adoption under which the defendant claimed. [p. 93, col. 1.]

Semble.—A Hindu widow fully represents the estate of her deceased husband and adverse possession which bars her bars the heirs after her. [p. 88, col 2]

Consolidated appeals from a decree of the Madras High Court (Sir John Wallis, Kt., Chief Justice, and Mr. Justice Burn), dated the 15th November 1916, printed as 41 Ind. Cas. 546, modifying that of the Subordinate Judge, Negapatam, dated the 4th September 1908, in O. S. No. 26 of 1905.

Sir *G. Lowndes, K. C.*, Messrs. *W. Waliach* and *M. R. R. Pillai*, for Vaithialinga Mudaliar and others.

Mr. *J. M. Parekh*, for Srirangath Anni and others.

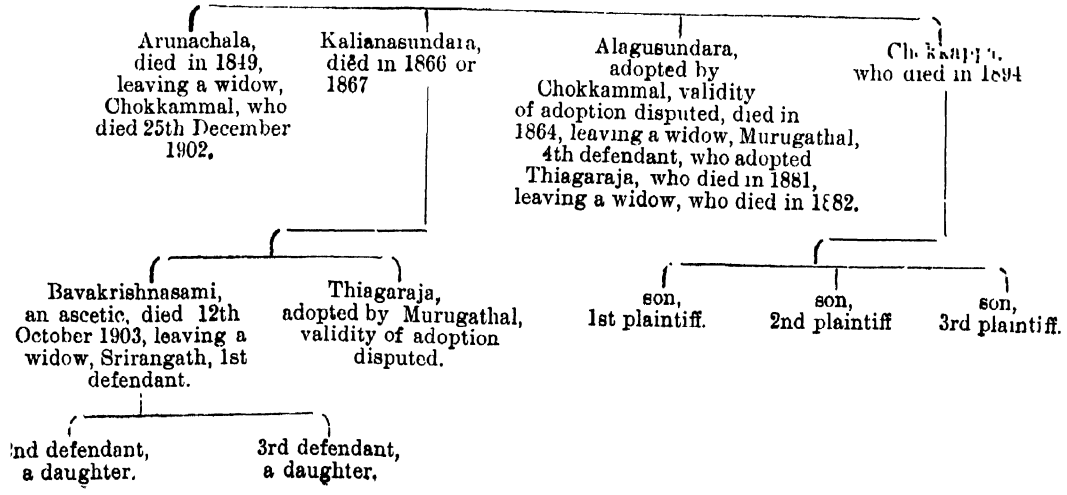
Messrs. *L. De Gruyther, K. C.*, and *K. V. L. Narasimham*, for Somasundaram Chettiar and A. Rangasami Chettiar.

JUDGMENT.

Sir John Edge.—These are nine consolidated appeals from a decree, dated the 15th November, 1916, of the High Court at Madras, which varied a decree, dated the 4th September, 1908, of the Subordinate Judge of Nagapatam.

The suit in which these appeals have arisen was brought in the Court of the Subordinate Judge on the 2nd July, 1905, by three plaintiffs, who were reversioners of Arunachala Mudaliar, against thirty-eight defendants for the possession of lands which were alleged by the plaintiffs to be lands of the Kulikara estate in the District of Tanjore and for mesne profits. The title of the plaintiffs to sue was denied by the defendants on various grounds, of which those which are now important and have to be considered are whether the suit was not barred by the result of a litigation which began in 1887 and ended with a final decree in 1892, and whether the suit was not otherwise barred by the law of limitation.

The Kulikara estate admittedly belonged to Arunachala when he died in 1849 He was then about 22 years of age. The family to which he belonged were Hindus of the *Sudra* caste He had been adopted by Vithialinga Mudaliar, a relation, who was descended from an ancestor from whom Arunachala also was descended. The plaintiffs are the three sons of Chokkappa Mudaliar, who was the youngest of three brothers by birth, that is, natural brothers, of Arunachala. Arunachala died childless, leaving a widow, Chokkammal, who died on the 25th December, 1902, within 12 years before this suit was instituted. She was a defendant to the suit with which the litigation of 1887 commenced. It will be necessary to refer at some length to that litigation. The following pedigree will show Arunachala and his natural brothers and some other persons:—



Arunachala, as whose reversioners the plaintiffs claim to be, had before his death directed his wife Chokkammal to adopt as a son to him his natural brother Alagusundara. In 1862 Chokkammal did as a fact adopt Alagusundara as a son to her late husband Alagusundara was a younger natural brother of Arunachala, and at the time of the adoption there was no one living who could give him in adoption. As a matter of Hindu Law the adoption was invalid.

In 1862 Chokkammal, having adopted Alagusundara, put him in possession of the immoveable property now in question, reserving to herself for her maintenance some of the immoveable property to which she was entitled as the widow of Arunachala. With the property which she reserved for her maintenance this suit is not concerned. There can be no doubt that in 1862 Chokkammal did put Alagusundara in possession of the property now in question. In March, 1862, she presented an undated petition to the *Tahsildar* of Nannilam, the Revenue Officer, in which she stated that, with the consent of her husband, she had adopted Alagusundara, his natural younger brother, and, with the exception of certain villages which she named, she had made him proprietor of all the land and other properties, etc., standing in her name, and prayed that, with the exception of the three villages, "the *miras*" (ownership) might be transferred to him and all the *sircar* proceedings might be passed in his name.

Alagusundara continued to be in possession of the property of which Chokkammal had put him in possession in 1862 until he died in 1864, and had dealt with the property which had been transferred to him as an absolute owner would have done. Upon his death in 1864 his elder brother Kalianasundara, on the 18th July, 1864, presented a deed of consent to the *Tahsildar* of Nannilam praying for the transfer to the name of Thiagaraja of the property which stood in the name of Alagusundara, and the *miras* was transferred to him. Thiagaraja was by birth a son of Kalianasundara and had been adopted by [illegible]. He was in 1864 about two years of age.

From the 18th July, 1864, Kalianasundara, until he died in September, 1876, was referred to in all documents relating to the property as the guardian of Thiagaraja, who was in possession of the property in question from 1864 until he died in 1881, and during that time the management of the affairs of the family was carried on solely in his name. Upon the death of Thiagaraja in 1881 the *miras* which had stood in his name was altered to the name of his widow Kamalath, a girl of about 12 years of age, who died in 1882. Upon the death of Kamalath in 1882, Murugathal, the mother by adoption of Thiagaraja, took possession of the property in question for a Hindu widow's interest and held it until 1884, when Chokkammal forcibly ejected her.

On the 9th February, 1887, [illegible] brought a suit in the Court of the [illegible] nate Judge of Negapatam against Chokkammal and others, in which she claimed a decree for the possession of the properties now in question, alleging in her plaint that her husband Alagusundara had been the adopted son of Arunachala, and that the properties which she claimed belonged to him as such adopted son, and had been enjoyed by him from 1862 until he died in 1864; that after his death her adopted son Thiagaraja had enjoyed them until he died in 1881, and after him his widow, Kamalath, got them according to Hindu Law and she died childless in 1882, and since her death she, Murugathal, got them under Hindu Law and enjoyed them until 1884, when Chokkammal forcibly took possession of them and enjoyed them adversely to her. Chokkammal in her written statement in that suit denied Murugathal's title, alleged that she, Chokkammal, had been in possession of the property in question for 38 years from the death of her husband Arunachala in 1849, and denied that Alagusundara had been adopted. Several issues were framed by the Subordinate Judge in that suit who found that Alagusundara was adopted as a son to Arunachala in 1862 by Chokkammal, who had the authority of her husband to make the adoption, that the adoption was invalid according to Hindu Law, that Thiagaraja was adopted by Murugathal under the authority of her husband, but that the course of conduct of Chokkammal and the change of position of Alagusundara as the result of his adoption made it inequitable to hold that he had not title to the property, and that the putting him in possession of the property in question and allowing him to manage it for his own purposes substantially operated as a gift of the property to him The Subordinate Judge in that suit also held that

Murugathal's claim of adverse possession of the *miras* for 12 years was established, and on the 18th December, 1889, he gave her a decree for possession of the property which she claimed. From that decree of the Subordinate Judge the suit of 1887 went on appeal by Chokkammal to the High Court at Madras. The learned Judges of the High Court held that Alagasundara's adoption was invalid, but holding that Murugathal's claim of adverse possession for 12 years was established by their decree of the 17th August, 1892, dismissed Chokkammal's appeal. Chokkammal did not appeal from that decree of the High Court, and it became final.

It is necessary to consider what was Chokkammal's position as a Hindu widow and how far her acts could, according to Hindu Law, bind the reversioners to her husband. On Arunachala's death in 1849 she became entitled to the full beneficial enjoyment of the estate which had been his at the time of his death. As Mr. Mayne, in para. 605 of his "Hindu Law and Usage," correctly, in their Lordships' opinion, said:—

"It was at one time common to speak of a widow's estate as being one for life. But this is wholly incorrect. It would be just as untrue to speak of the estate of a father under the Mitakshara Law as being one for life. Hindu Law knows nothing of estates for life, or in tail, or in fee. It measures estates, not by duration, but by use. The restrictions upon the use of an estate inherited by a woman are similar in kind to those which limit the powers of a male holder, but different in degree."

The Hindu widow has not power to make a gift of the estate. Handing over the possession of the estate to a son whom she has validly adopted to her deceased husband is not making a gift of the estate to him. The estate became his on his adoption if he was validly adopted. She has no power to sell or assign the estate except for necessity, so as to bind her husband's reversioners after her death. But she represents the estate in suits brought by her or against her for possession of the estate or any part of it, and she and the reversioners are equally bound by any final decree which a Court makes in such a suit provided that the suit was fought out according to law and was not collusive or fraudulent.

In the suit of 1837, Chokkammal was no doubt personally interested to defeat Murugathal's claim for the possession of lands which had been in her own possession as the widow of Arunachala from 1849 until 1862, but although her object in resisting Murugathal's claim was probably a purely personal and selfish object, she did, in fact and in law in that suit, represent the estate as well as her own interests as a Hindu widow. The suit of 1887 was not a collusive suit; it was regularly and according to due procedure at law fought out in the Court of the Subordinate Judge and in the High Court.

A protracted argument was submitted to the Board on the question whether under Hindu Law adverse possession against a widow in possession of an estate for a Hindu widow's interest bars the reversioner. While it is not necessary in the view which will later be announced by the Board on the question of limitation in this case to make any formal pronouncement upon this point, it may be convenient to say that the authorities referred to were as follows:—In *Goluckmonee Dabee* v. *Degumber Dey* which was decided in 1852, Sir Lawrence Peel, who was the Chief Justice of the Supreme Court at Calcutta, said:—"It has been invariably considered for many years that the widow" (speaking of the widow as heir) "fully represents the estate, and it is also settled law that adverse possession which bars her bars the heir also after her, which would not be the case if she were a mere tenant for life, as known to the English Law." [See the reference to that case in the judgment of Sir Barnes Peacock, C. J., in *Nobin Chunder Chukerbutty* v. *Issur Chunder Chukerbutty* (1).

In *Katama Natchier* v. *Raja of Shivagunga* (2), which was decided by the Board in 1863, the Board, consisting of Knight Bruce, L. J., Sir Edward Ryan, and Turner, L. J., the assessors being Sir Lawrence Peel and Sir James W. Colvile, all being eminent lawyers, and three of them having had judicial experience in India, Lord Justice Turner delivered the considered judgment of the Board, and in it said, at page 603*, as follows:—

"It seems, however, to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1847, if it had become final in Anga Mootoo Nat-

(1) 9 W. R. 505 at p. 507; B. L. R Sup. Vol. 1008.
(2) 9 M. I. A. 539; 2 W. R. P. C. 31; 1 Suth. P. C. J. 520, 2 Sar. P. C. J. 25; 19 E. R. 843.

*Page of 9 M. I. A.—[*Ed.*]

chier's lifetime, would have bound those claiming the *zemindari* in succession to her. And their Lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the *Zillah* Court by any person claiming in succession to Anga Mootoo Natchier. For, assuming her to be entitled to the *zemindari* at all, the whole estate would for the time be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindu widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

The declaration as to Hindu Law which their Lordships have quoted from the considered judgment of the Board, which was delivered by Lord Justice Turner in 1863, has in the present appeal been objected to on the ground that it was *obiter*. The following cases, however, were referred to as showing that the doctrine there set forth was in accord with the course of judicial decisions.

Their Lordships will first refer to the case *Nobin Chunder Chuckerbutty* v. *Issur Chunder Chuckerbutty* (1) which came before a Full Bench of the Calcutta High Court, 1867, in which the declaration of the Board in the *Shivagunga's case* (2) to which their Lordships have referred was accepted as a correct statement of the Hindu Law to which it related and was applied to the case before the Full Bench. The facts of the case before the Full Bench are not fully stated in the order of reference to the Full Bench, but they were as follows: One Ramdoollub Chuckerbutty died possessed of an estate consisting of lands leaving two sons, two daughters and his widow, Dhone Mala. The two sons died without issue in the lifetime of the widow, and upon their death the widow, Dhone Mala, became entitled to the possession of the respective estates of the sons, but the defendant in that suit, a stranger, and as a trespasser, took possession of the estate more than 12 years before the suit, and the widow never obtained possession. Upon the death of the widow, sons of the daughters, who were the reversioners to their uncle's estate, brought the suit for possession, which was before the Full Bench in second appeal. The first Appellate Court had dismissed the suit as not brought within time, that is, within 12 years from the time when the defendant had wrongfully taken possession, and the question before the Full Bench was whether the suit was barred by limitation or whether the reversioners could sue upon the death of the widow, Dhone Mala. The Full Bench held that the cause of action arose when the defendant had taken possession and that the suit was time-barred. The Full Bench was an exceptionally strong Bench of Judges, who had much experience in cases involving considerations of Hindu Law. Their Lordships will give extracts from the judgments which were delivered in the Full Bench, as those judgments appear to their Lordships to confirm the declaration as to Hindu Law which they have quoted from the judgment of the Board in the *Shivagunga's case*(2) and to have a direct bearing on the appeal before the Board, and are very instructive.

In delivering his judgment in that Full Bench case, with which Seton-Karr, J., concurred, Sir Barnes Peacock, C. J., after referring to Sir Lawrence Peel's judgment already mentioned, said:

"It was also held by the Privy Council in the *Shivagunga's case* (2) that in the absence of fraud or collusion, a decision against a widow, with regard to her deceased husband's estate, would be binding upon the reversionary heirs. . . . If the female heir in the present case had sued the wrong doer, and, without fraud or collusion, had failed to make out her case to turn him out of possession, the reversionary heirs would have been bound by the decision. I am assuming that they are not claiming through the female heir."

Farther on Sir Barnes Peacock, said:

"It is said that the reversionary heirs could not sue (for possession) during the lifetime of the widow, and that, therefore, they ought not to be barred by any adverse holding against the widow at a time when they could not sue. But when we look at the widow as a representative, and see that the reversionary heirs are bound by decrees relating to her husband's estate which are

obtained against her without fraud or collusion, we are of opinion, that they are also bound by limitation, by which she, without fraud or collusion, is barred."

Jackson, J., in his judgment, said:

"I entirely concur in the opinion of the Chief Justice that the plaintiff (the reversionary heir) was barred in the present case. . . . It has been distinctly held by the Privy Council in the *Shivagunga's case*(2) that a decision fairly arrived at without fraud or collusion in the presence of a Hindu widow in possession of the estate will bind reversionary heirs. That being so decided, it appears to me impossible to escape the conclusion that an adverse possession which barred the widow will also bar the heirs, and in that opinion we are fully and strongly supported by the decisions of the late Supreme Court in the case to which his Lordship the Chief Justice has referred."

Phear, J., in his judgment, said:

"I too desire to avoid pledging myself to all the illustrations which have fallen from the Chief Justice; but with this exception, I concur entirely in the reasoning which he has given in support of his conclusions, and I concur also in the remarks which have been made by Mr. Justice Jackson. I will add that it seems to me that, when a reversionary (Hindu) heir succeeds to the property of his ancestor on the death of an intervening female heir, he takes substantially the same proprietary right as she enjoyed, and no more, though, doubtless, she was fettered in a way that he is not, with regard to the dealings with the property, *viz.*, her alienations are often liable to be avoided by him when he succeeds to the right of succession."

Macpherson, J., in his judgment, said:

"I also concur in the proposed answer. But a very great difference exists between the case immediately before us, and the case in which a mother (or other Hindu female having an estate similar to that of a childless widow) has herself alienated property belonging to the estate which she has taken as heiress, without sufficient reason for making such alienation. In the latter case, the alienation is good as against her, and so far as her own life-interest is concerned. Therefore, in fact, no cause of action necessarily arises at all with respect to her alienation so long as she lives. The cause of action does not arise until her death, when the reversioner's cause of action for the first time accrues. In the case before us, the property having never reached the hands of the mother (the Hindu widow) at all, having been throughout held adversely to her, the cause of action (of the reversioner) accrued in the mother's lifetime, and, therefore, a suit to recover possession, by whomsoever it may be brought, is barred, unless instituted within 12 years from the commencement of the adverse possession."

In *Aumirtolall Bose* v. *Rajoneekant Mitter* (3), the decision of the Full Bench at Calcutta in *Nobin Chunder Chuckerbutty* v. *Issur Chunder Chuckerbutty* (1) was cited in argument, and Sir Barnes Peacock, in delivering the judgment of the Board, affirmed that decision.

In *Jugul Kishore* v. *Jotindro Mohun Tagore* (4), which was before the Board in 1884, where a Hindu widow's right, title and interest in property had been sold in execution of a money decree, the Board, without a suggestion of dissent from the ruling, said, at page 73*. "It was held in the *Shivagunga's case* (2) that although a widow has for some purposes only a partial interest, she has for other purposes the whole estate vested in her; and that in a suit against a widow in respect of the estate the decision is binding upon the reversionary heir." "The Board also said:

"If the suit is simply for a personal claim against the widow, then merely the widow's qualified interest is sold (in execution of the decree) and the reversionary interest is not bound by it (the sale). If, on the other hand, the suit is against the widow in respect of the estate, or for a cause which is not a mere personal cause of action against the widow, then the whole estate passes."

In *Pertabnarain Singh* v. *Trilokinath Singh* (5) which was before the Board in 1884, the Board, said, at page 207*:

"It is sufficient for the present purpose to hold that, until, she had appointed another to be owner and representative, the Maharanee's estate in the *taluk* was sufficient to constitute her the full representative of it in the former suit. Her estate

(3) 2 I. A 113, 23 W. R. 214; 15 B. L. R. 10; 3 Sar. P. C. J. 430; 3 Suth. P. C. J. 94.

(4) 11 I. A. 66; 10 C. 985, 8 Ind. Jur. 455, 4 Sar. P. C. J. 553, 5 Ind Dec. (N. S.) 657 (P. C.).

(5) 11 I. A. 197; 11 C 186; 8 Ind. Jur 697; 4 Sar. P. C. J. 567; Rafique and Jackson's P. C. No 86; 5 Ind. Dec. (N. S.) 883 (P. C.)

*Pages of 11 I. A.—[*Ed.*]

was at least as large as that of a Hindu widow in her husband's property. What was said by this Board of the widow's estate in the *Shivagunga's case* (2)is applicable to hers."

In *Hari Nath Chatterji* v. *Mothurmohun Goswami* (6) which came before the Board in 1893, it was held that the rule in the *Shivagunga's case* (2) to the effect that an adverse decree against a Hindu widow binds those claiming in succession applies equally to the case of the daughter. It had been argued in that case that the adverse title alleged was founded on something which was independent of limitation, and that the Limitation Act XV of 1877 let the reversionary heir sue within 12 years from the time when his right to possession accrued. With reference to that argument, Lord Watson, at page 188*, said :—

" But you must show that the new law gives a right of action to the reversioner notwithstanding that the widow's right of possession has been extinguished by decree "

Owing to the fact that it did not appear from the judgment of the Board when Pearimoni, who was the second wife of Ramanundun Goswami, had died, beyond the fact that she was living when he died in 1847, there was some hesitation in referring to that case in the argument of this appeal. Mr. De Gruyther has, however, shown from the appeal record of that case, which is preserved in the Privy Council Office, that Pearimoni died in 1855.

In *Risal Singh* v. *Balwant Singh* (7) which was before the Board in 1915, Chaudhari Risal Singh, alleging that he was the reversionary heir of Jagat Prakash Singh, brought a suit against Bulwant Singh for possession of immoveable property known as the Landhaura estate. The property there claimed had belonged to Raja Raghubir Singh until he died childless in 1868. Raghubir Singh left a widow, Rani Dharam Kunwar, who bore to him a posthumous son, Jagat Prakash Singh, who died in 1870. Rani Dharam Kunwar had the authority of her husband to make successive adoptions. In 1877 she adopted to her husband a boy who died within three years after he had been adopted, and then she adopted another boy, who died in 1885, and in 1890 she adopted Bulwant Singh, the defendant to the suit. She continued in possession of the property, alleging that her husband Raghubir Singh had by his Will left it to her for her life. After a time Rani Dharam Kunwar and Bulwant Singh quarrelled. She was claiming a right to manage the property during her life ; he was claiming his full rights as an adopted son. The result was that, on the 7th January 1905, Rani Dharam Kunwar brought a suit in the Court of the Subordinate Judge of Saharanpur against Bulwant Singh, in which she claimed to have it declared that she had no power to adopt Bulwant Singh and had never validly adopted him, and to have her registered deed of adoption, in accordance with which she had adopted him, declared void and ineffectual against her. He alleged that Rani Dharam Kunwar had power to adopt him, and had validly adopted him. The Subordinate Judge, holding that Rani Dharam Kunwar was estopped from denying that she had validly adopted Bulwant Singh, dismissed her suit. She appealed to the High Court at Allahabad, and the High Court, also holding that Rani Dharam Kunwar was estopped, dismissed her appeal. Thereupon she appealed to His Majesty in Council. The Board in that appeal considered the evidence in that suit, and having come to the conclusion that Rani Dharam Kunwar had validly adopted Bulwant Singh and that her appeal should be dismissed, advised His Majesty accordingly. In the judgment the Board, at page 178*, said :

"There can be no doubt, in their Lordships' opinion, that Rani Dharam Kunwar in her suit against Bulwant Singh did, notwithstanding the personal estoppel under which she laboured, represent the estate on the question of fact as to whether Bulwant Singh had or had not been validly adopted, and that she represented the estate within the meaning of the rule in *Katama Natchier* v. *Raja of Shivagunga* (2). The principle of law to be applied in such cases was, their Lordships consider, correctly summarized by Banerji, J., in his judgment in this case, thus: 'Where the estate of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is, in the absence of

(6) 20 I. A. 183; 21 C. 8; 17 Ind. Jur. 481; 6 Sar. P. C. J. 334; 10 Ind. Dec. (N. S.) 638 (P. C.).

(7) 48 Ind. Cas. 553; 45 I. A. 168; 28 C L. J. 519; 24 M. L. T. 361; 40 A. 593; 9 L. W. 52; 23 C. W. N. 326; (1919) M. W. N. 155; 36 M. L. J. 597; 21 Bom. L. R. 511 (P. C.)

*Page of 20 I. A.—[*Ed.*]

*Page of 45 I. A.—[*Ed.*]

fraud or collusion, binding on the reversionary heir.' It cannot be said that there had not been a fair trial by the Board in 1912 of the right in the suit of Rani Dharam Kunwar against Bulwant Singh. The right in that suit was his right to the estate as a son validly adopted to Raja Raghubir Singh."

Upon the other side it was asserted the principle of the *Shivagunga's case* (2) might have been applied and had not been applied in the case of *Runchordas Vandravandas* v. *Paravatibai* (8) which came before the Board in 1899 The suit in that case was brought on the 21st December, 1888, against Vandravandas and the Advocate-General of Bombay by Cursondas Govindjee as the heir at-law of Kallianji Sewji, who had died on the 6th January, 1869, leaving two widows—Cooverbai, who died in 1871, and Nenavahoo, who died in 1888. Kallianji Sewji had made a Will, which wes proved on the 2nd March, 1869, by three executors, who were trustees, of whom the first defendant to the suit was at the date of the suit the sole survivor. The three trustees were appointed by the testator as trustees for *dharam*—that is, to make gifts for charitable or religious purposes. The Will contained the following clause: "As to the estates which have been given by me to my wives, they are to enjoy the rent of the said estates during their natural lives, and on the death of my wives the said estates are to revert to my *dharam*, and whatsoever income may be derivable from the said estates is to be expended for my *dharam*." The main question in the suit was whether the gift for charitable or religious purposes was void for vagueness and uncertainty, and the High Court at Bombay and the Board in appeal held that it was void and that the trustees took no interest under the Will. The suit was brought after the death of Nenavahoo.

It appears to their Lordships that part of the property claimed by the reversioner had been property of the respective widows as their *stridhan*, as to which there was some question as to the "rights of the heir" and that other parts of the property claimed was property which had been in the possession of the widows, to which the reversionary heir, the plaintiff, in the ordinary course, was clearly entitled, and that the Board was considering how an account, which the Courts below had ordered to be prepared, should be worded so as to show those two classes of property.

The defence of limitation was raised, but the Board held that it did not apply, saying:

"It is not necessary to consider what might be the case if the widows or the survivor of them were suing, as the plaintiff does not derive his right from or through them, and the extinguishment of their right would not extinguish his."

It has been maintained that the Board was not intending to discredit the rule in the *Shivagunga's case* (2). What the Board was considering was the wording of an account which the Appellate Court and the first Court had ordered to be prepared. The judgment of the Board was delivered by Sir Richard Couch in 1899, who in 1893 had delivered the judgme[illegible] in *Hari Nath Chatterji* v. [illegible] *Goswami* (6) which expressly approved of and applied as sound Hindu Law the rule in the *Shivaguna's case* (2). What was said by the Board in 1899 at the conclusion of the judgment makes it plain what the Board was considering It is there said:

"The decree of the first [illegible] dated the 27the July, 1895, should [illegible] been varied as it has been. It is [illegible]unt of the moveable property le[illegible] Cooverbai and Nenavahoo at the time [illegible] their deaths distinguishing between such of it as was their *stridhan* and 'as such' formed part of the estate of the testator. 'As such' appears to be an error for 'such as.' With this alteration their Lordships think the decree will be right."

As altered by the Board the account which was to be taken was an account of the moveable property left by C[illegible]erbai and Nenavahoo, the widows of th[illegible] respectively at the time of their deaths distinguishing between such of the said pr perty as was the *stridhan* of the said Cooverbai and Nenavahoo and such as formed part of the estate of the said testator.

It does not appear to their Lordships how the rule in the *Shivagunga's case* (2), could have been applied in the case then before the Board. What the Board, at the stage of the suit which was then before the Board, the Board having decided against the trust to the trustees, was considering was what was the account which was to be

(8) 26 I A. 71; 23 B. 725, 1 Bom L. R. 607; 3 C. W. N. 621; 7 Sar. P. C. J. 543; 12 Ind. Dec. (N. S) 485 (P. C.).

taken, and the Board directed that the account should separately show what had been the *stridhan* of the widows, and what was the property to which the heir might ordinarily be entitled. Their Lordships are unable to see what was the estate, within the meaning of the *Shivagung's case* (2) which the widows had represented, or to what the rule in the *Shivagunga's case* (2) could have been applied. The title of the trustees to the property devised or bequeathed to them for charitable or religious purposes by Kallianji Sewji was not questioned until the survivor of the two widows died in 1888, and that property had never been represented by the widows or either of them. It had been in the exclusive possession of the trustees under the Will of Kallianji Sewji from 1869 until the Court in the suit which was brought on the 21st December, 1888, after the death of the last surviving widow, had decided that the gift for charitable or religious purposes was void.

The result of the cases to which their Lordships have referred shows, in their opinion, that the Board has invariably applied the rules of the *Shivagunga's case* (2) as sound Hindu Law where that rule was applicable.

It also appears to their Lordships that the suit is barred by limitation. The plaintiffs could not be entitled to a decree for possession without displacing the adoption of 1862 of Alagusundara by Chokkammal. It was held by the Board in *Jagadindra Nath Chaodhrani* v. *Dakhina Mohun* [illegible] (9), that Art. 129 of the Second Schedule of Act IX of 1871 relates to all suits in which the plaintiff cannot succeed without displacing an apparent adoption by virtue of which the defendant is in possession. That Article prescribed 12 years as the period of time within which a suit "to establish or set aside an adoption" might be brought and that such period of 12 years should begin to run from "The date of the adoption, or (at the option of the plaintiff) from the date of the adoptive father's death."

Act IX of 1871 did not give to a reversioner whose right to sue for possession accrued upon the death of Hindu widow any further time than the 12 years given by Art. 129 to any plaintiff. That Act was in force until the 19th July, 1877, when Act XV of 1877, the Indian Limitation Act, 1877, came into force, and by Art. 141 of the Second Schedule of Act XV of 1877 a Hindu entitled to the possession of immovable property on the death of a Hindu female might bring his suit for possession within 12 years from the time when the female dies In the present case the period of limitation allowed by Art. 129 of Act IX of 1871 expired in 1874.

The person who at the date of the adoption in 1862 was entitled to sue to set aside the adoption must have been a reversioner to Arunachala, and looking at the pedigrees he must have been either Kalianasundara or Chokkappa, and it has not been pleaded or otherwise alleged that they were at the time of the adoption under the age of 18 years so as to entitle them to an extension of the period allowable to a minor under s. 7, Act IX of 1871, to bring a suit. It is obvious looking at the facts and dates in the present case, that Kalianasundara and Chokkappa must have arrived at full age long before Act IX of 1871 expired and that that Act applied.

In the present suit the Subordinate Judge found that the question as to the adoption of Arunachala was *res judicata*, but Sir John Wallis, C. J., and Mr. Justice Burn, in the appeal to the High Court, decided that the principle of *res judicata* did not apply. On that subject their Lordships do not consider it necessary to express an opinion.

It has been arranged by the parties through their respective Counsel and their respective Solicitors in the best interests of their clients that the plaintiff's appeal No. 124 of 1923, and the first defendants' appeal, No. 128 of 1923, which relates to the village of Enkan, should be dismissed, and that there should be no order as to costs in either of these appeals in which other respondents have not appeared. It has also been arranged by the parties though their respective Counsel and their respective Solicitors in the best interests of their clients that the plaintiffs' appeal No. 125 of 1923, should be dismissed without costs on either side, the plaintiffs having admitted that the late husband of the first defendant was not disqualified from inheriting along with the plaintiffs. Except as above arranged by the parties it appears to their Lordships that all the appeals should be dismissed with costs, and their Lordships will so accordingly humbly advise His Majesty.

(2) 13 I. A. 84; 13 C. 308; 10 Ind. Jur. 307; 4 Sar. P. C. J. 715; 6 Ind. Dec. (N. S.) 705 (P. C.).

Since the hearing of these appeals some of the parties, their Lordships understand, have entered into compromises. On production of the proper evidence, effect to these compromises will be given in the Order in Council confirming this report.

Z. K. *Appeals dismissed.*

Solicitors for Vaidiliv... Mudaliar and others:—Messrs. *T. L. Wilson and Co.*

Solicitors for Srinivasa Ayyangar and others:—Messrs. [illegible], Watkins and Sheppard.

Solicitor for Somasundaram Chettiar and A. Rangasami Chettiar:—Mr. *D. Grant.*

OUDH CHIEF COURT.

FIRST CIVIL APPEAL No. 6 OF 1924.

November 18, 1925.

Present:—Mr. Justice Stuart, Chief Judge, and Mr. Justice Ashworth.

NATIONAL BANK OF UPPER INDIA (IN LIQUIDATION) THROUGH ITS LIQUIDATORS *Seth* RADHA KISHAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BANSI DHAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s 28—Pro-note, execution of, for another—Personal liability not intended—Inducement by promisee—Inducement by real borrower—Limitation Act (IX of 1908), s. 20—Pro-note, execution of, for another—Payment of interest by real debtor—Extension of time.

If a negotiable instrument does not set out clearly that the maker is not personally liable the fact of the knowledge of the payee that the executant did not intend to incur personal liability is irrelevant. [p. 96, col. 1.]

Where, however, the promisee induces the executant of a pro-note to sign the pro-note upon the belief that a third party only, and not he, would be liable thereunder, the executant cannot be held to be personally liable. [p. 95, col. 2.]

Where the belief is induced by the third party and not the promisee, the executant cannot escape liability. [p. 96, col 2, p. 97, col. 2.]

Where a promissory note is executed in pursuance of an agreement between the executant and a third party that the former would execute the promissory note, but that the latter would pay the interest on it and also the principal, this is sufficient evidence of an implied condition that that third party should pay the interest falling due on the promissory note as the duly appointed agent of the executant and the payment by him of interest saves limitation, but not so, where payment of interest is made not in consequence of any such agreement between the third party and the executant but in consequence of an understanding between the executant and the promisee. [p. 98, col. 1.]

Appeal from the judgment and decree of the Sub-Judge, Lucknow, dated the 22nd October 1923.

Mr. *Aditya Prasad*, for the Appellants.

Messrs. *Niamatullah, Ishwari Prasad* and *Jai Krishna Tandon*, for the Respondents.

JUDGMENT.

Ashworth, J.—This is a plaintiff's first appeal. The suit is one brought by the National Bank of Upper India (in liquidation) against the defendant No. 1 Bansi Dhar and defendant No. 2 Gopal Das on a promissory note signed by the former only, and on a current account alleged to have existed between the defendants and the Bank. Reliance on the current account as a cause of action was abandoned in the lower Court, as the only debit items in this account were instalments of interest due on the promissory note, and for the purposes of this appeal the sole cause of action is liability under the promissory note. In the lower Court the second defendant pleaded that he could not be liable on a promissory note which was only signed by defendant No. 1 and not by himself, a contention which was upheld by the Court, and which is not impugned in this appeal. Bansi Dhar defendant No. 1 pleaded that even if consideration were held to have existed the suit was barred by limitation, as he himself had neither paid any interest on it nor authorised any one else to pay interest on it, and that three years had elapsed since the date of its execution. The lower Court held that the promissory note was executed by defendant No. 1 for consideration, namely, the promise by the Bank to the defendant No. 1 (a promise fulfilled) to credit the account of Bishambhar Nath Tandon with the sum secured by the promissory note, namely, Rs. 20,000. It found, however, that there was only one payment towards interest made within three years, namely, that of Rs. 908-6-3 made on the 23rd November 1918. This sum it held to have been paid by a third party Bishambhar Nath otherwise than as the agent of the defendant No. 1. It, therefore, held that limitation was not saved under s. 20 of the Limitation Act (IX of 1908). The finding as to limitation is impugned in this appeal. The respondent's Counsel is prepared to maintain that the lower Court's finding as to limitation was correct, irrespective of any other finding, but his main contention is that the suit should have been dismissed because there was no consideration. I am of the opinion that it might be difficult to hold that the suit was barred by limitation if the promissory note was for consideration, and, therefore, I first

proceed to decide the question whether the lower Court's finding that there was consideration should be upheld or not.

The plaintiff's case as set forth in the plaint was that the defendant No. 1 and his brother the defendant No. 2 needed the money for their cloth and banking business and accordingly borrowed it from the Bank on the security of the promissory note in question. The promissory note in question is Ex. 1, dated 22nd December 1917. It is for the sum of Rs. 20,000 with interest at 9 per cent. per annum to be compounded half yearly, and purports to have been executed "for value received in full." It is signed by defendant No. 1 Bansi Dhar alone. Exhibit 2 is a receipt executed by Bansi Dhar alone for Rs. 20,000. The plaint explains that the note was executed by Bansi Dhar alone because his brother, the second defendant, was a Director of the Bank and did not think it advisable to appear as a borrower from the Bank. The plea set up by Bansi Dhar in para. 10 of his written statement was that neither he nor his brother ever borrowed the twenty thousand rupees from the Bank, and that the note was executed by him at the request of Bishambhar Nath, a third party, with the knowledge of the Manager of the Bank, Pandit Ram Nath Sapru, merely, to conceal the indebtness of Bishambhar Nath to the Bank, Bishambhar Nath being one of the Directors. The actual language of this para. 10 is as follows:—

"There was an intimate friendship between Pandit Ram Nath Sapru deceased Manager of the plaintiff Bank, and Rai Sahib Babu Bishambhar Nath, one of the Directors of it, and the answering defendant and the said Rai Sahib, were also on very intimate terms. Rai Sahib Babu Bishambar Nath had taken the debt entered in the pro-note, the basis of claim, from the plaintiff; at his suggestion the answering defendant signed the pro-note the basis of claim and its receipt without getting any consideration, the answering defendant did not sign the said deeds as a debtor and no contract was entered into or consideration passed between the plaintiff Bank and the answering defendant with respect to the said documents."

This pleading in the written statement of the defendant No. 1 was subsequently amplified by a statement of Mr. Wazir Hasan, Counsel for the defendant which was as follows:—

"The loan sued for, if real, was negotiated by Rai Bishambhar Nath for his own benefit. He received that money from the Bank, and, therefore, there was no consideration which moved from the Bank in favour of Bansi Dhar. Bansi Dhar is, therefore, not liable to re-pay the loan. Bishambhar Nath, the real debtor, is liable to pay the loan. The defendant Bansi Dhar signed the pro-note at the request of Lala Bishambhar Nath who in view of the practice in the Bank, being one of the Directors of the plaintiff Bank, could not sign the pro-note. The plaintiff's case is based on the ground that the consideration of the pro-note in suit consists in the payment made by the Bank to Bansi Dhar. There is no other consideration set up by the plaintiff. The consideration so set up is denied by us. It is not our case that Bansi Dhar signed the pro-note in the capacity of an agent of a disclosed or undisclosed principal. Our case is that we are not liable because there is no consideration moving from the Bank towards us that would make the promise contained in the note sued for binding on us. As a positive case we further state that the loan advanced by the Bank to Bishambhar Nath was not really due to the fact that we ever made any request to the Bank for the loan to be made to Bishambhar Nath. The whole transaction was concluded between the Bank and Bishambhar Nath alone, and Bansidhar came in only as a *benami* signatory to the pro-note. The Bank was fully cognizant of this state of affairs."

Now it must be admitted that this pleading did not furnish an answer to the claim on the pro-note This pleading set up the fact that by agreement between defendant No. 1 and Bishambhar Nath the former was to incur no personal liability, and these pleadings suggest, though they do not explicitly state so, that the Manager Ram Nath Sapru was aware that the defendant No. 1 did not intend to incur personal liability. This was not enough. It was necessary in the language of s. 28 of the Negotiable Instruments Act to prove that the Manager of the Bank Ram Nath Sapru induced defendant No. 1 to sign the pro-note upon the belief that Bishambhar Nath only would be held liable. Section 28 of the Negotiable Instruments Act runs as follows:—

"An agent who signs his name to a promissory note, bill of exchange or cheque without indicating thereon that he signs as

agent, or that he does not intend thereby to incur personal responsibility, is liable personally on the instrument, except to those who induced him to sign upon the belief that the principal only would be held liable."

The Subordinate Judge has relied on the case, *Yenuganti China Venkatarayanim* v. *Katagiri Venkata Narasimharayanim* (1), as authority for holding that "If a negotiable instrument does not set out clearly that the maker is not personally liable the fact of the knowledge of the payee that the executant did not intend to incur personal liability is irrelevant", and we see no reason for dissenting from this pronouncement. If the evidence had only proved as much as was contended in the pleadings of the Counsel of defendant No. 1, the decision of the Subordinate Judge would have been correct in my opinion, but the evidence proves much more than this. It proves that the Manager Ram Nath actually induced the defendant No. 1 to sign the pro-note upon the belief that Bishambhar Nath only would be held liable. It is on a finding of fact and not a finding of law that I dissent from the conclusion of the Subordinate Judge. The evidence on this matter consists of the oral evidence of Bansi Dhar defendant No. 1 and Bishambhar Nath and on certain documentary evidence furnished by the account books of the Bank. The Manager Ram Nath Sapru was dead before this suit was brought. The Bank could not, therefore, produce him. The plaintiff Bank cannot in reason object to reliance being placed on the evidence of Bansi Dhar who was called as a witness by the plaintiff. Moreover, as the case set up in the plaint that the money was borrowed by Bansi Dhar for his own uses has been clearly disproved, and this is now admitted, the Bank could only succeed by reliance on the facts proved from the evidence of these two witnesses. In his examination-in-chief Bansi Dhar stated as follows:—

"It was on account of Bishambhar Nath's request and Pandit Ram Nath's assurance that I signed the pro-note in suit. There was no third reason. I had no dealing jointly with Pandit Ram Nath We did not incur any other liability either before or after the suit at the binding of Pandit Ram Nath.

"The assurance given by Pandit Ram Nath was that Bishambhar Nath was taking the loan and would re-pay it, and he could not take the loan in his own name as he was a Director He also said that there was no concern with me and that Rai Sahib would pay back the money. Bishambahar Nath said he was a Director, and could not take the money in his name and it was necessary that somebody should sign for him. I believed that Bishambhar Nath could not borrow money from the Bank by signing himself.

"Rai Sahib had negotiated the loan with Pandit Ram Nath and said that he was the Director and could not take the money in his name and it was necessary that somebody should sign for him. I believed that Bishambhar Nath could not borrow money from the Bank by signing himself.

"Rai Sahib had negotiated the loan with Pandit Ram Nath and said that he was the Director and could not take the loan himself. Pandit Ram Nath said that Rai Sahib was liable for the money and that I was to have no concern with it. I do not know if Ram Nath had the authority to advance more than Rs. 500 or not."

In this statement he clearly states that the Manager Ram Nath had said that Rai Sahib was liable for the money and that he was to have no concern with it. Bishambhar Nath was called as a witness by the defendant, and corroborates the defendant, although to do so was clearly against his own interest in escaping liability. Bishambhar Nath in his evidence has stated:

"I had borrowed the amount, covered by this pro-note from the plaintiff Bank. As I could dot borrow this amount in my own name from the bank on pro-note, I got the pro note signed by Bansi Dhar defendant No. 1 on the advice of Pandit Ram Nath Sapru, then Manager and Director of the Bank..... ...I was talking to Pandit Ram Nath Sapru in the capacity of the Manager of the Bank and Bansi Dhar was also talking to him in the same capacity.....The sum of Rs. 20,000 was borrowed to pay off some other account in the plaintiff Bank payable by me and Pandit Ram Nath Sapru, the late Manager of the Bank, I do not remember in whose name this account was payable."

This evidence, which we believe, clearly shows that not only Bishambhar Nath Tandon, the third party, but also the Manager Ram Nath induced Bansi Dhar, defendant No. 1, to sign the pro-note upon the belief that Bishambhar Nath only would be held liable. It is also to be noted that

(1) 21 Ind. Cas. [illegible] N. 1005; 14 M. L. T. 502.

the Bank only brought the suit after the death of the Manager Ram Nath Sapru, from which it may be inferred that Ram Nath himself was aware that it would not be advisable to sue the defendant No. 1. There is also strong documentary and other evidence to support the view that Bansi Dhar was induced to sign the pro-note in this way. As the lower Court remarks in its judgment page 276, Ex. 15, cash book of the plaintiff Bank, shows that Rs. 20,000 were credited to the current account of Bishambhar Nath on the 28th December 1917, the next opening day after the 22nd December on which date the pro-note in suit was executed by Bansi Dhar. This important exhibit has not been printed by an oversight. I find, however, that just the same thing was done in the following December 1918. Exhibit 16, which is printed, is the cash book for Monday the 30th December 1918. There Bishambhar Nath Tandon is credited with Rs. 50,000 and one Radha Kishen is debited with Rs. 50,000 on a pro-note. The Subordinate Judge attempts to get over this evidence, that the Manager Ram Nath himself induced defendant No. 1 to sign the pro-note by holding out that he would not be liable under it, by two arguments.

"In the first place it is not said by Bansi Dhar that Ram Nath had told him that the plaintiff Bank would not hold him liable."

I have already quoted the statement,

"It was on account of Bishambhar Nath's request and Pandit Ram Nath's assurance that I signed the pro-note."

I have also quoted the evidence of Bishambhar Nath Tandon. The Subordinate Judge was, therefore, wrong on this point. Next he has stated, that even if Ram Nath had held out the inducement it would not, in his opinion, have helped the case for the defendant. He then proceeds to draw a distinction between the Manager acting on behalf of the Bank and acting in a private capacity. He thinks that the Manager got the pro-note executed on behalf of the Bank but gave the assurance in his individual capacity. This distinction appears to me to be an impossible one in view of the language of s. 199 of the Contract Act. It is common ground that the advance to defendant No. 1 by the Manager of the Bank was beyond the powers of the Manager—See Ex. B11, page 5 of Part III, which is a copy of a resolution passed by the Directors, and which runs as follows:—

"Resolved that the General Manager be empowered to make advances on approved securities to the extent of Rs. 500 only."

Now in order to bring this suit the Bank had to ratify the Manager's unauthorised action and by bringing the suit it may be deemed to have done so. But under s. 199 of the Contract Act a person ratifying any unauthorised act done on his behalf ratifies the whole of the transaction of which such act formed a part. The Bank could not disown any inducement made by the Manager at the time of getting the pro note executed.

It is clearly, therefore, proved in my opinion that Bansi Dhar is not liable personally on the pro-note inasmuch as he was induced by the Bank's Manager to sign upon the belief that Bishambhar Nath only would be held liable. The form in which the case has been argued in appeal is that there was no consideration. Section 28 of the Negotiable Instruments Act will only apply if Bansi Dhar be held to be the agent of Bishambhar Nath Tandon. This has not been pleaded by Bansi Dhar's Counsel in so many words, but it was obviously what was meant when Syed Wazir Hasan took up the plea on his behalf that the signature was *benami*. The matter has been argued in this Court on the ground that there was no consideration. For the plaintiff it was urged that the consideration passing from the Bank to the defendant No. 1 was that the Bank agreed to transfer the liability in respect of Rs. 20,000 due from Bishambhar Nath Tandon towards the Bank to the defendant No. 1. Enough has been said to show that there was no agreement by the Manager. The agreement by him was that the defendant No. 1 should not be held liable at all. It is urged, however, that actual forbearance at the request of the defendant would be a sufficient consideration although there was no contract to forbear. It is not shown that the defendant ever asked the Manager to forbear proceedings against Bishambhar Nath Tandon on the book debt. On the contrary the Manager told the defendant that he had no [illegible] proceed against Bishambhar [illegible] but in order to prevent the Directors making him do so he wanted the pro-note executed by the defendant No. 1. I do not agree with the finding of the lower Court that it was always open to the plaintiff Bank to recognise the pro-note in suit.

Coming to the question of limitation I should have been disposed to hold that if the

pro-note had been executed by defendant No. 1 in pursuance of an agreement between himself and Bishambhar Nath, that he would execute the pro-note but that Bishambhar Nath would pay the interest on it and also the principal, then this would have been sufficient evidence of an implied condition that Bishambhar Nath should pay the interest as the duly appointed agent of defendant No. 1. In this view the payment of the 23rd November 1918 by Bishambhar Nath would have saved limitation. The facts, however, are different. The interest was paid by Bishambhar Nath not in consequence of any such agreement between defendant No. 1 and Bishambhar Nath, but in consequence of an understanding between the defendant No. 1 and the Manager of the Bank. In the light of such an understanding Bishambhar Nath's payment cannot be said to have been on behalf of the defendant No. 1. It was a payment on behalf of himself, inasmuch as the Manager was still holding Bishmabhar Nath to be the real debtor. If the finding of the Subordinate Judge as to the liability of defendant No. 1 under the pro-note had been correct, it may well have been that his finding as to limitation could not have been upheld. In my view of the case, however, the suit must fail not only because the suit is time barred but also because there was no consideration for the defendant No. 1 signing the pro-note in his personal capacity. If he signed the pro-note on behalf of Bishambhar Nath Tandon then he did this on the inducement of the Bank and the Bank must proceed against Bishambhar Nath Tandon. In my view this appeal should be dismissed with costs.

Stuart, C. J.—I concur in the finding of my learned brother. I agree with him in accepting the evidence of Bansi Dhar and Bishambhar Nath as true upon the points to which he has referred. This evidence is strongly corroborated by other evidence. I agree that there was no consideration for the execution of the promissory note by Bansi Dhar and I further find that there was no payment of interest due upon the promissory note made by Bansi Dhar or by his agent duly authorised in this behalf. I, therefore, agree that the appeal should be dismissed with costs.

By the Court.—The appeal is dismissed with costs.

N. H. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 761 OF 1922.

October 10, 1924.

Present:—Mr. Justice Waller.

M. RAMA RAO—PETITIONER

versus

K. RENGASWAMY RAO—RESPONDENT.

Guardians and Wards Act (VII of 1890), ss. 40, 41 (3)—Guardian, discharge of, application for—Investigation into accounts—Court, power of.

On an application by a person for discharge from guardianship under s. 40 of the Wards Act, the Court has not only to order under s. 41 (3) delivery of accounts and property in his possession, but has power to direct an investigation into accounts before ordering discharge.

Nabu Bepari v. *Sheikh Mahomed*, 5 C. W. N. 207, distinguished.

Petition, under s. 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Nellore, dated the 23rd day of January 1922, in I. A. No. 16 of 1920, (O. P. No. 92 of 1913).

Mr. *M. Patanjali Sastri*, for the Petitioner.

Mr. *K. Krishnaswami Iyengar*, for the Respondent.

ORDER.—In January 1920 respondent applied to be discharged from guardianship. Two years later the District Judge granted him a discharge under s. 40 of the Act, at the same time directing him under s. 41 (3) to deliver his accounts and all property in his possession belonging to the minor. In doing so, the District Judge expressed the opinion that he could not make an investigation into the accounts. The ruling he relied on *Nabu Bepari* v. *Sheikh Mahomed* (1), has no application here, for it dealt with the case of a minor, who had come of age.

When the Court has ordered a guardian under s. 41 (3) to deliver accounts and property in his possession, there is still a further question to be decided, that is to say, whether he is to be discharged from further liability under the next sub-section. I am unable to see how it is to be decided without an investigation into the accounts. I cannot for a moment concede that the Court is bound to accept without scrutiny any account he chooses to submit or to allow him to deliver only such property as he admits himself to possess.

In this case, the District Judge has not yet passed any order under s. 41 (4). The records will be returned. The parties may apply to him for further orders. There will be no order as to costs in this Court.

V. N. V. *Petition allowed.*

(1) 5 C. W. N. 207.

OUDH CHIEF COURT.

SECOND RENT APPEAL No. 39 OF 1925.
November 11, 1925.
Present:—Mr. Justice Misra.
MAHIPAL SINGH—PLAINTIFF—APPELLANT
versus
SARJOO PRASAD—DEFENDANT—RESPONDENT.

Adverse possession—Possession under invalid title—Co-sharers—Realization of rent by one co-sharer.

If possession is acquired by a person under an invalid title and he continues to remain in possession for more than 12 years, although the document relating to his title may be invalid for want of registration or any other ground, yet the possession having lasted for more than 12 years the title becomes an un-assailable one. [p. 100, col. 1.]

Therefore, where a party originally enters into possession under an unregistered sale-deed, the defect in his title is cured by his having been in possession for over 12 years [*ibid*]

Varada Pillai v. *Jeevarathnammal*, 53 Ind. Cas 901; 43 M 244; (1919) M. W. N 724; 10 L W. 679, 24 C W. N. 346; 38 M. L. J 313; 18 A L J 274, 46 I A 285, 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444 (P. C), followed.

If a co-sharer has been in possession of a particular land, his possession cannot be considered adverse against the other co-sharers, and his possession must be deemed to be on behalf of them all In order to establish adverse possession in such a case a co-sharer has to establish that he expressly denied the title of the other co-sharers and remained in possession after such denial for over 12 years. [*ibid.*]

Therefore, the mere fact that a co-sharer has been realizing rents of certain plots of land in which he is a co-sharer, would not establish that he has been in adverse possession so as to extinguish the title of the other co-sharers [*ibid*]

Corea v. *Appuhamy*, (1912) A. C 230; 81 L. J. P. C. 151; 105 L T. 836, *Jogendra Nath* v. *Baladeb Das*, 35 C 961, 12 C. W. N. 127, 6 C L. J. 735 and *Ahmad Raza Khan* v. *Ram Lal*, 26 Ind. Cas. 922; 13 A. L. J. 201, 37 A 203, relied on.

Second rent appeal against the decree and judgment of the District Judge, Lucknow, dated the 16th March 1925 reversing those of the Assistant Collector First Class, Lucknow, dated the 25th October 1924.

Messrs. *Ganesh Prasad* and *Sheo Prasad*, for the Appellants

Mr. *Hakimuddin Siddique*, for the Respondents.

JUDGMENT.—This is an appeal arising out of a suit for profits under s. 108 cl. 15 of the Oudh Rent Act, in respect of land situate in *Mohal* Sarju Prasad, *Pargana* Nigohan, Tahsil Mohanlal Gunj, District Lucknow The defendants denied the title of the plaintiff and urged in defence that they had been in adverse possession of the share of the plaintiff and that consequently he was not entitled to claim any profits.

The learned Assistant Collector decreed the plaintiff's claim for Rs. 27-8-6 against the defendant No. 1.

On appeal the learned District Judge allowed the appeal and dismissed the plaintiff's suit with costs in both the Courts.

In second appeal it is contended that the decision of the learned District Judge with regard to adverse possession of the defendants is incorrect and that the plaintiff's suit should have been decreed as was done by the learned Assistant Collector.

In order to decide the plea of adverse possession it is necessary that I should go into some of the facts of the case. It appears that on the 2nd of November 1883 three persons Gaya Singh, Ganesh Singh and Diwan Singh sold their shares in villages Lalpur and Chak Kaitha to one Jokhelal *alias* Zaoki Lal, father of Sarju Prasad defendant-respondent No. 1. In the said sale-deed certain plots of land which consisted of grove land and cultivated land were exempted from sale. The share of each of the vendors in the cultivated plots and in the grove land was one-third each. Ganesh Singh had two sons, one Gur Dayal and the other Mahipal Singh who was the plaintiff in the Court below and is now the appellant in this Court. The one-third share which Ganesh Singh had in the grove land devolved, after his death, on his two sons named above. Gur Dayal sold half of his father's one-third which he had inherited by means of a sale-deed, dated the 23rd of December 1903 to defendant Sheo Dayal. Mahipal Singh is still in possession of his one-sixth share in the grove land. So far as the cultivated plots of land went Ganesh Singh sold his one-third share in them to Sheo Dayal respondent under an unregistered deed, dated the 9th of June 1896 for Rs. 200. The respondents contended that they were in possession of the plaintiff's share in the cultivated plots of land by virtue of the above mentioned sale-deed and that they were in adverse possession with regard to the plaintiff's one-sixth share in the grove land.

It is clearly proved from the facts stated above that so far as the cultivated plots of land are concerned the defendant's possession amounts to an adverse possession. Although the deed was an unregistered deed yet it is clear from the *Patwari's* evidence on the record that the vendee obtained possession of those plots of land from the

date of the sale. The defendants' have, therefore, been in possession of the plaintiff's share in those plots ever since the year 1896 when the sale-deed was executed and have remained in possession for a period of over 26 years. Although the defendants originally entered into possession under an unregistered sale-deed, yet the defect in their title has now been cured by their having been in such possession for over 12 years. This principle is clearly established by a decision of their Lordships of the Privy Council reported in *Varada Pillai* v. *Jeevarathnammal* (1). Their Lordships have held that if the possession is acquired by a person under an invalid title and he continues to remain in possession for more than 12 years, although the document relating to his title may be invalid for want of registration or any other ground, yet the possession having lasted for more than 12 years the title becomes an unassailable one. In my opinion the plaintiff's claim to profits with respect to his share in the cultivated plots of land cannot be maintained.

Regarding the plaintiff's claim with respect to his share in the grove plot it is equally clear to me that the defendants have not been able to establish their claim by adverse possession. I have not been able to follow the judgment of the learned District Judge on this point. It is clear that the plaintiff's share in groveland amounts to one-sixth and that the defendants are co-sharers in those very plots of land. The mere fact that the defendants have been realizing rents of those plots would not establish that they have been in adverse possession of the land. It is well established rule of law that if a co-sharer has been in possession of a particular land, his possession cannot be considered adverse against the other co-sharers, and his possession must be deemed to be on behalf of them all. In order to establish adverse possession in such a case a co-sharer has to establish that he expressly denied the title of the other co-sharers and remained in possession after such denial for over 12 years, *vide Corea* v. *Appuhamy* (2) *Jogendra Nath* v. *Baladeb Das* (3) and *Ahmad Raza Khan* v. *Ram Lal* (4). It, therefore, appears to me to be quite clear that the title of the plaintiff to claim profits with regard to one-sixth of the grove land is not, in any way, extinguished by adverse possession.

I, therefore, allow this appeal to this extent that I decree the plaintiff's claim with respect of his share of profits in the grove land which was agreed upon in the Trial Court as amounting to Rs. 15 for 3 years in suit. The plaintiff is also entitled to a sum of Rs. 8-6 for the produce of *chari* in plots Nos. 466 and 518 for one year, namely 1330 *F*, these plots being also included in the grove land. In the result I decree the plaintiff's claim for Rs. 15-8-6 with proportionate costs in all the three Courts, the rest of the claim will stand dismissed with costs in all the Courts.

G. H. *Appeal partly allowed.*

(1) 53 Ind. Cas. 901; 43 M. 244, (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274, 46 I. A. 285; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444 (P. C.).

(2) (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 836.

(3) 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735.

(4) 26 Ind. Cas. 922; 13 A. L. J. 204; 37 A. 203.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 924 OF 1924.

September 24, 1925.

Present:—Mr. Justice Ramesam.

D. A. KANDASAMI CHETTIAR—PETITIONER

versus

G. F. F. FOULKES—RESPONDENT.

Madras Local Boards Act (XIV of 1920), ss. 35, 56 (4)—Failure of member to attend three consecutive meetings of District Board—Restoration, effect of—Fresh oath of allegiance, whether necessary—Taluk Board member, election of, to District Board—Loss of and restoration to membership of Taluk Board, effect of—Election petition—Amendment application after expiry of period fixed, whether permissible

Where a member of a District Board fails to attend at the meetings of the Board for three consecutive months and is restored to office under s. 56 (4) of the Local Boards Act by a resolution of the Board, he does not become a new member but is merely restored to the office of membership for the balance of the period for which he was originally elected and a fresh oath of allegiance is, therefore, unnecessary. [p. 101, cols. 1 & 2.]

Where a member of a Taluk Board who has been elected to the District Board loses his membership of the former by absence for three consecutive months and thereby loses his membership of the District Board also and is then restored under s. 56 (4) of the Local Boards Act to the membership of the Taluk Board by a resolution of the said Board, such resolution cannot have the effect of restoring him to the membership of the District Board as well. [p. 102, col. 1]

v. *Sethuratna Iyer*, 87 Ind. Cas. 363; M.) 1034, followed.

An application for an amendment of an election petition filed after the expiry of the days allowed for

an objection petition is not unsustainable and may in the discretion of the Judge be allowed [p 102, col. 1]

Section 35 of the Madras Local Boards Act is inapplicable to an election petition and cannot cure defects in an election. [p. 102, col 2.]

Petition, under s. 115, C. P. C., and s. 107 of the Government of India Act, praying the High Court to revise the order of the District Court, Salem, dated the 11th November 1924, in O. S. No. 52 of 1924.

Messrs. *T. M. Krishnaswami Iyer* and *V. Ganpathi Iyer*, for the Petitioner.

Mr. *S. Varadachari*, for the Respondent.

JUDGMENT.—This is a revision petition against the order of the District Judge of Salem refusing to set aside the election of the President of the District Board of Salem held on 29th July 1924. The first ground alleged in the petition and repeated before me here is that five of the voters, namely, Arunachalla Goundan, 2. Bommanna Chetty, 3. Rahu, 4. Chinnappa Goundan and 5. Vasudeva Reddi have ceased to hold their office as members of the District Board by reason of their non-attendance at the meetings of the District Board for three consecutive months. Four of these were elected and one was nominated. Though all the five were restored to their office by a resolution of the Board under s. 56 (4) of the Act, it is said (1) that they cannot exercise the functions of the members of a Board at the meeting at which they were restored, (2) that they ought to take afresh oath of allegiance and until a fresh oath of allegiance was taken, they cannot exercise the functions of members of the District Board and in this case no such fresh oath or allegiance was taken.

The District Judge was of opinion that these members were not disqualified and their membership did not cease as they were not absent for three consecutive meetings. It appears that 4 of them were absent from one meeting and the 5th absent from two consecutive meetings, but in two of the three months preceding the meeting of the 29th July, the Board had not met at all, infringing r. 1 of the rules regulating the proceedings of Local Board (Sch. II of the Act). It is unnecessary to consider this question as the members were all restored to the office and as I have come to the conclusion that the other objections against their membership cannot stand. If, at the meeting of the 29th July, they were first restored to membership and afterwards the Board proceeded to the election of the President, I do not see anything irregular or illegal in this procedure. Therefore, there is no substance in the first ground.

The second ground is that a fresh oath of allegiance must be taken. The effect of the restoration of a member, though it may not be retrospective as to make him a member of the Board during the preceding 3 months or so as to restore to him any privileges besides the mere membership such as presidentship or vice-presidentship which he lost along with the membership, as was held by me in *Devasigamony* v. *Sethuratna Iyer* (1), is certainly to restore him to the office of membership for the balance of the period for which he was originally elected or nominated It is not that he becomes a new member getting a fresh full period of office from the date of the restoration. Whenever there is a fresh election or fresh nomination no doubt a fresh oath of allegiance ought to be taken. But in the case of a restored member he is restored to his former membership, that is, the membership he previously had by election or by nomination completed by the oath of allegiance which he had previously taken. If it be said that he does not get the benefit of he prior election or nomination and the oath which he had taken, it would be creating a fourth class of members not contemplated by the Act. The Act contemplates only *ex officio* members, elected members and nominated members. It is clear, therefore, that the restoration makes him the elected or nominated member he previously was. If so, he gets also the benefit of the previous oath of allegiance. I do not think, therefore, there is any substance even in the second ground. The result is, that so far as these five voters are concerned, the petition fails.

The next ground taken is that one Mekha Pillai a member of the Taluk Board, Salem who had been elected to the District Board lost his membership of the Taluk Board by absence for three consecutive months and thereby lost his membership of the District Board also. He was then restored to the membership of the Taluk Board by a resolution of the Taluk Board dated the 29th of March, 1924. The contention is that the resolution of the Taluk Board cannot have the effect of restoring him to the membership of the District Board which he lost. On this matter I do not agree with the view taken by the District Judge that

(1) 87 Ind. Cas. 363; (1925) A. I. R. (M.) 1034.

the restoration of Mekha Pillai to the membership of the Taluk Board also restores him into the membership of the District Board. I adhere to the view I have taken on this matter in my judgment in *Davasigamony* v. *Sethuratna Iyer* (1). But this does not help the petitioner for the respondent got 22 votes, and the petitioner got 19. In the first place, it is not clear that Mekha Pillai voted for the respondent (*vide* the judgment of the District Judge in para. 8). But assuming that he voted for the respondent and that his vote is invalid the respondent has still got a majority.

The next objection taken is that there are two cases like the case of Mekha Pillai of others who were elected to the District Board and who have lost their membership of the District Board by non-attendance at the Taluk Board and losing the membership of the Taluk Board and whose restoration to the membership of the Taluk Board does not, according to my view, restore them to the membership of the District Board. This objection was not taken in the original petition. It was sought to be introduced into the case by an application for amendment dated the 1st November, that is during the hearing of the petition. Though I do not hold that an application for an amendment of the petition filed after the expiry of the days allowed for an objection petition is never maintainable and I think that such an amendment petition may, in the discretion of the Judge, be allowed, even after the expiry of that period, I cannot say that the discretion has been improperly exercised by the District Judge in this case. If the petition cannot now be allowed to be amended, it is obvious that the petition must fail.

It has been contended by Mr. Varadachari who appeared for the respondent that s. 35 of the Act cures all the above defects in the election alleged by the petitioner. I adhere to the view I expressed in *Devasigamony* v. *Sethuratna Iyer* (1). Mr. Varadachari has called my attention to s. 57 (3) and to the fact that the English Act on which the decision in *Nell* v. *Longbottom* (2) was passed, there is a section (s. 84) which shows that an election petition did not come under the scope of s. 42 of the English Act similar to s. 35 of the Indian Act, and that in the Indian Act there is no section similar to s. 84. He also urged that it is inconvenient to hold that the acts of a Board the members of which consist of persons like Mekha Pillai in this case are invalid. I agree with this view in all acts of the Board other than election, s. 35 cures such a defect. But I do not think that s. 35 applies to an election petition. I think the rules regarding election petition allowing the improper receipt or refusal of a vote to be questioned correspond to s. 84 of the English Act. Were it not so, the election petition becomes a farce. I do not think that s. 57 (3) can help us in this matter. It relates to the case of a dispute being raised as to the membership of a member himself and provides that he should be deemed a member pending such decision.

But as I have already held the petition must fail and is, therefore, dismissed with costs.

Order will follow.

V. N. V. *Petition dismissed.*

N. H.

(2) (1884) 1 Q. B. 767; 63 L. J. Q. B. 440; 10 R. 193; 70 L. T. 499.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 475 OF 1924.

October 15, 1925.

Present:—Mr. Halifax, A. J. C.

KESHEORAO—DEFENDANT—APPELLANT

versus

MAROTIRAO—PLAINTIFF—RESPONDENT.

Partition—Temporary or permanent—Presumption—Burden of proof—Practice—Evidence produced at late stage, whether should be admitted.

A division of property, an arrangement whereby property is divided, a distribution of property are all exactly the same as a partition of property. But a partition may be either partial or complete and it may be either temporary or permanent. In the great majority of partitions of common property the partition is meant to be permanent. Therefore, if nothing more is known about a partition except that it has been made, it must be taken to be a permanent partition unless there is evidence to show that it was temporary. The length of time for which a partition has been allowed to stand undisturbed or without re-adjustment is a factor which may be taken into consideration in deciding whether a partition was temporary or permanent. [p. 103, col. 2; p. 104, col. 1.]

It is the duty of a Court to welcome any evidence that may be offered and indeed to search for it, and it is wrong to exclude any evidence that is relevant. If evidence which is relevant is tendered at a late stage such suspicion or disbelief of it as may be due to its production at a late stage will attach to it automatically and if the other party has had no opportunity because of the lateness of the stage at which the evi-

dence is produced, of producing any rebutting evidence that they might have had, the disbelief is greatly increased. [p. 104, col 1.]

Second appeal against the decree of the District Judge, Wardha, dated the 25th of August 1924, arising out of the decision of the First Sub-Judge, Second Class, Waradha, dated the 12th February 1924.

Messrs. *N.G. Bose*, R. B., and *M.B. Niyogi*, for the Appellant.

Messrs. *M. B. Kinkhede*, R. B., and *R. R. Jaywant*, for the Respondent.

JUDGMENT.—There is no appeal and there is none in the Court of the District Judge in respect of field No. 57-1, which was originally *sir* land but is now apparently recorded as *khudkasht* because it is held by the defendant-appellant Kesheorao on a lease for 99 years from a person who has no other interest in the village except the proprietary right in that field. The decision that this land must be excluded from the lands liable to partition is certainly correct, though the true state of affairs does not seem to have been realized.

The total area of *sir* and *khudkasht* in the village is said to be 364·39 acres. It is admitted that 107·87 acres of this were acquired by Kesheorao in certain years between 1886 and 1903, and it is in issue between the parties whether he acquired them for his own benefit or for that of the whole proprietary body. In regard to the rest he pleaded that it was divided among the co-sharers about 1860, so that each of them became separate owner of the fields allotted to him. The rights in the two parcels of land clearly require separate examination. Even after it has been found that the division of the lands in 1860 was only a temporary arrangement, to say that Kesheorao, an eight anna proprietor, is properly entitled to only one half of all the *sir* and *khudkasht* in the village is to beg the question as to his acquisition of the 107·87 acres for himself or for all the proprietors.

In regard to both parcels of land it has to be remembered that the plaintiffs can at the most claim that Kesheorao shall hand over to them so much land as will make the area of their land equal to the area they ought to hold, that is five sixteenth of the total. They cannot claim what belongs to the proprietors of the remaining three annas share in the village, the defendants, other than Kesheorao, who are content that Kesheorao should retain it.

In this connection it may be mentioned that one of those other defendants, holding an one anna share but no *sir* land at all, disclaimed all interest in the suit, but was not discharged and was made a respondent in this and in the lower Appellate Court. He did not appear in the lower Appellate Court, but has appeared here, and his costs must be paid by the appellant. But the other defendants, who own a two anna share and do hold 6·32 acres of *sir*, were discharged in the first Court before the issues were framed. They also have been impleaded as respondents in both Appellate Courts, and the appellant is saved from having to pay for his carelessness only by the failure of those respondents to appear in either Court.

In discussing the matter of the areas of the original home-farm, apart from Kesheorao's subsequent acquisitions, which are proportionate to the shares of the parties in the village, it has to be assumed that the whole of the 70·80 acres held by the plaintiffs is exactly the part of the original home-farm they have always held, neither more nor less. The truth of this assumption is of course, extremely doubtful, as they also may have made subsequent acquisitions.

The total home-farm in the village is 364·39 acres, and the area acquired by Kesheorao from tenants is 107·87 acres. That leaves 236·52 acres. The area in proportion to the share of the parties, which may be called their proper areas, and the areas they actually hold are as follows:—

		Proper area	Actual area
Kesheo Rao	Ans. 8	128·26	179·40
The plaintiffs	Ans. 5	80·16	70·80
The other defendants	Ans. 3	48·10	6·32

It appears then that of the old home-farm Kesheorao would have to hand over not more than 9·36 acres to the plaintiffs; even if it has been held in severalty but owned in common during all these years.

As to the partition, the issue has been much complicated by the common use of terms in narrow senses without any definition of them. A division of property, an arrangement whereby property is divided, a distribution of property are all exactly the same as a partition of property. But a partition may be either partial or complete and it may be either temporary or permanent. The partition of the home-farm that was certainly made in this case about 1860

or not long after, was partial, because it was not a partition of all the property of the co-owners, and the only question is whether it was temporary, that is to say, left the parties still co-owners of the land that was divided up among them, with an understanding that it could be restored to their joint possession or divided up again differently at some time in the future, or was permanent, that is to say, was not subject to re-adjustment and left each co-sharer a separate owner of the land allotted to him.

Now in the great majority of partitions of common property, the partition is meant to be permanent. Therefore, if we know nothing about a partition except that it has been made, we must believe that it was a permanent partition, unless somebody can give us good reason for believing his allegation that it was temporary. But in this case there is not only no reason for believing the partition was temporary but there are strong additional reasons for believing it was permanent. The strongest of them is the length of time, nearly seventy years, that it has been allowed to stand undisturbed and without re-adjustment. I hold, therefore, that all the home-farm land held by Kesheorao, apart from the 107·87 acres he acquired by purchase from tenants and by lease from a co-owner of the village, is his own separate property and the plaintiffs are not the owners of any share in it.

Of the 107·87 acres, the 12·21 acres of No. 57-1 mentioned at the beginning of this judgment has to be left out of consideration. That leaves 95·66 acres comprised in six fields all purchased by Kesheorao from absolute occupancy tenants, two together in 1886, two together in 1893 and two separately in 1903. The deed of sale of two of these fields was excluded from evidence because of its late production. It has always seemed to me to be the duty of the Court to welcome any evidence that may be offered and indeed to search for it and to be wrong to exclude any evidence that is relevant; if it is tendered late such suspicion or disbelief of it as may be due to that fact will attach to it automatically, and if the other party has had no opportunity, because of that lateness of producing of rebutting evidence they might have had, the disbelief is greately increased.

But here there was no necessity to produce or examine any of these documents. It is proved otherwise that Kesheo Rao purchased all these fields not later than 1903 from the absolute occupancy tenants of them. We are concerned only with that fact and not with any of the terms of the purchases. Kesheo Rao has undoubtedly held all these fields from 1903 or earlier as the separate owner of them. He was entitled to call himself the absolute occupancy tenant of them against the proprietary body of the village, and if he bought them without due notice to the proprietary body, as he probably did, he might have been turned out of them by a proper suit instituted within the time allowed. He seems not to have regarded himself or to have been regarded by the other sharers in the village as an absolute occupancy tenant, but as a separate holder of *khudkasht* land. I am not prepared to say which of these two is the more valuable right, but it is beyond doubt that Kesheorao was regarded by himself and by everybody else as the separate owner of that land, and having held it so for a great deal more than twelve years he became the separate owner of it, whether he was so at the beginning or not.

It may be remarked that the order of the Revenue Officer put the matter correctly and concisely, probably because he was not confused by half understood pleas of law. The decree of the lower Appellate Court will be set aside and the plaintiffs' suit will be dismissed. The plaintiffs will pay all the costs in all three Courts.

Z K.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 233 OF 1923.

July 3, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Graham

RAM KUMAR DAS—DEFENDANT—APPELLANT

versus

HARANARAIN DAS *alias* DINABANDHI DAS AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 13, scope of—Assertion of right made in previous suit, admissibility of—Cess Act (IX B. C. of 1880), s. 95—Road cess return,

admissibility of, in favour of party filing return—Appeal, second—Value of documentary evidence, whether can be considered

The language of s. 13 of the Evidence Act is very wide and covers the assertion of a right in a previous suit in which that right was in dispute. It is not necessary that the right should have been successfully asserted; the mere assertion of the right is sufficient. [p. 105, col. 2.]

Section 95 of the Cess Act is absolute in its terms in that a road cess return shall not be admissible in evidence in favour of the person on whose behalf it was filed; it is immaterial whether it is sought to be put in evidence directly to prove an admission or indirectly for some other purpose. [p. 106, col. 1.]

A Court of second appeal will deal with the question of the admissibility in evidence of a document but not with its evidentiary value. [p. 105, col. 2.]

Appeal against a decree of the Subordinate Judge, Midnapore, dated the 7th of September 1922, reversing that of the Munsif, Fourth Court, Tamluk, dated the 27th of July 1921.

Mr. *S. C. Maity* and Babu *A. Purba Charan Mookerji*, for the Appellant.

Mr. *Mohendra Nath Roy* and Babu *Sontosh Kumar Pal*, for the Respondents.

JUDGMENT.—This is an appeal against the decree which the plaintiffs have obtained for *khas* possession of the land in dispute on establishment of their *niskar* right thereto. The only point urged in this appeal is that in coming to a finding in favour of the plaintiffs-respondents the lower Appellate Court has relied on certain documents which are inadmissible in evidence. These documents are Exs. 10, 101, 11, 13, 14, 4, 2, 8 and 9. Exhibits 10, 13 and 14 are the decree plaint and *solenama* in a particular suit. In this suit the lands in suit are described as the *niskar* property of Shama Charan Das which had been inherited by his heirs who were parties to that suit.

It is contended that these documents cannot be admissible as in that suit there was no contest as to the plaintiff's right and it cannot be said that this right was asserted or claimed within the meaning of s. 13 of the Evidence Act. The latest ruling on this point is the case of *Gopi Sundari Dasi* v. *Kherod Gobinda Chowdhury* (1). Reference is there made to the decision of the Judicial Committee of the Privy Council in *Dinomoni Chaudhurani* v. *Brojo Mohini Chaudhurani* (2), where Lord Lindley in delivering their Lordship's judgment observed that the words of s. 13 of the Evidence Act were very wide. In our opinion they are wide enough to cover the assertion of *niskar* in the partition suit where that right was in dispute.

On behalf of the appellant great stress is laid on the fact that Mr. Justice Richardson who delivered that judgment referred to the right of the plaintiff being successfully asserted in the judgment which was sought to be put in evidence. Section 13 does not qualify the word "asserted" by the epithet "successfully." There is nothing in that section which requires that the right should be successfully asserted. But giving a wide interpretation to it the mere assertion is sufficient. We hold, therefore, that there is no reason to exclude this documentary evidence Exs. 10, 13 and 14. As regards the other documents to which objection has been taken with the exception of Ex. 2 the same remarks apply. They are, in our opinion, admissible as evidence of transactions in which the plaintiffs' *niskar* right was asserted. In second appeal we have to deal only with the question of the admissibility in evidence of the documents and not their evidentiary value. In the case of some of them, for instance, Exs. 10, 13 and 14 and also Exs. 8 and 9 the *chitta* and *khatian* their evidenciary value appears to be slight. Still they are some evidence that the plaintiffs were in possession of the land in dispute claiming it as their *niskar*. It is clear with regard to Exs. 10 (1) the decree passed in a damage suit in 1845 brought by the plaintiff's predecessor against Janaki Ram Panda that the lower Appellate Court was wrong in describing Janaki Ram Panda as the predecessor-in-interest of defendant No. 1. The defendant No. 1 the purchaser at a sale for arrears of revenue cannot rightly be described as the predecessor-in-interest of the previous proprietor. But this does not affect the question of the admissibility of this document, since it is admitted not as a document *inter partes* but under the provisions of s. 13 of the Evidence Act.

As regards Ex. 2 we hold that the contention raised on behalf of the appellant must prevail. Exhibit 2 is a road cess return submitted by the plaintiffs. Section 95 of the Cess Act IX B. C. of 1880 provides that such a return shall not be admissible in favour of the person on whose behalf it has been filed. The learned Subordinate Judge appears to have held that

(1) 82 Ind. Cas. 99; 28 C. W. N. 942; (1925) A. I. R. (C.) 194.

(2) 29 C. 187; 29 I. A. 24; 6 C. W. N. 386; 12 M. L. J. 83; 4 Bom. L. R. 167; 8 Sar. P. C. J. 224 (P. C.).

this document was admissible because it was put in evidence not directly as an admission by the plaintiffs but because considered with other evidence it proved an implied admission by defendant No 1 of the plaintiffs' *niskar* title. But even so, this document was put in evidence as a document in favour of the plaintiffs, and was, therefore, excluded by the provisions of s. 95. That section is absolute in its terms in declaring that a road cess return shall not be admissible in favour of the person on whose behalf it was filed, and it is immaterial whether it was put in evidence directly to prove an admission or indirectly for some other purpose. This being so we must decree the appeal on this ground.

We set aside the judgment and decree of the lower Appellate Court and remand the appeal to him for re-hearing after excluding from consideration the document Ex. 2. The costs will abide the result.

Z. K. *Appeal allowed: Case remanded.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 95 OF 1923.

October 6, 1925.

Present:—Mr. Justice Odgers.

GOVINDA NADAN REPRESENTED BY HIS AGENT GOVINDASAMI VENU UDAYAN—PLAINTIFF—APPELLANT

versus

A. Y. R. M. R. M. RAMASAMI CHETTIAR—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art 85—Mutual, open and current account—Shifting balance, effect of.

In order that an account may be mutual, open and current within the meaning of Art 85 of Sch. I to the Limitation Act, there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. [p. 106, col. 2; p. 107, col. 1]

Hirada Basappa v. *Gadigi Muddappa*, 6 M. H. C R. 142, relied on.

Where an account between two persons resembled a Bank pass-book where deposits of monies were made and withdrawals of monies took place from time to time the balance being in favour either of one or other as the case might be:

Held, that the mere shifting of account from one side to the other did not constitute mutual and independent obligations. [p. 107, col. 1.]

Second appeal against the decree of the District Court, East Tanjore at Negapatam in A. S. No. 252 of 1921 (A. S. No. 1096 of 1919 of the District Court, West Tanjore) preferred against the decree of the Court of the Additional District Munsif, Tiruvalur, in O. S. No. 434 of 1917 (O. S. No. 25 of 1917 of the Court of the District Munsif of Tiruvalur).

Mr. *A. Balakrishnen*, for the Appellant.

Mr. *V. Ramaswamy Iyer*, for the Respondent.

JUDGMENT.—I postponed judgment on the 15th September in order to give the appellant's Vakil an opportunity of satisfying me that the District Judge went into the question of the nature of the accounts in the case in spite of its not being taken in the grounds of appeal to the lower Appellate Court. The learned Vakil now states that he is unable to get information on the point.

The suit is brought by the plaintiff for a sum of Rs. 795 odd which is said to be due to him from the defendant a money-lender. The course of business between the parties was apparently that the plaintiff should draw money whenever he wanted it and should also deposit money with the defendant. The plaintiff has not produced any accounts of his own. He relies on a copy of the defendant's account, Ex. A. The District Munsif found that the plaintiff had proved his case as he held that a settlement had taken place on either the 14th or 17th of December 1913. The District Judge, to whom an appeal was taken, discredited the evidence with regard to this settlement and that is a finding of fact by which I am bound in second appeal. But the learned Judge goes on to consider whether the transaction is in the nature of a mutual, open and current account and would, therefore, save limitation if such was the case and the argument before me has been that the account in Ex. A is such an account. Now in order to see what the requisites are for such an account, we should look at the case of highest authority as far as I know in this Court, *i. e.*, the judgment of Holloway, J., in *Hiradą Basappa* v. *Gadigi Muddappa* (1). In order that an account may be mutual "there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on

(1) 6 M. H. C. R. 142.

the other being merely complete or partial discharges of such obligations" That statement has been repeated in many judgments ever since the year 1871 and it has over and over again been taken as a correct statement of the law. It may be that in the account before me the balance shifted from one side to the other from time to time. See *Shive Gowda* v. *Fernandez* (2) and *Kunhikuttiali* v. *Kunhammad* (3). But the account, as far as I have been able to see, resembles exactly a Bank pass-book where deposits of monies are made and withdrawals of monies take place from time to time, the balance being in favour either of the customer or of the Bank as the case may be at any given moment. I ,therefore, agree with the learned District Judge that there do not appear to be independent obligations on both sides and that a mere shifting of the account from one side to the other is not enough to constitute mutual obligations.

The second appeal must be dismissed with costs.

V. N. V.

Appeal dismissed.

(2) 8 Ind. Cas. 141; 34 M 513; 8 M L. T. 412 (1911) M W N. 1; 21 M. L J 391

(3) 71 Ind. Cas. 466; 44 M. L. J. 184; 17 L. W. 243; (1923) M. W N. 81, (1923) A I. R. (M.) 278.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1940 AND 1954 OF 1922.

May 11, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Chakravarti.

IN No. 1940 OF 1922

HEM CHANDRA SEN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GIRISH CHANDRA SAHA AND OTHERS—DEFENDANTS—RESPONDENTS.

IN No. 1954 OF 1922

ARJUN DHUPI AND OTHERS—DEFENDANTS—APPELLANTS

versus

HEM CHANDRA SEN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 50—Old tenancy—Additional area on additional rent—Presumption of fixity of rent, whether applicable—Burden of proof.

Where a tenant adds new area to his old tenancy on additional rent, he is not deprived of the presumption arising under s. 50 of the Bengal Tenancy Act so far as the old tenancy is concerned. The onus of proving what the old area was is upon the tenant. [p. 108, col. 1]

A tenant cannot, however, by adding new area to the old tenancy, claim the benefit of the presumption so far as the added area is concerned. [*ibid*]

Appeals against the decrees of the Special Judge, Tipperah, dated the 22nd April 1922, modifying those of the Assistant Settlement Officer, Comilla, dated the 25th September 1920.

Babus *Birendra Chandra Das* and *Nripendra Chandra Das*, for the Appellants.

Babu *Jatindra Mohan Ghose*, for the Respondents.

JUDGMENT.

IN APPEAL No. 1940 OF 1922.

Chakravarti, J.—This is an appeal by the plaintiffs and arises out of an application made by the landlord under s. 105 of the Bengal Tenancy Act. The question with which we are concerned is whether the landlords are entitled to an enhancement of rent under s. 30 (*b*) of the Bengal Tenancy Act.

The defence of the defendants was that the tenancy was held at a permanent fixed rent; and the tenants in order to establish their claim relied upon the presumption under s. 50 of the Bengal Tenancy Act. The Assistant Settlement Officer in the Court of first instance found that as regards the *khatians* which are now before us that is *Khatian* Nos. 17 and 25, the presumption was rebutted because it was shown that additional land was added to the holding at a time subsequent to the Permanent Settlement. In that view the Trial Court held that the tenants were not entitled to the presumption under s. 50 of the Bengal Tenancy Act.

On appeal by the defendants the learned Special Judge has held, reversing the judgment of the First Court, that the tenants were entitled to the presumption under that section. The learned Judge found that the variation of the rents was based on the variations in the area of the holding and, therefore, he held that the presumption under s. 50 applied to the holding as it is now in possession of tenants with the added area.

In this second appeal by the plaintiffs it has been contended by the learned Vakil for the appellants that, upon the findings of the learned Judge, the tenants were not entitled to the presumption under s. 50 of the Bengal Tenancy Act.

It appears to us that the contention of the appellants ought to succeed only partially. Upon the findings it appears that there was an old tenancy with a definite rent which was held for more than 20 years at a uniform rent; but it appears further from the findings that additional rent was added for additional area and in recent times the rent of the old tenancies was paid along with the additional rent for the added area. The question, therefore, arises is this: Do the tenants by holding additional lands for additional rent and paying the same along with the old rent and the old area lose the presumption as regards the old area and the old rent also? We think not. And also we think that the tenants are not entitled to the presumption for the added area although they are entitled to the presumption for the area which they held as was presumed before the Permanent Settlement. In a case like this the onus of proving what the old area was and what the area is subsequently added, is upon the tenants, and if they show what the old rents were then they are entitled to the presumption under s. 50 so far as the old tenancy is concerned, because, by showing that for 20 years immediately before the suit they were holding a particular area at a particular rent, the presumption under s. 50 arises. But the tenants, it seems to us, are not, by adding a new area to the old tenancy, entitled to get the benefit of the presumption so far as the added area is concerned—for the simple reason that the tenants or their predecessors were not holding those lands from before the Permanent Settlement. They were added subsequently. In that view we think that so far as *Khatians* Nos. 17 and 25 are concerned, the case must go back to the lower Appellate Court and that Court will, if there is evidence, find what was the area and the rent of the old tenancy and the area and the rent which were subsequently added. But so far as the old tenancy is concerned, the tenants will be entitled to a presumption as to the fixity of rent. But so far as the added area is concerned the learned Special Judge will fix the rent for that area

In this view this appeal succeeds and the decree of the lower Appellate Court is varied to the extent.

As regards *Khatian* No. 29, it has been admitted before us by the learned Vakil that he cannot press the point as regards this *khatian*, because, there has been no proper representation of the parties.

The appeal, therefore, so far as this *khatian* is concerned is dismissed. As the appeal succeeds only in part we do not make any order as to costs of this appeal.

IN APPEAL No. 1954 OF 1922.

The defendants are the appellants and this appeal arises out of an application made by the plaintiffs-landlords for settlement of fair and equitable rent. The Special Judge in *Khatians* Nos. 3, 10, 13, 20, 22, 24, 30, 33, 34, 42, 47, 49 and 55 allowed the claim of the plaintiffs-landlords. Against the decree the present appeal has been preferred by the defendants. It appears that some of the plaintiffs-respondents died and no application was made within three months for substitution of the heirs. The matter came up to this Court and it was ordered on the application of the appellants that the appeal so far as the deceased respondents were concerned abates and the appeal would proceed against the other respondents and the appellants gave it up so far as the deceased respondents were concerned. It being an appeal against a decree in favour of the plaintiffs it appears to us that the appeal is incompetent when some of the plaintiffs are not before the Court and the appeal has failed so far as the deceased respondents are concerned. In that view it is obvious that to hold otherwise would lead to an [illegible] position. The deceased plaintiff's heirs would be entitled to an enhanced rent as settled by the Special Judge and if we allowed this appeal the tenants would be entitled to hold the tenancy at a fixed rent so far as some of the plaintiffs landlords are concerned. In the absence of some of the plaintiffs not represented in the lower Appellate Court the whole appeal becomes incompetent.

The result is that this appeal is dismissed with costs.

Cuming, J.—I agree.

N. H. *Appeal No. 1940 allowed; Appeal No. 1954 dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 776 OF 1923.

September 8, 1925.

Present:—Mr. Justice Jackson.

THARAMAL PARKAM KALPATHOOR THULICHA PUTHIATUTH SANKARAN NAIR—PETITIONER

versus

URUPPOYIL AMBU AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s 115, O. XXI, rr. 13, 17—Execution application, defects in—Court, whether bound to give time for correction—Dismissal of petition—Revision

Under O XXI, r. 17, C P. C., when an execution application is presented which does not fulfil the requirements of rr. 11 to 14, the Court has an option either to reject it or to allow the defect to be remedied to be fixed by it.

Where it declines to adopt the latter course, it cannot be held to have refused jurisdiction so as to warrant interference in revision under s. 115, C. P. C.

Vemuri Pitchayya v. *Ankineedu Bahadur Zemindar Garu*, 76 Ind. Cas. 750, 45 M. L. J 651, 18 L W 739; 33 M L T. 125; (1924) A. I. R. (M.) 367, referred to

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the District Munsif of Payoli, dated the 15th March 1923, in R. E. P. No. 182 of 1922 in S. C. S. No. 229 of 1910.

Mr. *R. Govinda Menon*, for the Petitioner.

Mr. *K. P. Ramakrishna Iyer*, for the Respondents.

JUDGMENT.—Petitioner seeks to revise the order of the District Munsif of Payoli in R. E. P. No. 182 of 1922 in S. C. S. No. 229 of 1910.

Petitioner obtained a decree on 7th March, 1910. On 28th February, 1922, he applied for attachment promising to furnish a list of immoveables. The application was adjourned from time to time till July 1922, for the appointment of a guardian and then again from time to time till 15th March, 1923, when it was finally dismissed, because the list of immoveables was only produced on 5th April, 1922, after the expiry of 12 years from 7th March, 1910.

I cannot hold that the order is illegal. The Court has an option under O. XXI, r. 17, either to reject the application or to allow the defect to be remedied within a time to be fixed by it. Possibly the Munsif might, even on 15th March, 1923, have ordered the list of immoveable properties to be produced on 5th April, 1922, which would have dated the petition as from 28th February 1922, and would thus have saved the bar of limitation. But he cannot be said to have refused jurisdiction by declining to pass this remedial order. He is equally acting within his discretion when he finds that no time was fixed for remedying the defect, and, therefore, the application must date from the time when it fully conformed to O. XXI, r. 13, which would be April 5. The ruling reported in *Vemuri Pitchayya* v. *Ankineedu Bahadur Zemindar Garu* (1), turns on a converse case. There the District Munsif had exercised his discretion by fixing a time for the production of the descriptive shedule after the expiry of 12 years and this Court declined to interfere. But, of course, it was not held that the Munsif was bound to exercise his discretion in that manner. If he had liked to adopt the alternative he could have dismissed the application. Spencer, J., observes:—"I am, with due respect, inclined to think that the words 'on receiving an application for the execution of a decree' in r. 17 were not intended to make a party suffer for the failure of the Court establishment, which checks plaints and execution petitions on their presentation to at once notice all defects in any application that may be received and that these words do not preclude a Court from making an order allowing a defect to be remedied at a later stage." This can hardly be taken as putting the whole responsibility upon the Court. An applicant who files an application not in compliance with O. XXI, r. 13, does so at his own risk, and he cannot demand, as of right, that it shall be regularized by the Court establishment. In the present case, too, there is no question of suffering for the failure of the establishment, because the petitioner knew all along that his application was defective, and remedied that defect on his own initiative.

This judgment has proceeded on the assumption warranted by *Vemuri Pitchayya* v. *Ankineedu Bahadur Zemindar Garu* (1) that a Court retains its discretion to order the defect to be remedied after the application has been admitted and registered but before it has been finally disposed of in one of the ways mentioned in O. XXI, r. 17 (1).

As regards *Asgar Ali* v. *Troiloka Nath Ghose* (2) which the lower Court cites, it may be observed that the point specifically referred to the Full Bench has now been

(1) 76 Ind. Cas. 750; 45 M. L. J. 651; 18 L. W. 739; 33 M. L. T. 125; (1924) A. I. R. (M.) 367.

(2) 17 C. 631; 8 Ind. Dec. (N. S.) 960 (F B.).

settled by cl. 2 of O. XXI, r. 17, which is an addition to the old s. 245. If an application is defective by not containing a description of the property, it is none-theless an application provided that the Court has permitted the defect to be remedied. It also happened to be ruled in the same case that such permission could only be given before admission and registration (pp. 635-636). Whether "on receiving" in O. XXI, r. 17 (1) requires such strict interpretation is the question discussed in *Vemuri Pitchayya* v. *Ankineedu Bahadur Zemindar Garu* (1). Of course it would make the petitioner's case considerably weaker, if it were held, following *Asgar Ali* v. *Troilokya Nath Ghose* (2), that the Munsif had no jurisdiction in 1923 to order the defect to be remedied, but even allowing in the light of *Vemuri Pitchayya* v. *Ankineedu Bahadur Zemindar Garu* (1) that he had jurisdiction I do not find that he exercised it improperly.

The petition is dismissed with costs.

V. N. V. *Petition dismissed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 228 OF 1923.

January 6, 1925.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

BHIKAJI LAXMAN BHIKAJI AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA —DEFENDANT—RESPONDENT.

Bombay Hereditary Offices Act (III of 1874), ss 15, 73—Bombay Revenue Jurisdiction Act (X of 1876), s. 4 (a)*—Widow, whether holder of* watan*—Commutation order, passed at instance of widow, validity of—Order passed without recording investigation or notice to other members, validity of—Suit for declaration of invalidity of commutation order, maintainability of.*

The interest of a widow in a *watan* is to be compared to the interest of a Hindu widow in her husband's estate. [p. 111, col. 2.]

A widow holding an interest in *watan* property for the term of her life or until her marriage is not a "holder" within the meaning of that term in s. 15 of the Bombay Hereditary Offices Act, and the Collector negotiating with such a widow is not authorized to pass a commutation order under s. 15. [*ibid.*]

A commutation order passed under s. 15 of the Bombay Hereditary Offices Act, without making a record of any investigation or giving any opportunity to the other members of the *watan* family of being heard and without recording reasons is invalid. [p. 112, col. 1.]

A suit for a declaration that a commutation order passed under s. 15 of the Bombay Hereditary Offices Act is invalid on the ground that it was passed at the instance of a person who was not a "holder" within the meaning of s. 15 and that the provisions of s. 73 of the Act had not been complied with is not barred by the provisions of s. 4 (*a*) of the Bombay Revenue Jurisdiction Act. [*ibid.*]

First appeal from the decision of the District Judge, Belgaum, in Suit No. 7 of 1921.

Mr. *H. C. Coyajee*, (with him Mr. *D. R. Manerikar*), for the Appellants.

Mr. *S. S. Patkar*, Government Pleader, for the Respondents.

JUDGMENT.

Macleod, C. J.—The plaintiffs sued for a declaration that the order of commutation of *kulkarniki* service in regard to five villages in the Khanapur Taluka of the Balgaum District was *ultra vires* of the Collector and was not binding on them.

The defendant, the Secretary of State, claimed that the suit was barred under paras 2 and3 of s. 4 (*a*), Bombay Revenue Jurisdiction Act; that the order of commutation of the *kulkarniki* service was not *ultra vires* of the Collector; that Laxmibai at whose instance the order was passed was in 1915 the representative of the persons beneficially interested in the *watan* and was the duly registered representative *watandar*, and so was a "holder" as defined in cl. 4 of s. 15 of Bombay Act III, of 1874, and that the settlement made with her was, therefore, legal and binding on her successors, the plaintiffs, under cl. 3 of that section.

One Bhikaji Laxman was the sole representative *kulkarniki watandar* of seventeen villages, including the five mentioned in the plaint, and his widow, Laxmibai had been registered as the sole representative *watandar* after Bhikaji's death. On September 9th 1878 Laxmibai adopted plaintiff's father, Laxman, and two days later passed the adoption deed, Ex. 19. Laxman's natural father, Krishnaji on the same date, September 11, passed an agreement that Laxmibai should enjoy the right of *kulkarniki* service in the five plaint villages for the term of her natural life for maintenance.

Thereafter disputes arose between Laxmibai and Laxman which resulted in a suit being field, No. 10 of 1896, in which Laxman got a decree that his adoption was valid but Laxmibai's rights under the agreement were preserved. Laxman's name was then entered in the register as *watandar*

for twelve out of the seventeen villages, but Laxmibai's name was retained for the five plaint villages. In 1913 Laxman died, leaving a widow, Sitabai, and two minor sons, the present plaintiff's. On January 24, 1915, Laxmibai applied to the Collector to commute the right of *kulkarniki* service with respect to the plaint villages. On that application the commutation order was passed by the Collector. Laxmibai died on November 25, 1917, and thereafter Sitabai as plaintiffs' guardian asked the Assistant Collector to cancel the commutation order. This was refused, and the refusal was confirmed by an order of the Commissioner, and also by Government. Sitabai then gave notice that she would file a suit. Eventually the present suit was filed on September 16, 1921.

The District Judge has dismissed the plaintiffs' suit on the ground that it was barred by s. 4 (*a*) of the Bombay Revenue Jurisdiction Act. Assuming that it is a suit to obtain a declaration that the order of the Collector was *ultra vires*, and, therefore, null and void and not binding on the plaintiffs, the question is whether the plaintiffs are not entitled to prove certain facts which would justify the Court in granting them the declaration asked for in spite of the provisions of s. 4 (*a*) of the Bombay Revenue Jurisdiction Act.

In *Maganchand* v. *Vithalrao* (1) the Court found that the Assistant Collector's order, purporting to be made under s. 11 of the Hereditary Offices Act, was unauthorized, and, therefore, held that that order was no bar to the maintenance of the plaintiff's suit. Relying on that decision, two points have been taken by the appellants' Counsel before us:—(1) that Laxmibai was not the "holder" of the *watan* within the meaning of that term in s. 15 of Bombay Act III of 1874; and (2) that the provisions of s. 73 of the Act had not been complied with, and that, therefore, the order passed by the Collector directing commutation of the *watan* was not a proper order, so that the provisions of s. 4 (*a*) of the Revenue Jurisdiction Act did not apply. It does not appear that when Act III of 1874 was passed, it was contemplated that the widow of a *watandar* could succeed to him as *watandar*. "*Watandar*," according to s. 4 of that Act, means a person having an hereditary interest in a *watan* It includes a person holding *watan* property acquired by him before the introduction of the British Government into the locality of the *watan*, or legally acquired subsequent to such introduction, and a person holding such property from him by inheritance. It includes a person adopted by an owner of a *watan* or part of a *watan*, subject to the conditions specified in ss. 33 to 35. "Representative *watandar*" means a *watandar* registered by the Collector under s. 25 as having a right to perform the duties of an hereditary office. Although Laxmibai was registered under s. 25 as representative *watandar*, it does not follow that she was a *watandar* within the meaning of that term in s. 4, which includes for the purposes of the section any sole owner or the whole number of joint owners or any person dealt with as representative of the person beneficially interested or entered as such in the Government record at the time of the settlement, and it does not follow that she was a "holder" within the meaning of that word in s. 15 of the Act. By s. 2 of Bombay Act V of 1886 "Every femal member of a *watan* family other than the widow, mother or paternal grandmother of the last male owner, and every person claiming through a female, shall be postponed in the order of succession to any *watan*, or part thereof, or interest therein, devolving by inheritance after the date when this Act comes into force to every male member of the family qualified to inherit such *watan*, or part thereof, or interest therein. The interest of a widow, mother or paternal grandmother, in any *watan* or part thereof, shall be for the term of her life or until her marriage only." Therefore, the interest of the widow in a *watan* is to be compared to the interest of a Hindu widow in her husband's estate. I doubt whether it was ever intended that the Government should be able to treat the widow as a *watandar* for the purposes of [illegible] the commutation of the *watan* service. In my opinion a widow holding an interest in *watan* property for the term of her life or until her marriage is not a "holder" within the meaning of that term in s. 15 of Act III of 1874.

It would follow, therefore, that the Collector negotiating with a person who was not a holder of the *watan* was not authorised to pass a commutation order under s. 15 of the Act and the decision in *Maganchand* v. *Vithalrav* (1) is applicable to this suit.

A further objection arises from the fact

(1) 17 Ind. Cas. 148; 37 B. 37; 14 Bom. L. R. 793.

that the Collector had not complied with the provisions of s. 73 of the Act. That section is imperative and enacts that "No order under Part III. .directing commutation of a *watan*.....shall be passed, unless after an investigation recorded in writing and a proper opportunity afforded for the hearing of claims and the production of evidence. In each such investigation...the Collector or other officer shall record his decision with the reasons therefor in his own handwriting." It is admitted that there is no record of any investigation having been made, or that any opportunity had been given to the other members of the *watan* family of being heard, or that any reasons were recorded by the Collector for his decision. The learned Judge considered that as the claimants did not take this point in the appeals to the Revenue Authorities, and as it was not set out specifically in the plaint, he was entitled to consider that the Collector had duly complied with the provisions of s. 73. Although it may be said that the plaintiffs did not specifically rely upon this fact in asking the Court to hold that the order was *ultra vires*, still in para. 5 of the plaint it is stated that the Collector made a settlement of commutation some time in 1915 without giving notice to the minor plaintiffs or their guardian, so that the question whether the Collector had complied with the provisions of s. 73 was in issue.

I think, therefore, that as the provisions of s. 73 had not been complied with, any order of commutation passed by the Collector would not be a valid order, so that on this ground also the suit to set it aside will not be barred under s. 4 (*a*) of the Revenue Jurisdiction Act. In my opinion, therefore, the plaintiffs are entitled to succeed, and the appeal should be allowed and the declaration which the plaintiffs asked for decreed with costs in both Courts.

Crump, J.—I agree.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL SUIT No. 757 OF 1922.

February 17, 1925.

Present :—Mr. Justice Srinivasa Iyengar.

KHODAY GANGADARA SAH—

PLAINTIFF

versus

A. SWAMINADHA MUDALI AND OTHERS

—DEFENDANTS.

Contract Act (IX of 1872), s. 23—Abkari license—Prohibition to transfer and to sub-let—Partnership by licensee, whether forbidden—Foreign law—Law of Mysore State—Question of fact.

What a foreign law is on a particular point, is a question of fact and has to be proved by the party setting it up. [p. 113, col. 2.]

Where by the terms of an Abkari license, the sale transfer or sub-lease of the right is forbidden, the mere fact that the licensee enters into partnership with others in respect of profits or losses of the business for the carrying on of which he had obtained the license does not necessarily involve a transfer of the license right and is not illegal or forbidden by law. [p. 116, col. 2; p 117, col. 1]

Natla Bapiraju v. *Puran Achutha Rajajee*, 5 Ind Cas. 456, 20 M. L J. 337; (1910) M W. N 549; 7 M. L. T 176, *Karsan Sadashiv Patil* v. *Gatlu Shivaji Patil*, 19 Ind Cas. 442; 37 B. 320; 15 Bom. L. R. 227 and *Champsey Dossa* v. *Gordhandas Kessowji*, 40 Ind. Cas. 805, 19 Bom. L. R. 381, followed.

Marudamuthu Pillai v. *Rangasami Mooppan*, 24 M. 401, referred to.

Ganapathi Brahmayya v. *Kurella Ramiah*, 54 Ind. Cas 45, 43 M. 141; 10 L. W. 476, 38 M. L. J. 123, doubted.

Under the Law of Mysore such a partnership as the above is not unlawful. [p. 114, col. 2.]

Mahomed Ghouse Sab v. *Thimma Setti*, 1 Mysore L. J. 90, followed.

When the terms of a contract are reduced to writing and the question is whether the contract is illegal by reason of its seeking to do what is forbidden by law and the contention is that the agreement operates as a transfer, such a transfer should not merely be presumed but must [illegible] ument if not in terms at least as [illegible] " [p. 116, col 1]

Mr. *K. Krishnaswami Iyengar*, for the Plaintiff.

Messrs. *N. Rajagopalan* and *T. S. Rajagopala Iyer*, for the Defendants.

JUDGMENT.—The only point that arises for determination in this suit is quite simple and though not frequently arising is of considerable importance. The plaintiff's suit is for the taking of the accounts of a partnership between himself and the three defendants. That a partnership agreement was made between these parties it is not disputed. The terms of the partnership have been reduced to writing and are to be found in the admitted copy filed as Ex. A. Defendants Nos. 2 and 3 have not contested the claim of the plaintiff and are apparently themselves anxious that the accounts of the partnership should be taken and the profits or losses ascertained and distributed.

The contest in the case which raises the only point for determination has been put up only by the first defendant and has reference merely to the validity of the contract sought to be enforced. The point as put by the learned Counsel for the first defendant is this. The partnership contract was made in the Mysore State within the terri-

tories of His Highness the Maharaja and had reference to a business in *arrack* carried on by the plaintiff under a license obtained by him from the Mysore Government. Under the terms of the license granted to the plaintiff, he was not entitled without the previous permission of the Deputy Commissioner to do what he purported to do, namely, take into his business as partners the defendants Nos. 1, 2 and 3. No such permission was obtained by the plaintiff, and, therefore, his act of entering into the partnership agreement was an act forbidden by the law and, therefore, void and, therefore, unenforceable. If this contention should be upheld, it follows that the plaintiff's suit must fail. And, on the other hand, if this contention should fail, the plaintiff would be entitled to a preliminary decree for the taking of the accounts of the partnership and the matter will have to be referred to the Official Referee for the taking of the usual accounts

To begin with, I regret to state that neither the learned Counsel for the first defendant nor the learned Vakil for the plaintiff seemed to have paid any consideration to an important aspect in this case, namely, that whereas the contract was made and was apparently intended to be performed entirely within the Mysore State, this suit has been instituted in this Court. And in fact both sides argued the case before me as if there were no such complication and it was a simple case of the contract being or not being illegal [illegible] to the Law of the Mysore State. The Law of the State, however, it was recognised, had as being the Law of a Foreign State to be proved as a matter of fact by the expert witness as Advocate at Banglore who has been called for the purpose. The question, therefore, has not been properly argued before me on the footing of a contract sought to be enforced in a British Court but made and intended to be performed in a Foreign State and that a protected State under the protection of the British Government and subject to its suzerainty. The first question that has to be determined in such cases is: What is the law applicable to the particular contract in question?; that is to say, by the application of which law should it be determined whether the contract in question is void for illegality as urged. Fortunately there is no serious difficulty in this case with regard to the law applicable, because whether we take the law applicable generally in the first instance as the law by which the parties intended that the contract should be governed or as the law of the place where the contract was made or as the law of the place where the contract was intended to be performed, it is in every case the same law, the Law of the Mysore State. No evidence has been adduced before me and no argument addressed to show that the intention of the parties was that the contract should be governed by any law other than the Law of the Mysore State. We may also presume that as the contract was apparently intended to be performed in its entirety within the Mysore State, the parties intended that the contract should be governed by the law of that very State. This being settled, the questions that next arise for consideration are (*a*) whether according to the Law of the Mysore State this contract of partnership was forbidden, (*b*) whether if so forbidden, the provision of law forbidding was only a fiscal or taxing enactment or a provision of law based on the public policy of only a particular State or whether the prohibition is founded on natural justice or some moral principle which, if it is not, ought to be recognised in international jurisprudence.

As regards the first question whether under the law of the Mysore State the suit contract of partnership was illegal and void, it must be observed, to begin with, that the question "What a foreign law is on a particular point" is a question of fact and has to be proved by the parties setting it up. No evidence has been adduced before me as to what the law of contracts is with regard to the illegality and unenforceability of contracts which are entered into in violation of rules of law or against public policy. I have reason to believe that the law of contracts in that State is the same as the Indian Contract Act. But this was, however, bound to be established and not to be left merely to inference. The first defendant on whom the burden of proof lay to establish satisfactorily all matters necessary for enabling the Court to come to the conclusion regarding the illegality of the contract did not give any evidence with regard to it. I may, however, observe in passing that from Ex. III it does appear as if the Indian Contract Act has been bodily adopted by the Mysore State. But while it is true that most of the Indian Statutory Law has been adopted in the Mysore State, it also appears that in some cases changes have been made in the enact-

ments so adopted, and I am, therefore, not in a position, in the absence of satisfactory evidence, on the point to say what the Law of the Mysore State is with regard to the illegality of contracts.

In these circumstances, all that I can do is to proceed on the assumption that as indicated by Ex. III, the Contract Act in force in the Mysore State is the same as the Indian Contract Act. Section 23 of that Act provides amongst other things that the consideration or object of an agreement is lawful unless it is forbidden by law or is of such a nature that, if permitted it would defeat the provisions of any law or the Court regards it as immoral or opposed to public policy. It further provides that every agreement of which the object or consideration is unlawful is void.

The question then is whether the partnership agreement is one of which the consideration or object is unlawful within the meaning of s. 23 of the Contract Act. This would depend obviously on the terms and conditions of the licenses granted to and obtained by the plaintiff. But neither he nor the first defendant has produced the original license or even a copy. The Court has virtually been asked by both parties to assume that the terms and conditions of the licenses were in the common form as appearing in Ex. I, (*b*). Clause 16 of the general conditions of retail vend licenses is as follows :—

"No privilege of supply or vend shall be sold transferred or sub-rented without the Deputy Commissioner's previous permission which will only be given if the applicant is prepared to forfeit his deposit already made except in cases where the Deputy Commissioner sees reason not to enforce the penalty, Nor, if the Deputy Commissioner so orders shall any agent be appointed for the management of any such privilege without his previous approval".

On behalf of the first defendant, my attention has been drawn to a case decided by the Mysore High Court and reported as *Mahomed Ghouse Sab* v. *Thimmi Setti* (1), proved by the expert witness called for the first defendant and marked as Ex. III in the case. That case, however, refers only to a case of sub-letting actually covered by the terms of cl. 16 of the conditions. Generally speaking, it cannot possibly be contended that the mere fact that a licensee enters into a partnership with others or another in respect of profits or losses of the business for the carrying on of which he has obtained a license necessarily involves either a sale, transfer or sub-letting of the license. There may, no doubt, be partnership agreements which involve or include a transfer of the interest in the license itself. There is, therefore, no warrant for supposing that every partnership agreement must necessarily violate such a condition as set out in that clause.

Mr. N. Narasimha Iyengar, Advocate at Bangalore, has also referred in the course of cross-examination to a case reported in the 9th Vol. of the Mysore Chief Courts Reports page 316, where it was held in that State that a partnership entered into by a licensee in such circumstances was not illegal and he also told me that that decision is regarded as good law up-to-date and has not been overruled. The partnership agreement in this case Ex. A does not contain any words of sale, transfer or [illegible] No doubt in terms, as also [illegible] the result of a partnership agreement, the partners are constituted agents or managers of the concern. But the last sentence in cl. 16 of the general conditions indicates that if it was intended to prevent any agent being appointed for the management of any such privilege without the previous permission of the Deputy Commissioner, a special order of the Deputy Commissioner should be made; that is to say, in other words, generally speaking the appointment of a manager for the management of the privilege may be made without any previous permission and if the Government should deem fit to prevent any such thing being done, a special condition or order is required to be made by the Deputy Commissioner. No such special order or condition has been proved in this case. The effect of a partnership agreement is only to constitute the partners the agents of each other, and it, therefore, follows that the terms of cl. 16 far from forbidding the appointment of such agents for management impliedly allows such appointments except in cases where it is specially forbidden. Having regard, therefore, to the terms of cl. 16 and also the judgment of the Chief Court already referred to, I cannot but hold that according to the Law of the Mysore State, as recognised and acted upon by the subjects of that State, a partnership agreement with reference to a license of

(1) 1 Mysore L. J. 90.

the kind in question is not an agreement the consideration or object of which is unlawful. In this view which I have arrived at with regard to the question in issue, I am, therefore, bound to hold that the suit contract was not unlawful or void. This would be sufficient for the purpose of disposing of the issue. But the learned Counsel for the first defendant has referred me to various judgments of the High Courts in India for the purpose of showing that under clauses similarly worded in Abkari licenses issued by the British Government, the Courts have held that a partnership agreement is an agreement forbidden by law and, therefore, unlawful. It seems, however, unnecessary to refer to the decisions of the Birtish Indian Courts in the matter. If there is a particular statutory enactment or a provision or rule having the force of law in a particular State and the highest Court in that State has decided that having regard to the terms of such enactment or rule, a partnership agreement in those circumstances is not illegal, I cannot hold that such an agreement is illegal because the Birtish Indian Courts have held them to be illegal in very similar circumstances.

In my view, therefore, any detailed examination of the decisions of the British High Court in India is unnecessary. I may, however, briefly refer to them because after a careful examination of those cases, I have come to the conclusion that even on the principles decided in those cases the partnership agreement in this case could not be held to have been unlawful.

The case of *Marudamuthu Pillai* v. *Rangasami Moopan* (2), was one of the cases referred to and relied upon for the first defendant. The decision in that case proceeded upon a clause which is entirely different in its terms and scope from the clause in the present case. There are, no doubt, observations in the judgment of the learned Judges in that case regarding the principle underlying the provisions of the Abkari Act and also with regard to the partnership agreements entered into by or with the licensee being illegal. Those observations were not necessary for the decision of the case and were merely *obiter dicta*. With all respect, therefore, to the learned Judges that decided that case, I cannot regard it as a binding decision more especially when what I have to consider is not a British Indian license but a license issued by the Mysore State, which in some important respects materially differs from the terms that the learned Judges were considering. Further I may also in this connection observe that the learned Judges who came to the conclusion in that case that the rules under the Abkari Act were not merely for the protection of the revenue but also to regulate liquor traffic in the interests of the public were not confronted in the license with any such condition as that the previous permission by the Deputy Commissioner for the sale, transfer or sub-renting of the privilege of supply or vend will only be given if the applicant is prepared to forfeit his deposit already made except in cases where the Deputy Commissioner sees reason not to enforce the penalty. Further in the case of the license the learned Judges were considering, there do not appear to have been any such clause as the following :—

"Nor, if the Deputy Commissioner so orders shall any agent be appointed for the management of any such privilege without his previous approval".

The case of *Nalan Padmanabhan* v. *Badri Nadh Sarda* (3) was under the Opium Act and proceeded on the narrow ground that the terms of the Act prescribed that no one shall sell opium except as permitted by the Act and were different from the corresponding provisions in the Abkari Act. Further the learned Judges also relied for their decision on the terms of the partnership agreement with regard to which they observed as follows :—

"It is contended for the appellant that the admission of the plaintiff to partnership with the defendants is not a transfer. We are of opinion that it is. It is no doubt true that every contract of partnership is not necessarily a transfer but it is equally clear that such a contract may in many cases involve a transfer. Thus if two persons agree to start a business in partnership and to contribute capital therefor, there is no transfer involved in the transaction. But if one person carrying on a trade and possessing stock and capital, admits another into partnership with himself, making the stock and capital, the joint property of both, it is impossible to contend that there is not a transfer in such a case".

(2) 24 M. 491.

(3) 10 Ind Cas. 126; 35 M. 582; 21 M. L. J. 425; 9 M. L. T. 459; (1911) 1 M. W. N. 371.

The Tamil document filed in this case is far from clear and while there is no doubt that all the profits and losses were agreed to be divided amongst the four partners in equal shares, I have been unable to find in the document any words of transfer even though I have no doubt whatever that a transfer must have been intended by the parties. But if as stated in the case of *Marudamuthu Pillai* v. *Rangasami Mooppan* (1) the object of the rules framed for the purpose of preventing sale, transfer or subrenting is that the Government should not lose its control over the licensee, it is impossible to see, how, by the mere fact that a licensee admits certain persons into partnership with him, the control that the Government has over the licensee is in any manner or degree lost. Moreover, when the terms of a contract are reduced to writing and the question is whether the contract is illegal by reason of its seeking to do what is forbidden by law and the contention is that the agreement operates as a transfer, such a transfer should not merely be presumed but must appear in the document if not in terms at least as necessarily involved. There is no transfer so far as I can see either of the business or of the stock in trade or of any interest in the license; and I think what the parties really intended was only that the profits and losses of the concern should be shared by them.

The next case cited to me by the learned Counsel for the first defendant was *Ganapathi Brahmayya* v. *Kurella Ramiah* (4). With all respect it seems to me that the correctness of that decision is open to doubt. The clause in the license which the learned Judges were construing was as follows:—

"The privilege of supplying and vending shall not, without the permission of the Collector previously obtained, be sold, exchanged or sub-leased, nor, if the Collector has ordered, can an agent be appointed, without his permission previously obtained, for exercise of any such privilege."

Construing this clause, this is what the learned Judge says:—

"The clause prohibits sale by a stranger and the employment of an agent. In our opinion the taking of a partner has the effect, ordinarily of selling a portion of the business to him. It has certainly the effect of making him an agent for the sale of liquor."

I cannot possibly understand how the learned Judges came to the conclusion on a construction of the clause that apart from any special order of the Collector which is not referred to in the decision, the appointment of an agent was regarded as forbidden. The clause states that no agent can be appointed only if the Collector has so ordered. This would ordinarily mean and imply that in cases where the Collector has not so ordered, the appointment of an agent would not be illegal. Therefore, unless it be that in that case it was admitted by both parties that the Collector had made an order forbidding the appointment of an agent, it is impossible to understand the judgment or regard it as properly decided. Further the observation of the learned Judges that in their opinion the taking of the partner with him has the effect ordinarily of selling a portion of the business to him, is too general and sweeping to be accurate; and in that respect I have no hesitation in stating that the law with regard to it is much more accurately stated by Benson and Sundara Iyer, JJ., who decided the case of *Nalan Padmanabha* v. *Badri Nadh Sarda* (3).

On the other hand the case of *Natla Bapiraju* v. *Puran Achutha Rajajee* (5) decided by Miller and Krishnaswami Iyer, JJ., is an authority for a decision that a partnership agreement with a licensee is not in all cases and under all circumstances illegal.

These are the Madras cases that were cited to me. In the case for *Karsan Sadashiv Patil* v. *Gatlu Shivaji Patil* (6) Sir Basil Scott, C. J., and Chandavarkar, J., held that the Indian Legislature was by no means blind to the possibility of partnerships being entered into by licensees in which other persons may become interested in the sale of liquor and that the object of granting the license is to have control over the person who is authorised to sell the liquor and in order that sale of the liquor may not pass out of his control to unauthorised persons. Proceeding on this reasoning, those learned Judges held that a partnership was not prohibited by the terms of a license which merely forbade selling, transferring or sub-letting.

(4) 54 Ind. Cas. 45; 43 M. 141, 10 L. W. 476; 38 M. L. J. 123.

(5) 5 Ind. Cas 456, 20 M. L. J. 337; (1910) M W. N. 549; 7 M. L. T. 176.

(6) 19 Ind. Cas. 442; 37 B. 320; 15 Bom. L. R. 227.

In the case of *Champsay Dossa* v. *Gordhandas Kessowji* (7) Mr. Justice Macleod sitting singly on the Original Side held with reference to the terms of the license granted for manufacture of salt that the admission of partners to share in the profits cannot be considered as a subletting or alienation of a part of the privilege unless there has been a document directly transferring to the partners a part of the right to manufacture or vend. He accordingly held that a partnership agreement was not illegal which was entered into by a licensee who under the terms of the license was forbidden to sub-let, mortgage or otherwise alienate the whole or any part of the privilege granted by the licensee of manufacturing salt on the land.

In the case of *Gauri Shanker* v. *Mumtaz Ali Khan* (8) Oldfield, J, who was one of the Full Bench of that Court held apparently with the concurrence of the Chief Justice and Mr. Justice Spankie that a partnership contract was not contrary to the conditions of a lease of a ferry under which a transfer or sub-lease by the lessee was forbidden.

In none of the cases decided in the Calcutta High Court and to which reference was made, was this question regarding partnership raised or considered.

In these circumstances having regard to the state of the case-law not only in Madras but in British India generally, the weight of considered judicial opinion is against regarding a mere partnership agreement as being provision of law which merely sale, transfer, or subletting. As Mr. Justice Macleod of the Bombay High Court points out as Mr. Justice Miller and Mr. Justice Krishnaswami Iyer, JJ., and Benson and Sundara Iyer, JJ, have held, a partnership agreement does not necessarily involve any transfer by the licensee to the persons he admits as partners. No doubt a partnership agreement might also effect a transfer forbidden by law in which case it would be bad not because it was a partnership agreement but because it was a deed of transfer. In the present case in the agreement filed before me, no words have been relied upon for the purpose of showing that they are words of transfer or operate to effect any transfer of property, the transfer of which is forbidden by law. As I read the document the arrangement entered into by the partners was quite consistent with the licensee remaining as the legal owner but bound in equity to account for all the profits and losses to his other partners.

In any case, as I have already stated, what I have to consider is not whether apart altogether from the law of the Mysore State such a contract would or should be upheld by this Court but only whether according to the Law of the Mysore State the contract was void in its inception. If according to that law, as deposed to by the expert witness entering into a partnership with regard to the rights of a licensee is perfectly legal, this Court is bound to hold that, according to the law to which the contract is subject, the contract is not void or unenforceable, and I am glad to think that the rules of international law do not oblige the Courts of a foreign country to regard as against the law or as opposed to public policy and, therefore, void, any contract which the High Court of the very State in which the contract was intended to be performed and by the law of which it was intended to be governed, would not so regard it.

Some difficulty, no doubt, might have arisen if according to the State of the Mysore Law the contract would be illegal and the ground of illegality should appear to be not any fundamental principle, or morality or ethics or public policy but some regulation, which, as in this case, has for its chief purpose the realisation of revenue, and such a State happened also to be as in this case, a Protected Indian State. It is possible that even in those circumstances British Indian Courts might feel compelled to give effect to the Law of the Protected Indian States as it may be found to be. But in the present case no such question arises. I have, therefore, come to the conclusion that the defence of illegality set up by the first defendant regarding the plaintiff's claim to enforce the contractual obligation has not been made out There would, therefore, be a preliminary decree in the suit declaring the partnership between the plaintiff and defendants Nos. 1, 2 and 3 each being entitled to equal share of profits and losses of the partnership and directing the usual accounts of the partnership to be taken from the first day of July, 1919 as provided in the partnership agreement. The first defendant who was chiefly responsible for protracting this litigation so

(7) 10 Ind Cas 805, 19 Bom. L. R. 381.
(8) 2 A. 411, 1 Ind. Dec. (N. S.) 828.

long, will pay the plaintiff the taxed costs of the suit up to date. The costs to be incurred before the Official Referee will be dealt with at the time of passing the final decree in the suit.

V. N. V.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 41-B OF 1923.

August 22, 1925.

Present:—Mr. Kotval, A. J. C.

SURYABHAN—APPELLANT

versus

RENUKA—RESPONDENT.

Transfer of Property Act (IV of 1882), s 74—Limitation Act (IX of 1908), Sch I, Art 132—Mortgages, prior and subsequent—Decree obtained by prior mortgagee paid off by puisne mortgagee—Suit by puisne mortgagee to recover money paid by him—Limitation, commencement of

Under s 74 of the Transfer of Property Act a puisne mortgagee on paying off a decree obtained by a prior mortgagee acquires all the rights and powers of the prior mortgagee as such as determined by the decree and the rights so acquired by the puisne mortgagee can be enforced by him by a separate suit. Article 132 of Sch. I to the Limitation Act would apply to such a suit, the period of limitation being twelve years from the date on which the money became due to the puisne mortgagee, that is to say, from the date on which the puisne mortgagee paid off the prior mortgagee's decree and became entitled under the provisions of s. 74 of the Transfer of Property Act to the rights created by the decree [p 119, cols. 1 & 2]

Second appeal against a decree of the District Judge, Amraoti, dated the 9th November 1922, arising out of a decree by the Munsif, Amraoti, dated the 28th April 1922.

REFERENCE.

Kotval, A. J. C.—(*March 12, 1925*).—The plaintiffs as second mortgagees paid off the amount found due to the first mortgagee in a suit in which they were defendants. They now sue the mortgagor and other persons in possession of the mortgaged property for the recovery of the amount so paid. The lower Courts relying on *Nathuram* v. *Sheolal* (1) dismissed the suit on the ground that as the first mortgage was payable on the 10th March 1907, the suit which was brought on the 21st July 1921 was time-barred. *Nathuram* v. *Sheolal* (1) has been dissented from in *Bora Shib Lal* v. *Munni Lal* (2) and in my opinion requires to be considered by a Bench. I, therefore, refer to a Bench to be appointed by the Judicial Commissioner the point whether the question of limitation has been rightly decided in *Nathuram* v. *Sheolal* (1).

Mr. *P. C. Dutt*, for the Appellant.

Messrs. *Atmaram Bhagwant* and *Shridhar Atmaram*, for the Respondent.

OPINION OF THE BENCH.

Findlay, O. J. C. and Kotval, A. J. C.—(*August 11, 1925.*)—Vithal Sheoram and others brought a suit on a mortgage, dated the 10th March 1905, executed by the father of defendant No. 1, Ganpat against Ganpat and the present plaintiffs, who were subsequent mortgagees and obtained a preliminary decree for foreclosure. The plaintiffs paid the decretal amount into Court and now sue to recover it from Ganpat. In default of payment they claim foreclosure or in the alternative sale. The latter relief they claim apparently on the ground that they acquired a charge by the payment of the decretal amount.

The lower Appellate Court relying on *Nathuram* v. *Sheolal* (1) has held that the claim is time-barred and has dismissed the suit. The point referred to this Bench is whether the decision as to limitation in that case is correct.

Nathuram v. *Sheolal* (1) was referred to and dissented from by a Bench in *Bora Shib Lal* v. *Munni Lal* (2). The learned Judges there observed:—

"It is impossible to hold that the right of the plaintiff accrued before he made any payment at all. In that ruling the learned Judge seems to have assumed that the plaintiff was the assignee of the decree. Under s. 74 of the Transfer of Property Act he no doubt acquired the rights and powers of the mortgagee whom he redeemed, but the fact of his redeeming the prior mortgage does not make him an assignee of the mortgage. His rights may be akin to those of an assignee, but he is not the actual assignee. If he had been the assignee of the mortgage and no suit had been brought on the basis of the mortgage by the prior mortgagee, he would have been bound to bring his suit to enforce that prior mortgage within the period of limitation which was available to the prior mortgagee. But a suit like the present is not a suit to enforce the prior mortgage nor is it an

(1) 42 Ind. Cas. 796; 13 N. L. R. 217.

(2) 63 Ind. Cas. 604; 44 A. 67; 3 U. P. L. R. (A.) 193; 19 A. L. J. 810, (1922) A. I. R. (A.) 135.

application for the execution of the decree obtained on the basis of the prior mortgage."

In *Sibanand Misra* v. *Jagmohan Lal* (3), Das, J., dissents from the above view.

Under s. 74, Transfer of Property Act, the puisne mortgagee on paying off the prior mortgagee acquires all the rights and powers of the prior mortgagee as such. These rights and powers are the rights and powers created by the decree: *Narayan* v. *Nathmal* (4). In the present case they are the rights to the payment of the amount decreed and foreclosure in default of payment. It is these rights which may be said to be impliedly assigned by law to the puisne mortgagee and not to the rights under the mortgage which became merged in the decree. It would be hard and unjust in some cases to hold that it is the rights under the mortgage which are assigned to the puisne mortgagee. To protect his interest under his own mortgage the puisne mortgagee must satisfy the mortgage decree where the mortgagor fails to do so. But before the time comes for him to pay it up, a claim on the basis of the mortgage may have become time-barred. The result would be, where the condition in the prior mortgage was one of foreclosure, that the puisne mortgagee would have to pay up the prior mortgage debt without being able to recover it from the mortgagor or be foreclosed and lose the amount advanced by him to the mortgagor. It is said that the hardship may be avoided by enforcing the assignment under s 74 in the same suit and asking for a decree in Form 6. Form No. 6, however, refers to a case where the claims on both the prior and puisne mortgages are decided and decreed against the mortgagor in the same suit. There might be a decree in Form 7 in a case like the present but even then all that the Court may do is to grant a declaration keeping alive the mortgage in favour of one of the parties. It does not allow of any further action in the same suit by the puisne mortgage against the mortgagor.

The rights acquired by the puisne mortgagee can be enforced by a separate suit: *Gopi Narain Khanna* v. *Bansidhar* (5).

(3) 68 Ind. Cas. 707, 1 Pat. 780; 3 P. L. T. 533, (1922, Pat 331, (1922) A. I R. (Pat) 499.

(4) 65 Ind. Cas 275; 17 N. L. R. 200; (1922) A I R. (N) 155.

(5) 27 A 325; 2 C. L J. 173; 9 C. W. N. 577; 7 Bom. L R. 427, 15 M. L J 191; 2 A. L. J. 336; 32 I. A. 123; 8 Sar. P. C. J 779 (P. C.).

Article 132, First Schedule, Limitation Act, would apply to such a suit the period of limitation being 12 years from the date the money became due The money decreed can be said to have become due to the plaintiff and the right to foreclose in default of its payment to have arisen in his favour only when he made the payment and became entitled under the provisions of s. 74 to the rights created by the decree. This view finds support in *Parvati Ammal* v. *Venkatarama Aiyar* (6).

In *Mahomed Ibrahim Hossein* v. *Ambika Pershad Singh* (7), the claim was made on the basis of the prior mortgage which was claimed and held to have been kept alive for the subsequent mortgagees' benefit. The mortgage had not merged in a decree. The present claim is based upon the new rights created by the decree.

We are, therefore, of opinion, that the question of limitation has not been rightly decided in *Nathuram* v. *Sheolal* (1)

JUDGMENT.—The plaintiffs' claim was resisted in this Court on the grounds that a separate suit was not maintainable and that in any case the suit was barred by limitation. Both these points fail in view of the opinion of the Bench.

The appeal, therefore, succeeds. The plaintiffs' claim will be decreed with costs throughout.

Z K. *Appeal allowed.*

(6) 81 Ind Cas 771 47 M L J 316; (1921) M W. N 517; (1924) A I R (M) 80.

(7) 14 Ind Cas 496, 39 C 527, 11 M L. T 265, (1912) M W N 367, 9 A L J 332, 14 Bom L. R 280; 16 C. W N. 505, 15 C. L J 411, 22 M. L J. 468, 39 I A. 68 (P C)

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 940 AND 941 OF 1923.

September 12, 1925.

Present:—Mr. Justice Odgers.

A. DORASWAMI NADAR—PETITIONER

versus

JOSEPH L. MOTHER AND ANOTHER—RESPONDENTS.

Madras District Municipalities Act (V of 1920)—Rules for conduct of Elections, r 2 (2)—Nomination paper—Signature by agent of candidate, validity of—Acceptance of nomination paper by Returning Officer—Misconstruction of rules—Revision—Civil Procedure Code (Act V of 1908), s. 115.

Under r. 2 (2) of the Rules for the conduct of Elections under the Madras District Municipalities

Act, it is the candidate himself who must sign the nomination paper A nomination paper signed by an agent of the candidate with his authority is invalid.

The validity of a nomination paper, even after it had been accepted by the Returning Officer, may be questioned after the election Th Court has, therefore, jurisdiction to enquire into the matter and if necessary declare the election void

A mere error in the construction of rules by a Court sitting to dispose of an election petition is not a ground for interference in revision under s. 115, C. P. C, by the High Court

Petition, under s 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the orders of the Court of the Subordinate Judge, Tuticorin, in O S. Nos. 7 and 8 of 1923 respectively.

Messrs. *T. R. Venkatarama Sastriar* and *K. S. Sankara Iyer*, for the Petitioner.

Mr *K. R. Rama Iyer*, for the Respondents.

JUDGMENT.—These are revision petitions to revise the decision of the learned Subordinate Judge of Tuticorin in petitions presented to him under the Madras Municipalities Act, 1920 It appears that in an election for the Tuticorin Municipality, 8th ward, which was to be held in January 1923, a nomination paper was put in for Mr. A Doraiswami Nadar which was admittedly not signed by the candidate but the name of the candidate was written in the nomination paper by his son owing to his (candidate's absence at the time) The learned Subordinate Judge has found that the son was authorised to sign his father's signature for this purpose but it has to be observed that the signature purports to be that of the candidate and there is no indication that it is written by somebody else. The learned Subordinate Judge has held that the son was in fact authorised so to sign but under the Election Rules to which reference will be made in a moment, such a signature by the agent is not recognised and, therefore, the nomination paper was invalid.

For the petitioner two points are urged; (1) that not only under the Common Law but under many English Statutes signature by the agent even orally authorised is perfectly good and sufficient (2) that as the nomination paper has been accepted by the Chairman no question as to its validity is now open The learned Subordinate Judge has carefully gone into the provisions contained in the rules and he has come to the conclusion that their object and scope require that the signature should be put in by the very party concerned and not by his proxy. Rule 2 (2) runs thus:

"Every nomination paper shall be subscribed by two such electors as proposer and seconder and the candidate shall subscribe a declaration on it expressing his willingness to stand for election."

I am of opinion that it is no guide to refer to various English cases such as *In re Whitley Partners* (1), which is a case under the Companies Act or the dictum in 1 Halsbury's Laws of England page 157 that an agent may be authorised to sign for another orally, which of course cannot be disputed, nor has the case cited in *Pritchard* v. *Bangor Corporation* (2) anything to do with this matter. I am not disposed to disagree with the construction placed on r. 2 (2) by the learned Subordinate Judge.

As to the second point, that once the Chairman has passed the nomination paper it is beyond question, that I think is disproved by the rules for the decision of disputes. Government Order 1134, dated 30th November 1920. Under r. 11 (c) "if in the opinion of the Judge the result of the election has been materially affected by any irregularity in respect of a nominatian paper ....the election of the returned candidate shall be void." That must refer to a nomination paper after it has been accepted by the Chairman and what turns out to be invalid or irreglar. The Judge is there given jurisdiction to enquire into the matter and if necessary declare the election void. That is a strong argument against the sanctity of a nomination paper which has been accepted by the Chairman.

Another point has been argued with reference to these revision petitions and that is that they do not lie and in the latest Full Bench decision in C. R. P. No. 541 of 1923 the Chief Justice, Phillips and Kumaraswami Sastri, JJ., in a very similar case to this held in a decision as to the construction of rules which are similar that there was no question of jurisdiction or of acting illegally, "that the learned Judge had a point of construction before him and he decided it to the best of his ability" and "that the question of doubtful construction of a rule is not one that would enable the

(1) (1886) 32 Ch D 337; 55 L J Ch. 540; 54 L. T 912, 34 W. R. 505.

(2) (1888) 13 A C. 241; 57 L. J. Q. B. 313; 58 L T. 502; 37 W R. 103; 52 J. P. 564.

Court to interfere in revision." In my opinion these rules are strictly within the purview of those remarks in the latest Full Bench case. Even if they are not and civil revision petitions do lie, I am of opinion for the reasons given above, that the learned Subordinate Judge is correct in the decision that he arrived at. There is no doubt that in this case if an invalid nomination paper was in fact received and admitted the result of the election would be materially affected.

The civil revision petitions must be dismissed, C. R. P. No. 940 without costs and C. R. P. No. 941 with costs.

V. N. V. *Petitions dismissed.*

Z. K.

NAGPUR JUDICIAL COMMISSIONER'S COURT.
FULL BENCH.

SECOND CIVIL APPEAL No. 396-B OF 1923.

September 5 and 21, 1925.

Present:—Mr. Findlay, Officiating J. C., Mr. Hallifax, A. J. C. and Kotval, A. J. C.

KESHEO AND ANOTHER—APPELLANTS

versus

JAGANNATH—RESPONDENT.

Hindu Law - Joint family—Widow and step-son—Widow managing estate—Alienation by widow—Benefit of estate—Alienation, whether binding on step-son—Female member, whether can be manager Precedents—Official Reports

Per *Curiam.*—A sale by a Hindu widow who was managing the estate of her minor son and step-son of a part of the immoveable property belonging to the estate for necessary purposes is valid and binding on the step-son [p 122, col 2, p. 124, col. 2]

[Case-law reviewed]

Per *Hallifax, A J C*—Any adult member of a joint Hindu family whether male or female is entitled to be a manager of such family [p 124, col 1]

Every Court subordinate to the Judicial Commissioner's Court in Central Provinces and Berar is bound to follow a ruling published in Central Provinces Law Reports or Nagpur Law Reports until it has been overruled by another ruling similarly published Even in the Judicial Commissioner's Court according to an old standing rule of practice a Judge sitting alone always follows an officially published ruling If he doubts the correctness of such ruling, the only course properly open to him is to refer the matter for the decision of a Bench [p. 122, col. 1.]

FACTS.—Plaintiffs' father Rambharti died about 12 years ago. Rambharti by his senior wife *Musammat* Ani got plaintiff No. 1 and by his junior wife *Musammat* Jani got plaintiff No. 2. Within two years after Rambharti's death, *Musammat* Ani sold a site for Rs. 50 to the defendant by a registered sale-deed (Ex. D-1) on 26th February 1913. This sale-deed is executed by *Musammat* Ani alone for herself and also as guardian of plaintiff No. 1 (her son). The defendant has built a house over this site. The plaintiffs claimed to recover the site along with the house and shop over it (with superstructure) from the defendant on the grounds that the sale was without legal necessity, that *Musammat* Ani was deceived by the defendant, that as she was an idiot she was persuaded to make the sale and that she was not the guardian of plaintiffs Nos. 1 and 2. The defendant contested the claim alleging that plaintiffs' claim was barred by time as their suit was filed long after three years lapsed from the date of the majority of plaintiff No. 1. On other points of legal necessity and the guardianship of the plaintiff he joined issue. The lower Court found that plaintiff No 1 was aged 24 when the suit was filed, that plaintiff No. 1's suit is barred by time because Art. 91 of the First Schedule of the Indian Limitation Act, 1908 applies as the sale by his *de facto* and *de jure* guardian is voidable and not *ab initio* void, that plaintiff No. 2's suit is not barred because Art. 144 applies as the sale is *ab initio* void (if not for legal necessity), that *Musammat* Ani who managed the affairs of the plaintiffs' joint family after her husband's death was the "guardian" of plaintiffs' estate in law and that the sale was for legal necessity. Plaintiffs' claim, was, therefore, dismissed with costs.

Mr. *G. R Pradhan*, for the Appellants.

Sir Dr. *H. S. Gour* and Mr. *M. B. Marathe*, for the Respondent.

OPINIONS OF THE FULL BENCH.

Hallifax, A. J. C.—(*September 5, 1925*).—The head-note* in *Husen* v. *Rajaram* (1) is as follows: "An alienation of the property of a minor by a person who is that minor's guardian *de facto* but not *de jure* is not merely voidable but absolutely void, and the minor need not sue to have it set aside before he can obtain possession of the property Articles 44 and 91 of the Second Schedule of the Limitation Act do not apply to such a case." That is a correct epitome of the view of the law set out in

(1) 26 Ind. Cas. 813; 10 N L R. 133

*Head-note of 10 N. L. R. 133.—[*Ed.*]

my judgment in the case, in which the alienation in question was a sale of the property of a minor Hindu by the elder of his father's two widows, his mother being the younger. In the present case also the alienation was by the elder of two Hindu widows of property belonging jointly to her son and the son of the younger widow, both minors at the time, and the sale was for their benefit and necessary in their interests.

In both these cases, as in all the others to be mentioned later, the person who made the alienation purported to act as the guardian of the minor. The learned Judge of the lower Court has dissented from two officially published rulings of this Court, the one already mentioned and *Vithu* v. *Devidas* (2) which discussed and followed it, and has preferred to follow the view expressed in three judgments of Judges of this Court not officially published. The references to such judgments should always be by the number and year of the case, and not by the page of some unauthorised publication of which this Court may or may not have a copy. In this case it has not got a copy of the publication mentioned.

The impropriety of refusing to follow a judgment of this Court published officially needs to be pointed out, because it is so common. Every Court subordinate to this Court is bound to follow a ruling published in the Central Provinces Law Reports or the Nagpur Law Reports until it has been overruled by another judgment similarly published. Even in this Court according to an old standing rule of practice, which the Judges of this Court declared they would follow in an order published on the 21st of August 1913, a Judge sitting alone always follows an officially published ruling. If he sees reason to doubt the correctness of such a ruling the only course properly open to him is that taken by my brother Kotval in this case, to refer the matter for the decision of a Bench.

The three unpublished judgments of this Court followed in the lower Court are mentioned in the order of reference to a Bench which is quoted below. The first of them frankly dissented from *Husen* v. *Rajaram* (1) and the other two, with the judgment of the lower Court in the present case, dissented from *Vithu* v. *Devidas* (2) as well, though Kinkhede, A. J. C., in the judgment from which an extract is given below, seems to have thought that his view, with that of Stanyon, A. J. C., was accepted in *Vithu* v. *Devidas* (2). It happens, however, that the final decision of each of the four cases is correct, though the reasons given for it are unsound.

In the present case the two brothers whose property was sold have appealed against the decision that the transfer of the half of the property belonging to the son of the widow who did not join in executing the transfer is valid. The reference to the Bench was made by Kotval, A. J. C. in these terms: "The question here is whether a sale by a Hindu widow who was managing the estate of her minor son and step son of a part of the immoveable property belonging to the estate for necessary purposes is valid and binding on the step-son The appellants contend that it is not and rely on *Husen* v. *Rajaram* (1), where the facts were more or less similar. The respondent points out that three Judges of this Court have differed from that ruling, *vide* S. A. No. 316-B of 1914, S. A No. 493 of 1921 and S. A. No. 303-B of 1923. In these circumstances it appears desirable that the correctness of that ruling should be considered by a Bench."

The answer I would give is this. The statement of law in *Husen* v. *Rajaram* (1), which is repeated in *Vithu* v. *Devidas* (2), is perfectly correct, but the final decision of those cases is wrong because of a fact existing in each of them which was not brought to the notice of the Court. The statement of law in the judgment of the lower Court in the present case and in the judgments of this Court in the three cases mentioned in the Order of Reference is wrong, but the decision of each of the four cases is correct because of the same fact though there also it escaped the notice of the Court. That fact is that the transferor on behalf of the minor in each case, though purporting to act as the guardian of the minor, was the manager of the Hindu family of which the minor was a member and really acted in that capacity.

In the case of 1914 decided by Stanyon, A. J. C., there were two fatherless minors whose mother had married again, and they were living with their brother-in-law, who was as in fact looking after their property as well as their persons and made the alienation in question. In the case of 1921 decided

(2) 51 Ind. Cas. 943; 15 N. L. R. 55.

by Prideaux, A. J. C., there was one minor, and the alienation was made by his step-mother, his own mother being dead. In the case of 1923 decided by Kinkhede, A. J. C., the alienation was by the paternal grandmother of the two minor sons of one father and two mothers, of whom the father and one mother were dead. In all three cases the minors were Hindus.

In each of these three cases the person who actually made the alienation purported to act as guardian, and was treated in the judgment as the guardian, *de facto* but not *de jure*. The decisions rested on the view that there is a difference between Hindu Law and Muhammadan Law in respect of the right to dispose of the property of a minor held by a person who is in fact acting as the guardian of the minor but without any right to do so; that according to the Hindu Law, such a guardian even though self-constituted can alienate the property of the minor whom he has taken under his protection, provided only that the alienation is for the minor's benefit.

This appers to be a wrong statement of a correct principle, but it was the position taken before the Bench in this case on behalf of the appellants. The reasons urged to support it are fully set out in the judgment of Kinkhede, A J. C in the last of the cases already mentioned in these words:

"In my opinion. an alienation by a *de facto* guardian of a Hindu minor has not the same effect as an alienation by a *de facto* guardian of a Muhammadan minor. It has been laid down in *Hunooman Persaud Panday* v. *Babooee Munraj Koonweree* (3) that 'under the Hindu Law the right of a *bona fide* incumbrancer, who has taken from a *de facto* manager a charge on lands created honestly, for the purposes of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto*, with the *de jure* title.' This view has been consistently accepted as a correct exposition of Hindu Law in a series of cases of the several High Courts, *cf. Bai Amrit* v. *Bai Manik* (4), *Mohanund Mondul* v. *Nafur Mondul* (5), *Thayamal* v. *Kuppanna Kondam* (6), *Jago* v. *Oodal* (7) and *Somwarpuri* v. *Gopalsingh* (8) decided by Stanyon, A. J. C., on 28th April 1915 and quoted with approval in *Vithu* v. *Devidas* (2), by Mittra, A. J. C. Under Muhammadan Law *de facto* guardian has no recognised position and is no better than an officious intermeddler who as pointed out by their Lordships of the Privy Council in *Mata Din* v. *Ahmad Ali* (9) 'may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it.' In the aforesaid case of *Mata Din* (9) the point whether a sale by a *de facto* guardin if made of necessity or for payment of an ancestral debt affecting the minor's property and if beneficial to the minor was altogether void or voidable, was not decided by their Lordships of the Privy Council, nor were the observations of their Lordships such as could apply to the case of the alienation by a *de facto* guardian under Hindu Law. There is a fundamental distinction between the guardian under the two systems of jurisprudence. The actual structure of the Hindu society with its joint family system is a thing unkown to the Muhammadan society. Under the Muhammadan Law a *de facto* guardian has no recognised position while the Hindu Law gives to him a position identical to that acknowledged in a *de jure* guardian In this respect as pointed out by Dr. Gour in his Hindu Code, page 446, 2nd Edition 'the Muhammadan Law offers no analogy but rather presents a contrast . The one enquires who made the alienation, the other why it was made .This distinction between the two systems appears to have been ignored in a case in which an alienation by a Hindu *de facto* guardian was treated as *ipso facto* void, *Hussen* v. *Rajaram* (1).' That this is so is clearly pointed out by Stanyon, A J C., in *Somwarpuri* v. *Gopal Singh* (8) referred to above, I, therefore, respectfully record my dissent from the view taken in *Hussen* v. *Rajaram* (1) and prefer to follow the view taken in *Somwarpuri* v. *Gopal Singh* (8)."

(3) 6 M. I. A. 393 at pp 412, 413; 18 W. R. 8In, Sevestre 253n; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552, 19 E. R. 147.

(4) 12 B. H. C. R. 79.

(5) 26 C. 820, 3 C. W. N. 770, 13 Ind. Dec. (N. S) 1125.

(6) 26 Ind. Cas. 179, 38 M. 1125, 27 M. L. J. 285.

(7) 4 N. L R. 20

(8) 49 Ind Cas 246

(9) 13 Ind. Cas. 976; 34 A. 213; 16 C. W. N. 338; 11 M. L T 115, (1912) M W. N. 183, 9 A. L. J. 215, 15 C. L J 270, 14 Bom. L. R. 192; 15 O. C. 49, 23 M. L. J. 6; 39 I. A. 49 (P. C.).

The "structure of Hindu society, with its joint family system" certainly does differ from that of any other society in the world but that does not give any person the right to take charge of the property of any minor he may come across, just because he happens to be a Hindu, whether they are nearly or distantly related or not related at all, and "thereby clothe himself with power to sell it." It is, however, correct to say that it is the existence of the joint family system among Hindus that makes all the alienations under consideration valid though they would be invalid if the minors had not been Hindus, because they were made not by their guardians but by the managers of their family. The fundamental mistake made in respect of *Hunooman Persaudpanday's case* (3) is in assuming that it defines the powers of a guardian of a Hindu minor. It deals throughout with the powers of a manager, and the word *guardian* occurs in their Lordships' judgment only four times, twice in quotations from the judgment of the Sadar Diwani Adalat, once in a quotation from the plaint and once in their Lordships' summing up of their conclusions. In the last place the word may have been used because it had been used all through the case in the Courts in India or, if I may suggest it without disrespect, by a slip.

If there is any statement of the rule of Hindu Law as to who is entitled of right to be the manager of a joint Hindu family, I have been unable to find it, but I take it that any adult member of the family, male or female, is so entitled. If that is correct the person who actually executed the transfer in the present case, and indeed in each of the five other cases mentioned except that of 1914 decided by Stanyon, A. J. C., was the manager of the family *de jure* as well as *de facto*. If, as seems to have been assumed only for the purposes of the argument in *Hunoomanpersaud Panday's case* (3) a female cannot as of right be such a manager, even the mother of the only other member of the family who is a minor, then in this, as in all the other cases, the transfer was valid because it was made by the person who was the actual manager at the time, whether that person had a right to be manager or not, and it was for the benefit of the estate and necessary for its preservation.

The answer I would give to the Reference is, therefore, that the sale in this case by the Hindu widow who was managing the estate of her minor son and step-son of a part of the immoveable property belonging to the estate for necessary purposes is valid and binding on her step-son.

Findlay, Offg. J. C.—(*September 5, 1925*).—I have had the advantage of perusing and considering the opinion recorded by Hallifax, A. J. C. and I concour therein.

Kotval, A. J. C.—(*September 5, 1925*). —I concur.

By the Court.—As stated in the opinions separately recorded our answer to the question referred to us is that the alienation is valid and binding on the step-son of the widow who made it.

JUDGMENT.

Kotval, A. J. C.—(*September 21, 1925*). —Ganesh's case alone was pressed and the only point argued at the hearing was the one referred to the Full Bench. That point is decided against the appellants. Consequently the appeal fails and is dismissed with costs.

N H. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1635 OF 1922.

August 24, 1925.

Present :—Mr. Justice Phillips.

PAZHANIANDY TARAKAN—PLAINTIFF —APPELLANT

versus

MURUKAPPA TARAKAN AND OTHERS— DEFENDANTS—RESPONDENTS.

Trusts Act (II of 1882), s 88—Trust, acceptance of—Repudiation by trustee

A person who accepts a trust and acts upon it is estopped from afterwards disputing it and cannot bring a suit in his personal capacity in derogation of the trust [p 123, col 1]

Nor can he in such a suit claim to recoup himself what he has spent for the benefit of the trust [p. 125, col. 2]

Muniswami Chetty v *Maruthammal*, 7 Ind Cas 176, 20 M L. J. 687 at p 698; (1910) M W. N 233, 8 M L. T. 124; 34 M. 211 and *Srinivasa Moorthy* v *Venkatavarada Iyengar*, 11 Ind Cas 417, 34 M 257, 15 C. W. N. 741, 8 A L J 774, 13 Bom L R. 520, (1911) 2 M W. N 375, 14 C L. J 64, 21 M L J. 669, 10 M L. T 263, 38 I. A. 129 (P. C.), referred to.

Second appeal against a decree of the Court of the District Court, South Malabar, in A. S. No. 652 of 1921, preferred against

that of the Court of the Additional District Munsif, Palghat, in O. S. No. 415 of 1920.

Mr. *P. S. Naryanaswamy Iyer*, for the Appellant

Mr. *K. Bhashyam Iyengar*, for the Respondent.

JUDGMENT.—In this case the plaintiff and his family obtained a *saswatam* lease of certain property which was dedicated in trust. The plaintiff was appointed the managing trustee and in pursuance of that appointment, he gave notice to the person in possession of the property to deliver it up. The title of plaintiff's transferor was disputed and subsequently plaintiff purchased the *saswatam* right from the rival *jenmi* in his own name. He now sues for damages for trespass and an injunction. The lower Appellate Court dismissed his suit on the ground that under s 88 of the Trusts Act, plaintiff was bound to hold the property on behalf of the trust and could not, therefore, bring a suit in his personal capacity in derogation of the trust.

The first argument put forward in appeal is that inasmuch as the plaintiff did not obtain actual physical possession of the property, section 88 does not apply. In s. 88 there is no recital as to the possession of the property and in the cases relied on by the appellant, *Muniswami Chetty* v. *Maruthammal* (1) and *Srinivasa Moorthy* v. *Venkatavarada Iyengar* (2), there is really nothing to support this contention. In fact in *Muniswami Chetey* v. *Maruthammal* (1) it was held that "If an executor accepts the office and acts as executor 'with full knowledge of all the circumstances bearing on his right,' . . . . . he is estopped from subsequently repudiating the Will." Here the plaintiff accepted the trust and acted upon it and consequently he is now estopped from disputing the trust.

The next point put forward is that the plaintiff is entitled to be re-imbursed out of the trust the money which he paid out of his own pocket and that, therefore, until that is done the property is his own. This is, no doubt, true and would be applicable in a case where the beneficiaries sought to take the possession out of the plaintiff's hands, but in the present case this is not even a suit against the beneficiaries but a suit against a co-trustee and when s. 88 lays down that the plaintiff must hold this property for the benefit of the trust, I do not think that any Court would allow him to sue in his own capacity as being solely entitled to the property. If he does sue in such capacity he is, in effect, committing a breach of trust. Plaintiff is admittedly in possession of the trust property and can out of it recoup himself what he has spent for the benefit of the trust. Consequently I think that the lower Appellate Court is quite right in dismissing his suit. The second appeal is dismissed with costs.

V. N. V. *Appeal dismissed*

(1) 7 Ind. Cas. 176; 20 M. L. J. 687 at p. 698; (1910) M. W. N. 233, 8 M. L T. 124; 34 M. 211.

(2) 11 Ind. Cas. 447, 34 M. 257, 15 C. W. N. 741; 8 A. L. J. 774; 13 Bom. L. R. 520; (1911) 2 M. W. N. 375, 14 C. L. J. 64; 21 M. L. J. 669, 10 M. L. T. 263; 38 I. A. 129 (P. C.).

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPLICATION No. 93 OF 1924.

April 22, 1925.

Present:—Mr. Justice Rutledge and Mr. Justice Heald.

KALENTHER AMMAL—APPLICANT

versus

MA MI AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O I, r 10, O XLV—Remand by High Court—Appeal to Privy Council—Addition of parties—Power of Court

A suit was dismissed by the District Court but was remanded by the High Court on appeal Defendants applied for and obtained leave to appeal to the Privy Council. Petitioner then applied to the High Court to be added as a defendant in the suit

Held, (1) that the High Court having passed a final order in the case remanding the case to the District Court, was *functus officio* and could not, therefore, make any order adding parties to the case, [p. 126, col 1.]

(2) that as regards the appeal to the Privy Council the High Court had no powers beyond those given in O. XLV of the C. P. C., and that there was, in that order, no power to add parties; [*ibid.*]

(3) that the District Court had seizin of the case as a result of the remand by the High Court and had, therefore, power to add parties. [*ibid.*]

Mr. *Patel*, for the Applicant.

Mr. *Kalyanwala*, for the Respondents.

JUDGMENT.—In Suit No. 8 of 1922 of the District Court of Pegu Kalenther Ammal, as widow of one Sheik Moideen, sued for administration of Sheik Moideen's estate by the Court, and joined as defendants Ma Mi, who also claimed to be a widow of Sheik Moideen's, and Mahomed Eusoof, who claimed to be his son by another wife Ma Kin.

The District Court found that Kalenther Ammal had been divorced by Sheik Moideen, and, holding on that ground that she had no right to sue, dismissed her suit.

She appealed to this Court, which found that she had not been divorced, and remanded the case to the District Court for disposal on the merits.

Ma Mi and Mahomed Eusoof then applied to this Court for leave to appeal to the Privy Council, and leave has been granted.

Now the present petitioner Halima, who claims to be a [illegible] of Sheik Moideen, her mother Boodima having been a daughter of his by still another wife Jooma Bibi, claims in this Court to be added as a defendant in the suit.

She applied in the District Court after the suit was remanded by this Court, but, as the records were in this Court in connection with the appeal to the Privy Council, no orders were passed on her application.

It seems clear that this Court has no power either in the proceedings in Appeal No. 74 of 1923, or in the proceedings on the application for permission to appeal to the Privy Council to add petitioner as a defendant in the suit.

So far as the appeal to this Court is concerned, this Court, having passed a final order remanding the case to the District Court, is *functus officio*.

So far as the appeal to the Privy Council is concerned, this Court has no powers beyond those given in O. XLV, and there is in that Order no power to add parties.

The District Court has seizin of the case as a result of the remand by this Court, which remand is still effective, although proceedings in the suit have, by consent of the parties, been stayed, and the District Court has power to add parties.

Petitioner should, therefore, renew her application to that Court.

The application to this Court is dismissed with costs—Advocate's fee to be two gold *mohurs*.

Z. K. *Application dismissed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 415 OF 1924.

November 20, 1925.

Present :—Mr. Justice Ashworth and Mr. Justice Raza.

RAMPAL SINGH—DEFENDANT—APPELLANT

versus

RAJRANG SINGH—PLAINTIFF—RESPONDENT.

Custom, essentials of—Family custom—Modern instances—Inference of custom.

Per *Raza, J.*—If a party relies upon the special custom of a family to take the succession out of the ordinary Law, such custom must be proved to be ancient, continuous, certain and reasonable and, being in derogation of the general rule of law, must be construed strictly A custom must be satisfactorily proved by evidence of particular instances so numerous as to justify the Court in finding in favour of the custom [p 129, col 1.]

When the custom is proved to exist it supersedes the general law which however still regulates all outside the custom. [*ibid*]

Ram Nundun Singh v *Janki Koer*, 29 C. 828; 29 I. A 178, 7 C W N 57· 4 Bom L. R. 664, 8 Sar. P. C. J. 351 (P C), relied on

Per *Ashworth, J.*—A custom must be unequivocally stated and proved but it does not follow that it cannot be proved by inference Inference is one of the methods of proof and in the case of custom there is no reason to reject a clearly logical inference against which no consideration prevails. [p. 131, cols. 1 & 2.]

Per *Raza, J.* (*Ashworth, J*, dissenting) —One instance or even four modern instances are not sufficient to prove a family custom. [p 129, col. 1]

Durga Charan Mahto v *Raghunath Mahto*, 20 Ind. Cas 810, 18 C. W. N 55, 18 C. L. J. 559, referred to.

The existence of a custom of the brothers and nephews of a deceased Hindu succeeding together would not lead to a necessary inference that a custom existed to this effect also on the death of a childless widow [*ibid*]

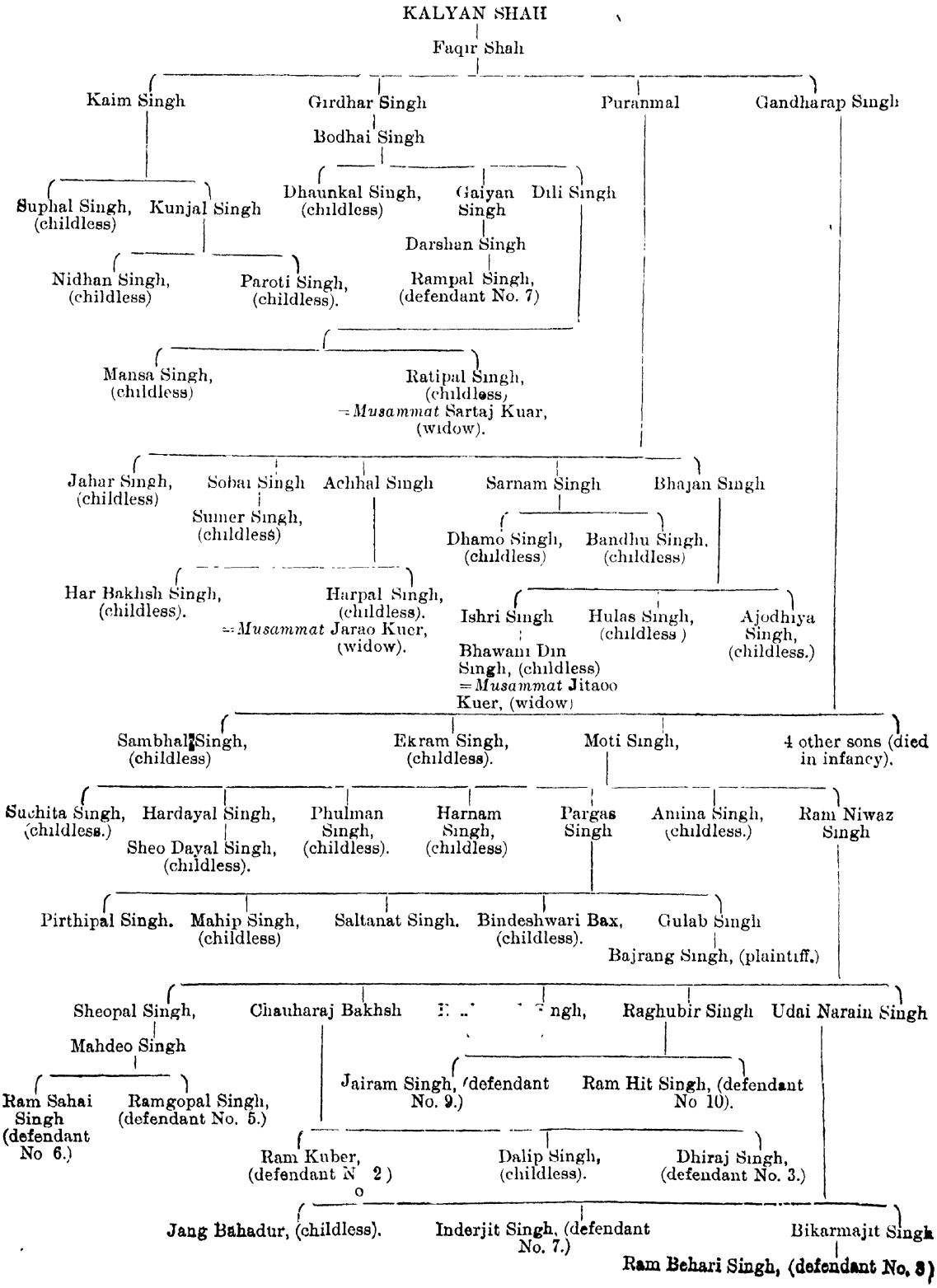
Appeal from a decree of the Additional Sub-Judge, Sultanpur, dated the 12th July 1924, confirming that of the Munsif, Sultanpur, dated the 25th of September 1923.

Mr. *Zahur Ahmad*, for the Appellant.

Mr. *Naimullah* for Mr. *Naimatullah*, for the Respondent.

JUDGMENT.

Raza, J.—(*November 17, 1925*).—This is a defendant's appeal arising out of a suit for possession of certain *zemindari* shares in *Mahal* Utri *Pargana* Miranpur, District Sultanpur. The relative position of the parties will appear from the following pedigree :—


KALYAN SHAH
Faqir Shah
Kaim Singh
Girdhar Singh
Puranmal
Gandharap Singh
Bodhai Singh
Suphal Singh, (childless)
Kunjal Singh
Dhaunkal Singh, (childless)
Gaiyan Singh
Dili Singh
Darshan Singh
Nidhan Singh, (childless)
Paroti Singh, (childless).
Rampal Singh, (defendant No. 7)
Mansa Singh, (childless)
Ratipal Singh, (childless) = Musammat Sartaj Kuar, (widow).
Jahar Singh, (childless)
Sobai Singh
Achhal Singh
Sarnam Singh
Bhajan Singh
Sumer Singh, (childless)
Dhamo Singh, (childless)
Bandhu Singh, (childless)
Har Bakhsh Singh, (childless).
Harpal Singh, (childless). = Musammat Jarao Kuer, (widow).
Ishri Singh
Hulas Singh, (childless)
Ajodhiya Singh, (childless.)
Bhawani Din Singh, (childless) = Musammat Jitaoo Kuer, (widow)
Sambhal Singh, (childless)
Ekram Singh, (childless).
Moti Singh,
4 other sons (died in infancy).
Suchita Singh, (childless.)
Hardayal Singh,
Phulman Singh, (childless).
Harnam Singh, (childless)
Pargas Singh
Amina Singh, (childless.)
Ram Niwaz Singh
Sheo Dayal Singh, (childless).
Pirthipal Singh.
Mahip Singh, (childless)
Saltanat Singh.
Bindeshwari Bax, (childless).
Gulab Singh
Bajrang Singh, (plaintiff.)
Sheopal Singh,
Chauharaj Bakhsh
Raghubir Singh
Udai Narain Singh
Mahdeo Singh
Ram Sahai Singh (defendant No 6.)
Ramgopal Singh, (defendant No. 5.)
Jairam Singh, (defendant No. 9.)
Ram Hit Singh, (defendant No 10).
Ram Kuber, (defendant No 2)
Dalip Singh, (childless).
Dhiraj Singh, (defendant No. 3.)
Jang Bahadur, (childless).
Inderjit Singh, (defendant No. 7.)
Bikarmajit Singh
Ram Behari Singh, (defendant No. 8)

Harpal Singh, Har Bakhsh Singh and Bagwanidin Singh were co sharers of the said *mahal*. Harpal Singh and Har Bakhsh Singh both died childless. Harpal Singh died about 30 years and Har Bakhsh Singh about 40 years ago. Though Harpal and Har Bakhsh (brothers) lived jointly but mutation was effected in respect of the share of Harpal Singh in favour of his widow *Musammat*, Jasaoo Kunwar. She got possession of Harbkhsh Singh's share also on his death. On the death of Bhawanidin's widow *Musammat* Jitaoo, mutation was made in favour of *Musammat* Jasaoo in respect of her share also in 1892. Thus *Musammat* Jasaoo got possession of these three shares and held them till her death. She died on the 18th November 1918. A revenue partition was made in 1911 and the said shares were allotted to a *mahal* called after her name. At the time of the death of *Musammat* Jasaoo three persons, namely, Gulab Singh, (father of the plaintiff), Raghubir Singh (father of the defendants Nos. 9 and 10) and Udit Narain Singh (father of the defendant No. 7) were the nearest reversioners of Harpal Singh. However mutation was effected in favour of the plaintiff Bajrang Singh, the defendant No. 1. Rampal Singh, and 8 others persons, the defendant No. 1 getting 19 shares and the plaintiff and others 16 shares. The plaintiff brought the present suit against the defendant No. 1 and 9 others claiming one-third share.

The suit was contested by the defendants Nos. 1 to 6 principally. Their defence was that they were entitled to the property by virtue of a custom the particulars of which will be set out hereafter. The Court of first instance decreed the plaintiff's claim holding that the custom set up by the contesting defendants was not satisfactorily proved and was not applicable to the present case. Rampal Singh defendant No. 1 alone appealed but his appeal was dismissed by the Subordinate Judge of Sultanpur on the 12th July 1921. He has now appealed to this Court. The question of custom is the only question to be decided in this case. The plaintiff's father being one of the nearest reversioners, the defendant-appellant cannot come in except on the ground of the custom set up by him.

Musammat Jasaoo Kunwar had no right to the property which she was holding in her lifetime. She had no right to succeed Har Bakhsh Singh and *Musammat* Jitaoo Kunwar. However she acquired title to the property by adverse possession and it is not disputed that it became her *stridhan* property. The *stridhan* property of an issueless woman goes to her husband and after him to his heirs in order of their succession to him. Under the Mitakshara Law the right to inherit arises from propinquity that is proximity of relationship. The appellant is the relation of a remoter degree of descent than the plaintiff's father and cannot succeed until and unless the alleged custom is made out.

The custom set up by the defendant-appellant is as follows:—"In the community (tribe) and family of Harpal Singh and the parties the custom which prevails relating to inheritance is that on the death of a childless widow her as well as her husband's estate is inherited by the collaterals of her husband, having regard to their descent without any consideration of their nearness, the descendants of the eldest son receiving 19 shares and those of the remaining sons 16 shares." The defendant-appellant alleges that his ancestor Girdhar Shah was the eldest son of Faqir Shah. No mention of the alleged custom was made in the *wajib-ul-arz* (that is the *Wajib-ul-arz* of Utri Ex. A-6).

The oral evidence which has been produced by the defendant-appellant to prove that brothers and nephews succeed together by custom is unreliable and insufficient. The learned Munsif has subjected that evidence to a careful analysis. No instance was given in which succession by collaterals also was regulated by that custom. The oral evidence has been properly rejected by the lower Courts.

The appellant's learned Counsel relies on documentary evidence principally. He has referred to Exs. A-1 to A-5 and A-23. Exs. A-1 to A-5 show that the plaintiff's father Gulab Singh had brought a suit against his uncle Ram Niwas Singh in 1866 in respect of the property of his another uncle Phulman Singh, who had died childless. He was not entitled to any share in the property of Phulman Singh, under the Hindu Law, in the presence of his uncle Ramniwaz Singh but he had claimed a one-third share in that property. He had made no mention of any custom in his plaint but his plaint and his statement show that he had taken the law and the custom both, to be the same. Ramniwaz had admitted the custom in his statement and

had contested the suit simply on the ground that a *panchayat* had already decided that Gulab Singh could not take the property unless he accepted his liability to pay his share of the debt of the deceased. The liability for the debt along with the property was the only question to be decided in that suit. The claim was eventually decreed without any liability for the debt. The principal custom which has been set up in this case was not set up or recognized in that case. Ramniwaz had stated the custom as follows:—

"If a co-sharer either a brother or other near relative dies without any issue, then his share is divided among the remaining living co-sharers according to their respective shares." In my opinion the statement of Ramniwaz alone does not establish the custom in question. It should be borne in mind that if a party relies upon the special custom of a family to take the succession out of the ordinary Hindu Law, such custom must be proved to be ancient, continuous, certain and reasonable and being in derogation of the general rule of law, must be construed strictly. A custom must be satisfactorily proved by evidence of particular instances so numerous as to justify the Court in finding in favour of the custom. One instance or even four modern instances are not sufficient to prove a custom. [See *Durga Charan Mahto* v. *Raghunath Mahto*(1),] When the custom is proved to exist it supersedes the general law which however still regulates all outside the custom. [See *Ram Nundun Singh* v. *Janki Koer* (2) and *Mata Din Sah* v. *Sheikh Ahmad Ali* (3).] In the first place the statement of Ramniwaz alone, mentioned above, does not establish the custom of brothers and nephews succeeding together and in the second place that statement does not establish the particular custom under consideration. I think the custom of brothers and nephews of a deceased man succeeding together does not lead to a necessary inference that a custom exists to this effect also that on the death of a childless widow her and her husband's properties are inherited, according to their respective stocks by the persons descending from the same ancestor as her husband but without any regard to the nearness and remoteness of the persons taking the properties. I think the latter custom is a different custom and is strictly to be proved. In my opinion Exs. A1 to A5 do not help the defendant-appellant in this case.

Exhibit A23 is a copy of a judgment in a suit between some Bajgoti Tahkurs of Dahyawau, District Sultanpur. It is true that following custom was held to be proved in that case:—"If a man dies without leaving a male issue his relatives, namely, brothers or cousins or nephews (son of brother or cousin) and grandson (grandson of a brother or a cousin) get shares in the property of the deceased without regard to nearness or remoteness." However that custom was held to be proved in that case as a family custom and not as a tribal custom. This is clear from the judgment of the Munsif who decided that case. The judgment shows clearly that no attempt was made to prove the custom as a tribal custom in that case. It appears that the parties to the present suit are also Bajgoti Thakurs, but it is not shown that they are related as members of a family to the proprietors of village Dahyawau. It was held in *Lalman* v. *Nand Lal* (4), that *wajib-ul-araiz* of villages belonging to the same clan are inadmissible in proof of a family custom unless it is shown that the proprietors of these villages were related as members of a family to the plaintiffs. "There is no objection to a party pleading that a custom obtains both in a family and in the tribe to which that family belongs but he must, of course, prove that the custom is binding on the family, whether he confines his evidence and plea to the family or not". *Parbati Kuar* v. *Rani Chandrapal Kuar* (5). In the present case no attempt has been made to prove the custom in question as a tribal custom. The defendant-appellant attempted to prove the custom as a family custom but failed in his attempt. I do not find a single instance in which the particular custom set up in this case was claimed, recognised or exercised. Under these circumstances I think the lower Courts were perfectly right in holding that the alleged custom was not proved and the plaintiff's claim must, therefore, be rejected. In my opinion there is no force in this appeal.

I would, therefore, dismiss this appeal with costs.

(1) 20 Ind. Cas. 810; 18 C. W. N. 55; 18 C. L. J. 559.
(2) 29 C. 828; 29 I. A. 178; 7 C. W. N. 57; 4 Bom. L. R. 664; 8 Sar. P. C. J. 351 (P. C.).
(3) 11 O. C. 1.
(4) 20 Ind. Cas. 894; 17 O. C. 1.
(5) 8 O. C. 94 at p. 100.

Ashworth, J.—(*November 18, 1925*).—This is a defendant's second appeal. The plaintiff's claim was resisted by the appellant on the ground of the existence of a certain custom, but both the lower Courts have held that he failed to prove this custom. The only question arising in this appeal is whether the lower Courts were right in holding that the custom did not exist. The custom set up may be phrased as follows:—

"A right of representation exists whereby collateral descendants in different degrees from a common ancestor succeed to the shares to which their immediate ancestor if alive would succeed."

There were two alternative claims in respect of this custom. One was that the custom prevailed in the family. The other was that the custom prevailed in the community of Baijgoti Thakurs settled in the Sultanpur District to which this family belongs.

As regards the family custom a preliminary objection has been taken that the decision of the lower Courts was one of fact which cannot be upset in second appeal. The evidence relied upon to prove this custom was the record of a certain case in which Gulab Singh, father of the plaintiff Bajrang Singh sued his uncle Ramniwaz Singh for a share of the property left by another uncle and was successful. The plaintiff in that case, it was urged by the present appellant, had based his claim on the custom now set up. The defendant in that case did not deny the custom but defended his suit on another ground. The suit was decreed. These proceedings embodied in Exs. A1 to A5 were pleaded as a transaction in which, to use the words of s. 13 of the Evidence Act, the custom was "claimed and recognised." The Court of first instance stated that "There was no evidence to prove that the father of Gulab Singh had pre-deceased Phulman Singh", *i. e.*, the uncle whose property was in question in the suit. Accordingly it held that the case was not necessarily evidence of the custom set up. In other words the Court held that it was possible that Gulab Singh was suing for property which had vested in his father before that father's death and as representative of his father, in which case there was no invocation of the custom now set up. The lower Appellate Court also held that the claim was based on the ordinary law of succession and not on any custom. Now it may be that the Courts were wrong in holding that in that case no custom was set up either expressly or by implication. It may be that the plaint showed that Gulab Singh's father had died before the succession in question in that case opened out, and that for this reason custom was alleged by implication. But no question of law arises in second appeal In determining what the plaint in that case meant and in deciding even wrongly, that there were no circumstances which would give a particular meaning to that plaint, the Courts were deciding questions of fact. We allow the preliminary objection that so far as the alleged family custom was held not to be proved the decision of the lower Appellate Court is not open to appeal.

It is next urged that a tribal custom was set up and proved. It was alleged alternatively to a family custom in the plaint, but no attempt seems to have been made to prove it. Exhibit A23 is invoked in arguments in this appeal. That is a judgment where the custom set up was held applicable to "the descendants of one Chitra Sen." As the Court of first hearing has remarked, there is no evidence to show that the present family are such descendants. The *wajib-ul arz* of the village says that all the Bachgoti Thakurs of the Sultanpur District are descended from a common ancestor Barial Singh but it is not suggested that Barial Singh was descendant of Chitra Sen.

I have seen the judgment of my learned colleague I concur with it so far as the finding is that the appeal should be dismissed. I think it, however, desirable to express dissent in respect of three matters. My learned colleague quotes the case *Durga Charan Mahto* v. *Raghunath Mahto* (1) as an authority for holding that a family custom should not be held proved merely by four modern instances. Reference to that decision shows that the Calcutta High Court were dealing with a custom set up as a family custom and referred to the Privy Council case *Chandika Bakhsh* v. *Muna Kunwar* (6) as showing that their Lordships of the Privy Council had declined to find in favour of the alleged custom upon evidence which consisted of four modern instances. A reference, however, to the decision of their Lordships of the Privy Council will show that they were considering in that case not a family custom but a case of tribal

(6) 29 I. A. 7; 24 A. 273; 6 C. W. N. 425; 4 Bom. L. R. 376; 8 Sar. P. C. J. 233 (P. C.).

custom. It is true that the head-note speaks of a family custom being set up but the custom that was being set up in that case was one said to obtain in the tribe known in Oudh as Ahban Thakurs. The evidence in the case had shown only four instances in favour of the tribal custom whereas there were altogether 18 instances discussed. I cosider that this ruling of the Privy Council has no application to a custom set up as a family custom.

Again I cannot agree with the finding that the existence (if proved) of a custom of brothers and nephews of a deceased man succeeding together would not lead to a necessary inference that a custom existed to this effect also on the death of a childless widow. There is a rule of Hindu Law which is set out as follows in s. 196 (1) of Dr. Gour's Hindu Code, 2nd Edition.—

"The *stirdhan* of an issueless woman devolves on her husband if she was married to him in the *Brahama* form which will be presumed, and failing him to his nearest *sapindas* in the order of their succession to him."

It is correct that a custom must be unequivocally stated and proved, but it does not follow that it cannot be proved by inference. It is urged that the evidence only justifies it being held that the property of a propositus will go to collaterals in different degrees without any preference being given to nearness, but what is proved does not justify us in holding that this will apply in respect of the property of a childless widow. Reliance has been placed on the case *Bijai Bahadur Singh* v. *Mathura Singh* (7). This is a judgment of a Single Judge of the Judicial Commissioner's Court of Oudh, but it follows the Privy Council decision of *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (8). In these cases it was held that from a custom excluding daughters and their issue from inheriting the property of their father it could not be inferred that they were excluded from inheriting the *stridhan* property of their mother. There was an obvious reason for this. Hindu Law generally favours the claims of daughters in respect of their mother's property. Here there is no such principle involved. I consider that inference is one of the methods of proof and that in the case of a custom, there is no reason to reject a clearly logical inference against which no consideration prevails. It appears to me that inasmuch as the *stridhan* of an issueless woman devolves first on her husband and then on his *sapindas* a custom regulating succession by *sapindas* to a male's property must also be held to regulate succession by the *sapindas* of the husband to the *stridhan* property of his widow.

Lastly I do not agree that Exs. A-1 to A-5 were not admissible as evidence of an instance under s. 13 of the Evidence Act, namely, as a transaction by which the custom in question was claimed and recognised. It makes no difference that the defendant contested the claim of the plaintiff in that case on another ground, namely, that he could not get the property in question without paying up the previous debt. The claim was only sustainable if inheritance was governed by the custom now set up. It was an easy answer to the defendant in that case that the custom did not exist. The fact that he did not resist the suit by denying the plaintiff's right in my opinion makes this case an instance. No doubt it was only one instance and it was unnecessary for this Court in appeal to consider it inasmuch as the finding in respect of the family custom was one of fact and no question of law arose.

By the Court.—We direct that the appeal shall be dismissed with costs to the respondent.

N. H. *Appeal dismissed.*

(7) 68 Ind. Cas. 555; 9 O. L. J. 327; 4 U. P. L. R. (O.) 66; (1922) A. I. R. (O.) 278; 25 O. C. 345.

(8) 5 I. A. 1; 1 C. L. R. 318; 3 Sar. P. C. J. 763; Bald. 148; 3 Suth. P. C. J. 474; Rafique & Jackson's P. C. No. 48 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1093 OF 1924.

January 8, 1925.

Present:—Mr. Justice Harrison.

MUKAND LAL—PLAINTIFF—APPELLANT

versus

Musammat LORINDI BAI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Execution of decree—Attachment—Objection—Question of title, decision of—Res judicata.

A plot of land was attached in execution of a decree.

Plaintiff and defendant both filed objections to the attachment each alleging that he was the owner of the plot. The Court held that the plot had been purchased by the defendant from the Municipality and belonged to the defendant. Plaintiff subsequently purchased the plot from the Municipality and sued the defendant to recover possession of the plot:

Held, that although the Municipality was not a party to the execution proceedings the question of title to the plot was *res judicata* between the parties by virtue of the decision of the Executing Court

Second appeal from a decree of the District Judge, Dera Ghazi Khan, dated the 18th January 1924, affirming that of the Subordinate Judge, Fourth Class, Dera Ghazi Khan, dated the 7th July 1923.

Mr. *S. Mukerji* for Lala *Har Gopal*, for the Appellant.

Mr. *Mukand Lal Puri*, for the Respondent.

JUDGMENT.—The facts of this case are that Government made over a certain area to the Municipal Committee of Dera Ghazi Khan with a view to the building of a new *abadi*. Plots were sold by the Municipal Committee and the land in suit is the frontage of one of those plots. One Pritam Das obtained a decree against one Bosa and after his death in 1918 applied that this frontage should be sold in execution of his decree. Objections were lodged by *Musammat* Lorindi Bai, the widow of Bosa and defendant in this case, and also by the plaintiff Mukand Lal. Both contended that the site belonged to them. It was decided by the District Judge on the 12th of June 1918 that *Musammat* Lorindi Bai had herself purchased this site from the Municipality and that it could not, therefore, be attached or sold. On the 18th of October 1917 the Municipality passed a mutation order entering the name of *Musammat* Lorindi Bai as the owner of this site and on the 1st of December 1917 granted permission to her to build upon it. In spite of this fact, acting on very peculiar advice given by the Government Pleader and accepted by the Deputy Commissioner, the Municipality while admitting that the title was doubtful and pointing out the fact to the plaintiff sold it to Mukand Lal, for Re. 1-8 it being clearly explained that he took all risks and would not be compensated if it were found that he had wasted his Re. 1-8. He now brings this suit and is met by the decision of the District Judge in a suit, to which he was a party, to the effect that the defendant had acquired a good title from the Municipality. His contention is that because the Municipality was not impleaded in those proceedings the decision does not bind him, as vendee from the Municipality. Whether it binds the Municipality or not it must certainly binds him, in my opinion, and it operates as *res judicata*. Knowing that this decision had been given he deliberately bought a bad title and he has only himself to blame. The Deputy Commissioner's order shows the rights sold as being Government rights. As a matter of fact they were the rights of the Municipality and this Mr. Mukerji admits, that is to say, the plaintiff's vendor and that of *Musammat* Lorindi Bai were one and the same. In spite of this fact he contends that he is now entitled to insist on strict proof of the payment of consideration by *Musammat* Lorindi Bai, althougth the matter has been finally adjudicated upon as between him and her by the District Judge, and it was decided in that litigation that *Musammat* Lorindi Bai had acquired a clear title and that the rights of the Municipality had automatically become extinct. Had he purchased the title of some person other than the vendor to *Musammat* Lorindi Bai, there might be some force in his contention that he can re-agitate the question as being a different person from that person who took part in the previous litigation but the vendor from whom he has been fit to purchase, and who behaved in this peculiar manner in selling to him, is the very person whose right, title and interest were held in that previous litigation to have been transferred to and vested in *Musammat* Lorindi Bai, and, therefore, extinguished for all time. As between him and her it has been found that her title is good and his must be bad, and, it was held that his present vendor had no subsisting title at the time he sold.

I find that it is a clear case of *res judicata* and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 248 OF 1923.

June 13, 1924.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

Bibi WASHIHAN—APPELLANT

versus

MIR NAWAB ALI—RESPONDENT.

Religious Endowments Act (XX of 1863), s. 18 - Order refusing leave to sue—Appeal, whether lies - Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887), s. 20, scope of.

No appeal lies against an order passed under s. 18 of the Religious Endowments Act.

Section 20 of the Bengal, N. W. P. and Assam Civil Courts Act does not confer a right of appeal from every order of the District Judge to the High Court; it only determines the *forum* to which an appeal, if any, shall lie from decrees or orders of the District Judge.

Appeal from an order of the District Judge, Shahabad, dated the 20th July 1923.

Mr. *Manmatha Nath Pal* (with him Mr. *N. N. Sen*), for the Appellant.

Mr. *G. N. Mukherjee*, for Mr. *M. Yunus*, for the Respondent.

JUDGMENT.

Dawson Miller, C. J.—[His Lordship after setting out the facts of the case, which are not material for the decision, proceeded :—] A preliminary objection has been taken that no appeal lies from an order of the learned District Judge under s. 18, Religious Endowments Act. This objection, I think, is sound. The Act itself which creates the cause of action does not provide for any appeal from the order of the District Judge. Nor is there anything in the C. P. C. which would indicate that any appeal lay. The order of the District Judge is clearly not a decree and the cases in which an appeal lies from orders are laid down in ss. 104 and 105 of the C. P. C., the cases are there named in which an appeal lies from certain orders and an appeal lies from no other orders. These two sections coupled with O. XLI of the Code show quite clearly to my mind that no appeal is permissible in such a case. The only contention put forward by the other side is that under s. 20 of the Bengal Civil Courts Act of 1887 it is provided that save as otherwise provided by any enactment for the time being in force an appeal from a decree or order of a District Judge or Additional District Judge shall lie to the High Court. The learned Vakil wants us to construe that section as if it granted a right of appeal from every order of the District Judge to the High Court. This is clearly not the interpretation of that section; the only thing the section is dealing with is the *forum* to which an appeal, if any, shall lie from decrees or orders of the District Judge.

In my opinion the preliminary objection is a sound one and this appeal is not permissible.

The appeal is dismissed with costs.

Foster, J.—I agree.

K. S. D. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 213 OF 1925.

April 8, 1926.

Present:—Mr. Justice Das and Mr. Justice Ross.

SAHAI MISTRI—DECREE HOLDER—APPELLANT

versus

SATALI DARJI—JUDGMENT-DEBTOR—RESPONDENT.

Construction of decree—Executing Court, duty of—Reference to pleadings and judgment.

Though an Executing Court cannot go behind the decree, it ought to interpret the decree when an application for its execution is presented before it, and for that purpose, it ought to refer to the pleadings in the case and to the judgment passed by the Court.

Appeal from a decision of the Subordinate Judge, Gaya, dated the 30th of May 1925, confirming that of the Munsif, Gaya, dated the 14th of February 1925.

Mr. *Sarju Prasad*, for the Appellant.

Mr. *Brijkishore Prasad*, for the Respondent.

JUDGMENT.—We think this case must go back. The learned Munsif thought that he had nothing to do with the meaning of the word "*chhaja*." The learned Subordinate Judge, on appeal, did not quite take that view, but he proceeded on the dictionary meaning of the word "*chhaja*." This is, in our opinion, erroneous. It is quite true that an Executing Court cannot go behind the decree; but it is well-established that that Court ought to interpret the decree when an application for execution is placed before it, and, for that purpose, it ought to refer to the pleadings in the case and to the judg-

ent passed by the Court. We allow the ppeal, set aside the orders passed by the Courts below and remand the case to the ower Appellate Court for disposal according to law. Costs are reserved and will be dealt with by the learned Judge in the Court below.

R. L. *Case remanded.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1163 OF 1923.

April 22, 1926.

Present:—Mr. Justice Kanhaiya Lal and Mr. Justice Ashworth.

GOPAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

THE COLLECTOR OF ALIGARH—PLAINTIFF AND CHUNNA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Muafi, *grant of—Transfer, prohibition against, effect of—Grove—Transfer, unauthorised—Forfeiture—Agra Tenancy Act (II of 1901), ss. 150, 167—Suit for resumption of grove—Jurisdiction of Civil and Revenue Courts.*

Where land is granted for planting a grove the person who plants the grove acquires, according to the general law, a transferable interest in the land and in the absence of a custom to the contrary, the trees become his property. The person who plants such grove possesses all rights in respect of his grove, which are not excluded by custom or the incidents of the tenure. [p. 135, cols. 1 & 2.]

Where the grant of a *muafi* tenure contains a condition restraining the tenure-holder from transferring his right but there is no covenant for re-entry or forfeiture on such transfer, and the *muafidar* plants a grove, constructs a well and builds other constructures of a permanent character upon the land, the landlord cannot claim to re-enter upon the land or forfeit the tenure upon a transfer of the tenure by the grantee. [p. 136, col. 1.]

Per *Ashworth*, J.—A local custom supersedes the Statute or general law. A local usage does not supersede it but is to be read into the contracts or implied contracts of persons living in the locality to which the usage applies. While a custom depends for its validity on its antiquity, a usage depends for its validity on its notoriety. [p. 137, col. 1.]

A provision in a grant against transfer would be meaningless unless one were to read into it also a provision that it will involve forfeiture. The terms of a grant forbidding transfer must, therefore, entail that the right of reversion operates from the date when possession is given to a third party under an unauthorised transfer. [*ibid*.]

Sections 150 and 167 of the Agra Tenancy Act only exclude the jurisdiction of Civil Courts in cases of the resumption of "land" which means land let or held for agricultural purposes and a grove is not such land. Therefore, a suit relating to the resumption of a grove does not fall within the purview of those sections. [p. 137, col. 2.]

Second appeal from a decree of the Additional Subordinate Judge, Aligarh, dated the 16th of May 1923.

Mr. *Panna Lal*, for the Appellants.

Messrs. *G. W. Dillon* and *M. A. Aziz*, for the Respondents.

JUDGMENT.

Kanhaiya Lal, J.—The dispute in this appeal relates to a piece of *muafi* land occupied by a grove situated in *Qasba* Koil, close to the town of Aligarh. The land was originally granted by the predecessors of the plaintiff to Sirh Mal, the predecessor of the contesting defendant, for planting a grove, and the question for consideration is whether the descendants of Sirh Mal had a right to sell the grove to Chunna and Ram Lal, and are liable to ejectment in consequence.

The allegation of the plaintiff was that there was a custom appertaining to the *muafis* granted by the *zemindars* by virtue of which the *muafi*-holders or their descendants had no right to transfer the *muafi* by sale. The plaintiff questioned the right of the son and grandsons of Sirh Mal to transfer the grove, and he sued for the cancellation of the sale and for possession of the grove by the ejectment of the *muafidars* and their transferees.

The plaintiff relied in support of the custom on the *wajib-ul-arz* prepared in 1872 in which under the heading referring to "*muafis* granted by the *zemindar* for specific purposes", it was stated that so long as the *muafidar* or his descendants remained in possession, there will be no interference with them, and the *muafidars* shall have every right thereto except that of a transfer by sale. A list of the plots and groves then held as *muafi* was also given and among those plots and groves the grove in dispute was mentioned and described as an old grove (*qadim baghicha*) held by Sirh Mal. Both in the *wajib-ul-arz* and in the *khasra* it was stated that the land had been given for the purpose of planting a grove, and that fact is not disputed.

The Courts below found that the entry in the *wajib-ul-arz* was sufficient proof of a custom forbidding the alienation and that the plaintiff was entitled to a decree for possession.

The entry aforesaid does not, however, purport to record any custom. There are other clauses which purport to record customs then in force in the village, and there are some others which describe the rights of other classes of *muafidars* and of ex proprietors entitled to *malikana* rights. The entry relating to the *muafidars* holding groves in the village merely records the incidents of the tenure, as dictated by the *zemindar* or his agent at the time, and though, as stated by their Lordships of the Privy Council in *Anant Singh* v. *Durga Singh* (1), there is no class of evidence more likely to vary in value, according to the circumstances, than the *wajib ul arz*, for entries at times are made therein connoting the views of individuals as to the practice they would wish to see prevailing, rather than the ascertainment of well-established custom, it would not be unreasonable to presume from the entry that the intention of the grantor when he gave the *muafi* land for planting the grove was that the enjoyment of the *muafi* land (as distinct from the right to the timber or the fruits of the grove) was to be restricted to the grantee and his descendants personally. The plaintiff does not, however, rely on any such incident or condition of the grant in the plaint. He does not even assert that forfeiture or resumption was one of the conditions of the grant or incidents of the custom set up. In fact in *Ala Bux* v. *Radhay Lal* (2) it was held that a statement in the *wajib-ul-arz* by one of the interested parties that he had power to take away all *muafis*, would not be regarded as sufficient proof of a custom of resumption.

Where land is granted for planting a grove the person who plants the grove acquires according to the general law a transferable interest therein, and in the absence of a custom to the contrary, the trees become his property. As pointed out in *Chokhe Lal* v. *Behari Lal* (3), *Lal Baijnath Singh* v. *Chandrapal Singh* (4) and *Man Singh* v. *Madho Singh* (5), the person who plants such a grove possesses all rights in respect of his grove, which are not excluded by custom, or the incidents of the tenure. No custom is established here and no right of forfeiture or re-entry or resumption is shown to have been reserved.

The *muafidar* built some structures over the land, besides a *pucca* well and boundary walls when he planted the grove. The grove was in existence from before 1872, and if one of the incidents of the tenure was that the *muafidar* shall have no right to alienate his *muafi* land, but no right of re-entry was reserved to the plaintiff, the *muafi* cannot be resumed and the *muafidar* or his descendants cannot be ejected, though the sale of the *muafi* rights can be set aside. In fact the *wajib-ul arz* states that a *zemindar* shall not interfere so long as the *muafidar* and his descendants remain in possession. There is no proof of any abandonment by them of their *muafi* rights in favour of the *zemindar*. The vendees had taken security from the vendors for the refund of the purchase-money in case their rights were interfered with. They have accepted the decree passed by the Trial Court against them and have not further interested themselves in the case. The vendors alone have appealed and, in the absence of an express covenant for re-entry, no right of forfeiture can be enforced.

In *Parameshri* v. *Vittapa Shanbaga* (6), where a permanent lease was granted by a certain person to another without any right to the latter to alienate the property, it was held that an alienation subsequently made by the lessee did not entitle the plaintiff to terminate the permanent lease and re-enter upon the land. In *Madar Saheb* v. *Sannabawa Gujranshah* (7) a clause in a lease, whereby the lessee covenanted not to alienate, unaccompanied by any clause for re-entry upon a breach of the covenant, was held to be merely a covenant and not a condition, and a suit brought by the lessor for ejectment was dismissed. In *Netrapal Singh* v. *Kalyan Das* (8) where perpetual lease of a village was granted to a lessee and his heirs, containing a covenant against an alienation, by the lessee but no covenant

(1) 6 Ind. Cas. 787; 32 A 363; 14 C. W. N. 770; 12 C. L. J. 36; 7 A. L. J. 704; 13 O. C. 163; 37 I. A 191; 12 Bom. L. R. 504; 8 M. L. T. 79; (1910) M. W. N. 327; 20 M. L. J. 604 (P. C.).

(2) 30 Ind. Cas. 805.

(3) 60 Ind. Cas. 115; 18 A. L. J. 820; 2 U. P. L. R. (A.) 292; 42 A. 634.

(4) 73 Ind. Cas. 529; 21 A. L. J. 457; A. I. R. 1923 All. 553.

(5) 79 Ind. Cas. 592; 22 A. L. J. 70; A. I. R. 1924 All. 430; L. R. 5 A. 34 Rev.

(6) 26 M 157; 12 M L. J. 189.

(7) 21 B. 195; 11 Ind. Dec (N s.) 132.

(8) 28 A. 400, A. W. N. (1906) 60; 3 A. L. J. 196.

giving to the lessor a right of re-entry upon breach of the former covenant, it was similarly held that the successors-in-title of the lessor could not recover the property, the subject of the lease, from the alienees of the successors-in-title of the lessee. In *Dharani Kanta Lahiri* v. *Siba Sundari Debi* (9) where a grant was made to certain persons in succession without any power of alienation, it was held that though the alienation by one of the grantees, who was given a life-interest, was against the provisions of the grant and was bad in law, yet inasmuch as the breach of the provisions did not operate as a forfeiture, the plaintiff was not entitled to a decree for *khas* possession. In *Basarat Ali Khan* v. *Maniulla* (10) where a lease was granted containing a covenant prohibiting the digging of pits and tanks, or the transfer of the land in any way without a letter from the lessor and no right of re-entry was reserved, it was held that an assignment subsequently made by the lessee was operative, notwithstanding the covenant.

What applies to a lease, where no right of re-entry is reserved, applies with greater force to the grant of a *muafi* tenure, where the grantee of the *muafidar* has planted a grove, constructed a well, and built other structures of a permanent character on the faith of the grant without any covenant for re-entry or forfeiture. The *muafidars* still reside in the town in which the *muafi* is situated; and there is no finding that they have abandoned possession. The vendees alone seem to have abandoned their rights under the sale-deed.

The appeal ought, therefore, to be allowed and the decrees of the Courts below modified so far as they award possession as against the defendants-appellants. The parties to the appeal ought in the circumstances to bear their own costs here and in the lower Appellate Court.

Ashworth, J.—This second appeal arises out of a suit brought by the respondent as *zemindar* against the appellants-defendants, transferees, and other defendants, transferors of a certain grove, for cancellation of the sale-deed executed by the former in favour of the latter. The suit was based on the allegation that according to *'rivaj'* (usage or custom) recorded in the *wajib-ul-arz* of 1872, the defendants first party held the grove on a tenure which did not entitle them to transfer it to a third party (defendants party No 2) and that the sale entitled the plaintiff to resume the grove. The defence was that there was no such custom or usage, and that, in any case, the defendants were entitled to compensation, in the event of the suit being decreed, for a well, buildings and improvements. Both the lower Courts decreed the suit but allowed the defendants to remove the materials of constructions from the grove. The first Court held that the *wajib-ul-arz* was decisive as evidence of the tenure of the defendants first party, and that this tenure did not allow sale. The lower Appellate Court held that the general law prevailing in these Provinces was that a grove holder could not transfer, and that this general law was given effect to in the *wajib-ul-arz*. It held that the defendants had failed to rebut the presumption arising from the general law.

In this appeal it is contended that the prevailing law in these Provinces is that a grove-holder may transfer his rights; and reliance is placed in *Lal Baijnath Singh* v. *Chandrapal Singh* (4) and other decisions of this Court. It is also maintained that the passage in the *wajib-ul-arz* relied upon by the plaintiff does not prove any custom, usage or tenure binding on the defendants. It may be conceded that there is authority for holding that a grove-holder can sell under the provisions of the Tenancy Act unless he is precluded by custom, usage or contract. The plaintiff relies upon para. 19 of the *wajib-ul-arz* of 1872 which is headed by the title "statement of *muafi* granted by the *zemindar* for special purposes." In this paragraph this particular grove is specified as granted without a right of transfer by the grantee. It has been clearly established by respondent's Counsel that it was the duty of the Settlement Officer in 1872 to "ascertain and record the fullest possible information in regard to landed tenures, rights, interests and privileges of the various classes of the agricultural community" and it was provided that "for this purpose the proceedings should embrace the formation of as accurate a record as possible of all local usages connected with landed tenures". This was provided in Regulation VII of 1822 which was not abrogated in this respect by Regulation IX of

(9) 35 C. 1069; 8 C. L. J. 188.
(10) 2 Ind. Cas. 416; 36 C. 745; 10 C. L. J. 49.

1833, the last Regulation preceding the Settlement of 1872. I construe this to mean that it was a duty of the Settlement Officer to (*a*) record local customs and (*b*) local usage. The paragraph is not a record of custom, because it does not purport to be this, but it may be construed as a record of local usage applicable, at any rate, to the holdings mentioned specifically. Now a local custom supersedes the Statute or general law. A local usage does not supersede it, but is to be read into the contracts, or implied contracts of persons living in the locality to which the usage applies. While a custom depends for its validity on its antiquity, a usage depends for its validity on its notoriety. The Settlement Officers were enjoined not only to record customs but usages. Regarding para. 16 as a record of local usage, it would be good evidence and, if accepted as sufficient evidence, would be binding not only on the *zemindars* who signed the *wajib-ul-arz* but on the grantees. The plaint cannot be construed as excluding reliance on "usage" as distinguished from custom. I, therefore, hold that the lower Courts were right in finding that the defendants first party were not entitled to sell the grove.

The next question is what is the result of their having done so It has been argued that the *wajib-ul-arz* does not specify forfeiture as a result of a sale, and that, therefore, there is no proof of liability upon defendants to forfeiture. But the provision against transfer would be meaningless unless we read into it also a provision that it will involve forfeiture. A liability implies a right and a right a remedy. There being no rent on the plot the *zemindar* would have no remedy. If there is a rent his remedy would have been to ignore the transferee and hold the transferor still liable. Apart from this it is clear that the transferor has given up possession. He has also given up his claim to title by the very fact of executing the sale-deed. In the case of abandonment the grove would revert to the *zemindar*, and the conduct of the transferor must amount to abandonment. He cannot claim to continue possession through his transferee because he can take no benefit from his unlawful alienation. Reference may also be made to s. 154 (*c*) of the Agra Tenancy Act (U. P. Act II of 1901) which enacts that a rent-free grant is forfeited on breach of a condition. What is enacted as a rule of law in the case of agricultural land granted rent-free is also equitable in the case of non-agricultural land so granted.

The provisions of law applying in the case of leases, which forbid an unlawful transfer operating as forfeiture, except where there is a contract or custom or usage providing for this, are not applicable to rent-free grants. The terms of a grant forbidding transfer must entail that the right of reversion operates, from the date when possession is given to a third party under such unlawful transfer.

It is further urged that this being a suit for resumption of *muafi*, should have been brought in the Revenue Court under the provisions of s. 150 read with s. 167 of the Tenancy Act. It is sufficient to say that those sections only exclude the jurisdiction of Civil Courts in cases for the resumption of land which means land let or held for agricultural purposes, and that a grove of the description in suit is not such land.

It has been urged that the plaintiff was bound to pay compensation for the well, buildings and other improvements. No rule of law or equity has been shown justifying such a claim.

For the above reasons, I would dismiss this appeal with costs including costs on the higher scale.

By the Court.—As we disagree, the appeal will stand dismissed with costs including costs on the higher scale in this Court.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1702 OF 1918.

October 22, 1923.

Present:—Mr. Justice Scott-Smith and Mr. Justice Fforde.

MURLI DAS—DEFENDANT—APPELLANT

versus

ACHUT DAS—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 86—Statements recorded in Native State—Copies forwarded by Resident—Certificate, whether necessary—Succession Certificate Act (VII of 1889), s. 25—Decision under Act, whether operates as res judicata.

The mere fact that copies of depositions of witnesses recorded in a Court in a Native State are forwarded to a British Court by the Resident in due course is not equivalent to the certificate referred to in s. 86 of the Evidence Act.

When a certificate is required by law, it cannot be dispensed with merely because it can be obtained at any time.

A decision arrived at under the Succession Certificate Act upon a question of right between the parties does not, by virtue of the provision contained in s. 25 of the Act, operate to bar the trial of the same question in any suit between the same parties.

First appeal from a decree of the Senior Subordinate Judge, Delhi, dated the 8th May 1918.

Mr. *Sardha Ram*, for the Appellant.

Mr. *Dev Raj Sawhney*, for the Respondent.

JUDGMENT.—The dispute in the present appeal relates to succession to the incumbency of a temple in Delhi known as *Baghichi* Madho Das. The previous incumbent Man Das died on the 17th October 1912. The plaintiff-respondent claimed to succeed as the *chela* of Man Das, whereas the appellant, Murli Das, who took possession of the temple after the death of Man Das, denied that the plaintiff was the latter's *chela*, and said that he himself was entitled to succeed as the *gurbhai* of Man Das. It was not denied that Murli Das was the *gurbhai* of Man Das, but the Court below held that Achut Das, the plaintiff, was appointed by Man Das to be his *chela* and was, therefore, entitled to succeed. It accordingly decreed his claim, and Murli Das appeals. The Court below, in addition to deciding the point of fact in favour of the plaintiff, held that the question whether he was a *chela* of Man Das was *res judicata* on account of the decision of the Jaipur Court in his favour in a succession certificate case.

Upon the question of fact the lower Court has based its decision upon (1) the oral evidence of three Bindraban witnesses, *Swami* Gowardhan Das Rangacharia, *Mahant* Murli Das and Chhote Lal, printed at pages 28 to 30 of paper-book A; (2) copies of the statements of certain witnesses who were examined in the succession certificate case (some of these witnesses have died and as regards the others the Court was of opinion that there was reasonable ground for holding that they could not be found within the meaning of s. 33 of the Evidence Act); and (3) a document (Ex. P. 1) which was prepared and attested for the purpose of meeting the claim of Murli Das to a succession certificate in the Jaipur State. As regards the copies of the depositions of witnesses who were examined in the succession certificate case it was objected in the lower Court, and the objection has been strongly pressed before us, that they are not admissible in evidence as the certificate of the Resident as required by s. 86 of the Indian Evidence Act has not been given. In regard to this the Court says (page 52 of the judgment) "As these copies have all been forwarded to this Court by and through him (Resident), I, therefore, take it, that he has certified by his action in the matter that the manner in which the documents are certified is the manner commonly in use in the Jaipur State for the certification of copies of judicial records. In any case the point is a trifling one as the necessary certificate under s. 86 can always be obtained." We are unable to admit the correctness of this view. It appears that the copies were obtained by the plaintiff himself in the Jaipur State, and that he got them forwarded by the State officials along with the evidence taken on commission. The mere fact that the Resident forwarded the papers in due course is not equivalent to the certificate referred to in s. 86. Further, we are unable to agree that, when a certificate is required by law, it can be dispensed with merely because it can be obtained at any time. We, therefore, propose to exclude this evidence from our consideration.

[Their Lordships after deciding on the rest of the evidence that the plaintiff was duly appointed *chela* by Man Das proceeded:—]

Having regard to our decision on the question of fact, it is unnecessary for us to decide whether the finding of the Jaipur Court in the succession certificate case operates as *res judicata*. The lower Court said it did so operate under s. 13 of the C. P. C., but it appears to us to have lost sight of s. 25 of the Succession Certificate

Act of 1889 which lays down that no decision under this Act upon any question of right between any parties shall be held to bar the trial of the same question in any suit between the same parties.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 312 OF 1921.

September 3, 1924.

Present:—Mr. Charles Gordon Spencer, Officiating Chief Justice, and Mr. Justice Srinivasa Aiyangar.

P. S. K. HAJI SAIT MUHAMMAD ABDUL GAFFUR ROWTHER AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

K. E S. MUHAMMAD SAMSUDDIN ROWTHER AND OTHER—DEFENDANTS NOS. 3 AND 4 AND LEGAL REPRESENTATIVE OF PLAINTIFF (DECEASED)—RESPONDENTS.

Mesne profit, suit for—Calculation of profits—Burden of proof—Mesne profits, nature of—Civil Procedure Code (Act V of 1908), s 2.

The onus of proving what profits might, with due diligence, have been received in any year lies upon the party claiming mesne profits, but the onus of proving what profits the person in wrongful possession actually received lies upon the person in possession. [p. 139, col. 2.]

Ramakka v. *Nagesam*, 92 Ind Cas. 133; 47 M. 800; 48 M. L. J. 89, (1925) A. I. R. (M) 145, relied on.

The best evidence of the profits derivable from the cultivation of a particular field in any given year is the evidence as to the actual yield in that year minus the cost of cultivation. But such evidence, in order to be useful, must be exact, and it is always open to the party out of possession to falsify the accounts as to the number of measures of grain gathered at the harvest or the price prevailing when they were sold or the cost of cultivation. He may also adduce evidence to prove that the occupant was not diligent and might have got greater profits by proper diligence. [*ibid*.]

In the absence of evidence as to actual profits, the next best evidence is evidence as to possible profits, of which evidence as to yield of . . . . lands in the year in dispute is an exa . . .

The yield of the suit lands in other years is not such a good guide as evidence as the yield of neighbouring lands of similar quality in the year in dispute would be. [p. 139, col. 2; p. 140, col. 1.]

Mesne profits are in the nature of damages which the Court may mould according to the justice of the case. [p. 141, col. 1.]

Grish Chunder Lahiri v. *Shashi Shikhareswar Roy*, 27 C. 951 at p. 967; 27 I. A. 110; 4 C. W. N. 631; 10 M. L. J. 356; 2 Bom. L. R. 709; 7 Sar. P. C. J. 687; 14 Ind. Dec. (N. s.) 622 (P. C.), relied on.

Where in a suit for mesne profits, the story of the defendant that he suffered a net loss is incredible or the loss is due to lack of proper diligence, but the plaintiff fails to produce any evidence himself as to the actual profits, or the profits which might have been received by the defendant with due diligence, the suit must be dismissed. [p. 141, cols. 1 & 2.]

Appeal against the decree of the Court of the Subordinate Judge, Tuticorin, in E. P. No. 722 of 1920 in O. S. No. 70 of 1916.

Mr. *C. V. Anantakrishna Aiyar*, for the Appellants.

Mr. *K. Rajah Aiyar*, for the Respondents.

JUDGMENT.

Spencer, Offg. C. J.—The onus of proving what profits might, with due diligence, have been received in any year lies upon the party claiming mesne profits, but the onus of proving what profits the person in wrongful possession actually received lies upon the person in possession. *Vide Ramakka* v. *Nagesam* (1). The best evidence of the profits derivable from the cultivation of a particular field in any given year is the evidence as to the actual yield in that year minus the cost of cultivation. But such evidence in order to be useful, must be exact, and it is always open to the party out of possession to falsify the accounts as to the number of measures of grain gathered at the harvest or the price prevailing when they were sold or the cost of cultivation. He may also adduce evidence to prove that the occupant was not diligent and might have got greater profits by proper diligence. In the absence of evidence as to actual profits, the next best evidence is evidence as to possible profits, of which evidence as to yield of similar adjoining lands in the year in dispute is an example. In the present case the petitioners did not prove that any particular items of the defendants declared accounts of the yield of lands kept under direct cultivation were incorrect, but they relied on the circumstance that for nine seasons there had been a net loss upon these lands as itself so highly improbable as to warrant the rejection of all the defendants' accounts on the ground that no man in his senses would go on cultivating the same land year after year, at a loss, although, every one is liable to losses in particular bad seasons. The yield of the suit lands in other years, which the Subordinate Judge has adopted as the yield for the years in dispute, is not such a good guide as evidence as to

(1) 92 Ind. Cas. 133; 47 M. 800; 48 M. L. J. 89; (1925) A. I. R. (M.) 145.

the yield of neighbouring lands of similar quality in these years would be, and is open to the objection that as regards the lands under lease, which are not kept separate, the leases are better evidence of the profits.

The plaintiffs failed to produce such evidence. The only course for the Court to adopt under these circumstances was to disallow mesne profits upon the lands under direct cultivation on account of the absence of any evidence as to what they might have yielded and the incredibility of the defendants' story that they did not actualy yield any profit at all and to award mesne profits upon the leased lands only.

I, therefore, agree in the order proposed to be made in my learned brother's judgment.

Srinivasa Iyengar, J.—The only question that arises in this appeal relates to the mode of ascertainment of mesne profits. The suit is one for partition instituted by the daughter now dead and represented by her legal representatives of a deceased Mahomedan against her brothers and others for her share in their father's estate and for mesne profits.

The proceedings from which this appeal has been preferred relate to the mesne profits of the agricultural lands from the date of the plaint. A Commissioner was appointed to take evidence and report on the amount of mesne profits and he, in his report, fixed the sum of Rs. 3,561-14-6 inclusive of interest as the amount of mesne profit payable by defendants Nos. 1 and 2 to the plaintiff's representatives. On objection taken to the Commissioner's report by both the parties, the matter came up before the Subordinate Judge of Tuticorin who awarded to the plaintiff's representatives the sum of Rs. 5,033-1-6 and interest thereon. Defendants Nos. 1 and 2, who have been found liable for this latter amount, have preferred this appeal.

At the enquiry before the Commissioner the plaintiff adduced no evidence whatever. The defendants, however, produced several account books and also examined a number of witnesses. The learned Subordinate Judge has rejected entirely the evidence of these account books on the ground that in his opinion they had been specially fabricated by the defendants with a view to defeat and defraud the plaintiffs. The two circumstances that he relies on for coming to that conclusion are : firstly, that the defendants, at any rate, after the institution of the suit, knew that they would some day be held accountable for mesne profits and that they had, therefore, a strong motive for fabricating false accounts; and secondly, that the accounts of the *khas* or direct cultivation of certain lands by the defendants shows that such direct cultivation has, strangely enough, in almost every season during the accounting period, resulted not in profit but considerable loss. This latter circumstance is undoubtedly calculated to raise a great deal of suspicion. But that alone even coupled as it may be with the existence of strong motive would not be sufficient to discredit the account books altogether. It must be observed that the plaintiffs have not challenged the accounts in any other manner or sought to show by an examination of the accounts or cross-examination of witnesses to bring out any aspects or characteristics of the account books on which it may be found that the account books are not genuine. The Subordinate Judge, after rejecting the account books entirely, practically brushed aside the whole of the Commissioner's report and proceeded to assess mesne profits himself not on the basis of any figures available for the period in question but on the basis of figures found for a previous period by a former Commissioner appointed in the suit.

A considerable portion of the lands were lands let out to tenants even during the accounting period ; and the agreements executed by the tenants in respect of the lands so leased out have all been produced and filed. In fact, so far as the rents recovered from these lands are concerned, both parties were clearly agreed that the plaintiff's representatives would be entitled to their proper share in the rents so realised. There was, therefore, no reason whatever for the Subordinate Judge to reject altogether the available figures in respect of the lands leased out.

We are clearly of opinion that the plaintiff's representatives would be entitled to their seventh share of the amounts found by the Commissioner as recovered from the tenants in respect of the lands leased out during the nine periods of cultivation in question. As this account has not been separately made up, the matter might have to be referred to the lower Court for the taking of such accounts if the parties here should be unable to agree in the same.

As regards, however, the lands which have been directly cultivated by the defandants during the period the net result of the cultivation in nearly all the periods has been shown to be considerable loss. The question arises in this connection, whether the claimant for mesne profits in such cases is entitled merely to a share of the actual profits received or recovered by the person in possession, and, if not, what the true measure of mesne profits should be. The point to start from is that mesne profits are in the nature of compensation or damages. Their Lordships of the Judicial Committee have observed in the case of *Grish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (2) that mesne profits are in the nature of damages which the Court may mould according to the justice of the case. In the case of *Midnapur Zamindary Co., Ltd.* v. *Kumar Naresh Narayan Roy* (3) their Lordships of the Judicial Committee refer to mesne profits as compensation to the plaintiff for the exclusive use of the land by the other party. The damages are for the wrongful withholding of possession or exclusion from possession of the party entitled thereto or found to be so.

The definition of mesne profits in the C. P. C., s. 2, cl. 12, itself contains a clear indication as to what the true measure of mesne profits is. It lays down that "mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom; that is to say, if, in respect of any particular property, the Court should find that profits received or recovered by the party in possession do not amount to what with ordinary diligence he might have received from the property, then the true measure is what would have been so received with due diligence, or, in other words, what the party in possession actually receives or recovers is the proper measure except in cases where it is or can be shown that what is so received or recovered falls below what would have been so recoverd or received with due diligence.

As it is conceivable that in respect of certain lands the party in possession might have cultivated with the diligence and with regard to others without such diligence, the question can be decided only with regard to each item of property.

Applying these principles to the lands under the direct or *khas* cultivation of the defendants themselves, we find that in all the nine seasons to which the accounting relates, the defendants are said to have not only not recovered any profits but suffered considerable loss, the expenses being alleged to be far in excess of the yield. We cannot, therefore, treat this kind of dealing by the defendants with certain lands as dealing with due diligence. The very facts clearly show that these lands have not been managed by the defendants with that amount of due diligence, which is indicated in the definition of mesne profits. It is clear that if the lands had been let out, they might have fetched, if not large rents as in the other cases, at least some low rent.

We are, therefore, left to find out the mesne profits in respect of all the lands under the *khas* or direct cultivation of the defendants by determining what rent or income they would or could have fetched in those seasons if they had been let out by the defendants to strangers. It was incumbent on the plaintiffs to adduce some affirmative evidence with regard to the amounts for which these lands might have been reasonably let in the particular seasons or years by the defendants. See judgment in *Ramakka* v. *Nagesana* (1) in this Court not yet reported.* No such evidence whatever has been adduced. There is some evidence to the effect that all the lands that could be let were leased out by the defendants and that only the other lands were cultivated by them directly. There is, therefore, no material whatever from which the amount of mesne profits in respect of these lands could be ascertained. There is also no principle or warrant for burdening the plaintiff's representatives who were admittedly out of possession with any losses alleged to have been sustained by the defendants in the course of their *khas* or direct cultivation of lands which must have been carried on without due diligence.

The best course, therefore, in these circumstances would be to strike out from the account of mesne profits all the figures relating to the *khas* or direct cultivation of some of the lands by the defendants them-

(2) 27 C. 951 at p. 967; 27 I. A. 110; 4 C. W. N. 631; 10 M. L. J. 356; 2 Bom. L. R. 709; 7 Sar. P. C. J. 687; 14 Ind. Dec. (N. S.) 622 (P. C.).

(3) 80 Ind. Cas. 827; 47 M. L. J. 23; (1924) A. I R. (P. C.) 144; 26 Bom. L. R. 651; 51 C. 631; 35 M. L. T. 169; (1924) M. W. N. 723; 29 C. W. N. 34; 20 L. W. 770; 51 I. A. 293; L. R. 5 A. (P. C.) 137; 23 A. L. J. 76; 3 Pat. L. R. 193; 6 P. L. T. 750.

*Since reported in 92 Ind. Cas. 133.—[*Ed.*]

selves and take only the lands leased out to tenants to ascertain the share to which the plaintiff's representatives would be entitled to therein. It seems to us that these figures could be easily worked out and agreed to by and between the parties themselves in this Court and in order to see whether they are in a position to do so, this case will be posted again for orders after the lapse of 10 days. If the parties, however, are unable to agree, the case will have to be sent back to the lower Court for the figures being worked out on that basis.

As both parties have partially succeeded and partially failed, there will be no order as to the costs of this appeal and each party will pay and bear his or their own costs in this Court.

V. N. V. *Decree modified.*
N. H.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL No. 52 OF 1925.
June 2, 1925.
Present:—Mr. Justice Das.
MAUNG PO TOKE—APPELLANT
versus
MAUNG PO GYI—RESPONDENT.

Provincial Insolvency Act (V of 1920), ss. 28 (2), 42—Discharge, refusal of—Execution of decree—Leave of Court, whether necessary.

Where an Insolvency Court refuses the discharge of an insolvent under s 42 of the Provincial Insolvency Act, the proceedings are terminated as far as the Insolvency Court is concerned, and the insolvent is thereafter liable to be arrested in execution of any decree without the leave of the Court.

Second appeal against a decree of the District Court, Bassein, in Civil Miscellaneous Appeal No. 95 of 1924.

Mr. *Leong*, for the Appellant.

Mr. *Ray*, for the Respondent.

JUDGMENT.—In this case one Maung Po Gyi presented an application for adjudication as an insolvent under the Provincial Insolvency Act, and he was adjudicated. His estate was vested in the hands of the Receiver; the Receiver declared a final dividend, and the estate was wound up as far as the Court was concerned. Maung Po Gyi then applied for his discharge, but his discharge was refused as his estate was not sufficient to pay eight annas in the rupee. One of his creditors, Maung Po Toke, then applied for his arrest in execution of the decree obtained by him against Maung Po Gyi. This application was resisted by Maung Po Gyi, on the ground that he was not liable to be arrested without the leave of the Court.

Mr. Ray, who appears for the insolvent, argues that under s. 28 (2) of the Provincial Insolvency Act the creditor cannot commence any legal proceedings against the insolvent without the leave of the Court. He argues that an application for the arrest of an insolvent is "commencing a legal proceeding against the insolvent," and that, as no leave of the Court had been obtained before the application was made the application must be dismissed. Mr. Ray cited before me certain authorities to show that an application for the arrest of an insolvent is "commencing a legal proceeding" but s. 28 (2) provides that nothing should be done against the property of the insolvent or against the insolvent without the leave of the Court during the pendency of the insolvency proceeding.

The main question which has to be decided now is whether the insolvency proceeding is still pending before any Court.

I am of opinion that there is no proceeding pending before any Court now. As far as the Court was concerned the proceedings terminated when the application of the insolvent for the discharge was refused. There is nothing further to be done by the Court as far as the insolvent is concerned.

Section 41 (2) of the Provincial Insolvency Act provides that the Court may refuse an absolute order of discharge; and s. 42 provides that the Court shall refuse an absolute order of discharge on proof of certain facts mentioned in that section, one of the facts being that the insolvent's assets are not of value equal to eight annas in the rupee.

The Court under the provisions of s. 42 refused the discharge of the insolvent and as far as that Court was concerned, the proceedings had terminated. I am, therefore, of opinion that the insolvent is liable to be arrested in execution of any decree, and that the orders of the lower Court are wrong.

I, therefore, set aside the orders of both the lower Courts, and direct that the matter be heard on its merits by the Court of first instance. The appellant will get his costs in all Courts.

Z. K. *Order set aside.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 57 OF 1921.

September 23, 1921.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.

VALLABHDAS TULSIDAS—DEFENDANT—APPELLANT

versus

NAGARDAS JUTHABHAI—PLAINTIFF—RESPONDENT.

Vendor and purchaser—Knowledge of defective title—Wilful default—Breach of contract—Damages.

Where a vendor contracts to sell property to which he knows that his title is defective, and there is a breach of the contract on his part, the conduct of the vendor is equivalent to wilful default, and he is liable to pay damages according to the ordinary rule, *i. e.*, the difference between the contract price and the market price of the property at the date of the breach, although there may be cases in which it may be found that there was an implied contract that in the event of the title proving to be defective without any default of the vendor, he should not be liable to pay damages according to the ordinary rule. [p. 143, cols. 1 & 2.]

Appeal from the decision of Mr. Justice Kanga.

Mr. *Munshi*, for the Appellant.

Messrs. *Coltman* and *Setalvad*, for the Respondent.

JUDGMENT.

Macleod, C. J.—This is an appeal from the decision of Mr. Justice Kanga. The suit filed by the plaintiff was for damages for the breach of a contract dated the 20th August 1920 whereby the defendant agreed to sell to the plaintiff and the plaintiff agreed to buy from the defendant certain immoveable property at Cadell Road for the sum of Rs. 35,000. The plaintiff paid Rs. 1,500 by way of earnest money, and according to the terms of the contract if in the title there should be any such thing as might require to be set right then the defendant was to set it right on his own account, and if he could not do that then he was to return the earnest money which the plaintiff had paid. When the title was investigated it was ascertained that the property was ancestral and that the defendant had two minor sons who had an interest therein. The plaintiff, therefore, required the defendant to obtain an order of the Court sanctioning the sale by the defendant on behalf of his minor sons. The defendant, however, made no endeavour to obtain such sanction. Accordingly, there was a breach of the contract. There can be no doubt that the defendant knew that the property was ancestral and that accordingly his interest in the property was limited. It is, therefore, a case of a vendor contracting to sell property to which he knew that his title was defective; and the only question at issue is whether he should pay damages calculated according to the ordinary rule in the case of a breach of contract, or whether he is only bound to pay the purchaser's costs of the agreement and of the investigation of title. I do not wish to exclude the possibility of there being cases in which it may be found there was an implied contract that in the event of the title proving to be defective without any default of the vendor, he should not be liable to pay damages according to the ordinary rule. But in this case it seems to me that clearly the conduct of the plaintiff in agreeing to sell the property, in which he knew he had not a good title, is equivalent to wilful default, and there is no occasion to reconsider what I said in *Hasan Premji* v. *Jerbai*, [(1920) O. C. J. Appeal No. 41 of 1920, decided by Macleod, C. J. and Shah, J., on the 17th December 1920] in the passage which has been quoted by the learned Judge.

I think, therefore, that the decision of the Court below was right, and the appeal must be dismissed with costs.

Shah, J.—I agree. It seems to me that, on the admitted facts of this case, the decision of the Trial Court is right. The defendant knew that the immoveable property, which he agreed to sell, was his ancestral property; and it is difficult to accept the suggestion made before us under the circumstances of this case that he could not realise the limitations upon his power to alienate this property which was part of the ancestral property and in which his minor sons had a vested interest according to Hindu Law. The limitations upon his power to alienate ancestral immoveable property are by no means obscure; and I do not believe that the defendant was not aware of them at the date of the agreement. When he was called upon to make good the title, he did not, and it is now conceded that he could not ask for the sanction of the Court for the sale on behalf of the minors on the ground of necessity or any other ground which would entitle him to convey the full title to the property so as to bind his minor sons. I do not see how he could be heard now to say that when he entered into this agreement he did not realise the limitations upon his power to sell

this property. In the case of a vendor who agrees to sell property which he knows he is not competent to sell except under certain circumstances he cannot take advantage of a clause in the contract such as we have in the present case; nor can he urge with justice that he is not liable to pay damages on the footing of wilful default. On the facts it seems to me that this is clearly a case in which with full knowledge of the limitations on his power the defendant contracted to sell this property. It is right, therefore, that the damages should be assessed on the lines directed by the Trial Court.

N. H. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 239 OF 1925.

May 14, 1925.

Present:—Mr. Simpson, A. J. C.

NATIONAL BANK OF UPPER INDIA, LIMITED, LUCKNOW IN LIQUIDATION—APPLICANT

versus

LAKHPAT RAI—OPPOSITE PARTY.

Companies Act (VII of 1913), ss. 207, 215—Voluntary liquidation—Decree obtained against Company in ... whether can be allowed to ... ity of.

Section 215 of the Companies Act lays a duty upon the High Court to see that justice is done in cases of voluntary liquidation.

Under s. 207 (1) of the Companies Act the assets of a Company which is being voluntarily wound up must be applied in satisfaction of its liabilities *pari passu*. A person who has obtained a decree against such a Company, therefore, cannot be allowed to realise his decree by way of execution inasmuch as to permit him to do so would give him more than his share of the assets of the Company.

Application under s. 215, Indian Companies Act, VII of 1913.

Mr. *N. C. Dutt*, for the Applicant.

Mr. *Bhawani Shankar*, for the Opposite Party.

JUDGMENT.—This is an application for the removal of an attachment. The attachment was made in execution of one decree, and the property attached is another decree. The applicants are Har Gobind Dayal and Seth Radha Kishan, the two liquidators of the National Bank of Upper India. The opposite party is one Lakhpat Rai, who was a depositor in the Bank. He tried to withdraw his deposit, but the Bank refused, and on 9th April 1923 he filed a suit against the Bank and on 31st May 1923 he obtained a decree for the sum of Rs. 1,362-10-0. By this time the Bank had gone into voluntary liquidation. That liquidation dates either from 6th May 1923, when one meeting was held, or more probably from 30th May 1923, when the proceedings of the first meeting were confirmed. In either case the decree was passed after the Bank had gone into liquidation, not that this point is of any importance. In execution of his decree Lakhpat Rai attached another decree. This was a decree for sale obtained by the Bank in a suit brought on the basis of a mortgage. It was dated 16th November 1923 and it was against one Ram Chandra. Lakhpat Rai attached this decree on 30th November 1923.

The first step taken by the liquidators was to apply to the Court, which was executing Lakhpat Rai's decree, for stay of execution. That Court refused stay of execution by an order passed on 23rd March 1925, on the ground that the proper course for the liquidators to take was to apply to this Court, under the provisions of the Indian Companies Act so the present application has been filed under s. 215.

It is pointed out that under s. 207 (1) the assets of the Company have to be applied in satisfaction of its liabilities *pari passu*, and that to allow Lakhpat Rai to realize his decree in this fashion would be to give him more than his share of the assets of the Company. It is also pointed out that s. 215 lays it upon this Court to see that justice is done in cases of voluntary liquidation.

On behalf of Lakhpat Rai it is pointed out that the Court has no power to pass the order prayed for. For me the matter is concluded by the authority in the case of *National Bank of Upper India* v. *Gopal Das* (1), similar powers were exercised by a Bench of this Court, and in the Single Judge case, Miscellaneous Application No. 238 of 1923, *Ajit Prasad* v. *Chandra Bhal* an application exactly on all fours with the present one was granted. I may add that I agree with my learned brothers that such orders ought to be passed by this Court. Order as prayed for with costs.

Z. K. *Attachment removed.*

(1) 91 Ind. Cas. 1053; 28 O. C. 197; (1925) A. I. R. (O) 630.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 51 OF 1923.

April 30, 1923.

Present :—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

ABDULLAH AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 196-A, 239—Penal Code (Act XLV of 1860), ss 120-B, 141, 149, 152, 302, 506—Conspiracy to obstruct Police and stop sale of certain goods—Unlawful assembly—Rioting—Murder committed in course of rioting—Responsibility of members of unlawful assembly—Sentence—Same transaction—Joint trial, liability of.

A large crowd of men assembled at a village and agreed among themselves to proceed in a body to a certain Police Station there to threaten and to obstruct the Sub-Inspector of Police and the Policemen with him in the discharge of their duty and then to proceed to a certain bazaar and stop the sale of intoxicants, meat, fish, etc It was also agreed that if the Sub-Inspector of Police did not act in a certain manner and offered resistance, he and the Policemen with him would be assaulted. The crowd then proceeded towards the Police Station and on arrival there started an altercation with the Sub-Inspector of Police. Their behaviour and attitude was such that if they had been called upon to disperse they would not have done so. During the course of the altercation the members of the crowd began to throw stones at the Police. The Police then fired, killing two men and wounding several others. The mob inflamed to fury then murdered the Police Inspector and several other Police and *chaukidars* Some of the members of the crowd were charged with offences under ss. 120-B and 302 read with s. 149 of the Penal Code and were convicted of the latter offence at one trial·

Held, (1) that the immediate object of the crowd as it reached the Police Station being to threaten and to obstruct the Police in the discharge of their duty, it was an object to commit an offence punishable under s. 152 of the Penal Code which was in itself sufficient to bring the matter within the purview of the third clause of s 141 of the Code and that consequently the crowd formed an unlawful assembly when they started from the village ; [p. 160, col. 1.]

(2) that the agreement arrived at between the members of the crowd to stop the sale of intoxicants, meat, fish, etc, in the bazaar, under the circumstances, was an agreement to commit an offence under s 506 of the Penal Code and that for this reason also the crowd was an unlawful assembly within the meaning of s. 141 of the Code ; [p. 158, col 2.]

(3) that as soon as stones began to be thrown at the Police by the members of the crowd at the Police Station the members of the unlawful assembly became guilty of rioting and that in view of what happened subsequently the charge under s 302 read with s. 149 of the Penal Code was fully established as against every one of the accused persons who was proved by evidence to have continued an active participant in the rioting after the moment when stones began to be thrown, unless it could be inferred from credible evidence that a particular accused person had separated himself from the rest before the offence of murder had been committed by any of them ; [p. 160, col. 2.]

(4) that having regard to the fact that the majority of the accused were ignorant peasants who had been drawn into the affair by misrepresentation of facts and preposterous promises concerning the millennium of *Swaraj*, the arrival of which was to be forwarded by courage and resolution on their part, those of them against whom specific acts such as would have resulted in their conviction on a charge of murder apart from the special provisions of s 149 of the Penal Code, were not proved, did not deserve the extreme penalty of death and should be sentenced to transportation for life only ; [p. 162, col. 1.]

(5) that the charge against the accused being that the events which occurred at the Police Station followed upon the alleged criminal conspiracy arrived at between the accused at the village and were so connected therewith, not merely by sequence of time but by the link of causation, as to make the conspiracy at the village and the subsequent assault on the Policemen at the Police Station parts of the same transaction, within the meaning of that expression in s. 239 of the Cr. P. C, the joint trial of the accused was perfectly justified ; [p. 146, col. 1]

(6) that in order to decide whether the joint trial of the accused was or was not legal the Judge had to look to the case for the prosecution as set forth in the charges themselves and that it was not necessary for him to consider what the position would be if he eventually came to the conclusion either that no offence punishable under s 120-B was committed by any of the accused or that if any offence was so committed it was one excluded from his cognizance by s. 196-A of the Cr P. C [p. 147, col. 1.]

Whatever may be said in defence of peaceful picketting when undertaken in the market of a large town by individuals or by small groups of earnest and enthusiastic men or women, has no application whatever to the flooding of a small bazaar by a body of men whose mere presence there would put a stop to all business which could only be carried on with their consent and with their active assistance. [p. 158, col. 2]

In every case of a conviction on a charge of murder the law regards the sentence of death as the normal and the appropriate sentence. Where the Court sees fit to pass the lesser sentence of transportation for life it must record its reasons for so doing. [p. 161, col. 2.]

Criminal appeal from an order of the Special Sessions Judge, Gorakhpur.

FACTS.—In this case 225 accused were jointly put up for trial on various charges for an assault on the Police force of Chaura Police Station in the Gorakhpur District, resulting in the murder of 23 Police and *chaukidars*, the plundering of property belonging to the said officials and to Government, the destruction by fire of the Police Station buildings, and the causing of hurt to various Police and *chaukidars*.

Messrs. *M. M. Malaviya, K. N. Malaviya, Sanyal, D. N. Malaviya, K. C. Shrivastava* and *A. P. Dube*, for the Appellants.

The Government Advocate and Mr. *Kadri*, R. B., for the Crown.

JUDGMENT.—[Their Lordships after referring to the incident and commending the bravery of the Police and the admirable

way in which the lower Court and Counsel had handled the case, proceeded]:—

The charges against all the accused were six in number. There was a seventh charge affecting twenty-six only out of the entire number and an eighth charge affecting the same twenty-six and twelve others in addition. These charges are set forth in detail in the opening pages of the judgment under appeal and we do not propose to recapitulate them. They admit, however, of a certain classification. We have already spoken of the crowd which attacked the Police as an assembly of persons moving in a certain formation and animated by a definite purpose. It is an essential part of the case for the prosecution that the nucleus of this crowd consisted of a body of perhaps 1,000, perhaps 1,500 persons, which set forth from the little village of Dumri Khurd, situated some two miles or rather less from Chaura Police Station. It is alleged as against all the accused persons that they formed part of this original assembly at the village of Dumri and that before their departure from that place, they had entered into an agreement amongst themselves to do certain illegal acts of such a nature as to render them liable to punishment under s. 120-B of the Indian Penal Code. This has been spoken of in argument as the "conspiracy charge" and we propose to refer to it hereafter under that designation. For the present, the point which we have to note is that it was an integral part of the case for the prosecution in the Court below that the events which occurred later in the day, in the neighbourhood of Chaura Police Station, followed upon this alleged criminal conspiracy at Dumri Khurd in such a manner and were so connected therewith not merely by sequence of time, but by the link of causation as to make the conspiracy at Dumri and the subsequent assault on the Policemen at Chaura parts of the same transaction, within the meaning of that expression in s. 239 of the Cr. P. C.

The next five charges, Nos. 2, 3, 4, 5 and 6, relate to what took place on the afternoon of the 4th of February 1922, at Chaura Police Station and in its immediate neighbourhood. They may be described as different presentations of one and the same charge in lesser or in more aggravated forms. They start with the second charge, which simply alleges as against all the accused persons that they were members of an unlawful assembly, within the meaning of the definition in s. 141 of the Indian Penal Code, at the time when force or violence was used by members of the said assembly, in prosecution of the common objects thereof. This charge is, therefore, laid under s. 147, Indian Penal Code. It is further the case for the prosecution that the force or violence thus used extended to the murder of twenty-three Police and *chaukidars*, the plundering of property belonging to the said officials and to Government, the destruction by fire of the Police Station buildings and the voluntary causing of hurt to various Police and *chaukidars*. We have, therefore, charges drawn up under ss. 302, 395, 436 and 332, Indian Penal Code, read in each case with s. 149 of the same Code.

The seventh and eighth charges, which affect some of the accused persons only, may be grouped together. They deal with the damage inflicted on the Railway line and on the telegraph wires and are framed respectively under s. 126 of the Railways Act IX of 1890 and under s. 25 of the Indian Telegraph Act No. XIII of 1885.

There is, as a matter of fact, one further charge of such slight importance that it had been almost overlooked. It affects a single one of the accused, the appellant Sikhari, and is framed under s. 412, Indian Penal Code. In substance it refers back to the charge of dacoity under s. 395/149, Indian Penal Code, in which Sikhari was already involved, and alleges against him, in the alternative, that, if he was not actually concerned in the said dacoity, he was at any rate subsequently found in possession of property which had been stolen in the course of the same. The charge is somewhat loosely worded and does not allege against Sikhari the essential point that he knew that the possession of the property in question had been transferred by the commission of dacoity, but this is not a matter upon which we find it necessary to insist.

Now the case for the appellants is that no offence of criminal conspiracy was committed by any persons at Dumri Khurd on the morning of the 4th of February 1922; or in the alternative that, if there was such conspiracy, it was not one in respect of which a prosecution could be instituted without an order in writing by the Local Government in view of the provisions of section 196-A of the Indian Penal Code. To this contention we shall have to revert later. The point immediately before us is that,

whatever offence may or may not have been committed at Dumri Khurd on the forenoon of the 4th of February 1922, it was not one so connected with the offences committed at Chaura later in the same day that it could fairly be regarded as "committed in the same transaction" within the meaning of s. 239 of the Cr. P. C. Upon this plea the appellants base the further contention that there has been a misjoinder of charges, sufficient to invalidate the entire trial in the Court below. We think we do no injustice to Pandit Madan Mohan Malaviya, the very able Counsel who argued this part of the case on behalf of the appellants, when we say that it is not our impression that he seriously pressed this argument to the logical conclusion that, if we found it correct, we should have no option but to order a re-trial of the entire case. He is certainly not to be blamed if he hesitated to face the possible consequences of such a contention, were it to prevail with the Court. Our own view of the question has been already indicated by the expressions we have used in setting forth the charges, but we should perhaps amplify it. When the learned Sessions Judge entered upon the trial of this case, and was faced with the question whether the provisions of s. 239, Cr. P. C., did or did not authorise him, not merely to try the 225 accused persons before him at one and the same trial, but to try them on each and all of the charges set forth against them under the order of the Committing Magistrate, he could not possibly know what conclusion he would arrive at after hearing the whole of the evidence. He had to look to the case for the prosecution as set forth in the charges themselves. He was, therefore, for the reasons which we have already indicated, warranted by law in entering upon this trial of the 225 accused on the charges as framed. The convictions which he has recorded are warranted by the conclusions at which he arrived on the evidence. As he had to regard merely the "charges," it was not necessary for him to consider what the position would be, if he had eventually come to the conclusion, either that no offence punishable under s. 120 B, Indian Penal Code, was committed by any persons at Dumri Khurd on the forenoon of 4th February 1922, or that if any offence was so committed it was one excluded from his cognizance by s. 196-A of the Cr. P. C. In any event, the acquittal of all the accused persons on the conspiracy charge would have removed any possible objection to the validity of the trial. It is possible that in certain events the prosecution may have to suffer the penalty of having attempted to prove too much, by seeing a verdict of acquittal recorded which might otherwise have been avoided.

We do not feel that we are greatly concerned at this stage to discuss the form of the various charges, so long as we are satisfied that there has been no such misjoinder of charges as to force upon us the duty of vindicating the law by quashing all the convictions upon this ground alone, and the consequent responsibility of considering the question of the ordering of a new trial upon such charge or charges as we might direct to be framed. On the case for the prosecution, the three groups of charges as we have set them forth were in respect of offences committed in the same transaction within the meaning af s. 239, Cr. P. C. The final charge against the accused Sikhari alone, was really in the nature of an alternative to one of the others. There was nothing illegal in the procedure adopted by the Trial Court. The conception we have formed of our duty in this matter is that we ought to concentrate our attention upon the one substantial charge in the case. There is not one of the appellants now before us who has been convicted upon any of the other charges, but has been also convicted of the offence of murder committed in the course of a riot and punishable under s. 302-149, Indian Penal Code. In respect of any of the appellants against whom this charge is not, in our opinion, satisfactorily proved, but who is not entitled to a clear verdict of acquittal upon all the charges, the only offence, in our opinion, established is that of simple rioting punishable under s. 147, Indian Penal Code. This offence is set forth in the second of the charges framed. As regards the conspiracy charge there are certain aspects of the case which we shall have to consider further, because of their bearing upon the important and essential question of the common object or objects of the unlawful assembly around Chaura Police Station referred to in the charge of murder. Otherwise we propose to concentrate our attention on the charge under s. 302/149 of the Indian Penal Code and to consider whether this is established against all or any of the appellants. The question of sentence can be completely and adequately

dealt with under that single charge. So far as this Court is concerned no lesser sentence than that of transportation for life can lawfully be imposed on any accused person found guilty upon that charge.

* * * * * * *

On the occasion of the Wednesday market —the 1st of February 1922—a body of volunteers, thirty to forty in number, moved upon Mundera and halted outside the village in the morning, waiting to commence operations as soon as the bazaar was fairly under way. The shop-keepers and the agents of the substantial land-owner of the village were on the alert. The latter came out and questioned the volunteers and told them bluntly that Babu Sant Bakhsh Singh would not allow them to interfere with his market. Reading a little between the lines of the evidence there can be no doubt that any attempt at actual coercion on the part of the volunteers would have been resisted by force. Moreover, it is clear that word had been sent to the Local Police Station, for Sub-Inspector Gupteshar Singh marched into Mundera with a considerable body of Police and *chaukidars*. Before his arrival, however, the volunteers had abandoned their enterprise. In face of the resolute attitude of the agents in charge of the bazaar, the volunteers felt themselves too few in number to attempt anything. They scattered and most of them returned to their homes.

Two points, however, require to be noticed. The leaders of the volunteers, before they went off, distinctly told their interlocutors that they would return on the following market day (Saturday, the 4th of February) in such numbers as to enforce compliance with their demands. There is naturally some room for controversy as to the precise language used; but that it was a threat, and was understood as such, is fully proved, not only by the direct evidence, but by the fact that the landholder sent a trusted agent to Gorakhpur to appeal personally to the District Magistrate for special Police protection for his market on the following Saturday. There can be no doubt whatever that such an appeal was made, and that it resulted in the arrival by train at Chauri Chaura Railway Station, at about 9 A. M, on the 4th of February of a small body of armed Police, nine muskets in all.

The other circumstance, trifling in itself but of far reaching consequence, is that a few volunteers did enter the Mundera bazaar after the gathering had dispersed. There is no evidence worth speaking of that they actually did anything provocative, and we give accused generally the benefit of our belief that the volunteer enterprise had really been given up for the day and that the individuals who entered the bazaar did so on private business of their own. Unfortunately, their mere presence in the bazaar proved, under the circumstances, to be provocative. Sub-Inspector, Gupteshar Singh reached Mundera under the impression of an emergency calling for action on his part and he found the persons in charge of the bazaar excited and alarmed. There is some conflict of evidence as to the details of what followed. Indeed the one witness from whom one would have expected a clear and co-herent account, Police Constable Siddiq (the one Constable who survived the massacre) is confused and self-contradictory. Taking the evidence as a whole, it seems clear to us that the Sub-Inspector was, at some time in the forenoon, at the office of the local landholder, when certain volunteers were brought before him by Policemen who had found them in the bazaar. There were probably only two of them; there may have been three or four, but one of them was certainly the accused Bhagwan *Ahir*, whom we have spoken of the "drill-instructor." The Sub-Inspector spoke roughly to the volunteers. His wrath was particularly directed against Bhagwan, whom he abused for drawing a pension from Government while taking an active part in an "unlawful association," whose ostensible object was the overthrow (no matter by what means) of the Government whose salt he was eating. There is an allegation that Bhagwan answered insolently; there is also a suggestion that the Sub-Inspector was in some way further inflamed against the man by one of the landholder's agents named Raghubar Dayal. What we are certain of is that the Sub-Inspector thoroughly lost his temper and struck the man; we hold it proved that he gave him two cuts with a light cane, and he very probably also struck him with the open hand.

Bhagwan and any volunteer or volunteers with him thereupon decamped and left Mundera altogether. No arrests were considered necessary by the Sub-Inspector and no official report was ever made as to any collision on that date between the Police

and volunteers. A curious fact is that we have it, not only from the evidence of Siddiq but from a statement made by the accused Bhagwan himself (Ex. 226), that the latter voluntarily presented himself at the Police Station the following morning (the 2nd of February) and had an explanation with Sub-Inspector Gupteshar Singh. As might be expected the accounts of this explanation differ somewhat; but they agree to this extent, that explanations and apologies were tendered and received and that, as between the principal actors in this episode, the unfortunate incident seemed to have been brought to a conclusion satisfactory to both parties.

There were nevertheless other interested parties who saw in the Sub-Inspector's loss of temper and his unjustifiable action a lever which might be worked with impressive results. For what immediately followed we turn to the evidence of the approver Sikhari. We agree with the learned Sessions Judge that this man was endeavouring to earn his pardon by making a clean breast of all facts within his knowledge. We find moreover abundant corroboration of all matters in his evidence which strike us as essential. He tells us that on the evening of the thwarted enterprise at Mundera, that is on Wednesday, the 1st of February 1922, there was a small gathering at his house. Bhagwan *Ahir* was present, and so also were ringleaders such as Nazar Ali, Lal Mohammad, Mahadeo, son of Thag, and Ramrup (*barhai*). What Sikhari understood from the conversation which followed was that, not Bhagwan only, but Mahadeo and Ramrup as well, had been beaten by Sub Inspector Gupteshar Singh. It was asserted that Babu Sant Bakhsh Singh (the owner of the Mundera bazaar) had caused them to be seized and brought to his office at Mundera, where they were beaten by the Police. On this it was agreed that letters should be sent out to volunteer associations in neighbouring villages, with a view to their assembling in a body strong enough to warrant them in paying a visit to the Sub Inspector and "asking him why he had beaten our men." Early on the following morning (Thursday, the 2nd of February 1922) the same persons came together again at Shikari's house and as the officials and ringleaders were illiterate, a body of eleven, the witness Nakched P. W. No. 125), was employed to transcribe ve copies of a letter to be sent out as a summons to neighbouring volunteers. There was some discussion as to the actual place to be chosen for the proposed gathering. Someone seems to have observed, shrewdly enough, that if this were fixed in the immediate neighbourhood of Chaura Police Station, the Sub-Inspector would break up the gathering by arresting the volunteers piecemeal as they arrived. Eventually a threshing floor at Dumri Khurd, in the immediate neighbourhood of Sikhari's house, was fixed upon for the meeting place. It was determined that the volunteers should first march to Chaura Police Station to settle their differences with Sub-Inspector Gupteshar Singh and thence proceed northwards to the Mundera bazaar in order to impose their will on the re-calcitrant shop-keepers of that place. There would thus be a long day's work before them, which could scarcely be undertaken fasting. Arrangements were, therefore, made for the collection of supplies in the shape of raw sugar which could be distributed to those attending the meeting. We have independent evidence that this was actually done. The five letters actually issued were to serve as summonses for five hundred to seven hundred and fifty men; but we note with interest that Sikhari says they were confident from the outset that more than this number would assemble once the news got abroad. They expected a gathering of between two and three thousand men.

The boy Nakched was perhaps a little confused under the stress of a severe cross-examination; but in the main he has told a consistent story, and we have no doubt he was trying to tell the truth to the best of his recollection. The account which he gave to the Investigating Police on the 16th of February 1922 (*vide* Ex. 139) of the contents of the letters he was required to write was given while his memory was still fresh. As a summary of the essentials of the message it is in complete accordance with the evidence subsequently given by the witness and we are prepared to accept it as an accurate summary. It runs as follows:

"The Sub-Inspector of Chaura seeks out and beats the volunteers; therefore bring all your volunteers to Dumri. We will go and enquire from the Sub-Inspector why he makes a practice of beating the volunteers; if he wants to send us to jail or to arrest us he may do so with all of us."

The meaning of this last pharse is obvious

enough: the volunteers were to assemble in such numbers as to make it palpably preposterous for the Sub-Inspector to attempt to arrest all of them. It was suggested in argument that we ought to see in these words a declaration beforehand, on the part of the leaders of the volunteers, that one and all of them would abide faithfully by their pledge to absolute non-violence submitting meekly to arrest or to any other action which the Police might taken within the limits of their lawful authority. We are impressed rather with the ironic turn of the phrase and its dangerous implications. The volunteers had only to assemble in sufficient numbers, and to be resolute enough in their determination that nothing should be done to any one of them which was not done to the whole body and they impose their own will; the arresting of even a couple of thousand men was a known impossibility.

In his evidence at the Sessions trial Nakched attempts a somewhat fuller statement. As we read his evidence, he purports to give from memory a complete transcript of the letters. In this version we find the provocative statement that the Sub-Inspector is seeking out the volunteers in order to beat them. The closing phrase appears in a confused form, with a reference both to beating and to imprisonment. The essential point remains the same: there was to be no beating of individuals, no arresting of individuals. In this version, however, there is a reference to a further object for the assembly; they were to go on to Mundera and stop the sale of fish and of meat.

We do not think it would help the defence if we were to insist on this fuller account of the contents of the letters as it appears at page 543 of our printed record and we are a little sceptical as to the capacity of this boy of eleven to re-produce the entire contents from memory. We think it safer to stand by the summary of essentials which he gave while his memory was comparatively fresh. The volunteers were summoned to Dumri Khurd on the strength of a preposterously exaggerated account of the assault committed by the Sub-Inspector on the accused Bhagwan; the immediate object of the assembly was that they should march in an organized body to Chaura Police Station and ask the Sub-Inspector what he meant by it. The meeting was fixed for Saturday morning, the 4th of February 1922.

In the interval, further action was taken about which Sikhari apparently knows little or nothing, but as to which there is plenty of evidence. The accused Lal Muhammad sent in a report to the District head-quarters of the Khilafat Committee at Gorakhpur. The evidence on this point consists partly of documents seized by the Police, when they raided the Khilafat Office on the 5th of February, and partly of the evidence of various members of the Executive Committee of the Khilafat at Gorakhpur, whom the prosecution put into the witness-box one after another, in the hope of getting at the whole truth concerning this important aspect of the case. We do not feel that any very substantial measure of success has been attained. On one matter of detail there is a distinct conflict of testimony. Maulvi Subhanullah (P. W. No. 134), seems positive that Lal Muhammad either brought his written report to Gorakhpur himself, or at any rate followed it up by a personal visit. The Secretary of the Khilafat Committee, Muhammad Sulaiman Adhami (P. W. No. 170), does not think that Lal Muhammad came to Gorakhpur in person, and is positive that Maulvi Subhanullah is making a mistake if he says (as he apparently does) that Lal Muhammad was sent from that gentleman's house to the office of the Khilafat Committee with his letter, or written report in his hand. There is a conflict of evidence also as to whether the paper, Ex. 95, is this report in original; indeed we are in some little doubt as to whether Lal Muhammad or any other volunteer had the capacity to draft such a document. We are beyond all question dealing with the testimony of reluctant witnesses, who were as economical of the truth as they dared to be. Certain facts are, however, fully established, Lal Muhammad did cause to be conveyed to the office of the Khilafat Committee a letter or report of which Ex 95 is at any rate a correct transcript. This report was sent in by hand, so that the information it conveyed could be, and undoubtedly was, supplemented by oral communication with the person or persons who carried it. The communication was one which called for an immediate answer: if any written answer was returned it has disappeared, nor can any trace of it be discovered in the correspondence registers of the Gorakhpur Khilafat Committee. Some sort of answer, oral or written, or both, was unquestionably returned.

The letter, Ex. 95, is to the effect that two volunteers, while peacefully engaged about their own marketing (the name of the bazaar is, not given), had been seized and severely beaten by the officer-in-charge of the Local Police Station. "We, therefore, report this matter to your worships," the letter concludes, "in order that you may come and investigate the matter. It is because of your worships that we (*ham-log, i. e.*, the local volunteers) have not committed any offence of any sort, for whatever action we take will be after inquiring from (you) our superiors." A book has been produced (Ex. 92) which purports to be the abstract register of correspondence received at the office of the Khilafat Committee at Gorakhpur: this register the witnesses called from that Committee have (not without some apparent shuffling and hesitation) admitted to be genuine. In this register there is an entry under date the 2nd of February, 1922, of a letter received from Lal Muhammad, Secretary, Chauri Chaura, the recorded summary of which is to the effect that the Sub-Inspector in charge of Chaura Police Station has severely beaten two volunteers, and the "people of that place" were ready to assault the Police in return, "but had been with difficulty restrained." It need scarcely be pointed out that this is not an accurate summary of Ex. 95. There are various points about the appearance of Ex. 92 calculated to suggest a doubt whether this is really the correspondence register, as kept up in the regular course of business. No abstract register of correspondence issued from the Gorakhpur Khilafat Office is forthcoming; and in face of the description of the book Ex. 92 in its own heading we are not prepared to accept the belated assertion of Niaz Ahmad Arif (P. W. No. 172) that this Exhibit is in fact the only register maintained at that office for correspondence received and correspondence issued.

In considering the inference to be drawn from this peculiar state of the evidence we bear in mind the fact that no official or member of the Executive Committee of the Khilafat at Gorakhpur is now on his trial before us; but we are very definitely called upon to form an opinion as to the objects with which the National Volunteers assembled at Dumri Khurd on the morning of 4th of February and as to the resolutions come to at that gathering before the meeting proceeded to take action in pursuance of the same. Looking at the matter from this point of view, we feel bound to record our opinion that the whole truth has not been disclosed in the evidence produced at this trial as to the communications which passed between the Executive Committee of the Khilafat at Gorakhpur and the local leaders of the National Volunteer associations in the neighbourhood of Chaura in the course of the 2nd and 3rd of February 1922. In particular, we do not believe that any written answer was ever returned by or on behalf of the said Executive Committee to the communication received from Lal Muhammad. We strongly suspect, to put it no higher, that the register of correspondence issued from that office has disappeared, not because of anything which it did contain but because of what it did not contain; that is to say, because no entry appeared therein of any written answer to Lal Muhammad's report. It follows that an oral answer was returned and that it was of such a character that those responsible for it could not venture to reduce it to writing. Our suspicions on this point are strengthened by certain evidence, which will be noticed in due course as to what took place at the meeting at Dumri Khurd. These considerations warrant us in putting upon Lal Muhammad's letter the sinister interpretation of which it is undoubtedly susceptible. In substance and in effect this accused reported to his "office" at Gorakhpur that the local volunteers had been roused by the outrageous conduct of the Sub-Inspector of Chaura to such a state of indignation that, if the officials would only give the word, they were prepared to teach that officer, and the Police generally, a signal lesson: and requested that some one should be sent down to look into the matter.

The reply to this communication was, as we believe and have already said, sent by word of mouth. The positive evidence as to its purport is to be found in the depositions of one or two "Khilafat" witnesses, who say that it was to the effect that the volunteers should be patient. If they were speaking the truth, and a written answer had been returned to this effect, we are confident that either the writing itself would be forthcoming, or reliable secondary evidence as to its purport. We are driven to form our opinion on this point from the evidence as to what actually

took place on Saturday, the 4th of February.

From early morning on that day preparations were made at Dumri Khurd for the expected gathering. The place chosen was a threshing floor in front of the house of the accused, Behari (*Pasi*). The local volunteers arranged the ground, sacking being spread to provide seating accommodation for the central group of leaders. Some modest provision was made for refreshments by way of baskets containing raw sugar. Flowers were collected and made into garlands for the adornment of those whom the assembly might particularly desire to honour. From about seven in the morning a steady stream of volunteers began to flow in. There is evidence scattered about the record, in the depositions of witnesses from various villages within a radius of several miles from Dumri, which shows the manner in which these men had been summoned by messages and mustered in little groups of half a dozen or so, before marching for the appointed rendezvous. Harpal, the village watchman of Dumri (P. W. No. 34), had received instructions beforehand. He watched the proceedings until two or three hundred men were collected, ascertained from the general trend of the conversation that the intention was to march on the Mundera bazaar and then slipped away to report the matter at Chaura Police Station. He says that volunteers were still streaming in when he left Dumri Khurd. The approver Sikhari (P. W. No. 1), estimates that five or six hundred men had come together by about 8 A.M. and that the numbers had increased to about one thousand when the meeting was brought to a close by the organized body of volunteers setting out for Chaura Police Station. So far as we have been able to check this estimate by the evidence of other witnesses, it certainly does not appear excessive: we are satisfied that the men who set out from Dumri Khurd for Chaura Police Station were at least one thousand in number, and may well have been fifteen hundred.

For the proceedings at this meeting, generally spoken of in the evidence and in the judgment as "the Dumri Sabha," we have before us a very considerable body of evidence. In the first place, we have the depositions of the two approvers, Shikari and Thakur. Next we find references to this matter in statements made under s. 164 of the Cr. P. C., to a Magistrate, before the commencement of the enquiry preliminary to commitment, by a number of accused persons. The most important of these are the statements of Ramrup *Barhai* (Ex. 225), Bhagwan *Ahir* (No. 226), Mahabir *Saithwar* (No. 248) and Raghubir *Sunar* (No. 251). In the third place, we find more or less detailed accounts of the affair from three witnesses, Jakat Narain Pande (P. W. No. 91), Bhawani Prasad Tewari (P. W. No. 25) and Shankar Dayal Rae (P. W. No. 102). It is quite beyond question that these three men were present at the occurrences they profess to describe. The first strikes us as the sort of vain and irresponsible busy-body whom one so often finds thrusting himself to the front in connection with some political or social movement. The reception he met with on his first arrival at Dumri is enough to show that the peasantry of the neighbourhood not only respected his caste and were inclined to take him at his own valuation as a professor of religion but looked upon him as a person of some authority in connection with the non-co-operation movement. We see no reason to believe that he was ever accepted as such by the organizers of the Congress or Khilafat movement in Gorakhpur itself; nor on the other hand do we see any real ground for regarding him as a Police spy, though he was accused of being one by indignant volunteers before the meeting at Dumri was over. His own account of what took him to Dumri is that he hastened to the place as soon as he heard what was going on because he had formed a low opinion of the character of local volunteers and was persuaded (from what had happened at Mundera on the previous Wednesday) that they were going to get themselves into trouble by acting contrary to the true precepts of non-violence as laid down by "*Mahatmaji*" Gandhi. He naturally tries to put his own conduct in the most favourable light, and we are not greatly concerned to inquire how far honest zeal for what he thought right, mingled with mere curiosity and a desire to gratify his self-importance in determining his conduct He certainly did go to Dumri and he does seem to have exerted himself, to the best of his ability, to prevent mischief. Bhawani Prasad is a land-holder and village headman of Pokharbinda, a hamlet which had sent a contingent of volunteers to Dumri. He was on friendly terms with

Sub-Inspector, Gupteshar Singh and was sent for to the Police Station on the Saturday morning. He was relieved to find the small contingent of armed Police arriving from Gorakhpur, and he went to Dumri, on the Sub-Inspector's suggestion, to see what was really happening and to warn the volunteers that they had better abandon whatever enterprise they were meditating, whether against Chaura Police Station or Mundera bazaar, especially in view of this re-inforcement which the Police had received. Rae Shankar Dayal is a resident of the Ballia District who was making a living in Gorakhpur out of District Board contracts and a contract which he held in connection with the Mundera bazaar. It was his interest in this matter which took him to Dumri to see what the volunteers were really doing. He has played an ambiguous part in this trial and portions of his evidence have been severely commented on by the learned Sessions Judge. We are satisfied that he may be regarded as a witness distinctly friendly to the accused persons.

The effect of this evidence as a whole is to corroborate the account of the meeting at Dumri given by the approver Sikhari, at least in its broad outlines, sufficiently to enable us to feel certain of its straightforwardness and general accuracy. Of the present accused, the men who took the lead were Nazir Ali and Lal Muhammad; also, in a lesser degree, Shyam Sunder and Abdulla *alias* Sukhi; with these must be placed Sikhari himself, a man of the name of Indarjit whom the Police had not been able to arrest up to the time of the trial in the Court below and an ascetic with a pair of tongs, an article commonly carried by religious mendicants of a certain class. He is frequently referred to in the evidence; and was probably a mischief-maker from a distance. No one seems to know his name. Jagat Narayan Pande and Shankar Dayal were cordially received on their arrival, garlanded and permitted to address the meeting. The latter was apparently mistaken for some emissary from head-quarters whom the volunteers were expecting, under the description of "the Ahrauli Babu." Both tried to persuade the gathering to break up and to abandon their expressed intention of proceeding in a body to Chaura Police Station and Mundera bazaar. Jagat Narayan especially exerted himself in this sense, appealing to the precepts of "Gandhi-ji" and to the fact that armed Police had reached Chaura. He was violently opposed by Nazar Ali, also by Lal Muhammad, Shyam Sundar and Abdulla *alias* Sukhi. He was told that he was no better than a Police spy, ridiculed, abused and finally turned out of the meeting with contumely. Eventually Nazar Ali carried the entire meeting with him in a resolution that they were to march in a body, first to Chaura Police Station, to ask the Sub-Inspector why he had beaten two volunteers, and thence to Mundera bazaar to stop the sale of intoxicants, of meat and of fish. These objects were to be pursued unflinchingly and carried through in the teeth of any opposition that might be encountered. No one was to start on the expedition who was not prepared to venture his life on the hazard. When challenged to do so by Nazar Ali, all those present bound themselves by oaths to persevere to the end. Anyone who turned back after setting forth with the rest was to be considered, if a Hindu, to have eaten cow's flesh, if a Musalman, the flesh of swine. What may be a coarse variant of the oath, but is more likely to be a description of any defaulter, is mentioned by Sikhari as particularly applicable to anyone "who should retreat from before the bullets at the *thana*." The assembly was a large one and it is easily conceivable that more than one form of oath was used. The coarser one, be it oath or description, was abhorrent in its terms and might well appeal more particularly to those elements in the crowd, drawn from the lowest strata of society, which are abundantly represented in the list of appellants before us.

On all the points hitherto set forth the evidence as to the proceeding at this Dumri Sabha is clear, consistent and overwhelming. There remains, however, one detail which calls for separate consideration. When Sikhari made his first statement before a Magistrate on the 16th of March 1922, he said, speaking of a late stage of the meeting "In the meantime two Muhammadans, one of whom was wearing spectacles, came there. I do not know where they lived. They took out a piece of paper and began to read it. Then they began to sing. In this song the names of Muhammad Ali and Shaukat Ali were uttered, again and again, and it was about their imprisonment. After singing the song they went

away to the west. *Then* we got up and passing along the raised borders of the fields reached the road." In his evidence at the trial, after speaking of the ejection of Pandit Jagat Narayan from the meeting and the departure of Rai Shankar Dayal--it is curious to note that he ignores Bhawani Prasad altogether—Sikhari goes on to state —"Two other men came, one wearing green glasses who was of my stature, but older, about 32, who from his words appeared to be a Musalman; the other was younger than I—I cannot say whether he was a Hindu or a Musalman. The man with glasses began to read from a slip of paper singing 'we are going for two years each' We understood going to jail. Then Nazar Ali stood and publicly administered an oath."

On the 13th of March 1922, the accused Bhagwan *Ahir* made a statement before a Magistrate, which contains the following passage:—"Then two Muhammadans wearing spectacles came there. They began to sing a song describing the deeds of Shaukat Ali and Muhammad Ali. On hearing the song all became angry and said, "Come, we will all go to the *thana*."

Four days later the accused Mahabir, son of Lalsa *Saithwar*, in a statement similarly recorded, told the Magistrate:—"Two Musalmans came there. One of them was wearing spectacles and the other had a beard. They came there and began to sing. After this all the volunteers, who were about three thousand, got up and started from there crying out, *Mahatma Gandhi ki jai*."

The accused Raghubir, son of Jaddu, is a *sunar* by caste a man of higher social position than the bulk of the accused. On the 4th of March 1922, he told a Magistrate as follows:—"Lectures were delivered. There was a Babu who in his lecture said that we should not go either to Mundera bazaar nor to the Police Station. If we went in a body there would be a riot. But no one listened to him. A *Miyan*, whose name and residence I do not know, delivered a lecture and asked his hearers whether they were ready to die. They replied that they were ready. Then all started from there."

It would be quite possible for us on the evidence which we have already reviewed, to record our finding as to the nature of the agreement come to by the volunteers assembled at Dumri Khurd and whether that agreement did or did not amount to a criminal conspiracy. We think it better, however, to proceed with the narrative of events. The evidence as to what the volunteers agreed amongst themselves to do cannot be altogether dissociated from the evidence of what they actually did. We shall have to consider, in connection with certain statements made by the approvers Shikari and Thakur, if their testimony is or is not borne out by the subsequent conduct of the volunteers.

Up to a certain point there is no room for controversy as to the course of events. When the volunteers left the threshing-floor at Dumri, they made their way along the field boundaries to the broad unmetalled road which runs from Gorakhpur to Deoria, by going eastward along which they would come to the Chaura Police Station, rather less than two miles distant. On this road the men were got into some sort of rough formation. The services of drill-instructor Bhagwan were requisitioned for this purpose. Flags which had been prepared beforehand were sent to the front and the crowd began to move under the guidance of their "officers," who halted them and moved them on again by the sound of whistles. They were in an excited mood, continually raising triumphant cries and acclamations. As a point roughly about half way to Chaura they came to Bhopa bazaar, where a road branches off to the left that is to say in a northerly direction, towards a Railway crossing, beyond which it leads directly to Mundera bazaar. This was the route which the crowd would have followed if they had not resolved to visit Chaura Police Station before going to Mundera. At this point they were met by the witness Awadhu Tewari a servant of Babu Sant Bakhsh Singh, the proprietor of the Mundera bazaar. The evidence of this witness as to what he saw at Bhopa corroborates Sikhari. The approver says that by that time the crowd had swollen to a total of 2,500 or 3,000 men. Awadhu puts the number considerably higher, but is probably exaggerating. He says the crowd came towards him carrying flags and raising triumphant cries. The leaders appeared to him to be the accused Nazar Ali and Shyam Sunder and the approver Sikhari. He gives an interesting and obviously genuine account of his conversation with them, when he endeavoured to persuade them to turn back or to disperse. Nazar Ali spoke with great insolence and remarked in an ironical tone that he was going on to the Police Station to get a beat-

ing. He raised his flag and the crowd moved on, still crying out "Victory". The witness hurried to the Police Station and told the Sub-Inspector what he had seen. In the meantime the crowd moved on as far as a building often referred to in the evidence as the factory of Lala *Halwai*. This brought them close to the Police Station enclosure which lies in an angle, where a short length of metalled road turns northward from the highway between Gorakhpur and Deoria and leads to a Railway crossing and the bazaar of Chaura, beyond which it proceeds to Mundera bazaar. The Police Station enclosure extends practically from the Gorakhpur Deoria highway on the south to the Railway crossing and the line of the Railway on the north side. The entrance to the Police Station is on the east, that is to say opening on to the short length of metalled road leading northwards from the highway to the level crossing. Opposite this entrance, and across the metalled road, were a few buildings, including the private quarters of the Sub-Inspector in charge of the Police Station. According to Sikhari the crowd was continuously increasing in numbers as they moved from Bhopa bazaar towards Chaura. We unhesitatingly accept his evidence as proving that when the crowd came to a halt beyond Lala *Halwai's* factory it was over 3,000 strong. Sikhari says "they were in ranks [illegible] the road on either side." He adds:—"When we came to the factory we knew there was danger and that there was a guard with guns at the *thana* (Police Station). We were ready to sacrifice our lives We saw that the *darogha* (the Sub-Inspector in charge of the Police Station, *i. e.*, Gupteshar Singh) was standing with Police and *chaukidars*. We supposed he was standing there to beat us. We went on because we considered ourselves to be in [illegible] numbers; and what could he do to us. We ought perhaps to explain that the vernacular word used by the witness, which had been translated "to beat," is a word of wide significance, meaning also "to strike" and even "to kill" it would undoubtedly include striking with bullets or other missiles as well as the infliction of blows in hand-to-hand combat.

To resume our narrative: at this point the witness Sardar Harcharan Singh came forward from the direction of the Police Station to meet the crowd. A conference took place between him and their leaders. He estimates the number of the crowd at three to four thousand. Their leaders appeared to him to be Nazar Ali, Shyam Sunder, Sikhari and the unknown ascetic carrying a pair of tongs who has been referred to elsewhere. He found the crowd in a singular state of fierce excitement. He says their leaders addressed him in a tone which was anything but respectful. They told him plainly that they were resolved at all costs to go to the Chaura Police Station and thence through the Chaura bazaar, through the village of Bale, to Mundera bazaar. The witness persuaded them to wait while he went to speak with the Sub-Inspector. It must be remembered that the Police occupied at this moment a position which was strategically sound. They were drawn up across the highway, the breadth of which would presumably be commanded by the muskets of the armed Police. These were the men on whom Sub-Inspector Gupteshar Singh would have to rely in the event of an encounter. The four or five men of the Civil Police whom he seems to have kept about him would scarcely count for anything as a fighting force. He had with him also, so far as we can gather, 40 or 50 *chaukidars* or village watchmen, being in part men whom he may have called in to the Police Station that morning in anticipation of trouble, and in part men whose turn it was to go to the Police Station on that day to draw their pay. These men were efficiently enough armed for an encounter at close quarters with the brass-bound *lathis* of stout bamboo which formed part of their official equipment. They were, however, a mere collection of village watchmen, wholly unused to acting together in numbers. The records of dacoity cases in this Court afford abundant evidence of the slight reliance which can be placed upon an assemblage of village watchmen as a fighting force. On the other hand no one who examines this record can fail to realise something of the impression produced on the minds of those who saw the crowd at close quarters, not merely by their numbers but by the spirit which animated them. Bhawani Prasad after seeing them at Dumri advised the Sub-Inspector to bow his head to the storm and let the day go by. He evidently believed that successful opposition to the march of the volunteers was out of the question; that it would be better to let them work their will, for that one day, in Mundera bazaar and to see what could be done subsequently in the way of re-estab-

lishing order. Sardar Harcharan Singh was deeply perturbed. We do not think that anything in his conduct bears out the imputations of treachery and double-dealing which have been cast upon him. He returned to the Sub-Inspector, after his interview with the leaders of the volunteers, with the conviction plainly on his mind that there was no stopping these men if they moved forward, as they were evidently determined to do. We take it that there was perceptible in the spirit of this crowd that sort of magnetic force which the ancient Greeks ascribed to supernatural influence, and which has often been noted as emanating from an army destined to be victorious in an impending encounter. Psychologically it has its basis in the recognition on the part of each member of the force that those around him are animated by the same resolution which he feels in himself: he knows that if he elects to go forward, he will not go forward alone. Sardar Harcharan Singh believed that he could exercise sufficient influence over the crowd and its leaders to ensure their marching, peacefully and without disorder, past the Police Station, if they were allowed to proceed in this way towards their destination at Mundera bazaar. He apparently received some assurance to this effect from the leaders. He says that, in communicating his views to the Sub-Inspector, he suggested that it would be easier "to deal with the crowd" after they had passed the Police Station.

If Sub-Inspector, Gupteshar Singh had followed resolutely the plain dictates of duty, if he had continued to bar the road against the advance of the crowd and had offered them a reasonable time in which to disperse, under threat of opening fire in the event of their refusal, his chances would have depended on the possible intimidating effect of two or three volleys delivered at close quarters into the crowd massed along highway and "over-flowing," as Shikari says, "the road on either side." If the crowd broke in panic, the miscellaneous force of *chaukidars* might have been useful enough in completing their dispersal, and possibly in arresting their leaders. If the resolution of the crowd held firm, we very much doubt whether, with the force and with the weapons at his disposal, Sub-Inspector Gupteshar Singh could have prevented the dispersal of his force by sheer weight of numbers, their isolation and subsequent massacre.

The matter was not put to the test. The unfortunate Sub-Inspector is not to be blamed, or at any rate to be severely blamed, if his resolution gave away. He had to consider, not only the chances of an actual conflict, but the subsequent justification of his own action against the flood of adverse criticism which would undoubtedly have been let loose upon him. He accepted the advice of Sardar Harcharan Singh, withdrew his force from across the highway and fell back within the Police enclosure. From that moment he and those with him were doomed. The crowd so far kept their express or implied compact with Sardar Harcharan Singh, that they moved in more or less orderly formation along the highway to the south of the Police Station and, turning to their left, began to file past the *thana* gate towards the Railway crossing, and on beyond into the Chaura bazaar. From this point we have to deal with evidence about which there has been some controversy. We think it useless to enter upon a detailed analysis of all the items of evidence upon which our conclusions are founded. Certain matters of detail must remain in doubt; but as to the main course of events we believe it possible to formulate conclusions quite sufficient for the determination of all the issues set before us.

It must be remembered that, when Nazar Ali and Lal Muhammad called the volunteers together, they had not done so merely in order to carry out their previous threats against the vendors of intoxicants, of meat and of fish in the Mundera bazaar. They had got together their men on the understanding that they were to go to Chaura Police Station and have it out with the Sub-Inspector about the matter of the beating of the volunteers. We know that highly exaggerated statements had been put about on this subject. Accordingly, while numbers of the crowd were continuing on their way towards the Railway crossing and Mundera bazaar, some of their leaders, with a considerable body of followers, came to a halt in front of the open gate of the Police Station and demanded to see the Sub-Inspector. Matters about which there has been considerable controversy are the numbers of the men who thus came to a halt and the question whether, as the movement of the crowd continued, there was ever at any moment a perceptible interval of space between the group which was halted in front of the Police Station and

the rest of the crowd. It cannot appear surprising to any one who endeavours to form a mental picture of the scene that the available evidence on question of this sort should be conflicting. We are prepared to believe that the number of those who definitely halted in front of the *thana* gate, to have it out with the Sub-Inspector, did not exceed three hundred. Events moved rapidly : a crowd of three to four thousand men cannot get along very fast by a narrow street and over a Railway crossing; we very much doubt whether there was at any moment a clear interval of space between those who were still moving on northwards and those, who, whether of set purpose or out of mere curiosity, lingered about the eastern front of the Police Station. The evidence satisfies us that the demand for an explanation in the matter of the beating of a volunteer, or of volunteers, was made in insolent and over-bearing tones and that Sub-Inspector, Gupteshar Singh adhered to the policy which he had adopted by speaking the crowd fair. He told them that the man whom he had beaten (the accused Bhagwan) was not a brother of theirs; that he was a Government pensioner and might, therefore, fairly be regarded as subject to his (the Sub-Inspector's) authority. There are statements here and there on the record which attribute to the Sub-Inspector words and expressions of more abject apology. Whatever he said, his remarks were received by the crowd, not merely with satisfaction, but with insolent and mocking triumph. Numbers of witnesses depose to a coarse jest which passed from mouth to mouth in the crowd, no doubt with slight variations of form, ascribing abject terror to the Sub-Inspector personally, to the Police generally and even to that abstract entity referred to as "the Government." Along with this came a derisive clapping of hands, similar to that which had driven Pandit Jagat Narayan from the assembly at Dumri. Some of the crowd which had halted by the Police Station gate began to move northwards, but we are quite satisfied that the gateway was still beset by numbers of the crowd when the patience of the much tried Sub-Inspector gave way. The man is dead, and we shall never know with certainty what was passing in his mind. We can well believe that he was roused to anger by the taunts of the crowd, their coarse jest and their derisive hand-clapping. It is quite conceivable, however, that it was precisely these taunts which brought home to him the disadvantages of the position into which he had allowed himself to drift. After all, the armed guard had been sent out, not to defend him personally, but in order that he might use it to protect the licensed vendors and other shopkeepers of the Mundera bazaar against terrorism and mob violence. The organised crowd of volunteers was now moving steadily on towards Mundera, while the Sub-Inspector himself was practically blockaded inside his own Police Station by the crowd which still hung about the gateway. If the volunteers achieved their threatened purpose in Mundera that day, and still more in the not improbable event of the baser elements of the crowd getting out of hand there and plundering shops or the like, he would have to answer to his superiors for the remissness by which he had allowed these things to happen. He may well have felt, and we think that in all human probability he did feel, that the first and most urgent duty incumbent upon him at that moment was to recover his own freedom of action by clearing the road immediately in front of the Police Station. He ordered a number of *chaukidars* forward for this purpose. As might be expected, the evidence regarding the brief and confused scene which followed is somewhat conflicting. The crowd, undoubtedly, scattered before the advance of the *chaukidars*; there are witnesses who speak of them as running in different directions. In the main, however, the natural tendency of the crowd would be to press northward towards the Railway crossing, that is in the direction of their own re-inforcements. Hence we have some of the witnessess who speak of the *chaukidars* as driving the crowd towards the Railway crossing, which would in itself be a futile thing for the Police to have done. What precise degree of violence was used by the *chaukidars* it is impossible to determine. Sardar Harcharan Singh, who was in as good a position to observe what happened as any other witness, will not admit that the *chaukidars* actually struck any one: he describes them as thumping the ends of their *lathis* on the ground, which is a well-known and frequently adopted method of breaking up, or moving on, a crowd by threatening them with painful, but not serious, injury to their feet. There is no doubt a good deal

of evidence to the effect that some of the *chaukidars* "beat" some of the volunteers, and we are prepared to take it that blows were struck. What seems to us the one crucial fact which stands out in plain relief from the evidence is that the crowd generally, and more particularly the volunteers who constituted the back-bone of the crowd and the leaders of those volunteers, were prepared beforehand for just such a contingency. As the cry was passed along that the *chaukidars* were beating the volunteers, whistles were sounded and, upon this preconcerted signal, the whole crowd swung back upon the Police Station. The men spread themselves out along the Railway line, arming themselves with *kankur* and brick-bats from the ballast, which missiles were also carried down towards the eastern front of the Police Station. A steady hail of missiles began to overwhelm the scanty Police force, already disorganised and manœuvred into an untenable position. The firing of the first volley in the air was met by a cry that "*Mahatmaji Gandhi*" was working miraculously in favour of the volunteers and was turning the bullets to water. We have plenty of evidence on this record as to the wide-spread belief in this gentleman's miraculous powers. We have no doubt that such a cry was raised and that it put the finishing touch to the resolution of the mob. When the Police began to fire in earnest, and two of the rioters had been shot down and others wounded, the only result was to inflame this resolution into fury. What followed has been already told.

In the light of these events we must now go back to the question, what was it that the volunteers assembled at Dumri agreed to do? The case laid before us by the defence may be fairly summed up as follows. The agreement, undoubtedly, was that the volunteers should go first to Chaura Police Station and thence to the Mundera bazaar. At the former place they were to submit to Sub-Inspector, Gupteshar Singh a sober and dignified remonstrance against his illegal conduct in assaulting individual volunteers. They were to offer themselves to him for arrest in a body, if he was prepared to act upon the view that under the order of Government every enrolled volunteer was *ipso facto* liable to arrest and prosecution. When this piece of business was satisfactorily settled, they were to move on to Mundera bazaar and there, by peaceful persuation exercised towards the licensed vendors of intoxicating liquor and drugs, and towards any persons whom they might find attempting to purchase the same, put a stop to the public sale of these harmful intoxicants. They were at the same time to stop the sale of meat and of fish, either absolutety or unless the vendors submitted to the sweeping reduction in price of which we have already spoken. As a matter of fact this latter alternative cannot be seriously considered. Everyone must have known that meat and fish would not be sold at the price suggested by the volunteers and the idea of obtaining meat and fish at reduced prices had by this time been wholly superseded by the idea of punishing the vendors of these commodities in Mundera bazaar for their contumacy by closing their shops altogether. All the evidence on the point is simply and plainly to the effect that the volunteers were to stop the sale of meat and of fish.

On this the first comment we have to make is, that the very idea of a body of 3,000 men or more controlling the shops in the Mundera bazaar by means of peaceful persuasion is on the face of it almost grotesque. Whatever may be said in defence of peaceful picketting, when undertaken in the market of a large town by individuals, or by small groups of earnest and enthusiastic men or women, has no application whatever to the proposed flooding of a small bazaar like Mundera by a body of men whose mere presence there would put a stop to all business which could only be carried on with their consent, and indeed with their active assistance. Secondly we cannot deal with the question of the object of the volunteers in moving on Mundera bazaar without taking into consideration the events of the previous Wednesday. The expedition of Saturday, February 4th, was in plain fulfilment of the threats which had been used by Nazar Ali and other leaders of the volunteers on the previous market day. So far as this part of the case is concerned, we have no doubt that the agreement come to at Dumri to stop the sale of intoxicants, of meat and of fish in the Mundera bazaar was, under the circumstances, an agreement to commit an offence punishable with rigorous imprisonment for two years at least, namely, the offence of criminal intimidation under s. 506, Indian Penal Code.

As regards the visit to Chaura Police Station, it may perhaps be necessary to dis-

tinguish between the intention of those who organised the movement and the purpose of the great mass of the crowd who gave their adhesion to the same. Lal Muhammad, Nazar Ali and those who were with them had used very exaggerated versions of the Sub-Inspector's violence towards the volunteers in order to get together the largest possible gathering of their supporters. They were taking them to Chaura for the avowed purpose of asking the Sub-Inspector why he beat volunteers. To the minds of the great majority of the crowd this expression, we have no doubt, carried very much the same significance as that conveyed by the corresponding English phrase in the historic rhyme, which tells how the Cornish men proposed "to know the reason why" Bishop Trilawny was being prosecuted by King James II. At the same time the purpose actually uppermost in the minds of those who organised this demonstration was to overawe the Police at Chaura into quiescence, before the crowd moved on the Mundera bazaar, in order that they might be certain of being able to work their will there without interference.

From every point of view the agreement come to amounted to criminal conspiracy. There has been much criticism before us, directed against the drafting of the conspiracy charge, and that criticism is not altogether without foundation. As we read the charge, the illegal acts which the accused are alleged to have agreed amongst themselves to do fall under two distinct heads:—

(*a*) to overawe the Police by force or show of force,

(*b*) to beat the Police, in consequence of what the Sub-Inspector and his subordinates had previously done at Mundera on the 1st of February.

The second part of the charge, as thus stated, is not sustainable, if only for the reason that when Sub-Inspector, Gupteshar Singh caned the accused, Bhagwan *Ahir*, he was not acting in the discharge of his duty. The first part of the charge is, in our opinion, borne out by the evidence. We have also expressed our opinion that the agreement come to as to what was to be done by the crowd when they reached Mundera amounted to criminal conspiracy, although that is not expressly set forth in the charge. As a matter of fact, although we are prepared technically to affirm the convictions recorded under s. 120-B, Indian Penal Code, except where we have arrived at the conclusion that in the case of a particular appellant the evidence is insufficient to support any of the charges, the question is to our minds one of little more than academic importance. What we really have to determine is whether Sub-Inspector Gupteshar Singh was warranted by law in the action which he took that afternoon at Chaura Police Station, and what was the common object of the crowd there assembled at least from the moment when they began to discharge volleys of missiles against the Police.

On the first point we have in substance already expressed our opinion. A statement has been made in evidence that, before calling upon the *chaukidars* to disperse the assembly in front of the *thana* gate, Sub-Inspector, Gupteshar Singh made some attempt to issue a formal command directing the assembly to disperse. It is likely enough that the unfortunate Sub-Inspector did try to strengthen his own position by formal compliance with the provisions of s. 127, Cr. P.C. It would have been no more than a formal compliance at most, and the evidence on point is not particularly convincing. We are, however, abundantly satisfied that, from the moment the crowd of volunteers left Dumri Khurd, right up to the time when they began to file past the gate of Chaura Police Station, they not merely constituted an unlawful assembly, but were conducting themselves throughout in such a manner as to show the firmest possible determination not to disperse if called upon to do so. The Sub-Inspector was, therefore, abundantly justified, under section 128, Cr. P. C, in attempting the dispersal of the crowd at the moment when he did so. If he failed in his duty at all, it was in not having done so sometime before. Arguments which have been addressed to us at the hearing of this appeal only serve to suggest the storm of criticism which the Sub-Inspector would have provoked if he had resolutely done his duty, as we conceive it, by barring the further advance of the crowd before they reached the southern boundary of the Police Station. In this connection we are bound to note the great stress laid in argument before us on the fact that the volunteers set forth on this expedition were, generally speaking, unarmed. We agree that the evidence justifies the conclusion that they did so, though we are not prepared to say that numbers of those who joined the

crowd on the march were similarly unarmed It may be matter for consideration also how far the flags mounted on staffs, carried in front of the crowd, were capable at need of being used as weapons. We do think, however, that those responsible for organising this movement did intend that the volunteers should advance on the Police Station without weapons and that, in the main, they succeeded in carrying out this purpose. This finding in no way conflicts with the findings we have recorded as to the unlawful character of the assembly. The crowd was formidable enough, without carrying weapons, to have overwhelmed any resistance offered hy the small Police force, provided only they showed sufficient courage and resolution. If their resolution had failed them and they had scattered, after suffering a number of casualties from the muskets of the Police, the fact that they carried no weapons would no doubt have been used to support a story of the wanton massacre of peaceful demonstrators by the agents of a ruthless Government.

The immediate object of the assembly as it reached the Police Station was to threaten and to obstruct Sub-Inspector, Gupteshar Singh and the Policemen with him in the discharge of their duty, an offence punishable under s. 152, Indian Penal Code, an object sufficient in itself, and apart from any of the other clauses of s. 141 of the same Code, to bring the matter within the purview of the third clause of the said section. We have, however, already indicated our opinion that a further and more dangerous purpose lurked behind. Shikari stated in his evidence that the resolution come to at Dumri was that, after asking the Sub-Inspector why he had beaten volunteers, they should beat him if his answer was unsatisfactory. The approver Thakur stated that the agreement they had come to was that if he (the Sub-Inspector) "beat us we should beat him." We are asked to disbelieve these statements on the strength of various arguments based, in part, upon a comparison of the evidence given by the approvers at the Sessions trial with previous statements which they had made in the Magistrate's Court, or elsewhere. This evidence, however, and particularly Thakur's version of the scheme as it presented itself to the minds of the volunteers, fits in too well with what actually occurred at Chaura for us to feel any doubt that these controverted statements are substantially true. The instructions which had come down to the volunteers from their superiors, by what channel we do not know, were that they were not to be the first to use violence; but that, if the Police used force, they were to be at liberty to retaliate in such manner as they might consider best and most effective. The evidence as a whole leaves no doubt whatever in our minds on this point. We know also that the objects which the volunteers had set before them for accomplishment, at Chaura first, and afterwards at Mundera, were such as must sooner or later provoke the most long suffering of Police Officers to the forcible use of his lawful authority against the lawless crowd.

An intention to assault the Police in certain eventualities was, therefore, part of the common object of the whole assembly of volunteers from the time they left Dumri. From the moment the whistles sounded and the crowd turned back and commenced their organised, and, to the extent which we have indicated, their premeditated, attack on the Police Station, the object of every member of the crowd was unquestionably to cause the utmost hurt in his power to any Policeman on whom he could succeed in laying hands. After the first effective volley had been fired, and when the crowd continued their attack and pressed it home in face of the casualties they had suffered, their object was, beyond possibility of doubt or contradiction, to do simply what they did, namely, to take life, in revenge for life. The crowd which stormed the Police Station and massacred the Policemen and *chaukidars* was the same crowd which had commenced the attack with volleys of missiles. The charge drawn up under s. 302/149, Indian Penal Code, is fully established as against any one of the accused persons who is proved by evidence to have continued an active participant in the riot after the moment when *kankar* began to be thrown, unless and until it can be inferred from credible evidence that he separated himself from the rest before the offence of murder had been committed by any one of them.

Passing on to consider the cases of individual appellants, we find it convenient to depart from the alphabetical order followed by the learned Sessions Judge. Up to certain point at any rate, it appears to us that we are able to obtain a clearer

and more logical view of the effect of the evidence as a whole by grouping the accused persons together, as far as possible, under the head of the villages in which they reside. The prosecution believed that they had evidence in their possession to support the conclusion that contingents of volunteers from no less than sixty villages, situated within a radius of fifteen miles or so from Chaura Police Station, took part in the final encounter with the Police. The list of appellants now before us contains representatives from a large proportion of these villages; but considerable groups come from each of five or six particular localities which have consequently assumed a special importance in the history of the case. We propose to take up these groups first.

We begin with the village of Dumri Khurd, which was the rendezvous of the volunteers and from which the nucleus of 1,000 to 1,500 men set forth on their expedition to Chaura Police Station and Mundera bazaar. The learned Sessions Judge had before him no fewer than 31 accused persons from this village. He found the evidence against six of them insufficient to warrant a conviction—a fact which in itself suggests to our minds that the prosecution net had been spread a little too widely, so far as this village is concerned. One feature common to practically all the accused from this village is that they are implicated in the evidence given by the approver Shikari. The circumstances under which this man made his appearance in the witness-box are sufficiently set forth in the judgment under appeal. He proved himself an intelligent and even plausible witness. His statement, as we have been taken through it, reads convincingly. We have no hesitation in agreeing with the learned Sessions Judge that Shikari did take that part in the events referred to in his evidence which he ascribed to himself, possibly even a somewhat more prominent part. In the main, as we have already stated, we are satisfied that the witness had made up his mind to earn his pardon honestly, by making a clean breast of the facts so far as known to him. At the same time we are entirely in agreement with the principle which the learned Sessions Judge has himself laid down, that this is not a case in which the Court would think of departing from the general rule of practice which requires some reliable corroboration of the evidence of an accomplice, before it will accept that evidence as sufficient proof of the guilt of a particular accused. In certain instances the learned Sessions Judge has himself found reason to suspect that Shikari may have stretched a point against particular neighbours of his, for the sake of gratifying an antecedent grudge. Apart from this, the man was obviously under a considerable temptation to introduce into his story the names of any of his own fellow villagers against whom he believed that the Investigating Police Officers were entertaining serious suspicions. His failure to do so might, according to the mentality of a person of his class, endanger his own pardon by creating a suspicion in the minds of the Police that he was endeavouring to shield neighbours of his own about whose doings he could not well profess ignorance. We have made these general remarks because, upon a review of the entire evidence against the Dumri men and a further sifting of that evidence, we have come to the conclusion that the doubts entertained by the learned Sessions Judge regarding the adequacy of the corroboration forthcoming against six of these men should have been extended to a considerably larger number.

We have now to consider the appropriate sentence to pass on each of those appellants in respect of whom we have affirmed the conviction on the capital charge, namely, that under s. 302/149 of the Indian Penal Code. The law allows us a certain discretion. We are empowered to confirm the sentence of death in each case which has been passed by the Trial Court; or we can set aside that sentence and substitute for it one of transportation for life. The exercise of this discretion is subject to the same condition by which the learned Sessions Judge felt himself to be bound. In every case of a conviction on a charge of murder the law regards sentence of death as the normal and appropriate punishment. Where the Court sees fit to pass the lesser sentence of transportation for life it must record its reasons for so doing.

We do not, however, agree with the learned Sessions Judge that it is impossible to formulate such reasons in respect of any of the appellants in this case whose conviction on the capital charge we have affirmed. We do not think it expedient to say too much on this point, for we, in no way, desire to extenuate the savage nature of the

crime or to come forward as apologists for the lawlessness of the crowd. We take account nevertheless of the fact that this crime grew out of a political agitation. The appellants are in the main ignorant peasants; the great majority of them were drawn into the business by misrepresentations of fact and preposterous promises concerning the millennium of "*Swaraj*," the arrival of which was to be forwarded by courage and resolution on their part. Some indeed were apparently influenced by the belief that Mr. Gandhi was a worker of miracles. We cannot take leave of the case without an uneasy feeling that there are individuals at large at this moment, men who have not even been put on their trial in connection with this affair, whose moral responsibility for what took place at Chaura Police Station on the afternoon of February 4th, 1922, is at least equal to that which rests upon such men as Nazar Ali and Lal Muhammad, who acted as leaders openly, in the light of day, and at least placed their own lives on the hazard along with the rest.

These are sufficient reasons, in our opinion, to warrant the course we propose to take. We reserve the supreme penalty of the law for the ringleaders and for those against whom we find specific acts proved by the evidence such as would have bound us to convict them on a charge of murder, apart from the special provisions of s. 149 of the Indian Penal Code. As to these we find nothing which can in our view warrant any other sentence than that of death. Against the remainder we pass the only other sentence permissible to us by law, that of transportation for life

We propose to go a step further than this. In respect of a considerable number of the men whom we are sentencing to transportation for life we have formed the opinion that their cases are fit to be considered with a view to the exercise of the clemency of the Crown.

* * * * * * *

N. H. *Sentence confirmed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS PETITION No 61 OF 1925.

November 3, 1925.

Present:—Mr. Findlay, Officiating J. C.

VISHWANATH PRASAD PANDE—APPLICANT

versus

EMPEROR—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), s 526—Transfer of criminal case—Expression of opinion by Magistrate in another case about guilt of accused.

The fact that a Magistrate has expressed in another criminal case a distinct opinion about the guilt of the accused is a reasonable ground for the apprehension that he may not have a fair and impartial trial before the Magistrate and is, therefore, a good ground for transferring the case from his file. [p. 163, col. 1.]

Application for transfer of Miscellaneous Criminal Case No. 41 of 1925 under s. 110 of the Cr. P. C. pending before the Sub-Divisional Magistrate, Bhandara, to the file of some other Magistrate.

Mr. *D. T. Mangalmoorti*, for the Applicant.

Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—The present applicant desires a transfer of Miscellaneous Criminal Case No. 41 of 1925 pending against him under s. 110 of the Cr. P. C., from the Court of Mr. G.L. Mukerji, First Class, Magistrate, Bhandara. The only ground in the transfer application, which seems to me to require serious notice, is the fact that in Miscellaneous Criminal Case No. 18 of 1925 against Lochan and Chunbadia under the same s. (110) of the Cr. P. C. the same Magistrate expressed a distinct opinion at the end of his order that the present applicant was abetting the actions of these two men who are his servants.

It is urged that on this ground the applicant has reasonable cause of apprehension, that he will not meet with a fair or impartial trial. While I am far from supposing that the Magistrate would be likely to be unfair or non-impartial towards the present applicant, it is in the circumstances of this case, impossible, if one takes the point of view of the applicant, to hold that there is not reasonable ground for an apprehension of the kind he says he entertains.

The learned Standing Counsel on behalf of the Crown, in opposing the application has relied on the decisions in *Rajani Kanta Dutta* v. *Emperor* (1) and *Emperor* v. *Har-*

(1) 3 Ind. Cas. 88; 36 C. 804; 10 Cr. L. J. 244.

gobind (2). The former decision so far as any general principle can be extracted from it, merely lays down that, in applying the doctrine of reasonable apprehension in the mind of an applicant like the present one, regard must be had to the circumstances of each particular case. The second decision is somewhat different. There two cross-cases arising out of a riot were pending in a single Magistrate's Court. Tudball, J., did not find it necessary to order the transfer of the second case, although the Magistrate had expressed an opinion in the previous case that the applicants in the second case were the aggressors. The learned Justice merely pointed out that it would be the duty of the Magistrate to act simply and solely on the evidence which was laid before him in the course of the second trial. A decision somewhat to the contrary effect is to be found in the case *Rangasami Goundan* v. *Emperor* (3).

Now, in the present instance, the fact remains that the Magistrate has, possibly quite rightly, expressed a distinct opinion in his order of 5th August 1925 that the present applicant was guilty of abetting Lochan and Chunbadia, his two servants, concerned therein. This seems to afford ample ground for a reasonable apprehension of the kind alluded to in s. 526 of the Cr. P. C., and it would appear to me also that, even from the point of view of the Crown itself, it is highly desirable that the present case should be disposed of by a Court in which there could not be the slightest ground for any allegation that there was any tinge of conscious or unconscious bias on the part of the Magistrate concerned. For these reasons, therefore, I order Miscellaneous Criminal Case No. 41 of 1925 to be transferred from the Court of Mr. Mukerji, First Class Magistrate, Bhandara, to the Court of the District Magistrate, Bhandara, or to the Court of such other First Class Magistrate in the District as he may appoint to dispose of it.

N. H. *Case transferred.*

(2) 12 Ind. Cas. 652; 33 A. 583; 12 Cr. L. J. 564.
(3) 30 M. 233; 2 M. L. T. 89; 5 Cr. L. J. 290.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 590 OF 1925.
June 5, 1925.
Present:—Mr. Justice Abdul Raoof.
ABDUL QADIR—PETITIONER
versus
EMPEROR—RESPONDENT.

Practice—Dispute of Civil nature—Criminal proceedings.

Parties should not be encouraged to resort to the Criminal Courts in cases in which the point at issue between them is one which can more properly be decided by a Civil Court. In each case, however, it must be seen whether the issue as to title is raised *bona fide* or *mala fide* [p 164, col. 1.]

Criminal revision against an order of the Magistrate, Ferozepore.

Lala *Fakir Chand*, for the Petitioner.

Messrs. *Abdul Aziz* and *Ata Jelani Khan*, for the Respondent.

JUDGMENT.—This petition for revision is the result of a dispute between the Municipal Committee of Zira and the petitioner with regard to a pond around which are certain number of trees. It was reported to the Municipality that some of those trees had dried up. Thereupon the Municipal Committee resolved to sell the timber of those trees. A notice was issued to the public inviting them to attend the sale which was to take place on the 18th of February 1925, at 10 A. M. The petitioner claims to be one of the proprietors of the pond and of the trees standing around that pond. He also claims that he has purchased the shares of some of the other co-proprietors under four sale-deeds. He asserted his right of ownership by openly cutting certain trees on the date and at the hour fixed for the sale by the Municipal Committee. Thereupon the Committee decided to prosecute the petitioner in the Criminal Court for the offence of theft. A certain amount of evidence was taken and the Magistrate framed a charge charging the petitioner of the offence of theft under s. 379, Indian Penal Code. Against the order framing the charge the present petition for revision has been preferred and it has been contended chiefly with reference to the ruling in *Emperor* v. *Bishan Das* (1) that the dispute between the parties being of a civil nature the Magistrate ought not to have framed the charge of theft against the petitioner and ought to have directed the parties to go

(1) 8 Ind. Cas. 1161; 33 P. R. 1910 Cr.; 57 P. L. R. 1911; 12 Cr. L. J. 50.

to the Civil Court and seek a remedy there. The learned Judges who decided the case made some observations on this particular point, which is summed up in the head-note appended to the report of the case in the following words:—

"That it is a very sound general principle and one to be observed by all Magistrates that parties should not be encouraged to resort to the Criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided by a Civil Court."

This ruling has been followed in various other cases in this Province, see, for example, *Khushi Ram* v. *Emperor* (2) and *Ladha Shah* v. *Zaman Ali* (3). There is a later case also, namely, *Shib Das* v. *Emperor* (4), which also lays down a similar rule. Of course in each case it is to be seen whether the issue as to title is raised *bona fide* or *mala fide*. It is premature for me to decide at this stage whether the petitioner and his co-owners are the proprietors of this bond and the trees or the Municipal Committee exercises right of ownership over them. But from what I have been able to see from the record I am not prepared to hold that the claim asserted by the petitioner is wholly without foundation. It is possible that he may not have a title which may be accepted in a Civil Court, but on the other hand it cannot be said in an off-hand manner that he was not exercising his right of ownership when he began to cut the trees on the date fixed by the Municipal Committee for the sale of these trees. Having regard to all the [illegible] circumstances of this case I think the Magistrate would have exercised a better descretion if he had followed the instructions contained in *Emperor* v. *Bishen Das* (1) I, therefore, accept the petition and quash the charge framed by the learned Magistrate.

Z. K. *Appeal accepted.*

(2) 59 Ind. Cas. 654; 22 Cr. L. J. 142; 6 P. W. R. 1921 Cr.; 3 L. L. J. 99.
(3) 84 Ind. Cas 351; (1925) A. I. R. (L.) 289; 26 Cr. L. J. 287
(4) 21 Ind Cas. 899; 335 P. L. R. 1913; 40 P. W. R. 1913 Cr.; 14 Cr. L. J. 659.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 98 OF 1925.
August 13, 1925.
Present:—Mr. Findlay, Officiating J. C.

BAJIRAO—APPLICANT
versus
Musammat DADIBAI AND ANOTHER—NON-APPLICANTS.

Criminal Procedure Code (Act V of 1898), s. 145—Possession of agent or servant, whether can be pleaded against principal or master.

The possession of an agent or a servant which is permissive cannot give a party to a proceeding under s. 145 a *locus standi* against his principal or master. The possession that can be pleaded in such a proceeding must be possession based on a claim of right to possession. [p. 165, col 2.]

Nritta Gopal Singh v. *Chandi Charan Singh*, 10 C. W. N. 1088; 4 Cr. L. J. 215, followed.

Application for revision of an order of the Sub-Divisional Magistrate, Gondia, dated the 15th April 1925, in Criminal Case No. 30 of 1924.

Mr. *M. V. Abhyankar*, for the Applicant.

Messrs *V. M.* and *Y. V. Jakatdar*, for the Non-Applicants.

ORDER.—The facts of this case have been fully stated in the Sub-Divisional Magistrate's order. The present applicant Bajirao has now come up in revision against the said order under which *Musammat* Kamabai and Dadibai were ordered to put in possession of the 9 *sir* fields in question in *Mouza* Gangla.

It cannot be denied that on 28th February 1924 Kondibai and Laxmanrao executed a deed of surrender in respect of the *sir* land in question in favour of the present applicant, and the said deed of surrender contained a condition that the applicant would enter into possession on 1st May 1924, that is in the beginning of the agricultural year 1924 25. In the previous proceeding under s. 145, Cr. P. C., the all important document is the compromise application of 16th August 1924. This compromise application was signed not only by Kondiba, Laxmanrao and Bajirao, but by Narayan for *Musammat* Kamabai as well Objection had been taken to it [illegible] but as it forms part of a [illegible] is clearly admissible as evidence of an admission by Kamabai that Bajirao had obtained possession not necessarily on 1st May 1924, but on some date before 16th August 1924, the date of the petition in question. It is Narayan's authority to make the admission which is now sought to be impugned on behalf of

the non applicants, but it is noticeable from his evidence in the said proceedings that he was agent both for Laxmanrao and for Kamabai. The Magistrate, after examining three witnesses, including Kondiba, passed an order cancelling his preliminary one. Even the Magistrate found, *vide* para. 5 of the order now sought to be revised, that the dispute had been settled by the male members, *viz*, Kondiba and Laxmanrao, who were, in effect, the principals. On 30th October 1924, however, when Bajirao sent his ploughs to sow the *rabi* crops, he was obstructed by the non-applicants, *vide* Exs. P. 6 and P. 7. In consequence of the reports to the Police and their further enquiry a fresh preliminary order was passed on 16th December 1924.

The only vital question, therefore, for consideration is whether the present applicant was in possession on 16th December 1924, or within two months beforehand. The compromise petition, as a result of which the previous proceedings under s. 145, Cr. P. C., were abortive, may or may not be attackable in the Civil Court, but must, for the purposes of the proceedings, obviously be assumed to be a genuine one, and it follows therefrom that the applicant was, on the non-applicant's own admisssion, in peaceable possession, at any rate, in August 1924. There has been no evidence of the non-applicants' possession between that date and 30th October 1924 when undoubtedly they obstructed the applicant in his attempt to sow the fields Applicant's possession would *prima facie* appear to have been a lawful and proper one in pursuance of a deed of compromise containing the relevant admission as to possession, which had been duly filed in Court The Magistrate has laid great stress on the question of who was in possession on 1st May 1924. But assuming that the non-applicants were in possession then, and assuming further that they had sown the *kharif* crop of that year, the position was entirely altered by the admission made in the deed of compromise, and on the material available it certainly seems to me that the presumption must be made that the applicant was in lawful possession within two months of the date of the preliminary order. The forcible obstruction of the applicant from sowing the *rabi* crop on 30th October 1924 occurred less than two months before the date of the preliminary order.

In dealing with the various reports, which have been made to the Police in connection with various episodes in this dispute, the Magistrate seems to have put an entirely wrong construction on the reports in question. Let us consider who the non-applicants are. They themselves practically admit that they are holding on behalf of Kondiba and Laxmanrao who are in reality their principals. The plea that they have some right to the land in respect of the claim for maintenance is not one which need be considered seriously in a summary proceeding like that we are concerned with. What the reports like *e. g.* Exs. P. 1 to P. 5 do show is that when Bajirao went, in pursuance apparently of a *bona fide* belief that he was entitled to the possession of the fields in question, to take steps for cultivating them or reaping the crops he was forcibly obstructed by the servants and partisans of the non-applicants. The Magistrate, for some reason or other, construes this mere act of resistance and obstruction as proof of the possession of the non-applicants. I am wholly unable to endorse such an interpretation of these documents. What all these documents as well as the later reports (Exs. P. 8 to P. 10) do show is that the non-applicants were attempting to obstruct the applicant in taking effective measures to cultivate the land in question. The position of the non-applicants, in effect, amounts to this that they were attempting to obtain or hold possession of the property against their principals. *Musammat* Kamabai in her evidence frankly admits that she was merely managing the property on behalf of the two principals Kondiba and Laxmanrao. At the very best, therefore, the only plea, which can be put forward in favour of the possession of the non-applicants, is that their possession was merely on behalf of their principals.

I fully concur with the view laid down in *Nritta Gopal Singh* v. *Chandi Charan Singh* (1), that the possession of an agent or a servant which is permissive cannot give a party to a proceeding a *locus standi* as against his principal or master. The possession that can be pleaded in a proceeding under s. 145, Cr. P. C, must be possession based on a claim of right to possession. From this point of view the position of the non-applicants is an absolutely untenable one. They, at the most, have a

(1) 10 C. W. N. 1088; 4 Cr. L. J. 215.

right to challenge the surrender of the *sir* fields in the Civil Court, but their attempt to claim possession in their own names is, on the face of it, an improper and erroneous one in the circumstances of the present case. There may, of course, be reason for supposing that the present non-applicants are merely taking up the position they do as the result of a fraudulent and collusive conspiracy with Kondiba and Laxmanrao, but with this aspect of the case I am not at present concerned. Clearly, to my mind, in the present case the presumption must be drawn that Bajirao was put in effective possession by the surrendering tenants on some date prior to 16th August 1924 and remained in such possession, at any rate, until 30th October 1924 when the non-applicants prevented him from pursuing the cultivation of the fields in question.

I am wholly unable to understand the Magistrate's finding in para. 13 of his judgment to the effect that he had grave doubts about the deed of compromise. If by this he meant that there may be a chance of successfully contesting the said compromise in the Civil Court, he may have been correct in this statement, but if, on the other hand, he meant that he was not, for the purposes of determining the question of possession, to assume that the admissions made in the deed of compromise as to the applicant's possession were actually made, then clearly he was not entitled to put such a construction on the said transaction in dealing with the present proceeding.

It is no part of my duty in the present proceeding to determine whether the compromise was, as Kamabai alleges, made "behind her back" or not. We can only deal with the actual facts as to possession on the evidence available, and the circumstances, under which the previous s. 145 proceedings were brought to an end, formed themselves the strongest and most irrefutable proof that the applicant was in possession within two months of the preliminary order we are concerned with. Undoubtedly it is true that the Police reports on the record show that the non-applicants were diligent in obstructing, in every possible manner and for the most part in illegal fashion, the applicant from effectively carrying on the cultivation of the fields in question, but this fact of itself does not necessarily predicate that the possession was with the non-applicants. On the contrary, all the circumstances go to show that the non-applicants, no doubt owing to a belief that they had a genuine grievance were all through attempting to dispute and render ineffective by forcible and illegal action the surrender which had duly been made in favour of the present applicant by Kondiba and Laxmanrao.

The argument, which has been advanced on behalf of the applicant to the effect that if there had been a real compromise in August 1924, they would not have obstructed the applicant in October, hardly requires serious discussion. Very obviously various possibilities remain in this connection. It may be that the non-applicants have been put up by Kamabai and Laxmanrao to render their surrender abortive or ineffective, or again it may be that the non-applicants have taken up the position they have of their own accord. It is, however, impossible and unnecessary to decide these questions in the present case. It is, in my opinion, clear, even on the case of the non-applicants themselves, that the applicant was in possession within two months of the date of the preliminary order. He is in possession *prima facie* under a good and legal title acquired, not only on the basis of the surrender but on the admissions made in the deed of compromise, and it seems to me that from this point of view his possession must be in the meantime confirmed.

The order of the Sub-Divisional Magistrate, dated 15th April 1925, is accordingly reversed and instead I order Bajiro, the applicant, to be put in possession of the *sir* fields Nos. 116, 118, 120, 129, 130, 139, 140, 141 and 144, total area 52·40 acres, situate in *Mauza* Gangla, until evicted therefrom in due course of law, and I further forbid the non-applicants, *Musammat* Dadibai and Kamabai, to create any disturbance of such possession until such eviction.

G. R. D. *Order accordingly.*
N. H.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 135 OF 1925.
May 15, 1925.
Present:—Mr. Justice Harrison and
Mr Justice Jai Lal.

PARTAP SINGH AND OTHERS—ACCUSED —APPELLANTS
versus
EMPEROR—RESPONDENT.

Evidence Act (I of 1872), ss. 159, 160—Dying declaration, proof of—Identification—Evidence of officer who held parade for identification, admissibility of.

A dying declaration, if certified in Court, as having been recorded correctly, is admissible in proof of its own contents and it is unnecessary that the person recording it should repeat exactly in his own words what the deceased had said [p 168, col 2.]

Ghazi v. *Emperor*, 14 Ind Cas 417, 17 P R. 1911 Cr.; 13 Cr L. J. 225; 48 P. W R. 1911 Cr and *Abdul Jalil* v. *Empress*, 13 P R. 1886 Cr, referred to.

Emperor v. *Balaram Das*, 71 Ind. Cas. 685, 49 C. 358, (1922) A. I. R. (C) 382; 24 Cr. L. J. 221, relied upon

If the witnesses themselves do not repeat in Court, that they had picked out certain men at an identification parade, the evidence of officers who had conducted the parade, that the witnesses had picket out the men, is admissible. [p 169, col. 1]

Emperor v *Balaram Das*, 71 Ind. Cas 635; 49 C. 358; (1922) A I. R (C) 382; 24 Cr. L J 221, relied upon.

Where it is shown that at an identification parade witnesses picked out certain men as having taken part in a riot, but did not state to the officer who conducted the parade what part each man had taken in the riot, the officer's evidence that he had told the witnesses to pick out the persons present in the riot, is quite sufficient and it is not necessary that he should have examined the witnesses as to the part played by each individual [*ibid*]

Lal Singh v. *Emperor*, 91 Ind. Cas. 954; 5 L. 396; (1925) A I. R. (L) 19; 27 Cr L J. 170, distinguished.

Appeal from an order of the Sessions Judge, Sialkot, dated the 18th December 1924.

Mr. *B. R. Puri*, for the Appellants.

Kanwar *Dalip Singh*, Government Advocate, for the Respondent.

ORDER.—(*May 6, 1925*).—The appeals of Ganda Singh son of Khushal Singh and Bhan Singh are accepted and it is ordered that they be set at liberty.

JUDGMENT.—(*May 15, 1925*).—A very serious riot took place on the 12th April 1924 at village Mahar in the Sialkot District in which three men Maula Dad, Imam Din and Nawab son of Umra were killed and four men: Umar Din, Hussain Bakhsh, Nawab son of Bulanda and Bakha were injured: Hussain Bakhsh having two fingers cut off and having lost in consequence the use of both hands. Twenty men were sent up for trial of whom four were discharged by the Committing Magistrate, eight were convicted by the Sessions Judge and eight were acquitted. It is also said that four absconders took part in the riot. Of the men convicted six, Partap Singh, Kartar Singh, Ajab Singh, Ganda Singh son of Jiwan Singh, Amar Singh and Ganda Singh son of Khushal Singh have been sentenced to death. Sharam Singh son of Hawind Singh and Bhan Singh son of Atar Singh have been sentenced to transportation for life. All have appealed and the case is also before us for consideration of the question of the confirmation of the death sentences.

After hearing the arguments addressed to us by the learned Counsel for the accused and the Crown we accepted the appeals of Bhan Singh son of Atar Singh and Ganda Singh son of Khushal Singh finding that the evidence was not sufficient to justify their conviction. After further consideration we have come to the conclusion that although there is a considerable amount of evidence against Sharm Singh and Amar Singh there is a certain element of doubt in their cases also.

In the case of Sharm Singh, Hussain Bakhsh the most important witness, did not identify him at the parade held in Jail though he, subsequently, picked him out in Court, and although he was identified by Nawab son of Bulanda and Bakha, the remaining evidence against him is not sufficient to establish beyond all possibility of doubt that he actually took part in the riot.

The case of Amar Singh is similar: he also was not identified by Hussain Bakhsh in gaol nor by Ahmad Din, and the remaining evidence in his case also is not conclusive.

We acquit both these men.

The facts are that a large "*bhangar* party consisting of some 20 men armed with *chhavis*, *gandasas* and *lathis* and headed, it is said, by Sohan Singh *Zaildar*, who has not been sent up for trial came from the village Bhula to village Mahar. They marched to the house of Maula Dad deceased, where he was sitting with Ahmad Din and Hussain Bakhsh his brothers and Imam Din his cousin. They deliberately picked a quarrel and attacked Hussin Bakhsh first and then assaulted the others and killed and injured them.

The medical evidence shows that Maula Dad who was killed had four incised wounds on his head and six others on his body: Imam Din had two incised wounds on the

head and twelve blows from a *lathi* and was so seriously injured that he could not be carried to the hospital. Nawab son of Umra had three injuries, his leg having been cut right through, his forearm broken and his head fractured. Ahmad Din had 8 injuries, Nawab 13 and Bakha 4. Two of the accused Partab Singh and Kartar Singh were found in jail to have been injured, Kartar Singh having an incised wound on the back of the head and Partap Singh 4 injuries caused by a blunt weapon. Both Counsel for the accused and Counsel for the Crown rely on the fact of these two men having been injured, the latter pointing out that the medical evidence shows that the injuries must have been inflicted at or about the time of the riot and that no satisfactory explanation has been given as to how they were caused, the former urging that there must have been a general *melee* and that it is only fair to presume that it was the members of the village Mahar who began the quarrel.

We will first deal with the general criticisms which have been made on the evidence produced by the prosecution and will then deal with the case of each accused.

The first point and one to which due importance must be attached is that the leader of the *bhangra* party is said to have been Sohan Singh *Zaildar*, who has not been sent up for trial, and Counsel urges with considerable force that it was presumably found in the course of the investigation that he had been falsely implicated because of his prominent position and that this fact must be taken as discrediting the whole of the evidence for the prosecution. We have given due weight to this contention and have treated the evidence with extreme caution throughout.

In addition to the eye-witnesses who have given evidence in Court certain statements were recorded with a view to their being used as dying declarations. These were the statements of Hussain Baksh, Ahmad Din, and Nawab son of Umra. Of these only Nawab son of Umra died and it is only his statement which can be treated or considered as dying declaration. This was recorded by Muhammad Bashir Head Constable, who certified in Court that he had recorded it correctly and that Nawab was in his senses at the time. Counsel contends that inasmuch as Muhammad Bashir did not repeat in his own words what Nawab said to him this statement is inadmissible. In *Ghazi* v. *Emperor* (1) and *Abdul Jalil* v. *Empress* (2) it was laid down that such statement must be proved and this would appear to show that if proved they are admissible. We also find that it has been clearly laid down in *Emperor* v. *Balaram Das* (3) that such a statement is admissible in proof of its own contents and it is unnecessary that the person who recorded it should repeat exactly what was said. In ss. 159 and 160 of the Evidence Act a distinction is drawn between the manner in which a witness may refresh his memory by referring to the writing he has made and the testimony which he can give of facts stated in the document. If it is merely a question of a man refreshing his memory the document itself is not tendered in evidence, and the witness merely gives evidence in the ordinary way after reading what he had written. Section 160 deals with the case where in spite of writing a document the witness has not got specific recollection of the facts therein recorded but is sure that they were correctly recorded. Where this is the case the witness is still entitled to testify to the facts and the document itself is then tendered in evidence. This is what happens in cases such as these and the fact that the witness does not say in so many words that he does not recollect exactly what the witness said, which he naturally cannot do, does not affect admissibility of the evidence which he gives. Following *Emperor* v. *Balaram Das* (3) we find that this evidence is certainly admissible and we take the same view as was taken in *Amir Zaman* v. *Emperor* (4).

The next point on which the Counsel has laid stress is the evidence of identification dealing with the two parades, which were held at village Kalswala and in Jail. At the first of these parades accused Nos. 1—6 were not present, the obvious reason being as found by the learned Sessions Judge, with whom we agree, that it was considered unnecessary to include them in this first parade as they and their names were already known and the parade was not conducted with a view to see which men out of those, who were arrested, could be identified by the witnesses but to see which men out of a large number of

(1) 14 Ind. Cas 417; 17 P. R. 1911 Cr.; 13 Cr. L. J. 225; 48 P W. R. 1911 Cr.
(2) 13 P. R. 1886 Cr.
(3) 71 Ind. Cas. 685; 49 C. 358; (1922) A. I. R. (C.) 382; 24 Cr L. J. 221.
(4) 88 Ind. Cas. 861; 6 L. 199; (1925) A. I. R. (L.) 452; 26 Cr. L. J. 1245.

over 250 the witnesses could pick out as having taken part in the riot. The criticism amounts to this that the witnesses themselves do not in all cases repeat in Court that they picked out certain men, that the evidence on the subject consists of the statements of officers who conducted the parade and who tell us what happened. This, Counsel urges, is secondary or corroborative and not primary evidence and, therefore, by itself has no value. Relying on the same ruling which we have quoted above we find that this evidence is admissible.

A further criticism is that the witnesses are not stated to have told the officer who conducted the parade what part each man took in the riot. This, in our opinion, is unnecessary. It has to be shown that the witnesses knew what they were doing and understood that they were identifying the men who took part in the riot, and this has, in our opinion, been shown to have happened. Sardar Hazara Singh Tahsildar says that he told them to pick out the persons present in the riot. This evidence is quite sufficient and it was unnecessary for him to record at the time or to examine the witnesses as to the part played by each individual. The facts are not the same as those of *Lal Singh* v. *Emperor* (5) on which Counsel relies for there the notes were merely referred to and nothing more and the necessary facts were not established.

The fourth general criticism is that Hussain Bakhsh the man who was seriously injured and who made the First Information Report has given a different statement in Court in the sense that he says that he was so seriously injured that he lost consciousness and did not see all that is contained in First Information Report. This is not of any great importance and we are satisfied that he did not see exactly what part each of the rioters played and that at the time he made his First Information Report he was not able to name all the persons who took part.

We now turn to the cases of the individual accused.

[After discussing evidence against each accused their Lordships concluded:—]

There can, in our opinion, be no question as to sentences and we confirm all the four sentences of death.

S. D. *Sentence confirmed.*

(6) 91 Ind. Cas. 954; 5 L. 396; (1925) A. I. R. (L.) 19; 27 Cr. L. J. 170.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 121 OF 1924.

July 16, 1924.

Present:—Mr. Baker, J. C.

RAHIMBEG—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s 297.—Jury trial—Charge—Omission to read material evidence—Omission to explain accused's right to benefit of doubt—Trial, whether vitiated.

An objection that in [illegible]'s charge to the Jury the Sessions Judge [illegible] material portions of the evidence is not in itself sufficient for the reversal of the verdict of the Jury. In each case it must be a question whether the omission to read the material portion of the evidence was such as to mislead the Jury and the Court of Appeal will not interfere if it has not prejudiced the accused. [p. 169, col. 2, p 170, col. 1]

Emperor v *Appunna Devappa*, 5 Bom L. R 207 and *Empress* v. *Rochia Mohato*, 7 C. 42, 8 C. L. R. 273; 3 Ind. Dec (N s) 577, referred to.

The omission to tell the Jury that the accused is entitled to the benefit of any reasonable doubt is not a misdirection vitiating the trial, though as a matter of practice it is as well to always end the charge with these words. [p 170, col. 2]

Criminal appeal against an order of the Additional District and Sessions Judge, Nagpur.

Mr. *V. N. Herlekar*, for the Appellant.

JUDGMENT.—The appellant has been convicted by the unanimous verdict of the Jury of rape and sentenced to seven years' rigorous imprisonment and a fine of Rs. 100 by the Additional Sessions Judge, Nagpur.

It is contended that the charge is vitiated because the Sessions Judge has not laid the evidence before the Jury and that he misdirected them in certain particulars which are given in the grounds of appeal.

I have read the charge several times and have also read the whole of the evidence. It is to be noted that the evidence is not very lengthy, the witnesses on whom the case depends being the complainant (P. W. No. 1), Ram Narain, (P. W. No. 2), Nathulal, (P. W. No. 7) and the two constables. The learned Pleader for the appellant has referred to some old cases which lay down that the whole of the evidence must be read out to the Jury. That is not the law now. An objection that in delivering his charge to the Jury the Sessions Judge did not read material portions of the evidence is not in itself sufficient for the reversal of the verdict of the Jury. In each case it must be a question whether the omission to read the material portion of the evidence

was such as to mislead the Jury and the Court of Appeal will not interfere, if it has not prejudiced the accused. *Emperor* v. *Appunna Devappa* (1) and *Empress* v. *Rachia Mahato* (2)

The learned Additional Sessions Judge has referred in para. 6 of his charge to the evidence that the present appellant was inside the room with the other two accused at the time the girl was heard crying out, and that one man left the room after P. W. No. 2 went to call the Police. In para. 5, the Judge has called the Jury's attention to the discrepancies in the evidence pointed out by the Pleader for the accused, and asked them whether they are such as to lead to a reasonable conclusion that the statements are not substantially true.

I am, therefore, of opinion, that the Judge put the case fairly before the Jury, though perhaps not so fully as he might have done.

Objection is taken to certain statements made by the Judge in his charge They are marked (*a*), (1) in the memorandum of appeal.

Statement (*a*) regarding the First Information Report is perfectly unobjectionable. Statement (*b*) is a statement of evidence appearing on the record. So is statement (*c*). The fact that this statement was made in cross-examination, not in examination-in-chief, was not brought to the notice of the Jury, but as the arguments for the defence had been heard that day and the evidence was fresh in the minds of the Jury this is not a sufficient ground for interference with the verdict.

Statement (*d*) is not only not a misdirection but a statement which the Judge was bound to make to the Jury. It was his duty to ask the Jury to consider, whether if the girl was ravished by two men, the man other than Sarjerao was the present accused. I do not understand how this can be made a ground of appeal.

Statement (*e*) consists of two parts. The first is a statement of a well-known fact and the Jury was asked to consider the medical evidence in the light of that fact.

The second portion is a statement of a fact appearing in the evidence of Shaikh Juman, constable, (P. W. No. 9). The Judge drew the attention of the Jury to the fact that the bundle of cotton on which the girl is alleged to have been lying was not produced, and to the question whether the girl's *lugda* was under her person at the time of the commission of the offence.

The last statement is that lawyers usually describe such evidence as has been given in this case as overwhelming evidence against the accused. It would have been perhaps better if the Sessions Judge had not expressed his opinion of the evidence in so forcible a manner, but in the very next sentence he invites the Jury to find their own opinion on the facts as to which evidence has been given.

The omission to tell the Jury that the accused is entitled to the benefit of any reasonable doubt is not a misdirection vitiating the trial, though, as a matter of practice, it is as well to always end the charge with these words.

After considering all the statements to which exception has been taken, I do not think there was any misdirection requiring the interference of this Court. The sentence, though severe, is not out of proportion to the heinous nature of the offence in this particular case, which was of a peculiarly revolting character, the girl being confined in a room in a *serai* and ravished by two men in succession while the *chaukidar* of the *serai* stood by with a cane threatening to beat her if she cried for help.

The appeal is consequently dismissed without notice to the Crown.

N. H. *Appeal dismissed.*

(1) 5 Bom. L. R. 207.

(2) 7 C. 42; 8 C. L. R. 273; 3 Ind. Dec. (N s) 577.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 379 OF 1924.

May 23, 1924.

Present:—Mr. Justice Campbell.

RAM CHARAN AND ANOTHER—ACCUSED – PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 188—Offence committed in Native State by British Indian subject—Trial in British India—Certificate of Political Agent, necessity of.

Where the offence of kidnapping has been committed by British Indian subjects in a Native State it is not triable in British India without the certificate of the Political Agent. [p. 172, col. 1]

Queen-Empress v. *Mastana*, 11 P. R. 1893 Cr., followed.

Queen-Empress v. *Katharperumal*, 13 M. 423; 2 Weir

147; 4 Ind. Dec. (N. S.) 1007 and *Queen-Empress* v. *Ram Sundar*, 19 A. 109; A. W. N. (1896) 191; 9 Ind. Dec. (N. S.) 71, referred to.

The defect of the absence of a certificate is not curable by the subsequent production of the certificate. [*ibid.*]

Case reported by the Additional Sessions Judge, Gujranwala at Sialkot, with his No. 55-J of 22nd February 1924.

FACTS appear from the following report of the Additional Sessions Judge:—The accused on being charged under s. 363, Indian Penal Code, by *Chaudhri* Muhammad Ismail Khan, exercising the powers of a Magistrate of the First Class in the Gujranwala District, were committed to this Court by order, dated 9th of January 1924, to stand their trial in this Court on the said charge.

* * * * *

Both Ram Charan and *Musammat* Gopi are Native Indian subjects of His Majesty; they are charged with having kidnapped the two minors from Jatauli Kadim which is situate within the Bharatpur State which is without the limits of British India as that term is defined in the General Clauses Act, X of 1897. An offence under s. 363, Indian Penal Code, is not a continuing one, and, therefore, the offence, if committed, was committed in Jatauli in the Bharatpur State. Under s. 188 of the Cr. P. C. the accused Ram Charan and *Musammat* Gopi as Native Indian subjects of His Majesty having, it is alleged, committed an offence without the limits of British India, *viz.*, in the Bharatpur State, may be dealt with in respect of such offence as if it had been committed in the place where the accused are found. The accused Ram Charan was "found" in the Bulandshahr Jail where he was and is serving a term of rigorous imprisonment in December 1922.

Musammat Gopi was "found" and arrested on the alleged charge in Aligarh in November or December 1922. In short both the accused were found in British India but outside the Punjab in the United Provinces, and could have been dealt with in that Province only. But a condition precedent to this dealing with the said accused is laid down by the proviso to the said section, and this prohibits any inquiry into the said charge of the offence of kidnapping without a certificate from the Political Agent of Bharatpur State that the charges are to be enquired into in British India. The record of the case does not show that any such certificate has been obtained, and a reply received to the enquiry sent to the District Magistrate, Gujranwala, confirms this. Therefore, the Magistrate at Gujranwala had no jurisdiction to enquire into the said charge for the following reasons:—

The offence was committed in the Bharatpur State and is only triable at the place where the accused are "found," *i. e.*, either in the Bulandshahr or Aligarh Districts as may be determined by the Allahabad High Court on a certificate given by the Political Agent of the Bharatpur State as required by s. 188 of the Cr. P. C. The provisions of sub-s. (4) of s. 181, Cr. P. C., cannot be invoked on the ground that the minors were conveyed, concealed or detained in the Gujranwala District as, in my opinion, this sub-section does not apply to any offence under s. 363, Indian Penal Code, and, secondly, the sub-section only provides an alternative *venue* when the offence is committed in British India. Section 188 completely ousts any jurisdiction exercisable under sub-s (4) when the offence is committed outside British India.

The authorities dealing with the application of s. 188 are:—*Shamir Khan* v. *Empress* (1), *Roda* v. *Empress* (2) and *Queen-Empress* v. *Mastana* (3).

The one applicable to the present case is *Queen-Empress* v. *Mastana* (3), as the defect has not only been noticed by this Court, but attention has also been drawn to it by the learned Public Prosecutor.

In the other two cases cited objection was never taken to the want of jurisdiction, and it was, therefore, held that this only amounted to an irregularity and was cured by the provisions of s. 537 of Cr. P. C.

For the above reasons and following *Queen Empress* v. *Mastana* (3) I am of opinion that the accused Ram Charan and *Musammat* Gopi have not been validly committed to this Court, and I submit the record for the orders of the Hon'ble High Court with a recommendation that the commitment be quashed under s. 215, Cr. P. C.

The other two cases under ss. 420 and 368, Indian Penal Code, have been tried at the Sessions held on the 18th and 19th February 1924. No conflicting findings can possibly result from this course, and it was really unnecessary to have committed the two cases under ss. 363 and 368.

(1) 35 P. R. 1889 Cr.
(2) 30 P. R. 1889 Cr.

Mr *Jai Lal*, Government Advocate, for the Respondent.

JUDGMENT.—The accused persons are neither present nor represented before me, and I express no opinion upon the suggestions of the learned Sessions Judge that s. 181 (4), Cr. P. C., does not apply to any offence under s. 363 of the Indian Penal Code and that s. 188 completely ousts any jurisdiction exerciseable under s. 181 (4) when the offence is committed outside British India. On the question whether the commitment must be set aside, because the Committing Magistrate has held an enquiry without a certificate of the Political Agent obtained under s 188, the ruling of the Chief Court reported as *Queen-Empress* v. *Mastana* (3) appears to me to be conclusive. The learned Government Advocate, who has appeared, at first contended on the strength of the last few words of the judgment that in that case a specific objection to the commitment proceedings had been raised on behalf of the accused and he was disposed to argue that on the analogy of *Shahmir Khan* v. *Empress* (1) which was affirmed by a Full Bench in *Fateh Din* v. *Emperor* (4) the defect of the absence of a certificate would be curable by the subsequent production of a certificate for which he was prepared to arrange. The referring order, however, of Mr Justice Maude in *Queen-Empress* v *Mastana* (3), makes it clear that the objection to the legality of the commitment order was raised by the Sessions Judge only and not by any of the accused. The case, therefore, was exactly parallel with the present case, and the two rulings approved in the decision, namely, *Queen-Empress* v. *Katharperumal* (5) and *Queen-Empress* v. *Ram Sundar* (6) held definitely that in such circumstances as the present the enquiry held by the Magistrate and the commitment order were wholly void.

Acting under s. 215, Cr. P. C., I quash the commitment.

K. S. D *Commitment quashed.*

(3) 11 P. R. 1899 Cr.
(4) 4 P. R. 1902 Cr; 21 P. L. R. 1902. (F. B.)
(5) 13 M. 423; 2 Weir. 147; 4 Ind. Dec. (N. S.) 1007.
(6) 19 A. 109; A. W. N. (1896) 191; 9 Ind. Dec. (N. S.) 71.

PATNA HIGH COURT.

CRIMINAL REVISION No. 413 OF 1923.
December 20, 1923.
Present:—Mr. Justice Adami and Mr. Justice Foster.

UTTIM SINGH—PETITIONER
versus
JUDHAN RAI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145—Dispute concerning immoveable property—Arbitration, reference to, validity of—Award concerning future possession, whether can be taken into consideration—Order relating to property not referred to in preliminary order, validity of.

Under s. 145 of the Cr. P. C. it is for the Court to consider which of the parties was in possession of the property in dispute at the date of the proceedings or, in some cases, within two months previous to the date of the proceedings. The scheme of the enquiry is retrospective and not prospective. There might be certain circumstances in which the parties may agree that the Court should refer the matter in dispute to arbitration for the purpose of deciding the question as to who was in actual possession at the time of the proceedings, but the question as to future possession in such a proceeding cannot be referred to arbitration. The law does not allow delegation of the jurisdiction of the Court under s. 145 to arbitrators. The utmost that the Code allows in a proceeding under s 145 is that the Court may direct a local enquiry and bring the enquiry report on the record as evidence. [p. 173, cols. 1 & 2.]

If, however, the Magistrate has before him clear and undeniable evidence that there is no further likelihood of the breach of peace and that the parties have come to a settlement of their dispute, the Magistrate must drop the proceedings In such a case a compromise between the parties may be taken by the Magistrate as evidence for an order to be passed under cl. (5) of s. 145 of the Cr. P. C., but the compromise cannot possibly be made the basis of an order under cl. 6 of the section. [p. 173, col 2.]

A Magistrate has no jurisdiction to pass an order under s. 145 of the Cr P. C in respect of property which was not referred to in the initiatory proceedings. [*ibid.*]

Criminal revision from an order of the Sub-Divisional Officer, Sitamarhi, dated the 15th February 1923.

FACTS.—In a proceeding under s. 145, Cr. P. C., after the parties had filed their written statements, it was agreed that the matter should be referred to arbitration. The award, which related to future possession of the parties, was accepted by the Court and the dispute decided accordingly.

Mr. *Bhagwan Prasad*, for the Petitioner.

Mr. *Gour Chandra Pal*, for the Opposite Party.

JUDGMENT.

Foster, J.—[After stating the facts, his Lordship proceeded as follows:—]

The main question with which this revision is concerned is whether a reference to arbitration, such as was made in this case,

can be made the basis of an order under s. 145. It appears to me that the scheme of the section is against such a proposition. As the wording of the section goes, it is for the Court to consider who was in possession at the date of the proceedings or (in some cases) within two months previous to the date of the proceedings. So the scheme of the enquiry is retrospective and not prospective. There might conceivably be certain instances in which the parties have agreed that the Court should refer the matter in dispute to arbitration for the purpose of deciding the question as to who is in actual possession at the time of the proceedings. Apparently such a procedure has not been condemned. In the case of *Taramani Chaudhurani* v. *Gyanendra Mohan Chaudhuri* (1) the question put to the arbitrators was : who was in possession of the land in dispute? As regards the case of *Haldhar Singh* v. *Bulaki Singh* (2) which has been quoted by the opposite party, I am unable to find from the report of that case whether the arbitrators' report was as to actual possession at the moment or as to future possession under their award. In the present case it is obvious that this distinction is important, because in the order of the 15th February 1923, the Sub-Divisional Officer states that the lands "will be divided amongst the parties." So the order passed by the Sub-Divisional Officer on the arbitration award was prospective and not retrospective. This appears to me to be an impossible foundation for the formal order which, in the Cr. P. C., which was in force before the 1st of September, 1923, was formulated in Sch. V (XXII). In that formal order the Magistrate certifies that he is satisfied without reference to the merits of the claim of either of the said parties to the legal right of possession that the claim of actual possession by one of the said parties is true.

There are decided cases in which the delegation of the jurisdiction of the Court, under s. 145, to arbitrators has been condemned. In the case of *Banwari Lal Mukerjee* v. *Hriday Chakravarti* (3) this procedure was condemned on the ground that the law does not allow delegation. The utmost that the Code allows in a proceeding under s. 145 is that the Court may direct a local enquiry and bring the enquiry report on the record as evidence. In the case *Hamidul Huque* v. *Sheikh Atait Hussain* (4) the procedure was also condemned on the ground that it was not in accordance with the specific directions given in s. 145. An analogous case to this, bearing out the same principle, is to be found in case of *Sadhu Biswas* v. *Mahammad Ali Biswas* (5), where a compromise was filed in a proceeding under s. 145. The importance of this last quoted ruling is that it has some bearing on the next matter which I propose to discuss; that if the Magistrate has before him clear and undeniable evidence that there is no more likelihood of a breach of the peace and that the parties have come to a settlement of their disputes, it is obvious that the Magistrate must drop the proceedings. In this last case it has been laid down that a compromise can only be taken by the Magistrate as evidence for an order to be passed under cl. (5) of s. 145 and cannot possibly be made the basis of an order passed under cl. (6). That decision appears to me to govern any case in which an arbitration award is before the Court and where that arbitration refers not to existing and past possession but to future possession after division of the property or alteration of the existing conditions.

There is only one point remaining. It is admitted by the opposite party that the proceedings were initiated in respect of 39 *bighas* and odd and that the final order that purports to have been passed under s. 145 has reference to 82 *bighas*. It is obvious that the Magistrate had no jurisdiction to pass such order in respect of land which was not referred to in the initiatory proceedings.

For these reasons I would set aside the order of the Sub-Divisional Officer on the ground that it is an order which he had no legal authority to pass.

Adami, J.—I agree.

Z. K. *Order set aside.*

(1) 7 C. W. N. 461.
(2) 44 Ind. Cas. 122; 3 P. L. J. 248; 4 P. L. W. 104; 19 Cr. L. J. 266.
(3) 32 C. 552; 2 Cr. L. J. 347; 1 C. L. J. 432.
(4) 37 Ind. Cas. 513; 2 P. L. J. 81; 1 P. L. W. 812; 18 Cr. L. J 141.
(5) 9 Ind. Cas. 167; 15 C. W. N. 568; 12 Cr. L. J. 32.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 77 OF 1925.

June 24, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Panton.

BHAGIRATHI CHOWDHURY AND OTHERS —APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s 162—Statement made to Police, whether admissible—Map containing hearsay matter, whether admissible.

In the course of a Sessions trial the Investigating Sub-Inspector of Police, when examined as a prosecution witness, was asked whether he had during the [illegible] examined any witnesses on behalf of the accused. He stated that he had examined certain witnesses but that they had denied their presence at the occurrence. One of the persons named by the Sub-Inspector had been summoned by the accused as a defence witness.

Held, that the statement of the Sub-Inspector was not admissible in evidence having regard to the provisions of s. 162 of the Cr. P. C [p 175, col. 1]

A person who makes a map in a criminal case ought not to put upon it anything more than what he sees himself. Particulars derived from witnesses examined on the spot should not be noted on the body of the map but on a separate sheet of paper annexed to the map as an index thereto. [*ibid.*]

Such particulars are hearsay evidence and are not admissible. Where the map is prepared by a Police Officer, such particulars are also inadmissible under s. 162 of the Cr. P. C. [*ibid*]

Criminal appeal against an order of the Sessions Judge, Rajshahi, dated the 6th December 1924.

Babus *Debendra Narain Bhattacharjee* and *Lalit Mohan Sanyal*, for the Appellants.

Mr. *Khondkar* (Deputy Legal Remembrancer), for the Crown.

Babu *Khirode Lal Sen*, for the Complainant.

JUDGMENT.

Suhrawardy, J.—This appeal is by Bhagirathi Chowdhury and four others who have been convicted in accordance with the majority verdict of the Jury by the Sessions Judge of Rajshahi. The first accused has been convicted under ss. 147 and 325, Indian Penal Code, and sentenced under s. 325 to five years' rigorous imprisonment, no separate sentence having been passed under s. 147. The other four accused persons have been convicted under ss. 325/149, Indian Penal Code, and sentenced to three years' rigorous imprisonment.

The riot alleged to have taken place was over a piece of land, in course of which, it is said, one Mir Panchu was beaten to death. Several objections have been taken on behalf of the accused to the address by the Judge to the Jury; but it is sufficient to refer to two of these, as in our opinion, the others are not important.

The first objection is that certain statements have been admitted by the learned Sessions Judge which are inadmissible in evidence. In the course of the examination of Ananta Prosad Das (Sub Inspector of Police) he was asked in examination-in-chief whether he examined during the course of the investigation any witness on behalf of the accused and he said that he had examined only two witnesses Bartu Chowdhury and Daulot Ghose who were produced before him and both of them stated that they were not present at the occurrence. This, it is said, is in contravention of the provisions of s. 162, Cr. P. C. That section says that no statement made by any person to a Police Officer in the course of an investigation . . . . shall be used for any purpose at any enquiry or trial . . . . It is not clear why the witness was made to make this statement; but it is suggested that one of the persons named by him at least, namely, Daulot Ghose, was a witness, cited by the defence and, therefore, in anticipation of the evidence which might be given by Daulot Ghose, this statement was made by the Inspector. In my opinion this statement by the Sub-Inspector is not admissible. Section 162, Cr. P. C., is clear enough to exclude any statement made by any person and directs that such statement shall not be used for any purpose. The way in which this evidence has been brought out is objectionable in more ways than one. It is in direct contravention of the above provision of law and it is not justified by any other provision of law which makes evidence contradicting possible evidence of a possible witness admissible against the accused. The mere fact that one of the persons so named by the Sub-Inspector was cited by the defence did not justify the prosecution in getting out a statement made by him in anticipation of what he might say. This statement by the Sub-Inspector in the hearing of the Jury must have apparently prejudiced the case for the defence and left an impression in the mind of the Jury that the accused produced witnesses in support of their case before the Sub-Inspector and both of them denied any knowledge of the occurrence. This statement is not, therefore, admissible.

The second ground on which the legality of the trial is assailed is that the map prepared by the Sub-Inspector and placed before the Jury contains statements of witnesses and hence the map should not have been placed before the Jury with those statements thereon. There are two very important endorsements on the map. The first is against the point marked with an arrow and runs thus: "The deceased and Luddi Sheikh Peadas stood here and the deceased received *lathi* blow from Bhagirathi *chowkidar* accused while standing here." In another part of the map certain dotted lines were put and the remark against them is, "showing the route taken by the deceased on being chased by the accused persons." These statements were not of the Sub-Inspector from his personal knowledge but from what he had heard from other people at the time of the investigation. Such statements are, therefore, inadmissible under s. 162, Cr. P. C., and as hearsay evidence. The impropriety of placing maps before the Jury containing statements of witnesses or of information received by the person preparing the map from other persons has been recently pointed out in several cases. In *Emperor* v. *Abinash Chandra Bose* (1), the learned Chief Justice has fully dealt with this matter and it has been laid down that " a person who makes a map in a criminal case ought not to put upon it anything more than what he sees himself. Particulars derived from witnesses examined on the spot should not be noted on the body of the map but on a separate sheet of paper annexed to the map as an index thereto." The direction given here may be inconvenient but the law seems to be clear. The learned Chief Justice in a very recent case to which my learned brother was party [*Emperor* v. *Mofizel Peada* (2) decided on the 1st May 1925) referred to a map like the one in the present case and remarked that the map placed before the Jury was a clear instance of what should not be done, and observed as follows:—"In my judgment, the map in its present state ought not to have been allowed to be placed before the Jury. If it was necessary for the map to be placed before the Jury, the proper thing to be done was to have a clean copy made with these entries omitted so that the Jury would have a map before them which would not have prejudiced their mind in any way." In my judgment apart from the instruction in the Police Regulations and the High Court Circular Orders, it is highly prejudicial in the interest of justice to allow statements which may or may not be admissible in evidence to be introduced in a case by indirect means. For instance, the map prepared by the Sub-Inspector from certain information received from another person introduces a statement made by that person and it is possible that the person who gave the information to the Sub-Inspector was not himself competent to make the statement his information having been derived from others not before the Court. Apart from s. 162, Cr. P. C., such statements under the general law ought not to be made to go in in the shape of entries in maps. The trial accordingly has been vitiated by the introduction of these pieces of evidence and, in my opinion, the conviction cannot stand.

In the result the conviction of and the sentences passed upon the appellants should be set aside and a re-trial ordered. The appellants Nos. 2 to 5 will remain on bail and the appellant No. 1 in custody until further orders by the Magistrate.

Panton, J.—I agree.

Z. K. *Conviction set aside.*

(1) 84 Ind. Cas. 654; 52 C. 172; 28 C. W. N. 995; (1924) A. I R (C.) 1029; 26 Cr. L J. 350.

(2) 89 Ind. Cas. 242; 29 C. W. N. 842; (1925) A. I. R. (C.) 909; 26 Cr. L. J. 1298.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 227 OF 1925.

April 6, 1925.

Present :—Mr. Justice Jai Lal.

PALI AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal trial—Practice—Conviction, whether can be based on interested and contradictory evidence.

It is not safe to base the conviction of an accused person on the evidence of interested witnesses who were not mentioned in the First Information Report as eye-witnesses of the occurrence and whose evidence is contradicted by other witnesses produced on behalf of the prosecution. [p. 176, col. 2.]

Criminal appeal from an order of the Magistrate First Class, exercising enhanced powers under s. 30, Cr. P. C., Ferozepur, dated the 7th February 1925.

Dr. *Nand Lal*, for the Appellants.

Mr. *C. H. Cardon Noad*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—Pali, Chanan and Sarwan, sons of Nikka Jat, have been convict-

ed, the first named under s. 324/109 and the last two under s. 304, Part II of the Indian Penal Code, and have been sentenced to one and six years' rigorous imprisonment respectively. They have all appealed to this Court and I have heard Dr. Nand Lal on their behalf and the Assistant Legal Remembrancer on behalf of the Crown.

The case for the prosecution is that Nikka father of the convicts owed some money to one Kishen Singh on a number of deeds. On the 13th of November 1924 he consolidated all the previous loans into one and effected a mortgage of his property in favour of Kishen Singh and had the mortgage attested before the *Naib-Tahsildar*. The former mortgage deeds had to be returned to the [illegible] and the *Naib-Tahsildar* ordered Ram Rattan a *Patwari* to arrange for the return of the deeds. On the 14th of December the parties came to the *Patwari*, but there was some difference of opinion as to the manner in which the former deeds had to be dealt with. The result was that the parties quarrelled and the quarrel between the parties led to the *Patwari* being abused by the relations of Nikka. The *Patwari* left the place on a pony in order to report the matter to the *Naib-Tahsildar* who was encamping in a village a few miles away. During the absence of the *Patwari* his brother Durga Das passed in front of the house of Nikka and told the three appellants that his brother had gone to make a report to the *Naib-Tahsildar* and that they would be ruined. On this all three appellants are alleged to have come out of their house armed with *dangs*. Sarwan and Chanan beat him. Durga Das fell down. Pali was going to strike him but on the bye-standers asking him to desist and finding that Durga Das had fallen on the ground he did not actually strike him. Information was immediately conveyed to the *Patwari* of this incident. He came back soon after the assault. The deceased died as a result of the injuries received the next morning.

Sarwan Singh admits his presence, but says that he was abused by the deceased who along with another person attacked him. He is unable to explain how the deceased received these injuries. He denies the presence of his two brothers. Pali and Chanan both deny their presence at the fight.

The First Information Report was made by the *Patwari* Ram Rattan, who has appeared as P. W. No. 1. This report was made after the death of the deceased, and, therefore, at a time when the informant had presumably ascertained the full facts of the incident. There two Nathus and a Pohu were mentioned as eye-witnesses. At the trial Amin Chand, Sucha Singh and Pohu were produced as eye-witnesses. Pohu does not support the prosecution. On the other hand he distinctly contradicts the version put forward by the prosecution. Amin Chand is a son of Ram Rattan *Patwari*, and, therefore, a nephew of the deceased. Sucha Singh is a son of Kishen Singh the mortgagee. Both these witnesses are obviously interested. Kishen Singh states that when information of the incident was first conveyed to the *Patwari* by Bainka, his son, the names of Chanan and Sarwan alone were mentioned as the assailants. In my opinion it will not be safe to uphold the conviction of Chanan and Pali on the evidence of Sucha and Amin Chand, specially considering that they were not, mentioned in the First Information Report as eye-witnesses and that their evidence is contradicted by other witnesses produced on behalf of the prosecution.

The case of Sarwan, however, stands on a different footing. He admits his presence and some sort of quarrel with the deceased, but makes an obviously absurd statement that he does not know how the deceased received his injuries. The evidence produced on his behalf is unreliable and is open to the same criticism as the statement of Sarwan. In my opinion Sarwan must be held responsible for the injuries caused to the deceased. The learned Counsel on behalf of Sarwan claimed the benefit of a right of private defence on behalf of Sarwan. In my opinion no facts entitling the convict to any such right have been established. It was then contended that in any case Sarwan acted under grave and sudden provocation There is no force in this contention also. The use of the language imputed to Durga Das does not in any sense amount to grave and sudden provocation.

I accept the appeals of Pali and Chanan and acquitting them order their release forthwith. The conviction and sentence of Sarwan are confirmed and his appeal is dismissed.

Z. K. *Appeal partly accepted.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1254 OF 1922.

June 24, 1925.

Present:—Mr. Justice Adami and Mr. Justice Sen.

Musammat BATISA KUER—PLAINTIFF—APPELLANT

versus

RAJA RAM PANDEY AND OTHERS —DEFENDANTS—RESPONDENTS.

Pleadings—Adverse possession, plea of Appeal—Plea, whether can be taken—Limitation, commencement of, during lifetime of full owner—Death of full owner—Succession by limited owner—Suspension of limitation.

Ordinarily a plea of adverse possession should be distinctly raised in the pleadings and should also form the subject-matter of an issue, but a party may be allowed to succeed on a title by adverse possession pleaded for the first time in the Court of Appeal, if such a case arises on facts stated in the pleadings and the opposite party is not taken by surprise. [p 178, col. 1.]

Once limitation has commenced to run in the lifetime of a full owner it is not suspended by reason of the fact that the full owner dies and is succeeded by a limited owner. [*ibid.*]

Appeal against a decision of the Additional Subordinate Judge, Saran, dated the 18th August 1922, reversing that of the Additional Munsif, Siwan, dated the 26th November 1921.

Mr. *N. N. Sinha*, for the Appellant.

Mr. *H. N. Prasad*, for the Respondents.

JUDGMENT.

Sen, J.—This appeal arises out of a suit by the plaintiff-appellant for a declaration that a deed of *zerpeshgi* dated the 20th December 1907 executed by *Musammat* Inderbaso in favour of the defendant No. 1 was fraudulent and collusive and without legal necessity; that the said mortgagor had no right or title to execute the *zerpeshgi* deed and that, therefore, it was not operative on plaintiff who had inherited the land in dispute from her father Sadhu Dubey.

The case of the plaintiff was that one Sheo Dubey had two sons Nakched and Chulhai; that Nakched had a son Dukhi Dubey and Chulhai had a son Sadhu Dubey; that Dukhi and Sadhu were joint; that Dukhi died and Sadhu came into the family property by survivorship, that after Sadhu's death his widow *Musammat* Jharo succeeded her and that after *Musammat* Jharo the plaintiff inherited the property in suit from her father. The plaintiff alleged that Inderbaso Kuer, the widow of Dukhi, illegally and fraudulently executed a deed of *zerpeshgi* dated the 20th December 1907 in favour of her brother, the defendant No. 1, who in turn assigned the mortgage in favour of defendant No. 2. The case for the defence was that the plaintiff was not the daughter of Sadhu and Jharo; that Dukhi and Sadhu were not joint when Dukhi died that upon Dukhi's death Inderbaso Kuer succeeded to his property and upon her death her daughter Sona Kuer succeeded. The defendant No. 1 alleged that he was the daughter's son of Inderbaso, that is, the son of Sona Kuer and not the brother of Inderbaso Kuer, as alleged by the plaintiff. The learned Munsif held that the plaintiff was the daughter of Sadhu Dubey; that the *zerpeshgi* deed was fraudulent and collusive; that Dukhi died whilst living joint with Sadhu and that defendant No. 1 is the brother of Inderbaso; and he decreed the suit. On appeal, the learned Subordinate Judge affirmed the finding that the plaintiff was the daughter of Sadhu; but he held that, even assuming that Inderbaso, the mortgagor of defendant No. 1, had no title to the land in suit, the defendant No. 1 having got possession of the land in 1907 on the basis of his *zerpeshgi* and having continued in possession for over 12 years his title was perfected by adverse possession. He, therefore, allowed the appeal and dismissed the suit.

It is contended before us, first, that the question of adverse possession was not in issue and that the Court of Appeal was not competent to raise it or pass his decision on it. Secondly, that the question whether Dukhi or Sadhu were joint or separate was not gone into by the Court of Appeal; that he should have gone into the question fully.

There is no doubt that title by adverse possession does not appear to have been raised in the pleadings, but the principle has often been laid down that a party may be allowed to succeed on a title by adverse possession pleaded for the first time in the Court of Appeal if such a case arises on facts stated in the pleadings and the party is not taken by surprise. The learned Subordinate Judge bases his decision on the following facts. He finds that as early as 1898 in the Cadastral Survey Inderbaso Kuer's name is recorded in the survey *khatian*, and he observes that this entry must be regarded as a presumptive piece of evidence of possession of *Musammat* Inderbaso. He finds that in 1901 there was a *zerpeshgi* in favour of defendant No. 1

granted by Inderbaso Kuer; he finds that in 1907 the *zerpeshgi* in suit was executed; that the dues of the previous bond were satisfied out of the consideration of the disputed *zerpeshgi* in favour of defendant No. 1. These two old registered bonds, he observes, executed so long ago as 1901 and 1907 show that *Musammat* Inderbaso exercised acts of possession over the disputed land. He also records it as an admitted fact that Sadhu, the father of the plaintiff-appellant, "died seven or eight years ago," and that the defendant's possession over the land in suit commenced during Sadhu's lifetime, and further that admittedly he is still in possession. He also states that the witnesses of the plaintiff had to admit that plaintiff never got possession of the land in suit; that in fact not a single witness examined by the plaintiff spoke a word about the possession of the plaintiff or her predecessor Sadhu over the land in suit. It is also found that at the Revisional Survey of 1919, the name of defendant No. 1 was entered as being in possession as *zerpeshgidar* of Inderbaso. Now most of the material facts above mentioned were stated in the pleadings and evidence was gone into in detail on all the points. On the principle laid down in the case of *Lilabati Misrain* v. *Bishen Chobey* (1) the learned Subordinate Judge rightly comes to the conclusion that limitation having once commenced to run in the lifetime of a full owner cannot be taken to be suspended if he dies and is succeeded by a limited owner. Upon the facts found and upon the facts appearing in the pleadings I am inclined to think that the finding as to adverse possession is well-sustainable. Ordinarily the principle, no doubt, holds good that adverse possession should be distinctly raised in the pleadings and should also form the subject-matter of an issue, but where the fact is so clear and unmistakable that the plaintiff has never been in possession of the land claimed for nearly 22 years and where, on the other hand, possession is exercised adversely to him as found in the present case, I see no reason for interference.

The appeal is dismissed with costs.

Adami, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 6 O. L. J. 621 at p. 635

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 80 OF 1925.

May 20, 1925.

Present:—Mr. Justice Zafar Ali.

BARKAT AND OTHERS—DEFENDANTS—APPELLANTS

versus

RELU MAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 135 - Mortgage with possession- Suit by mortgagee to recover possession—Limitation, commencement of—Submersion of land, effect of.

In the case of a mortgage with possession the mortgagor is liable to deliver possession of the mortgaged property to the mortgagee on the date of the mortgage, but is not bound to do so until the [illegible] asks for or seeks to enforce his right to possession. If the latter fails to do so, the mortgagor's possession cannot be said to be that of a trespasser or wrong-doer. [p. 179, col 1]

The mortgagor's right to possession, however, determines on the date of the mortgage, and under Art 135 of Sch I to the Limitation Act, a suit by the mortgagee to recover possession of the mortgaged property must be brought within twelve years of such date. Where, after such date the land mortgaged becomes submerged and is taken possession of by the mortgagor on its re-appearance, the mortgagor will be deemed to have remained in constructive possession thereof during the period of submersion and time will be deemed to have continued to run against the mortgagee during the period of submersion. In any case, time having begun to run against the mortgagee from the date of the mortgage, the subsequent submersion of the land would not have the effect of stopping it. [*ibid*]

Miscellaneous second appeal from an order of the District Judge, Hoshiarpur, dated the 13th October 1924, reversing that of the Subordinate Judge, Second Class, Hoshiarpur, dated the 15th January 1924.

Sheikh *Niaz Mohammad*, for the Appellants.

Mr. *N. C. Pandit* and Lala *Hargopal*, for the Respondents.

JUDGMENT.—The only question for determination in this second appeal is whether the plaintiffs' suit for possession of the land mortgaged to them was barred by time or not. The Trial Court decreed the suit in respect of that portion of the land which had been in possession of a prior mortgagee and was redeemed by the plaintiffs in 1921, but dismissed the suit with regard to the rest on the ground that it was barred by time. On appeal by the plaintiffs, the learned District Judge came to the conclusion that the suit was within time in respect of the rest also by virtue of a certain condition embodied in the mortgage deed. It is contended on behalf of

the defendants-appellants that the said condition did not warrant the conclusion drawn by the learned District Judge.

The facts, that need be stated here for the purpose of the disposing of this appeal, are briefly as below:—

The land is situated on the banks of the river Sutlej and is liable to submersion under water, but, as found by the learned District Judge, the whole of the land mortgaged was out of water at the time of the mortgage, that is, on the 25th June 1894, which is the date of the registered deed of mortgage. The mortgagor's right to possession, therefore, determined on that very date as the mortgage was with possession, and under Art. 135 of the Limitation Act, the suit for possession should have been brought within 12 years from that date. Limitation began to run against the mortgagee from the said date, but a considerable portion of the land remained submerged under water from 1903 04 to 1911-12, and the learned Counsel for the plaintiffs-respondents contends that the mortgagee should be deemed to have been in constructive possession of the land during this period, because he argues, the mortgagors were trespassers from the date of the mortgage and their possession as trespassers and wrong-doers should be deemed to have terminated with the submersion of the land. But the learned Counsel could cite no authority in support of his proposition that in case of every mortgage with possession, the mortgagor becomes a trespasser and wrong-doer if he remains in possession after the mortgage. The mortgagor is, no doubt, liable to deliver possession to the mortgagee, but is not bound to do so until the mortgagee asks for or seeks to enforce his right to possession. If the latter fails to do so, the mortgagor's possession cannot be said to be that of a trespasser or wrong-doer.

As the time began to run from the date of the mortgage, the subsequent submersion of the land could not have had the effect of stopping it. Further the mortgagor, who was in actual possession of the land before submersion, should be deemed to have remained in constructive possession thereof after submersion as evidenced by his having taken actual possession when the land emerged from the river. It cannot be said that the mortgagee, who had never obtained possession, remained in constructive possession so long as the land was under the water.

The condition which, according to the learned District Judge, gave the mortgagee a fresh cause of action for suing for possession every time that the land emerged after submersion runs as follows:—

"*Jis qadar arazi kul khata se khwah qabza murtahin, khwah ba qabza muzhiran (rahinan) burd ho jawe to us men se bawajih hissa marhuna ke zimawari murtahinan ke samjhi jawegi, aur jis qadar arazi baramad hogi us men se bhi murtahin bawajih hissa marhuna ke zamin lene ka mustahiq hoga.*"

Now, the property mortgaged was only a share in an undivided joint holding and, therefore, this condition gave expression to the ordinary rights and liabilities of all the co sharers following each submersion or re-appearance of the land. The condition does not create any new right, that is, a right, which the mortgagee would not have been entitled to but for the stipulation in question. If the mortgagee had once taken possession, he would have remained in constructive possession after the submersion of the land and been entitled as matter of course, to take possession of it on its re-appearance. Thus the condition does not create any right which the mortgagee had not already got as such. The mortgagee's cause of action arose when the mortgagor's right of possession determined, and as that right had once determined, no fresh cause of action could be said to have arisen after that. The lower Appellate Court's interpretation of the condition would lead to the conclusion that a fresh cause of action would arise even if the first submersion should have taken place more than 12 years after the mortgage.

In view of what has been stated above I accept the appeal with costs and, reversing the order of the lower Appellate Court, restore that of the Trial Court.

Z. K. *Appeal accepted.*

PATNA HIGH COURT.

CIVIL REVISION NOS. 381 AND 382 OF 1923.
March 13, 1925.
Present:—Justice Sir Jwala Prasad, KT.
LAURENTIUS EKKA—PETITIONER
versus
DHUKI KOERI—OPPOSITE PARTY.
Civil Procedure Code (Act V of 1908), O. III, rr. 1,

*4—Legal Practitioners Act (XVIII of 1879), s. 4—"Practise," meaning of—Advocate, authority of, to act on behalf of client—*Vakalatnama, *whether necessary—Compromise consented to by Pleader, when can be set aside—Fraud—Collusion—Petition presented out of time—Delay, explanation of—Extension of time, prayer for—Limitation Act (IX of 1908), s. 5.*

The word "practise" in s. 4 of the Legal Practitioners Act, includes the right to appear, plead and act. [p. 182, col. 1.]

By virtue of the provisions of cl (3) of r 4 of O. III, C. P. C., an Advocate, unlike a Pleader, can be verbally appointed to act on behalf of his client, and when so appointed, under r. 1 of O III, he can appear, plead and act. There is, therefore, nothing to prevent an Advocate, either in the High Court or in the subordinate Courts, from presenting an application on behalf of his client without any power of appointment or *vakalatnama* given to him in writing. [p 181, col. 2.]

A petition filed out of time must show on the face of it the reason for the delay, and there must be an express prayer for condonation of the delay under s. 5 of the Limitation Act. [p. 182, col. 2]

A compromise consented to bya Pleader duly authorised in that behalf will not be set aside, unless fraud or collusion is imputed to the Pleader. [p 183, col 1.]

Revision against an order of the Subordinate Judge, Ranchi, dated the 9th June 1923.

Mr. *H. P. Sinha*, for the Petitioner.

Mr. *S. Saran*, for the Opposite Party.

JUDGMENT.—This is an application against an order of the Subordinate Judge of Ranchi, dated the 9th June 1923, rejecting an application of the petitioners presented under O. XLVII. r. 1, of the C. P. C., for review of a judgment, dated the 23rd December 1922, passed by him.

The petitioners were plaintiffs in the case and sought to recover possession of the disputed land on a declaration of their title thereto as their ancestral *bhuinhari* land. The defendants, on the other hand, claimed to be in possession of the property under purchase made by their father in 1873 from one Sheikh Bhukun, an auction-purchaser of the land. The plaintiffs' suit was dismissed by the Munsif, and the appeal filed by them was placed in the file of the Subordinate Judge for disposal. The hearing of both sides concluded on the 20th December. On the 23rd December a compromise petition was filed before the learned Subordinate Judge. The petition was signed by the defendants and their Pleader, and on behalf of the petitioners their Pleader signed the same. By the petition of compromise the *bhuinhari* title of the petitioners was admitted and acknowledged by the defendants, and the defendants were allowed to hold the disputed land as occupancy *raiyats* under the plaintiffs on payment of rent at the rate of Rs. 3 per acre, the rent being revisable at the time of the preparation of the Record of Rights The appeal was disposed of in terms of the compromise petition by judgment of the Court, dated the 23rd December, 1923.

The petition for review of the judgment was filed on behalf of the petitioners on the 5th June. In it it was alleged that after the arguments were over, the petitioner No. 1, who was in charge of the case on behalf of the plaintiffs, had left Ranchi for his village in order to make preparation for the Christmas festival in his charge, and he came back to Ranchi in the first week of January and learnt that the appeal was disposed of in terms of the compromise referred to above. It was alleged in the [illegible] the compromise petition was [illegible] his knowledge and without instructions to his Pleader and that it was prejudicial to the plaintiffs' interest.

The compromise petition was signed by the petitioners themselves, and countersigned by their Counsel Mr. Roy. On the 9th June 1923, the Court rejected the application for review holding: (1) that it was out of time, and (2) that it was not in proper form. As to the latter ground the learned Subordinate Judge observed that Mr. Roy being a Counsel (Advocate) could not move the petition unless he was instructed by a Pleader and after the latter had signed it, and that if Mr. Roy wanted to present the petition and thereby act as a Pleader, he would have filed a *vakalatnama*. In support of this view the learned Subordinate Judge has cited the case of Mr. B. N. Misra, an Advocate of the Court, who practises in Cuttack. I have looked into the file of the case. Mr. Misra applied for refund of some money on behalf of his client and filed a petition for that purpose under his own signature, without filing a *vakalatnama*. The learned Chief Justice (Sir Edward Chamier) observed that if Mr. Misra wanted to perform the functions of a Pleader he must file a *vakalatnama*. This view has been maintained in this Court in several cases, and thus a practice has been established of not allowing refund of money to an Advocate unless he is especially authorized and files a *vakalatnama*. This would be so under the provisions of the stamp law which especially require that a refund of money can only be made to a person

holding a power-of-attorney, duly stamped, from the person on whose behalf the withdrawal is sought [Art. 48 (*g*), Sch. I of the Stamp Act]. But the Counsel in the present case did not want any refund of money on behalf of his client; he only applied for review of judgment. The petition for review in the present case was duly signed by all the petitioners, and it was moved by Counsel, Mr. Roy, who appeared for the petitioners who were also present in Court at the time. The rules as to the presentation of an application are to be found in Ch. III, page 13, of the High Court Rules, and in Ch. I, Part I, page 5, of the General Rules and Circular Orders for the subordinate Courts. Rule 4, cls. (*iii*) and (*iv*), of Ch. III of the High Court Rules say that a petition shall be signed and dated either by the petitioner or declarant or his Pleader and presented either by the petitioner or declarant or his recognized agent or his Pleader or some person appointed in writing in each case by such Pleader to present the same. The note to that rule says:

'Here and throughout these rules unless there is anything repugnant in the subject or context 'Pleader' means Advocate, Vakil or Attorney."

Therefore, a petition must be signed and presented either by the petitioner himself or an Advocate, Vakil or Attorney of this Court. In the present case the petition was signed by the petitioners themselves. They were present in Court, and it was signed and presented by Mr. Roy, Advocate, on their behalf. Therefore, if the petition were filed in this Court it would have been in order. It is, however, contended by Mr. Sambhu Saran that, as it was presented before the learned Subordinate Judge, the Advocate in question could not present it. Rule 2, cl. (3), Ch. I, of the General Rules and Circular Orders, however, states that a petition to be presented in the lower Courts may be signed by the person presenting it, and r. 3 says that if the person presenting it is not a Pleader or a *mukhtiar*, he shall, if so required by the Court, be identified. Therefore, a petition in the subordinate Courts may be signed and presented by a party or by his Pleader. "Pleader" has been defined in the C. P. C., s. 2, cl. (15), to mean any person entitled to appear and plead for another in Court and to include an Advocate, Vakil and Attorney of a High Court. This rule refers only to the functions of appearing and pleading, and it is said that it does not include acting.

Rule 1 of O. III of the C. P. C, says:

"Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except, where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent or by a Pleader duly appointed to act in his behalf."

Rule 4 (1) of the order says:

"The appointment of a Pleader to make or do any appearance, application or act for any person shall be in writing, and shall be signed by such person or by his recognized agent or by some other person duly authorized by power-of-attorney to act in this behalf."

Clause (3) of r. 4 dispenses with the appointment in writing in the case of an Advocate of any High Court, and an Advocate is not required to present any document empowering him to act.

Therefore, an Advocate, unlike a Pleader, can be verbally appointed to act on behalf of his client, and when so appointed under r. 1 of O. III he can appear, plead and act. Hence Mr. Roy need not have filed any *vakalatnama* as his authority to present the petition of revision on behalf of the petitioners. So far as the law and the rules are concerned, there is nothing to prevent an Advocate, either in the High Court or in the subordinate Courts, from presenting an application on behalf of his client without any power of appointment or *vakalatnama* given to him in writing. There is nothing in the Legal Practitioners Act also against this view.

Section 7 of the Letters Patent of this Court confers upon the Court power

"to approve, admit and enrol such and so many Advocates, Vakils and attorneys as to the said High Court may seem meet; and such Advocates, Vakils and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions."

In s. 8 of the Letters Patent it is further declared that this Court

"shall have power to make rules from time to time for the qualification and admission of proper persons to be Advocates,

Vakils or attorneys-at-law of the said High Court, and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakils or attorneys-at law; and no person whatsoever but such Advocates, Vakils, or attorneys shall be allowed to...appear, plead or act on his own behalf or on behalf of a co-suitor."

Section 119 of the C. P. C, enacts that

"Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its Charter authorized him so to do or to interfere with the power of the High Court to make rules concerning Advocates, Vakils and Attorneys."

No rule has been framed in this Court prohibiting an Advocate from presenting an application or acting on behalf of his client.

Under s. 4 of the Legal Practitioners Act (XVIII of 1879).

"Every person now or hereafter entered as an Advocate or Vakil on the roll of any High Court under the Letters Patent constituting such Court, shall be entitled to practise in all Courts subordinate to the Court on the roll of which he is entered," etc.

Thus, if an Advocate on the roll of this High Court is entitled to sign and present an application and to act on behalf of his client in the High Court itself, by s. 4 of the Legal Practitioners Act referred to above he will be entitled to practise in all the Courts subordinate to this Court. The word "practise" in the section has been advisedly used and unless prohibited by any special rule will include the right to appear, plead and act.

Mr. Sambhu Saran has referred us to the case of *Ram Taruck Barrik* v. *Sidhessuree Dossee* (1). That case, no doubt, supports his contention, but that case relates to the practice in the Calcutta High Court under the rules framed by that Court prohibiting Advocates of the Court from acting on behalf of their clients either on the original or on the appellate side; and all the arguments advanced by Mr. Sambhu Saran were considered and fully met by a Full Bench of the Allahabad High Court in the case of *Bakhtawar Singh* v. *Sant Lal* (2). Their Lordships in that case observed: "It does not appear to us necessary to enter upon a discussion of the practice that prevails and regulates the professional status and proceedings of Counsel in England, as it seems to us to be altogether beside the question we have to determine, namely, whether enrolled Advocates of this Court are, as such, prohibited from doing all such acts as admittedly may be done by the Vakils."

Accordingly their Lordships held that under the Letters Patent of the Allahabad High Court and its rules an Advocate can appear, plead and act.

Now, the Letters Patent of this Court and the rules framed by us are on similar lines to those of the Allahabad High Court. I am, therefore, inclined to adopt the view taken by the Full Bench of that Court and to hold that the learned Subordinate Judge was wrong in his view that the petition of review presented to him by Mr. Roy, Advocate, on behalf of the petitioners was not properly presented.

The first ground upon which the learned Subordinate Judge rejected the application of the petitioners, however, seems to be substantial. The petition was filed much out of time. The appeal was disposed of on the 23rd December 1922, and the petitioner No. 1 came to know of it in the first week of January 1923, when he came to Ranchi to inquire about the case. The review petition should have been filed about the 23rd of March, 1923. It was, however, filed on the 5th June 1920. This enormous delay has not been explained in the petition for review presented to the Subordinate Judge.

It is a well-recognized principle that a petition filed out of time must show on the face of it the reason for delay and there must further be an express prayer for condonation of the delay under s. 5 of the Limitation Act. On the face of it the petition was time-barred and the Court below was right in holding that it was not entertainable.

Again, the petition does not impute improper conduct on the part of the Pleader who filed the compromise petition, and unless that was done the action taken by the Pleader on behalf of the petitioners could not be challenged, for under the *vakalatnama* the Pleader had full power to compromise the case [*vide Sadho Saran Rai*

(1) 13 W. R. 60.
(2) 9 A. 617; A. W. N. (1887) 153; 5 Ind. Dec. (N. S.) 848 (F. B.).

v. *Anant Rai* (3).] The recent decision of their Lordships of the Judicial Committee in the case of *Sourindra Nath Mittra* v. *Heramba Nath Bandopadhaya* (4) may be usefully cited, though the facts of the case are not very similar to those of the present one. On principle there does not seem to be any reason for interfering with a compromise consented to by the Pleader duly authorized in this behalf, unless fraud or collusion is imputed to the Pleader. No such collusion or fraud has been pleaded in the petition. No doubt, ignorance of the compromise, want of instructions to the Pleader and possibly fraud practised by the opposite party have been vaguely stated in the petition. These are, however, not sufficient to affect the compromise filed in the present case. Again, the petitioner No. 1 says that he was looking after the case and went away on the 23rd December 1922, to make arrangements for Christmas festivities, but there were about ten other petitioners and there is no reason why the petitioners other than petitioner No. 1 could not remain in Ranchi to look after the case.

For all these reasons I dismiss the applications.

Z. K. *Applications dismissed.*

(3) 77 Ind. Cas 14, 2 Pat 731, (1923) Pat. 197; (1923) A I R (Pat) 483

(4) 84 Ind Cas 721; (1923) A I. R (P. C) 98; 45 M L J 453; (1923) M. W. N. 734, 33 M. L. T. 294 (P. C)

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 2603 OF 1924.

April 22, 1925.

Present:—Mr. Justice Harrison.

Musammat PRAG DEVI AND ANOTHER—OBJECTORS—APPELLANTS

versus

NATHU MAL AND OTHERS—PETITIONERS RESPONDENTS.

Will—Undue influence—Disposing mind—Inference from surrounding circumstances.

In the absence of direct evidence as to the possession of a disposing mind by a testator at the time of making a Will, it is open to the Court to infer from the surrounding circumstances of the case the exercise of undue influence over the testator. [p 183, col. 2.]

Where the Court is able to find that a testator at the time of making a Will was in a very weak state of health and was under the influence of persons who were benefited by the Will, the Will must be rejected as having been executed by the testator without a disposing mind. [p. 184, col 1.]

Miscellaneous civil appeal from an order of the District Judge, Jullundur, dated the 25th June 1924.

Lala *Jagan Nath Agarwal* and Mr. *Anant Ram*, for the Appellants.

Messrs. *Faqir Chand* and *Madan Gopal*, for the Respondents.

JUDGMENT.—The Probate of a Will of Bhan Mal has been granted to three of his nephews Nathu Mal, Girdhari Lal and Gurdas Mal by the District Judge of Jullundur. The application for Probate was contested by the daughter of the deceased, *Musammat* Prag Devi, and she presented this appeal.

The contention in the Trial Court, as here, has been that the document was undoubtedly executed by the late Bhan Mal a few days before his death but that he was in such a bad state of health that he did not know what he was doing, that the Will after registration was taken over by Girdhari Lal and is still in his possession unless he has destroyed it, that he refused to produce it because he does not wish it to be shown that the Will bears the thumb-mark, and not signature, of the late Bhan Mal, and that there are various indications to prove that the mind of Bhan Mal was dominated by his nephews and that he had not a disposing mind at the time when the Will was executed four days before his death. The learned District Judge has held that there could be no reason for Girdhari Lal to lose or suppress the Will, that the daughter has been very well treated, and that there is no evidence that Bhan Mal was under the influence of his nephews. It is true that there is no direct evidence and it is only a question of whether such influence can be inferred. The reason put forward for the possible suppression of the Will is perfectly comprehensible and if the recital in the Will be ignored, it appears that the daughter would have succeeded to the whole of her father's property, while according to the Will she receives only a portion and the nephews take the remainder.

This point of the disappearance of the Will is I think of great importance. The Sub-Registrar himself came to the house of Bhan Mal, and tells us that he was weak and comatose and that he had to wait till he woke up. He states that Bhan Mal assented to the contents and put his thumb mark upon it, *i. e.*, on the endorsement. Th

Sub-Registrar then took the deed away to his office for necessary formalities to be observed, and made it over to Girdhari Lal, one of the nephews, when he came to fetch it. This man Girdhari Lal brought with him a receipt purporting to bear the thumb impression of *Musammat* Prag Devi the daughter a curious proceeding. This thumb impression has not been proved. Counsel, however, contends that this is sufficient to establish that the Will was made over by Girdhari Lal to *Musammat* Prag Devi, and he further contends that the Sub-Registrar's statement that he was told that the thumb impression was that of *Musammat* Prag Devi, but that he had not seen it put on is good evidence. This incident of handing in the previously prepared receipt is I think very highly suspicious. The reason for suppressing the Will is said to be that it bore the thumb-mark of Bhan Mal and that he would not have executed a solemn document in this way had he not been too weak to write. The witnesses as to the actual signature are two, Tulsi Ram the scribe and Mela Ram one of the witnesses. Tulsi Ram says that Bhan Mal put his thumb-mark, while Mela Ram is very positive that he signed in Urdu. The document itself shows *baqalam khud Bhan Mal angutha* which I take to mean his thumb-mark and not his signature, and there is the further fact that he affixed his thumb-mark to the endorsement before the Sub-Registrar, I find that Tulsi Ram is right in saying that Bhan Mal put his thumb-mark and did not sign, and I think that he is also right in saying that his reason for doing so was that he was very weak. The Will recites that Bhan Mal wishes to ensure the inheritance of his daughter and leaves to her what is called his self-acquired property and states that his reversioners will take the ancestral property. There is no presumption regarding the ancestral nature of any property, nor has it ever been pleaded in this case that any of the property was ancestral. The natural heir to receive the estate was the daughter and taking every thing into account, in spite of the evidence of the Sub-Registrar that Bhan Mal appeared to him to understand what he was doing, I find that he was in a very weak state of health, and that every thing points to the conclusion to which I come, that he was under the influence of his nephews and had not a disposing mind at the time he executed this document.

I, therefore, accept the appeal and dismiss the application for Probate.

Z K. *Appeal accepted.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 265 OF 1921.

June 20, 1924.

Present :—Mr. Justice Das and Mr. Justice Ross.

TARKESHWAR PRASAD TEWARI —APPELLANT

versus

DEVENDRA PRASAD TEWARI— RESPONDENT.

Evidence Act (I of 1872), s. 74—Plaint, whether public document—Certified copy, whether admissible—Patna High Court Rules, Ch IX, rr. 1, 4, 30—Paper-book, printing of—Registrar, whether can grant exemption

Neither a plaint nor a written statement is a public document, and a certified copy of either is not admissible in evidence. [p. 188, col. 2.]

Rule 30 of Ch. IX of the Patna High Court Rules must be construed as subject to rr 1 and 4 of the Chapter, and the Registrar has no authority to exempt a party from having a printed paper-book prepared in a case. [p 191, col. 2.]

Appeal from a decision of the Additional Subordinate Judge, Patna, dated the 14th September 1921.

Messrs. *C. C. Das*, *S. M. Gupta*, *Ram Prasad* and *Janak Kishore*, for the Appellant.

Messrs. *S. P. Sen* and *A. T. Sen*, for the Respondent.

JUDGMENT.

Ross, J.—The question in this appeal is a pure question of fact and relates to the origin of Tarkeshwar, defendant No. 1.

Sheo Prasad Tiwari had two sons, Ram Partap *alias* Halkhori and Maheshwar Dutt *alias* Duttan. Ram Pratap had two sons, Ramrup and Ramsuraj, by his wife Parbati. The plaintiff Debendra Prasad Tiwari is the son of Ramrup and his wife Hartalika. The question for decision in the suit is whether Tarkeshwar is the posthumous son of Ramsuraj and his wife Harnandan Kuer. Ram Pratap died in 1899. The plaintiff alleges that both his sons were then minors and the management of the property was assumed by Maheshwar Dutt. Even after he attained majority Ramrup was incapable of managing his estate being of weak intellect and dissolute habits. His

mother then formed the idea of marrying one of her sons in the family of a man of affairs and accordingly Ramsuraj was married to Harnandan Kuer, the grand-daughter of one Nanku Pande, who is described in the plaint as "a successful tout practising in the district of Patna possessed of great tact and fully capable of understanding business and managing *zemindari* affairs" Nanku Pande then took up the management of the estate acting in consultation with Maheshwar Dutt.

The plaintiff alleges that Ramsuraj died on the 23rd of *Bhado* 1313 two years after his marriage. On the death of Ramsuraj Nanku Pande took Harnandan Kuer to his house at Machuatoli in Patna and set up Tarkeshwar who was the son of one Banke Singh, a constable by his mistress as the son of Ramsuraj and Harnandan Kuer. Maheshwar Dutt is also alleged to have had illicit connection with the mistress of Banke Singh and to have acted in collusion with Nanku Pande in this matter. In 1317 Ramrup also died. The main case is stated in paras. 17 and 18 of the plaint in these words. "To the best of the plaintiff's knowledge on enquiry no son or daughter was born to Ramsuraj Tiwari of the womb of *Musammat* Harnandan Kuer. When Ramsuraj Tewari died he was only 13 years old and could not possibly beget a child at that age, and it was not at all a fact that *Musammat* Harnandan Kuer was pregnant at the time of his death. Defendant No. 1 is not at all the son of Ramsuraj Tiwari nor did the latter beget him nor was he born of the womb of Harnandan Kuer. On the other hand he was born of the womb of Banke Singh's mistress and his father is Banke Singh resident of *Mouza* Bairia." The plaintiff claims a declaration that the defendant No. 1 is not the son of Ramsuraj Tiwari and has no title to the property of the family and a decree for confirmation of his possession or recovery of possession.

In the written statement various dates of the birth, marriage and death of the members of the family alleged in the plaint are stated differently. Ramrup's incapacity for affairs and dissolute character are denied and it is alleged that Tarkeshwar is the son of Ramsuraj and Harnandan Kuer born on the 8th of *Kartick* 1314 about a month and a half after the death of Ramsuraj. He was married in 1324 to the daughter of one Rambhawan Missir a respectable *Brahmin* of high family. The suit is said to have been instituted fraudulently owing to a dispute about the title to certain monies owing to the family.

The main issue in the case is Issue No. 4 "Is not defendant No. 1 the son of Ramsuraj Tiwari? Is he the son of Banke Singh as alleged by the plaintiff? The learned Subordinate Judge has found, that if Banke Singh had any son by any mistress Tarkeshwar was not that son, secondly, that Harnandan Kuer was really pregnant when her husband died, and it was in that condition that she was removed to Machuatoli, and thirdly, that considering all the circumstances he was not prepared to hold that Tarkeshwar is the son of Ramsuraj Tiwari. He, therefore, passed a decree in favour of the plaintiff.

On these findings the learned Counsel for the appellant contended that he was entitled to a judgment. Both the main allegations in the plaint had been negatived by the first two findings and the Subordinate Judge was bound on these findings to come to the conclusion that Tarkeshwar was the son of Ramsuraj Tewari. He further relied on the documentary evidence in the case as showing that the existence of Tarkeshwar and his relationship to the family had been admitted in a long series of transactions by members of the family itself In my opinion it is impossible to dispose of this appeal on the findings of the learned Subordinate Judge. It is true that the first two findings are in terms inconsistent with the conclusion but apparently, all that the second finding was intended to amount to was that *Musammat* Harnandan Kuer might have been pregnant when her husband died. The finding is based on a consideration of the evidence relating to the age of Ramsuraj and the learned Subordinate Judge has not discussed at all the direct evidence for and against the pregnancy of Harnandan Kuer. The only conclusion to which the evidence which he has discussed could lead was a finding that pregnancy was possible. On the other hand the learned Counsel for the respondent contests both the first and the second finding. It is necessary, therefore, to discuss the evidence in the case.

I shall deal first with the allegation that Tarkeshwar is the son of the constable Banke Singh and his mistress. The evidence on this point is oral evidence only and consists of the depositions of Banke Singh P. W. No. 24, Biru Gope P. W. No. 19, Ram

Khelawan P. W. No. 21, Chhedi Ram P. W. No. 17, Sanichar Koeri P. W. No. 20 and Jawahir Lal P. W. No. 18. The first comment that falls to be made on this evidence is that none of these witnesses is a person of any consideration. Banke Singh is a retired Police constable and Biru Gope is a milk-seller. The mistress of Banke Singh rented a room in his house for one rupee a month and here she bore twins one of whom is set up as the defendant Tarkeshwar Ram Khelawan who says that he used to supply drinking water to the College students, also lodged in that house. Chhedi Ram is a neighbouring tobacconist; Sanichar Koeri is a labourer, and Jawahir Lal seems to be a contractor whose father was a physician and supplied medicine to Banke Singh's family, secondly the story they tell is improbable in itself. The evidence is that Tarkeshwar was three or four months old when the negotiations for obtaining him began, but, owing to the opposition of his mother, it was not until three or four months after this that the child was made over to Nanku Pande. It is difficult to believe that a child of six or eight months old could be introduced into a house as a son of the house. Presumably negotiations were not entered into until Ramsuraj had died Consequently a considerable period must have elapsed when there was child in the house before this child of six or eight months appeared upon the scene. Thirdly it seems unlikely that a child would have been procured for this fraudulent purpose from a [illegible] *tola* and that too, apparently, without any attempt at secrecy, if these witnesses are to be believed. The evidence has been placed before us and I am unable to believe it. The evidence of Banke Singh does not appear to me to be true. It is difficult to believe that if Tarkeshwar was his son he would have come to Court to ruin his prospects in life; and his evidence is open to the initial criticism that having entered into this transaction with Nanku Pande he now for no apparent reason has turned against him and exposed the whole plot. The allegation in the plaint that this mistress of Banke Singh was also mistress of Maheshwar Dutt appears to be merely scandalous no evidence whatsoever being given in support of it. It seems to me impossible to decide a question of descent affirmatively on evidence of this kind. I agree with the learned Subordinate Judge in holding that the plaintiff has failed to prove that the defendant Tarkeshwar is the son of Banke Singh.

The next question is whether Tarkeshwar is the son of Ramsuraj. The real question involved here is whether Harnandan Kuer was pregnant at the time of her husband's death. As a preliminary to that enquiry there was a good deal of discussion of the age of Ramsuraj. The oral evidence is conflicting and considering that most of that evidence was interested and that the witnesses were deposing 15 years after the death of Ramsuraj, it is, in my opinion, difficult to arrive at any certain conclusion on the oral evidence. Each side has been able to elicit statements from the witnesses of the other side supporting his contention. Thus the defendant contends that Ramsuraj was only four or five years younger than Ramrup while the plaintiff contends that he was about 11 years younger. Parbati, the grand mother, says in one place that the difference was four or five years though her evidence was not consistent on the point Hartalika, the widow of Ramrup, makes the difference six or seven years. Tapeswar Kuer, a relation, makes it four or five years as does Deepnarain Tiwari a *gotia*. On the other hand Nanku Pande the principal defence witness makes the difference eight or nine years, while the mother of Harnandan Kuer said that Ramrup was 18 when Ramsuraj died. It is possible by combining certain of the statements to arrive at the conclusion that Ramsuraj died at the age of 13 or 14. It seems to me that evidence of this kind is most uncertain and that even statements made in cross-examination unfavourable to the witness's side are not necessarily to be relied upon. Exhibit R is a petition for registration of his name made by Ramrup Tiwari, as major for himself and his minor brother Ramsuraj on the 14th of December 1899 after the death of Rampartap. It has not been shown that Ramrup himself filed this petition. It was not shown to any of the plaintiff's witnesses and the *mukhtarnama* Ex. R (1) shows that it was received through Maheshwar Dutt. It is contended that if Ramrup himself signed the petition there is no reason why the *mukhtarnama* should have been presented to the *mukhtar* by his uncle. This may be explained by the consideration of the youth of Ramrup, but it looks as if Maheshwar Dutt had managed the whole of this business. Still there is no strong reason for disbelieving

the statement of Ramrup's majority. It was suggested by the learned Counsel for the respondent that Maheshwar Dutt by this means would get rid of all liability to account if he managed the estate. But this is a speculation with nothing to support it. I consider that Ex. R is the best evidence on the question of age. This would show that Ramrup was at least 18 in December 1899, and if Ramsuraj was only four or five years younger, he would have between 19 and 20 when he died. The difference may have been greater, but the general effect of the evidence seems to be, if Ex. R is accepted, that he was old enough to beget a son. But the question is not whether he could have begotten a son, but whether he did in fact beget one, and this is the real question in the case. The evidence on this point is oral but it may to some extent be tested by the attitude of the family in the matter.

By far the most important witness on this point is Parbati Kuer, the grand-mother. She says that excepting Dabendra she has got no other grand-son and that Harnandan Kuer was not pregnant at the time of her husband's death. The learned Counsel for the appellant relied upon the statement made in cross-examination by this witness, that two months after Harnandan's departure in the month of *Katick* she sent a barber to her with clothes and sweetmeats and he argued this was in connection with the birth of Harnandan's son but no such conclusion was put to the witness and it is impossible to infer from her sending clothes and sweetmeats in the month of *Kartick* to her daughter-in-law that any son was born at that time. There can be no doubt that the evidence of Parbati is the best evidence that could be given. She has no interest in the result of the suit because she can only get maintenance in any case. There is no reason for her to make any distinction between her two sons and to give evidence in favour of one grand-son and against another if that other was in fact her grand-son. It is impossible to believe that she would have deposed in the manner if her son Ramsuraj had left his wife with child. Hartalika, the widow of Ramrup, who is also a competent witness (as the family lived together) says that Harnandan Kuer was not pregnant when her husband died. Her evidence is, however, open to the criticism that she is an interested witness and, therefore, not much reliance can be placed upon it. Tapeshwar Kuer, the daughter of Deepan Tiwari, a *gotia* who was on terms of close intimacy with Harnandan Kuer, and, according to her statement, her inseparable companion says that she was not pregnant when Ramsuraj died. She says that they did not say in Tewarichak that a child was born to Harnandan Kuer and that to her knowledge no one in the village had any information of the birth of a child and there was no rumour about it. The criticism made on the evidence of this witness is that her father Deepan Tiwari looks after the plaintiff's affairs. Darsani Kuer also a relation and *gotia* and resident of Tewarichak says that when Ramsuraj died, she went to his house and saw Harnandan Kuer and she was not pregnant. Three male *gotias* have also given evidence on this point—Udaiprakash Tiwari, Bajrangi Tiwari and Deepnarain Tiwari. Udaiprakash said that he was in the village when Ramsuraj died and that he never heard that he ever had a son and no one in the village knew anything about it. He also denies that he had gone to Patna to attend the *mukhdekhai* ceremony of the defendant No. 1. He says that when Ramsuraj died he heard people saying that his line had ceased to exist. Bajrangi gives similar evidence. Deepnarain says that no information was sent to Tewarichak from Machuatoli that a child was born to the widow of Ramsuraj and they did not assemble at the Darzitola house to see his face. Evidence was also given by tenants of the village to the effect that they had no knowledge of any son of Ramsuraj.

For the defence, evidence has been given by Sheonandan Upadhya (D W. No. 2) who speaks of seeing Harnandan Kuer when she was pregnant and a little later seeing Tarkeshwar when he was about one month old. He is Nanku Pande's brother-in-law and it is unlikely that Harnandan Kuer would have appeared before him in pregnant condition. Deodhari Pande (D. W. No. 8) a physician deposes that he went twice to Tewarichak once for the treatment of Harnandan Kuer and a second time for treatment of Ramsuraj Harnandan Kuer was suffering from fever and on examining her pulse he finds that she was pregnant. This witness is not unfamiliar with the law Courts and he is a physician who seems to be attached to the family of Nanku Pande from whom he takes no fees. There does not appear to have been any occasion for

his being taken to Tewarichak. He was not the family doctor nor was he a well-known physician. Evidence of this nature does not carry any conviction to my mind. Deodhari Raut (D. W. No. 11) is a servant of Nanku Pandey and wholly dependent upon him with his whole family. His wife Chitkoeri (D. W. No. 12) deposes to having been present at the birth. The other witnesses are Nanku Pande himself, Harnandan Kuer and her mother Nandakumari. Harnandan Kuer says that her mother-in-law attended the *mukhdekhai* ceremony at the Darzitola house, Parbati denies this and the other persons named by Harnandan Kuer as having been present were not called, nor were their name ever put to Parbati so that the plaintiff might have had an opportunity to call them. Nandakumari says that the Guru of the Tiwaris of the Tewarichak came and blessed the child. This Guru lives at Benares and would presumably have been an independent witness but he has not been called. She also says that letters used to be sent by Parbati Kuer which may be in the possession of the male members of the family, but no letters were produced. Nanku Pande says that *Brahmins* were fed on the *barhi* day and that Ramrup, Kanhauli people and others who were living close to him then were called on the occasion but of these the only one called as a witness is Debendra Prasad Sukul of Kanhauli who is a relation by marriage and who denies having attended the *barhi* ceremony.

The story of the removal of Harnandan Kuer from Tewarichak to her grand-father's house in Patna in the eighth month of her pregnancy is improbable in itself. There is no evidence of any independent witness who was present at any ceremony in connection with the birth of the child. The pregnancy of Harnandan Kuer must have been matter of common knowledge to the relations but not a single member of her husband's family appears to give evidence on her side. All the *Gotias* are on the side of the plaintiff and in a matter of this kind this seems to me a fact of the highest importance. On the other hand the evidence for the defence is that of the connections or creatures of Nanku Pande who by his own admissions was in a position to give better and more independent evidence than has been adduced None of the neighbours in Machuatoli has come to depose although there were respectable persons living there with whom Nanku was on friendly terms. On a consideration of all the evidence and especially, the evidence of Parbati Kuer, I come to the conclusion that Harnandan Kuer was not pregnant when her husband died.

This is enough for the disposal of the case, but the main argument on behalf of the appellant was that in a long series of documents Tarkeshwar had been acknowledged as the son of Ramsuraj. It is, therefore, necessary to examine the documentary evidence. It was in the first place sought to be established that Ramrup was capable of business and did in fact take part in affairs after the death of Rampratab. The documents referred to in this connection are these: Ex. R which has been discussed above, Ex. X37 this is the certified copy of a plaint dated the 10th of March 1900 which purports to have been signed by Ramrup for self and for Ramsuraj Tewari minor. I doubt whether this document was admissible in evidence. The learned Subordinate Judge apparently followed the ruling in *Shazada Mahomed Shahaboodeen* v. *Daniel Wedgeberry* (1). The soundness of this ruling has been questioned by Field (Law of Evidence, 7th Edition, p. 236) and Woodroffe (Law of Evidence, 7th Edition, p. 583) in their commentaries on the Evidence Act. It has not been followed on the Original Side of the Calcutta High Court. I can see no ground for making a distinction between plaints and written statements nor is there any reason why the certified copy of one should be admissible in evidence while the certified copy of the other is not. Neither is a public document. In my opinion Ex. X-37 should not have been admitted in evidence Ex. X-48 is a decree in Suit No. 80 of 1900 which merely shows that Ramrup Tewari was a major and was a party to the suit. Exhibit X-54, X 55 and X-56 were three plaints in suits of 1904 in which Ramrup Tewari sued for himself and as guardian of Ramsuraj. The plaints purport to have been signed by Ramrup in his own pen. The learned Subordinate Judge has discussed the signatures purporting to be those of Ramrup in Suit Nos. 22 and 23 of 1904 and in a various *vakalatnamas* and petitions filed in those suits and has come to the conclusion that they are in three different hands. By comparison of some of the signatures made by Nanku Pande in

(1) 10 B. L. R. App. 31.

Court (Ex. 16 series) and other documents he has held that some of the signatures are by Nanku Pande some by Jaldhar Lal and a third set by some one who has not been identified. I have examined these signatures and it is clear that they are at all events in two different hands, possibly three, so that it is clear that whoever made the signatures they were not all made by Ramrup Tewari and possibly none was. The inference to be drawn is that his name was being used in these documents with or without his authority. Exhibit X-62 is a plaint in a suit of 1905 filed by Ramrup. Ex. M-1 is a payment order for money awarded in compensation for land acquired by the Government to Maheshwardutt Tewari and Ramrup Tewari. Both purport to have signed by their own hands. The only comment that is to be made on this document is that whereas Maheshwardutt Tewari was identified by the manager of the Court of Wards, Ramrup was identified by an unknown person.

Evidence was given by Babu Dwarka Prasad Pathak a Vakil who acts for this family. He proved a *vakalatnama* (Ex. K) which showed that he got it from Ramrup. He also says that Ramrup used to come to him occasionally in connection with the cases of the family and he talked like a man of ordinary intelligence. He did not remember if he had received any instructions from him. Nanku Pande in his evidence admitted that the *sradh* of Ramsuraj was performed by Dultan Tiwari. Now ordinarily it was Ramrup who was entitled to perform this *sradh* and the fact that he did not do so lends some support to the contention that he was not entrusted with the management of affairs. There is no doubt exaggeration in the plaintiff's case about Ramrup Tewari but the evidence that he took an active part in managing the estate and in the conduct of litigation is unconvincing while the documents clearly show that his name was signed by others. It is probable, therefore, that if Nanku Pande intended when occasion offered, to create evidence of Tarkeshwar's being the son of Ramsuraj the presence of Ramrup Tiwari would not offer any serious obstacle.

I now come to the period after the death of Ramsuraj Tiwari. Exhibit P-3 is a deed of sale in favour of Maheshwar Dutt Tiwari and Tarkeshwar through the guardianship of his mother Harnandan Kuer, the widow of Ramsuraj. This is dated the 4th of February 1907 and it, in my opinion, clearly indicates that evidence was being created to support Tarkeshwar's claim No explanation could be offered for taking this conveyance in the name of Tarkeshwar in preference to the name of Ramrup his uncle, who was still alive. Exhibit X-80 and Ex. X-81 are plaints in Suit Nos. 84 and 85 of 1908 and they are remarkable for the description of Tarkeshwar as born of the seed of Ramsuraj from the womb of Harnandan Kuer. This is an unusual expression and further supports the theory that evidence was being created. It may be noted that these documents were not put to any of the plaintiff's witnesses and this remark applies to all the important documents in this case filed on behalf of the defence except Ex. A. Two of the defendants in these suits disputed the allegation that Tarkeshwar was the son of Ramsuraj and the question was decided in favour of the plaintiffs on the evidence of Maheshwar Dutt. But it is significant that the question of the origin of Tarkeshwar was raised by stangers to the family at this early date. It is true that they did not attempt to substantiate their allegation but this allegation could not have been made if there had not in fact been some serious doubt as to Tarkeshwar's origin Ex. R-4 is an application for registration of names filed by Ramrup on the 13th of January 1908. This document recited that about three months after the death of Ramsuraj a son named Tarkeshwar Prasad Tewari was born to him and it purports to be signed by Ramrup Tewari by his own hand. But no weight can be given to this document because the original was not produced and in view of the evidence above referred to that the name of Ramrup Tewari was used by others, there is no presumption that he actually signed this document himself. Moreover the statement that Tarkeshwar was born about three months after the death of Ramsuraj is inconsistent with the evidence in the present case that the birth took place about six weeks after. Exhibit R 8 is an application for registration on behalf of Debendra Prasad Tewari made on the 19th of February 1909 after the death of Ramrup. It recites that Parbati Kuer was the grandmother of Debendra and of Tarkeshwar and it purports to be signed on behalf of Debendra through the guardianship of his mother Hartalika by the pen of Kuber Tewari, his maternal uncle. Kuber is dead. But his brother

Shivajee Tewari (P. W. No. 36) was examined by the plaintiffs and this document was not put to him. It cannot, therefore, be given much weight. Exhibit R-9 is the application on behalf of Tarkeshwar filed in 1910. This documen[illegible] by Kunj Behari Lal his servant. [illegible] and U-1 are a petition for returning certain documents and an affidavit in support thereof, dated the 30th and 31st July 1908. It is asserted in these documents that Tarkeshwar is the son of Ramsuraj and the affidavit purports to have been sworn by Ramrup. The learned Subordinate Judge in discussing the signature of Ramrup on the *vakalatnama* in this matter (Ex. C. 3) has shown that there is no certainty that it is his. Exhibit W is a curious document. It is a petition for execution of a decree filed on the 11th of March 1909. It shows that the previous execution case was struck off in 1901. On the face of it, therefore, this application was barred by time. It alleges that Tarkeshwar was the son of Ramsuraj and the petition bears not only the signature of Jaleshwar Prasad Tewari who presented it, but [illegible] of the Pleaders Akhoy Kumar M[illegible]warka Prasad Pathak. The order sheet, Ex. X-17, shows that Tarkeshwar was substituted for Ramsuraj as decree-holder. Apparently this was the object of the application because no further steps were taken and the case was dismissed for want of prosecution. It is difficult to understand why a petition for execution which was obviously time-barred, should have been filed unless it was with the object of creating evidence.

Exhibit X-49 is the decree for the registration of Tarkeshwar's name in the Collectorate but the petition itself has not been produced, Exs. X-27, X-29a and X-31 are plaints and decrees in suit showing that Tarkeshwar was impleaded in these litigations some of which were at the instance of the other members of the family. Exhibit A is a security bond executed by Hartalika Kuer and Ramlagan Pande on the 18th June 1916, which declares the ancestry of Tarkeshwar in the same terms as the plaints of 1908 and purports to be signed by Hartalika by her own pen. Hartalika in her evidence says that she has not signed any document with the knowledge that it had the name of Tarkeshwar in it. Exhibits X-64 and X-65 are plaints in suit Nos. 83 and 84 of 1916 by Debendra and Tarkeshwar verified and signed by Harihar Lal, servant of the plaintiff. The learned Counsel for the appellant referred to an affidavit in the present suit sworn on behalf of the plaintiffs by Harihar Lal son of Khiali Lal and contends that this is the same person. Even if he is the same person, the statement in the plaint Ex 64 that Tarkeshwar is the son of of Ramsuraj is only the statement of a servant and will not bind the plaintiff. But Hartalika denies that Harihar Lal was ever her servant and the defence has not proved identity. Exhibit 8 is a petition by Maheshwar Dutt and others acknowledging the receipt of decretal money. This, however, is a late document of the year 1917 and as Tarkeshwar's name had been registered it must appear in such documents as these. The same remark applies to Ex. N which is dated the 23rd September 1917. Exhibit B is a deposition of Dipan Tewari made in 1915 in which he spoke of lending money to the grandmother of Dependra and Tarkeshwar. Exs. M and M2 are receipt for compensation granted for lands, acquired by the Government. These are of 1913 one by Harnandan Kuer on behalf of Devendra. The same remark applies to these documents also as also to Exs. R 10 and R-11. Exhibit O is an account-book from 1307 to 1311 showing expenses in connection with Tarkeshwar's visits to Tewarichak. These papers came from the custody of Kunj Behari Lal and may have been fabricated, at all events they are not beyond question.

These are the principal documents that were referred to in the course of the argument. The name of Tarkeshwar was entered in the Collectorate Registers and also in the Record of Rights which was prepared between 1909 and 1911. On the other hand the documents which are evidence of actual payment of revenue do not show the names of Tarkeshwar. The plaintiff has produced about 260 land revenue *chalans* and only one of these shows a payment of 4 annas said to have been made by Tarkeshwar and this entry was made by Kunj Behari Lal just when he was about to leave the plaintiff's service. The defence has produced no revenue *chalans*. All the canal irrigation papers are in the name of the plaintiff. There is a large volume of oral evidence to the effect that Nanku Pande and Duttan Tewari managed all the affairs. This evidence is given by Hartalika, Parbati, Udaiprakash, Ramgulam Singh, Sheo Singh, Kali Singh, Bekahal Pande, Dipnarayan Tewari, Ram-

khelawan Singh, and many others. Kunj Bihari in his evidence indicates that the *ijmali* papers were with Duttan Tewari. This shows he was managing the property. Reviewing these documents, as a whole, they seem to me to bear clear indications that evidence was being created on behalf of Tarkeshwar. No admission has been brought home to the plaintiff or his mother and in view of the use that has been made of Ramrup's name it is impossible to say that any admission was made by him either. It is contended for the appellant that if Tarkeshwar was not the son of Ramsuraj the fact must have been known to the members of the family and the fraud would have been exposed long ago. But it was not a simple matter, as the volume of evidence presented in the present suit shows, and *gotias* who have no particular interest in the matter and were not affected one way or another whether Ramsuraj left a son or not, could not be expected to embark upon an expensive litigation for no immediate object. It was not until Debendra was married that it became possible to take the matter up. The defence attributes this litigation to Debendra's father-in-law, Hira Lal Missir a Police Sub Inspector and it may be that he has brought the matter to a head. But he is the only person who has been in a position to do so and has an interest in doing so. The documents, in my opinion do not make the conclusion at which I have already arrived on a consideration of the oral evidence as to the pregnancy of Harnandan Kuer and I find nothing in these papers which convincingly establishes Tarkeshwar's ancestry as alleged by the defence.

The result is that the appeal must be dismissed with costs.

Permission was given in this case by the learned Registrar to the appellant to have type-written copies of the papers prepared instead of the ordinary printed paper-book. The learned Registrar apparently relied upon the provisions of r. 30 in Ch. IX of the Rules of the High Court which empowers him to exempt any appellant or respondent from the operation of the whole or any part of the rules of the Chapter. Now rule 1 directs that the paper-book shall be printed in accordance with the directions therein laid down. Rule 4 provides that in every case in which an appeal has been admitted the Registrar shall cause a paper-book to be prepared in accordance with the rules of this Chapter with the proviso that in small or urgent cases where good cause has been shown the Registrar may allow any party to put in typed copies. The construction placed upon r 30 makes the proviso to r. 4 superfluous and r. 30 must be construed as subject to rr. 1 and 4. In my opinion the learned Registrar had not authority to exempt the appellant from having a printed paper-book prepared in this case.

Das, J.—I agree.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 4879 OF 1923.

July 4, 1924.

Present:—Justice Sir Amberson Marten, KT.

A. CECIL COLE—PLAINTIFF

versus

NANALAL MORAJI DAVE AND ANOTHER —DEFENDANTS.

Construction of document—Hire-purchase agreement—Agreement to sell—Property, when passes—Contract Act (IX of 1872), s 78.

Under a hire-purchase agreement, in the sense in which it is understood in England, there is no absolute sale of the chattel but only a hiring of it by a person who has the option of returning it at any time before the various instalments are paid Under such an agreement the property in the chattel does not pass to the purchaser until the whole price has been paid. [p. 192, col 1, p 194, col 2]

An agreement entered into between the parties provided that the plaintiff had agreed to sell to the defendant on the hire-purchase system, for a certain sum of money, a certain number of motor-lorries in consideration of payment of the price by certain instalments settled between the parties It was also provided that in case of failure to pay any of the instalments on the due date, the previous payments would be considered null and void. The lorries were not to be considered as sold until the final payment was made The defendant was prohibited from mortgaging or disposing of the lorries until the final instalment was paid and the plaintiff had the right to seize the lorries wherever they may be. A portion of the price was paid at the time of the execution of the agreement and delivery of the lorries was given to the defendant and they were transferred to his name in the registers kept by the Commissioner of Police. Defendant paid some of the instalments and then made default. Plaintiff thereupon brought a suit to recover from the defendant the balance of the unpaid instalments together with damages alleging that the defendant was merely a hirer of the lorries and in the alternative to recover the balance of the price if it was held that the agreement was one of sale;

Held, (1) that the agreement was one of sale providing for the price to be paid by instalments and that the property in the lorries had passed to the defendant on the execution of the document. [p. 195, col. 1.]

(2) that the plaintiff was, therefore, entitled only to claim the balance of the purchase-money which had not been paid by the defendant. [*ibid.*]

FACTS.—In this case the plaintiff made over certain motor vehicles to defendant No. 1 under an agreement, the material portion of which was as follows:—

"I have to-day agreed to sell to you on the hire-purchase system for Rs. 25,000 my nine lorries and accessories together with office furniture lying at present at the garage...In case of failure to pay any of the instalments on due date previous payments will be considered null and void and the lorries are not considered as sold until the final payment has been received. The purchaser has no right to mortgage or dispose of any lorries until the final amount has been paid" [A list of instalments was then given which made up the full amount of Rs 25,000.]

The defendant did not pay all the instalments, and pledged the vehicles with defendant No. 2. The plaintiff alleged in his suit that defendant No. 1 was merely a hirer of the vehicles and had no right to pledge them, and claimed the unpaid instalments and damages. In the alternative he prayed that if the defendant No. 1 be held to be a purchaser the plaintiff should be paid the balance of the price with interest.

Mr. *Davar*, for the Plaintiff.

Mr. *M. V. Desai*, for Defendant No. 2.

JUDGMENT.—[His Lordship after giving the facts of the case proceeded:—]The first point that really arises is what is the nature of the agreement which the parties entered into. Was it a hire-purchase agreement in the sense in which it is so understood in England, *viz.*, no absolute sale, but only a hiring of the chattel by a person who has the option of returning it at any time before the various instalments are paid? Or, on the other hand, despite the language which the parties have used, was it really a sale having regard to what the parties in fact agreed to do? Before I turn to the actual document in this case, I wish to keep these two points of principle clearly before me, so that when I come to the document, I can show what in particular are the relevant passages to be borne in mind.

Now there are two lines of authority illustrating what I have just said. The first line of cases illustrates a hire-purchase agreement proper, *viz.*, where the hirer of a chattel has only an option to purchase the goods and is under no obligation to purchase. That is shown in *Helby* v. *Matthews* (1). A leading case on the other side of the line is *Lee* v. *Butler* (2) where notwithstanding the fact that the parties spoke of themselves as being hirers and so on, and notwithstanding that it was expressly agreed that no property other than as tenant should vest in the hirer until the whole of the payments of rent thereby reserved should have been actually paid, the Court there held that the hirer of the goods had agreed to buy them notwithstanding the language used in the agreement.

Then if I turn to *Belsize Motor Supply Company* v. *Cox* (3) the judgment of Mr. Justice Channell states the dividing line between these two classes of cases. In that particular case the owners of a motor vehicle let it to certain hirers for twenty-four calendar months at the rate of £15 12*s* 2*d* per calendar month. On the signing of the agreement the hirers were to pay, and did pay, £ 50 on account of hire in advance, and each subsequent payment was to be made in advance on specified dates. The hirers were not to re-let, sell, or part with the vehicle without the consent in writing of the owners. But if the hirers should, on or before the expiration of the twenty-four calendar months, be desirous of purchasing the vehicle they could do so by making the amount of hire paid equal to the amount of £422 11*s* 6*d*. Then if the hirers did certain things, of which parting with the possession of the vehicle without the owners' consent in writing was one, it was made lawful for the owners and they were authorised to take possession of the vehicle and terminate the agreement. Then it appears that while the agreement was subsisting, there being a sum due and unpaid on account of hire, the hirers without the consent of the owners pledged the vehicle to a pledgee who took it in good faith and without notice of the owners' rights. Subsequently the owners on hearing of the pledge demanded the vehicle from the

(1) (1895) A. C. 471; 64 L. J. Q. B. 465; 11 R. 232; 72 L. T. 841; 43 W. R. 561; 60 J. P. 20.

(2) (1893) 2 Q. B. 318; 62 L. J. Q. B. 591; 4 R. 563; 69 L. T. 370; 42 W. R. 88.

(3) (1914) 1 K. B. 244: 83 L. J. K. B. 261; 110 L. T. 151.

pledgee, who refused to restore it. At the date of this demand and refusal there was a sum of £58 9*s* due and unpaid on account of hire.

Mr. Justice Channell, in delivering the judgment, said (page 250*):—

"The first question is whether this case comes within the principle of *Helby* v. *Matthews* (1) or that of *Lee* v. *Butler* (2) and later cases of the same class. To decide that question I have to see whether in this agreement of December 10, 1910, the Burgess Company, the original hirers, bound themselves to buy the motor cab. The case of *Lee* v. *Butler* (2) which was not dissented from in *Helby* v *Matthews* (1), decided that where the hirer has agreed to pay all the instalments of purchase-money that amounts to an agreement to buy, and the case comes within s. 9 of the Factors Act, 1889, or s. 25 of the Sale of Goods Act, 1893. In *Helby* v. *Matthews* (1) it was decided that, as the hirer had an option to return the goods, the case did not come within the sections. When those cases had been decided the case of *Hull Ropes Co.*, v. *Adams* (4) came before a Divisional Court. No report of *Helby* v. *Matthews* (1) had as yet been published in the Law Reports, and the Court reserved judgment until a report should appear. Having seen the report they decided that the facts in *Hull Ropes Co.* v. *Adams* (4) did not bring the case within the decision of *Helby* v. *Matthews* (1). There is no conflict between these cases. Where the agreement contains an obligation to pay the purchase-money it is an agreement to buy. In the present case there is a positive obligation to pay twenty-four instalments of £ 15 12 *s.* 2 *d.* That amounts to £ 374-12-*s.* There was also an obligation to pay on the signing of the agreement the sum of £ 50 'on account of hire in advance'. If £ 374 12 *s.* had been the entire sum which would have been necessary to enable the hirer to say that the cab was his property, the agreement would have been an agreement to purchase within the principle of *Lee* v. *Butler* (2) but £ 374 12 *s.* was short of the entire purchase-money by the exact sum of £ 50 (5). If the hirers had both paid the £ 50 and all the twenty-four instalments they would have paid up the full amount required to purchase the cab; but the £ 50 would have been paid as deposit on account of purchase-money in advance. The document on the face of it gives the hirers an option to purchase at any time by paying up the difference between £ 424 11 *s.* 6 *d.* and the sum already paid. That is an option which no doubt the hirers would probably exercise unless it proved valueless, but it is none the less an option when they had paid the twenty-fourth instalment to decline to proceed with the purchase, and to claim a return of the £ 50 deposit. In my view they were never bound to pay more than £ 374 12 *s.* They never bound themselves to pay the whole sum of £ 424 11 *s.* 6 *d.* The case, therefore, comes within the principle of *Helby* v *Matthews* (1) and not within *Lee* v *Butler* (2)."

Then I may mention one more case of *Lewis & Sons* v. *Thomas* (6) where the head-note runs:—

"A hirer of personal chattels under a hiring agreement which gives him an option to purchase them upon payment of all the agreed instalments of rent, but imposes upon him no obligation to do so, is not the 'true owner' of the chattels within the meaning of s. 5 of the Bills of Sale Act (1878) Amendment Act, 1882."

There in effect the Court thought that the case came within *Helby* v. *Matthews* (1).

Then in India there is a case of *In re Linotype and Machinery Co. and Windsor Press* (7) under the Stamp Act, where the Court held that the document in that case was an agreement and not a conveyance. I do not think I need go into the details of that case.

There is one more authority in *Brij Coomaree* v. *Salamandar Fire Insurance Company* (8), where it is pointed out that the rights of parties are governed by the provisions of the Indian Contract Act, and that if they agree to do certain things, then in law certain consequences are bound to ensue. Sir Francis Maclean there says (page 823*):—

"But, if you find in a contract certain terms from which, when they exist, the Legislature says that certain consequences shall ensue, these consequences must ensue; otherwise, it is difficult to see what object

(4) (1895) 65 L. J. Q. B. 114; 73 L. T. 446; 44 W. R. 108.

(5) Both parties ignored as being immaterial the difference between £ 424 12*s.* (*i. e.* £50+£ 374 12 *s*) and the figure £ 424 11*s.* 6*d.* specified as the purchase price in clause 5 of the agreement of December 10, 1910.

*Page of (1924) 1 K. B.—[*Ed.*]

(6) (1919) 1 K. B. 319; 88 L. J. K. B. 275; 118 L. T. 689; (1918-19) B. & C. R. 65.

(7) 37 Ind. Cas. 175; 44 C. 72; 24 C. L. J. 93; 20 C. W. N. 1252.

(8) 2 C. 816.

*Page of 32 C.—[*Ed.*]

there can be in codifying the law upon the question. For these reasons I think that the property in the goods was in the plaintiff and that they were covered by the policy of insurance."

Now the very expression "hire purchase agreement" is not one that originated in this country. It is clearly a form of agreement which has originated in England and has been created by those engaged in the trade of particular articles. Substantially in this country there is little or no authority on hire-purchase agreements. At any rate none has been cited to me, although there has been some reference to some unauthorised reports which I am told are not even in the Bar Library. Under these circumstances I propose to follow the distinctions adopted in the House of Lords between these two classes of authorities, and to consider whether in the suit agreement there was an obligation by the purchaser to buy. As was said by Lord Herschell in *Helby* v. *Matthews* (1) (page 477*):—

"Reliance was placed on the decision in *Lee* v. *Butler* (2), and it was said that the present case was not, in principle, distinguishable from it. There seems to me to be the broadest distinction between the two cases. There was there an agreement to buy. The purchase-money was to be paid in two instalments, but as soon as the agreement was entered into there was an absolute obligation to pay both of them, which might have been enforced by action. The person who obtained the goods could not insist upon returning them and so absolve himself from any obligation to make further payment. Unless there were a breach of contract by the party who engaged to make the payments the transaction necessarily resulted in a sale. That there was in that case an agreement to buy appears to me, as it did to the Court of Appeal, to be beyond question."

(Here his Lordship set out the relevant portions of the agreement and proceeded.] Now was there any option to the purchaser to return these lorries after, say, he had paid four instalments? In my opinion there was not. The agreement begins with an agreement to sell. I agree the words "on the hire-purchase system" follow, but nevertheless it is an agreement to sell for Rs. 25,000, and it is to be "in consideration of payment as under." Then lower down the agreement provides: "The consideration is to be paid as under" and a list of instalments is given which makes up the full purchase-price of Rs. 25,000. I read that document as meaning that the purchaser was bound in any event to pay the whole of this consideration of Rs. 25,000, and that it would be a breach of contract on which he could be sued if he failed to pay up any of the instalments. I do not overlook the fact that the agreement provides that "in case of failure to pay any of the instalments on due date previous payments will be considered null and void." But that may be referable to the kind of measure of damages that the parties had in mind. I cannot consider those words as implying that the purchaser had an option to return the vehicles provided he forfeited the past instalments actually paid.

Then there is a provision that "the lorries are not considered as sold until the final payment has been received." But there again one must consider what is the principle on which the dividing line in the above cases has been laid down. If then there was a sale, on the true construction of this document, I cannot read this clause as meaning that the property was not to pass notwithstanding that the purchaser definitely agreed to buy the lorries and took delivery of the lorries there and then, and agreed to pay the purchase-money by instalments. If one turns to s. 78 of the Indian Contract Act, it is clear that in such a case the property in the goods would ordinarily pass.

There is one further point that the agreement speaks of delivery of all the lorries having been given that day. That is an expression which is applicable as between a vendor and a purchaser. For a mere hirer who has taken the goods on hire, delivery perhaps is not quite the apt word to use.

Then similarly the fact that the motor lorries are to be transferred to the name of the purchaser in the motor register kept by the Commissioner of Police, is at least in keeping with the view that the defendant was to be the purchaser although the purchase-money was to be paid by instalments. At the moment I have only before me the Act itself, *viz.*, The Indian Motor Vehicles Act, 1914, s. 10 of which provides: "The owner of every motor vehicle shall cause it to be registered in the prescribed manner." The rules under that Act which are before me are "The Bombay Motor Vehicles Rules, 1915" which are set out in 'The Motorists

*Page of (1895) A. C.—[*Ed.*]

Guide (India), 2nd Edition" of Mr. Giles, Head Police Office, Bombay. But I am informed by Counsel for the plaintiff that since then other rules have been issued by Government, particularly in connection with motor lorries, and that under those rules a person who plies a vehicle for hire and some other persons who are not necessarily the true owners have to be registered. If that is so, then the point that these lorries were to be transferred to the name of the defendant is not so significant as it otherwise would have been.

What has really happened here is that this is a home-drawn document, in which the parties have talked glibly about a hire-purchase agreement without really understanding what it means: and I have to make the best sense I can of it. In my opinion on its true construction it was really a sale where payment was to be made by instalments, and it comes within the principle of *Lee* v. *Butler* (2) and not within *Helby* v. *Matthews* (1). Under these circumstances, in my opinion, the property in these lorries passed to the purchaser on the execution of the document.

That being so, the relief which the vendor is entitled to is to claim the balance of the purchase-money for goods sold and delivered. It will be seen on looking at the plaint, prayer (*d*), that the plaintiff's claim is put in the alternative there, *viz.*, first for unpaid instalments and also for damages, and alternatively "in the event of this Court holding that there was an agreement of sale of the said nine lorries to the first defendant by a writing dated May 21, 1923, the first defendant may be ordered to pay to the plaintiff the balance of the price, *viz.*, Rs 12,000, with interest thereon at nine per cent. per annum from November 1, 1923." That, in my opinion, is the relief which the plaintiff is entitled to as against defendant No. 1. * * * *

Z. K. *Decree accordingly.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2116 OF 1925.

May 27, 1925.

Present:—Mr. Justice Zafar Ali.

Bawa PARBODH SINGH—DEFENDANT—APPELLANT

versus

Babu BODH RAJ AND OTHERS—PLAINTIFFS—RESPONDENTS.

Construction of document—Mortgage-deed—Compound interest, when can be charged.

A mortgage-deed stated that the mortgage was for a period of four years and that interest would be calculated every two years:

Held, that in the absence of an express stipulation in the deed for payment of compound interest, the deed could not be construed as meaning that compound interest was to be charged after every two years [p. 196, cols. 1 & 2.]

Second appeal from a decree of the District Judge, Shahpur at Sargodha, dated the 27th May 1924, modifying that of the Senior Sub-Judge, Sargodha, dated the 14th August 1923.

Pandit *Sheo Narain*, R. B., Lala *Badri Das*, R. B, and Lala *Arjun Das*, for the Appellant.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—The main contest between the parties in this redemption suit raged round the question of the rate of interest. The mortgage is very old one and the mortgagor was the plaintiff's ancestor Ranpat. By a registered deed dated the 24th May 1869, Ranpat mortgaged with possession his house situated in Miani, District Shahpur, for the sum of Rs. 1,100 The mortgagees were Bawa Partap Singh Pir Chanchal Nath and Har Sahai. Rs. 600 out of the mortgage-money was due to Bawa Partap Singh and the rest, *i.e.* Rs. 500, to the other two mortgagees jointly. The house was later on partitioned so that Bawa Partap Singh got exclusive possession of a portion of the house in proportion to the amount due to him. It is this portion which the plaintiffs sue to redeem. The rate of interest stated in the deed of mortgage is Rs. 80 per cent. per annum and the defendants plead that that was the rate agreed upon though they do not claim the full amount that would be due at that rate. The plaintiffs', on the other hand, contend that the rate agreed upon was Rs. 80 per annum for whole of the mortgage-debt and that the words "*fi sadi*" (per cent.) in the deed were subsequently forged. The Courts below have come to the conclusion that the rate stipulated upon was Rs. 80 per annum for the whole amount.

It is urged in this second appeal that this finding was erroneous as no trace of forgery being discernable in the deed of mortgage, the rate should be taken to be what is stated therein. The parties to the transaction and the scribe and the marginal witnesses of the deed are all dead; but the circumstantial evidence which the Courts below have detailed in their judgments is so strong that it irresistably leads to the con-

clusion at which they have arrived. That evidence is briefly as below:—

(1) Rs. 535 was due by the mortgagor to Bawa Partap Singh mortgagee on a bond and the rate of interest stated in the bond was 10 annas per cent. per mensem. Similarly Rs. 400 was due by the mortgagor to Pir Chanchal Nath on a bond and the rate of interest payable thereon was 8 annas per cent. per mensem. These bond debts, it appears, were included in the mortgage debt and these previous dealings show conclusively that the mortgagor could borrow money on simple bond at the ordinary rate of 8 annas per cent. per mensem. It is, therefore, inconceivable that on converting unsecured debts into secured debts the creditors demanded and the debtors agreed to pay interest at the unusually exorbitant rate of Rs. 80 per cent. per annum. The debtor was not an ignorant rustic but a shrewd Hindu citizen of a town who presumably could not have found it difficult to raise money on the security of his house at the ordinary market rate of interest.

(2) By a registered-deed, dated the 29th June 1871, Pir Chanchal Nath and Har Sahai sold their rights as mortgagees to one Ishar Das and received from him Rs. 500 principal and Rs. 80 on account of interest for about two years. At the rate of Rs. 80 per cent. the interest would have come to Rs. 800 for two years and if the rate had been Rs. 80 per cent. they would have taken care to realize interest at that rate. It is not likely that Pir Chanchal Nath and Har Sahai forgot that the rate was Rs. 80 per cent. This clearly indicates that to the knowledge of these mortgagees the rate was Rs. 80 per annum on the whole amount of the mortgage debt.

From the above and some other circumstances, which it is not necessary to detail here, it follows that the rate of interest agreed upon was Rs. 80 on Rs. 1,100 per annum, and not Rs. 80 per cent. Even if no forgery was committed it can be said without any hesitation that the words "*fi sadi*" were written by the scribe by mistake, as the rate of interest is generally given 'per cent.' and the scribes are in the habit of writing the words 'per cent.' along with the rate.

Further the defendants stated that the plaintiffs were liable to pay compound interest, but there was no stipulation in the deed for payment of compound interest. The mortgage was for a period of four years, and it was stated in the deed that interest will be calculated every two years. From this the defendants conclude that compound interest was to be charged after every two years. No such conclusion could be justified and the point is of no importance because the defendants do not demand payment of the full amount of even simple interest at the rate of Rs. 80 per cent.

The third point relates to a dispute between the two sons of Bawa Partap Singh *inter se*. They are co-defendants in the case and one of them states that he is entitled to the whole of the mortgage-money to the exclusion of other by virtue of the Will of Bawa Partap Singh. The learned District Judge rightly refused to give a decision on their rights of inheritance to determine which a separate suit should be brought. The appeal, therefore, fails and I dismiss it with costs.

The cross-objections were withdrawn by the respondents' Counsel, Bakhshi Tek Chand, before the commencement of the hearing of the appeal.

Z. K. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 15 OF 1923.

AND

REVISION APPLICATION No. 41 OF 1923.

October 3, 1924.

Present:—Mr. Kennedy, J. C., and Mr. Percival, A. J. C.

FATEHCHAND—APPELLANT

versus

PARPATI BAI AND OTHERS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 41, 45—Death of minor—Guardian, whether ceases—Court's power to call for accounts—Refusal to give accounts—Fine—Progressive fine, levy of.

On the death of a ward the powers of the guardian as such do cease, and the Court may properly require him to deliver in any accounts in his possession or control. [p. 198, col. 1.]

When a ward dies, the Court should generally direct the guardian to deliver the property into Court or to deliver property to some person producing an heirship certificate. In very rare cases the latter precaution might be dispensed with, but in that case the Court would otherwise guarantee the interests of possible claimants. The possible dangers, therefore, from the misuse of the Court's powers under s. 41 (3) of the Guardians and Wards Act in the case of a deceased minor do not seem to be very serious and from their existence it should not be deduced that the Legislature intended that on the ward dying, the guardian should be completely beyond control of the Court in his dealings with the estate of the deceased into possession of which he has come under the order of the Court. [p. 197, col. 2; p. 198, col. 1.]

Where the guardian refuses to give full accounts a

fine of Rs. 25 inflicted on him under s. 45, Guardians and Wards Act, is not inappropriate [p. 198, col. 1]

An order for accumulative and [illegible] fine can, however, be levied under s. 45, [illegible] and Wards Act, only in the case of recusancy, which is something more than mere disobedience, and if it is intended to use those powers, as a general rule, it is better to fix some date on which the guardian is to comply with the order of the Court or demonstrate why he is unable to do so and that order may properly contain the penalty that if the Court's order is not complied with, fine will be inflicted on the principle of progression as laid down in the section. [p. 198, col. 2]

Appeal against an order of the District Judge, Hyderabad, (Sind), dated the 13th April 1923.

Mr. *Dharamdas Thawerdas*, for the Appellant.

Messrs. *Tahilram Maniram*, *Dingomal Narainsing*, and *Khanchand Gopaldas*, for the Respondents.

JUDGMENT.—In this case the learned Distr[illegible] J[illegible] of Hyderabad had directed the [illegible] to file accounts within one month and directed that if the accounts were not so filed within one month, notice was to issue under s. 39 of the Guardians and Wards Act. On the 13th of April, the District Judge being dissatisfied with the accounts of the guardian, Fatehchand, called on the guardian to render accounts and having called on him to render accounts and the guardian having failed to do so, fined him Rs. 25 with a recurring fine of Re. 1 per diem until the order was complied with. These orders have been objected to by Fatehchand on various grounds:—

It appears that there were several minors, one boy and some girls. The appointment of two guardians Fatehchand and Kalachand was made in consequence of a settlement and Fatehchand was to be the active guardian whereas Kalachand was the checking guardian. Kalachand put in an application to be relieved of his duty, but no orders have as yet been passed on that matter. There is an allegation that the family was actually joint. In that case, it was alleged by Fatehchand that at any rate on the death of the minor boy, his functions of the guardian have ceased. This position is hotly contested by *Musammat* Parpati Bai and it need not be decided at present.

The main point raised by Fatechand in the present proceedings is, that the Court has no power to order the delivery of accounts or any property, on the ground that the minor boy is now dead. It is not very clear what position he imagines himself at present to possess, but the objection if it has any validity at all must be more to the form rather than to the substance of the order, because if he is still a guardian he can be dealt with under s. 45 (*b*) and if he has ceased to be guardian he can be dealt with under s. 45 (*c*). Notice, however, has gone to him under s. 41 (3) which is only applicable to the case, when the powers of the guardian of property have ceased. Now the argument of Fatehchand is that the circumstances which lead to the ceasing of the powers of the guardian are fully stated in s. 41 (*c*) and until it is shown that one of these three contingencies has occurred, it cannot be said his power as such has ceased. But it would seem that to suppose that after the death of a ward the person who had been a guardian continued to be a guardian would be preposterous. If there be no ward, there can be no guardian. Similarly if there be no wife, there can be no husband. It is not to be supposed that the Legislature did not foresee this difficulty or did not contemplate so common a case as that of a death of a child. Section 41 must be read in so far as possible to give effect to what may be supposed to be the reasonable intentions of the Legislature.

It cannot be denied that it would be expedient that the Court should continue to have control over the action of the ex-guardian. A guardian in some sense is the Officer of the Court and the heirs and relatives of the deceased ward might reasonably complain if the Court would not assist them to ascertain the condition of the estate and tell them how it has been dealt with during the time during which it had been under the control of the guardian. It seems to us unnecessary to suppose that the Legislature wished to guard against dangers of the Court mistaking its functions, that is the fear that the Court might, under colour of directing the guardian to deliver the property in his possession under cl. (3), go on to ascertain questions of title and settle doubtful claims. It appears to us when a ward dies, the Court should generally direct the guardian to deliver the property into Court or to deliver property to some person producing an heirship certificate. In very rare cases the latter precaution might be dispensed with, but in that case the Court would otherwise guarantee the interests of possible claimants. The possible dangers, therefore, from the

misuse of the Court's powers under s. 41 (3) in the case of a deceased minor do not seem to be very serious and from their existence we are not to deduce that the Legislature intended that on the ward dying, the guardian should be completely beyond control of the Court in his dealings with the estate of the deceased into possession of which he has come under the order of the Court.

Nor is it necessary to read s. 41 in so an inconvenient way. Paragraph 2 no doubt gives list of contingencies on the happening of wnich the powers of the guardian cease, but they are not necessarily exhaustive and even if they are exhaustive it is arguable that (c) applies. When the ward owing to death ceases to exist he ceases also to be a minor. If the Legislature had intended to confine the operation of s. 41 (c) to the case where a ward attains majority nothing would have been easier than to have said so. Even if that be taken as a forced interpretation still it does not seem necessarily to follow that the contingencies given in cl. (2) are exhaustive. Clause (3), the clause with which we are at present concerned, says "If for *any cause* the powers of a guardian cease" and it is hardly disputable that when there is no ward, the power of a guardian as guardian must cease. And it would appear, therefore, that on the death of a ward, the powers of guardian as such do cease and the Court may properly require him to deliver in any accounts in his possession or under control. So far we agree with the learned District Judge and we think his order so far is proper.

Inasmuch as the guardian refused to give full accounts, we think the fine of Rs. 25 inflicted is not inappropriate.

The further order for accumulative and progressive fine seems if not without jurisdiction yet inappropriate. The fine is to be levied in the case of recusancy which is something more than mere disobedience and if it is intended to use those powers, as a general rule, it is better to fix some date on which the guardian is to comply with the orders of the Court or demonstrate why he is unable to do so and that order may properly contain the penalty that if the Court's order is not complied with, fine will be inflicted on the principle of progression as laid down in the section.

As it is, we modify the order dated the 13th April 1923 in Miscellaneous Appeal No. 15 of 1923 by upholding the sentence of fine of Rs. 25, but by directing the District Judge now to fix a date in which the accounts are to be produced subject in default to such penalty in the case of recusancy as the District Judge may think fit.

Costs of miscellaneous appeal and revision application to be borne by the appellant. One set of costs allowed in both cases. *Order modified.*

N. H.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2731 OF 1924.

May 21, 1925.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Addison.

FIRM SAGHRU MAL-HAR CHARAN DASS—DEFENDANT—APPELLANT

versus

FIRM DHANPAT RAI-DIWAN CHAND PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 10, 11—Cross-suits between principal and agent—Stay of one suit—Decision of other suit—Res judicata.

A principal filed a suit against his agent for the recovery of a certain sum of money alleged to be due to the former on certain transactions entered into by the agent on behalf of the principal. The agent also instituted a suit against the principal for a certain sum of money on similar grounds The latter suit was stayed pending the decision of the former suit. The trial of the principal's suit was proceeded with and the suit was dismissed, the dismissal being confirmed on appeal:

Held, that the decision of the Trial Court in the principal's suit operated as *res judicata* in the agent's suit with regard to all matters which were in dispute in the former suit. [p. 199, col. 2.]

Second appeal from a decree of the District Judge, Ludhiana, dated the 25th July 1924, reversing that of the Sub-Judge, Ludhiana, dated the 29th February 1924.

Lala *Badri Das*, R. B., and Mr. *Jai Gopal Sethi*, for the Appellant.

Mr. *Mukand Lal Puri*, for the Respondent.

JUDGMENT.—The firm of Saghru Mal Harcharan Das (to be described hereinafter as principals), who carried on business at Ludhiana employed Dhanpat Rai-Diwan Chand (to be described hereinafter as agents) as their agents to do business on their behalf at Karachi. The dealings between the parties led to certain disputes between them, with the result that in August 1913, the principals instituted a suit at Ludhiana for the recovery of Rs. 716-2 3 from the agents. In September 1913 the agents brought an action at Karachi

against the principals claiming a sum of Rs. 3,562-8-0.

The plaint in the latter suit was returned by the Karachi Court with the direction that it should be presented to a competent Court in the Punjab. Consequently this suit too was instituted in the Ludhiana Court but was stayed under s. 10 of the C. P. C. pending the decision of the previously instituted suit.

The suit brought by the principals was, after a protracted trial, dismissed by the Subordinate Judge, and the appeal preferred against his decision was disallowed by a Division Bench of the High Court. The action brought by the agents was then taken up and the principal question for determination was whether the decision in the former suit operated as *res judicata*. In order to determine this question it is necessary to examine carefully the pleadings and the issues in that suit and the decision arrived at by the Courts.

Now, the claim in the former suit related to various transactions set out in Appendices A, B, C and D attached to the plaint in that case. The principals claimed, *inter alia*, Rs. 652-13-0 on account of the balance due to them on transactions detailed in Appendices A and B, Rs. 2,300 the total of the two items advanced by them in cash to the agents and Rs. 900 5 0 in respect of a wheat transaction mentioned in Appendix D. They also urged that the transactions set out in Appendix C were not binding upon them, and that they were wrongly debited with the losses on those transactions.

The agents while admitting the receipt of Rs. 2,300 stated that only Rs. 651-9 6 represented the balance due by them on items contained in Appendices A and B and repudiated the rest of the claim. They pleaded that the transactions in Appendix C were binding on the principals, and that they resulted in a loss amounting to Rs. 6,209-13-0. They denied their liability for the payment of any sum of money to the principals, and asserted that they were entitled to recover from the latter Rs. 3,562 8 0 for which they had instituted a suit which had been stayed under s. 10 of the C. P. C.

The Trial Judge decided that though the sums Rs. 651-9-6 on transactions recorded in Appendices A and B, and Rs. 2,300 on account of advances were due by the agents to the principals, those items were wiped out by the losses suffered by the principals on transactions detailed in Appendix C. These losses, which were found to amount to Rs. 6,209-13-0 left a balance in favour of the agents.

Now, we may say at once that there was a clear finding by the Subordinate Judge that Rs. 651-9-6 were due to the principals on transactions mentioned in Appendices A and B and this finding was not impeached by them in their appeal to the High Court. They cannot now be allowed to raise the question that they were entitled to a larger sum on those transactions. The main dispute relates to the decision on the issues relating to the transactions in Appendix C and on this issue the Trial Court decided not only that the principals were bound by those transactions but also that the losses incurred on their behalf by the agents amounted to Rs. 6,209-13-0. It is to be observed that but for these losses the principals would have been entitled to a decree for a large sum of money, and that in order to wipe out the amounts due to them on other transactions it was necessary to determine the amount payable by them on account of the aforesaid losses. It is true that in their appeal to the High Court they did not challenge the finding of the Trial Judge on the amount of the losses but confined themselves to the question whether they were bound by the transactions. A perusal of the judgment of the High Court, however, shows that the learned Judges after disposing of all the points urged by the appellants, confirmed the decree passed by the Trial Court and dismissed the appeal *in toto*. There can, therefore, be no doubt that the decision of the Trial Court confirmed as it was by the High Court, operates as *res judicata* and that the principals are now precluded from re-agitating the question of the amount of the losses incurred on their behalf by the agents.

Mr. Badri Das for the appellants also impeaches the correctness of the order of the Karachi Court returning the plaint for presentation to a Court of competent jurisdiction in the Punjab, but that order has now become final and cannot be challenged by either of the parties.

On the question of future interest on the amount due to the agents we find that they claimed interest on the sum which was alleged to be due to them at the date of the institution of the suit, and there is no reason why they should not be allowed interest at the usual rate.

The result is that we dismiss the appeals preferred by Sughru Mal-Harcharn Das with costs, and accepting the appeal preferred by Dhanpat Rai-Diwan Chand, we grant them a decree for Rs. 3,549-2-6 with interest at 6 per cent. on that sum from the date of the institution of the suit up to the date of payment. The defendants must pay the costs on that sum to the appellants in all the Courts.

Z. K. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE LOWER BURMA CHIEF COURT.

October 22, 1925.

Present:—Lord Phillimore, Lord Blanesburgh and Sir John Edge.

D. R. K. SAKLAT AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BELLA—DEFENDANT—RESPONDENT.

Trust—Religious endowment—Person not entitled to benefit permitted to share—Trustees, duty of—Zoroastrian Temple at Rangoon—Non-Parsi Zoroastrian, whether entitled to benefit—Injunction

The Zoroastrian religion not only permits but enjoins the conversion to that religion of persons born in other religions and of non-Zoroastrian parents. [p. 202, col. 2.]

In spite of such permission, however, the Zoroastrians, ever since their advent into India, have never attempted to convert anyone into their religion. [*Ibid.*]

The benefits of the Zoroastrian Temple at Rangoon are confined to persons who possess the double qualification of being Zoroastrians and racial Parsis, and Zoroastrians, who are not racial Parsis, have no right of entering into the Temple and may, therefore, be excluded or extruded from the Temple by the Trustees [p. 204, cols. 1 & 2.]

But it does not follow that the trustees are bound to exclude such non-Parsi Zoroastrians from the Temple. Still less does it follow that in an action to which the trustees are not parties, and in which, therefore, no indirect remedy can be claimed, a direct claim by the Parsi Zoroastrians c[illegible] against a non-Parsi Zoroastrian who [illegible] emple, as if for a tort comitted by such person. [p. 204, col 2.]

For a trespass upon temple land, the only person who can bring an action for injunction is the person in possession of the land, that is, the trustee. It may be that in India it may be convenient to allow such a suit by certain worshippers against others. But if so, it must, at any rate, be established that the juxtaposition of the two sets of persons is so repugnant to their [illegible] at the entrance of one set into the T[illegible] departure of the other, so that it is, as it were, trespass to the person. [p 206, col. 1.]

When property is set apart for public or charitable uses, it will be a malversation to apply any of the funds for persons who are not objects of the trust. Those who are objects of the trust must have all the benefits they require; and if there is a surplus, it must be left to the Courts to make a cypres application of it. But when the subject-matter of such a trust or charity is the rendering of some convenience or service of such a nature that it will not hurt the lawful recipients if others share with them, the trustees are not bound to exclude persons who have no legal title to share. They may do so; they may treat all such persons as trespassers and say. *Sic volo sic jubeo, stet pro ratione voluntas.* But if they choose to admit to the benefit of some park or garden established for a particular district some persons from over the border or to admit to a public library destined for a particular Municipality persons from outside, or admit to the hearing of a lecture by a University Professor persons not members of the University, this of itself furnishes no ground of complaint. If the numbers admitted are too large or the persons are disorderly or unpleasant in their habits or in any way substantially interfere with the convenience or benefit of those for whom the endowment was created, the trustees may be required to exclude them. But the mere claim of *A* that *B* shall not share in such a benefit because *B* is not within the terms of the foundation is not one that Courts would encourage. [p. 204, col. 2; 205, col. 1.]

Appeal from a decision of the Chief Court, Lower Burma.

Mr. *A. M. Dunne, K. C.*, Sir *G. R. Lowndes, K. C.*, and Mr. *E. B. Raikes*, for the Appellants.

Messrs. *W. H. Upjohn, K. C.* and *Warwick Draper*, for the Respondent.

JUDGMENT.

Lord Phillimore.—The circumstances of this case are as follows:—

Sometime in 1899 a Goanese Christian named Jones with his wife arrived in Rangoon. They were in humble circumstances, and the wife applied for assistance to a Parsi of good position at Rangoon, Bomanji Cowasji, stating that she too was a Parsi. He befriended her till he went to England in 1900, and then asked his brother Sapurji Cawasji to look after her and the child to which she had just given birth, the respondent Bella. The father died, and when her mother died shortly afterwards, Sapurji, who was a defendant in this suit, but died pending the appeal, took Bella into his own house and he and his wife treated her as their own child.

When Bella was nearly 14, it was desired that the initiation ceremony into the Zoroastrian religion called Navjot should be performed for her, but the local Head Priest at Rangoon refused, chiefly because—as it appears from his evidence—he thought it would be unpopular with the Parsi community. Advantage was then taken of the temporary presence of some other priest, who performed the ceremony; and after that invitations were sent by the Head Priest to Bella to come with Sapurji and his wife to the temple on festival days. Three such invitations were sent, the High

Priest said, with the expectations that they would not be accepted, but on the third occasion, being 21st March 1915, Sapurji brought her and put her within sacred precincts facing the sacred fire, and in such a position that she went through all the ceremonies like other worshippers.

This proceedings gave great offence to a number of members of the Parsi community in Rangoon, and on the 31st March, this suit was brought by three members of the Parsi community, who stated that they brought it not only on their own behalf but on behalf of a large number of members of the Parsi community at Rangoon, against Bella and against Sapurji, stating that the Temple was held on trust for the free and unrestricted use of the Parsi inhabitants in Rangoon professing the Zoroastrian faith, further stating that it was alleged that the mother of Bella was a Parsi, and that Bella had been validly converted or initiated into the Zoroastrian religion, but denying that this was so or indeed could be so, and averring that the defendants had by their acts "not only wounded the religious feelings entertained by religiously inclined Parsis, but also caused the desecration of the said sacred Temple".

In another paragraph of the plaint, they stated that only members of the Parsi community professing the Zoroastrian religion were entitled to the use of the Temple, to the access of the sacred precincts and to attend, witness or take part in any religious ceremonies held therein, and that it was never the intention of the Parsi community that the children of non-Parsi fathers should be allowed the use of the Temple. They further said that even assuming that Bella could be duly admitted into the Zoroastrian religion, and assuming that her mother was a Parsi, even then she could not be considered a Parsi or a member of the Parsi population. They prayed for a declaration that Bella was not entitled to use the Temple or to attend or to participate in any of the religious ceremonies performed therein and for injunctions to restrain her from entering the Temple and Sapurji from taking her there.

Sapurji, in his own name and as guardian for Bella, put in their written statement. In this it was contended that the plaint disclosed no cause of action, that the defendant Bella was entitled to attend the Temple and the ceremonies and caused no desecration by her presence and it was stated that her mother was a Parsi that she had been brought up from early infancy as a Parsi and in the Zoroastrain faith and that she came within the terms of the trust of the Temple.

The following issues were then settled:

"1. Whether the plaint discloses any cause of action?

2. Whether this suit is maintainable?

3. Who are entitled to the benefit of the Fire Temple Trust?

4. Is the first defendant the daughter of a Parsi mother.

5. Is it possible for the first defendant, being a daughter of a non-Parsi father to be initiated (*a*) into the Zoroastarin Religion and (*b*) into the Parsi Community?"

"6. If it was possible, whether the ceremonies adopted for the purpose were defective (the second defendant to give particulars of the ceremonies performed at the initiation of the first defendant within one week, and the plaintiffs to state within one week thereafter whether, and if so, in what respects they contend that these ceremonies were inefficacious"):

and the case was set down for a preliminary hearing on the first and second issues.

The Judge decided these points in favour of the plaintiffs; and thereupon some oral evidence was taken before the Judge at Rangoon, and a mass of evidence covering 664 pages of the record was taken on commission at Bombay.

It appears that this was not the first occasion in modern times in which the question of the admissibility of a person who was not a racial Parsi, but who had become a convert to the Zoroastrian religion, to participate in the religious services and enter the temples of the Parsis had arisen.

In 1903 a French woman had declared that she had become a convert to the Zoroastrian religion and had married a Parsi gentleman of position at Bombay. Her claim to participate in religious worship had given rise to much excitement in the Parsi community, and seven Parsis, one of whom was the French woman's husband, had brought a suit in the High Court of Bombay against the trustees of the Parsi endowments, first making a general case of some misfeasances requiring the intervention of the Court, and, secondly, claiming a declaration that the trust deeds ought to be construed as admitting to their benefits

any persons professing the Zoroastrian religion whether a racial Parsi or not.

After a prolonged litigation, this suit, except in so far as it prayed for a correction of the general misfeasances, was dismissed; and the Judges, for reasons which will have to be more minutely entered into, held that the various endowments were limited to the use of people who as well as being Zoroastrian were also racial Parsis. But the controversy had not been forgotten, and its echoes are to be heard in the evidence given on commission in the present case.

Young, J., in the preliminary judgment given in the present case, held that the plaintiffs could not sue for trespass on land or in the Temple, but that they might have a third cause of action which he described as an interference with their right to exclusive worship. He thought that they had sufficiently alleged this right and its infringement, that the right was one which had been often upheld by the Courts, and that the suit could be brought without joining the trustee or without obtaining the consent of the Advocate-General. When he came to his later decision upon the whole case, he described the injury as "an injury to the plaintiffs' individual right to worship undisturbed by the intrusion of a person not belonging to their faith," and applying his mind to the fifth and sixth issues, he held that Bella could be initiated into the Zoroastrian religion and into the Parsi community; that the ceremonies adopted for the purpose were sufficient, and that, therefore, there was no intrusion of a person not belonging to the plaintiffs' faith, and it became immaterial to decide issues Nos. 3 and 4. Accordingly he dismissed the suit.

When the matter came before the Chief Court, on appeal, the Judges, though apparently they heard one continuous argument, gave two judgments: the first in respect of the preliminary issues. In this they confirmed the actual decision of Young, J., but enlarged the plaintiffs' cause of action, saying that they might treat it as an injury to themselves, that Bella, even though she were a Zoroastrian, yet not being a Parsi, came to the Temple worship.

This made it necessary for the Judges in the Chief Court to determine the third issue, *viz.*, who are entitled to the benefits of the Fire Temple Trust; and they held that it was a trust for a religion and not for a race. They then held in agreement with Young, J., that Bella could be and was converted or initiated into the Zoroastrian religion, and, therefore, they concurred with him in dismissing the suit.

The Judges in the Chief Court took the view that fourth issue might also have been decided in favour of Bella, *i. e.*, that her mother was a Parsi, but that this fact was unimportant, except as leading up to her conversion or initiation. Their Lordships agree with this. In their view it is settled that as regards the racial claim, maternity is of no importance.

The appeal to their Lordships' Board has raised among other questions the actuality and validity of Bella's conversion and initiation; but on this point their Lordships see no reason for differing from the judgment of the Chief Court.

In the great controversy in the Bombay case, *Dinsaw Manockji Petit* v. *Jamsetji Jeejebhoy* (1) the two learned Judges (one of whom was himself a Parsi), came to the following conclusions thus expressed by the Parsi Judge, Davar, J.,:—

"1. That the Zoroastrian religion not only permits but enjoins the conversion of a person born in another religion and of non-Zoroastrian parents.

"2. That although such conversion was permissible, the Zoroastrians, ever since their advent into India 1200 years ago, have never attempted to convert anyone into their religion.

"3. That there is not a single instance proved before the Court of a person born of both non-Zoroastrian parents ever having been admitted into the Zoroastrian religion professed by the Parsis in India."

It is true that as regards the quantum of the necessary ceremonial on initiation, Davar, J., expressed an opinion that a piece of ritual called Burushnun was an essential part; but in this matter he was travelling outside anything necessary for the case before him; and their Lordships do not find that Beaman, J., the other Judge, concurred with him as to this and they think that the evidence given in the present case warranted the decision to which the Chief Court came that this additional ceremonial was not necessary.

It follows, therefore, that the points which their Lordships have now to determine are whether the trusts of the Temple are for the benefit of all persons professing the Zoroastrian religion or limited to those who,

(1) 2 Ind. Cas. 701; 33 B. 509; 11 Bom. L. R. 85; 5 M. L. T 301.

professing that religion, are also racial Parsis in the sense in which that word is understood in the Parsi community; and, secondly, whether if Bella, not being a racial Parsi, is not a person within the benefits of the Temple Trust, this fact gives the plaintiffs any right of direct action against her and against her guardian.

The contention on behalf of the plaintiffs was the same as that of the contention of the defendants in the Bombay case, namly, that all these trusts were intended for Parsis in the limited sense, *i.e.* :—

"First.—The descendants of the original emigrants into India from Persia who profess the Zoroastrian religion.

"Secondly.—The descendants of the Zoroastrians in Persia who were not amongst the original emigrants, but who are of the same stock and have since that date, from time to time, come to India and have settled here, either permanently or temporarily, and who profess the Zoroastrian religion.

"Thirdly.—The children of a Parsi father by an alien mother, if such children are admitted into the religion of their fathers and profess the Zoroastrian religion."

Now the origin of the Temple, the right to worship at which is in dispute in the present case, is as follows :—

On the 24th November 1863 the Deputy-Commissioner at Rangoon, on behalf of Her Majesty's Government, [illegible] to Bajunji Cowasji and Sapurji [illegible] parcel of land in the town of Rangoon of a certain size "upon trust to build and maintain upon the said parcel of land a temple for the use of Parsi population".

It was provided that the Deputy Commissioner might nominate new trustees, and that if a Temple was not erected within a year, he might revoke the grant.

On the 14th August, 1882—probably because there had been delay in building the Temple—a re grant was made to new trustees upon trust for the same intents and purposes as the old grant, with like powers to appoint new trustees and a similar power of revocation if no temple was built within a year.

Previously on the 11th January 1859 the then Deputy Commissioner had granted to two Parsi gentlemen another piece of land upon trust to maintain it "as a cemetery and to the free use of persons of the Parsi denomination". There was a similar power given to the Deputy Commissioner to appoint new trustees and a power of revocation in case the land was applied to other uses. This grant was again renewed also on the 14th August 1882.

Some disputes having arisen as to the Temple, a suit was brought to have a new trustee appointed, and a scheme of management framed; and on the 20th March 1889 the Recorder appointed Bajunji Cowasji sole trustee and ordered a scheme to be framed.

About the same time, a similar suit had been brought in respect of the burial ground, and by an order of the same date the same person was appointed trustee and a similar order to frame a scheme was made. The scheme in respect of the Temple gave the trustee charge of the Temple and its appurtenances with duty to manage and improve as funds permitted and power to build a range of shops on part of the trust lands, borrowing money for the purpose. After re-payment of monies borrowed the rest was to be applied for the current expenses of the Fire Temple and the Parsi Burial Ground. In this way and to this extent the two properties were brought together.

When the scheme for the burial ground was to be framed, there was a serious dispute with regard to children of Parsi fathers who died without having gone through the ceremonies of initiation, and eventually the scheme was framed in the following words :—

"1. The Burial ground shall be used for burying persons who shall at his or her death be actually professing the Zoroastrian religion and no other.

"*Explanation.*—No one shall be taken to be actually professing the Zoroastrian religion who has not been duly invested with the Sudra and Kusti, in accordance with the rites prescribed by that religion, provided, nevertheless, that children born of fathers following the Zoroastrian religion, and brought up in that faith, and dying before the age of 14 years and three months, without having been invested with the Sudra and Kusti, may be taken to be actually professing the Zoroastrian religion, but children dying after having attained that age without having been invested with the Sudra and Kusti shall not be taken to have professed the Zoroastrian religion unless his or her investiture was prevented by unforeseen and unavoidable circumstances."

It is suggested for the defendants that

this document shows that the stress of the matter was laid upon the religion and not upon the race.

One other document must be mentioned. Apparently it took a long time before the Temple or at any rate the present Temple was built, and on the 20th August 1904, Bajunji Cowasji executed a deed of declaration of trust reciting that he and his brother had built at their charge a fire temple upon the trust lands so that the same might form part of the said trusts and be for the use of the Parsi inhabitants of Rangoon, and purporting to declare for himself and his successors-in-office that he held the fire temple "for the use of the Parsi inhabitants of Rangoon free and unrestricted but subject notwithstanding to the tenets of the pure Zoroastrian religion and to the scheme prescribed by the Court."

The defendants as their Lordships' bar contended that this was an attempt to alter the trust and as such should be rejected, but in their written statement they accepted it as a valid document. So far as it goes, it rather makes in the plaintiff's favour, but their Lordships are not disposed to attach grave importance to it.

The Chief Court—as already stated—considered that the effect of these documents was to impose a trust for the benefit of persons professing the Zoroastrian religion and no others.

Their Lordships agree with the latter part of this proposition. Parsis who cease to be Zoroastrians have, in their Lordships' view, no claim. But upon the whole and after much consideration, they think that the benefits are confined to persons who possess the double qualification of Zoroastrians and racial Parsis.

The judgment in the Bombay case travelled over much ground—indeed, in their Lordships' opinion, much unnecessary ground—but both Judges came to the conclusion that the various trusts in that case must be construed as being confined to persons who were of the Zoroastrian religion and racial Parsis. There were several trusts, and the expressions in the deeds were different; but the word Parsi never appeared in them, and the word Zoroastrian or some equivalent religious word was used. Sometimes the trusts were for the members of the Zoroastrian community of Bombay; other phrases were similar. Nevertheless, both Judges came to the conclusion that they must be read as has been already stated.

Davar, J. Thus expressad himself:—

"A Juddin (that is a Gentile) may become a Zoroastrian, but how he ever could possibly become a member of 'the Holy Zoroastrian Anjuman of Bombay' or be one of 'the members of the Zoroastrian Community of Bombay' or become one of the 'Anjuman of the Mazdiasni faith,' passes my comprehension. A Juddin converted to Zoroastrianism had never come into existence. Such a person could not possibly have been within the contemplation of the donors and founders: the possibility of such a being coming into existence would be so new and novel that if the donor ever conceived such an idea and intended to include him in his benefaction, he would certainly designate him separately and specially and not include him in the general description of the community of his then existing co-religionists and their descendants."

Beaman, J., said:—

"The question is not whether the Zoroastrian religion permits conversion, but whether, when these trusts were founded, the Founders contemplated and intended that converts should be admitted to participate in them."

In their Lordships' view the same line of reasoning applies to the present case. The Parsi community had grown up to be such a distinct body, and admissions into it from outside had been so very rare, that at the time when these grants at Rangoon were made, the Government must have intended that the Temple should be for the benefit of professing members of the Parsi community, *i.e.*, racial Parsis or people deemed after a long lapse of ages to be racial Parsis.

But this does not exhaust the matters to be determined on the present appeal. It determines that the respondent Bella has no right of entering into the Temple and may, therefore, be excluded or extruded from the Temple by the Trustees. They can treat her as a trespasser. But it does not follow that they are bound so to treat her. Still less does it follow that in an action to which the trustees are not parties, and in which, therefore, no indirect remedy can be obtained, a direct claim can be supported as if for a tort committed by Bella or her guardian.

When property is set apart for public or

charitable uses, it will be a malversation to apply any of the funds for persons who are not objects of the trust. Those who are objects of the trust must have all the benefits they require; and if there is a surplus, it must be left to the Courts to make a cypres application of it. But when the subject-matter of such a trust or charity is the rendering of some convenience or service of such a nature that it will not hurt the lawful recipients if others share with them their Lordships are aware of no case in which it has been held, that the trustees are bound to exclude persons who have no legal title to share. They may do so; they may treat all such persons as trespassers and say: *Sic volo sic jubeo, stet pro ratione voluntas.* But if they choose to admit to the benefit of some park or garden established for a particular district some persons from over the border or to admit to a public library destined for a particular Municipality persons from outside, or what is perhaps a nearer analogy, admit to the hearing of a lecture by a University Professor persons not members of the University, this of itself furnishes no ground of complaint. If the numbers admitted are too large or the persons are disorderly or unpleasant in their habits or in any way substantially interfere with the convenience or benefit of those for whom the endowment was created, the trustees may be required to exclude them. But the mere claim of *A* that *B* shall not share in such a benefit because *B* is not within the terms of the foundation is not one that Courts would encourage.

Many illustrations of this doctrine could be drawn from the history of English institutions. The great schools of Westminster, Eton and Winchester arose from small nuclei, namely, a fixed number of endowed and privileged scholars taught by appointed masters. They have become what they are because unprivileged boys in greater numbers have been allowed to benefit by the services of the appointed masters, and to use the school class-room and play-grounds.

The Statutes of the Colleges in Oxford and Cambridge make provision for the education of a fixed number of students or scholars privileged and endowed. Many, if not most, of them make no provision for the admission of other members in *statu pupillari*. But "commoners," so called, though their legal position is merely that of boarders, *Rex* v. *Grundon, Exp. Davison* (2) have been for several centuries admitted equally with the privileged scholars to the benefits of the colleges, particularly to the use of hall, library and chapel.

The intrusion of an unbeliever into a place of religious worship might well be a case of substantial interference with the devotions of worshippers. But the plaintiffs have failed to make out that Bella was not a Zoroastrian. They suggested indeed that her conversion was impossible, or, at any rate, that it had not been completed by due initiation; but their Lordships agree with the Judge of first instance that this suggestion was not established; while, except in the evidence of one unsatisfactory witness, there was nothing to show that Bella's presence would be thought to cause desecration, if once it was accepted that she was a Zoroastrian.

Also, if it were a question of caste and worshippers of a higher caste would be defiled by the presence of a lower caste, as in *Anandrav Bhikaji Phadke* v. *Shankar Daji Charya* (3) this would be a serious disturbance. As was said in that case:—

"This right is one which the Courts must guard, as otherwise all high-caste Hindus would hold their sanctuaries, and perfrom their worship, only so far as those of the lower castes chose to allow them."

But this claim is again not established. Indeed, what may be called the *quasi*-caste claim is not even suggested in the pleadings. It is the wounding of religious feelings and the desecration of the Temple which are put forward.

Their Lordships have now to consider the relief which the plaintiffs have sought in his suit. They have not sought for a general declaration as to the persons who are objects of the trust. They have not sought for a construction of the scheme, or for any order to be made upon the trustee, nor have they made the trustee a party. For this they would probably have required the consent of the Advocate General. They pray in the plaint "for a declaration that the defendant Bella is not entitled to the use and benefits of the Parsi Fire Temple in Dalhousie Street known as 'Captain's Agiary or Dhurraymair' or to the use and benefits of the buildings standing on the said trust land or to attend at

(2) Cooper's Reports 319,
(3) 7 B. 323; 7 Ind. Jur. 613; 4 Ind. Dec. (N. S.) 218.

or participate in any of the religious ceremonies performed therein."

Then they claim an injunction to restrain the defendant Bella from entering and the other defendant, now dead, from bringing her into the temple to attend the religious ceremonies. This is a claim for an injunction to prevent the repetition of an alleged trespass. It must, therefore, first be established that there was a trespass and one for which damages, though possibly only nominal, could be rocovered. But for trespass upon land the only person to bring the action is the person in possession of the land, that is, the trustee. That a beneficiary or two or three beneficiaries of a trust for public purposes may bring a suit for trespass against an intruder is a novel principle of jurisprudence; and the case is not made stronger by the suggestion that several other beneficiaries agree with them.

It may be that in India it would be convenient in some cases to allow such a suit, and the judgment in *Anandran Bhikaji Phadke* v. *Shonkar Daji Charya* (3) may form a precedent. But, if so, the circumstances must be as powerful as in that case. It must be established that the juxt aposition of the two sets of persons is so repugnant to their habits of mind that the entrance of one set into the Temple entails the departure of the other, so that it is, as it were, trespass to the person.

As already stated, no such case has been established, and, therefore, it is not necessary to discuss the principle on which the judgment in *Anandran Bhikaji Phadke* v. *Shankar Daji Charya* (3) is founded and which was indeed accepted by the Judge of first instance in the present case. The facts do not warrant the claim, if it be a sound one, and no injunction can be granted.

With regard to costs, the learned Judge of first instance, while giving the defendants the general costs of the action, thought that both sides were to blame for the inordinate length of the Bombay commission and made the plaintiffs pay two-thirds only of the defendant's costs of the Commission.

If any costs of the action were to be given, some similar provision should be applied. But, upon the whole, their Lordships feel that the plaintiffs have failed in the greater part of their suit, and that the giving to them of a declaration is an indulgence. They were given the costs of the preliminary issues before Young, J., and the costs of so much of the appeal as related to those issues. These they keep, and the orders against them in respect of other costs in the Courts below will be discharged, and there will be no costs of this appeal. Their Lordships will humbly recommend His Majesty that this appeal be allowed, that the judgment of the Chief Court be varied, and that a declaration be made, namely, that Bella was not entitled, as of right, to use the temple, or to attend or to participate in any of the religious ceremonies performed therein, that except as to the costs awarded to the plaintiffs in the Court of first instance, and in the Chief Court, there be no costs in the Courts below and that there be no costs of this appeal.

N. H. *Appeal allowed.*
Z. K.

Solicitor for the Appellants Mr. *A. M. Bramall*

Solicitors for the Respondent:—Messrs. *Waterhouse & Co.*

SIND JUDICIAL COMMISSIONER'S COURT.

REVISION APPLICATION No. 90 OF 1923.
July 25, 1923.

Present:—Mr. Kennedy, J. C., and Mr. Rupchand Bilaram, A. J. C.

MESSRS. POHUMAL AND BROTHERS—PLAINTIFFS—APPLICANTS

versus

THE KARACHI PORT TRUST AND ANOTHER—DEFENDANTS—OPPONENTS.

Bills of Lading Act (IX of 1856), s. 3—Bill of Lading, description of goods in, whether conclusive—Exemptions clause in Bill of Lading, effect of—Port Trust, whether entitled to benefit of exemption.

The general rule based on the provisions of s. 3 of the Bills of Lading Act, to the effect that in the absence of any proof that the Bills of Lading were granted under a misrepresentation without any default on the part of the person signing them and wholly due to the fault of the shipper or the holder of such Bills of Lading, the Bills of Lading are conclusive evidence that the goods bearing particular marks as shown in the respective Bills of Lading were put on board, has no application when the Shipping Company has protected itself by insertion of a clause in the Bill of Lading that the marks and numbers though shown in the Bill of Lading are unknown to them and that they do not admit that the marks or numbers shown in the Bill of Lading are correct and when they have exempted themselves from liability against obliteration or difference of marks. [p. 207, cols. 1 & 2.]

Section 3 of the Bills of Lading Act applies only in the case of the master or person signing the Bill and does not apply to the Port Trust. [p. 208, col. 1]

Even if the Port Trust be considered to be the agent of the Shipping Company, they would be equally entitled to the benefit of an exemption clause, as a wharfinger is justified or excused by the same thing as would justify or excuse the master and can, consequently, claim benefit of exemptions provided in a Bill of Lading. [*ibid*]

Glyn Mills Co., v. *East and West India Dock Co*, (1882) 7 A. C. 591 at p 614; 52 L. J. Q B 146, 47 L. T. 309; 31 W. R. 201, relied upon.

Revision application against the judgment and decree, of the Judge of the Small Causes Court, Karachi, dated the 31st July 1923.

Mr. *Dipchand Chandumal*, for the Applicants.

Messrs. *T. G. Elphinston* and *Nihalchand Tikamdas*, for the Opponents.

JUDGMENT.—The plaintiffs-applicants are holders of certain Bills of Lading of tin plates consigned from Trieste to Karachi by an Italian ship. The plaintiffs instituted this suit in the Small Causes Court, Karachi against the Shipping Company and the Karachi Port Trust for the value of 57 mild-steel plates short accounted for. Their suit was dismissed against both the defendants except in respect of the value of one mild-steel plate which was proved to have been short landed and for which they got a decree against the Shipping Company. The plaintiffs come now before us in revision. It appears from the written statement filed by the Karachi Port Trust that 2,070 plates bearing various marks were landed at Karachi of which 2,014 plates were delivered to the consignees according to the proper marks shown in their Bills of Lading. The remaining 56 plates bore marks different from those shown in the Bills of Lading of the plaintiffs. These 56 plates were tendered to the plaintiffs but were rejected.

To prove their claim against both the defendants the plaintiffs have relied on the description of the plates as given in the Bills of Lading and the provisions of s. 3 of the Bills of Lading Act and have contended that in the absence of any proof that the Bills of Lading were granted under a misrepresentation without any default on the part of the person signing them and wholly due to the fault of the shipper or the holder of such Bills of Lading, the Bills of Lading are conclusive evidence that the goods bearing particular marks as shown in the respective Bills of Lading were put on board. Ordinarily the Bills of Lading would no doubt afford such evidence against the Shipping Company, but in view of the difficulty of verifying particular marks on articles of a similar nature shipped on board, the Shipping Companies protect themselves by inserting a clause that the marks and numbers though shown in the Bill of Lading are unknown to them and that they do not admit that the marks or numbers shown in the Bills of Lading are correct They also protect themselves against obliteration of marks.

The Bills of Lading in suit are in Italian and contain side by side English translation of the clauses providing for exemption. The original Italian clause provides for exemption of the Shipping Company "*Per differenza O Mancanza di marche e Numeri.*" It has been translated as "for want or obliteration of marks or numbers," which is not accurate The Bills of Lading do exempt the Company for *difference in marks*. The description of marks as given in the Bills of Lading is, therefore, no evidence against the Shipping Company. It was, therefore, for the plaintiffs to prove by evidence *aliende* that plates bearing the particular marks were actually handed over to the Shipping Company. This they have failed to prove. Even if it be assumed that the plates bearing the particular marks were put on Board, the Shipping Company are further exempted from liability under cl. 14 of the Bill of Lading known as the "free of ships Tackle clause" which reads as follows:—

"The ship's responsibility shall cease when goods pass on deck ready to be discharged.

"As soon as the steamer arrives at the discharging place and is ready to discharge wherever she may be anchored, Consignees must be ready to take delivery of the goods as they come to hand in the holds from the ship's deck where the responsibility of the Company shall cease. Captain is authorised to discharge by day and night on Sundays and holidays without interruption and to change berth during discharge.

"And if consignees do not take delivery in due time, the Captain has faculty to land or discharge the goods in lighters or hulks at receiver's risk and expenses. In case of taking delivery from ship's deck no claims shall be admitted for loss or damage after the goods have left the ship's side without any such loss or damage being

ascertained. In every other case no claim for indemnity shall be admitted, unless made in writing to the Company's agent within 24 hours from unloading of the goods."

The plaintiffs' case, therefore, fails against the Shipping Company. They cannot rely on the description given in the Bills of Lading as against the Karachi Port Trust as s. 3 of the Bills of Lading Act is limited to the master or the person signing the Bills. Even if it be assumed that the Port Trust act as the agents of the Shipping Company they will equally be entitled to take advantage of the exemption in the Bills of Lading. As pointed out by Lord Blackburn in *Glyn Mills Co.* v. *East and West India Dock Co.* (1), a wharfinger is justified or excused by the same thing as would justify or excuse the master.

The Port Trust are, however, not ordinary wharfingers or agents of the Shipping Company. They land the goods under their statutory authority as agents of both parties and a Bill of Lading are no evidence against them. Again it was for the plaintiffs to prove that the Port Trust received the particular goods. This they could have done either by proving that the Port Trust signed for the specific goods as that they wrongly delivered the specific goods belonging to them to other consignees. This they have failed to prove.

The plaintiffs' case as against them also fails. We dismiss this appeal with costs two separate sets of costs to be allowed to the two defendants.

P. B. A. *Application dismissed.*

(1) (1882) 7 A. C. 591 at p. 614; 52 L. J. Q. B. 146; 47 L. T. 309; 31 W. R. 201.

RANGOON HIGH COURT.

CIVIL REVISION NO. 15 OF 1925.

May 7, 1925.

Present:—Mr. Justice Pratt.

MAUNG THAN—PETITIONER

versus

ZAINAT BIBI AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151, O. XLI, r. 19—Appeal—Dismissal for default—Laches of Advocate—Mistake of clerk—Restoration.

The laches of an Advocate or the careless mistake of his clerk is not sufficient cause for restoration of an appeal dismissed for default.

Mr. *San Wa*, for the Petitioner.

Mr. *Lutter*, for the Respondents.

JUDGMENT.—Applicant seeks to have his revisional application, which was dismissed for default of appearance, restored under O. XLI, r. 19.

Counsel's explanation of his failure to appear on the day fixed for hearing is that his clerk after examining the cause list for the week made a mistake and informed him that the case was fixed for hearing before the Bench on the 17th or 18th.

Counsel went to Court to argue the case on the 17th and found that it had been heard *ex parte* on the previous day.

An examination of the cause lists for the week in question shows that the case was on the Single Judge Board fixed for the 16th.

There was a Bench Board fixed for the 17th and 18th.

It is hard *prima facie* to understand how the clerk could have made the mistake, he is alleged to have done, and in any case the revision application was not a Bench matter and Counsel should have known there was something suspicious, when his clerk informed him the case was down for hearing before a Bench.

The Punjab case of *Gauran* v. *Brij Raj Saran* (1) does not lay down that the mistake of an Advocate is sufficient cause within the meaning of r. 19 of O. XLI, but a Single Judge there held that he had a discretion to restore an appeal where a case was made out even though that case did not amount to sufficient cause.

Apparently the Judge was of opinion that the case was one, where he was justified in using his inherent power of restoration.

The laches of an Advocate or the careless mistake of his clerk is not sufficient cause for restoration of an appeal dismissed for default.

I do not consider on the facts the present is a case in which good ground has been made out for the exercise of its inherent power by the Court.

The application is dismissed with costs—Advocate's fee one gold *mohur*.

Z. K. *Application dismissed.*

(1) 51 Ind. Cas. 607; 53 P. R. 1919.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 877 OF 1924.

January 7, 1925.

Present :—Mr. Justice Abdul Raoof.

HASHMAT HUSSAIN *alias* CHUNNI AND OTHERS—CONVICTS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal trial—First Information, delay in making—Conflicting statements as to number of accused—Suspicion.

Where a complainant has made conflicting statements with regard to the number of accused in the First Information Report and his complaint, his evidence with regard to the identification of the accused persons should be looked upon with suspicion. The fact that the First Information Report was made after considerable delay and that there is no satisfactory explanation of the delay would add to the suspicion. [p. 211, col. 2.]

Criminal appeal from an order of the District Magistrate, Gurgaon, dated the 30th September 1924.

Messrs. *Aziz Ahmad* and *Shamair Chand*, for the Appellants.

The Government Advocate, for the Respondent.

JUDGMENT.—The appellants have been convicted under s. 363 of the Indian Penal Code and have been awarded various sentences. They have come up in appeal, and it has been contended that they having been once discharged ought not to have been tried a second time.

The following facts will disclose the nature of the proceedings taken against the appellants :—

In the village Narainpur lived one Kanhaya *Ahir*, a collateral in the 6th degree of Mangtu complainant Kanhaya died in 1918 leaving a widow and three daughters named *Musammat* Moharli, major, Janki minor, and Shanti minor. After the death of their father the girls lived with their mother till her death in March 1920. *Musammat* Moharli was married to Pem Raj accused No 1. Her minor sisters *Musammat* Janki and *Musammat* Shanti then began to live with Bhagwana and Sheo Lal *Ahirs*. Mangtu applied to be appointed the guardian of the girls and in spite of the opposition of Bhagwana, Sheo Lal and Ram Narain he was appointed the guardian both of persons and the property of the minors. The girls then came to live with Mangtu. On the 25th of April 1923, *Musammat* Moharli, the married sister of the minor girls, applied to the Senior Subordinate Judge for the removal of Mangtu from the guardianship on the ground that he was going to marry *Musammat* Janki to an unsuitable person. She also asked the Court to appoint her as guardian of her sisters in the place of Mangtu. Her application was, of course, opposed by Mangtu. On the 29th of April 1923 Mangtu lodged the First Information Report at Police Station Khol, 10 miles from Narainpur, to the effect that on the evening of the 28th he and most of the men of the village of Narainpur were on their threshing-floors when the appellants along with some other persons came to his house and took away the two minor girls by force. He mentioned the names of the eight accused and Umrao, Mashuq and Nathu as the persons who had been seen by witnesses at the time of the raid. As the Sub Inspector in charge of the *thana* was absent, the *Madad Muharrir* proceeded the next day to the spot to make the investigation. On the 1st of May a Head Constable took charge and on the 2nd of May the Sub-Inspector Amjad Ali was specially deputed to investigate and he carried on the investigation upto the 6th of May. On the 29th of May the Sub-Inspector Kamar-ud-din took charge of the investigation. In the meantime Mangtu put in a petition of complaint on the 15th of May 1923 in the Court of Mr. F. L. Brayne, District Magistrate, Gurgaon. In this petition he added the names of Maulia, Aftab Husain, Ijaz Hussain, Muhammad Abbas, Shabrati and Azimullah to the list of the accused persons. On the 7th of August 1923 the Police sent up a *challan* for proceeding against eleven persons, namely, Pem Raj, Hashmat Hussain, Muhammad Abbas, Maulia, *Musammat* Moharli, Bal Chand, Ikram, Gauria, Deoki, Hazari, and Nathu. The *challan* was presented before Mr. Brayne, District Magistrate, Gurgaon, before whom the complaint of Mangtu was pending. On the 7th of August 1923 the Court Inspector submitted a report criticising the First Information Report, Mangtu's complaint and all the witnesses produced by Mangtu during the investigation and expressed his opinion that there was no case worth trying. The Public Prosecutor also expressed his opinion to the same effect and the Superintendent of Police agreed with him. At the suggestion of the Superintendent of Police the Court Inspector on the 4th of September 1923 asked the permission of the Court to withdraw the case. The accused were

accordingly discharged by the District Magistrate.

Soon after *i. e.*, on the 11th of September 1923 the District Magistrate proceeded on the complaint of Mangtu and after taking action under s 202 of the Cr. P. C. decided to try the eight accused. Objection was taken on behalf of the accused persons that they having already been discharged could not be tried a second time. The District Magistrate overruled this objection and proceeded with the case. It must be noted in the beginning that on account of the Police proceedings and the subsequent order of discharge the case has become very much complicated. Of the accused persons four were *Syyads*, one *Ahir* and two *Baurias*. With the exception of Pem Raj *Ahir* of *Mauza* Fazilpur, all the other accused persons were residents of *Mauza* Hussainpur, *Tahsil* Rewari, District Gurgaon. There are two alternative versions of the occurrence of the 28th of April 1923. The version of the prosecution has already been given. The defence version was that the girls were taken away by their sister *Musammat* Mahorli and they had willingly accompanied her because they were badly treated by the two wives of their guardian Mangtu. The issue to be tried in the case was whether the accused persons had forcibly taken away the girls and had committed an offence under s. 363 of the Indian Penal Code or whether the girls had gone away willingly with their sister *Musammat* Moharli and Mangtu finding that the girls had disappeared had falsely brought the charge against the accused. As already pointed out in the First Information Report the names of eleven persons were mentioned by Mangtu. When he filed his complaint he added some more names. The Police *challaned* the case against some of the accused and some other persons. These discrepancies in the First Information Report, in the complaint and in the *challan* make the case very suspicious because it appears that Mangtu and his friends were not able to make up their minds as to the persons whom they would like to prosecute. Another circumstance which makes the case suspicious is that *Musammat* Moharli and her minor sisters appeared before the *thanedar* of Farrukhnagar and stated that owing to the bad treatment by the two wives of Mangtu they had come away from his house. The statement of *Musammat* Moharli was taken down and also that of *Musammat* Janki the elder of the two minor girls. In the First Information Report by Mangtu Sheo Dat, Nathu and Hem Raj were mentioned as eye-witnesses. In his examination on the complaint he also mentioned Bala (P. W. No. 4) and *Musammat* Jeoni (P. W. No. 2) among the eye-witnesses. In the First Information Report no motive was alleged for the crime. In the petition of complaint, however, it was stated that the intention of the accused was to sell the girls and to take away some moveables from his house. Nathu, though mentioned as an eye-witness was not examined for the prosecution. Likewise the second wife of Mangtu, though present in the house at the time of the occurrence, was not called as a witness. Sidhu, brother of Mangtu, was also present but he too was not called. Mangtu in his deposition mentioned the name of one Sohnia as a witness, but this person also was not called as a witness for the prosecution.

According to the story for the prosecution a number of persons had arrived on the spot on hearing the hue and cry, yet no attempt appears to have been made either to follow the raiders or to report to the Police at once without losing time. What appears to have been done was that some persons were sent about to search the girls.

The question to be decided whether the occurrence, as stated by the prosecution witnesses, took place at all and whether the appellants were members of the raiding party. If the story told by Mangtu is true he ought to have known that Pem Raj, the husband of *Musammat* Moharli must have taken away the girls to Fazilpur. Instead of going straight to Pem Raj's house he is said to have sent men to search the girls. This indicates that he did not know how and when the girls had been taken away. The learned Magistrate instead of discussing and considering the evidence for the prosecution first took up the case set up on behalf of the accused and for reasons set forth in his judgment disbelieved the story told for the defence. *Musammat* Moharli has stated that she took away the girls on the night in question in the absence of Mangtu and travelled by Railway from Rewari Station to Patli from where she walked on foot. The distance between Fazilpur and Narainpur is 15 or 16 *kos*. It was not easy to cover this distance on foot, and I am inclined to believe that whoever might have taken the

girls the journey must have been made by Railway. There is no evidence on the record to prove that accused persons had travelled that night by Railway. On the other hand there is a good deal of evidence to corroborate the story told by *Musammat* Moharli that the girls were taken away by her by Railway. There is also evidence on the record, as pointed out by the Magistrate himself, that *Musammat* Moharli had been observed in the village Narainpur for two or three days before the date of occurrence. Piare Lal compounder saw the girls at the Railway Station Rewari standing and weeping in the passengers' shed and saying that they had missed their elder sister. A Constable searched out the woman from the Booking Office. Ram Pershad (D. W. No. 3) on his way back from Farrukhnagar where he had gone to get articles for his daughter's marriage saw *Musammat* Moharli at a *piao* about 1½ *kos* from Farrukhnagar going with the girls. In a similar manner Ram Jas (D. W. No. 4) also saw the girls in the company of *Musammat* Moharli at the *Piao*. Mangalia (D. W. No. 18) also saw *Musammat* Moharli taking away her two younger sisters. Bal Ram (D. W. No. 19) met *Musammat* Moharli. with her two sisters at a well outside Fazilpur about sunset at the end of *Bisakh*. Bag Mal (D. W. No. 20) met the woman with her two sisters at the *Piao*. Kundan (D. W. No. 21) while working in the *Johar* saw Moharli passing by with two younger girls. Sayyed Amir Shah (D. W. No. 28), Head Constable Railway Police, Rewari, has corroborated Piara Lal's evidence as to the presence of the two girls and *Musammat* Moharli at the Rewari Railway Station to whom *Musammat* Moharli stated that she was taking away the girls from Narainpur to Fazilpur. Piare Lal (D. W. No. 2), the compounder, and Sayyed Amir Shah (D. W No. 28) Head Constable Railway Police, are quite independent witnesses not shown to be in any way connected with the accused. There is no reason why their evidence should not be believed. The learned Magistrate has believed this story on the ground that it was extremely unlikely that Mangtu, who was trying to arrange marriages for these girls for his own profit would have left them unguarded when he knew that his principal opponent *Musammat* Moharli, who had already applied to the Civil Court to stop the marriages was staying in the village. there is no evidence in support of the Magistrate's theory. According to his own story Mangtu was not present at his house on the evening in question. There are some other reasons also given by the learned Magistrate for discarding the story of *Musammat* Moharli but they are all conjectural. Nasir-ud din Ahmad, the Sub-Inspector of Farrukhnagar, has proved the report No. 14 dated the 30th of April 1923 in which he had taken down the statement of *Musammat* Moharli and the minor girl *Musammat* Janki as to how they had come away from Narainpur. All this evidence fully supports the story that *Musammat* Moharli, the only interested person in the girls, had taken them away probably with the help of some male friends whose names have not been disclosed.

The prosecution story is sought to be proved by the following witnesses:—Mangtu (P. W. No. 1) *Musammat* Jeoni (P. W. No. 2), Hem Raj (P. W. No. 3), Bala (P. W. No. 4), Sheo Dat (P. W. No 5), *Musammat* Janki (P. W. No. 6), Ram Dat (P W. No. 7) and *Musammat* Shanti (P. W. No. 8). The principal witness of course is Mangtu, but he has made such conflicting statements about his movements after the alleged occurrence that it is difficult to place explicit reliance upon his evidence. The Magistrate, while admitting that Mangtu had made conflicting statements, has expressed his opinion that they can be reconciled. He has, of course, mentioned the names of all the eight accused; but as he made conflicting statements with regard to the number of accused in the First Information Report and his complaint I am not prepared to accept his evidence with regard to the identification of the accused persons. The occurrence is said to have taken place at about 8 o'clock in the evening and the First Information Report was not lodged till the evening of the 29th. The explanation given for the delay is not convincing. *Musammat* Jeoni though not mentioned either in the First Information Report or in the petition of complaint, has been produced as a witness in the case. She is obviously a biased witness and she could only identify Pem Raj and Hussain *alias* Chunni whose names most necessarily have been uppermost in her mind, that of Pem Raj on account of his being the husband of *Musammat* Moharli and that of Hashmat Hussain on account of old standing enmity. Much reliance cannot be placed upon her statement. Hem Raj has mentioned all the eight accused. He is of the complainant's *baradri*. He gave

evidence for Mangtu in a case against Hashmat Hussain accused. He also gave evidence in favour of the complainant in the guardianship case. He is evidently a partisan of the complainant. His evidence, therefore, is not of much value. Bala (P. W. No. 4) had been evidently substituted for Nathu who has not been called, as his name was neither disclosed in the First Information Report nor in the petition of complaint. The learned Government Advocate has not relied upon the evidence of this man nor has the District Magistrate. Sheo Dat (P. W. No. 5) has mentioned Hashmat Husain, Pem Raj, Ikram and Deoki, but he has stated that the raiding party consisted of 30 or 35 men. His statement was not taken down till two or three days later. The witness has evidently exaggerated the number of raiders as his statement was taken after such a long time. I am not inclined to place much reliance upon his evidence. *Musammat* Janki had stated on the 30th of April 1924 at Fazilpur that she had gone with her sister *Musammat* Moharli of her own accord to escape the bad treatment of Mangtu's wives. She is now under the influence of Mangtu and as a witness in this case has contradicted her first statement. It is not safe to place much reliance upon her evidence. The evidence of Ram Ditta does not help the prosecution much, because the fact of the presence of the girls at Fazilpur is admitted on both sides. The girl Shanti has mentioned the names of Hashmat Hussain and Pem Raj, but she being under the influence of Mangtu much weight does not attach to her evidence. Numerous discrepancies were pointed out to the learned Magistrate in the evidence for the prosecution witnesses which he has tried to explain away on various theories. I am, however, not satisfied with the explanations given by the learned Magistrate. In my opinion the learned District Magistrate has taken a one sided view in this case. The circumstances of the case were such that raised great doubts as to the correctness of the prosecution story. The Court Inspector, the Public Prosecutor and the Superintendent of Police after a careful consideration of all the evidence and circumstances of the case, had come to the conclusion that there were great doubts as to the correctness of the prosecution story. The District Magistrate himself upon the application of the Court Inspector had discharged all the accused persons. The fact that one of the Sub-Inspectors, who had carried on the investigation, was in a way related to Hashmat Hussain accused influenced the mind of the learned District Magistrate to a large extent and induced him to disregard entirely the Police proceedings. Kamar-ud-din Sub-Inspector, however, cannot be said to have been a biased officer. Nothing is alleged against the Court Inspector, the Public Prosecutor and the Superintendent of Police. In my opinion the Court Inspector was fully justified in withdrawing the case. I have grave doubts as to the correctness of the conviction in this case.

I, therefore, accept the appeal, acquit all the appellants and direct that they be forthwith released.

Z K. *Appeal accepted.*

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

November 5, 1925.

Present:—Lord Dunedin, Lord Sumner and Sir John Edge.

SHAFI AHMED NABI AHMED AND OTHERS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Privy Council—Practice—Criminal [illegible] *sal by Governor-General to transfer of evidence—Adequacy of Judge's charge to Jury—Interference, when permissible*

Their Lordships of the Judicial Committee of the Privy Council in dealing with petitions for special leave to appeal against sentences pronounced in the Criminal Courts of the various dominions of His Majesty will not act as a Court of Criminal Appeal and will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.

It is in the power of the Governor General of India, if he thinks that in the state of public feeling a fair trial cannot be obtained in the place where an offence would ordinarily be tried, to order that the trial be held elsewhere

Where, however, the Governor-General refuses to make such an order, the refusal cannot be held to amount to a violation of the principles of natural justice so as to enable their Lordships of the Privy Council to interfere with the result of the trial.

Questions as to the sufficiency of evidence or the adequacy of the Judge's charge to the Jury cannot come within the ambit of the rule laid down as to the disregard of the forms of legal process or violation of the principles of natural justice.

Messrs. *John Simon, G. R. Lowndes, J. M. Parikh* and *R. R. Pillai*, for the Petitioners.

Messrs. *Dunne* and *K. Brown*, for the Respondent.

JUDGMENT.

Lord Dunedin.—Their Lordships have repeatedly announced that in dealing with petitions for special leave to appeal against sentences pronounced in the Criminal Courts of the various Dominions of the King, they will not act as a Court of Criminal Appeal and will not, to use the words of Lord Watson in *In re Dillet* (1) advise His Majesty to "review or interfere with the course of criminal proceedings, unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."

In the present case the first point urged by the petitioners is that there had been such copious and prejudicial newspaper comment on the crime committed that a fair trial by a Jury was impossible in Bombay.

It is in the power of the Governor-General of India if he thinks that in the state of public feeling a fair trial could not be obtained in the place where the offence would ordinarily be tried, to order that the trial be held elsewhere. An application was made to him to so order and was refused. To ask the Board to declare that such a refusal of the Governor-General, who had all the advantages of being in the country and of judging of the real state of public feeling, amounted to a violation of the principles of natural justice is nothing less than preposterous, and their Lordships cannot too strongly qualify the impropriety and uselessness of such a demand.

As regards the other grounds in the case of the first six petitioners, they are all questions as to the sufficiency of evidence —fit for consideration by a Court of Criminal Appeal, but falling far short of the definite dictum quoted.

The case of the remaining petitioner which at first sight might seem different, is, when more closely looked at, just the same. He was not present at the scene of the assault and murder and consequently the offence of which he was found guilty was abetment of murder. The point that was sought to be urged by his Counsel was that the charge of the learned Judge did not adequately bring home to the Jury that abetment of murder could not be properly inferred from a conspiracy to kidnap unless the natural result of the attempt to kidnap was murder. The learned Judge in the course of his charge used these words after explaining s. 111 of the Penal Code:—

"I merely emphasise once more that the crucial point as regards the applicability of that section is whether that which is done was a probable consequence of the abetment; was it a probable consequence of the conspiracy into which accused No. 9 had entered that Bawla would be murdered on the night of January the 12th? Unless you can so find, that charge of murder cannot be established."

And he specially left it to them to say whether after finding conspiracy they "could go the length of saying that the probable consequence of the conspiracy was the murder of Bawla and the attempted murder of Lieutenant Sægert." If this were a Court of Criminal Appeal it would be difficult indeed to say that this advice to the Jury was not adequate to the situation. Still, it would be a question for a Court of Criminal Appeal. Here the moment that adequacy is raised in reference to such advice the case of the petitioners is gone; for who could possibly say that the adequacy or otherwise could amount to a "disregard of the forms of process or violation of the principles of natural justice"? The averment fails, just as the averments in the other cases failed.

Their Lordships will humbly advise His Majesty to refuse the prayer of all the petitioners. *Prayer refused.*

Z. K.

Solicitors for the Petitioners: Messrs. *T. L. Wilson and Co.*

Solicitor for the Crown: *Solicitor India Office.*

(1) (1887) 12 A. C. 459; 56 L. T. 615; 36 W. R. 81; 16 Cox C. C. 241.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 853 OF 1925.

August 8, 1925.

Present:—Mr. Justice Jai Lal.

AKBAR ALI AND OTHERS—CONVICTS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 342, 365 -

Wrongful confinement—Whereabouts of person confined not concealed—Offence

The intent to cause the person abducted to be secretly and wrongfully confined is an essential element of an offence under s. 365 of the Penal Code

Accused wrongfully confined their sister but her whereabouts were not concealed from her other relatives and persons interested in her

Held, that the accused were guilty of an offence under s 342 of the Penal Code but not of an offence under s 365 of the Code.

Petition for revision of the order of the Sessions Judge, Jhelum, dated the 7th May 1925, modifying that of the Magistrate, First Class, Chakwal, dated the 31st March 1925.

Dr. *Nand Lal*, for the Petitioners.

JUDGMENT.—*Musammat* Siftan is a sister of Akbar Ali and Abdul Rahman petitioners and a cousin of Nur petitioner. It has been found by the learned Sessions Judge that *Musammat* Siftan was divorced by her former husband Ghulam Kadir. She was living in the house of her aunt, and it appears that she proposed to marry one Bakhsh. This marriage was not acceptable to the petitioners. They, therefore, went to the house in which *Musammat* Siftan was living and carried off *Musammat* Siftan against her will and kept her in confinement. On these findings, the petitioners have been convicted under s 365, Indian Penal Code. That section makes punishable the offence of abduction with intent to cause the person abducted to be secretly and wrongfully confined. There is no doubt that on the findings of the learned Sessions Judge *Musammat* Siftan was wrongfully confined, but it is contended by the learned Counsel for the petitioners that under the circumstances it could not be held that *Musammat* Siftan was secretly confined. In this contention of the learned Counsel I agree. There is nothing to show that the whereabouts of *Musammat* Siftan were concealed by her brothers and the cousin from the other relations or from the person interested in *Musammat* Siftan. The offence of the petitioners, therefore, amounts to one of wrongful confinement. Accepting the petition I alter the conviction to one under s. 342 and reduce the sentence of imprisonment to that already undergone.

The sentence of fine will be set aside.

Z. K. *Sentence reduced.*

MADRAS HIGH COURT.
FULL BENCH.

July 31, 1923.

Present :—Sir Walter Salis Schwabe, Kt., Chief Justice, Mr. Justice Victor Murray Coutts-Trotter and Mr. Justice Krishnan.

In the matter of Mr. K. M., First Grade Pleader, CHALAPURAM, CALICUT

AND

In the matter of Mr. U. G., First Grade Pleader, KALLAI, CALICUT.

Legal Practitioners Act (XVIII of 1879), ss 7, 13 - Legal practitioner—Civil disobedience—Sanad, *renewal of.*

While the High Court will not interfere with or have regard to any man's political opinions or opinions on public questions, it is impossible to allow a person, who proclaims or practices what is called the doctrine of "civil disobedience", to ask to be part of the machinery of the Courts which exist for the very purpose of the . . il disobedience and the enforcement of He may be a perfectly honourable man, he may act from conscientious motives, he may in conceivable circumstances be a patriot It may be imagined that he should not be punished or even prosecuted for holding or expressing these opinions but, however, admirable a person he may be, he cannot consistently with his professions, ask to be considered and to be adopted as a legal practitioner, that is, as part of the machinery of the High Court for enforcement of law and order [p. 215, col. 1]

Mr. *A. Krishnaswami Aiyar*, for both Pleaders.

Messers. *K. Kuttikrishna Menon*, *V. V. Srinivasa Aiyangar*, and *T. R Ramachandra Aiyar*, for the Vakil's Association.

JUDGMENT.

Schwabe, C. J.—I think these cases have been very properly brought before the Court, so that the two Pleaders, Mr. K. M. and Mr. U. G may have the opportunity of explaining to the Court the circumstances relating to their imprisonment on the charges that were made against them, and I think they have now stated very fully, and I am prepared to say very fairly, the facts of their respective cases. They both disclaim and disavow any intention at all of either disobeying the District Magistrate's orders, or of in any way paralysing the administration of justice. They express regret that in the one case the sending out of a telegram to the press; and in the other case the refusal to sign a statement before the Magistrate have been understood to show a spirit of disaffection or an intention either to disobey the orders of the duly constituted authorities or in any way to paralyse the administration of justice. I think that we can accept their statements as being accu-

rate and accept their expressions of regret as being genuine and, under the circumstances I think that we can quite properly order the *sanad* to be issued to these two Pleaders.

In both cases our attention was also called to a minor offence of having engaged themselves in another profession while they were still Pleaders It appears that they had not renewed their *sanads* when they took up their respective occupations on the press. It appears also that the work was done mainly without any sort of remuneration a matter which can without difficulty be overlooked.

In these circumstances, the *sanads* will be issued.

Coutts-Trotter, J.—I am of the same opinion. All the concern that I have had in this or in any of these cases is to make it as plain as any language of mine can make it that, while this Court will not interfere with or have regard to any man's political opinions or opinions on public questions, it is impossible to allow a person, who proclaims or practices what is called the doctrine of "Civil disobedience", to ask to be part of the machinery of the Courts which exist for the very purpose of the thwarting of civil disobedience and the enforcement of civil obedience. He may be a perfectly honourable man; he may act from conscientious motives; he may in conceivable circumstances be a patriot. It may be imagined that he should not be punished or even prosecuted for holding or expressing these opinions. All our business is to say that, however, admirable a person he may be, he cannot consistently with his professions, ask to be considered and to be adopted as part of the machinery of this Court for enforcement of law and order. But I am satisfied now, I confess I was not before from their last statements, that the intention of these gentlemen is to give an assurance to this Court, which I hold the Court is entitled to demand, that they are not and do not in the future intend to be, exponents of the doctrine of civil disobedience.

For these reasons, I agree with my Lord that *sanads* may be properly issued to them.

Krishnan, J.—I also agree with the opinion of the learned Chief Justice and that of my learned brother Coutts Trotter that in these two cases we should not withhold the *sanad*. I do not think it necessary, after what fell from the Chief Justice with which I entirely agree, that I need say anything more.

I agree to the order proposed.

Schwabe, C. J.—I should like to add that I agree entirely with what has just fallen from my learned brother Coutts Trotter.

N. H. *Sanads granted.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 675 OF 1925.

June 12, 1925.

Present:—Mr. Justice Abdul Raoof.

TULSI AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Practice—Dispute of civil nature—Procedure

The complainant had mortgaged some land to the accused. The accused claimed that the mortgage was with possession while the complainant said it was not One day the complainant found the accused ploughing the land, remonstrated with him, and was assaulted. The Magistrate convicted the accused and sentenced him to a fine under s 323, Penal Code.

Held, that the dispute between the parties being of a civil nature, the M[illegible] ld have exercised a better discretion h[illegible] the complainant to seek his remedy from a Civil Court [p 216, col 2]

Petition for revision of an order of the District M[illegible] Rohtak, dated the 9th March 1925 [illegible] that of the Tahsildar Magistrate, Second Class, Jhajjar, District Rohtak, dated the 5th February 1925.

Mr. *Shamair Chand*, for the Petitioners.

JUDGMENT.—The petitioners before me have been convicted under s 323 of the Indian Penal Code and have been sentenced to pay a fine of Rs. 15 each. The facts giving rise to the prosecution are as follows:—

The complainant mortgaged some land to the petitioner Tulsi for Rs. 250 for a term of two years. On the 7th September 1924, the complainant brought a case against the petitioners charging them with the same offence with which he has charged them in the present case. That complaint was dismissed after enquiry under s. 203 of the Cr. P. C. On the 19th September 1924, this offence is alleged to have been committed. He made a report at the Bahadur Garh *thana* that Tulsi and Munshi had beaten him with slaps and fists. In that report he did not mention the names of Sudhan and Ram Singh. The complainant was directed to file a formal complaint in Court Thereupon the complaint was instituted under s. 323, Indian Penal Code.

Two witnesses were produced in support of the prosecution and both of them were closely related to the complainant. The real dispute between the parties was whe-

ther the alleged mortgage was with possession and [illegible] were entitled to plough the land mortgaged. Tulsi was found ploughing the land and the complainant remonstrated with him, when the alleged assault was made The case for the complainant was that the mortgage was without possession and Tulsi and the co-accused had wrongfully taken possession of the mortgaged land. The *patwari* has stated that the complainant himself had reported to him that the mortgage was with possession and he had consequently made a report recommending the mutation of the mortgagees' name. The complainant was cross-examined on the point. His statement has been read to me which goes to show that the mortgage was intended to be one with possession. The mutation report was also made on that hypothesis and although mutation has not yet been sanctioned it appears that the mortgage was with possession. Under these circumstances if the mortgagee had taken possession the complainant had no business to interfere with it.

From the facts disclosed it appears that the mortgagee and his companions used force in the exercise of their right of private defence. Having regard to the history of the dispute between the parties it appears that the matter was very much exaggerated by the complainant. Over and above all that has been said above the dispute between the parties appears primarily to be one of civil nature, and the Magistrate would have exercised a better discretion if he had directed the complainant to seek his remedy from a Civil Court. The case against the petitioners appears to be of a doubtful nature. I, therefore, give the benefit of the doubt to the petitioners and, accepting the petition for revision, set aside their convictions and direct that the fines, if paid, be refunded.

N. H. *Petition accepted.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 436 OF 1924.
July 22, 1924.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Hugh Walmsley, KT.

AMIRUDDIN AND OTHERS—ACCUSED—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 71, 147, 149, 342—Rioting and wrongful confinement—Separate sentences, legality of.

Members of an unlawful assembly who attack a person and then take him and confine him in a house cannot be given separate sentences under s. 147, and s 342 read with s. 149, Penal Code, by virtue of s. 71 of the Code.

Criminal revision against an order of the Sessions Judge Pabna and Bogra, dated the 23rd April 1921, affirming that of the Deputy Magistrate, Sirajgunj, dated the 4th March 1924.

FACTS.—The accused in this case came armed with *lathis* and attacked the complainant who was ploughing his field. The latter made for a house, where he was caught. He was then taken to, and confined in, another house. The accused were given separate sentences for rioting and wrongful confinement.

Mr. *Dinesh Chunder Roy*, for the Petitioners.

JUDGMENT.

Sanderson, C. J.—This is a Rule granted by two of my learned brothers calling upon the District Magistrate to show cause why the conviction and sentence passed on the petitioners Salimuddy Pramanik, Gani Pramanik and Kazam Pramanik under s. 342 read with s. 149 should not be set aside on the 7th ground stated in the petition.

The 7th ground was that the order of separate sentence passed on the petitioners was illegal.

The learned Vakil has stated that he cannot argue that the conviction should be set aside; and he has confined his argument to the question whether the imposition of separate sentence under s. 342 read with s. 149 was illegal. We are of opinion that it was, by reason of the provisions of s. 71, Indian Penal Code.

Consequently, the Rule should be made absolute and the sentence of three weeks' rigorous imprisonment under s. 342/149 must be set aside.

We draw the attention of the lower Court to the case of *Alim Sheikh* v. *Shahazada* (1) and also to the case of *Keamuddi Karikar* v. *Emperor* (2).

The bail bonds of the petitioners will be cancelled.

Walmsley, J.—I agree.

N. H. *Rule made absolute.*

(1) 8 C. W. N. 483; 1 Cr. L. J. 365.
(2) 81 Ind. Cas. 593, 51 C. 79, 28 C. W. N. 347; 25 Cr. L. J. 945; (1924) A. I. R. (C) 771.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 665 OF 1925.

September 12, 1925.

Present:—Mr. Justice Zafar Ali and Mr. Justice Jai Lal.

HARI SINGH AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss 148, 302—Rioting—Deadly weapons—Death caused by blows—Offence.

Accused, five in number, assembled at a canal water-head to divert water by force and armed themselves with deadly weapons to strike and vanquish anybody who should stand in their way and prevent them from accomplishing their purpose. The party of the deceased remonstrated with the accused whereupon the accused assaulted them with their weapons and caused the death of the deceased.

Held, (1) that the accused constituted an unlawful assembly and became guilty of rioting when they used their weapons in pursuance of their common object; [p 218, col. 1]

(2) that as every one of the accused knew that the weapons were likely to be used with deadly effect, they were all responsible for the fatal injury inflicted on the deceased. [p. 218, cols. 1 & 2.]

Appeal from an order of the Sessions Judge, Ferozepore, dated the 18th May 1925.

Lala *Moti Sagar*, R. B, and Mr. *Bal Mokand Vaid*, for the Appellants.

Mr. *Des Raj Sawhney*, Public Prosecutor, for the Respondent.

JUDGMENT.—The two brothers Hari Singh and Indar Singh and their uncle Sher Singh have been convicted by the Sessions Judge of Ferozepore of the murder of one Jaimal Singh *Jat* and along with two others, namely, Sawal and Ganesha, they have further been convicted of rioting under s. 148, Indian Penal Code. All five have filed a joint appeal through Mr. Moti Sagar and the case is also before us under s. 374, Cr. P. C., for confirmation of the capital sentence passed upon Hari Singh.

The first three appellants are *Kumhars*, *i. e.*, potters by caste but are [illegible] by avocation. Of the remaining two, Sawal is a *Bagri Jat*, and Ganesha a *Bania*. They are all residents of the village Mithri, District Ferozepore. All these appellants set up *alibis*, but produced no evidence whatsoever and thus left the prosecution evidence quite unrebutted. Their Counsel could do no better than to urge that the prosecution evidence was unreliable, and he advanced the argument that the appellants could not be held guilty of rioting because they fought in defence of their right to use the water of which they were already in possession and further contended that the charge of murder was not established against any one of the appellants who have been held guilty of that offence. But he could refer to no material on the record in support of any of the questions of fact or law that he raised and argued before us, and as will presently be shown he failed to make out any of his points.

The account of the fatal event given by the eye-witnesses may be summarised thus:—On the 13th October 1924 at about *rotiwela* (noon) Dayal Singh (P. W. No. 7) with his 18 years old son Har Chand Singh (P. W. No. 8) was directing the irrigation of his field No. 343 about 5 *bighas* in area when the flow of water ceased all of a sudden and he heard a shout from Hari Singh who was at the water-head about half a mile away to the following effect:—"We have diverted your water, come and do what you like about it" Dayal Singh proceeded to the water-head accompanied by his son Har Chand Singh who was empty handed but Dayal Singh carried a *kahi* with which he had been regulating the irrigation Bhaggu Singh (P. W. No. 10) with his *Siri* Wayaman and brother-in-law Saudagar followed Dayal Singh and Har Chand Singh from a neighbouring field to see what would happen. As Dayal Singh got to the water-head he found the water diverted into Hari Singh's cotton field. All the five appellants were standing there armed with *chhavis*. Dayal Singh asked them why they had diverted his water. Hari Singh replied "we have stopped your water. We do not care whether it is your turn or not. Take it if you can."

Dayal Singh proceeded to re-open his channel whereupon Ganesha struck him on the head with a *chhavi* and next Sawal struck him with a *chhavi*. At this stage Jaimal Singh brother of Dayal Singh, who had come up from his field near there, interfered on behalf of his brother and shouted to the appellants not to strike his brother. Thereupon Hari Singh struck Jaimal Singh on the head with his *chhavi* and then Indar Singh inflicted a *chhavi* blow on his head. Jaimal Singh dropped down and as he did so Sher Singh struck him on his left arm with a *chhavi*.

The above version was given in the First Information Report and was supported by all the eye-witnesses who appeared in the

witness-box, and the learned Sessions Judge came to the conclusion that it was substantially true. Further, there was the evidence that it was Dayal Singh's turn to the use of the water and that the appellants had not even a shadow of a claim to take the water at that stage. The appellants made no attempt to refute even this point. Their Counsel in the Court below contended himself with urging:—

(1) that the eye-witnesses were unworthy of credit because they were all connected with each other and Sahib Singh *lambardar* (P. W. No. 13);

(2) that there was an unnecessary delay in making the First Information Report;

(3) that an inference unfavourable to the prosecution should be drawn from their failure to produce two of the eye witnesses, namely, Karam Singh and Wayaman; and

(4) that the prosecution story was inherently improbable.

The learned Sessions Judge in his judgment considered all these contentions and overruled them for reasons which appear to us to be unanswerable and which we do not consider it necessary to repeat here. But he accepted one contention, *viz.*, that the attack on Jaimal Singh was not made in pursuance of the common object of the unlawful assembly and that, therefore, only those members of the aseembly who actually made the assault upon Jaimal Singh were responsible for it and not the rest. There is no appeal from his order acquitting Sawal and Ganesha of the charge of murder and, therefore, we need not express any opinion with regard to the validity or otherwise of this conclusion of the learned Sessions Judge, but we agree with him that the prosecution version is substantially true and that the defence have entirely failed to show that that evidence was unworthy of belief. From the facts thus established by the prosecution it follows that the five appellants had assembled at the water-head to take water by force and had armed themselves with deadly weapons to strike and vanquish anybody who should stand in their way and prevent them from accomplishing their purpose. This being so, these five men constituted an unlawful assembly and became guilty of rioting when they used their deadly weapons in pursuance of their common object. Further, as every one of them knew that these weapons were likely to be used with deadly effect, they were all responsible if any one of them inflicted a fatal injury.

The mainstay of the defence was a judgment of a Division Bench of this High Court reported as *Baga Singh* v. *Emperor* (1) which was relied upon and referred to before the Sessions Judge and again before us; but that was quite a converse of the present case. The distinguishing features are that there in the first place the water was diverted in the *bona fide* belief that the turn of the man who had been taking the water had expired. Secondly, it was next the turn of the man who diverted the water, and thirdly, it was the latter who was attacked first and had received injuries before he shot his assailant and killed him. In the present case Dayal Singh was entitled to irrigate the whole of his fields of 5 *bighas* but he had hardly irrigated 2 *bighas* when the water was diverted. Thus it was wrongfully diverted before time and by a person who had no right to take the water at that stage, as the turns of several others intervened between his turn and that of Dayal Singh.

It is clear from what has been stated above that the appellants at first made a preparation for an attack and subsequently resorted to force to carry out their wrongful purpose. The common object of the assembly undoubtedly was to defend by use of violence their act of diverting the water which was a wrongful act. The amount of violence that they all intended to use or knew would likely be used is to be inferred from the nature of the weapons with which they came armed. As they all knew that the weapons would be used and that if used mortal injuries would very likely be inflicted, every one of them who joined the assembly with that guilty knowledge was liable to be held responsible for the use of those weapons by any of them. The argument that the appellants were not the aggressors because having already taken possession of the water they were entitled to resist by force any attempt to dispossess them thereof is obviously fallacious, because having no right to take the water at that time their act of diverting it was wrongful and quite unjustified and the rightful person was entitled to recover what he had lost by a wrongful act. Further there is nothing to show that the appellants had any reason to apprehend any injury at the hands of Dayal Singh, nor

(1) 81 Ind. Cas. 113; 25 Cr. L. J. 625; (1925) A. I. R. (L.) 49.

is there anything to indicate that Dayal Singh and his brother made any show of criminal force. It was, therefore, a very wanton attack that the appellants made to restrain Dayal Singh from diverting the water to his field, and to chastise his brother for raising a voice on his behalf. We, therefore, come to the conclusion that Hari Singh, Indar Singh and Sher Singh have rightly been held guilty of the murder of Jaimal Singh.

We may here refer to another contention of the learned Counsel for the appellants which, it appears, had not been raised in the Court below. The prosecution evidence was that Hari Singh and Indar Singh inflicted one *chhavi* blow each on the head of the deceased, but the medical witness after describing two injuries on the head stated that both were practically the result of a single blow. On strength of this opinion of the medical witness the learned Counsel contended that the deceased received only one *chhavi* blow on the head, that it could not be said which of the two appellants Hari Singh and Indar Singh dealt that blow, and that, therefore, neither of them could be held responsible for it. We have already held that all the appellants who were armed with *chhavis* and attacked the deceased were responsible for his death and this contention, therefore, falls to the ground, but we may point out with regard to it that the Police Officer who arrived at the spot and examined the body of the deceased found two wounds on his head and noted their lengths in the inquest report as well as in the statement of injuries which he prepared on the spot. The medical witness also did not positively state that there was only one injury on the head and we are unable to understand what he meant by saying that the two injuries were *practically* the result of a single blow.

As regards the capital sentence, we are of opinion that Hari Singh who was evidently the ring-leader well deserves it, and that the lesser punishment would not meet the ends of justice in his case. We, therefore, dismiss the appeal of all the convicts and confirm the sentence of death.

Z K. *Appeal dismissed.*

PATNA HIGH COURT.

CRIMINAL REVISION NO. 104 OF 1925.

June 12, 1925.

Present:—Justice Sir B. K. Mullick, KT., and Mr. Justice Macpherson.

SIBAN RAI—PETITIONER

versus

BHAGWAT DASS AND ANOTHER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s 439—Acquittal—Revision—Interference by High Court.

Per *Mullick, J.*—The power of interference in revision with orders of acquittal should be most sparingly exercised and only in cases where it is urgently demanded in the interests of public justice, for instance, where an order of acquittal has been made without trial and under an error of law The High Court will not in any case interfere in revision with an order of acquittal on the ground that the inferences drawn by the lower Court from evidence are erroneous [p 220, cols 1 & 2]

The Legislature does not intend that a private party shall secure by an application in revision a right which is reserved for the Crown only The High Court has the right to interfere in revision with orders of acquittal, but will only do so in very exceptional cases, for instance, where there has been a denial of the right of fair trial [p 220, col. 2]

Per *Macpherson, J.*—The High Court will, in exercising its power of revision against an order of acquittal under s 439 of the Cr P. C, observe the limitations which established practice has imposed upon appeals under s 417 of the Code But though in practice the broad rule of guidance that the Court will only interfere in revision with an acquittal, at least in a case where there has been a trial, sparingly and only where interference is urgently demanded in the interests of public justice, may be accepted, no general rule can be laid down beyond this that the Court will interfere where the circumstances require it. [p. 221, col 2]

Application against an order of the District Magistrate, Darbhanga, dated the 6th January 1925, setting aside that of the Sub-Deputy Magistrate, Samastipur, dated the 17th November 1924.

Sir *Ali Imam* and Mr. *S. A. Sami*, for the Petitioner.

Mr. *Sultan Ahmad*, Government Advocate, for the Crown.

Mr. *Ram Prasad*, for the Opposite Party.

JUDGMENT.

Mullick, J.—In this case the Second Class Magistrate of Samastipur, found that *Mahanth* Ganga Das had title and possession in an *asthal* at Waini and that the accused Bhagwat Das and Narain Das had forcibly dispossessed him and committed criminal house trespass in a building appertaining to the *asthal*. He, therefore, convicted the accused under s. 448 of the Indian Penal Code and sentenced them to a fine of Rs. 50 each.

In appeal the District Magistrate of Darbhanga found that the story of forcible dispossession was false and that Bhagwat Das and Narain Das were in possession and that they had successfully resisted an attempt by Siban Rai, the servant of Ganga Das, to forcibly evict them from the *asthal*. He found that the accused had no right to stay in the *asthal* against the will of Ganga Das; but at the same time the case of Ganga Das being false in material particulars, he acquitted the accused.

An application in revision is now made before us to set aside the acquittal, and the question arises whether this Court should interfere.

Ganga Das made an application to the Local Government requesting it to lodge an appeal under s. 417 of the Cr. P. C., but the Local Government refused on the ground that the case was not one of sufficient public importance.

In now asking us to interfere in revision the petitioner relies upon the following cases of the Calcutta High Court; *Bazu* v. *Raika Singh* (1), *Harai Chandra Nama* v. *Osmanali* (2), *Nabin Chandra Chakrabutty* v. *Rajendra Nath Banerjee* (3). In these cases a re-hearing was ordered by the High Court on the ground that there had not been a sufficient trial in the Court below; the decisions were based on the special facts of each case, but it was not till *Faujdar Thakur* v. *Kasi Choudhuri* (4) that any attempt was made to define the principles upon which the High Court will interfere in revision. That case was noticed with approval by this Court in *Gulli Bhagat* v. *Narain Singh* (5) and by a Full Bench of the Madras High Court in *Sankaralinga Mudaliar* v. *Narayana Mudaliar* (6) and I think it is now settled that the power of interference in revision should be most sparingly exercised and only in cases where it is urgently demanded in the interests of public justice.

The rule, of course, does not apply to cases where there has been no trial. For instance in *Jitan Dusadh* v. *Domoo Sahoo* (7) this Court set aside an acquittal in revision because an acquittal had been entered without trial and under an error of law. In that case the complainant having died the Magistrate refused permission to the complainant's son to proceed with the case and acquitted the accused and the District Magistrate moved the High Court in revision. On the other hand, in *Rajkishore Dubey* v. *Ram Pratap* (8) a Division Bench (Mullick and Macpherson, JJ.) of this Court declined to interfere even though there was a clear error in the lower Appellate Court's judgment. We have not been shown any case in which a High Court has interfered in revision on the ground that the inferences drawn from evidence were erroneous.

In my opinion the Legislature does not intend that the private party shall secure by an application in revision a right which is reserved for the Crown only. The High Court has the right to interfere but will only do so in very exceptional cases, which it may be stated generally are cases in which there has been a denial of the right of fair trial and which attract the operation of s. 107 of the Government of India Act. Nor does it intend that the High Court will interfere in revision to correct an error when another remedy exists.

In England where any member of the public may set the Criminal Law in motion, there is no procedure at all for setting aside an acquittal. In France, where the law permits in most criminal cases a private injured party to intervene as a *partie civile*, the right of appeal against an acquittal is accorded only to the Crown. Neither system permits a private prosecutor to control the proceedings if the Crown objects.

Nor is the private prosecutor's control any greater under the Indian Law though he is entitled in certain cases to compound with the offender: see *Jamuna Kanth Jha* v. *Rudra Kumar Jha* (9).

I am still therefore of the opinion which I expressed in *Gulli Bhagat* v. *Narain Singh* (5) that in cognizable cases the private prosecutor has no position at all and that if the Crown, which is the custo-

(1) 26 Ind Cas 170; 18 C. W. N 1244; 15 Cr. L. J 722.
(2) 44 Ind. Cas 337, 27 C L J 226; 19 Cr. L. J. 321.
(3) 39 Ind Cas 487, 18 Cr L J 519.
(4) 27 Ind Cas 186, 42 C. 612; 19 C. W. N. 184, 21 C L J 53, 16 Cr L J 122.
(5) 77 Ind. Cas 734; 5 P. L T. 404, 2 Pat 708, 25 Cr L J. 446; (1924) A. I. R. (Pat) 283, 2 Pat. L. R. 165 and 187 Cr.
(6) 68 Ind Cas 615; 16 L. W. 413, 43 M L J. 369; (1922) M. W. N. 579; 31 M L. T. 342; 23 Cr. L. J. 583; (1922) A. I. R. (M.) 502; 45 M. 913.
(7) 37 Ind. Cas 519, 1 P L. J 264; 20 C. W. N. 862; 18 Cr L J 151, 2 P L. W 409.
(8) Cr Rev No. 229 of 1923
(9) 52 Ind Cas. 424; 4 P. L. J. 656; 20 Cr. L. J. 648; (1920) Pat. 42.

dian of the public peace, decides to let an offender go, no other aggrieved party can be heard to object that he has not taken his full toll of private vengeance. These observations were made with reference to a private party's power to get an acquittal set aside in a [illegible] case which had been conducted [illegible] Prosecutor; but if it were necessary here I would be prepared to hold that they apply with equal force to acquittals in all cases. The Crown and not the complainant is always the party: see *Queen-Empress* v. *Murarji Gokuldas* (10) and *Gaya Prasad* v. *Bhagat Singh* (11).

If that view is correct, then the circumstance that in the present case *Mahanth* Ganga Das, in spite of delivery of possession by the Civil Court, is being deprived by the judgment debtor of the enjoyment of his rights, is no ground for our interference in revision. There has been no denial of the right of fair trial. The District Magistrate has considered the evidence and if he has come to a wrong conclusion, it certainly cannot be said that there has been no fair trial. He has found that the complainant's story that the accused came with a mob and drove out Ganga Das's servants was false and that Bhagwat Das was in possession and that it was the complainant who attempted to forcibly eject him. If the true facts had been put by the complainant before the Court, I have no doubt that he would have succeeded and if Bhagwat Das persists in occupying the land and house which formed the subject-matter of the Civil Court decree against him, the Criminal Courts are still open to him. The present application is misconceived and is dismissed.

Macpherson, J.—I agree to the order proposed.

In my opinion the application must fail on the simple ground that it is not even possible to say that the acquittal by the Appellate Court (which rightly found that the case which petitioner set out to prove was false) was not in the circumstances warranted. If an appeal had been preferred by the Local Government under s. 417, it would have failed for the same reason.

The question whether a private person has any *locus standi* to move the High Court against an acquittal, and if so in what circumstances has, however, been argued at length and claims an expression of opinion.

I agree with the Government Advocate when he concedes that the High Court possesses the power to set aside an acquittal under s. 439 on being moved by a private person But I am unable to accept his contention that that power is either in law or under the practice of the Courts in India, definitely restricted to cases where as in *Jitan Dusadh* v. *Domoo Sahoo* (7) there has been no trial, or where there has been a denial of the right of fair trial. All that can be said to be established is that in that class of cases at least the Court will in a proper case set aside an acquittal at the instance of a private party. No doubt the High Court will in exercising its power of revision under s 439 observe the limitations which established practice has imposed upon appeals under s. 417. But though in pratice the broad rule of guidance that the Court will only interfere in revision with an acquittal, at least in a case where there has been a trial, sparingly and only where interference is urgently demanded in the interests of public justice, *Faujdar Thakur* v. *Kasi Chaudhuri* (4) may be accepted, it appears dangerous to go further. I was a party to the decisions in *Rajkishore Dubey* v. *Ram Partap* (8) and *Gulli Bhagat* v. *Narain Singh* (5) decided on successive days but my considered opinion is to be found in the subsequent decision in *Ganga Singh* v. *Rambhajan Singh* (12) where after referring to the cases above cited, I said—

"But it is not possible nor would it be expedient to lay down a general principle. The Court will interfere where the circumstances require it."

In particular I am not prepared to subscribe to the view that in every case of a prosecution for a cognizable offence the private prosecutor in India has no position at all in the litigation. It might possibly be contended that at least where the prosecution has in fact been a public or as it is designated, a Police prosecution, the private prosecutor has no position at any stage. I doubt whether even such a contention is tenable, though of course the Court acting in revision would in such a case enquire earnestly why the Crown has not

(10) 13 B. 389; 7 Ind. Dec. (N. S) 258.
(11) 30 A. 525, 12 C. W. N. 1017; 4 M. L. T. 204; 18 M. L. J. 394; 5 A. L. J. 665; 10 Bom. L. R. 1080; 8 C. L. J. 337; 11 O. C. 371; 35 I. A. 189 (P. C.).

(12) 82 Ind. Cas. 274; 25 Cr. L. J. 1266.

appealed. But in any event the criterion cannot be whether the Police could under the law arrest without warrant for the offence under trial irrespective of whether they did so and initiated a public prosecution under the Cr. P. C., it is open to the private prosecutor to initiate criminal proceedings by complaint without the intervention of the Police and where that has been done, and the prosecution has not been taken over by the Crown, a private prosecuter cannot, in my judgment, be said to be without position in the litigation even if the offence is cognizable. The majority of prosecutions for criminal trespass and house trespass which are cognizable offences are private. I cannot hold that either principle or authority supports the view that an application under s. 439 against an acquittal is not maintainable in a private prosecution where the offence charged is cognizable.

Again too much stress may easily be laid upon the remedy available under s. 417 even in Police cases. An appeal against acquittal is a special weapon in its armoury which a Local Government judiciously reserves for exceptional occasions, and which is only used after most anxious consideration and in cases which are themselves of great public importance or in which a principle is involved. It cannot be expected that Government will dull the edge of that salutary provision by utilising it freely in cases which though of importance to individual subjects, are of no or of little general interest. Actually, therefore, a remedy under s. 417 is practically non-existent in the less heinous cases whether they are private or public prosecutions. Yet where justice fails in this country, it undeniably does so at least as much by erroneous acquittal as by erroneous conviction.

In my judgment it is neither necessary nor expedient to lay down or even suggest any limitations in this regard beyond the practice of the High Court in appeal under s. 417 and the principles which guide the Court in receiving and determining under s. 439 applications for the exercise of their powers of revision in respect of convictions. I would adhere to the view expressed by Jenkins, C. J., in *Faujdar Thakur* v. *Kasi Choudhuri* (4) read in the light of the observations of the same Judge in *Emperor* v. *Bankatram Lachiram* (13) and *Mahomed Ali* v. *Emperor* (14) as to the spirit which should guide the Courts in the exercise of their discretionary powers in revision. The result may in practice not differ greatly from that which would be obtained by laying down and following detailed rules. Doubtless the Court will only interfere in revision with an acquittal in an exceptional case. But the supreme consideration is that the Court should exercise its discretion untramelled in each case as it arises.

Z K. *Application dismissed.*

(13) 28 B. 533; 6 Bom. L. R. 379; 11 Cr. L. J. 390.

(14) 20 Ind. Cas. 977; 41 C. 466; 14 Cr. L. J 497, 18 C. W. N. 1.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 491 OF 1925.

October 14, 1925.

Present:—Mr. Justice LeRossignol and Mr. Justice Fforde

LACHHMAN SINGH—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s 302—Death caused by attack with sharp-edged weapon—Offence

In the course of an altercation accused suddenly struck the deceased with a sharp-edged weapon causing two wounds of a penetrating nature, one of which completely perforated the heart and the other penetrating the abdomen divided the intestines, from the effect of which the deceased died at once,

Held, that having regard to the nature of the wounds inflicted the accused must be deemed to have intended to cause death or at least such bodily injury as was likely to cause death and was, therefore, guilty of murder.

Appeal from an order of the Sessions Judge, Amritsar, dated the 15th April 1925.

Dr. *Nand Lal*, for the Appellant.

Mr. *Des Raj Sawhney*, Public Prosecutor, for the Respondent.

JUDGMENT.—The appellant Lachhman Singh has been sentenced to transportation for life for the murder of Sajjan Singh on the evening of the 25th September 1924.

In continuation of an altercation which had taken place earlier in the day between the mother of the appellant and the wife of the deceased the two men were struggling in front of their houses when Lachhman Singh suddenly struck the deceased with a weapon which has not been recovered and

which is variously described as a spear head and a sickle. Sajjan Singh collapsed and died at once whilst Lachhman Singh ran off to his house where he was shortly afterwards arrested with blood stains on his clothes and his person by the village notables to whom he is said to have confessed his guilt.

The medical evidence shows that the person of the deceased bore two wounds of a penetrating nature one of which completely perforated the heart; the other penetrating the abdomen on the left side had divided the intestines Death was due to shock and hæmorrhage.

The eye-witnesses in the case are *Musammat* Basant Kaur. *Musammat* Naraini, *Musammat* Rukman and *Musammat* Tabo, who all were in the neighbourhood and were likely to have seen any fight that took place in the open space before their houses. We believe their statements implicitly.

The appellant pleaded not guilty but produced no defence. He denied all knowledge of the occurrence and did not take the plea of self defence. Even, therefore, if the deceased was the stronger man of the two he was unarmed and the appellant was under no apprehension of receiving grievous hurt in the course of the struggle. The fight was an ordinary one arising out of a very trivial dispute and the appellant stabbed to death an unarmed man. He himself bore no mark of injury upon his person. Having regard to the nature of the wounds inflicted it is impossible for us to avoid the conclusion that his intention was, if not to cause death, at least to cause such bodily injury as was likely to cause death. We consider that offences of this type are becoming far too common and that the sentence passed upon the appellant is not excessive.

We dismiss the appeal.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 62 OF 1925.

April 29, 1925.

Present:—Justice Sir Hugh Walmsley, KT., and Mr. Justice B. B. Ghose.

SURENDRA NATH BANERJEE—

PETITIONER

versus

SHASHI BHUSHAN SARKAR—

OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, scope of—Dispute regarding offerings of idol, nature of.

The right to perform the *puja* of an idol or to have a share of the offerings made to the idol cannot be said to be a right of user of land, as provided in s 145, Cr P. C Therefore a dispute relating to such a right does not come within that section

Guiram Ghoshal v *Lal Behary Das*, 6 Ind Cas 182; 37 C 578, 14 C W N. 611; 12 C L J 22, 11 Cr. L J. 292, referred to

Reference made by the Additional Sessions Judge, Hooghly, dated the 26th February 1925.

Babu *Birbhusan Dutt* (with him Babu *Shekar Kumar Bose*), for the Petitioner.

Dr. *Bijon Kumar Mukerjee* (with him Babu *Sarat Kumar Bose*), for the Opposite-Party.

JUDGMENT.

Ghose, J.—This is a Reference by the Additional Sessions Judge of Hooghly recommending that an order passed under s. 147 of the Cr. P. C., should be set aside.

The dispute between the parties was with regard to the performance of the *puja* of an idol. There was no dispute as regards the temple or any land belonging to the idol. The whole question in controversy is whether the right claimed by the first party is a right of *user* of any land, as explained in s. 145 sub-s. (2) of the Cr. P. C. The right is alleged to be a right to go into the temple and to perform the *puja* and to take a portion of the offerings made to the idol.

The learned Sessions Judge is of opinion that this right is not included within the words "right of user of any land." He refers to a decision of this Court in the case of *Guiram Ghoshal* v. *Lal Behary Das* (1), in support of his conclusion.

It is contended on behalf of the first party that that decision proceeded upon the ground that the expression "land" was not defined in s. 145 of the Cr. P. C., as it then stood, and as now it has been especially enacted that it includes a "building" under the

(1) 6 Ind. Cas. 182; 37 C. 578; 14 C. W. N. 611; 12 C. L. J. 22; 11 Cr. L. J. 292.

newly added sub-s. (2) of s. 145, the authority of that case is no longer in force. However, that may be, it seems to me that the right to perform the *puja* of an idol, or to have a share of the offerings made to the idol, cannot be said to be a right of user of any land, as explained in s. 145 of the Cr. P. C., and, therefore, the present dispute cannot be considered to be one coming under the provisions of that section.

On this ground I would accept the Reference, and set aside the order of the Magistrate in favour of the first party.

If there is such a dispute between the parties which the Magistrate considers may lead to any breach of the peace, he may take such steps as he considers necessary under s. 107 of the Cr. P. C.

The order for payment of costs is set aside, and the costs, if paid, will be refunded.

Walmsley, J.—I agree.

N. H. *Reference accepted.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 224 OF 1925.

July 7, 1925.

Present:—Justice Sir P. C, Banerji, KT.,

MIRAN AND OTHERS—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 147, 149, 332—Constable interfering with wrestling match—Assault on members of Police force—Rioting—Sentence.

One of the Constables deputed to keep order at a wrestling match interfered with the wrestling, whereupon several members of the audience set upon the members of the Police force present, hustled them and tore their uniforms.

Held, (1) that the assailants of the Constables were guilty of offences under ss. 147 and 332/149, Penal Code;

(2) that, in the circumstances of the case, severe sentences were not called for.

Criminal revision from an order of the Additional Sessions Judge, Meerut.

Sir *Charles Ross Alston*, for the Applicants.

Mr. *M. Waliullah* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This is an application in revision on behalf of six persons, who have been convicted under s. 147 read with ss. 149 and 332 of the Indian Penal Code and sentenced to various terms of imprisonment, and they have been further directed to execute bonds with sureties under s. 106 of the Cr. P. C., to keep the peace.

On the 12th January, 1925, there was a wrestling match between Hashmat of Jalalabad and Inna of Kairana in the Chharian fair at Kairana. This wrestling match, it appears, was under the patronage of the Municipal Board and the Municipality had invited Policemen to keep peace and order in the fair. The wrestling match was a very evenly contested one and, according to the evidence of the Vice-Chairman, five minutes more were allowed to the wrestlers to finish the wrestling; but it appears that one Qazim Husain Constable, who was a backer of Hashmat, interfered with the wrestling Thereafter there was a sort of scuffle and the net result was that some of the Policemen were hustled and their uniform torn. It is very difficult in a case like this, where the backers of the wrestlers were grappled on the throat, to resist rushing the arena when a Constable who was backer of one of the wrestlers was interfering; but that, however, will not permit the crowd or such of the members of the assembly present there to hustle the Police who were there for the purpose of maintaining law and order. Having given my careful consideration to all that Sir Charles Ross Alston had to say in support of his case and the agreement of the Assistant Government Advocate, I am of opinion that the whole of the incident was a very trivial affair; but the accused were, no doubt, technically guilty of the offence with which they were charged. I realise that the duty of controlling a crowd at these wrestling matches is a very serious duty and anybody interfering therewith must be punished. But under the circumstances of this case I am of opinion that the period of imprisonment already served by the petitioners is a sufficient punishment. I reduce the sentence to that already undergone. I maintain the sentences of fine. I do not think it is in this case necessary to bind the accused under s. 106 of the Cr. P C., to keep the peace. I set aside the order directing the accused to execute bonds under that section.

Z. K. *Sentence reduced.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 16 OF 1924.

July 10, 1924.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Fawcett.

DHANRAJGIRJI NARSINGGIRJI—DEFENDANT—APPELLANT

versus

TATA SONS LTD.—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s 73—Breach of contract—Damages, when can be recovered—Measure of damages—Surrounding circumstances, relevancy of

Section 73 of the Contract Act does not necessarily exclude [illegible] of the rule laid down in *Bain* v. [illegible] that normally apart from deliberate carelessness or known want of title by a vendor, a purchaser cannot recover damages for loss of his bargain under a contract for the sale of real estate, apart from costs of investigating the title. The question must be answered on the facts and circumstances of each case whether that rule would apply to that particular case [p 229, col 2]

In an ordinary contract for the purchase and sale of land in which the vendor contracts to make out a marketable title, the usual result would be, if without any default on the part of the vendor he was unable to make out a marketable title, that the bargain would be off and the vendor would have to pay the purchaser's costs of the agreement and of the inspection of the title-deeds But if the conduct of the vendor in committing the breach shows that he has been guilty of any default of a wilful nature, then the damages would be calculated on a higher scale, and the measure of damages would be the difference between the contract price and the market price of the property at the date of the breach. [p 229, cols. 1 & 2.]

Hasan Premji v. *Jerbai*, O. C. J. Appeal No 41 of 1920 decided by Macleod, C. J. and Shah, J. on December 17, 1920 (Unrep.) followed.

Vallabhdas Tulsi Das v *Nagar Das Juthabai*, 92 Ind Cas. 143; 23 Bom. L. R 1213, referred to.

Per *Fawcett, J*—It is not the profit which would have arisen to the plaintiffs, which is to be taken into account, but the market price of the property on the date of the breach [p 231, col. 2.]

The discretion which a Court has under s 73, Contract Act, cannot properly be restricted by any Judge-made rule that every case of a particular kind must be dealt with in a particular manner. [p 232, col 1.]

The circumstances of each case have to be considered in deciding what is reasonable and proper compensation for the damage, caused by a breach of contract under s 73 of the Contract Act and the Court is not bound in every case to award damages on the basis of a difference between the price at the date of the contract and the market price at the date of the breach. [p. 232, col. 2.]

In a case where the plaintiff has no very outstanding circumstances to support his claim to damages on a higher scale, the fact of the contract being made under conditions similar to those obtaining in England is a factor which can reasonably be taken into account. [p. 233, col. 1.]

Appeal against the decision of Mr. Justice Marten.

[illegible] (1871) 7 H. L. 158, 13 L. J. Ex 213, 31 L. T. 287; 32 W. R. 261.

Mr. *Kanga*, Advocate General, (with him Mr. *Coltman*), for the Appellant.

Mr. *Campbell*, (with him Mr. *B. J. Desai*), for the Respondent.

JUDGMENT.

Shah, Ag. C. J.—This appeal arises out of a suit filed by the plaintiffs for recovery of the deposit money, and for damages in respect of a contract entered into between them and the deceased Raja Bahadur Narsinggirji with reference to certain immoveable property in Bombay which has been described as "Watson's Annexe." The contract was entered into on January 12, 1920. There was no formal contract between the parties, but it is evidenced by the two letters written on January 12, 1920, to the parties by their common broker (Exs. A2 and 1). The price of this property was fixed at Rs. 18,00,000 (eighteen lacs). The plaintiffs paid Rs. 1,00,000 as earnest money on January 13.

The plaintiffs' case is that Raja Bahadur Narsinggirji broke the contract on November 20, 1920, the final date by which performance of the contract was insisted upon on their behalf. It appears that the plaintiffs entered into a contract for the sale of this very property with another person for twenty-three lacs of rupees within a fortnight from the date of the agreement in question. The plaintiffs ultimately claimed the return of the deposit money and damages to the extent of five lacs of rupees by way of loss which they suffered on account of their having been unable to carry out their contract with their purchaser.

The defendant denied having broken the contract, and in effect contended that he had a good title to the property which he was always ready and willing to convey to the plaintiffs, and that the difficulty which arose in consequence of a suit filed by one Dr. Billimoria, who was in possession of this property as a lessee from him, was one for which he was not in any sense responsible. He made a counter claim for the specific performance of the contract in his favour, and contended that the plaintiffs had forfeited the deposit money.

On these pleadings the necessary issues were raised, and the evidence adduced principally consisted of the correspondence between the parties. The oral evidence in the case is not of much importance, so far as the [illegible] issues in the case are concerned.

On a consideration of the facts disclosed

in the correspondence and of the oral evidence the learned Judge came to the conclusion that there was a representation by the defendant to plaintiffs that Dr. Billimoria was in occupation under a lease which was shortly to expire, and that the plaintiffs agreed to buy the property on the faith of such representation. He also found that the plaintiffs were justified in rescinding the contract on November 20, 1920, and that the defendant had committed a breach of the contract. On these findings the learned Judge passed a decree in favour of the plaintiffs for the return of one lac of rupees paid as earnest money, and for costs incidental to the investigation of the title in reference to this contract. As regards damages the learned Judge made a reference to the Commissioner for inquiry as to the amount of damages. He did not decide any question as to the basis upon which damages were to be assessed in the case. The learned Judge thought that there was a good deal to be said in favour of the rule laid down in *Bain* v. *Fothergill* (1) that normally, apart from deliberate carelessness or known want of title by a vendor, a purchaser cannot recover damages for loss of his bargain under a contract for the sale of real estate, apart from costs of investigating the title. But he held that the rule in India was different from that laid down in *Bain* v. *Fothergill* (1) and made this reference to the Commissioner for the determination of damages.

The legal representative of the original defendant, Raja Narsinggirji, who died during the pendency of the suit, has appealed from this judgment. In appeal the claim for specific performance has not been pressed, and nothing remains to be said with reference to that part of the defendant's claim.

Principally two points have been raised in support of the appeal. First, it is argued that the lower Court is wrong in directing a return of the deposit money. It is contended that the plaintiffs had really kept the contract open up to the end of October 1920; that they knew perfectly well since June 1920 that Dr. Billimoria had filed a suit against the defendant to enforce specific performance of an agreement to lease this very property for a further period of six years; that that suit between Dr. Billimoria and the defendant was pending; and that with full knowledge of that fact they kept the contract alive with a view to secure if possible the profit which they were likely to make on account of their contract with S. R. Bomanji. It is further urged that when they gave notice on November 8 that they would treat the contract as cancelled if it was not performed by November 20, and when they made time of the essence of the contract they were not justified in doing so and the notice was not reasonable under the circumstances. The contention is that the defendant was trying his best to have the suit of Dr. Billimoria expedited, and it was not under his control to get the decision of the suit on or before any particular date. It is urged that if the notice is not reasonable under the circumstances, the plaintiffs have no right to recover this earnest money. The second point relates to the question of damages.

I shall first deal with the question as to the right of the plaintiffs to recover the earnest money. In connection with this point, it is necessary to remember at the start that this property which formed the subject-matter of the agreement between the parties was a lease-hold property. The terms of the lease are to be found in Ex. D in the case. The land was leased out by trustees of the Port of Bombay for fifty years from January 1, 1886, and at the date of this contract, *i. e*, in January 1920 nearly thiry-three years had elapsed, and the lease was still to run for about seventeen years. As regards the buildings put up by the lessee on this land, unless the lease was renewed, under the terms of the lease the lessee had only a right to remove the building at the termination of the lease. That was the nature of the property for which the plaintiffs had agreed to pay eighteen lacs of rupees. On January 12, 1920, the contract was entered into through a firm of brokers who were not familiar with transactions in land and immoveable property. We find that after Narsinggirji made the offer on December 30, 1919, two letters were written by the brokers on January 12, 1920, one to the plaintiffs and the other to the deceased defendant Narsinggirji. The letter to the plaintiffs was in these terms:— "We have this day bought by your order and for your account from Raja Bahadur Narsinggirji Gyangirji Watson's Annexe Building situated at Apollo Bunder, Fort, Bombay, admeasuring about 7,400 square yards of Bombay Port Trust Land (the pre-

(1) (1874) 7 H. L. 158; 43 L. J. Ex. 243; 31 L. T. 387; 23 W. R. 261.

sent Port Trust lease is to run for about sixteen years further) for Rs. 18,00,000. Title deeds to be marketable. The purchaser is to pay Rs. 1,00,000, as earnest money. Legal charges to be paid half by you and half by the seller. The sale to be completed within six months from the date of this contract."

We find substantially the same terms in the letter to the defendant. On January 13, the earnest money, Rs. one lac, was paid by the plaintiffs to the defendant. It appears that on January 22, the plaintiffs agreed to sell this very property for twenty-three lacs of rupees to S. R. Bomanji, and the letter refers to the payment of Rs. 50,000 by way of earnest money to the plaintiffs.

Before the end of January it came to be known that Dr. Billimoria, who was in possession of this property under a lease, which was to expire shortly, was putting forward a claim to a further lease of this property for six years against the defendant. This fact came to be known to the plaintiffs by a letter of January 29, written by the Solicitors of Dr. Billimoria to the plaintiffs. The defendants wrote to the broker on January 30, saying that it was a misrepresentation to say that the present lessee was entitled to a new lease. That must have been communicated to the plaintiffs.

* * * *

It may be mentioned that in Dr. Billimoria's suit a consent decree was passed [illegible] to which Dr. Billimoria was to vacate the premises on or before February 23, 1923. The allegation of Dr. Billimoria as to his right to have a further lease for six years from Narasingirji was not investigated. In the first place there was his claim for specific performance of this agreement for a further lease, and, secondly, the defendant had to meet the possible plea of the tenant in possession based on the provisions of the Rent Act (Bom. Act II of 1918). In that state this consent decree was obtained on February 24, 1921.

The present suit was filed on August 3, 1921. I have stated the correspondence between the parties at some length, as the facts appearing in the correspondence have a bearing upon both the points arising in the appeal. With regard to the question of the right of the plaintiffs to claim the earnest money, it depends upon the view which the Court takes of the letters of August 12 and of November 8 written by the plaintiffs' Solicitors to the defendant's Solicitors. It is quite true that on August 12 they did not in terms make time of the essence of the contract. Apparently they were not unwilling to keep the contract alive then, if by any chance the contract could be completed by November 1, as that was the date fixed by the plaintiffs with reference to the fulfilment of their agreement with S. R. Bomanji. But they intimated in clear terms in that letter that if the sale was not completed by that time, they would lose the benefit of their contract with S. R. Bomanji, and that they would claim the difference of rupees five lacs by way of damages. The suit of Dr. Bilimoria which had really created a difficulty in the way of the fulfilment of this contract was then pending. It appears that the summons of the suit was served on the defendant on June 10, and the written statement was filed on August 5. Apparently in accordance with the suggestion made by the defendant's Solicitors the plaintiffs' Solicitors had called for the title-deeds after April 12. Nothing appears to have been done, and the plaintiffs were waiting for the completion of the contract by November 1. There was practically no correspondence from August 16 to October 28, 1920. At any rate on November 8, 1920, the plaintiffs' Solicitors definitely intimated to the defendant's Solicitors that they could not possibly wait beyond November 20. It is true that if by any chance the contract could be fulfilled by that date they were anxious to see it fulfilled as that would put them in a position to fulfil their contract with their purchaser. But the terms of the letter of November 8 are very clear, and the whole question is whether on November 8 the plaintiffs were justified in making time of the essence of the contract, and whether the notice given by them is reasonable under the circumstances. It is urged on behalf of the defendant that it is not a reasonable notice because it was not within their power to get the suit disposed of before that date. In fact they made some effort after November 20 to expedite the hearing of that suit, and as a result of that effort apparently the hearing was expedited. Ultimately a consent decree was obtained in February 1921.

The question as between the plaintiffs and the defendant is whether the plaintiffs were bound to wait until the disposal of the suit. That really is the contention of the defendant. According to the defendant the plaintiffs having elected in August

1920 to keep the contract alive, they could not ask him on November 8 to complete the contract within twelve days from that date. As between the plaintiffs and the defendant the original agreement was to fulfil the contract within six months. That period expired on June 12, and thereafter having regard to the nature of the property it is clear that the plaintiffs could not be expected to wait for any indefinite length of time. It is true that as between the plaintiffs and the defendant the contract which the plaintiffs had entered into with S. R. Bomanji is not material. Leaving alone that contract, it is clear that the plaintiffs themselves were entitled, without any reference to the particular reason for their doing so, to insist upon the fulfilment of the contract within a reasonable time. After June 1920 they were in a position to make time of the essence of the contract in view of the difficulty about getting immediate vacant possession. On August 12 they intimated fairly clearly to the defendant that they would insist upon the fulfilment of the contract by November 1. It is quite true that they did not state that they were making time of the essence of the contract; and that letter cannot be taken as notice making time of the essence of the contract. But in fact a definite intimation was given thereby that they would insist on the fulfilment of the contract by November 1. I do not take that as election on the part of the plaintiffs that they were going to wait until the disposal of the suit, whatever time the suit may take. It only indicates a desire to wait up to November 1. In fixing November 1, it seems to me, that the plaintiffs gave the defendant sufficient time in view of the pendency of Dr. Billimoria's claim; but when it became evident that they could not allow the contract to remain outstanding any longer without risk to themselves, they made it clear on November 8 that at the most they would wait up to November 20. It seems to me that they were justified in doing so, and the time they gave was under the circumstances reasonable.

The dispute between the vendor and his sub-lessee was a matter with which the plaintiffs were not directly concerned. If the defendant wanted to have the benefit of this contract, it was his duty to see the disputes between him and his vendee settled in such a manner as to put him in a position to fulfil his part of the contract. Having regard to the nature of the property the plaintiffs were perfectly justified in insisting upon the fulfilment of the contract by November 1, and when they realised that the contract was not fulfilled by November 1, they made it perfectly clear to the defendant that they could not wait in any case beyond November 20. That is a position which, it seems to me, they were justified in taking up. The time given was reasonable. They could have no control over the proceedings in the suit between Dr. Billimoria and the defendant, and the result in that case shows that the defendant could not have completed this contract in any reasonable time. It is in view of the result in that suit that possibly the claim for specific performance is not pressed by the defendant now. But whatever the reason may be for not pressing the claim for specific performance, I am satisfied that the view taken by the the lower Court as to the return of the deposit money to the plaintiffs is right. I do not think under the circumstances that the defendant could forfeit this money for his own benefit.

The next question in the case relates to damages. As regards the measure of damages in a case of this kind, the test to be applied is not easy to lay down. No doubt s 73 of the Indian Contract Act would apply to this contract, as it would apply to any other contract. Under s. 73 the plaintiffs would be entitled to claim, any loss or damage caused to them, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

The question that we have to consider is whether the rule of English Law laid down in *Bain* v. *Fothergill* (1) is necessarily excluded by the terms of s. 73 of the Indian Contract Act. I am assuming for the moment that the rule might otherwise apply to the facts in this case. I shall deal separately with the question as to whether in the present case the breach on the part of the defendant could be said to be due to wilful default on his part, or on account of some difficulty in the way of making out a title for which he cannot be held justly responsible. The question is whether under the circumstances the plaintiffs are entitled only to the return of the deposit money, and all the costs of the investigation of title, or whether they are entitled to damages on the footing of

the difference between the contract price and the market value of the property on the date of the breach.

The decisions on this point have been somewhat conflicting. I may mention that in *Pitamber Sundarji* v. *Cassibai* (2) the view taken by Mr. Justice Scott was that the English rule on this point would apply here. In *Nagardas Saubhagyadas* v. *Ahmed khan* (3) there are observations of Farran, C. J., to the effect that the Legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts relating to commodities. That was the decision of a Division Bench on the Appellate Side of this Court; and on the facts of that case it was not essential to decide the question as to whether the application of the English rule was necessarily excluded in India in virtue of the provisions of s. 73 of the Indian Contract Act. Then Macleod, C.J., considered this question in *Ranchhod Bhawan* v. *Manmohandas Ramji* (4) and held that s. 73 imposed no exception on the ordinary law as to damages whatever the subject matter of the contract, and in effect he held that the English rule would not apply in India unless it could be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable in damages. In *Hasan Premji* v. *Jerbai*, O. C. J. Appeal No. 41 of 1920, decided by Macleod, C.J., and Shah, J., on December 17, 1920, (Unrep.), the question came up for consideration on the Original Side before the Court of Appeal, and it was dealt with as follows:

"Therefore, it must follow that the defendants have committed a breach of their agreement, and under s. 73 of the Indian Contract Act, they would be liable to damages. What the measure of damages would be must depend entirely on a contract of this description on the facts of this case. In an ordinary contract for the purchase and sale of land in which the defendant contracts to make out a marketable title, the usual result would be if without any default on the part of the vendor he was unable to make out a marketable title, that the bargain would be off and the vendor would have to pay the purchaser's costs of the agreement and of the inspection of the title-deeds. But if the conduct of the vendor in committing the breach shows that he has been guilty of any default of a wilful nature, then the damages would be calculated on a higher scale, and the measure of damages would be the difference between the contract price and the market price of the property at the date of the breach. In any event, the defendants would have to pay the costs of the plaintiff up to the time they found they could not complete the bargain."

In that case it was held on the facts that the defendants had been guilty of wilful default, and accordingly the order directing an inquiry as to the amount of damages on the footing of the difference between the contract price and the market price was upheld. The same Bench had occasion to consider the same point again in *Vallabhdas Tulsi Das* v. *Nagar Juthabidas Juthabai* (5) when Macleod, C. J., observed as follows page 1223*):—

"It is, therefore, a case of a vendor contracting to sell property to which he knew that his title was defective; and the only question at issue is whether he should pay damages calculated according to the ordinary rule in the case of a breach of contract, or whether he is only bound to pay the purchaser's costs of the agreement and of the investigation of title. I do not wish to exclude the possibility of there being cases in which it may be found there was an implied contract that in the event of the title proving to be defective without any default of the vendor, he should not be liable to pay damages according to the ordinary rule."

In that particular case the Court found that it was a case in which the defendant should be held liable in damages on the footing of wilful default.

The question now is whether the application of the English rule is necessarily excluded in all cases, and whether there should be a reference to the Commissioner to determine the amount of damages on the basis of the difference between the contract price and the market value of the property on the date of the breach. On a careful perusal of the judgments in *Bain* v. *Forthergill* (1) which affirmed the rule in *Flureau* v. *Thornhill* (6), and the terms of s. 73 of the Indian Contract Act, it seems to me that the application of the rule is not necessarily excluded. The question must be answered on the facts and circumstances of each case whether that rule would apply to that particular case. That is the view which

(2) 11 B 272; 6 Ind Dec. (N. S.) 178.
(3) 21 B. 175, 11 Ind. Dec. (N. S.) 113.
(4) 32 B. 165; 9 Bom. L. R. 1087.
(5) 92 Ind. Cas. 143, 23 Bom. L. R. 1213.
(6) (1776) 2 W. M. Bl. 1078; 96 E. R. 635.

*Page of 23 Bom. L. R.—[*Ed.*]

was taken practically in the unreported judgment in *Hasan Premji* v. *Jerbai*, O. C. J. Appeal No. 41 of 1920, decided by Macleod, C. J., and Shah, J., on December 17, 1924 (Unrep.)] and in *Vallabhdas Tulsi Das* v. *Nagardas Juthabai* (5). On the present state of the authorities that is the view which I am still inclined to take. I am aware of the view taken by the Calcutta High Court in *Nabinchandra Saha Pramanick* v. *Krishna Barana Dasee* (7) and by the Full Bench of the Madras High Court in *Adikesavan Naidu* v. *Gurunatha Chetti* (8). I have referred in detail to the opinions which have been expressed on different occasions in this Court. As I read the judgment of the Chief Justice in the case of *Vallabhdas Tulsi Das* v. *Nagardas Juthabai* (5) it seem to me that in a proper case the rule in *Bain* v. *Forthergill* (1) can be and may be applied in India. It is possible that it may become necessary hereafter to have this question of recurring importance considered and decided by a Full Bench. But having regard to the circumstances of this case, it seems to me that under the present state of the authorities the application of the English rule is not excluded. I, therefore, proceed to consider whether on the facts of this case that rule could be properly applied.

As regards the facts it is clear that from the beginning the defendant's position was that the representation of Dr. Billimoria that he was entitled to a lease for a further period of six years was false, and that he was otherwise in a position to fulfil the contract. If the allegation of Dr. Billimoria had been dealt with in the suit filed by him on its merits, we would have been in a better position to know what the real fact was. But there were conflicting considerations in that suit. On the one hand, there was the plea of Dr. Billimoria that there was an agreement to give him a lease for a further period of six years. Even if that allegation was not proved, the defendant had to face a further plea on account of the provisions of the Rent Act. If Dr. Billimoria could not be evicted from the premises, he would not be in a position to give vacant possession of the property in fulfilment of his contract with the plaintiffs. Under the circumstances the parties compromised the matter, and in February 1921, the compromise arrived at was that Dr. Billimoria was to vacate the premises by February 28, 1923. That compromise does not indicate how far the allegation as to the contract between him and the defendant for a further lease was true. Narsinggirji died before the suit came on for hearing.

On the present record, therefore, my view is that the defendant's contention, that it is the improper claim on the part of Dr. Billimoria that has really come in the way of his fulfilling his contract with the plaintiffs, cannot be rejected. There is nothing on the record to show that the defendant was otherwise not in a position to fulfil the contract or that he was unwilling to fulfil the contract. In fact before any investigation of the title took place, the plaintiffs also realised that the contract could not be put through unless this difficulty which arose in consequence of the claim by Dr. Billimoria was removed. That difficulty could not be removed within the time fixed by the plaintiffs and, therefore, the contract could not be fulfilled. Then we should have regard to the informal manner in which the terms of the contract are evidenced in this case. The usual agreement which we find in such cases between the parties was not executed. The terms are evidenced by the two letters which are written by the broker, and it is sufficiently indicated in these letters that the defendant agreed to deduce a marketable title though the expression used in the letter is very inapt. In fact a marketable title could not be deduced by the defendant under the circumstances which I have indicated. There is nothing in the circumstances of the case nor in the terms of the contract, to show that the plaintiffs were not alive to the reasonable possibility, which exists in such cases, of the vendor being unable to make a good title without any default on his part. It appears to me that this case falls clearly within the rule of *Flureau* v. *Thornhill* (6) as explained and affirmed by the House of Lords in *Bain* v. *Fothergill* (1).

I am, therefore, of opinion that under the circumstances of this case it is not necessary to make any reference to the Commissioner for any inquiry into the *quantum* of damages. The plaintiffs will get damages by way of costs incidental to the investigation of title. This would, in my opinion, meet the justice of the case. I would, therefore, affirm the decree appealed from so far

(7) 9 Ind Cas. 523; 38 C. 458; 15 C W. N. 420.
(8) 39 Ind. Cas. 358; 40 M. 338; 32 M L. J. 160; (1917) M. W. N. 171; 5 L. W. 425; 22 M. L. T. 300.

as it relates to the return of the earnest money, the dismissal of the counter-claim, and the cost of the investigation of title. But I would set aside the decree so far as it relates to the reference to the Commissioner for inquiry into the question of damages, and dismiss the rest of the plaintiffs' claim for damages

Taking all the circumstances of the case into consideration, including the fact that the plaintiffs' claim for damages on the higher scale has been disallowed, we direct that the plaintiffs should get their costs in the lower Court from the defendant, and that each party should bear his own costs of appeal.

Fawcett, J.—I agree that there was a breach of contract on the part of the defendant on November 20, 1920. I think, however, that the breach is not so much due to a failure to show a marketable title, as a failure to show a title, subject only to a lease expiring on March 1, 1920, and not to any longer or other lease. On the oral evidence that was adduced, and accepted by the learned Judge in the Court below, there was a representation by the original defendant that the only lease to which the property was subject was one expiring on March 1, 1920, and the learned Judge has held that that was a material representation, and the plaintiffs were justified in rescinding the contract. That finding is not disputed before us, and the difficulty that really prevented the performance of the contract in this case was the failure of the defendant to pass the property, subject only to this particular lease, there being in fact a claim by Dr. Billimoria that he was entitled to a longer lease. This claim was not a negligible one, for in May 1920 he brought a suit asking that the defendant should be ordered specifically to perform the agreement to lease the property for six years, and also that he should be restrained by an injunction from selling or completing the sale of the premises to the plaintiffs, except subject to the six years' lease that he had set up. The original date fixed for performance was in August 1920, and I agree with the learned Chief Justice that in the circumstances of the case the plaintiffs were entitled on November 8, 1920, to give notice to the defendant that they did. I also agree that in the circumstances there was a reasonable time fixed in the notice for the defendant to remove the hitch about this claim of Dr. Billimoria. It is no doubt true that there would be great difficulties in getting the suit decided before November 20, 1920. But there were other ways of removing the impediment, such as an amicable settlement; and it is quite clear that the law in a case of this kind is that the intending purchaser is not bound to wait indefinitely until a claim has been got rid of in the ordinary course of litigation. The defendant had due notice from the plaintiffs to get rid of this claim, and I do not accept the contention of the learned Counsel for the appellant that they misled the defendant and so were disentitled to give their notice of Novembar 8, 1920.

The next question is as to the alleged right of the defendant to retain the deposit made by the plaintiffs On this point, it seems to me clear that there being, as I have held, a breach of the contract on the part of the defendant, the plaintiffs were entitled to recover their deposit, and no facts are shown which make it inequitable that the plaintiffs should so recover it, or make it equitable that the defendant should retain it The difficulty that arose was not in any way due to any default on the part of the plaintiffs, and so far as there was any conduct conducive to Dr. Billimoria's claim, it must have arisen on the part of the defendant rather than on the part of the plaintiffs.

Next as to the question of damages. The plaintiffs claimed the sum of five lacs, being the difference of the price at which they had agreed to purchase from the defendant and the price at which they had entered into a contract to sell to S. R. Bomanji. But that claim can be disposed of very shortly by a reference to illustration (o) to s. 73 of the Indian Contract Act, which shows that it is not the profit which would have arisen to the plaintiff, which is to be taken into account, but the market price of the property on the date of the breach. At the same time, as ruled in *Engell* v. *Fitch* (9) the profit which the plaintiffs could have made on a re-sale, if uncontradicted by other evidence, is evidence, of the latter value.

The main question is whether in the circumstances of this case the plaintiffs should be allowed damages under what may be called the ordinary rule of the difference between the price which they agreed to pay the defendant and the market price on

(9) (1869) 4 Q. B. 659; 10 B. & S. 738, 38 L. J. Q. B. 304, 17 W. R. 894.

the date of the breach, namely, November 20, 1920. That is not a definite rule which is laid down in the text of s. 73, and it is not the law, as I understand it, that in every case where a contract of this kind has been broken the party who suffers from the breach is entitled to get compensation in that particular manner. There can be exceptions, and the illustrations to s. 73 merely lay down what is expressed in s. 51 (3) of the English Sale of Goods Act, *viz.*, that the measure of damages in such a case is *prima facie* to be ascertained in that manner. Each case, in my opinion, depends upon its own particular circumstances, and I agree with the opening remark of the Chief Justice Sir Norman Macleod in the passage quoted in *Vallabhdas Tulsi Das* v. *Nagar Das Juthabai* (5) from his judgment in another case [*Hasan Premji* v. *Jerbai*, O. C. J. Appeal No. 41 of 1920, decided by Macleod, C. J., and Shah J., on December 17, 1920 (Unrep.) that "what the measure of damages would be must depend entirely in a contract of this description on the facts of each case." He then goes on to say that:—

"In an ordinary contract for the purchase and sale of land in which the defendant contracts to make out a marketable title, the usual result would be, if without any default on the part of the vendor, he was unable to make out a marketable title, that the bargain would be off and the vendor would have to pay the purchaser's costs of the agreement and of the inspection of the title-deeds."

That is practically applying the rule adopted in England in the leading case of *Bain* v. *Fothergill* (1) and if the Chief Justice intended to go back on his previous decision in *Ranchhod Bhawan* v. *Manmohandas Ramji* (4). I should certainly feel great difficulty in following it. The view taken in *Ranchhod Bhawan* v. *Manmohandas Ramji* (4) has been followed in the Calcutta and Madras High Courts, as already mentioned in my learned brother's judgment, as well as in the Lahore High Court in *Jai Kishen Das* v. *Arya Priti Nidhi Sabha* (10) and in my opinion the discretion which a Court has under s. 73 cannot properly be restricted by any Judge-made rule that every case of a particular kind must be dealt with in a particular manner, such as the rule laid down in *Bain* v. *Fothergill* (1). I think each case depends upon its own facts, and I may, for instance, refer to a case which I had before me last year, *viz.*, *Shamsuddin Tajbhai* v. *Dahyabhai* (11). The plaintiff there sued for damages for breach of contract to sell immoveable property, and though I held that the defendant had been deliberately trying to get out of his agreement and, therefore, was guilty of conduct which would presumably come under the head of "wilful default" on his part, yet in the circumstances of the case, namely, certain delay on the part of the plaintiff, I thought the plaintiff was not entitled to recover any damages other than the taxed costs of and incidental to the agreement for sale, plus the forfeiture of the defendant's earnest money. In my opinion no hard and fast rule can be laid down in these cases, and if it were necessary for the purposes of this case to decide whether the rule laid down in *Bain* v. *Fothergill* (1) should be applied as an invariable rule of law, then I agree with my learned brother that it would be desirable to have a reference about it to a Full Bench. But I think we agree that the circumstances of each case have to be considered in deciding what is reasonable and proper compensation for the damage caused by a breach of contract under s. 73 of the Indian Contract Act; that the Court is not bound in every case to award damages on the basis of a difference between the price at the date of the contract and the market price at the date of the breach; and that the rule laid down in *Bain* v. *Fothergill* (1) is not necessarily excluded and can be properly applied if the circumstances justify it.

In this particular case, the circumstances are somewhat peculiar. The contract was entered into at a time when the Rent Act was in force in Bombay, and when undoubtedly there were difficulties in the way of an owner obtaining possession of land which had been leased to a tenant. These difficulties were within the knowledge of both the parties to this suit. The case is thus a very different one from that of *Engell* v. *Fitch* (9) which was another case where the trouble arose on account of a failure to get vacant possession. The vendors were mortgagees who sold with vacant possession, and it was held that they had deliberately failed to eject the mortgagor, and

(10) 58 Ind. Cas. 757; 1 L. 380 at p. 385; 80 P. W. R. 1920, 55 P. L. R. 1921.

(11) 84 Ind. Cas. 947: 26 Bom. L. R. 105; 48 B. 368; (1924) A I. R. (B.) 357.

therefore, there had been a "wilful default" on their part which took the case out of the rule in *Bain* v. *Fothergill* (1). But this cannot apply in the present case where the defendant would, quite apart from the question whether he had or had not given to Dr. Billimoria a fresh lease of the premises, not necessarily get vacant possession by August 1920, even although Dr. Billimoria's lease expired on March 1, 1920. I bear in mind the remark of the learned Judge that the same difficulties would not have confronted the plaintiffs, who could, he says, have alleged that they wanted the land for their own occupation or for building operations. But they could hardly have alleged that they wanted it for their own occupation in view of the admission that they had bought it for a syndicate, and as regards building operations, it has to be shown under the Rent Act that the property is reasonably required for such operations. It is not by any means certain that the plaintiffs would have got an order for delivery of possession by Dr. Billimoria, if he had contested the matter, within any specific period of time, and these peculiar difficulties can, I think, be fairly taken into consideration in regard to the question of damages.

Another circumstance which I think may be taken into consideration in this case is the fact that this was a contract in Bombay, where conveyancing work and negotiations in regard to purchase and sale of property are carried on in a very similar manner to that followed in England. The House of Lords have laid down, for reasons connected with conveyancing difficulties, that the rule in *Bain* v. *Fothergill* (1) is a reasonable one to apply in certain circumstances, and, therefore, in a case where the plaintiff has no very outstanding circumstances to support his claim to damages on a higher scale, the fact of the contract being made under conditions similar to those obtaining in England is, I think, a factor which can reasonably be taken into account.

Then there is the further fact that the suit brought by Dr. Billimoria was compromised, and that in the circumstances it is impossible to say with certainty that his claim was due to some conduct of the defendant which should enhance the damages otherwise awardable. It seems to me that, having regard to the special circumstances of the case, the difficulty which arose was not entirely due to defendant's conduct, but can also be reasonably ascribed to the difficulties of the kind that I have mentioned, and that substantial justice is done by putting the parties back in the position from which they originally started, that is to say, that the plaintiffs should merely recover their deposit and get their costs of investigating the title.

I, therefore, agree with the decree proposed by my learned brother.

K. S. D. *Decree varied.*

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 89 OF 1924.

April 27, 1925.

Present :—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice Maung Ba.

CHINA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

TE THOE SENG—DEFENDANT—RESPONDENT.

Mistake of fact—Money paid, when can be recovered—Mistake between payer and third person, effect of

Where money is paid under a mistake of fact intentionally, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all enquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is entitled to retain it, but if it is paid under the impression of the truth of a fact which is untrue, it may ordinarily be recovered back, however careless the party paying may have been in omitting to use due diligence to enquire into the fact. The mistake must, however, be one as between the person paying and the person receiving the money and as to some fact affecting the right of the payee to receive the money. [p. 234, col. 2; p. 235, col. 1.]

Appeal against a decree of this Court on the Original Side in Civil Regular No 610 of 1922.

Mr. *Clifton*, for the Appellants.

Mr. *Young*, for the Respondent.

JUDGMENT.—The suit out of which this appeal arises is founded on money had and received to plaintiffs' use In the plaint originally filed there was an allegation of negligence on the part of the defendant Bank. Defendant demanded the particulars of the alleged negligence. The plaintiff was unable to supply them, and the Court ordered that this paragraph be struck out, plaintiff reserving permission to file a plea of negligence if, after inspecting documents, he was in a position to do so. Eleven days later an amended plaint

was filed and all allegations of negligence were omitted.

There is no dispute as to the facts. The plaintiff firm carries on business in Penang under the style of Ghee Seng & Co. They have a branch in Rangoon under the style of Ghee Seng Chan & Co. On the 16th July 1922, plaintiff firm in Penang received a telegram purporting to come from their Rangoon branch. It ran as follows:— "Rupees bought pay Mercantile five thousand. Advice follow letter Ghee Seng Chan." On receipt of this telegram, plaintiff assumed it came from his Rangoon branch and went to the Mercantile Bank and, showing them the [illegible] desired to pay in five thousand [illegible] Bank declined to receive the money saying that they had had no instructions to do so. On the 18th of July, the Mercantile Bank received a telegram "Receive five thousand Ghee Seng & Co., China and Southern Bank." Thereupon they informed plaintiff that they had now received advice and plaintiff paid them five thousand dollars. He was given a receipt in the ordinary printed form that the Bank uses, and, in that, it is stated "For the credit of China and Southern Bank, Rangoon." It appears that one Gaw Keong Pho went to the defendant Bank and offered to sell them 5,000 dollars. He told them that he was the travelling agent of Gee Seng & Co of Penang. They asked if he had a power-of-attorney or any documents to prove this. He said he had not. They then enquired how he would pay them 5,000 dollars and he said that Gee Seng & Co. would pay the Mercantile Bank. They then instructed the Mercantile Bank to receive the money. After receiving advice from the Mercantile Bank that the money had been paid in, they paid Gaw Keong Pho the equivalent in Rupees. Subsequently plaintiffs enquired from their Rangoon branch and found that they had not sent this telegram. Gaw Keong Pho was searched for, but had, of course, disappeared. It is obvious that he committed a fraud upon the defendant Bank and upon the plaintiffs.

The learned Judge in the Court below treated the case as being one raising the question as to which of two innocent parties was to suffer by this fraud. He held that plaintiffs had not done or omitted to do anything that they ought to have done which made the success of the fraud more easy, but that the defendant Bank had not made enquiries and had so conduced to the fraud, and he, therefore, held that plaintiff was entitled to recover his money back and that the defendant Bank was bound to restore it. He further held that even apart from that the money was paid to the Mercantile Bank by the plaintiff for his own use, and that the defendant Bank had received that money on account of the plaintiff firm and, through no fault of the plaintiff, had paid it away wrongly to someone else.

The appeal has been argued before us solely on the question as to whether this was money paid by mistake, and reliance is placed on the case of *Kelly* v. *Solary* (1). In that case Parke, J., said: "If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it."

We were also referred to the dictum of Williams, J., in *Townsend* v. *Crowdy* (2): "No doubt, at one time the rule that money paid under a mistake of fact might be recovered back, was subject to the limitation that it must be shown that the party seeking to recover it back had been guilty of no laches. But, since the case of *Kelly* v. *Solari* (1) it has been established that it is not enough that the party had the means of learning the truth if he had chosen to make inquiry. The only limitation now is, that he must not waive all inquiry." Now, it cannot be said in this case that plaintiff intended to waive all inquiry or intended that defendant Bank was to receive the money at all events, and, if the rule stopped there, plaintiff would be entitled to a decision in his favour. However, there is a further fact to be weighed in deciding these cases, and that is, the mistake must be one as between the person paying and the person receiving

(1) (1841) 9 M. & W. 54; 11 L. J. Ex. 10; 6 Jur. 107; 152 E. R. 24.

(2) (1860) 8 C. B. (N. S.) 477; 29 L. J. C. P. 300; 2 L. T. 537; 7 Jur. (N. S.) 71; 141 E. R. 1251; 125 R. R. 740.

the money and as to some fact affecting the right of the payee to receive the money.

In *Chambers* v. *Miller* (3), this principle is dealt with by Erle, C. J. It was a case in which a person presented a cheque for payment at a Bank. The cashier paid the money but, while the plaintiff was counting the money, he discovered that their client's account was overdrawn and demanded the money back. On plaintiff's refusing, the money was taken forcibly from him and a suit was brought for assault and trespass for taking the money by force, and it was urged that plaintiff was entitled to recover it. Erle, C. J., said : "It is true that there was a mistake in cashing the cheque at all, but that was a mistake as between the defendants and their customer. As between the plaintiff and the defendants there was no mistake at all ; the plaintiff asked the defendants to cash the cheque, and they did so. But then the defendants say that by reason of this mistake they had a right to revoke the transaction ; but it is clear to me that the money having once passed, it is, notwithstanding a mistake of this kind, a perfectly good payment and irrevocable. As to the case of *Kelly* v. *Solari* (1) and others of that class which have been cited, there the money was paid to a party who had no right to it whatever, and the mistake was between the parties themselves as to the money being due Here the money was due, and as between the defendants and the plaintiff there was no manner of mistake whatsoever, and I am quite clear that, under these circumstances, the defendants could never have recovered back the money."

Williams, J., in his judgment said : "It may be that, if he had been aware of all the facts of which he afterwards became aware he would not have paid the money, but you cannot recover back money because you have paid it in ignorance of some fact, which had you known it, would have influenced you not to pay it ; that fact being one with which the payee has nothing to do."

The fact in this case is the fact that the telegram received by plaintiff on the 16th of July was a false telegram and did not come from his Rangoon branch. Plaintiff was asked, "for what purpose did you pay the money in ;" and his answer was, "I paid the money in because on the 16th I received a telegram saying, 'Rupees bought by Gee Seng Chan'." Again he was asked, "When you paid the money into the Mercantile Bank, did you give any instructions ?" And he replied, "No, because I paid it in, in accordance with the instructions I received by telegram." It is no doubt true that believing that this telegram came from his Rangoon branch he paid in the money believing that the equivalent in rupees would be paid to his Rangoon branch. But the mistake of fact, on which he relies, was not a mistake as between him and the defendant Bank who received the money. The defendant Bank had nothing whatever to do with the fact that that telegram was a false telegram. The Bank was merely conducting an ordinary banking transaction with a stranger. All that they were concerned with was that they should get the dollars. They were told that plaintiff would pay the money in ; they instructed the Mercantile Bank to collect the money ; the plaintiff did pay the money in, and they thereupon carried through an ordinary business transaction. Under these circumstances, the rule laid down in *Kelly* v. *Solari* (1) does not apply. The money was not had and received to the plaintiffs' use and, in our opinion, the decision of the Court below was wrong, and must be reversed. The appeal will be accepted and the plaintiffs' suit dismissed with costs in both Courts.

Z. K. *Appeal accepted.*

(3) (1862) 32 L. J. C P. 30; 13 C. B. (N. S.) 125; 9 Jur. (N. S.) 626; 11 W. R. 236; 7 L. T. 856, 134 R. R. 479; 143 E. R. 50.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1037 OF 1925.

October 29, 1926.

Present:—Mr. Justice Addison.

THE FIRM JAI SINGH-DIYAL SINGH THROUGH DIYAL SINGH AND THE FIRM JWALA DAS-ASA NAND THROUGH JAWALA DASS—CREDITORS—APPELLANTS

versus

NARMAL DAS, DEBTOR-INSOLVENT; THE FIRM RAM LAL-CHAMAN DAS THROUGH RAM LAL, CREDITOR AND RAM LAL KHANNA—RECEIVER—RESPONDENTS

Provincial Insolvency Act (V of 1920), ss. 41, 43, 75—Adjudication—Period for applying for discharge not specified—Subsequent addition without notice to parties, whether operative—Failure to apply for discharge—Annulment of adjudication—Appeal by creditors, whether maintainable—Persons aggrieved.

Where a person is adjudicated an insolvent at the instance of his creditors, and the order of adjudication is subsequently annulled under s. 43 of the Provincial Insolvency Act, the creditors are the aggrieved parties and an appeal against the order annulling the adjudication is maintainable at the instance of the creditors [p. 236, col 2]

Where an order of adjudication did not fix a period within which the insolvent was to apply for his discharge but an addition was subsequently made to the order behind the back of the parties fixing such period

Held, (1) that the subsequent addition could not be treated as a part of the order of adjudication and was, therefore, inoperative, [*ibid*]

(2) that no time having been fixed in the order of adjudication within which the insolvent was to apply for his discharge, s. 43 of the Provincial Insolvency Act had no application to the case, and the order of adjudication could not, therefore, be annulled for failure of the insolvent to apply for his discharge within the period specified in the subsequent addition to the order of adjudication, [*ibid.*]

A wrong order becomes final unless set aside in accordance with law [p 237, col. 1]

Miscellaneous first appeal from an order of the District Judge, Jhang, at Sargoda, dated the 23rd February 1925.

Dr. *Nand Lal*, for the Appellants.

Lala *Ram Chand Manchanda*, for the Respondents.

JUDGMENT.—Certain creditors applied to have Narmal Das adjudicated an insolvent and this was done by the District Judge of Jhang on 8th January 1923. At the foot of the order on the English record there is an addition signed by the District Judge but not dated to the effect that Narmal Das should apply within two years for his discharge. I have consulted the vernacular record, however, and it is only a translation of the order proper and not of the undated addition. Proceedings went on before the District Judge and certain objections were urged before him. In the middle of these objections without notice to any one on the subject the District Judge who had succeeded the first District Judge noticed that the two years had expired in January 1925 and he therefore, passed an order annulling the adjudication as Narmal Das had not applied for his discharge within two years. This order is dated the 23rd February 1925, and it was further ordered that the Receiver should distribute the money in his hands amongst those creditors who had proved their debts and return the rest of the insolvent's property to him. Against this order two creditors have appealed.

A preliminary objection was taken that no appeal lay at the instance of the creditors as the property of the insolvent had vested in the Receiver and that he, therefore, was the only person aggrieved by the order annulling the adjudication especially as the ordinary rights of the creditors revived by the order of annulment. Narmal Das, however, was adjudicated an insolvent at the instance of the creditors and they are obviously the aggrieved parties. For this reason alone the creditors have a right of appeal. In this view of the case it is not necessary to decide whether a creditor must be an aggrieved party before he has the right of appeal as to which different views seem to have been taken by this High Court and the Allahabad High Court: *vide Ishar Das* v. *Ladha Ram* (1) and *Shikri Prasad* v. *Aziz Ali* (2). I overrule the preliminary objection.

In the appeal it was argued that it is clear from two records that the addendum at the foot of the signed and dated order was not written at the time the order was made. It seems to me that this view must prevail. It is true that it is laid down in s. 114 of the Evidence Act that the Court may presume that judicial and official acts have been regularly performed, but it is clear from a comparison of the two records that the addendum was not written when the order of adjudication was made. It is not clear when it was added. This may have been the next day or a week later or at any other subsequent time. But in any case it cannot be held to be a part of the order as no proper steps were ever taken by the Judge to review it after notice to the parties. It follows that this addendum cannot be considered and that no time was stated in the order within which the insolvent had to apply for his discharge although such time should have been stated.

As no such time was stated the order under appeal cannot be sustained. Of course, it would still be possible for the debtor to apply for his discharge under s. 41 of the Act which provides that he may apply at any time after the order of adjudication and shall apply within the period specified by the Court. Further, as he was never directed by the order to apply within two years s. 43 of the Act does not apply and the adjudication cannot be annulled for the reason given.

It was contended on behalf of the respondent insolvent that as a time was not

(1) 62 Ind Cas. 924.

(2) 63 Ind. Cas. 601; 19 A. L. J. 862; 3 U. P. L. R. (A.) 195; 44 A. 71; (1922) A. I. R. (A.) 196.

fixed within which he was to apply for his discharge as ordered by s. 27 of the Act the order was defective, and it must be held that he was not adjudicated an insolvent in accordance with law. This consequence, however, does not follow. A wrong order when passed becomes final unless set aside in accordance with law.

No other point was argued before me. For the reasons given I accept the appeal and set aside the order of the District Judge under appeal. He is directed to proceed with the insolvency proceedings according to law. There will be no costs of this appeal as the insolvent does not seem to be to blame for what has happened.

Z. K. *Appeal accepted.*

OUDH CHIEF COURT.

FIRST CIVIL APPEAL No. 57 OF 1924.

December 4, 1925.

Present:—Mr. Justice Hasan and Mr. Justice Raza.

BALDEO SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat GULAB AND OTHERS—DEFENDANTS—RESPONDENTS.

Will, execution of—Undue influence—Burden of proof—Surrounding circumstances—Pardanashin *lady—Probabilities of case*

If a person impugns a Will on the ground that it was obtained by the exercise of undue influence, excessive persuasion or moral coercion, it lies upon him to establish it. [p. 238, col. 2.]

A man may act foolishly and even heartlessly if he acts with full comprehension of what he is doing, the Court will not interfere with the exercise of his volition. In such cases the decision of the Court must rest not upon suspicion, but upon legal grounds, established by legal testimony. [*ibid.*]

Sreemanchunder Dey v. *Gopaul Chunder Chuckerbutty*, 11 M I A. 28 at p. 44; 7 W R. P. C. 10; 1 Suth. P. C. J. 651, 2 Sar. P. C. J. 215, 20 E. R. 11, referred to.

A Will executed by a *pardanashin* lady in plain language, in lieu of services rendered by devisee, and otherwise natural and consistent with the probabilities of the case, must be upheld. [p 240, col 1]

Appeal [illegible] decree of the Subordinate Judge, [illegible] dated the 3rd July 1924.

Messrs. *Hyder Husain* and *Kanhaiya Lal*, for the Appellants.

Messrs. *A. P. Sen*, *H. K. Ghosh*, *C. N. Harkauli* and *Sidh Prasad*, for Respondent No. 1.

JUDGMENT.—This is the plaintiffs' appeal from the decree of the Subordinate Judge of Sitapur dated the 3rd July 1924. The suit out of which this appeal arises and which has been dismissed by the Court below relates to certain *zemindari* shares in villages mentioned in list B attached to the plaint. The plaintiffs claim the recovery of possession of 2/11 share in that property. This property originally belonged to one Ganga Bakhsh Singh. Ganga Bakhsh Sindh died childless and on his death the estate devolved on his widow, *Musammat* Bindra, who entered into the possession of the estate after having obtained mutation of names in place of her husband from the Revenue Courts. *Musammat* Bindra died, as is proved by the evidence in the record, on or about the 30th of March 1917. The plaintiffs' case is that on her death the reversion opened to one Mannu Singh, now deceased, husband of *Musammat* Ram Kunwar, plaintiff No. 4 and on Sumer Singh, plaintiff No. 3, to the extent of 2/11th share in that estate. Munnu Singh executed a deed of gift in respect of half of his 1/11th share on the 22nd November 1921 in favour of Baldeo Singh son of Bahadur Singh plaintiff No. 1 and Sumer Singh executed another deed of gift on the 4th of March 1921 in favour of Baldeo Singh son of Kunwar Singh, plaintiff No. 2 in respect of one-half of his 1/11th share. The chief contesting defendant to the suit is *Musammat* Gulaba, now respondent in this appeal. The case set forth in the plaint was that *Musammat* Gulaba was in unlawful possession of the estate in suit. The title to that estate was claimed by the plaintiffs under the rules of inheritance of the Law of Mitakshara.

The defence to this suit was that *Musammat* Bindra entered into the possession of her husband's estate not as a Hindu widow with limited interest but under a custom governing the succession to the estate of Ganga Bakhsh Singh and under that custom she had absolute proprietary rights in the inheritance which devolved upon her from her husband Ganga Bakhsh, that in the exercise of her proprietary powers *Musammat* Bindra made a Will in favour of *Musammat* Gulaba on the 25th of February 1917 in respect of the entire estate which had devolved on *Musammat* Bindra by right of succession from her husband and that by the terms of that Will *Musammat* Gulaba acquired absolute proprietary interest in the property in suit.

The Trial Court has found that the custom under which *Musammat* Bindra

acquired full proprietary rights in the estate of her husband was proved. It has also found that the Will of the 25th of February 1917 said to have been executed by *Musammat* Bindra in favour of *Musammat* Gulaba was also proved.

In the memorandum of appeal filed in this Court both these findings of the Trial Court were impugned. At the hearing of the appeal, however, the learned Counsel for the appellants expressly accepted the correctness of the finding as to the custom. The arguments were consequently limited to the question of the genuineness and validity of the Will of the 25th February 1917.

The attack on the Will was made on the following lines. *Musammat* Bindra was a *pardanashin* lady of an advanced age of 70 or 75 years. There was no motive for a Will of the nature now propounded by the defendant; the Will has the effect of ignoring the claims of natural heirs both of her own estate and of the estate of her husband. The testator was surrounded by *Musammat* Gulaba, her daughters and her son-in-law Pirthipal Singh. No relations either of *Musammat* Bindra or of her husband Ganga Bakhsh Singh were consulted in the matter of the Will. The attesting witnesses and the scribe were all strangers; *Musammat* Bindra had been ill and was about the time of the execution of the propounded Will attacked with paralysis which had made her speechless and more or less devoid of her senses.

These lines of attack we have carefully examined with reference to the evidence on the record and find that each one of them is amply and conclusively replied by the merits of the case. All along the arguments addressed to us on the side of the appellants we could never reach to a certainty as to whether the arguments were intended to attack the genuineness of the Will of the 25th February 1917 or whether they were intended to establish the case that the Will was the result of the exercise of undue influence on the part of the attesting witnesses, Pirthipal Singh, *Musammat* Gulaba and other persons surrounding the testator *Musammat* Bindra. In this estate of the arguments we think it advisable to deal with this matter in both aspects.

The law on the subject is perfectly clear. In delivering the judgment of their Lordships of the Privy Council in the case of *Motibai Hormusjee Kanga* v. *Jamsetjee Hormusjee Kanga* (1) Mr. Ameer Ali made the following observations:—"In this connection it may be useful to refer to the observations of Lord Westbury in the case of *Sreemanchunder Dey* v. *Gopaulchunder Chuckerbutty* (2) 'in matters of this description' (he was dealing with a charge of fraud in connection with a sale in execution of a decree) 'it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds, established by legal' testimony.' It is quite clear that the onus of establishing capacity lay on the petitioner. It is also clear that if the caveator impugned the Will on the ground that it was obtained by the exercise of undue influence, excessive persuasion or moral coercion, it lay upon him to establish that .....A man may act foolishly and even heartlessly; if he acts with full comprehension of what he is doing, the Court will not interfere with the exercise of his volition."

The Will in question was written by Ram Dayal. He has given evidence in the case and deposes to circumstances in which he came to write this particular Will. Ram Dayal was admittedly in the service of Pirthipal Singh since the year 1916. This Pirthipal Singh, as we have already said, is one of the sons-in-law of *Musammat* Gulaba. It seems to us to be perfectly natural and consistent with the probabilities of the case that Ram Dayal should be at the house of *Musammat* Bindra where Pirthipal Singh himself was staying at the time when the Will was executed. Ram Dayal's testimony is that he wrote out this Will at the desire of *Musammat* Bindra and that *Musammat* Bindra affixed her thumb mark on the Will. The next witness in support of the execution of the Will of the 25th of February 1917 is Thakur Madho Singh. He has attested the Will in question and his evidence is that he was sent for from his house by *Musammat* Bindra. Madho Singh is a gentleman of position and respectability. Ganga Bakhsh Singh was his maternal uncle. During his childhood he lived for the most part of the time at Ganga Bakhsh's house. He swears to his own

(1) 80 Ind. Cas. 777; 22 A. L. J. 98; (1924) A. I. R. (P. C.) 28, (1924) M W. N. 173; 34 M. L. T. 4; 19 L. W. 437; 26 Bom. L. R. 579; 29 C. W. N. 45; L. R. 5. A. (P. C.) 165 (P. C.).

(2) 11 M. I. A. 28 at p. 44; 7 W. R. P. C. 10; 1 Suth. P. C. J. 651; 2 Sar. P. C. J. 215; 20 E. R. 11.

signature as an attesting witness and also to the thumb mark made by the testator *Musammat* Bindra on the Will in question. The next witness is Thakur Sardar Singh. He is also a relation. He says that the daughter of the brother of the widow of Ganga Bakhsh was married to his brother D[illegible] He was sent for by the Thakurain, that is *Musammat* Bindra. He saw the execution of the Will and in token of it he attested it. He also swears to the thumb impression on the Will as that of *Musammat* Bindra. Then comes Thakur Ratan Singh. He also gives evidence in support of the Will. He is also an attesting witness to it, is a *zemindar* paying Rs. 600 revenue and is a relation of the family of Ganga Bakhsh Singh. Ganga Bakhsh Singh's grandfather was Mardan Singh and Mardan Singh's [illegible] was married to the grandfather of Ratan Singh, the witness. He was also sent for by *Musammat* Bindra and at her desire attested the Will and swears also to the thumb mark of *Musammat* Bindra. Finally we have the evidence of one Veshunu Dass Mahant of Husainpur who was acting as a *pujari* at the *thakurdwara* founded by Ganga Bakhsh Singh. He was also sent for by the lady, saw the execution of the Will and affixed his own signature to it as an attesting witness. He also saw the Thakurain making her thumb impression of this Will. These witnesses, one and all, fully, in our judgment, prove the execution of the Will propounded by the defendant by *Musammat* Gulaba. There can, therefore, be no doubt that the document before us is the Will which *Musammat* Bindra executed.

We fully realise the importance of the fact that *Musammat* Bindra was a *pardanashin* lady. We also realise that she was a woman of advanced age. We think, therefore, in view of these circumstances, our duty is to see that the physical act of the execution of this Will by *Musammat* Bindra accompanied her mind and desire in the matter. The testimony of the witnesses to which we have referred in the preceding paragraph of this judgment is positive on the fact that the Thakurain was 'quite alright' when the Will was executed and she was in possession of her senses. Every one of these witnesses says that the desire to execute the Will in question arose with the Thakurain herself and she communicated her desire in the presence of the witnesses to Ram Dayal with a request that he might prepare a Will of the nature she wanted. Ram Dayal accordingly made a draft. This draft after having been prepared was read out to the lady and the witnesses unanimously emphasise the fact that it was also explained to her. The evidence does not stop here. A fair copy was then made and this copy, which is the original Ex. A-1 before us, was again read and explained to the lady and that in token of her consent she said it was 'quite alright' To use the language of Mr. Ameer Ali in the case already referred to

"It is to be remarked that the Will itself is simple and short, and not requiring any great mental strain on the part of a sick man to grasp its meaning" We should not be understood to mean that *Musammat* Bindra was sick in any sense of the word at the time of the execution of this Will. To the question of her alleged illness we will address ourselves later. The Will before us recites the motive for the making of it and then gives all the property of the teatator to the devisee *Musammat* Gulaba. There is no more in this Will. The words used are of the simplest nature. The idea is most rudimentary. Taking into consideration, therefore, the simple nature of the Will, the evidence as to the fact that the lady was in the possession of her mental faculties, that she was "quite alright," that the draft and the fair copy were both read and explained to the lady and that the Will before us expresses her testamentary intentions we have no hesitation in holding that the lady executed the document in question intelligently and with a complete comprehension of its contents and effects.

There is no evidence on the side of those who impeach this Will as to the exercise of any undue influence by anybody in the matter of the execution of this Will. In the course of the arguments reliance was placed on some of the circumstances to which we have made reference at the outset of this judgment in support of the case of undue influence. Now what are the facts? *Musammat* Gulaba is the widow of Thakur Sheo Singh. Thakur Sheo Singh was the younger brother of Thakur Ganga Bakhsh Singh. The testimony of the witnesses to which we have referred already is clear, reliable and unanimous on the point that *Musammat* Bindra and *Musammat* Gulaba lived all along jointly and were on good terms with each other. *Musammat* Gulaba was about 12 years

younger than *Musammat* Bindra. The former served the latter in her widowhood gave her comfort and above all gave her the joy of companionship. Ganga Bakhsh Singh as we know had no child at all. Sheo Singh had four daughters. These daughters grew up in the house and must naturally have been the object of love and affection to the old lady *Musammat* Bindra. Indeed the motive impelling the execution of the Will in question is set forth in clear, simple and [illegible] in the Will itself and that [illegible] was being made in recognition of the long services which *Musammat* Gulaba had rendered to the testator *Musammat* Bindra. The other side of the picture is, according to the same evidence, that *Musammat* Bindra was not on good terms with the collaterals of her husband. Indeed the evidence leaves no room for doubt on the question that there was never love lost between *Musammat* Bindra and the collaterals of her husband. There were occasions when points of actual quarrel were reached but apart from that the entire body of these collaterals, which were large in number, stood on the footing of absolute strangers to the lady. In this state of things it was but natural that *Musammat* Bindra should desire to leave her property to one who was nearest and dearest to her. The Will is, therefore, in our judgment wholly natural The defendants' case that the idea of making the Will of the nature which the Thakurain eventually made originated with the Thakurain herself is supported by the defendants' witness Thakur Anrudh Singh, a man of a very respectable position. We desire to quote a portion of his evidence. "I went many times to the widow of Thakur Ganga Bakhsh Singh and the widow of Sheo Singh. They used to treat me with great consideration. The two women used to live in one house. They had their business and mess joint. They were on very cordial terms..... When I had advised her not to make the endowment and to let the property go to the reversioners she had told that she would not let them take the property but she would make the transfer to her *deorani*." By the expression *deorani* was admittedly meant the widow of Sheo Singh, that is, *Musammat* Gulaba. This intention on the part of *Musammat* Bindra came into birth so long ago as 15 or 16 years preceding the date of the evidence of Thakur Anrudh Singh. A very commonly prevailing superstition intervened and the intention came to be embodied in the document before us long after.

The evidence as to the Thakurain's illness produced on the side of the propounders of the Will is, in our judgment, equally clear and reliable. Indeed it is supported in a measure by the evidence produced on the side of the appellants. Besides the evidence of the attesting witnesses and the scribe, Anant Ram states that he practised as a physician and that about six years ago he treated the Thakurain and Ganga Bakhsh Singh. She had fever for three days and then she was attacked by paralysis. She died four days after the attack. Before the attack of paralysis she was in her perfect senses. The attack of paralysis came on while she was in fever. The appellants' witness Badri admits in his cross-examination that *Musammat* Bindra was treated by Anant Ram amongst others. To the same effect is the evidence of the plaintiffs' witness Sardar Singh. He said in cross-examination that Anant Ram Vaidya had seen the lady twice when she was ill. It is quite clear, therefore, that the lady had an attack of paralysis only three or four days before her death. The Will as we have found was executed on the 25th of February 1917 and according to the evidence of defendants' witness Ram Dayal, *Musammat* Bindra lived for a month or one and a half month after the execution of the Will and she was in good health up till three or seven days before her death. A some what clear idea is obtained of the precise period of *Musammat* Bindra's death from the evidence of Sardar Singh, D. W. No. 5. He says that he saw *Musammat* Bindra on the day following the attack of paralysis and it was the sixth or seventh day of the latter part of the month of *Chait*. She died the third day of the attack of paralysis and on the morning following the last visit of the witness to her. According to this evidence *Musammat* Bindra died on or about the 30th of March 1917. The result is that in agreement with the findings of the Court below we hold that the Will of the 25th February 1917 was executed by *Musammat* Bindra intelligently and with a sound disposing mind.

The appeal, therefore, fails and is dismissed with costs.

N. H. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1047 OF 1925.

July 24, 1925.

Present:—Mr. Justice Martineau.

ASA NAND—PLAINTIFF—APPELLANT

versus

MAHMUD AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 16 (fourthly)—Common entrance from street—Permissive user of compound, whether entrance—Practice and pleadings—Appeal—Case, whether can be decided on plea not raised in pleadings.

Plaintiff sued for possession of a house by right of pre-emption on the ground that his house adjoined the house in suit and had a common entrance with it from the street. The vendee whose house was also contiguous to the house in suit, denied that the plaintiff had a superior right and pleaded that he had a right of way through the compound of the house in suit. It was found that the vendee was not a joint owner of the compound in which the plaintiff's house and the house in suit were situated, and that he had no right of way over the compound as his use of it had only been permissive. The lower Appellate Court, however, dismissed the plaintiff's suit on the ground that the defendant's house as well as the plaintiff's had a common entrance with the house in suit from the street and that, therefore, they had equal rights of pre-emption

Held, (1) that the lower Appellate Court was wrong in dismissing the plaintiff's suit on a ground which had not been raised by the defendant in his pleadings,

(2) that, in any case, on the findings it could not be said that the defendant's house had an entrance through the compound in which the plaintiff's house and the house in suit were situated;

(3) that, therefore, the plaintiff's suit must succeed.

Second appeal from a decree of the District Judge, Dera Ghazi Khan, dated the 26th January 1925, reversing that of the Subordinate Judge, Fourth Class, Dera Ghazi Khan, dated the 7th December 1924.

Mr. *M. L. Puri*, for the Appellant.

Mr. *M. A. Ghani*, for the Respondents.

JUDGMENT.—The plaintiff sued for possession of a house by right of pre-emption on the ground that his house adjoined the house in suit and had a common entrance with it from the street. The contesting defendant, whose house was also contiguous to the house in suit, denied that the plaintiff had a superior right and pleaded that he had a right of way through the compound of the house in suit.

The Subordinate Judge gave the plaintiff a decree, finding that his house and the house in suit had a common entrance from the street and that the plaintiff had, therefore, a superior claim under the 4th clause of s. 16 of the Pre-emption Act, but the District Judge has reversed the decree and dismissed the suit, finding that the defendant's house as well as the plaintiff's has a common entrance with the house in suit from the street, and that, therefore, the parties have equal rights. The plaintiff has filed a second appeal.

The defendant did not plead either in the Trial Court or in his grounds of appeal in the lower Appellate Court that his house and the house in suit had a common entrance, and the lower Appellate Court was wrong in deciding the case on a point which had not been raised. Moreover the defendant is not a joint owner of the compound in which the plaintiff's house and the house in suit are, and the District Judge has found as a fact, that he has no right of way over the compound as his use of it has been only permissive. There is, therefore, no entrance to the defendant's house through that compound.

It is contended for the defendant that the plaintiff's house and the house in suit have not got a common entrance, but the Trial Court's finding on the point was not contested in the lower Appellate Court.

I accept the appeal, reverse the lower Appellate Court's decree, and restore the decree of the Trial Court. The respondent Mahmud will pay the appellant's costs throughout.

Z. K. *Appeal accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 323 OF 1924.

August 8, 1925.

Present:—Mr. Findlay, Officiating J. C.

SADASHEO—PLAINTIFF—APPELLANT

versus

KARIM—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXXII, r. 3—Execution proceedings—Guardian ad litem—No formal order of appointment—Failure to support minor's case—Application to release minor's property from attachment, dismissal of—Declaratory suit by minor, whether maintainable.

The mere absence of a formal order of the appointment of a person as the guardian *ad litem* of a minor is no ground for holding that the minor was not represented at all in the suit. [p. 243, col. I.]

The negligence of a guardian to support the case of a minor [illegible] amounting to show that he [illegible] the minor to avoid the operation of the decree passed therein. [p. 244, col. 1.]

The mere omission of a guardian to appear in a suit or execution proceedings does not necessarily amount to gross negligence on the part of the guardian. [p. 244, col. 2.]

A suit by a person for a declaration that an order dismissing an application filed by his guardian to release his share of the property attached in execution as he was discharged by the decree is null and void, because his guardian was grossly negligent in protecting his interests in execution proceedings, is in reality a suit to set aside the auction-sale held subsequent to the dismissal of the application and is barred under s 47 of the C P. C. [p. 245, col. 1]

Appeal against a decree of the Additional District Judge, Nagpur, dated the 23rd April 1924, in Civil Appeal No. 9 of 1924.

Messrs. *M. R. Bobde* and *M. D. Khandekar*, for the Appellant.

Mr. *C. B. Parakh*, for the Respondent.

JUDGMENT.—The plaintiff Sadasheo brought the connected suit against the defendant-respondent Karim in the Court of the Second Class Subordinate Judge No. 2, Nagpur, under the following circumstances. The defendant had sued the plaintiff and his brother Balaji in the Court of the Small Causes, Nagpur, and obtained a decree for Rs. 969-1-9. The claim against the plaintiff was dismissed on the ground that he was no party to the contract on which the suit was based. In execution of the decree Karim attached a house and a shop which were the joint property of Balaji and the plaintiff. At this time the plaintiff was a minor and some four applications on his behalf were presented by Balaji for release of the plaintiff's share in the properties attached. The first of these applications was dismissed in default on 29th September 1914: *cf.* Ex. P-4. The second such application was dismissed for want of prosecution, as the objector had failed to pay process-fees: *cf.* Ex. P-6, dated 4th December 1914. The third application was presented after the attached property had been sold and purchased by the defendant, and was dismissed as not lying on 26th February 1915: *cf.* Ex. P-9. The fourth application was similarly dismissed on 30th July 1915: *cf.* Exs. P-10 and P-12. In the case of the latter application a detailed order was passed, recounting the previous history of the plaintiff's attempt to upset the sale, and the merits of the case were considered to some extent. Still, a fifth application was made under O. XXI, r. 10, C. P. C., by the plaintiff's sister *Musammat* Saraswati Bai on his behalf: *cf.* Ex. P-14, and it was dismissed on 27th August 1915 on the ground that Sadasheo could not come in as a stranger under the provision of law quoted. It is these orders which the present plaintiff is attempting to upset in the present case. In para. 12 of the plaint he asks that these orders should be set aside and that a declaratory decree should issue to the effect that they are null and void against him.

The plaintiff's next attempt to attack the sale was by means of a declaratory suit to the effect that he was the owner of the half share in the property sold. This suit failed both in the first Court and in the Court of the District Judge on appeal. On second appeal to this Court permission was given to him to withdraw the suit with liberty to bring a fresh one. Prior, however, to the withdrawal, the plaintiff had once more filed an application in the Executing Court under s. 47, C. P. C., the basis therefor being that he had attained majority in 1917, that the applications presented on his behalf were dismissed in default or otherwise, and that the execution proceedings under s. 47, C. P. C., should be re-opened. This application also failed and the connected appeal was also dismissed.

The various pleas raised on behalf of the defendant are sufficiently clear from the judgments of the two lower Courts. The Subordinate Judge dismissed the plaintiff's suit on the ground that the suit should have been filed within one year from the date of his attaining majority on 28th September 1917, Art. 11 of the First Schedule of the Limitation Act being considered to apply. The Subordinate Judge also held that on the merits in the execution proceedings the plaintiff would have had a good case and that the failure of the various applications was due to gross negligence on the part of his brother or sister who represented him.

The Additional District Judge dismissed the appeal mainly on the ground that limitation was governed not by Art. 11 but by Art. 12, First Schedule of the Limitation Act. The lower Appellate Court upheld the findings of the Subordinate Judge as to the property being ancestral and it also held that there had been gross negligence on the part of the plaintiff's guardian. The Additional District Judge further held that in any event the case was not one where in the exercise of his judicial discretion he should grant a declaratory decree. In his opinion the plaintiff could not recover possession from the execution purchase

except by setting aside the sale within the period allowed by Art. 12 of the Limitation Act, for which suit ought to have been brought within a year from the date of the plaintiff attaining majority From this point of view also the lower Appellate Court held that the plaintiff was not entitled to the relief claimed and in this connection also he relied on the decision in *Abdul Karim* v. *Islamunnissa Bibi* (1). The plaintiff's appeal was accordingly dismissed and he has now come up to this Court on second appeal.

It has been strongly urged before me that the present suit is not one for setting aside the execution sale. Reference has been made to the futile attempt made by the plaintiff in 1920 to enable the proceedings under s. 47, C. P. C., being reopened afresh and it has been urged that the real object of this suit was to have set aside the five orders, already specified, which were then held to be standing against the plaintiff and to bar his right to any relief. As regards the application (Ex. P-14) it has been urged that *Musammat* Saraswati Bai was not the plaintiff's guardian *ad litem: cf. Kisni* v. *Chulaji Teli* (2) while as regards the previous four applications, in which the plaintiff was represented by his brother, it was urged that Balaji had never been appointed as guardian *ad litem* formally by the Court. Reliance has been placed in this connection on the decision in *Hanuman Prasad* v. *Muhammad Ishaq* (3). The incidents of that case were, however, very different. Therein it was held (*cf.* page 140* thereof) that the uncle not only did not effectively defend the interests of the plaintiff, but had acted dishonestly and improperly in bringing in his nephew into a suit with which he had no concern whatever, and had entirely neglected his duty towards his nephew. The mere want of a formal order appointing Balaji as the plaintiff's guardian *ad litem* in the previous proceedings is no reason *per se* for holding that he was not represented at all: *cf. Walian* v. *Banke Behari Pershad Singh* (4).

It has been urged, however, that in any event the findings of both the lower Courts that there had been gross negligence on the part of the plaintiff's guardian Balaji, assuming him to be such, was sufficient to justify the conclusion that the plaintiff had not, as a matter of fact, been represented in the execution proceedings. The decision in *Rashid un-Nissa* v. *Muhammad Ismail Khan* (5) is not peculiarly apposite in this connection. In that suit the minor had been represented by a married woman, her sister, who was not the natural and proper guardian. Here Balaji was the natural and proper guardian, whereas in the case quoted the person who acted as guardian was expressly disqualified under law from so acting. The decision of their Lordships of the Privy Council in *Partab Singh* v. *Bhabuti Singh* (6) is even more inapposite. There it was found that the so called guardian had been introduced in the suit expressly to further the interests of the respondent and very naturally, therefore, their Lordships were forced to the conclusion that there had been no proper representation of the appellants. The decision in *Pasumarti Payidanna* v. *Ganti Lakshminarasamma* (7) is also of no help whatever in the present case. In that suit the minor had been impleaded as a major and this fact was known at least to the two other defendants. It obviously followed, therefore, that the minor had to be held to have been wholly unrepresented in the suit in question. Even, therefore, assuming that there had been gross negligence on the part of Balaji in the representation of the minor, it seems to me utterly impossible to predicate that the plaintiff was not represented at all in the execution proceedings.

The various decisions quoted are really based on the fact that therein there was no representation of the minor. Here there was representation, although there the representation may have been faulty and indifferent. In *Imam Din* v. *Puran Chand* (8) Scott-Smith, J., held that where a decree has been made against a minor duly represented by his guardian and the minor attaining his majority seeks to set aside that decree by a separate suit, he can only succeed on proof of fraud or collusion

(1) 34 Ind. Cas. 231; 38 A. 339; 14 A. L. J. 401.
(2) 1 N. L. R. 128.
(3) 28 A. 137; A. W. N. (1905) 229; 2 A. L. J, 615.
(4) 30 C. 1021; 30 I. A. 182, 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.).

*Page of 28 A.—[*Ed.*]

(5) 3 Ind. Cas. 864; 31 A. 572; 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279, 19 M. L. J. 631; 36 I. A. 168 (P. C.).
(6) 21 Ind. Cas. 288; 35 A. 487; 11 C. W. N. 1165; (1913) M. W. N. 785; 14 M. L. T. 299; 25 M. L. J. 492. 11 A. L. J. 901; 16 O. C. 247. 18 C. L. J. 384; 15 Bom; L. R. 1001; 40 I. A. 182 (P. C).
(7) 29 Ind. Cas. 314; 28 M. L. J. 525; 38 M. 1076.
(8) 55 Ind. Cas. 833; 1 L. 27; 84 P. L. R. 1920; 37 P. W. R. 1920.

on the part of his guardian. If the guardian merely neglected to support the case of the minor and there is nothing to show that he did so deliberately, that circumstance alone would not entitle the minor to avoid the operation of the decree. In the present case there is not the slightest reason for supposing that Balaji deliberately neglected the interests of the minor. There may have been negligence which entailed, for example, one application being dismissed in default and another being similarly dealt with because of the failure to pay Court-fees. Moreover, in the present case so far as the orders, dated 30th July 1915 and 27th August 1915, are concerned, it is extremely difficult to see how there can be any question of negligence. The connected applications were obviously fought out elaborately on either side, and in this connection it is regrettable that both the lower Courts have been extremely vague in their findings as to the negligence. There may have been negligence in respect of the applications dealt with in the orders, dated 29th September 1914 and 4th December 1914 (Exs. P-4 and P-6), but I utterly fail to see how there has been any negligence in respect of three later applications. Taking the applications as a whole it seems to me utterly impossible to come to the conclusion that the plaintiff-appellant was not represented in the proceedings in question. In my opinion, therefore, s. 47, C. P. C., clearly applies in the circumstances of the case, and the orders Exs. P-9, P-12 and P-14, dated 26th February 1915, 30th July 1915 and 27th August 1915, clearly bar and lock the door of the plaintiff's chance of success in the present suit. Indeed, from another point of view also the present suit was an utterly hopeless one.

It has been quite seriously suggested in the course of arguments on behalf of the appellants that the questions I am concerned with here do not relate to the execution, discharge or satisfaction of the decree. The decisions in *Tallapragada Sundarappa* v. *Boorugapalli Sreeramulu* (9) and *Biharisingh* v. *Newalsingh* (10) have been referred to in this connection. In the former case the questions raised in the later suit were held to be such as could not have been tried in execution, and the same was also true of the local case just quoted. The decisions already quoted in *Imam Din* v. *Puran Chand* (8) and *Rashid-un-Nisa* v. *Muhammad Ismail Khan* (5), can, of course, give the appellant no help in this connection in view of my finding that he cannot be described as having been unrepresented in the execution proceedings. The decision in *Chunduru Ponniyya* v. *Rajam Viranna* (11) relates to the question whether a person who has been impleaded as a minor defendant in a suit can institute a fresh suit to set aside the previous decree on the ground of gross negligence, apart from fraud or collusion. In this matter there is some diversity of opinion between several Indian High Courts, but as I have already shown, it is impossible to say in the present case, that there was gross negligence in respect of each of the five applications, which is the object of this suit to impeach. Moreover, even in this Madras case [*Chunduru Ponniyya* v. *Rajam Viranna* (11)] it was pointed out that mere omission of a guardian to appear at the trial does not necessarily amount to gross negligence. If this were true of a mere non-appearance in the suit, it would possibly be even more true of a mere omission to appear in execution proceedings. The decision in *Sellappa Goundan* v. *Masa Naiken* (12) is wholly inapposite, for therein the guardian of the minor was found to have had an interest adverse to him. It, therefore, seems to me to be clear that the present suit is barred by s. 47 of the C. P. C.

The question of limitation has been argued at some length before me. It has been urged that the lower Appellate Court was incorrect in applying Art. 12 thereto. It has been pointed out on behalf of the appellant that Art. 12 only applies if the sale is valid till it is set aside: *cf. Khiarajmal* v. *Daim* (13), and that it has no application to a case like the present where the appellant alleges that the execution proceedings were *ultra vires* and void: *cf. Jwala Sahai* v. *Masiat Khan* (14) and *Nazar Ali* v. *Kedar Nath* (15). For reasons already given, how-

(9) 30 M. 402; 17 M. L. J. 288; 2 M. L. T. 360.

(10) 78 Ind. Cas. 136; 20 N. L. R. 24; (1924) A. I. R. (N.) 81.

(11) 70 Ind Cas. 668; 45 M. 425; 15 L. W. 427; (1922) M. W. N. 213, (1922) A. I. R. (M.) 273; 42 M. L. J. 429.

(12) 76 Ind. Cas. 1018; 47 M. 79; (1923) M. W. N. 775; 45 M. L. J. 675; 18 L. W. 838; 33 M. L. T. 126; (1924) A. I. R. (M.) 297.

(13) 32 C. 296 at p. 312; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734 (P. C.).

(14) 26 A. 346; A. W. N. (1904) 35; 1 A. L. J. 53.

(15) 19 A. 308; A. W. N. (1897) 71; 9 Ind. Dec. (N s.) 201.

ever, it is impossible for me to hold that the appellant was not at all represented in the previous execution proceedings. Therefore, no question of these proceedings being *ab initio* void arises. Even, therefore, had the decision as to whether the plaintiff's suit could succeed or not depended on the mere question of limitation, I should have seen no reason for differing from the finding arrived at by the lower Appellate Court on this point.

There is, however, a further ground on which the present suit must be pronounced an utterly hopeless one, which was inevitably bound to fail. Even if the plaintiff could have got over the bars, which have been found to exist against him, both under s. 47 of the C. P. C., and that of limitation, it would obviously have been improper for any Court to have exercised its discretion in the direction of giving him the declaratory decree which he seeks in the present case. It is impossible to take seriously the suggestion made on behalf of the appellant that the present suit is not one for setting aside a sale. If that is not the sole and primary object of the suit, then it is a meaningless one. The remarks of their Lordships of the Privy Council at pages 351* and 352* of the decision in *Malkarjun* v. *Narhari* (16) are peculiarly pertinent in this connection and have full application in the present case. What we have to decide in this case is what is the real nature of the suit. Most obviously the reply is that the real object of the suit is to set aside the execution sale, although a faint attempt is made to obscure this fact by merely asking a relief that the five orders we are concerned with should merely be declared to be null and void against the plaintiff. A Full Bench of the Calcutta High Court in *Sharoop Dass Mondal* v. *[illegible] Roy Chowdhry* (17) remarked as follows at page 567† thereof:—

"As a general principle, in construing this Act of the Legislature we ought not to regard a case as coming under Art. 120, unless clearly satisfied that it does not come under one of the many articles dealing with specific cases. Further, if there be two articles which may cover the case, the one, however, more general and the other more particular or specific, as a principle of construction the more particular and specific article ought to be regarded as the one governing the case."

I fully concur, therefore, with the findings of the Additional District Judge in paras 10 and 11 of his judgment.

From any and every point of view, therefore, the present suit was bound to fail. The appeal is accordingly dismissed. The appellant must bear the respondent's costs. Costs in the lower Courts as already ordered.

G. R. D. *Appeal dismissed.*

[illegible] A. 216; 5 C. W. N. [illegible] L. J. [illegible] 7 Sar. P. C. J. [illegible] V. N. 464; 13 Ind. Dec. (N. S.) 962.

*Page of 25 B. [illegible]

†Page of 25 C. [illegible]

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1520 OF 1922.

April 29, 1925.

Present:—Mr. Justice Phillips.

M. R. RY. MANAVIKRAMA ZAMORIN RAJA AVERGAL OF CALICUT THROUGH K. SRINIVASA RAO AVERGAL, ZAMORIN ESTATE COLLECTOR—PLAINTIFF—APPELLANT

versus

P. VENKATAGIRI PATTAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 142, 143, 144—Assignment of lease—Forfeiture of lease—Suit for possession—Limitation—Civil Procedure Code (Act V of 1908), ss. 11, Expl IV—Suit by lessee for renewal—Subsequent suit for possession by lessor—Adverse possession, whether can be pleaded

Article 143 of Sch. I to the Limitation Act only applies to suits to enforce reliefs claimable by reason of forfeiture or of breach of condition under a contract and can only apply to suits brought against parties who have incurred that forfeiture or committed the breach. [p. 246, col. 1]

Where, however, a person holding under a lease containing conditions of forfeiture has assigned his right to another person, a suit by the lessor against the assignee for recovery of property by reason of forfeiture or breach of conditions in the lease is not governed by Art. 143. The proper Article applicable is 144 or 142, as the case may be. [*ibid.*]

Where an assignee from a lessee sues the lessor for renewal of the lease and fails, it is not open to him in a subsequent suit by the lessor to plead title by adverse possession. Such a plea ought to have been set up in the prior suit. [p. 246, col. 2, p. 247, col. 1.]

Second appeal against a decree of the Court of the Subordinate Judge, South Malabar at Palghat, in A. S. No. 9 of 1920 (A. S No. 1008 of 1920 on the file of the District Court of South Malabar) preferred against that of the Court of the District Munsif, Alatur, in O. S. No. 26 of 1918.

Mr. *K. Kutti Krishna Menon*, for the Appellant.

Messrs. *A. Sivarama Menon* and *P. S. Narayanasami Iyer*, for the Respondents.

JUDGMENT.—In this case the appellant-plaintiff demised the suit property to Krishnan Nayar and Kunju Nayar on Adimayavana right on 7th April 1908. In 1900, the lessees assigned their right to the first defendant and the father of the second defendant. The lease contains a provision that on the expiry of every 12 years a renewal fee of Rs. 125 shall be paid by the lessee and further documents exchanged between the parties. Accordingly the assignees brought a suit in 1913 for renewal of the Adimayavana lease and for the acceptance of the renewal fee It was then held that the Adimayavana lease being inalienable, the plaintiffs in that suit could not obtain a valid assignment and, therefore, their suit was dismissed. The plaintiff now brings the present suit in 1918 to recover possession of the suit properties from the assignees and their representatives. The facts are all recited in the plaint and the first prayer in the plaint is "that a decree may be passed directing the defendants to surrender the schedule items to the plaintiff by virtue of the *Kaichit* of 1073 described in para. 2 and on the strength of title, as the Adimayavana right has ceased." Both the lower Courts have found that the plaintiff's suit is barred by limitation, because Art. 143 is applicable. That Article provides for a suit in which the plaintiff has become entitled to possession of immoveable property by reason of forfeiture or breach of condition. Had this suit been brought by the plaintiff against the lessees, Krishna Nayar and Kunju Nayar, the suit would undoubtedly have come under Art. 143, but as I understand that Article, it only applies to suits to enforce relief claimable by reason of forfeiture or of breach of condition under a contract and can only apply to suits brought against parties who have incurred that forfeiture or committed the breach. In the present case the defendants are not parties to the lease-deed and have not themselves incurred any forfeiture, or broken any condition in a contract between them and the plaintiff. It seems to me, therefore, that Art. 143 is clearly inapplicable. In fact when the plea of limitation was first raised in the defendants' written statement, Art. 144 was relied on and that or Art. 142 is the Article which is applicable.

The contention is raised for the respondents that they are taken by surprise by this plea that Art. 143 is not applicable, but inasmuch as the defendants did not plead this Article in bar in the first Court and both in the grounds of appeal to the lower Appellate Court and in the grounds of appeal to this Court, the point has been taken that Art. 143 is not applicable; and inasmuch as it was not in the first place the contention of the defendants that Art. 142 is applicable, this plea of being taken by surprise cannot be upheld.

The question then remains whether the plaintiff's suit is barred by Art. 144, in which case the period of 12 years begins when the possession of the defendants becomes adverse to the plaintiff. The defendants got into possession by virtue of their assignment from the original lessees, and the lessees were entitled to let anybody into possession during the terms of their tenancy which enured for at least 12 years. During that period of 12 years from 1898, the possession of the defendants under the lessees was under the lessees who held under the plaintiff. There can, therefore, be no question of the possession of the defendants being adverse to the plaintiff from the date of their assignment. It could only become adverse after the 12 years' lease had expired and the legal origin of their possession had changed. In that view this suit is within time.

It is then contended that Art. 142 will apply and the plaintiff must prove that he has been dispossessed of the property within 12 years of the suit. During the 12 years subsequent to 1898 the property was in the possession of the defendants with the permission of the plaintiff's tenants and, therefore, it cannot be said that the plaintiff was dispossessed, for his tenants were entitled to possession and could allow defendants to enter into possession. It is suggested that the defendants by reason of the assignment in 1900 prescribed for an Adimayavana tenure as against the original lessees and also plaintiff. If that were so, their title had become complete before the suit of 1913 was filed. Inasmuch as that suit was based on the allegation that the defendants were the Adimayavana tenants of the plaintiff, the plea that they had obtained such a right by adverse possession should have been pleaded. Not having taken such a plea in that suit, the defendants are precluded under

Expl: IV to s. 11, C. P. C. from raising it now.

The plaintiff's suit seems to have been very inefficiently conducted in the lower Courts and a large number of issues have been framed which seem to be quite irrelevant, in view of the fact that the plaintiff does not claim by reason of any forfeiture incurred by the defendants. It is, however, argued that there are other points in the case which should be determined and, therefore, I think it is advisable to refer the appeal back to the lower Appellate Court for decision on the other point which it considered unnecessary to decide and any other points that legally arise. The view of the case set out here does not seem to have been pleaded definitely in the lower Courts and, therefore, I think that the respondents are entitled to a further hearing.

I may also add that the plaintiff relies on the breach of another condition in the Adimayavana lease, namely, that no renewal fee was paid on the expiry of the 12 years' time and consequently he is entitled to recover possession of the property on that ground.

I, therefore, set aside the decree and remand the case to the lower Appellate Court for further hearing and for decision in the light of the above remarks on the other point or points which were not determined before. It is suggested for the respondents that additional evidence should be taken, but the respondents' Vakil has been unable to point out in what respect evidence can now be admitted which should not have been adduced in the Trial Court as the case was understood there. I leave it to the discretion of the lower Appellate Court to decide whether any additional evidence is necessary. Costs of this appeal will abide the result.

Court-fee on the memorandum of appeal will be refunded to the appellant.

V. N. V.

N. H. *Case remanded.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 313 OF 1924.

December 5, 1925.

Present:—Mr. Stuart, C. J. and Mr. Justice Misra.

SHEO NANDAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HIRA LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession—Occupancy rights.

Occupancy rights can be the subject of adverse possession. [p. 248, col. 2]

Madhavrao Waman Saundalgekar v. *Raghunath Venkatesh Deshpande*, 74 Ind Cas 362; 50 I A 255; 25 Bom L. R 1005, (1923) M. W. N 689; (1923) A. I. R (P. C) 205; 33 M L. T 389; 47 B 798, 28 C W. N. 857; 20 L W. 218, 47 M. L. J 248 (P. C), distinguished.

Appeal against a decree of the Additional Subordinate Judge, Lucknow, dated the 10th May 1924, confirming that of the Munsif, Havali, Lucknow, dated the 31st May 1923.

Mr. *Ishri Prasad*, for the Appellants.

Mr. *Daya Kishan Seth*, for Respondent No. 1.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-appellants against the defendants-respondents for possession of two plots of land No. 400, measuring 8 *biswas* and No. 444 measuring 16 *biswas* 15 *biswansis* situate in village Sarawan Farindpur, District Lucknow.

The facts of the case are that one Baryar, the grandfather of the plaintiffs-appellants got a decree for '*kabzadari*' rights in respect of these plots from the Settlement Court on the 29th of May, 1889 that the plaintiffs claiming to be the heirs of the said Baryar, alleged that they are entitled to those plots, that the defendant has been in wrongful possession over them for a long time and that when they asked him to deliver possession to them he refused to do so on the ground that he was a mortgagee of the land. The plaintiffs further claimed that they should be allowed to redeem in case the mortgage was established. The defendant denied the plaintiffs' title and contended that he had purchased the plots at a Court-sale and had become owner of '*kabzadari*' rights by adverse possession. He also denied the mortgage set up by the plaintiffs.

The Trial Court, the Munsif of Havali, Lucknow, in having arrived at the findings that the plaintiffs had failed to prove the mortgage set up by them and that the de-

fendant had established his adverse possession, dismissed the plaintiffs' suit.

On appeal the learned Additional Subordinate Judge, Lucknow, has confirmed those findings and dismissed the plaintiffs' appeal.

The plaintiffs have now come to this Court in second appeal and the contention raised by the learned Pleader on their behalf is two-fold. Firstly, that Baryar, the grandfather of the plaintiffs, had acquired occupancy rights through the Settlement Court and that the plaintiffs, as his grandsons, are now entitled to those rights. Secondly, that the defendant being in possession as mortgagee cannot plead adverse possession in his favour in regard to occupancy rights and that, therefore, the plaintiffs be decreed possession of the land on condition of their paying to the defendant, the mortgage money. The case originally came before one of us sitting singly and it has now been put up before us on a reference by him to a Bench.

As to the first point it appears to us to be clear that the rights conferred by the Settlement decree, dated the 29th May 1869, a copy of which is on the record and is marked Ex. 1 are the occupancy rights as contemplated by s. 5 of the Oudh Rent Act (Act XIX of 1868), which was the Act then in force. The Settlement Officer has clearly stated in his judgment that the ancestors of Baryar were owners of the village within the period provided in the said section, and that they lost the village owing to the *taluqdar* having forcibly made it a part of his estate. The said officer also allowed Baryar a deduction of 12 per cent. from his rental. There can under the circumstances be no room for doubt that the intention of the Settlement Officer was to confer on the ancestor of the appellants, occupancy rights as stated in s. 5 of the said Act. The said rights being heritable the appellants would be entitled to them.

As to the second point, we might state that the mortgage set up by the appellants has not been proved. This being a finding of fact we cannot interfere with it in second appeal.

It, therefore, remains a matter hidden in obscurity as to how the defendant came in possession of the land in dispute. It may have been that Baryar was ejected from his holding and the *taluqdar* recognized the respondent as the occupancy tenant of the land. In the *khasra* of the last Settlement of the District prepared in 1304 *Fasli* the defendant is shown as the '*kabzadar*' of one plot and as the purchaser of the other, and this record has been continuously kept up since then. We have been informed during the course of arguments that no sale-deed had been executed by Baryar in favour of the defendant, but that he purchased those rights at an auction sale. It is, therefore, clear that the defendant does not hold the land under Baryar or the plaintiffs. If the alleged mortgage in favour of the defendant had been established, it appears to us, in that case it should not have been possible for the defendant to have successfully set up an adverse title to himself, but the finding of the Courts below on this point is against the appellants. If Baryar, the ancestor of the plaintiffs, lost possession long ago and they have not been in possession at any time during the course of 12 years prior to the institution of the suit, they, in our opinion, cannot be allowed to recover the land in dispute from the defendant on the mere allegation that at one time it was the property of their grandfather.

An argument is put forward before us to the effect that the occupancy rights cannot be lost by adverse possession for more than 12 years and in support of it reliance is placed on a ruling of their Lordships of the Privy Council reported in *Madhavrao Waman Saundalgekar* v. *Raghunath Venkatesh Deshpande* (1), which relates to '*watan*' lands usually found in the Bombay Presidency. Their Lordships observed in that judgment that it was somewhat difficult to see how a title with regard to '*watan*' land could be created by adverse possession for more than 12 years when the alienation of such land was prohibited in the interest of the State. We have given our best consideration to this point and it appears to us that the tenure of the '*watan*' lands is quite different from the tenure of the occupancy lands. Under the Bombay Act (Act III of 1874) '*watan*' lands are lands held or assigned for the purpose of providing remuneration for the performance of the duties appertaining to a hereditary office, such office meaning an office held hereditarily for the performance of duties connected with the administration or collection

(1) 74 Ind. Cas. 362; 50 I. A. 255; 25 Bom. L. R. 1005; (1923) M. W. N. 689; (1923) A. I. R (P. C.) 205; 33 M. L. T. 389; 47 B. 798; 28 C. W. N. 857; 20 L. W. 248; 47 M. L. J. 248 (P. C.)

of the public revenue or with the village Police, or with other similar matters. Under these circumstances it would be impossible to allow rights in '*watan* lands' to be capable of being acquired by adverse possession; to do so would mean conferring a hereditary office, rights and the privileges attached to it by means of adverse possession. We, therefore, are of opinion that the principle enunciated in the said ruling is inapplicable to the facts of the present case.

We are, therefore, of opinion that the plaintiffs' suit was rightly dismissed by the Courts below, and we hereby dismiss the appeal with costs.

N. H. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 434 OF 1924.
September 29, 1925.
Present:—Mr. Justice Devadoss and Mr. Justice Waller.

AKELLA RAMASOMAYYAGULU AND OTHERS—PETITIONERS—APPELLANTS

versus

THE OFFICIAL RECEIVER, GODAVARI, RAJAHMUNDRY—RESPONDENT.

Provincial Insolvency Act (V of 1920), s. 4—Hindu father adjudicated insolvent—Objection of sons to sale by Receiver—Order for sale without deciding rights of parties, whether proper.

Where a Hindu father is adjudicated an insolvent and the sons apply to the Court objecting to the sale of the entire family properties advertised by the Receiver on the ground that they were divided and that their share ought not to be sold, the Court ought not to allow the insolvent's interest in the property to be sold leaving it to future litigation to determine the rights of parties.

The Official Receiver has the power under the Provincial Insolvency Act to sell the shares of the sons to a Hindu insolvent unless the sons make out that their shares are not bound to liquidate the debt contracted by their father. The Court, therefore, ought to inquire and decide on the rights of parties.

Appeal against an order of the District Court, Godavari at Rajahmundry, dated the 28th October 1924 and made in I. A. No. 524 of 1924 in I. P. No. 30 of 1923.

Mr. *P. Satyanarayana*, for the Appellants.

Mr. *D. Appa Row*, for the Respondent.

JUDGMENT.—The appellants are the sons of the insolvent. They applied to the lower Court for stay of sale advertised to be held on 29th August 1924 by the Official Receiver of Godavari on the ground that they were divided from the insolvent and that their shares should not be sold. The learned Judge has not considered the question whether the shares of the appellants are liable to satisfy the debts of the insolvent. He has allowed the Official Receiver to sell the insolvent's interest in the property leaving it to future litigation to determine the rights of the parties. We consider in a case like this it is not proper that the insolvent's property should be sold when there is a cloud on the title which could be removed by a proper proceeding under s. 4 of the Provincial Insolvency Act. We, therefore, set aside the order and direct the District Judge to restore the application to file and treat it as an application under s. 4 of the Act and dispose of it according to law. The Official Receiver has the power under the Act to sell the shares of the sons of the insolvent and it would be for the sons to make out that their shares are not bound to liquidate the debt contracted by their father.

Costs of this appeal will abide the result.

V. N. V.

N. H. *Order set aside.*

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL CASE No. 655 OF 1923.
January 20, 1925.
Present:—Mr. Justice Broadway and Mr. Justice Zafar Ali.

In the matter of ASSESSMENT OF INCOME TAX ON MESSRS. ISHAR DAS DHARAM CHAND OF KATRA AHLUWALIAN, AMRITSAR—PETITIONERS.

Income Tax Act (XI of 1922), ss 9, 66—Application to Income Tax Commissioner—Application to High Court—Reference by Commissioner—All points in case, whether to be stated—Loss incurred by standing [illegible] business.

[illegible] under s. 66 (2), Income Tax Act, to the Commissioner of Income Tax should state the questions of law which the petitioner desires to be referred to the High Court. In the same way the application under s. 66 (3) to the High Court should also specify the question or questions of law which the applicant considers ought to have been referred to the High Court by the Commissioner. If only one of several questions raised before the Commissioner is raised in [illegible] to the High Court under s. 66 (3), no [illegible] be taken to the course, if the Commissioner confines his reference to that point alone. [p. 251, col. 1.]

A loss incurred by a firm on account of standing surety for another firm, is not loss incurred in connection with their business, and cannot be deducted in assessing the Income-tax. [p. 250, col. 2.]

Application under s. 66 (3) of the Indian Income Tax Act XI of 1922.

Lala *Badri Das*, R. B., for the Petitioners.

Kanwar *Dalip Singh*, Government Advocate, for the Respondent.

JUDGMENT.

Broadway, J.—A joint Hindu family carrying on business under the style of Ishar Das-Dharam Chand in Amritsar and elsewhere, was assessed to income-tax by the Income Tax Officer on the 25th of March 1923. It was found, after what appears to have been a very full enquiry, that the income of this business, liable to taxation amounted to over a lac. The assessee then undertook to pay tax on a round sum of one lac. This offer was accepted by the Income Tax Officer and the assessment was made accordingly. The firm then petitioned the Assistant Commissioner of of Income Tax. The Assistant Commissioner, after going thoroughly into the points raised, upheld the assessment of the Income Tax Officer. Thereupon Messrs. Ishar Das-Dharam Chand moved the Income Tax Commissioner under s. 66 (2) of the Income Tax Act and raised the following points :—

(1) That the rejection of the statement of accounts submitted by the petitioner is opposed to law.

(2) That the assessing authorities were not justified in applying a flat rate of 5 per cent. to determine the assessable income.

(3) That the refusal to allow a loss of Rs. 25,000 incurred in Bombay as a business deduction was illegal.

(4) That the petitioners being members of an undivided family were entitled to a reduction of Rs. 75,000 for purposes of super-tax. It was asked that these questions of law be referred to the High Court. The Income Tax Commissioner allowed the prayer as to the reduction of Rs. 74,000, for purposes of super-tax, but declined to refer the case to this Court on the ground that no questions of law were involved.

The petitioners then came up to this Court under s. 66 (3) of the Income Tax Act and asked this Court to take the action provided for by that sub-section in connection with the deduction of Rs. 25,000 referred to in the third ground mentioned above. This Court not being satisfied with the correctness of the Commissioner's decision required him to state the case and to refer it. The Income Tax Commissioner thereupon stated the case. He pointed out that the direction of this Court did not confine the statement of the case to the only point raised before the Court and, therefore, he stated the case relating to the three points, Nos. 1, 2 and 3, raised before him. Before us the case has been argued on behalf of the petitioners by Mr. Badri Das, while the learned Government Advocate has addressed us on behalf of the Commissioner.

Mr. Badri Das has addressed us on two points only. He has urged (1) that the application of a flat rate was without any material on the record and was, therefore, erroneous and illegal, and (2) that a sum of Rs. 25,000 should have been deducted from the total income and treated as a loss. The second point is the point which was taken in the petition to this Court.

It appears that the petitioners have got a branch of their business at Bombay. There they stood surety for another firm. That firm became insolvent with the result that the petitioners had to pay the sum of Rs. 2,5000 It has been held by the Income Tax Officer that the loan for which the petitioners stood surety had nothing whatever to do with the petitioners' business. The petitioners stood surety in order to do friends of theirs a kindness. It is unfortunate that they have been called upon to pay up for their friends, but inasmuch as this standing of surety was not in the course of the petitioners' business, it cannot be said that the loss was incurred in connection with the petitioners' business. The refusal to allow this amount to be deducted from the total assessable income was, therefore, perfectly correct.

As to the first point the learned Government Advocate urged, firstly, that inasmuch as the only point raised before this Court by the petitioners was that relating to the deduction of Rs. 25,000 the statement of the case in so far as it related to any other points was unnecessary. In the alternative he contended that the decision on that point was one of fact and that the application of a flat rate was justified. The language of s. 66 (3) is wide and it is not easy to say whether it was the intention of the Legislature that this Court should confine itself to the points raised before it, or whether the raising of one point in the application to the Court would necessitate the statement of all the points raised before the Commissioner although not pressed in

the application to this Court. Under s. 66 (3) an assessee may apply to the Commissioner "requiring him to refer to the High Court any question of law arising out of such order, and the Commissioner shall, within one month of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court." If the Commissioner refuses to do this on the ground that no question of law arises the assessee may under s. 66 (3) apply to the High Court and the High Court, if it is not satisfied of the correctness of the Commissioner's decision, may require the Commissioner to state the case and to refer it, and, on receipt of any such requisition, the Commissioner shall state and refer the case accordingly.

It seems to me that the application under s. 66 (2) to the Commissioner should state the questions of law which the petitioner desires to be referred to the High Court and I am also inclined to the view that the application under s. 66 (3) should also specify the question or questions of law which the applicant considers ought to have been referred to the High Court by the Commissioner. In the present case three points were taken before the Commissioner in the application under s. 66 (2). One question alone was raised in the application to this Court under s. 66 (3), and it seems to me that had the Commissioner confined his reference to the point raised before this Court objection could not have been taken to his action. As he has, however, stated the case on the other question I think it necessary to dispose of it.

In this connection an examination of the proceedings shows that the enquiry was not a cursory or a summary one. The Income Tax Officer called for the accounts and after an examination of them, as well as of an auditor's report based on them came to the conclusion that they were not reliable. This undoubtedly is pure question of fact. The Income Tax Officer then after a consideration of the dealings accepted the turnover as shown by the petitioners and came to the conclusion that a flat rate of 5 per cent. was a reasonable amount to fix. His finding that a profit had been made is also a question of fact and the assessment based on a 5 per cent. flat rate cannot be regarded as unreasonable. Further, in the present case it will be seen that the petitioners themselves offered to pay on one lac, and I would, therefore, hold that the conclusions arrived at by the Income Tax Officer are correct and would dismiss this application with costs.

Zafar Ali, J.—I concur.

N. H. *Application dismissed*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1036 OF 19 3.

October 14, 1925.

Present:—Mr. Justice Phillips.

SRINIVASA CHETTI—PETITIONER

versus

CHENNA CHETTI (DEAD) AND OTHERS —RESPONDENTS.

Surety, release of—Misconduct of party.

A surety to the Court for a party to the suit undertaking to discharge a certain obligation in the event of the suit being decided in a certain manner is not entitled to be discharged from his obligation under the surety bond on account of any alleged misconduct of such party, whatever remedy the surety may have against the party himself.

Bai Somi v. *Chokshi Ishvardas Mangaldas*, 19 B. 245; 10 Ind. Dec. (N. S.) 166, relied on.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the order of the District Court, Salem, dated the 26th March 1923, in I. A. No. 24 of 1923 (in O. S. No. 14 of 1912) in O. S. No. 7 of 1915 on the file of the Court of the Subordinate Judge, Salem.

Mr. *A. Ramachandra Iyer*, for the Petitioner.

Mr. *N. C. Vijiaraghavachariar*, for the Respondents.

JUDGMENT.—The petitioner stood surety in a sum of Rs. 4,000 for the respondent who undertook to re-pay to a minor his share of an estate in case the Court declared that the minor had been validly adopted. The petitioner subsequently applied to be released from his obligation under the bonds and that the bonds should be cancelled. The District Judge has held that he cannot be released from his obligations unless and until he finds some one else willing to offer security.

It is now contended that it is not the petitioner's duty to find another security but it is the respondent's duty either to pay up the whole amount for which the

security is given or to produce some other security. This ignores the contract entered into by the petitioner that he would be responsible until a certain specified time for any loss that might be incurred by the minor during that period and that contract cannot be set aside at the mere wish of the petitioner. It is possible that he may have some remedy against the respondent if he can prove the misconduct alleged, but he has contracted both with the respondent, and with the Court that he will carry out a certain promise, namely, to pay Rs. 4,000 if default is committed by the respondent. It is not for him to say that he will or will not discharge this obligation and, therefore, I think that the District Judge was right in dismissing his application. I may refer in this connection to a case reported in *Bai Somi* v. *Chokshi Ishvardas Mangaldas* (1) which supports my view.

V. N. V *Petition dismissed.*

N. H.

(1) 19 B. 215; 10 Ind. Dec. (N. S.) 166.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 38 OF 1924.

January 21, 1925

Present: Sir Shadi Lal, KT, Chief Justice, and Mr. Justice LeRossignol.

DIN MOHAMMAD AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat MATAB BIBI—PLAINTIFF—RESPONDENT.

Custom—Succession—Diversion of ancestral property—Extinction of lineal descendants—Reversion.

On the lineal descendants of the person, in whose favour a diversion of ancestral land had been made, dying out, the land reverts to the male heirs of the last owner before the diversion, and not to those of the person who received the land from him

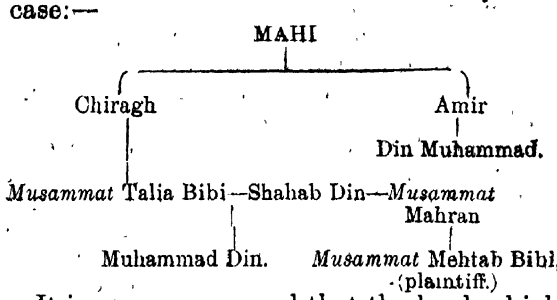
Sita Ram v *Raja Ram*, 12 P. R. 1892, followed.

Letters Patent Appeal against the judgment of Mr. Justice Martineau, dated the 9th January 1924, in Second Appeal No. 952 of 1920, reported in 89 Ind Cas. 351, reversing the decree of the District Judge, Lahore, dated the 2nd March 1920.

Lala *Shaukat Rai*, for the Appellants.

Sheikh *Niaz Ali*, for Mr. *M. Obedullah*, for the Respondent.

JUDGMENT.—The following pedigree table explains the relationship of the various persons concerned in this case:—



It is common ground that the land which is the subject-matter of controversy in this suit, was [illegible] of Chiragh, an *Arain* [illegible] the Lahore District and that on his death his daughter *Musammat* Talia Bibi succeeded to the estate in preference to his brother Amir. On *Musammat* Talia Bibi's death the property was inherited by her son Muhammad Din. Muhammad Din has died, and the question for determination is whether his half sister *Musammat* Mehtab Bibi is entitled to succeed to the property as against Amir, the brother of Chiragh who was the original owner thereof.

It will be observed that neither of the parents of *Musammat* Mehtab Bibi had any connection with the land. The question is not whether among the *Arain* there is a custom allowing a half sister to succeed to the estate of her half brother, but whether the property, which has been allowed to pass out of the possession of the male heirs of the original proprietor into the possession of a daughter's son, should not revert to the heirs of the last owner before the diversion. The rule enunciated by the Full Bench in *Sita Ram* v. *Raja Ram* (1) is to the effect that on the lineal descendants of the person in whose favour a diversion had been made dying out the land reverts to the male heirs of the last owner before the diversion and not to those of the person who received the land from him. In view of this ruling, which has been repeatedly affirmed in subsequent judgments, we have no hesitation in holding that *Musammat* Mehtab Bibi has absolutely no title to the property.

We accordingly accept the appeal and setting aside the judgment of the Single Bench, dismiss the suit with costs throughout.

N. H. *Appeal accepted.*

(1) 12 P. R. 1892.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 166 OF 1924.

May 5, 1925.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice Maung Ba.

MAUNG BA THEIN—DEFENDANT—APPELLANT

versus

MA THAN MYINT AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O VI, r. 17—Amendment of plaint—Causes of action, different - Buddhist Law, Burmese—Adoption—Kittima and Appathitta forms—Claim based on kittima adoption, failure of—Appathitta adoption, whether can be allowed to be set up.

A plaintiff must be confined to the case that he sets up in his pleadings, or to a case which is consistent with those pleadings. [p. 254, col 1]

Amendment of pleadings is a matter for the discretion of the Court and that discretion must be exercised with regard to all the facts and circumstances of the case [*ibid.*]

The causes of action on which a person can claim to be a *kittima* or an *appathitta* son are widely different, and different considerations govern the question of these two distinct forms of adoption [p. 254, col 2]

Where a plaintiff comes into a Court on the basis of a *kittima* adoption and fails to prove the case set up by him, he cannot be allowed to amend his plaint so as to base his claim on an *appathitta* adoption. [*ibid*]

First appeal against a decree of the Original Side of this Court, in Civil Regular No. 423 of 1923.

Mr. *Kyaw Din*, for the Appellant.

Mr. *Higinbotham*, for the Respondents.

JUDGMENT.—The plaintiff sued claiming to be the *kittima* adopted son of U Myat San and Daw Lay. He prayed that the estate be administered under the orders of the Court. On three occasions in the plaint, he set out the fact of a *kittima* adoption. There was no alternative prayer made as an *appathitta* son. The defendants also relied on a *kittima* adoption.

Two issues were drawn, namely:—

(*i*) Was the plaintiff the *kittima* son of U Myat San and Daw Lay, or Daw Lay alone?

and,

(*ii*) If the first issue is decided in the affirmative, was the first defendant the *kittima* daughter of U Myat San and Daw Lay, and were the second and third defendants *kittima* son and daughter respectively of Daw Lay?

The learned Judge in the Court below held that the plaintiff had failed to prove the *kittima* adoption and, therefore, did not consider it necessary to decide the second issue.

In this appeal, it is admitted that it is impossible to contest the finding of the Court below that the plaintiff was not the *kittima* son he claimed to be; but it is sought to obtain leave to amend the plaint by inserting an alternative claim as an *appathitta* son, and we have heard Counsel, in the first instance, on the question whether such an amendment can be allowed at this stage.

We have been referred to a number of authorities on the matter.

In the case of *Maung Aing* v. *Ma Kin* (1), the Judicial Commissioner of Upper Burma expressed an opinion that such a procedure was questionable. It was not, however, necessary in that case to decide the point.

In *Ma Sa Yi* v. *Ma Me Gale* (2) Mr. Justice Birks did not decide the point, because, even if the plaintiff established her position as an *appathitta* daughter, she was not entitled to any share. Mr. Justice Fox laid down in that case that the plaintiff made no alternative claim upon the basis of her being an *appathitta* daughter, and that, consequently, he did not think it necessary to consider what her rights to share in the inheritance possibly might be, if she had made such a claim. The Court was clearly opposed to allowing any amendment.

In the case of *Maung Tha So* v. *Maung Lu Pe* (3), the late Sir Maung Kin definitely held that a plaintiff who sued as a *kittima* son, but made no alternative claim as an *appathitta*, cannot be allowed to make the alternative claim for a first time in appeal.

That decision was followed by a Bench of the late Chief Court in the case of *Shwe Kin* v. *Maung Sin* (4). In that case the appellant's Counsel, who appeared at the hearing of the appeal, asked to be allowed to make a claim as the children of an *appathitta* daughter; and the learned Judge, after referring to the case last cited, said that he had no reason to change his views on that point. Mr. Justice Rigg must be presumed to have concurred in this view.

We were next referred to a Single Judge judgment by Lentaigne, J., in *Maung Gye* v. *Maung Aung Pyo* (5), in which the plaintiff claimed to be entitled to the estate as a cousin and the nearest surviving relation

(1) 1 Ch. T. L. C. 157.
(2) 7 Bur. L. R. 295.
(3) 41 Ind. Cas. 749; 11 Bur. L. T. 246.
(4) 87 Ind. Cas. 673; 10 L. B. R. 376.
(5) 85 Ind. Cas. 286; 2 R. 611 at p. 669; (1925) A. I. R. (R.) 178.

of one Ma Pu. The defendant, who was a more distant relation, contended that he was the *kittima* adopted son of Ma Pu. The learned Judge said:

"The learned District Judge, has, however, overlooked the fact that Maung Gyi is a defendant, and that in that case it is not a question of altering the cause of action in the suit. The cause of action of the plaintiff-respondent remains the same whether the defence is based on a claim to a *kittima* adoption or to an *appathitta* adoption and the question which the Court has to decide is whether the plaintiff is entitled to relief against the defendant. Even on the admissions of the plaintiff in his evidence in this case, it is apparent that the plaintiff had in effect recognized Maung Gyi as an heir of Ma Pu after her death and had consented to Maung Gyi incurring all the funeral expenses and mortgaging the house if necessary for that purpose. It is clear, therefore, that it would be most inequitable to allow the plaintiff to take the whole estate and to deprive the defendant of his right as heir which is shown to have been recognized even on the admissions of the plaintiff in addition to depriving the defendant of all rights to re-imbursement of the funeral expenses, etc."

He draws a distinction between the case of a plaintiff being allowed, at the last moment, to amend his plaint, and a defendant being allowed to amend his written statement. He also found that there were special circumstances in that case, which made it equitable to allow the amendment prayed for. That case is clearly distinguishable from the present one.

It has been often laid down that the plaintiff must be confined to the case that he sets up in his pleadings, or to a case which is consistent with those pleadings. While the right of amendment has been largely increased in the new Code—and amendment is now much more freely granted—it remains a matter for discretion, and that discretion must be exercised with regard to all the facts and circumstances of the case.

In this case, the plaintiff deliberately chose to take his stand on the allegation that he was the *kittima* adopted son. He made no effort to set up any other claim, and he claimed to be entitled to the whole of the estate. Having gone to trial on that issue, and there being no question raised of an *appathitta* adoption, the cross-examination of the witnesses for the plaintiff and examination of the witnesses for the defendants were confined to that claim.

Moreover, it is established—and admitted—that there were no special circumstances in that case whatsoever; and, if we were to allow an amendment, and remand the case to the Court of first instance, we should practically be ordering a new suit to be commenced afresh and tried from the beginning.

There is ample authority for holding that the causes of action, on which the claims to be a *kittima* or an *appathitta* son are based, are widely different. Different considerations govern the question of these two distinct forms of adoption. We should not only be allowing the plaintiff, who has deliberately chosen his line of attack to alter his claim to one of a different character, but we should be allowing him to do so as a last hope, when he has entirely failed to establish the case with which he came to Court.

In our opinion, therefore, we should not permit the plaintiff to amend his pleadings now.

This appeal, therefore, fails; the decree of the Court below will be confirmed, and the appeal dismissed with costs.

Z. K. *Appeal*

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 1385 OF 1921.

July 21, 1924.

Present:—Mr. Justice Zafar Ali and Mr. Justice Martineau.

BANU MAL—JUDGMENT-DEBTOR—DEFENDANT—APPELLANT

versus

PARAS RAM AND OTHERS—DECREE-HOLDERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 4, 5—Composite decree for sale of mortgaged property and realisation of decree from person and property of judgment-debtor—Absolute decree, whether necessary—Execution—Objection not taken, effect of—Application for sale, effect of.

A preliminary decree under r. 4 of O. XXXIV of the C. P. C. for the sale of mortgaged property cannot be executed unless made absolute under r. 5 of the Order. Rule 5, however, does not apply to a decree which does not conform to the provisions of r. 4 of O. XXXIV. [p. 255, col 2.]

A decree directing that if the decretal amount is not paid within a certain period, the decree shall be realised by the sale of the hypothecated property and

in case that is not sufficient, from the person and property of the debtor, is not a preliminary decree for sale under r. 4 of O. XXXIV, C. P. C, and is capable of execution. [p. 255, col. 2.]

Even though a relief may not have been granted by the decree, yet if in execution proceedings a Court holds that a party is entitled to such relief under the decree, it is not open to the parties afterwards to contend that no such relief has been awarded and the matter is *res judicata* [p. 256, cols. 1 & 2.]

After a preliminary decree for sale has been passed, an application by the decree-holder for sale of the property may be taken to be an application for an order absolute for sale. [p. 256, col. 2.]

Miscellaneous second appeal from an order of the District Judge, Ambala, dated the 31st March 1921, reversing that of the Senior Sub-Judge, Ambala, dated the 15th June 1920.

Mr. *Shamair Chand* and Bakhshi *Tek Chand*, for the Appellant.

Lalas *Jagan Nath* and *Mehr Chand Mahajan*, for the Respondents.

JUDGMENT.—In this second appeal from an order in appeal of the learned District Judge, Ambala, relating to an objection to the execution of a decree, the questions that arise for determination are :—

(1) Was the decree in question a simple money-decree or a preliminary decree under O. XXXIV, r. 4, C. P. C., for sale of the property mortgaged ?

(2) If it was a preliminary decree under O. XXXIV, r. 4, and was as such incapable of execution unless made absolute under O. XXXIV, r. 5, was the judgment-debtor precluded from taking the objection that it could not be executed because he had not taken that objection on the previous applications for execution ?

(3) As the judgment-debtor took no objection to the application of the decree-holder for sale of the property mortgaged, and as sale thereof was ordered, was the application thus granted tantamount to an application for an order absolute for sale ?

As regards (1) there can be no manner of doubt that neither did the plaintiffs ask for a decree under O. XXXIV, r. 4, nor did the Trial Court (Sub-Judge, Ambala) pass a preliminary decree in terms of O. XXXIV, r. 4, C. P. C. As pointed out by the learned District Judge the plaintiffs' prayer in the plaint was for a decree for the money claimed with a lien on the property hypothecated (*ba kafalatti-jaedad-i-marhuma*) and against the other property and person of the defendant. There was no prayer in the plaint for sale of the land mortgaged. The defendant did not deny the claim, but wanted to pay the debt by instalments. The Sub-Judge did not allow instalments and ordered as below :—

"I allow the defendant six months in which to pay the decree ; failing which the decree shall be realised in the first instance by the sale of hypothecated property. If that is not found sufficient, the decree shall be realised from the person and the property of the debtor."

The decree that was drawn up was in the terms of the above order on a form prescribed for simple money-decrees. Evidently this decree was not merely a preliminary decree for sale of mortgaged property, but it was what is called a composite decree, *i. e.*, a decree for sale of the property mortgaged as well as against the person and other property of the mortgagor. The question is what rules of procedure apply to the execution of a decree of this description. It has been repeatedly held that s. 89 of the Transfer of Property Act, for which O. XXXIV, r. 5, has been substituted does not apply to a consent-decree in a suit for sale of the property mortgaged because such decree could not be drawn up in accordance with s. 88 of that Act or O. XXXIV, r. 5, C. P. C. The same principle applies by analogy to a composite decree of the kind passed in the present case, and it may safely be affirmed that O. XXXIV, r. 5, cannot apply to it as it does not conform to O. XXXIV, r. 4.

It may be remarked here in passing that the Madras High Court held in *Kommachi Kather* v. *Pakker* (1) and again in *Abdulla Sahib* v. *Oosman Sahib* (2) that decree of the kind in question is a simple money-decree, but that the Calcutta High Court took a contrary view in *Kartick Nath Pandey* v. *Jugger Nath Ram Marwari* (3). The proposition that a preliminary decree for sale of property mortgaged under O. XXXIV, r. 4, C. P. C., cannot be executed unless made absolute under O. XXXIV, r. 5 is unassailable, and, therefore, the authorities cited in support of it need not be referred to. But the decree in the present case was beyond the scope of O. XXXIV, r. 4, because it was not only a decree for sale of the property hypothecated but also a decree against the person as well as other property of the judgment-debtor.

(1) 20 M. 107; 7 M. L. J. 66; 7 Ind. Dec. (N. S.) 75.
(2) 28 M. 224.
(3) 27 C. 285; 14 Ind. Dec. (N. S.) 188.

But the appeal must fail on another ground also granting for the sake of argument that the decree in question is covered by O. XXXIV, r. 4. The judgment-debtor is precluded from now taking the objection that it is incapable of execution because he did not take that objection on the previous applications for execution thereof. The decree was passed on the 19th May 1916 and execution proceedings went on from 1917 to 1920 with objections and offers to pay and applications for time on the part of the judgment-debtor. The present objection was taken for the first time on the 16th February 1920. The question is: Was the judgment-debtor competent to raise this objection at that stage? Precisely this very question arose before a Division Bench of the Madras High Court in the case reported as *Epoor Ramasamy Reddy* v. *Kandadai Rangamanner Iyengar* (4) and was answered in the negative in the following way:—"The next question is whether the respondent is entitled to execute the decree at all. It is contended that it is only a preliminary decree and that according to the decision of the Privy Council [*Ashfaq Husain* v. *Gauri Sahai* (5)] which has been followed by Miller and Sadasiva Aiyar, JJ., in *Yemani Chinna Seshaya* v *Varanasi Pepaya* (6), Benson and Sundara Aiyar, JJ., in *Raja Kumara Venkata Perumal Raja Bahadur* v. *Audikesvalu Reddi* (7) a preliminary decree is not capable of execution and it is only the decree absolute under r. 5, O. XXXIV, that can be executed. In this case it is clear that no decree absolute under r. 5 has been passed, but we think it is necessary to decide this question, because this contention is not available to the appellants. On the decree-holder's application for the execution of the decree, notice was issued to the judgment-debtors (appellants) and an order was passed directing the sale of the property; no objection was taken to the sale on this ground. It has been repeatedly held that even though a relief may not have been granted by the decree, yet if in execution proceedings a Court holds that a party is entitled to such relief under the decree, it is not open to the parties afterwards to contend that no such relief has been awarded and the matter is *res judicata*. We are, therefore, of opinion that in this case it is not open to the appellants to plead that there is no decree under which the properties could be sold. We must, therefore, disallow this contention and we dismiss the appeal with costs."

The learned Counsel for the appellant made an attempt to distinguish the above ruling on the ground that a notice was issued to the judgment-debtor in that case to show cause why the mortgaged property should not be sold, while in the present case no such notice was issued; but he admitted that the judgment-debtor was aware of the execution proceedings and took part therein all along. Therefore he had full notice of the order made for sale of the property, and as he did not object to it at the proper time he could not be allowed to do so later on. The excuse that he did not do so because he was under the impression that the decree was a simple money decree can be of no avail.

Further, the Madras High Court has held that under the circumstances stated in (3) above the application for sale should be taken to be an application for an order absolute for sale—See *Appa Rao* v. *Krishna Ayyangar* (8), which was followed in *Veera Reddi* v. *Ramalinga Mudaley* (9). This is another way of looking at the effect of the judgment-debtor's omission to object in time to the decree-holder's application for sale and indicates the judicial policy that the decree-holder should not be left in the lurch when in consequence of the judgment-debtor's own conduct he has allowed to pass the period prescribed by the Statute of Limitation for making an application for an order absolute for sale.

In all the reasons given above the appeal fails and is dismissed with costs. Counsel's fee Rs. 100.

Z. K. *Appeal dismissed.*

(4) 23 Ind. Cas. 390; 26 M. L. J. 255; 15 M. L. T. 246; (1914) M. W. N. 622.

(5) 9 Ind. Cas. 975; 33 A. 264; 15 C. W. N. 370; 8 A. L. J. 332; 13 C. L. J. 351; 9 M. L. T. 380; 13 Bom. L. R. 367; 4 Bur. L. T. 121; 21 M. L. J. 1140; 38 I. A. 37; (1911) 2 M. W. N. 177 (P. C.).

(6) 15 Ind. Cas. 732.

(7) 17 Ind. Cas. 759; 23 M. L. J. 675; 12 M. L. T. 659.

(8) 25 M. 537.

(9) 4 Ind. Cas. 42; 6 M. L. T. 361.

OUDH CHIEF COURT.

REFERENCE FOR RULING No. 1 OF 1925.

December 7, 1925.

Present:—Mr. Justice Hasan and Mr. Justice Ashworth.

D. M. STEWART, COMMISSIONER OF INCOME TAX, UNITED PROVINCES

versus

THE LUCKNOW ICE ASSOCIATION.

Income Tax Act (XI of 1922), ss. 3, 66—Selling association of several firms—Association, whether separate firm liable to assessment—Chief Court of Oudh, whether High Court for purposes of s. 66—Oudh Courts Act (IV of 1925), s. 8—U. P. General Clauses Act (I of 1904), s 4.

Where certain [illegible] firms by means of an agreement formed a Selling Association to prevent underselling by the constituent firms and fixed a certain rate to be paid by the Association for ice manufactured by the constituent firms:

Held, that the Association was clearly a separate firm within the meaning of s 3 of the Income Tax Act and was liable to assessment of income tax [p. 257, col. 2.]

Per *Hasan, J*—The Chief Court of Oudh is a High Court within the meaning of s. 66 of the Income Tax Act. [p. 258, col 1]

Reference under s. 66 (2) of the Income Tax Act, 1922, demanded by the Lucknow Ice Association.

The Government Advocate, for the Commissioner of Income Tax.

Mr. *Bisheshar Nath Srivastava* for the firm Messrs. Ramchand Gopaldas and others.

ORDER.

Hasan, J.—This is a reference under s. 66, sub-s. (2) of the Indian Income Tax Act, of 1922, by the Income Tax Commissioner of the United Provinces of Agra and Oudh. The question of law which the Commissioner has referred to this Court for decision is stated in the reference as follows:—Was the Ice Association described in para. 3 above a firm within the meaning of s. 3 of the Indian Income Tax Act, whose income, profits and gains are liable to assessment to tax under the said Act.

The Commissioner has answered this question in the affirmative, and I am of the opinion that his answer is right.

It appears that on the 15th day of March 1923, an agreement was made and entered into between two proprietors of two ice factories, and three managers of three ice factories all situate in the City of Lucknow. In the preamble of this agreement the object of Association formed thereby was stated to be the promotion and protection of the trade of ice business and of facilities to the public, and also the economising of the working of such manufacture and business. The Association formed under this agreement was to work in accordance with the terms contained therein for a period of two years from 1st April 1923 to 31st March 1925. The Association thus formed was to have the entire control over the management of sales and distribution of the profits to the constituent factories, and the proprietors and managers of these factories were bound to assist the Association "in making the work easy and more successful." The parties to the agreement were to manage the affairs of the Association, to fix rates, and prices and adjust accounts and determine other matters arising out of the said agreement. On behalf of the Association and under para. 8 of the agreement, M. Amir Hasan proprietor of one of the constituent ice factories, was to work as an Honorary Sale Commissioner. Rates for the sale and disposal of ice were to be fixed from time to time by the Association and the Sale Commissioner was to keep the accounts, and was provided with a staff to be paid by the Association. Paragraph 19 of the agreement provides for the distribution of the sale-proceeds of the ice amongst the constituent factories in certain proportions. On an interpretation of these terms of agreement, I am clearly of opinion that the Association formed under this agreement, is a firm within the meaning of s. 3 of the Indian Income Tax Act of 1922, and as such, is liable to assessment under the same Act.

The reference before us also raises a preliminary question as to the jurisdiction of this Court to entertain this reference. In other words, the question is, whether this Court is a High Court within the meaning of s. 66 of the Indian Income Tax Act of 1922. Section 8 of the Oudh Courts Act, 1925 runs as follows:—

"The Chief Court shall be deemed for the purposes of all enactments for the time being in force to be the highest Civil Court of appeal and revision."

This Court is the Chief Court of Oudh under s. 3 of the Oudh Courts Act, 1925. Section 4, para. 21 of the General Clauses Act, 1904, United Provinces defines High Court as follows:—

"'High Court' used with reference to civil proceedings, shall mean the highest Civil Court of Appeal in the part of the United Provinces in which the Act containing the expression operates."

The Oudh Courts Act operates in the

Province of Oudh in the United Provinces. I am, therefore, of opinion that the effect of the two enactements is to constitute this Court a High Court within the meaning of s. 66 of the Indian Income Tax Act, 1922.

Ashworth, J. — I agree. Certain manufacturing firms by means of an agreement formed a Selling Association to prevent under-selling by the constituent firms. One clause in the agreement provided for an article manufactured by the constituent firms being paid for at a fixed rate by the Association. It is alleged in argument that heavy losses were incurred by the constituent firms by manufacturing at this rate. In my opinion the Association was clearly a separate firm within the meaning of s. 3 of the Income Tax Act. Reference has been made in a form which does not require this Court to decide the method of assessment, but it is apparently from the argument of Counsel for the Association, the method that the Association really objects to. There does not appear to me any reason why the profits of the association should be held diminished by any losses of the individual firms.

By the Court.—The answer of the Court to both questions asked in the reference is in the affirmative. Having regard to the provision of s. 66 (6), it is ordered that the Association shall bear the costs of this reference.

G. H. *Answered affirmatively.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1115 OF 1921.

April 15, 1925.

Present:—Mr. Justice Martineau and Mr. Justice Zafar Ali.

NATHA SINGH AND OTHERS—DEFENDANTS —APPELLANTS

versus

SUNDER SINGH AND OTHERS—PLAINTIFFS —RESPONDENTS.

Pre-emption—Market-value, determination of—Evidence, absence of—Waiver—Refusal to purchase at certain sum—Sale for lesser sum—Right, whether can be asserted.

In a pre-emption case, in the absence of satisfactory evidence of the market value of the land in dispute, the sum actually paid may be taken to be the proper market value. [p. 259, col. 1.]

Where a pre-emptor refuses to purchase the property offered for sale at a certain price, he is not estopped from asserting his right of pre-emption if the property is subsequently sold for a lesser sum. [*ibid.*]

First appeal from a decree of the Senior Subordinate Judge, Seikhupura at Gujranwala, dated the 14th March 1921.

Dr. *Nand Lal* and Lala *Amolak Ram Kapur*, for the Appellants.

Lala *Badri Nath* and Diwan *Mehr Chand*, for the Respondents.

JUDGMENT.—Barkat Ram, defendant No. 1, sold the land in suit to defendants Nos. 2 and 3 for Rs. 12,000. The plaintiffs sue for pre-emption, alleging themselves to be collaterals of the vendor, and have been given a decree subject to the payment of Rs. 12,024, the additional Rs. 24 having been allowed for improvements to well-gear. Both parties have appealed.

The evidence of Atma Ram P. W. No. 1 and Pala Mal D. W. No 3, who are both first cousins of the vendor, proves that the plaintiffs are the latter's second cousins. Their statements are supported by an extract from the settlement pedigree table which is on the record, and are unrebutted. We agree with the lower Court's finding that the plaintiffs are collaterals of the vendor and have a right of pre-emption superior to that of the vendees.

The next question is whether the full price entered in the sale-deed was paid, and the main dispute relates to an item of Rs. 1,400 alleged to have been paid by the vendees to Mangal Singh, who is said to have been a creditor of the vendor Barkat Ram. Mangal Singh is the vendor's sister's son, and the *bahi* which he produces to prove the debt which he says Barkat Ram owed him is one in which an entry could be made at any time, as he keeps no cash book or daybook. The receipt that he gave to the vendees for the Rs. 1,400 is unattested. He lives about 8 *kos* from the vendee's village, but it is alleged that when he went there to ask Barkat Ram for payment the vendees undertook in writing to pay the money for Barkat Ram, and that they paid it about a month later. The written undertaking which the vendees are said to have given is not on the record, although it was produced before the lower Court. It is peculiar that the receipt for the Rs. 1,400 bears date the 2nd *Poh*, which was one day before the execution of the sale-deed. The vendees themselves have not gone into the witness-box, and we regard the evidence of Mangal Singh as to the debt and the pay-

ment of Rs. 1,400 with suspicion, and are not satisfied that any such payment was made. We have no doubt that the remaining sum of Rs. 10,600 was paid. There is no satisfactory evidence of the market-value of the land, and Rs. 10,600 the sum actually paid, may be taken to be the proper value.

Evidence was given by the vendees to prove that the land had been offered to the plaintiffs and that they had refused to buy it and had thus waived their right, but as the evidence is to the effect that Barkat Ram demanded Rs. 12,000, for the land, and we have found that the market-value was much less, the plea of waiver has no force.

There is no dispute about the item of Rs. 24, allowed by the lower Court for improvements.

We accept the plaintiffs' appeal (No. 1437 of 1921) and alter the decree to one for possession of the land in suit on payment of Rs. 10,624. It is not necessary to fix a date for payment as the amount has already been deposited. The defendant-vendees will pay the plaintiffs' costs in both Courts.

The defendants' appeal (No. 1115 of 1921) is dismissed with cost.

Plaintiffs' appeal accepted
Z. K. *and defendants' appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST APPEAL No. 694 OF 1925.

June 1, 1925.

Present:—Mr. Justice Zafar Ali.

KANSHI RAM—DEFENDANT—APPELLANT

versus

FIRM PRABH DIAL ARJAN DASS & Co. —RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 47, 145, O. XXXIX, rr. 1, 2—Specific Relief Act (I of 1877), ss. 54, 55—Execution of decree—Application against surety—Fraud, plea of, whether can be taken—Injunction restraining Court from executing decree, whether can be granted—Subordinate Courts, power of.

Where an application is made to execute a decree against a surety, the surety is a party within the meaning of s. 47 of the C. P. C., and it is open to the surety to raise a plea of fraud before the Executing Court. [p. 259, col 2.]

A subordinate Court has no power under the C. P. C. or any other statutory enactment to restrain another Court by an injunction from executing a decree. [*ibid.*]

Miscellaneous first appeal from an order of the Senior Sub-Judge, Amritsar, dated the 3rd March 1925.

Lala *Badri Das, R B*, for the Appellant,

Lala *Fakir Chand*, for the Respondent.

JUDGMENT.—The question for determination in this miscellaneous appeal is whether the Sub-Judge, Third Class, before whom a suit is pending for a declaration that a security bond for stay of execution of a decree was given under fraud and was, therefore, unenforceable, can issue an injunction to the Senior Sub-Judge, First Class, who is executing the decree against the surety for stay of execution pending decision of the said suit by the surety. The facts are briefly as below :—

An *ex parte* decree for Rs. 12,990 and costs was passed against Hira Lal and others, and the decree-holders took out execution of the same. The judgment-debtors then applied to have that decree set aside and also for stay of execution. This was allowed on their furnishing security for payment of the decretal amount if the *ex parte* decree were not set aside. The persons who gave the security bond were Kanshi Ram and Devi Chand. The *ex parte* decree was not set aside and was eventually affirmed by the High Court. The decree-holders proceeded to execute it against the judgment-debtors as well as the sureties, and on their application the Executing Court proceeded against the persons of the surety, Kanshi Ram and twice ordered his arrest. Each time Kanshi Ram appealed to the High Court against that order, and as his last appeal was dismissed he filed the declaratory suit in question. The plea of fraud was never raised in the execution proceedings, and it is a question whether he could bring a separate suit to establish fraud. A surety by virtue of s. 145, C. P. C., is a party within the meaning of s. 47, C. P. C. and a plea of this nature could be raised before the Executing Court. But this is by the way. The real point is that the Court in which the suit was instituted had no power under the C. P. C. or any other statutory enactment to restrain the Executing Court by an injunction from executing the decree.

Only a chartered High Court has inherent powers to issue injunctions of this nature in certain cases, but other Courts do not possess any such powers, *vide Rash Behary Dey* v. *Bhowani Churn Bhose* (1)

(1) 34 C. 97.

and *Mungle Chand* v. *Gopal Ram* (2). The Executing Court was, therefore, competent to refuse to stay proceedings and this appeal as against its order must fail and I dismiss it with costs.

It may be noted here that copy of the plaint produced by Mr. Fakir Chand shows that the surety's suit is to have the decree itself decreed void.

Z. K. *Appeal dismissed.*

(2) 34 C. 101.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 10 OF 1925.

May 26, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

Musammat MOHAMDI BEGAM—DEFENDANT—APPELLANT

versus

TUFAIL HASAN—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, O. XXXIV, r. 8—Redemption suit—Decree based on compromise—Default in payment—Second suit for redemption, whether maintainable.

A decree passed in a redemption suit on the basis of a compromise provided that on payment of a certain sum to the defendant within one month of the date of the compromise the plaintiff would be entitled to get the property redeemed and to be put in possession and that after the expiry of the fixed period he would be entitled to execute the decree on payment of the sum mentioned in the decree. Plaintiff failed to pay the amount within the time mentioned in the decree and failed to apply for execution of the decree within three years of its date. He subsequently brought a second suit for redemption of the same property.

Held, that inasmuch as the first decree did not provide that the plaintiff's right to redeem was to be extinguished absolutely in case of default of payment he was not prevented from bringing a second suit for redemption and that the defendant was still a mortgagee and had not become absolute proprietor of the property.

Hari Ram v. *Indraj*, 69 Ind. Cas 167; 44 A. 730, 20 A. L. J. 631; (1922) A. I. R. (A.) 377; 9 O & A. L R. 123 and *Arura* v. *Bur Singh*, 84 Ind. Cas. 67; 5 L. 371; (1925) A. I. R. (L.) 31, relied on.

First appeal from an order of the Subordinate Judge, Moradabad, dated the 5th September 1924.

Mr. *Baleshwari Prasad*, for the Appellant.

Mr. *Mushtaq Ahmad*, for the Respondent.

JUDGMENT.—This is a defendant's appeal arising out of a suit for redemption. It appears that on a previous occasion the plaintiff instituted a suit for redemption of this very mortgage and obtained a compromise decree in December 1916. The decree as framed was not in accordance with the compromise and was accordingly subsequently corrected in April 1924. The amended decree stood as follows:

"On payment of Rs. 225 to the defendant within one month of the date of the compromise the plaintiff would be entitled to get the property redeemed and put in possession but after the expiry of the fixed period he will be entitled to execute his decree on payment of Rs. 225. Parties shall bear their own costs." The plaintiff failed to pay the amount in time and failed to apply for execution within three years. He however has brought a second suit for redemption of that property. The Trial Court dismissed the suit holding that the claim was barred by the provisions of s. 11, C. P. C. On appeal the learned Subordinate Judge has taken the contrary view and remanded the case for trial of the other points involved in the case. In our opinion the view taken by the lower Appellate Court is correct. When it is borne in mind that the original mortgage deed was a usufructuary mortgage a suit for redemption of that mortgage in spite of a default of payment of the mortgage money within the time fixed can be brought. If there had been no compromise the proper course would have been that the property would be sold and the mortgage money realised thereby. By mere lapse of the time fixed, the mortgagee does not become the absolute proprietor of the martgaged property. The case however was compromised and the decree was passed in terms of the compromise. The compromise nowhere expressly stated that in default of the payment of Rs. 225 within one month the plaintiff's right to redeem would be extinguished or that his exclusive remedy would be to apply for execution. We may note that the decree as originally framed bore a clause that in default of payment his right to redeem would be extinguished, but the Court subsequently corrected this, holding that it was not in accordance with the compromise. It seems to us that when under the compromise the parties did not agree that his right to redeem would be extinguished absolutely he is not prevented from bringing a second suit for redemption, and the mortgagee is still a mortgagee and has not become the absolute proprietor of the property. In support of our view we may refer

to the case of *Hari Ram* v. *Indraj* (1) which has been followed by the Punjab High Court in the case of *Arura* v. *Bur Singh* (2).

We accordingly dismiss this appeal with costs including fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 69 Ind. Cas. 167; 44 A. 730; 20 A. L. J. 631; (1922) A. I R (A.) 377; 9 O. & A. L R. 123.

(2) 84 Ind. Cas. 67; 5 L 371; (1925) A. I. R. (L.) 31.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2141 OF 1924.

July 1, 1925.

Present:—Mr. Justice Jai Lal.

RAM LABHAYA AND OTHERS—DEFENDANTS —APPELLANTS

versus

KARTAR SINGH AND OTHERS—PLAINTIFFS AND KESAR MAL AND OTHERS—DEFENDANTS —RESPONDENTS.

Mortgage—Redemption by one of several mortgagors —Civil Procedure Code (Act V of 1908), O. XXII, r. 4 —Death of pro forma *respondent—Legal representatives not brought on record—Abatement, extent of*

One of several mortgagors is entitled to redeem the entire mortgage and by doing so he steps into the shoes of the mortgagee in respect of the shares of the other mortgagors [p. 261, col 2]

Where a *pro forma* respondent dies and his legal representatives are not brought upon the record within the prescribed period, the abatement of the appeal as against the deceased respondent does not result in the abatement of the appeal as a whole. [p. 262, col. 1.]

Second appeal from a decree of the District Judge, Attock at Campbellpore, dated the 25th April 1924, affirming that of the Subordinate Judge, Fourth Class, Pindigheb, District Attock.

Dr. *Nand Lal*, for the Appellants.

Mr. *M. S. Bhagat*, for the Respondents.

JUDGMENT.—A preliminary objection was taken on behalf of the respondents that Budhe Khan respondent died on the 13th of February 1925 and no legal representatives having been brought on the record in his place within the prescribed time the appeal abated as against him. On behalf of the appellant an application was made on the 13th of June praying that certain persons be substituted as legal representatives of Budhe Khan. An affidavit was filed explaining the delay in presenting the application. It was alleged that the appellants did not know of the death of the respondent. In my opinion there was no sufficient ground for extension of the ordinary period of limitation. I, therefore, intimated to the parties that the appeal as against Budhe Khan had abated.

The learned Counsel for the respondents then contended that the whole appeal had abated. In order to understand this objection it is necessary to state the facts of this case. The land in suit was in possession of a *muqarridar*. On his death without an heir it reverted to the proprietary body of the village. The deceased *muqarridar* had mortgaged this land with defendants Nos. 1 to 27. The plaintiffs are two of the proprietary body. They instituted this suit for the redemption of the mortgage and impleaded defendants Nos. 28—51, the other proprietors of the village as *pro forma* defendants. Budhe Khan, deceased, was one of the *pro forma* defendants. The suit was decreed by the Trial Court. An appeal by the mortgagee defendants has been dismissed by the District Judge on the ground that one of the *pro forma* defendants was not impleaded or represented before him. The mortgagees appeal to this Court. It appears that the plaintiffs are the owners of a very large share in the land in suit. The question, therefore, is whether a few of the mortgagors can redeem the entire mortgage. This was not a suit by the plaintiff to redeem only his share of the mortgaged property. In my opinion one of the mortgagors is entitled to redeem the entire mortgage, and by doing so he steps into the shoes of the mortgagee in respect of the shares of the other mortgagors. In this case owing to the death of *muqarridar* all the proprietors became mortgagors.

The learned Counsel for the respondents argued that the proprietors are more like heirs of a deceased person and that a few of a number of heirs are not competent to sue in respect of a cause of action which vested in the deceased. In my opinion this analogy does not apply. The plaintiffs in this case cannot be called the heirs of the deceased *muqarridar*. They became co-owners of the land by virtue of reversion. They are, therefore, the owners of the land in whom the equity of redemption vests.

The matter can be looked at from another point of view. It was contended that the integrity of the mortgage cannot be broken except under certain circumstances. It was admitted that a mortgagee can allow partial redemption of a mortgage. The plaintiffs in this case are the mortgagors and the contesting defendants are the mortgagees. They are the appellants before me and they

have allowed their appeal to abate against one of the respondents. Supposing a decree had been given against them in favour of a number of mortgagors jointly, I think it was open to them to abandon their appeal or to compromise the case against some of the mortgagors and to contest the right of others to redeem. The practical effect of the omission of the appellants to bring on record the legal representatives of Budhe Khan is the same.

Moreover, Budhe Khan was merely a *pro forma* defendant and the abatement of the appeal as against him does not result in the abatement of the appeal as a whole I, therefore, hold that the appeal does not abate. This practically disposes of this appeal on the merits also, because the appeal by the mortgagees defendants has been dismissed by the learned District Judge on the ground that one of the *pro forma* defendants, Nawab, had sold his rights to one Alam Sher and on the plaintiffs' application Alam Sher, was made a defendant in place of Nawab. Nawab subsequently died, but Nawab's heirs were not made respondents by the appellants in the District Judge's Court nor was Alam Sher made a respondent. The Court ordered that Alam Sher should be joined. The appellants not having complied with these orders the appeal was dismissed. It is admitted by the learned Counsel for the respondents that if Alam Sher was not a necessary party to the appeal then the order of the learned District Judge could not be sustained. For reasons already given I hold that none of the *pro forma* defendants were a necessary party to the appeal and, therefore, accepting this appeal I remand the case to the learned District Judge for decision on the merits. The Court-fee on the memorandum of appeal will be refunded to the appellants. The other costs will abide the result.

Z. K. *Appeal accepted.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 80 OF 1925.

December 9, 1925.

Present:—Mr. Justice Raza.

JAHANGIR—DEFENDANT—APPELLANT

versus

RAM HARAKH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Grove planted by mortgagee—Accession—Right of mortgagor to grove.

Where a mortgagee in possession, without the consent of the mortgagor, plants a grove which is not necessary for the preservation of the property and of which separate possession is not possible, the mortgagor is entitled to possession of the grove unconditionally.

Zubeda Bibi v. *Sheo Charan*, 22 A. 83 at p. 85; A. W. N. (1899) 189; 9 Ind. Dec. (N S.) 1085, referred to.

Appeal from a decree of the Subordinate Judge, Partabgarh, dated the 31st October 1924, confirming that of the Munsif, Partabgarh, dated the 31st July 1923.

Messrs. *Suraj Prasad Khandelwal* and *Radha Krishna*, for the Appellant.

Mr. *H. D. Chandra*, for the Respondents.

JUDGMENT.—This is a defendant's appeal arising out of a redemption suit. The facts of the case are as follows:—

One Durga Singh mortgaged grove No. 719 in Sahjanpur District Partabgarh to Jahangir (appellant), with possession, for Rs. 25 in or about 1904. Durga Singh died in or about 1912 leaving Saraojit Singh and Bhagwant Singh (defendants Nos. 2 and 3) as his heirs The plaintiff Ram Harakh purchased the equity of redemption from the defendants Nos. 2 and 3 on 30th August 1922 and instituted the present suit in December 1922 against Jahangir impleading the defendants Nos. 2 and 3 also. The claim was decreed by the first Court on the 31st July 1923. That decree was affirmed by the lower Appellate Court on the 31st October 1924. The mortgagee, defendant No. 1, has come to this Court in second appeal contending that the lower Courts were wrong in not allowing the price and cost of 80 new trees planted by him in the grove during the continuance of the mortgage.

It is admitted that 18 old trees still stand in the grove. It is neither alleged nor shown that the plot lost the character of a grove at any time. The new trees in dispute are accession to the mortgaged property. It has been found that separate possession and enjoyment of the grove is not possible without detriment to the principal property and that the planting of the new trees was not necessary to preserve the mortgaged property from destruction, forfeiture or sale and that the new trees were not planted with the consent of the mortgagor. Where a mortgagee in possession planted a grove without the consent of the mortgagor, which was not necessary for the preservation of the property and of which separate possession was not possible, it was held that the mortgagor was entitled

to possession of the grove unconditionally [*Zubeda Bibi* v. *Sheo Charan*(1)] I should like to note also that the defendant No. 1 (mortgagee) had not raised the plea in question in the written-statement which he had filed in the first Court. I fail to understand how and why he or his legal adviser was allowed to raise the plea in question in the course of arguments in the lower Courts. Upon the findings of the lower Court the mortgagor must be held entitled as against the mortgagee to the accession in question.

The appeal fails and must be dismissed. I dismiss the appeal with costs and order the appellant to pay the cost of the contesting respondents.

G. H. *Appeal dismissed.*

(1) 22 A. 83 at p. 85; A. W. N. (1899) 189; 9 Ind. Dec. (N. S) 1085.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1242 OF 1924.

January 5, 1925.

Present:—Mr. Justice Harrison.

IBRAHIM AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHAH MAHOMED—PLAINTIFF AND OTHERS DEFENDANTS—RESPONDENTS.

Custom—Alienation—Necessity—Marriage of children—Enquiry, scope of.

Where the necessity stated for an alienation of ancestral land by a village proprietor is the marriage of children, and this is also spoken to by the *lambardar*, who attests the sale-deed, and there are, as a matter of fact, several young children, one of whom is approaching marriageable age, the vendee is not bound to make any further enquiry as to whether any actual steps to make arrangements for marriages have been taken or not.

Second appeal against a decree of the District Judge, Jullundur, dated the 5th March 1924, modifyng that of the First Class Sub-Judge, Jullunder, dated the 31st October 1923.

Lala *Mehr Chand Mahajan*, for the Appellants.

Sheikh *Niaz Mahommed*, for the Respondents.

JUDGMENT.—This suit was brought by the son of a vendor for the usual declaration. The amount of consideration was shown in the deed as Rs. 2,600, out of which Rs. 1,300 were on account of previous mortgages and this amount was not contested before the District Judge. The only question, therefore, was with regard to the necessity for the balance of Rs. 1,300, which was paid in full before the Sub-Registrar. The entry in the deed was that the money was required for the marriages of the vendor's children, etc. The Trial Court has held that the vendee had sufficient reasons to suppose that the money was so required, and the fact that the vendor had five unmarried children, the eldest of which a boy of 14 was approaching marriageable age, was a sufficient reason for his believing the story told him, and has dismissed the suit *in toto*.

The learned District Judge has held that the evidence regarding necessity for this sum is wholly insufficient, that it was for the alienee to prove that there was such necessity, and that he should have satisfied himself beyond all reasonable doubt that the money was actually required for the marriages, and that the absence of any evidence as to there having actually been a betrothal or any sort of preparations for the marriage shows that the vendee did not make sufficient enquiry, that necessity is not established for this item, and that only the sum required for the previous mortgages constituted a charge upon the land.

The only question to be decided is whether the vendee made sufficient enquiries, and whether it was incumbent upon him when told by the vendor and the *lambardar* of the village, who witnessed the sale-deed, and who gives evidence to this effect, that money was required for the children's marriages, to ascertain whether any steps had been taken to make arrangements or not. Doubtless he was bound to satisfy himself that the vendor had a child or children, and here the vendor had five young children his eldest daughter by his first wife having already been married. In the natural course of events he had to make arrangements for the marriages of these children and presumably the eldest child would be married before long and I think it was sufficient for him to satisfy himself of these facts and that he was not bound to make further enquiries, which would have been of a somewhat inquisitional nature and might have been very much resented. All that I understand to be laid down in *Devi Ditta* v. *Saudagar Singh* (1) and subsequent judgments is that the vendee

(1) 65 P. R. 1900; P. L. R. 1900, p. 322.

is required to satisfy himself that there is *prima facie* necessity, and just as he need not go behind an antecedent mortgage or a just debt, it is sufficient if the circumstances justify him in supposing that the vendor is telling the truth when he tells him that he requires money for the marriages of his children.

The question remains of whether the amount is so excessive that it should not be allowed. It is true that the children would presumably be married one by one, there being five of whom two are daughters. I do not think it can be said that the amount is excessive for a *Sayyad zemindar* to spend on the marriages. I therefore, accept the appeal and dismiss the suit with costs throughout.

N. H. *Appeal accepted.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. OF 1925.
July 27, 1925.
Present:—Mr. Justice Kanhaiya Lal.
BACHAN—DEFENDANT—APPLICANT
versus
RAGHUNATH AND OTHERS—PLAINTIFFS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 152—Amendment of decree—Appeal filed but not decided—Jurisdiction of Trial Court to amend decree.

It is only when an appeal has been decided and a decree has been passed in appeal confirming, amending or reversing the decree of the Trial Court that the appellate decree operates to supersede the Trial Court's decree, and it is only then that the jurisdiction of the Trial Court to interfere with the decree so superseded ceases. Till the Appellate Court hears the appeal and decides it, the decree of the Trial Court remains in force and it can be rectified or amended by the Court which passed it.

Civil revision from an order of the Subordinate Judge, Benares, dated the 9th May 1925.

Mr. *K. N. Malaviya*, for the Applicant.

JUDGMENT.—This is an application in revision for the discharge of an order for the amendment of a decree passed by the Trial Court on the 9th May 1925. The Trial Court observes that there was a mistake in the decree which was not in accordance with the judgment and it has directed that mistake to be rectified. It is argued here that the Trial Court had ceased to have any jurisdiction to amend this decree or to rectify it after an appeal had been filed from that decree in the Court of the District Judge. But till the District Judge hears the appeal and decides it, the decree of the Trial Court remains in force and it can be rectified or amended by the Court which passed it. It is only when the appeal has been decided and a decree has been passed in appeal confirming, amending or reversing it, that the appellate decree operates to supersede the decree of the Trial Court, and it is only then that the jurisdiction of the Trial Court to interfere with the decree so superseded, ceases. It is immaterial what has happened since the order of the Trial Court of the 9th May 1925 now sought to be revised was passed. The order as passed on that date was correct and the Trial Court had jurisdiction to pass it. The decision in *Asma Bibi* v. *Ahmad Husain* (1) refered to by the learned Counsel for the applicant does not apply because in that case the amendment was made after the appeal was decided. The application is, therefore, rejected. The stay order passed will be withdrawn.

Z. K. *Application rejected.*

(1) 30 A. 290; A. W. N. (1908) 109; 5 A. L. J. 584.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1433 OF 1924.
December 23, 1924.
Present:—Mr. Justice LeRossignol.
HAKIM DIN—PLAINTIFF—APPELLANT
versus
QUTAB DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law — Gift, revocability of.

When once a delivery of possession has been made a gift under Muhammadan Law is not revocable if the conditions of the gift have not been broken.

Second appeal against the decree of the Senior Sub-Judge, Sialkot, dated the 26th February 1924, confirming that of the Fourth Class, Sub-Judge, Sialkot, dated the 4th December 1923.

Lala *Mool Chand*, R. S., for the Appellant.

Mr. *Abdul Rashid*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit for a declaration that a gift by the plaintiff is null and void and should be revoked. The gift consisted of the plaintiff's fourth share in a house which was under mortgage with possession, and in the Courts below several reasons were alleged why the gift should be set aside,

as, for instance, undue influence, breach of the conditions of the gift, invalidity of the gift of plaintiff's undivided share. On all these points the plaintiff has been unsuccessful and before me the appellants Counsel has narrowed down his contentions' to this only that under Muhammadan Law a gift is always revocable even after seisin has been delivered except in certain cases into none of which the present case falls. This contention is that a gift under Muhammadan Law is always revocable by the donor even after delivery of the property gifted although none of the conditions of the gift have been broken. I am not able to accept this proposition and hold that when once delivery has been made a gift under Muhammadan Law is not revocable if the conditions of the gift have not been broken, and I dismiss the appeal with costs.

N. H. *Appeal dismissed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 516 OF 1924.

November 26, 1925.

Present:—Mr. Justice Hasan and Mr. Justice Raza.

Sheikh BASHIR AHMAD—PLAINTIFF—APPELLANT

versus

Musammat ZOBAIDA KHATUN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Hiba-bil-ewaz, *nature of—Conveyance of landed property for dower—Transaction, whether sale—Pre-emption, right of—Oudh Laws Act (XVIII of 1876), s. 9—Transfer of Property Act (IV of 1882), s 54—"Price," meaning of—Dower-debt, whether price—Deed, construction of.*

A conveyance of landed property by a husband to his wife in consideration of an extinction of her dower-debt is a gift of the form known as *hiba-bil-ewaz* in Muhammadan Law, and as such is not liable to pre-emption. It cannot be regarded as a sale attracting the provisions of s. 9 of the Oudh Laws Act. [p. 265, col. 2.]

Ram Prasad v. *Rahat Bibi*, 33 Ind. Cas. 622; 18 O. C. 367, *Abid Ali* v. *Arabunnissa*, 1 O. C. 75, followed.

Nathu v. *Shadi*, 29 Ind. Cas. 495, 37 A. 522; 13 A. L. J. 714, not followed.

A *hiba-bil-ewaz* is a well recognised mode of transfer of property in Muhammadan Law. A sale is equally a well-understood form of contract in the same law, yet according to that law the legal incidents of each case differ in many respects. [p. 266, col. 2.]

A *hiba-bil-ewaz* is a combination of two reciprocal gifts. [*ibid.*]

Imdad Ali v. *Ahmad Ali*, 85 Ind. Cas. 400; 1 O. W. N. 868; 10 O. & A. L. R. 1215; 28 O. C. 55; (1925) A. I. R. (O.) 518, referred to.

The consideration for a transaction of *hiba-bil-ewaz* in Muhammadan Law does not, therefore, rest merely in the pecuniary value of the subject-matter of the gift and of the return but there is always a personal element when the gift is made in favour of one's wife or other near relations. [p 267, col. 1.]

It is wholly unsafe to deduce a rule of law that a claim for pre-emption can lie in respect of a transaction of *hiba-bil-ewaz* if in effect it amounts to a sale, when no such rule was promulgated by the Muhammadan jurists. [*ibid.*]

The word "property" as understood in Muhammadan Law does not include *res incorporales* which a claim for dower is. [p. 267, col 2.]

The word "price" in the definition of sale in s 54, Transfer of Property Act, means "money" [p 268, col 1.]

A Muhammadan transferring property in lieu of dower to his wife does not receive any "price" within the meaning of that word in s. 54, Transfer of Property Act. [p 268, col. 1.]

There is no difference in principle whether the property is transferred 'as dower' or 'in lieu of dower'. [p 267, col 2.]

The primary object of all interpretation is to determine what intention is conveyed by the deed and the primary source of determining such an intention is the language used in the deed [p 266, col. 2.]

Appeal against a decree of the District Judge, Fyzabad, dated the 15th September 1924, setting aside the decree of the Additional Subordinate Judge, Sitapur, dated the 12th March 1924.

ORDER.

Simpson, A. J. C.—(*September 2, 1925*)—Counsel for the appellant at the close of his argument asked me to refer this appeal for decision to a Bench. Counsel for the respondent agreed to this course being taken. The reason is that the appeal raises the question whether a conveyance of landed property by a husband to his wife, in consideration of an extinction of her dower-debt, is to be regarded as a sale, attracting the provisions of s. 9 of the Oudh Laws Act, and liable to pre-emption, or whether it is to be regarded as a gift of the form known in Muhammadan Law as a *hiba-bil ewaz*, and as such not liable to pre-emption.

The learned Munsif decided that the transaction was a sale and gave plaintiff a decree. The learned District Judge felt himself constrained to follow *Ram Prasad* v. *Rahat Bibi* (1), and dismissed the suit. I do not propose to discuss the cases, but I mention *Mohammad Zaki Khan* v. *Munnu Sahu* (2), and the cases therein referred to,

(1) 33 Ind Cas. 622; 18 O. C. 367.

(2) 87 Ind Cas 176; 2 O W. N 171; 12 O. L. J. 267; (1925) A I. R. (O.) 407; 28 O. C. 227.

especially *Fida Ali* v. *Muzaffar Ali* (3) a decision of Mahmood, J., a high authority on Muhammadan Law, and *Abbas Ali Shikdar* v. *Karim Bakhsh Shikdar* (4). The cases *Lachhman Prasad* v. *Mir Fida Husain* (5), *Abid Ali* v. *Arabunnissa* (6) and *Raj Kishore* v. *Raghunath Prashad* (7) on which *Ram Prasad* v. *Rahat Bibi* (1) purports to be founded, were all cases of actual exchange of some specific thing. They were not cases either of a money price or of a extinction of a debt. I certify that the appeal ought to be heard by a Bench.

Mr. *Niamatullah*, for the Appellant.

Mr. *Haider Hussain*, for the Respondent.

JUDGMENT.—This is the plaintiff's appeal in a suit for pre-emption which succeeded in the Trial Court but on appeal by the defendants the learned District Judge of Fyzabad reversed the decree of the Court of first instance and dismissed the plaintiff's suit. This appeal is preferred from the decree of the learned District Judge dated the 15th of September 1924.

On the 25th of August 1922 Akhtar Husain defendant No. 2 executed a document by which he transferred certain immoveable property of his own to his wife, *Musammat* Zubaida Khatun, defendant No. 1. The claim for pre-emption is in respect of that transfer. The defence, with which we are concerned in this appeal, was that the transaction evidenced by the deed of the 25th of August 1922 was not a sale but one of a *hiba-bil-ewaz* and that consequently it was not subject to the right of pre emption.

The deed in question recites the fact of the marriage of Akhtar Husain with *Musammat* Zubaida Khatun and also the fact that *Musammat* Zubaida Khatun's dower was fixed at that marriage at the sum of Rs. 2,500. The deed then proceeds to say that the dower had remained unpaid till then and that it was incumbent on the husband, Akhtar Husain, to satisfy it. The operative part of the deed is the transfer of a 2 *biswa* 2½ *anansi* under proprietary share in village Dostpur Ferozpur, *Parganna* Aldemau, District Sultanpur, in favour of *Musammat* Zabaida Khatun. The words of transfer used in the document are "*hiba wa bakhsh diya*" (made a gift and present of). The value of the *zemindari* share which is the subject-matter of the gift is mentioned to be Rs 2,000. At the end the document is christened a deed of gift.

Under s. 9 of the Oudh Laws Act, 1876, the right of pre-emption arises in respect of "the property to be sold or foreclosed." The question for decision, therefore, is whether the 2 *biswas* odd share was sold or not by the deed of the 25th of Augurt 1922. The plaintiff's case, as stated in para 2 of the plaint, is that the transaction evidenced by the deed of the 25th of August 1922 was in reality a sale but that it has been clothed in the garb of a *hiba-bil ewaz* with the fraudulent motive of defeating the claim for pre-emption. No evidence *aliunde* of the contents of the deed was relied upon in proof of this case. The question is, therefore, one of interpretation alone. The primary object of all interpretation is to determine what intention is conveyed by the deed and the primary source of determining such an intention is the language used in the deed In the present instance the intention is floating on the surface of the document and that intention was to effectuate a transaction of *hiba-bil ewaz* and not of sale. A *hiba-bil-ewaz* is a well-recognised mode of transfer of property in Muhammadan Law. A sale is equally a well-understood form of contract in the same law, yet according to that law the legal incidents of each case differ in many respects. The parties to the deed of the 25th of August 1922 are *Hanafi* Muhammadans. Is it competent for the Courts of law to thwart the express intention of the parties and to convert the transaction of *hiba bil-ewaz* into one of sale so as to attract to it a claim for pre-emption under the Oudh Laws Act. Our answer to this question is in the negative.

It was admitted at the Bar that *hiba-bil-ewaz* is a combination of two reciprocal gifts—See in this connection the decision of one of us in the case *Imdad Ali* v. *Ahmad Ali* (8). If that is so, the transaction in question evidences the gift of the *zamindari* share by Akhtar Husain to his wife, *Musammat* Zubaida Khatun, and of the claim for dower by the latter to the former. Such a transaction is clearly not a sale.

The entire law of gifts, whether simple

(3) 5 A. 65; A. W. N. (1882) 175; 3 Ind. Dec. (N. S.) 85.
(4) 4 Ind. Cas. 466; 13 C. W. N 160.
(5) 30 Ind. Cas. 232; 18 O. C. 109; 2 O. L. J. 220.
(6) 1 O. C. 75.
(7) 4 O. C. 169.
(8) 85 Ind. Cas. 400; 1 O. W. N. 868; 10 O. & A. L. R. 1215; 28 O. C. 55; (1925) A. I. R. (O) 518.

or *bil-ewaz* rests on the Prophet's saying:— "Send ye presents to each other for the increase of your love." (Hamilton's Hedaya, Book XXX p. 291). In the case of a gift by the husband to his wife and *vice versa* the recognised object of the gift, in Muhammadan Law, 'is improved affection' Hamilton's Hedaya, Book XXX p. 302.) The consideration for a transaction of *hiba-bil-ewaz* in Muhammadan Law does not, therefore, rest merely on the pecuniary value of the subject-matter of the gift and of the return but there is always a personal element when the gift is made in favour of one's wife or other near relations. In the present case the wife has accepted property worth Rs. 2,000 only in satisfaction of her claim of dower for Rs 2,500. The acceptance of the gift is, therefore, clearly prompted by considerations of natural love and affection and acceptance is an essential element of a contract of gift.

The strongest case in favour of the appellant is the decision of Mahmood, J. in the case of *Fida Ali* v. *Muzaffar Ali* (3) This decision was followed in *Nathu* v. *Shadi* (9) but is not accepted as good law by Mr. Ameer Ali—See his book on Muhammadan Law, Volume I, 4th Edition, page 713. We are of opinion that the view expressed by Mr. Ameer Ali is correct. Now in the first place, in the books of Muhammadan Law for instance Hedaya, the transaction of *hiba-bil-ewaz* is not mentioned as one subject to the exercise of the right of pre-emption. We think it is wholly unsafe to deduce a rule of law that a claim for pre-emption can lie in respect of a transaction of *hiba-bil-ewaz* if in effect it amounts to a sale when no such rule was promulgated by the Muhammadan jurists. In the judgment of Mahmood, J., which commands our greatest respect, no rule of Muhammadan Law is quoted. A passage from the Sharaya-ul-Islam and another from the Mafatih, both books of authority on the Shia Law, are quoted to elucidate the rule applicable to the cases where there is no right of pre-emption. The learned Judge rightly points out "that sale is an essential condition precedent to the operation of the right of pre-emption is a well-established principle of Muhammadan Law and in this respect no serious difference exists between the doctrines of the Sunni and the Shia Schools." The rule stated in the Mafatih and the Sharaya-ul-Islam as quoted in the judgment of the learned Judge may well, therefore, be regarded as the rule of the Sunni Law also. In the Sharaya-ul-Islam the rule is thus expressed:—

"If the share has been assigned as a dower, or given in charity, or bestowed by way of gift, or in compromise, it is not subject to the claim of pre-emption." In the Mafatih the rule is stated in similar terms:— "The transfer must be by sale. So, if the transfer be made as dower, or as a gift, or in compromise, then according to the prevalent doctrine, there is no right of pre-emption". The rule precisely apposite to the case before us is stated in Hedaya as follows:—

"If a man marry a woman without settling on her any dower and afterwards settle on her as house as a dower the privilege of *shuffa* does not take place, the house being considered in the same light as if it had been settled on the woman at the time of . . . . It is otherwise where a man sells his house in order to discharge his wife's dower either proper or stipulated; because here exists exchange of property for property. "(Hamilton's Hedaya, Book XXXVIII, page 593). We think that these rules conclusively exclude the right of pre-emption in a case of the nature which we have before us.

In the rule in Hedaya emphasis must be laid on the word '*sells*.' The case before us is not of sale and of the application of the purchase money to the payment of the dower. In interpreting this rule it should be borne in mind that the word 'property' as understood in Muhammadan Law does not include *res incorporales* which a claim for dower is.

What difference in principle can it make whether the property is transferred "as dower" or "in lieu of dower." In each case the dower is represented by the property. The transaction before us may equally fall within the description of a "compromise." The wife has a claim of dower to the extent of Rs. 2,500. The husband is unable to satisfy it fully. He is willing to offer property in satisfaction of the entire claim the value of which is Rs. 2,000 only. The wife accepts the offer. Is this not a compromise ? Again what difference can it make in principle whether the amount of dower is fixed before hand in money or whether it is fixed by the value of the property given as dower. It is permissible in Muhammadan Law to fix no dower at the marriage and to fix it later. An instructive instance on the point just

(9) 29 Ind. Cas. 495; 37 A. 522; 13 A. L. J. 714.

now mentioned will be found in the decision of their Lordships of the Privy Council in the case of *Kamar-Un-Nissa Bibi* v. *Hussaini Bibi* (10).

It was argued by the learned Advocate for the appellant that the transaction in question was a sale within the meaning of s. 54 of the Transfer of Property Act, 1882, and it was further argued that if that was so the claim for pre-emption must prevail. In support of the first portion of the argument the following cases were cited:—

Asalat Fatima v. *Shambhu Dayal* (11) and *Abbas Ali* v. *Karim Bakhsh* (4). These cases established the need of a registered instrument for a transaction of a *hiba-bil ewaz*. The following cases were also cited to show that the doctrine of *marzul-maut* as understood in Muhammadan Law was not applicable to a transaction of *hiba-bil-ewaz*:—*Ghulam Mustafa* v. *Hurmat* (12) and *Esahuq Chowdhury* v. *Ahedanissa Bebi* (13). We have considered these cases carefully and we think that we will misguide ourselves if we decide the question involved in the present appeal in the light of the expressions of opinion used in those cases on matters wholly different in essence.

There is one feature of the definition of sale in s. 54 of the Transfer of Property Act, 1882, to which we might profitably advert and that is the meaning of the word 'price' as used therein. It was agreed at the Bar that that word in that definition meant "money." We also agree with that view. The question, therefore, is: Did Akhtar Husain obtain money or a promise of payment of money in consideration of the transfer of the *zemindari* share which he made to his wife? Our answer is in the negative. On the date of the deed of gift *Musammat* Zubaida Khatun had only a claim on a legal right to her dower debt against her husband, Akhtar Husain, and Akhtar Husain was under a corresponding legal obligation to satisfy it. In discharge of that obligation Akhtar Husain makes the transfer in question and *Musammat* Zubaida Khatun releases him of that obligation. A claim for a debt is a "chose in action" and has well-known legal incidents—See *Ryall* v. *Ramles* (14) and notes under it, in White and Tudor's Leading Cases Volume 1, page 98, eighth edition). Where does then payment of money or a promise to pay money come in this transaction? Nowhere. In *Lachhman Prasad* v. *Mir Fida Husain* (5) it was held that the "equity of redemption" was not "price" within the meaning of s. 54 of the Transfer of Property Act but that it was a "thing" within the meaning of s. 118 of the same Act. The Bench of the late Court of the Judicial Commissioner held in that case that where a person assigned his equity of redemption in consideration of the assignee transferring to him proprietary rights over certain other lands the transaction was an "exchange" and no right of pre-emption could be exercised with respect to it.

The course of decisions in the late Court has been uniform and we are not prepared to disturb it. The decision in the case of *Ram Prasad* v. *Rahat Bibi* (1) is directly in point and against the appellant. Previous decisions of that Court are to the same effect—See *Mir Abid Ali* v. *Arabunnissa* (6) and *Raj Kishore* v. *Raghunath Prasad* (7).

On behalf of the respondents our attention was drawn to two decisions of the late Punjab Chief Court also *Mir Zaman Khan* v. *Ghulam Fatima* (15) and *Ghulam Raza* v. *Sardar Khan* (16). Our opinion falls in line with the opinions expressed in these Punjab cases.

The result is that the appeal fails and is dismissed with costs.

N. H. *Appeal dismissed.*

(15) 88 P. R. 1901, 145 P. L. R. 1901.
(16) 86 P. R. 1902, 4 P. L. R. 1903.

(10) 3 A. 266; 3 Suth. P. C. J. 804; 4 Ind. Jur. 538; 4 Sar. P. C. J. 185; 2 Ind. Dec. (N. S.) 46 (P. C.).
(11) 11 Ind. Cas. 928; 14 O. C. 214
(12) 2 A. 854; 1 Ind. Dec. (N. S.) 1134.
(13) 28 Ind. Cas. 692; 42 C. 361; 19 C. W. N. 325.
(14) 1 Wh. & T. L. C. (8th Ed.) p. 98n.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 55 OF 1924.
July 23, 1925.
Present:—Mr. Justice Broadway and Mr. Justice Coldstream.
HUSSIAN BAKHSH—PLAINTIFF—APPELLANT
versus
SARBULAND—DEFENDANT—RESPONDENT.

Colonization of Government Lands (Punjab) Act (V of 1912), s. 19—Agreement by tenant to hold land jointly with another, validity of.

A Government tenant of a horse-breeding tenancy executed an agreement in favour of his brother reciting that he and his brother had jointly purchased the

mare required for the grant of land and paid for the grant out of joint funds and that the land would be considered their joint property in future.

Held, that in the absence of the consent of the Commissioner or other officer specified in s. 19 of the Colonization of Government Lands (Punjab) Act, the agreement was void under the provisions of that section and could not be enforced in a Civil Court. [p. 270, col. 1.]

First appeal from a decree of the Senior Subordinate Judge, Shahpur at Sargodha, dated the 30th November 1923.

Mr. *J. L. Kapur* for Dr. *Muhammad Alam*, and Lala *Maya Das*, for the Appellants.

Messrs. *M. L. Puri* and *Bal Kishan*, for the Respondents.

JUDGMENT.—This order will dispose of the two appeals, Nos. 55 and 422 of 1924. The circumstances out of which they arise are as follows:—

In or about the year 1903 Sarbuland, the respondent, was given by Government a horse breeding grant of two squares of land Nos. 21 and 30 in Chak No. 36 in Sargodha Tahsil. On 30th August 1912 Sarbuland executed a document reciting that his brother Hussain Bakhsh and he had jointly purchased the mare required for the grant of land and paid for the grant out of joint funds, that they were jointly liable for their debts, and that the land would be considered their joint property in future. The document stated that Hussain Bakhsh was to continue to cultivate the square No. 21 and Surbuland the other square. If Sarbuland resiled from this "agreement" he was to pay Rs. 5,000 to Hussain Bakhsh.

Sarbuland then proceeded to petition for insolvency on 2nd October 1913 and was adjudicated insolvent. In subsequent proceedings Hussain Bakhsh appears to have made several unsuccessful attempts to have one square, or its produce, released on the strength of the document of 1912. There was, it seems, some kind of arrangement between Sarbuland and his creditors leading to a discharge, for on 7th January 1922 a creditor applied to the Insolvency Court to have Sarbuland declared insolvent again. On 12th May 1922 Hussain Bakhsh filed objections to the attachment of one square. His petition was dismissed by the District Judge on 27th March 1923 by the following order:—

"He claims to be owner of one square out of two squares held by the insolvent. Hussain Bakhsh has sometimes put in a claim for the produce of the land as a tenant and had once asked to be admitted as a creditor to the extent of Rs. 5,000 if this claim to one square was not allowed, but my predecessors have not admitted his rights. I am not prepared to re open the question. He may have the question, if he likes, decided by a Civil Court. The application is accordingly rejected."

On 20th May 1923 Hussain Bakhsh filed a suit in the Court of the Senior Subordinate Judge at Sargodha against Sarbuland for a declaration that he had the same right in the square No. 21 as Sarbuland had in square No. 30, alleging that the grant had been paid for out of proceeds of ancestral land of himself and his brother and relying on the document executed by Sarbuland in 1912.

The plaint ended with the prayer that if Hussain Bakhsh was not found entitled to the rights claimed, a decree in respect of the rights found proved might be granted. This suit was dismissed on 30th November 1923, on the grounds, firstly, that the question of plaintiff's title had been finally decided against him under the provisions of s. 4 (2) of the Provincial Insolvency Act, 1920, by the order of the Insolvency Court of 27th March 1923, and secondly, that the provisions of the document of the 30th August 1912 were contrary to the law contained in s. 19 of the Colonization of Government Lands (Punjab) Act, V of 1912, by which any transfer or change made without the consent in writing of the Commissioner, or other officer empowered, of any of the rights or interest vested in a tenant by or under the Government Tenants (Punjab) Act, 1893 or the Act V of 1912 "shall be void." Against this order Hussain Bakhsh on 4th January 1924 filed the Appeal No. 55 of 1924 Three days later he filed the Appeal No. 422 of 1924 against the order of the District Judge, dated 27th Mrach 1923, along with an affidavit in support of his prayer for extension of time under s. 14 of the Indian Limitation Act.

We may take first the appeal against the District Judge's judgment of 30th November 1923.

Mr. J. L. Kapur for the appellant admits that the defendant is still a tenant, bound by the provisions of Act V of 1912, and that the agreement of 1912 was executed after the Act V of 1912 came into force, but contends that there is nothing in s. 19 of that Act to preclude the grant of a decree giving effect to the agreement of

1912, which can be binding only upon the parties to the suit and will not affect the rights of Government. He cites *Ali Mardan* v. *Bakar Khan* (1), *Hussain Khan* v. *Jahan Khan* (2) and *Nathu* v. *Allah Ditta* (3). The facts in these three cases were, however, clearly distinguishable from those of the present case. In *Ali Mardan* v. *Bakar Khan* (1) the question for decision was whether a Deputy Commissioner could move for the revision of a decree which contravened a provision of the Government Tenants (Punjab) Act III of 1893 (which has been superseded by the Colonization of Government Lands Act, 1912). It was held that there was no legal procedure providing for such revision.

The ruling *Hussain Khan* v. *Jahan Khan* (2) dealt with a case in which it was sought to enforce an agreement, similar to that relied upon here, after proprietary rights had been acquired in land granted under the provisions of Act III of 1893. Similarly in the case decided in *Nathu* v. *Allah Ditta* (3), the defendant, against whom an agreement to share a grant was enforced, had acquired proprietary rights and was no longer a mere tenant. It is further to be noticed that s. 19 of Act V of 1912 contains an express provision that transfers contrary to its other provisions shall he void, which is not to be found in the corresponding s. 8 of the Act of 1893. In view of s. 19 of the Act of 1912 we are of opinion, that the agreement of 30th August 1912, so far as it relates to rights vested in the respondent as a tenant grantee (and it is not here sought to have declared any rights which may not be so described) is void and its enforcement by declaration was rightly refused by the Trial Court. As the appeal must fail upon this finding, there is no necessity to discuss the second ground urged by Mr. Kapur relating to the effect of the order of 27th March 1923 in the insolvency proceedings. The Appeal No. 55 of 1924 is dismissed with costs.

It is admitted by Mr. Kapur that if Appeal No. 55 fails there remains no force in the other Appeal No. 422 of 1924, which is accordingly also dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 17 Ind. Cas. 680; 13 P. R. 1913; 7 P. W. R. 1913; 27 P. L. R. 1913.
(2) 18 Ind. Cas. 5; 58 P. R. 1913; 48 P. L. R. 1913; 36 P. W R. 1913
(3) 64 Ind. Cas. 18; 3 L. 92; 3 L. L. J. 505; (1922) A. I. R. (L) 287.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL No. 89 OF 1924.
March 16, 1925.
Present:—Mr. Justice Lentaigne.
MAUNG SEIN HTIN—PLAINTIFF—APPELLANT
versus
CHEE PAN NGAW—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s 23—Agreement not to bid at excise auction, legality of—Public policy—Money paid under agreement not to bid, whether can be recovered—Fraud, plea of—Burden of proof.

An agreement not to bid at an excise auction is not *per se* illegal or opposed to public policy. [p. 272, col.1]

Where a plaintiff alleging that he had paid certain money to the defendant on the latter agreeing not to bid against the plaintiff at an excise auction sues to recover the amount paid by him and the defendant pleads that the agreement between him and the plaintiff was illegal under s. 23 of the Contract Act, the burden lies on him to show that it was intended by the agreement to effect the purpose of the agreement by illegal means. It is not sufficient for him to have used indefinite expressions when demanding the money from the plaintiff and then to ask the Court to presume that he had intended to act fraudulently or otherwise in contravention of any law If he avoids pleading his own fraud he cannot ask the Court to presume that he had fraudulent intentions of an unspecified or an indefinite kind without his advancing evidence that such was the case. To refuse relief to the plaintiff under such circumstances would be to encourage fraud and trickery of a different kind by a person who had done nothing illegal except possibly to defraud the plaintiff with whom he entered into an agreement of an indefinite kind, with no intention of doing anything except to fraudulently keep the money in any event. [p 272, cols. 1 & 2.]

Second appeal against a decree of the District Court, Ma-ubin, confirming that of the Sub-Divisional Court, Ma-ubin.

Mr. *Ochme*, for the Appellant.

Mr. *Young*, for the Respondent.

JUDGMENT.—This is a second appeal against the judgment and decree of the District Court of Ma-ubin confirming the decree of the Sub-Divisional Court of Ma-ubin, and the only point for determination is whether the decree is invalid by reason of the fact that it is alleged by the defendant that the object of the alleged agreement was illegal, and that the contract sued on was void and contrary to public policy.

The plaint alleged that the plaintiff is the owner of the *Hlawza* shop at Ma-ubin Town; that first defendant is an Honorary Magistrate at Ma-ubin, and a *Lugyi* of the Chinese Association and has influence over the Chinese Community; that second defendant is a teacher of the Chinese school in Rangoon, and is a person having influence over the Chinese people; that in the year

1922 plaintiff purchased the licenses for Ma-ubin and Mezali *Hlawza* shops, and joined as partner in the Yele, Kanwehabo and Payagyidaung shops; that the licenses for the said five shops were proclaimed for sale by auction in the Deputy Commissioner's Office, Ma-ubin, for the year 1923-24 on the 18th April 1923; that on the 17th April 1923 the first and second defendants came to the plaintiff's house at Ma-ubin and asked for payment of a total sum of Rs. 4,000—made up of Rs. 2,000 for Ma-ubin *Hlawza* shop, Rs. 1,000 for Mezali shop, Rs. 500 for Payagyidaung shop and Rs. 500 for Yele shop; and said that they would not bid for the said five shops; that they would prevent others from bidding for the same, and that they would return the money, if there was no reduction in the revenue, and if there was an increase of revenue as other persons were bidding for the same, and as plaintiff believed the statements made by the defendants, the plaintiff gave Rs. 4,000 to the defendants; that on the 18th April 1923 when there was a sale by auction other persons came and bid for the shops in question and plaintiff was about to be deprived of the shops, and, therefore, he had to purchase licenses for some shops at a reduced rate and for some shops at an increased rate of revenue; that the rates were as follows:—

Ma-ubin Shop for 1923-24 Rs. 22,100 but for 1922-23 Rs. 20,000 (an increase of Rs. 2,100);

Mezali Shop for 1923-24 Rs. 3,050 but for 1922-23 Rs. 2,800 (an increase of Rs. 250);

Yele Shop for 1923-24 Rs. 6,250 but for 1922-23 Rs. 7,050 (a decrease of Rs. 800);

Kanwekabo Shop for 1923-24, the plaintiff did not obtain the license.

Payagyidaung Shop for 1923-24 Rs 5,000 but for 1922-23 Rs. 3,000 (an increase of Rs. 2,000);

That according to the agreement made by the plaintiff and the defendants, a demand for payment of Rs. 3,500 was made after leaving aside Rs. 500 for Yele Shop; that first defendant returned Rs. 500 promising that the balance of Rs. 3,000 would be paid when second defendant came back from Pyapon; that on several occasions defendants were asked to pay Rs. 3,000 according to the agreement, but in vain; and the prayer was for recovery of Rs. 3,000.

The written statement of the first defendant denied the alleged agreement and denied the receipt of Rs. 4,000 from the plaintiff and denied the alleged re-payment of Rs. 500 and promise to pay the balance; and the defendant contended that the suit is not maintainable and the money is not recoverable as it is paid in consideration of the promise to sacrifice the chance of pursuing one's own trade and to deter other competitors from [illegible] the plaintiffs at the Government *Hlawza* License Auction Sale, thus inflicting injury on the public purse, excluding one of the parties from competitions entirely at a sacrifice and restraining another from pursuing lawful trade, thereby rendering the said agreement void, being fraudulent, unlawful and opposed to public policy; that the defendant further contended that the plaintiff sued the defendant just to enable plaintiff to defend a criminal charge of defamation and criminal intimidation instituted by the defendant in a specified prosecution. The latter had reference to a prosecution instituted by the defendant against the plaintiff for calling him "a thief" in connection with this transaction. The second defendant raised similar legal defences and also denied the allegations of fact.

Both the lower Courts have decided all issues of fact in favour of the plaintiff. The learned Sub-Divisional Judge also decided the legal issue as to "whether the agreement was fraudulent, unlawful or opposed to public policy" in favour of the plaintiff. He disregarded two old decisions in Upper Burma and followed a more recent decision of a Bench of the late Chief Court in the case of *Nagappa Chetty* v. *Ah Foke* (1), where the plaintiff was allowed to recover a sum of money which had been deposited with a Chetty to be paid to another Chinaman if certain *Hlawza* licenses were sold below a certain price and on agreement that the defendants were not to bid for certain licenses. That decision was based on certain English decisions and also followed the Privy Council decision in *Mahomed Mira Ravuther* v *Savvasi Vijaya Raghunadha* (2). The learned Trial Judge held that the facts of the present case are very similar to the facts of the case in the Chief Court, and he granted the plaintiff a decree with costs.

On first appeal the learned District Judge

(1) 56 Ind. Cas. 963; 12 B. L. T. 241.
(2) 23 M. 227; 27 I. A. 17; 4 C. W. N. 228; 10 M. L. J. 1; 2 Bom. L. R. 640; 7 Sar. P. C. J. 661; 8 Ind. Dec. (N. s.) 561 (P. C.).

held that there was not a tittle of evidence that Government had suffered any loss of revenue by the arrangement made between the parties; and that it is evident that defendants did not or could not induce the other intending buyers to desist from outbidding the plaintiff, and that there was no combination between the bidders to curtail the bidding; and that unless and until it was established that the arrangement made between them and the plaintiff was an artifice to defraud Government revenue, he found no reason for allowing them to take advantage of their own fraud, thereby enabling them to pocket a sum of Rs. 3,000, and he added that he was in full agreement with the learned Sub-Divisional Judge in following the decision in *P. M. A. Nagappa Chettiar* v. *Ah Foke* (1).

The present second appeal is against that decision. It is admitted that an agreement not to bid is not illegal, but it is urged that the case is not covered by the decisions of the Privy Council and of the late Chief Court, because it involves the further agreement of defendants that they would prevent others from bidding. I find, however, that no name of any other person was mentioned as a person to be so prevented and that no indication is given as to what defendants were to do, and that it is not clear what the defendants really contemplated when they used the original Chinese or Burmese expressions which have been so translated.

In the case of *Mahomed Mira Ravuther* v. *Savvasi Vijaya Raghunadha* (2), their Lordships of the Privy Council cited their previous decision that "all purchasers are bound to abstain from breaches of trust and from intimidation or falsehood in keeping off bidders" and in a later passage they quote the finding of the High Court, "The means by which competition was discouraged at the auction were clearly of an innocent character. In employing them, as in making the agreement with the *zemindar*, the purchaser did not go beyond the limit of what he was entitled to do in order to make a good bargain"; and they expressed the view that such findings were in accordance with the view pronounced by the Board.

I think that if the defendants in this case intended to show that the contract was illegal under s. 23 of the Indian Contract Act, 1872, the burden lay on them to show clearly that it was intended to effect the purpose by illegal means, and that it is not sufficient for them to have used indefinite expressions when demanding the money from the plaintiff and then to ask the Court to presume that they, defendants, had intended to act fraudulently, illegally or otherwise in contravention of any law. The defendants avoid pleading their own fraud, but they ask the Court to presume that they, the defendants, had fraudulent intentions of an unspecified or indefinite kind without their advancing any evidence that such was the case. To refuse plaintiff relief under such circumstances would be to encourage fraud and trickery of a different kind by persons who intended nothing illegal except possibly to defraud the person with whom they were entering into agreements of an indefinite kind, with no intention of doing anything except to fraudulently keep the money in any event.

For the above reasons, I see no reason, to disagree with the decisions of the lower Courts, and I dismiss this second appeal with costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION No. 219 OF 1925.

June 26, 1925.

Present:—Sir Shadi Lal, KT., Chief Justice.

DITTU RAM—PLAINTIFF—PETITIONER

versus

NAWAB—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 164—Civil Procedure Code (Act V of 1908), O. V, r. 20, O. IX, r. 13—Ex parte *decree, application to set aside—Service of summons—Substituted service—Limitation—Burden of proof.*

Article 164 of Sch. I to the Limitation Act prescribes a period of thirty days for an application to set aside an *ex parte* decree, and the *terminus a quo* is the date of the decree, or, where the summons was not duly served, the date on which the applicant has knowledge of the decree. [p. 273, col. 1.]

In the case of substituted service effected by order of the Court, the summons must be deemed to be duly served for the purpose of Art. 164 of Sch. I to the Limitation Act, even though it does not in fact come to the defendant's knowledge. [*ibid.*]

Where the summons is not duly served on the defendant, the *terminus a quo* for an application to set aside an *ex parte* decree is the date on which the defendant has knowledge of the decree, and the burden lies upon him to show that his application is within time. [*ibid.*]

Petition, under s. 44 of Act IX of 1919, for revision of an order of the Subordinate Judge, Fourth Class, Jhang, dated the 10th

February 1925, reversing that of the Munsif, First Class, Jhang, dated the 31st October 1917.

Mr. *M. L. Puri*, for the Petitioner.

Malik *Ram Lal*, for the Respondent.

JUDGMENT.—On the 31st of October 1917 an *ex parte* decree was passed against the defendant, and it was not until the 25th of August 1924 (nearly seven years after the date of the *ex parte* decree) that the defendant made an application for an order to set aside the *ex parte* decree. The Subordinate Judge has granted the application without considering the question whether the application was or was not barred by time.

Now, Art. 164 of the Indian Limitation Act prescribes a period of thirty days for an application of this character, and the *terminus a quo* is the date of the decree, or, where the summons was not duly served, the date on which the applicant has knowledge of the decree. Now, the learned Judge, who passed the *ex parte* decree, had after satisfying himself that the defendant was keeping out of the way for the purpose of avoiding service directed that substituted service should be effected as prescribed by O. V, r 20, C. P. C., and this order was duly carried out. Sub-rule (2) of that rule prescribes that service substituted by order of the Court shall be as effectual as it had been made on the defendant personally. There can be no doubt that in the case of substituted service a summons is duly served for the purpose of Art. 164 even though it does not in fact come to the defendant's knowledge; and that time runs from the date of the decree. The application for setting aside the *ex parte* decree was made after the expiry of thirty days from the date of the decree, and was clearly barred by time.

Assuming, for the sake of argument, that the summons was not duly served on the defendant, the *terminus a quo* is the date on which the defendant has knowledge of the decree and it is clearly for him to show that his application was within time. Now, the plaintiff made several applications for executing his decree, and there is abundant evidence, both oral and circumstantial, to the effect that the defendant had knowledge of the decree more than thirty days before the date on which he made his application. The application is hopelessly barred by time, and the Subordinate Judge was entirely wrong in re-opening the case after the expiry of several years on the ground that "as ordinarily the suits should be dicided on the merits a lenient attitude has to be taken in cases where the defendant is not personally served."

For the aforesaid reasons I accept the application for revision with costs and discharge the order of the lower Court setting aside the decree.

Z. K. *Application accepted.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST APPEAL NO. 1955 OF 1924.

January 20, 1925.

Present:—Mr. Justice Campbell.

THE FIRM HAZURA MAL-LAL CHAND THROUGH LAL CHAND—PLAINTIFFS—APPELLANTS

versus

RANG ILAHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 20—Suit by commission agent—Jurisdiction.

A suit by a commission agent against his principal for balance due on accounts can be entertained by a Court having jurisdiction at the place where, in compliance with the principal's orders, the commission is executed [p 274, col 1.]

Motilal Pratabchand v. *Surajmal Joharmal*, 30 B. 167, 6 Bom L R 1038, explained.

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Montgomery, dated the 9th July 1924.

Dewan *Mehr Chand*, for the Appellants.

JUDGMENT.—The two Appeals Nos. 1955 and 1956 of 1924 can be disposed of conveniently in one judgment.

There were two suits by different plaintiffs against the same defendants Rang Ilahi and others, alleged to be the former proprietors of a defunct firm in Kasur. The plaintiffs in one case were Ruchi Ram-Khan Chand of Kamalia in the Montgomery District and in the other Hazura Mal-Lal Chand of Okara in the same District. In each case the plaintiffs said that they were employed by the late firm of the defendants as commission agents to purchase in the Montgomery District cotton, grain, etc., and to despatch it to Kasur. In one case the plaintiffs alleged thata deposit of Rs. 200 had been made with them and paid at their shop at Kamalia by the defendants and in the other case a similar deposit of Rs. 2,000

was stated to have been made. Both suits were for a balance due on accounts.

One of the defendants admitted in each case the dealings alleged by the plaintiffs and did not deny the deposits but he also pleaded that the Montgomery Courts had no jurisdiction. The learned Senior Subordinate Judge proceeded to try this issue purely on the question of the place at which payment by the Kasur firm was to have been made. After discussing certain evidence he concluded that there had been a special agreement in each case that payment to the plaintiffs was to be made at Kasur in the Lahore District, the home of the defendants, and from this fact he proceeded to lay down a rule "in cases between commission agents and principals when money is specifically agreed to be paid at a place the claims are to be entertained only by those Courts having jurisdiction at that place." As authority for this proposition he has relied upon *Motilal Pratabchand* v. *Surajmal Joharmal*, (1).

Section 20, however, of the C. P. C. enacts that a suit may be instituted in a Court within the local limits of whose jurisdiction the cause of action wholly or in part arises. The expression "cause of action" is defined in *Motilal Pratabchand* v. *Surajmal Joharmal* (1) the ruling which the learned Senior Subordinate Judge has cited, as the bundle of facts which it is necessary for the plaintiff to prove before he can succeed in his suit. The learned Judge who decided that case after laying down this definition proceeded to explain what the bundle of facts must contain in a suit between a principal and commission agent. In that case the principal was the plaintiff and the commission agent was the defendant. It was explained that the plaintiff had to establish that he gave certain instructions to the defendant as his commission agent, that those instructions duly reached the defendant, that the defendant executed the commission with which he was charged, that the defendant was bound to render an account, etc:.

In the present case the plaintiffs had to prove *inter alia* that they received a commission from the defendants and that they executed it. That commission was the purchase of cotton, etc., in the Montgomery District and their alleged purchase of these goods in compliance with the defendants' orders was, therefore, part of their cause of action. What the learned Senior Subordinate Judge has really been at pains to do is to demonstrate that the suits could also be brought in a Court in the Lahore District. To establish this fact does not lead to the conclusion that the Court of no other district has jurisdiction, for it is a common phenomenon for a suit to be capable of institution in more than one district. The learned Senior Subordinate Judge's own Court has also jurisdiction since the alleged causes of action arose partly in the Montgomery District.

I accept both appeals with costs and set aside the orders returning the plaints for presentation to the proper Court. They will be received back by the learned Senior Subordinate Judge and the suits be proceeded with.

N. H. *Appeals accepted.*

(1) 30 B. 167; 6 Bom. L. R. 1038.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

July 27, 1925.

Present:—Lord Shaw, Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.

Musammat NAG KUER—APPELLANT

versus

SHAM LAL SAHU AND OTHERS—RESPONDENTS.

Partnership, dissolution of—Accounts, mode of—Partnership moneys appropriated by one partner—Procedure.

Where a partner takes moneys of the parntership out of the partnership business and appropriates them to his own use, he must, on accounts being taken, be charged with the sums withdrawn by him from the partnership assets in his hands with interest thereon from the dates of withdrawal. [p. 277, col. 2]

In such a case where it is found that the balance of the cash capital of the partnership is not sufficient to satisfy the claims of the remaining partners with regard to the contributions made by them towards capital, the proper procedure is to appoint a Receiver of partnership assets, to direct him to proceed with the collections of the outstanding debts of the partnership and to declare that such receipts should be employed first towards the discharge of all outside liabilities, costs and expenses and then towards the satisfaction of the respective claims on capital account of the partners. It is not proper in such a case to credit the partner who has appropriated the partnership moneys with the receipt of such moneys and to require other partners to accept book-debts due to the partnership in lieu of their claims on the capital account. [*ibid.*]

Messrs. *A. M. Dunne, K. C.*, and *W. Wallach*, for the Appellant.

Mr. *S. Hyam*, for the Respondents.

JUDGMENT.

Lord Blanesburgh.—The question now before the Board arises in the course of a suit for dissolution of a partnership firm. The suit has been pending in the first Court of Gaya since the 2nd February 1915.

The firm's business was that of tobacco manufacturers, and at the commencement of the suit the partners in it were the plaintiff, Bishun Ram, entitled to a 10 anna share of profits, and the defendant, Bundi Lall, entitled to a 6 anna share There were four branches of the business in different parts of India. The partnership was governed by a deed of the 2nd August 1905 under which the management was vested in Bishun Ram, and there was a stipulation for annual accounts. Interest on capital contributed was allowed at 9 per cent. and each partner was at liberty to add his profits to his capital if he so desired.

Out of the profits of the business certain house properties had been from time to time purchased by the firm, and it seems that these were left in the several possession of the partners according to their respective share in profits. Probably for this reason, possibly also because Bundi Lall's proportionate interest in capital was by this time much greater than his interest in profits, a serious difference arose in the course of the proceedings upon the question whether in the final division these properties were to be specifically divided between the partners in the proportion of 10 to 6, or whether, like other partnership assets, they could be made available first to satisfy the partners' claims on capital account. That question still lies at the root of the present appeal, but so far as it turns upon the construction of the partnership deed their Lordships accept the view taken of it by the High Court at Patna. They are satisfied that thereunder these houses are partnership assets burdened with the liabilities of the partnership whether to outsiders or to the partners. It is only after all such liabilities have been adjusted and in full—with recourse, if necessary, to the houses for the purpose—that they, or such of them as then remain available, will be distributable as surplus assets between the partners severally and in proportion to their shares in profits. Their Lordships, however, do not fail to recognise that it was a desire shared by both partners that these houses should be the last assets to be resorted to for discharge of partnership liabilities, and they see in a provision of the preliminary decree in the suit to which, with some observations as to its true effect, they will call attention in the sequel, some fulfilment of that desire.

The accounts between the partners were not taken annually. The last one taken and adjusted before action covered the period prior to the 20th October, 1911 From that account it appeared that there had been contributed by the plaintiff to the partnership on capital account Rs. 43,039 2 9, and by the defendant Rs 40,789-0-1½. The position in this respect changed further in favour of the defendant before the commencement of the suit. It now appears that by that time his capital claims exceeded in amount those of the plaintiff on any view of the position.

The suit, as has been said, was commenced on the 2nd February 1915. On the 7th April 1915, Bundi Lall, the defendant, died and the suit was thereafter continued against his legal representatives, the present respondents. To them their Lordships will refer as the defendants.

In March of the following year the defendants applied for the appointment of an independant Receiver. The Court on that occasion refused to displace the plaintiff from his position of management under the partnership deed, but appointed him to be Receiver and manager *pendente lite* without remuneration and without security, and directed him to submit his accounts every month.

The responsibilities of his office lay lightly upon the plaintiff, and many of the subsequent difficulties in the case, including that with which their Lordships are now concerned, are attributable to two unauthorised, and so far as appears inexcusable, acts on his part committed while Receiver. Without leave of the Court or consent of parties he withdrew from the partnership funds in his hands as such Receiver, first, a sum of Rs. 22,049 4-7½, and later, one of Rs. 5,500, and although subsequently ordered on several occasions to pay over these moneys, he failed, except to the extent of Rs. 2,000, to do so, with the result that Rs. 25,549 4-7½—now an adjusted balance of Rs. 24,345—if not long ago applied to his own purposes, has remained in his hands, or since his death, which has now

occurred, in the hands of his legal representatives, the present appellants.

Their Lordships desire at once to associate themselves with the observations upon these withdrawals made by the learned Judges of the Court at Patna in the judgment here under appeal. Like them, their Lordships see in the comparative inaction of the first Court of Gaya, when the plaintiff's grave misconduct was brought to its notice, a failure to appreciate the extreme seriousness of what the plaintiff had done. Their Lordships see indications of the same want of appreciation in the readiness of that Court in later orders to condone the plaintiff's unauthorised retentions by treating them, without even any charge for interest, as being in account with the defendants both regular and final. In truth, the action of the plaintiff in this matter, fully acknowledged and neither explained nor excused, amounted to a breach of duty as serious in character as any that can be committed by an officer of the Court in his position. It ought not to have been overlooked to any degree by any Court jealous of its responsibility for the actions of its own officers.

The suit came on for trial in August, 1916. Many issues were framed and fought, but no further reference thereto need now be made. In the result, on the 15th August, 1916, the then Subordinate Judge of Gaya made a preliminary decree declaring the respective interests in profits of the partners as above stated, dissolving the partnership as from the 7th April, 1915, the date of the defendant, Bundi Lall's death, appointing Balin Durga Prasad in place of the plaintiff to "be the Receiver of the partnership estate and effects in this suit and to get in all the outstanding book debts and claims of the partnership," directing the usual dissolution accounts, that of the dealings and transactions between the partners to be taken as from the 20th October, 1911, the date of the account already mentioned. The decree then proceeded as follows (this is the passage already above referred to):

"It is further ordered that the goodwill of business heretofore carried on by the parties and the stock-in-trade be sold on the premises. Saving the houses and landed property for being divided as directed above"—that is, in the proportion of 10 to 6.

And a Commissioner was appointed to take and certify the accounts.

Notwithstanding the direction given by this order to the Receiver to get in the outstanding book debts of the partnership, no steps were apparently taken by him to do so, and the Commissioner in his report, made after prolonged enquiry and dated the 9th February, 1918, found the total assets of the partnership, excluding house property, to amount to Rs. 67,641-6-1½, consisting as to more than Rs. 40,000 of book debts still outstanding. The house properties—19 in number—were severally valued by the Commissioner at sums amounting in all to Rs. 57,300, and on the footing that the other assets of the partnership as above stated would suffice to satisfy all its liabilities both to outsiders and to the partners on capital account, he proposed to partition these 19 properties between the partners or their representatives in proportion to their shares in profits, awarding to the plaintiff properties valued at Rs. 35,812-8 and to the defendants properties valued at Rs. 21,487-8.

In arriving at the figure of Rs. 67,641-6-1½ as the value of the remaining assets of the firm, the Commissioner included nothing in respect of the sums withdrawn by the plaintiff as above stated. It did not apparently occur to him to treat these sums as a partnership asset in the plaintiff's hands for which, with or without interest, he was accountable to the firm. He regarded them as proper receipts in respect of capital, merely operating a reduction *pro tanto* of his claim against the assets on that account.

And the Subordinate Judge of the first Court of Gaya, by his final decree of the 17th August, 1917, which it is the purpose of the present appeal to have restored, confirmed the Commissioner's report. He, too, treating the sum retained by the plaintiff as a receipt on account of capital, provided for discharge of the balance a sum which as, subsequently adjusted, was Rs. 9,713-2-0 by directing that Rs. 3,791-11-10½ was to be paid him by the Receiver out of cash in his hands and Rs. 5,921 6-1½ by the appropriation to him of book debts of that amount due to the firm. To the defendants, on the other hand, the learned Judge allocated, in respect of their ascertained capital in the business a net amount, as subsequently corrected and adjusted, of Rs. 43,903-9-1½ by directing that Rs. 9,523-2-0 was to be paid them by the Receiver in cash, while the residue of Rs. 34,380-7-1½ was to be satisfied by the appropriation to

them of the remaining uncollected book debts of that nominal value.

Against the order of the Subordinate Judge the defendants appealed to the High Court of Judicature at Patna. Their principal grievance—that with which alone their Lordships are now concerned—was that while the plaintiff had been permitted to retain cash in respect of over Rs. 24,000 of his capital, he was now allowed in respect of the balance a further sum of over Rs. 3,700 in cash and was required to accept no more than Rs. 5,921 of his entire claim in book debts, the defendants were, in respect of as much as Rs. 43,903 of their capital, required to accept book debts, which as they asserted were "bad, mostly barred, and not at all recoverable."

The High Court on this point agreed with the defendants. The learned Judges of that Court in their judgment of the 4th May, 1921, held that as the plaintiff had received in cash a sum which they adjusted as being Rs. 24,345, the defendants should receive a similar amount in cash before there was any further receipt by the plaintiff, and they accordingly made a decree which contained the following clause:—

"The first direction must be to pay to the defendants towards the amount due to them as capital Rs. 24,345 in cash, if there is cash in hand to that amount, and, if not, in cash and house property. The balance of his capital still due to the plaintiff and the balance then due to the defendants will be paid in house property. The plaintiff will get 10/16 and the defendant will get 6/16 of the house properties remaining after re-payment of capital and of the debts due to the firm."

The last sentence in this clause is not intelligible to their Lordships. There must, they think, be a typist's error somewhere. While, however, this seems to be so, their Lordships cannot escape the impression—and it is convenient to indicate it now—that the learned Judges of the High Court, while fully conscious that there were uncollected book debts (that fact is referred to in the oral judgment of Ross, J.,—did not, apparently any more than did the Subordinate Judge, intend that these should be collected and applied so far as they would go in discharging partnership liabilities. Their intention apparently was to throw any otherwise unsatisfied portion of these, in the first instance, at all events, upon the house properties. To this point their Lordships will recur. Against that order of the High Court the legal representatives of the plaintiff—he is now dead—now appeal. They insist that the order of the Subordinate Judge of the 17th August, 1917, should be restored. They contend that there was ample jurisdiction to require the defendants to accept in satisfaction of their capital claims uncollected book-debts of any amount, and they say that even if this be not so, still by the deed of partnership, and if not then by the preliminary decree in the suit from which there has been no appeal, the house property is destined for division, as it was in the result divided by the Commissioner and Subordinate Judge irrespective of the question whether the claims of the partners in respect of capital had been so satisfied or not.

Their Lordships cannot agree. In their judgment it was entirely improper to distribute the assets in the way directed by the Subordinate Judge. The strict order, they think, would have been one charging the plaintiff with the sums withdrawn by him as being partnership assets in his hands with, they should have thought, at least mercantile interest from the dates of withdrawal. No claim has, however, been made against the plaintiff for interest, and their Lordships say no more about that. A strict order would then have directed the Receiver to proceed with the collection of the outstanding debts in obedience to the order of the 15th August, 1916, and would have declared that, subject to the discharge of all outside liabilities, costs and expenses, the sum so realized ought to be applied as far as it would extend in satisfaction of the respective claims on capital account of the plaintiff and defendants, any deficiency being made good out of the house properties as now directed by the High Court. As their Lordships have already said, they can see in the partnership deed no foundation for the appellant's present contention, while as to the direction in the preliminary decree, it amounted to no more than this: that the house properties were the last of the assets to be resorted to for the discharge of partnership liabilities to the intent that they might so far as was possible remain for appropriation between the partners in specie and as profits.

While, however, their Lordships can see no foundation for the appellant's appeal on the grounds on which it was pressed, they think, for reasons already indicated, that

the clause in the order appealed from, above set forth, does not give full effect to the preliminary decree, and that clause should, in their judgment, be somewhat varied. They think the clause should read as follows (their Lordships retain the phraseology of the High Court):—

"The first direction must be to the Receiver to get in, so far as they now subsist, the outstanding book-debts as directed by the order of the 15th August, 1916, with full power to him to agree for the sale of any particular debt or debts to either of the parties for such consideration as he shall in each case consider adequate. The next direction must be to pay to the defendants towards the amount due to them as capital Rs. 24,345 in cash if the cash so collected, and in hand and available for the purpose is sufficient, and if not, then in cash and house property. The balance of his capital still due to the plaintiff and the balance then due to the defendants will be paid in cash or house property, or partly in one way and partly in the other. The plaintiff will get 10/16th and the defendants 6/16th of the house property remaining after re-payment of the capital and all other liabilities of the firm."

Their Lordships think that, with those variations in the clause referred to, the decree of the High Court should be affirmed. The variations, in their judgment, ought not to affect the costs of this appeal. These the appellant must pay.

Their Lordships will humbly advise His Majesty accordingly.

Z K. *Decree affirmed.*

Solicitor for the Appellant: —Mr. *Hy. S. H. Polak.*

Solicitors for the Respondents:—Messrs. *Barrow, Rogers & Nevill.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 386 OF 1919.

December 23, 1924.

Present:—Justice Sir Henry Scott-Smith, KT., and Mr. Justice Fforde.

Musammat MURAD BIBI AND ANOTHER —DEFENDANTS—APPELLANTS

versus

AMIR HAMZA AND ANOTHER—PLAINTIFFS —RESPONDENTS.

Custom - Inheritance — Daughters v. Collaterals— Muttazai Pathans of Basti Mithu Sahib in Jullundur District.

Among Muttazai Pathans of *Basti* Mithu Sahib, a suburb of Jullundur City, a daughter does not inherit in the presence of brothers or near collaterals of the last male owner. [p 282, col. 2.]

Civil Appeal No. 1404 of 1899 dated 27th November 1905 and *Nizam Din v. Fauja*, 68 P. R 1889, referred to.

The Muttazai Pathans of *Basti* Mithu Sahib are presumably governed by agricultural custom, and the onus to prove that a daughter inherits in the presence of brothers or near collaterals, lies on the daughter. [p 280, col. 1.]

First appeal from a decree of the Senior Subordinate Judge, Jullundur, dated the 30th November 1918.

Lala *Badri Das*, R. B., and Lala *Balwant Rai*, for the Appellants.

Bakhshi *Tek Chand* and Maulvi *Ghulam Mohy-ud-Din Khan*, for the Respondent.

JUDGMENT.—Muhammad Hussain and Khadim Hussain Muttazai Pathans of *Basti* Mithu Sahib a suburb of Jullundur City were two brothers. Muhammad Hussain died on the 6th of May 1902, leaving a widow *Musammat* Murad Bibi and a daughter *Musammat* Fatima, defendants-appellants, as well as two other daughters. A dispute arose as to succession to his property, and Khadim Husain set up a Will in his favour dated the 6th of May 1902. Eventually there was a civil suit in which it was held that the Will was not genuine. Subsequently *Musammat* Murad Bibi brought a suit and got a decree against her brother-in law for joint possession of her husband's share in the family property, but as she could not get full enjoyment of her share she applied for partition. The Revenue Courts refused partition and *Musammat* Murad Bibi then, on the 15th of May 1916, instituted a civil suit for a declaration that she is entitled to partition of her share. With her was associated as plaintiff *Musammat* Fatima to whom she had made a gift of one-third of her share. The lower Court gave the ladies a decree and Khadim Hussain has filed an appeal in this Court, No. 433 of 1919. On the 5th of July 1917 Khadim Hussain filed a suit for a declaration to the effect that the deed of gift dated the 19th of August 1914 executed by *Musammat* Murad Bibi in favour of her daughter *Musammat* Fatima should not effect his reversionary rights after the death or re marriage of the donor. The lower Court disposed of this suit and that brought by the ladies above referred to together, and gave the plaintiff a decree for the declaration sought. From this decree *Musammat* Murad Bibi and *Musammat* Fatima have brought the present

appeal. The Court in disposing of both the suits directed that the parties should bear their own costs. In Khadim Hussain's suit *Musammat* Murad Bibi and *Musammat* Fatima have filed an appeal (No. 385 of 1919) as regards their costs. We proceed in this judgment to dispose of the ladies' appeal against the lower Court's declaratory decree in favour of Khadim Hussain to the effect that the gift of *Musammat* Murad Bibi should not affect his reversionary rights.

In the suit brought by Khadim Hussain he alleged as regards part of the property that it did not belong to the widow at all. This, however, was decided against him and the point has not been raised in appeal before us. The issues in the suit brought by *Musammat* Murad Bibi and *Musammat* Fatima were framed on the 18th of August 1916, and will be found on page 26 of Paper Book A The second issue was whether the gift made by plaintiff No. 1 to plaintiff No. 2 is valid, the onus being laid upon the plaintiffs. In the case brought by Khadim Hussain issues were struck on the 21st August 1917, see page 12 of Paper Book D and the fifth and sixth issues were as follows :—

5. "Has the plaintiff *locus standi* to contest the gift? onus on the plaintiff," and,

6. "If so, is the gift lawful ? onus on the defendants.

Subsequently on the 5th of October 1917 these issues were altered and then read as follows :—

5 "Has not the plaintiff *locus standi* to contest the gift? onus on the defendants" and,

6. "Is the gift lawful? onus on the defendants."

Evidence in both cases was heard together and *Musammat* Murad Bibi and *Musammat* Fatima produced their evidence first. At the time when the issues in Khadim Hassain's case were amended on the 5th of October 1917, only one witness on the other side had been examined. From that time on the onus of proving the validity of the gift was placed upon *Musammat* Murad Bibi and *Musammat* Fatima. Mr. Badri Das urges that the onus of proving that the gift was invalid should have been on Khadim Hussain. In support of this contention he urges that the parties are Muttazai Pathans and live in a suburb of Jullundur City, and that they migrated to this part of the country from the Peshawar District six generations ago, and that *prima facie* there is no presumption that they are governed by agricultural custom. He also states that they do not themselves cultivate land and that they are called *Pirzadas*. Now, in the lower Court it was never contended that the parties did not themselves cultivate their lands, or that they followed any other pursuit than that of agriculture. Nor was any stress laid on the fact that they had migrated from the Peshawar District; nor was it ever alleged that they were [illegible] y Muhammadan Law. Bakhshi [illegible], who appeared for Khadim Hussain, referred us to the written pleas of the ladies at pages 7-9 of Paper Book D, where in para 3, it is stated that according to the custom of the parties' tribe, the plaintiff has no right to succeed to the property of *Musammat* Murad Bibi whose reversionary heirs are her daughters. Again in para. 5 it is stated that according to the custom of the parties' tribe defendant No. 1, *Musammat* Murad Bibi, is full owner and is competent to alienate her property, and that even if no gift were made, still defendant No 2, *Musammat* Fatima, and her sister would succeed to any property that would be left by defendant No. 1. Further, it is to be noted that *Musammat* Murad Bibi is in possession of her husband's share of the family property in accordance with general custom. If Muhammadan Law had applied she would have inherited $\frac{1}{8}$th share only, while her daughters would have taken $\frac{3}{4}$ths.

The parties are residents of *Basti* Mithu Sahib, a suburb of Jullundur town, and the judgment of the Division Bench of the Chief Court dated the 27th of November 1905 in Civil Appeal No. 1404 of 1899 is very important in this connection. It is printed at pages 387-395 of Paper Book B. The dispute was between members of the same family who are parties in the present case, Khadim Hussian being himself one of the plaintiffs. At page 389 in the judgment it is stated :— "In spite of their foreign origin and first settlemant in the *Bastis* as horse-dealers there is nothing at present to distinguish these Pathan agriculturists from the surrounding agricultural tribes. They have lived by agriculture in groups from generations and I, therefore, would agree with the Divisional Judge that Ghulam Hussain deceased was an agriculturist, and further that he had not an unrestricted power of alienation. The onus, therefore,

lay on the defendants to show that Ghulam Hussain was competent by custom to make the gift in dispute." Again, in Johnstone J.'s judgment at page 395*, the following passage occurs:—"I agree that these Pathans, though they may have come to Jullundur as horse dealers, yet inasmuch as they have settled down as a compact village community and have apparently for six or seven generations lived by agriculture can fairly be styled agriculturists. I also agree that in view of what has become their hereditary occupation, *viz.*, agriculture, and also in view of the fact that the village is situated in the midst of the population following the rules in regard to succession to ancestral estate and alienation thereof, which are known as Punjab agricultural custom, it can reasonably be presumed that the powers of alienation of ancestral landed estate possessed by a sonless proprietor in this village are restricted." It is true that in that decision the Judges left out of consideration cases of gifts to daughters on the ground that such gifts were specially favoured amongst endogamous Muhammadan tribes, but the decision is important as showing that the Judges considered that the members of this tribe were agriculturists and generally followed the customs of agriculturists.

In this connection also the judgments of the Division Bench of the Chief Court in the case of *Ata Muhammad Khan* v. *Jiwani* (1) may be referred to. In that case the parties were Barki Sayyads of *Basti* Pir Dad Khan, a neighbouring *Basti* to that to which the parties to the present suit belong, and it was held that according to the rule of the customary law generally applicable to agricultural tribes in the Punjab, the presumption was in favour of the exclusion of a daughter by a near collateral in the matter of succession to ancestral property and the onus is on the daughthr to prove an exception to this rule. Having regard to these decisions, and to all the facts above stated, we are clearly of opinion that the onus was rightly laid upon *Musammat* Murad Bibi and her daughter to prove that the gift by the former to the latter was valid.

The third ground of the appeal is that the lower Court should have framed an issue as to how much of the property was ancestral and how much self-acquired. The contention of Mr. Badri Das is that even if the onus is on the ladies to prove that the gift was valid *qua* ancestral property, the onus would have been on Khadim Hussain to prove that the gift is invalid *qua* self-acquired property. In the plaint Khadim Hussain stated that the property in dispute was ancestral. In their pleas the defendants stated that a part of it was self-acquired, but they did not state how much of it was self-acquired. In his replication Khadim Hussain stated that the small portion of the property which was self-acquired had been acquired with the aid of income from the ancestral property. No issue was framed as to how much of the property was self-acquired, but the defendants got the special *kanungo* to produce an extract from the revenue papers, which is printed at page 109 of the Paper Book B. This extract is not admissible in evidence and in any case it shows that only 134 *kanals* and 2 *marlas* of the family property was acquired by the brothers. Of this half, 67 *kanals* and 1 *marla* is *Musammat* Murad Bibi's share out of which she has gifted only one third, or 22 *kanalas* 7 *marlas* to her daughter. It is, however, in our opinion, unnecessary that any further enquiry should be made as to how much of the property is self-acquired. Though the ladies pleaded that part of the property was self-acquired they did not go on to say that there was any difference in the custom as to succession to ancestral and self-acquired property. There was no allegation that the gift would in any case be valid *qua* the self-acquired property. The witnesses, who gave oral evidence as to the custom, made no difference as to the different kinds of property, and there is no such distinction made in the *Riwaj-i-am* of 1885 or in that of 1913. We, therefore, are of opinion that the ladies never meant to plead that there was any difference in the custom dependent upon the question whether the property was ancestral or self-acquired. They meant to state that the custom was the same in each case.

A good deal of oral evidence was produced by the defendants, but very little stress has been laid upon it in this Court. The oral instances given by the witnesses are not well ascertained and we proceed to discuss the documentary evidence on the record about which lengthy arguments have been addressed to us.

Pages 2 to 103 of Paper Book B contain extracts from revenue papers the object of

(1) 26 Ind Cas. 492; 31 P. R. 1915; 2 P. W. R. 1915; 33 P. L. R. 1915.

which is to show that daughters have in several cases succeeded to property, and on pages 104-107 a list of seventeen instances is given in which daughters succeeded either in virtue of gifts, or by inheritance. These were prepared by the special *kanungo* who did not produce the original documents in Court. They are not attested copies of any entries in the Revenue Records and are, therefore, not admissible in evidence. They have not been considered, and, in our opinion, rightly so, by the lower Court.

Mr. Badri Das has referred us to the two pedigree tables printed at pages 453—81 of Paper Book B in which the names of daughters appear in various places, and has argued from this fact that daughters have succeeded to their fathers in the presence of collaterals. No doubt daughters' names do appear, but apart from the fact that in many cases these daughters or their issues are shown as out of possession (*bedakhal*) it cannot be said to be clear from the mere presence of the names in the pedigree tables that [illegible] inherited their fathers' estate. They may have got it by gift, as gifts are specially favoured in this tribe, or the land may have passed from the father to his daughter's son either by inheritance or by gift. We do not think that the mere presence of the daughters names in these tables is a sufficient ground for holding that they inherited their fathers' lands. In the second pedigree table the name of Sharaf Din appears who had two wives, *Musammat* Aishan and *Musammat* Fatima, and it appears that his property went to his two daughters Mir Begam and Sahib Zadi. He also had a brother Shams-ud-Din. The *tamilknama* at page 559 of Paper Book B shows that the property was gifted to these daughters by *Musammat* Fatima who purported to be entitled to the property on account of dower due from her husband. If she received this land as dower it became her absolute property and she was entitled to dispose of it as she pleased. It appears, however, that the collaterals never disputed the daughters' rights to this property, but what they did dispute was the right of *Musammat* Fatima to make a gift of her brother-in-law Shams-ud-Din's property, to her daughters. The final order upon the claim brought by the collaterals was that the share of Shams-ud-Din was allotted to them, see the final order printed at pages 563-564 of the Paper Book B, which is in accordance with the award of arbitrator This instance, therefore, does not help th defendants.

An attempt was made to show that in the neighbouring *bastis* there was a custom under which daughters inherited in the presence of near collaterals. We proceed to consider the cases from these *bastis* in order.

Basti Ghuzan. Exhibit P 273 shows that one Haidar Ali made a gift to his brother and sisters. Subsequently *Musammat* Hur brought a suit for possession of her father's share and her right was admitted by all the defendants except one, and the Court gave her a decree, but the judgment does not show that any enquiry was made into custom.

Exhibit P 274 mentioned in the lower Court's judgment at page 132 of Paper Book A is not now relied upon.

Exhibit P. 275 will be found at page 41 of Paper Book C. That was a case where a widow had made a gift in favour of her daughter, and on a collateral suing it was held that the widow had full ownership free from all restrictions which fetter property held on a life tenure and that the widow had the power to will it away to her daughters. This instance does not help the defendants because as the widow was found to be full owner she could obviously dispose of the property in any way she pleased.

These are the only instances cited by the defendants from *Basti* Ghuzan and we have no hesitation in agreeing with the lower Court that no well defined custom favouring daughters' succession in this *basti* has been established. *Basti* Pir Dad Exhibits 278 and 279 do not appear to be in point.

Exhibit P 280, printed at page 580 of Paper Book B. This case was decided in accordance with a special entry in the *wajib-ul-arz* of the village which allowed the gift. The case went in appeal and it appears that the appeal was referred to arbitrators, see Ex P 282 at page 44 of Paper Book C, in which it is stated that the arbitrators, had decided in favour of the right to part with her land being allowed to the widow and this decision of theirs was said to be not inconsistent with the *wajib-ul-arz*.

Exhibit P 283, printed at page 584 *et seq* (Paper Book B) is no doubt a case in point but the parties are clearly shown to be Barki Sayyads. It cannot be said

that the parties to the present case who are Muttazai Pathans follow the same custom as Sayyads. The case of *Ata Muhammad Khan* v. *Jiwani* (1) was also from this *basti*, and the parties were stated to be Barki Sayyads, and it was held that a daughter was entitled to succeed to her father's ancestral property to the exclusion of her father's nephews The owners of this *basti* as the lower Court notes, sometime call themselves Pathans or Afghans, and at other time Barki Sayyads. We agree with the view of the Court that the custom of these people cannot be considered as the same as those of Muttazai Pathans of *Basti* Mithu Sahib.

Basti Baba Khel:—The in habitants of this *basti* are Barkis who came originally from Arabia and it does not follow that the parties to the present suit follow every custom which prevails amongst them. The instances produced are Ex. P 288 and 289 at page 277 of Paper Book B. These are mutations of gifts and no facts are given. Exhibits P 292—294 pages 281—284 of Paper Book B, relate to a decision in favour of daughters based upon a compromise in which there was no enquiry as to custom. Exhibits P 290 contains a statement, at page 278 of Paper Book B, by a number of persons in answer to a question whether according to the present custom a gift of land made by a woman in favour of her daughter was lawful. This is the answer of a number of people and is not admissible in evidence under s 32 of the Indian Evidence Act. It is quite clear that no custom has been proved to exist in *Basti* Baba Khel in favour of daughters.

There are two other *bastis*, *Basti* Danishmandan and *Basti* Sheikh Darwesh, but the inhabitants in these are Ansaris whose customs are admittedly different from those of the inhabitants of *Basti* Mithu Sahib. Counsel for both parties admit this and it is not necessary for us, therefore, to discuss the instances from them.

An entry in the *Riwaj-i-am* of 1885 will be found at page 553 of Paper Book B. It shows that generally speaking a daughter does not inherit in the presence of a son, a widow or a near collateral. In the last column exceptions in favour of certain Musalman tribes are made. Thus, in the case of Lodhi Afghans, Sayyads and Barkis if there be no sons, a daughter inherits even in the absence of a writing of her father. This entry was specifically relied upon by the Chief Court in *Ata Muhammad Khan* v. *Jiwani* (1) in which the parties were Barkis Sayyads. An exception was, therefore, made in the *Riwaj-i-am* of 1885 in favour of Lodhi Afghans, Sayyads and Barkis, but no such exception was made in favour of Muttazai Pathans, and we, therefore, consider that the absence of any mention of the parties tribe is a strong point in favour of the view that in this tribe daughters do not inherit in the presence of near collaterals. In the later *riwaj-i-am* also no exception was made in favour of this tribe.

In fact the exception entered in favour of Lodhi Afghans, Sayyads and Barkis in the earlier *riwaj-i am* has been omitted.

Bakkshi Tek Chand referred us to the cases reported as *Nizam Din* v. *Fauja* (2) and *Mandas* v. *Shah Wasim* (3) the parties to which were Pathans of the Peshwar District, as showing that some Pathans of that district were governed by custom in matters of inheritance and not by Muhammadan Law. His argument is that merely because Muttazai Pathans originally came from Peshawar, it does not follow that they are governed by strict Muhammadan Law.

In our opinion *Musammat* Murad Bibi and *Musammat* Fatima have failed to prove that by custom daughters inherit in the presence of brothers or near collaterals of the last male owner, or that the gift by the former in favour of the latter is valid We therefore, dismiss the appeal, but as we are also dismissing the appeal filed by Khadim Hussain in the other case, we direct the parties to bear their own costs in this Court.

N. H. *Appeal dismissed.*

(2) 68 P. R. 1889
(3) 44 P. R. 1893

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 173 OF 1924.

June 24, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Boys.

Rai Thakur KEHRI SINGH—PLAINTIFF—APPELLANT

versus

THIRPAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 175, 177—

Letters Patent (All.), cl. 11—Civil Procedure Code (Act V of 1908), s. 115—Revenue appeal—District Judge, order of—Appeal—Revision.

No appeal lies to the High Court from an order, as apart from a decree, of the District Judge passed on appeal from a Revenue Court under s. 177 of the Agra Tenancy Act [p. 283, col 1]

Zohra v *Mangu Lal*, 28 A. 753, 3 A. L. J. 569, A. W. N. (1906) 223 (F B) and *Gulzari Lal* v. *Latif Husain*, 35 Ind. Cas. 27; 38 A 181; 14 A. L J. 84, followed.

Nor is an appeal competent in such a case as the above under cl. 11 of the Letters Patent of the Allahabad High Court [*ibid*]

Obiter.—The High Court has power to entertain a revision of an order passed by a District Judge under s. 177 of the Agra Tenancy Act. [p. 288, col. 2.]

[Case-law discussed.]

First appeal from an order of the District Judge, Agra, dated the 16th of August 1924.

Mr. *Gopinath Kunzru* for Mr. *N. P. Ashthana*, for the Appellant.

Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT.

Sulaiman, J.—This is an appeal from an order of remand passed by the District Judge in an appeal from a Revenue Court. A preliminary objection has been taken that no appeal lies. This objection is well-founded. Under s. 175 of the Agra Tenancy Act, no appeal from any decree or order passed by any Court under that Act lies except as therein provided. Under s. 177 an appeal is provided from a decree of a District Judge passed on appeal but no appeal is provided from an order passed by a District Judge. It is, therefore, apparent that no appeal from his order of remand, which, of course, is not a decree lies to this Court This view is concluded by the decision of the Full Bench case of *Zohra* v. *Mangu Lal* (1) which has been followed recently in the case of *Gulzari Lal* v. *Latif Husain* (2).

The learned Vakil for the appellant, however, contends that an appeal lies under para. 11 of the Letters Patent of this Court. In our opinion no such appeal lies under that paragraph at all. Under that paragraph, this High Court is constituted a Court of Appeal from the Civil Courts and has power to exercise appellate jurisdiction *in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force.* The constitution of this High Court as a Court of appeal is quite a different thing from saying that this Court has jurisdiction to hear appeals from every decree or order passed by a subordinate Court. If, therefore, there is no law or regulation which allows an appeal to it the High Court cannot assume an appellate jurisdiction. The power of revision and superintendence, however, is much wider.

The learned Vakil for the appellant next urged that his appeal should be treated as a revision and that inasmuch as the learned District Judge has assumed jurisdiction which was not vested in him, this Court should interfere in revision. This argument is based on the assumption that no appeal lay to the District Judge because no question of proprietary title had been raised in the first Court and no question of jurisdiction had been decided by it. The reply of the learned Advocate for the respondent is that the High Court has no power of revision in a revenue matter at all. The question whether the High Court has power to interfere in revision has been considered in a number of cases which are by no means unanimous and so far there is no Full Bench decision on this matter. The position is as follows :—

In at least three cases *Ahmad Ullah Khan* v. *Murli* (3), *Kesho Das* v. *Morat Pandey* (4) and *Lalta Prasad* v. *Kharga* (5), an application for revision was entertained. Then again in the case of *Parbhu Narain Singh* v. *Harbans Lal* (6), at least one Judge expressed the view that a revision may lie from an order passed by a Judge on appeal. On the other hand, the other learned Judge in the case last mentioned, as well as other learned Judges in the case reported as *Mohammad Ehtisham Ali* v. *Lalji Singh* (7) and *Gaj Kumar Chander* v. *Salamat Ali* (8) have expressly laid down that the High Court has no revisional jurisdiction in cases under the Tenancy Act.

If there were no direct authority in point, I would have no hesitation in saying that there is no provision in the Tenancy Act which bars the revisional jurisdiction of the High Court. In the first place, under s. 193 of the Act, the provisions of

(1) 28 A. 753; 3 A. L. J. 569; A. W. N. (1906) 223 (F. B.).

(2) 35 Ind. Cas. 27; 38 A. 181; 14 A. L. J. 84.

(3) 5 A. L. J 128; A. W. N. (1908) 69.

(4) 23 Ind. Cas. 320; 12 A. L. J. 367.

(5) 71 Ind. Cas. 773; 21 A. L. J. 189, (1923) A. I. R. (A) 313, 45 A. 336.

(6) 35 Ind. Cas. 279; 14 A. L. J 281.

(7) 49 Ind. Cas. 362; 17 A. L. J. 123; 41 A. 226.

(8) 52 Ind. Cas. 756; 17 A. L. J. 1057; 1 U. P. L. R (A.) 142; 42 A. 83.

the C. P. C., with the exception of certain provisions mentioned therein, are made applicable so far as they are not inconsistent with the Act. Section 115 of the C. P. C. corresponding to the old s. 622 is not excluded. *Prima facie*, therefore, the revisional section of the C. P. C. is made applicable to suits and proceedings under the Tenancy Act unless there are other provisions of the Act which are repugnant to its application. In cases where it has been held that the High Court has no jurisdiction to interfere, reliance has been placed solely on the provisions of s. 167 of the Act. Now s. 167 bars suits and applications of the nature specified in the Fourth Schedule and it also prevents every Court other than a Revenue Court from taking cognizance of any dispute or matter in respect of which any such suit or application might be brought or made. It seems to us that the present application for revision would not be incompetent unless it be shown that a suit or application of the nature of this application could be brought or made in the Revenue Court as specified in the Fourth Schedule. Reference has been made to serial No. 51 in the Fourth Schedule where an application for revision under s. 185 of the Act can be filed without any fixed period of limitation. But s. 185 is expressly confined to revisions to the Board of Revenue from subordinate Revenue Courts. It does not refer to revisions from the Court of the District Judge. It is, therefore, impossible to suggest that any application of this nature could have been brought or made in the Revenue Court. It would then follow that s. 167 cannot be a bar to this application. If the argument be accepted that the High Court has no revisional jurisdiction to interfere at all, then it was wholly futile to make s 115 of the C. P. C. applicable to the Act for no case would then be conceivable where a revision would lie and s. 167 would not be a bar. If the view urged on behalf of the appellant were not the correct view, then the result would be that an order passed by a District Judge without jurisdiction, and howsoever illegal it might be, would remain final and be not open to revision either by the Board of Revenue or by the High Court. We do not, however, consider it necessary to refer this case to a larger Bench because it is possible to dispose of the case on different grounds. In the written statement the defendant had taken several pleas including a denial of the relation of landlord and tenant and also a plea of want of jurisdiction of the Civil Court. The Assistant Collector only framed one issue as to whether the relation of landlord and tenant existed between the parties or not, and decided it by a summary judgment. The learned District Judge was of opinion that the suit had not been decided in a satisfactory manner inasmuch as the first Court did not even take the trouble to go into the question whether the tenant had really relinquished the holding or whether the alleged relinquishment was valid. He did not even come to a definite finding whether a surrender had been made, for before the mortgagee could be ejected, it was necessary to find that a surrender had actually taken place. In view of these defects the learned District Judge has set aside the decree and remanded the case for re-trial after taking such additional evidence as may be tendered by the parties. After all, the case will be re-tried after both parties have had full opportunity of producing their evidence. No real injustice has been done to the parties. It is not a fit case, even assuming that we have power to interfere in revision, in which we ought to interfere. I would dismiss the appeal.

Boys, J.—I agree with the order proposed by my learned brother Mr. Justice Sulaiman. The appeal is from an order of remand passed by a District Judge under s. 177 of the Tenancy Act on appeal from a decree of an Assistant Collector of the First Class.

It has hardly been contended that an appeal lies but we are asked to treat the matter as an application under s. 115 on the revisional side. It is contended for the opposite party that no revision lies and the contention is certainly supported by judicial authority.

The relevant sections of the Tenancy Act are ss. 167, 177, 185, 193 and 196

We had to consider the following cases:—*Damber Singh* v. *Sri Kishun Das* (9), *Parbhu Narain Singh* v. *Harbans Lal* (6), *Jumna Prasad* v. *Karan Singh* (10), *Mohammad Ehtisham Ali* v. *Lalji Singh* (7) and *Gaj Kumar Chunder* v. *Salamat Ali* (8).

We are also referred to *Ahmad Ullah Khan* v. *Murli* (3), *Kesho Das* v. *Murat*

(9) 2 Ind Cas 377; 6 A. L. J. 552; 31 A. 445.
(10) 46 Ind. Cas. 338; 16 A. L. J. 859; 41 A. 28.

Pandey (4) and *Lalta Prasad* v. *Kharga* (5), but though a revision was in fact entertained, the point whether a revision is competent was not raised in those cases.

In *Chutten Lal* v. *Kanhaya Lal* (11) the point was raised but not decided. I shall not, therefore, further refer to these last four cases.

Of the first five cases that I have mentioned it will be convenient to give a brief account in order to Judge exactly how far they are apposite to the facts of the present case and in order that it may be possible to form a correct estimate as to the steps by which the proposition may be said to have become nearly established that a revision does not lie.

In *Damber Singh* v. *Sri Kishun Das* (9) Richards and Alston, JJ., had before them an application in revision of an order of an Assistant Collector refusing execution. The suit had been filed in the Court of an Assistant Collector of the First Class and dismissed. The District Judge held that it should not have been tried in a Revenue Court, but under the provisions of ss. 177, 196, 197 of the Tenancy Act entertained the appeal and decreed the suit. The decree-holder applied to the Assistant Collector in execution. The Assistant Collector refused the application, and the decree-holder applied to the High Court in revision. It was held that a revision was barred by s. 167 of the Tenancy Act; and reliance was placed on the words "except in the way of appeal." In support of his right to apply in revision the applicant urged that the decree to be executed was in fact the decree of the District Judge. Richards, J., remarked "possibly his remedy was to apply to the District Judge for execution of the decree." This suggests at least the possibility that an application in revision might have been considered competent if it had been framed as a revision from the order of a District Judge. The actual case dealt with the revision by the High Court of an order of an Assistant Collector, *i. e.*, an order of a Revenue Court and can have no direct bearing on the case before us. The more general effect of some of the remarks I will consider later.

In *Parbhu Narain Singh* v. *Harbans Lal* (6) Piggott and Walsh, JJ., had before them a revision of an order of a District Judge under s. 10 of the T[illegible] Act [illegible] suit on second appeal [illegible] gott, J., after holding that in any event the application did not come within the narrow compass of the provisions of s. 115 of the C. P. C., further held that the revision was wholly excluded by the last clause of s. 167 of the Tenancy Act; that to entertain a revision would amount to "taking cognizance" of the dispute or matter in respect of which the suit was brought, and that the fact that s. 115 of the C. P. C. is one of the sections made applicable by s. 193 of the Tenancy Act to proceedings under the Tenancy Act did not affect the matter as s. 193 was expressly subject to and could not override s. 167. Walsh, J. differed, holding that "the decision of a District Judge given by way of an appeal from a Revenue Court is a decision of the Civil Court and is, therefore, subject to revision", and further that the hearing of the revision would not amount to "taking cognizance" of the dispute or matter in respect of which the suit was brought.

In *Jamna Prasad* v. *Karan Singh* (10) Abdul Raoof, J., had before him a case in which an appeal had been filed under s. 177 before a District Judge from the decree of an Assistant Collector The District Judge held that no appeal lay to his Court from the decree of the Assistant Collector and returned the memorandum of appeal. Abdul Raoof, J., refused to distinguish the case of *Damber Singh* v. *Sri Kishan Das* (9) and following the construction of s. 167 in that case held that no revision was competent. I find myself unable to appreciate why the learned Judge found himself unable to distinguish the case of *Damber Singh* v. *Sri Kishan Das* (9), which, as I have quoted above, was a case where the Court was asked to revise, not the order of a District Judge, a Civil Court, but of an Assistant Collector, a Revenue Court.

In *Mohammad Ehtisham Ali* v. *Lalji Singh* (7). Tudball J., had before him a revision of an order of an Assistant Collector of the First Class. The matter had not gone before a District Judge. Tudball, J., relied on *Damber Singh* v. *Sri Kishan Das* (9) referred to *Parbhu Narain Singh* v. *Harbans Lal* (6) and pointed out that Walsh, J., would apparently in the case of a revision of an order of an Assistant Collector have agreed that no revision was competent. Tudball, J., further relied on the words "of the nature" in s. 167 and held that the

(11) 17 Ind. Cas. 836; 10 A. L. J. 478.

nature of all revisions whether civil, criminal or revenue was alike. The learned Judge further remarked, and it is important to note this, that in the matter before him the case had not gone into the Civil Court at all because there had been no appeal whatever preferred to the District Judge, and there was, therefore, no order before him which could in any sense be deemed to be an order of a Civil Court. This again as in the case *Damber Singh* v. *Sri Kishan Das* (9) suggests at least the possibility that the learned Judge would have decided otherwise if he had had before him the order of a District Judge. He held that there could be no revision of the order of the Assistant Collector. Here again the High Court was asked to revise the order of an Assistant Collector, a Revenue Court, and the decision can have no direct bearing on the case before us. The more general effect of some of the remarks I will consider later.

In *Gaj Kumar Chander* v. *Salamat Ali* (8) Stuart and Wallach, JJ., had before them a revision of an appellate order of a District Judge under s. 180. After remarking that only Revenue Courts can deal with original matters while appellate powers are sometimes vested in the Revenue and sometimes in Civil Courts, the learned Judges held that by virtue of ss. 167 and 193 "the only power that the High Court has to dispose of matters covered by Local Act II of 1901 is given by the Act itself; and the power of revision is not a power which is so given to it". They held that the fact that there is no inclusion of s. 622 (now s. 115) in s. 193 of the Tenancy Act did not affect the question, for the provisions of the C. P. C. apply to the procedure in suits and other proceedings under the Rent Act so far as they are not so inconsistent therewith. They held, therefore, that no revision lies.

It will be seen that the question whether an application in revision lies against an order of a District Judge under s. 177 (the case before us) was only directly dealt with in *Jamna Prasad* v. *Karan Singh* (10) but the decisions in *Parbhu Narain Singh* v. *Harbans Lal* (6) and *Gaj Kumar Chander* v. *Salamat Ali* (8) which were cases where a District Judge acted under s. 180 are also analogous. Section 177 is expressly referred in the exception in s. 185 while s. 180 is not, but, whatever may be the reason for the omission, it does not seem to affect the present question, so I will regard the two later cases as also bearing on the case before us where the appeal was allowed by s. 177.

In the main reliance was placed in these cases on a particular interpretation put on s. 167 ; while any effect was denied to s. 193 on the ground that any other interpretation would be in conflict with the interpretation already put on s. 167.

I will first deal with these considerations.

In dealing with s. 167 the words "of the nature" were relied on by Tudball, J., in *Mohammad Ehtisham Ali* v. *Lalji Singh* (7) as showing that not only revisions by the Board under s. 185 (Serial No. 51 of the Fourth Schedule) were excluded from the jurisdiction of Revenue Courts, but all revisions whether by Civil, Revenue or Criminal Courts. It may be that the words "of the nature" were used because there are some applications in the Fourth Schedule not further specified by sections (Serial Nos. 47, 48 and 49) or, by way of precaution because there might be found to be ana[illegible] inclusion of which in the sole [illegible] of Revenue Courts was desirable. But whatever be the reason for the words, I cannot believe that the Legislature would have adopted such a vague method of including in the prohibition enacted by s. 167 such a clearly defined class of proceeding such as revisions. Nor was it necessary to hold this to support the particular decision. The fact that a power of revision was conferred on the Board by s. 185 of the Tenancy Act was sufficient to exclude any power of the High Court under s. 115 of the C. P. C. which otherwise might be held to exist in virtue of s. 193 of the Tenancy Act.

Next, the words "*except in the way of appeal*" were relied on in *Damber Singh* v *Sri Kishan Das* (9) as showing that no revision lies. I will later state my view as to the real scope and intent of s. 167 and of these words in particular as meant merely to make s. 167 consistent with s. 196 ; but, even if that view be wrong, the words in question could at most be intended to make s. 167 consistent with ss. 177, 180 and 196; such a form of words could not rightly be used or be interpreted to enact affirmatively anything in regard to revisional jurisdiction nor was it necessary to attribute this effect to the words in order to support the particular decision. It could be supported

for the same reason that I have already noted that the decision in *Mohammad Ehtisham Ali* v. *Lalji Singh* (7) could be supported.

Further the words "*take cognizance*" were relied on in *Parbhu Narain Singh* v. *Harbans Lal* (6) by Piggott, J., as excluding revision Walsh, J., held the contrary. I shall state later, when giving my own view, the real scope, in my opinion, of these words.

In more than one case, the force of the argument, that while certain sections of the C. P C. are by s. 193 excluded, s 115 (the old s 622) is not excluded, was repelled by holding that it was excluded as being inconsistent with s. 167 of the Tenancy Act. The contention is of course sound, if in fact s. 167 does really exclude revision under s. 115 of the C. P. C.; but that only brings us back to the main question.

I have now considered earlier judicial authority and can find therein nothing that satisfies me that s. 167 is any bar to this Court exercising revisional jurisdiction in respect of an order passed under s. 177 of a District Judge who is undoubtedly a Civil Court. I would add that I am confirmed in my view by the absence of any reason for excluding the revisional jurisdiction of this Court in regard to a subordinate Civil Court, a District Judge, while allowing it to the Board, with one exception the reason for which is obvious, in regard to subordinate Revenue Courts.

I am further confirmed in my view by the fact that when the Legislature considered in s. 193 with such meticulous care what provisions of the C. P. C. were to be excluded from importation by virtue of s. 193 or were to be modified in their application, it would have left the exclusion of such an important provision as s. 115 a matter of doubtful inference.

Further I note that apparently in both the decisions, *Damber Singh* v. *Sri Kishan Das* (9) and *Mohammad Ehtisham Ali* v. *Lalji Singh* (7) there are remarks, to which I have referred above when summarising those cases, which strongly suggest the possibility at least that they would have been decided differently if the revision had been against the order of a District Judge.

I have discussed what, in my opinion, s. 167 does not enact, namely, that it does not affirmatively, even indirectly, prohibit revision of an order of a District Judge. I will now state my view of what s. 167 does enact, the really limited scope and intent of the section.

It appears to me that the intention as expressed in s. 167 is that the section is only concerned with the hearing of original suits and applications. This view of the section was not raised before us, but it appears at the least certainly not untenable and to be in accord with the scheme of the Act.

Before considering in detail the contents of the section, I would observe that there is nothing improbable in such a section being confined to original suits and other original proceedings. There is not the least need for any such section to contain any prohibition against appeals or revisions from orders of Revenue Courts being heard by other than Revenue Courts (except as provided). It is wholly unnecessary to forbid a Civil Court to hear a matter in appeal from a Revenue Court for the jurisdiction of Civil Courts ordinarily to hear such appeals is already confined by the la[illegible]ch Courts to appeals from [illegible] Courts, and they could not under any circumstances touch an appeal *from a Revenue Court*, except where such power was expressly given. Such power is, of course, given by ss. 177, 180 and 196. But except where such power is expressly given it would be entirely impossible to suggest that a Civil Court could have any appellate power at all, and, therefore, any prohibition would be entirely superfluous. *Mutatis mutandis* exactly the same reasoning applies to revisions. No Civil Court could possibly entertain a revision *of an order of a Revenue Court* under the ordinary power and laws constituting the Civil Courts. Therefore, there is no need to prohibit the exercise of such a revisional power. When we come, however, to original suits and proceedings the situation is wholly different and a prohibiting section is essential. But for such a section Civil Courts would have co ordinate jurisdiction with Revenue Courts in very many matters. It is, therefore, necessary to prohibit the exercise of such jurisdiction by the Civil Courts, where it is desired to confine it to Revenue Courts. If I have made my meaning clear we should then expect to find in the Act a section forbidding the exercise by Civil Courts of original jurisdiction in revenue matters and we should not expect to find such a section forbidding them to exercise appellate or

revisional powers as such prohibitions would be superfluous.

I have thought it convenient to consider first what might be expected before considering what we actually find, thus inverting the usual course; while, of course, recognising that operative words must be interpreted in accordance with what has been actually said and that what might be expected can only be allowed weight in support or where ambiguity, if any, exists.

I will now consider the indications to be found in the actual words of the section. The section may be divided into its two clauses. In the first clause the first phrase which suggests itself for consideration is "all suits and applications" This phrasing is certainly more appropriate to original proceedings. If it had been intended to apply to appeals and revisions, nothing would have been easier than to say so in plain language. In fact, no reference is made in this clause in any way whatever to appeals and revisions. I will refer later to the reference to appeals in the second clause and will endeavour to show that that reference is entirely consistent with the view which I am now discussing.

In the second clause we next find the words "shall take cognizance". In *Parbhu Narain Singh* v. *Harbans Lal* (6) Piggott, J, held that it would be "taking cognizance" of the dispute or matter in which the suit was brought for a higher Court to deal in revision with the order of a Civil Court (District Judge) on appeal from an order of a Revenue Court. Walsh, J., differed and held that the term was not appropriate to the hearing of the revision from an appellate order. I have no hesitation in expressing my agreement with Walsh, J., for it appears to me difficult to hold that the words "take cognizance" are not very much more appropriate to original proceedings and are not almost invariably applied to original proceedings. I am not prepared to go so far as to say that those words have never been applied by the Legislature to appellate or revisional proceedings but I am certainly not aware of any such case, though it would not be difficult to quote very many instances of their application to original proceedings.

The next phrase calling for comment in the second clause of s. 167 is "except in the way of appeal as hereinafter provided". It is these words which, I think, have in some way or other not very clear to me appeared to at least one Judge to lend support to the view that s. 167 excluded revisional jurisdiction. So far as I am aware the words were first referred to in *Damber Singh* v. *Sri Kishan Das* (9) where reliance was placed on them in a case where there was no question of the revision of an order of a District Judge but revision only of an order of an Assistant Collector refusing an application for execution.

In *Mohammad Ehtisham Ali* v. *Lalji Singh* (7) the report of the judgment of Tudball, J., shows that when quoting the earlier case, *Damber Singh* v. *Sri Kishan Das* (9) the words "except by way of appeal" have been put in italics suggesting that the learned Judge was to some extent influenced by them. That again was a case only of revision of an order of an Assistant Collector. I have suggested above when outlining those two cases that in neither of them was the suggested effect of the words necessary to support the decision. I am unable to appreciate that the words "except by way of appeal" justify any such inference at all. In the view that I take that s. 167 only applies to original proceedings, the words are not superfluous or without meaning; but, on the contrary, they are found to be essential and of import to effect consistency between s. 167 and s. 196. But for those words it is clear that s. 167 would be making illegal entirely the hearing of certain original proceedings in any Civil Court whilst s 196 would be declaring that the hearing of such original proceedings in a Civil Court was not in every case to be regarded as invalid. The words, then, "except in the way of appeal as hereinafter provided" are necessary and have a definite appropriate intention and effect if the view which I suggest be correct that s. 167 only applies to original proceedings.

I am, therefore, of opinion with the greatest respect for other decision to the contrary, that decisions which proceeded on the assumption that s. 167 has anything to do with appellate or revisional proceedings (except to the limited extent that I have specified) cannot be supported. I, therefore, hold, firstly, that there is nothing in s. 167 precluding the hearing by the High Court under s. 115 of the C. P. C. of a revision of an order passed by a District Judge under s. 177 of the Tenancy Act; and, further that it is reasonable that the High Court should have such power, and that to hold

that it has such power is in accord with s. 193 of the Tenancy Act; and secondly that s. 167 is only concerned with original proceedings.

For both these reasons I would hold that this Court has power to entertain a revision of an order made by a District Judge under s. 177 of the Tenancy Act.

As some of these considerations were urged before us on one side or the other, I have thought it desirable to put them on record and to express my opinion thereon; and, in fact, we cannot really reject the revision on its merits without by implication approving the view that a revision lies.

I agree, however, that it is not a case in which we should refer the matter to a Full Bench as in the course of the hearing we have been satisfied that the application has no merits. I agree, therefore, in the order proposed by my brother.

By the Court.—The appeal is dismissed with costs.

N. H. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1178 OF 1924.

December 22, 1924.

Present:—Mr. Justice LeRossignol.

MUHAMMAD—PLAINTIFF—APPELLANT

versus

MUHAMMAD ALI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Previous refusal—Waiver

A previous refusal by the pre-emptor to buy the property on the ground of his inability to buy operates as a waiver of his right to pre-empt.

Second appeal from a decree of the District Judge, Jhelum, dated the 3rd January 1924, reversing that of the Munsif, First Class, Jhelum, dated the 30th November 1922.

Lala *Amar Nath Chona*, for the Appellant.

Lala *Gobind Ram Khanna*, for the Respondents.

JUDGMENT.—The plaintiff in this case asked for two reliefs, first, for a declaration that the sale impeached should not affect his reversionary rights, and secondly in the alternative for possession of the land as a pre-emptor. The first Court found that the sale was without necessity and, therefore, gave the plaintiff a declaration. The learned District Judge in appeal held that the sale was for necessity and dismissed the suit evidently overlooking the alternative claim to pre-empt.

Sometime before effecting the sale now impeached the vendor, a widow, applied to the Collector for permission to sell her land to one Fateh Muhammad a non-agriculturist for Rs. 600 and in those proceedings the plaintiff on the 18th August 1921 made a statement to the effect that he could not afford to buy the land and that so far as he was concerned the vendor was at liberty to sell it to Fateh Muhammad for Rs. 600 or to anybody who would give her the cost price for it. The Collector refused to sanction the sale of the land to Fateh Muhammad on the ground that it was worth more than Rs. 600.

The first Court held that this statement of the plaintiff did not amount to waiver but merely to a refusal to purchase the land for Rs. 600 and the learned District Judge merely says "I am not prepared to dispute that finding."

A second appeal has been preferred to this Court and I am asked to remand the case so that the plaintiff's right to pre-empt may be determined but I see no need for adopting that course as I hold it is clearly proved that the plaintiff in 1921 waived his right to purchase the land on the ground that he had no money at all and could not afford to purchase it. The land was subsequently sold to the present vendee for Rs. 500 and I do not think that the plaintiff should now be allowed to intervene after his clear disclaimer of any intention to purchase the land at any price.

I, therefore, dismiss the appeal with costs.

N. H. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

July 16, 1925.

Present:—Viscount Haldane, Lord Wrenbury and Lord Blanesburgh.

S. SOUNDARA RAJAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

C. M. NATARAJAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Succession Act (X of 1865), ss 101, 102—Hindu Law—Will, construction of—Devise of estate to daughters and thereafter to their children—Perpetuities, rule of.

A Hindu testator gave the following direction in his Will with regard to the disposal of his property:—"I give, devise and bequeath all my estate and effects immoveable and moveable unto my Trustees upon Trust that my Trustees shall sell, call in and convert into money the same or such part thereof as shall not consist of money and shall with and out of the proceeds of such sale calling in and conversion and with and out of my ready money pay my funeral and testamentary expenses and debts and shall stand possessed of the residue of such proceeds upon Trust to set

apart thereout and invest in promissory notes of the Government of India such a sum or sums of money as when so invested as aforesaid will produce by the income thereof a monthly sum of rupees one hundred and to pay such income monthly to my wife C Andalammal during her life and from and after her decease to stand possessed of the said sum and the investments for the time being representing the same upon the Trusts hereinafter declared concerning the residue of my estate And as to the residue of my estate I direct that my trustees shall at their discretion invest the same in any of the modes of investment in which trustees are by law authorised to invest trust funds and shall stand possessed of the said residuary trust monies and the investments for the time being representing same (hereinafter called "the residuary trust funds"), in Trust to apportion the residuary trust funds into as many equal parts or shares as there may be daughters of mine living at the time of my decease or who having pre-deceased me shall have left issue her or them and me surviving and to pay the income of each of such equal parts of shares to my said daughters respectively during their respective lives. And from and after the decease of each of my said daughters to stand possessed of the share of the residuary trust funds so appropriated as aforesaid to such daughter upon Trust for all the children of such daughter who shall attain the age of twenty-one years in equal shares and if there shall be only one such child the whole to be in trust for that one child and in the event of any of my said daughters dying without leaving lawful issue her or them surviving I direct that my trustees shall stand possessed of the share or shares so appropriated to her or them as aforesaid upon Trust for all the children of the other or others of my said daughters who shall attain the age of twenty-one years as tenants-in-common in equal shares per *stirpes*. Provided always and I hereby declare that if any daughter of mine shall die in my lifetime leaving lawful issue at the time of my death such issue as shall attain the age of twenty-one years shall take and if more than one as tenants-in-common in equal shares per *stirpes* the share which would have been [illegible] s aforesaid to such daughter of mine had survived me".

Held, (1) that on a proper construction of the Will the three daughters took only for their lives, [p. 292, col 2]

(2) that inasmuch as the bequest in favour of the daughters' children, tested as at the testator's death made delay in vesting the estate beyond the lifetime of the daughters and the minority of some of their children possible, the bequest in favour of the children was inoperative having regard to the provisions of s. 101 read with s 102 of the Succession Act; [p 293 col 1]

(3) that, therefore, at the termination of the life-estate of the daughters of the testator the estate would devolve upon the next heirs as upon an intestacy. [*ibid*]

Appeal from the decision of the Madras High Court (Sir John Wallis, Kt., Chief Justice, and Mr. Justice Ramesam) in Original Side Appeal No. 15 of 1920, and Civil Miscellaneous Petition No. 3350 of 1920, dated December 16, 1920, and printed as 62 Ind. Cas. 987, affirming a decree of the Court in its Ordinary Jurisdiction, dated November 16, 1919.

Messrs. *Clauson*, *K. C.*, and *Narasimham*, for the Appellants.

Mr. *Upjohn*, *K. C.*, Sir *Walter Schwabe*, *K C.*, and Mr. *A. M. Talbot*, for the Respondents.

JUDGMENT.

Viscount Haldane.—The questions which arise for decision on this appeal relate to the construction and validity of the provisions of a Will, dated 27th April, 1897, and made by a Hindu, C. Ratna Mudaliar, who died in 1904. He left a widow and three daughters One of these daughters, Yasodammal, died in 1907; another, Rajammal, in 1908; and the third Nilayathatchi Ammal, in 1918 Yasodammal had four children, three of them, two sons and a daughter, born before the death of the testator in 1904, and one of them, born afterwards in 1907. Rajammal, the second daughter, had a son T[illegible] who was born in 1907. This child was constituted a Ward of Court in 1910. Nilayathatchi Ammal, the third daughter, had six children, three sons and three daughters, all born after 1904 Of these various families the three sons of the third daughter were plaintiffs in the suit and are appellants to-day The others were defendants and are now respondents.

It will be convenient first of all to set out the material portions of the Will:—

"I give devise and bequeath all my estate and effects immoveable and moveable unto my Trustees upon Trust that my Trustees shall sell, call in and convert into money the same or such part thereof as shall not consist of money and shall with and out of the proceeds of such sale calling in and conversion and with and out of my ready money pay my funeral and testamentary expenses and debts and shall stand possessed of the residue of such proceeds upon Trust to set apart thereout and invest in promissory notes of the Government of India such a sum or sums of money as when so invested as aforesaid will produce by the income thereof a monthly sum of rupees one hundred and to pay such income monthly to my wife C. Andalammal during her life and from and after her decease to stand possessed of the said sum and the investments for the time being representing the same upon the Trusts hereinafter declared concerning the residue of my estate. And as to the residue of my estate I direct that my Trustees shall at their discretion invest the same in any of the modes of investment in which trustees are by law authorised to invest trust funds and shall

stand possessed of the said residuary trust monies and the investments for the time being representing same (hereinafter called "the residuary trust funds"), in Trust to apportion the residuary trust funds into as many equal parts or shares as there may be daughters of mine living at the time of my decease or who having pre-deceased me shall have left issue her or them and me surviving and to pay the income of each of such equal parts of shares to my said daughters respectively during their respective lives. And from and after the decease of each of my said daughters to stand possessed of the share of the residuary trust funds so appropriated as aforesaid to such daughter upon Trust for all the children of such daughter who shall attain the age of twenty-one years in equal shares and if there shall be only one such child the whole to be in trust for that one child and in the event of any of my said daughters dying without leaving lawful issue her or them surviving I direct that my trustees shall stand possessed of the share or shares so appropriated to her or them as aforesaid upon Trust for all the children of the other or others of my said daughters who shall attain the age of twenty-one years as tenants-in-common in equal shares per *stirpes*. Provided always and I hereby declare that if any daughter of mine shall die in my life-time leaving lawful issue at the time of my death such issue as shall attain the age of twenty-one years shall take and if more than one as tenants in-common in equal shares per *stirpes* the share which would have been so appropriated as aforesaid to such daughter of mine and her issue if she had survived me."

The suit was instituted in the High Court of Madras for a due construction of the Will and for administration. The plaintiffs, the present appellants, were, as already stated, grand-sons of the testator and children of his third daughter. Their case is that they, along with the sons of the other two daughters, are entitled to succeed to the testator's residuary estate subject to an annuity to the widow and to mere life-estates given to the three daughters, who are all now dead. For they contend that the trusts in favour of grand-children, following in the Will on those for the daughters for life, are void by the law of India. The case of the respondents, on the other hand, is that the trusts introduced in favour of grand-children were validly created by the Will, or, alternatively, that the three daughters of the testator in the result took his residue absolutely.

The case was tried before Mr. Justice Coutts Trotter, who decided in substance (1) that the testator gave only a life-estate to each of his three daughters, and not an absolute estate, remarking: "It seems to me clear that what the testator wished to do was to divide the income of his estate into three shares for the benefit of his three daughters respectively during their life-time, and thereafter the corpus of each share should belong to such of the children of each daughter as should attain the age of twenty-one years"; (2) that under the provisions of s. 3 of the Hindu Wills Act, 1870, and the rules laid down by the Lords of the Judicial Committee in the case of *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1), and other decisions, the gifts to the grand-children of the testator born after his death were void; but that the provisions of the Madras Act I of 1914, which were not in his opinion *ultra vires* of a Provincial Legislative Council, validated the bequest in this respect. The learned Judge was further of opinion that the testator's Will did not, for reasons which he gave, contravene the Indian rule against perpetuities in view of the provisions of Act IX of 1875, as amended by the Guardians and Wards Act, 1890.

There was an appeal to the Appellate Court Civil Jurisdiction of the High Court of Judicature at Madras. Before judgment on that appeal was delivered certain compromises were made between certain of the parties, for the division between them of what might be the fruits of this litigation. Into the terms of the compromise it is not, however, necessary, at this stage of the suit, to enter.

The appeal was heard by the Chief Justice (Sir John Wallis) and Mr. Justice Ramesam. These learned Judges did not agree with the view of the Trial Judge as to the effect of the Indian Majority Act, 1875, and of the Madras Act I of 1914 (which they held to have been *ultra vires* of the Provincial Legislature). They were accordingly of opinion that the disposition of the Will could not take effect as regards beneficiaries born after the death of the testator, and, as the provisions in favour of issue of daughters were obnoxious to s. 101 of the Indian

(1) I. A. Supp. Vol. 47; 18 W. R. 359; 9 B. L. R. 377; 3 Sar. P. C. J. 82 (P. C.).

Succession Act, 1865, they thought that the whole disposition in favour of the daughters' children failed as a result of s. 102 of that Act. They held, however, that upon the true construction of the Will the intention of the testator was, in the first instance, to make an absolute gift in favour of each of his three daughters, the provisions which followed being a mere settlement of the gift thus absolutely made, and that consequently under s. 126 of the Indian Succession Act, 1865, the daughters of the testator took absolutely, when these provisions failed of effect. That section, made applicable to the testator's Will by the Hindu Wills Act (XXI of 1870), is as follows:—

"Where a testator absolutely bequeaths a fund, so as to sever it from his own estate, but directs that the mode of enjoyment of it by the legatee shall be restricted so as to secure a specified benefit for the legatee; if that benefit cannot be obtained for the legatee, the fund belongs to him as if the Will had contained no such direction."

This is an enactment in statutory form of a principle which was already familiar to English lawyers. The case of *Lassence* v. *Tierney* (2) shows that where, reading the Will as a whole, the intention to confer an absolute estate in the first instance is expressed or implied, and following on that absolute estate there is a provision for settlement which in the event cannot be operative, then the words of prior intention prevail and the absolute estate takes effect notwithstanding the failure of the provision for settlement that follows. In India the words in s. 126 must be followed as laying down the principle, but the principle is not substantially different from what was expressed in *Lassence* v. *Tierney* (2). Their Lordships have given consideration to the terms of the Will in the present case The material directions are those to the trustees "to apportion the residuary trust funds into as many equal parts or shares as there may be daughters of mine living at the time of my decease or who having predeceased me shall have left issue her or them and me surviving." The trustees are then to "pay the income of each of such equal parts or shares to my said daughters respectively during their respective lives. And from and after the decease of each of my said daughters to stand possessed of the share of the residuary trust funds so appropriated as aforesaid to such daughter upon trust for the children of such daughter who shall attain the age of 21 years." The testator then directs that in the event of any of the daughters dying without leaving lawful issue the trustees are to "stand possessed of the share or shares so appropriated to her or them as aforesaid" on trust for her children who shall attain twenty-one. He goes on to introduce a proviso under which, if a daughter dies in his life-time leaving lawful issue, such issue as shall attain 21 years are to take the share "which would have been so appropriated as aforesaid to such daughter of mine and her issue if she had survived me."

Reading the Will as a whole their Lordships are unable to agree with the conclusion about the construction of these clauses come to by the Court of Appeal. They think that the first trust for apportionment directs merely division of the fund into as many equal parts or shares as there are daughters living at the testator's death, or sets of issue then living of daughters then dead.

The words of apportionment are introduced for merely arithmetical purposes and so far do not dispose of property. In order to find the interest given under the Will it is necessary to proceed to the further words, and these, in the case of a daughter, confine her interest to a right to income for life. They are followed by words of disposition in favour of the children and issue. This view of what may be called the apportionment clause is even more apparent as regards the suggested gift to issue of a deceased daughter. There is no unqualified gift to them by the apportionment clause. The effective gift in the later words of the Will is to such of a deceased [illegible] children as attain 21. And if, [illegible] it could be said that the testator had used the words "issue" and "children" interchangeably then the limitation to such children only as attained 21 would, if there were a prior gift to them without that qualification, be merely otiose. If so much cannot be said then there is no room for the operation of the rule. Their Lordships are, therefore, unable to find in this Will the absolute bequests required by s. 126. They think that the three daughters took only for life, and that it must remain to be seen whether the later gifts in favour of their children or other issue are validly made under Hindu Law.

(2) (1849) 1 Mac. & G. 551; 2 H. & Tw. 115; 14 Jur. 182; 41 E. R 1379; 84 R. R. 158.

Turning to this question, the first observation to be made is that the Will has apparently been drawn by someone familiar with English Law, but not with the Indian Statutes which apply. If it were only a question of the English rule against perpetuities, there would be no objection to the Will. But there comes in s. 101 of the Indian Succession Act of 1865. Under this section no bequest is valid whereby the vesting of the thing bequeathed *may* be delayed beyond the life-time of one or more persons living at the testator's decease, and the minority (ending at 18) of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the thing bequeathed is to belong. The validity of the gifts now in question must be scrutinized as at the death of the testator, *i. e.*, 1904, and if s. 101 then applied the disposition subsequent to the life-time of the testator's daughter was invalid, for the children of the daughters take only in classes, and by s. 102 of the Succession Act, if a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the rules contained in s. 101, the bequest is wholly void. It being plain that this bequest, tested as at the testators's death, made delay beyond the lifetime of the daughters and the minority of some of their children possible, the bequest in favour of the children was inoperative. It was suggested, however, that this section had no application to the Will of a Hindu by reason of the fact that, as is shown by the *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1) any disposition in such a Will is invalid if the disponee is an unborn person at the testator's death. The section, it was said, is only applicable to dispositions which are not otherwise ineffective. One answer to this was that in 1914 the Madras Act above referred to was passed which purported to get rid of the difficulty caused by the *Juttendromohun Tagore* v *Ganendromohun Tagore* (1) decision. This Act provides by s. 3 that a disposition shall not be invalid by reason only that the transferee or legatee is an unborn person at the date of the transfer, or the death of the testator. Questions were raised, as has already been observed, in the Courts below as to the validity of the Madras Act, but these questions are now superseded by the Act of the Indian Legislature, Act VIII of 1921, which has validated the law contained in the Madras Act, and repeats in s. 5 a provision identical with s. 101 of the Succession Act, 1865. The result is to make that section applicable to this Will, upon a view which was not contested before their Lordships if the Madras Act or the Act of 1921 were treated as operative. Now in that section, as has been already said, a "minor" means any person who shall not have completed the age of eighteen years. It was, however, pointed out by the respondents that, by the Majority Act, 1875, every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding anything contained in the Indian Succession Act or in any other enactment, be deemed to have attained his majority when he shall have completed his age of 21 years and not before; and this is accompanied by a provision that every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of 18 years and not earlier. These provisions do not, however, in the opinin of their Lordships,help the respondents. At the testator's death—for this purpose the relevant date—it was not clear, and could not be certain, whether all or any of the members of the classes in whose favour the disposition was made would ever have guardians appointed. The provision of the Will fixing 21 in every case as the age of vesting was, therefore, in contravention of s. 101, and the whole gift is invalid under s. 102. Their Lordships are unable to agree with the views expressed in some detail on this point by the learned Trial Judge.

Their Lordships are of opinion, for the reasons they have given, that the appeal must succeed. There will be a declaration that the appellants are entitled to their respective shares in the property in suit as upon an intestacy, subject to the life-estates (now at an end) in favour of the testator's daughters This will be without prejudice to the compromises referred to in the decree appealed from, and to the sanction given to them by that decree. The case must go back to the High Court for further inquiry on that footing. Their Lordships do not think it necessary to interfere with the orders as to costs made in the Courts below. They think that the costs of this appeal should, in the same way, be payable out of the estate.

They will humbly advise His Majesty accordingly.

Z. K. *Appeal accepted.*

Solicitors for the Appellants:—Mr. *H. S. L. Polak.*

Solicitors for the Respondents:—Mr. *Douglas Grant.*

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 1291 OF 1924.

January 27, 1925.

Present:—Mr. Justice Jai Lal.

MAHOMED GHAUS—DEFENDANT—APPELLANT

versus

MAHOMED ALI SHAH AND OTHERS—DEFENDANTS AND PLAINTIFFS—RESPONDENTS.

Punjab Limitation (Custom) Act (I of 1920), ss 5, 6, scope of—Limitation Act (IX of 1908), ss 6, 8—Declaratory suit by reversioner after majority—Limitation.

Section 6 of the Punjab Limitation (Custom) Act of 1920 really gives an additional period of one year to those who were at the time of the enforcement of the Act entitled to institute suits, but could be successfully met by a plea of limitation owing to the repeal of the Punjab Limitation (Ancestral Land Alienation) Act of 1900, and the consequent reduction of the limitation by the new Act The section, however, does not control the operation of s. 5 of the Act. [p. 295, col. 1]

A father governed by Punjab Custom, having a minor son, sold certain ancestral property on 1st April 1913 The son attained his majority on 3rd July 1921. In a suit by the son instituted on 23rd May 1923, for a declaration that the sale being without necessity would not affect his reversionary rights it was objected that the limitation of 12 years prescribed for the suit by Punjab Limitation (Ancestral Land Alienation) Act of 1900 having been reduced to six years under Punjab Limitation (Custom) Act of 1920, the suit was governed by s. 6 of the Act, and not having been brought within one year of the operation of the said Act was barred by limitation:

Held, that s. 6 of the Act did not apply to the case, and the suit was within time under s. 5 of the Act, read with ss 6 and 8 of the Indian Limitation Act of 1908. [*ibid.*]

Miscellaneous appeal from an order of the District Judge, Lyallpur, dated the 13th March 1924, reversing that of the Sub-Judge, Sheikhupura, dated the 5th January 1924.

Lala *Badri Das*, R. B., for the Appellant.

Mr. *Sagar Chand* for Mr. *Shah Nawaz*, for the Respondents.

JUDGMENT.—The legal point involved in this second appeal is of considerable difficulty. In order to understand it the following statements of facts will be useful:—

Raji Shah, the father of the two plaintiffs, sold the land in dispute to defendants Nos. 1, 2 and 3 on the 1st of April 1913. Mahomed Ali Shah, plaintiff, was a minor at that time and Imam Shah, the other plaintiff, had not yet been born. Mahomed Ali Shah attained his age of majority on the 3rd July 1921 and this suit was instituted on the 23rd May 1923 for a declaration that the sale in question was fictitious and without consideration or necessity and did not, therefore, affect the reversionary rights of the plaintiffs on the death of the alienor.

The first Court dismissed the suit as barred by limitation, but the District Judge held it to be within time and remanded the case to the first Court for decision on the merits. The defendant-vendees have appealed to this Court.

At the time of the sale the period of limitation for such suits was provided by the Punjab Limitation (Ancestral Land Alienation) Act, 1900, which provided a period of 12 years, but that Act was repealed by the Punjab Limitation (Custom) Act, 1920, which came into force on the 4th January 1920. This Act reduced the period for such suits to six years. It is contended on behalf of the defendant-appellant that the present suit is barred by limitation on the ground that limitation for such suits in relation to alienation which took place before the 4th June 1920 is only one year by virtue of s. 6 of the Punjab Limitation (Custom) Act, 1920.

Section 5 of that Act runs as follows:—

"Subject to the provisions contained in ss. 4 to 25 (inclusive) of the Indian Limitation Act, 1908, and notwithstanding anything to the contrary contained in the First Schedule of the said Act, every suit, of any description specified in the Schedule annexed to this Act, instituted after the period of limitation prescribed therefor in the Schedule, shall be dismissed, although limitation has not been set up as a defence."

And s. 6 reads as follows:—

"*Notwithstanding anything herein contained*, any suit for which the period of limitation prescribed by this Act is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908, or by the Punjab Limitation (Ancestral Land Alienation) Act, 1900, may be instituted within

the period of one year next after the commencement of this Act or within the period prescribed for such suit by the Indian Limitation Act, 1908, or by the Punjab Limitation (Ancestral Land Alienation) Act, 1900, whichever period expires first."

It is admitted by Mr. Badri Das, who appeared for the appellant, that if the present suit is governed by s. 5 then the suit is within limitation by virtue of ss 6 and 8 of the Indian Limitation Act. The difficulty is really created by the opening sentence, which we have underlined, of s. 6 of the Act of 1920, which if read by itself might be interpreted to mean that s. 5 of the Act does not govern cases to which the Punjab Limitation (Ancestral Land Alienation) Act, 1900, applied but has ceased to do so by virtue of its repeal by the Act of 1920; in other words cases in which the cause of action to contest alienations has already arisen. We must say that the phraseology of s. 6 of the Act of 1920 is obscure and open to misconstruction, but we do not consider that the contention of Mr. Badri Das is sound. The point is one of first impression and reading the two sections together, *i.e.*, ss. 5 and 6 of the Act of 1920, we hold that s. 6 really gives an additional period of one year to those who were at the time, when the Act came into force entitled to institute suits of the nature as the one before us, but could be successfully met by a plea of limitation owing to the repeal of the Act of 1900 and the consequent reduction of the limitation. In the case before us the limitation would have expired on the 1st April 1925 under the Act of 1900 and on the 3rd July 1924 under s. 5 of the Act of 1920 read with ss. 6 and 8 of the Indian Limitation Act. The opening sentence of s. 6 of the Act of 1920 being vague we are unable to hold that it had the effect of depriving the plaintiffs of their right which they had under s. 5.

We, therefore, hold that s. 6 of the Act of 1920 does not apply to the case of the plaintiffs in the suit before us. In view of our finding on this point the other point involved does not arise. The result is that this appeal is dismissed with costs.

N. H. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 198-B OF 1923.

February 22, 1924.

Present:—Mr. Kinkhede, A. J. C.

ISRAM—APPLICANT

versus

GANGIA—NON-APPLICANT.

Ex parte *decree, setting aside of—Knowledge of decree.*

A proof of knowledge of the decree with all its contents and the general effect thereof is necessary in order to support a plea of limitation in bar of an application to set aside an *ex parte* decree.

Kumud Nath Roy v *Jatindra Nath*, 9 Ind Cas 189, 38 C 394, 13 C L J 221, 15 C W N 399, *Pundlick* v *Vasant Rao*, 4 Ind. Cas 586, 11 Bom L R. 1296 and *Habibullah* v. *Karanju*, 19 Ind Cas. 125, 9 N L R. 35, referred to

Application for revision of an order of the Small Cause Court, Akola, dated 28th July 1923, in Miscellaneous Case No. 333 of 1922.

FACTS appear from the order of the Small Cause Court, Akola:—The original suit was fixed for 19th September 1922 and was decided *ex parte* on that day as the report of the process-server was that defendant refused the summons on 14th August 1922 and it was affixed to his house. Defendant stated that the report is false. His application is dated 30th October 1922 and to explain the delay he alleged that he came to know of the decree on 5th October 1922. This fact was to be proved by him. He himself went into the witness-box and deposed that on 5th October 1922 K G Deshmukh Pleader's clerk informed him of the decree and that he took inspection through petition writer Kasarkar Mr. Deshmukh's clerk was not examined and the petition writer P. W. No. 3 gave the lie to his story. This is not proved. The fact that he filed his first application for setting aside this decree on 5th October 1922 would not be evidence of the fact that he came to know of the decree on that day and not before. And since he has failed to prove that his application is in time under Art. 164, Limitation Act, it must be disallowed.

It is true that the summons was not properly served. It appears from defendant's evidence that the process server did not personally go to the defendant's house but called him to the *chaori* through the *patil* and as he refused to come the report of refusal was made This was no service at all but that does not help the applicant Article 164 of the Limitation Act prescribes the time when the limitation begins to run the

first is date of the decree and the present application is clearly beyond 30 days from that. The second is the date of the applicant's knowledge of the decree when the summons was not duly served. The present application comes within this second clause. In such a case it is for the applicant to prove when he came to know of it. Ordinarily in the absence of evidence to the contrary the applicant's sworn testimony would be enough but in this case applicant gave the names of the persons from whom he came to know of the decree and one of them proves the falsity of his statement and the other was not summoned at all. I cannot in these circumstances accept applicant's statement as sufficient and rely on it. I, therefore, dismiss the application with costs.

Mr. *G. G. Hatvalne*, for the Applicant.

Mr. *M. B. Niyogi*, for the Non-Applicant.

ORDER.—I think this civil revision must succeed on the short ground that there is no material on record to show that the applicant had knowledge of the decree complained of at any time prior to 5th October 1922. The cases in *Kumud Nath Roy* v. *Jatindra Nath*(1) which follows *Pundlick* v. *Vasant Rao* (2) and *Habibullah* v. *Karanju* (3) clearly require proof of knowledge of the particular decree with all its contents and the general effect thereof. Such proof is wanting and I am not, therefore, prepared to accept the decision disallowing the defendant's petition for a hearing on merits as correct. The application is allowed and the lower Court is directed to deal with the merits of the case. The *ex parte* decree of the lower Court is *ipso facto* reopened.

I allow the revision but in the circumstances of the case I direct that each party shall bear his own costs of this revision.

G. R. D. *Revision allowed.*

(1) 9 Ind. Cas. 189, 38 C. 394, 13 C. L J. 221; 15 C. W. N 399

(2) 4 Ind Cas 586, 11 Bom. L. R. 1296.

(3) 19 Ind. Cas. 425, 9 N. L. R. 35

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 199 OF 1923.

January 12, 1925.

Present:—Sir Shadi Lal, KT., Chief Justice and Mr. Justice Le Rossignol.

MOTI MAL-RAM SARUP—APPELLANT

versus

DAULAT RAM AND OTHERS—RESPONDENTS

Provincial Insolvency Act (V of 1920), s. 54—Preference of one creditor over others—Mortgage securing old and new loans.

A transfer cannot be avoided merely because its effect is to give one creditor preference over other creditors unless the debtor intends to do so

Where a debtor who is unable to meet his liabilities and stands in need of further accommodation, approaches one of his creditors for a further loan, and executes a mortgage securing both the fresh and the previous loans, it cannot be said that he intended to prefer that creditor over others, but merely that he wanted to benefit himself.

Letters Patent Appeal against the judgment of Mr. Justice Moti Sagar, in Civil Appeal No. 1396 of 1922, dated the 28th May 1923, and printed as 75 Ind. Cas. 861, reversing that of the District Judge, Karnal, dated the 12th May 1922.

Mr. *Shamair Chand*, for the Appellant.

Mr. *Manohar Lal*, for the Respondents.

JUDGMENT.—On the 10th February 1921, one Sondha mortgaged the property in dispute in favour of his creditor Daulat Ram for a sum of Rs. 5,000. On the 18th April he presented an application for insolvency, and this application was granted on the 6th December. The creditors seek to impeach the transfer on the ground that it was made with a view of giving Daulat Ram a preference over other creditors, and the determination of the question depends upon the motive which inspired the debtor in making the transfer.

Now, the deed of mortgage shows that Sondha was already indebted to Daulat Ram to the extent of Rs. 3,200, and that he obtained a fresh loan of Rs. 1,800 and hypothecated his property for Rs. 5,000. There can be no doubt that Sondha was, at the time of the transfer, unable to pay his debts; and that he applied for insolvency within three months after the date of the transfer. It is further clear that the effect of the transfer was to give preference to one creditor over others, but s. 54 of the Provincial Insolvency Act does not avoid a transfer merely because its effect is to give one creditor preference over other creditors but makes the intention of the debtor the dominant factor in deciding the fate of the transaction.

It appears to us that the debtor who was unable to meet his liabilities, stood in need of further accommodation and it was for this reason that he approached the creditor and asked him to make a loan. In entering into this transaction he intended to benefit himself and not the creditor; and we cannot, therefore, accept the contention of the learned Counsel for the appellant that

the transaction was effected with a view of giving Daulat Ram a preference over other creditors.

The learned Counsel for the appellant argues that Daulat Ram has not succeeded in establishing the whole of the debt of Rs. 3,200, and that in support of five *hundis* of Rs. 1,800 he has not produced any documentary evidence beyond the *hundis* themselves to prove the payment of consideration. It is to be observed that the learned District Judge recorded a finding on this point in favour of Daulat Ram and registered him as a creditor for the whole of Rs. 5,000 and interest thereon. No appeal was preferred against this decision so far as the amount of the debt was concerned, and the appellant is now precluded from impeaching it.

The appeal is accordingly dismissed. Parties to bear their own costs in this Court.

N. H. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 999 OF 1924.

November 19, 1924.

Present:—Mr. Justice Abdul Raoof.

ATTAR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KIRPA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharer—Exclusive possession—Erection of building—Injunction, suit for—Demolition of building—Special injury

A co-sharer whose rights have been invaded by the exclusive possession of another co-sharer can maintain a suit without proving material and substantial injury. [p. 297, col. 2.]

Majju v. *Teja Singh*, 44 Ind. Cas. 814; 29 P. R. 1918; 114 P. W. R. 1918, 118 P. L. R. 1918, distinguished.

A co-sharer who knowing perfectly that he has no right to take exclusive possession of any portion of the common land, commences and completes a building thereon with his eyes open, is not entitled to any consideration at the hands of the Court, and the latter should grant a mandatory injunction against him for demolition of the building [p 297, col. 2; p. 298, col. 1.]

Manji v. *Ghulam Muhammad*, 57 Ind Cas 207, 1 L. 249 and *Manji* v. *Ghulam Muhammad*, 61 Ind. Cas. 415; 2 L. 73; 3 L. L. J. 75, followed.

Second appeal from a decree of the District Judge, Jullundur, dated the 28th January 1924, reversing that of the Subordinate Judge, Third Class, Phillour, District Jullundur, dated the 1st November 1923.

Lala *Balwant Rai* for Lala *Badri Das*, R. B., for the Appellants.

Mr. *D. C. Ralli*, for Kanwar *Dalip Singh*, for the Respondents.

JUDGMENT.—The defendant Kirpa Singh built a *kotha* on a plot of land belonging jointly to the plaintiffs and the defendants. The present plaintiff-appellants brought a suit for demolition of that *kotha* on the ground that the particular plot had been left open by the common consent of all the co-sharers to be used on ceremonial occasions.

The Trial Court decreed the claim and granted the mandatory injunction prayed for.

In appeal the lower Appellate Court has set aside decision of the Trial Court and has dismissed the suit mainly upon the ground stated in its judgment. "There is, I think, no doubt from the evidence that he has been in possession for some time but that he only recently erected this particular *kotha* to which the plaintiffs object. This is practically admitted by both parties. The leading case applicable to the present one seems to me to be that reported in *Majju* v. *Teja Singh* (1) and it was there laid down that a suit of this description could only be maintained when the action of one of the proprietors had actually caused such material and substantial injury as could not be remedied by partition of the joint land. In the present case although this particular plot has not been partitioned but was left open, I do not see how it can be said that material and substantial injury has been caused to the plaintiffs, seeing that the greater number of proprietors seem to acquiesce in the erection of the *kotha*."

The learned Judge appears to be under the impression that co-sharers whose rights may be invaded by the exclusive possession of another co sharer cannot maintain a suit without proving material and substantial injury. No doubt this at one time was the view adopted in this Court but the recent decisions on this question have set the matter at rest.

Now, the facts to be taken into consideration in this particlar case are these: The defendant was one of the many co-sharers and he perfectly knew that he had no right to take exclusive possession of any portion of the common land and that with his eyes open he commenced and completed the

(1) 44 Ind. Cas. 814; 29 P. R. 1918; 114 P. W. R. 1918; 118 P. L. R. 1918.

building. Now when he is confronted with a suit by the plaintiffs he turns round and says, "you cannot dispossess me without showing special damage".

This was the very argument put forward in the case of *Manji* v. *Ghulam Muhammad*, (2). I examined almost all the authorities bearing upon this question and came to the conclusion that a plaintiff under these circumstances was entitled to sue without proving special damage. This view was upheld by a Bench of this Court in Letters Patent appeal which is reported as *Manji* v *Ghulam Muhammad* (3). The learned Judge of the Court below has altogether ignored these two decisions and has based his decision upon an older ruling which must be considered to be no more law. Mr. Ralli, however, has contended that after all it was only a discretionary relief which the Court might have declined to grant and that it is not open to this Court to interfere with the discretion exercised by the lower Appellate Court. Now as a matter of fact the Court of first instance had given this relief in the exercise of its discretion. Therefore, the lower Appellate Court ought not to have interfered with the decision of the first Court. But leaving this question aside, is the defendant really entitled to any consideration in the matter? He knew perfectly well that this piece of land could never be partitioned and the injury, if any, caused to the plaintiff could never be remedied, and he also knew the limited right of joint ownership that he possessed and yet he persisted in erecting this building He is not entitled to ask this Court either not to grant the injunction, or to refuse the prayer altogether or compensate the plaintiffs by awarding damages only.

In my opinion the lower Appellate Court was not justified in interfering with the decision of the Trial Court. I accordingly accept this appeal, set aside the decree of the lower Appellate Court and restore that of the first Court with costs throughout.

N. H. *Appeal accepted.*

(2) 57 Ind Cas. 207, 1 L. 249
(3) 61 Ind. Cas. 415; 2 L. 73, 3 L L J. 75.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 94 OF 1925.

June 16, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice B B. Ghose.

THE FIRM OF RAM PROSAD-RAM KISSEN AGARWALLA, RAM PROSAD PODDAR—DECREE-HOLDERS—APPELLANTS

versus

HARO KUMAR BASAK AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s 115—Execution of decree—Stay proceedings, failure of—Decree-holder ordered to take out execution at once—Talbana, deposit of - Reasonable time for filing processes -Execution case, dismissal of, for default—Illegal exercise of jurisdiction - -Revision.

Stay of execution of a decree was directed by the Court on the judgment-debtor furnishing security by a specified date. The judgment-debtor failed to furnish security on that date, and the Court directed the decree-holder to take steps for execution at once The decree-holder deposited *talbana* for service of sale proclamation on the same day but did not file the processes, and the Court dismissed the execution case for default there and then. On revision

Held, that the Court exercised its jurisdiction illegally in not allowing the decree-holder reasonable time for filing processes, as he could not have been expected to be ready with the processes on the expectation that the judgment-debtor would fail to furnish security, and that, therefore, the dismissal of the execution case for default must be set aside. [p. 299, col 1]

Appeal against an order of the Subordinate Judge, Second Court, Mymensingh, dated the 20th of February 1925

Dr *Dwarka Nath Mitter* (with him Babu *Satyendra Nath Mukherjee*), for the Appellants.

Babu *Annoda Charan Karkoon*, for the Respondents.

JUDGMENT.

B. B. Ghose, J.—A preliminary objection has been taken as to the competency of this appeal on the ground that the order against which this appeal has been filed is an order of dismissal for default which does not come within the definition of decree under s. 2, sub s. (2), cl. (*d*) of the C. P. C. The appeal is not maintainable.

The appeal is, therefore, dismissed with costs, hearing fee three gold *mohurs*.

There is however an application by the decree-holder, and we are asked to interfere in revision with the order of the Subordinate Judge dismissing the execution case for default. The matter stands thus : Stay of execution was directed by this Court on furnishing security within a specified time. That date expired on the 20th February 1925. The judgment-debtor failed to furnish

the required security on that date and the Subordinate Judge directed the decree-holder to take steps for execution at once. The next order dated the 20th February, proceeds thus: "The decree-holder has deposited *talbana* for service of sale proclamation. The processes have not been filed. I reject his prayer for the issue of sale proclamation". Then the next order of that very date is "the execution case is dismissed for default".

It seems to us that the Subordinate Judge had exercised his jurisdiction illegally in not allowing the decree-holder reasonable time for filing the processes after he had put in the *talbana* under the direction of the Court. The 20th February was fixed as the last date on which the judgment-debtor might furnish security for stay of execution and the decree-holder could not have been expected to be ready with the processes in the expectation that the judgment-debtor would fail to furnish the required security. In such circumstances, the Subordinate Judge ought, in the proper exercise of his jurisdiction, to have given the decree-holder reasonable time for furnishing the processes.

The order of the Subordinate Judge dated the 20th February 1925 dismissing the case for default is, therefore, set aside and the case is remanded to him for allowing the decree-holder to take further steps for the execution of his decree. The petitioner will be entitled to his costs of this application, hearing-fee three gold *mohurs*.

Greaves, J.—I agree.

Order set aside,
Case remanded.

N. H

LAHORE HIGH COURT.

MISCELLANEOUS SECOND APPEAL
No. 1190 OF 1924.
January 12, 1925.

Present:—Mr. Justice Harrison.

MOHAN SINGH AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS
versus
NATHU MAL—DECREE HOLDER—RESPONDENT

Limitation Act (IX of 1908), s. 14—Application not lying in any Court—Extension of time

An application which does not lie in any Court cannot be taken into account for the sake of extending time under s. 14, Limitation Act. [p. 299, col. 2.]

Moti Singh v. *Maghar*, 11 Ind. Cas. 880; 22 P. R. 1912; 163 P. W. R. 1911; 244 P. L. R. 1911, followed.

Miscellaneous second appeal from an order of the District Judge, Amritsar, dated the 24th January 1924, reversing that of the Subordinate Judge, First Class, Amritsar, dated the 26th July 1922.

Mr. *Jai Gopal Sethi*, for the Appellants.

Dr. *Nand Lal*, for the Respondent.

JUDGMENT.—On the 27th of June 1916 a preliminary decree under O XXXIV, r 4 was passed in favour of a mortgagee. On the 4th January 1917 an application for execution was presented on which a notice issued. Proceedings were then stayed by another Court. On 12th April 1922 a further application for execution was presented on which the Court quite rightly held that it could not execute the preliminary decree. On the 1st May 1922 an application was put in for the first time asking for a final decree to be passed. This was dismissed by the Trial Court as barred by limitation under Art 181.

On appeal the learned District Judge held that time ought to have been extended under s 14 of the Limitation Act. He accordingly extended the time and directed that the decree holder should be given a final decree under O. XXXIV, r. 5.

At the hearing of the second appeal a preliminary objection was taken that it was undervalued at Rs 4. It is contended by the respondent that the words "direct that the decree-holder be given a final decree" mean that the District Judge himself passed a final decree and that, therefore, the appeal should bear full stamp No final decree has in fact been prepared by the District Judge but merely a memorandum of costs such as is prepared when an order is passed which does not require a decree I read the words as meaning that in accordance with the usual procedure the final decree is to be prepared by the Trial Court which gave the preliminary decree and I hold that this appeal is correctly stamped.

On the merits, Counsel contends that there was no excuse for the mistake made by the decree-holder and that, as laid down in *Moti Singh* v *Maghar* (1) an application which does not lie in any Court cannot be taken into account for the sake of extending time under s. 14 of the Limitation Act. As against this the respondent contends

(1) 11 Ind. Cas. 880; 22 P. R. 1912, 163 P. W. R. 1911; 244 P L. R 1911.

that the decree is in the form of a final decree. The words used by the District Judge are: "The decree, though not strictly in accordance with the prescribed form, seems, in my opinion, to be intended to be preliminary." All that Counsel has been able to show is that in the concluding words of this decree instead of saying, "the plaintiff shall be at liberty to apply for a personal decree", the words used are: 'he shall be entitled to realize it by sale of other property." At first Counsel contended that certain other passages in the decree are not in accordance with the Code but this he withdrew after examining the prescribed form.

It appears to me not only that the decree was intended to be preliminary, but that it is preliminary both in form and substance and the trifling difference in the words in the concluding portion is wholly immaterial.

As against *Moti Singh* v. *Maghar* (1) Counsel cannot quote any authority of this Court and I have no hesitation in following it. The application is clearly barred by time and it appears to me that the delay is wholly inexcusable.

Counsel for the respondent contends that the fact that the first Executing Court did not realize that this was a preliminary decree and issued notice debars all other Courts including this Court from treating it as such a wholly impossible position.

I accept the appeal and confirm the order of the Trial Court. Costs of the judgment debtor will be paid throughout by the decree-holder.

N. H. *Appeal accepted.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 547 OF 1924.

January 26, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Wallace.

VEERAPPA CHETTIAR AND OTHERS —PETITIONERS

versus

P. G. SUNDARESA SASTRIGAL—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. III, r. 4, scope of—Madras Civil Rules of Practice, r. 277, object of—Pleader application of, to appear against former client—"Matter connected therewith," meaning of—Wrong order by misinterpretation of rule—Revision.

Order III, r. 4, C. P. C., does not give an absolute right to a Pleader to appear in a Court till the termination of the proceedings, but only provides in what manner a Pleader competent to appear, plead and act should be appointed and till what time the appointment will be in force If he is not competent to appear, plead and act in any Court under the rules governing the procedure in that Court, he cannot claim right of audience by virtue of O. III, r. 4 [p 301, col. 2]

A Pleader can appear for a party whose interest is opposed to that of the party for whom he had acted, drawn up pleadings or appeared in the same proceedings, only with the latter's consent or when specially authorised by the Court. [p. 302, col. 2]

Rule 277 of the Madras Civil Rules of Practice is intended to regulate the proceedings in Courts and a practitioner of the Court has to conform to the rules governing its procedure [p 301, col 2]

The object of r 277 is not to save the Pleader from a suit for damages by the party for whom he acted and against whom he subsequently acted, but to prevent an unreasonable conduct on the part of both the Pleader and the client [p 302, col 1.]

A Pleader who has acted for a party to a suit and has discharged himself cannot afterwards act for the opposite party and the Court has power to restrain him from doing so on an application made for that purpose [*ibid*]

The words "in any matter connected therewith" in r. 277 mean connected with the suit or appeal or other proceeding in which the Pleader gave the advice and does not refer to a subsequent suit, or appeal or proceeding after the termination of the former suit, appeal or proceeding, where the causes of action in the two are different [p. 303, col. 1]

The subsequent suit or proceeding or matter can be said to be connected with the previous suit or proceeding or matter only if the former flows from, or in consequence of, the previous suit or proceeding. Otherwise there is no connection at all [*ibid*]

It is not the identity of the subject-matter that establishes the connection between the two suits or the identity of the parties but the identity of the right or title that is asserted or denied and the relief claimed. [p. 303, col 2.]

Where a Court by a wrong interpretation of r. 277 refuses to allow a practitioner to appear against a client for whom he is alleged to have acted on a former occasion, it exercises a jurisdiction not vested in it by law and the order is revisable by the High Court [p 303, col 1]

Srinivasa Row v *Pichai Pillai*, 21 Ind Cas 629; 38 M 650; 25 M L. J. 567 and *Ramakrishna Pillai* v. *Balakrishna Aiyar*, 62 Ind Cas. 712, 41 M L. J. 60; 13 L. W 541; (1921) M W N. 646, relied upon.

[Duty of Pleaders stated.]

Petition, under s. 115 of Act V of 1908 and under s. 107 of the Government of India Act, praying the High Court to revise an order of the Court of the District Munsif, Srirangam, dated the 24th June 1924, in C. M. P. No 315 of 1924 in Original Suit No. 103 of 1924 on its file.

Messrs. *K. V. Krishnaswami Iyer* and *R. Kesava Iyengar*, for the Petitioners.

Messrs. *T. M. Krishnaswami Iyer* and *K. G. Srinivasan*, for the Respondent.

JUDGMENT.—This is an application

to revise the order of the District Munsif of Srirangam, who directed two Pleaders not to appear for the defendants in two suits pending in his Court as the plaintiff objected to their appearance inasmuch as they had appeared for him in previous suits against the defendant in which the subject-matter was the same as in the suits now pending. The first contention of Mr. K. V. Krishnaswamy Iyer is that the District Munsif had no jurisdiction to pass such an order. It is argued that the Pleaders are not parties to the suits and that they have no right of appeal against such an order and, therefore, the order is without jurisdiction and is not covered by r. 277 of the Civil Rules of Practice.

The District Munsif purported to act under r. 277 which is in these terms: "Except when specially authorised by the Court, or by consent of the party, a Pleader who has advised in connection with the institution of a suit, appeal or other proceeding, or has drawn pleadings in connection with any such matter, or has, during the progress of any such suit, appeal or other proceedings, acted for a party, shall not, unless he first gives the party for whom he has advised, drawn pleadings or acted, an opportunity of engaging his services, appear in such suit, appeal or other proceeding, or in any appeal, or application for revision arising therefrom or in any matter connected therewith, for any person, whose interest is opposed to that of his former client, provided that the consent of the party shall be presumed if he engages another Pleader to appear for him in such suit, appeal or other proceeding without offering an engagement to the Pleader whose services he originally engaged". It is conceded by Mr. K. V. Krishnaswamy Iyer that the Court has jurisdiction either to grant or to refuse such authority when a Pleader applies for the same under the rule. But it is urged that when he does not make an application for special authority, the Court has no jurisdiction to pass an order against him and that the only course open against a Pleader who violates the rule is by a proceeding under the Legal Practitioners Act for unprofessional conduct.

Considerable stress was laid on O. III r. 4 of the C. P. C., in support of the argument that a Pleader's engagement lasts till the termination of the proceedings, and, therefore, the Court cannot prevent the Pleader from appearing for a party after he has filed his *vakalat* in Court. Order III, r. 4 does not give an absolute right to a Pleader to appear in a Court till the termination of the proceedings but only provides in what manner should a Pleader be appointed and till what time the appointment will be in force. It assumes that a Pleader is competent to appear, plead and act in the Court in which he wishes to plead and act. If he is not competent to appear, plead and act in any Court under the rules governing the procedure in that Court, he cannot claim right of audience by virtue of O. III r. 4. Is it open to a second grade Pleader to claim a right of audience in the District Court by filing a *vakalat* or for a first grade Pleader to claim a right of audience in the High Court by filing a *vakalat* in Court for a party? The District Court and the High Court will refuse to receive the *vakalat* of a Pleader not entitled to appear before them and will refuse to allow him to act in that Court by reason of the rules governing their procedure. *In re the Pleaders of the High Court* (1), it was held that ss 2 and 36 of the C. P. C, Act XIV of 1882, did not give the Pleaders of the Bombay High Court the right to appear in the Presidency Small Cause Court of Bombay wherein only Barristers and Attorneys had a right to practise. Rule 277 is intended to regulate the proceedings in Courts and a practitioner of the Court has to conform to the rules governing its procedure. If he does not conform to the rules governing the procedure he cannot claim a right of audience in that Court. A Pleader can appear for a party whose interest is opposed to that of the party for whom he had acted, drawn up pleadings or appeared in the same proceedings either with the latter's consent or when specially authorized by the Court. The rule contains a prohibition against the Pleader's appearance unless the conditions therein laid down are satisfied. Supposing a Pleader is disbarred or struck off the rolls, can he insist upon his right to appear in a Court in which he had filed his *vakalat* before he was disbarred or struck off the rolls by reason of O. III, r. 4. Rule 4 is only an enabling provision by which a Pleader when he accepts an engagement and files his *vakalat* in Court is entitled to conduct the proceedings till he or his client dies or the termination of the proceedings. But this rule does not override the rules

(1) 8 B. 105; 8 Ind. Jur. 306 & 378; 4 Ind. Dec. (N. S.) 413.

governing the qualifications of various classes of Pleaders or the rules governing the procedure of the Courts. If the contention of Mr. K V. Krishnaswamy Iyer is pushed to its logical conclusion, it would mean that a Pleader could appear for both the plaintiff and the defendant if the contending parties are foolish enough to engage the same Pleader, and the Court would be powerless to prevent the Pleader from appearing for both the plaintiff and the contesting defendant in the same suit. It is to prevent such conduct on the part of the Pleaders and unreasonable conduct on the part of the clients that r. 277 of the Civil Rules of Practice has been enacted. In *Ramlall Agarwallah* v. *Moonia Bibee* (2), Wilson, J., held, following the principle of law laid down in the case of *Cholmondeley* v. *Clinton* (3), that an Attorney who has acted for a party to a suit and has discharged himself cannot afterwards act for the opposite party and that the Court had power to restrain him from doing so on an application made for that purpose The High Court of Madras in their proceedings dated 8th April 1869 ruled that when a suit is remitted by order of an Appellate Court for re-hearing or finding on an issue, the proceedings on such order must be regarded as a further proceedings in the trial of the suit and, consequently, under s. 22 of Regulation XIV of 1816 a Vakil cannot change sides and hold a *vakalatnama* for the party opponent to the one for whom he appeared at the first hearing. See *Proceedings, 8th April 1869* (4). The Court has, therefore, power to refuse to hear practitioners who violate the rules regulating the procedure in Courts.

It is next contended that the special authority required under r. 277 is only for the protection of the Pleader against an action for damages by the party for whom he had acted and not for enabling the Pleader to appear in Court for his opponent. The rule is no doubt intended both for the protection of the Pleader as well as the client but not in the sense in which the appellant wants it to be understood. The object of the rule is not to save the Pleader from a suit for damages by the party for whom he acted and against whom he subsequently acted but to prevent an unreasonable conduct on the part of a party who engaged the Pleader's services and afterwards gave him up without proper grounds. If a party who gets advice from a Pleader does not choose to engage his services for the conduct of the suit but engages another the Pleader is not altogether debarred from accepting an engagement from the opposite party but he could do so by giving the former an opportunity to engage his services and if he refuses to engage his services and unreasonably withholds his consent he may appear for the latter with the special authority of the Court. It is to prevent unfair dealing by the parties that the Court is invested with the power to grant special authority to a Pleader to appear against the party whom he gave advice or acted or appeared for at an early stage of the proceedings. But for such power any rich party or an unscrupulous client might prevent all leading Pleaders from appearing for his opponent by seeking their advice by paying a nominal fee and then engaging the services of one or more of them to conduct the proceedings in Court.

Mr. T. M. Krishnaswamy Iyer for the respondent urges that there is a finding of fact that the suits now pending are connected with previous suits and the High Court should not interfere with the order of the lower Court under s. 115 of the C. P. C. The facts are:—The plaintiff filed O. S. No. 525 of 1912 afterwards numbered as 400 of 1914 against the defendant in which he asked for possession of a plot to the west of his house and prayed for a permanent injunction restraining the defendant from interfering with his right to the common lane to the north of the plot. In O. S. No. 860 of 1920 the plaintiff prayed for a mandatory injunction for the removal of a cross-wall put up by the defendant in a portion of the lane. The plaintiff has now brought two suits against the defendant, *viz.*, O. S. No. 103 of 1924 for a mandatory injunction for removal of the balcony wrongly put up by the defendant over a portion of the common lane and for the removal of a portion of the defendant's drain encroaching on the common lane and O. S. No. 104 of 1924 for a mandatory injunction for removal of the arch of the verandah erected by the defendant on the ground that it had interfered with the free access of light and air to his house and for incidental reliefs. The District Munsif finds that the four suits are closely con-

(2) 6 C. 79; 5 Ind. Jur. 583; 3 Ind. Dec. (N. S.) 52.
(3) (1815) 19 Ves. 261; 13 R. R. 183; 34 E. R. 515.
(4) 4 M. H. C. R. App. 43.

nected with one another. It is difficult to see the connection. If the same questions are in dispute now as were in dispute in the previous suits, the decision of the previous suits would be *res judicata* in the present ones. The connection contemplated by r 277 is not the connection of the parties or of the subject-matter. The wording in r 277 is "in such suit, appeal or other proceeding, or in any appeal, or application for revision arising therefrom, or in any matter connected therewith." The words "in any matter connected therewith" mean connected with the suit or appeal or other proceeding in which the Pleader gave the advice and does not refer to a subsequent suit, appeal or proceeding after the termination of the former suit, appeal or proceeding. If a Vakil appears for a party in a suit or proceeding, he cannot appear for the opposite party in subsequent proceedings, in the same suit or proceeding, but that does not prevent a Pleader who appeared for a party from appearing in a subsequent suit for the opposite party when the causes of action in the two are different. The subsequent suit or proceeding or matter can be said to be connected with the previous suit or proceeding or matter only if the former flows from, or in consequence of, the previous suit or [illegible] Otherwise there is no connection at all. If a plaintiff sues the defendant for possession of land on his title and succeeds and sometime after brings a suit upon a fresh cause of action against the same defendant, there is no connection between the two suits though the defendant may raise the question of title of the plaintiff, but that would not be sufficient to establish a connection between the two. The question involved in the two suits in the District Munsif's Court are the right of the plaintiff to object to the defendant putting up certain structures and that right was not in dispute in the former suits. The causes of action are different, and the reliefs claimed are not the same. The District Munsif's exercise of jurisdiction was owing to a wrong interpretation of the rule and this Court has power to interfere with the order of the District Munsif as he exercised a jurisdiction not given to him by r. 277 of the Civil Rules of Practice.

The two cases *Ramakrishna Pillai* v. *Balakrishna Aiyar* (5) and *Srinivasa Row* v. *Pichai Pillai* (6) relied upon by Mr. Krishnaswamy Iyer as supporting his contention are distinguishable from the present. In *Ramakrishna Pillai* v. *Balakrishna Iyer* (5) the petitioner was plaintiff in O. S. No. 8 of 1917 and defendant in O. S. No. 56 of 1920 on the file of the Subordinate Judge's Court of Mayavaram. The respondents were two Vakils of the Mayavaram Sub-Court who appeared for him in the former suit and for the plaintiff in the latter suit. The petitioner's application that audience should be refused to the Vakil respondents who had filed O. S. No. 56 of 1920 for the plaintiff was rejected by the Subordinate Judge as he was not satisfied that there would be any conflict between their duty in representing the plaintiff in O. S. No. 8 of 1917 and in representing his opponent in O. S. No 56 of 1920. Both the learned Judges who heard the civil revision petition against the order of the Subordinate Judge were of opinion that the suits were connected with one another. Spencer, J., observed at page 62* 'In both suits questions arise as to the validity and binding character upon the petitioner of the indenture and whether he is estopped by reason of it from questioning the title of the defendant in the former suit and the title of the plaintiff in the second suit." The learned Judges allowed the petition and directed the Subordinate Judge to refuse to allow the respondents to conduct O S. No 56 of 1920 for the plaintiff. That case has no application to the present, as in that both the suits were then pending in the Mayavaram Court and as found by the learned Judges they were connected and some of the important questions arising in the suits were common to both suits It is not the identity of the subject-matter that establishes the connection between the two suits or the identity of the parties but the identity of the right or title that is asserted or denied, and the relief claimed.

In *Srinivasa Rao* v. *Pichai Pillai* (6) Miller, J., approved of the order of the District Munsif who prohibited a second grade Pleader from appearing for the plaintiffs in O. S. No. 32 of 1913 on his file. The Pleader appeared for the defendant in proceedings under s. 145, Cr. P. C., and obtained an order in favour of the defendant and he

(5) 62 Ind. Cas. 712, 41 M. L. J. 60; 13 L. W. 541; (1921) M. W. N. 646.

(6) 21 Ind. Cas 629; 38 M 650, 25 M. L. J. 567.

*Page of 41 M. L. J.—[*Ed.*]

filed O. S. No. 32 of 1913 for the defeated party. The District Munsif relied on r 277 of the Civil Rules of Practice prohibiting the Pleader from appearing for the plaintiff. In proceedings under s. 145, Cr. P. C., the Magistrate decides only the question of possession and his order is to maintain the possession of the party found to be in possession at the time the proceedings are adopted. His order is subject to the result of a civil suit and is good only till the Civil Court decides which party is entitled to the property in dispute. The civil suit, therefore, in almost all cases follows the order of the Magistrate and the proceedings in a the civil suit are in a sense continuation of the proceedings before the Magistrate. Though the Magistrate enquires only into the question of possession, yet documents are relied upon by the parties for the purpose of proving their possession and the Pleader who appears for a party necessarily acquaints himself with the title to the property and invariably peruses the documents produced by his client. With the knowledge of the strength and weakness of his client's title if he appears in the civil suit for a party whose interests are opposed to his clients in the proceedings before the Magistrate, there is a danger of his using for his client in the civil suit the knowlege gainedby him from his client in the proceedings in the Magistrate's Court. There is anintimate connection between the proceedings under s. 145, Cr. P. C., in the Magistrate's Court and the civil suit filed in consequence of the order of the Magistrate.

If a Pleader appears for a party in the proceedings in execution, he cannot appear in the suit filed by reason of the order in claim proceedings for a party whose interests are opposed to that of the party for whom he acted in the claim proceedings without his consent or without the authority of the Court in which the suit is pending. The suits now pending in the District Munsif's Court are not the necessary consequence of the previous suits. There is no connection between the present one and the former suits. As observed by Spencer, J., in *Ramakrishna Pillai* v. *Balakrishna Iyer* (5) the two suits will ordinarily be considered connected if they have any issue in common or involve substantially a determination of the same question of fact or the same mixed question of law and fact.

A few observations as to the duty of Pleaders would not be out of place here. The legal profession is a very noble one; and no Pleader should by his conduct consciously or unconsciously do anything to lower its high standard of morality, probity and honesty. The Pleaders would do well to avoid any conduct on their part which is reasonably capable of being misunderstood. If a Pleader advises or acts for a client he should not appear against him in any subsequent proceeding if he feels that he might in such proceeding even unconsciously use the information gained from his former client against him. Clients should have the fullset confidence in their legal advisers and should not be deterred or hampered in disclosing the strength and weakness of their cases by the fear that their instructions might at some future time be used against them by their legal advisers. It is the duty of legal practitioners to avoid even the suspicion that they might possibly use the information which they received in their professional capacity against the clients from whom they received them. There is no rule, etiquette or code of ethics to govern the conduct of clients. On the other hand the Pleaders who are guided and governed by the etiquette of the profession are not likely to do anything which would incur the censure of the profession and, in order to prevent an unscrupulous or contankerous client from depriving his opponent of the services of Pleaders, r. 277 of the Civil Rules of Practices gives a discretion to the Court to specially authorize a Pleader to appear and act for a party whose interests are opposed to those of the party for whom he at one time acted or appeared or gave advice.

We have no hesitation in holding that the plaintiff has no reason to complain of the conduct of the Pleaders. He has only to thank himself if he lost the services of the two prominent Pleaders. He could have retained them if he had cared. He engaged other Vakils to appear for him and his petition to the District Munsif is evidently not to protect his own interests for they require no protection but to annoy the defendants and the Pleaders whom he did not care to retain. Perhaps there is some motive at the bottom of the plaintiff's petition. We set aside the order of the District Munsif and allow the petition with costs throughout.

V. N. V.
N. H. *Order set aside.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 61 OF 1924.

April 14, 1925.

Present:—Mr. W [illegible] Officiating A. J. C.

TAPIRAM—PLAINTIFF—APPELLANT

versus

JUGALKISHORE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Document, material alteration in—Suit to recover money—Acknowledgment produced in evidence—Material alteration in acknowledgment, effect of—Suit, whether can be decreed.

The rule that no decree can be passed in a suit brought on a document which has been materially altered after execution without the privity of the party to be affected by it, has no application where the obligation to be enforced does not arise under the altered instrument and the instrument is produced merely as a piece of evidence in proof of the obligation. [p. 305, col. 2.]

[Case-law discussed.]

Where a cause of action for recovery of money lent to the defendant exists independently of any document which may have been obtained from the defendant in support of the advance, the fact that the document has been materially altered is no ground for dismissing plaintiff's claim for the advance. [p. 307, col. 2.]

An acknowledgment which merely evidences the receipt of a loan does not amount to a contract and does not furnish a cause of action, and a claim in proof of which such an [illegible] is produced can be decreed despite the fact that the acknowledgment has been materially altered without the consent of the debtor affected by it. [*ibid.*]

Raghubirsingh v. *Udechand*, 11 C. P. L. R. 65, and *Durga Shanker* v. *Ram Prasad*, 14 C. P. L. R. 151 at p. 152, relied on.

A material alteration in a written acknowledgment of debt does not render it inoperative as the [illegible] ment is merely an evidence of pre-existing [illegible] 305, col. 2.]

Appeal against a judgment of the District Judge, Nimar, dated the 17th September 1923, in Civil Appeal No. 126 of 1923.

Mr. *W. R. Puranik*, for the Appellant.

Mr. *J. Sen*, for the Respondents.

JUDGMENT. — Defendants-respondents borrowed from Hemlal cousin of plaintiff-appellant Rs. 200 on 11th February 1920, Rs. 100 on 25th April 1920, Rs. 25 on 21st May 1920 and again Rs. 25 on 23rd September 1920, and for each of the sums so borrowed they passed an acknowledgment or *ruju* in favour of Hemlal in his account book. As they failed to re-pay the money in spite of demand, plaintiff brought a suit against them for recovery of all the four items plus interest thereon at the rate of Re. 1-8 per cent. per mensem.

Defendants admitted having borrowed all the four items referred to by the plaintiff. They also admitted having passed all four acknowledgments filed by the plaintiff in respect of the aforesaid four items. They, however, denied that they had agreed to pay any interest. They pleaded that in the first acknowledgment dated 11th February 1920 the letters "Da-1½" had been fraudulently interpolated without their knowledge or consent in order to make it appear that that they had agreed to pay interest at Re. 1-8 per cent per mensem, although there was no agreement on their part to pay any interest, and contended that as a material alteration has been made in one of the acknowledgments plaintiff was not entitled to recover anything from them.

Both the Courts below held that defendants had not agreed to pay any interest. They further held that a material alteration had been made in the first acknowledgment without the knowledge or consent of the defendants by inserting therein the letters "Da 1½". They consequently dismissed plaintiff's claim for the money covered by that acknowledgment and decreed his claim for the money due on the remaining three acknowledgments with interest thereon at Re. 1 per cent. per mensem by way of damages. Plaintiff has now preferred this appeal and he contends that his claim for the money covered by the first acknowledgment should not have been dismissed by the Courts below. In my opinion his contention is sound and must prevail.

It has, no doubt, been held that there is no right of action on a document which has been materially altered after execution and without the privity of the party to be affected by it, and that no decree should be passed in a suit brought on such a document despite the fact that consideration for the document has been admitted by the defendant: *Pandurang* v. *Kishan* (1), *Kanhayalal Tarachand* v. *Sitaram Tukaram* (2). But this rule has no application where the obligation to be enforced does not arise under the altered instrument and the instrument is produced merely as a piece of evidence in proof of the obligation. It has accordingly been held that a material alteration in a written acknowledgment of debt does not render it inoperative as the acknowledgment is merely an evidence of pre-existing liability: *Atmaram* v. *Umed-*

(1) 74 Ind. Cas. 20; 19 N. L. R. 79; (1923) A. I. R. (N.) 295; 7 N. L. J. 39.

(2) 81 Ind. Cas. 847; 20 N. L. R. 76; (1924) A. I. R. (N.) 250.

ram (3). In that case Chandavarkar, J., has observed at pages 620 and 621:*

"The principle of English Law, which was first laid down in *Pigot's case* (4) that the material alteration of a document by a party to it after its execution without the consent of the other party renders it void, has been followed in India. But all the decisions which have been cited at the Bar from the English and Indian Law Reports relate to cases in one and all of which the *altered* instrument was the foundation of the plaintiff's claim and the source of the defendant's obligation or liability. They were cases of written contracts, or bonds or Bills of Exchange or similar instruments, as to which it may be taken as settled law both in England and here that a material alteration avoids the instrument where the action is on the instrument itself: see *Agricultural Cattle Insurance Company* v. *Fitzgerald* (5). The decisions cited in the notes to the case of *Master* v. *Miller* (6) in Smith's Leading Cases also make that clear. As pointed out in the case of *Earl of Falmouth* v. *Roberts* (7) there is a distinction between cases in which the altered instrument is merely evidence and those in which the obligation sought to be enforced is by reason of the instrument itself. 'The rule of law,' said Parke, B, in that case, 'applies where the obligation is by reason of the instrument'..... But no case has been cited to us nor have we been able to find any in which it has been laid down either in England or here that a written acknowledgment of his liability by a debtor becomes void and inoperative if it is materially altered without his consent by his creditor. An instrument which creates a liability and gives rise to a cause of action is one thing and a written acknowledgment of that liability is another."

In *Harendra Lal Roy* v. *Uma Charan Ghosh* (8) plaintiff had sued the defendant for money advanced. In the business book of the plaintiff, defendant had acknowledged his liability for that amount by signing his name over an eight anna stamp. It was found that an entry relating to interest had been subsequently interpolated in the acknowledgment and consequently the Small Cause Court held that the plaintiff was not entitled to recover the sum covered by the acknowledgment and dismissed plaintiff's suit. When the matter came up in revision before the High Court, Maclean, C. J., set aside the decree of the Small Cause Court and gave a decree to the plaintiff on the ground that plaintiff had not sued on the basis of the altered acknowledgment but had produced it merely as evidence in support of the loan. He pointed out in that case that the authorities discriminated between the cases in which the altered document was the foundation of the claim and those in which it was only filed as evidence and observed that the principle that where a plaintiff sues upon an instrument which he has materially and fraudulently altered, such alteration vitiates the instrument had no application to suits in which the altered instrument was not the foundation of the plaintiff's claim.

In this connection, I may also refer to the case of *Moti Lal Saha* v. *Monmohan Gossami* (9). In that case plaintiff had sued the defendant for recovery of debt on the allegation that the defendant had borrowed the debt from him by executing promissory-notes in his favour. The promissory-notes were found to be forgeries but still the plaintiff was held entitled to recover. Rampini and Pratt, JJ., observed in that case as follows:—

"We think, therefore, that although the promissory-notes are forgeries, it does not follow that the plaintiffs are not entitled to a decree for the money lent by them if they can prove the loan in any other way. And in support of this view, we need only cite the case of *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (10)."

It is, no doubt, true that the case cited above was a case in which the document sued upon was held to be forgery and was not a case of material alteration. But the principle upon which the decision in that case was based fully governs the present case. That principle is that where a cause of action for recovery of an advance exists independently of any instrument which may have been given for the advance, the fact that the instrument is vitiated by fraud is

(3) 25 B 616, 3 Bom. L R. 213.
(4) 11 Rep. 26; 11 Rep. folio 27 (a).
(5) (1851) 16 Q B. 432 at pp. 440, 441; 20 L. J. Q. B. 244; 15 Jur. 489; 117 E R. 944.
(6) (1791) 1 Sm. L. C (11th Ed.) 767; 4 T. R. 320; 2 R. R. 399; 100 E. R. 1042.
(7) (1842) 9 M & W. 469; 1 Dowl. (N. S.) 633; 11 L. J. Ex. 180; 152 E R 198; 60 R. R. 790.
(8) 9 C. W N 695.

*Pages of 25 B.—[*Ed.*]

(9) 5 C. W. N. 56.
(10) 23 C. 851; 12 Ind. Dec. (N. S.) 565.

no ground for dismissing plaintiff's claim for recovery of the advance.

Similarly in *Dula Meah* v. *Abdul Rahaman* (11), Newbould, J., has observed "I can find no decided authority that the material alteration of a written contract destroys the original debt if the debt is not merged in the written contract. If the written contract is a negotiable instrument this would usually happen. But in the case of a simple bond I would hold that the alteration prevents a suit being based on the bond, and that the question whether a suit would lie on the original debt depends on whether there is a separate contract which can be proved apart from the bond." Rankin, J., has also pointed out in that case that "an independent cause of action must be shown if the doctrine of *Master* v. *Miller* (5) is not to take effect." This case also recognises the principle that where a cause of action for recovery of money lent to the defendant exists independently of any document which may have been obtained from the defendant in support of the advance, the fact that the document has been materially altered is no ground for dismissing plaintiff's claim for the advance.

In this connection, it may be useful to refer by way of analogy to cases in which a creditor's claim for recovery of the loan advanced to his debtor has been decreed in spite of the fact the document obtained from the debtor in support of the loan was found inadmissible to evidence for want of proper stamp or for a like reason: *Banarsi Prasad* v. *Fazal Ahmad* (12) *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (10) *Ram Bahadur* v. *Dusari Ram* (13). These cases have also been decided on the principle that where a cause of action for money lent is complete in itself and where the claim is founded on the original consideration, it can be enforced provided that the original consideration has not merged in the instrument (*e. g.* bond or promissory-note) which is excluded from evidence

Bearing in mind, the principles referred to above, let us examine the facts of the present case In this case, Rs. 200 were admittedly advanced to the defendants on the 14th February 1920 and an acknowledgment for the money advanced was obtaind from them by plaintiff's predecessor Hemlal. The acknowledgment does not contain the terms of any agreement which may have been arrived at between the parties in regard to re-payment of the loan, etc. It simply recites the fact of the receipt of Rs. 200 by the defendants. Such an acknowledgment which merely evidences receipt of the loan does not amount to a contract and furnishes no cause of action: *Raghubirsingh* v. *Udechand* (14), *Durga Shankar* v. *Ram Prasad* (15) The foundation of plaintiff's claim is the advance of Rs. 200 made by Hemlal to the defendants and the acknowledgment in question was produced by the plaintiff merely in proof of the loan. Every loan carries with it an implied promise to re-pay it, even though no express promise, written or verbal is made by the debtor to repay it: *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (10). As this is the undoubted law, it follows that when the defendants have admitted that they borrowed Rs. 200 from the plaintiff, they must also be deemed to have admitted that they had promised to re-pay the money and as they have failed to re-pay it, the plaintiff is entitled to maintain an action against them for breach of the implied promise, independently of the acknowledgment given by them to show that they received the money and in spite of the fact that the acknowledgment has been materially altered. The fact that the acknowledgment in the present case was given simultaneously with the loan makes absolutely no difference because the question to be decided in such a case is not whether the instrument evidencing the loan sought to be recovered was given simultaneously with the loan or not but whether it constitutes the sole foundation of plaintiff's claim for recovery of money lent. I have already held that the acknowledgment in question is not and cannot be the foundation of plaintiff's claim and consequently, plaintiff is entitled to recover Rs. 200 from the defendants despite the fact that the acknowledgment has been materially altered.

In the view I have taken above, it is not necessary for me to consider whether the case of *Kandre Jula Anantha Rao Pantulu* v. *Kandikonda Surayya* (16) which was cited before me by the learned Pleader for the appellant and also the cases of *Khosal Moham-*

(11) 81 Ind. Cas. 641; (1924) A. I. R. (C.) 452.
(12) 28 A. 298; 3 A. L. J. 25; A. W. N. 1906) 9
(13) 19 Ind. Cas. 840; 17 C. L. J. 399.
(14) 11 C. P. L. R. 65.
(15) 14 C. P. L. R. 151 at p. 152.
(16) 55 Ind. Cas. 697; 38 M. L. J. 256; (1920) M. W. N. 187; 27 M. L. T 134; 11 L. 390; 43 M. 703.

mad v. *Amiruddin Mahammad Pramanik* (17) and *Hemchand* v. *Govind* (18) were rightly decided.

I hold that the plaintiff is entitled to a decree for Rs. 200. I, however, allow him no interest on this sum. The appeal is accordingly allowed and the decree appealed against is modified by substituting Rs. 337-10 for the sum decreed in plaintiff's favour. Under the circumstances of the case I order that the parties do bear their own costs of this appeal and direct that the costs in the Courts below be paid as directed by the lower Appellate Court.

Z. K. *Appeal allowed.*

(17) 68 Ind. Cas. 331; (1923) A. I. R. (C.) 318.

(18) 86 Ind. Cas. 185; 8 N. L. J. 1, (1925) A. I. R. (N.) 243.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No 292 OF 1923.

August 19, 1925.

Present:—Mr. Justice Phillips.

KARIPINENI RAJAYYA—DEFENDANT—APPELLANT

versus

KALPATAPU ANNAPURNAMMA MINOR BY GUARDIAN MANGAMMA—PLAINTIFF—RESPONDENT.

Execution of decree—Death of judgment-debtor before sale—Legal representatives not impleaded—Sale, whether nullity.

Where subsequent to an order for sale of the judgment-debtor's property in execution of a decree, the judgment-debtor dies, an execution sale conducted without his legal representatives being brought on record as parties is a nullity [p 308, col. 2]

Raghunathaswami Iyengar v *Gopaul Rao*, 68 Ind. Cas. 667; 41 M. L. J. 547, (1921) M. W. N 732, 15 L. W. 123; (1922) A. I. R (M.) 307 and *Ragunath Das* v. *Sunder Das Khetri*, 24 Ind. Cas. 304; 42 C. 72; 18 C. W. N. 1058, 1 L. W. 567; 27 M. L. J. 150, 16 M. L. T. 353, (1914) M. W. N. 747; 16 Bom. L. R. 814, 20 C. L. J. 555, 13 A. L. J 154, 41 I. A. 251 (P. C.), relied on.

Doraisami v. *Chidambaram Pillai*, 75 Ind Cas. 46; 47 M. 63; 45 M. L. J. 413; 18 L. W. 577; 33 M. L. T. 25; (1923) M. W. N. 817; (1924) A. I. R. (M.) 130, not followed.

Second appeal against a decree of the Court of the Subordinate Judge at Masulipatam, dated the 11th of September 1922, in A. S. No. 65 of 1922, preferred against that of the Court of the Principal District Munsif, Gudivada, in O. S. No. 602 of 1919.

Messrs. *V. Ramadoss* and *P. Satyanarayana Rao*, for the Appellant.

Mr. *A. Venkatachalam*, for the Respondent.

JUDGMENT.—The main question for consideration in this appeal is whether the sale in execution of the property of the deceased judgment-debtor is a mere irregularity or a nullity. It appears that in this case an order for the sale of the judgment-debtor's property was made and that before the sale took place, the judgment-debtor died. His legal representatives were not impleaded. There are two cases of this Court which are exactly applicable, one reported in *Raghunathaswami Iyengar* v. *Gopaul Rao* (1) and the other in *Doraisami* v. *Chidambaram Pillai* (2). The decisions being directly opposed to one another, it is suggested for the appellant that in view of this difference of opinion this second appeal should be referred to a Bench but, as I will explain, I do not think that is necessary.

In *Raghunathaswami Iyengar* v. *Gopaul Rao* (1) Oldfield and Ramesam, JJ., held that the sale in execution which took place after the death of the judgment-debtor without bringing in legal representatives on record was a nullity. Spencer and Krishnan, J., in *Doraiswami* v. *Chidambaram Pillai* (2) held exactly the contrary. The Full Bench decision in *Rajagopala Aiyar* v. *Ramanujachariar* (3) does not in terms decide the point at issue but it did hold, overruling *Doraiswami* v. *Chidambaram Pillai* (2), that an omission to give notice under O. XXI, r 22 renders a sale held in execution a nullity. It does, in effect, deal with the present question at issue, although in that case the judgment-debtor was not dead but no notice was issued in accordance with O. XXI, r. 22. The question is, however, definitely decided by the Privy Council in *Raghunath Das* v. *Sunder Das Khetri* (4). That was a case, where after the sale had been proclaimed and had even been adjourned to a further date, the judgment debtor became an insolvent. Notice was given to the Official Assignee, but the notice apparently was merely a

(1) 68 Ind. Cas. 667; 41 M. L. J. 547; (1921) M. W. N. 732; 15 L. W. 123, (1922) A. I. R. (M.) 307.

(2) 75 Ind. Cas. 46; 47 M. 63, 45 M. L. J. 413; 18 L. W. 577, 33 M. L. T. 25; (1923) M. W. N. 817; (1924) A. I. A. (M.) 130.

(3) 80 Ind. Cas. 92; 47 M. 288; 46 M. L. J. 104; 19 L. W. 179; (1924) M. W. N. 182; (1924) A. I. R. (M.) 431; 34 M. L. T. 37.

(4) 24 Ind Cas. 304; 42 C. 72; 18 C. W N. 1058; 1 L. W. 567; 27 M. L. J. 150; 16 M L. T. 353; (1914) M. W. N.747; 16 Bom. L. R. 814; 20 C. L J. 555; 13 A. L. J. 154; 41 I. A. 251 (P. C.).

notice asking him whether he would come on record and it was not a notice that execution would proceed against him It was there held that inasmuch as the property passed by operation of law from the judgment-debtor to the Official Assignee, execution could not proceed until the Official Assignee had been brought before the Court and an order binding on him had been obtained. Their Lordships further remark that "a notice under s. 248 of the Code (corresponding to O. XXI, r. 22) is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representatives of a deceased judgment-debtor." No distinction can be drawn between the civil death of a judgment-debtor as the result of insolvency and the actual death of the judgment-debtor and the effect would appear to be exactly the same. When the sale in this suit was held, the judgment-debtor in whom the property had vested was dead and consequently the property could no longer vest in him and there could be no sale of his property, but only of property which had been his before his death. The property that was sought to be sold is property which at the date of the sale had become vested in the legal representative of the debtor and in asmuch as that legal representative was not on record, there could be no valid sale as against him. Provision for executing decrees after the death of the judgment-debtor is contained in s. 50 of the C. P. C. which provides that the decree-holder may apply to execute them against the legal representatives. I do not think that I need discuss the question whether execution can be taken against a deceased man, for that is not possible. He cannot be arrested and he has no longer any property to be proceeded against. Therefore, the only remedy for a decree-holder is to proceed against the legal representatives as possessing the assets of the deceased and then the provisions of O. XXI, r. 22 must be applied. If they are not complied with, we have the authority of the Privy Council and a Full Bench of this Court to the effect that the sale is a nullity. The question is thus concluded by authority and the difference of opinion between two Benches of this Court does not render it necessary for me to refer this case to a Bench. I must follow the decision of the Privy Council in *Raghunath Das* v. *Sunder Das Khetri* (4) and accordingly I confirm the finding of the lower Court that the sale was a nullity.

Further, an argument is put forward by the appellant that the finding of the lower Appellate Court that the brothers were divided is wrong in law. The Subordinate Judge relies on oral evidence and the circumstances of the case for arriving at this finding, and that evidence is not before me and, I am not, therefore, in a position to say that there was no evidence on which his finding could be based. Being a finding of fact, I must accept it. The second appeal is accordingly dismissed with costs.

V. N. V.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL NO. 205 OF 1925.

December 11, 1925.

Present:—Mr. Justice Dalal and Mr. Justice Boys.

THE ALLAHABAD BANK, LD., BAREILLY—DECREE HOLDER—APPELLANT

versus

BHAGWAN DAS JOHARI AND OTHERS—JUDGMENT DEBTORS—RESPONDENTS.

Hindu Law—Joint family—Father, insolvency of—Family property, whether vests in Receiver—Provincial Insolvency Act (V of 1920), s. 2 (d)

On an adjudication of a Hindu father as an insolvent under the Provincial Insolvency Act, 1920, the joint property of the family does not at once vest in the Receiver. [p 310, col. 1]

Sat Narain v *Behari Lal*, 84 Ind Cas 883, 23 A. L. J 85, 47 M L. J 857; 10 O & A L R. 1332, (1925) A I R (P C) 18; (1925) M. W N. 1, L R. 6 A. (P. C) 1; 26 P. L R 81; 27 Bom. L R. 135; 21 L. W. 375, 1 L C 509, 1 O W N. 916; 6 L. 1, 29 C. W. N. 797; 52 I A 22 (P. C), followed.

Execution first appeal from a decree of the Subordinate Judge, Bareilly, dated the 24th February 1925.

Dr. *K. N. Katju*, for the Appellant.

Mr. *B. Malik* for Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—This is an appeal by a decree-holder, the Allahabad Bank, Ld., Bareilly, against an order of the Subordinate Judge of Bareilly, dated the 24th of February 1925. The order does not contain the facts of the case which must, therefore, be narrated here. The decree-

holder had obtained a decree against one Banke Lal and his four sons on the 31st of Jannary 1924. An application for execution was presented on the 8th of May 1924 and the property of the whole family was attached and proceedings were being taken for sale of the property. Before a sale took place, Banke Lal alone was adjudged an insolvent by the Insolvency Court which appointed a Receiver for his property. His property thereupon vested in the Receiver. On the 7th of December 1924 subsequent to the insolvency proceedings, the Pleader for the Bank requested the lower Court that the father's one-fifth share may be released and only four-fifths of the attached property may be sold. The Court passed an order accordingly. On the 26th of January 1925 two sons of Banke Lal applied that the entire property of the family may be sold by the Receiver appointed by the Insolvency Court. There was no suggestion that the entire property had vested in the Receiver upon an adjudication in favour of the father. On this application the lower Court passed an order with the terms of which we do not agree. The learned Subordinate Judge directed that copies of the application and of the order of the Court may be sent to the Receiver in insolvency to take steps accordingly and to act as if the entire family property were the assets of the insolvent. This order was not justified because on an adjudication of a Hindu father as an insolvent under the Insolvency Act, the joint property of the family does not at once vest in the assignee. Their Lordships enunciated this proposition of law in the case of *Sat Narain* v. *Behari Lal* (1), where the terms construed were those of the Presidency Towns Insolvency Act (III of 1909). The term "property" is defined in the Provincial Insolvency Act in the same words. (Section 2 (*d*) of Act V of 1920). That pronouncement of their Lordships will, therefore, cover the present case also.

On the 6th of February 1925, the Receiver of the Insolvency Court, Babu Johri, applied that he may be permitted to carry out the sale of the entire family property and on this application the lower Court ordered that sale proceedings through the *Amin* and the Collector be stopped and that the whole property shall be sold by the Receiver in whom, according to the Court, the entire property had vested The decree-holder was informed of this order. Eighteen days later on the 24th February, the learned Judge ordered the execution case to be struck off. This is the order under appeal. It is in the following terms. "Banke Lal judgment-debtor has been declared an insolvent. His property together with the whole of the family property will be sold through the Receiver."

The mere words of this order as quoted above are not objectionable as the lower Court would be well advised to have the sale of the sons' interest and of the father's interest in the joint family property carried out by the same agency. The previous orders of the lower Court, however, indicate that according to its opinion all the assets have vested in the Receiver. Such a finding will obviously be prejudicial to the decree-holder because, if the assets are all vested in the Receiver, the other creditors will claim rateable shares in the shares of the sons in the joint family property and so far that portion of the property of the sons will not be available to the decree-holder-appellant.

We set aside the order of the 24th of February 1925 and direct the lower Court to proceed according to law. We have already indicated that the insolvency of the father does not vest the interest of the sons in the joint family property in the Receiver. Whatever interest the sons may have in the property will be available to the decree-holder appellant to satisfy his decree of the 31st of January 1924, which was specifically passed against the sons as well as against the father. We think that the proper procedure in the case would be to carry out execution proceedings in combination with the Receiver in insolvency and arrange so that the entire property both of the father and of the sons may be sold at the same time. It appears that part of the immoveable property is house property which could be sold by the lower Court directly and part is revenue paying property which will have to be sold through the Collector of the district. There ought to be no difficulty about the sale of the shares of the sons in the house property being carried out at the same time that the share of the father is sold. The

(1) 81 Ind. Cas 882; 23 A. L. J 85; 47 M. L. J. 857; 10 O & A. L. R. 1332; (1925) A. I. R. (P. C.) 18; (1925) M. W. N. 1; L. R. 6 A. (P. C.) 1; 26 P. L. R. 81; 27 Bom L. R. 135; 21 L. W. 375; 1 L. C. 500; 1 O. W. N 916, 6 L. 1; 29 C. W. N. 797; 52 I. A. 22 (P. C.).

lower Court may appoint the Receiver in insolvency sale officer for the house property and when the property is sold the Receiver under the direction of the lower Court and independently of the Insolvency Court will deposit four-fifths of the sale amount in the lower Court for the benefit of the decree-holder appellant. There will be some difficulty in selling the share of the sons in the revenue paying property along with the share of the father. It may be found possible by the lower Court to advise the Collector at the time of the sale that the sale by him may take place at the same time that the father's share is sold. If any other arrangement of joint sale suggests itself to the lower Court and is acceptable to the parties, it may be adopted.

The respondents were not represented to-day and the appeal was heard *ex parte*. The appellant shall receive his costs here including fees on the higher scale.

N. H. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 607 OF 1924.

March 12, 1925.

Present:—Justice Sir Kumaraswami Sastri, KT.

B. RAJA RAJESWARI MUTHURAMAILINGA SETHUPATHI AVERGAL RAJA OF RAMNAD—PETITIONER

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF RAMNAD AND ANOTHER —RESPONDENTS

Civil Procedure Code (Act V of 1908), O XXIII, r. 3—Compromise between parties to suit—Application to pass decree in terms thereof, pendency of—Addition of third person as party without deciding validity of compromise, legality of—Remedy of party affected—Madras Local Boards Act (XIV of 1920), ss 36, 38—Local Government, power of, to rescind contract embodied in resolution of Board—Rights of third parties.

Under O. XXIII, r. 3, C. P. C, where the terms of a compromise are legal and valid, the Court is bound to pass a decree in terms thereof Where the original parties to the suit thus terminate it by a lawful compromise, it is not competent to the Court to add a third person as party to the proceedings to agitate his rights therein The remedy of such person who has any right or interest in the subject-matter of the suit is to file a separate suit. [p. 312, cols. 1 & 2.]

Sankaralinga Nadan v. *Rajeswara Dorai*, 31 M. 236; 12 C. W. N. 946, 4 M. L. T. 101; 18 M. L. J. 387; 10 Bom. L. R. 781; 8 C. L. J. 230; 35 I A. 176 (P. C.), distinguished.

A suit by the plaintiff against a Union Board in respect of the ownership of certain streets in the town was settled by a compromise under which the plaintiff's title to the streets was recognised but the public were to be given access during specified hours in a day The said compromise was embodied in a resolution of the Board and an application was made by both parties to the Court to pass a decree in terms thereof. Pending the disposal of the petition, the Government acting under s 38 of the Madras Local Boards Act rescinded the said resolution and applied to be made a party to the suit, and without deciding the question whether the compromise between the parties to the suit was lawful or not, the Court added the Government as party to the suit. On revision against the said order:

Held, that the order adding the Secretary of State as party, without determining whether the compromise was legal and put an end to the suit or not, was irregular and must be set aside and the case remanded to the Court for deciding whether the compromise was legal or not [p. 313, cols 1 & 2.]

Quære—Whether it is competent to the Government, under s 38 of the Madras Local Boards Act, to cancel a resolution of a Board embodying a valid contract with a third person, where such person has acquired valid rights thereunder. [p 313, col 1]

Allen v. *Gold Reefs of West Africa*, (1900) 1 Ch 656; 69 L J. Ch. 266; 48 W R 452; 82 L. T 210; 16 T. L. R. 213, 7 Manson 417, *British Murac Syndicate* v. *Alperton Rubber Company*, (1915) 2 Ch. 186; 84 L J. Ch. 665, 113 L. T 373, 59 S J. 494, 31 T. L R. 391 and *Baily* v *British Equitable Assurance Company*, (1904) 1 Ch. 374, 73 L J. Ch. 240, 90 L. T. 335, 52 W. R. 549, 11 Manson 169, 20 T L. R. 242, referred to.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order of the Court of the District Munsif, Ramnad, dated the 15th August 1924, in I. A. No. 475 of 1924 in O S. No. 8 of 1924.

Mr. *A. Kishnaswani Iyer*, for the Petitioner.

Mr. *C V. Ananta Krishna Iyer*, for the Respondents.

JUDGMENT.—This is an application to revise the order of the District Munsif of Ramnad directing the Secretary of State for India in Council to be made a party to the suit which was filed by the Raja of Ramnad against the Union Board of Ramnad for a declaration that certain streets around his palace belong to him and are not vested in the Union Board. Trouble seems to have arisen from the fact that during the survey under the Survey Act, these roads were classified as public streets The suit, however, as appears from the note of the District Munsif was not a suit under the Survey Act but was a suit by the plaintiff to establish his title to the roads. There was a compromise entered into between the Raja of Ramnad and the Union Board and

this compromise was entered into after a resolution of the Union Board. A joint petition was put in under O. XXIII, r. 3 of the C. P. C on the 26th of April 1924 where it was stated that the parties had come to an agreement and that a decree should be passed in terms of the *razinamah*. By that *razinamah* the defendant Board recognised the ownership of the plaintiff over the lanes A, B and C mentioned in the Commissioner's plan ; the plaintiff was to allow the public free use of the lanes from 5 A. M. till 9 P. M. for ever ; and the plaintiff was given the right to close the lanes except during the hours when the public were allowed access ; each party was to bear its own costs. It was prayed that a decree be passed in terms of this *razinamah*. This petition was put in on the 26th of April but no order was passed on it It appears from the affidavit filed on behalf of the Secretary of State for India in Council that the Government on the 4th of July 1924, long after this petition was presented, and purporting to act under s. 36 of the Local Boards Act rescinded the resolution of the Union Board to enter into a compromise. On the date the petition to record the compromise came on for hearing, the Secretary of State for India in Council put in a petition to be made a party to the suit and the District Munsif without deciding the petition already filed to record the compromise passed an order making the Secretary of State for India in Council a party to the suit. The present revision petition is filed against that order.

The contention of Mr. Krishnaswamy Iyer for the petitioner is that, under O. XXIII, r. 3, C. P. C, the Court was bound to pass a decree in terms of the compromise, such compromise being legal and valid and that it was not competent to the Court to add a party to the proceedings where the original parties terminated the suit by a lawful compromise. Order XXIII, r. 3 runs as follows:— "Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit." It seems to me to be clear that if this compromise between the Union Board and the plaintiff was a lawful and valid one, the District Munsif had no power to add any party but he had only power to pass a decree in terms of the compromise.

Sankaralinga Nadan v. *Rajeswara Dorai* (1) has no application. In that case the defendants who were Shanars were sued as representing their community. The High Court found that the compromise after decree passed in favour of the trustee by the Subordinate Judge was a breach of trust on the part of the trustee and that third parties interested were entitled to intervene. Their Lordships of the Privy Council upheld the order of the High Court. In the present case there is no such charge and the suit is not filed by or against either party in a representative character.

The fact that the petitioner claims a right or interest in the matter cannot, if the suit was terminated lawfully by the original parties thereto, allow third parties to agitate their rights in the suit. If third persons have any interest in the matter, their remedy is to file a separate suit. The District Munsif has passed no orders on the validity of the compromise and I think that the order which he has passed making the Secretary of State for India in Council a party is clearly premature. The first question to be determined was whether the compromise was legal. On this part of the case I have heard the arguments both of Mr. Krishnaswami Iyer for the petitioner and of Mr. Anantakrishna Iyer for the Secretary of State. Mr. Krishnaswami Iyer argues that the Local Boards Act constitutes the defendant, the Union Board of Ramnad as a Corporation with all rights of suing or being sued, or acquiring, holding or transferring property moveable or immoveable, or to contract and do all other things which it considers proper or expedient for the purposes for which it was constituted. The streets vested in the Board under the Act and that Board was, having regard to the allegations in the plaint, the proper party to be impleaded. The contract, therefore, which resulted in the *razinamah* was a contract entered into by a body which had authority to enter into the contract. Such being the case, there could be no question of the contract not being enforceable. It is contended by him that the provisions of s. 38 of the Act, which gives

(1) 31 M. 236; 12 C. W. N. 946; 4 M. L. T. 101. 18 M. L. J. 387; 10 Bom. L. R. 781; 8 C. L. J. 230; 5 I. A. 176 (P. C.).

the Government the power to suspend or cancel any resolution of the Local Board, can only be exercised so long as the matter rests in the stage of a mere resolution which as between the Board and the Government the Government can interfere with, and that so long as the rights of third parties are validly created under a contract which cannot be impeached on the ground of fraud or misrepresentation or ultra vires, the contract is enforceable irrespective of what the Government may do under s. 38. Reference has been made to the decisions in *Allen* v. *Gold Reefs of West Africa* (2), *British Murac Syndicate* v. *Alperton Rubber Company* (3) and *Baily* v. *British Equitable Assurance Company* (4) and to Vol. VIII of Halsbury's Laws of England p. 384. It is argued by Mr. Anantakrishna Iyer that s. 38 by necessary implication renders all contracts invalid where such contracts are based upon the resolution which has been set aside by the Government in other words, that all contracts which are entered into by Local Boards will by virtue of s. 38 be of no effect if the Government later on rescind the resolution by virtue of the powers vested in them under that section which gives no time within which the contract may be rescinded. This would really mean that all contracts are liable to the risk of being cancelled at any period irrespective of the rights of the parties. As at present advised, I am not prepared to concede so wide a proposition, but it is unnecessary for me to give any decision on the point at this stage of the proceedings especially as any decision passed by me on this point would not be subject to an appeal. If the case goes to the District Munsif for adjudication as to the validity of the compromise and should he pass any order one way or the other, it would be subject to an appeal. As it is, it is difficult to uphold the order of the District Munsif who adds a party without determining whether the compromise has put an end to the suit. There is no question about the effective addition of parties. I also refrain from saying whether, should he hold that the compromise is invalid, this is a case in which the Secretary of State for India in Council should be made a party.

(2) (1900) 1 Ch. 656; 69 L. J. Ch. 266; 48 W. R. 452; 82 L. T. 210; 16 T. L. R. 213; 7 Manson 417

(3) (1915) 2 Ch. 186; 84 L. J. Ch. 665; 113 L. T. 373; 59 S. J. 494; 31 T. L. R. 391.

(4) (1904) 1 Ch. 374; 73 L. J. Ch. 240; 90 L. T. 335; 52 W. R. 549; 11 Manson 169; 20 T. L. R. 242.

The result is that the order of the District Munsif is set aside and the case remanded for disposal in the light of the observations made above. Costs will abide and follow the result.

N. H. *Petition allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1668 OF 1924.

January 17, 1925.

Present:—Mr. Justice Harrison.

SITA RAM MINOR, THROUGH HIKAM SAIN —DEFENDANT—APPELLANT

versus

NANAK CHAND REPRESENTATIVE OF PIARE LAL DIED—PLAINTIFF—RESPONDENT.

Vendor and vendee—Covenant of indemnity against loss—Pre-emption decree—Vendor's liability.

A vendor who by virtue of a clause in the sale-deed takes upon himself to recoup any loss incurred by the vendee in consequence of any suit ("*kisi qism ka dawa*") by anybody in relation to the property sold, is bound to make good the loss on vendee's losing his land on a pre-emption decree being passed against him [p 314, col. 1.]

Ghulam Jilani v. *Imdad Husain*, 4 A. 357, A. W. N. (1882) 67, 2 Ind Dec (N S.) 979, not followed.

Wazira v. *Shadi Khan*, 67 P. R 1881, referred to

Second appeal from a decree of the District Judge, Hissar, dated the 8th April 1924, modifying that of the Fourth Class Sub-Judge, Hissar, dated the 4th October 1923.

Pandit *Nanak Chand*, for the Appellant.

Lala *Anant Ram Khosla* for Lala *Jagan Nath Agarwal*, for the Respondent.

JUDGMENT.——The only points in this case are whether a vendee whose sale was pre-empted was entitled by a clause in his covenant to recover from his vendor the loss which he suffered, and whether apart from this clause on general principles his confession of judgment in the sense that he admitted the plaintiff's right to pre-empt debars him from obtaining the relief which has been given to him by both the lower Courts. Finally there is a cross-objection in which he claims Rs. 25, the sum allowed by the Trial Court and disallowed by the District Judge, being the costs incurred by him in execution in endeavouring to obtain an order from the Executing Court that his vendor was liable to make good the sum re-payable to the pre-emptor and thereby save the whole of this litigation. The relevant portion of the contract of sale runs as follows:—

"*Yeh bai sahi hai aur bila kisi shart ke hai, jaidad mazkur manmuqirr ne* Musammian *Shams-ud-Din wa Abdur Rahman wa Munawer pisran Salah-ud-Din wa Musammat Allah Jawai bewa Salah-ud-Din qaum Sheikh, sakin Hissar, se kharidi hai, agar baian ya un ka koi waris jaidad mazkur ke mutallaq kisi kism ka dawa karen aur us se koi nuqsan kisi kism ka mushtri ko ho to us nuqsan wa kharcha muqaddama ka manmuqirr bazat-i khud zimmawar hoga, aur meri jaidad uski zimmewar hogi, niz baad tahrir wasiqa haza agar koi sahim wa sharik mera ya aur koi shakhs kisi kism ka dawa jaidad mubaia ki babat karega to us ki zimmewari manmuqirr ki hogi aur aise dawe se jo kuchh harj wa nuqsan mushtri ka hoga uski adaigi ka manmuqirr zummewar hogi, mushtri ko ikhtiar hoga ke woh harjana wa nuqsan meri zat wa jaidad har kism se jis tarah chahen wasul kar le*"

It has been held that under this clause the vendor is liable to recoup the vendee for his losses. Counsel on appeal relies on *Ghulam Jilani* v. *Imdad Husain* (1) which, though not expressly dissented from in *Wazira* v. *Shadi Khan* (2), was certainly not followed. It appears to me that whatever may be the view taken of the words used in the contract which forms the subject-matter of *Ghulam Jilani* v. *Imdad Husain* (1) the words "*aur koi shakhs kisi kism ka dawa jaidad mubaia ki babat karega*" most certainly cover a pre emption suit. The vendor guaranteed peaceful enjoyment to his vendee and the clause was not confined to any patent defect of title existing before sale, but covered the inherent and potential defect which would become tangible and real as soon as a pre-emption suit was lodged by a competent person. I find, therefore, agreeing with the learned District Judge that under this clause the defendant is liable to make good the losses by the plaintiff.

The second point appears at first sight to be very much stronger than it really is. In the pre emption suit the defendant-vendee admitted the title of the pre-emptor and at first the vendor denied it, and an issue was framed as to whether the subject-matter of the suit really consisted of shops, regarding which there was no right of pre-emption. On going through the record of the pre-emption case I find that on the 5th of October 1917 the vendor himself stated on solemn affirmation that he did not contest the pre emptor's right to bring the suit. Counsel urges that he may have been induced to do so because of the craven conduct of the vendee, but it is impossible to get over the fact that he himself confessed judgment on this point and cannot now plead that the whole of the losses of the suit are due to the carelessness or dishonesty of his vendee. On this point also, therefore, there is no reason why the plaintiff should not succeed.

As to the cross-objection the District Judge was apparently under the impression that this sum of Rs. 25 formed part of the costs incurred in the pre-emption case proper. They were incurred and I think *bona fide* in execution proceedings, and this being so I think the plaintiff is entitled to recover.

I dismiss the appeal with costs, and I accept the cross-objections also with costs. The decree will be in the same form as granted by the District Judge, *i. e*, against Sita Ram to the extent only that he received property from Jai Kishan Das his father.

N. H. *Appeal dismissed.*

(1) 1 A. 357; A. W. N. (1882) 67; 2 Ind. Dec. (N. S.) 979

(2) 67 P. R. 1881.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1800 OF 1922
AND
CIVIL MISCELLANEOUS SECOND APPEAL
NO 36 OF 1922.
July 28, 1925.

Present :—Mr. Justice Phillips.

MATTAPALLI VENKATARATNAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

VEPPU SITARAMAYYA—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 11, O XXXIV—Suit for redemption—Decree for possession—Mesne profits left unascertained—Decree, whether preliminary or final—Subsequent application for ascertainment of mesne profits, maintainability of.

In an appeal from a decree in a suit for redemption, the Appellate Court, in remanding the suit, directed accounts to be taken up to the date fixed for redemption. The Trial Court after inquiry found that the mortgage amount deposited was in excess of the amount due to the mortgagee. Accordingly a decree was given to the plaintiff for possession of the suit land. The question of mesne profits was left undecided;

Held, (1) that the decree was partly final and partly preliminary, final as to possession and preliminary in so far as the question of mesne profits was left undecided ; [p. 315; col 2.]

(2) that an application, therefore, properly lay under O. XXXIV, C. P. C, for the ascertainment of mesne profits. [p. 316, col. 1]

Muhammad Abdul Majid v. *Muhammad Abdul Aziz*, 19 A. 155, 24 I. A 22; 7 Sar P. C. J. 111, 9 Ind Dec. (N. S) 103 (P. C.), followed.

Second appeal against a decree of the Court of the Subordinate Judge, Cocanada, dated the 10th August 1922, in A. S. Nos. 7 and 11 of 1922 presented, against that of the Court of the Principal District Munsif, Cocanada, dated the 12th October 1921, in O S. No. 43 of 1921.

Appeal against a decree of the Subordinate Judge, Cocanada, dated the 3rd August 1921, made in A. S. No. 1 of 1921, presented against an order of the Court of the Principal District Munsif, Cocanada, dated the 30th August 1920, made in E. P. No. 529 of 1919, in O. S. No. 1 of 1917 on its file.

Mr. *K. Kumaraswami Rao*, for the Appellant.

Mr. *P. Soma Sundaram*, for the Respondent.

JUDGMENT.—The appellants in this case brought a suit for redemption and a decree was passed in 1917. The appeal against the decree was decided on 22nd February 1918. In that judgment the Appellate Court passed the following order:—"In a redemption suit there should be a final and complete adjustment of all the accounts between the parties upto the time of actual redemption and no claim for mesne profits can be kept outstanding or can be enforced by the mortgagor subsequently—Account should, therefore, be taken down to the date to be fixed in the decree for redemption." A fresh enquiry was, therefore, held by the District Munsif and on 5th December 1918 he passed a decree finding that the mortgage amount deposited was in excess of the amount due to the mortgagee and that it was, therefore, unnecessary to pass decree for payment of the amount and possession to be given on payment. He accordingly gave a decree to the plaintiff for possession of the suit land and further held that the question of mesne profits was left undecided. Both the lower Courts have held that this is in itself a final decree and that this question of mesne profits not having been decided, the plaintiff is precluded from asking the Court to ascertain what those profits are. Ordinarily in a redemption suit there should be a preliminary decree, followed by a final decree. It seems to me that this decree is in fact partly final and partly preliminary. In so far as it is a decree for possession it is final, and in so far as it leaves the question of mesne profits undecided and expressly states that it was so left, it is preliminary to an ascertainment of those mesne profits. The plaintiff put in an application which purports to be under O XXI, r 11, for delivery of possession and for attachment of moveables under O. XXI, r. 35 and O. XXI, r. 43 and added a prayer to ascertain the mesne profits from the date of suit. This petition was put in on 3rd November 1919 and it came before a different Munsif. He held that it was not open to the plaintiff to ask for mesne profits and, therefore, dismissed the petition. On appeal to the Subordinate Judge, his order was confirmed If the Munsif intended by his order to have the ascertainment of mesne profits adjourned to a future date, these orders of dismissal are clearly wrong. The language of the decree saying that the question of mesne profits is left undecided is somewhat unusual and it is contended for the respondents that it must be taken to mean that the relief was refused and that no effect can be given to the order leaving the mesne profits unascertained. When we consider that the appellate judgment directly ordered the Munsif to take an account and ascertain the mesne profits and has given as a ground, therefore, that the mortgagor would have no right to obtain any relief in a subsequent suit, it is hardly conceivable that the Munsif would have acted exactly contrary to the orders given by the Appellate Court, even though he might have been personally of the opinion that that order was wrong. That fact has to be taken into account in considering the suggestion of the respondents. On the other hand if the interpretation put upon the decree by the appellant is correct the Munsif would not have been guilty of this disrespect of the Appellate Court's order. Although this order is not strictly in accordance with the form that it should have taken, I think we must look to the circumstances which led up the decree and interpret it accordingly. I think it is clear that it was interpreted as a preliminary decree by the appellants when they put in their subsequent application. No doubt their prayer for ascertainment of mesne profits should have been put in under O. XXXIV, but I do not think that the omission to spe-

cify the provision of law is a serious objection. If necessary, an amendment of the petition might have been ordered to bring it into confirmity with strict procedure but the omission to specify O XXXIV, cannot deprive the plaintiff of his rights.

A large number of authorities have been cited before me in this respect but I do not think it is necessary to deal with them here because of the interpretation that I put upon this decree. I may refer to a Privy Council case *Muhammad Abdul Majid* v. *Muhammad Abdul Aziz* (1) in which the question of mesne profits was reserved when the decree was passed and although there was a final disposal of one portion of the subject-matter of the suit, it was held that it was open to the Court to subsequently ascertain the mesne profits and pass further decree. It seems to me that that is in accordance with what I propose to do now. I, therefore, allow this appeal and remand the Execution Petition No. 529 of 1919 to the District Munsif for disposal according to law. The respondents will pay the appellant's costs in A. A. A. O. No. 36 of 1922 throughout. In this view the suit filed by the plaintiff to recover the mesne profits is not maintainable and, therefore, the second appeal must be dismissed. Under the circumstances I award no costs.

V. N V. *Appeal dismissed.*

(1) 19 A. 155, 24 I A. 22; 7 Sar. P. C J 111, 9 Ind. Dec. (N. S.) 103 (P. C)

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1391 OF 1924.

October 23, 1925

Present:—Mr. Justice Sulaiman.

NANAK CHAND—PLAINTIFF—APPELLANT

versus

RAM PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Mortgage by manager—Execution sale—Suit to set aside sale—Legal necessity.

The proposition that where the property of a Hindu joint family has passed out of the family in execution of a decree and rights of a third party have come in, the sale cannot be set aside unless it is established that the debt was tainted with illegality or immorality, applies only to cases where the persons who challenge the transaction are sons or grandsons of the transferor. It is only when the transfer has been made by a father or grandfather that the question of the debt having been tainted with immorality or illegality can arise. No such consideration arises when the transfer has been made by an uncle and a mere manager of a joint Hindu family. In such cases the transfer, unless it is supported by legal necessity, cannot be upheld. [p 317, cols. 1 & 2]

Ram Chandra v *Muhammad Nur*, 73 Ind. Cas. 656; 21 A L J. 485, 45 A 545, (1923) A I R (A.) 591, *Jadubir* v *Gajadhar*, 75 Ind. Cas 785, 21 A L J. 809; (1924) A. I R (A) 163. L R 5 A 53 Civ, and *Gajadhar Pande* v. *Jadubir Pande*, 85 Ind. Cas. 31 22 A. L J 980, L. R. 5 A. 780 Civ; (1925) A I R (A.) 180; 47 A 122, distinguished

Second appeal against a decree of the District Judge, Shahjahanpur, dated the 5th of August 1924.

Mr. *S. K Dar*, for the Appellant.

Mr. *Harnandan Prasad*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for partition of a ¼th share in a house and a shop. In 1899 there was a partition suit brought by Salig Ram, a cousin of the contesting defendants' fathers, for separation of his share. That suit was decreed and separate lots were allotted to Salig Ram and his brothers. According to the judgment of the Court of first instance the lots marked yellow and red were given to Lalman and Jagannath, the fathers of the three contesting defendants. Subsequently Jagannath made a mortgage of the ¼th share allotted to him and Lalman in favour of one Shib Narain. A suit was brought on the basis of this mortgage deed against Jagannath and his sons, two of the contesting defendants who were impleaded as minors under the guardianship of Jagannath himself. To this suit neither Lalman nor his son Ram Prasad, the other defendant, was impleaded. The suit was decreed. The decree was sold to the present plaintiff who put it in execution, and the mortgaged property was put up at auction sale and purchased by the plaintiff. He also obtained a delivery of symbolical possession over the property purchased by him at auctions but admittedly he did not succeed in obtaining actual possession of the house and the shop.

The present suit has been instituted for an actual partition and separation of the ¼th share. The suit was resisted by the sons of Jagannath and his nephew on the ground that the mortgage of 1908 was without any legel necessity and was inoperative. Both the Courts below have dismissed the claim. The lower Appellate Court has held that Jagannath his sons

and his nephew were members of a joint Hindu family and that the mortgage was without any legal necessity. It has further held that the mortgage debt was not tainted with any illegality or immorality but that inasmuch as the plaintiff had not obtained actual possession of the property, the property could not be said to have passed out of the family so as to make the rule laid down by their Lordships of the Privy Council applicable.

The first point to consider in second appeal is whether the finding of the lower Appellate Court that the family is joint must be accepted. *Prima facie* it is clearly a finding of fact and cannot be challenged in second appeal. The learned Vakil for the appellant, however, urged that in the litigation of 1899 the shares of Lalman and Jagannath also were separated and that, therefore, the partition decree of that year involved a separation between the two brothers Jagannath and Lalman also. This argument is based on the passage in the judgment of the Court of first instance that two lots yellow and red belonged to Lalman and Jagannath. That however does not show that each got one lot and not that the two lots were given to both jointly. I, therefore, feel bound to accept the finding of the lower Appellate Court that Jagannath his sons and nephew Ram Prasad formed a joint Hindu family in 1908 and do so even now.

It has been argued on behalf of the appellant that the view of the lower Appellate Court is that in order to make the rule laid down by their Lordships of the Privy Council in the case of *Girdharee Lal* v. *Kantoo Lal* (1) applicable, it is not necessary that actual possession should have been taken by the purchaser third party and that all that is necessary is that the property should have passed out of the family under a sale in execution of a decree. This contention may have some force, but the plaintiff cannot succeed in the present case because of the finding that the nephew Ram Prasad is also joint with Jagannath. In all the cases where it has been held that where property has passed out of the family in execution of a decree and rights of a third party have come in, the sale cannot be set aside unless it is established that the debt was tainted with illegality or immorality, the persons who were challenging the transaction were sons or grandsons of the transferor. It is only when the transfer has been made by a father or grandfather that the question of the debt having been tainted with immorality or illegality can arise. No such consideration arises when the transfer has been made by an uncle and a mere manager of a joint Hindu family. In such cases the transfer unless it is supported by legal necessity cannot be upheld. The learned Vakil for the appellant has referred me to the cases of *Ram Chandra* v. *Muhammad Nur* (2), *Jadubir Pande* v. *Gajadhar* (3) and *Gajadhar Pande* v. *Jadubir Pande* (4) but in all these three cases the persons who wanted to challenge the alienations were sons of the transferors. I am, therefore, of opinion that on the ground last mentioned the plaintiff cannot succeed. The finding that there was no legal necessity for the mortgage of 1908 is fatal to this case. When the plea of want of legal necessity raised by one of the contesting defendants succeeds the whole suit must stand dismissed. The appeal is accordingly dismissed with costs including fees in this Court on the higher scale.

N. H. *Appeal dismissed.*

(1) 1 I. A. 321; 14 B. L. R. 187; 22 W. R. 56; 3 Sar. P. C. J. 380 (P. C.).

(2) 73 Ind Cas 656, 21 A L. J. 485, 45 A 545, (1923) A I. R (A) 591

(3) 75 Ind Cas. 785, 21 A. L. J 809, (1924) A. I. R. (A) 169; L R 5 A. 53 Civ

(4) 85 Ind. Cas. 31, 22 A. L J 980; L. R. 5 A. 780 Civ; (1925) A. I. R. (A.) 180, 47 A. 122.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1576 OF 1924.

January 20, 1925.

Present:—Mr. Justice Martineau.

BISHEN SINGH AND OTHERS—DEFENDANTS —APPELLANTS,

versus

WASAWA SINGH AND OTHERS—PLAINTIFFS —RESPONDENTS.

Decree, setting aside of—Fraud and mistake—Fraud, nature of—Nature of error.

In a suit to obtain the reversal, on the ground of fraud, of a judgment given in a former case, it is not sufficient for the plaintiff to prove constructive fraud but he must prove actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and the obtaining of that decree by that contrivance. [p. 318, col. 2.]

Nanda Kumar v. *Ram Jiban*, 23 Ind. Cas. 337; 41 C. 990; 18 C. W. N. 681; 19 C. L. J. 457, *Sarup Narain* v. *Sheo Shankar Lal*, 42 Ind. Cas. 416, 4 O. L.

J. 522 and *Sreenath Das* v. *Ghanashyam Naik*, 46 Ind. Cas 531; 3 P. L J. 465, followed.

A suit to rectify the error or mistake upon which a decree is founded lies when the error or mistake has been made in drawing up of the decree, but not when the mistake is not in the judgment or decree but in a document forming part of the evidence on which the judgment is based. [p 318, col. 2]

Appeal from a decree of the Additional District Judge, Amritsar, dated the 19th March 1924, reversing that of the Third Class, Sub-Judge, Amritsar, dated the 20th February 1923.

Lala *Sahib Dayal*, for the Appellants.

Mr. *Dev Raj Sawhney*, for the Respondents.

JUDGMENT.—Hira Singh, a collateral of the present plaintiffs, was an occupancy tenant of the land in suit. After his death the present defendants, who are the landlord, obtained a decree against the present plaintiffs for possession of the land, the Court finding that the latter had failed to prove that the land had been in the occupation of their and Hira Singh's common ancestor. In the present case the plaintiffs sue for possession on the ground that the former judgment was obtained against them by fraud or mistake, the land having been entered in the Settlement Record of 1865 under the wrong *khasra* numbers.

The suit was dismissed by the first Court, which found that, though a mistake had been made in the Revenue Records, no fraud on the part of the present defendants had been proved, and that the judgment in the former case was, therefore, *res judicata* and the plaintiffs had no cause of action.

On appeal the District Judge, Col. Nicholas, held that the plaintiffs were entitled to maintain the suit as the point in issue had not been before the Court in the former case, and he remanded the suit to the Trial Court for disposal on the remaining issues. The suit was again dismissed by the Subordinate Judge on the ground that no fraud had been proved. The plaintiffs appealed, and the Additional Judge, Lala Chuni Lal, has accepted their appeal and passed a decree in their favour, holding (1) that a mistake had been made in the *khasra* numbers in the Settlement Record of 1865, (2) that the mistake was a constructive fraud on the Courts, and (3) that Col. Nicholas had by his judgment decided that the mistake was tantamount to constructive fraud, and that that judgment not having been appealed against had become final. The defendants have preferred a second appeal to this Court.

I am unable to agree with the lower Appellate Court that Col. Nicholas give any decision on the question of fraud. He decided only that the judgment in the former suit was not a bar to the present suit, as the points in issue in the two suits were not the same.

Further, in order to obtain a reversal of the judgment given in the former case it is not sufficient for the plaintiffs to prove constructive fraud, but they must prove actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and the obtaining of that decree by that contrivance, as was held in *Nunda Kumar* v. *Ram Jiban* (1). See also *Sarup Narain* v. *Sheo Shankar Lal* (2) and Kerr on Fraud and Mistake, 5th Edition, page 344.

It has also been observed by the learned Additional Judge that where a decree had been procured by some grave mistake so as to vitiate the whole character of the decree and to permit its execution would amount to an abuse, the Court has power to rectify the error or mistake upon which the decree is founded in an independent suit. *Sreenath Das* v. *Ghanashyam Naik* (3) is an authority for this proposition, but that was a case in which a mistake had been made in the drawing up of a decree, and the proposition is not applicable to the case of a mistake contained, not in the judgment or decree, but in a document forming part of the evidence on which the judgment is based.

As no actual fraud on the part of the defendants has been proved, the suit must fail, and I accordingly accept the appeal, reverse the decree of the lower Appellate Court, and restore the decree of the first Court dismissing the suit, but in view of the fact that the decision in the former case was due to a mistake in the entries of the Settlement Record of 1865, I direct that the parties shall bear their own costs throughout.

N. H. *Appeal accepted.*

(1) 23 Ind. Cas. 337; 41 C. 990; 18 C. W. N. 681; 19 C. L. J. 457.
(2) 42 Ind. Cas. 416; 4 O. L. J. 522.
(3) 46 Ind. Cas. 534; 3 P. L. J. 465.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No 2519 OF 1921.

December 22, 1924.

Present:—Mr. Justice Jai Lal and Mr. Justice Abdul Raoof.

Kanwar RANZOR SINGH—OBJECTOR—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—OPPOSITE PARTY—RESPONDENT

Civil Procedure Code (Act V of 1908), s 149—Limitation Act (IX of 1908), s. 5—Insufficient Court-fee on appeal—Bona fide *mistake—Extension of time—Evidence Act (I of 1872), s 23—Appeal against award—Land acquisition proceedings—Price of acquired property, determination of—Private offer by Government, whether admissible.*

An appellant who is misled by an error of the Court and the insufficiency of the Court-fee originally paid by him is due to a *bona fide* mistake on his part, is entitled to the benefit of s 149 of the C P C and s 5 of the Limitation Act. [p 319, col 2]

Where after a notification has been issued for acquisition of a particular property, negotiations are started by the Government with the owner of the property on the question of price, and an offer purporting to be without prejudice is made to him, the evidence of the offer for purposes of determining value in Court, in an appeal by the owner against the award of the District Judge, is not admissible as it must be inferred that the parties agreed together that the evidence of the offer should not be given in Court. [p 320, col. 1]

Appeal from a decree of the District Judge, Ambala, dated the 7th June 1921.

Bakhshi *Tek Chand* and Lala *Mool Chand*, R. S., for the Appellant.

Kanwar *Dalip Singh*, Government Advocate, for Lala *Mehr Chand Mahajan*, for the Respondent.

JUDGMENT.—This is an appeal by the owner, *Kanwar* Ranzor Singh, from the award dated the 7th of June 1921 made by the District Judge of Ambala under the Land Acquisition Act. By Notification No. 2588 G. dated the 20th of May 1919 the Punjab Government declared its intention of acquiring the Morcyu Estate situated in Simla for a public purpose, namely, residences for public servants. The Collector by his award, dated the 20th of November 1920, awarded Rs. 29,120-0-0 as the market value of the estate, and Rs. 4,368-0 0 the usual allowance of 15 per cent. for compulsory acquisition; the total amount awarded was Rs. 33,488 0 0. The owner having objected to the award the matter was referred to the District Judge of Ambala for determination of the market value of the property acquired, but the learned Judge declined to enhance the award of the Collector.

At the commencement of the hearing the learned Government Advocate took a preliminary objection that the appeal was barred by limitation. It was filed on the 12th of October 1921. That was the first day on which the High Court opened after the long vacation which began on the 29th of July 1921. The memorandum of appeal was returned to the Counsel for the appellant on the 4th of November 1921 on the ground that the Court-fee paid was insufficient. It was re-filed by the Counsel on the 7th of November 1921 with the following endorsement:—

"The Court-fee originally paid by the appellant is correct. But to avoid further loss of time, the deficiency is made up and additional Court-fee is paid"

In our opinion the Court-fee originally paid by the appellant was insufficient; but it appears that the Counsel was misled by the award of the learned District Judge, the last [illegible] of which runs as follows:—

"The objector did not state in his written application the amount which he claimed but his Vakil stated before my predecessor that he claimed Rs. 70,852-0 0. I, therefore, allow the Secretary of State his costs on the difference between this amount and the amount awarded by the Collector, *viz.*, on (Rs. 70,852-0-0 *minus* Rs. 33,488-0-0) = Rs. 37,364-0-0.

The Court-fee originally paid was on Rs. 37,364-0 0. As a fact it should have been on Rs. 70,852-0-0 *minus* Rs. 29,120 0 0 = Rs. 41,732-0-0. An appeal filed on the 7th of November would be barred by limitation, but as we hold that the appellant was misled by an error of the District Judge and the insufficiency in the Court fee originally paid was due to a *bona fide* mistake on his part he is entitled to the benefit of s. 149 of the C. P. C. and s. 5 of the Indian Limitation Act. We, therefore, overrule the objection of the learned Government Advocate.

The only point involved on the merits of this appeal is the market value of the property acquired. The learned Counsel for the appellant has relied upon the following evidence in support of his appeal:—

(1) Certain offers made by the Superintending Enginer, Imperial Circle, Simla, but declined by the owner.

(2) Evidence of certain witnesses who give their opinion as to the value of the property.

(3) The evidence of Mr. Goldstine, an Engineer of Simla, who prepared an estimate of the value of the building and the land, and

(4) The prices realized on sales of other properties in Simla.

As regards (1) it appears that after the issue of the Notification the Superintending Engineer started negotiations with the owner with a view to settle the market value of the property in order to avoid the contingency of going to Court and in the course of such negotiations he made offers of Rs. 40,000-0 0 to Rs. 42,500 0-0 to the owner which were declined. Two of the offers are alleged to be oral ones made by Mr. Aikeman, Superintending Engineer, and the last one was made in writing by Mr. Hope, Superintending Engineer, by means of his letter dated the 25th of February 1920 In this letter Mr Hope clearly stated that the offer was being made without prejudice. The learned District Judge held that evidence as to these offers was inadmissible under the provisions of s. 23 of the Indian Evidence Act. The learned Counsel for the appellant has contended before us that s. 23 does not apply to the facts of this case. He argued that the section applies only when there is a dispute between the parties and an offer is made to settle such a dispute. It was contended by the learned Counsel that after the notification there was no occasion for any negotiations between the Government and the owner as it was not within the power of the latter to refuse to sell the property. We consider, however, that it was still open to the owner to take the matter to the Civil Courts on the question of amount of compensation, and it was in order to avoid this contingency that negotiations were started by the Superintending Engineers. In our opinion it is clearly established that the offers were made by these Engineers under circumstances from which the Court ought to infer that the parties agreed together that the evidence of the offers should not be given and agreeing with the Court below, we hold that the evidence as to these offers is not admissble.

Regarding the evidence of witnesses who give their opinion as to the market value of the Moroyu Estate, we observe that these witnesses have given no reasons to show that they were in a position to judge of the market value of this estate. Ordinarily such evidence is seldom accepted as a satisfactory guide to determine the market value of property, but in this case it is almost worthless.

As regards (3) Mr. Goldstine has not produced any detailed estimate of his valuation. All that we have on the record is a letter signed by him adressed to the owner in which he stated that in his opinion the value of the buildings on the es ate was Rs. 49,852 and the value of the site was Rs. 21,000, making a total of Rs. 70,852. In the absence of a detailed estimate it is not possible to check the correctness of the figures supplied by the witnesses We cannot, therefore, accept this evidence.

(4) The Collector awarded 16 times the net rental f[illegible] two judgments dated the 26th of [illegible] of the Chief Court of the Punjab. The notifications in those cases were issued in 1916 and the properties then acquired had changed bonds shortly before the issue of the notifications and, therefore, the price then fetched was considered by the Chief Court as the best guide in determining their respective market values. This property has not changed bonds for a considerable time. It is situated about 220 yards from the Vicregal Lodge and has always been occupied by high Government Officials. At the time of the acquisition it was occupied by the Hon'ble Mr. Sharp, Secretary to the Government of India. It has a tennis court and a large compound. Its situation and position are both stated to be very good. Its area is 2·15 acres. All these factors contribute materially to appreciate the market value of property. The appellants' witnesses have mentioned certain sales of properties alleged to be inferior to the present one for amounts larger than the market value awarded in this case; but we find that the evidence is mostly hearsay and cannot, therefore, be admitted. Some of the witnesses stated that the market value of house property in Simla was 20 times the net rental while one thought that it was so much as 22 times the gross rental. It is impossible to act on such evidence unsupported by any instances, and there is a vast difference between 20 times the net rental and 22 times the gross rental. There is no evidence on the record that the Moroyu Estate has any potential value beyond the income from its rent. Moreover, the house is old. Having, however, regard to the fact that 16 times the net rental was awarded in one case in 1916 and 18 times

in the other, and that this property has certain undoubted advantages, we consider that in the absence of any evidence to the contrary 18 times the net rent will be its fair market value. Mr. Goldstine states that the owners of old houses in Simla get about 5 or 5½ per cent interest in house property. At 5 per cent. the market value would be 20 times the net rental, and at 5 per cent. it will be about 18 times.

The actual rent of the house at the time of the acquisition was Rs. 2,600. It is claimed on behalf of the appellant that the actual rent is low and that the proper rent of the house is somewhere between Rs. 3,500 and Rs. 4,000. We do not think that there is any material on the record to justify our assuming that Rs. 2,600 is a low rent. In order to calculate the net rent of a house the usual rule in Simla appears to be to deduct 30 per cent. out of the gross rent, being 10 per cent. on account of furniture, 10 per cent. on account of repairs and 10 per cent. on account of Municipal taxes. The net rent of the Moryu estate as found by the Collector is Rs. 1,820 and this figure multiplied by 18 comes Rs. 32,760. The usual allowance of 15 per cent. on this figure comes to Rs. 4,914.

We accept the appeal so as to enhance the award to Rs. 32,760 as a market value and adding Rs. 4,914 the usual 15 per cent. the total award will be Rs. 37,674. Under the peculiar circumstances of the case we leave the parties to bear their own costs throughout.

N. H. *Appeal accepted.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1574 OF 1922.

April 30, 1925.

Present:—Mr. Justice Phillips.

DEVAGUPTAPU NARASIMHAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DEVAGUPTAPU CHENDRAMMA AND OTHERS—DEFENDANTS NOS. 1 TO 6, 8, 10 TO 12—RESPONDENTS.

Inam *grant—Grant "to representatives and assigns"—Death of grantee before date of grant—Grant, whether enures to heirs of grantee—Board's Standing Order 52 (2).*

An *inam* title-deed issued by Government ran as follows:—"The *inam* is now confirmed to you, your representatives and assigns, to hold or dispose of as you or they think proper". The grantee was dead on the date of grant, and the question was whether the grant enured for the benefit of the heirs of the grantee:

Held, that having regard to the Board's Standing Order 52 (2), the words "representatives and assigns" should not be interpreted as mere words of limitation but as effective to secure the grant to the heirs of the deceased grantee. [p 322, col. 1.]

Second appeal against a decree of the Court of the Additional Subordinate Judge, Vizagapatam, in A. S. No. 112 of 1922 (A. S. No. 309 of 1920, on the file of the District Court and A. S. No. 161 of 1920 of the Sub-Court), preferred against that of the Court of the District Munsif, Vizagapatam, in O. S. No. 83 of 1918.

Mr. *C. Rama Rao*, for the Appellants.

Mr. *Y. Suryanarayana*, for the Respondents.

JUDGMENT.—The plaintiffs are the nearest heirs of one Venkataraju in whose favour (with others) three *inam* title-deeds were issued in 1906 and 1907. Both the lower Courts have found that as Venkataraju was dead on the day on which these title-deeds were issued, he obtained no right to the suit property, and, therefore, the plaintiffs as his heirs have got no right.

The title-deed runs as follows: "Title-deed granted to (1) Devaguptapu Subbarayudu, (2) Devaguptapu Chendramma, (3) Devaguptapu Venkatajaru and four others as per register;" and it recites,

"The *inam* is now confirmed to you, your representatives and assigns, to hold or dispose of as you or they think proper."

The question at issue is whether this is a grant to Venkataraju and his representatives and assigns, or whether these words are words of mere limitation as contended for by the respondent. The treatment of such words as being words of limitation is a legal technicality and the question is, whether the Government in issuing this deed intended to adopt this technicality or whether they intended to use the words in their ordinary meaning. The words are, no doubt, ambiguous; therefore, I think, it is relevant to refer to the Board's Standing Order 52 (2) which deals with this question. There it is laid down,

"In case of the death of the holder of an enfranchised *inam* before the actual delivery to him of the title-deed, the deed should, in the first place, be entrusted to the Revenue Authorities for safe custody. The Collector should make inquiry as to who is the party entitled, as heir of the deceased, to receive

the deed, and is enjoined to hand it over, exactly as received, to the heir of the deceased." If these words were words of mere limitation, the grant to the deceased would fail, and if it was intended to give a fresh grant to the heirs, it would be necessary to issue a grant afresh in their name. Inasmuch as the Government have declared that that is not the procedure to be adopted, I think it is clear that these words are not mere words of limitation but are effective to secure the grant to the heirs of the deceased grantee, which is the intention of Government as expressed in the above Board's Standing Order. That being so, the plaintiffs are entitled to the properties covered by the grant.

A question is raised by the respondent as to the non-joinder of parties, but under O. I, r. 13, C. P. C., this should have been raised in the Trial Court and must now be deemed to have been waived.

As the lower Appellate Court has not recorded any finding on the other issues in this suit, this decree must be set aside and the appeal remanded for disposal on the other issues. Costs will abide the result.

Stamp fee on the appeal memo. will be refunded to the appellant.

V. N V. *Appeal remanded.*
N. H.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2546 OF 1921.
July 4, 1925.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Addison

PUNJAB COMMERCIAL SYNDICATE AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
PUNJAB CO-OPERATIVE BANK, LTD, IN LIQUIDATION AND OTHERS—DEFENDANTS—RESPONDENTS.

Fraud—Particulars—Ex parte *decree, suit to set aside—Fraud, proof of.*

When fraud is charged against a party, the person pleading the fraud must set forth the particulars of the fraud which he alleges. [p. 324, col. 2.]

An *ex parte* decree cannot be re-opened except on the ground of fraud as an extrinsic collateral fact vitiating the proceedings in which the decree was obtained. It is not sufficient to allege that it was obtained on a false claim. [p. 325, col. 2.]

Before an *ex parte* decree can be vacated on the ground of fraud, it must be established that the decree was the result of fraud directed against the person who seeks to set it aside. [p. 326, col 1.]

First appeal from a decree of the Senior Subordinate Judge, Rawalpindi, dated the 2nd July 1921.

Dr. *Nand Lal* and Mr. *Amolak Ram*, for the Appellants.

Messrs. *M. S. Bhagat* and *Amar Nath Chopra*, for the Respondents.

JUDGMENT.—On the 4th October 1917 the Punjab Co-operative Bank in liquidation filed a suit for Rs. 27,950-15-9 against Baldeo Das and his three brothers. It was alleged that the defendants and their father, Kishan Chand, who died about 1909, constituted a joint Hindu family, which also carried on contract work and a brick kiln business under the name of Kishan Chand and sons. On the father's death the eldest son, Baldeo Das, became the manager of the joint family and the business carried on by it and in that capacity executed on the 11th October 1911 two promissory notes in favour of the plaintiff Bank, one for Rs. 16,300 with interest at 9 per cent. per annum and one for Rs. 3,700 with interest at 11 annas per cent. per-mensem, and for the second promissory note (para. 4 of the plaint) deposited two sale-deeds of land by way of equitable mortgage. In para. 10 of the plaint, however, it was prayed that a decree for the full sum claimed should be passed against the mortgaged property as well as against the other property of the defendants and against them personally. There was thus a contradiction between the two paragraphs of the plaint, quoted above, in one place the allegation being that there was an equitable mortgage of land only as regards the second and smaller promissory note, while at the end the claim was that the total amount sued for should be a charge on the land in question. During the pendency of the suit, Thakar Das, who used to be the manager of the Bank before it went into liquidation, was examined as P. W. No. 3 on the 7th March 1918. He deposed that the title-deeds were handed over to the Bank when Rs. 2,000 were given to Baldeo Das, on the 21st October 1908, long before the promissory notes were taken. At that time the total advances made amounted to Rs. 12,200. He further said that the title-deeds were to be security for the whole loan advanced. The words "up to date" in the English record after "advanced" do

not occur in the vernacular record. The proceedings were *ex parte* throughout against Baldeo Das, but the suit was contested by his three brothers, who finally entered into a compromise with the plaintiff Bank on the 7th April 1919. By this compromise the Bank gave up its claim against the three brothers while the brothers admitted that the decretal amount would be a charge on the 17 *kanals* 4 *marlas* of land in question which was Baldeo Das's self-acquired property and which was under equitable mortgage with the Bank and that his other self-acquired property including his shares in the plaintiff Bank and his one-fourth share of the ancestral property would also be liable. As against this, the plaintiff Bank admitted that the three brothers were not joint with Baldeo Das, and that their share in the ancestral property would, therefore, not be liable and that the suit as against them should be dismissed. After this compromise, a decree was passed *ex parte* against Baldeo Das, and by that decree a charge was created on the land in question. As the presumption was that all four brothers were joint, it is obvious that *prima facie* the compromise was to the advantage of all the parties.

In the meantime, the Punjab Commercial Syndicate and Krishan Lal filed a suit on the 6th May 1918 against Baldeo Das and his three brothers for Rs. 27,000. The dealings in this case also had been by Baldeo Das who did not appear, but the suit was contested by his three brothers. The Syndicate compromised with them on the 18th July 1919 in exactly similar terms to those entered into by them with the Punjab Co-operative Bank except that there was no charge upon any land, as there was no mortgage. The three brothers admitted that Baldeo Das's one-fourth share of the ancestral property and his self-acquired property should be liable while a list of the known ancestral property was given. In return for this the Syndicate released the three brothers and their shares of the ancestral property from liability and obtained an *ex parte* decree against Baldeo Das only.

Then on the 24th February 1920, the above named Syndicate and Krishan Lal sued the above-named Bank along with Baldeo Das and his three brothers for a declaration that the words "against the land mortgaged measuring about 17 *kanals*" in the decree obtained by the Bank in accordance with the compromise of the 7th April 1919 should not affect the Syndicate, that was to say, that the said land was not mortgaged with the Bank for the amount of their decree, and that the Syndicate could also execute its decree against the said land. It was mentioned in the plaint that according to para. 4 of the Bank's plaint (as already described) it was only alleged that there was an equitable mortgage of the land as regards the smaller promissory note of Rs. 3,700, but it was not mentioned that in para. 10 of the Bank's plaint it was prayed that the whole sum sued for should be a charge on the land. After alluding to the compromise of the 7th April 1919, it was stated that in accordance with it the Bank by fraud obtained a decree for Rs. 27,950-15-9 against Baldeo Das on the condition that he should be personally liable, and that the decretal amount should form a charge on the land in question. In this way the other defendants, that is, Baldeo Das's brothers, got themselves absolved from liability, while in reality the land was not mortgaged with the Bank and neither the whole amount claimed nor any part of it was a charge on the land. It was further alleged that Baldeo Das's brothers entered into a compromise affecting their brother to which he was not a party, and inserted therein conditions affecting him whereas they had no power to make a compromise encumbering the land in question. The plaintiff Syndicate, therefore, claimed that they as decree-holders were also entitled to execute their decree against this land. These are the only allegations in the plaint. This suit has been dismissed and it is an appeal from its dismissal, which is now before us.

The defendant-Bank raised several preliminary questions and also pleaded that there was no fraud, as the land was mortgaged with them for the debt due to the Bank. The plaintiff-Syndicate in their replication stated that they could bring the suit as they suffered under the decree in question and that they had a cause of action because the Bank had obtained their decree by fraud and collusion. No attempt was made further to define what the fraud and collusion was.

The Senior Subordinate Judge, who tried the case, held *inter alia* that, as the money realised by the sale of the disputed land was lying in Court, a suit for a mere declaration lay because the effect of a decree

if given, would be to allow the Syndicate a rateable distribution in the net assets; that s. 73, C. P. C., did not bar the suit; and that the decree which was attacked could only be avoided if there had been a fraud (*a*) either upon the Court or (*b*) upon the defendants in that case in the conduct of the proceedings as an extrinsic collateral act or (*c*) unless there had been fraudulent collusion directed against the alleged injured creditor.

On the issues of the merits, he held that the fraud alleged in the pleadings was that no land was in reality hypothecated with the Bank and that the defendants other than Baldeo Das, who was absent, colluded with the Bank to charge the land in order to extricate themselves from liability. He further held that there was no fraudulent collusion of this nature and that, in any case, if Baldeo Das's brothers did agree to the charge on the land in consideration of the claim being given up against them, this would not give the plaintiff-Syndicate a cause of action, as it was necessary for them to show that the fraud was directed against them. He also held that there was no allegation in the pleadings that any fraud was directed against the plaintiff-Syndicate and that if there had been, there was no evidence to support it. Lastly, he held that it was not alleged in the plaint that there was any fraud on the Court, and that, in any case, no fraud upon the Court had been made out.

The grounds of appeal are somewhat diffuse. Grounds Nos. 1, 5, 8, 9, 10, 11 and 12 are of a general nature and require no discussion. In ground No. 13 it was prayed that the distribution of the proceeds of the sale of the land should be stayed pending the decision of the appeal. This was not done so that the money must have been paid to the Bank. The other grounds taken amount to this (1) that there was a fraud upon the Court [ground No. 2 (*a*)] and (2) that there was a fraud directed against the plaintiffs-appellants [ground No. 2 (*b*)], in that the compromise was designed with intent to defeat their claim [ground No. 2 (*c*)], their suit being then pending (ground No. 7), while (3) grounds Nos. 3, 4 and 6 go on to state that none of the land in suit was mortgaged by Baldeo Das with the Bank and that para. (4) of the Bank's plaint showed that in any case the hypothecation was only as regards the promissory note of Rs. 3,700, and that the decree was (therefore) obtained by fraud by the Bank in collusion with Baldeo Das's brothers.

It has been held by their Lordships of the Privy Council in *Gunga Narain Gupta* v. *Tiluckram Chowdhry* (1) that when fraud is charged against the defendants, it is an acknowledged rule of pleading that the plaintiff must set forth the particulars of the fraud which he alleges Now in the present case, if the pleadings are looked at, the only fraud alleged is that Baldeo Das's brothers and the Bank colluded together to obtain for the Bank a charge upon the disputed land which in reality was not mortgaged with them, this having been done in order that the brothers should escape liability. This is the best possible statement of the appellants' case. There is no allegation that there was a fraud upon the Court or directed towards the Syndicate though it is noted in the pleadings that the Syndicate was adversely affected by the decree in question but nothing more and that they for this reason had a cause of action. We would, therefore, hold that the appellants cannot be allowed to go beyond their own statement of their case, though, as we have heard appellants' Counsel on all the grounds of appeal, we think it will be the best course to record our findings on all the points raised.

The case for the appellants, therefore, was that the Bank obtained their *ex parte* decree with a charge on the disputed land against Baldeo Das by fraud in that, in reality, the land was not mortgaged with the Bank but Baldeo Das's brothers admitted that it was mortgaged and that it was their brother's self-acquired property in return for the Bank's releasing them from liability as members of a joint Hindu family with him. In order to establish their case, the appellants relied on the record of the previous case and examined two witnesses. The first witness was Lajpat Rai, one of Baldeo Das's brothers. He denied that there was any talk at the time of the compromise to the effect that the decree should be made a charge on the disputed land in case other creditors should step in. It was not even mentioned at that time that there were other creditors. Though he and his two brothers, who contested the suit with him, disputed the hypothecation in their written statement, they admitted it later, he explained, when the sale-deeds were produced by the Bank and

(1) 15 C. 533; 15 I. A. 119; 12 Ind. Jur. 254; 5 Sar. P. C. J. 168; 7 Ind. Dec. (N. S.) 939 (P. C.).

Thakar Das made his statement as a witness. The second witness knew nothing about the transaction. No further attempt was made to prove that the land in question was not hypothecated with the Bank or what the fraud was. The appellants' oral evidence was thus in favour of the Bank and against the appellants, whatever the fraud alleged be considered to be. This leaves to be considered only the circumstances. In connection with them appellants' Counsel laid great stress on para 4 of the Bank's plaint, and the fact that the Syndicate's suit was then pending. He also commented at great length on the statement of Thakar Das, P. W. No. 3, in the Bank's suit, and stated that it was not sufficient to enable the Court to pass an *ex parte* decree in favour of the Bank against Baldeo Das. All this, however, amounts to little or nothing. At the time the Bank's suit was filed, it was in liquidation and its officials were dispersed. This might easily account for the statement in para. 4 of its plaint, which was contradicted by para. 10. The compromise in question might well have been entered into by the Bank and Baldeo Das's brothers, even if there had been no other creditor. There was a presumption against the brothers that they were joint with Baldeo Das. At the same time the contest was delaying the Bank from realising its debt. The brothers had seen that the title-deeds were produced by the Bank and they had heard the statement of Thakar Das, who used to be its manager, to the effect that the title-deeds were deposited as a cover for the whole loan in 1903 It was thus quite reasonable on their part to admit that the land in dispute was the self-acquired property of Baldeo Das and was mortgaged with the Bank and that they had no concern with it, in return for the Bank giving up its claim against them. The Bank gained even more than that; for the brothers also admitted that Baldeo Das had a one-fourth share in the joint ancestral property and that the shares of the Bank held by him were his self-acquired property and not family property. In this way the brothers were estopping themselves from denying these facts in the subsequent execution proceedings. From these circumstances combined with the fact that the appellants have not even tried to establish that there was not an equitable mortgage with the Bank, it is impossible to draw the deduction that the Bank and the brothers of Baldeo Das colluded together to defraud Baldeo Das or to obtain a fraudulent charge on the disputed land for the Bank. There was an eminently reasonable compromise entered into between them and thereafter the Court, with the record and the evidence before it, passed the *ex parte* decree in question against Baldeo Das and, on the basis of the compromise, dismissed the suit against his brothers. The mere fact that the appellants' suit was pending, does not make such a fair compromise appear even suspicious. As the alleged fraud was not established the suit was properly dismissed on this ground alone.

We would go further and hold that the present suit did not lie on the allegation of fraud made. It has been held in *Janki Kuer* v. *Mahabir Singh* (2), that an *ex parte* decree cannot be re-opened except on the ground of fraud as an extrinsic collateral fact vitiating the proceedings in which the decree was obtained and it is not sufficient to allege that it was obtained on a false claim. Even if an *ex parte* decree is obtained on perjured evidence, it cannot be set aside on that ground, *Kripasindhu Panigrahi* v. *Nandu Charan Panigrahi* (3). The following passage from *Venkatarama Aiyar* v. *South Indian Bank, Limited* (4) may be quoted *in extenso*:—

"The passages relied upon in the books referred to above lay stress on the fact that a fraud practised on the debtor is not itself any ground for interference by third parties. The defendant holds a decree which finally determines that the relation of creditor and debtor exists between him and his judgment-debtors and which is conclusive as to the amount of the debt as between the parties (and in the present case, as to there being a charge on the land)..... The plaintiffs have failed to establish fraud or collusion against themselves. In these circumstances I think the principle of the decision above referred to applies, and the plaintiffs are not entitled to attack the decree by showing that it is not based on a real debt."

It follows from this that it was necessary for the appellants to allege that there was collusion directed against themselves and

(2) 58 Ind. Cas. 317; 2 U. P. L. R. (Pat.) 242.
(3) 56 Ind. Cas. 606; 1 P. L. T. 206.
(4) 55 Ind. Cas. 452; 43 M. 381 at p. 389; 27 M. L. T. 66; 38 M. L. J. 108; 11 L. W. 81; (1920) M. W. N. 92.

this they did not do. Their suit failed on this ground also.

Even if it be taken that the allegations in the pleadings amount to an averment of fraud directed against the appellants, it is obvious from the above discussion that there is no evidence of any such fraud or collusion. It is unnecessary to go over the same ground again as it has been shown that the compromise complained of would have been a fair and reasonable compromise as between the Bank and Baldeo Das's brothers, even if the appellants' suit had not then been pending. The burden was, therefore, heavy upon the appellants to establish that it was the result of collusion to injure them. The evidence led by the appellants did not help them. It has not been shown that the land was in fact not hypothecated with the Bank. It does not affect the case that the result was detrimental to the present appellants, though it must be noted that there is no evidence on the record to show that it was detrimental to their interests and that they could not execute their decree in full otherwise. Fraud and collusion against the appellants were not alleged nor have they been made out.

Obviously there was no fraud on the Court. That also was not alleged in the pleadings. The *ex parte* decree against Baldeo Das was passed on evidence. It would not matter if that evidence was insufficient, or if the decree was obtained on perjured evidence. Before the decree could be vacated, it would have to be established that it was the result of collusion and fraud directed against the appellants. As to this there is neither direct nor indirect evidence.

We dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 267 OF 1923.

April 16, 1924.

Present:—Mr. Justice Das and Mr. Justice Ross.

BAIJNATH SINGH AND OTHERS—APPELLANTS

versus

HARI PRASAD BAL—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 11, 47, O. XXI, rr. 66, 100—Mortgage decree—Execution of decree—Application to be made party, rejection of—Sale—Application for order declaring non-liability to eviction, maintainability of—Res judicata.

In execution of a mortgage decree, a pusine mortgagee, who had been made a *pro forma* defendant in the suit, applied to be made a party to the execution proceedings and to have a notice under r. 66 of O. XXI, C. P. C., issued to him. This application was rejected and the applicant did not appeal against the order of rejection. After the sale had taken place, he made an application for an order declaring that he was not liable to eviction inasmuch as no notice under O. XXI, r 66 had been issued to him:

Held, (1) that the second application was not maintainable, [p 326, col 2.]

(2) that, in any case, the question raised in the [illegible] was *res judicata* by virtue of the [illegible] first application. [p. 327, col. 1]

Appeal against an order of the District Judge, Gaya, dated the 4th August 1923, confirming that of the Subordinate Judge, Gaya, dated the 14th April 1923.

Mr. *S. N. Ray*, for the Appellants.

Messrs. *Shiveswar Dayal* and *Brij Kishore Prasad*, for the Respondent.

JUDGMENT.

Das, J.—I am clearly of opinion that the application, in the form in which it was presented, was not maintainable, and that the Courts below should have refused it. It was urged before us that the application was one under s. 47; but what was the question that the Courts had to try? The question was whether, not having been made a party to the execution proceedings, the respondent was bound by a sale held in his absence. But this is precisely the question which he raised in his application of the 11th September 1922. The Court held that he was a *pro forma* defendant and was not entitled to a notice under O XXI, r. 66. I think the decision of the Court was wrong. But the applicant was satisfied with the order, and did not prefer an appeal therefrom. The sale has now taken place, and he applies for an order that he is not liable to be evicted inasmuch as notice under O. XXI, r 66 was not served on him. The Courts below have acceded to his application, and, as a result of their orders, the applicant in effect becomes the owner of the properties, though he was a puisne mortgagee and failed to redeem the prior mortgage

If his present application is to be regarded as an application under s. 47, the application of the 11th September 1922 was equally an application under s. 47. If that be so, then the order passed on the application of the 11th September 1922 operates as *res judicata*, and it is not open to the applicant to re-agitate the question whether

he was entitled to notice of execution. In order to succeed in the present application, the applicant must establish that he was entitled to notice under O. XXI, r. 66; but this question he cannot raise having regard to the order of the Court on his application of the 11th September 1922

It was next urged that the application was one under O. XXI, r. 100 But r. 100 applies to a case where a person other than the judgment-debtor is dispossessed of immoveable property; but here the applicant is the judgment-debtor, and so far as we are informed, he has not been dispossessed of the property yet.

Lastly, it was contended that the application was one substantially under O. XXI, r. 90; but it is sufficient to point out that there is no complaint here of a material irregularity in publishing or conducting the sale.

There was no merit whatever in the application, and the Courts below should not have stretched the law to give the applicant the status of an owner. He is a puisne mortgagee and a decree was fairly and properly obtained against him. He failed to redeem within the time fixed by the decree. He has made no attempt to satisfy the mortgage decree; and the position now taken up by him is one of absolute technicality, namely, that he should have been served with notice under O. XXI, r. 66 of the Code. The technical objection may be met by the technical reply that this is precisely the issue which he raised in his application of the 11th September 1922, and that the order passed on that application operates as *res judicata* between the parties.

I would allow this appeal, set aside the orders passed in the Courts below, and dismiss the application with costs in all the Courts.

Ross, J.—I agree.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 497 OF 1922.

October 29, 1923.

Present :—Mr. Hallifax, A. J. C.

TUKARAM—DEFENDANT No. 2—APPELLANT

versus

CHINTARAM—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 100—Appeal, second—Finding of fact—Question for trial not understood, effect of.

A finding of fact cannot be disturbed in second appeal, provided the facts found by the lower Appellate Court are relevant and the finding is based on evidence proper for consideration [p. 329, col. 1]

It is not necessary that the whole of the evidence given in the case should have been considered in the lower Appellate Court and still less that every part of it should have been mentioned in the judgment; interference is not justified by an apparent omission to consider some material part or even the main part of it. Where, however, the lower Appellate Court has entirely misunderstood the question it had to try, its finding cannot be upheld in second appeal. [*ibid.*]

Appeal against a decree of the Additional District Judge, Bhandara, dated the 22nd of July 1922, reversing that of the Second Munsif, Bhandara, dated the 27th of March 1922.

Mr. *V. R. Pandit*, R. B., for the Appellant.

Mr. *D. T. Mangalmurti*, for the Respondent.

JUDGMENT.—The plaintiff Chintaram and the two defendants Vithoba and Tukaram all belong to the *Kalar* caste. The first two live in Warad and the third in Borgaon, which is not far away, and they appear to be the sons of three brothers. The plaintiff alleged that by a registered sale-deed, dated the 3rd of February 1921, Raghunath, the father of Vithoba, sold him for Rs. 156 his absolute occupancy holding consisting of field No. 420/4 (45) and field No. 423-9 (·90), and that in the following *Mrig*, that is to say the second fortnight of June, the two defendants ousted him from the larger field No. 423/9. Raghunath, it appears, died in April of that year. Chintaram further stated that he had lost the original sale-deed, but gave no details in the plaint of the time or manner of the loss. In the appellate judgment it is incorrectly stated that the allegation in the plaint was that the loss occurred in what the learned Additional District Judge in his judgment calls the "*month* of *Mrig*" The same term is used in the plaint, but in reference to another event.

Stripped of irrelevancies the version of the facts really put forward by the defendants was as follows: There was a decree for Rs. 67-12-0 against Raghunath and he was otherwise deeply indebted He, therefore, arranged to execute a bogus sale deed in favour of the plaintiff. For payment of the decree he borrowed Rs. 52, from the plaintiff Chintaram, and executed the sale-deed for Rs. 156, the balance being untruly entered in the deed as due for pre-

vious loans. There was never any intention of making any real sale and no consideration was paid excepting the Rs. 52, nor was possession of either field ever given to the ostensible purchaser. But after Raghunath's death Chintaram showed signs of treating the sale-deed as a genuine and valid document, and so the matter was discussed in the presence of others on the 13th of June, though no formal *panchayat* was convened. As a result of that discussion Chintaram agreed that inasmuch as he had actually paid only the Rs. 52, which had been given to Raghunath in cash when the document was registered and as this was just a third of the whole stated consideration of the sale-deed, he should be given only the smaller of the two fields, which is just half the size of the other, and the latter should remain with Vithoba. Chintaram himself recorded a note of this agreement on the back of the sale-deed. At the same time and place the first defendant Vithoba executed a document leasing the larger field for one year to the second defendant Tukaram, which Chintaram also signed as an attesting witness. Later, that is on the 16th of October 1921, the lease to Tukaram was converted into a sale by a registered document.

The defendants in their pleadings denied knowledge of the execution of the sale-deed by Raghunath, and in almost the same breath made their allegations of what was done about it at the *panchayat*. They also pleaded that secondary evidence of its existence and contents could not be given for the reason that it was not lost but intentionally suppressed, for the purpose of concealing Chintaram's own endorsement on it. It does not appear to have struck any body that the allegations in regard to that endorsement are not only an admission but an affirmation of the existence and execution and contents of the document, and that those matters require no further proof. Much argument seems to have been wasted on this point, different views being taken in the two Courts below, and the petition of appeal here challenges that of the lower Appellate Court.

The plaintiff was apparently unable to deny his signature on the lease of the 13th of June 1921 He, however, "denied" the document, whatever that may mean when it is coupled with an admission that as far as he knows it was executed and that he signed it himself as an attesting witness. The latter admission, however, is qualified by the statement that Vithoba represented to him that the document was to be a lease of some other field, and he signed it when only the first two lines had been written and then went away. It was then urged at considerable length that neither the lease nor the sale to Tukaram could convey any title, as they were both subsequent to the sale to the plaintiff, and the legality of the "award" of the *panchayat* was also impeached. Neither the lease nor the sale was pleaded as a basis of any title, nor was there any allegation of an arbitration or an award : all three matters were put in merely as evidence in support of the allegation that on the 13th of June 1921 the plaintiff agreed that the larger field should be retained by Vithoba and the smaller one given to him and that no more of the consideration of the sale was to be paid by him than he had already paid. His pleadings ended with a statement that the loss of the sale-deed occurred "about the time of *Mrig*" during a journey from Warad to Bhandara.

On those pleadings and the evidence adduced by the parties the suit was dismissed in the first Court on the finding that loss of the original sale-deed had not been proved and, therefore, secondary evidence of its existence and contents could not be given. This decree was set aside in appeal on the following findings, stated as far as possible in the learned Additional District Judge's own words. He held "that the original sale-deed is lost and that secondary evidence is admissible in evidence to prove the same," and further that, in the absence of rebutting evidence, the secondary evidence adduced by the plaintiff proved "that the sale-deed was for consideration and that it was not nominal." It is next found that there was no arbitration and no award, and "the whole story about the *panchayat* and the award is false and untrue". There is a complete avoidance of a finding on the question whether the plaintiff signed the lease of the 13th of June 1921 with knowledge of its contents or signed it under the impression that it was to be a lease of other land when only the first two lines had been written. All there is on this point is a finding that there is nothing to show that the attestation of the document by the plaintiff induced the lessee Tukaram to believe that the field belonged to his lessor Vithoba, and "the

attestation in question does not, therefore, operate as an estoppel."

It was laid down by the Privy Council in *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (1), that an erroneous finding of fact, however gross or inexcusable the error may be, cannot be made the basis of a second appeal. Such findings of fact as there are in the judgment of the lower Appellate Court cannot be described as anything less than gross and inexcusable errors, and it would seem that in writing that judgment the learned Judge was fitting the material to a predetermined result, not working on it to its natural result. That is an entirely wrong method and one bound to lead to error, however unconsciously it may be adopted.

But I would be precluded from disturbing the findings of fact in the judgment of the lower Appellate Court, however strongly I might think they were opposed to any really sane view of the evidence, provided the facts found were relevant and the findings were based on evidence proper for consideration. It is not necessary that the whole of the evidence given in the case should have been considered in the lower Appellate Court and still less that every part of it should have been mentioned in the judgment; interference is not justified by an apparent omission to consider some material part or even the main part of it. The proposition that it is so justified has, however, been accepted in this Court till it has become an established practice, and it is enunciated in several published rulings among which I need only mention my own in *Raoji* v. *Warlu* (2), though that proposition was very definitely rejected by the Privy Council in the case mentioned, which was an appeal from a judgment of this Court. It was followed by Ismay, J. C. in *Tanto* v. *Gajadhar* (3), but since then appears to have dropped out of sight.

It has been suggested that their Lordships did not lay down any such strict rule in that case. There can be little doubt about that, from the remarks in the judgment on the Calcutta case of *Futtehma Begum* v. *Mohammad Ausur* (4) and the Allahabad case of *Nivath Singh* v. *Bhikki Singh* (5), the views expressed in which were not accepted as a correct statement of the law. If there were any doubt it would be cleared by the remarks made by their Lordships in *Shivabasava* v. *Sangappa* (6), on this and another previous judgment of the Board in *Anangamanjari Chowdhrani* v. *Tripura Sundari Chowdhrani* (7). The same rule was also laid down negatively in *Hemanta Kumari Debi* v. *Brojendro Kishore Roy Chowdhry* (8). In *Damusa* v. *Abdul Samad* (9), their Lordships did uphold a refusal by this Court to accept concurrent findings of fact by the two lower Courts, but that refusal was based on the opinion that both those Courts had misconceived the real question they had to try.

Now the one question for trial in the present case was this: did the plaintiff admit on the 13th of June 1921 that only Rs. 52 of the consideration of his sale-deed had been paid and agree that the rest should remain unpaid and that Vithoba should retain the larger of the two fields and he himself should take the smaller? The judgment of the lower Court does not even approach that question, but deals, apart from it, with two at the most of the subsidiary issues of fact on which the answer to it depends. That answer must, therefore, be given here under s. 103 of the C. P. C., and the learned Pleader for the respondent was unable to urge that on a proper consideration of the case the answer could be anything but an affirmative.

The appearance of the document of the 13th of June 1921, in which Chintaram's admitted signature appears below that of another attesting witness, makes his unsupported story of having signed it when only the first two lines had been written even more ridiculous than it is in itself. That document alone is sufficient proof of the allegations of the defendants, which are otherwise well supported, and sufficient disproof of the essentially improbable story of the plaintiff, which is unsupported except by his own deposition, which in most other

(1) 18 C 23; 17 I. A. 122; 5 Sar. P. C. J. 560; 9 Ind. Dec (N. S.) 16 (P. C.).
(2) 77 Ind. Cas. 911; 18 N. L. R. 182; (1923) A. I. R. (N.) 107; 3 N. L. J. 313.
(3) 2 N. L R. 98.
(4) 9 C. 309; 4 Ind. Dec. (N. S.) 855.
(5) 7 A. 649; A. W. N. (1885) 151; 4 Ind. Dec. (N. S.) 830.
(6) 29 B. 1, 8 C. W. N. 865; 6 Bom. L. R. 770; 1 A. L. J. 637; 31 I A. 154; 8 Sar. P. C. J 720 (P. C.).
(7) 14 C. 740; 14 I. A. 101; 11 Ind. Jur. 350; 5 Sar. P. C. J 45; 7 Ind. Dec. (N. S.) 490 (P. C.).
(8) 17 C. 875; 17 I. A. 65, 5 Sar. P. C J. 542; 8 Ind. Dec. (N S.) 1128 (P. C.).
(9) 51 Ind. Cas. 177; 15 N. L. R. 97; 17 A. L. J. 700, 37 M. L. J. 36; (1919) M. W. N. 505; 21 Bom. L. R. 920; 10 L. W. 310; 24 C. W. N. 81; 47 C. 107; 46 I. A. 140 (P. C.).

respects is obviously untrue. It seems to me still more patent that he never lost the sale deed but has intentionally suppressed or destroyed it, and, therefore, that it does bear the endorsement in his hand which the defendants allege; no sane person outside a Court of Justice would accept for a single moment as anything but an obvious and brazen lie his ridiculous story of the loss of the document, though in many Courts the application of wrong standards and principles has led to a very general impression that a Judge must pretend to believe in the truth of what he knows to be untrue, and must act as if it were true. The definitions of "proved" and "disproved" in s. 3 of the Evidence Act are perfectly clear.

The decree of the lower Appellate Court will be set aside and that of the first Court dismissing the plaintiff's suit will be restored. The plaintiff-respondent will pay all the costs of the litigation in all three Courts.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 14 OF 1923.
May 28, 1924.

Present:—Mr. Cecil Henry Walsh, Acting Chief Justice, and Mr. Justice Ryves.

MRS. ALICE GEORGINA SKINNER—PLAINTIFF—APPELLANT

versus

Kunwar MUKARRAM ALI KHAN—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 177—Appeal—Death of respondent—Application to bring legal representatives on record—Limitation.

Article 177 of Sch. I to the Limitation Act, which prescribes the period of limitation for an application to bring on the record the legal representatives of a deceased respondent, was not in any manner affected by the passing of the Amending Act XXVI of 1920. It was not till the Amending Act XI of 1923 was passed that the period of limitation prescribed by Art. 177 was reduced from six months to ninety days.

First appeal from an order of the Subordinate Judge, Muzaffarnager at Meerut.

Messrs. *B. E. O'Conor* and *Nehal Chand*, for the Appellant.

Messrs. *Surendra Nath Sen*, *Girdhari Lal Agarwala*, *Panna Lal* and *Gopi Nath Kunzru*, for the Respondent.

JUDGMENT.—In our opinion this appeal must succeed. The learned Judge says this ingorance of the law is no excuse. It is a dangerous proposition. We think that almost any excuse for ignorance might be accepted under these circumstances if it were necessary for us to consider whether we ought to extend the time. But we are of opinion that no extention of time, or concession of any kind, is required by the appellant. The difficulty has been to ascertain what the law is. It now turns out, that the appellant was right and the Judge was wrong. The Punjab High Court, [*cf. Gobind Das* v. *Rup Kishore* (1)] after an exhaustive enquiry have ascertained that when the Act of 1920 was enacted by the Government of India, the period provided in the appropriate column opposite Art. 177 was "six months" No slovenly use of the word "ditto" a word which ought to have no place in any Statute at all, has anything to do with the matter. The period was six months.

The Amending Act, XXVI of 1920, did not touch Art. 177. Therefore, after the Amending, Act was passed; the period in the column, according to law, opposite Art. 177, was still six months and that was actually the period provided when the appellant put in her application on the 28th June. That application was well within six months and was, therefore, in accordance with the existing law. Subsequently in 1923, by Act XI of 1923, the period has been altered to ninety days, but that was subsequent to this application. The appellant was, therefore perfectly within her rights.

The appeal succeeds and the matter must be sent back to the lower Court with direction to re-hear the application according to law.

The appellant is entitled to her costs here and below. The costs in this Court will include fees on the higher scale.

Z. K. *Appeal allowed.*

(1) 77 Ind. Cas. 409; 4 L. 367, 6 L. L. J. 25; (1924) A. I. R. (L) 65.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 408 OF 1923.
September 16, 1925.

Present:—Mr. Justice Viswanatha Sastry.

ALAPATI RAMASWAMI—PLAINTIFF—APPELLANT

versus

DASARI VENKATARANAYANA—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—

Plaint, amendment of—Cause of action, date of, change of.

No plaint should be allowed to be amended so as to change the cause of action; but an amendment to change the date when the cause of action was stated in the plaint to have arisen ought to be allowed, even though the effect of so doing would be to deprive the defendant of a plea of limitation [p. 331, col 2.]

Sevugan Chetty v. *Krishna Aiyangar*, 13 Ind. Cas. 268; 36 M. 378; 10 M. L. T. 557; 22 M. L. J. 139, relied on.

Balkaran Upadhya v. *Gaya Din Kalwar*, 24 Ind. Cas. 255; 36 A. 370; 12 A. L. J. 635, distinguished.

Second appeal against a decree of the District Court, Guntur, in A. S. No. 332 of 1921, preferred against that of the Court of the District Munsif, Tenali, in O. S. No. 804 of 1920.

Mr. *B. Somayya*, for the Appellant.

Mr. *N. Rama Rao*, for the Respondent.

JUDGMENT.—Second appeal by plaintiff against the decree of the District Judge of Guntur in A. S. No 332 of 1920.

The question to be considered in this appeal is one of limitation, and the facts are as follows:—The defendant executed a hypothecation bond Ex. A on 10th October 1917. Under this bond a sum of Rs. 2,000, was due to the plaintiff and the defendant undertook to deliver $7\frac{1}{4}$ *candies* of paddy every year for a period of eight years. The paddy was deliverable on *Pushya Bahula* 30th of every year, and in case default was made in the delivery of the paddy, the defendant made himself liable to pay the market value of the paddy in Ponnur market on the 30th *Phalguna Bahula* of the same year. There is also a provision in the bond to the effect that in case the first instalment was not fully paid, the last instalment also became due and that in case the second instalment was not paid the seventh instalment also became due; and so on. For the first instalment a small quantity of paddy had been delivered; and on 20th November 1918 the plaintiff instituted a suit for the recovery of the amount due with respect to the first and eighth instalments. The plaint in this suit was returned for presentation to the proper Court on 24th February 1919, and it was presented in the District Munsif's Court of Baptla on 26th February 1919. The present suit out of which this second appeal arises was in respect of the second and seventh instalments. One of the contentions urged was that the suit was barred under O. II, r. 2 of the C. P. C. Both the Courts below upheld this contention and dismissed the suit.

It is contended before me that the cause of action in the present suit which was instituted on 31st August 1920 did not arise on the date when the plaint for the first and eighth instalments was filed and that, even if it did arise the date of the cause of action was not 30th January 1919 as stated in the plaint, but 30th of *Phalguna Bahula* which would be about March 1919. For considering when the cause of action really arose, reference has to be made to Ex. A. This document recites that the paddy was deliverable on *Pushya Bahula* 30th of every year, and that in case there was failure to deliver the paddy, defendant was to pay the value of $14\frac{1}{2}$ *candies* at the rate prevailing in the Ponnur market on *Phalguna Bahula* 30th. Before the parties went to trial, the plaintiff put in a petition to amend the plaint by stating that the cause of action arose on *Phalguna Bahula* 30th and this application was refused by both the Courts below on the ground that a change in the cause of action would prevent the suit being barred and thus deprive the defendant of his right to have the suit dismissed. Both the lower Courts were of opinion that the amendment would make a change in the cause of action, but this does not appear to me to be so. The change would be only in the date when the cause of action arose and not in the cause of action itself which would remain the same. The document distinctly provides that the value of the paddy as and on *Phalguna Bahula* 30th was to become payable in case the paddy was not delivered. For the purpose of instituting the suit the plaintiff would, therefore, have to wait till *Phalguna Bahula* 30th for the purpose of ascertaining the price on that date. It is only after ascertaining the price that he could have valued his suit and come in with his plaint. The cause of action remains as it was, namely, the failure to deliver paddy, but the only variation which the plaintiff wanted to make was as to when the cause of action arose. Therefore such an amendment could be allowed as laid down by this Court in *Sevugan Chetty* v. *Krishna Aiyangar* (1). The Vakil for the respondent relied upon a case in *Balkaran Upadhya* v. *Gaya Din Kalwar* (2); but all that this case lays down is that no amendment should be allowed when there is a change in the cause of action and not when there is a change in the date

(1) 13 Ind Cas. 268, 36 M. 378; 10 M. L. T. 557; 22 M. L. J. 139.

(2) 24 Ind. Cas. 255; 36 A. 370; 12 A. L. J. 635.

when the cause of action arose. The grounds on which the lower Courts declined to allow the amendment seem to me to be untenable; and the amendment, in my opinion, ought to have been allowed. In this view the suit would not be barred by limitation.

Other pleas were also raised which form the subject-matter of Issues Nos. 2 and 3. No evidence was let in and no finding given on these issues by the Trial Court.

The appeal is, therefore, allowed, and the suit is remanded to the Trial Court for disposal after receiving evidence on the remaining issues.

Costs in this Court will be paid by the respondents. Costs in the lower Courts will abide and follow the result.

The appellant will get refund of the Court-fee paid on the memorandum of second appeal, and in the memorandum of appeal to the lower Appellate Court.

V. N. V. *Appeal allowed.*
N. H.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1285 OF 1922.
May 27, 1924.
Present:—Mr. Justice Daniels and Mr. Justice Neave.

BHAGWATI SINGH AND OTHERS—DEFENDANTS—APPELLANTS
versus
GURCHARAN DUBE—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Mortgage by father to pay off encumbrance on property acquired by pre-emption, validity of.

A mortgage of family property executed by a Hindu father in order to pay off an encumbrance on property acquired by him under a pre-emption decree, is not binding on the sons unless it is shown that it was for the benefit of the family that the encumbrance should be paid off by hypothecation of the family property.

Second appeal from a decree of the Subordinate Judge, Basti.

Mr. *Shankar Saran*, for the Appellants.

Mr. *N. Upadhia*, for the Respondent.

JUDGMENT.—We think that this appeal cannot succeed. The suit was for a declaration that a hypothecation bond executed by the plaintiff's father of ancestral joint property was not binding on the plaintiff, not having been executed for legal necessity. Both the Courts have decreed the suit and the defendants appeal. The bond in question was for a sum of Rs. 177 of which Rs. 165 was paid in discharge of a mortgage on certain property which the plaintiff's father had acquired under a pre-emption decree. The decree was given him on payment of Rs. 130 which had been paid into Court. The pre-empted property was, however, subject to an encumbrance, and the hypothecation bond in suit was executed to pay off this encumbrance. Reference has been made to the decisions in *Nathu* v. *Kundan Lal* (1) and *Chatur Bhuj* v. *Gobind Ram* (2) which dissented from the decision in *Nathu* v *Kundan Lal* (1). Neither of these decisions is strictly applicable. In these cases the question arose whether payment of an amount which the father was required to deposit under a pre-emption decree amounted to antecedent debt or not. In this case there was no question of any debt. The amount which the father was required to deposit under the decree had already been deposited. The question is, therefore, reduced to this whether it was more advantageous to the family that the encumbrance on the pre-empted property should be paid off at the cost of encumbering the ancestral property or not. On this there is a finding of both the lower Courts that it is not established that the discharge of the encumbrance at the cost of hypothecating the family property was for the benefit of the family. The Courts have pointed out that the hypothecation bond in suit carried compound interest at a fairly high rate. In face of this finding the appeal cannot succeed and we accordingly dismiss it with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 8 Ind. Cas 836, 7 A. L. J. 1182; 33 A. 242.
(2) 67 Ind. Cas. 668, 45 A. 407; 4 U. P. L. R. (A.) 43; (1923) A. I. R. (A.) 218, 21 A L J. 348.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 691 OF 1924.
July 21, 1925.
Present:—Mr. Justice Abdul Raoof and Mr. Justice Addison.

DARBARI MAL-RAM SAHAI—PLAINTIFF—APPELLANT
versus
THE SECRETARY OF STATE—DEFENDANT—RESPONDENT.

Railways Act (IX of 1890), s. 80—Goods consigned to Railway Company—Carriage over systems of more

Railways than one—Liability of other Railway Companies—Loss, proof of.

Where goods are delivered to one Railway Administration for carriage, another Railway Administration over whose system the goods had to be carried can be held liable for the loss of the goods only if it is proved that the loss occurred on that Railway.

Second appeal from a decree of the District Judge, Amritsar, dated the 17th January 1924, modifying that of the Subordinate Judge, Third Class, Amritsar, dated the 3rd May 1923.

Mr. *Durga Das*, for the Appellant.

The Government Advocate, for the Respondent.

JUDGMENT.—The plaintiff sued the Secretary of State for India for Rs. 1,505-9-6, on the ground that half of a consignment of 820 tins of molasses, namely, 410 tins, had not been delivered to him by the North-Western Railway. The goods were delivered to the Bengal North-Western Railway by Dana Mal-Babu Ram of Naukhar, District Gorakhpur, on Risk Notes A and B. The plaintiff refused to make the Bengal North Western Railway a party to the suit. The North-Western Railway pleaded that no suit lay against them under the provisions of s. 80 of the Railways Act, and that they were protected by the Risk Notes. The Trial Court decreed the claim to the extent of Rs. 1,328-0-6, but on appeal, the learned District Judge allowed the plaintiff only the sum of Rs. 268-14-0 being the freight paid for the undelivered half of the consignment. He held that the North-Western Railway was not liable by reason of the provisions of s. 80 of the Railways Act, as it had not been proved that the loss occurred on that Railway, and that further the Risk Notes on which the goods were booked protected the Railway. Against this decision, the plaintiff has filed this second appeal.

There is a finding of fact that it has not been proved that the loss occurred on the North-Western Railway, and it seems to us that on this finding the decision of the lower Appellate Court must be upheld, as in order to make the North-Western Railway liable it is necessary under s. 80 of the Railways Act, that the loss should have occurred on that Railway. There may have been loss to the owner by the fact that the goods in question were not delivered, as laid down in *Hill Sawyers and Company* v. *Secretary of State for India* (1); but in that case it was clearly established that the "loss" to the owner was caused by the North-Western Railway, and, therefore, it was not protected by s. 80 of the Railways Act. In the present case, however, the North-Western Railway is clearly not liable as the concluding portion of s. 80 is to the effect that, when goods are delivered to one Railway Administration, another Railway Administration can only be sued if the "loss" occurred on its Railway. This appeal must, therefore, fail and we dismiss it with costs.

Z. K. *Appeal dismissed.*

(1) 61 Ind. Cas. 926; 2 L. 133; 3 L. L. J. 207 (F.B.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 18 OF 1923.

July 31, 1925.

Present:—Mr. Justice Jackson.

P. NARASIMHA MUDALI AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

POTTI NARAYANASAMI CHETTY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract—Repudiation by one party—Remedies of other party—Long delay—Implied abandonment of contract.

If one party to a contract repudiates it, the other party may treat the repudiation as inoperative, and at the end of the period of the contract, treat the other party as responsible for all the consequences of non-performance, thereby keeping the contract alive, or, on the other hand, he may treat the repudiation as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it. A promisee cannot, however, both sue upon the breach and also keep the contract open. [p 334, col. 1]

Frost v. *Knight*, (1872) 7 Ex. 111; 41 L. J. Ex. 78; 26 L. T. 77; 20 W. R 471, followed.

Where one party to a contract by acts and conduct evinces an intention no longer to be bound by it, the other party will be justified in regarding himself as having been emancipated [p. 334, col. 2.]

A party cannot repudiate a contract, wait a long time and then suddenly insist upon its performance, long delay coupled with repudiation will amount to conduct giving rise to an implication of abandonment of the contract [*ibid*]

Pearl Mill Co. v. *Ivy Tannery Co.*, (1919) 1 K. B. 78, 88 L. J. K. B. 134; 120 L. T. 28; 24 Com. Cas. 169, relied on.

Second appeal against a decree of the Court of the Subordinate Judge, Chittor, in A. S. No. 282 of 1921, (A S. No. 138 of 1921, on the file of the District Court, Chittor), preferred against that of the Court of the District Munsif, Sholinghur, in O. S. No. 55 of 1920.

Mr. *C. V. Ananta Krishnier*, for the Appellants.

Mr. *S. Jagadisa Iyer*, for the Respondents.

JUDGMENT.—This is a second appeal from the decree in A. S. No. 282 of 1921, on the file of the Subordinate Judge of Chittor, preferred against the decree in O. S. No. 55 of 1920, on the file of the Court of the District Munsif of Sholinghur. Both the lower Courts have dismissed their suit and plaintiffs appeal.

A Chetti firm contracted with a Mudali firm to supply the Mudali firm with twenty-five bales of yarn: Exs. A and A-1. On 24th October 1918, the Mudali firm wrote Ex. II cancelling the contract because the supply had been irregular. The Chetti firm not accepting this cancellation gave notice of suit and in due course filed O. S. No. 27 of 1919 in the Court of the District Munsif of Chittor. The matter was referred to arbitration and apparently settled by award, but the award is not in evidence. Then on 9th December 1919, the Mudali firm wrote Ex. D to the Chettis that under the previous contract they were still bound to supply them with 11½ bales, and if these were not supplied within two days, they would file a suit. Hence the present suit brought by the Mudali firm, the plaintiffs and appellants.

The point taken in this appeal is that the contract was never cancelled and the appellants rely for this position upon *Frost* v. *Knight* (1). There it is laid down at page 112*, that if one party to a contract repudiates it, the promisee may treat the repudiation as inoperative, and at the end of the period of the contract, treat the other party as responsible for all the consequences of non-performance, thereby keeping the contract alive, or, on the other hand, he may treat the repudiation as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it. The Chetti firm evidently adopted the latter alternative when it brought O. S. No. 27 of 1919. But relying upon a passage in the plaint of that suit, the appellants would have it that the Chettis availed themselves of both alternatives. They sued upon the breach of the contract, and in the same breath kept it open, because in para. 11 of their plaint there is a statement that they were still entitled to deliver the rest of the bales. The short answer to this is that they had no right to make any such reservation. *Frost* v. *Knight* (1), is recognised authority prescribing the remedies open to a promisee and he cannot both sue upon the breach and also keep the contract open.

The appellants then proceed to argue that, if so much must be conceded, the Chetti firm closed the first portion of the contract, but re-opened a new contract by their 11th para. This plea can have no force unless the Mudali firm can show its acceptance of this fresh tender, and so far from accepting it, that firm in its written statement utterly repudiated the 11th para. as false (Ex. III, para. 11). Therefore, there was no fresh contract between the parties.

Apart from contesting this plea of the plaintiffs, the respondents have a good case as set forth in para. 8 of their written statement by way of waiver and estoppel. A party cannot repudiate a contract, wait a year, and then suddenly insist upon its performance. The question turns upon whether his conduct gives rise to an implication of abandonment [*cf. Pearl Mill Co.* v. *Ivy Tannery Co.* (2).] Delay coupled with repudiation does give rise to such an implication. "Where one party by acts and conduct evinces an intention no longer to be bound by the contract, the other party will be justified in regarding himself to be emancipated:" Halsbury's Laws of England, Vol. VII, para. 865.

For the above reasons the appeal is dismissed with costs.

V. N. V. *Appeal dismissed.*

N. H.

(1) (1872) 7 Ex. 111; 41 L. J. Ex. 78; 26 L. T. 77; 20 W. R. 471.

*Page of (1872) 7 Ex.—[*Ed.*]

(2) (1919) 1 K. B. 78; 88 L. J. K. B. 134; 120 L. T. 28; 24 Com. Cas. 169.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 109-B OF 1924.

April 14, 1925.

Present:—Mr. Kotval, A. J. C.

SAKHARAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SHEORAM—PLAINTIFF—RESPONDENT.

Berar Land Revenue Code, 1896, s. 210—Sale to co-occupant and stranger—Pre-emption.

Where a co-occupant in a survey number sells his share in the survey number to a co-occupant and a stranger, the sale cannot be described as being one in favour of a co-occupant and s 210 of the Berar Land Revenue Code has no application to such a case.

Appeal against a decree of the Additional District Judge, Amraoti, dated the 22nd of February 1924, reversing that of the Second Class Subordinate Judge, Morsi, dated the 24th of October 1923.

Mr. *D. T. Mangalmoorti*, for the Appellants.

Mr. *W. R. Puranik*, for the Respondent.

JUDGMENT.—The plaintiff is a co-occupant of survey No. 1. Bhojaji and Sitaram, the owners of *Pot-hissa* No. 2 in the same survey number sold their share to defendants Nos. 1 and 2 on the 2nd May 1922, without giving notice to the plaintiff. Plaintiff, therefore, claims to pre-empt *Pot-hissa* No 2.

The defendants admit that the plaintiff is a co occupant in survey No. 1. They plead that defendant No. 2 has acquired no interest by the purchase, his name having been nominally inserted in the sale-deed, and that defendant No. 1 having a share in *Pot-hissa* No. 6 which his father acquired on the 10th April 1916, by purchase, the plaintiff cannot claim pre-emption under s. 210, Berar Land Revenue Code.

The finding of the lower Appellate Court is that the purchase was solely for the benefit of defendant No. 2 and that he was not a purchaser merely in name. No reason has been shown why the finding should not be upheld.

On the above finding there is no room for the application of s. 210 since defendant No 2, the real purchaser, is not a co-occupant in the survey number.

Assuming that both the defendants are purchasers and defendant No. 1 is a co-occupant, still s. 210 will not apply, for the transfer is not to a person already a co-occupant, but to a body consisting of a co-occupant and a stranger which cannot be called a co-occupant.

There is no question here under s. 209 of priority in pre-emption, because defendant No. 1 does not claim pre-emption against defendant No. 2.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 60 OF 1922.

June 10, 1924.

Present:—Mr. Justice Sulaiman and Mr. Justice Kanhaiya Lal.

Chaudhri KHAZAN SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Chaudhri UMRAO SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Pre-emption—Village Badnauli, Tahsil Hapur, Meerut District.

A custom of pre-emption exists in village Badnauli, Tahsil Hapur, Meerut District. [p. 338, col. 1.]

First appeal from a decree of the Subordinate Judge, Meerut.

Messrs. *Nehal Chand* and *Harendra Krishna Mukerji*, for the Appellants.

Messrs. *Nehal Chand Vaish* and *Surendra Nath Gupta*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal arising out of a suit for pre-emption. The defendants Nos. 1 and 2 by a sale-deed, dated the 15th of July 1920, transferred their shares in village Badnauli in Tahsil Hapur, District Meerut, in favour of two sets of defendants. Half of the property was transferred to defendants Nos. 3 to 7 and the other half to defendants Nos. 8 to 12. There is a clear specification of this in the sale-deed. The plaintiffs alleged in the plaint that under a custom of pre-emption existing in the village they were entitled to pre-empt as against the defendants who were strangers to the *mahal*. As to the sale consideration it was alleged that out of the sum shown before the Sub-Registrar a sum of Rs. 2,000 was actually returned afterwards and was a fictitious item. It was further asserted that the property sold covered standing sugar-cane crop of the value of Rs. 1,500 which had since been appropriated by the vendees.

The defendants vendees denied the existence of any custom of pre-emption and also asserted that the sale consideration mentioned in the sale-deed was true.

We may note that a considerable portion of the sale consideration mentioned in the sale-deed was left in the hands of the vendees for payment to certain specified creditors.

The learned Subordinate Judge has held that the evidence produced by the plaintiffs is insufficient to establish that a custom of pre-emption existed in this village. On this finding the suit has been dismissed *in toto*. He has, however, gone on to record

findings on the other issues which arose in the case and has come to the conclusion that it is not established by the plaintiffs that a sum of Rs. 2,000 was returned by the vendors after registration. He has also come to the conclusion that the value of sugar-cane crop was only Rs. 1,000 and not Rs. 1,500 and, therefore, Rs. 1,000 would have to be deducted from the sale consideration. There was also an allegation by the plaintiffs that the defendants vendees had cut away certain trees of wild growth worth Rs. 150, but this was not substantiated by any evidence.

The plaintiffs have come up in appeal before us and two main points arise for consideration, (1) The existence or non-existence of the alleged custom of pre-emption and (2) the amount of sale consideration.

In support of the alleged custom of pre-emption the plaintiffs relied on the *wajib-ul-arz* of 1870 prepared by Mr. Nasir Ali, a Settlement Deputy Collector. They also relied on two suits for pre-emption instituted in 1886 and in 1892 respectively. The defendants, on the other hand, produced what purports to be a *wajib-ul-arz* prepared by Mr. Mohar Singh another Settlement Deputy Collector, and of which the learned Subordinate Judge says the year is 1860. The document which is produced, however, bears no such date. The defendants also produced a *rubkar* of 1836 drawn up by Sir Henry Elliot and the *dastur dehi* prepared by Mr. Gillan for 1303 *Fasli*. The last two documents do not contain any mention of the right of pre-emption.

The learned Subordinate Judge has made a great point against the plaintiffs by pointing out that there are some variations in the entries regarding the right of pre-emption as contained in the *wajib-ul-arzes* prepared by Mr. Mohar Singh and Mr. Nasir Ali respectively. It is necessary for us to consider as to the exact nature of the *wajib-ul-arz* prepared by Mr. Mohar Singh. In this document, it is shown that the entire village had been settled with Girwar Singh, *lambardar*, from the year 1242 *Fasli* to the year 1262 *Fasli* (corresponding to 1835-1855 A. D.). It goes on to say that subsequently as sanctioned by the Board of Revenue the term of theSettlement was extended by a further period of 10 years and the aforesaid revenue was maintained.. It is clear, therefore, that the Settlement which was made by Sir Henry Elliot in 1835 continued till 1865. The *wajib-ul-arz* prepared by Mr. Mohar Singh is said to have been prepared in the year 1860. A reference to the Gazetteer of the District of Meerut shows that after the Settlement of Sir Henry Elliot the next regular Settlement was made by Mr. Forbes and Mr. Porter between the years 1865 and 1870. It is quite clear that there was no Settlement, in the strict sense of the word, in the year 1860. It is, therefore, impossible to regard the *wajib-ul-arz* prepared by Mr. Mohar Singh as the final Record of Rights prepared at the Settlement. There are no materials on the record to show when the Settlement which was completed in 1870 actually commenced. It is possible that some preliminary operations may have deen started in 1860 in course of which the *wajib-ul-arz* drawn up by Mr. Mohar Singh might have been prepared. The clause containing the verification is not filed and it is difficult to say whether that *wajib-ul-arz* represents a final record of a custom or contract enforceable in the village. It is possible that the *wajib-ul-arz* of 1870 may be the revised and corrected record.

In this view of the nature of the document it cannot be seriously urged that the presumption arising from the entry in the *wajib-ul-arz* of 1870 which was admittedly a Settlement period, has been negatived by a different entry contained in Mr. Mohar Singh's document.

The defendants have also produced a *rubkar* issued by Sir Henry (then Mr. Henry) Elliot, dated the 25th of February 1836, which contains no reference to any right of pre-emption. That, however, is not the complete *wajib-ul-arz*. The defendants further relied on the absence of any entry of a right of pre-emption in the *dastur dehi* prepared by Mr. Gillan in the subsequent Settlement. As to this we may point out that Mr. Gillan's Settlement was completed in the year 1901 and the settlement of Tahsil Hapur came into effect in 1898 (*vide* page 132 of the Gazetteer). On the 19th of November, 1897, however, a fresh set of Settlement Rules had been issued by the Board of Revenue under which directions were given to Settlement Officers to make certain entries in the Record of Rights. A comparison of the directions then issued with the previous directions makes it clear that no specific authority was given to Settlement Officers to make an entry of custom like pre-emption, prevailing in the village other than those covered by certain specified clauses. Accordingly under the new

rules no entry was ordinarily to be made by the Settlement Officers as regards a custom of pre-emption and it is on this account that in *wajib-ul-arzes* prepared subsequent to 1897 there is no mention of any such rights either way. The omission, therefore is not so conclusive.

We are, therefore, left with the entry in the *wajib-ul-arz* of the year 1870, which was of the second regular Settlement, and which contains a clear recital of a right of pre-emption. Paragraph 17 states that if any share-holder wishes to sell his share he can do so first to his *bhai hakiki* (own brothers), then to *qaribi* (near) and then to share-holders in the *thok*. If the share-holders in the *thok* refuse to purchase it the vendor is at liberty to transfer it to any share-holder of the village. Then follows a clause regarding the settlement of price by arbitration in case of a dispute. This entry raises a *prima facie* presumption of the existence of a custom of pre-emption. This *wajib-ul-arz* was prepared at the time when the Board's Circular No. 24 of 1868 had come into effect, under which the Settlement Officers were expressly authorised to make entries as regards customs prevailing in the village. We are, therefore, entitled to presume that this entry is a record of custom. There is nothing in the previous or subsequent history of the village which necessarily negatives the existence of such a custom. All that is shown is that the village was settled with Girwar Singh, *lambardar*. There may have been many other co-sharers besides Girwar Singh and in any case he may have represented a joint Hindu family. There is, therefore, no ground for holding that during this period the entire village was owned by a single proprietor. As to the circumstances that various other proprietors became co-sharers between 1860 and 1870 we may point out that the Gazetteer at page 130 mentions that in Hapur old proprietors were replaced to the extent of 20 per cent. mainly by money-lenders, that no less than 69 estates were confiscated owing to the action of proprietors during the Mutiny, and of these 49 were sold by auction and 16 were given away in reward while 4 were held for a time under the direct management. Therefore, it might well have been that some of these strangers became co-sharers by purchases at auction.

The learned Subordinate Judge has been influenced by two main points The first is that the preamble of the *wajib-ul-arz* indicates that it was a record of an agreement. The inference is not quite correct because all *wajib-ul-arzes* are in stereotyped forms and contain similar preambles: *vide Returaji Dubain* v. *Pahalwan Bhagat* (1). They are primarily records of engagements of co-sharers with the Government for payment of Government revenue. The second circumstance relied on is a supposed variation between the *wajib-ul-arzes* of 1860 and 1870. As to this we have already stated that the *wajib-ul-arz* of 1860 cannot be regarded as a complete and final record of any regular Settlement. In any case the variation does not make the two *wajib-ul-arzes* necessarily contradictory. In the *wajib-ul-arz* of Mr. Mohar Singh the right of pre-emption was given first to the true brother, then to a near brother, but not specifically to a co-sharer. It is, however, to be noted that in that year there might have been no other co-sharers but the three brothers Baldeo Singh, Jagdish Singh and Gurdayal Singh, sons of Girwar Singh, whose names are entered in the opening portion of the *wajib-ul-arz*. This circumstance might explain the omission of a reference to co-sharers. The other discrepancy relied upon is that under the first *wajib-ul-arz* a right was given in the case of transfer by mortgages as well as sales, whereas in the *wajib-ul-arz* of 1870 the right was confined to sales and it was expressly stated that there was no right of pre-emption as regards mortgages. We may say that even if a custom of pre-emption as regards mortgages had existed in 1860 there was nothing to prevent the co-sharers in 1870 from abrogating that part of the custom.

The plaintiffs relied on two pre-emption suits in order to show that claims of pre-emption had been asserted. In 1886 a suit was instituted for pre-emption and in para. 3 of the plaint it was expressly alleged that according to the terms of the *wajib-ul-arz* and the custom of the village the plaintiffs were entitled to claim pre-emption. In the written statement which was filed the substantial plea taken was that the plaintiffs were not proprietors at all and there was no express denial of the existence of a custom of pre-emption. This suit is said to have been ultimately withdrawn and is, therefore, not of very great importance. The second suit was instituted in the year 1892 where the plaintiff merely asserted that he had a right of pre-emption,

(1) [illegible], 33 A. 196; 7 A. L. J. 1040.

not expressly mentioning that there was a custom under which this right existed. That suit also was ultimately dismissed on the ground that the plaintiff was not the absolute proprietor by virtue of which she was claiming pre emption. As the Settlement of 1870 was then in force no conclusive inference can be drawn from this litigation also. Having regard, however, to the entry in the *wajib-ul-arz* of 1870 which, in our opinion, stands unrebutted, we must hold that the custom of pre-emption exists in this village.

As regards the sale consideration, the finding of the learned Subordinate Judge that there is no satisfactory evidence that Rs. 2,000 were returned after registration, cannot be seriously challenged. We are satisfied that that finding must be accepted.

The learned Vakil for the plaintiffs has not challenged the finding that there is no satisfactory evidence to prove that *dhak* and other kind of timber worth Rs. 150 had been removed by the defendants vendees. Therefore this finding must also stand.

On behalf of the defendants there is no cross-objection with regard to the finding that out of the sale consideration, sugarcane crops worth Rs. 1,000 had been appropriated by the vendees. So this finding of the learned Subordinate Judge also must stand.

There is, however, some dispute between the parties as to the exact amount which has been paid by the vendees to the creditors named in the sale-deed, for whom money had been left in the hands of the vendees. The vendees are entitled to claim from the plaintiffs pre-emptors only that much of the amount which they have actually paid to the vendors or to the prior creditors named in the deed. If there is any sum still left in their hands for payment the plaintiffs will make this payment as they have stepped into the shoes of the vendees.

We, accordingly, allow this appeal and setting aside the decree of the Court below, decree the plaintiffs' claim for pre-emption subject to the payment of Rs. 21,000 to be deposited in the Court below within two months from this date. Out of this sum Rs. 1,000 will be paid to the vendees, and out of the balance of Rs. 20,000 the vendees will be entitled to get as much as they have actually paid to the prior creditors mentioned in the sale-deed. The balance will be paid to the creditors themselves directly. In case of default of payment by the plaintiffs within the time specified the suit shall stand dismissed with costs in all Courts. In case of payment within the time allowed the plaintiffs will get their costs in both the Courts. The fees in this Court will include fees on the higher scale.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

MISCELLANEOUS JUDICIAL CASE No. 53 OF 1923.

December 2, 1924.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

MAHARAJ DHIRAJ OF DARBHANGA —APPELLANT

versus

THE COMMISSIONER OF INCOME TAX—RESPONDENT.

Bengal Regulation (XXVII of 1793)—Permanent Settlement—Income from jalkar, hat *and* ghatlaggi, *whether taken into account—Income, whether liable to assessment to income-tax—Darbhanga Raj.*

The Permanent Settlement left to the *zemindar* the ground rents of land, shops, etc., in all the then existing *hats* except such, if any, as were specifically excluded and if more *hats* are now shown to exist than appear in the Settlement papers it must be presumed, in the absence of evidence to the contrary, that they have sprung up since the Settlement. If they existed at the time of Settlement they were left under the general regulations to the *zemindar* in the absence of any specific exclusion The onus is not on the assessee to prove inclusion but upon the Crown to prove exclusion. [p. 341, col. 1]

The Permanent Settlement Regulations apply as much to subsequently settled lands as to lands settled in 1793. [p. 341, col 2.]

Where a *ghat* has been settled with a *zemindar*, the latter has the right to collect mooring dues as well as tolls or ferry dues. [*ibid.*]

The income derived from *jalkar, hat* and *ghatlaggi* was included in the assets of the Darbhanga Raj when the *jama* was assessed at the time of the Permanent Settlement, and such income is, therefore, not liable to be assessed to income-tax. [p. 340, col. 1.]

Messrs. *K. P. Jayaswal* and *M. Prasad*, for the Appellant.

The Government Advocate, for the Respondent.

JUDGMENT.

Miller, C. J.—This matter came before

the Court in January last upon a reference* by the Income Tax Commissioner for determination of certain questions of law, one of which was whether income derived from *jalkar*, *hat* and *ghatlaggi* was liable to income-tax. The decision of the Court on that occasion was that if these items were included in the assets when the *jama* was assessed at the time of the Permanent Settlement the Income Tax Act was not sufficiently specific to indicate that it was the intention of the Legislature to vary the bargain made at the time of the Permanent Settlement and that income from such sources was not chargeable to income-tax. As there was some doubt, however, whether *jalkar*, *hat* and *ghatlaggi* rights had been taken into account as part of the assets of the assessee's *zemindari* in assessing the *jama* at the time of the Settlement the case was remitted to the Income Tax Commissioner to determine the question of fact whether the *jalkar*, *hat* and *ghatlaggi* rights in respect of which the exemption was claimed did form a part of the assets taken into consideration in settling the *jama* at the date of the settlement with predecessors in title of the assessee.

The Commissioner of Income Tax has considered the question submitted to him and has made a report containing his findings. These findings, however, have been qualified in certain respects and the assessee now challenges the qualifications upon various grounds. With regard to the *jalkar* or fishery rights no serious question arises. The Commissioner finds that *jalkar* was included in the assets of the Permanent Settlement and points out that in the rules for the resumption of *sayer* passed in 1790 which are referred to in Regulation XXVII of 1793 the rights of *phalkar*, *bankar* and *jalkar*, were exempted from the resumption and remained vested in the landholders. He has submitted an opinion, however, at the end of his report that under Art. 2 of Regulation I of 1793 it was only the *jama* assessed upon the lands which was fixed for ever and that there was no undertaking not to enhance the assessment upon incorporeal rights, whether or no, the assets of such rights were included in the Permanent Settlement. In offering this opinion the Commissioner appears to me to be travelling outside his province. This question was determined by the Court on the previous occasion and after consideration of the Regulation relating to the subject.

With regard to *hat* or markets his general finding is that in so far as *hats* or *gunjes* are concerned the general Regulations leave the *zemindar* the right to take ground rents and if the assessee is now being taxed only in respect of ground rents it is not necessary to consider his claims based on specific documents. There can be no doubt from a perusal of Regulation XXVII of 1793 that in resuming the *sayer* the Government did not intend to divest the landholders of collections made by them as consideration for the use of grounds, shops or other buildings belonging to them and that ground rents whether in markets or in other parts of the *zemindari* were the exclusive property of the *zemindar*. The Regulation states "In the adoption of the above arrangements, the Governor-General-in-Council had no intention to divest the land-holders of any collection they had made, under the denomination of *sayer* not in reality a duty but a consideration for the use of grounds, shops, or other buildings belonging to them. As, however, the rent of warehouses (*golah*) and shops (*dokans*) had in general been received by the officers employed to collect the *gunje*, *hat*, and *bazar* duties, and had frequently been let in farm with them, and as the rent paid for orchards, pasture ground and fisheries had been sometimes included in the *sayer* under the denominations of *phulkar*, *bankar*, and *jalkar*, the Governor General in-Council thought it necessary to declare expressly, that it was by no means his intention to include in the resumption of the *sayer* then ordered, the monthly or annual rents paid for grounds, or buildings erected thereon, of whatever description or the *phulkar bankar*, and *jalkar*, such rents being properly the private right of the proprietors, and in no respect a tax or duty on commodities, the exclusive right of Government." The exemptions claimed in respect of *hats* in the present case are claimed as income derived from ground rents of the land or house in the *hats*. The Commissioner, however, is apparently not satisfied that the rent so received by the assessee did not include some illegal exactions in the nature of internal duties or

*See *Maharaj Dhiraj of Darbhanga* v. *Commissioner of Income Tax*, 78 Ind. Cas. 783, 2 Pat. L. R. 25 Cr.; (1924) Pat. 69; 3 Pat. 470; 5 P. L. T. 459; (1924) A. I. R. (Pat.) 474.—[*Ed.*]

tolls which were reserved by the Permanent Settlement as the exclusive property of Government. He says "It is common knowledge that wherever *bazar* dues are realised not only ground rent is collected but also other duties, which may be levied either on every person who brings goods into the *bazar* or from both purchaser and seller in every transaction or in other ways. No doubt, the *zemindar* who lets out a *bazar* in *thicca* does not himself collect internal duties but I think it is safe to say that the *thiccadar* invariably does. In so far as this question is one of fact no evidence whatever has been offered that the *zemindar's* receipts for *bazar* settlement are really ground rents. If they are not ground rents the assessee has to prove that these internal duties were included in the assets of the Permanent Settlement. In my opinion he has failed to do this." Whether by this finding the learned Commissioner intends to exclude from exemption the whole of the income derived from *hats* or only a portion thereof is by no means clear, but in his summary of his findings at the end of his report it would appear that he intended to find that the ground rent of the *gunjes* or markets specifically mentioned in the Schedule prepared at the time of the settlement were included in the assets although it would seem that his view is that such ground rents as were not specifically mentioned were not included. Nor does he arrive at any definite findings as to how much of the exemptions claimed may be justified as ground rents or how much he regards as payment in respect of internal duties. It seems to me, however, that the Commissiner is not entitled to deprive the assessee of his right to exemption of income received by him as ground rent payable by the lessee for the land and houses in the markets. It is quite clear from the Regulation that these ground rents were included in the assets as the property of the *zemindar* at the time of settlement and the mere fact that the lessee may in some instances abuse his rights and enforce illegal exactions from those using the markets, is not itself any ground for depriving the *zemindar* of his legal rights. The rents from markets are, I think, just as much *mal* rents as the rent from agricultural or any other species of land. The exemptions are claimed as being ground rents from markets, ferries and fisheries and if the Commissioner is not satisfied that the income received is in fact ground rent he has ample power to call upon the assessee to produce his books or other documents relating to the collections and to enforce the attendance of witnesses to give evidence upon a question about which he has any doubt (see ss. 22 (4) and 37 to 39 of the Income Tax Act, 1922). The Commissioner may if he thinks fit, investigate further into the matter by calling for the production of evidence or documents to show the exact nature of the collections made under the head of ground rents for which exemption is claimed but he is not entitled on mere suspicion to assume that that which was received in the name of ground rent is not in fact that which it purports to be. It does not appear that the assesee has been called on to produce his collection papers or his contracts with the *thiccadars* which would show the nature of the income derived from the sources named.

The next question which arises on these findings is that the Commissioner would apparently exclude from exemption the ground rents in respect of all existing *hats* except those specifically mentioned in the settlement papers as then existing. It is not contended that the ground rents of markets which came into existence subsequently to the Permanent Settlement would not be part of the *zemindar's* assets, but the Commissioner points out that in the settlement documents relating to the different *parganas* of the assessees' *zemindari* only a few *hats* or *gunjes* are specifically mentioned and argues from this that there may have been others then existing, and still subsisting about which nothing is said and which were, therefore, not included. It is probably correct to say that there are *hats* now existing within the Darbhanga Raj about which no specific mention is found in the settlement papers, but Regulation XXVII of 1793 is so clear and emphatic in stating that such rents were to be retained by the proprietors that it cannot reasonably be presumed that any markets then existing were intended to be excluded without specific mention of the fact in the settlement papers. I do not think that any inference can be drawn that any markets now existing in fact existed at the time of the Permanent Settlement although they were not mentioned in the settlement papers. The

natural and only proper inference appears to me to be the exact opposite, for we find in the rules for the resumption of *sayer* passed on the 17th June 1790 and set out in Regulation XXVII of 1793 the following Article:—

"2nd, no monthly or annual payments now made or which may be hereafter made for the use of the land or houses, shops or other buildings erected thereon, being clearly of the nature of rents and not duties or taxes, are to be understood to be within this prohibition but all such rents are to be enjoyed by the proprietors entitled thereto as heretofore."

The irresistible inference, therefore, is that the settlement left to the *zemindar* the ground rents of land, shops, etc., in all the then existing *hats* except such, if any, as were specifically excluded and if more *hats* are now shown to exist than appear in the settlement papers it must be presumed, in the absence of evidence to the contrary, that they have sprung up since the settlement. If they existed at the time of settlement they were left under the general Regulations to the *zemindar* in the absence of any specific exclusion. The onus is not on the assessee to prove inclusion but upon the Crown to prove exclusion.

The learned Commissioner appears also to have had some doubt as to the proper rendering in idiomatic English of the word "*sewa*" where it appears in the application of the assessee's ancestor for settlement of *Pargana* Hati a part of the Darbhanga Raj. According to his view the proper translation of the word was " with the exception of." If this be accepted as accurate he thought that the application excluded settlement of *gunjes* or markets although he states he had been shown a dictionary dated 1802 prepared under the orders of the East India Company which says that the word may also mean "in addition to." The truth is that the meaning of this word appears to depend upon the context in which it is found and it may be in many cases rendered into English either by the words "in addition to" or by the words "apart from." A simple example may be given where either rendering would be accurate in English. The sentence" apart from this house I have many others" might equally well be expressed by saying, "in addition to this house I have many others." The matter, however, is not one of much importance as it is clear from the settlement papers that ground rents for markets as distinguished from tolls or other internal duties in connection therewith were included in the schedule of the assets settled with the *zemindar*. In fact the Commissioner states, "I agree that the *gunjes* mentioned in the schedule must apparently be included."

With regard to *Pargana* Haveli Kharagpur which was settled for 20 years in 1844 and permanently settled in 1866 the Commissioner has pointed out that although the markets were included in the settlement, the Income Tax Act of 1860, was then in force and he states, "It is clear that non-agricultural income of this *pargana* must have been assessed or at least assessable to income-tax under the Act of 1860 and there is nothing in the *rubakar* of 1866 to indicate that such income would in future be exempted from income-tax". With respect to the Commissioner the exemption is claimed under the Permanent Settlement Regulations which apply as much to subsequently settled lands as to lands settled in 1793. Moreover this question is one which was disposed of by this Court at the previous hearing and it is not open to the Commissioner to re-open that decision.

With regard to *ghatlaggi* it is agreed that the *ghats* were settled with the assessee's ancestors. The Commissioner takes the view, however, that settlement of *ghats* ordinarily means the right to collect tolls or ferry dues and not the right to mooring dues. In my opinion this is giving much too narrow a construction to the rights incident to the settlement of *ghats*. The proprietor is just as much "entitled to be" paid for the use of the *ghats* for purposes of mooring as he is to take dues from those using the *ghats* for other purposes.

The case must be remanded to the Commissioner of Income Tax to be dealt with according to our ruling upon the questions dealt with in this judgment. He is at liberty, however, if he should think fit, to call for further evidence as to the exact nature of the exemptions claimed by the assessee under the head of ground rents for *hats*.

It is necessary to deal with the costs of the hearing originally as well as the hearing after remand. We think that the petitioner, having substantially succeeded both in the original petition upon the case stated and in the application to us after remand, is entitled to his costs and we assess the

hearing fee in respect of both the applications together at a sum of Rs. 500.

Foster, J.– I concur.

Z. K. *Case remanded.*

MADRAS HIGH COURT.

APPEAL SUIT No. 182 OF 1921.

March 24, 1925.

Present:—Justice Sir Charles Gordon Spencer, KT., and Mr. Justice Ramesam.

VENKU SHETTITHI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

T. RAMACHANDRAYYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art 134, scope of—Transfer by mortgagee—Suit for redemption—Honest belief of transferee—Limitation.

In every case where Art 134 of Sch I to the Limitation Act is set up as a defence by a transferee from a mortgagee, it is material to see what interest the mortgagee purported to transfer, and where both the seller and purchaser honestly believed that the entire interest of an owner was being transferred, the Article is clearly applicable. [p 345, cols 1 & 2]

Obiter – The omission in Art 134 of Sch. I to the Limitation Acts of 1877 and 1908 of the words 'in good faith' which appeared in the corresponding article of the Limitation Acts of 1859 and 1871 now render it unnecessary for a transferee from the mortgagee to prove that he acted in good faith before he can plead limitation [p 343, col 1]

Per *Ramesam, J.*—The possible cases that may arise in the case of a transfer by a mortgagee are four :—

(1) Where the transfer on its face purports to be an assignment of the mortgagee's interest only, to such a case Art 134 of Sch I to the Limitation Act can never apply. [p 344, col 1.]

(2) Where the transfer purported to be a sale-deed but as a matter of fact only an assignment of the mortgagee's interest was all that was bargained for, to such a case also Art 134 does not apply. [*ibid.*]

(3) Where the deed of transfer is a sale-deed and what was bargained by the transferee is also an absolute sale, though he knew that the transferor had only a mortgagee's interest, in such a case though under the Limitation Acts of 1859 and 1871, Art. 134 may not apply, under the Acts of 1877 and 1908 it does apply. [*ibid.*]

(4) Where the transfer is in the form of a sale-deed and the transferee bargained for an absolute interest and acted *bona fide* throughout, to such a case there is no doubt that Art. 134 will always apply. [*ibid.*]

Subbaiya Pandaram v *Muhamad Mustapha Maracayar*, 74 Ind. Cas 492; 47 M 751, 21 A. L. J. 730; (1923) A. I R. (P C) 175; 45 M. L J 588; 25 Bom L. R. 1275; 18 L W. 903; (1924) M. W N 65; 28 C. W. N. 493; 2 Pat. L R. 104; 33 M. L. T. 285; 40 C. L. J. 20; 50 I. A. 295 (P. C.), *Kannusami Thonjirayan* v. *Muthusami Pillai*, 38 Ind. Cas. 194; (1917) M. W. N. 5; 5 L. W 2[illegible] 45 Ind. C[illegible] 7 L. W. 482, 23 M. L. T. 291, relied on.

[Case-law considered.]

Appeal against a decree of the Court of the Subordinate Judge, South Kanara, in O. S. No. 21 of 1919.

Mr. *C. V. Anantakrishna Iyer*, for the Appellants.

Mr. *B. Sitarama Rao*, for the Respondents.

JUDGMENT.

Ramesam, J.—This appeal arises out of a suit for redemption of a mortgage. The plaintiffs' predecessors-in-title, namely, Parameswari Hengsu and others mortgaged such of the properties as are comprised in Sch. A and the properties in Sch. A-1 to one Manjinatha Naicker by Ex. I, dated the 12th January 1872 for Rs. 14,000. The mortgagee conveyed the properties in Sch. A by Ex. II, dated the 16th July 1878 to one Venkappa, the ancestor of the defendants and the defendants obtained them for their share at a family partition. The mortgagors assigned the equity of redemption in the [illegible] properties by Ex. B, dated the 12th September 1906 to one Boobashetti from whom it devolved on the plaintiffs under the Aliyasantana Law. We are not now concerned with the properties in Sch. A-1 as to which the interest of the mortgagee also has come to the plaintiffs' hands by various transactions. The Subordinate Judge dismissed the suit. In appeal, the claim for the properties in Sch. A 2 has not been pressed and no reference need be made to them and we are only concerned with the properties in Sch A Two points have been argued by the learned Vakil for the appellants.

(1) Whether Ex. I is a mortgage by conditional sale or a sale with an agreement for re-purchase?

(2) Assuming it is a mortgage, whether the suit is barred by limitation under Art. 134 of the Limitation Act?

In the view I take of the second question, I think it is unnecessary to discuss the first. For the purposes of discussion I will assume in favour of the appellant that Ex. I ought to be construed only as a mortgage by conditional sale. The question now is whether the properties having been sold by Ex. II, Art. 134 of the Limitation Act does not apply.

Mr. Anantakrishna Iyer the learned Vakil for the appellants contends that

Art. 134 of the Limitation Act can only apply where the transferee from the mortgagee took the properties in the belief that the transferor was absolutely entitled to them. That this was the law under the corresponding articles of the Acts of 1859 and 1871 admits of no doubt: see *Radhanath Doss* v. *Gisborne and Co.* (1). But the words "in good faith" which appeared in that Article have been omitted in the Acts of 1877 and 1908. The question is whether it can be contended that under the Acts of 1877 and 1908 the knowledge on the part of the purchaser of the true nature of the interest of the transferor prevents the application of Art. 134. Mr. Anantakrishna Iyer relied on *Singaram Chettiar* v. *Kalayanasundaram Pillai* (2). Though the remarks at page 738* of that decision are somewhat in favour of the appellant, the point was not actually decided in that case The next decision relied on by him is *Tholasinga Mudali* v. *Nagalinga Chetty* (3) where the *obiter dictum* in *Singaram Chettiar* v. *Kalayanasundaram Pillai* (2) was followed by Sadasiva Iyer, J., and Napier, J. The next case relied on by him is the decision in *Muthaya Shetti* v. *Kanthappa Shetti* (4). In that case, it is observed:—

"If the transferee bargained for and believed he is bargaining only for the interest of the mortgagee, he cannot acquire title as the absolute owner of the property. After all, Art. 134 is only a branch of the law of prescription and the question to be determined would be, what it is that the purchaser prescribed for. The fact that he knew that his vendor had only a mortgagee right would not be conclusive on this question. The real test would be, did he ask for and obtain an absolute right in the property and believe himself that he was having an absolute interest in it? In *Pandu* v. *Vithu* (5) that is the test that was suggested". I do not see how these remarks of Seshagiri Iyer, J., help the appellant. If the transferee purported to purchase the absolute interest even though he knew that the transferor had only the interest of a mortgagee, the Article would still apply according to this view Bakewell, J., added that "If the title adduced by the vendor and the deed of transfer to the purchaser are consistent with an intention to transfer an absolute interest, the burden will lie upon the plaintiff to show that the circumstances of the transfer negative such an intention". He made no reference to the case of *Singaram Chetti* v. *Kalayanasundaram Pillai* (2) unlike Seshagiri Iyer, J. The finding shows that the deed of mortgage in that case was styled a sale-deed though construed by the High Court as a mortgage by conditional sale. The period for redemption fixed in it had expired and it was said that the vendee would naturally suppose that he was purchasing an absolute title. The finding accordingly was that the transferor intended to transfer an absolute interest and that the intention of the parties was that there should be an absolute transfer of title of property. The finding was accepted by the High Court and the second appeal was dismissed. I do not think that this case really supports the appellants.

Mr. Sitarama Rao for the respondent relied on the case of *Kannusami Thonjiraya*n v. *Muthusami Pillai* (6) in which my learned brother took part He pointed out that the decision in *Veerabadra Tevan* v. *Veerappa Tevan* (7) was really a case of an assignment of the mortgagee's interest. He also referred to *Prasanna Venkatachella Reddiar* v. *Collector of Trichinopoly* (8) which was a case of a transferee from a trustee. He agreed with the decision in *Pandu* v. *Vithu* (5) and differed from Chamier, J.'s opinion in *Ghasi Ram* v *Kishna* (9) and held that the purchaser need not prove that he purchased in good faith that is without constructive notice of the restricted nature of the vendor's title In *Baluswami Aiyer* v. *Venkitaswamy Naicker* (10), it was held in the case of a transferee from a trustee that knowledge of the limited nature of the transferor's title will not disentitle the transferee from taking advantage of Art. 134 of the Limitation Act. In the case of trusts this is the view also adopted in *Subbaiya Pandaram* v. *Muhamad Mustapha Maraca-*

(1) 14 M. I. A. 1; 15 W R. P. C 24; 6 B. L R. 530; 2 Suth. P. C. J. 397; 2 Sar. P. C. J. 636, 20 E. R. 687.

(2) 26 Ind. Cas. 1; (1914) M. W. N: 735; 1 L. W. 687.

(3) 32 Ind. Cas. 265; (1916) 1 M. W. N. 28; 3 L. W. 19.

(4) 45 Ind. Cas. 975; (1918) M. W. N. 334; 34 M. L. J. 432; 7 L. W. 482; 23 M. L. T. 291.

(5) 19 B. 14); 10 Ind. Dec (N. S.) 95.

(6) 38 Ind. Cas. 194; (1917) M. W. N. 5; 5 L. W. 250.

(7) 15 Ind. Cas 609.

(8) 33 Ind. Cas 45; 38 M. 1064.

(9) 30 Ind. Cas. 564; 13 A. L. J. 877.

(10) 40 Ind. Cas. 531; 32 M. L. J. 24; 40 M. 745.

*Page of (1914) M. W. N.—[Ed.]

yar (11) which was afterwards affirmed by the Privy Council in *Subbaiya Pandaram* v. *Muhamad Mustapha Maracayar* (12). These decisions were referred to by the learned Judges who decided *Muthayya Shetti* v. *Kanthappa Shetty* (4) as consistent with their view. To sum up, the possible cases that may arise in a matter of this sort are four:—

1. Where the transfer on its face purports to be an assignment of the mortgagee's interest only, into such a case Art. 134 can never apply.

2. Where the transfer purported to be a sale-deed but as a matter of fact only an assignment of the mortgagee's interest was all that was bargained for, it may be conceded that in such a case also Art. 134 does not apply. And this is all that was decided in *Muthayya Shetti* v. *Kanthappa Shetti* (4).

3. Where the deed of transfer is a sale-deed and what was bargained by the transferee is also an absolute sale though he knew that the transferor has only a mortgagee's interest, in such a case, though under the Acts of 1859 and 1871, Art 134 may not apply, I think under the Acts of 1877 and 1908 it applies. This is also the view taken by the Calcutta High Court in *Ram Kanai Ghosh* v. *Raja Sri Sri Sri Hari Narayan Singh Deo Bahadur* (13) which was also a case of a trustee. Seeing that the Privy Council have come to the same conclusion in *Subbaiya Pandaram* v. *Muhamad Mustapha Maracayar* (12), I do not think any value can be attached to the dissent from the decision in *Ram Kanai Ghosh* v. *Raja Sri Sri Sri Hari Narayan Singh Deo Bahadur* (13) in *Singaram Chettiar* v. *Kalyanasundaram Pillai* (2).

4. Where the transfer is in the form of a sale-deed and the transferee bargained for an absolute interest and acted *bona fide* throughout, to such a case there is no doubt that Art. 134 will always apply. Only the third case is the one in respect of which there seems to be some difference of opinion. But it seems to me that the preponderance of opinion in this High Court, in Bombay, in Calcutta and in the Privy Council is in favour of the view that Art. 134 applies. In the present case, though we may now construe Ex. I to be a deed of mortgage, it is impossible to say that the purchaser under Ex 2 acted otherwise than *bona fide*. According to the terms of Ex. 1 the debt was to be paid off after the 12th of January 1876 and before the 12th of January 1878 and in default of payment on the latter date, it was to operate as an absolute sale; under the law as it then stood, the mortgagee might have honestly thought that he obtained an absolute title by the default of payment within the stipulated date and the transferee might have also similarly thought that the transferor had an absolute title. That both were acting perfectly *bona fide* is clear from the recitals in Ex. II. It must be remembered that the Transfer of Property Act had not been enacted in 1878. The Privy Council held in *Pattabhiramier* v. *Vencatarow Naicken* (14) that the principle that a mortgage is for ever redeemable was not known to the ancient law of India. It is true that in a later case *Thumbuswamy Moodelly* v. *Hossain Rowthen* (15) their Lordships indicated a different rule in the case of mortgages after the year 1858. But the parties to Ex. II might well have thought that in the case of mortgage documents between 1871 and 1875 the decision in *Pattabhiramier* v. *Vencatarow Naicken* (14) applied. It is true that the Madras High Court repelled such a contention, but this was long after 1878. In the above remarks I assumed that the parties to Ex. II knew that the proper construction of Ex. I is that it was a mortgage by conditional sale. But even this is extremely doubtful. Whatever view we may now take of Ex. I there is nothing to show that the parties to Ex. II did not honestly suppose it to be a deed of absolute sale which is what it purported to be. I think the present case is a case where the transferee acted *bona fide* according to the strictest meaning of the term, and Art. 134 applied. There is nothing to show that he did not pay the full value, according to the prices that ruled in 1878. I think the appeal fails on this ground and ought to be dismissed with costs.

Spencer, J.—I agree. I am unable to regard the omission of the words "in good

(11) 40 Ind. Cas. 50; 32 M. L. J. 85; 21 M. L. T. 62; 5 L. W. 690.

(12) 74 Ind. Cas. 492; 46 M 751; 21 A. L. J. 730; (1923) A. I R. (P. C.) 175; 45 M. L. J. 588; 25 Bom. L. R. 1275; 18 L. W. 903; (1924) M. W. N. 65; 28 C. W. N. 493, 2 Pat. L. R. 104; 33 M. L. T. 285; 40 C. L. J. 20; 50 I. A. 295 (P. C.).

(13) 2 C. L. J. 546.

(14) 13 M. I. A. 560; 15 W. R P. C. 35; 7 B L. R. 136; 2 Suth. P C. J. 410, 2 Sar. P. C. J. 623; 20 E. R. 660.

(15) 1 M. 1; 2 I. A. 241; 3 Suth. P. C. J. 198; 3 Sar. P. C. J. 531; 1 Ind. Dec. (N. s.) 1 (P. C.).

faith" which appeared in the corresponding Articles of the Limitation Acts of 1859 and 1871, as being without any significance, so as to throw the onus on a purchaser of the full interest from a mortgagee to prove that he acted in good faith before he can plead limitation. The same Art. 134 governs both properties conveyed in trust and properties mortgaged when they have been transferred afterwards for valuable consideration. In the case of trust property, the Privy Council has decided in *Subbiaya Pandaram* v. *Muhamad Mustapha Maracayar* (12) that a purchaser for valuable consideration with notice of the trust can under Art. 134 plead 12 years' adverse possession as a defence to a suit brought by the trustees. I see no reason to suppose that trustees were intended to be put in a worse position than mortgagors as regards recovery of alienated property. The only distinction between the positions of a purchaser from a mortgagee and a purchaser from a trustee is that a mortgagee as such has the mortgagee's interest which is assignable in the property, whereas a trustee as such has no transferable interest This distinction is pointed out in *Subbaiya Pandaram* v. *Muhamad Mustapha Marcayar* (11), but nevertheless it was held in that case that a transferee of trust property need not prove good faith before taking advantage of Art. 134, and the decision was confirmed by the Privy Council in *Subbaiya Pandaram* v. *Muhammad Mustapha Maracayar* (12). My judgment in *Kannuswami Thonjirayan* v. *Muthusami Pillai* (6) was quoted with approval in *Muthaya Shetti* v. *Kanthappa Shetti* (4), and we have not been shown any reason for doubting its correctness beyond a foot-note at page 516 of Rustomji's Commentary on the Law of Limitation (3rd Edition). The view of the majority of the Full Bench which decided *Mulla Vittil Seeti Kutti* v. *Kunhi Pathumma* (16), that Art. 134 does not apply to cases where the transferee from a mortgagee does not get possession of the property will not help the appellants before us who are out of possession and ask for delivery of possession. In every case where Art. 134 is set up as a defence by a transferee from a mortgagee it is material to see what interest the mortgagee purported to transfer to him (*vide Rego* v. *Abbu Beari* (17); *Muthaya Shetti* v. *Kanthappa Shetti* (4), *Veerabadra Thevan* v. *Veerappa Tevan* (7) and *Baluswami Aiyer* v. *Venkitaswamy Naicker* (10). Exhibit II dated July 16th, 1878, purports to be an absolute sale of the properties in Sch. A. and not a mere assignment of a mortgage interest in them. I think that both seller and purchaser must have honestly believed that the entire interest of the owner was being transferred by this document, seeing that if Ex. I dated January 12th, 1872, were to be treated as a sale with an option for re-purchase after five years and before six years, the date for re-purchase had passed and the property had become vested entirely in the purchaser on January 12th, 1878. The present suit was rightly held by the Subordinate Judge to be time-barred and the appeal must be dismissed with costs.

V. N. V. *Appeal dismissed.*
N. H.

(16) 43 Ind. Cas. 31; 40 M. 1040; 33 M. L. J. 320; (1917) M. W. N. 609; 22 M. L. T. 236; 6 L. W. 464.
(17) 21 M. 151; 7 Ind. Dec. (N. S.) 463.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 127 OF 1923.
May 8, 1924.

Present:—Mr. Cecil Henry Walsh, Acting Chief Justice, and Mr. Justice Ryves.

YASIN BIBI AND OTHERS—DEFENDANTS —APPELLANTS
versus
Syed MUNAWAR HUSAIN—PLAINTIFF —RESPONDENT.

Registration Act (XVI of 1908), ss. 32, 33—Presentation, what amounts to—Deed executed by pardanashin *woman handed over to Sub-Registrar by husband, effect of.*

The presentation of a document for registration is a question of fact requiring no formality.

The husband of a *pardanashin* lady went to a Sub-Registrar and handing over to the latter a deed executed by his wife requested him to go to his house and register the deed:

Held, that the handing over of the deed to the Sub-Registrar by the husband did not amount to "presentation" and did not preclude a subsequent presentation of the deed by the executant herself.

First appeal from an order of the District Judge, Gorakhpur, dated the 23rd of June 1923.

Babu *Piari Lal Banerji* and Hafiz *Mushtaq Ahmed*, for the Appellants.

Maulvi *Muhammad Abdul Aziz*, for the Respondent.

JUDGMENT.—We are of opinion that no question of law arises in this appeal. In order to support the argument of the learned

Vakil on the point of law which he submitted to us, it is necessary for his case that presentation should have been made at the office of the Sub-Registrar. Then the point would have arisen. If presentation had been made at the office of the Sub-Registrar, it would have followed that it had been made by somebody under a power-of-attorney, which was not duly executed in accordance with the provisions of the Act. But the difficulty of considering that question of law in this particular case, is that the learned Judge has definitely held, that the act of the husband in going to the Sub-Registrar and handing over the deed, and asking him to go to the house of the *pardanashin* lady to have it registered, was not presentation. He has found as a fact that the presentation did not take place until the Sub-Registrar went to the house of the lady. It is admitted that if that is true, the decision of the learned District Judge is correct. As Lord Buckmaster, in the course of argument in the Privy Council in the case of *Bharat Indu* v. *Hamid Ali Khan* (1), (the material passage occurs on page 718)* says, " Presentation is a question of fact requiring no formality. The servant (and if we substitute the word 'husband' instead of 'servant' in this case, the cases become similar) really wrongly handed over the document to the Registrar; he should merely have told him to go to the house." Lord Phillimore, in the course of delivering their Lordships' opinion, said that the handing over by Wazir Beg, that is the servant, was inoperative but not injurious to the subsequent presentation.

So the learned Judge had the support of the Privy Council for taking the view of the fact of presentation which he has done. In other words, he has found a fact which is binding upon us. There was evidence to entitle him to do so, and we cannot interfere. The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 58 Ind. Cas 386; 42 A. 487; 18 A. L. J. 717 718; 39 M. L. J. 41, (1920) M. W N. 413; 28 M L T. 98; 25 C. W. N 73; 22 Bom. L R. 1362; 47 I. A. 177, 13 L W 4; 2 U. P. L. R. (P. C.) 179 (P. C.).

*Page of 18 A. L. J.—[*Ed.*]

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1138 OF 1923.

December 17, 1923.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Moti Sagar.

JIWA RAM—PLAINTIFF—APPELLANT

versus

JHANDA SINGH—DEFENDANT—RESPONDENT

Evidence Act (I of 1872), s. 102, Illus (b)—*Mortgage suit—Consideration, receipt of—Burden of proof—Consideration, inadequacy of, effect of.*

Where a mortgagor admits the execution of the mortgage-deed, it lies upon him to prove that the consideration mentioned in the deed had not been received by him in full The mere fact that he had been recklessly borrowing money would not absolve him from discharging the burden that lies upon him. [p. 347, col. 2]

An equity can be founded upon gross inadequacy of consideration only when the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition. [p 348, col. 1]

First appeal from a decree of the Senior Subordinate Judge, Lahore.

Lala *Badri Das*, R. B., and Lala *Tirath Ram*, for the Appellant.

Mr. *M. S. Bhagat*, for the Respondent.

JUDGMENT.—This was a suit for sale upon a mortgage. The mortgage was executed by Jhanda Singh on the 28th of July 1915 securing an advance of Rs. 4,000 bearing interest at the rate of Rs. 2 per cent. per mensem in favour of Jiwa Ram, the plaintiff. The detail of the consideration stated in the mortgage deed is as follows :—

(*a*) Rs. 2,200, in cash, and

(*b*) Rs. 1,800 in currency-notes.

The deed was signed by the mortgagor and attested by witnesses. On the same date the mortgagor executed a receipt [illegible] the payment of Rs. 4,000 as [illegible] The mortgagor in his own hand put down the detail of the consideration money in the receipt and signed it. The period fixed for re-payment was six months. The property mortgaged consisted of a two storyed house together with shops situated in the Lahore city, Gumti Bazar. The suit was instituted on the 28th of May 1918 claiming Rs. 4,000 principal and Rs. 2,720 interest for two years and ten months from the 28th July 1915 to the 28th of May 1918 at the rate of Rs. 2 per cent. per mensem, the total claim being put to Rs. 6,720. The suit was resisted by the defendant on the plea that full consideration for the mortgage had not been received and that only Rs. 2,000 had been

paid and an oral promise had been made either to confine the claim to Rs. 2,000 only or to pay the balance to the mortgagor whenever required by him. It was also pleaded that the rate of interest agreed upon was 9-annas per cent. per mensem as stated in the mortgage-deed. The mortgagor having refused to get the deed registered the mortgagee applied under s. 36 of the Indian Registration Act for the compulsory registration of the document. The Sub-Registrar having refused to register the deed an appeal was preferred against his order and the Registrar ordered its registration. On these pleas two issues were framed by the Trial Court, namely.

(1) Did the plaintiff advance Rs. 4,000 to the defendant on the 28th of July 1915?

(2) Did the defendant agree to pay interest at Rs. 2 per cent. per mensem?

The burden of proof was laid by the learned Senior Subordinate Judge upon the plaintiff To discharge this burden the plaintiff called the two marginal witnesses Raghpat Rai (P. W. No. 1) and Ram Chand (P. W. No. 2). The scribe having died could not be produced in Court. The plaintiff also produced his *roznamcha bahi* and further supported the claim by his own evidence by going into the witness-box. Evidence was produced on behalf of the defendant to prove that his property was released by the Court of Wards on the 1st of July 1915. On the 24th of July he mortgaged this very house to one Ramun Mal for Rs. 4,000 and only four days after this he executed the mortgage in suit in lieu of Rs. 4,000. On the 14th of October 1915 he mortgaged certain property to one Lakhu Mal for Rs. 6,000. The evidence disclosed that between the year 1914-15 the defendant incurred liability to the extent of Rs. 80,000. The defendant tried to prove that he was an inexperienced and impecunious youngman and that he had fallen into the clutches of a ring of money-lenders of Lahore. On those facts the defendant asked the Court to relieve him of the consequences of his extravagance and inexperience. The Court accepted this contention, scrutinised the evidence given by the plaintiff strictly and came to the conclusion that the plaintiff had failed to prove that Rs. 4,000 had been paid to the defendant as consideration for the mortgage. The defendant having acknowledged the payment of Rs. 2,000 the Court granted a decree for that amount with interest at the rate of Rs. 2 per cent. per mensem.

Against this decision the present appeal has been preferred by the plaintiff. The defendant also has filed a cross appeal questioning the decision of the Court below as to interest.

Mr. Badri Das for the plaintiff-appellant has contended that, having regard to the fact that the execution of the deed was admitted, it lay upon the defendant to prove that the consideration mentioned in it had not been received in full. He questioned the decision of the Court below relating to the *onus probandi* and contended that the mere fact that the defendant had been recklessly borrowing money would not absolve him of the burden that lay upon him. He relied on Illustration (*b*) appended to s. 102 of the Indian Evidence Act and cited the ruling reported as *Fateh Ali Shah* v. *Miran Bakhsh* (1). The facts of the reported case and the decision thereon are fully summarised in the head-note and it may be usefully quoted here.

"In a suit by plaintiff to recover from defendant No. 1 and his wife a sum of Rs. 10,000 principal and Rs. 2,400 interest on a promissory note purporting to be executed by both defendants on the 29th November 1895, payable six months after date, defendant No. 1 while admitting execution, pleaded that after he had attained majority his extravagance had necessitated his estate being again put under the Court of Wards; that after the time the debt was contracted he was living on a small monthly allowance of Rs. 160 which was inadequate for his wants; that he cast about for a loan; and that plaintiff, whom he described as an astute lawyer's clerk, caught him in his meshes and got him to execute the note for a grossly inadequate consideration. It was, therefore, urged on his behalf that the doctrine of the English Court of Chancery in the case of expectant heirs and necessitous persons should be applied, and a decree passed merely for what he had actually received, with reasonable interest thereon. It appeared that defendant No. 1 was a well grown and mature man of about thirty, who had already succeeded to a large estate, and that, though addicted to extravagance and debauchery he was not a person of weak mental capacity, or in any state of mental or bodily distress, or

(1) 60 P. R. 1898.

such necessity as made him incapable of weighing the consequences of the transaction into which he was entering with the plaintiff with whom he had had no previous dealings.

"Held, that under the above circumstances defendant No. 1 could not be placed in the category of those incapable of protecting themselves, and that the case must, therefore, be treated as an ordinary case of debtor and creditor, the onus of proof of all the disputed facts being, on the pleadings, upon defendant No. 1.

"Held, further, that there is an equity founded upon the gross inadequacy of consideration, but it can only be when the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition."

The facts and the pleadings in the present case are peculiarly similar to those in the reported case and every word of the decision applies with equal force to the defendant in the case. We are, therefore, clearly of opinion that the burden was wrongly placed upon the plaintiff.

Thd evidence produced by the defendant to prove his allegation is wholly unreliable and inadequate and has rightly been so characterised by the Court below. Mr. M. S Bhagat the learned Counsel for the defendant, did not rely upon the statement of the witnesses produced on behalf of the defendant and admitted the correctness of the criticism made by the learned Judge of the Court below. We ourselves have carefully examined the evidence and we entirely agree with the learned Judge of the Court below in holding that it is unreliable and utterly useless. The defendant himself made contradictory statement as to the circumstances relating to the transaction. His statement for very good reasons was discarded by the Court below and we ourselves feel unable to attach any importance to it. The defendant has utterly failed to establish that the whole consideration for the mortgage had not been received by him.

We accordingly accept the appeal with costs and modifying the decree of the Court below grant a decree for Rs. 4,000, the principal money, together with interest at the rate of Rs. 2 per cent. per mensem up to the date fixed and thereafter on the aggregate amount at the rate of Rs. 6 per cent. per annum. The office will prepare a preliminary decree for sale in accordance with the Form No. 4 given in Appendix D of the C. P. C.

The defendant's appeal has neither been seriously pressed nor do we find any force in it. We accordingly dismiss it with costs.

Z. K. *Appeal accepted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1594 OF 1922.

July 8, 1924.

Present :—Mr. Justice Daniels and Mr. Justice Neave.

MAHADEO PRASAD—DEFENDANT—APPELLANT

versus

ANANDI LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss 40, 100—Charge created by decree—Enforcement against transferee for value without notice.

The general rule is that where the owner of property creates successive rights by different transactions entered into at different times, the rights will, in the absence of special circumstances, take effect in order of priority. The rule laid down in s 40 of the Transfer of Property Act that a right arising out of contract and not amounting to an interest or an easement, cannot be enforced against a transferee for value without notice has no application to an obligation creating a charge upon property. [p. 349, col 2; p. 350, col. 1]

A charge created by a decree is enforceable against a transferee for value without notice. [p. 350, col 1]

Second appeal from a decree of the District Judge, Allahabad, confirming that of the Munsif, Allahabad (West).

Mr. *M. L. Agarwala*, for the Appellant.

Dr. *Kailas Nath Katju* and Pandit *S. S. Sastry*, for the Respondents.

JUDGMENT.—The question of law which is raised in this appeal is whether a charge which does not amount to a mortgage can be enforced against a transferee for value without notice of the charge. The Court below, relying on the decision in *Maina* v. *Bachchi* (1) has held that it can. The appellant contests this proposition, The plaintiff-respondent supports it, but in addition contends that on the finding of fact of the Court below the question does not really arise. He relies also on the fact that the appellant's title was acquired at execution sale and not by private conveyance.

The property in dispute consists of a half share in three houses Nos. 29, 45 and 66, situated in the city of Allahabad. The plaintiff, Anandi Lal, was at the institution

(1) 28 A. 655; 3 A. L. J. 551; A. W. N. (1906) 165.

of the suit the holder of a decree for Rs. 701-9-0 against the first defendant, Sham Lal, and seeks to enforce his decree by the sale of these houses. The houses originally belonged to the plaintiff and his cousin, Kalyan Chand, in equal shares. One Sheo Nath obtained a decree against Kalyan Chand and attached his half share in the houses before judgment on 5th February 1918. The suit was finally decreed on 13th June 1918 on the basis of a compromise which provided that the amount decreed in favour of Sheo Nath should constitute a charge on the property already under attachment. As an additional precaution the decree was registered. The rights of the decree-holder were purchased by the plaintiff, Anandi Lal, who proceeded to put the decree in execution. The houses were put up to sale and purchased by one Badri Prasad, but the sale was set aside on the application of Sham Lal, and the plaintiff has in consequence brought the present suit to establish his right to have the half share in the houses attached and sold under his decree.

The claim of the appellant arises out of proceedings taken by Bulaki another creditor of Kalyan Chand, who brought a suit, No. 189 of 1918, against the latter and obtained a decree on 30th April 1918. Before judgment Bulaki got an injunction, on 21st January, 1918, from the Small Cause Court restraining the judgment-debtor from transferring the property. It is said by the learned District Judge that the issue of this injunction was *ultra vires*, and it has not been relied on in argument, in this Court. In execution of this decree, Kalyan Chand's interest in the houses was attached and brought to sale and was ultimately purchased by Sham Lal on 22nd March 1919. Sham Lal got possession of the property on 27th March 1920. He subsequently sold his rights to the appellant, Mahadeo Prasad. The latter was added as a defendant after the institution of the suit. The question for decision is whether Sham Lal's purchase was or was not subject to the charge created by the decree of 13th June, 1918, in Sheo Nath's case, the benefit of which has now passed to the plaintiff.

According to the definition in s 3 of the Transfer of Property Act, a person is said to have notice of a fact, not only when he actually knows it but when he could have been aware of it but for wilful abstention from such inquiry or search as he ought to have made. Now in this case the purchaser, Sham Lal, knew that a previous suit had been filed against Kalyan Chand, for he had actually been summoned as a witness in that suit. He was summoned for the very day on which the compromise decree was passed. As he professes not to know whether he attended the Court or not (a fact which he could not possibly have forgotten), the probability is that he really was there. In any case he knew enough to make it incumbent on him to ascertain, before buying the property, what had happened in the previous suit and whether the creditor having got his decree had taken any steps against the property, which would affect the title of a subsequent purchaser. This is substantially what the District Judge finds, though he has put his finding in the somewhat indefinite form that the facts "strongly suggest" that Sham Lal knew more about the proceedings in the former case than he is now prepared to admit. The learned Judge further points out that the decree-holder, by registering his decree, had done everything possible to give notice to any one who might contemplate buying the decree. On the findings of the District Judge it must be held that there was sufficient to put the original defendant, Sham Lal, on enquiry, and that, if he had made any enquiry, he could not have failed to learn the true state of the case. He must, therefore, be held to have had notice of the plaintiff's charge within the meaning of the definition in s. 3 of the Act.

This really concludes the case. But we may say that we are not disposed to differ from Sir Henry Richards' view, in *Maina* v. *Bachchi* (1), that the position of a charge-holder, under the Transfer of Property Act, is stronger than that of a person holding a merely equitable charge under English Law, and that though there may be cases in which a mere equitable claim will not be enforced against *bona fide* transferees for value without notice, yet

"It is much too broad a proposition to state that in all cases where by act of parties or operation of law, immoveable property of one person is made security for payment of money to another and the transaction does not amount to a mortgage, the security will not be enforced even against such transferees."

The general rule is that where the owner of property creates successive rights by

different transactions entered into at different times, the rights will, in the absence of special circumstances, take effect in order of priority. On the other hand, s. 40 of the Transfer of Property Act lays down that a right arising out of contract and not amounting to an interest or an easement, cannot be enforced against a transferee for value without notice. In this case the right was not a merely contractual right but an obligation embodied in a decree. It is also to be remembered that Sham Lal was an execution purchaser who bought the interest of the judgment-debtor as it stood on the date of the decree. There are two Calcutta judgments, *Royzuddi Sheik* v. *Kali Nath Mookerjee* (2) and *Akhoy Kumar Banerjee* v. *Corporation of Calcutta* (3), both delivered by Mr. Justice Mookerjee, which lay down in general terms that a charge cannot be enforced against a transferee for value without notice. But in neither of these cases did the decision actually turn on this question. In the earlier case the document relied on as creating a charge was held to be invalid and in the later case the later transferee was found to have had notice of the charge. For the reasons given, we dismiss the appeal with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(2) 33 C 985; 4 C. L. J. 219.

(3) 27 Ind. Cas. 261; 42 C. 625; 19 C. W. N. 37; 21 C. L. J. 177.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 58 OF 1925.

October 23, 1925.

Present:—Justice Sir B. K. Mullick, KT., and Mr. Justice Kulwant Sahay.

BADRI SAHU AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

Pandit PEARE LAL MISRA AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 66, 72—Execution of decree—Sale proclamation, valuation in—Decree-holder, whether bound to bid up to valuation

There is no provision of law compelling the decree-holder to bid at an auction-sale up to any sum that may be fixed by the Court. The valuation in the sale proclamation is intended primarily for the protection of the judgment-debtor and for giving information to the bidders at the auction-sale It is in no sense intended to be an exact estimate of the value of the property and if in a sale properly published and conducted the highest bid, whether of the decree-holder or any other person, is some figure below the figure given in the sale proclamation, it is not competent to the Court to compel the decree-holder to bid higher than that highest bid.

Appeal against an order of the Subordinate Judge, Muzafferpur, dated the 22nd December 1924, affirming that of the Munsif, Sitamarhi, dated the 14th August 1924.

Mr. *Lakshmi Narayan Singh*, for the Appellants.

JUDGMENT.

Mullick, J.—No one appears to oppose this appeal.

It appears that the decree-holder valued the property for the purposes of sale proclamation at Rs. 1,600. At the sale the decree-holder bid up to Rs. 600, but the Munsif declined to allow him to purchase the property unless he bid up to Rs. 1,300. As the decree-holder was unwilling to do so the sale was not held and the execution case was dismissed. The decree-holder then appealed and the Subordinate Judge, who heard the appeal agreed with the Munsif.

The present second appeal is preferred by the decree-holder.

There is no provision of law compelling the decree-holder to bid up to any sum that may be fixed by the Court. The valuation in the sale proclamation is intended primarily for the protection of the judgment-debtor and for giving information to the bidders at the auction sale. It is in no sense intended to be an exact estimate of the value of the property and if in a sale properly published and conducted the highest bid, whether of the decree-holder or any other person, is some figure below the figure given in the sale proclamation, it is not competent to the Court to compel the decree-holder to bid higher than that highest bid.

The order of the Subordinate Judge will be set aside and the appeal will be decreed and the decree-holder's bid of Rs. 600 must be accepted.

Kulwant Sahay, J.—I agree.

Z. K. *Appeal allowed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No 17 OF 1923.
August 19, 1925.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

HAJI REHEMTULLA HAJI TARMAHOMED—PLAINTIFF—APPELLANT
versus
THE SECRETARY OF STATE FOR INDIA—DEFENDANT—RESPONDENT.

Income Tax Act (II of 1886), s 39—Declaration that assessment is ultra vires, *suit for, maintainability of—Resident of Native State, whether liable to assessment on profits made outside British India.*

The provisions of s. 39 of the Income Tax Act of 1886 do not operate to bar a suit in which it is claimed that an assessment is *ultra vires*

The profits of a business are earned where the actual excess over the expenditure incurred is earned.

A resident of a Native State cannot be assessed to income-tax in British India on profits made in another Native State, unless it can be proved that those profits arose or were received in British India.

First appeal from the decision of the District Judge, Broach, in Suit No. 1 of 1921.

Mr. *G. N. Thakor* (with him Mr. *M. K. Thakore*), for the Appellant.

Mr. *S. S. Patkar*, Government Pleader, for the Respondent.

JUDGMENT.—The first plaintiff is the proprietor of the Firm of Haji Tar Mahomed Hasan. The second plaintiff is the manager of the Broach shop of the firm. Plaintiff No. 1 resides in the town of Upleta in Gondal State in Kathiawar. He has various shops in the British territory, and three shops in the Baroda State. The income of each shop is received direct from the shop by the plaintiff at Upleta. The Income Tax Collector of the Broach City assessed the income of the plaintiffs on the income which was earned or accrued within the British territory. He also sought to levy income-tax on the income earned by the shops in the Baroda State. Eventually the plaintiff had to file these three suits for a declaration that the Income Tax Officer could not levy a tax on the income of the shops of the firm of plaintiff No. 1 situate at Miyagam, Karwan and Badharpur in the Native State of Baroda.

The first question is whether the plaintiff was not barred from bringing these suits by the provisions of s. 39 of the Indian Income Tax Act II of 1886, which says that no suit shall lie in any Civil Court to set aside or modify any assessment under this Act. If the assessment is clearly *ultra vires* then we do not think that the provisions of that Act will apply. In this case the Income Tax Collector of Broach seeks to assess a resident of the Gondal State on the profits made in the Baroda State and unless he can prove that those profits arose, or were received, in British India, then clearly the assessment is *ultra vires*.

It is not suggested that the profits were received in British India, but it is contended that the profits accrued or arose in British India The Judge held that the plaintiff had proved that fact, but the argument upon which his conclusion is based is clearly fallacious. He says:—"For plaintiff it is contended that each branch is a separate entity, the branches in British India merely purchase to order and get their commission on the market price and merely act as any other business would do. The decision is a different one, but I think this is a case in which the profits arise or accrue in British India indirectly for the profits arise from the growth of the crops, conversion into grain and purchase here though the ultimate profit is made in Baroda State."

If we take an instance, which must constantly be happening, of the manager of a Baroda Branch of the plaintiff's firm sending an order to his commission agent in Bombay for certain bales of cotton, or bags of wheat, and the cotton or wheat is sent to Baroda and sold there at a profit, it cannot possibly be said that the profit arose in British India because the goods may have come from Bombay or some other town in British India. It is quite clear that the profits are earned where the actual money is earned in excess of the expenditure incurred.

That was decided in *In re Aurangabad Mills Ltd.* (1) where the Court referred to the case of *Commissioner of Taxation* v. *Kirk* (2).

On the question where the ultimate profits arose which would entitle the Income Tax Authority to levy a tax on profits, the Judge admits that the ultimate profits were made in the Baroda State.

We think, therefore, that the profits arose in the Baroda State. The decrees in all the three suits will be reversed on the ground that income-tax was levied without authorization, and the appeal allowed with costs. Plaintiff will be entitled to refund of the money he has paid, except in F. A No. 32, where the refund will be limited to the amount claimed in the appeal, *viz.* Rs. 460.

Z. K. *Appeal allowed.*

(1) 64 Ind. Cas. 9; 45 B. 1286; 23 Bom. L. R. 570.
(2) (1900) A. C. 588; 69 L. J. P. C. 87; 83 L. T. 4.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1413 OF 1922.

April 17, 1925.

Present:—Mr. Justice Phillips.

SINNANNA KONE AND OTHERS—DEFENDANTS NOS. 3 AND 6 TO 12—APPELLANTS

versus

MUTHUPALANI CHETTI AND ANOTHER—PLAINTIFF AND DEFENDANT NO. 1—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Decrees in connected suits—Appeal against only one decree—Decree not appealed from, whether* res judicata—*Appeal, maintainability of.*

Where two connected suits are tried and decided together on the same facts, but an appeal is filed against one decree only, the decree not appealed from does not operate as *res judicata* so as to bar the hearing the appeal.

Panchanada Velan v. *Vaithinatha Sastrial*, 29 M. 333; 16 M. L. J. 63, followed.

Bommadevara Naganna Naidu Bahadur v. *Ravi* [illegible] 76 Ind. Cas. 594; 46 M. 895; (1923) M. W. N. 554; 21 A. L. J. 726; (1923) A. I. R (P. C.) 167; 33 M. L. T. 262; 45 M L J. 657; 25 Bom. L. R. 1290; 18 L. W. 913; 28 C. W. N. 568; 39 C. L. J. 312; 50 I A. 301 (P. C.), distinguished.

Second appeal against a decree of the Court of the Second Additional Subordinate Judge, Madura, in A. S. No. 93 of 1921, preferred against that of the Court of the Second Additional District Munsif, Madura, in O. S. No. 46 of 1919.

Mr. *T. L. Venkatarama Iyer*, for the Appellants.

Mr. *K. V. Sesha Iyengar*, for the Respondents.

JUDGMENT.—The appellants set up a peculiar custom in their community that widows and daughters were excluded by the reversioners of the last male member of a family and this custom has been found by the lower Appellate Court not have been proved.

The finding is objected to on the ground that it is bad in law, but I have not been referred to any statement in the judgment in which the law has been wrongly propounded and the arguments here have mainly been directed to showing that adequate weight has not been attached by the learned Subordinate Judge to certain portions of the evidence. It is also contended that two important statements made by the plaintiff's witnesses have not been considered at all. The evidence of these witnesses has been dealt with by the Subordinate Judge and there is nothing so vital in these so-called admissions as to make it obligatory on the Subordinate Judge to deal with them in greater detail. The whole of the evidence is oral although the custom is said to be one which is in accordance with the law which prevailed before the present system of Hindu Law came into being and consequently must have been in existence for an incredibly long period, the Judge, therefore, rightly relies on the argument that notwithstanding this fact, there is no documentary evidence to support the custom. Certain documents are alleged to be in existence which have not been produced and the appellants rely entirely on oral evidence. The Subordinate Judge has found that to be totally inadequate and I see no reason to differ from his conclusion. An attempt is made to support the custom by a statement in the District Gazetteer where similar custom in this community is referred to, but the custom there set out is not in accordance with the custom pleaded in this case and, therefore, does not at all corroborate the existence of the custom pleaded. I see no reason for not accepting this finding of the Subordinate Judge and, therefore, confirm it.

A further point is argued, namely, that the question at issue in this appeal was *res judicata* because in a connected suit tried with this one and decided at the same time no appeal was preferred. This question has been expressly decided by a Full Bench of this Court in *Panchanada Velan* v. *Vaithinatha Sastrial* (1) and I am bound by that decision. It is argued that that decision has been overruled by the Privy Council decision in *Bommadevara Naganna Naidu Bahadur* v. *Ravi Venkatappayya* (2). I have already considered this point in a previous case, Second Appeal No. 1643 of 1922, where I came to the conclusion that *Panchanada Velan* v. *Vaithinatha Sastrial* (1) was not expressly overruled and I am still of the same opinion. Applying *Panchanada Velan* v. *Vaithinatha Sastrial* (1) the Subordinate Judge is right in hearing this appeal and deciding it on the merits.

The second appeal is, therefore, dismissed with costs.

V. N. V.

N. H. *Appeal dismissed.*

(1) 29 M. 333; 16 M. L. J. 63.

(2) 76 Ind. Cas. 594; 46 M. 895; (1923) M. W. N. 554; 21 A. L. J. 726; (1923) A I. R. (P. C.) 167; 33 M. L T. 262; 45 M. L. J. 657; 25 Bom. L. R. 1290; 18 L. W. 913; 28 C. W. N. 568; 39 C. L. J. 312; 50 I. A. 301 (P. C.).

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 200 OF 1925.

December 11, 1925.

Present:- Mr. Justice Walsh and Mr. Justice Kanhaiya Lal.

Bahora SRI KISHEN AND ANOTHER —DEFENDANTS—APPELLANTS

versus

Kunwar CHANDRA SEKHAR BAKSH SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pre-emption—Wajib-ul-arz *embodying custom*—*Partition of village*—*Agreement to observe custom irrespective of partition*—*Agreement, whether binding*—*Fresh* wajib-ul-arz, *whether necessary*

Ordinarily where a partition of a village has taken place, the joint ownership is destroyed, and each *mahal* becomes a separate unit for the purpose of regulating the rights of the co-sharers forming the proprietary body of that *mahal inter se.* [p 353, col. 2]

Where, however, the *wajib-ul-arz* relating to the village recognises the existence of a custom of pre-emption amongst the co-sharers of the village, and when the village is divided by partition into different *mahals*, the co-sharers agree to the partition subject to the reservation that the custom will continue in force irrespective of that partition, and that a co-sharer of one *mahal* would be entitled to pre-empt in respect of property situated in another *mahal*, the reservation operates as a condition precedent to the partition and is as much binding on the co-sharers, who are parties to the partition proceeding, as the partition itself It is not necessary that a fresh *wajib-ul-arz* should be prepared at the time of partition in respect of each *mahal* embodying such a custom. [*ibid*]

Digambar Singh v. *Ahmed Sayeed Khan*, 28 Ind Cas 34; 37 A. 129, 13 A L. J 236, 19 C W. N 393, 17 M. L T. 193, 2 L. W 303, 21 C L. J. 237; 28 M L. J. 556, 17 Bom. L. R. 393, (1915) M W. N 581, 42 I. A. 10 (P. C.), referred to.

First appeal from an order of the District Judge, Mainpuri, dated the 24th of March 1925.

Mr. *N. Upadhiya*, for the Appellants.

JUDGMENT.—This appeal arises out of a suit for pre-emption, and the question for consideration is whether a custom of pre-emption recorded in the *wajib-ul-arz* framed prior to the partition of the village can be enforced after the village has been partitioned by a co-sharer of one *mahal* in respect of property situate in another *mahal*. The Court of first instance dismissed the claim, but the lower Appellate Court, relying on the decision of their Lordships of the Privy Council in the case of *Digambar Singh* v. *Ahmed Sayeed Khan* (1), held that in the absence of a fresh *wajib-ul-arz* prepared at the time of partition, indicating a contrary intention, it cannot be presumed as a matter of law or principle that the custom of pre-emption in force before partition was no longer to have effect or operation. It referred to the *tarz taqsim* prepared at the time of the partition, wherein it was stated as a matter of arrangement between the co-sharers, which the partition officer had accepted and the Collector had confirmed, that a co-sharer in a *mahal* will have a right of pre-emption in respect of the property of the other *mahal* despite the partition. Section 114 of the U. P. Land Revenue Act, III of 1901, provides for the preparation of a *tarz taqsim* or partition proceeding determining the principles which shall govern the partition, detailing how the partition is to be made, and deciding all disputed questions that may have arisen in connection therewith. A partition is subsequently effected in accordance with the principles so laid down in the partition proceedings. If reservation is made in favour of a custom of the kind here in question, that reservation operates as a condition precedent to the partition and is as much binding on the co-sharers, who are parties to the partition proceeding, as the partition itself. It is not necessary that a fresh *wajib-ul-arz* should be prepared at the time of partition in respect of each *mahal*, embodying such a custom. The *wajib-ul-arz* relating to the village recognised the existence of a custom of pre-emption amongst the co-sharers of the village, and when the village was divided by partition into different *mahals*, the co-sharers agreed to the partition subject to the reservation that the custom will continue in force irrespective of that partition, and that a co-sharer of one *mahal* would be entitled to pre-empt in respect of property situated in another *mahal*. Ordinarily where a partition has taken place, the joint ownership is destroyed, and each *mahal* becomes a separate unit for the purpose of regulating the rights of the co-sharers, forming the proprietary body of that *mahal inter se*. But in this particular case the partition was made subject to the reservation that so far as the custom of pre-emption was concerned, it was to continue in force irrespective of the partition, or in other words, as if the interests of the co-sharers of the village in the different *mahals* had remained undisturbed. The defendant vendee is a stranger. The plaintiff pre-emptor is a co-

(1) 28 Ind Cas. 34; 37 A. 129; 13 A. L. J 236; 19 C. W. N. 393; 17 M. L. T. 193; 2 L. W. 303; 21 C. L. J. 237; 28 M. L. J. 556; 17 Bom. L. R. 393; (1915) M. W. N. 581; 42 I. A. 10 (P. C.).

sharer in one of the *mahals* and as such he is entitled to preference as against the former. There is no reason in these circumstances for interfering with the decision of the lower Appellate Court. The appeal is dismissed under O. XLI, r. 11, C. P. C.

N. H. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 793 OF 1923.

August 17, 1925.

Present:—Mr. Justice Madhavan Nair.

K. VENKAT REDDIAR & Co.—PETITIONER

versus

DESIKACHARIAR—RESPONDENT.

Interest Act (XXXII of 1839), s 1—Interest—Absence of demand—General principles.

In the absence of demand for interest, a plaintiff is not entitled to interest under the Interest Act

Muhammad Abdul Gaffur Rowther v. *Hamida Beevi Ammal*, 52 Ind. Cas. 505, 42 M. 661; (1919) M. W. N. 484; 25 M. L. T. 242; 36 M. L. J. 456 and *Arunachalam Chettiar* v. *Rajeswara Setupati*, 71 Ind. Cas. 257; 15 L. W. 63; (1921) M. W. N. 873; 30 M. L. T. 84; 42 M. L. J. 74; (1922) A I. R (M) 55, distinguished.

On general principles of law, interest is not due on money, unless it was intended to be paid or unless such intention could be implied from the usage of trade, as in the case of mercantile instruments.

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge, Chingleput, in S. C. S. No. 2 of 1923 on the file of his Court.

Mr. *N. Swaminadhan*, for the Petitioner.

Mr. *G. N. Thirumalachariar*, for the Respondent.

JUDGMENT.—The plaintiff is the petitioner. The plaintiff's suit was to recover principal and interest on account of dealings carried on between him and the defendant from the 22nd May 1916 to the 10th of December 1922. The plaintiff has been given a decree for Rs. 196 but he has not been awarded interest on that amount. The question in this case is whether the lower Court was wrong in refusing 'interest' to the petitioner. Interest is claimed under the Interest Act and on general principles of law.

In view of the finding that there was no demand for interest by the plaintiff, the plea that he is entitled to interest under the Interest Act cannot be accepted.

The next question is whether the plaintiff is entitled to interest on general principles of law. It is well-known that under the rules of English Common Law, interest is not due on money, unless interest was intended to be paid or unless it is implied from the usage of trade, as in the case of mercantile instruments. Applying this principle, the petitioner is not entitled to interest in this case because the learned Judge in para. 4 finds that the parties commenced dealings on the assumption that no interest would be demanded. This finding that interest was not intended to be paid is supported by the evidence of D. W. No. 1. Accepting this finding, I am of opinion that plaintiff is not entitled to interest even under the general principles of the Common Law.

The decision in *Muhammad Abdul Gaffur Rowther* v. *Hamida Beevi Ammal* (1) and *Arunachalam Chettiar* v. *Rajeswara Setupati* (2) are inapplicable to the present case, inasmuch as it has been found that interest was not intended to be charged, when the parties commenced their dealings. I may also mention that interest has not been claimed, based on the usage of trade.

I think, therefore, that the decision of the lower Court is right. I dismiss this revision petition with costs.

V. N. V.

N. H. *Petition dismissed.*

(1) 52 Ind. Cas. 505; 42 M 661; (1919) M W. N. 484; 25 M. L. T 242, 36 M. L. J. 456.

(2) 71 Ind. Cas. 257; 15 L. W. 63; (1921) M. W. N. 873; 30 M. L. T. 84; 42 M. L. J. 74; (1922) A. I. R. (M.) 55.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 351 OF 1924.

September 17, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

VIRAPPA GOVINDAPPA KONRADDI—DEFENDANT—APPELLANT

versus

BASAPPA VIRBHADRAPPA KULKARNI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151—Inherent power of Court, when to be exercised.

Where a party does not take advantage of the right of appeal granted to him by the C. P. C., he cannot be allowed to come to the Court and ask the Court to exercise its powers under s. 151 of the Code.

First appeal from the decision of the First Class Subordinate Judge of Dharwar, in *Darkhast* No. 251 of 1923.

Mr. *A. G. Desai*, for the Appellants.

Mr. *P. V. Kane*, for the Respondents.

JUDGMENT.—The defendants applied for the execution of the consent decree in Suit No. 350 of 1919, dated November 22, 1920, whereby it was ordered that the plaintiffs should pay to defendants Nos. 1-5 Rs. 13,000 by instalments. If the plaintiffs could not pay the amount, the defendants were entitled to recover the amount by sale of the property in suit which was charged with payment of the decree. The property was sold and the sale proceeds were not sufficient to satisfy the decree. Thereupon the defendants applied for the attachment of certain other property belonging to the plaintiffs. On October 13, 1923, an order was made and it was transferred to the Collector for further execution under s 68, C. P. C. The plaintiffs might have appealed against that order. But instead of doing that, they made a miscellaneous application to the Judge praying that the defendants' *darkhast* should be dismissed. We do not know how it was competent to the Judge to entertain that application. It is suggested now that he could deal with it under s. 151 of the Code. But it certainly is not intended that where a party does not take advantage of the right of appeal granted him by the Code that he should be allowed to come to the Court and ask the Court to exercise its powers under s. 151.

We think, therefore, that the Judge was not competent to dismiss the *darkhast* on this application. The appeal must be allowed. The *darkhast* must proceed. The appellant is entitled to his costs throughout.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 73 OF 1922.

August 18, 1925.

Present :—Justice Sir Charles Gordon Spencer, KT., and Mr. Justice Viswanatha Sastri.

MEDAI DALAVOY KALIANI ANNI —PLAINTIFF—APPELLANT

versus

MEDAI DALAVOY THIRUMALAYAPPA MUDALIAR—DEFENDANTS NOS. 1 TO 9 —RESPONDENTS.

Hindu Law—Widows—Partition—Relinquishment of survivorship—Intention.

There is no legal obstacle to prevent one of two Hindu co-widows from so far releasing her right of survivorship as to preclude her from recovering from an alienee, after the other co-widow's death, property given by way of partition to the latter and alienated by her. The partition may be by document or oral. [p. 358, col. 2.]

Gomathi Ammal v. *Kupputhayi Ammal*, 14 M. L. J. 175, followed.

It is a question of intention in each case, to be gathered from the deed of partition, if any, and the surrounding circumstances, whether the widows retained or renounced their rights of survivorship.

It has to be proved by clear evidence that the widows were conscious of the right of survivorship possessed by them, and that they intended to give up such right. [p. 358, col. 2, p 359, col. 1.]

Appeal against a decree of the Court of the Additional Subordinate Judge, Tinnevelly, in O. S. No. 39 of 1919 (O. S. No. 69 of 1918 of the Sub-Court, Tinnevelly).

Mr. *S. Muthia Mudaliar*, for the Appellant.

Messrs. *A. Krishnaswamy Iyer*, *K. Subramania Pillai* and *S. Sankara Iyer*, for the Respondents.

JUDGMENT.

Viswanatha Sastri, J.—Appeal by plaintiff against the decree of the Court of the Additional Subordinate Judge of Tinnevelly, in O. S. No. 39 of 1919. The facts which gave rise to the suit are as follows: One Shanmuga Kumaraswami Mudaliar died on January 15th, 1892, leaving two widows Parasakti Vadivu Anni, and Kaliani Anni (plaintiff) as his heirs. The two widows "to suit their convenience", divided some of the properties into equal moities, and the income from other properties was also similarly divided, as also debts due to the family. Parasakti died on December 10th, 1915, and, on her death, all the properties which she was enjoying accrued to plaintiff by right of survivorship. The properties which were in the enjoyment of Parasakti yielded an annual income of Rs. 6,000. The 1st defendant who is the next reversioner, fraudulently induced Parasakti to execute a sale-deed in his favour with respect to the properties specified in some of the schedules; and he also induced her to execute another sale-deed with respect to certain other properties in favour of the 7th defendant's father, *benami* for himself. A third sale-deed was executed in respect of certain other properties in favour of one Ramalinga Mudaliar, who is the son of 1st defendant's maternal uncle. Subsequent to these transactions, the 1st defendant obtained two other sale deeds with respect to properties comprised in Sch,

III, and he also obtained a usufructuary deed of mortgage with respect to properties comprised in Sch. XXVI. All these transactions were entered into without any legal necessity and with a view to defraud plaintiff. The 1st defendant also received monies from the Taluk Board, Shermadevi, which were legally due to plaintiff. Defendants Nos. 2 to 4 are the undivided sons of the 1st defendant. Defendants Nos. 5 and 6 are the widows of Renganatha Mudaliar the undivided elder brother of the 1st defendant; and the 7th defendant is the son of the 1st defendant's sister. Hence the suit for the recovery of the properties that were in the possession of Parasakti Vadivu Anni, together with mesne profits. The 1st defendant contended that plaintiff and Parasakti effected an absoulte partition of the properties, that each gave up the right she had to succeed to the properties that fell to the share of the other by right of survivorship; that the alienations sought to be impeached were for purposes binding on the estate, and that plaintiff was not entitled to any relief. Defendants Nos. 2 to 6 adopted the written statement of the 1st defendant. The 7th defendant contended that the alienations in his favour were for purposes binding on the estate. The 8th defendant was added as a supplementary defendant on the ground that the property specified in Sch. XXV was in her possession, but she disclaimed all interest therein. The 9th defendant was also, subsequent to the suit, added as a party, on the ground that he claimed an interest in Schs. XXV and LIX. He pleaded that the alienations were binding on the estate. The learned Subordinate Judge held that the division between the widows was only for the sake of convenience, that neither of them gave up the right she had to succeed to the properties in the possession of the other, and that the plaintiff was entitled to possession of the properties comprised in all the Schedules, except Schs. II, XII, and XIII. The appeal relates to properties with respect to which possession was not decreed and the 1st defendant filed a memorandum of objections with respect to the items decreed and which were in his possession. A similar memorandum of objections was filed by the 7th defendant.

In dealing with the memorandum of objections the question to be considered is, the nature of the estate taken up by the widows by reason of the arrangement said to have been come to between them. The contention of the plaintiff is that they were in enjoyment of separate portions simply for the sake of convenience, whereas the contention of the defendants is that the partition gave each widow an absolute interest in the properties, and that the widows parted with their right of survivorship. There is no document to evidence the partition of the properties now in suit, but it was contended on behalf of the respondents that the partition was on the lines of Ex. L of the date January 30th, 1892. The circumstances which led up to the execution of Ex. L are these. Shanmuga Kumaraswami died on January 15th, 1892; and, on February 10th 1892, Avudiayammal Anni widow of his deceased brother, presented for registration a document which purported to be a Will, and which was put forward as having been executed by Shanmuga Kumaraswami on 14th January 1892. The registration of the Will appears to have been opposed on behalf of the 1st defendant, as will appear from Ex. AAAAA. Exhibit L came into existence on January 30th, 1892, and it related to houses and house sites which have no connection with the present claim. To this document plaintiff, Parasakti and Avudaiyammal were parties, and the document recites that these three persons had acquired under the Will of Shanmuga Kumaraswami the properties absolutely; and that the properties described in the document were to be enjoyed in the manner stated therein. The concluding words of the document on which reliance was placed are these "the properties belonging to the respective persons, be enjoyed by them alone with all rights." It was urged on behalf of the 1st respondent that the other properties left by Shanmuga Kumaraswami, including the properties now in suit, were also divided in the same manner in which the properties comprised in Ex. L were divided; but there is no document to evidence the partition of these properties; nor is the date of the division ascertainable with any degree of certainty. In her evidence, plaintiff stated that "Ex. L was not brought into force as there were disputes about the Will", and this statement of hers receives support from the circumstance that there was admittedly no division of the properties not comprised in Ex. L into three equal shares, between plaintiff Parasakti and Avudaiyammal, as contem-

plated in Ex. L. Parasakti gave evidence in the Ambasamudram District Munsif's Court in a suit between her, plaintiff and 1st defendant; and Ex. G is a copy of the deposition then given. This is what appears at page 28 of the paper-book. "After the death of my husband, the defendants Nos. 2 and 3 and myself were enjoying his properties. We were enjoying them, each one share. For *Fasli* 1301, we paid *theerva* in three shares". At page 33 of the paper book she says "Now for the past five or six months the 2nd defendant and myself have been paying in two shares". She gave her evidence in June 1894, and consequently, the payment of *kist* in two shares must have been only from January 1894, Ex. M of the date July 15th 1893, is a lease deed in favour of plaintiff and Parasakti, and the circumstance that the lease deed was taken in their joint names indicates that on the date of this document there was no division of the properties between them. There is, therefore, strong ground for coming to the conclusion that the division of the properties not comprised in Ex. L was not made at or about the time of Ex. L but two years afterwards. The 1st defendant had not examined himself and we have not been referred to any oral evidence on his side as to the division of the properties in suit in the manner contended for by him.

Prasakti and plaintiff admittedly enjoyed the properties not comprised in Ex. L, in equal shares; and, it was contended on behalf of the 1st defendant that this enjoyment was in pursuance of an arrangement between them to the effect that each was to take an absolute interest in the properties each got; and that there was to be no right of survivorship between them. We are asked to infer such an arrangement from the following circumstances: (1) The division of the debts due to the estate into two equal shares; (2) the liability undertaken by each widow to pay the debts due from the estate, in equal shares; (3) their conduct in pleading that they were each liable to pay only a half share in the debt, when creditors sued them; (4) compromises made by them in such suits under which each agreed to pay a half share in the debts; (5) Succession Certificates got by each of them with respect to half of some of the debts; (6) each of them executing promissory notes in favour of creditors with respect to a half share in the debts due by their husband; (7) mortgages and sales effected separately, giving the alienees absolute rights in the shares enjoyed by each; (8) each contributing half the expenses for the *Kattalais* that had to be performed; (9) each paying *kist* separately for the portions enjoyed by her; and (10) each suing the other for contribution with respect to excess payments made by her. It appears to me that all these circumstances are consistent with the division having been made for the sake of convenience. The learned Vakil for the 1st respondent contended that this could not be said with respect to the mortgages and sales effected separately; as also with respect to suits for contribution, although it may be so said with respect to the other circumstances. So far as suits for contribution go, I fail to see why such suits would not lie in case the arrangement had been only for the sake of convenience. The claim may be based not under the Common Law; but under the arrangement between the parties to the effect that each was to pay a half share in the debts due by her husband, and any violation of this arrangement by reason of which one widow was sued by a creditor and made to pay the entire debt, would certainly entitle her to recover from the other widow the portion paid in excess of her share. With respect to [illegible] and sales, each widow did, no doubt, sell her half share, but this circumstance could not be taken to indicate that each widow gave up the right of survivorship to the portion enjoyed by the other widow, in case she survived her. Even in case the division had been only for the sake of convenience, the same thing would have been done. The whole question is one of intention, and there is clear documentary evidence in the case which, in my opinion, conclusively proves that such an intention was not present in the minds of the widows at the time they came to enjoy the properties separately. Exhibit C of the date December 10th, 1909, is a sale-deed executed by Parasakti in favour of the 1st defendant, and therein the following appears "What belonged to my husband and what he was enjoying and for what an arrangement was made to the effect that afterwards I and Kaliani Anni (plaintiff) should enjoy in equal half shares for convenience, etc". A similar recital appears in Ex. D which is a document executed by plaintiff in favour of 1st defendant on June 8th 1910. There was thus a clear statement on the part of both the widows as early as 1909

to the effect that their enjoyment separately was only for the sake of convenience. That the 1st defendant was also under the same impression will appear from Ex. A which is a copy of the plaint presented by him in the Subordinate Judge's Court, Tinnevelly, to which plaint plaintiff and Parasakti were parties. In para. 6 there is a clear statement to the effect that the widows were "for the sake of convenience" enjoying the properties by halves. In para. 7 there is a statement to the effect that plaintiff (present defendant) was to get the properties after the lifetime of defendants Nos. 1 and 2 (plaintiff and Parasakti), and such a statement would not have been made in case the division was absolute. In para. 9 it was stated that the sale effected by the 1st defendant without the consent of the 2nd defendant would not be valid beyond the lifetime of the 1st defendant. If the division was complete and the right of survivorship was given up, the consent of one widow to the alienation effected by the other widow would not have been necessary. Exhibit J is the plaint in another suit instituted by 1st defendant in the District Munsif's Court, Ambasamudram in the year 1902, to which suit Parasakti and plaintiff were parties. Although the name of the plaintiff is given as Medai Dalavoi Thitharappa Mudaliar, he is said to be the son of Medai Dalavoi Kumarasami Mudaliar, and the signature to the body of the plaint, as also to the verification, are of Tirumalappa Mudaliar, there can be no doubt that the plaintiff in that suit was the present 1st defendant. In para. 6 of this plaint, the 1st defendant claims to be entitled to all the properties left by Shanmuga Kumaraswami after the death of the two widows, and such a demand would not have been made in case there had been a complete division in status, and the right of survivorship lost to each of the widows. There is, therefore, strong documentary evidence to indicate that the widows intended the division to be only for the sake of convenience, and that the 1st defendant was also under the same impression. Reference was made to Exs. XV and XV (*a*) which are sale-deeds executed by Parasakti in favour of the 1st defendant on the 19th of November 1915. These documents were admittedly executed a few days before her death, and she was aged 70 then. It is stated in these documents that Kaliani had no subsequent interest in the properties. It was suggested on behalf of the plaintiff that the 1st defendant acquired influence over Parasakti during her later days, and got from her documents in his favour. The 1st defendant has not gone into the witness-box, and the circumstances under which Exs. XV and XV (*a*) were obtained have not been explained. The documents relating to the ten circumstances above referred to, have been dealt with in detail by the learned Subordinate Judge and it will serve no useful purpose to deal with them here.

The right of Hindu widows to effect a partition of their husbands' estate in such a way as to release the right of survivorship each possessed, was first recognised in *Ramakkal* v. *Ramasami Naicken* (1). It was there held that there was no legal obstacle to prevent one of two co-widows from so far releasing her right of survivorship as to preclude her from recovering from an alienee after the other co-widow's death, property given by way of partition to the latter and alienated by her. In this case there was a formal registered partition deed and, upon a construction of its terms it was held that the right of survivorship was given up. In *Gomathi Ammal* v. *Kupputhayi Ammal* (2), the above mentioned case was referred to, and it was held that it was open to daughters while effecting a partition, by apt language to renounce their right of survivorship. In that case the daughters proceeded on the erroneous view that they had not a qualified but had an absolute estate which carried with it no right of survivorship, and it was held that the parties could not have possibly intended to renounce and did not renounce the rights of each to take as the father's heir. The learned Judges observe that it was a question of intention in each case, to be gathered from the deed of partition, if any, and the surrounding circumstances, whether the daughters retained or renounced their rights of survivorship. In *Subbammal* v. *Krishna Aiyar* (3) there was a deed of partition between the widows; and, on the basis of the deed it was held that the female heirs holding limited estates can so divide as to preclude the right of survivorship *inter se*. That this could also be done by means of an oral partition was

(1) 22 M. 522; 9 M. L. J. 101; 8 Ind. Dec. (N. s.) 373.
(2) 14 M. L J. 175
(3) 22 Ind. Cas. 399; 26 M. L. J. 479.

held in *Alamelu Ammal* v. *Balu Ammal* (4). The oral partition was proved; and the learned Judge (Sadasiva Iyer, J.), observes as follows: "In this view, the plaintiffs having effected an oral partition with Subbammal, giving her under the oral partition agreement an absolute right in plaint properties, which gift involves the relinquishment by themselves of their right to claim possession of the property if they survived Subbammal, the said partition arrangement is binding upon them". The Vakil for the 1st respondent referred to the case of *Hardei* v. *Bhagwan Singh* (5) but it will appear from the observations at page 440* that the arrangement was supported, on the gronnd that it was a family settlement, and that the rights of the parties were in doubt when the partition was made.

The Vakil for the 1st respondent, also referred to the judgment in an unreported case, *Nelakanti Sundarasiva Row* v. *Ivatuary Viyyamma* (6) but in that case this Court held that there was an arrangement between the parties to the effect that the division was absolute: although the Trial Judge held that such an inference should be drawn from the conduct of the parties. The trend of the decisions above referred to indicates to my mind that it has to be proved by clear evidence that the widows were conscious of the right of survivorship possessed by them; and that they intended to give up such right. Exhibit L is of no value because the division under it was made on the clear supposition that the widows got an absolute interest under the Will left by their husband. This document cannot, therefore, indicate the intention with which the properties in suit were divided; and there being no other evidence to indicate what the intention of the parties was when the properties were divided; and the circumstances referred to by the 1st defendant's Vakil being not conclusive for the purpose of proving division in status; coupled with the fact that Exs. A, C, D and J prove in unmistakable terms that the division was only for the sake of convenience; the only conclusion that can be come to is the one come to by the learned Subordinate Judge, *i. e.*, that there was no giving up by the widows of the right of survivorship, and that separate enjoyment in equal moieties was resolved upon only for the sake of convenience.

The memorandum of objections filed by the 1st respondent relates also to alienations with respect to properties in the possession of the 1st defendant, which have not been upheld. Mr. Krishnaswami Iyer who appeared for the respondent did not urge any arguments impeaching the finding of the lower Court with respect to these alienations

The 7th defendant also filed a memorandum of objections with respect to the sales in his favour made under Exs. LXI, LXII, LXIII. He is closely related to the 1st defendant, and did not examine himself. Exhibit LXI of the date 4th October 1909 is for a sum of Rs. 700, and it recites that this amount was paid in cash, to meet the pilgrimage expenses of Parasakti Vadivu. There is no evidence to show that Parasakti Vadivu went on a pilgrimage at or about the time of Ex. LXI, and the circumstance that the plaintiff admitted that she went twice to Benares could not be availed of because, she has not stated that Parasakti Vadivu went to Benares at or about the time of Ex. LXI. Moreover, the properties which were in the possession of Parasakti Vadivu were yielding an income of Rs. 5,000 to Rs. 6,000 a year; and it cannot be said that she could not have gone on a pilgrimage without effecting a sale of immoveable properties.

Exhibit LXII dated November 29th 1910, appears to be a rectification deed and is connected with and goes with Ex. LXI.

Exhibit LXIII of the date December 6th 1915 purports to be for a sum of Rs. 2,000 and this amount is said to have been borrowed by Parasakti Vadivu "for the purpose of establishing a fund for the expenses of her funeral obsequies". This document was executed four days before her death, and there is absolutely no evidence to show that the amount was entrusted with any person to perform her funeral obsequies. The case in *Sadashiv Bhaskar Joshi* v. *Dhakubai* (7) was relied on, but the facts of that case are that the amount was spent on funeral obsequies; and it was consequently held that the amount spent was a charge upon the husband's estate. The conclusion of the learned Subordinate

(4) 26 Ind. Cas. 455; 28 M. L J. 685; 16 M. L. T. 592; (1915) M. W. N. 26.

(5) 50 Ind. Cas. 812; 13 L. W. 436; 24 C. W. N. 105 (P. C.).

(6) 91 Ind. Cas. 401; 48 M. 933; 49 M. L. J. 266; (1925) M. W. N. 643; 22 L. W. 398; (1925) A. I. R. (M.) 1267.

*Page of 13 L. W.—[*Ed.*]

(7) 5 B. 450; 3 Ind. Dec. (N. S.) 297.

Judge with respect to these documents has to be upheld.

The appeal preferred by plaintiff relates to properties comprised in Schs. II, XII and XIII. The sale-deeds are Exs. III, IV and IX, and all that was urged was that the properties were sold for very inadequate sums. It was said that the plaintiff sold her share under Exs. XI and XII for Rs. 5,300 and odd, that Ex. IX was only for Rs. 4,000, that Exs. XI and XII had been executed 10 months prior to Ex. IX and that the sale under Ex. IX should also have been for at least Rs. 5,300. It was also said that the 1st defendant purchased under Ex. XIII the properties conveyed under Exs. IX, XI and XII for a sum of Rs. 6,500, and that this circumstance also indicated that the sale for Rs. 4,000 under Ex. IX was for a grossly inadequate sum. Beyond the inference to be drawn from the considerations recited in Exs. XI and XII no evidence worth the name has been let in to prove that the sale under Ex. IX was for a grossly inadequate sum. Exhibit Q was relied upon, but the person who prepared the statement was not examined, and the value of the property as given in it is, therefore, of no evidentiary value. The finding of the learned Subordinate Judge with respect to these schedules has, therefore, to be upheld.

Another objection urged by the Vakil for the appellant with respect to alienations evidenced by Exs. III, IV and IX was, that the registration of these documents was invalid. It was stated that certain items of property not intended to be conveyed, were conveyed under them, that this was done with a view to give jurisdiction to the Sub-Registrar within whose jurisdiction the vendors resided, and that as a fraud on the Registration Law was practised, the registration was invalid. It was conceded that the items said to have been included with this view belonged to the vendors and neither the writer nor the attestors to these documents have been examined for the purpose of proving that the items were never intended to be conveyed. It was said that these items did not pass into the possession of the vendees but this circumstance even if true cannot be taken to imply that they were included in the documents for the purpose of practising fraud upon the Registration Law. This contention cannot, therefore, prevail.

Another objection urged by the appellant's Vakil was with respect to the interest allowed on mesne profits. The lower Court allowed interest at six per cent. and it was contended that interest should have been allowed at the rate of 12 per cent. I am not prepared to interfere with the discretion exercised by the lower Court.

The last ground of appeal relates to mesne profits subsequent to suit and upto the date of the delivery of possession. It was mentioned by the 1st respondent's Vakil that a suit had been filed by the plaintiff for the recovery of mesne profits for a period of three years subsequent to suit; but the plaintiff's Vakil stated that he was prepared to withdraw that suit which was still pending and which was stayed pending this appeal, in case this Court gave a direction for the recovery of mesne profits due from the date of plaint to the date of the delivery of possession. The Vakil for the 1st respondent stated that he had no objection to this course.

The decree of the lower Court will, therefore, be modified by adding a direction to the effect that the plaintiff will be entitled to mesne profits from the date of plaint to the date of the delivery of possession, the amount to be ascertained by the lower Court.

The printing in this case appears to me to have been recklessly done. There are two paper-books containing 624 pages. Schedules have been printed which have no bearing with the matters in issue between the parties and our attention was not drawn to more than 30 Exhibits. Excepting the evidence of plaintiff, the remaining oral evidence was not referred to. It appears to me that the costs of printing the two paper-books containing oral and documentary evidence in the case should not be allowed in taxation.

In the result the decree of the lower Court will be modified as indicated above. Appellant will pay the costs of the contesting respondents, the costs not to include the costs of printing the oral and documentary evidence in the case.

The memorandum of objections filed by respondents Nos. 1 and 7 will stand dismissed with costs, costs not to include cost of printing paper-books.

Spencer, J.—I agree.

V. N. V.

N. H. *Decree modified.*

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 17 OF 1925.

September 16, 1925.

Present:—Mr. Kennedy, J. C., and Mr. Rupchand Bilaram, A. J. C.

JOTSING HARISING ADVANI—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA—DEFENDANT—RESPONDENT.

Cantonments Act (XV of 1910), s 15 (1)—Water charges, whether tax—Modification of charges—Previous sanction of Governor-General, whether necessary—Cantonment Committee, whether can sell water—Cantonment Code of 1912, r. 157—Bombay District Municipal Act (III of 1901), s 71.

The water charges sanctioned by the Governor-General in Council as required by s. 15 (1) of the Cantonments Act and levied by a Cantonment Committee under Notifications issued under the said section are in the nature of a tax and cannot be increased or varied by the Committee without the previous like sanction of the Governor-General in Council [p 362, col. 1]

Badcock v. *Hunt*, (1889) 22 Q.B D. 145, 58 L J. Q B. 134; 60 L. T 314; 37 W R. 205, 53 J P. 340 and *Committee of Management of Hyderabad* v *Ramchand Gownkiram*, 87 Ind. Cas 258; 16 S. L R. 98 at p 101, (1923) A I R (S.) 1, explained and distinguished

Rule 157 of the Cantonment Code of 1912 does not empower a Cantonment Committee to limit the quantity of water supplied in proportion to the buying value of the tax levied This rule is not intended by implication to vest a non-commercial body like a Cantonment Committee with the right to vend water as a commodity [p 363, col. 2]

Appeal against the judgment and decree of the District Judge, Hyderabad Sind, dated the 2nd December 1924.

Mr. *Pahlajsing B. Advani*, for the Appellant.

Captain *C. C. Lewis*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit instituted by the plaintiff-appellant for a declaration that certain water charges levied from him by the Cantonment Committee of Hyderabad were in excess of the water rates sanctioned by Government for refund of the excess amount levied and for Rs. 200 as damages sustained by him during the period his water supply was cut off for refusal to pay such charges.

The plaintiff-appellant has died since the filing of this appeal and his representative has been brought on the record.

The facts leading up to this litigation are not in dispute.

The Cantonment Committee received its supply of water from the Hyderabad Municipality on payment of certain charges settled by the two bodies on some date prior to 1913. The Cantonment Committee recouped itself for the amount paid to the Municipality by recovering certain water rates from the occupants of property within the Cantonment limits, which were sanctioned by Government in 1913. Government Notification No. 5099 of 1923, empowered the Committee *inter alia* to levy for use of water for domestic purposes a flat rate of 10 per cent. on the rental of all premises within their limits and provided for the mode of fixing such rentals. Government Notification No. 5594 empowered the Committee to charge certain water rates for buildings under construction with a minimum flat rate of Rs. 4 per month where no water main was on the premises, and a graduated but uniform scale of rates where a water main had been laid, the scale of rates to be levied depending on the dimensions of the water main.

In 1923 the Hyderabad Municipality revised its terms for the supply of water and it was agreed between the two bodies that from 1st April 1923 the Hyderabad Municipality was to receive payment at the rate of Re. 0-10-6 per 1000 gallons of water supplied within the Cantonment limits. In anticipation of the sanction of Government and the issue of fresh Notification enabling the Committee to charge higher rates, the Committee fixed metres to the water mains of some of the residential buildings, where they thought that the flat rate of 10 per cent. on the rental was not a sufficient recompense for the supply of water with the object for charging such occupants the actual cost of water consumed calculated at the rate of Re. 0-10-6 per 1000 gallons subject, however, to the payment of the minimum water rate on the 10 per cent. rental basis.

The plaintiff-appellant was the owner of one of such Bungalows. He went to live in it in the beginning of April 1923 and immediately thereafter he commenced to rear a garden in his compound and also to carry out extensive repairs, alterations and additions. He was a retired Executive Engineer and required greater comforts than those afforded by the Bungalow as already constructed. For April and May 1923 the Committee sent him a bill for Rs. 6 per month for use of water for domestic purposes and for Rs. 8 per month for constructional purposes in terms of the two Notifications. He demurred to the payment of a double water rate and contended that Government Notification No. 5594 of 1913

referred to new buildings only. The Committee thereupon decided to charge him for the quantity registered by the metre attached to his house at their actual cost of Re. 0-10-6 for 1000 gallons which was far in excess of Rs. 14 per month. The bill for one of the months alone was Rs 43 The plaintiff refused to pay the amended bills with the result that the Committee cut off his water connection which was restored to him on his paying under protest his overdue bills. After paying such bills he instituted the present suit.

The points urged before us are the same taken in the lower Court.

The main point at issue between the parties is as to the right of the Committee to claim for supply of water in excess of rates sanctioned by Government and it depends on the question whether such rates are levied as a tax and cannot be increased or varied by the Committee without the like sanction of Government.

A perusal of the two Notifications Nos. 5099/13 and 5594/13 shows without a shadow of doubt that the water rates sanctioned thereunder were intended to be enforced as taxes. Both Notifications purport to have been issued under s. 15 (1) of the Cantonments Act 1910 which reads as follows:—

"With the previous sanction of the Governor-General in Council, the Local Government may, by Notification in the Official Gazette,—

(*a*) impose in any Cantonment which is not included in a Municipality any tax which, under any enactment in force at the date of the Notification, can be imposed in any Municipality within the territories administered by such Government; and

(*b*) abolish or modify any tax so imposed."

Government Notification No. 5099 of 1913 provides for a flat rate to be imposed in the case of residential buildings on their rental basis irrespective of the quantity of water consumed by the registered occupant or his tenant.

Government Notification No. 5594 of 1913 again provides for a flat minimum rate of Rs 4 per month for each building under construction irrespective of the quantity of water used in any particular month. Neither of the two Notifications afford an option to the registered occupant to avoid payment of the water rate on the ground that he does not intend to use water supplied by the Committee. An occupant who has a well in his premises or is prepared to dig one or who receives his water supply from a channel adjoining and outside the Cantonment limits is equally liable to pay the flat rates fixed by the two Notifications.

It is likewise not open to a registered occupant to pay less than the sanctioned water rate on the ground that he is consuming less water than his neighbour whose rental is less than his.

The use of the expression "water rate" in the two Notifications does not indicate that such water rate is not a tax. The expression "tax" is more appropriately used in respect of an imperial tax imposed on persons generally without reference to locality as opposed to a local, or Municipal tax levied for the use of a local authority on persons or property within the local limits of such authority and often referred to as a rate.

The learned District Judge has relied on certain observations of Fry, L J., in *Badcock* v. *Hunt* (1) in support of his finding that the water rates referred to in the two Notifications were not taxes but mere charges for the supply of water, and as such liable to be varied without sanction of Government.

Badcock's case (1) is distinguishable and the observations of Fry, L. J., so far as they apply to the facts of the present case on the contrary support the plaintiff's case.

In that case the Court of Appeal was called upon to interpret a covenant in a lease of Warehouse in the City of London by which the lessor had covenanted to pay "all rates, taxes and impositions whatsoever whether Parliamentary parochial or imposed by the Corporation of the City of London or otherwise, however, which were or thereafter might be rated or assessed on the said premises". And the lessee claimed to recover from the lessor under the terms of that covenant certain charges paid by them to the New River Company of London for supply of water to the lessees for domestic purposes. These charges were referred to in the incorporating Statute of the River Company as water rates, and it was not seriously contended that such charges or rates were not the rates specifically referred to in the covenant, and were payable only in the event of the lessee voluntarily receiving the supply of water. The only material question for decision was whether such charges were "imposed" within the mean-

(1) (1889) 22 Q. B. D. 145; 58 L. J. Q. B. 131; 60 L. T. 314; 37 W. R. 205; 53 J. P. 340.

ing of the covenant and it was held that as such charges were payable only in the event of the lessee voluntarily desiring to have the supply of water, they were not imposed on him. The following observations of Fry, L. J. at page 149* are pertinent to the point at issue:

"In my judgment it is not imposed at all within the meaning of the covenant, it becomes payable by the voluntary action of the person who chooses to take the water and thereby incurs the legal liability to pay for it; it is not, like the rates and charges previously mentioned in the covenant, an imposition by some superior authority which a man becomes liable to pay whether he will or not."

These observations support the case of the plaintiff and not that of the defendant. Here the sanctioned water rates are in no way voluntary depending on the plaintiff's desire to have the water supply. The distinction between a voluntary and a non-voluntary liability for water rate payable to a District Municipal Corporation under s. 71 of the Bombay District Municipal Act III of 1901 and that payable to the Municipal Corporation of Bombay under s. 141 of the Bombay City Municipal Act III of 1888 was pointed out by Fawcett, J. C. in *The Committee of Management of Hyderabad* v. *Ramchand Zownkiram* (2). The water rate referred to in the two Notifications is not only expressed to be but is pre-eminently a tax imposed by the Crown and could not be modified without the sanction of Government.

It has been urged by the learned Solicitor for the Crown that though the water rate prescribed by the two Notifications be held to be a tax, r. 157 in Ch. IX of the Cantonment Code of 1912 empowers the Cantonment Committee to control the supply of water and that it is, therefore, open to the Committee to prescribe the quantity of water an occupant may comsume free of charges in lieu of the water rate or tax imposed on him and to supply to him such additional quantity of water as he may require on such reasonable terms as the Committee may prescribe. And it is urged that in the present case the Committee had prescribed the most reasonable rate of charging the plaintiff the actual cost to the Committee of such supply of water. At first sight this argument may appear to be sound and supported by equitable considerations. But the obvious answer to it is that the Cantonment Committee is a creature of the Statute and can only exercise such powers as are expressly or impliedly delegated to it and any act of the Committee outside the scope of such powers is *ultra vires*. No express provisions similar to those of s. 71 of the Bombay District Municipal Act III of 1901 empowering the Cantonment Committee to supply water to occupants on its own terms find place either in the Cantonments Act of 1910 or the Cantonment Code of 1912. Chapter IX of the Cantonment Code of 1912 is intended to secure a pure and uncontaminated supply of water and to prevent its waste. It provides adequate remedies by way of punishment for the enforcement of its rules. This Chapter is, however, not intended to empower the Cantonment Committee to deal in water or to fix and charge reasonable rates for its supply. And it is difficult for us to read into r. 157 a provision enabling the Committee to limit the quantity of water supplied in proportion to the buying value of the tax levied or to hold that this rule was intended by implication to vest in a non-commercial body like the Cantonment Committee the right to vend water as a commodity. The two Notifications do not purport to entail any limitations on the quantity of water to be supplied and, however, equitable the action of the Committee may be, it cannot be upheld as *ultra vires*.

We think the learned District Judge was in error in refusing to grant the declaration asked for.

With regard to the liability of the plaintiff to pay the water rate both for domestic and for constructional purposes, we think on the facts of this case, there can be no doubt that the plaintiff was liable. He was using water for two different purposes. He was occupying the Bungalow and using water for domestic purposes. He was also carrying out extensive alterations which were not confined to mere white-washing of the Bungalow or to ordinary and usual repairs which a landlord is required to carry out to maintain the Bungalow in proper condition, but consisted of building new walls and additional rooms. We hold that, for the period in suit the plaintiff was liable to pay Rs. 6 per month as the water rate for domestic purposes and Rs. 8 per month as the water rate for his building being under construc-

(2) 87 Ind. Cas. 258; 16 S. L. R. 98 at p. 101, (1923) A. I. R. (S.) 1.

*Page 91 (1889) 22 Q. B. D.—[*Ed.*]

tion and that his refusal to pay at that rate was wrongful.

The plaintiff has failed to prove that he suffered Rs. 200 as damages or that he suffered any damage at all. His case, therefore, fails on this count also.

We accordingly vary the decree of the lower Court by granting relief for declaration that the act of the Cantonment Committee in enforcing payment of water charges in excess of the sanctioned rates was *ultra vires*, and by ordering that the defendant do refund to the legal representative of the plaintiff the excess recovered over and above Rs. 14 per month for the period in suit In the circumstances of the present case where the plaintiff has succeeded only in part we order that each party should bear his own costs throughout.

F. B. A.

N. H. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 480 OF 1924.

November 18, 1925.

Present:—Mr. Findlay, Officiating J. C.

NILKANTH—PLAINTIFF—APPELLANT

versus

GAJANAN—DEFENDANT—RESPONDENT.

Hindu Law—Joint family—Partition suit—Mesne profits, when can be claimed.

There is no absolute rule that in a partition suit, a claim for mesne profits is necessarily unsustainable. Where the plaintiff proves that he was excluded from the property he is entitled to claim mesne profits for the period during which he has been excluded. [p. 365, col. 2.]

Balakrishna Aiyar v. *Muthusawmi Aiyar*, 3 Ind. Cas. 878; 32 M. 271; 5 M. L. T. 145; 19 M. L. J. 70, distinguished.

Krishna v. *Subbanna*, 7 M. 564; 8 Ind. Jur. 504; 2 Ind. Dec. (N. S.) 975, followed.

Bhivrav v. *Sitaram*, 19 B. 532, 10 Ind. Dec. (N. S.) 355 [illegible] 21 Ind Cas. 590, 9 N. L. R. 115 and [illegible] v. *Goturam Radhakisan*, 54 Ind. Cas. 115; 44 B. 179; 21 Bom. L. R. 1179, referred to.

Appeal against a decree of the Additional District Judge, Nagpur, dated the 27th August 1924, in Civil Appeal No. 27 of 1924.

Mr. *M. V. Abhyankar*, for the Appellant.

Mr. *M. R. Bobde*, for the Respondent.

JUDGMENT.—The plaintiff Nilkanth is the nephew of the defendant Gajanan. The suit was brought in the Court of the First Subordinate Judge, 2nd Class, Nagpur, for partition of two houses [illegible] in *Mouza* Nagardhan of Ramtek [illegible] well as of moveables and also for Rs. 900 being the plaintiff's alleged share of profits of an occupancy field in *Mouza* Nandapuri. The pleadings of the parties have been fully stated in both the judgments of the lower Courts and need not be repeated here. On the issues which arise on these pleadings the Subordinate Judge gave the following findings:—

(*a*) that the plaintiff and defendant were joint on the date of suit;

(*b*) that in revenue proceedings the defendant had admitted the fact of jointness with the plaintiff;

(*c*) that one of the houses in the plaint, *viz.*, that facing west, was the self-acquisition of the defendant and was not liable to be partitioned,

(*d*) that the claim to partition of the house was not barred by ss. 35 and 94 of the Tenancy Act, 1898;

(*e*) that there were certain family debts binding on the plaintiff, who was then a minor;

(*f*) that plaintiff was entitled to the half share of the profits of the field and could claim them for 18 years from 1904 to 1922;

(*g*) that there was no ancestral moveable property;

(*h*) that defendant and plaintiff's father had not separated in 1901;

(*i*) that plaintiff was liable for certain debts paid by the defendant.

On these findings a preliminary decree was passed for partition of the one house held as joint property and the defendant was ordered to pay Rs. 537-8 0 as plaintiff's share of profits of the field described above.

The defendant appealed to the Court of the Additional District Judge, Nagpur. He only succeeded as regards part of the decree which ordered the payment of Rs. 537-8-0 on account of profits of the field. The plaintiff has now come up on second appeal as regards dismissal of this part of the relief claimed by him.

The Additional District Judge has dealt with the matter of profits in paras. 6 and 7 of his judgment. He has held that there was no exclusion of the plaintiff until his title was denied in the year 1921. It seems to me that in para. 2 of the plaint there was a clear allegation which practically amounted to one of exclusion,

That allegation was to the effect that one year after the death of Jagoba, father of the plaintiff, the defendant made it impossible for the plaintiff and his mother to live with him and he was forced to remove to his maternal . . In para. 4 of the plaint it was alleged that when after the plaintiff had attained majority he in 1921 claimed the profits for 18 years during which he had been excluded from the enjoyment of the property, the defendant had refused to pay him any such profits. I cannot, therefore, agree with the following remarks made in para. 6 of the lower Appellate Court's judgment:—

"It is not alleged in the plaint that there was a dispossession or that there was any occasion to prohibit the plaintiff from exercising possessory rights or that the title was denied till the year 1921."

It is true that the plaint as the Judge of the lower Appellate Court himself remarks was inartistically drafted, but if it be read as a whole I think the only reasonable construction to be put on it was that there was a definite allegation of exclusion. If any doubt remained on this point it seems to me to be removed by the allegations of the defendant himself in his written statement dated the 28th February 1923. Paragraph 5 thereof if it means anything at all clearly implies that from 1901 the defendant remained in sole possession of the property. This allegation the defendant has, as we have seen, failed to establish, but it is nonetheless of great value as indicating his possession with regard to the field in question. In para. 6 of the same written statement, there was a clear and unequivocal denial that the plaintiff had ever been the tenant of the field in question. In para. 11 of the same, it was clearly alleged that the plaintiff had been admittedly excluded from the plaint property for more than 12 years before the date of the suit and, as if to make certainty sure para. 12 went on to offer a plea of abandonment of the plaint property, while in para. 19 a definite affirmation was made that the defendant was the sole owner of the field in question. If these allegations mean anything at all they imply that the defendant asserted his exclusive right to the tenancy of the field, that he denied jointness of the plaintiff therein, and further admitted that he had excluded the plaintiff. The Judge of the lower Appellate Court seems to have entirely overlooked this aspect of the case. It is perfectly true that the decision in *Balakrishna Aiyar* v. *Muthusawmi Aiyar* (1) laid down that a co-parcener, who sues for possession, *and who has not been excluded from the family*, is not, unless he establishes fraud or misappropriation, entitled to call upon the manager to account for dealing with the family property. But in relying on this case the learned Additional District Judge has entirely overlooked the words "who has not been excluded from the family". The *ratio decidendi* of the said decision is, therefore, quite inapplicable in the present case.

The learned Additional District Judge remarks that the fact that the respondent may have obtained no share of the income since he ceased to live with the appellant does not affect the principle which is laid down in *Balakrishna Aiyer* v. *Muthuswami Aiyar* (1) and other similar cases. The real point, however, in the present case is that the defendant's attitude in this suit has been that from 1904 he was exclusive owner of the property, and that plaintiff had no claims whatever to the share of the profits. In these circumstances I am wholly unable to see how, having excluded plaintiff, as he has, and having, moreover, admitted the exclusion himself, he can be brought within the purview of *Balakrishna Aiyar* v. *Muthuswami Aiyar* (1). On the contrary it seems to me that the principle enunciated in *Krishna* v. *Subbanna* (2) is fully applicable in the circumstances of the present case. That case is to all intents and purposes on all fours with the present one, *cf.*. *Bhivrav* v. *Sitaram* (3). In *Amritrao* v. *Govind* (4) Mittra, A. J. C. remarked at page 148* as follows:—

"No doubt in cases of exclusion from joint property, accounts may be taken of past profits, but this, I think, can only be taken in a suit for general partition."

There is thus, in my opinion, no absolute rule that in a partition suit each and every claim for mesne profits is necessarily unsustainable. In the case of the present plaintiff, who was excluded as a minor from the property, the claim, therefore, in my opinion, clearly lies.

The decision of Macleod, C. J., and

(1) 3 Ind. Cas 878; 32 M. 271; 5 M. L. T. 145; 19 M. L. J. 70.
(2) 7 M. 564; 8 Ind. Jur. 504; 2 Ind. Dec. (N. s) 975.
(3) 19 B. 532; 10 Ind. Dec. (N. s.) 355.
(4) 21 Ind. Cas. 590; 9 N. L. R. 145.

*Page of 9 N. L. R.—[*Ed.*]

Heaton, J., in *Ramnath Chhoturam* v. *Goturam Radhakisan* (5) has been quoted by the respondent, but I cannot see that it is applicable to the circumstances of the present case. For these reasons, therefore, I am of opinion that the lower Appellate Court was incorrect in dealing with the profits in question in the way it did. The judgment and decree appealed against are reversed and instead the decree of the first Court is restored. The defendant-respondent will bear the present appellant's costs both in this Court and in the lower Appellate Court. The Judge of the first Court when he passes the final decree will allocate the costs in it according to the result.

Z. K. *Decree reversed.*

(5) 54 Ind. Cas. 115; 44 B. 179; 21 Bom. L. R. 1179.

MADRAS HIGH COURT.

CIVIL APPEAL No. 131 OF 1924.

August 28, 1925.

Present :—Sir Victor Murray Coutts Trotter, KT., Chief Justice, and Mr. Justice Vishwanatha Sastri.

PALANIAPPA CHETTIAR—2ND LEGAL REPRESENTATIVE OF THE PLAINTIFF—APPELLANT

versus

B. RAJARAJESWARA SETHUPATHI *alias* MUTHURAMALINGA SETHUPATHI AVERGAL, RAJAH OF RAMNAD AND OTHERS—DEFENDANTS NOS 1 TO 3 AND LEGAL REPRESENTATIVES OF PLAINTIFFS NOS. 1 AND 3—RESPONDENTS.

Malicious prosecution, suit for damages for—Death of plaintiff—Legal representative, whether can continue suit.

A suit for damages for malicious prosecution cannot, after the death of the plaintiff, be permitted to be carried on by his executor or legal representative.

Appeal against a decree of the Court of the Subordinate Judge, Madura, in Original Suit No. 20 of 1923.

Mr. *V. Rajagopala Iyer*, for the Appellant.

Messrs *C. V. Ananthakrishna Iyer* and *S. Sundararaja Iyengar*, for the Respondents.

JUDGMENT.—This is a point of some little interest. A man called Subramanya Chetti started a suit for damages for malicious prosecution and in his plaint, he claimed a sum of money by way of general damages and he also claimed special damages under two heads. The first was Vakil's fees and the second was travelling and other incidental expenses for securing the attendances of witnesses for the purpose of defending the prosecution which was launched against him. We will take it that that prosecution failed and had this unfortunate man lived, he would have got substantial damages against the defendant which would have included the special damages alleged to have been incurred by him. As a matter of fact, he died while the suit was pending, and when the suit actually came on for trial before the learned Subordinate Judge, it was proposed to continue the action with his executor or legal representative substituted as the plaintiff. The learned Judge held that that could not be done and we agree with him.

The thing can be put in two ways: (1) on a narrower and (2) on a broader ground. The narrower ground is this: that his cause of action throughout is the tortious act of which he was the victim and not the fact that he incurred out of pocket expenses, *e.g.*, for getting himself cured by a Doctor in case of personal injuries or getting himself defended by a Barrister or a Vakil in case of malicious prosecution. That goes to swell the bill against the defendant but it is not a cause of action. The cause of action is that which was done to him by running him over or by prosecuting him maliciously as the case may be. When we come to the case of an executor or a legal representative, his cause of action on behalf of the estate is quite different. He can only sue for a tangible, measurable, pecuniary loss caused to the estate by reason of the tortious act, so that it would follow on the narrower ground that although both the plaintiff if living, and his legal representative after his death had a cause of action for the recovery of these out of pocket expenses caused by the wrong of the defendant, nevertheless they would recover them in different rights and for different reasons. The living plaintiff will recover them as part of the damages for his general cause of action, *i. e.*, malicious prosecution; while to the executor or administrator, the expenditure would be the sole cause of action, because to that alone would he be entitled to a judgment. It may be put as it was put in the English case of *Pulling* v. *Great Eastern Railway*

Co. (1) on the broader ground that these expenses are not the losses to the estate of the deceased within the meaning of the Act of Parliament (the wording of which is practically identical with that of the Indian Statute), because they are so submerged and overtopped by the real cause of action which was the tortious injury here malicious prosecution) that they must be treated as a mere incident of that cause of action and not as giving rise to a separate head of liability enuring after death, to the legal representative. On that the legal representative could not start an independent action for the expenses of the malicious prosecution as in the present case. We respectfully agree but in any event we think that the learned Judge was quite correct in holding in accordance with the authorities in Calcutta and Madras that the cause of action of the deceased man himself and that if any of his executors, are so different that it would be impossible to permit his legal representatives to carry on a suit instituted by him to recover damages. That being so, there is no cause of action and this appeal will be dismissed. One set of costs to be divided.

V. N. V. *Appeal dismissed.*

Z. K.

(1) (1882) 9 Q. B. D. 110; 51 L. J. Q. B. 453, 30 W. R. 798; 45 J. P. 617.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 219 OF 1924.

August 11, 1925.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

LEOH MOSES AND OTHERS—APPLICANTS

versus

SOLOMON JUDAH MEYER—OPPONENTS.

Civil Procedure Code (Act V of 1908), s 115—Letters of Administration, grant of, by Resident at Aden—Revision—Jurisdiction of Bombay High Court.

The Bombay High Court has no jurisdiction to interfere in revision with an appealable order of the Resident's Court at Aden.

An order granting Letters of Administration passed by the Resident's Court at Aden, is a final judgment against which an appeal would lie to the Privy Council. It is not, therefore, open to the Bombay High Court to entertain an application in revision against such an order.

Application against an order of the Resident at Aden.

Mr. *Binning* (with him Messrs. *Crawford Bailey & Co.*), for the Applicants.

Mr. *O'Gorman* (with him Mr. *K. N. Koyajee*), for the Opponents.

JUDGMENT.

Macleod, C. J.—A petition was filed in this Court by Leoh Moses *bin* Moses Enoch Levi and Hanna Menahem Haiter, daughter and widow of one Moses *bin* Moses, stating that the sons of Dawood Moses, brother of the deceased Moses *bin* Moses had applied to the Court of the Resident at Aden for the grant of the Letters of Administration with the Will annexed of the estate of Moses Enoch Levi, the father of the said Moses *bin* Moses. The Court of the Assistant Resident issued citations, and the petitioners filed a caveat against the grant of letters. The Assistant Resident finding the matter contentious directed under s. 75 of the Probate and Administration Act that the petition and the documents should be returned to the applicants for submission to the Resident. The Court of the Resident then issued notices fixing April 17, for the hearing of the said application. Thereafter because the petitioners did not file an affidavit in support of their caveat within eight days prescribed by r. 600 of the Rules of the Bombay High Court, their objections were invalidated, and therefore, overruled. The petitioners applied to this Court on June 27, 1924, to set aside this order; but the application was rejected on the ground that the order was of an interlocutory nature. On July 14, 1924, the Resident without hearing the petitioners on their objections granted Letters of Administration to the applicants. The petitioners applied to this Court to call for the record and proceedings in order that the order might be set aside. A Rule was granted. Apparently it was noted at the time that a question might arise whether this Court was competent to entertain an application under s. 115 of the Code, as the judgment or order complained against was appealable. In *Rahimbhai Jamabhoy* v. *Mariam Abdul Rasul* (1), it was held that this High Court had jurisdiction to interfere in revision with any order passed by the Resident in the exercise of his civil jurisdiction under the Aden Act II of 1864. I

(1) 5 Ind. Cas. 867; 34 B. 267; 12 Bom. L. R. 149.

feel doubtful whether such an assumption of jurisdiction is warranted under the terms of the Act, but in any event, the case decided by the Aden Court must be one from which no appeal lies. The Aden Court is a Court of final appeal, and the decision in this case is a final judgment or order granting Letters of Administration to the applicants. There would, therefore, be an appeal to the Privy Council. and it is not competent to this Court to deal in revision with such a judgment or order. The Rule is discharged with costs.

Coyajee, J.—I concur.

Z. K. *Rule discharged.*

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 7 OF 1925.

May 11, 1925.

Present:—Mr. Justice Rutledge and Mr. Justice Heald.

MA ME MYA—APPELLANT

versus

MA MIN ZAN—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 23, O. XLIII, r. 1 (u)—*Suit decided on merits—Appeal—Remand for re-decision after adding necessary party—Appeal, whether lies—Buddhist Law, Burmese—Suit to recover share of inheritance—Necessary parties.*

Where an Appellate Court sets aside a judgment of the Trial Court which has been given on the merits and remands the case for a fresh trial on the ground that a necessary party has not been impleaded as a defendant to the suit, the order of remand does not fall within the purview of r. 23, O. XLI of the C. P. C. and is not, therefore, appealable under r. 1 (*u*) of O. XLIII.

In a suit by an adoptive daughter of a deceased Burmese Buddhist couple to recover her share in the jointly acquired estate of her adoptive parents, all persons who are co-heirs of the deceased must be impleaded as parties.

Miscellaneous appeal from an order of the District Court, Henzada, in C. A. No. 74 of 1924.

Mr. *R. M. Sen*, for the Appellant.

Mr. *D. Dutt*, for the Respondent.

JUDGMENT.

Heald, J.—Appellant, claiming to be the adoptive daughter of Nga Le and his first wife Ma Po, sued respondent who is Nga Le's second wife, to recover the share of the jointly acquired property of the marriage of Nga Le and Ma Po to which under Burmese Buddhist Law she became entitled on Nga Le's death. Respondent has a minor son by Nga Le who was no made a party to the suit.

The Trial Court gave appellant a decre for a five-eighth share of the property.

Respondent appealed and one of he grounds of appeal was that her son by Ng Le was a necessary party.

The lower Appellate Court, holding tha the son was a necessary party set aside th judgment and decree of the Trial Cour and remanded the case for a fresh trial wit the son added as a defendant.

Appellant appeals but I do not think tha any appeal lies. Order XLIII, r. 1 (*u*) give a right of appeal against an order unde O. XLI, r. 23 but that rule appiles onl when the Trial Court has disposed of th suit on a preliminary point. It is impossibl to say that the lower Court in this cas disposed of the suit on a preliminary poin and so neither O. XLI, r. 23 nor O. XLIII r. 1 (*u*) applies.

I would, therefore, dismiss the appeal or this ground, but I would add that althoug on the death of Nga Le, his son by respond ent was not one of his heirs, nevertheless since he had become an heir by reason o the re-marriage of his mother before the institution of the suit, I think that he wa a proper party.

I would also add that the learned Judg in the lower Appellate Court has evidently read the judgment in the case of *Ma E Hmyin* v. *Maung Ba Maung* (1) perfunctorily and has failed to understand it.

I would dismiss the appeal with costs Advocate's fees to be three gold *mohurs*.

Rutledge, J.—I concur.

Z. K. *Appeal dismissed.*

(1) 83 Ind. Cas. 426; 2 R. 123; (1924) A. I. R. (R.) 298.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 746 OF 1924.

August 14, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

CHUNI LAL MOKAMDAS MARWADI—DEFENDANT—APPELLANT

versus

E. CHRISTOPHER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Usurious Loans Act (X of 1918), ss. 2 (3), 3—Suit to redeem pledged ornaments—Interest, high rate of—Relief, whether can be granted.

A suit by a debtor to redeem certain ornaments pledged by him with the defendant does not fall within the purview of s. 2 (3) of the Usurious Loans Act, and s. 3 of the Act has, therefore, no application to such a case.

Second appeal from the decision of the Acting District Judge, Poona, in Appeal No. 95 of 1924, varying a decree of the Joint Subordinate Judge at Poona, in Civil Suit No. 1116 of 1923.

Mr. *S. R. Bakhale*, for the Appellant.

Mr. *J. G. Rele*, for the Respondents.

JUDGMENT.

Macleod, C. J.—The plaintiffs sued to redeem their ornaments by paying the loan amount and interest thereon at eighteen per cent. per annum. They admitted that they borrowed the amount of Rs. 2,000 for their business from the defendant and passed to him a promissory note dated September 17, 1922, for that amount on the pledge of ornaments and Cash Certificates of the Post Office, agreeing to pay interest at 6¼ per cent. per mensem, but they alleged that they were orally told by the defendant that they would be charged interest at 1½ per cent. per mensem on the promissory note amount when it was returned. The defendant denied ever having promised to charge interest at 1½ per cent. per mensem.

The chief contention of the plaintiffs was that the Court could give relief against the transaction as being harsh and oppressive under ss. 16, 19-A and 74 of the Indian Contract Act and the Usurious Loans Act X of 1918. It is quite clear that the provisions of the Indian Contract Act would be of no assistance whatever to the plaintiffs. They wanted money for their business and expected to make a good profit out of the business when assisted by the loan from the defendant. The first plaintiff had to admit that she consented freely and willingly to pay a high rate of interest in anticipation of realising a bumper profit out of her own business. The defendant demanded one anna interest and she consented. There cannot, therefore, be any question of undue influence or misrepresentation, and the Trial Judge was right in his decision on this point.

The Judge then referred to the Usurious Loans Act X of 1918 and held that the Act could not apply where the suit is brought by a debtor. Under s. 2 (3) a suit to which the Act applies means any suit, (*a*) for the recovery of a loan made after the commencement of the Act, (*b*) for the enforcement of any security taken or any agreement whether by way of settlement of account or otherwise made after the commencement of the Act, in respect of any loan made either before or after the commencement of the Act. I should say that it is possible that a suit for the enforcement of an agreement whether by way of settlement of account or otherwise made in respect of any loan might include a suit brought by a debtor.

The chief argument urged in appeal was that this was a suit to enforce such an agreement, namely, the agreement to charge interest at the rate of 18 per cent. and not 75.

The Trial Judge [illegible] ing the issues against the [illegible] them to pay the balance due according to the promissory note and the costs of the suit to the defendant, and on their doing so they were at liberty to take back their ornaments lying with the Nazir as produced by the defendant.

The Acting District Judge said :—

"It seems to me that the nature of the suit should be regarded not from the point as to by whom it was filed but from the point as to upon what matter judicial inquiry became necessary and judicial pronouncement made. Plaintiff deposited an amount in Court and asked for release of security pledged and adjudication of the amount due on the promissory note. If the defendant had applied for recovery of the loan made by him the course of the suit would have been exactly the same. In the absence of clear direction to the contrary, I do not consider that the application of the Act can be refused, merely because it is the debtor who came to Court to end the relation between herself and the moneylender.

The security in the present case was ample. The interest was exorbitant. It was excessive within the meaning of the term as explained in s. 3 (2) (*a*) of the Usurious Loans Act. I think it proper in the circumstances to reduce it to one-third of that specified in the promissory note, that is to say 25 per cent. per annum."

The order of the Trial Court was varied accordingly.

We cannot agree. We do not think this is a suit to which the Act applied. It cannot be said that the plaintiffs' suit is for the enforcement of any security taken. It would only be a creditor who could file a

suit for the enforcement of his security. While the fact that the plaintiffs set up an agreement, which, being contrary to the written terms of the promissory note, they were unable to prove, could not be said to change the suit which was really a suit to redeem the ornaments pledged, into a suit to enforce an agreement in respect of the loan. If that were the case, it would always be possible for a debtor to set up an agreement in his favour contrary to the terms of the contract to support a contention that the Court was then entitled to re-open the transaction and exercise the powers given to it under s. 3.

We must, therefore, allow the appeal and restore the order of the Trial Court with costs throughout.

Coyajee, J.—I concur.

Z. K. *Appeal allowed.*

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL NO. 417 OF 1925.

April 28, 1925.

Present:—Mr. Justice Carr.

NACHIAPPA CHETTIAR—APPELLANT

versus

MAHOMED SABIR KHAN—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 81, O. XLI, rr. 23, 25—Mortgage of moveable property—Sale of property in execution of decree against mortgagor—Mortgagee, whether entitled to follow property in hands of purchaser—Remand, what amounts to—Case returned for finding, whether remanded.

A mortgagee of moveable property is not entitled to follow the mortgaged property into the hands of a purchaser who has purchased the property at a sale in execution of a decree against the mortgagor

A case can be remanded only when it is returned for a fresh decision. The word remand is not applicable to an order returning a case for a finding on a particular issue

Special second appeal from a decision of the District Judge, Rangoon.

Mr. *Ba Maw*, for the Appellant.

Mr. *Ankelsaria*, for the Respondent.

JUDGMENT.—The appellant had a mortgage over a piece of land and a number of logs of timber. Both of these properties were purchased by the respondent at a sale in execution of a decree.

The only question that arises now is whether the appellant is entitled to follow the moveable property into the hands of the purchaser. I agree with the District Judge that he is not. Sufficient authority for this proposition is to be found in the decisions reported as *Sreeram Narasiah* v. *Bammireddi Venkataramiah* (1), *Raman Chetty* v. *Steel Brothers & Co.* (2) and *Maung Shwe Hnyin* v. *Fulchand* (3).

This appeal is, therefore, dismissed with costs.

But some comment on the procedure is desirable. The District Judge "remanded" the case to the Sub-Divisional Court to ascertain the relative values of the immoveable and moveable properties with a view to the assessment of costs. I take no exception to that, except that instead of "remanding" the District Judge should have sent the case back for a finding on this question, and after receipt of the finding should have passed his final judgment. Instead of that he merely held back his decree until the return of the case. I do not, however, think that any exception need be taken to the form of the decree.

The word "remand" should be used only when a case is returned for decision. It is used in this sense in the C. P. C. and is not used there in the provisions for return of a case for findings This seems to have caused the Sub-Divisional Judge to misunderstand what he had to do. All that he should have done was to ascertain the respective values and report to the District Judge. Instead he had a fresh decree drawn up, dated the 8th August and signed it before returning the case.

This he had no jurisdiction to do. Moreover, the decree was incorrectly drawn up. This decree is of no effect and the decree of the District Court in any case supersedes it.

To make things clear the final decree of this Court will be a mortgage-decree over this immoveable property in suit for Rs. 5,000 with the costs and interest allowed in the original decree of the Sub-Divisional Court and fixing the same date for payment. It will be declared that the liability under this decree of the present respondents is limited to the amount of the sale-proceeds of the immoveable property, and that the costs awarded to him in this Court and the District Court are separately payable to him by the appellant.

Z. K. *Decree modified.*

(1) 47 Ind. Cas. 976; 42 M. 59; 35 M. L. J. 450; 8 L. W. 517; (1918) M. W. N. 718; 24 M. L. T. 454.

(2) 2 Ind. Cas 351; 5 L. B. R. 8.

(3) 74 Ind. Cas. 52; 1 Bur. L. J. 136; (1923) A. I. R. (R.) 60.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 552 OF 1921.

November 22, 1923.

Present:—Mr. Kennedy, A. J. C.

JETHANAND TEKCHAND—

PLAINTIFF

versus

THE SECRETARY OF STATE FOR INDIA AND ANOTHER—DEFENDANTS.

Railways Act (IX of 1890), s. 72—Risk Note B, goods consigned under—Loss, damages for, suit to recover —Liability of Railway Company, extent of—Burden of proof.

Under Risk Note Form B, all that is required is that the standard of the carrier should not fall below the common practice of the Railway, and it is only when the loss is due to some act of dereliction of duty which has reduced the standard to somewhat below the ordinary standard of precaution that the Railway Company is liable under the Risk Note. [p. 372, col. 2]

In a suit to recover damages from a Railway Company for the loss of goods consigned to the Company for carriage under Risk Note Form B, it is necessary for the plaintiff to show that the loss was due to wilful neglect or other contingency which renders the Company liable under the terms of the Risk Note. [p. 372, col. 1.]

Mr. *Hassomal M. Gurbuxani*, for the Plaintiff.

Messrs. *Tolasing K. Advani* and *T. G. Elphinston*, for the Defendants.

JUDGMENT.—The plaintiff on the 18th March 1920 bought 250 bags of flour from defendant No. 2, the Ganesh Flour Mills. On the 18th March 1920 the Ganesh Flour Mills put these 250 bags on the North Western Railway at Delhi for despatch to Karachi. The North Western Railway is a State Railway and is represented in this suit by the Secretary of State. Only 231 bags, however, arrived at Karachi, the remaining 19 bags having been lost in transit between Delhi and Karachi. The plaintiff having failed to recover anything from either the Flour Mills or the Railway brought an action against both, the Railway and the Mills.

The cause of action was somewhat difficult to ascertain, because in para 3 of the plaint the suit is against the Railway defendant No. 1 for failure to deliver the 19 bags or their price and against defendant No. 2 in the alternative.

The Mills said that their liability to the plaintiff expired as soon as the bags were handed over to the Railway, and they asserted that the Railway took possession of them as a common carrier to deliver to the plaintiffs. They also set up the terms of the contract which exonerates the Mills from any liability in respect of any goods purchased from it as soon as such goods have left the godowns of the Mills.

The Railway set up that the suit was bad in its form and said that the goods were consigned under Risk Note Form B which exempts the Railway from liability from any loss of goods so consigned except under certain special circumstances which the Company pleads are here non-existent. The Court framed various issues and the case has now been heard.

On the first issue, whether the suit is bad for multifariousness, it is certainly difficult for me to understand how the same suit can lie against both the defendants, but I do not think that need detain us. On the second issue, the question as to estoppel of the plaintiff does not arise, it does not appear that the plaintiff has made any admission which would prejudice the right of parties to recover any losses which may have been caused by the failure of the defendant No. 2 to deliver these goods to the plaintiff, at any rate no such statement is proved before me, and no arguments have been addressed to me on the subject.

Issue No. 3.—The consignment was certainly booked at the owner's risk under the Risk Note Form B. Issues Nos. 4, 5 and 6 have been postponed for the present. The remaining issues Nos 7 to 10 can be put more concisely and I propose to discuss them on the following lines:—The goods were bound to be delivered to the plaintiff, but it now appears to me quite clear that it was the duty of the Mills to deliver. Looking at the contract, the contract calls for delivery at Karachi. Clause 4 exonerates the Company from responsibility for late delivery at Karachi Station only if the delay is due to certain contingencies, which do not arise in this case. Under cl. 5 the purchaser is required to take delivery in Delhi only on the condition that waggons are wholly unavailable to transfer the consignment from Delhi to Karachi. Moreover, the bags were put upon the Railway and receipt taken not in the name of the purchaser but in the name of the Mills and the Railway receipt is forwarded to a Bank in Karachi being endorsed over to such Bank and it was only upon satisfaction of the Bank that the receipt was to be handed over by the Bank to the purchaser.

It is true that cl. 3 of the contract says that the Company is not responsible

for shortage of goods after they have been removed from their godowns, but that clearly must mean after the purchaser has taken delivery whether in Delhi at the godown of the Company or at the contractual place of delivery from the godown of the agents. That being so, *viz*, the contract being for the delivery of these goods at Karachi, it is, in my opinion, to the Mills and not to the Railway Company that the plaintiffs must look. The Railway Company has nothing to do with the plaintiffs being merely an instrument by which the Mills were attempting to fulfil their contract for delivery in Karachi. As the Mills failed so to deliver, for whatever cause it might be, it is not I think possible for the Mills to refuse to fulfil their contract. As regards defendant No. 2 there will have to be a decree in respect of these bags.

Coming now on to the question of defendant No. 2 it appears to me clear enough that the plaintiff has no cause of action against the Railway Company. Very likely the Mills may have but with that I am not concerned. But perhaps it is better to record a finding as to the question of the liability of the Company assuming that they were agents of the plaintiff as common carriers to the plaintiff. The goods were shipped under this shipping note which has frequently been the subject of judicial interpretation, and has been exposed to a great deal of criticism both on account of the rigorous nature of the terms imposed by it, and its obscurity and it is well-established that assuming *prima facie* that there is a loss, it is necessary, for the claimant to show (as indeed clearly appears from the wording of the clause) that the loss was due to some wilful neglect or other contingencies which render the Company liable for the loss. Now nothing is known about this consignment except so far as the evidence goes that at Bhatinda the waggons said to contain these 250 bags were sealed, and it was reported to the Guard at Mcleod Ganj that the seals were intact and that it was at Bahawal Nagar, which is said to be about 36 miles from Mcleod Ganj that the seals were found broken and on examination the shortage was discovered. There was, therefore, apparently a loss due to theft from a running train. This being so, if it were necessary for me to decide it, I should hold that the Company was exempt under the Risk Note.

It may well be that the Railway Company did not take as many precautions as they might conceivably do, but that is not what is aimed at under the Risk Note. All that the Risk Note requires is that the standard of the carrier should not fall below the common practice of the Railway. It is a reasonable enough clause, in my opinion, because the common contract of the Railway is known to consignors and if they choose to undertake a risk of loss incurring to their consignment consequent upon this common conduct they cannot afterwards complain if they have been unfortunate enough in any particular instance. It is only when the loss is due to some act of dereliction of duty which has reduced the standard to somewhat below the ordinary standard of precaution that the Railway Company is liable under the Risk Note.

It may be observed that I have not decided, whether assuming that the Mills were otherwise free from liability on the ground that they were bound to make delivery to the plaintiff at Delhi and not at Karachi, they would still be liable because they chose to send these goods without specific instructions, by the Risk Note B. There is no specific issue on that question and it would be difficult to decide that without knowing what the natural course of trade was, and without giving the parties an opportunity to lead evidence on that particular point. I, therefore, say nothing about it, and it is not necessary for this suit. As regards the claim for market price of the goods I do not think that the plaintiff is entitled to that. He has not brought his suit as I understand it, for damages but for recovery of a specific number of bags. I think he is only entitled to a decree against defendant No. 2 for Rs. 427-11-0 with interest at six per cent. from 25th March 1920 to date of suit and further interest on the principal amount at six per cent. till the date of payment, with costs. Against these costs are to be set-off the costs incurred in sommoning the Manager of the second defendant. I am of the opinion that that sommoning was unnecessary and I will set off Rs. 95 in respect of it. There will, therefore, be a decree for the plaintiff against defendant No. 2 with costs as aforesaid with the exception that I award Rs. 95 as counter costs Suit against the Railway Company is dismissed with costs.

P. B. A. *Suit dismissed.*
Z. K.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NOS. 855 TO 1039 OF 1922.

July 30, 1925

Present: —Mr. Justice Phillips.

SINNAKARUPPAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

R. M. P. S. MUTHIAH CHETTIAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VII, r. 10 —Limitation Act (IX of 1908), s. 14, Plaint presented in wrong Court—Order for return of plaint for presentation to proper Court—Time between date of order directing return and date of actual return, exclusion of—Landlord and tenant—Rent, when falls due.

Where a plaint is presented in a wrong Court, and the Court after inquiry ultimately directs the plaint to be returned for presentation to the proper Court, the plaintiff is entitled, under s 14 of the Limitation Act, to exclude the whole period from the date of the filing of the plaint in the wrong Court to the date on which the plaint is actually returned for re-presentation. [p. 373, col. 2]

Krishna Variar v *Kunji Toravanar*, 3 M. L. J. 190, not followed.

Bapu Ammal v *Govinda Padiyachi*, 7 M L. J. 261 and *Bishesher Singh* v. *Ram Daur Singh*, A. W. N. (1887) 302, followed.

In such a case the proceedings terminate not on the date of the order directing the plaint to be returned but on the date of the actual return with the endorsements on the plaint in accordance with the provisions of O. VII, r. 10, C. P C [p 373, col 2]

Ordinarily rent for agricultural land becomes due on the last day of the year [p 374, col. 1]

Second appeals against the decrees of the District Court, Ramnad at Madura, preferred against the decrees of the Court of the Special Deputy Collector, Ramnad at Manamadura.

Messrs. *K. Bhashyam Iyengar* and *A. Srinivasa Iyengar*, for the Appellants.

Messrs. *A. Krishnasamy Iyer* and *M. Patanjali Sastri*, for the Respondents.

JUDGMENT.—All these suits were filed in four batches by the plaintiffs, the first being filed in the Subordinate Judge's Court on the Small Cause side. The Subordinate Judge held that the suits were not of a small cause nature and that they should be filed either on the original side or else in the Revenue Court. The alternative was given for the reason that the plaintiffs claimed both *warams*, and it was held that if they were entitled to both *warams*, the suits would lie in a Civil Court whereas if they were not entitled to both the *waramss*, the suits would lie only in a Revenue Court. The suits were accordingly filed in the Civil Court on the original side. The question was then determined and it was found that the plaintiffs did not possess both the *warams* and the plaint was returned to the Revenue Court. The only question which arises here is one of limitation, *i. e.*, whether the time taken for prosecuting these suits in the Small Cause Court and the Civil Court (original side) should not be excluded. The lower Appellate Court has held that the plaintiff has prosecuted these suits with due diligence and consequently under s. 14 of the Limitation Act, he is entitled to exclude the whole of the period. The period allowed is the period from the date of the filing of the plaints to the date on which the plaints were finally returned by the Court for representation. It is now argued that this is not the correct period allowed, the contention being that the proceedings terminated on the date of the appellate order and not on the date on which the plaints were originally returned. This was the view taken by a Bench of this Court in *Krishna Variar* v. *Kunji Taravanar* (1) a case decided after the C. P. C. of 1882 came into force; it merely purported to follow the decision in *Abhoya Churn Chuckerbutty* v. *Gour Mohun Dutt* (2) which was based on the old Code of 1859 in which there was no provision identical with O. VII, r. 10. When the C. P. C. distinctly orders a Court to return a plaint for representation, and at the same time to endorse on it the date of presentation, the date of return, the party presenting it and the statement of the reasons for returning it. I regret I cannot agree with the view that the proceedings with reference to that plaint can be said to have terminated, when there was still an act to be done by the Court which had seisin of the plaint. With all respect, I am of opinion that the decision in *Krishna Variar* v. *Kunji Taravanar* (1) cannot be justified by reason of O. VII, r. 10, C. P C., and I am supported in this view by subsequent cases of this Court. In *Bapu Ammal* v. *Govinda Padiyachi* (3) the time to be excluded is held to be from the date of presentation until the date of return of the plaint and this view is also adopted in *Basvanappa Shivrudrappa* v. *Krishnadas Govardhandas* (4) and *Bishesher Singh* v. *Ram Dhur Singh* (5). The District Judge has, therefore, rightly calculated the time to be excluded from the period of limitation.

(1) 3 M. L. J. 190
(2) 24 W. R. 26.
(3) 7 M. L. J. 261.
(4) 59 Ind. Cas 743; 22 Bom. L. R. 1387; 45 B. 443,
(5) A. W. N. (1887) 302.

The next argument is directed to a question of fact, namely, whether the plaintiff was exercising due diligence during the whole of that period. The lower Appellate Court found that he did do so and no facts have been put before me to justify me in interfering with this finding of fact. In fact the arguments are all based on what might have happened, and no assertion is made as to any particular act of the plaintiff, to show that he did not exercise due diligence. I must presume that the lower Court has considered all the circumstances and I cannot interfere with the conclusion at which it has arrived.

The last point taken is with reference to certain suits in which it was said that the amount became payable when the *kodai* harvest was reaped, namely, in September or October. A large number of plaints were filed in October, three years later. Although some were filed in November, it does not appear in which of these cases the crop was harvested in October, nor whether in those cases, the plaints were not filed also in October, even if it is assumed that the cause of action arises at the moment that the last piece of crop is cut. I am not, however, prepared to accede to this contention, for ordinarily, the rent of each year becomes due on the last day of the year, and there is no evidence that that was not the case in respect of the suit tenancies. If that date is taken, all the suits were within time. I am not at all satisfied either that the cause of action arose in October or that it has been shown that in any particular case, the crops were cut at or before that time. The plaintiff gave the date of the cause of action in the plaint and no objection was taken in the written statements, and consequently that must be taken as the correct date.

The second appeals fail on all these points and are dismissed with costs in Second Appeal No. 855 of 1922. There are 185 appeals to which this judgment applies but the respondent is only represented in Second Appeal No. 855 of 1922; the argument being the same in all the cases. Considering the large number of suits involved I fix the fee at Rs. 75.

V. N. V. *Appeals dismissed.*

Z K

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 243 OF 1925.

September 22, 1925

Present:—Mr. Raymond, A. J. C.

RUSTOM K. SIDHVA—PLAINTIFF

versus

THE INDIAN MERCHANTS ASSOCIATION, KARACHI, AND OTHERS—DEFENDANTS.

Karachi Port Trust (Amendment) Act (VI of 1924), s. 4 (2)—"Becoming registered," meaning of—Right of election, when accrues

The word "becoming" has been deliberately used in contradistinction to the word "being" in s. 4 (2) of the Karachi Port Trust (Amendment) Act of 1924, and is intended to connote something different to that which would be conveyed by the word "being". The expression "becoming registered" in the section means in the process of registration as contrasted with "being registered," which refers to an act previous to the election. Therefore, an association mentioned in the section even though unregistered at the date of election, would be entitled to elect representatives to the Karachi Port Trust Board, provided it was in the process of being registered, that is to say, was making *bona fide* efforts to become registered. [p. 375, col. 2]

Mr. *Srikishandas H. Lulla*, for the Plaintiff.

Messrs. *Kimatrai Bhojraj* and *Tolasing Khushalsing*, for the Defendants.

JUDGMENT.—This is a suit of rather an unusual character. The plaintiff Mr. R. K. Sidhva, a Parsi gentleman of repute in this city, seeks to set aside the election of two prominent citizens of this place. Messrs. Harchandrai Vishindas and Shivrattan G. Mohatta, defendants Nos. 2 (*a*) and (*b*) by the Karachi Indian Merchants Association, defendants No. 1, as their representatives on the Board of Trustees of the Port of Karachi. This election was held on the 23rd February 1925. Three candidates stood for election, the plaintiff and defendants Nos. 2 (*a*) and (*b*). The last two were elected defeating the plaintiff by a very narrow majority of votes.

I am not concerned with the motives that may have inspired the plaintiff in instituting the present suit; they may be good or bad. He raises the question as to the validity of the election of defendants Nos. 2 (*a*) and (*b*), and whether as a member of the Karachi Indian Merchants Association or as a public citizen of Karachi, he certainly is competent to do so. He challenges the validity of the election on the sole ground that the Karachi Indian Merchants Association, not being an Association registered under the law for the time being in force before the date of the election was not competent to

elect any representatives on the Port Trust Board. This forms the crucial point in this suit. Though no doubt other issues have been raised as to the maintainability of the suit, etc., the main issue in the suit is Issue No. 1 which is as follows:—

"Had the right to elect representatives on the Karachi Port Trust accrued to defendants No. 1 on the 23rd February 1925?"

Bombay Act VI of 1924, which is described as the Karachi Port Trust Amendment Act, was published on the 25th November 1924, but this amending Act was to come into operation only from the 1st April 1925. The immediate purpose of this Act was undoubtedly to extend the right of franchise to important commercial bodies in Karachi. Section 7 of the Original Karachi Port Trust Act VI of 1886 was repealed by s. 4 of the amending Act which now provided for additional representation by the Karachi Chamber of Commerce, and empowered the Karachi Buyers and Shippers Chamber, and the Karachi Indian Merchants Association to elect, each of them two of their members as their representatives on the Karachi Port Trust Board. Until this amending Act came into force the Karachi Indian Merchants Association had no right of representation on the Karachi Port Trust Board, but the Commissioner in Sind under the powers vested in him by the original Act nominated one of their members, usually the President, to a seat on the Board.

Now, the controversy between the parties hinges on the construction to be placed on sub-s. 2 of s. 4 of the amending Act. This sub-section I reproduce.

"The right to elect trustees conferred on the Karachi Chamber of Commerce, the Indian Merchants Association and the Karachi Buyers and Shippers Chamber shall accrue only on such Chamber of Commerce, or such Indian Merchants Association, or such Karachi Buyers and Shippers Chamber being or becoming registered under the law for the time being in force for the registration of Companies or Associations".

It is on the words "being or becoming registered" that the Pleaders for the respective parties have concentrated their attention. There is, of course, no difficulty whatever as to the interpretation of the word "being". If it stood by itself, there could not be the vestige of a doubt that the registration of the Association concerned was to be a condition precedent to a valid election. It is the word, "becoming," however, that has given rise to the controversy between the parties, though, in my opinion, in consideration of the circumstances that prevailed at the time of the enactment of the amending Act, its interpretation ought not to afford much difficulty. Mr. Lulla for the plaintiff contends in substance that the words "being or becoming" connote the same idea, and should be construed in an identical manner. Both these words according to him require as an indispensable condition that the Association should have been registered before there could be a valid election, and, therefore, in his view the elections of defendants Nos. 2 (*a*) and (*b*) prior to the registration of the Karachi Indian Merchants Association was invalid and should be set aside.

It is rather difficult to follow Mr. Lulla in his interpretation of the word "becoming" If the meaning underlying this word is the same as that conveyed by the word "being", then it is inconceivable that the draftsman should have used two words, when the word "being" by itself would have correctly expressed the intention of the Legislature. It appears to me obvious that the word "becoming" has been deliberately used in contradistinction to the word "being" and is intended to connote some thing different to that which would be conveyed by the word "being." The words used in the section are "becoming registered," *i. e.*, as I interpret them, in the process of registration as contrasted with the words "being registered," which refer to an act previous to the election. The Century Dictionary explains the word "becoming" as an intermediate stage between "being" and "not being." The literal meaning of the word "becoming" in the sense in which it is used in this Act, would, in my opinion, be the transitionary stage between the non-registration and the registration. If the Karachi Indian Merchants Association had taken the necessary steps to have itself registered under the law for the time being in force "before the election was held, though the registration may not have been an accomplished fact before the date of the elections, yet there would have been a sufficient compliance with the terms and conditions as prescribed in sub s. 2 to s. 4 of the amending Act, I cannot, therefore, agree with Mr.

Lulla in his interpretation of the words "becoming registered" as implying that the registration was to be a condition precedent to the elections. It may be that the word "becoming" does not convey the intention of the Legislature very explicitly, it was probably used for want of a better word but I feel no manner of doubt as to the sense in which it was intended to be understood and my province is *jus dicere* not *jus dare*. As I have observed the amending Act was passed into law on the 25th November 1924. I am informed by the Pleaders that on this date none of the Associations or bodies to which the franchise was extended, were registered. Whether this be true or not, the Karachi Indian Merchants Association had not been registered.

Now under s. 12 of Act VI of 1886, the elections for a seat on the Karachi Port Trust Board are to be held "not earlier than the 15th and not later than the last day of the month of February next preceding the first day of April from which the term of office of the new trustees is to commence." The term of office of the new trustees was to commence on the 1st April 1925, and as the election was to take place in the month of February such Associations who had the right to elect and had not been registered, would only have a period of scarcely three months to effect the registration. It was, therefore, anticipated at the time when the amending Act was passed that the registration may not be completed within the time the election was to take place, and hence, in my opinion, the words "being or becoming registered" were inserted in the Act not only for the benefit of those Associations that were already registered, but also those that were in the process of registration, and has honestly taken such steps as were necessary to have them registered. This, I conceive, is the reason of the words "becoming registered" being inserted in the amending Act. The object of the registration of the bodies and Associations qualified to return a representative on the Port Trust Board was evidently with a view to placing these Associations under the control of Government, and as long as these Associations had evinced an honest desire to comply with the requisitions of Government, it was not reckoned a matter of any importance whether these Associations were registered before the elections actually took place or later.

Now, I have no doubt that in the present case the Karachi Indian Merchant Association did make *bona fide* endeavours to have themselves registered. It was on the 26th August, 1924, that they addressed a letter to the Chief Secretary to the Government of Bombay, for the issue of a license as to their registration. This application was made under s. 26 of the Indian Companies Act. The reply to this application from Government is dated the 25th September 1924. The applicants are informed that prior to the registration the memorandum and articles of Association of the Karachi Indian Merchants Association were to be scrutinized by the Solicitor to Government, and that notices were to be published in the local newspapers inviting objections to the registration, and some other formalities had to be complied with. Further correspondence then ensued between the applicants and the Government of Bombay and the Solicitor to the Government of Bombay. The entire correspondence has been exhibited. It will be seen from a perusal of it, that, though the applicants pressed for early registration, the delay in the registration was inevitable. The memorandum and articles of Association were revised by the Solicitor to Government, and sent for approval to the applicants. The public notices in the papers were to be in the form suggested by Government. Sometime had to be allowed to give the public an opportunity of lodging their objections, if any, to the registration. In short, it was not before the 12th May 1925 that the Bombay Government informed the applicants that their petition had been granted, and they were registered as an Association under s. 26 of the Indian Companies Act. The correspondence clearly reveals this indubitable fact that the Karachi Indian Merchants Association was endeavouring from August 1924 to have themselves registered as an Association. In consequence of the time involved in examining the memorandum and articles of Association, and in complying with certain requisite formalities, the Association was not registered till May 1925. But it was in process of registration, and the words "becoming registered under the law for the time being in force" would aptly apply to them. I, therefore, hold that the right to elect representatives on the Karachi Port Trust Board did accrue to the Karachi Indian Merchants Association on the 23rd February 1925, and my finding on this issue is in the affirmative. The election of defendants Nos. 2 (*a*) and (*b*) is

valid and the plaintiffs' suit must, therefore, fail as it discloses no cause of action.

There are some other issues framed in this suit, which have been based on the defence raised to the plaintiffs' action. They mainly refer to the jurisdiction of the Court to try the suit and to the maintainability of the suit. But in view of my finding on Issue No. 1, I think it superfluous for me to embark on a consideration of the other issues in the suit. The foundation of the plaintiffs' suit is the ineligibility of the Karachi Indian Merchants Association to elect any representatives on the Karachi Port Trust Board before the Association had been registered, and it is this factor which according to him supplies the cause of action. As I have pointed out above and personally I feel no doubt as to the correctness of my finding, this argument is based on an erroneous construction placed by the plaintiff on the words "becoming registered." As, therefore, I think, the plaintiff has no cause of action, the plaintiffs' suit is dismissed, and he must pay the costs of defendants Nos. 1 and 2 (*a*) and (*b*). However, only one set of costs is allowed.

Before concluding this judgment one further point may be alluded to, not indeed as a guide to my decision, but as tending to confirm my interpretation of sub-s. 2 of the amending Act On the 6th March, 1925, the plaintiff addressed a letter to the Commissioner in Sind bringing to his notice that the Karachi Indian Merchants Association had not been registered on the 23rd February 1925, when the elections took place, and, therefore, the elections were *ultra vires* of the Association, and must be regarded as invalid. On the receipt of this letter, the Commissioner in Sind had a letter addressed to the Secretary, Karachi Indian Merchants Association, requesting information as to whether the Association was a registered body prior to the elections of the 23rd February 1925. The Secretary replied that the Association lay unregistered on the date of the elections, but that an application had been made to the Bombay Government in August 1924, for its registration, and steps had been taken to comply with the requisitions of Government preliminary to the registration, and the registration was daily awaited. Now under s. 5 of the amending Act which has been substituted for s. 8 of the original Act, the Associations to which the amending Act applies, are required to make a return to the Commissioner in Sind of the names of the persons elected by them as their representatives on the Port Trust Board. Under s. 9 of the original Act, the names of the persons "duly elected" on the Board are to be notified in the *Bombay Government Gazette*, and the *Sind Official Gazette*. The names of Messrs. Harchandrai Vishindas and Shivrattan Gordhandas were thus notified as being "duly elected." Now the Commissioner in Sind was aware not only of the allegation made by the plaintiff that the Karachi Indian Merchants Association was incompetent to hold the elections before its registration, but also of the fact that it was not registered when the elections were held and yet it was declared that defendants Nos. 2 (*a*) and (*b*) had been "duly elected." The words are "duly elected" not merely "elected", and this would pre-suppose that the Commissioner in Sind was not prepared to accept the allegation made by the plaintiff that the non-registration of the Karachi Indian Merchants Association was a defect fatal to the validity of the elections, as he was assured that the Association had already applied for its registration.

In conclusion I need only briefly refer to the Karachi Port Trust who are defendants No. 3. The plaintiff has stated in his plaint that he impleads them as *pro forma* defendants. They were represented by Mr. Tolasing who stated that his clients were indifferent as to the result of this suit and they supported neither party. He, however, pressed for costs. The plaintiff has claimed no relief against them, and they need not have appeared at the hearing. I do not think that there was any impropriety on the part of the plaintiff in joining them as co-defenants. They were included *ex majori cautela*, and if not necessary, they were proper parties. I direct defendants No. 3 to bear their own costs.

Z. K. *Suit dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1676 OF 1922.
April 29, 1925.
Present :—Mr. Justice Phillips.
SEKKHU MUSTHABU *alias* APPU RAVUTHAN—PLAINTIFF—APPELLANT
versus
NANI AND OTHERS—DEFENDANTS NOS. 1 TO 4 AND 6 TO 10—RESPONDENTS.
Civil Procedure Code (Act V of 1908), ss. 11, Expl.

IV, 39, 42—Execution of decree—Transfer of decree—Death of decree-holder—Legal representatives brought on record—Order confirmed on appeal—Objection by judgment-debtor at subsequent stage to jurisdiction of Court to make order—Res judicata.

A decree was transferred for execution to a Court other than the Court which had passed it. The decree-holder thereafter died and the Court to which the decree had been transferred made an order adding the legal representatives of the deceased decree-holder as parties and directing that execution should proceed. [illegible] appealed against the order, but [illegible] He then took the objection, which he had not taken in his appeal, that the Court to which the decree had been transferred for execution had no jurisdiction to add the legal representatives of the deceased decree-holder as parties to the execution proceeding

Held, that the objection must be deemed to have been decided adversely to the judgment-debtor in the appeal preferred by him against the order, by virtue of the provisions of Expl. IV to s. 11, C. P. C., and was, therefore, *res judicata*

Second appeal against a decree of the District Court, South Malabar, in A. S. No. 726 of 1921, preferred against that of the Court of the District Munsif, Alathur, in O. S. No. 182 of 1920.

Mr. *N. R. Lakshmana Iyer*, for the Appellant.

Mr. *C. V. Ananta Krishna Iyer*, for the Respondents.

JUDGMENT.—The first objection taken by the appellant is that the application to execute the decree on behalf of the legal representatives of the decree-holder ought not to have been made to the Court which was executing the decree but to the Court which passed the decree. This question is concluded by a decision of the Full Bench in this Court in *Swaminatha Ayyar* v. *Vaidyanatha Sastri* (1) and also in *Amar Chundra Banerjee* v. *Guru Prosunno Mukerjee* (2) and *Tameshar Prasad* v. *Thakur Prasad* (3) *Sham Lal Pali* v. *Modhu Sudan Sircar* (4). All these cases were decided under C. P. C. of 1882 and there has since been an alteration in ss. 88, 244, 232 and 234 of that Code. It is questionable whether these decisions are correct under the new C. P C. and I may observe that in the Full Bench decision in Madras, the learned Chief Justice did not come to a determination without considerable hesitation and one of the Judges was of opinion that ss. 234 and 244 of the Code of 1882 are irreconcilable. As these sections have now been amended, it is possible that they may be reconciled by a different interpretation of them. I, however, refrain from discussing this question further in view of the fact that the appeal must fail on another ground.

The appellant was a party to the order in execution proceedings in which the legal representatives were added and although he preferred an appeal against the order, he did not take this particular ground of appeal and the order was confirmed. Under s. 11, Expl. 4 the ground ought to have been decided. It is, therefore, not open to him now to raise the same objection in a suit. It is contended that he can do so, because the Executing Court had no jurisdiction to decide the case. It has been held that the Court had no jurisdiction, but it is not a question of absolute jurisdiction, but a question of exercising jurisdiction wrongly, and it has been held that a similar order passed in these circumstances is subject to appeal and is not necessarily null and void from its inception. I may refer in this connection to *Hadjee Abdoollah Reasut Hossein* v. *Hadjee Abdoollah* (5). The order not being null and void from its inception, this plea that it was absolutely without jurisdiction cannot avail the appellant. This suit was rightly dismissed and the second appeal must also be dismissed with costs.

V. N. V.

Z. K. *Appeal dismissed.*

(1) 28 M. 466, 15 M. L. J. 116.
(2) 27 C. 488; 14 Ind. Dec. (N. S.) 321.
(3) 25 A. 443; A. W. N. (1901) 99.
(4) 22 C. 558; 11 Ind. Dec. (N. S.) 372.
(5) 2 C. 131; 3 I. A. 221; 26 W. R. 50; 1 Ind. Dec. (N. S.) 380 (P. C.).

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 207 OF 1923.

September 7, 1925.

Present:—Mr. Raymond, A. J. C.

RATILAL SON OF MOOLJI—
PLAINTIFF
versus
RUGHNATH MULJI AND OTHERS—
DEFENDANTS.

Hindu Law—Joint family—Alienation by manager—Necessity—Benefit to family.

The manager of a joint Hindu family has power to sell or mortgage "on reasonable commercial terms" joint family property, so as to bind the interests of adult as well as minor co-parceners in the property, provided that in the case of minor members the sale or mortgage is made for legal necessity including debts incurred for family business or for benefit of the family. [p 383, col 1.]

The term "necessity" must not be strictly construed. Benefit to the family may under certain circumstances mean a necessity for the transaction. [*ibid.*]

Hunoomanpersaud Panday v. *Babooee Munraj Koonweree*, 6 M. I. A. 393; 18 W. R. 81*n*; Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R 147, *Nagindas Maneklal* v. *Mahomad Yusaif Mitchela*, 64 Ind. Cas. 923; 46 B. 312; 23 Bom. L. R 1094; (1922) A. I. R. (B) 122, *Tula Ram* v. *Tulshi Ram*, 60 Ind Cas. 3; 42 A. 559; 18 A. L. J. 699 and *Ram Bilas Singh* v. *Ramyad Singh*, 58 Ind. Cas. 303; 5 P. L. J. 622; 1 P. L. T. 535; 2 U. P. L. R. (Pat.) 228, relied upon.

Vishnu Vishvanath Nimkar v. *Ramchandra Sadashiv Nimkar*, 73 Ind. Cas. 1017; 25 Bom. L. R. 508; (1923) A. I. R. (B.) 453 and *Shankar Sahi* v *Baichu Ram*, 86 Ind. Cas. 769; 47 A 381; 23 A. L. J. 204; L R. 6 A. 214 Civ.; (1925) A. I. R. (A.) 333, distinguished.

Mr. *Kimatrai Bhojraj*, for the Plaintiff.

Mr. *Fatehchand Assudamal*, for Defendant No. 3.

JUDGMENT.—This is one of the class of suits not unfrequent of late wherein minors in a joint Hindu family seek to set aside alienations of immoveable properties, made either by the father or the managing member of the family, as unsupported by family or legal necessity. The present suit has been filed by one Batilal, a minor, through his next friend, his mother, Parvatibai, widow of Moolji, for a declaration and injunction, and for partition of two immoveable properties wherein the plaintiff states he is interested as a co-parcener in a joint undivided Hindu family. Defendants Nos. 1 and 2 Rughnath and Bhagwanji are the two elder brothers of the minor plaintiff. They have filed no written statements, and have raised no defence to the action, and there is but little doubt that this suit has been filed either at their instigation or that they are in collusion with the plaintiff. The only defence to the action is by defendant No. 3 who is the mortgagee of the two immoveable properties in suit which by the suit are sought to be partitioned.

The allegations in the plaint are that one Moolji, the father of the plaintiff and defendants Nos. 1 and 2 died in 1915, and left one immoveable property with building thereon situated in the Runchore Lines, and which is referred to in the evidence as the residential house of the family. About a year or two after the death of Moolji, defendants Nos. 1 and 2 bought a building adjacent to the residential house. They were under the necessity of raising money for the payment of the purchase price, and accordingly borrowed a sum of Rs. 11,500 from defendants No. 3 on the security of the mortgage of both the residential house and the new building subsequently purchased. Owing to non payment of the amount there were disputes between defendants Nos. 1 and 2 on the one hand, and defendant No. 3 on the other with the result that there was a reference to arbitration, and a consent award was passed and made a rule of the Court. The plaintiff contends that defendants Nos. 1 and 2 were not empowered either to mortgage the property in its entirety to defendant No. 3 or consent to an award decree in his favour inasmuch as the loan taken from defendant No. 3 was neither for the family benefit nor for legal necessity, and, therefore, both the mortgage and the award decree are void and inoperative so far as his interests in the properties are concerned. On the strength of the award decree defendant No. 3 applied for attachment and sale of the two properties on which his lien had been declared, and the plaintiff now seeks for an injunction to restrain him from proceeding with the sale. He also prays for a declaration that neither the mortgage nor the award decree is effectual to transfer his interest in the properties, and finally prays for a partition of the two properties, and being awarded his one-third share in them.

By his written statement the defendant No. 3 states that defendants Nos. 1 and 2 are the only persons interested in the properties mortgaged, and in the alternative, if it be held, that plaintiff No. 1 has an interest in them, the action of defendants Nos. 1 and 2, the former being the manager of the joint family, is binding upon the plaintiff He maintains that the amount borrowed from him was for the benefit of the family, and that it was utilised to pay antecedent debts and for house-hold purposes. He adds that the decree obtained by defendant No. 3 is binding on the plaintiff and that in this suit the plaintiff is incompetent to have it set aside. He, therefore, prays that the plaintiff's suit be dismissed with costs.

The following issues were framed with the consent of the Pleaders for the respective parties:—

1. Is the property in suit the joint family property of the plaintiff and defendants Nos. 1 and 2 or the property of defendants Nos. 1 and 2 only?
2. Was the amount borrowed from defendant No. 3 for purposes which would bind the interest of the plaintiff, if any, in the property (covers paras. 3 and 4 of the plaint).
3. Is the plaintiff bound by the award?
4. General.

At the commencement of the hearing of the case, the Pleader for the plaintiff stated that he would not press the plaintiff's claim to any share in the immoveable property purchased by defendants Nos. 1 and 2 after the death of their father Moolji I, therefore, confine myself to the consideration of the question as to the plaintiff's right in the residential house.

Now, before I touch upon the legal aspect of the case it is a matter of essential importance to grasp the facts and set out my deductions on the evidence recorded. For, in cases of this nature where the family benefit or the legal necessity are challenged, it is necessary, before the law applicable is discussed, to have a true conception as to the merits of each case.

Moolji, the father of the plaintiff and defendants Nos. 1 and 2 died in Africa in 1915. The evidence shows that at the time of his death, and for some years previous he was earning a salary of about Rs. 250 per mensem. He died, however, virtually a pauper, and the only property that he left at his death, in addition to the residential house, was a sum of Rs. 600 only, his contribution from certain funds to which he had subscribed in his life-time. As Bhagwanji said in his evidence it was difficult for his father to save any money as he had a large family dependent upon his earnings. Moolji must have also spent money on the education of defendants Nos. 1 and 2. Defendant No. 2 appeared to me to speak English fairly well, and at present according to him he draws a salary of Rs. 105 in the National Bank, but at the time of his father's death, he was schooling. Rughnath, defendant No. 1, is employed in the Port Trust, and earns about Rs. 70 or Rs. 80 per mensem, now, though at the time of his father's death his salary was about Rs. 30 or 40 per mensem. The pecuniary condition of the family, therefore, at the time of Moolji's death is a matter of no little importance in the consideration of this case. As long as Moolji was alive, the family apparently enjoyed some degree of comfort and to which the family had been accustomed. But after Moolji's death, the pinch of poverty was felt, and the meagre income of defendant No. 1 was insufficient to defray the household expenses of the family. I shall revert to, later, the necessity which rendered some loan imperative.

On behalf of the plaintiff it has been urged that the necessity for the loan was dictated by the conduct of defendant No. 1 indulging in speculation. It is said that in or about the year 1916 defendant No. 1 entered into some forward contracts in sugar in partnership with one Ladhuram Vishinji and sustained a loss of Rs. 3,000 and for the purpose of liquidating it a sum of Rs. 2,000 was borrowed from one Haji Ahmad Yusif, and as security for the loan, the residential house was mortgaged with him. In my experience it occurs not unoften that in cases of this description the plea that the debts were incurred for an illegal or immoral purpose is set up in order to impeach the binding effect of a loan on the members of a Hindu family who have not effectively participated in it. In the present case on a consideration of the evidence, I find that this forward transaction in sugar imputed to defendant No 1, Rughnath, is a myth, and that it has been set up for the purpose of cloaking the real nature of the borrowings by defendants Nos. 1 and 2. The evidence on the point that Rughnath had been speculating in sugar is confined to himself and his brother, defendant No 2. It was the latter that was first examined on the opening day of the hearing of the case. When questioned, as to the forward contracts entered into by his brother, he professed not to be acquainted with any details in respect of them ; as a matter of fact, he had no knowledge even as to the nature of the contract, whether it was a forward contract or otherwise, and all that he knew was from Rughnath's information that he had entered into some contracts in partnership with Ladhuram Vishinji and had sustained a loss of Rs. 3,000. Rughnath, who was examined as a witness a couple of days after his brother's evidence had been recorded, stated that in 1916 he had proceeded to Tando Allah Yar where Ladharam Vishinji lived, and that the latter proposed to him that they should be partners in some good business transactions. Rughnath says he agreed to the proposal and also to share the profit and loss with Ladharam. According to Rughnath however he heard no more of this partnership transactions till he proceeded to Bombay in May or June 1918 and met Ladharam Vishinji. The latter informed him that he had entered into a sugar transaction in pursuance of the alleged partnership agreement and had sustained a loss of Rs. 6,000 of which a moiety was to be paid by

Rughnath. Rughnath says that he trusted Ladharam Vishinji implicitly, and agreed to pay him his share of Rs. 3,000 which he did. The Pleader for defendant No. 3 described this forward contract as bogus, and I am inclined to agree with him. The only evidence as to the partnership between Rughnath and Ladharam Vishinji is the oral, uncorroborated statement of Rughnath. Ladharam Vishinji, has not been cited as a witness to prove the partnership, nor is there any documentary evidence forthcoming as to it. The family of defendants Nos. 1 and 2 was in very impoverished circumstances after the death of Moolji, and it is incredible that Rughnath should promptly undertake to pay a large sum like Rs. 3,000 to Ladharam Vishinji without the slightest attempt at any inquiry into the account or as to the circumstances which entailed a loss. In my opinion the alleged loss of Rs. 3,000 on a speculative contract entered into by Rughnath has been falsely set up with the view to proving the immoral nature of the contracts entered into by him, and hence the exemption of all liability on the part of the minor plaintiff in respect of such a tainted debt.

Now, further according to Rughnath, he borrowed a sum of Rs. 2,000 from Haji Ahmed Yusif and paid the same to Ladharam Vishinji towards the loss. The remaining sum of Rs. 1,000 Rughnath at first said that it was borrowed from Manikchand on the pledge of ornaments, but he soon altered his statement and said that he borrowed Rs. 2,000 from one Gangji Seth on the pledge of ornaments which amount he paid to Ladharam Vishinji and that the sum of Rs. 2,000 which he borrowed from Haji Ahmed Yusif he paid to Gangji Seth and redeemed his ornaments. There is thus no satisfactory explanation as to the payment of the balance of Rs. 1,000 to Ladharam Vishinji, and this is an additional element which throws considerable suspicion on the alleged debt due to Ladharam Vishinji.

That there was a sum of Rs. 2,000 borrowed from Haji Ahmed Yusif in 1916, and that the residential house had been mortgaged with him in consideration of this loan admit of no doubt but I do not believe that this amount of Rs 2,000 was utilised towards the payment of a sum of Rs. 3,000 which it is alleged Ladharam Vishinji claimed. Rughnath in his evidence has stated that before he proceeded to Bombay, and when Ladharam Vishinji for the first time mentioned to him that there was a sum of Rs. 3,000 due by him on the losses sustained by the partnership contract, he had borrowed a sum of Rs. 1,600 or 1,700 from one Chaganlal Inderji. His evidence on this point is as follows :—

"Before going to Bombay I borrowed from Chaganlal Inderji the sum of Rs. 1,600 or 1,700 to liquidate my debts. I do not remember how those debts had been created. It may be that this amount had been borrowed from Chaganlal to pay the household expenses, as our salaries were small".

This statement of Rughnath appears to me to supply the correct solution of the loan from Haji Ahmed Yusif. As I have observed above, after the death of Moolji, the family were substantially in an impecunious condition. It was only Rughnath that earned a scanty pittance of Rs. 25 or 30 per mensem and Bhagwanji states that he was still at school when his father died. It was impossible for the family to subsist on their slender income which, therefore, had to be supplemented by loans. These loans were first secured on the pledge of the family ornaments and the amount at first borrowed from Haji Ahmed Yusif which was as I have said on the mortgage of the residential house, was utilised towards the payment of the moneys borrowed for the household expenses, and the family ornaments were thus redeemed. I hold, therefore, that the sum of Rs. 2,000 borrowed from Haji Ahmed Yusif was for family necessity.

Now, in 1918, the second house in suit was purchased by defendants Nos. 1 and 2 in the name of defendant No. 2. This house was adjacent to the residential house and its owner Ladharam Dharamsi was a relation of the defendants. From Rughnath's evidence it appears that he was very keen on the purchase of this house. From Karachi he proceeded to Hanjam in Berar and concluded the bargain there with Ladharam Dharamsin for the purchase of the house for the sum of Rs. 8,300. It is significant to observe that defendants Nos. 1 and 2 were eager to secure this house for themselves not on account of its situation but as Bhagwanji said the purchase price was low, and they anticipated that owing to the boon in land that then prevailed in 1918, they would be in a position to realise a considerable profit by its sale and thus

discharge the family debt that weighed heavily on it. Again, they had recourse to Haji Ahmed Yusif, and borrowed a sum of Rs. 8,000 from him on the security of both the residential house and the house newly acquired. It is important, therefore, not to overlook the motive inspiring the purchase of the second house.

Haji Ahmed Yusif, had advanced to defendants Nos. 1 and 2 a sum of Rs. 10,000 which with interest due thereon amounted to about Rs. 10,700. He pressed for the re-payment of this loan as he was in urgent need of money, and the defendants Nos. 1 and 2 then appealed to Ibrahim Walli to help them with a loan. The loan was first granted on *hundis*, defendants equitably mortgaging with Ibrahim Walli the title deeds of the two properties. The loan from Ibrahim Walli was utilised in the payment of the amount due to Haji Ahmed Yusif and the mortgaged properties were redeemed. As the amount due on the *hundis* was not paid to Ibrahim Walli by the due date, fresh *hundis* were drawn and executed, and finally, a mortgage-deed was executed in favour of Ibrahim Walli on August 21st 1920 by the two defendants, Rughnath defendant No 1 executing it for himself and as guardian for his minor brother Ratilal. The consideration in the mortgage-deed is shown at Rs. 12,000, Rs 8,000 being the amount due on the *hundis* previously executed and Rs. 4,000 was a fresh loan advanced to defendants Nos. 1 and 2. By this deed the two immoveable properties above described were mortgaged with defendant No. 3 as security for the aforesaid loan of Rs. 12,000. Exhibit 9 are a batch of four letters addressed by defendants Nos. 1 and 2 to defendant No. 3 equitably mortgaging with him the two aforesaid properties in consideration of the loans advanced on various occasions. All these four letters have been signed by defendants Nos. 1 and 2, and the defendant No. 1 has also signed them as guardian for the minor plaintiff. I may here observe that defendants Nos. 1 and 2 have not challanged the accuracy of the principal sum which defendant No. 3 claimed from them. Exhibit 10 is the consent award between defendants Nos. 1 and 2 and defendant No. 3 and was passed on April 20, 1922. It would appear from the award that the amount due to the defendant No. 3 was not paid in terms of the agreement between the parties, and further, there was a dispute with regard to the rate of interest 18 per cent. claimed by defendant No. 3, whereas the defendants Nos. 1 and 2 contended that the interest due was only at the rate of 15 per cent. Defendants Nos. 1 and 2 also contended that they were entitled to sufficient time for payment of the amount due. When the proceedings were still pending before the arbitrators, the parties entered into an amicable arrangement which is embodied in the award, and in terms of this arrangement interest was allowed to defendant No. 3 at the rate of 15 per cent. only and the amount due was payable in certain instalments, and a mortgage lien was granted to defendant No. 3 with a right to proceed in execution against the aforesaid immoveable property and also to proceed personally against defendants Nos. 1 and 2, if the realisation by the sale of the mortgage properties did not cover the amount due. The reference to the arbitrator was signed both by Rughnath and Bhagwanji the former signing it both for himself and as guardian of the minor plaintiff. The award was filed in Court under the Indian Arbitration Act and no objections have ever been lodged to it.

I now proceed to discuss the legal aspect of the case, as it has been contended for the plaintiff by his Pleader Mr. Kimatrai, that the plaintiff is not bound by the loan transactions entered into by his brothers defendants Nos. 1 and 2, as the loans were neither for the benefit of the family nor for legal necessity. There is no doubt that defendant No. 2 Rughnath, the elder brother, was the manager of the family consisting of the plaintiff and defendants Nos. 1 and 2. Bhagwanji has admitted this. It was first contended by Mr. Kimatrai that as the sum of Rs. 2,000 borrowed from Haji Ahmed Yusif was for the purpose of liquidating an antecedent immoral debt, contracted by Rughnath in respect of some *satta* transactions that he entered into, which entailed a loss of Rs. 3,000 the loan from Haji Ahmed Yusif cannot be regarded as one for the benefit of the family or as creating a legal necessity. As I have shown above, it has not been proved that Rughnath did enter into any partnership with Ladharam Vishinji. Nor has it been established that any loss was incurred by the partnership entering into any forward contracts, nor is there any satisfactory evidence as to the payment of the sum of Rs. 3,000 to

Ladharam Vishinji. This argument must fail I hold that the sum of Rs. 2,000 borrowed from Haji Ahmad Yusif was for the purpose of paying the debt of Chaganlal Inderji which had been incurred to defray household expenses, and as the debt was contracted for the benefit of the family by its manager, it is, therefore, binding on the minor plaintiff.

The second point taken by Mr. Kimatrai for the plaintiff was that the sum of Rs. 8000 borrowed from Haji Ahmed Yusif and utilised towards the payment of the purchase price of the second house cannot be regarded as a debt for the family benefit or as creating any legal necessity for the loan.

In *Hunoomanpersaud Pandey* v. *Babooee Mumraj Koonweree* (1) their Lordships of the Privy Council observed as follows:—

"The power of the manager for an infant heir to charge an, estate not his own is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it...is the thing to be regarded".

In Mull's Hindu Law, Art. 200, the following passage occurs :—

"The manager of a joint Hindu family has power to sell or to mortgage 'on reasonable commercial terms' joint family property, so as to bind the interests of adult as well as minor co-parceners in the property, provided that in the case of minor members the sale or mortgage is made for a legal necessity including debts incurred for family business, or for the benefit of the family."

In *Nagindas Maneklal* v. *Mahomad Yusif Mitchella* (2) it was held by Shah, J, that:

"The term 'necessity' must not be strictly construed. The benefit to the family may under certain circumstances mean a necessity for the transaction."

The facts of this case throw some light on the consideration of the present case :—

"A Hindu joint family owned several houses, one of which was in such a dilapidated condition that the Municipality required it to be pulled down. The adult co-parceners contracted to sell it to the plaintiffs. The joint family was in fairly good circumstances; and it was not necessary to sell the house. But the house could not be used by the family for residence and would not have fetched any rent. The plaintiff having sued for specific performance of the agreement to sell, the minor co-parceners contended that the contract did not affect their interest in the absence of 'necessity' for the sale. It was held that the agreement of sale was binding on the minor co-parceners, because the adult co-parceners had properly and wisely decided to get rid of the property which was in such a state as to be a burden to the family."

No doubt this was a case of sale, but the Privy Council has held that the same principle would also apply to cases of mortgage. Cases may arise wherein a prudent owner with due regard to the interests of the family which he represents might feel compelled to resort to methods which would have the effect not only of re-habitilating the fortune of the family, but also of supplementing its income. What was the motive for the purchase of the second house in this case? Bhagwanji had supplied the answer. He stated that it was anticipated that a substantial profit would be realised by its sale. The family was undoubtedly in debt at the time of the purchase. There was no possibility of wiping off this debt from the incomes of the two brothers, and the sum of Rs. 2,000 due to Haji Ahmad Yusif which carried interest at 12 per cent. per annum would accumulate to such an extent as to make its liquidation impossible for the family. It was, therefore, necessary to conceive some mode or the other of paying off this debt. In 1918 there was a boon in land in Karachi as is well known the second house was being obtained at a cost fairly low, and a prudent and reasonable man might well conclude that an opportunity was now offered to him of realising a handsome profit on the sale of the house after its purchase and it would be for the benefit of the family to embark on this investment. In my opinion, therefore, the purchase of this house was dictated by the motive to liquidate the debts due by the family and hence was for the family benefit.

In *Tula Ram* v. *Tulshi Ram* (3) the loan

(1) 6 M. I. A. 393; 18 W. R. 81n; Sevestre 253n; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

(2) 64 Ind. Cas. 923; 46 B. 312; 23 Bom L. R. 1094; (1922) A. I. R. (B.) 122.

(3) 60 Ind. Cas. 3; 42 A. 559; 18 A. L. J. 699.

advanced by the mortgagee was for the purpose of enabling the mortgagors in a joint Hindu family to purchase some *zemindari* property, though ultimately it was found that the loan was not utilised for the purpose indicated: It was held that as the purchase of the *zemindari* was beneficial to the family, the non-application of the loan to the purpose originally stated did not invalidate the mortgage. This case affords an illustration that even the purchase of immoveable property may well be reckoned as contributing to the benefit of a Hindu joint family.

Mr. Kimatrai referred to the case of *Vishnu Vishvanath Nimkar* v. *Ramchandra Sadashiv Nimkar* (4) but the facts of this case are divergent in their essentials from the facts of the case before me. It was held in the case cited :—

"That the manager of a joint Hindu family can justify the sale of joint family property only for necessity. He cannot justify it merely on the ground that the sale at the time appeared to be advantageous. Such a sale is not binding on the minor co-parceners".

The property in the present case had not been purchased merely because the purchase was [illegible] it was bought, as I have observed, to liquidate a family debt, and this was a necessity.

Mr. Kimatrai next cited the case of *Shankar Sahi* v. *Baichu Ram* (5). In this case it was held that ordinarily a Hindu father cannot encumber joint ancestral property to acquire the necessary funds to pre-empt other property. In the body of the judgment at page 383* there occur the following observations :—

"It is not permissible to a Hindu father to voluntarily go forward and initiate litigation for the purposes of extending the boundaries of his property, and having succeeded in that litigation and having obtained a pre-emption decree, which gives him liberty to do something, can thereby raise money, and encumber the joint... family estate".

It will be seen from the case cited that this was a voluntary action on the part of the father not dictated by the necessities of the family. It was further observed in this judgment: "that an adventure in the hope of a speculative suit which might possibly bring profit to the estate, could properly be regarded as a 'benefit to the estate' or 'a legal necessity'."

That facts of the present case are entirely different. At the time the second house was purchased, there was a sum of Rs. 2,000 due by the family of defendants Nos 1 and 2 to Haji Ahmed Yusif, and in respect of this loan the ancestral property was mortgaged with him. Apart from the stigma that the mortgage of the residential house carried with it, it became essential to pay up this loan, and redeem the mortgaged property promptly, for otherwise with the interest of 12 per cent. accumulating on the principal sum, the family would have been unable to redeem the house. The second house was, therefore, purchased, as Bhagwanji says, to liquidate the family debt that had been incurred. It was not a case of a mere speculative adventure, for it was reasonably anticipated that the house would realise a profit by its sale, and any prudent man, whether the father or the manager of a Hindu family, would avail himself of the opportunity offered to him of contriving to wipe off the family debt.

Ram Bilas Singh v. *Ramyad Singh* (6), was cited by Mr. Kimatrai apparently with reference to the following passage :—

"The mere fact that the manager borrowed money in order to purchase immoveable property does not in itself create any presumption that the transaction was beneficial to the family so as to authorise the manager to hypothecate existing family property by way of security for the loan. Some necessity for the transaction or some benefit resulting to the family therefrom must in all cases be shown".

I am in entire agreement with these observations, and, in my opinion, they rather tend to support my view of this case. In the present case the necessity for the purchase of the second house has been established and it has been shown on the admission of defendants Nos. 1 and 2 themselves that the purchase was for the benefit of the family.

In view of my conclusions that the sum of Rs. 2,000 first borrowed from Haji Ahmed Yusif was for the benefit of the joint family, and the second sum of

(4) 73 Ind. Cas. 1017; 25 Bom. L. R. 508; (1923) A. I. R. (B.) 453.

(5) 86 Ind. Cas. 769; 47 A. 381; 23 A. L. J. 204; L. R. 6 A. 214 Civ.; (1925) A. I. R. (A.) 333.

*Page of 47 A.—[*Ed.*]

(6) 58 Ind. Cas. 303; 5 P. L. J. 622; 1 P. L. T. 535; 2 U. P. L. R. (Pat.) 228.

Rs. 8,000 borrowed from the same individual, utilised towards paying the purchase price of the house purchased was dictated by the family necessities, the question whether Ibrahim Walli made the requisite inquiries as to the necessity of the loan from him is not one of any particular significance. No doubt, a purchaser or a mortgagee must make reasonable inquiry, when he advances a loan to the father or the manager of a joint undivided family as to the necessity for the loan, and the burden lies upon him to do so. Mere recitals in a sale or a mortgage-deed would not by themselves be sufficient to establish the necessity for the sale of the mortgage so as to bind the other co-parceners in a Hindu family. Ibrahim Walli is dead, but his son Karim Ibrahim has been examined. He deposes that he was joint with his father in business, and was present at the time when the conversation took place between his father and defendants Nos. 1 and 2 as to the loan. He states that defendants Nos. 1 and 2 told his father that they required the loan to pay off antecedent debts. He adds that his father inquired from Haji Ahmed Yusif as to the status of the family of defendants Nos. 1 and 2 and that the latter explained to him that he demanded the re-payment of the loan only because he was in urgent need of money, and apparently gave him to understand, that the loan was needed for the benefit of the family. He also states that his father made inquiries from other members of the caste to which defendants Nos. 1 and 2 belong. The mortgage-deed which was signed by defendant No. 1 as the guardian of Ratilal recites that the loan was needed for the benefit of the family, and Bhagwanji in his evidence has admitted the correctness of the statement in the mortgage-deed that the loan was required for the benefit of the family. I need hardly point out that the amount borrowed from Ibrahim Walli was utilised towards the liquidation of the debt due to Haji Ahmed Yusif which was a debt incurred for family purposes. I have referred above to the consent award that was made a rule of the Court. Mr. Kimatrai objected to the award on the only ground that the minor had not been properly represented. But admittedly the reference to arbitration was signed by Rughnath as guardian for the minor plaintiff and he, as I have held, was the managing member of the joint family. It was lastly urged, that the rate of interest at which the money was borrowed was exorbitant and that this revealed a gross disregard of the family interest. The mortgage-deed describes the rate of interest as being 15 per cent. which has been allowed also by the arbitrator. To Haji Ahmed Yusif the interest payable is 12 per cent. per annum. I do not regard the interest payable to defendant No. 3 exorbitant and unconscionable, or as betraying an utter disregard of the family interest so as to exempt the minor plaintiff from liability.

My findings, therefore, on the issues are:

Issue No. 1.—The residential house was the joint family property of the plaintiff and defendants Nos. 1 and 2.

Issue No. 2.—In the affirmative.

Issue No. 3.—In the affirmative.

The plaintiff's suit is dismissed with costs.

P. B. A. *Suit dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 244 OF 1922.

October 2, 1924.

Present:—Mr. Justice Madhavan Nair.

M. RUDRAPPA—DEFENDANT No. 3—APPELLANT

versus

K. MARIAPPA AND OTHERS—DEFENDANTS Nos. 1, 2, 4 AND 3 AND PLAINTIFFS Nos. 1 TO 6—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, O. XXIII—Withdrawal of suit—Second suit when barred—Two suits involving same relief—Withdrawal of one—Other, maintainability of.

Under O. XXIII, C. P. C, when a plaintiff withdraws a suit without the permission of the Court, he is precluded from instituting fresh suit; but this does not prevent the trial of a subject-matter, so long as such trial is not affected by the principle of *res judicata*. [p. 387, cols 1 & 2]

A filed a suit and attached certain property before judgment. *B* filed a claim petition, which was dismissed, and then filed a suit for getting the summary order set aside Subsequently *B* filed another suit for declaration of his right to the property and for delivery of possession. Both these suits were filed within a year of the date of the order on the claim petition. *B* withdrew the first suit as being unnecessary with the permission of the Court, the order allowing withdrawal not mentioning whether it was with or without liberty to bring a fresh suit. *A* now took the objection that the second suit was not maintainable as *B* was precluded from agitating the question of setting aside the claim petition therein by the withdrawal of the first suit:

Held, that a declaration of his title claimed by *B* in the second suit involved a setting aside of the order on the claim petition, and there being no final adjudication of the matter in the first suit, and the second suit being filed within a year of the order on the claim petition, the suit was maintainable. [p. 387, col. 2.]

Second appeal against a decree of the District Court, Bellary, in A. S. No. 70 of 1921, preferred against that of the Court of the District Munsif, Hospet, in O. S. No. 91 of 1920.

The Advocate-General and Mr. *C. S. Venkatachariar*, for the Appellant.

Mr. *V. C. Seshachariar*, for the Respondent.

JUDGMENT.—The 3rd defendant is the appellant. The plaintiff's suit was substantially for a declaration of the rights of plaintiffs Nos. 1 to 4 to the plaint lands and also for delivery of possession. During the pendency of the suit plaintiffs Nos. 1 to 4 sold their rights to plaintiffs Nos. 5 and 6. According to the plaintiffs, the suit property originally belonged to the members of the Racheyla family and it was purchased by the father of plaintiffs Nos. 1 to 4 one Hampayya of Idukal on the 3rd of September 1912 under Ex. A. The case of the defendants is that the property belonged to the family of Ponpayya and Mallayya, that they took a sale-deed of it from the Racherla family in the name of Mallayya's father-in-law, Harupyya of Idukal, that it was a mere *benami* transaction, that Pompayya and Mallayya were always in possession, that the lands now belong to defendants Nos. 4 and 5 the children of Pompayya and Mallayya, and that the lands are now being held by the 2nd defendant on a lease given to him by the first defendant as the guardian of the 4th defendant. The 3rd defendant supported the plea of defendants Nos. 1 to 4 and also stated that the present suit is not maintainable on account of the order passed in O. S. No. 531 of 1918 on the file of the District Munsif's Court of Bellary.

Three questions were argued before me (1) that the purchase by Hampayya of Idukal, the father-in-law of Mallayya was a *benami* transaction; (2) that defendants Nos. 4 and 5 are owners of the suit lands by adverse possession and (3) that the present suit is not maintainable.

The first question, *viz.*, the *benami* character of the sale to Hampayya, is a question of fact. Both the lower Courts have found that Ex. A evidenced a real transaction and conveyed title to the property to the father of plaintiffs Nos. 1 to 4. This finding is attacked by the learned Advocate-General on behalf of the appellant. Exhibit A, the sale-deed, recites that the plaint lands were orally sold to Hampayya for Rs. 800 in 1903 and put in Hampayya's possession and that as no proper sale-deed was executed till then, Ex. A was executed and delivered to Hampayya. According to the evidence in the case, out of the consideration of Rs. 800, Rs. 400 was paid in cash for the rest a promissory-note, Ex. C, was executed. This was renewed by Exs. D and E, and when the whole amount was paid, the sale-deed Ex. A was executed in favour of Hampayya. In attacking the finding that the sale to Hampapya was not a *benami* transaction, the learned Advocate-General mainly relies upon Exs. XLV and XLV (*a*) 1, extracts from the account-books of the Racherla family relating to the transaction of Hampayya's son-in-law, Mallayya, and his elder brother Pompayya. These accounts show that originally the idea was to sell the plaint lands to Pompayya and Mallayya for Rs. 650, that along with this sum the whole amount due to the Racherla people came to Rs. 1,030 in 1903, of this Rs. 230 was excused and the consideration was fixed at Rs. 800, half of which, *viz*, Rs. 400 was paid by Hampayya and for the remaining sum he gave Ex. C. Both the lower Courts have found that there is really no reason to suppose that the payments were made by Hampayya on behalf of Pompayya and Mallayya. Though originally the idea might have been to sell the property in their favour, as they were not able to find consideration. Mallayya's father-in-law must be taken to have purchased the property for himself. This is the view taken by both of the lower Courts on an examination of the evidence in the case. Pompayya and Mallayya were in possession of the lands for a considerable number of years; but it must be remembered that Mallayya was the son-in-law of Hampayya. The conclusion that Ex. A evidenced a real transaction in favour of the plaintiffs Nos. 1 to 4 is based upon the evidence in the case and I cannot say that that conclusion is not warranted by the facts.

Point No. 2.—As regards adverse possession, both the lower Courts have found that from 1899 to 1903 Pompayya and Mallayya were in possession by virtue of the agreement to purchase entered into with the Racherla family, so their possession was

not certainly adverse to the Racherla people. The sale had not been completed, and the Racherla people must be still considered to have regarded themselves as the owners. As the sale had not been completed in 1903 Hampayya decided to purchase the lands and the possession of Pompayya and Mallayya after that period must be considered to be by the permission of Hampayya. I do not think, therefore, that defendants Nos. 4 and 5 are the owners of the suit lands by adverse possession. I may state that this argument was only lightly touched upon by the learned Advocate General. Long possession by Pompayya and Mallayya was referred to by him more in support of the agreement that Ex. A evidences a *benami* transaction than as a basis for separate argument.

As regards the plea of the 3rd defendant that the present suit is not maintainable on account of the order passed in O. S. No. 531 of 1918, the facts are as follows. The 3rd defendant filed O S. No. 2 of 1918 on the file of the District Court and attached the plaint lands before judgment; plaintiffs filed a claim petition which was dismissed, they, therefore, filed O. S. No. 531 of 1918 on the 9th of October 1918 for getting the summary order set aside and they filed the present suit on the 8th of July 1919. It will be seen that both these suits were filed within a year of the date of the order on the claim petition. In the present suit there is reference in the plaint to the claim petition and a prayer for a declaration of the rights of the plaintiffs to the plaint lands aginst all the defendants including the 3rd defendant. After the institution of this suit, the prosecution of O. S. No. 531 of 1918 was obviously unnecessary when the 3rd defendant took the objection that the present suit was not maintainable, O. S. No. 531 of 1918 had already been filed against him and the plaintiffs, therefore, withdrew that suit (O. S. No. 531 of 1918). It is the order passed when it was withdrawn that is relied upon by the 3rd defendant as a bar to the present suit. The decree, Ex. XLIV, giving permission to the plaintiffs to withdraw the suit does not say whether it was with liberty or without liberty to bring a fresh suit. As it does not dismiss the suit, I do not think that the plaintiffs are precluded from agitating the question raised in O. S. No. 531 of 1918 in this suit. No doubt under O. XXIII, when a plaintiff withdraws a suit without the permission of the Court, he shall be precluded from instituting fresh suit; but this does not prevent the trial of a subject-matter, so long as such trial is not affected by the principle of *res judicata*. As Ex. XLIV shows that there was no final adjudication of the rights forming the subject-matter of that suit, I think that the plaintiffs may claim that the summary order passed on their claim petition should be set aside in the present suit. The declaration of title claimed by the plaintiffs in this suit amounts to a setting aside of the order on the claim petition. I have already stated that both this suit as well as O. S. No. 531 of 1918 were filed within a year of the date of the order on the claim petition. The plaintiffs elected to proceed with this suit involving the same relief after dropping the other. I may say in this connection O. S. No. 2 of 1918, in connection with which the plaint lands were attached by the 3rd defendant was dismissed after the filing of this suit. I agree with the learned District Judge that the present suit is not barred by the order in O. S. No. 531 of 1918.

I dismiss the second appeal with costs of defendants Nos. 9 and 10. The memorandum of objections filed by respondents Nos. 1 and 2 raises the same question dealt with in the second appeal. It is also dismissed with costs of respondents Nos. 9 and 10.

V. N. V. *Appeal dismissed.*
N. H.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUITS NOS. 432 AND 433 OF 1924.
EXECUTION MISCELLANEOUS No. 273 OF 1925.
July 20, 1925.

Present:—Mr. Tyabji, A. J. C.

YUSIF MAHBUB & COY.—PLAINTIFFS IN ALL
versus
SALLOH MAHOMOD UMOR DOSSAL—DEFENDANTS IN SUIT No. 432.
LALCHAND JEYRAMDAS—DEFENDANTS IN SUIT No. 433 OF 1924.
FIDDA HUSSAIN ADAMJI—DEFENDANTS IN EXECUTION MISCELLANEOUS No. 273 OF 1925.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 2, 15, O. XXX, r. 1—Suit in name of firm—Payment to one partner—Satisfaction of decree.

Where a suit is brought in the name of a firm under the provisions of O. XXX, r. 1, C. P. C., one partner of the firm is competent to receive payment in respect of the decree in favour of the firm and to notify

satisfaction of the said decree to the Court. [p. 390, col 1]

Mr. *Kimatrai Bhojraj*, for the Plaintiffs.

Mr. *Khanchand Gopaldas*, for the Defendants.

ORDER.—These three matters were argued together by consent. In each there is an application for execution and a notification of satisfaction and the point is whether the decrees have been satisfied or whether execution should proceed.

The same questions of law arise in all these, and the questions of fact are similar. I shall, therefore, deal in detail with Suit No. 432 of 1924 and thereafter deal with points not already covered so far as they affect or arise in Suit No. 433 of 1924 and Execution No. 273 of 1925.

SUIT No. 432 OF 1924.

The decree in this matter was made on 13th May 1921 and is for Rs. 11,744-13-8. On the 19th of May, Yusif Haji Abdullah one of the members of the plaintiffs' firm wrote to the defendant the letter which is Ex 3-A in these proceedings to the effect that the defendants well knew that the firm of the plaintiffs was dissolved and that Mahbub was no longer a member of the firm and that no payment should be made to Mahboob. This was followed by a letter dated the 10th June 1925 and written by the Pleaders of the plaintiffs to the Pleaders of the defendants in the following terms:.

"We shall thank you to direct your clients to pay up the decretal amounts in the above two cases as detailed below. Failing payment we have instructions to file execution application immediately the Court re-opens.

	Principal Rs. a. p.	Costs Rs. a. p.	
Suit No. 424 of 1924 ...	27,906 13 0	2,217 14 9	Interest at 6 per cent. per annum from 20th June 1924 to payment.
Suit No. 432 of 1924 ..	10,192 1 0	650 13 3	Do.

The judgment-debtors allege that they paid the decretal amount on the 13th of June to Mahbub, one of the members of the plaintiffs' firm, and that, therefore, the notification that the decree has been satisfied is effective. The plaintiffs in the first instance deny that any payment was in fact made, secondly they contend that the payment being to one of several partners of their firm it was not valid, and that Mahbub as a single partner was not empowered by law to give a valid discharge or to notify satisfaction of the decree on behalf of the firm; finally they say that, in any event, there was collusion between Mahbub and the judgment-debtors that the collusive transactions cannot affect their rights: so that assuming that the defendants did pay Mahbub in collusion with him, they are nevertheless bound to pay the amount over again to the plaintiffs.

As to the question of fact I think the defendants have satisfactorily proved payment on the 13th of June. They have produced their books of account which I have examined with some care, and I feel no doubt that those books are properly kept, and that they prove the payment supported as they are by the oral evidence, of Thawerdas and Bhoora who are employed in the defendants' firm. Both these witnesses, especially Thawerdas impressed me favourably.

Doubt was thrown on the payment by reference to five circumstances.

In the first place because it was said that the head of the defendants' firm who was referred to as Saith Osman was not called. I had at a very early stage drawn Mr. Khanchand's attention to the importance of his being called; and I give full weight to this omission: but I am satisfied that the cause of it was merely that the witness was not available at convenient hours. This matter has been heard during three hearings I believe. In any case when Mr. Khanchand offered to have him called so that the plaintiff may have an opportunity of cross-examining him, Mr. Kimatrai said that if I called him as a Court witness he would cross examine the witness, but otherwise he would prefer to rely on the fact that the witness had not been called by the defendants. That reliance, therefore, is on a broken reed.

The next circumstance relied upon in connection with this question, is whether the letter of 19th May (Ex. 3-A) was not sufficient to warn the defendants, and whether apart from its legal effect (which I shall consider later), it did not throw great suspicion on the alleged payment. It did strike me at the start in that light. But it must be borne in mind that Ex. 3-A was written only by one of the three partners

(assuming that there were only the 3 partners alleged by Seth Ismail Ex. 3 and not the five persons stated to be partners by Mahbub in his deposition Ex. 91. 48 at the hearing of the suit). Exhibit 3-A cannot, therefore, be compared in regard to its formal effect or weight to Ex. 8 which was addressed by the Pleaders of the firm in whose favour the decree was passed. Exhibit 8 may well be described as a demand for payment enforced by a threat. To my mind the natural effect of this correspondence is that the defendants' firm, unless it was in monetary difficulties, would make the payments demanded. As a result, therefore, of the examination of the correspondence I have come to the conclusion that Exs. 3-A and 8 far from supporting the applicant are in favour of the contention of the defendants.

A third circumstance was the fact that on the date of the payment, *viz.*, the 13th of June, Rs. 12,000 are alleged to have been paid in cash into the defendants' firm and that the source of this sum is not further traced. There was, however, a balance of Rs. 4,400 brought forward, and then the large sum of Rs. 23,000 was drawn by a cheque from the National Bank of India, and these two sums sufficed for the payment of the decretal amount, and yet to leave a balance of as much as Rs. 14,000 in hand. After looking over the accounts I think that the sum of Rs. 12,000 was not comparatively so large as to make that circumstance, in itself, sufficient to throw its payment by Seith Osman in doubt.

Fourthly it is said that there is a sum standing in the defendants' account books due from Mahbub, and that this circumstance throws doubt on the alleged payment to him. But the defendants could not deduct the sum that was due from Mahboob personally from a sum due to the firm under a decree of the Court. The two transactions were entirely distinct, and one could not affect the other.

Finally it was said that the firm of Yusuf Mahbub and Co. had been dissolved and was known to have been dissolved as early as 1921. But the plaint in the present suit, dated the 20th of June 1924, is in the name of the firm and describes it as then carrying on business. There is no substance in this point. I, therefore, come to the conclusion that the amount of the decree was paid as alleged.

There is no evidence of collusion between the defendants and Mahbub and the mere suggestions and suspicions that the plaintiffs make or throw out against the defendants are quite insufficient to prove allegations of this nature.

I should like to add with reference to the evidence of Ismail that he did not impress me very favourably. He knows English well enough to write the letter Ex. 3-A in Suit No. 432 and Ex. 9 in Suit No. 433 ; and yet he wanted to have every question put to him translated and he himself answered in the vernacular. Then his statement in the letter and in the witness-box that the firm of Yusuf Mahbub & Co. had been dissolved in 1921 was opposed to the frame of the suit, where the firm are plaintiffs and are described as still carrying on business. In the witness box he struck me as a shrewd man taking into consideration all the bearings of a question before he was willing to commit himself to a reply, and yet eager to seize points in his own favour.

It remains to be considered whether payment to Mahbub in the circumstance entitles the judgment-debtor to have satisfaction of the decree recorded.

The relevant provisions of the law are contained in the C. P. C., O. XXI, r. 15 and O. XXX. I think the references to the Indian Contract Act, s. 38 *et seq* were quite uncalled for. Even apart from the fact that the provisions of the Contract Act have caused much difference of opinion in the Courts, it is obvious that the effect of a decree against a firm is quite different and based on entirely different principles and considerations from the effect of a promise to joint promisors; and, in any case, the specific provisions of the Code dealing with procedure and execution must be considered rather than far-fetched analogies drawn from rules relating to contracts. For similar reasons I think O XXX which deals with suits by or against firms should be considered in the first instance, and in priority to the more general rules relating to joint decree-holders.

Order XXX, it must de observed, permits but does not make it incumbent on persons claiming or being liable as partners, to sue or be sued in the name of the firm; and the plaintiffs in the present case adopted this course voluntarily. I say this, as, if the evidence of Ismail Haji Abdul Satar before me was accurate and the firm of Yusuf Mahbub & Co. had been dissolved before the suit was instituted and if it be the fact that

there were differences between the partners; then apart from the variance from the truth which there is in the title to the suit, it was not very wise on the plaintiffs' part to sue in the firm name, nor to obtain a decree in favour of the firm. For, in the very first rule of O. XXX it is laid down that where persons sue in the name of their firm, any one of the partners may sign, verify or certifiy pleadings or other documents required to be signed, verified or certified by the plaintiff. Unless there is something to take away the effect of this sub-rule, it would seem that Mahbub not only could but was under a duty to certify payment which was received by him; and that the Court was then bound under O. XXI, r. 2 (1) to record the same. (The language of this rule is markedly different from that of O. XXIII, r. 3, where it has to be proved to the satisfaction of the Court that a suit has been adjusted wholly or in part).

Nothing that was said to me in the course of the elaborate arguments from the Bar seems to me to add to or detract from these provisions which are, in my opinion, sufficiently clear.

I am of opinion that the suit having been brought in the name or the firm under O. XXX, r. I, Mahbub can certify payment under O. XXI, r. 15; and the Court, unless satisfied that fraud or collusion necessitated some cautionary measures, is bound to record satisfaction. I am not now dealing with any case of fraud or collusion, so I need not consider what course (if any) is left open to the Court when that is proved. I have the less hesitation in coming to the conclusion as the plaintiffs need not have sued in the firm name. They could have asked the Court to impose conditions against any one partner executing the decee (under O. XXI, r. 15); or they could have applied for a Receiver

If the law empowers a partner to certify receipt of payment, as I hold, then it must follow that he is empowered to receive it. But the general law of partnership is sufficiently explicit on this point.

The decree will, therefore, be noted as having been satisfied in full and the application for execution dismissed with costs

SUIT No. 433 of 1924.

The amount concerned in this suit is only Rs. 557-8-0 and the evidence is less full. I am not prepared to hold that the evidence of payment and the books of account showing payment are all false. Nor is there any evidence of collusion or fraud.

The decree will, therefore, be noted as having been satisfied in full and the application for execution dismissed with costs.

EXECUTION MISCELLANEOUS No. 273 OF 1925.

The evidence in this matter is somewhat more detailed than in the last; for, though the amount concerned is only Rs. 550 it was paid in the settlement of a decree for Rs 750, besides costs, etc. altogether amounting to over Rs. 1,000. There were also prior overtures for settlement which were declined by Ismail and Yusuf. The sum of Rs. 550 was, I hold, paid in full settlement of the decree. This amount was borrowed for the purpose, and Rs. 500 out of this were received by cheque and Rs. 50 in cash. These details are proved by the witness Tyabali and by entries in his books, and also by Yusufali Noorbhai. These witnesses seemed to me to be speaking the truth. I can quite imagine that the defendants should have preferred settling with Mahbub who was willing to give a full discharge on receipt of Rs. 550, rather than Ismail or Yusif who would not accept Rs. 750 or Rs. 800 and who further had the judgment-debtor arrested.

The decree will, therefore, be noted as having been satisfied in full and the application for execution dismissed with costs.

P. B. A. *Application dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1416 TO 1418 OF 1923.

AND

CIVIL MISCELLANEOUS PETITIONS NOS. 2637 AND 2638 OF 1925.

August 3, 1925.

Present:—Mr. Justice Phillips.

CHANDAYYA HEGDE—DEFENDANT—APPELLANT

versus

KAVERI HEGADTHI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Aliyasantana family—Maintenance—Junior members, right of, to separate maintenance—Disputes between members, whether sufficient ground for award of separate maintenance.

The junior members of an Aliyasantana family are not entitled to separate maintenance on the ground of mere inconvenience caused by want of harmony between the *ejman* and the junior members. [p. 391, col. 2.]

In the absence of any evidence that the disputes between the members are of such a nature as to make it impossible or dangerous for the members to con-

tinue to live together in the same house and take meals together, a Court should not award separate maintenance to junior members on the ground that the members are not moving well together and that a joint mess would be extremely inconvenient. [*ibid*]

Kunhi Amma v. *Ammu Amma*, 16 Ind. Cas 178, 36 M. 591; (1912) M. W. N. 1233; 24 M L. J. 559, relied on.

It is not incumbent on the *ejman* of an Aliyasantana family to distribute any spare money he has in his pocket amongst all the members of the family or among some of them [p 392, col. 1]

When some junior members of the family reside away from the family for a portion of the year with their husbands or wives, as the case might be, they are not entitled to claim from the *ejman* a sum equivalent to their maintenance during the period of absence [*ibid*]

Second appeal against the decrees of the Court of the Subordinate Judge, South Karana, in A. S. Nos. 167, 166 and 165 of 1922, preferred against those of the Court of the District Munsif, Udipi, in O. S. Nos. 133, 134 and 135 of 1920 respectively.

Petition praying that in the circumstances stated therein, the High Court will be pleased to dismiss the Second Appeal No. 1416 of 1923 without costs as disputes between the parties to it have been settled in pursuance of a compromise referred to in the affidavit filed in C M. P No. 2638 of 1925 on the file of the High Court praying for leave to compromise detailed in the affidavit filed herewith as being beneficial to the minor respondents Nos. 8 to 10 in the said Second Appeal No. 1416 of 1923.

Messrs. *B. L. N. Rai* and *B. Sitarama Rao*, for the Appellant.

Mr. *K. Y. Adiga*, for the Respondents.

JUDGMENT.—These three suits are brought for maintenance against the first defendant who is the *ejman* of the Aliyasantana family to which the plaintiffs belong. Separate maintenance is claimed in all three suits on the ground that the defendant had refused to maintain the plaintiffs. Both the Courts have found that this case is untrue and that there was no refusal by the defendant to maintain the family but both the Courts have given a decree for maintenance. The lower Appellate Court has held that "defendant and the plaintiffs are not moving well and that a joint mess in the family house has become extremely inconvenient" and on that ground has awarded separate maintenance. The right of a member of an Alayasantana family for maintenance in the *tarwad* house is undoubted and under certain circumstances he is entitled to separate maintenance outside. It has been held that when a wife goes to live with her husband or when a husband goes to live with his wife in a separate house, they are entitled to separate maintenance. *Vide Maravadi* v. *Pamakkar* (1), *Kunbi Amma* v. *Ammu Amma* (2), *Muthu Amma* v. *Vellathumkara Gopalan* (3) and *Govindan Nair* v. *Kunja Nayar* (4). But it is not suggested in these cases that any of the members has gone to reside separately for any proper purpose. One Seshappa, the head of the branch, which brings the Suit No. 133 of 1920 did apparently leave the *tarwad* house for a year or two but he admits that he returned there when he found that both his branch and the other two branches were being treated alike. It is not suggested that any of the other members has gone away to live separately, except temporarily and from time to time. It is now urged for respondents that they are entitled to separate maintenance because of the quarrels that have taken place in the family. There have been suits between the *ejman* and some members of the family and also one suit between two branches of the family, but there is no evidence to show that these disputes have been of such a nature as to make it impossible or dangerous for the members to continue to live together in the same house and take meals together. The lower Appellate Court has merely found that their living together was extremely inconvenient. It has been pointed out in *Kunhi Amma* v. *Ammu Amma* (2) that the right to separate maintenance cannot be put on the mere ground that there is no such complete harmony in the house as to ensure the happiness of the claimant. Mere inconvenience, therefore, is not sufficient to warrant separate maintenance. It may be observed that the lower Appellate Court does add to these reasons the following "I, therefore, agree with the lower Court in holding that the plaintiffs are entitled to claim separate maintenance" and he must be deemed to have adopted the District Munsif's reasoning. When we look at the findings of the District Munsif, we see nothing more definite than the finding of the Subordinate Judge. The Dis-

(1) 14 Ind. Cas. 383, 36 M. 203; 11 M. L. T 112; (1912) M. W N. 109; 22 M L. J. 309.

(2) 16 Ind Cas 178; 36 M. 591; (1912) M. W. N. 1233; 24 M. L J. 559

(3) 16 Ind. Cas 895; 36 M. 593, 23 M. L. J. 496; 13 M. L T. 120.

(4) 51 Ind. Cas. 326; 42 M. 686; 36 M. L. J. 565; (1919) M. W. N. 302; 26 M. L. T. 189.

trict Munsif elaborately discusses the evidence and finds the plaintiffs are not debarred from claiming maintenance, but the mere fact that they are not debarred in suitable circumstances from so claiming is no evidence that such suitable circumstances do exist and that point he has not considered, his main ground being that the defendant had refused to permit the plaintiffs to "freely participate in the family income," defendant had acted up to the terms of a family *karar* which defined the rights of the parties and it was not incumbent on him to distribute any spare money that he had in his pocket among all the other members or even among some of them. Similarly the District Munsif seems to think that when some members resided away for a portion of the year with their husbands or wives, as the case might be, they were entitled to claim from the *ejman* a sum equivalent to their maintenance during the period of absence. Such a right has certainly never been recognised by the Courts and the District Munsif gives no authority for his opinion. Even, therefore, if we take the findings of the District Munsif together with those of the Subordinate Judge no adequate reasons have been given for awarding separate maintenance in these suits. In view of these findings it is unnecessary for me to say anything about the rate of maintenance; but I would point out that the Subordinate Judge has given very inadequate reasons for rejecting the actual income shown in the leases and accepting in preference some vague estimate of what the yield would have been and the price that it would have fetched. He has also divided the income into exactly equal shares for each person and allotted it accordingly not taking into account the right of the *karnavan* to something more and the right of those members who continued to live jointly in the family house to enjoy the same mode of living as they formerly enjoyed subject only to the rights of those who have separated from the family.

Second Appeal No. 1416 of 1923 has been compromised as between the defendant and all the plaintiffs except the third. There will be a decree in accordance with that compromise and also a decree dismissing the suits with costs throughout, the costs in S. A. No. 1416 of 1923 being met by 3rd plaintiff alone.

V. N. V.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 1202 OF 1924.

June 16, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice B. B. Ghose.

MESSRS. SUKHDEODAS RAM PROSAD—LANDLORDS—PETITIONERS

versus

MESSRS. JAINTILAL JAMUNADAS AND ANOTHER—OPPOSITE PARTIES.

Calcutta Rent Act (B. C. III of 1920), s. 15—Decree for ejectment—Standardization of rent—Rent Controller, jurisdiction of

After a landlord has obtained a decree for ejectment of the tenant, the Rent Controller has no jurisdiction to fix a standard rent of the premises, as there is no tenancy in existence. [p. 393, col. 1.]

Rule against an order of the Court of the Controller of Rents, Calcutta, in Standard Rent Case No. 405 of 1923.

Babus *Satindra Nath Mukherji* and *Hiralal Ganguli*, for the Petitioners.

Babu *J. M. Mitra*, for the Opposite Parties.

JUDGMENT.—This is a Rule obtained at the instance of the landlords and directed against an order passed by the Rent Controller on the 25th September 1924 purporting to fix a standard rent of the premises in suit.

The material facts are as follows. On the 21st March 1922 the tenants applied for standardization of rent and a written statement was filed by the landlords on the 27th April in that year. On the 8th June the tenants' case before the Rent Controller was dismissed for default. On the 29th April 1922 the landlords served a notice to quit on the tenants and the determination of the tenancy was to take place as from the 1st June 1922. In the following December the landlords commenced a suit on the Original Side of this Court for ejectment for non-compliance with the notice and for arrears of rent and mesne profits. Subsequent to this on the 20th June 1923, the tenants whose previous application before the Rent Controller had been dismissed, again applied for standardization of rent. On the 29th June 1923, the landlords' suit for ejectment was decreed *ex parte*. But the suit was subsequently restored and was again heard on the 24th July 1924 when the suit was decreed on contest and an order was made for possession to be given within four weeks. The rent for the five months, January to May 1922, was fixed at a sum of Rs. 250 for the five months and mesne profits were decreed at the rate of Rs. 220 per month.

The question before us is whether the Rent Controller was entitled to fix standard rent of the premises on the 24th September 1924. In our opinion he clearly had no jurisdiction to deal with the matter on this date. The suit for ejectment had been decreed on the 24th July 1924 and thereby the notice to determine the tenancy on the 1st June 1922, was held to be a valid notice. Consequently, at the time the tenants' application was made for fixing a standard rent, namely, on the 20th June 1923, and on the date when the Rent Controller purported to fix a standard rent, namely, the 5th September 1924, there was no tenancy in existence and consequently there was nobody who could, as a tenant, apply to the Rent Controller for fixing standard rent. Consequently, in our opinion, the whole of the proceedings before the Rent Controller was incompetent and the order purporting to fix a standard rent on the 25th September 1924 was without jurisdiction. Some suggestion is made that there was a statutory tenancy under the Rent Act in existence until the suit was decreed on the 24th July 1924 but it does not seem that there is any substance in this argument and we do not see how this contention can really be raised.

In the circumstances, therefore, we make the Rule absolute and the landlords, the petitioners, will be entitled to their costs which we assess at five gold *mohurs*.

N. H. *Rule made absolute.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 33 OF 1924.

November 28, 1924.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

S. N. S. SATHEPPA CHETTIAR BY AUTHORISED AGENT, CHIDAMBARA VELAN—PLAINTIFF—APPELLANT

versus

K. MUTHUSAMI PILLAI—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 92—Suit on pro-note—Discharge, proof of.

Where in answer to a suit on a pro-note, the defendant admits execution of the note and receipt of the money but pleads that the amount was agreed to be treated as an advance towards the pay and bonus of the defendant while in plaintiff's service and that as the pay and bonus had fallen due before date of suit, the note had been discharged, proof of the agreement is not excluded by s. 92 of the Evidence Act, inasmuch as, in the circumstances, it is merely a method of payment or discharge proveable and enforceable as such [p. 394, col. 1.]

Appeal against an order of the Court of the Additional Subordinate Judge, Madura, dated the 4th October 1923, in A. S. No. 74 of 1923 (O. S. No. 597 of 1921 on the file of the Court of the District Munsif, Madura Town).

Messrs. *B. Sitarama Rao* and *S. R. Muthu Swamy Iyer*, for the Appellant.

Mr. *R. Satherama Sastri*, for the Respondents.

JUDGMENT.—This is an appeal against an order of remand by the lower Appellate Court in a promissory note suit. The plaintiff sued the defendant in the District Munsif's Court on an on-demand promissory note for Rs. 700. The defendant admitted execution and the receipt of the money, but pleaded that the promissory-note was taken by the plaintiff as a sort of guarantee that the plaintiff would not resile from his bargain to empower the defendant to manage his lands and get possession of them for him by criminal proceedings that the plaintiff promised to pay him Rs 10 a month for his services and a bonus of Rs. 500 if the criminal proceedings turned out successful, that he thus got the Rs 700 as a sort of advance of his pay and bonus which were going to fall due to him, and that this advance was to be discharged as and when that pay and bonus became due and that the plaintiff agreed to this course being adopted; the defendant further pleaded that pay to the extent of Rs 200 and more and the bonus of Rs. 500 had actually fallen due to him before the date of suit and that, therefore, the promissory-note had been fully discharged.

The District Munsif held that the defendant could not put forward the above agreement in defence in a promissory-note suit as such an agreement contravened the provisions of s. 92 of the Indian Evidence Act. The lower Appellate Court held that the agreement could be proved and remanded the suit for evidence, and against this order the present appeal is filed.

Neither of the lower Courts has, we think, quite clearly understood the nature of the case. The defendant's written statement is not as clear as it might be but we think that his plea really amounts to a contention that the promissory-note sum was paid to him as an advance of pay and bonus, that

advance to be paid off as and when that pay and bonus fell due. Now, if this is a plea that the promissory-note was not payable on demand and was not enforceable until the pay and bonus became due, *i. e.*, was not enforceable until it was discharged and was, therefore, never really enforceable at all, that would be a plea of a condition in defeasance of the on-demand contract and the District Munsif's view would be perfectly correct. But it is not that and the defendant himself admits so much. His plea is rather an admission that if the plaintiff chooses to sue before the pay and bonus were due then he cannot resist the demand but if the plaintiff chooses to delay his suit until the pay and bonus had fallen due, then the promissory-note is in fact discharged because the plaintiff agreed to allow that pay and bonus to be credited towards the promissory-note debt. That that was the case between the parties from the first, is clear from the fact that the first issue in the case was whether the discharge pleaded is true, the defence being treated not as plea of non-enforceability of the note, but as a plea of discharge, and it was until another District Munsif took up the case that the third issue was framed, namely, whether the written statement discloses any valid defence. Now, as the plaintiff has on the defendant's case deferred his suit until the pay and bonus were due from him to the defendant, we can see no bar under s. 92 of the Indian Evidence Act against the proof of this agreement. It is not in any sense an alteration of the original terms of the contract. It is for the purposes of the present defence a mere agreement as to the method of payment proveable and enforceable when a state of affairs is reached where it does not conflict with the on-demand condition in the promissory-note. The note is still and has always been payable on demand; but when in answer to the demand the defendant is in a position to say that he has already discharged the note according to the method agreed upon between the plaintiff and himself, there can be no bar under s. 92 to prevent proof of that agreement.

In this view, no question of legal or equitable set off will arise. If it is proved that there was an agreement that the note should be discharged in that way, then the note is either discharged or it is not, and the correct issue for decision in the case is Issue-I—whether the discharge pleaded is true?

The defendant has also put forward a plea of general set off against the plaintiff that the plaintiff owed him various sums of money amounting to much more than the promissory-note amount and that, therefore, the promissory-note amount is not owing. But he did not in the first Court pay any fee on the amount claimed by him as a set off and the District Munsif, therefore, refused to entertain that plea. The defendant did not appeal on that ground and he never urged that ground before the lower Appellate Court. We are not prepared, therefore, to allow him to take the point here in appeal, nor need we deal also with the further ground put forward by him that this promissory note was merely an item in a series of running accounts that being a point which he also never put forward before the lower Appellate Court. We are here concerned only with the question whether the lower Appellate Court's order of remand is a proper one. We are of opinion for the reasons given above that it was and that the suit after remand should be dealt with by the first Court on the lines that we have indicated above. We, therefore, dismiss this appeal with costs.

V. N. V. *Appeal dismissed.*
Z. K.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 81 OF 1924.
September 17, 1925.

Present:—Mr. Raymond, A. J. C.

R. P. KHARAS AND OTHERS—PLAINTIFFS
versus
BHAWANJI NARSI—DEFENDANT.

Contract Act (I of 1872), s. 230—Principal and agent—Auctioneer, whether can maintain suit for value of goods auctioned

An auctioneer is not a bare agent, but an agent who has an interest in the goods which are entrusted to him for sale and as such can maintain a suit for the recovery of the value of the goods auctioned by him. [p. 396, col. 1]

Subrahmania Pattar v. *Narayana Nayar*, 24 M 130 and *Williams* v. *Millington*, (1788) 2 R. R. 724; 1 H. Bl. 81, 126 E R. 49, relied upon.

Mr. *Dipchand Chandumal*, for the Plaintiffs.

Mr. *Gordhandas A. Kikla*, for the Defendant.

JUDGMENT.—"Can the plaintiffs as auctioneers, maintain a suit for the recovery of the value of the goods sold at an auction sale"? is the issue on which I have been invited to pronounce my judgment prior to the consideration of the evidence as to the merits of their claim.

Mr. Kikla for the defendant urges that they cannot. His argument is that the auctioneers in the present suit were merely agents for known principals, and as according to the law of agency, an agent can neither sue nor be sued, the present suit by the plaintiffs is incompetent. He relies on s. 230, Indian Contract Act, in support of his contention. He contends that the exceptions to the section have no application in the circumstances of the present case as they obviously have none, nor has it been established that there was any contract to the contrary, and, therefore, this suit must be dismissed at the very threshold.

There is no definite statutory provision as to the rights and liabilities of an auctioneer, and the Indian case law on the point is very meagre. The industry of the Pleaders for the respective parties has succeeded in unearthing only one authoritative case which is reported as *Subramania Pattar* v. *Narayanan Nayar* (1). No doubt an auctioneer, is classified as an agent, but it must not be over-looked that the nature of his duties invest him with certain rights which differentiate him from an ordinary agent. In his capacity as an auctioneer he has an interest in the goods entrusted to him for auction sale. He has a lien upon them for his charges and advances. His custody of the goods is not the bare custody of an ordinary agent, but he by virtue of the auction of his principal acquires a special property in the goods which are in his possession for the purposes of the auction-sale. It is, therefore, essential to discriminate between the legal possession of an agent, and that of an auctioneer, and the interest which the latter acquires in the goods that are entrusted to him for auction sale differentiate his legal rights and duties from those of an ordinary agent. The English authorities are very explicit as to the right of an auctioneer to sue, and his liability to be sued. Mr. Kikla however argued that there is a divergence between the Indian and English law as to legal position of an auctioneer, and consequently the English authorities could not be accepted as safe guides in determining the law in India. It will appear from the commentaries of different authors on the Indian Contract Act that in their opinion the rights and liabilities of auctioneers are identical both in England and in India. In Cunningham and Shephard's Commentaries to s. 230 of the Indian Contract Act, page 534, there occur the following pertinent observations:—"The case of an agent who has an interest in the contract made by him as such is not within the rule. He is the person to sue, and he is liable to be sued on the contract. An auctioneer or factor, being in possession of his employer's goods having a lien on them for his charges and advances, is in this position. An auctioneer may be sued for non-delivery of the goods sold and he may sue the buyer for the price."

In Pollock and Mulla's commentaries on the same section, page 742 there are the following remarks :—"It is settled law that when an agent has made a contract in the subject matter of which he has a special property he may, even though he contracted for an avowed principal, sue in his own name. Such is the case of a factor, and of an auctioneer, who 'has a possession coupled with an interest in goods which he is employed to sell, not a bare custody, like a servant or a shopman' and a special property by reason of his lien". The above observation are no doubt based on the English authorities, but the learned commentators of the Indian Contract Act say that the like rule is laid down by our Indian Courts and cite *Subrahmania Pattar* v. *Narayanan Nayar* (1). In this case it was held that "where an agent enters into a contract as such, if he has an interest in the contract he may sue in his own name".

In my opinion, therefore, the English and the Indian law are analogous on the point that where an agent has an interest in the contract he may sue on that contract in his own name. This is a proposition of law deducible from the English authorities and I see no reason for its non-application in India. In Halsbury's Laws of England, Vol. 1, page 519, para. 1063, the law on the point is stated as follows :— "An auctioneer, may by reason of his lien on a special property in goods, maintain an action in his own name for the price of goods sold . . . . This right to sue continues as long as the auctioneer's lien on the proceeds of the sale exists, and cannot be affected by any settle-

(1) 24 M. 130.

ment or set-off between the vendor and purchaser". In *Williams* v. *Millington* (2) it was held "that an auctioneer employed to sell the goods of a third person by auction, may maintain an action for goods sold and delivered against a buyer, though the sale was at the house of such third person, and the goods were known to be his property." In the present case though, no doubt, the principals were well known, the plaintiffs were employed to sell the goods by public auction. They did so, and they sue for recovery of the value of the goods which were knocked down to the defendant as the highest bidder, and delivery of which was given to him, the plaintiffs were in possession of the goods not merely "as a servant or a shopman", they had a lien on them and on the price realised for their charges and expenses. They, therefore, had an interest in them, or what may be designated as special property. Their position, therefore, was not of a bare agent, but of agents who had an interest in the goods which were entrusted to them for sale. Therefore, by reason of this interest I hold that the suit in their own name is competent.

My finding on this issue is, therefore, in the affirmative.

Z. K.

(2) (1788) 2 R. R. 724; 1 H. Bl. 81; 126 E. R. 49.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 4 OF 1924.

July 27, 1925.

Present:—Mr. Justice Odgers and Mr. Justice Madhavan Nair.

SULTAN ABDUL KADIR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MOHAMMAD ESUF ROWTHER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, O. VI, r. 17—Res judicata—*Suit for possession of whole property, dismissal of—Subsequent suit for possession of share on same title, whether barred—Partition, suit for —Amendment of plaint.*

Where a suit for recovery of possession of the whole of a certain property based on a claim of sole ownership is dismissed, a subsequent suit based on the same claim of sole ownership but to recover only a portion thereof will be barred by *res judicata*. [p. 397, col. 1]

Noor Muhammad Rowther v *Abdul Rahaman Rowther* 72 Ind. Cas. 207; 46 M. 135; (1922) M. W. N. 845; 17 L. W. 188; 32 M. L. T. 82; (1923) A. I. R. (M.) 257, followed.

Where, however, the plaintiff has a cause of action for asking for partition of his admitted share on the ground of co-ownership, the plaint may, in a proper case, be allowed to be amended so as to convert the suit into one for partition. [p. 397, col. 1.]

Letters Patent Appeal against the judgment and decree of Mr. Charles Spencer, Offg. C. J., in S. A. No. 940 of 1921, reported as 78 Ind. Cas. 1055, preferred to the High Court against a decree of the Court of the Second Additional Subordinate Judge, Tanjore, in A. S. No. 99 of 1920 (O. S. No. 502 of 1918 on the file of the Court of the District Munsif, Negapatam).

Mr. *A. Krishnaswami Iyer*, for the Appellants.

Mr. *K. V. Krishnaswami Iyer*, for the Respondents.

JUDGMENT.

Odgers, J.—This is an appeal from the judgment of the learned Officiating Chief Justice in S. A. No. 940 of the 1921 which was in turn an appeal from the Second Additional Subordinate Judge's Court of Tanjore.

The matter came before us sometime before the vacation when we heard arguments at considerable length. We, however, deferred giving judgment in view of representations that were made to us that there was a strong probability of the parties coming to terms. We were informed just before the beginning of the vacation that these negotiations had broken down and we, therefore, posted the case for fresh argument after the vacation.

The litigants are Muhammadans, the plaintiffs Nos. 1 and 2 being the children and the 3rd plaintiff the wife of one Sheik Muhammad Rowther. The defendant is the brother of Sheik Muhammad Rowther uncle of the present male plaintiff. The subject of the litigation is certain property and this has been a fruitful subject of controversy between the parties or their ancestors in the past. In O. S. No. 15 of 1905 Sheik Muhammad Rowther through whom the plaintiffs claim filed a suit against the present defendant his brother for disturbance of his possession of the suit property. The defendant pleaded that the property was not the exclusive property of the plaintiff but belonged to the whole family, the plaintiff being entitled only to a quarter share. The plaintiff put the defendant on his oath which defendant took and the suit was thereupon dismissed without trial. Ten years afterwards in O. S. No. 38 of 1915

one of the daughters of a sister of the family sued her uncles and aunts for a partition of her share. The present plaintiff was the 5th defendant in that suit and the present defendant was the 6th defendant. The plaintiff contended that he was the owner of the property as did also the 6th defendant, but the Court finding that the property belonged to the 5th defendant who is the present plaintiff, the suit was dismissed.

Now the present suit is O. S. No. 502 of 1918 and this is a suit, to use a neutral term for the present, for recovering the three quarters share belonging to the plaintiffs. The plaint recognises that owing to the litigation in O. S. No. 15 of 1905 the plaintiff cannot now say that he is entitled to the whole property and the question before us has been first, whether the plaint is in fact one for partition of his property and or whether the suit is barred by reason of O. S. No. 15 of 1905. There is no doubt that the suit of 1905 was based on ownership and Mr. K. V. Krishnaswami Iyer's argument for the respondant in this case is that the suit is also based on ownership. The plaintiff failed in the suit of 1905 because he failed to prove that the whole of the property was his or that the property was entirely his. The learned Officiating Chief Justice in his judgment observes that the suit does not purport to be a suit for partition of property between co-owners. I think what the learned Chief Justice means is that the plaint is practically a plaint for the recovery of the property (*minus* a certain proportion) on the score of ownership residing in the plaintiff. On a careful consideration of the matter which speaking for myself has caused some difficulty, I am not prepared to say that the learned Officiating Chief Justice was wrong. If that is so, *i. e*, if the suit of 1905 in which the plaintiff claimed the whole and if the present suit of 1918 in which without claiming the whole he still bases his claim on his ownership are so regarded, there can be no doubt that the suit of 1905 bars the plaintiff's claim in the present suit. This seems to have been the opinion of the learned Officiating Chief Justice basing his judgment on *Naina Muhammad Rowther* v. *Abdul Rahaman Rowther* (1). He thought, however, that on the plain admission, by the appellants that a suit for partition, if properly constituted, would lie, the proper course to take was to allow an amendment of the plaint and for the plaintiffs to be allowed to rectify the mistaken course on which they have, I think, plainly embarked. I do not disguise that my first feeling was that a proper decision had been come to by the learned District Munsif, and Subordinate Judge. The judgment of the District Munsif particularly strikes me as luminous and exhaustive. But I see the difficulty and inconvenience which even if the state of the pleadings allowed it this course would have entailed. It seems no doubt that there are ladies in this family who are entitled to shares and who are now at present on the record and if we divided this property now among the plaintiff and the defendant in whatever proportions, it is extremely likely that we should be embarrassing these ladies in the recovery of their proper shares. I think, therefore, if I may say so with respect, that the proper course was followed by the Officiating Chief Justice and that this Letters Patent appeal must be dismissed with costs.

Madhavan Nair, J.—I agree. The facts of the case are somewhat complicated but for the purpose of this Letters Patent appeal the real question requiring consideration is whether the plaint in the case is one for partition of the suit property between the plaintiff and the defendant as co owners thereof. The parties are Muhammadans. The plaintiff's case is that the property is absolutely his own and that, since the defendant asked for two-eighths of that property in O.S No. 15 1905, he is willing to let him have that portion, with the result that according to him he is now entitled to claim six-eighths. *i. e.*, the remainder of the suit property. A perusal of the plaint clearly shows that the plaintiff has based his title on his exclusive ownership, then the allegations in the plaint would certainly be different; the plaintiff will not allege that the property is exclusively his own. A suit for partition based upon plaintiff's exclusive ownership of the property is admittedly barred in view of the decision in O. S. No. 15 of 1905. However, it is conceded that the plaintiff has a cause of action for asking for partition on the ground of co-ownership. The learned Officiating Chief Justice has, therefore, allowed an amendment of the

(1) 72 Ind. Cas. 207; 46 M. 135; (1922) M. W. N. 845; 17 L. W. 186; 32 M. L. T. 82; (1923) A. I. R. (M.) 257.

plaint. In this view, it becomes necessary that the sisters of the plaintiff who are alive and their children, if any, will have to be made parties to the suit. The learned Officiating Chief Justice has given specific directions that this should be done and that the defendant should be allowed to alter his written statement in whichever way he pleases. In my opinion, the course adopted by the learned Officiating Chief Justice, if I may say so respectfully, is certainly right. The Letters Patent appeal must, therefore, be dismissed with costs.

V. N. V. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 1 OF 1925.

September 24, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Waller.

MUTHUVENKATARAMA REDDIAR AND OTHERS—PETITIONERS—APPELLANTS

versus

THE OFFICIAL RECEIVER, SOUTH ARCOT AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 60 (c)—Provincial Insolvency Act (V of 1920), s. 28 (5)—Agriculturist, who is—"House occupied by agriculturist," meaning of.

The word 'agriculturist' in s. 60 (c), C. P. C., is not used in its etymological sense, it is used to denote a person making his living by tilling the soil, in other words, one whose sole means of livelihood is gained by cultivating land and does not necessarily mean only a person who works with his hands. The protection from attachment under the clause is given only to small owners of land as well as actual tillers of the soil. [p. 398, col 2; p. 399, col 1]

A large landed proprietor, even though his sole income is from land, is not an "agriculturist" within the meaning of s. 60 (c), C. P. C, and is not entitled to protection thereunder. [p. 399, col. 1]

Jivan Bhaga v. *Hira Bhaiji*, 12 B 363, 6 Ind. Dec. (N. S.) 726, followed.

The exemption from attachment under cl (c) of s. 60, C. P. C., is given in respect of a house or building occupied by an agriculturist, *i.e.*, a house dwelt in by the agriculturist as such and necessary for his effectively pursuing his occupation as an agriculturist. [*ibid.*]

A mansion in a large village in which the owner lives, even though he has no other source of income except that from land, is not such a house as is contemplated by cl. (c) of s. 60, C P. C, nor is the house of an ordinary agriculturist situated at a considerable distance from the land which he cultivates and which is not necessary for effective or convenient cultivation of the land. [p. 399, col. 2.]

Appeal against an order of the District Court, South Arcot, at Cuddalore, dated the 17th of November 1924, in I. A. No. 399 of 1924, in I. P. No. 14 of 1922.

Mr. *S. T. Srinivasagopalachari*, for the Appellants.

Mr. *C. Padmanabha Iyengar*, for the Respondents.

JUDGMENT.

Devadoss, J.—The appellants were adjudicated insolvents on their own petition in 1922. They applied to the District Court on 24th July 1924 for a declaration that the two items of property, a terraced house and a cattle-shed, did not vest in the Official Receiver. The District Judge dismissed their petition, and they have preferred this appeal.

The contention of the appellants is that they are agriculturists and the two items which are buildings which they occupied are exempt from the operation of the Insolvency Law by reason of s. 28, cl. 5 of the Provincial Insolvency Act. The appellants are large landed proprietors owning about 300 acres of land worth nearly a *lakh* and their debts amounted to Rs. 1,35,000 and odd. The two items are valued by the appellants themselves at Rs. 6,000 and Rs. 1,000 respectively. Under s. 28, cl. 5 all properties which are exempt by reason of s. 60 of the C. P. C. or by any other law from liability to attachment and sale in execution of a decree do not vest in the Official Receiver and are, therefore, not liable to be sold to satisfy the claims of the creditors. The question for determination is whether the two buildings come within s. 60, cl. (*c*) of the C. P. C. Clause (*c*) is in these items:—

"Houses and other buildings with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment belonging to an agriculturist and occupied by him."

In order to claim exemption under s. 60, cl. (*c*) two points should be found in favour of the appellants, (1) the appellants are agriculturists within the meaning of cl. (*c*) and (2) the house and cattle-shed are such as are mentioned in cl. (*c*).

The term, "agriculturist", means etymologically one versed in agriculture and is not used in cl. (*c*) in its etymological sense, but it is used to denote a person making his living by tilling the soil, in other words one whose sole means of livelihood is gained by cultivating land and does not necessarily

mean only a person who works with his hands. But it means and includes a small holder of land who tills the soil and cultivates it. Clause (c) has to be read in the light of cl. (1) and (2). What is exempt from attachment is what is absolutely necessary to enable a person to live such as wearing apparel, cooking vessels, bedding, etc., tools of artisons, implements of husbandary, etc. A large landed proprietor, even though his sole income is from land, is not an agriculturist within the meaning of cl. (c). Mr. Srinivasagopalachariar's contention is that a man whose sole income is from land, whatever its extent may be, whether he cultivates the land himself or leases it, is an agriculturist. If this is the correct meaning of the word "agriculturist" a man owning say, 1,000 acres of wet land is an agriculturist provided he has no other source of income. It could not have been the intention of the Legislature to give protection to such people The protection is given to small owners of land as well as actual tillers of the soil. The word "agriculturist" must be interpreted in a strict sense. In *Jivan Bhaga* v. *Hira Bhaiji* (1) West, J., observes

"It was for agriculturist in the strictest sense and for an agriculturist in that sole character that the protection of s. 266, cl. (c) of the C. P. C, was intended." We hold that the appellants are not agriculturists within the meaning of cl. (c) of s. 60.

Even if the contention of the appellants that they are agriculturists is upheld, they would not succeed in the appeal unless they make out that the house and cattle-shed are houses and buildings within the meaning of cl. (c). In order to make out that the house and cattle-shed come within the meaning of cl. (c), they must be shown to have been occupied for purposes of agriculture, that is, in order to enable the owner or occupier to cultivate land. The expression "and occupied by him" gives the clue to the meaning of cl. (c), *i. e.*, that they are occupied by the agriculturists as such, as houses or buildings as are necessary for pursuing the occupation of the agriculturists—a shed in a field or a house in the midst of fields which is occupied, so that the agricultural occupation may be carried on effectively and without loss of time, or in other words without such buildings and houses the agricultural operations would suffer. A mansion in a large village in which the owner lives, even though he has no other source of income except that from land, is not such a house as is contemplated by cl. (c) nor is the house of an ordinary agriculturist situated at a considerable distance from the land which he cultivates and which is not necessary for effective or convenient cultivation of the land. A man may have a house in a town and a small holding at a considerable distance from the income of which he maintains himself. As the house in the town is not occupied by him for purposes of agriculture, it is not exempt from attachment and sale under cl (c).

We are glad to find that the view that we hold is in accordance with the view expressed by West and Nanabhai Haridas, JJ., in *Radhakisan Hakumji* v. *Balvant Ramji* (2). The learned Judges observes at page 531*:—

"The exemption is of a house or building occupied by an agriculturist, and this, we think, means a house dwelt in by an agriculturist as such, and the farm buildings appended to such dwelling. It does not include other houses, which in one sense may be occupied; what is meant is a physical occupation, by an owner, of his house as a dwelling appropriate or convenient for his calling."

The house and cattle shed are in the midst of a village containing, it is said, about 300 houses and cannot be said that they were occupied by the appellants for purposes of agriculture and they do not come within the meaning of "houses and other buildings belonging to an agriculturist and occupied by him" within the meaning of s. 60, cl. (c) of the C. P. C.

The decision in *Devara Hegde* v. *Vaikunt Subaya Sonde* (3) does not help the appellants. The learned Judges cite with approval the passage in *Radhakisan Hakumji* v. *Balvant Ramji* (2) extracted above and hold that if the building came within the exemption given by s. 60, cl. (c) at the time of the attachment, the benefit thereof, would not be lost by the death of the judgment-debtor.

That the present contention is an afterthought is clear from the fact that the appellants mention the two items in their schedule

(1) 12 B. 363; 6 Ind. Dec. (N. S.) 726.

(2) 7 B. 530; 8 Ind. Jur. 146; 4 Ind. Dec. (N. S.) 357.

(3) 39 Ind. Cas 639; 41 B. 475; 19 Bom. L. R. 281.

*Page of 7 B.—[*Ed.*]

as assets available for distribution among the creditors and delivered possession thereof to the Official Receiver two years before they made the application to the lower Court.

In the result the appeal fails and is dismissed with costs.

Walker, J.—I do not consider that appellants can any longer be described as agriculturists. Their land has vested in the Official Receiver and there is nothing to show that they cultivate any other land as labourers or tenants. A house to be exempt from attachment under s. 60 of the C. P. C., must belong to or be occupied by an agriculturist as such, *i. e.*, for the purpose of agriculture. Apart from that, appellants placed the Official Receiver in possession of goods before the adjudication and I do not think that they should now be allowed to plead exemption. I agree that the appeal should be dismissed with costs.

V. N. V. *Appeal dismissed.*
Z. K.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 703 OF 1923.
August 28, 1925.
Present:—Mr. Justice Phillips.
SUBBIAH GOUNDAN—DEFENDANT No. 7—PETITIONER
versus
SONNIMALAI GOUNDAN AND OTHERS—PLAINTIFFS AND DEFENDANT No. 9—RESPONDENTS.

Execution of decree—Partition decree—Partition not [illegible] decree, whether can be carried out—Jurisdiction Consent of parties.

In executing a decree for partition, the Executing Court has no power to effect a partition which has not been ordered by the decree and for which there is no properly framed application before the Court. In such a matter no consent of parties can give the Court [illegible] [401, col. 1.]

Petition under s. 115 of Act V of 1908, and s. 107 of the Government of India Act, praying the High Court to revise an order of the Court of the Subordinate Judge, Coimbatore, dated the 3rd March 1923, in I. A. No. 628 of 1922, in O. S. No. 3 of 1919.

Mr. *S. Subramania Iyer*, for the Petitioner.

Mr. *S. Muthiah Mudaliar*, for the Respondents.

JUDGMENT.—In this case the plaintiff obtained a decree declaring that he and the 9th defendant were each entitled to a moiety of the plaint B and E schedule properties. In this petition we are only concerned with the B schedule properties. It would appear that after that decree was passed, the plaintiff and the 9th defendant were put in possession of the B schedule properties, for a statement of the Vakil for defendants was put into Court stating "that the plaintiff and the 9th defendant are in possession of the properties mentioned in the B schedule for the last two years, the defendants Nos. 5 and 12 have no objection to their continuing in possession and that the defendants have no objection to their taking possession through Court." On that memo. the plaintiff and the 9th defendant put in a memo. on the 19th September 1922 asking that the properties should be delivered by Court, but they asked that such of the survey numbers in the B schedule as belonged to their share exclusively should be delivered to them but as regards the survey numbers in which they had only a share they asked that B and C schedule properties should be put together and partition effected according to good and bad qualities. There was no decree for such a partition. The plaintiff in his plaint had not even hinted that the B schedule properties were not ascertainable and in the written statement it was alleged that the partition had taken place years before and that the properties had been allotted to the various sharers. In Ex. A also the plaintiff's father purported to give possession of the B schedule properties. It is, I think, abundantly clear from these pleadings that there was a partition by metes and bounds and the plaintiff's application to effect a further partition of some of the B and C schedules properties is not at all warranted. Apart from that the Court had no jurisdiction to effect such a partition. The order of the petition runs:—

"With the consent of the Vakil for defendants Nos. 1, 5, 7 and 12, I order that properties in B schedule 1, 1*a* 1*b* as given in their petition be delivered to the plaintiff and 9th defendant and that a Commissioner be appointed to divide the properties in B schedule II as suggested in their petition."

By "their" I assume that the Subordinate Judge means plaintiff and 9th defend-

ant who in their memo. had divided B schedule properties into B schedule I, 1*a*, 1*b* and II. This consent appears to be based on an affidavit filed by the 5th defendant and docketed as being on behalf of defendants Nos. 1, 5, 7 and 12. In the affidavit the 5th defendant alleged the prior partition and stated at the end of the affidavit :—

"The plaintiff and 9th defendant desire to have a division. We have no objection to do so."

Presumably the Vakil who appeared raised no objection to the Commissioner appointed. It is on this statement of consent that the jurisdiction must be founded; otherwise the Court had no power to effect a partition which had not been ordered by the decree and for which there was no properly framed application before the Court. No consent of parties could give the Court jurisdiction in a matter like this, for the question was not pending before the Court and had never been put in issue in any proceedings. I may also observe that when the Commissioner had sent in a report, objections were ordered to be filed before the 5th January. On the 5th January, the Court was closed on account of plague. It does not appear when it was re-opened but an affidavit was filed on the day when the petition was next taken up and rejected as being out of time. It is not quite clear whether it was filed on the day the Court re-opened or not, and consequently I cannot say that this order is incorrect, but it seems strange that this objection to a division by the 7th defendant, the present petitioner who had never consented to it specifically should have been rejected on this ground. I must set aside the Subordinate Judge's order of the 3rd March for delivery according to the partition made by the Commissioner. Respondents will pay the petitioner's costs in this petition.

V. N. V. *Petition allowed.*

Z. K.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 142 OF 1924.

October 22, 1925.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Lindsay.

RAM NEWAZ AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

NANKOO AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 14—Perpetuities, rule against—Transfer on extinction of descendants.

A transfer of property in favour of another, to take effect on the extinction of the transferor's line of male descendants, is against the law of perpetuities and cannot be given effect to. [p. 402, col. 1.]

Letters Patent Appeal against a judgment of Mr. Justice Kanhaiya Lal, dated the 3rd July 1924, in S. A. No. 265 of 1923, printed as 82 Ind. Cas. 326.

Messrs. *Haribans Sahai* and *P. L. Banerji*, for the Appellants.

Mr. *Gulzari Lal* and Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—This is the appeal of the plaintiffs who had instituted a suit as reversioners of one Ram Charan for the possession of 2 *bighas* of land. In 1884 Ram Charan appears to have been in difficulties and he had a 9-pie odd share in a certain village. He executed a sale-deed which has had to be construed in all the Courts and on the proper construction of that sale-deed the rights of the parties depend. The plaintiffs are the reversioners but the defendants are the purchasers of whatever rights the vendee had. The real point is whether the sale was an out-and-out sale of the 9-pie odd share or whether it was a sale by the vendor of the 9-pie odd share minus the 2 *bighas* now in dispute. The document lies before us and it starts by Ram Charan stating that he had a 9-pie 3-*kauri* 2-*dant zemindari* share in the property and then, after usual formal parts, says that he has absolutely sold with the exception of 2 *bighas* of *nankar* land numbered as below (1460) the entire property. Pausing there and putting the sale in the plainest possible terms, it was a sale of the 9-pie odd share minus the 2 *bighas* specifically numbered. At a later portion of the deed he says :—

"Let this be known that the 2 *bighas* of *nankar* land which I have excluded from the sale shall remain in my possession for life and after my death in the possession of my *aulad khas* without payment of rent or Government revenue. I or my lineal de-

scendants have no right to transfer the property excluded either permanently or temporarily. If none of my lineal descendants is alive in my family then the said land shall be declared to be the own property of the vendee and his heirs and the persons of my family shall have no claim to the same."

It remains only to notice one further reference to this land. In the detail we find the share sold, *viz.*, 9-pie 3-*kauri* 2-*dant nankar* land excluded from the 2 *bighas* No. 1460. The construction that we put upon the passages that we have read is that the vendee got on the 12th of February 1884, the date of the sale, the 9-pie odd share with No. 1460, the 2 *bighas* definitely excluded, but that they had a possibility of becoming its owners at a future date provided that provision was one which the law would recognize. We can see in the document no indication whatever of the vendees having acquired the whole of the property in the whole of the land including the two *bighas*. What we do find is an acquisition of the whole of the 9-pie odd share except that particular area of 2 *bighas* numbered 1460. Now if that be so, what is the position when a contest arises between the nearest reversioners and the successors of the vendees? The position was that Ram Charan having died, he was succeeded by his son Mauzzam Ram, who in turn died childless in 1918, and, therefore, these 2 *bighas* of land would as it happened, if there was no law to the contrary, become the property of the vendees within a life or lives in being and twenty-one years after. But the fact that it happened to fall in within the legal limitation is not the test which is to be applied to these cases. What you have to see is whether the event can be postponed to beyond the period of a life or lives in being and 21 years after and not what in fact happened. Now applying that test it is perfectly evident that these 2 *bighas* of *nankar* land might have remained with the lineal descendants of Ram Charan for 100 or 200 years, and that being so, we are of opinion, that this was a condition repugnant to the law and being so repugnant to the law the defendants could not set up this document on which they rely as entitling them to possession of the property. We are, therefore, of opinion that the plaintiffs were right in bringing this action and that the decision of the learned Judge of this Court must be set aside and the decree of the First Appellate Court which confirmed the judgment of the Munsif must be restored with costs and fees in this Court on the higher scale.

N. M. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1867 OF 1923.

August 27, 1925.

Present:—Mr. Justice Phillips.

Sree Rajah VASUREDDI SREE CHANDRA MOULESWARA PRASADA BAHADUR MANNI-SULTAN *Zamindar* GARU (MUKTYALA ESTATE) —PLAINTIFF—APPELLANT

versus

YADAVALLI KAMESWARA SOMAYAJULU AND OTHERS—DEFENDANTS —RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 151—Ejectment—Agricultural land—Sale by ryot for building purposes—Actual building only on small portion—Value as agricultural land, whether impaired—Landlord's right to eject.

Where a *ryot* sells the major portion of an agricultural holding for building purposes he in effect converts the agricultural land into a building site, and thereby materially impairs the value of the holding for agricultural purposes and the landlord is entitled to a decree in ejectment under s. 151 of the Madras Estates Land Act. It is immaterial that on the date of the suit only a small portion of the land has been built upon [p 403, col. 1]

Second appeal against a decree of the District Court, Kistna at Masulipatam, dated the 5th March 1923, in A. S. No. 119 of 1922, preferred against that of the Court of the Additional Deputy Collector, Bezwada, dated the 31st March 1922, in Summary Suit No. 439 of 1921.

Messrs. *C. S. Venkatachariar* and *A. Venkatachalam*, for the Appellant.

Sir *K. V. Reddi*, for the Respondents.

JUDGMENT.—The plaintiff leased 15 acres 65 cents of dry land to the predecessor of defendants Nos. 1 to 4 in 1907 for a period of 30 years. Defendants Nos. 1 to 4 have now sold 14 acres of land to defendants Nos. 5 to 10 and the 5th defendant has begun the erection of a building on 100 square yards, has planted about 25 or 30 trees and fenced in one acre of this land and sunk a well. The plaintiff accordingly brings this suit under s 151 of the Estates Land Act for the ejectment of

defendants Nos. 1 to 4. The sale-deed of the 14 acres is not filed but the 8th defendant, who is the only defendant examined in the suit admits that the 14 acres were purchased for about Rs. 1,800 and that the land has been purchased for building purposes, cattlesheds and storage of hay. Although, therefore, the 5th defendant alone has begun building on the land, it is clear that defendants Nos. 5 to 10 have all purchased the land for building purposes and defendants Nos. 1 to 4 have executed the sale-deed for that purpose. Both the lower Courts have found that the erection of this building by 5th defendant on two cents of land and the planting of fruit trees and the sinking of the well have not materially impaired the value of the holding for agricultural purposes.

It is contended for the respondent on the authority of *Hari Mohan Misser* v. *Surendra Narayan Singh* (1) that this is a finding of fact which is binding on me in second appeal, but this contention cannot be upheld in the present case, for s. 151 contemplates a suit against the *ryot* for materially impairing the value of the holding. In this case the *ryot* is defendants Nos. 1 to 4 between whom alone and the plaintiff there is the relation of landlord and tenant. We are not concerned here with the action of the 5th defendant, except in so far as it is in pursuance of the act of defendants Nos. 1 to 4. The sale to defendants Nos. 5 to 10 is not binding on the plaintiff, and inasmuch as each of the vendors is only entitled to $2\frac{1}{3}$ acres, the landlord can object to the sub-division of the land, inasmuch as each sub-division is less than 5 acres of dry land. When we come to consider whether the tenants have materially impaired the value of the holding we have to realise what it is that the tenants have done. The land is leased for agricultural purposes and by selling 14 acres out of 15 65 acres for building purposes, the tenants have in effect converted the agricultural land into building sites. It is true that at present only a small extent of the land has been actually built upon, but defendants Nos. 1 to 4 have agreed to buildings being erected upon the whole 14 acres and have precluded themselves from raising any objection thereto. When we, therefore, consider the holding as an agricultural holding, there only remains 1 acre 65 cents of agricultural land. If the *ryots* wished to cultivate the whole, they could not do so because of their contract with defendants 5 to 10 under which the nature of the holding is entirely altered, and in this view it appears to me that they have materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes.

The plaintiff is accordingly entitled to a decree for ejectment.

Plaintiff has also claimed compensation. It cannot be suggested that the erection of this small building has materially injured the plaintiff and it would be very difficult to fix the amount of compensation. It is, however, recognised by Napier, J., in *Sankaralinga Moopanar* v. *Subramania Pillai* (2) that some compensation would be admissible as otherwise *ryots* will be enabled to convert agricultural land into town plots and take the whole increased value to themselves, but as in this case the buildings have not yet been erected over any considerable portion of the holding, I do not consider that any compensation need be paid.

The second appeal is allowed and there will be a decree for ejectment with costs throughout.

V. N. V. *Appeal allowed.*

N. H.

(2) 31 Ind. Cas. 273, 29 M. L. J. 514.

(1) 31 C. 715. 11 C. W. N. 794; 6 C. L. J. 19; 9 Bom. L. R. 730. 17 M. L. J. 361; 2 M. L. T. 399; 34 I. A. 133 (P. C.).

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1950 OF 1920.

May 22, 1924.

Present:—Mr. Justice Moti Sagar and Mr. Justice Martineau.

KANSHI RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MUHAMMAD ABDUL RAHMAN KHAN AND ANOTHER PER COURT OF WARDS AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Shamilat—Grazing rights—Proprietors, right of, to cultivate—Pasturage—Sufficient area to be set apart.

Plaintiffs, *malikan-i-qabza*, sued defendants, proprietors, for a declaration that they were entitled to graze their cattle in and to take away wood from the *shamilat deh*, and for an injunction restraining the defendants from cultivating their land. It appeared that the plaintiffs' right to graze their cattle, to take away fuel and to cut grass from the area in

dispute had been established in previous litigation between the parties :

Held, that though the defendants were entitled to cultivate the land, the plaintiffs were entitled to have sufficient pasturage for their cattle and that, therefore, the defendants' right of cultivation should extend only to so much of the land as will leave plaintiffs a sufficient amount of area for grazing purposes. [p 405, col. 1.]

First appeal from a decree of the Senior Subordinate Judge, Sargodha, dated the 30th of [illegible], 1925.

Lala *Ram Chand Manchanda* and Lala *Hargopal*, for the Appellants.

Messrs. *Nanak Chand* and *Chuni Lal*, for the Respondents.

JUDGMENT.—The plaintiffs in this case, who are 375 in number are the *malikan-i-qabza* and certain inhabitants of the village Girote in the Khushab Tahsil of the Shahpur District. The defendants are the proprietors. The dispute relates to the *shamilat-deh* 11,110 *bighas* and $1\frac{3}{4}$ *kanals* in area which the plaintiffs allege they and their ancestors have always been using as pasturage, but which the defendants are now trying to encroach upon and to bring under cultivation. The right to take away fuel and to cut grass from the land in dispute for the use of their cattle is also claimed, and it is contended that the defendants are preventing plaintiffs from the exercise of these rights. The learned Senior Subordinate Judge has granted plaintiffs a declaratory decree to the effect that they are entitled to graze their cattle and to take away wood from the area which is free from cultivation, and has refused their prayer for an injunction restraining the defendants from cultivating their lands when the same are vacant and the sowing of the crops is possible.

Against the decision the plaintiffs have preferred a first appeal to this Court, and the main contention put forward on their behalf is that the learned Senior Subordinate Judge was not justified in refusing their prayer for an injunction, and that the area which the defendants were entitled to cultivate ought to have been specifically defined in the decree. It is further contended that the decree and the judgment were not in conformity with each other, and that it should have been stated in the decree that the plaintiffs were entitled to cut grass, to which right they were found entitled in the judgment. After hearing the learned Counsel for the parties we are of opinion that the appeal must succeed and that the decree of the learned Senior Subordinate Judge should be modified to some extent. A reference to the *jamabandi* papers printed at pages 4 to 9 of the supplementary paper-book of First Appeal No. 4405 of 1915 shows that in *Sambat* 1935-36 the land was entered as *shamilat-deh* and shown in the column of remark as unassessed to land revenue and being used by the inhabitants of the village for grazing purposes. This entry was continued till *Sambat* 1948-49, corresponding to 1893-94, when about 918 *bighas* of land were for the first time brought under cultivation. A note was made in the revenue papers showing that this area was under the cultivation of non-occupancy tenants, but that no rent was paid. In the same year a dispute appears to have arisen between the proprietors and the inhabitants of the village as to the extent of the area which should have been entered in the revenue papers as *shamilat-deh*. The matter went up to Court, and on the 14th of July 1893 Munshi Ghulam Farid, Assistant Collector, decided that the land should be shown as owned by the *Bilochis*, who were entitled to cultivate it, but that it should also be entered that the inhabitants of the village had the right of grazing their cattle in the *thal* land and that the proprietors had no right to prevent them from doing so. A further entry was ordered to be made to the effect that no dues in respect of grazing were chargeable by the proprietors. In the present suit, which was instituted in 1914, it was stated by the plaintiffs that the defendants had ploughed and brought about 220 *bighas* of land more under cultivation in different places, and that they were gradually trying to reduce the area which the former were using for grazing purposes from time immemorial.

That the plaintiffs have a right to graze their cattle, to take away fuel, and to cut grass from the area in dispute cannot be doubted for a moment, and in fact the finding of the learned Senior Subordinate Judge is also to the same effect. The rights have been peacefully enjoyed till 1914, and it has not been shown that the defendants are in any way entitled to interfere with the exercise of these rights. The sole question for consideration is whether it is necessary that the area which the plaintiffs are entitled to use for grazing purposes should be sufficiently defined in the decree. By the order of Munshi Ghulam Farid, dated the 14th of July 1893, it was declared

that the defendants were the owners of the land in dispute and that they were entitled to cultivate it. It was further declared that the plaintiffs have the right to graze their cattle over the whole of the area in dispute. There is nothing on the present record to show that the whole of the land is required for grazing purposes. There can, however, be no doubt that, though the defendants are entitled to cultivate the land, the plaintiffs are entitled to have sufficient pasturage left for the use of their cattle and that it appears to us advisable that a provision to this effect should be inserted in the decree. It will tend to prevent disputes in future and will also prevent the defendants from bringing the whole of the land under cultivation as apprehended by the plaintiffs. We are accordingly of opinion that it should be stated in the decree that the defendants' right of cultivation will extend only to so much of the land as will leave plaintiffs a sufficient amount of area for grazing purposes. The right to cut grass is included in the right of grazing as found by the learned Senior Subordinate Judge himself, and there is no reason why the plaintiffs' suit in respect of this right should not have been decreed. We are further of opinion that the plaintiffs should also be given a decree for an injunction restraining the defendants from preventing plaintiffs from the exercise of these rights. The question as to the sufficiency of pasturage to be left for the plaintiffs need not be decided in this case and may be left for execution proceedings. We accordingly accept the appeal and order that the decree of the lower Court should be modified to the extent above indicated. The defendants shall pay the costs of the plaintiffs in this Court.

K. S. D. *Appeal accepted.*

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 58 OF 1924.

March 12, 1925.

Present:—Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.

GUNTUR NARASIMHAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

NYAPATI NARAYANA RAO GARU—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 53—Limitation Act (IX of 1908), Sch. I, Art. 120—Fraudulent alienation—Suit by creditors—Nature of suit—Individual creditors, right of—Limitation—Starting point

A suit under s. 53, Transfer of Property Act, to set aside a fraudulent alienation by a debtor is governed by Art. 120 of Sch. I to the Limitation Act. [p 406, col. 1.]

Muthikesavaloo Naicker v. *Shah Abdulla*, 29 Ind Cas 62, 2 L W. 479, (1915) M. W N 337 and *Venkateswara Aiyar* v *Somasundram Chettiar*, 44 Ind. Cas. 551, 7 L W 280, (1918) M W. N 244, relied on.

The right of suit under s. 53, Transfer of Property Act, is an individual right which each creditor has, although if one creditor obtains a decree in a suit under s 53 that decree accrues to the benefit of the other creditors as well [p 410, col. 2, p 411, col. 1]

Per *Venkatasubba Rao, J.*—The right to sue under s. 53, Transfer of Property Act, accrues when a creditor exercises his option [illegible] fraudulent alienation and the starting po[illegible] a suit by him, therefore, is the date when he exercises this option [p 406, col 1.]

In re Maddever, Three Towns Banking Co. v. *Maddever*, (1884) 27 Ch. D 523, 53 L. J. Ch 998; 52 L T. 35, 33 W. R 286, relied on.

Venkateswara Aiyar v. *Somasundram Chettiar*, 44 Ind. Cas. 551, 7 L. W. 280, (1918) M. W. N. 244, referred to

Per *Madhavan Nair, J.*—The starting point for limitation for a suit under s. 53, Transfer of Property Act, is not the date on which the creditor exercises the option to avoid the transfer, but it is the date on which the circumstances entitling the creditor to have the transfer avoided, first become known to him. [p 409, col 1]

Letters Patent Appeal against the judgment of Mr. Justice Krishnan, dated the 19th February 1924, in Second Appeal No. 796 of 1921, preferred to the High Court against a decree of the Court of the Second Additional Subordinate Judge, Guntur, in A. S. No. 70 of 1920 (A. S. No. 392 of 1920, District Court, Guntur, O. S. No. 134 of 1919, on the file of the Court of the Second Additional District Munsif, Guntur.)

Mr. *B. Jagannadha Das*, for the Appellants.

Mr. *N. Rama Rao*, for the Respondent.

JUDGMENT.

Venkatasubba Rao, J.—The question to be decided in this appeal is one of limitation. This suit was filed under s. 53 of the Transfer of Property Act. The plaintiff, being the Receiver in insolvency represents the body of creditors of the insolvent. The transaction impeached is a mortgage, dated 27th July 1908, executed by the insolvent in favour of the defendant. The suit was filed on the 15th of February 1918.

The first question that arises is what is the Article that is applicable? Article

120 seems to be the appropriate Article. The decisions seem to be to the same effect: see *Authikesavaloo Naicker* v. *Shah Abdulla* (1) and *Venkateswara Aiyar* v. *Somasundram Chettiar* (2). It was conceded before us, and, in my opinion, rightly that the Article applicable is Art. 120. The more difficult question, however, is what is the starting point of limitation? On this point, there is no authority. Phillips, J., in *Venkateswara Aiyar* v. *Somasundram Chettiar* (2) expressed the view that the time runs from the date when the plaintiff had knowledge of the facts entitling him to relief. This though an *obiter dictum* is entitled to great weight as the point was fully considered by him. Krishnan, J, in the judgment under appeal, as I understand it, is not quite definite on the point. He thinks that limitation runs from the date when the creditor exercises his option; in the alternative from the date when he has knowledge of the facts that give him a right to relief. As I read his judgment he is more inclined to take the former than the latter view. It seems to me that he expressed the alternative view, as on the facts, whichever view was taken the same result followed. Krishnan, J., having held that the suit was filed in time, the defendant has filed this appeal and Mr. Jagannadha Das has argued the case very fully on his behalf. His contention is that the date of alienation gives the starting point. He supports his contention by relying on what I may describe as grounds of convenience. Before adverting to these grounds, I shall deal with the point with reference to the two provisions of law that have a bearing, *viz.*...s. 53 of the Transfer of Property Act and Art. 120 of the Limitation Act. Under s. 53 a transfer that offends against the rule enacted in it is voidable at the option of any person defrauded, defeated or delayed. Under Art. 120 the suit may be brought within six years of the date when the right to sue accrues. The question resolves itself into this. When does the right to sue accrues? If the transaction is voidable at the option of a creditor he may avoid it at any time at his pleasure. Section 53 does not say that, after the lapse of a certain time, he shall not be able to avoid the transaction. It does not prescribe a limit of time. What then constitutes the exercise of the option? In the words of Wallis, C. J. In *Ramaswami Chettiar* v. *Mallappa Reddiar* (3) a voidable transaction may be avoided by any open and unequivocal declaration of an intention to avoid it, see page 769*. The right to sue accrues when this option is exercised. Under Art. 120 the suit may be instituted within six years from the date when the right to sue accrues. As that right accrues, as I have shown, when the plaintiff exercises his option, the suit may be filed within six years from the date of the exercise of the option. The proper construction of the sections compels us to take this view and it seems to me that this is what Krishnan, J., intended to hold. If so, I entirely agree with him.

The alternative view, namely, that time begins to run from the date when the plaintiff becomes aware of the facts that entitle him to relief found favour with Phillips, J., in *Venkateswara Aiyar* v. *Somasundram Chettiar* (2). But a perusal of his judgment shows that only two theories were put forward before him namely, (1) the date of alienation gives the starting point, (2) the date of knowledge. These were the two rival views that were placed before him and he preferred the view that knowledge gives the starting point. His judgment leaves no doubt in my mind that if what may be compendiously described as the option theory was suggested to him, he would have gladly adopted it. Indeed in this connection, he uses the word "option" but does not go the necessary length. Section 53, it is needless to point out, does not take note of knowledge at all. It speaks of option and not of knowledge. Under Art. 95 of the Limitation Act which relates to a suit for relief on the ground of fraud, knowledge, no doubt, would be a material element, for the prescribed period of three years runs from the date when the fraud becomes known to the party wronged. But the suit contemplated by s. 53 is not one for relief on the ground of fraud, and the knowledge of fraud to which Art. 95 refers is, therefore, not a material circumstance. Moreover, it is not necessary that there should be actual fraud to invalidate a transaction unless s. 53 as the second clause of that section shows, which runs as follows :—

(1) 29 Ind. Cas. 62; 2 L. W. 479; (1915) M. W. N. 337.

(2) 44 Ind. Cas. 551; 7 L. W. 280; (1918) M. W. N. 244.

(3) 59 Ind. Cas. 917; 43 M. 760; (1920) M. W. N. 572; 39 M. L. J. 350; 28 M. L. T. 173; 12 L. W. 475.

*Page of 43 M.—[*Ed.*]

"Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid."

In my opinion, therefore, fraud or knowledge of fraud is not a relevant consideration and on the strict construction of the sections, I have arrived at the result and it is a matter for satisfaction that considerations of convenience and justice point to the same conclusion. From this point of view, I shall next deal with three different standpoints suggested.

First, let me take the date of alienation, being the starting point. Section 53 refers to an intention to defraud prior or subsequent transferees, co-owners and creditors. I shall take the case of creditors as this is the most usual case. It is settled that the benefit of the section is not restricted to existing creditors alone. Even subsequent creditors may impeach the transacton. Suppose then a trader makes an alienation of the property which offends against the terms of this section. Why should any creditor call in question the alienation if the trader is possessed of sufficient funds to satisfy him? Why should a subsequent creditor be barred although the alienation was made long previous to his debt having come into existence? Creditors are not generally interested in impugning the transaction entered into by their debtor. In spite of the fact that a property worth Rs. 10,000 has been alienated, the debtor may yet be possessed of assets worth laks and why should any creditor take the trouble of impugning the alienation, or again the debtor may have alienated the property, but may still be expected to make large profits or to amass large wealth. The creditors are only concerned with this that the debtor must one day be in a position to re-pay the amounts due. To say that the right to avoid a transaction becomes barred at the lapse of six years from the alienation, is practically to throw upon them the burden of impeaching every suspicious transaction, although for the time being, it may not be necessary to adopt this course of conduct. In the case of subsequent creditors whose interest accrues at a period too remote, the section will remain on this construction a dead letter. Further, if the date of alienation is the starting point, creditors may become barred for no fault of theirs, as it is very likely that they may not in time become aware of the transaction itself without even, be it noted, any active steps being taken by the debtor to conceal the transaction from his creditors.

Let me now take the second theory suggested, the date of knowledge being the starting point. As I have said, it matters little to a creditor that his debtor has alienated some of the property. Why should a creditor be driven to embark on litigation merely because it has come to his knowledge that his debtor has entered into a transaction not above board? The property still remaining, as I have said, may suffice or they may hope that the debtor may in time rally and no creditor can be expected to have before him a balance sheet disclosing actually the debtor's affairs.

The view then I have taken, namely, that the exercise of the option is the starting point imposes no unnecessary burden on the creditors. When they find that their interests demand that the transaction should be set aside they exercise the option and avoid the transaction. Moreover it is now settled that the option may be exercised otherwise than by the institution of a suit. Firstly, a creditor may attach the property alienated and he may do so, whatever may be length of time that lapses from the date of alienation. Secondly, if, on attachment, the transferee prefers a claim under O. XXI, r. 58, C. P. C., and the claim is allowed, the judgment creditor may file the statutory suit prescribed by r. 63 without regard again to the lapse of time from the date of alienation: see *Kottarathil Puthiyapurayil Pokker* v. *Balathil Parkum Chandrankandi Kunhamed* (4). Thirdly, if the claim, is on the other hand, disallowed and the transferee files the suit under r. 63, the creditor may defend it by showing that the transaction was in fraud of creditors: see *Ramaswami Chettiar* v. *Mallappa Reddiar* (3). In all these cases, the creditor exercises the option without resorting to the suit, under s. 53, and it would be anomalous to hold that although his right to file a suit is barred, his right still subsists to question the transaction by these other methods.

Mr. Jagannadha Das strongly argued that the starting point should not be made to

(4) 51 Ind. Cas. 714; 42 M. 113; 25 M. L. T. 47; (1919) M. W. N. 39; 9 L. W. 138; 36 M. L. J. 231.

rest upon such a shifting ground as exercise of option. I see nothing objectionable in this To take another instance from the Limitation Act, under Art. 60 the period of limitation for a suit to recover money deposited under an agreement that it shall be payable on demand, is three years from the date when the demand is made. The making of the demand is entirely dependent upon the volition of the plaintiff and the period of limitation may be indefinitely prolonged and a suit may be instituted without even a demand being made, in which case no question of limitation arises. The exercising of the option is analogous in this respect to the making of the demand and the option may be exercised by the filing of the suit itself, in which case the question of limitation will likewise not arise. Mr. Jagannadha Das in his exhaustive argument contended that this will be a startling result. I do not in the least agree with him. On the other hand, the English cases show that this is assumed to be the normal position. *In re Maddever*; *Three Towns Banking Co.* v. *Maddever* (5) a creditor brought an action to set aside a conveyance several years after it was made and although he had been aware of the facts during the whole period and gave no satisfactory reason for his delay, the Court of Appeal held, affirming North, J., that his right to impeach the transaction was not barred. The only limitation recognised is that the debt should be subsisting. North, J., puts it thus: "Where the parties have been merely non-active, I do not see any reason why they should not take proceedings at any time while the debt is a subsisting debt. The time might have arrived when the Statute of Limitations would be a bar, and, of course, when the debt was gone, no proceedings could be taken in respect of it." Cotton, L. J., observes: "The plaintiffs in this case say 'We are creditors whose debt is not barred, and we seek payment out of property conveyed away by the debtor by a deed which the Statute of 13 Eliz, c 5, makes void as against us.' The defendant relies on the delay of the creditor; but I am of opinion that this defence is not effectual." See also May on Fraudulent Conveyances, page 120, when the learned author says :—

"Since the right of a creditor to set aside a deed under 13 Eliz., c. 5 is a legal right, and not merely a right to set aside the instrument on equitable grounds, the fact that the creditor has delayed to take proceedings to set aside the deed under that Statute, although with full knowledge of the facts, is immaterial, so long as the delay has not been such as to create a statutory bar. Until the right to recover the debt is barred by the Statutes of Limitations, the legal right to avoid the deed exists, and no equity arises from the mere delay to enforce it."

Mr. Jagannadha Das next contended that the nature of the action is representative and if one creditor is barred the whole body of creditors becomes barred. May a creditor bring a suit on his own behalf or must the suit be brought on behalf of all the creditors? This question does not strictly arise although I may say that on this point the preponderance of authority, so far as Madras is concerned, is in favour of the view that a creditor may bring such a suit on his own behalf : see Krishnan, J.'s judgment in *Kottarathil Puthiyapurayil Pokker* v. *Balathil Parkum Chandrankandi Kunhamed* (4) and Sadasiva Aiyar's observation at page 781* in *Ramaswami Chettiar* v. *Mallappa Reddiar* (3). Again, under s. 11, Expl. VI, C. P. C., the section relating to *res judicata*, the result of a suit brought by one creditor *bona fide* contested may be binding on the transferee and on the general body of creditors. I express no opinion on this. But assuming that when there has been a suit the principle of *res judicata* applies, it does not by any means follow that the inaction of one creditor, that is to say, his failure to file a suit within six years of his exercising the option, bars the general body of creditors. Under s. 53 of the Transfer of Property Act "Any person so defrauded, defeated or delayed" may avoid the transaction. An individual right is conferred upon each creditor by this section and the inaction or laches of one cannot deprive the others of their rights. The learned Vakil for the appellant relied on the analogy furnished by *Challagundla Varamma* v. *Madala Gopaladasayya* (6), where by reason of the nearest reversioner failing to sue within the time limited to set aside an alienation by a Hindu widow, all the reversioners existing as well as subsequently born

(5) (1884) 27 Ch. D. 523; 53 L. J. Ch. 998; 52 L. T. 35; 33 W. R. 286.

(6) 46 Ind. Cas. 202; 41 M. 659; 35 M. L. J. 57; 24 M. L. T. 115; 8 L. W. 62; (1918) M. W. N. 461.

*Page of 43 M.—[*Ed.*]

were held equally barred. The matters are not *in pari materia*; special considerations apply in the case of suits by reversioners and the analogy is misleading.

As the Receiver represents all the creditors, granting that the inaction of one may lead to the result contended for, it must be observed that in this case it is not suggested that any particular creditor exercised his option at a time too remote for the suit to be brought. Therefore, though I have dealt with the matter at some length, the question as to the nature of the suit under s. 53, Transfer of Property Act, does not, as I have said, on the facts arise.

I hold that the suit is not barred by limitation.

It is lastly urged that the suit is quite a frivolous one as appears from the previous proceedings that transpired in insolvency, but this is a matter we cannot go into as the suit remains to be tried on the other issues in the case.

The only order as to costs that we propose to make is that they shall abide the event.

Madhavan Nair, J.—I agree with my learned brother that the plaintiff's suit in this case is not barred by limitation, but with regard to the grounds for that decision, I regret I have to differ from him.

I agree that a creditor's suit under s. 53 of the Transfer of Property Act is governed by Art. 120 of the Indian Limitation Act; but I think that the starting point for limitation is not the date on which the creditor exercises the option to avoid the transfer, but it is the date on which the circumstances entitling the creditor to have the transfer avoided, first become known to him. The result of holding that the starting point for limitation is the exercise of option by the creditor is that the creditor in that case would be entitled to wait any number of years he pleases before bringing the suit, which would mean that in effect, there would be no period of limitation at all for a suit under s. 53 of the Transfer of Property Act. Having regard to the spirit and provisions of the Indian Limitation Act which contains also a residuary article for all suits not specifically provided for, I think that we should not construe s. 53 of the Transfer of Property Act, in such a way as to have the above-mentioned effect unless the language thereof clearly compels us to adopt such a construction.

Section 53 of the Transfer of Property Act runs as follows:—"Every transfer of immoveable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed". The sole basis, as it appears to me, for the view that the starting point for limitation is the date of the exercise of option by the creditors is the use of the expression "at the option of" in the above section. In my opinion, it is not necessary, nor is it right, to interpret that expression in such a way as to make the exercise of option the starting point. The same expression occurs in ss. 2, cl. (1), 19 and 19 (*a*) of the Indian Contract Act, there it has been used simply to indicate at whose instance it is that the transaction referred to therein is voidable and has no reference at all, to any question of limitation, for Art. 114 of the Limitation Act provides that the period of limitation for a suit for the rescission of a contract commences from the date when the facts entitling the plaintiff to have the contract rescinded first became known to him. I think that the words "at the option of" which occur in s. 53 of the Transfer of Property Act should also be construed in the same manner and the question whether a suit under that section is barred should be judged solely from a consideration of Art. 120 of the Limitation Act.

Under Art. 120 the time from which the period begins to run is "when the right to sue accrues". I agree with my learned brother that the date of the transfer (alienation) sought to be avoided cannot be the starting point for limitation. If we hold that the date of the transfer is the starting point, then in a case where the creditor comes to know of the transfer only more than six years after the date thereof it would have to be held that the right to sue had not only accrued to him, but had terminated as well before he himself knew anything about the transaction, which would mean that the creditors would have no opportunity of avoiding the transfer at all. It is not, therefore, right to hold that the starting point for limitation is the date of alienation. When once the creditor comes to know of the circumstances which entitle him under s. 53 to avoid the transfer, there can be no further impediment in the way

of his bringing the suit and I think the right to sue accrues to him within the meaning of Art. 120 from the date of such knowledge. This view finds support in the judgment of Phillips, J., in *Venkateswara Aiyar* v. *Somasundram Chettiar* (2). At page 283*, the learned Judge says "that the cause of action arises on the date when the creditor seeking to set aside the alienation knows that he has been defrauded, defeated or delayed". It is true that it is not specifically stated in Art. 120 that this is the starting point and that only the general expression "when the right to sue accrues" occurs in that Article but it is a residuary Article for all suits not specifically provided for and as such, the language thereof has necessarily to be general. The interpretation to be put on that expression would, to a certain extent, depend on the particular class of cases to which the Article is sought to be applied As observed by Phillips, J:—"In all cases of fraud, misconduct, etc., the period of limitation for a suit begins to run from the time when the fraud, misconduct, etc, becomes known (*vide* Arts. 90, 91, 95 96, etc.), but no such provision could be inserted in Art. 120, for it is a residuary Article and thus applicable to every variety of suits not otherwise provided for and is not confined to suits based on fraud If such a suit coming within Art. 120 is based on fraud, the time when the right to sue accrues must, I think, be determined in consonance with the principle governing the other specific suits based on fraud, and that is, that the time when the fraud becomes known, becomes the starting point for limitation." No doubt it is stated by the learned Judge that a suit by a creditor under s. 53 depends upon the exercise of option by him but he states this in order to negative the contention that the right to sue accrues on the date of alienation itself. I think, Krishnan, J., also in the judgment under appeal takes the same view; for he observes thus in the concluding portion of his judgment:—"The Receiver himself puts the cause of action as having arisen on the 31st July 1915 when one Sambiah and others learnt that the suit mortgage-deed was a collusive document; it does not appear that Sambiah knew it earlier. Taking this view it seems to me that the suit is not barred by limitation". It is true that the learned Judge makes reference in an earlier portion of his judgment to the exercise of option by the creditor or by the Receiver; but the context shows that he is there considering the question as to whether each of the creditors has got a separate right of suit under s. 53 or whether if one creditor is barred by limitation from bringing the suit the rest are also barred; and I think that he did not intend to lay down that the exercise of option is the starting point for limitation. The decision in *In re Maddever*; *Three Towns Banking Co.* v. *Maddever* (5) does not in my view help us in deciding the present question. That case merely decides that delay on the part of the creditors to take proceedings even after full knowledge of the facts is immaterial provided the delay is not such as to create a statutory bar.

It is true as pointed out by my learned brother that there would be some anomaly if a creditor is allowed to set up in a suit under O. XXI, r. 63 of the C. P. C, the fraudulent nature of the transfer as against the claimant even though he may be barred by limitation from bringing a suit under s. 53 to have the transfer avoided, but it appears to me that the anomaly would still exist even if we adopt the "option theory", for supposing the creditor exercises the option on a particular date and keeps quiet for more than six years without bringing a suit under s 53, I take it that in proceedings under O. XXI, r. 63, such creditor may still set up the fraudulent nature of the transfer as against the claimant. This consideration, therefore, does not, in my view give us any help in solving the present question.

For the reasons above stated, I am of opinion that the starting point for limitation is the date on which the circumstances entitling the creditor to have the transfer avoided first become known to him. In view, of the fact that a few of the creditors in this case knew of the fraudulent character of the alienation in 1909, *i.e*, more than six years before the suit, it becomes necessary to consider whether the creditors' right of suit under s. 53 is an individual right which each individual creditor has or whether it is only a representative right in the sense that if one creditor is barred by limitation from bringing the suit, the others are also barred. I agree with my learned brother in thinking that the right of suit under s. 53 is an individual right which each creditor has. It is true that, if a creditor obtains a decree in a suit

*Page of 7 L. W.—[*Ed.*]

under s. 53, that decree accrues to the benefit of the other creditors as well, but I think s. 53 confers on each of the creditors the right of bringing a suit on his own behalf. As the Receiver presents the whole body of the creditors and as some at least of the creditors knew that the suit mortgage-deed was a collusive document only within six years of the suit, I hold the suit by the Receiver is not barred by limitation.

In the result I agree that this appeal should be dismissed. I agree with him as regards the costs also.

V. N. V.
N. H. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1056 OF 1923.

April 23, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

GOPAL CHANDRA BANERJEE—PLAINTIFF—APPELLANT

versus

BHUTNATH SASMAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Construction of document—Lease, whether agricultural or residential—Heritable lease—Ejectment.

A plot of land upon which there were a certain number of fruit-trees was leased to the defendants who were to enjoy the land by erecting houses on it and planting, if they so liked, other fruit-trees It was provided that the lease should continue to the defendants' heirs, but that if at any time the lessor should require the land he would give notice to the lessees who would give up the land on receipt of the value of fruit-trees, etc.

Held, (1) that the lease was one for residential and not for horticultural or agricultural purposes and was, therefore, governed by the Transfer of Property Act and not by the Bengal Tenancy Act, [p. 412, col. 1.]

(2) that the rights of the parties must be governed on a construction of the lease itself and that the conduct of the parties after the lease had been entered into could not be taken into consideration, [*ibid*]

(3) that the land was to be enjoyed by the defendants from generation to generation so long as the landlord did not require it for his own purposes, but that if he so required it, he had the right to re-enter after giving notice and paying compensation in accordance with the terms of the lease. [p. 412, cols. 1 & 2.]

Appeal against a decree of the Subordinate Judge, First Court, of 24-Parganas, dated the 20th December 1922, affirming that of the Munsif, Second Court, at Alipur, dated the 23rd May 1921.

Mr. *Sarat Chandra Roy Choudhury* and Babu *Charu Chandra Bhattacharjee*, for the Appellant.

Babu *Baranasibashi Mukherjee*, for the Respondents.

JUDGMENT.

Duval, J.—In this case the plaintiff brought a suit in ejectment and for arrears of rent and damages in respect of a piece of land, said to measure 1 *bigha*, 17 *cottas*, which was leased to the defendants by a *pottah* dated the 27th November 1889. The plaintiff's case was that he served on the defendants a notice to quit and determined the lease. The first Court found that the defendants' tenancy was a tenancy under the Bengal Tenancy Act, that notice was not duly served under that Act and that the defendants could not be ejected except under the provisions of s. 25, Bengal Tenancy Act. The learned Subordinate Judge on appeal confirmed this order and against his order the present appeal is brought.

Now the main point in this appeal is whether on the construction of the *pottah* this tenure is one which comes under the Bengal Tenancy Act at all or is a tenancy which comes under the provisions of the Transfer of Property Act. It appears that on the land in suit at the time of the lease there were only a certain number of fruit-trees and by the lease the defendants were to enjoy the land by erecting houses on it and planting, if they so liked, other fruit-trees. The provision was that the lease should continue to the defendants' heirs; but there is a further provision that if at any time the lessor should require the land he would give notice to the lessees who would, therefore, give up the land on receipt of the value of the fruit-trees, etc. It is argued on behalf of the appellant that by the nature of the premises and terms of the lease the parties are governed by the Transfer of Property Act and not by the Bengal Tenancy Act and the lease can, therefore, be terminated on the terms let out in the *pottah*. For the respondent it is argued that the lease is one governed by the Bengal Tenancy Act and that the defendants have acquired a right of occupancy and cannot be ejected. It is clear that the land is not let out for purposes of cultivation. It was let out for residential purposes with the right to take fruit from the trees on the land and to plant other fruit-trees and take their fruits. The *pottah* is described as a *basatbati pottah*, *i. e.*, a *pottah* for residential purposes. Now the mere fact that there is a right to plant trees or pluck the fruits of trees would not by it-

self convert a *pottah* granted for residential purposes into a horticultural lease carrying the same rights as an agricultural lease and so bring it under the Bengal Tenancy Act. In this connection I would refer to the case of *Hedayet Ali* v. *Kalanand Singh* (1) where it was observed that if a lease is for the purpose of gathering fruits from the trees on the land, the lease is not for horticultural purposes. Again in the unreported case of *Raj Kumar Nali* v. *Mohesh Chandra Guha* (2) where it was found that after the creation of a lease the defendants possessed the land by enjoying fruits of the trees and that none of the land was under any sort of cultivation and it was held that it could not be said that such land was really let out as subject to the provisions of the Bengal Tenancy Act. I would also refer to the case of *Sashi Bala Debi* v. *Amola Debi* (3) where it was observed that the whole area of a residential holding cannot, ordinarily, be covered with buildings and the fact that the surplus land is planted with fruit bearing trees does not alter the character of holding; and the case was governed by the Transfer of Property Act. On the other hand it is argued on behalf of the defendants that the growing of fruit trees is a horticultural purpose and so the Bengal Tenancy Act applies. Following the rulings set out above we cannot agree to the respondent's proposition of law on the facts of this case. Lastly it is urged that the lease anyhow is a permanent one owing to the covenant in it that the land will be enjoyed down to sons and grandsons in succession and that the covenant as to the right of re-entry on compensation is a purely personal covenant between the original lessor and the original lessee; and it is argued that as the original lessor is dead and the present plaintiff is only an assignee from him that covenant being a personal one is no longer enforceable. We see no force in this contention. It appears to us that the purpose of the lease was clearly one for residential purposes. Incidentally there was the right to plant trees and take fruits but there was nothing agricultural about the land at all. As to the terms, it is clear to us that it was given to be enjoyed from generation to generation so long as the landlord did not require it for his own purposes. He had then according to the terms of the document, the right to re-enter on giving certain compensation. In this view we must hold that the Bengal Tenancy Act does not apply but that the Transfer of Property Act applies. It was also urged that by their conduct the parties have treated the lease as a permanent one. In a matter of this character, rights as between the parties must be determined on a construction of the lease and we have nothing to do with the conduct of the parties after the lease has once been entered into. In view of these findings it has next to be determined whether the lease has been duly determined by notice. The notice appears to be one served by registered post and is not a notice under the Bengal Tenancy Act. The lower Courts have not considered whether such notice is sufficient under the Transfer of Property Act or is one given in accordance with the terms of the lease. It is necessary, therefore, to remand the case to the lower Appellate Court to come to a finding as to whether in the present suit notice has been duly served or not in accordance with the terms of the lease.

The result is that this appeal is allowed with costs of this Court, the decree of the lower Appellate Court set aside and the case remanded to that Court to be dealt with in the manner indicated above. Other costs will abide the result.

Suhrawardy, J.—I agree.

Z. K. *Appeal allowed.*

(1) 20 Ind. Cas. 332; 17 C. L. J. 411

(2) (1915) Unreported S. A. No. 2371 of 1915, decided on the 19th July

(3) 66 Ind. Cas. 61; 25 C. W. N. 378.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 73 OF 1923.

September 24, 1925.

Present:—Mr. Justice Odgers and Mr. Justice Viswanatha Sastri.

MAHALINGA NAICKER—PLAINTIFF—APPELLANT

versus

VELLAYA NAICKER *alias* GURUSAMI NAICKER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (I of 1908), Ch VI, ss. 191, 189, 192—Civil Procedure Code (Act V of 1908), O. XXI, rr. 89, 92 Sale of holding—Application to set aside sale, rejection of—Suit to set aside sale, maintainability of—Jurisdiction of Civil Courts.

Civil Courts have jurisdiction in all cases in which they would have had jurisdiction prior to the passing of the Madras Estates Land Act, except in so far as jurisdiction is expressly or by necessary implication taken away by the provisions of s. 189 of the Act. [p. 413, col. 2.]

A Civil Court has jurisdiction to entertain a suit by a *ryot* to set aside a sale of his holding held under the provisions of Ch. VI of the Madras Estates Land Act. The fact that an unsuccessful application had been made by the *ryot* under s. 131 of the Act to set aside the sale makes no difference. [*ibid.*]

Rajah of Ramnad v. *Venkataramaiyer*, 69 Ind. Cas. 923; 45 M. 890; 16 L. W. 274; (1922) M. W. N. 501; 31 M. L. T. 158, 43 M. L. J. 264; (1923) A. I. R. (M) 6, followed.

Second appeal against a decree of the Court of the Subordinate Judge, Ramnad at Madura, in A. S. No. 74 of 1921 (A. S. No. 722 of 1919 of Ramnad District Court at Madura), preferred against that of the Court of the Additional District Munsif, Srivallipattur, in O. S. No. 430 of 1917 (O. S. No. 247 of 1917 on the file of the Court of the District Munsif, Sattur.)

Messrs *B. Sitarama Rao* and *S. R. Muthuswami Iyer*, for the Appellant.

Mr. *A. Venkatarayaliah*, for the Respondents.

JUDGMENT.

Viswanatha Sastri, J.—Plaintiff is the appellant. He sued to set aside a sale held under the provisions of Ch. VI of the Estates Land Act and for a permanent injunction restraining the defendants from interfering with his enjoyment, on the following grounds:—(1) that the sale was held without due notice to him; (2) that there was no publication and (3) that the price was grossly inadequate. The first Court held on all these points in favour of the plaintiff, and passed a decree as prayed for. Defendants appealed, and the Appellate Court held that a Civil Court had no jurisdiction to entertain such a suit and allowed the appeal. That such a suit would lie has been held by a Full Bench of this Court in *Rajah of Ramnad* v. *Venkataramai Iyer* (1). The Vakil for the respondents contended that this ruling would not apply because there was an application to set aside the sale under s. 131 of the Act, and that O. XXI, r. 92 (1) of the C. P. C., barred the suit. This rule runs as follows:—"Where no application is made under r. 89, r. 90 or r. 91 or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute." I may here estate that r 89 is similar to s. 131 of the Estates Land Act, and it was represented that the applications put in by plaintiff under this section were dismissed, because the proper sum was not deposited. Section 192 of the Estates Land Act relates to the application of the C. P. C. to "suits, appeals and other proceedings under the Act" and it lays down that "subject to the other provisions of this Act and subject to the following modifications and additions, the provisions of the C. P. C. shall apply to all suits, appeals and other proceedings under this Act so far as they are not inconsistent therewith." And in cl. (*a*) it is stated that s. 310-A (corresponding to r. 89 of O XXI) shall not apply. Now if r. 89 of O. XXI, of the C. P. C., does not apply to proceedings under the Estates Land Act, I fail to see how r. 92 (1) of O. XXI, can be made applicable simply on the ground that s. 131 of the Estates Land Act is similar to r. 89 of O. XXI. As observed in the Full Bench case above referred to, the jurisdiction of Civil Courts is taken away only in cases referred to in s. 189 of the Estates Land Act and it was not even suggested that there is anything in this section to bar the suit out of which this second appeal arises.

I would, therefore, allow the appeal and setting aside the decree of the lower Appellate Court direct that that Court do re-hear the appeal. Appellant will get his costs in this Court and costs in the lower Appellate Court will abide and follow the result. Appellant will get a refund of the Court-fee paid on the memorandum of appeal.

Odgers, J.—I agree. It was stated in the referring judgment in *Rajah of Ramnad* v. *Venkataramaiyer* (1) as well-settled that the Civil Courts have jurisdiction in all cases in which they would have had jurisdiction prior to the Act except in so far as such jurisdiction is expressly or by necessary implication taken away by the provisions of s. 189 of the Estates Land Act. The question put before the Full Bench was quite general in its terms. It is admitted that the only distinction between this case and that dealt with by the Full Bench is that two unsuccessful applications were made by the *ryot* under s. 131. I cannot see that this makes the slightest difference in principle and a suit by a *ryot* who says that his property has been improperly sold is expressly said by the Full Bench to be outside the restrictive provisions of the

(1) 69 Ind Cas. 923; 4 M. 890; 16 L. W. 274; (1922) M. W. N. 501; 31 M. L. T 158; 43 M. L. J. 264; (1923) A. I. R. (M.) 6.

Madras Estates Land Act. I agree as to the order proposed by my learned brother.

V. N. V. *Appeal allowed.*

Z. K.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 121 OF 1924.

October 22, 1925.

Present:—Sir Grimwood Mears, KT., Chief Justice and Mr. Justice Lindsay.

Musammat RAM KUER—DEFENDANT—APPELLANT

versus

GOVIND RAM AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Adverse possession—Mortgage, redemption of—Widow of mortgagee retaining possession—Lawful origin—Nature of widow's possession.

Where after the redemption of a mortgage the mortgagee retains possession of the mortgaged property and, after his death, his widow comes to occupy the said property to the exclusion of the rightful heirs of her husband as well as the mortgagor, the possession of the widow cannot be referred to a lawful origin and is adverse to the mortgagor and, in case it exter[illegible] twelve years, will ripen into ownership. [p. 115, col. 2.]

Letters Patent Appeal against a judgment of Mr. Justice Neave, dated the 28th of April 1924, in S. A. No. 1702 of 1922, printed as 85 Ind. Cas. 740, affirming the decree of the District Judge, Mainpuri, dated the 13th October 1922.

Messrs. *Haribans Sahai* and *L. M. Banerji*, for the Appellant.

Mr. *Saila Nath Mukerji*, for the Respondents.

JUDGMENT.—After hearing the arguments in this case we have come to the conclusion that the appeal must be allowed, the decision of the Judge of this Court reversed and the decree of the first Appellate Court restored.

The suit as framed was a suit for redemption in which the defendant was one *Musammat* Ram Kuer who is now before us as the appellant.

It appears that on the 22nd of November 1884 one Pahar Singh executed a mortgage in favour of four persons one of whom was Ram Prasad. The amount of the mortgage money was Rs. 1,000 and admittedly Ram Prasad was interested in this money to the extent of one-fifth only.

On the 17th of October 1890 Pahar Singh the mortgagor sold some other property of his to three of [illegible] left with them a sum of Rs. 93[illegible] to discharge the mortgage of 1884. It has been found and has not been questioned that Rs. 938 represented the full amount of the mortgage debt at the time this transaction took place.

It is further proved that Ram Prasad, who as we have said was interested to the extent of 1/5th of this mortgage, received his proportionate share of this money. A further fact which is established by the evidence on the record is that when this money was paid in pursuance of the contract made on 17th of October 1890 the mortgage-deed which was executed on the 22nd of November 1884 was returned to the mortgagor Pahar Singh.

After this transaction had taken place it seems that Pahar Singh in the year 1891 made a mortgage of this property which had been so released to certain other persons by way of conditional sale. In the year 1894 these mortgagees got a decree for foreclosure, the property was brought to sale in the year 1896 and after the sale had taken place there was a suit for pre-emption which ended in the property being transferred to the plaintiffs in the present suit. They got a pre-emption decree on the 26th of April 1898.

It appears that notwithstanding the payment of the mortgage debt in the year 1890 the portion of the mortgaged property in which Ram Prasad was interested remained in possession of Ram Prasad and after Ram Prasad's death, which it seems took place in or about the year 1892, this property came into the possession of his widow *Musammat* Ram Kuer who is the appellant before us.

The plaintiffs whose title as we have said dates back to 1898, brought this suit in the year 1920 against *Musammat* Ram Kuer. The position which they took up in the case was that the mortgage of the year 1884 was still subsisting, that the defendant *Musammat* Ram Kuer was in the position of a mortgagee and that they were entitled to redeem the property as purchasers of the equity of redemption. A number of defences were raised. The only one with which we are concerned was whether the plaintiffs were entitled to succeed on the case so brought. The case put forward by *Musammat* Ram Kuer was that there was no mortgage in existence and that she had been in adverse possession of this property for more than twelve years.

The Court of first instance dismissed the suit and gave effect to the plea of adverse

possession raised by the lady and this decree was affirmed in appeal by the Subordinate Judge of Mainpuri. There was a second appeal to this Court and the learned Judge has taken the view that the mortgage was still in existence, that *Musammat* Ram Kuer could not be heard to set up any adverse title to the property and that consequently the plaintiffs were entitled to have a decree for redemption.

Before us it has been argued that this view taken by the learned Judge of this Court is erroneous. We are of opinion that the learned Judge fell into error in dealing with this question of adverse possession.

To go back to the beginning of things it is clear that the original mortgagor of the property in the year 1884 was Pahar Singh. It is further quite clear that when Pahar Singh in the year 1890 sold some other property to some of the mortgagees and arranged for the discharge of the mortgage debt that after the payment of this money the person who was entitled to immediate possession of the property mortgaged in 1884 was Pahar Singh and no one else. It is quite clear that the other three mortgagees who had entered into the transaction of sale with Pahar Singh in 1890 had no right whatever to this mortgaged property—undoubtedly the mortgaged property was to return to Pahar Singh.

Ram Prasad, as we have said, died some time after the year 1890. It is an admitted fact that Ram Prasad left sons who are still in existence and who, according to the Hindu Law, were his heirs and entitled to possession of all his property. On the other hand, it is equally clear that *Musammat* Ram Kuer the widow of Ram Prasad had in the presence of her sons no right whatever to any property belonging to her husband. It is admitted, however, that ever since the death of Ram Prasad this lady has been in possession to the exclusion of her sons and all other persons, and that being so, it is difficult to see how her plea of adverse possession of this property can be repelled.

We do not agree with the view which was taken by the learned Judge of this Court. He seems to have been of opinion that the widow of Ram Prasad could not hold adversely to the mortgagor Pahar Singh or his representatives. He thought that the widow's possession might be adverse to her own sons but he held that any right she had would not be a right adverse to Pahar Singh. In our opinion this is not so, for at the time she entered into possession the person who was entitled to immediate possession of this property was, as we have said, Pahar Singh himself.

While it may be that possession which can be referred to a lawful origin is not to be deemed to be adverse, it is quite clear in the present case that the possession of the widow *Musammat* Ram Kuer never had any rightful origin. On all hands it must be admitted that she took possession as a trespasser. It cannot, therefore, be said that her possession can be referred back to the possession which her husband originally acquired in his capacity as mortgagee. Her possession at once became adverse as against the person who was then entitled to immediate possession, namely, Pahar Singh. The plaintiffs in the present suit derived their title from Pahar Singh and are in the same position as he would have been had he been alive now. In other words, having been entitled to immediate possession of property and having failed to bring their suit within twelve years from the date on which they became so entitled their title to the property has been lost.

We hold, therefore, that the rights of this litigation are with *Musammat* Ram Kuer, the defendant-appellant, and for the reasons just given we set aside the decree of the learned Judge of this Court and restore the decree of the first Appellate Court. The appellant is entitled to all her costs in this Court including fees on the higher scale.

N. H. *Decree set aside.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 897 OF 1923.

September 11, 1925.

Present:—Mr. Justice Waller.

THAMAYA BANGARUSWAMI NAICKER—PETITIONER

versus

VADAMALAI THIRUNATHASUNDARA DOSS THEVAR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, O. XXXIII, r. 1—Government of India Act, 1915, (5 & 6 Geo. ... r leave to sue in forma ... whether can be gone into—Revision.

On an application for leave to sue to *in forma pauperis*, it is not desirable for a Court to go into a complicated question of limitation, and its order is liable to be set aside in revision.

Kalliani Amma v. *Matathil Veetil Achuthan Nair*, 53 Ind. Cas. 239; 10 L. W. 174; (1919) M. W. N. 573, 37 M. L. J. 309, followed

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order of the Court of the Subordinate Judge, Madura, in O. P. No. 50 of 1922.

Mr. *K. V. Sesha Iyengar*, for the Petitioner.

Mr. *A. Krishnaswami Iyer*, for the Respondent.

JUDGMENT.—I agree with the view of Kumaraswami Sastri, J., in *Kalliani Amma* v. *Matathil Veetil Achuthan Nair* (1) that it is undesirable on an application for leave to sue *in forma pauperis* to go into a complicated question of limitation. In this case the discussion of such a question has led to the delivery of a judgment six pages long.

The order of the lower Court is set aside. The application will be disposed of on the other grounds raised.

The costs of this petition will abide the result.

V. N. V.
N. H. *Order set aside.*

(1) 53 Ind. Cas 239, 10 L W. 174; (1919) M. W. N. 573; 37 M. L. J. 309.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 3 OF 1924.
December 15, 1924.
Present:—Mr. Justice Devadoss and Mr. Justice Wallace

PEYYETY GOPALAM GARU—RESPONDENT—APPELLANT
versus
ADUSUMILLY GOPALAKRISHNAYYA GARU—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 60—"Agriculturist", who is—Exemption of house from sale.

For deciding the question of the exemption of the liability of the house of an insolvent to be sold for debts, the Court must decide whether the insolvent's chief means of livelihood is agriculture. It is not enough that he be an agriculturist, or that he be a trader. The point is, which profession forms his chief means of livelihood.

Appeal against an order of the District Court, Kistna at Masulipatam, dated the 15th August 1923, in I. A. No. 4 of 1923, in I. P No. 136 of 1920 (Official Receiver's file).

FACTS.—An insolvent applied before the Official Receiver for exempting his house from liability from being sold to discharge his debts on the ground that he was an agriculturist.

Under s. 68, Provincial Insolvency Act, the creditors applied to the Court to set aside the order alleging that the insolvent was also carrying on a trade and was not entitled to the exemption claimed. The Court relying on the evidence of the insolvent and his witnesses who deposed that he lived by [illegible] and trade and following *Surangini Deby* v. *Kedarnath Chandra* (1) held that he was not entitled to the exemption claimed under s. 60, C. P. C.

The insolvent appealed.

Messrs *C. S. Venkatachariar* and *P. Markandeyulu*, for the Appellant.

Mr. *P. Satyanarayana*, for the Respondent.

JUDGMENT.—Neither the District Judge nor the Official Receiver has directed his attention to the real issue, in this matter, *viz.*, whether the insolvent's *chief* means of livelihood is agriculture. It is not enough that he be an agriculturist, or that he be a trader. The point is, which profession forms his chief means of livelihood.

We set aside the District Judge's order and direct him to pass a fresh order in the light of the above remarks. Fresh evidence may be given. Costs up to date will abide the result.

V. N. V.
N. H. *Case remanded.*

(1) 63 Ind. Cas 681.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 265 OF 1925.
May 29, 1925.
Present:—Mr. Justice Martineau and Mr. Justice Coldstream.
POHLA SON OF GUJAR SINGH—ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Practice—Criminal trial—Witnesses, unreliable—Conviction, whether justified—Murder—Motive.

In this country and among *Jats* murders are sometimes committed from motives of pride to avenge comparatively harmless insults [p. 418, col. 1]

The mere presence of motive, however, will not justify a conviction for murder when the testimony of alleged eye-witnesses of the occurrence cannot be relied upon. [p 419, cols. 1 & 2]

Criminal appeal from an order of the Sessions Judge, Ferozepur, dated the 19th January 1925.

Dr. *Nand Lal*, for the Appellant.

Mr. *Des Raj Sawhney*, Public Prosecutor, for the Respondent.

JUDGMENT.—In this case Pohla, son of Gujar Singh, a *Jat* of village Dina in Tehsil Moga, has been sentenced to death by the Sessions Judge of Ferozepur for the murder of Kapur Singh (or Kapura) of the same village. The story disclosed by the prosecution evidence is as follows:—

Kapura and his brother, Phumman, (witness) owned a field, half of which was mortgaged to *Musammat* Punjabo, a creditor, and cultivated for *Musammat* Punjabo by Gujar Singh, father of Pohla and Subha. There was a dispute over the cultivation of this field between Kapura and his brother on one side and Gujar Singh on the other and a *panchayat* was held on or about the 17th July 1924 to settle the matter. At this *panchayat* Kapura and Gujar quarrelled. Gujar's nephew Phumman intervened on his uncle's behalf and pulled Kapura's beard. The people present separated the two men, but Gujar declared that he would be revenged and would "drink Kapura's blood." Pohla was not present when this happened.

On the 22nd of July at 6 30 A. M. Phumman, brother of Kapura, reported at Nihal Singhwala Police Station five *kos* from Dina, that Pohla and Subha the sons of Gujar, together with Phumman, Gujar's nephew, had waylaid Kapura on his way home from his field at sunset on the previous evening and beaten him to death with *dangs*. The murder he said, had been seen by Pritam Singh, Puran Singh and the son of Kehar Singh and one Attar Singh had seen the accused going armed with *dangs* towards the place of the murder. Phumman added that he had heard of this from one Ralla (who had himself heard the story from Pritam Singh) when he (Phumman) had returned to the village later the same evening. He had gone to the place and found his brother dead, bleeding at his mouth and nose and with his hands and feet bound with his turban. The Police went to Dina on the same day (22nd). The statements of witnesses were not, however, recorded until the 23rd, on which day also a *post mortem* examination was made by the Assistant Surgeon at Moga. From this examination it appeared that Kapura's death was due to strangulation probably effected by hands. There were twelve contusions and swellings on Kapura's legs, chest, back, arms, head and neck.

The Police found no evidence against Phumman accused. Subha was absconding and Pohla was tried alone.

Besides the evidence of the Assistant Surgeon, Rai Bahadur Dr. Mathra Das (P. W. No. 1) and the necessary formal testimony, there is evidence as to the motive (the ill-feeling engendered by the quarrel in the *panchayat*) and the evidence of no less than nine witnesses who profess to have seen Pohla and Subha assaulting the deceased Kupura. Their story is that from various points of view they saw Subha striking Kapura with *dang* while Pohla was seated on or beside Kapura, pommelling or beating Kapura with his fists or squeezing his neck. According to one witness Ganda (P. W. No. 15) it was Subha who was throttling Kapura while Pohla used a *dang*.

Pohla admitted that there had been a quarrel in the *panchayat* (at which he himself had not been present). He declared he had no enmity with the deceased, but Kehar Singh, Santu, and Chanan (eye-witnesses) who were interested in a canal with the deceased were at enmity with him. Karela, father of Kehar Singh, and Rullia, father of Santu, had once beaten him and Gujar, his father, and he and Gujar had complained to the *Sufedposh*. At the time of the murder he was ploughing land on the other side of the village. He produced one witness to prove his *alibi*.

The truth of the evidence as to motive is not seriously questioned by Dr. Nand Lal who appears for the appellant. It is to be remembered that Pohla took no part in

the squabble at the *panchayat*. The squabble itself was not such as would at first sight appear to be a sufficient motive for the murder of Kapura by Gujar's sons, but in this country and among *Jats* there is no doubt that murders are actually committed from motives of pride to avenge what appear to be comparatively harmless insults. Moreover the real enmity was over the possession of land, such as is certainly a common origin of murder. There is no reason to doubt that Kapura was throttled to death. It is, however, unfortunate that there is no evidence as to the probable manner in which the various contusions and marks found on the deceased other than those of strangulation were caused.

The defence evidence is of small value. It may, however, be remarked that it discountenances the theory, now advanced by appellant's Counsel, that the murder really took place at night and was not discovered until the following morning. If this theory were true, the story of the eye-witnesses could not, of course, be believed.

The only matter for consideration is whether the evidence of the eye-witnesses or of any of them is to be believed. We may here note that the Assessors' verdict was not a satisfactory one. Virtually, after some vacillation and an expression of opinion that Pohla "participated in the attack," they acquitted Pohla of murder on the grounds, apparently, that there was an unpremeditated assault by Subha absconder with a *dang* and that they did not believe that it was Pohla who throttled Kapura.

A careful scrutiny of the evidence and the arguments of Mr. Des Raj Sawhney who appears for the Crown have left us unconvinced that the actual murder was really seen by any of the eye-witnesses. Several considerations have influenced us in arriving at our conclusion.

The evidence has been fully described in the Sessions Judge's judgment and we do not propose to repeat a description here, but will confine our remarks to the points which appear to us to justify doubts as to the truth of the story told by the eye-witnesses.

According to Phumman, who made the First Report, he was informed of the murder by Ralla, a Muhammadan, (P. W. No. 19) who got the news from one Indar Singh. This Indar Singh is not produced. The fact by itself would be of small consequence but for the astonishing fact that, though so many people saw what happened and mingled immediately after the murder with the murderers and the villagers, no one said a word about it to any one who had not seen it except Pritam (P. W. No. 14), a child of 10, who told his uncle Indar Singh. It is this Indar Singh who is said to have informed Ralla, the Muhammadan. Now Indar Singh's evidence as to when and in what manner the child informed him would have been of considerable importance, and its absence adds to the feeling of uncertainty provoked by the curious silence of the many eye-witnesses. Pritam says that he told Indar Singh as soon as he returned to the village, *i. e.*, about sunset time, but it was not until night time that there was an outcry in the village. Phumman did not verify the news by questioning the eye-witnesses before going to the *thana*. When he made his report there he accused Phumman Singh as well as Pohla and Subha. In his evidence before the Committing Magistrate he declared that Rulla had named Phumman as one of the culprits But at the trial he admitted that he included Phumman's name on no evidence, but merely on conjectures. According to the evidence Pritam (aged 10), Puran (aged 16) and Chanchal (aged 13) saw the assault together. But none of these except Pritam the youngest spoke a word about it to any one until the second day of the investigation, the first having been occupied in "looking for witnesses" (see evidence of Sub-Inspector Muhammad Sharif, P. W. No. 21). Some witnesses had, however, been named in the First Information Report.

We come now to examine the story told by the supposed eye-witnesses.

Kapura was a stout man of 44. His assailants were only two. The evidence is that Kapura kept crying out loud enough to be heard 200 *karams* away and the actual words ("Pohla and Subha, don't beat me") were heard 80 or 100 *karams* away. There were very many people in the fields all round, but no one went to Kapura's help. Two men Ganda Singh (P. W. No. 15) and Vir Singh (P. W. No. 16), approached, so they say, to within 20 *karams* of where the assault was going on. They did not interfere. All the eye-witnesses say they saw Pohla and Subha, either leaving Kapura after the beating or going to the village together immediately afterwards. None, however, went to see if Kapura was alive

or dead. None except the child Pritam mentioned anything to any one until the 23rd July. It is certain that Kapura's hands and feet were found tied up with his turban when his body was first seen by Phumman. No witness mentions that Kapura's hands and feet were tied. We find it difficult to believe that any witness who really saw the murder being accomplished could possibly have failed to notice that Kapura was bound hand and foot.

There is a remarkable discrepancy in the evidence of Ganda Singh (P. W. No. 15) and Vir Singh (P. W. No. 16) whose testimony would otherwise have carried some weight. Both knew Pohla and Subha and both were standing, so they say, close to the place of the assault. But while Ganda says that Pohla was using the *dang* while Subha was pressing Kapura's neck and pulling his beard. Vir Singh declares the exact opposite. This discrepancy, as the learned Sessions Judge points out, does not necessarily absolve either accused; but it adds to the doubt in our minds both as to whether the alleged eye-witnesses really saw any assault and as to whether if they did see an assault this assault was the one in which Kapura was killed. Here we may refer to a discrepancy between the evidence given by Chanan (P. W. No. 4) and his statement made to the Police. He told the Police that he saw Pohla and Subha "scuffling with Kapura in Bishan Singh's field." At the trial he altered this so as to make his evidence confirm with that of others and declared that Pohla was seated on Kapura and Subha was beating him. According to most of the witnesses the accused after assault replaced their bundles of grass upon their heads and went off to the village. Ganda Singh says "they ran away." There is a curious passing reference in the evidence of Pritam Singh (P. W. No. 14) to a second beating in his examination-in-chief, where he states that he did not see accused beating Kapura a "second time." This may be of no importance, but, in our opinion, suggests that it was known or guessed that the murder took place after the scuffle at sunset.

We have given due consideration to the arguments addressed to us by Mr. Des Raj Sawhney who points out the absence of any motive on the part of the witnesses to charge the accused falsely. We admit that there is force in this argument. But we are unable to rid our minds of the impression of doubt left upon us by the evidence as a whole. We are not convinced that the murder was seen by any of the witnesses. It is upon the direct evidence of the eye-witnesses that the conviction depends and finding ourselves unable to accept and act upon this evidence we accept this appeal and acquit Pohla.

Z. K. *Appeal accepted.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 108 OF 1925.

August 25, 1925.

Present:—Mr. Kennedy, J. C., and Mr Rupchand Bilaram, A. J. C.

KISHANCHAND—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss 120-B, 420—Conspiracy, charge of; essential requisites of—Nature of proof—"Where an express provision has been made in the Code for the punishment of such conspiracy," meaning of

A charge of conspiracy in respect of but one agreement between several accused persons to cheat such members of the public as they could defraud by deceitful means is not a bad charge. [p. 421, col 1.]

It is immaterial if all the accused had concocted the scheme of the conspiracy or that all of them should have originated it. It is sufficient if it originated with some of them and the others had subsequently joined the original conspirators [p. 421, col. 2.]

R v *Murphy*, (1838) 8 C. & P 297, relied upon.

O'Connell v *Reg.* (1844) 11 C & F. 155; 9 Jur 25, 1 Cox C C. 413, 7 Ir. L R 261, 5 St Tr. (N. S.) 1, 8 E. R 1061; 65 R R 59, referred to

The conspiracy may be proved either by direct evidence or by proof of circumstances from which the Court may presume the conspiracy. [*Ibid.*]

R v *Parsons*, (1762) 1 Bl. W. 392; 92 E. R. 222, *R.* v. *Murphy*, (1838) 8 C. & P. 297, *Emperor* v *Anappa Bharamgauda*, 9 Bom. L. R 347, 5 Cr. L. J. 323, *Birendra Ghose* v. *Emperor*, 7 Ind. Cas 359, 37 C 467; 11 C W. N. 1111, 11 Cr. L. J 453 and *Jumo Allarakhio* v *Emperor*, 34 Ind Cas 649, 9 S. L. R. 223; 17 Cr. L. J 233, relied upon.

The words "where an express provision has been made in the Code for the punishment of such a conspiracy" appearing in s. 120-B of the Penal Code do not mean that where there is proof of an abetment of an offence, the charge should be for such abetment. It is optional for the Crown to proceed for abetment of an offence committed in pursuance of the conspiracy or of the offence of conspiracy. [p. 421, col. 2; p. 422, col 1.]

Udhasing v. *Emperor*, 35 Ind. Cas. 670; 10 S. L. R. 69 at p 71, 17 Cr L. J. 366, relied upon.

The inclusion in a charge of conspiracy to cheat of certain specific offences relied on by the prosecution in proof of the substantive offence of cheating does not render the charge illegal as being in respect of different offences specified therein. [p. 422, col. 1.]

R. v. *DeBerenger*, (1814) 3 M. & S. 67; 105 E. R. 536; 15 R. R. 415 and *R.* v. *Gurney*, (1869) 11 Cox C. C. 414, relied upon

Application to revise the judgment of the Sessions Judge, Hyderabad Sind, dated the 9th April 1925.

Mr. *Partabrai D. Punwani*, for the Applicant.

Mr. *C. M. Lobo*, Acting Public Prosecutor, for the Crown.

JUDGMENT.—The appellant Kishanchand and three other accused persons, namely, Dharamdas, Isarsing and Urs have been tried together on a charge of conspiracy to cheat under s. 120 B read with s. 420, Indian Penal Code, and have been convicted and sentenced to twelve months' rigorous imprisonment and a fine of Rs. 1,000 each by the City Magistrate of Hyderabad. The appeals filed by them before the Sessions Judge of Hyderabad have failed. The revision applications filed by the three accused Dharamdas, Isarsing and Urs have been summarily dismissed. The application of Kishanchand has now come up before us for hearing.

The facts which led to the trial of the four accused briefly stated are that in June 1924 one Nebhraj who is said to have been one of the gang of cheats met the complainant Partabrai at a certain place of resort for the public and considering him to be credulous enough to fall into their trap introduced his conspirator Isarsing to the complainant representing Isarsing to be the faithless clerk of a wealthy and extravagant Hindu Sethia who had helped Nebhraj to win Rs. 3,000 from his Sethia by playing at cards and that he would help the complainant in the same way on payment of a handsome commission. The process of playing with a specially arranged pack of 36 cards was explained to him and he was taken to his Sethia who was no other man than their co-conspirator Urs. The first day's operation resulted in Partabrai winning Rs 4,500. The Sethia, however, would not part with the money on the pretext that Partabrai had brought no money with him and in the event of his losing he would have paid nothing. This made Partabrai to take Rs. 2,000 on a subsequent day to enable him to secure his previous day's earning and to make more money. The result, however, was disasterous and not only did he lose his previous day's gains and the money he took with himself but a further sum of Rs. 300. He apprised his brother Chellaram of what had happened who suspected foul play and put himself in touch with the Police. Partabrai subsequently pretended to fall in with the views of Isarsing to join in the conspiracy and by inducing other victims to recoup himself of his loss. He introduced one Kishanchand a friend of his who after being initiated in the process of manipulating the special pack of cards took with himself Rs. 5,000 to play with the wealthy master of Isarsing who on this occasion was personated by the accused Dharamdas in place of the accused Urs. The Police who kept themselves in touch with what was being done were up on the scene when Sobhraj was about to part with Rs. 4,980 having lost that amount. The applicant appears not to have taken any part either in luring Partabrai or his friend Sobhraj to their den or to have been in any way implicated in the two affairs.

Subsequent investigation led the Police to rope in the applicant as a co-conspirator. Nebhraj has not been run in as his services were required by the Police in bringing to book the offenders.

The case of the other accused presents no difficulty. They were all concerned in attempts to cheat Sobhraj and whether there was a conspiracy to cheat other persons besides Sobhraj or not, the evidence of the conspiracy to cheat him is conclusive on that point. The case of the applicant however stands on a different footing.

It would be convenient to re-produce the charge framed against the accused and which is as follows:

"That you between September 1920 and August 1924 at Hyderabad (and other places in Sind) did agree with one another (and other persons unknown) to do or cause to be done an illegal act to wit the commission of cheating by deceiving persons by inducing them to play with cards dice and by pretending to double currency-notes and thereby to induce them to deliver money and currency-notes to you. You were thus partners to a criminal conspiracy and in pursuance of that said conspiracy you have done the following acts.

1. In October 1920 you (Dharamdas and Urs) induced Shewaram to part with 9 notes of Rs. 100 each on the pretence of doubling them.

2. You Dharamdas and Kishanchand in company with another person unknown induced in similar manner Jethomal to de-

liver to you notes of Rs. 500 in October 1923 on the same pretext.

3. You Isarsing on 26th or 27th June 1924 induced Partabrai to play with particular cards with your pretended master Urs in a particular manner suggesting that he, *i. e.*, Partabrai was only to win. You taught him the trick of the play and made him win Rs. 4,500 which were never paid to him. You Isarsing and Urs dishonestly induced Partabrai to bring money to take his gains and thus dishonestly induced him to part with Rs. 2,000 which you took away.

4. You Isarsing and Dharamdas in the above related manner on 31st July 1924 or 1st August 1924 induced Sobhraj to play and make an attempt of making him deliver to you Rs. 4,980 the payment being interrupted by the arrival of the Police.

5. You Dharamdas along with Bava Subhlal (since deceased) induced Chellaram Pleader to play with you loaded dice and dishonestly induced him to part with Rs. 1,600 on Thadri holidays in September 1923. And thereby committed an offence punishable under s. 120-B read with s. 420, Indian Penal Code and within my cognizance. I hereby direct that you be tried by me on the said charge".

Several objections have been raised by the learned Pleader for the applicant as to the legality of the charge framed against the accused. They are based on a misconception of what the charge is and are due to the failure to keep in view the distinction between the charge and the evidence adduced in proof of the charge.

The gist of the offence of criminal conspiracy as defined in s. 120-A, Indian Penal Code, which is by itself punishable as a substantive offence is the very agreement between the co-conspirators to do or cause to be done an illegal act or a legal act by illegal means subject however to the proviso that where the agreement is not an agreement to commit an offence the agreement does not amount to a conspiracy unless it is followed up by an act done by one or more persons in pursuance of such agreement.

The case of the prosecution as disclosed by the charge in effect was that at one time or the other between the years 1920 and 1924 there was an agreement. between the four accused to cheat such members of the public as they could defraud by deceitful means *inter alia* by playing with a specially arranged pack of cards loaded dice or by pretending to double currency-notes for them.

As so stated there was nothing wrong about the charge. It was a charge in respect of but one agreement which afforded the Crown one single cause of action to try all the accused jointly for one single offence, namely, the offence of cheating the public within the meaning of ss. 233 and 239, Cr. P. C. It was also immaterial if all the four had concocted the scheme of the charge or that all of them should have originated it. It was sufficient if it originated with some of them and others had subsequently joined the original conspirators. [*R.* v. *Murphy* (1).]

It was equally open to the Crown to prove the conspiracy by direct evidence which as observed by Earl, J., in *R.* v. *Duffield* (2) is hardly available in such cases or by proof of circumstances from which the Court may presume the conspiracy *R.* v. *Parsons* (3), *R.* v. *Murphy* (1), *Emperor* v. *Annappa Bharamganda* (4) *Birenara Kumar Ghose* v. *Emperor* (5), and *Jumo Allarakhio* v. *Emperor* (6). In the present case the Crown relied on certain criminal acts of the accused said to have been done in pursuance of the conspiracy. The fact that such criminal acts were in themselves substantive offences again cast no obligation on the Crown to prosecute the individual offenders for such specific offences or deprive the Crown of its right to proceed against all of them for conspiracy pure and simple.

The plea that where the only evidence given in proof of the conspiracy is the evidence of abetment of an act which is in itself an offence is equally untenable. As pointed out by Pratt, J. C. In *Udhasing* v. *Emperor* (7) the words "Where an express provision has been made in the Code for the punishment of such a conspiracy" appearing in s 120-B, Indian Penal Code, do not mean that where there is proof of an abetment of an offence the charge should be for such abetment and that it is optional for the Crown to proceed for abetment of the offence committed

(1) (1838) 8 C. & P. 297.
(2) (1851) 5 Cox. C C. 404.
(3) (1762) 1 Bl. W. 392; 96 E. R 222.
(4) 9 Bom L. R. 347; 5 Cr. L. J. 323.
(5) 7 Ind Cas. 359; 37 C. 467, 14 C. W. N. 1114; 11 Cr. L. J 453.
(6) 31 Ind. Cas 649, 9 S. L R. 223; 17 Cr. L. J. 233.
(7) 35 Ind. Cas. 670; 10 S. L. R. 69 at p. 71; 17 Cr. L. J. 366.

in pursuance of conspiracy or of the offence of conspiracy.

The inclusion in the charge of certain specific offences relied on by the prosecution in proof of the substantive offence of cheating again had not the effect of rendering the charge illegal as being one in respect of the different offences specified therein. The recital of the specific offences was at most a surplusage. Though it is not uncommon to set out in the charge overt acts by which the object of the conspiracy is sought to be attained recital of such acts was not essential in the present case. Defrauding the public by deceitful means is an offence and the allegation of the charge of such object without specifying the persons defrauded was sufficient to maintain a charge of conspiracy *R.* v. *De Berenger* (8), and *R* v. *Gurney* (9), Halsbury's Laws of England, Vol. IX note to para. 1401.

Though the several techincal objections raised on behalf of the applicant have failed we are not satisfied that the evidence relied on by the prosecution is sufficient to maintain the conviction against the applicant. The first circumstantial piece of evidence relied on by the Crown is the deceit practised on one Shewaram to part with currency-notes of Rs. 900 on the false pretence of doubling them. The only accused concerned in it were Dharamdas and Urs.

The second act relied on is that in September 1923 three years later when again the accused Dharamdas in company not of the applicant or any of the other accused persons but of one Bawa Sukhlal since deceased cheated one Chellaram Pleader by dishonestly inducing him to part with Rs. 1,000 by playing with loaded dice.

There is no evidence in either of these two cases which could inculpate the applicant as having taken any part in them or which would show that the deceit was perpetrated in pursuance of a common agreement to which the applicant was a party.

The third act is the only one in which the applicant is said to have been directly concerned. It is said that in October 1923 the applicant the accused Dharamdas and an unknown person cheated one Jethmal Pleader of currency-notes of Rs. 500 on the pretext of doubling them. The accused Issarsing and Urs again appear to have taken no part in this deal.

The fourth and fifth acts of cheating Partabrai in June 1924 and of attempting to cheat Sobhraj in August 1924 which led to the apprehension and the trial of the accused again in no way inculpate the applicant

The only connecting link between the different acts complained of is that the accused Dharamdas is a common factor in all of them. This evidence by itself is not sufficient to warrant our holding that all or at any rate the third act of October 1923 in which the applicant was directly concerned was done in pursuance of one common agreement between all the four accused persons.

The evidence of Dharamdas being a common factor in all the acts complained of is equally consistent with the existence of more than one separate conspiracy and to the third act having been done in pursuance of a separate conspiracy to which Dharamdas and the applicant were parties but the other two accused persons were not parties.

In *O'Connell* v. *Reg.* (10) where a Court in an indictment charged several defendants with conspiracy together to do several illegal acts and the Jury found some of the defendants to do one of the acts and guilty of conspiracy with others of the defendants to do another of the acts such finding was held bad as amounting to a finding that one defendant was guilty of two conspiracies though the Court charged only one. In the present case the charge and the only charge for which under the circumstances of the case all the accused could have been jointly tried framed against them was in respect of an agreement to cheat the public generally. And if the evidence is equally consistent with the existence of two separate agreements one in which Dharamdas and the applicant alone were concerned and the other in which Dharamdas and the other two accused were concerned the irresistible inference that all the acts were done in pursuance of one agreement does not arise and the charge as laid cannot be said to be conclusively proved against the applicant. This aspect of the case has escaped the attention of the learned Sessions Judge.

We think under the circumstances the applicant is entitled to the benefit of the

(8) (1814) 3 M. & S. 67, 105 E. R. 536; 15 R. R. 415.

(9) (1869) 11 Cox. C. C. 414.

(10) (1844) 11 C. & F. 155; 9 Jur. 25; 1 Cox. C. C 413, 7 Ir. L. R. 261, 5 St. Tr. (N. S.) 1; 8 E. R. 1061; 65 R R 59.

doubt and we accordingly order that he be acquitted and discharged and fine if paid be refunded.

Z. K. *Revision allowed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 454 OF 1925.

July 16, 1925.

Present:—Mr. Justice Martineau and Mr. Justice Jai Lal.

DAYA RAM—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s 512—Absconder—Evidence recorded in absence Finding as to absconding, whether necessary

Section 512 of the Cr P C requires only that before the Court records the depositions of the witnesses for the prosecution it should be proved that the accused person has absconded and that there is no immediate prospect of arresting him, and not that a finding should be recorded to that effect. [p. 423, col 2]

A Magistrate before recording evidence under s. 512, Cr P. C, took the statements of two constables who had searched for the accused and had not been able to find him, and also issued a proclamation against the accused under s 87 of the Code

Held, that the requirements of s 512, Cr P C, had been fulfilled and that evidence had been properly recorded under that section [p 424, col. 1]

Criminal appeal from an order of the Sessions Judge, Ludhiana, dated the 21st April 1925.

Mr. *Abdul Aziz*, for the Appellant.

Mr. *Abdul Rashid*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—The appellant, Daya Ram, a *Jat* of Sudhar, in the Ludhiana District, has been sentenced to death for the murder of one Mangal Singh, whose death was caused by numerous incised wounds on the head. The case for the prosecution is briefly as follows:—

On the morning of the 4th February 1922 Mangal Singh got drunk in a drinking bout at the house of a friend named Nigahiya (P. W. No. 4) at Sudhar, and was afterwards brought by Nigahiya and Indar (P. W. No. 15) to the shop of Pala Ram (P. W. No. 7), where he lay down. Shortly afterwards the appellant came to the shop and called out to Mangal Singh. The latter did not reply and the appellant then went into the shop and with a *chhavi*, the blade of which he had concealed under his arm, he dealt Mangal Singh a number of blows on the head, and neck. The assault was witnessed by Atma Singh (P. W. No. 2) and Pala Ram's uncle Thakar Das (P. W. No. 3) who were sitting at the shop. They raised an outcry, and Thakar Das went and informed Pala Ram, who was at his house at the time. Meanwhile the appellant left Pala Ram's shop and went to the *Sath*, where several men were sitting, and attacked one of them, named Sucha Singh (P. W. No. 10), with his *chhavi*, one blow striking Sucha Singh on the arm. Two other men, Sawan Singh (P. W. No. 11) and Sham Singh (P. W. No. 12), managed to seize the *chhavi* from the appellant, who then ran away and absconded for nearly three years. The murder appears to have been committed in consequence of an altercation which had occurred when Mangal Singh shortly before coming to Pala Ram's shop, met the appellant and asked him whether a camel which the appellant had with him was a stolen one.

We see no reason for rejecting the evidence of Atma Singh and Thakar Das, who have deposed to having witnessed the commission of the murder by the appellant. Mangal Singh was found lying dead in Pala Ram's shop, and Pala Ram's evidence shows that Atma Singh and Thakar Das at once told him and the other people who collected that the appellant had committed the murder.

Thakar Das' deposition is that which he made before the Honorary Magistrate of Raikot in 1922 in the proceedings taken under s. 512 of the Cr. P. C., as he could not be found at the time of the Magisterial enquiry or of the trial in 1925. It is contended for the appellant that the statement made by Thakar Das in those proceedings is inadmissible, because no finding was given in them, that the accused person had absconded and that there was no immediate prospect of arresting him. But the section requires only that before the Court records the depositions of the witnesses for the prosecution it should be proved that the accused person has absconded and that there is no immediate prospect of arresting him, and not that a finding should be given to that effect. The Honorary Magistrate in the proceedings of 1922 before he took down the depositions of the witnesses in regard to the murder took the statements of two constables, who had searched for the accused and had not been able to find him. Those statements afforded the proof that was required, and the fact that the Hono-

rary Magistrate issued a proclamation against the appellant under s. 87 of the Cr. P. C. would show that he was satisfied with the proof given. Counsel for the appellant has referred to *Wahid* v. *Empress* (1) *Ghurbin Bind* v. *Queen-Empress* (2) and *Rustam* v. *Emperor* (3). In the first of those cases no evidence had been taken as to the accused person having absconded, and in the second the deposition recorded had not been recorded under s. 512, Cr. P.C., against the absconder, but had been recorded in the ordinary course of proceedings against other persons. Those two cases are, therefore, not in point. In the third case the learned Judges expressed the opinion that the language of s. 512 showed that the Court which records the proceedings must first of all record an order that in its opinion it had deen proved that the accused person has absconded and that there is no immediate prospect of arresting him, but a different view on this point was taken by the same Court in *Bhagwati* v. *Emperor* (4). In the present case it was proved in the proceedings taken against the appellant under s. 512, Cr. P. C., in 1922 that he had absconded and that there was no immediate prospect of arresting him, and we hold, therefore, that Thakar Das' statement taken in the proceedings under that section was admissible in evidence at the trial.

Besides the direct evidence of Atma Singh and Thakar Das in regard to the murder there are the statements of P. Ws. Nos. 10—13 as to the appellant having come to *Sath* armed with a *chhavi* and attacked Sucha Singh. The *chhavi* was handed over by Sawan Singh (P. W. No. 11) to the Sub-Inspector on his arrival, and was forwarded to the Imperial Serologist who found it to be stained with human blood.

The statement made by Nigahiya before the Committing Magistrate was admitted in evidence under s. 33 of the Evidence Act as he was in the Malerkotla Jail. Objection has been taken to this, but even if Nigahiya's statement is excluded there is other evidence also against the appellant which is ample. Nigahiya's statement was in regard to the altercation which led to the commission of the crime and that altercation is mentioned also by Ishar (P. W. No. 5) and Shera (P. W. No. 6).

The guilt of the appellant who has produced no evidence in his defence, has, in our opinion, been clearly established. We accordingly dismiss the appeal confirming the sentence of death.

Z. K. *Appeal dismissed.*

(1) 21 P. R. 1883 Cr.
(2) 10 C. 1097; 5 Ind. Dec. (N s.) 734
(3) 31 Ind Cas 817; 38 A. 20, 13 A. L. J. 1013; 16 Cr. L. J 801.
(4) 48 Ind. Cas. 481; 41 A. 60, 16 A. L. J. 902; 20 Cr. L. J. 6.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 137 OF 1925.

September 21, 1925.

Present :—Mr. Kennedy, J. C., and Mr. Tyabji, A. J. C.

MOMOON—APPLICANT

versus

IBRAHIM—OPPONENT.

Criminal Procedure Code (Act V of 1898), s. 250—Order for compensation—Appeal—Notice to accused, whether necessary.

Though not legally necessary, it is desirable in general that an accused person should have notice of an intended interference with an order of compensation made in his favour under s. 250 of the Cr. P C. [p. 425, col. 1.]

Application to revise an order of the Sub-Divisional Magistrate, Tatta, dated the 1st May 1925.

Mr. *Tulsidas Amerdinomal*, for the Applicant.

Mr. *Thakurdas*, for the Opponent.

Mr. *C. M. Lobo*, Acting Public Prosecutor, for the Crown.

JUDGMENT.—This is an application in revision against the order of the Sub-Divisional Magistrate, Tatta, who has set aside an order of the Second Class Magistrate, Ketibunder, awarding Rs. 100 as compensation to the accused, for a false and malicious prosecution brought against him by the complainant.

It is stated before us that the accused had no notice of the proceedings which the Sub-Divisional Magistrate held; and that he had no opportunity of presenting his aspect of the case in appeal. Inasmuch as the Sub-Divisional Magistrate set aside the order of compensation, we consider it would have been desirable if notice had been issued to the present applicant, before the Sub-Divisional Magistrate had set aside the order in favour of the accus-

ed. It is pointed out, on the other hand that in the case of *Ambakkagari Nagi Reddi* v. *Basappa* (1) it was held that no such notice was legally necessary. That is true, but it is desirable in general that before an order of this kind is made, the accused person should have notice of any intended interference with an order of compensation made in his favour. In the present case, however, we have looked into the judgments of the Second Class Magistrate and the Sub-Divisional Magistrate, and we think it unnecessary to interfere in revision.

The application will, therefore, be dismissed.

P. B. A. *Application dismissed.*

(1) 1 Ind Cas 79; 33 M. 89; 5 M L T. 262; 19 M. L. J. 130, 9 Cr. L. J. 150.

LAHORE HIGH COURT.

CRIMINLL REVISION No. 1344 OF 1924.

December 15, 1924.

Present:—Mr Justice Abdul Raoof.

QAIM DIN AND ANOTHER—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss 411, 457—Stolen proprety found in house occupied by several persons—Exclusive possession—Offence.

Certain stolen property was found concealed in a dung heap in the courtyard of a house which was owned and occupied by four persons:

Held, that the property could not be said to be in the exclusive possession of any of the occupants of the house and that none of them could, therefore, be convicted of any offence under s. 457 or 411 of the Penal Code. [p. 425, col. 2.]

Petition, for revision of an order of the Additional Sessions Judge, Gujranwala at Sialkot, dated the 25th August 1924, affirming that of the Magistrate First Class, Gujranwala, dated the 12th July 1924.

Mr. *M. L. Puri*, for the Petitioner.

The Government Advocate, for the Respondent.

JUDGMENT.—On the night between the 6th-7th of May 1924 a burglary was committed in the house of Mathra Das complainant and some property was stolen. Somehow suspicion fell upon the applicants Qaim Din and Muhammad Din and their brother Sardara. On information being given to the Police it arrived at the house belonging to these three brothers and their father Ghulam Mohammad. Some property was found in a dung heap in the courtyard of the house and some was recovered from *kotha* No. 3. All the three brothers and the father Ghulam Mohammad were prosecuted. The case against Sardara being doubtful he was given the benefit of the doubt and was acquitted by the Magistrate The petitioners were convicted under s. 457 of the Indian Penal Code and sentenced to two years' rigorous imprisonment each. Ghulam Mohammad was found guilty under s. 414 of the Indian Penal Code and was sentenced to one year's rigorous imprisonment. On appeal the learned Additional Sessions Judge found the case against Ghulam Mohammad also to be doubtful and acquitted him. He, however, upheld the convictions of the applicants and maintained their sentences. They have come up in revision to this Court.

The following facts have been established by the evidence for the prosecution in this case:—

(1) That some of the stolen property was identified by Mathra Das complainant as his property The petitioners did not claim the articles recovered as their property.

(2) That some of the stolen property was found in the dung heap situated in the courtyard of the house and some other property was recovered from *kotha* No. 3. If this finding had stood alone the Courts below would not have convicted the petitioners, because the house admittedly belonged to all the four persons, namely, the three brothers and the father, jointly, and it could not be said with certainty as to who was in exclusive possession of the stolen articles. There was, however, some evidence which went to show that the petitioners were seen soon after the theft carrying away some trunks, etc. This evidence in the opinion of the Courts below connected the petitioners with the stolen property.

The trunks and the bags recovered from the house were not, however, identified by the witnesses as being those which they had seen the petitioners carrying away. This evidence, therefore, falls short of bringing home to the petitioners the theft of the stolen articles. The circumstances no doubt raise a great suspicion against the petitioners and make it highly probable that the things were stolen by them; but it cannot be said to be conclusive. Under these circumstances, in my opinion, the

Courts below were not justified in holding that the case has been conclusively proved against the petitioners In any event there is some room for doubt and the petitioners must be given the benefit of that doubt.

I accordingly accept the petition for revision, set aside the convictions and sentences of the petitioners and order that they be forthwith released. Qaim Din petitioner is on bail. He shall be discharged from his bail-bond.

Z. K. *Petition accepted.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 453 OF 1925.

August 31, 1925.

Present:—Mr. Justice Kanhaiya Lal.

Pandit RAM SARUP—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

U. P. Municipalities Act (II of 1916), ss. 118, 178, 185, 186, 307—Sanction to erect chabutra *-Notice prohibiting stone brackets to support* chabutra, *disregard of—Offence*

Where a sanction to erect a *chabutra* does not limit the discretion of the builder to build it in any particular form, it is open to him to erect stone brackets for supporting the new *chabutra* and his refusal to stop the erection of the brackets on a notice being served on him under s 186 of the U P Municipalities Act does not make him criminally liable

Criminal revision from an order of the Sessions Judge, Aligarh, dated the 2nd June 1925.

Mr. *M. A. Aziz*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The applicant Ram Sarup applied to the Municipal Board of Hathras to extend his *chabutra* by two feet in an almost triangular line so as to make the new *chabutra* and the old *chabutra* form a rectangle. He also mentioned that he may be granted permission to put a stone on the drain to serve as a stop for getting on to the *chabutra*. The map attached to the application explains the position and the form in which the new *chabutra* was to be built. This sanction was granted. At the time the application for sanction was made, it was not mentioned that the new *chabutra* would rest on stone brackets. The applicant is now being prosecuted for having put up stone brackets to support the new *chabutra*, for the construction of which the Municipality had already granted its sanction. A *chabutra* can only rest on earth or on pillars or on brackets, and as the sanction did not limit the discretion of Ram Sarup to build it in any particular form, it was open to him to erect stone brackets for supporting the new *chabutra*. The prosecution is wholly unjustified. The construction of the *chabutra* was made with the sanction of the Municipal Board obtained under s. 178 of the U. P. Municipalities Act, II of 1916, and a separate sanction for the erection of stone brackets to support the *chabutra* was not needed. The Municipal Board issued a notice under s. 186 requiring Ram Sarup to stop the erection of the stone brackets but he refused to stop the erection. The Trying Magistrate and the learned Sessions Judge were of opinion that by refusing to stop the erection of the stone brackets he had incurred a liability under s. 307 of the Act, but s. 186 read with s. 185 refers to the construction made either in contravention of the requirements of s. 178, or in contravention of the written directions given by the Board under s. 118 or any by-law. There is no by-law pointed out to us in this case, and there is nothing in the sanction to forbid the use of stone brackets as supports for the *chabutra*. The learned Sessions Judge also observes that Ram Sarup had extended his *chabutra* beyond the size sanctioned by the Board by 6 inches, but there is no mention of any such extension in the notice issued to him by the Municipal Board, nor was that one of the grounds taken by the Municipal Board in the Trial Court In fact the contention of Ram Sarup is that his *chabutra* does not extend beyond 2 feet anywhere, and that matter not having been a part of the original complaint, it cannot be tried here. The application is allowed and the conviction and sentence passed on the applicant are set aside. The fine if realised will be refunded.

N. H. *Application allowed.*

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 76 OF 1925.

June 12, 1925.

Present:—Mr. Justice Mirza and Mr. Justice Percival.

GULABCHAND RUPJI—ACCUSED No. 1—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s 195 (c) —Document handed up to Judge but not placed on file, whether "produced"—Prosecution in respect of document—Complaint, whether necessary

A decree-holder filed an application for execution of his decree. In answer to that application the defendant produced what purported to be a receipt in respect of a certain payment which he alleged he had made to the decree-holder and handed up the document to the Judge. The Judge did not place the document on the file on the ground that the date it bore showed that it was out of time for the purpose of evidencing any compromise or payment of the decree, and returned the document to the judgment-debtor The judgment-debtor was subsequently prosecuted for an offence under s. 467 of the Penal Code in respect of the document·

Held, that the document had been "produced" in Court within the meaning of s 195 *(c)* of the Cr P. C. and that a complaint by the Judge was, therefore, necessary in order to give jurisdiction to the Court to try the accused for an offence under s. 467 of the Penal Code. [p. 428, col. 1]

Criminal application against an order of the Resident Magistrate, First Class at Nadiad.

Mr. *H. C. Coyajee* (with him Mr. *H. M. Chokshi*), for the Applicant.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

Mirza, J.—This is an application in revision on behalf of the accused against an order of the Resident First Class Magistrate, Nadiad, who rejected the accused's application to quash certain criminal proceedings pending in his Court under ss. 467 and 109, Indian Penal Code, against the accused.

The contention of the accused is that a document in respect of which a charge of abetment of forgery is made against him in those proceedings was "produced" before the Extra First Class Subordinate Judge of Surat in the Civil Suit No. 529 of 1922, that any prosecution against him in respect of such a document can be instituted only on a written complaint of the Subordinate Judge and admittedly as there is no written complaint the present proceedings are irregular and should be quashed.

It appears that the accused was the defendant in Civil Suit No. 529 of 1922. The plaintiff in that suit had obtained a decree against the accused and had filed a *darkhast* in the Extra First Class Subordinate Judge's Court for execution of that decree. In answer to that *darkhast* the defendant had produced the document in question and had handed up the same to the Subordinate Judge. That document purported to show that the decree had been compromised for a payment of Rs. 1,500. The Subordinate Judge did not take the document on the file on the ground that the date it bore showed that it was out of time for the purpose of evidencing any compromise of the decree. In doing so the learned Subordinate Judge failed to observe the provisions of O. XIII, r. 6, C. P. C., which lays down :—

"Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed there on the particulars mentioned. ... .. "

The learned Subordinate Judge returned the document to the Pleader of the accused. It is now alleged that that document is being suppressed by the accused and is, therefore, not forthcoming. Under these circumstances the question before us to decide is whether what happened before the Subordinate Judge was tantamount to the "production" of the document in question within the meaning of s. 195, cl. (c), of the Cr. P. C. That section provides :—

"195 (1) No Court shall take cognizance —(c) of any offence described in s. 463 or punishable under s. 471, s. 475 or s. 476 of the same Code, (Indian Penal Code) when such offence is alleged to have been committed by a pary to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such Court, or of some other Court to which such Court is subordinate."

Reliance is placed by the learned Counsel for the accused upon O. VII, r. 14, as showing that production of a document is different from giving the document in evidence O. VII, r. 14, C. P. C., provides :—

"Where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint."

Like O. VII, r. 18, O. VII, r. 14, contemplates that a record of the document or its copy should be kept in the Court when it is said "to be produced" although it may not be given in evidence.

Our attention has been further called to *Queen-Empress* v. *Nagindas* (1) where a Division Bench of this Court consisting of Birdwood and Jardine, JJ., held that a document is given in evidence within the meaning of s. 195, Cr. P. C, when it is handed over by the person tendering it to the Court though the Court on inspection may reject it as evidence, for insufficiency of stamp or want of registration. This decision was prior to the date of the amendment of the Cr. P. C., whereby the words "produced or" have been added.

Our attention has been further called to a decision of the Calcutta High Court in *Nalini Kanta Laha* v. *Anukul Chandra Laha* (2). That case decided that where a document was called for by a party to a proceeding under s. 145 of the Cr. P. C., brought into Court and referred to by his Pleader in argument and by the Magistrate in his judgment, though he expressly refrained from any opinion, as to its authenticity, that the document was "produced" in the proceeding within the meaning of s. 195 (1) (*c*) of the Code.

We are further referred to a more recent case of our own Division Bench in *In re Gopal Sidheshvar* (3). In that case Chandavarkar and Pratt, JJ, held that s. 195 (*c*) of the Cr. P. C., 1898, applied to a document which was alleged to be forged and was produced in a Court of Justice. "Production" of a document in Court, they say, is not the same as "giving it in evidence." A document produced in Court according to this decision means "one which is produced for the purpose of being tendered in evidence or for some other purposes." We are of the opinion that this interpretation of s. 195 (*c*) is binding upon us. The circumstances in that case were very similar to the circumstances in the present case.

In a still more recent judgment in *In re Bhau Vyankatesh* (4) Macleod, C. J., and Coyajee, J., have given the same wide interpretation to the word "produce."

(1) (1886) Unrep. Cr. C. 242
(2) 39 Ind. Cas 490; 44 C. 1002; 25 C. L. J. 255; 21 C. W N 640, 18 Cr. L. J. 522.
(3) 9 Bom. L R 735; 6 Cr. L. J. 78.
(4) 91 Ind. Cas. 245; 27 Bom. L. R. 607; 49 B. 608; (1925) A. I. R. (B.) 433; 27 Cr. L. J. 69.

We, therefore, make the Rule absolute and quash the Magistrate's proceedings in the matter of the complaint against the applicant. This order, however, will not preclude fresh proceedings being instituted after a complaint is made in writing by the learned Subordinate Judge which in his discretion he is competent to do.

Percival, J.—I agree in regard to the legal aspect of the case. I should like to add that, while it will be a matter of discretion for the learned Subordinate Judge whether to make a complaint or not, in the peculiar circumstances of the case it appears that the complaint by the Subordinate Judge is rather a formality, owing to the fact that, although the document was technically produced in his Court, it was not retained there ; and, therefore, the Subordinat Judge will probably not find anything on his record regarding it. It is even a question whether the document is in existence now or not. Thus, while on technical grounds the complaint by the Sudordinate Judge is necessary, it cannot be expected that he will have any personal knowledge of the subject under consideration.

Z. K. *Rule made absolute.*

LAHORE HIGH COURT.

CRIMINAL REVISION CASE No. 1619 OF 1924.
January 23, 1925.
Present:—Mr. Justice Broadway.
KALLU—ACCUSED—PETITIONER
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 480—Penal Code (Act XLV of 1860), ss. 179, 193—Witness, prosecution of—False answer to question—Refusal to answer question.

Where a witness on being asked the name of his paternal grandfather, replies that he does not remember it, it is not a refusal to answer the question, and the witness cannot be [illegible] under s 179, Penal Code, read with [illegible], although if the answer is false, the witness could be prosecuted under s. 193, Penal Code. [p 429, col. 1.]

Case reported by the District Magistrate, Karnal, with his No. 2411-M of 21st November 1924.

FACTS.—The accused Kallu was a witness in a criminal case before *Sardar* Jai Singh, Magistrate of the First Class. In cross-examination he was asked the name of his paternal grandfather. His reply was

that he did not know. On this the Magistrate taking action under s. 480, Cr. P. C., sentenced him to a fine of Rs. 50 under s. 179, Indian Penal Code.

GROUNDS.—Section 179, Indian Penal Code, only applies in cases where the accused person refuses to answer any question. Here the accused did not refuse to answer, but gave an answer which the Magistrate considered to be wrong. This might have come under s. 193, Indian Penal Code.

The application of s. 179 appears to be wrong and the case is reported for the orders of the High Court with the recommendation that the sentence be reversed.

The fine has already been paid.

ORDER.—Kallu son of Data Ram has been convicted of an offence under s. 179, Indian Penal Code, read with s. 480, Cr. P. C., and has been sentenced to a fine of Rs. 50, or in default to undergo one week's simple imprisonment. The learned District Magistrate has reported the case to this Court recommending that the conviction be set aside and the fine refunded.

This recommendation is based on the fact that the said Kallu had not committed the offence of which he has been convicted. It appears that Kallu was being examined as a witness and was asked the name of his paternal grandfather. To this question he applied that he did not remember the name of that gentleman. The learned Magistrate treated that as a contempt of Court holding that the reply given was "not consistent with reason," and that, therefore, Kallu had refused to answer the question put to him. The learned District Magistrate is right in his view that Kallu did not refuse to answer the question. As a matter of fact he did give an answer to the question put. If the answer was a false one Kallu committed an offence under s. 193, Indian Penal Code. He certainly did not render himself liable to being dealt with under s. 480, Cr. P. C. I, therefore, accept the recommendation of the learned District Magistrate and set aside the conviction. The fine must be refunded.

N. H. *Conviction set aside.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 648 OF 1925.

December 14, 1925.

Present:—Mr. Justice Daniels.

Musammat CHAMPA DEVI AND ANOTHER—APPLICANTS

versus

PIRBHU LAL AND OTHERS—OPPOSITE PARTIES

Penal Code (Act XLV of 1860), s. 499—Defamation—Good faith—Principles applicable—Criminal Procedure Code (Act V of 1898), s 342 (2)—Written statement by accused—Privilege.

There is a distinction between criminal and civil liability for defamation. Civil liability is to be determined by the principles of English Law, but criminal liability is governed by the provisions of the Penal Code and those provisions alone. [p. 430, col 1.]

Isuri Prasad Singh v *Umrao Singh*, 22 A 234; A. W. N. (1900) 46, 9 Ind Dec. (N. s) 1187, *Emperor* v. *Ganga Prasad*, 29 A 685; 4 A. L J 605, 6 Cr. L. J. 197, A W. N. (1907) 235 and *Satis Chandra Chakrabarti* v *Ram Dayal De*, 59 Ind Cas 143, 48 C. 388; 32 C L. J. 94, 24 C W. N. 982, 22 Cr. L. J. 31, relied on.

A finding that a defamatory statement was made in good faith within s 499, Penal Code, cannot be read into a general statement by the Sessions Judge, that the statement was covered by privilege, and that it was made not with the intention of doing harm to the person defamed but with the object of saving the p[illegible]t [p 430, col 2]

[illegible] conferred by s 342 (2), Cr P. C, does not extend to a written statement by the accused [p. 430, cols 1 & 2]

Criminal revision from an order of the Sessions Judge, Bulandshahr, dated the 8th July 1925.

Mr. *Nehal Chand*, for the Applicants.

Messrs. *Saila Nath Mukerji* and *Jai Kishen Lal*, for the Opposite Parties.

JUDGMENT.—This is an application in revision asking for further inquiry into a complaint of defamation under s 500 of the Indian Penal Code which has been dismissed under s. 203 of the Cr. P. C. An application was made to the Sessions Judge who has rejected it. One *Musammat* Champa Devi filed a complaint charging Pirbhu Lal, Basdeo and Banarsi Das with offences under ss. 451 and 506 of the Indian Penal Code. When asked for their answer to the charge they said that they would file a written statement. In the course of that written statement they made an imputation of unchastity against the complainant alleging that she had an illegal connection with one Piare Lal and that the case had been instituted at the instigation of Piare Lal in consequence. That complaint was dismissed, and *Musammat* Champa Devi and Piare Lal then filed this complaint of

defamation against Pirbhu Lal, Basdeo and Banarsi Das.

The Deputy Magistrate made an inquiry under s. 202 of the Cr. P. C. He then dismissed the complaint partly on the technical ground that the written statement had not been formally proved and partly on the ground that the defamatory imputation was not a "serious, direct, clear and complete imputation" and was not made with the intention of harming, or knowledge that it was likely to harm, the reputation of the complainants. The learned Sessions Judge has rightly brushed aside the reasons given by the learned Deputy Magistrate. He decided the case on the broad ground that a statement made by an accused person in a written statement filed by him in answer to a criminal prosecution is privileged, and that even if the privilege is not absolute it covers the present case because the imputation was made for the protection of the persons making it and not with the intention of doing harm to the complainants.

The learned Judge refers to the decision of the Madras High Court in *Potaraju Venkata Reddy* v. *Emperor* (1), in which they held that an oral statement made by an accused person was absolutely privileged, but I am not sure that he intends to adopt the view taken in this case, otherwise he would have hardly remarked below that the privilege may not be absolute. The view consistently taken by this Court has been that there is a distinction between criminal and civil liability for defamation. Civil liability is to be determined by the rules of English Law, but criminal liability is governed by the provisions of the Indian Penal Code and by those provisions alone. This view was taken by Mr. Justice Aikman in *Isuri Prasad Singh* v. *Umrao Singh* (2), and was re-affirmed by a Full Bench in *Emperor* v. *Ganga Prasad* (3). The view taken by this Court has quite recently been unanimously approved by a Full Bench of five Judges of the Calcutta High Court in *Satis Chandra Chakrabarti* v. *Ram Dayal De* (4). The immunity conferred by s. 342 (2) does not extend to a written statement.

I entirely concur with the Sessions Judge in finding that in the cirumstances of this case the statement was made for the protection of the interests of the persons making it. The statement was undoubtedly a defamatory statement which the parties making it must have known to be likely to harm the reputation of the complainants. The only further question is whether the imputation was made in good faith within the meaning of ninth Exception to s. 499. If there had been a definite finding of the Court below that the imputation was made in good faith I would have unhesitatingly refused to interfere, but I cannot read any such finding into the general statement of the learned Sessions Judge that the case is covered by privilege and that the statement was not made with the intention of doing harm to the applicants but with the object of saving the persons making it. Indeed on the materials on the record I do not see how it would have been possible for the Courts to arrive at any such finding. No notice had been issued to the accused and all that the Deputy Magistrate had before him was the statements of the complainants and the statements of their witnesses called under s. 202. I, therefore, accept this revision and direct further inquiry to be made into the complaint.

N. H. *Revision accepted.*

(1) 14 Ind Cas 659; 36 M. 216, (1912) M W. N. 476, 13 Cr. L J. 275; 11 M. L. T. 416; 23 M. L. J. 39

(2) 22 A. 234; A. W. N. (1900) 46; 9 Ind. Dec. (N. S.) 1187.

(3) 29 A. 685; 4 A. L. J. 605; 6 Cr. L J. 197; A. W. N. (1907) 235.

(4) 59 Ind. Cas. 143; 48 C. 388; 32 C. L. J. 94; 24 C. W. N. 982, 22 Cr. L. J. 31.

RANGOON HIGH COURT.

CRIMINAL APPEAL No. 1243 OF 1924.

January 5, 1925.

Present:—Sir Sydney Robinson., KT., Chief Justice, and Mr. Mr. Justice Cunliffe.

NGA WA GYI AND OTHERS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 193, 339, 532 —Approver, prosecution of—Commitment to Sessions—Certificate of Public Prosecutor, absence of —Certificate supplied at trial—Irregularity—Approver failing to adhere to confession, whether proof of guilt.

Accused and two others were arrested on charges of kidnapping and murder. Accused was tendered a pardon which he accepted and he was examined as a witness at the trial of the other two accused. On the conclusion of that trial the Magistrate ordered the Police to prosecute the accused of the original offence and the accused was sent before a Magistrate who committed him to the Sessions Court on charges

of kidnapping and murder. On the case coming up for trial, the Sessions Judge noticed the absence of the certificate from the Public Prosecutor required by s. 339 of the Cr. P. C. The trial was adjourned and on the adjourned date a certificate was filed by the Public Prosecutor and was accepted by the Sessions Judge and the trial proceeded and the accused was eventually convicted.

Held, that the proceedings before the Magistrate who made the commitment were merely an enquiry and were not a trial within the meaning of s 339 of the Cr. P. C., and that it was open to the Sessions Judge to accept the commitment made by the Magistrate even if it was irregular and that the provisions of s. 339 having been complied with before the trial commenced the trial was in order. [p. 431, col. 2, p. 432, col. 1.]

In re Sessions Judge of Tanjore, 51 Ind. Cas 674; 35 M. L. J. 259, 20 Cr. L. J 514, *Queen-Empress* v. *Morton*, 9 B. 288, 5 Ind. Dec (N. S) 192, *Queen-Empress* v. *Bal Gangadhar*, 22 B. 112; 11 Ind. Dec. (N. S) 656, *Dilan Singh* v. *Emperor*, 17 Ind Cas. 570, 40 C 360, 13 Cr. L. J. 826, *Barindra Kumar Ghose* v *Emperor*, 7 Ind. Cas 359, 37 C 467; 14 C W N 1114, 11 Cr. L. J. 453, *Emperor* v. *Bhimaji Venkaji Nadgir*, 14 Ind. Cas 454; 42 B. 172, 20 Bom L R. 89; 19 Cr. L. J. 342 and *Queen-Empress* v. *Abbi Reddi*, 17 M 402, 4 M. L J 196; 2 Weir 704, 6 Ind. Dec (N S) 279, referred to.

Where an approver is put on trial for the original offence, the mere fact that he has not adhered to his confession should not lead to the conclusion that he has failed to comply with the condition on which the pardon was granted to him. False confessions, wrongfully extorted or induced are not unknown and no man must be led to adhere to a false confession for fear of his pardon being forfeited. [p 432, col 2.]

Criminal appeal from an order of the Sessions Judge, Tharrawaddy, in Sessions Trial No. 26 of 1924.

JUDGMENT.

Robinson, C. J.—The appellant, Nga Wa Gyi, and two others were arrested on charges of kidnapping and murder. Nga Wa Gyi was tendered a pardon, which he accepted, and he was examined as a witness at the trial of the other two accused. On the conclusion of that trial the District Magistrate ordered the Police to prosecute him of the original offence. He overlooked the provisions of s. 339 of the Cr. P. C. The accused went before a Magistrate, who also overlooked those provisions. The Magistrate committed Nga Wa Gyi to the Court of Session on charges of murder, etc. On the case coming up for trial, the learned Sessions Judge noticed the absence of the certificate from the Public Prosecutor. The Public Prosecutor desired time to see if he could make the necessary certification, and the trial was accordingly adjourned. On the adjourned date, a certificate was filed and accepted by the learned Sessions Judge, and the trial proceeded; in other words, the learned Seesions Judge accepted the commitment as an irregular commitment in exercise of the powers conferred by s. 532 of the Code. He convicted Nga Wa Gyi under s. 365, and sentenced him to seven years' rigorous imprisonment. Nga Wa Gyi has appealed, and the question, whether the commitment is illegal, having been made without a certificate, has been referred to a Bench.

The authorities naturally refer to cases concerned with the absence of sanctions that were required by the old Code, but the principles governing the matter are much the same although it would not necessarily follow that the absence of a Public Prosecutor's certificate, under s. 339, is as fatal a defect as the absence of a sanction.

In the first place, it must be pointed out that, what s. 339 lays down is that where a person who has been tendered a pardon and the Public Prosecutor certifies that he has, either by wilfully concealing something essential or by giving false evidence not complied with the condition on which the pardon was given, such person may be tried for the offence, in respect of which the pardon was so tendered. In the case of sanctions under the old Code, the provision was that no Court should take cognisance, and, in cases under the Arms Act, it was laid down that no proceedings may be instituted without certain sanction.

In the next place, it is to be noted that proceedings before a Committing Magistrate fall under Ch. XVII of the Code which deals with the enquiry into cases triable by a Court of Session. The charge in the present case was one which was exclusively triable by a Court of Session, and the Magistrate, making the enquiry, was doing so only with a view to committal, and not with a view to trial by himself, though he could, no doubt, have found the accused guilty only of an offence triable by himself, or have discharged him.

In a case referred to the High Court at Madras *In re Sessions Judge of Tanjore* (1), it was pointed out that an enquiry before a Magistrate is not a trial, the trial itself taking place before the Sessions Judge at a later stage. This is important, for the certificate of the Public Prosecutor is only required for the trial of a person who has accepted the tender of the pardon.

Coming now to the authorities in reference

(1) 51 Ind. Cas. 674; 35 M. L. J. 259; 20 Cr. L. J. 514.

to cases of sanction, the first case that I will refer to is of *Queen-Empress* v. *Morton* (2). There a magisterial enquiry was held without the previous sanction required by s. 197 of the Code of 1882, and it was held that proceedings were irregular and without jurisdiction and that the sanction subsequently obtained was of no effect; but it was further held that the Judge presiding at the Sessions had nevertheless power in his discretion to accept the commitment and to proceed with the trial of the prisoner under the provisions of s. 532. That case was followed in the case of *Queen-Empress* v. *Bal Gangadhar Tilak* (3).

Again in *Dilan Singh* v. *Emperor* (4), it was held that a conviction by a Court of Session cannot be set aside simply on the ground of defect in the initiation of proceedings in the commitment Court, or on the ground of some irregularity in the commitment proceedings, more especially when that point was not raised in the lower Court, and it was held that s. 532 would cure such a defect. *Morton's case* (2) was again followed. No reference, however, was made to an earlier decision of the same Court in *Barindra Kumar Ghose* v. *Emperor* (5), in which it was held that there being no complaint under s. 121 of the Penal Code, authorised by the Local Government, or in fact preferred, the Magistrate had no power to commit thereunder, and that the defect was not cured by a subsequent order obtained while the case was before the Sessions Court. It was further held that s. 532 did not cure the defect. That, however, was a case of an order under s. 196 of the Code, and, in the complaint that was filed, a number of sections were actually specified, but s. 121 was not amongst them. The case can, therefore, I think, be distinguished.

There is one other case, *viz.*, *Emperor* v. *Bhimaji Venkaji Nadgir* (6). The enquiry into the case was instituted and the whole of the evidence was taken in the absence of sanction to prosecute. The Magistrate committed the case to the Sessions Court and the Sessions Judge referred the case to the High Court, as he was of opinion that the commitment was illegal. It was held that, owing to the absence of sanction the whole of the proceedings before the Magistrate were without jurisdiction and totally invalid. The Sessions Judge did not accept the commitment.

By s. 193 of the Code it is laid down that no Court of Session shall take cognisance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate duly empowered in that behalf. In this case, the Magistrate was, in my opinion, duly empowered to commit it. The proceedings before him were merely an enquiry and what is forbidden by the provisions of s. 339 is the trial of the accused which, in this particular case, had to be a trial by a Court of Session as a Court of original jurisdiction. Even in the case of a Magistrate, who commits for trial by a Sessions Court, the fact that he had no territorial jurisdiction over the place where the alleged offence was committed has been held to be no ground for the Court, to which the commitment was made, quashing the commitment under s. 532, the accused not having been injured thereby. And in that case, objection was taken before commitment. See *Queen-Empress* v. *Abbi Reddi* (7). Having regard to the weight of authority and to the wording of s. 339, I am of opinion, that it was open to the Sessions Judge, in this case, to accept the commitment even if it was irregular. Before the trial began, the provisions of s. 339 had been complied with, and the trial was in order. The proceedings before the Magistrate were not, therefore, in my opinion, totally invalid and there is no ground for setting aside the proceedings on this ground, more particularly, as no objection had been taken either before the Magistrate or before the Sessions Court even after the point was brought prominently to notice.

It is not right that the mere fact that a confession has been made should lead to the conclusion that if withdrawn the man must be held to have failed to comply with the condition on which it was granted. False confessions wrongfully extorted or induced are not unknown and no man should be led to adhere to a false confession for fear of having his pardon forfeited.

* * * *

Cunliffe, J.—I concur.

Z. K. *Order accordingly.*

(2) 9 B. 288; 5 Ind. Dec. (N S) 192.
(3) 22 B. 112; 11 Ind. Dec (N S.) 656.
(4) 17 Ind. Cas. 570; 40 C. 360; 13 Cr. L. J. 826.
(5) 7 Ind. Cas. 359; 37 C. 467; 14 C. W. N. 1114; 11 Cr L. J. 453.
(6) 44 Ind. Cas. 454, 42 B. 172; 20 Bom. L. R. 89; 19 Cr. L. J. 342.
(7) 17 M. 402; 4 M. L J. 196; 2 Weir 704; 6 Ind. Dec. (N. S.) 279.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 105 OF 1924.

November 27, 1924.

Present:—Mr. Kennedy, J. C., and Mr. Rupchand Bilaram, A. J. C.

F. C. WOODWARD—ACCUSED—APPELLANT

versus

EMPEROR—OPPONENT.

Penal Code (Act XLV of 1860), ss 304-A, 337, 338, 465, 471—Criminal Procedure Code (Act V of 1898), s. 235—Accident causing loss of life and injury to person—Neglect of duty—Forgery committed by accused to screen himself from criminal liability and to continue in employment—Joinder of charges—"Same transaction, meaning of—Contributory negligence, plea of, whether relevant.

In a prosecution under ss. 304-A, 337 and 338 of the Penal Code the accused cannot claim the benefit of an error of judgment when he has exercised no judgment at all. [p. 437, col. 1]

The expression "gross neglect" finds no place in the Criminal Law of India. That law does not render a mere casual inadvertance of duty criminal, but such neglect of duty as either directly results in loss of life or injury to person or such neglect as endangers life or property. [p. 437, col 2.]

Where a person is charged with the offence of causing loss of life by a negligent omission it is not open to him to rely on the plea of contributory [illegible] which is distinctly recognized in the Law of Torts but finds no place in an indictment for criminal negligence. In such a case the question is what was the proximate cause of the accident [p 438, col 1.]

The arena of facts covered by the expression "same transaction" used in s. 235 of the Cr P C varies with the circumstances of each case. The real and substantial test for determining whether several offences are so connected together as to form one transaction depends upon whether they are so related together in point of purpose or as cause and effect or as principal or subsidiary acts as to constitute one continuous action. [*ibid*]

It was the duty of the accused to make a periodical inspection of certain boilers in order to see that the boilers were in a fit condition to be worked. One of the boilers exploded and caused loss of life and injury to person, the accident being due to the fact that the crown stays of the boiler were badly corroded, some of them having disappeared altogether If the accused had carried out his duty of inspecting the boiler from time to time all possibility of the accident would have been avoided. During a departmental enquiry into the cause of the accident the accused produced a Dak Despatch Book in order to prove that he had submitted periodical reports of his inspection of the boiler to his superior officer. He also relied on certain entries made by him in a private book to show that he had reported on the condition of the crown stays. The entries in the Dak Despatch Book and the private book produced by the accused were suspected to be forged and the accused was put on his trial on three different charges, (1) under ss. 304-A, 337 and 338 for neglect of duty resulting in the bursting of the boiler and causing loss of life and injury to person, (2) under ss. 465, 471 or in the alternative under s. 193 of the Penal Code for having forged entries in his private book with the object of inducing the officer who was holding an enquiry to form an erroneous opinion and (3) under s. 477-A of the Penal Code for falsifying Dak Despatch Book. He was convicted under the first and second heads but was acquitted on the third,

Held, (1) that the neglect of the accused resulting in the bursting of the boiler and the subsequent forgeries with the object of screening himself from criminal liability and in order that he might be retained in his employment were part of the same transaction within the meaning of s. 235 of the Cr P C, and that there was consequently no misjoinder of charges; [p. 438, col. 2.]

(2) that the bursting of the boiler being due to the neglect of duty of the accused and that the accused having forged the entries in the private book with the object of being retained in employment his conviction on the first and second charges was justified. [p. 438, col 1.]

Criminal appeal against a decision of the Sessions Judge, Sukkur.

Mr. *Fatehchand Assudomal*, for the Appellant.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT.—On 23rd February 1924 at about 4-40 P. M. a serious Railway accident occurred while the 100 Down Goods Train was passing over a bridge on the down line between Mahesar and Pano Akil Stations on the North-Western Railway line. The boiler of the locomotive engine was blown off the frame and implanted at the 14th pier of the bridge damaging the pier and the embankment close by, the frame of the engine was lifted off the rails and thrown down in the *nulla* between piers Nos. 8 and 9, the spans of the bridge between piers Nos. 7 and 9 were smashed and the space in between piled with a jumbled mass of waggons. The engine driver had been terribly burnt and before he died, all that he could say was "I know only about the falling." The two firemen who were on the engine were found dead. Five coolies of the contractor, who were scrapping the paint of the girders of the bridge, were found dead and eight other coolies injured. These coolies were doing their work sitting on planks swung by cords from the bridge, and were overwhelmed by the falling waggons.

The inquiry held immediately thereafter by the Senior Inspector of the Railway disclosed that the accident was due to the unsafe condition of the boiler of this engine. The crown stays of the boiler were badly corroded and some of them completely gone. The crown plate had been ripped open, causing an explosion in the fire-box, with the result that the boiler had blown off. The engine was of the "H. B." class

bearing No. 1591, the number of its boiler being 121. It was one of the eighty engines housed at the Rohri Shed and had been sent out for work on the previous day to Khanpur. After the usual rest at Khanpur for about six hours it was returning to Rohri with another load.

The appellant was then employed as a European boiler-maker at the Rohri Shed. It was his duty to have periodical inspection of the boilers of the engines housed at Rohri. At the inquiry he produced a Dak Despatch Book similar to an ordinary peon's delivery book to prove that he had submitted the periodical reports of his inspection through the Foreman of his shed to the District Loco Superintendent, and further relied on certain entries made by him in a private book to show that he had reported on the crown stays of this engine not being perfect. The entries in the Dak Despatch Book were believed to be forged, and the appellant was put on his trial on three different charges:

(1) Under ss. 304-A, 337 and 338, Indian Penal Code, for neglect of his duty in not complying with rr. 42 and 49 of the Rules and Regulations of the Locomotive Department made under Act IX of 1890, resulting in the bursting of the boiler and causing loss of five lives and injury to eight other persons.

(2) Under ss. 465 and 471, or in the alternative under s. 193, Indian Penal Code, for having forged entries with the object of inducing the Senior Government Inspector who was holding an inquiry intending that such forged entries might cause him to form an erroneous opinion.

(3) Under s. 477-A, Indian Penal Code, for falsifying the Dak Despatch Book.

He has been convicted and sentenced to six months' simple imprisonment on the first count, to one month's simple imprisonment under ss. 465 and 471, Indian Penal Code, on the second count, and acquitted on the third count. He has appealed against his conviction. A notice has also been issued to him to show cause why the sentences inflicted on him should not be enhanced.

We have no hesitation in holding that the proximate cause of this terrible accident was the bursting of the boiler on account of the corroded stays giving way and the crown plate being ripped open. The evidence of the experts who examined the scene of occurrence immediatly after the accident shows that the boiler was blown off the chassis of the engine at pier No. 7 when the engine was running on the rails. There were marks of sludge on the top of pier No. 7, on the face of that pier between the girders on the ground, and at the base of pier No. 6 and also on some sleepers that were blown down through the bridge. The marks of this sludge were inconsistent with the sludge which passes from the blow off cock which was only to the right side of the engine and were consistent with the theory that the sludge was dropped from the boiler when it was bodily lifted by the explosion.

The sleepers were blown forcibly downwards between the rails leaving their ends undisturbed, due evidently to three or four tons of metal and live coal crushing down through the sleepers. A number of bridge timbers immediately before pier No. 7 and on the side of it facing pier No. 6 had been completely shattered between the inner flangs of the top girders.

The boiler of the engine had received a violent dent on the front upper portion which was originally flat which showed that it had turned somersault over on its head and had again come down the right way up and facing in the same direction as before. It was lying almost in front of the train about eighty yards away from the place where it first left the chassis. The rear part of the boiler and the barrel are less strongly fastened down than the smoke-box in front, and the rear part of the boiler naturally blew up first. If the boiler had blown off after the chassis had fallen off the rails or into the *nulla*, it is least likely that the boiler would be implanted on the bridge just in front of the train on the down line or would receive the dent on the front upper portion of the boiler.

The place where the chassis was found lying in the *nulla* showed that it had been thrown off the rail after the boiler had burst and had been pushed further up to pillar No. 9 where it was imbedded in the *nulla*. There are also other indicia, for instance the discovery of the smoke-box door, near pier No. 7, which seems to have dropped out when the rear part of the boiler had been lifted up.

Added to it was the state of the crown plate and the crown stays. The flat top plate on the firebox, which is of copper, is stayed to the crown plate of the boiler

by stays 192 in number. Each of these stays has a nut at the end. These stays are liable to be corroded with heat and water and galvanic action of the copper and iron. The place of corrosion of a stay is just above the firebox crown. If a sufficient number of stays are corroded the top of the firebox is liable to collapse under steam pressure. A new stay is about $1\frac{1}{4}''$ in thickness. The inspection of the boiler by the Railway experts disclosed that out of the 192 crown stays ten were completely gone and except a few stays, towards the front of the boiler, the rest were badly corroded and the average thickness of the stays reduced to about $\frac{5}{16}$th of an inch, and the crown plate had ripped open under pressure of steam, the corroded stays having been broken by the pressure.

There was no other ostensible cause of the accident. The line between the two stations is a main line subject to constant traffic both up and down. The coolies working on the bridge found no obstacle being placed on the line to cause a derailment, and the accident occurred in broad day-light. There is also the evidence of three coolies who were sheltered under trolly refuge on pier No. 5 who speak to the explosion and the shooting out of the sludge as the first thing that occurred, and have been believed as true witnesses by the learned Sessions Judge.

The expert evidence further shows that the minimum average thickness of the stays for purposes of safety should not be less than $\frac{7}{16}$th of an inch, and according to Welsh Foreman, Boiler-maker, Karachi, Ex. 18, it was very dangerous to send out for work the engine with its crown stays so badly corroded, and according to Brooks Foreman, Boiler-maker, Lahore, Ex. 16 the boiler in that state was unsafe for work.

There can be also no doubt that it was a part of the duty of the appellant to examine the crown stays periodically, at least once every three months.

The crown stays require watching as they are liable to corrosion. There are nine plug holes provided for inspection, five of the plugs being in the top plate of the fire-box and so situated as to render the examination of the outer rows easily observable from the plug holes. These outer rows corrode the quickest. At least two stays can be examined through each hole and those so examined serve as an index to the condition of the rows to which they belong. Stays commonly become encrusted and require to be cleaned with a chisel to remove the encrustation and corroded portions to see how deep the corrosion has progressed. The thickness of the stays is judged by the use of the chisel through one of the holes and by introducing a light through another hole to observe the result of chiselling. This part of the work is the duty of an experienced European boiler-maker like the appellant and not of any of the subordinates working under him.

Rule 49 of the rules requires the European boiler makers to carry out the quarterly examination of the running engines; and one of the chief things which requires examination is the crown and side water stays which are liable to corrosion.

The appellant was aware that the water at Rohri was likely to cause greater corrosion than ordinary water. His special attention had been drawn to the effect of criminal neglect of examining stays by Ex. 71, dated 18th December 1923, which was issued in consequence of another boiler having been sent to a workshop with a majority of the crown stays badly corroded, and showing that the European boiler-makers who were supposed to have examined the engines had neglected to examine the stays and for which they were punished. This circular is signed by the appellant and requires him to have a proper examination of boilers.

The statement of the appellant before the inquiry officer shows that the appellant was aware of the importance of the stays, his duty to periodically examine them, and the serious danger resulting from the stays giving way. He admits that in 1906 a boiler of an engine on the Great Eastern Railway was blown off the chassis while the engine was running, on account of the side water stays giving way and causing the explosion, the boiler in that case having blown off on one side owing to the greater pressure on that side. The appellant further admits that it was a part of his duty to immediately report to the District Loco. Superintendent, if he found a boiler of any engine to be unsafe for work and to stop the engine from running, pending instructions from the District Loco. Superintendent. The appellant is an experienced boiler-maker of over sixteen years standing and was fully cognizant of the serious danger to life and property in permitting an unsafe boiler to work.

The expert evidence further proves that the crown stays of this boiler were so badly encrusted and corroded that it was not likely that the appellant could have removed the encrustation or examined the stays for a period of nine to twelve months.

This evidence finds ample support in the conduct of the appellant in attempting to create evidence at the inquiry to show that he had examined the boiler every three months and had submitted his quarterly report of inspection. He produced a Dak Despatch Book, Ex. 87, with certain interpolations to prove that the quarterly reports were delivered to the head clerk of the Foreman who had signed for them in the book. He further relied on certain entries made by him in his private book, Ex. 88, which recited *inter alia* that he had examined the boiler of this engine on 15th January 1924 and found "the crown bolts badly encrusted, patches leaking and to be watched and the tubes as far as they could be seen in a good condition." The object of producing these books was evidently to lead the Inspector to believe in the first place that the appellant had discharged his duties properly and that his failure to stop the boiler from working at most amounted to an error of judgment and not to neglect of duty.

The story of his having submitted quarterly reports is false. None of the Shed office or the District Loco. Superintendent's office remember having seen the reports nor does Spiers, the Assistant Loco. Superintendent, or Brock, the District Loco. Superintendent, remember having received them. The life history of the boiler in the life register kept in the District Loco. Superintendent's office has not been written up, and no office copies of the reports have been produced by the appellant, though it is usual to make out the reports in duplicate and to retain one as an office copy. The Dak Despatch Book, Ex. 87, shows distinct signs of interpolations and manipulations. It would be sufficient to refer to the last entry of the despatch of the last quarterly report. It reads as follows:—

Head Clerk	S. Report 137 T. 28 1-24 returned on date 30-1-24 and quarterly Boiler report.	Signature of Head Clerk.

The words "and quarterly Boiler reports" are a clear interpolation. We think that the learned Judge was right in holding that the different entries in this book, showing that the appellant had despatched reports for the different quarters from November 1922, were manipulated. The private book, Ex. 88, could not possibly have formed the basis for the appellant to make out his quarterly report. It does not contain notes of inspection of several engines which were housed in the same Shed during the period, though this book purports to have been kept from the time of the appellant's transfer to the Rohri Shed upto the time of the accident. It would appear that when the appellant was off and on required to carry out Shed repairs to any boiler or to re-place worn out parts he made notes of it in this book. It is not at all a book maintained as a substitute for the office copies of the quarterly report. He has availed of it to prove that he carried out the quarterly inspection of the boiler in question by making certain additions about the state of this boiler and the dates on which he examined it. The notes in Ex. 88 do not however prove that the appellant carried out quarterly inspection of the boilers in his charge or that he submitted the quarterly reports. The learned Sessions Judge has rightly pointed out that after the accident the appellant was in a dilemma. If he said that he had noted in the report the boiler as safe in January, the state of the boiler would show that his report was incorrect, and if he said that he had noted the boiler to be unsafe, he would have to explain why he did not despatch an urgent memo to the District Loco. Superintendent, and stop the boiler from working. He therefore, fabricated an evasive entry in this book Ex. 88 : "Crown bolts badly encrusted, patches leaking, to be watched, tubes good as far as can be seen." The appellant was himself uncertain as to the effect of this entry and when questioned by Mr. Brock he said that he had sent a memo stopping the engine, thereby showing that he considered the boiler unsafe, though no such memo. could be traced, and when questioned by the Senior Government Inspector he told him that he considered the boiler safe. If this entry be true, and the appellant really found that the bolts were badly encrusted and patches leaking and to be watched, there was a greater obligation on him to examine thoroughly the crown stays and also to watch the state of the boiler each time the engine was sent out

of the Shed. There is nothing in his notes to show that he did either.

We are of opinion that the appellant's action in manipulating Exs. 87 and 88 was most foolish and ill-advised.

Mr. Fatehchand, the learned Pleader, for the appellant has urged that the conduct of the appellant in not stopping the boiler from work is consistent with his having committed an error of judgment.

In support of this plea it is urged that it is a matter of opinion if the minimum thickness of crown stays for safety should be $\frac{7}{16}$th of an inch or less, and that even if the thickness of the stays were only $\frac{1}{4}$th of an inch, they would be able to bear the maximum pressure of steam. As the stays were of an average thickness of $\frac{5}{16}$th of an inch the act of the appellant in not stopping the engine from work was an error of judgment.

There may have been some force in this argument if the appellant had removed the encrustations and cleaned the stays. He cannot claim the benefit of an error of judgment when he exercised none. Again it is to be observed that, if all the stays were of the uniform thickness of $\frac{1}{4}$th of an inch, they could withstand the pressure of steam. It does not follow that stays of less than $\frac{7}{16}$th of an inch would be able to bear the same pressure when some of the stays were completely gone, and others reduced to less than $\frac{5}{16}$th of an inch. The front ten stays afforded a fair index to the appellant as to the condition of the stays in the back rows, and as these ten stays were completely gone, it is difficult to believe that if the appellant had applied his mind to it, he could have fallen into any error of judgment.

The second contention raised by Mr. Fatehchand is that the dereliction of duty, if any, was not so gross as to make it culpable, and has relied on certain English rulings in support of his contention. These rulings which are based on the English Common Law have very little bearing on the codified law in force here and should be applied with some caution. Under the Common Law whether a dereliction of duty in any particular case is criminal or not is a question of fact in each case. As said by Lord Blackburn in *R. Eyre* (1) "'criminal negligence' is a phrase constantly used in criminal cases, but the amount of negligence that would make a man so responsible cannot be defined. It is not a little failure in duty that would make him criminally responsible. A great failure of duty undoubtedly would. The line between the two is hard to define and must be left to a very great extent in each individual case to the common sense of the Jury whether or not the degree of failure of duty is criminal."

So far as the facts of this case go, there can be no doubt that the appellant is not guilty of a little failure of duty, but a great failure for over a long period of the very duty with which he was particularly entrusted, for it is in evidence that stays could not have got corroded and reduced to that thickness in the course of two or three months, and he failed to perform this duty notwithstanding his special attention being drawn by the circular of December 1923 to the importance of the stays being examined periodically and his personal knowledge of a boiler having burst in consequence of the side stays giving way. This dereliction of duty is as gross as it could possibly be. The expression "gross neglect" however finds no place in the Indian Criminal Codes and there is no occasion or reason for introducing it here. The codified Criminal Law of India does not render a mere casual inadvertance to duty criminal, but such neglect of duty as either directly results in loss of life or injury to person (ss. 304-A, 337 and 338, Indian Penal Code, and in certain special cases) or such neglect as endangers life or property (ss 279 to 289, Indian Penal Code, ss. 102 and 128 of the Indian Railways Act). In the present case the neglect of duty has directly resulted in loss of life.

Mr. Fatehchand has further contended that the cause of this accident is consistent with the engine driver having put on the brakes too suddenly or negligently thereby causing a greater steam pressure on the boiler, and that the immediate cause of the accident was the act of the engine-driver.

He has urged that as the engine was drawing a load, there was less pressure on the stays and less chance of the crown plate giving way at that time unless a sudden attempt had been made to stop the engine. There is nothing to show that the crown plate may not have yielded to pressure of steam while the engine was moving. Even assuming that the engine-driver saw some person ahead and attempt-

1) Finlason's Report 57.

ed to slow down the engine or stop the train, and in so doing contributed in part to the accident, this is no defence to the charge. The proximate cause of the accident, however, is not the sudden stopping of the train for it is expected that the boiler of a locomotive should be strong enough to withstand such strain, but the weakness of the stays. It is also not open to the appellant to rely on the plea of contributory negligence which has a distinct and recognised place in the Law of Torts, but finds no place in an indictment for criminal negligence. We are of the opinion that the appellant has been rightly convicted on the first count.

Though the object of the appellant to manipulate Ex. 87 was mainly intended to screen himself from criminal liability for neglect of duty, he stood to gain by it, if he could convince the Senior Inspector that the entries in Ex. 87 were true. As pointed out by the learned Sessions Judge he would have been permitted to continue in service, though he was unfit for it. There is also evidence to show that he used Ex. 87. We are of opinion that he has been rightly convicted on the second count as well.

Mr. Fatehchand has lastly urged that there was a misjoinder of charges which rendered the trial illegal. The three counts under which the appellant has been charged may fairly be said to be in respect of one and the same transaction within the meaning of s. 235, cl. (1), Cr. P. C. The expression "same transaction" is, as pointed out in *Crown* v. *Ghulam* (2), incapable of exact definition and has been advisedly used in this section and s. 239. The arena of facts covered by the expression "same transaction" varies with the circumstances of each case. In *Emperor* v. *Sherufalli* (3) it was pointed out that the real and substantial test for determining whether several offences are so connected together as to form one transaction depends upon whether they are related together in point of purpose or as cause and effect or as principal or subsidiary acts so as to constitute one continuous action. Criminal misappropriation and falsification of accounts in order to screen the misappropriation in *Emperor* v. *Jiban Krishna Bagchi* (4), criminal breach of trust and falsification of accounts made to conceal the breach of trust in *Emperor* v. *Jagat Ram* (5), the charge of murder and of causing evidence of the murder to disappear with the intention of screening the offender in *Hanmappa Rudirappa* v. *Emperor* (6), *Crown* v. *Ghulam* (2) and *Emperor* v. *Bawa Manghnidas* (7) causing grievous hurt with the object of extorting a confession from a person and after his death forging entries to conceal the cause of death in *Emperor* v. *Balwant Kondo* (8) misappropriation of ornaments taken charge of by a Police Officer from a lady and the subsequent alteration of entries in the Police diaries to show that the ornaments were not taken charge of at the Police Station in *Bilash Chandra Banerjee* v. *Emperor* (9) have all been held to fall within the purview of s. 235, cl. (1). Here the appellant was similarly charged with forging entries in order to conceal his offence of criminal neglect. The evidence to prove the charge on the first count was relevant to prove the charge on the second count and *vice versa*. The appellant cannot even plead that he has been prejudiced by the joint trial. We hold that there has been no misjoinder of charges.

We have carefully considered the question of enhancement of sentence. The criminal neglect of the appellant was to a certain extent encouraged by the District Loco. Superintendent's office in not calling for the quarterly returns. The first expedite sent by the office was after a period of over twenty-two months in January 1923 and was probably a result of the circular Ex. 71. In response to that expedite the appellant submitted the reports for two engines housed at Pad-Idan and five engines at Khanpur which were also under his charge, but was too inactive or lazy to examine and report on the eighty engines housed at Rohri. If the District Loco. Superintendent's office had been more active, probably the appellant would have looked up a bit and this terrible accident might have been avoided. We have been told that the appellant not only loses his appointment,

(2) 1 S. L. R. 73; 8 Cr. L. J. 191.
(3) 27 B. 135; 4 Bom. L. R. 910.
(4) 20 Ind. Cas. 412; 40 C. 318; 14 Cr. L. J. 428.
(5) 48 Ind. Cas. 167, 19 Cr. L. J. 987.
(6) 82 Ind. Cas. 709; 25 Bom. L. R. 231; (1923) A. I. R. (B.) 262; 25 Cr. L. J. 1349.
(7) 8 Ind. Cas. 936; 4 S. L. R. 174; 11 Cr. L. J. 731.
(8) 13 Ind. Cas. 825; 14 Bom. L. R. 41; 13 Cr. L. J. 127.
(9) 77 Ind. Cas. 231; 27 C. W. N. 626; (1923) A. I. R. (C.) 647; 25 Cr. L. J. 343.

but with a conviction standing against him it will be difficult for him to get employment, and this in itself would be a sufficient punishment for him and for his family who are now rendered helpless in England.

Taking into consideration all the circumstances, we think, it will meet the ends of justice if we sentence him to six months' rigorous imprisonment instead of six months' simple imprisonment on the first count, and to one month's rigorous imprisonment on the second count, both sentences to run concurrently, and order that the portion of the sentence already undergone by him be treated as part of this sentence and be deemed to have been one of rigorous imprisonment.

Z. K. *Conviction confirmed.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 568 OF 1924.

February 12, 1925.

Present :—Justice Sir Babington Newbould, KT., and Mr. Justice B. B. Ghose.

KERAMAT MANDAL AND ANOTHER—ACCUSED—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss 162, 233, 239—Penal Code (Act XLV of 1860), ss. 366, 376—Evidence Act (I of 1872), s 155 (4)—Abduction and rape on different occasions—Joint charge, legality of—Abduction, what constitutes—Statements made to Police during investigation, admissibility of—Statements of persons not examined as witnesses as to whereabouts of accused at time of occurrence, admissibility of—Character of prosecutrix, whether relevant.

K and *B* abducted a woman and committed rape upon her at a place called D. The woman was subsequently taken by *B* to different places where he alone committed rape upon her. On these facts :

Held, (1) that a joint charge under s. 366 of the Penal Code against both *K* and *B* was justified; [p. 439, col. 2.]

(2) that a joint charge under s. 376 of the Penal Code against both of them in respect of the occurrence which took place at D was also justified; [p. 440, col. 1.]

(3) that a joint charge against both of them of having committed rape upon the woman at D and in other places was both improper and embarrassing ; [*ibid.*]

(4) that if it was intended to prosecute *B* with regard to the offences that he was accused of having committed elsewhere there should be separate charges with regard to those offences. [*ibid.*]

In order to sustain a charge under s. 366 of the Penal Code, it is not necessary for the prosecution to establish that after the woman had been by force compelled to leave her house, she was by force compelled to go to various places. [p. 400, col. 1.]

Under s. 162, Cr. P. C., no statement or any record thereof whether in a Police diary or otherwise or any part of such statement made by any person to a Police Officer in the course of an investigation under Ch. XIV of the Cr. P. C., is admissible as evidence except as provided in the second para. of that section. [*ibid.*]

Evidence of [illegible] statements made by an accused person [illegible] custody of the Police and of his having pointed out the places where he had taken the abducted woman during the course of the night in which the offence of abduction is alleged to have been committed are not admissible in evidence. [p. 440, col. 2.]

A statement made by a person who is not examined as a witness that the accused was not in his house on the night on which the offence is alleged to have been committed is not admissible in evidence. [*ibid.*]

In a case of rape evidence as regards the general immoral character of the woman is relevant under s. 155 (4) of the Evidence Act. [p. 441, col. 1.]

Criminal appeal against an order of the Sessions Judge, Rajshahi.

Babu *Debendra Narain Bhattacharjee*, for the Appellants.

Mr. *Khondkar*, (Deputy Legal Remembrancer), for the Crown.

JUDGMENT.—The appellants in this case Keramat Mandal and Belat Ali Mandal were tried by the Sessions Judge of Rajshahi with the assistance of a Jury on two charges under ss. 366 and 376, Indian Penal Code. The Jury returned a unanimous verdict of guilty against the first appellant on both charges and a verdict by a majority of four to one of guilty on both charges against Belat Ali. The learned Sessions Judge accepted the verdict and sentenced both the appellants to transportation for life under s. 376, Indian Penal Code, no separate sentence being awarded under s. 366, Indian Penal Code.

On behalf of the appellants several grounds have been taken the first of which being with reference to misjoinder of charges. With regard to the first charge under s. 366, Indian Penal Code, no objection is taken and it appears to us to be quite in order. The difficulty is caused with regard to the second charge which runs thus: "Secondly that you on or about the 25th day of May 1924 at Dasmari P. S. Paba and other places committed rape on Benodini." The story of the prosecution was that rape was committed on Benodini on a field at Dasmari by both the accused persons. Subsequently this woman was

taken either by force or by fraud by Belat Ali alone to different places where he alone committed rape upon her. In this circumstance a joint charge against both the accused of having committed rape upon Benodini at Dasmari and in other places is improper. We are of opinion that such a charge is also . . It is urged on behalf of the Crown that although this is not a proper charge this has not in fact occasioned a failure of justice, because if the evidence on behalf of the prosecution as to the first act of rape in the field at Dasmari was believed by the Jury, both of the accused persons might be convicted of the offence. It is possible that this is so, but having regard to the other questions on which we consider this trial has been vitiated we think that in the subsequent trial this error in the charge should be set right. Although both of the accused persons might have been jointly charged with both the offences which were committed at Dasmari, if it is intended to prosecute Belat Ali with regard to the offences that he was accused of having committed elsewhere there should be separate charges with regard to those offences. While dealing with this matter we may also point out that in his charge to the Jury with reference to the offence under s. 366, Indian Penal Code, the learned Judge has stated this: You shall have to see (*a*) if the woman Benodini was by force compelled to leave her house and to go to the various places. In our opinion it is not necessary for the prosecution to establish that she was by force compelled to leave not only her house but compelled to go to various places in order to sustain the first charge on which the accused were tried.

The principal question on which we hold that the trial has been vitiated, is of erroneous admission of evidence. The first is that evidence has been admitted as to what Benodini has stated to the Investigating Police Officer and her pointing out the places where she was taken. The statement of another witness, that is, the mother-in-law of Benodini before the Police has also been put in evidence. We should point out that under s. 162, Cr. P. C., no statement or any record thereof whether in a Police diary or otherwise or any part of such statement made by any person to a Police Officer in the course of an investigation under Ch. XIV of the Cr. P. C. is admissible as evidence except as provided in the second para. of that section. It was urged on behalf of the Crown that the statements that were put in evidence were not corroborative of the facts sworn to the witnesses in the box, but were practically harmless and could not affect the decision as regards the main story of the offences. It is difficult for us to say how it worked on the minds of the Jury, and the law forbids such evidence being introduced in the manner it has been done. In this particular case the statements that were made by the witness to the Police Officer and the fact of pointing out the places to him ought to have been kept back from the Jury, as such facts were not brought out in evidence on behalf of the defence as provided by s. 162 of the Code. A still more objectionable thing happened in allowing the evidence of the statements of Belat Ali while in custody of the Police Officer, and of his having pointed out the places where he had taken the woman during the course of the night in which the offence is alleged to have been committed. Although the learned Judge has stated in the last part of his charge that the Jury should reject the evidence as regards the part taken by Belat Ali in pointing out the places, the mischief of introducing inadmissible evidence had already been done. It seems that the learned Judge allowed this evidence to be introduced on the ground that it was the conduct of the accused influenced by a fact in issue. It can hardly be said that the statements of the accused were admissible as his conduct. These statements were certainly of an incriminating nature and were not admissible under the law.

The next objection which is also of substance is that when search was made for Belat Ali two persons Kafil and Sukalal were alleged to have said that Belat Ali was absent from home on the night of the occurrence. These two persons have not been examined in Court but their allegations about the absence of Belat Ali were allowed to go in. Those statements were certainly inadmissible. The learned Judge only refers to that fact while dealing with the arguments on behalf of the defence.

On this ground of wrong admission of evidence we must set aside the conviction and sentence and send the case back for re-trial according to law. While doing so we desire to make certain observations with regard to the nature of the statement made by Belat Ali to the Magistrate by way of

confession. This statement is not really a confession, because so far as it goes it is self-exculpatory. The learned Judge was, therefore, wrong in using the expression that it was a confession.

The next point is that the learned Judge begins by saying that on a question of rape the character of the woman is not relevant. It seems to us that what the learned Judge means, as he says subsequently, is that even a woman of immoral character may be the subject of rape. In such a case evidence as regards the general immoral character of the woman is relevant evidence as enacted in s. 155 (4) of the Evidence Act. We noticed that the learned Judge admitted evidence which suggested that the woman concerned in this case was of bad character and he dealt with this matter in his charge. We are of opinion, therefore, that the learned Judge was quite aware of the provisions of the law, but the use of the expression that the character of the woman is not relevant is somewhat misleading.

The result is that we set aside the conviction and sentence passed on the appellants and send the case back for re-trial. The accused will be tried on the following charges. The one charge against both the accused under s. 366, Indian Penal Code, as framed; one charge against the accused No. 1, Keramat Mandal, for committing rape on Benodini at Dasmari; a separate charge against Belat Ali for committing rape on Benodini at Dasmari; and if the prosecution so desires a separate charge of rape against Belat Ali for what has been alleged to have taken place subsequent to Benodini being taken away from the field at Dasmari.

Z. K. *Conviction set aside: Case remanded.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 450 OF 1925.

August 26, 1925.

Present:—Mr. Justice Kanhaiya Lal.

ABDUL HAFIZ KHAN—ACCUSED —APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

U. P. Excise Act (IV of 1910), s. 53—Criminal Procedure Code (Act V of 1898), s. 103—Search, irregular —Conviction, legality of.

An irregularity in the search does not render illegal the conviction of a person who is found in possession of an excisable article on such search. [p. 442, col. 2.]

Emperor v. *Allahdad Khan*, 19 Ind. Cas. 332, 11 A. L. J 442; 14 Cr. L. J. 236, 35 A. 358, *Syed Ahmad* v. *Emperor*, 22 Ind. Cas. 163, 35 A. 575; 11 A. L. J. 933; 15 Cr. L. J 19, followed

Kutru v. *Emperor*, 88 Ind. Cas. 280; 23 A. L. J 364; L. R 6 A. 124 Cr, (1925) A. I. R. (A.) 434, 47 A. 575; 26 Cr. L. J. 1112, referred to.

Criminal revision from an order of the Sessions Judge, Cawnpore, dated the 18th July 1925.

Mr. *Zahur Ahmad*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The accused, Abdul Hafiz Khan, was found in possession of one ounce of cocaine lying in a trunk inside his house. He has been convicted under s. 60 (*a*) of the U. P. Excise Act and sentenced to rigorous imprisonment for eight months and a fine of Rs. 500. It appears that the Excise Inspector received information that certain men had come from Rampur and were engaged in selling cocaine at Cawnpore. The accused is a resident of Rampur and is now living at Cawnpore. When the Excise Inspector received the above information, he arranged that 50 ounces of cocaine should be purchased at Rs. 65 per ounce by the informer. He had completed the arrangement for its purchase and was trying to arrange for the price when on the 19th April he received further information that one of his informers had divulged that information to the smugglers and that they were leaving the shop on the Latouche Road which was in their occupation. He, therefore hurried to the house and the shop occupied by the accused without waiting to obtain a search warrant from the Collector under s. 53 of the Excise Act. The shop was found closed. It was opened but nothing excisable was found in it. The Excise Inspector and the constable who accompanied him then went to the house of the accused accompanied by two search witnesses, one of whom was a neighbour keeping a leather shop in an adjoining house and the other was the Excise Inspector's own tonga-driver. On a search being made in the house the packet containing an ounce of cocaine was found in a steel trunk which also contained clothes and jewellery. Both the Courts below accepted the evidence of the Excise Inspector and the two search witnesses and convicted the accused.

The contention here is that the search

was illegal because there was ample time for the Excise Inspector to have obtained a warrant from the Collector before making the search, and to have got two search witnesses from the locality to accompany him when he went inside the house to make the search. Section 53 of the U. P. Excise Act provides that where a Collector or an officer of the Excise Department not below such rank as the Local Government may prescribe or a Police Officer not below the rank of an officer in charge of a Police Station has reason to believe that an offence punishable under certain sections of the Excise Act is being or likely to be committed in a certain place and that a search warrant cannot be obtained without affording the offender an opportunity of escape or of concealing evidence of the offence, he may at any time by day or night enter and search such place, provided that any officer, other than a Collector, taking action under this sub-section shall before entering such place record the grounds of his belief as aforesaid. The learned Sessions Judge had rightly pointed out that even if the Excise Inspector had no opportunity of obtaining a warrant from the Collector and thought that any delay would afford the offender an opportunity of escape or of concealing evidence of the offence, it was his duty before proceeding to make the search to record the grounds for his belief that an offence of the kind mentioned was being or likely to be committed and that an immediate search was necessary. The Excise Inspector does not appear to have recorded any proceeding showing the grounds of such belief; and that was a serious irregularity which but for the clear evidence adduced in this case and accepted by the Courts below might have seriously affected the situation. The object of the provision is that searches should not be lightly carried out on the strength of a suspicion formed without adequate basis and that there should be some guarantee that the information received had been independently examined and found to be reliable and that a search was necessary in the public interest. The learned Sessions Judge thinks that there was ample opportunity in the present case for the Excise Inspector to have obtained a warrant; but even if that was so, the irregularity in the proceedings leading to the search would not mitigate the offence or operate as a bar to the conviction of the accused as satisfactory evidence of an excisable article having been found in his house or possession is forthcoming. As pointed out in *Emperor* v. *Allahdad Khan* (1) and *Syed Ahmad* v. *Emperor* (2) the absence of the search warrant does not render the subsequent conviction of the person found in possession of an excisable article on such search illegal. It is also urged that the provisions of s. 103, Cr. P. C., were imperative and that the search was illegal because the Excise Inspector and the Police constable who accompanied him did not take two respectable inhabitants of the locality with them when they went to search the house. It is undoubtedly important that an officer making a search should comply with these provisions, for the credibility of his story may in many cases depend on the support it might receive from the persons accompanying him in the search. But if for any reason the officer making the search is unable to get two or more respectable inhabitants of the locality and a search is effected in the presence of one or more men available at the time, leading to the discovery of an excisable article, the accused who is found in possession of that article can all the same be convicted, if the Court is satisfied from the evidence that an offence has been committed. In a case where a search had been carried out in disregard of the provisions of ss. 25 and 30 of the Arms Act it was held that though the search was illegal, the person found in possession of the arms could still be convicted. [*Kutroo* v. *Emperor* (3)] There is no reason in these circumstances for interfering with the conviction. The sentence is not excessive. The application is dismissed.

N. H. *Application dismissed.*

(1) 19 Ind Cas. 332; 11 A. L. J. 442; 14 Cr. L. J 236; 35 A. 358.

(2) 22 Ind. Cas. 163; 35 A. 575; 11 A L. J. 933; 15 Cr L. J. 19.

(3) 88 Ind. Cas. 280; 23 A L. J. 364; L. R. 6 A 124 Cr; (1925) A. I. R. (A.) 434; 47 A. 575; 26 Cr. L. J. 1112.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 259 OF 1925.

August 26, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Mukerji.

KHIJIRUDDIN AND OTHERS—ACCUSED —APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 297—

Sessions trial—Judge's charge to Jury—Heads of charge, contents of—Several accused—Duty of Judge—Defence evidence, part of, not placed before Jury, effect of—Earliest version of prosecution case, importance of—Evidence Act (I of 1872), ss. 6, 8, 45, 47, 73, 154—Res gestæ, *what is—Statement influencing conduct of witness, admissibility of—Handwriting, proof of—Comparison with admitted handwriting, whether to be made by Jury—Cross-examination of party's own witness, effect of—Permission, when to be granted.*

The object of a summing up under s. 297, Cr P. C, is to enable the Judge to place before the Jury the facts and circumstances of the case both for and against the prosecution so as to help them in arriving at a right decision upon the points which arise for their consideration [p 444, col 2.]

It is not the province of the Judge to find the facts for the Jury and then make an attempt to persuade them to accept his conclusions as correct. [p 445, col. 2.]

A Judge's charge to the Jury must be recorded in such a way as would enable the High Court sitting as a Court of Appeal to judge whether the facts and circumstances of the case had been properly placed before the Jury and also whether the law had been correctly explained to them. [p. 448, col 2]

A mere statement in the heads of charge that the Judge explained certain sections of the Penal Code to the Jury does not satisfy the above requirement. [*ibid.*]

Where several accused persons are being jointly tried and the case as against all of them does not stand on the same footing and their defences are also different, the Judge must ask the Jury to consider the case as against each of the accused individually. The Judge's failure to do so is a very serious omission and is likely to prejudice the accused persons. [p. 447, col. 1]

A verdict obtained from the Jury without placing before them an important piece of evidence in favour of the defence, whatever may have been its real worth, cannot be sustained. [p. 448, col. 2.]

The earliest version of an occurrence as given by an informant or prosecutor who is the principal witness to the occurrence, and on whose testimony practically the whole case depends, must always be placed before the Jury in order to enable them to judge of the truth or falsity of the prosecution case. [p. 447, col. 2.]

When a witness who has been called by the prosecution is permitted to be cross-examined on behalf of the prosecution under the provisions of s. 154 of the Evidence Act, the result of that course being permitted is to discredit that witness altogether and not merely to get rid of a part of his testimony, so that the accused is deprived of the benefit of any statement which the witness may have made in his favour. For this reason the law has enacted that a party desiring to cross-examine its own witness has to take the permission of the Court, implying thereby that there is a discretion in the Court whether it would permit the witness to be cross-examined or not. That discretion must always be exercised with caution by the Court before which the matter comes up for consideration. [p. 446, col. 1.]

What a person states at the time of an occurrence in respect of the occurrence itself is *res gestæ* under s. 6 of the Evidence Act. A statement, however, made at the time of an occurrence relating to a previous occurrence which took place a year earlier is not part of the *res gestæ* and is not admissible in evidence. [p. 448, col. 1.]

A statement made by a person, who is not examined as a witness, is not admissible under s. 8 of the Evidence Act as having affected the conduct of a witness assuming that such conduct is relevant. [p. 448, col. 1.]

A party wishing to prove that a document is in the handwriting of a particular person can rely upon expert evidence under s 45 of the Evidence Act, or the opinion of a competent witness under s. 47 of the Act, or direct comparison of the document with proved or admitted documents under s. 73 of the Act. [p. 449, col 2]

When an accused person puts forward in his defence a letter alleged to have been written by the prosecutor and the latter denies the fact, and the accused requests the Court to compare the handwriting of the letter with the handwriting of documents admittedly written by the prosecutor, the Judge must place the documents before the Jury and ask them to make the comparison and decide whether the handwritings do or do not tally. [p. 450, col. 1.]

Criminal appeal against an order of the Sessions Judge, Rungpur.

Messrs. *S. K. Sen*, *Wahed Hossein*, Babus *Pramatha Lall Dutt*, *Jnan Chandra Roy* and *Benoyendra Prosad Bagchi*, for the Appellants.

Mr. *A. K. Basu*, for the Crown.

Babu *Lalit Mohan Sanyal*, for the Complainant.

JUDGMENT.

Mukerji, J.—The three appellants, that is to say, No. 1 Khijiruddin Sonar, No. 2 Nawabali Sheikh and No. 3 Qamruzzaman (*alias* Quamarulzaman) were tried by the Sessions Judge of Rungpur with the aid of a Jury. The Jury were divided in the proportion of four to one. The majority convicted the appellants in respect of the charges on which they were tried, *viz.*, Nos. 1 and 2 under ss. 364, 344 and 120-B and No. 3 under ss. 364, 342 and 120-B. The learned Judge accepting the verdict convicted the appellants of the said offences and sentenced the appellant No. 1 to rigorous imprisonment for ten years under s. 366, Indian Penal Code and to rigorous imprisonment for three years under s. 344, Indian Penal Code, the sentences to run consecutively; the appellant No. 2 to rigorous imprisonment for three years under s. 366, Indian Penal Code, and to rigorous imprisonment for one year under s. 344, Indian Penal Code, the sentences to run concurrently; and the appellant No. 3 to rigorous imprisonment for five years under s. 366, Indian Penal Code, and to rigorous imprisonment for one year under s. 342, Indian Penal Code, the sentences to run concurrently. No separate sentence was passed for the offence under s. 120-B, Indian Penal Code.

It is not necessary to set out in detail the case for the prosecution upon which the trial was held, for it is to be found narrated in sufficient detail in the learned Judge's charge to the Jury. Shortly stated, the prosecution case was that a girl Suhasini was abducted by the first two appellants some time in February 1923 from Gaibandha where she used to reside with her parents, that thereafter she managed to escape from the custody of the appellant No. 1 sometime in March 1923 when she was again abducted by the appellant No. 1 from a Railway Station called Trimohini. After the second abduction, the case for the prosecution is, the girl remained with the appellant No 1 for about a year, roughly speaking from March 1923 till March 1924. The prosecution case further is that after she had succeeded in escaping from the custody of the appellant No. 1 in March 1924 she was again abducted at Gaibandha by the three appellants acting in conspiracy with each other. She was thereafter detained, according to the case for the prosecution, in the house of the appellant No. 3 for about a day wherefrom she was removed to the house of the appellant No. 1 where she was detained for a period over ten days. According to the prosecution case she was recovered from the house of appellant No. 1 on execution of a warrant issued by the Sub-Divisional Officer of Gaibandha who had in the meantime received an anonymous letter informing him about the abduction. She is said to have been recovered as aforesaid on the 6th of April 1924.

The defences of the three appellants are not exactly the same. But it is unnecessary to set out the defences here, because the learned Judge in his charge to the Jury has given a substantially correct synopsis of the different defences of the three appellants.

Various points have been argued before us on behalf of the appellants by Mr. Sen who has appeared on behalf of the appellant No. 3 and by Mr. Wahed Hossain who has appeared on behalf of the first two appellants. Mr. Basu has appeared on behalf of the Crown. It will not be possible within the short space of this judgment to deal with all the points that have been urged in this appeal. These points vary in the degree of their strength, some being points of very great importance and substance, other apparently appear to be well-founded but have been successfully met by Mr. Basu and others again rest upon very slender basis or upon materials which when examined do not afford any real support. It would only be possible to refer to some of the salient features of the case and a few only of the grounds which to us appear to be of importance.

Before dealing with the points I desire to make a few observations as to the general character of the learned Judge's charge to the Jury. Section 297, Cr P. C., enjoins that when the case for the defence and the prosecutor's reply, if any, are concluded the Court shall proceed to charge the Jury, summing up the evidence for the prosecution and defence and laying down the law by which the Jury are to be guided. The object of a summing up under that section is to enable the Judge to place before the Jury the facts and circumstances of the case both for and against the prosecution so as to help them in arriving at a right decision upon the points which arise for their consideration. If that be the object with which s. 297 of the Cr. P. C. was enacted I must say that in this particular case that object has not been fulfilled but rather frustrated by the way in which the learned Judge charged the Jury. The heads of charge recorded by the learned Judge read more like a judgment or a speech of a prosecuting Counsel than a summing up of the case as required under the law. Even as a judgment it lacks in sobriety and there is in it a want of a judicial equanimity which is the very essence of a judgment in a trial. As a speech of a prosecuting Counsel it is open to the comment that it uses language which in some instances may be said to overstep the legitimate bounds of advocacy.

I refer to a few instances only. In dealing with the witnesses who are said to have deposed in connection with the occurrence that took place at the Trimohini Railway Station the learned Judge told the Jury that those witnesses had acted selfishly and were morally and legally and on their own showing guilty of abetting a villanous crime and that in his experience he had never come across a more contemptible pair of cowards or one more selfishly deaf to the common claims of humanity. This is not my language but the language of the learned Judge. The learned Judge characterised Banamali and Biseswar while narrating what they did at the Gaibandha Railway Station as a precious pair of poltroons, the evidence of the Sub-Assistant Surgeon of

Gaibandha as shilly-shallying evidence, and as the evidence of a witness who showed a more than usual tendency to hedge and play for safety in giving his opinion. When putting the evidence of the Sub Assistant Surgeon in contrast with that of the Sub-Divisional Magistrate he exhorted them with an amount of vigour which is apparent on the face of the charge: he told them that it would not be difficult for them to decide which of the two opinions was the more entitled to respect. This is not all. The learned Judge presented too forcibly before the Jury those aspects of the defence case which would appeal to them as most revolting. The defence which the appellants had seriously put forward before the Court was unquestionably worthy of consideration whatever might have been its worth. The learned Judge told the Jury that if they were to give effect to the defence put forward by Khijiruddin they would have to hold that the girl had done an act which was doubly bigamous and adulterous and which was in defiance of law, custom, religion and morality. A part of the defence of the appellant No. 1 was characterized as having been rather mistily adumbrated. When referring to the fact that there was no evidence in support of the defence which the appellant No. 1 had taken to the effect that he had been married to the girl the learned Judge instead of telling the Jury that it is no part of the duty of the accused person to adduce any evidence in his defence if he does not wish to do so and that the Jury were not entitled to draw any inference from this omission on the part of the accused, went on asking them to take into their serious consideration the fact that the defence had not suggested any answer to some of the prosecution arguments and that they had not given any evidence. He called the Policemen who are said to have been with the appellant No. 3 his henchmen and throughout the charge referred to the acts alleged to have been done by the appellants as partaking of the character of criminal acts. He asked the Jury to consider whether the version given by the defence was one that a person of ordinary prudence and sanity could reasonably accept as true. It is unnecessary to refer to other passages of the learned Judge's charge to the Jury; but, as I have already said, if the object of summing up is to assist the Jury in arriving at their decision this charge instead of helping them informing their own decision impressed the Judge's conclusions indelibly on their minds and gave them no option but to arrive at a decision which the Judge himself had arrived at, namely, that the accused were guilty and that there was no substance in the defence put forward by them. The learned Judge found the facts for the Jury and made a laboured attempt in order to persuade them to accept his conclusions as correct.

Turning now to the points which have been specifically taken on behalf of the appellants there are some which deserve special mention.

The first objection taken to the trial held is to the effect that evidence had been admitted which was not admissible in law. This objection relates to three different matters. The first item to which this objection relates is with regard to Exs. 13 and 13-A. Exhibit 13 is the evidence of prosecution witness No. 11, Jogesh Chandra De as given before the Assistant Sessions Judge in a previous trial of appellants Nos. 1 and 2 the subject-matter of which trial was the two earlier occurrences of abduction, namely, the one which took place at Gaibandha and the other which took place at the Trimohini Railway Station. Exhibit 13-A is the deposition of the same witness before the Committing Magistrate in the course of the commitment enquiry preliminary to the said trial. The circumstances under which these two depositions came to be admitted in the present trial are these : In the course of his evidence in the present trial, the witness made a statement to the effect that at a time when Khijiruddin asserted that he had lawfully married Suhasini, the latter remained silent. This the witness said in his examination-in-chief. The accused declined to cross-examine him. Thereupon certain questions were put to this witness by the Foreman of the Jury. Thereafter the prosecution again examined this witness-in-chief and in the course of this further examination questions were put to the witness by the prosecution in order to bring out the fact that in his depositions as given before the Assistant Sessions Judge in the previous trial as also before the Committing Magistrate in the commitment enquiry which preceded that trial he had made statements which would go to show that the girl was trembling, obviously meaning that even if she had a desire to protest it was not possible for her to do so in the circumstances in which she

was at the time. The learned Judge allowed these questions, which were questions in the nature of cross-examination, to be put to the witness. After these questions had been answered the prosecution was permitted to put in the depositions of this witness to which I have referred and they were marked as Exs. 13 and 13-A in the case. The learned Counsel appearing on behalf of the Crown urges that the reception of this evidence, even if it be held that it was inadmissible, did not prejudice the accused persons. With this argument I am unable to agree. The accused undoubtedly must have been prejudiced and for two reasons. When a witness who has been called by the prosecution is permitted to be cross-examined on behalf of the prosecution under the provisions of s. 154 of the Evidence Act, the result of that course being permitted is to discredit that witness altogether and not merely to get rid of a part of his testimony. [Lord Campbell, C. J., in *Faulkner* v. *Brine* (1)]. This has been held in a good number of cases in this country as well, amongst which reference may be made to two, namely, the case of *Luchiram Motilal* v. *Radha Charan Poddar* (2) and the case of *Emperor* v. *Satyendra Kumar Dutt Chowdhury* (3). The net result of allowing these questions to be put by the prosecution was to deprive the accused of the benefit which might accrue to them from any statement which the witness might have made in favour of the accused and which the defence could have availed of if the witness had not been allowed to be cross-examined by the prosecution. For this reason the law has enacted that the party desiring to cross-examine its own witness has to take the permission of the Court, implying thereby that there is a discretion in the Court whether it would permit the witness to be cross-examined or not. That discretion has always to be exercised with caution by the Court before which the matter comes up for consideration. In this instance it does not appear that any permission was sought for or was given. The result of the procedure adopted was to deprive the accused of the benefit of any statement which the witness may have made in their favour. That is one of the reasons why this procedure should not have been allowed. If, however, this was not the intention of the prosecution but their only object was to show that the witness had merely omitted to mention the fact in the present trial but had spoken about it consistently before and should, therefore, be relied upon, then it amounts to this that they wanted to get rid of a part of the testimony of the witness and were relying upon the earlier statement as a piece of substantive evidence in the case which however they cannot be permitted to do. The earlier statements cannot be let in under s. 157 of the Evidence Act as there is nothing in the deposition of the witness in the present trial which may be corroborated by these earlier statements. Moreover there is hardly any justification for the whole of the depositions being brought as evidence in the present record, and the Jury were not directed as to how they were to deal with this evidence. It is true, as the learned Counsel for the Crown has urged that there is enough other evidence which if believed would indicate that there was no marriage between the appellant No. 1 and the girl. But that is a matter as to the weight of evidence which does not concern us, nor it did concern the learned Judge. It was a matter entirely for the Jury.

The next item to which this objection relates is Ex. 14 which is the deposition of Suhasini given by her in the trial before the Assistant Sessions Judge. The learned Counsel appearing on behalf of the Crown urges that in view of the cross-examination of Suhasini it was necessary for the prosecution to put this evidence in. While I can see that it was necessary for the prosecution to put in particular passages from out of this deposition in order to rebut the suggestions which were being made on behalf of the defence that certain statements which were made in the present trial had not been made by the witness in the previous trial, I do not see why it would be necessary to put the whole of the deposition of the witness as given in the previous trial for the purpose of corroborating the witness in the evidence which she has given in the present trial. If it be that any suggestion was made in the course of the cross-examination to the effect that the witness had made a particular statement in the previous trial which as a matter of fact the witness did not make in that trial and that suggestion was not correct, the proper course for

(1) (1858) 1 F. & F. 254.
(2) 66 Ind. Cas. 15; 34 C. L. J. 107; 49 C. 93; (1922) A. I. R. (C.) 267.
(3) 71 Ind. Cas. 657; 37 C. L. J. 173; 24 Cr. L. J. 193; (1923) A. I. R. (C. 463

the learned Judge was to have disallowed the question. The whole of the deposition is sometimes admitted for the sake of convenience. But the whole of the deposition cannot be used for any purpose in connection with a matter like this and only particular passages which are relevant may be used by the Jury. It does not however appear whether the whole of the deposition as contained in Ex. 14 was read out to the Jury or not and I am, therefore, not in a position to say how far the reception of this deposition as evidence has prejudiced the accused persons.

The third objection under this head relates to the statement recorded by the Sub-Divisional Magistrate in the course of the enquiry which he held on receipt of the anonymous letter. The point urged on behalf of the defence in this connection is that Exs. 5 and 6 the statements made by Krishna Das Banik and Jogesh Chandra De recorded by the Sub-Divisional-Magistrate were inadmissible in evidence in the present trial. The learned Counsel for the Crown has urged that these statements were recorded by an authority competent to investigate into the facts and they could be admitted under the provisions of s. 157 of the Indian Evidence Act. I do not see any particular objection to these statements, although I must say that the learned Judge should have either at the time when these statements were admitted or when charging the Jury told them definitely the purpose for which these statements were admitted in the case.

The second ground urged on behalf of the appellants is to the effect that the statement of Suhasini made by her on the 7th of April 1924, before the Sub-Divisional Magistrate and which has been marked in the present trial as Ex. 4 in the case was not brought to the notice of the Jury by the learned Judge in the course of this summing up. This, in my opinion, is a serious omission. In that statement is to be found the earliest version of the occurrence as given by Suhasini, and it was obligatory on the part of the learned Judge to draw the attention of the Jury to that statement so that they might judge whether the case as against the appellant No. 3 particularly and probably the case against the other appellants as well had not been developed gradually and whether facts and circumstances were subsequently alleged against them which had not been stated by the witness in her first statement before the Sub Divisional Magistrate. The learned Counsel for the Crown has urged that even before the girl made her statement before the Sub-Divisional Magistrate there were other materials existing from before in which it was mentioned that all the accused persons were concerned in the offence, *e. g.*, the anonymous letter Ex. 1 which the Magistrate had received on the 30th March 1924. He has also drawn our attention to the other pieces of evidence, for instance ths evidence of the Sub-Divisional Officer, and the evidence of Bisseswar prosecution witness No. 7 and of the girl herself which, if believed, would go to show that the present story of the girl was the story given to the authorities before there was any chance of the girl being tutored. That may be so, but then it was a matter entirely for the Jury to consider and the accused had a right that this piece of evidence, Ex. 4, which was in their favour was properly placed before the Jury in order that they might have given it a proper consideration. The earliest version of the occurrence as given by an informant or prosecutrix who is the principal witness to the occurrence, and on whose testimony practically the whole case depends, has always to be placed before the Jury in order to judge of the truth or falsity of the prosecution case.

The third objection relates to a still more serious matter. The father of the girl Bonomali was not examined as a witness in the case. His son-in-law, P. W. No. 7, Bisweswar, in the course of his examination-in-chief was allowed to state that he and his father-in-law, Bonomali, were in the station platform when the voice of the accused Nos. 1 and 2 or rather of some persons was heard. Bonomali got up hurriedly and said "Bisweswar, destruction has come about. Those ruffians who a year ago took away Suhasini have again come. Let us be off, caste and honour are at stake." Although Bonomali was not examined as a witness, through the mouth of P. W. No. 7 this statement was brought on the record. The learned Counsel for the Crown says that this evidence is relevant under the provisions of ss. 6 and 8 of the Evidence Act—under s. 6 of the Evidence Act as part of the *res gestæ* and under s. 8 of the Evidence Act as explaining the conduct of Bisweswar in his leaving the place and running away with Bonomali. I am of opinion

that the statement is wholly inadmissible and that neither s. 6 nor s. 8 of the Evidence Act would justify the reception of this evidence. What Bonomali told at the time of the occurrence in respect of the occurrence itself is *res gestæ* under s. 6 of the Evidence Act. But his statement which was with regard to an event which took place a year ago and which was meant to convey that the accused persons who were there had taken away Suhasini by force a year ago would not be part of *res gestæ* but related to an altogether different transaction separated by a sufficiently long interval of time and by no stretch of imagination would the area of events which may be taken as covering the *res gestæ* of the present occurrence extend to what happened in the earlier occurrence. Section 6 of the Evidence Act, therefore, would not help the prosecution. As regards s. 8 of the Evidence Act I am exceedingly doubtful whether the conduct of Bisweswar was a relevent fact in the present trial, but assuming that it was, any statement made by Bonomali which would affect the conduct of Bisweswar when Bonomali was not examined would be purely hearsay evidence and would not come under s. 8 of the Evidence Act. I am clearly of opinion that the reception of this evidence prejudiced the accused very seriously, for although Bonomali was not a witness, we have on the record a statement of Bonomali which contradicts and gives a direct denial to the main defence of the appellants which is to the effect that the girl had been made over by Bonomali to the appellant No. 1 and had been married to him. Even if there was nothing else in the case and if this was the only objection taken on behalf of the appellants I should have been prepared to upset their convictions.

The fourth objection relates also to a matter of similar importance. It is to the effect that the personal diary of the Sub-Inspector the appellant No. 3 which was proved by the prosecution and marked as Ex. 10 in the case was not put before the Jury at all by the learned Judge. This diary, it is said by the prosecution, contains an interpolation and, therefore, is a piece of evidence which if put before the Jury might have gone against the defence. Assuming for a moment that there is an interpolation in that diary and that an inference adverse to the appellant No. 3 may be drawn from that interpolation, still according to the case for the defence the diary contains statement recorded by the Sub Inspector of his own movement and conduct in connection with this case recorded at a time when there was not the slightest indication that any case would be started against him with regard to the occurrence. The Sub-Inspector might well say that this diary contains a true account of what he had done on that occasion. It was absolutely necessary for the learned Judge, if he wanted to put before the Jury the facts and circumstances in favour of the defence, as he should have done, to place the personal diary of the Sub-Inspector, Ex. 10, before the Jury. The fact that the prosecution challenged the authenticity of that diary as containing an interpolation and that they pointed out other circumstances which might indicate that it should not be relied upon did not jusify the learned Judge in withholding it entirely from the Jury. A verdict obtained from the Jury without placing before them this important piece of evidence in favour of the defence, whatever may have been its real worth, cannot, in my opinion, possibly be sustained.

The next objection relates to the way in which the learned Judge has recorded in his charge to the Jury as to how he had explained the law. The learned Judge states in the heads of charge that he explained certain sections of the Indian Penal Code. But there is nothing to indicate what he stated to the Jury or how he explained the different elements constituting the offences. It is urged on behalf of the prosecution that in the heads of charge it is not necessary for the learned Judge to record in full what he actually told the Jury and that furthermore the sections of the Indian Penal Code under which the accused persons were tried were not so complicated as to necessitate a record of what the learned Judge might have said to the Jury in explaining the law. It is true that it is not in every case that the Judge is bound to state in his charge how he explained the law to the Jury. But in a series of decisions of this Court it has been laid down that the charge must be recorded in such a way as would enable this Court sitting as a Court of Appeal to judge whether the facts and circumstances of the case had been properly placed before the Jury and also whether the law has been correctly explained. I shall refer to a few of such cases. One of them is the case of *Panchu*

Das v. *Emperor* (4) where it has been laid down that it is not only desirable but necessary that the charge should be recorded in an intelligible form and with sufficient fulness to satisfy the Appellate Court that all points of law arising in the case were clearly and correctly explained to the Jury. Reference may also be made to the case of *Abbas Peada* v. *Queen-Empress* (5) and the case of *Hemanta Kumar Pathak* v. *Emperor* (6). In the present case where there was a charge under s. 120-B of the Indian Penal Code and there was a question as to the *bona fides* or otherwise on the part of the appellant No. 3 as also various other questions of fact it was absolutely necessary to record the charge in such a way as would have enabled this Court to ascertain whether the law has been properly explained to the Jury or not in relation to the facts of this particular case and also whether the facts in so far as they bear upon the elements necessary to constitute the offences were properly explained to the Jury or not.

The next objection relates to the procedure that was adopted by the learned Judge under the provisions of s. 73 of the Evidence Act. It appears that certain letters were produced on behalf of the defence and it was alleged on behalf of the defence that these letters were written by the girl Suhasini. The letters were not proved as having been written or signed by Suhasini. The defence thereupon asked the learned Judge to proceed under the provisions of s. 73 of the Evidence Act and to have the handwriting of the girl taken in Court so that the writing in the letters might be compared with the handwriting of the girl taken in Court and also with her admitted or proved writings and signatures. This procedure was adopted by the learned Judge. But from the two orders which the learned Judge recorded, one on the 4th of March 1925 and the other on the 5th March 1925 it appears that all that was placed before the Jury were the signatures of the girl as contained in those letters and some admitted signatures of hers. It does not at all appear whether the Jury were asked to compare the handwriting of the girl as alleged to have been contained in the letters with what she had written in Court under the Court's direction. The learned Counsel appearing on behalf of the Crown urged that so long as the letters were not proved it would not have been proper for the learned Judge to have put these letters before the Jury and the question whether the letters were admissible or not was a question for the Judge and not for the Jury to decide and inasmuch as the learned Judge thought that it had not been proved that the letters had been written by the girl it was not necessary for him to place those letters before the Jury in order to get their opinion whether the letters were written by the girl or not. With all deference to the arguments of the learned Counsel in this respect I am not prepared to agree with this contention of his. The defence in order to use these letters as evidence in their favour had to prove that the letters had been written by the girl. For this purpose they could rely upon expert evidence under s. 45 of the Evidence Act or the opinion of a competent witness under s. 47 of the Act or direct comparison of the letters with proved or admitted documents under s. 73 of the Act. This comparison has to be made by the Court or by a witness called for the purpose. If the defence had succeeded in proving by other evidence that the letters had actually been written by the girl there was no point in making the comparison. It is only where such evidence is not available and where although the handwriting in the letters had not been proved by independent evidence to have been the handwriting of the girl that it is necessary to have recourse to the provisions of s. 73 of the Evidence Act to see whether by comparison it can be determined whether the letters were written by the girl or not. The issue before the Court in a case like this is whether the girl had written the letters. Taylor in his Book on Evidence says—"It further appears that any person whose handwriting is in dispute, and who is present in Court, may be required by the Judge to write in his presence, and that such writing may be compared with the document in question. Moreover in all cases of comparison of handwriting the witnesses, the Jury and the Court may respectively exercise their judgment on the resemblance of the writings produced, with respect to the general character of the handwring, the form of the letters, the orthography of the

(4) 34 C. 698; 11 C. W. N. 666; 5 Cr. L J. 427.
(5) 25 C. 736; 2 C. W. N. 484; 13 Ind. Dec. (N. S.) 481.
(6) 58 Ind. Cas. 455; 47 C. 46; 30 C. L. J. 29; 21 Cr. L. J. 775.

words and the style of the composition and also on the fact of one or more of the documents being written in a feigned hand." The result of this comparison is the determination of an issue arising in the case and is quite distinct from the determination of the question of admissibility or otherwise of evidence, which latter is within the province of the Judge alone. Therefore, the learned Judge in not placing before the Jury and in not asking them to compare with the writing in the letters the handwriting taken in Court omitted to give the accused persons an opportunity of getting an opinion of the Jury on the question as to whether the letters were really written by the girl or not.

A further objection appears on the face of the charge and that is to the effect that although there were three accused persons and the case as against all the three did not stand on the same footing the learned Judge nowhere asked the Jury to consider the case as against each of the accused individually. This, in my opinion, is also a very serious omission and is likely to have prejudiced the accused persons, having regard to their defences which were not similar but different.

These are some of the more important objections which have been taken to the learned Judge's charge to the Jury in this case, and in the face of these objections I am not prepared to hold either that the accused had a fair trial or that there was a proper summing up. In my opinion, therefore, the verdict of the Jury should be set aside and the convictions of and the sentences passed upon the appellants on the basis of that verdict should also be quashed.

The question then arises as to whether there should be a re-trial of this case or not. The learned Counsel appearing on behalf of the appellant No. 3 has strenuously urged that in view of certain facts which he has placed before us and also of certain circumstances which may lend support to his argument to the effect that the appellant No. 3 acted *bona fide* it is not necessary for us to send the case back for re-trial at least so far as the appellant No. 3 is concerned. We have carefully considered the matter. We do not express any opinion on the merits of the case but in view of the evidence on the record we are not prepared to say that this is a case in which we can substitute our own opinion for the verdict of the Jury and we accordingly order that the case against all the three accused should be tried again.

A further question then arises and that is as to where the case should be tried. It is quite clear that in view of the nature of the case, the allegations made on behalf of the respective parties, the length of time that has elapsed since the case was instituted, the fact that the case has been widely talked about and has been discussed in the columns of newspapers and that there has been some agitation over the case in certain quarters, an atmosphere of prejudice has been created locally and possibly in some of the neighbouring districts. It is, therefore, highly desirable that the case should be tried elsewhere that at Rangpur in order that the accused should have a fair and impartial trial. The accused persons desire that the case be tried at Dinajpore and we think that it would be right to accede to their prayer in this respect. We accordingly direct that the re-trial ordered above do take place in the Court of Sessions at Dinajpur.

The accused will remain on bail pending their re-trial.

Cuming, J.—I agree.

Z. K. *Appeal allowed: Re-trial ordered.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 635 OF 1925.

November 24, 1925.

Present:—Mr. Justice Daniels.

RATAN MANI—ACCUSED—APPLICANT

versus

HANS RAM AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 209—Inquiry before commitment—Discharge of accused—Subsidiary witnesses not examined, effect of.

When a Committing Magistrate finds that the prosecution evidence is totally unworthy of credit it is his duty to discharge the accused. [p. 451, col. 1.]

Where all the material evidence has been heard and disbelieved, an order of discharge passed by a Committing Magistrate should not be set aside merely because there were one or two subsidiary witnesses who might have been called but whose evidence was not recorded. [*ibid.*]

Criminal revision against an order of the District Magistrate, Almora, dated the 20th of August 1925.

Mr. *S. B. Johari*, for the Applicant.

JUDGMENT.—This is an application for revision of an order discharging the

accused in a charge triable by the Sessions Court. An application in revision was made to the District Magistrate who rejected it. The history of the case is this. The Magistrate who heard it after hearing witnesses under s. 202 originally came to the conclusion that the complaint was groundless and dismissed it under s. 203, Cr. P. C. On application being made to him the District Magistrate directed a further inquiry. The Deputy Magistrate then made a full inquiry and after examining witnesses at length and taking the statements of the accused again came to the conclusion that the charge was false. He accordingly discharged the accused. It is said that in doing so he was usurping the functions of the Sessions Judge, but even in the authority relied on by the applicant, namely, *In re Bai Parvati* (1) it is laid down that when a Committing Magistrate finds that the prosecution evidence is totally unworthy of credit it is his duty to discharge the accused The ruling of this Court in *Ganpat Lal* v. *Emperor* (2) is to the same effect.

A further complaint is made that all the evidence was not recorded. Only one witness has been mentioned, and it appears from the District Magistrate's order that he was not re-examined. Where all the material evidence has been heard and disbelieved I am not prepared to set aside the order merely because there were one or two subsidiary witnesses who might have been called but whose evidence was not recorded. I find no reason to interfere and I dismiss the application.

Z. K. *Application dismissed.*

(1) 8 Ind. Cas. 631, 35 B. 163; 12 Bom. L. R. 923; 11 Cr. L. J. 692.

(2) 81 Ind. Cas. 315; 46 A. 537; 22 A. L. J. 411; 10 O. & A. L. R. 551; 25 Cr. L. J. 795, (1924) A. I. R. (A.) 664; L. R. 5 A. 174 Cr.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 634 OF 1925.

July 20, 1925.

Present:—Mr. Justice Abdul Raoof.

BHOLA—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 302, 304, 323—Blow struck with heavy weapon—Disappearance of person struck—Offence.

Accused struck his brother's widow with a heavy *moosal*, felled her to the ground, and then dragged her into the house after which no trace of her could be discovered.

Held, that in the absence of definite evidence that the woman had died and that her death was due to the blow which the accused dealt her, the accused could not be convicted of an offence either under s. 302 or under s. 304 of the Penal Code and that at the most he was guilty of an offence under s 323 of the Penal Code. [p 452, col 1]

Petition, for revision of an order of the Sessions Judge, Karnal, dated the 26th March 1925, affirming that of the Magistrate, First Class, Rohtak, dated the 16th March 1925.

Mr. *Shamair Chand*, for the Petitioner.

Mr. *Des Raj Sawhney*, Public Prosecutor, for the Respondent.

JUDGMENT.—The applicant, Bhola, was convicted by M. Abdul Aziz, Magistrate First Class, with s 30 powers, Rohtak, under s. 304-II of the Indian Penal Code and sentenced to four years' rigorous imprisonment. His appeal to the learned Sessions Judge of Karnal was dismissed and the sentence upheld. Hence this petition for revision to this Court. A learned Judge of this Court, while admitting the petition for revision to a hearing, directed notice to be issued calling upon the applicant to show cause why he should not be convicted under s. 302 of the Indian Penal Code and why the sentence should not be enhanced.

The case for the prosecution was that on or about the 21st of November 1924 the appellant struck his brother's widow, *Musammat* Lachmi, with a heavy *moosal* and that she fell down and was dragged into the house. After that no trace of her was found The occurrence was seen by Ramji Lal and Jug Lal prosecution witnesses who have given evidence in this case. In addition to their evidence there is also the evidence of a nine years old boy named Pirthi son of the deceased who has deposed that since that day his mother had not been traced and that his uncle had been telling him that she had gone to a village and would be returning soon. He has further deposed that on the evening of the day of occurrence he had seen his mother lying in the house and that she had not spoken to him when called. Balram *Zaildar* has deposed that a pit was discovered in the village from which foul smell had been coming indicating that some corpse had been concealed therein. No dead body, however, was found. As the dead body of the woman was not found there was no

medical examination and so there is no evidence as to the nature of the injury caused by the blow given with the *moosal* and further naturally there is no direct evidence that the woman had actually been killed or had died. The defence tried to make out that for certain reasons she had run away. The Magistrate has further relied on the circumstances that although the woman was the wife of Nagar, brother of the petitioner, no search appears to have been made for her.

The question to be decided is whether the above evidence is sufficient to support the conviction under s. 304 II of the Indian Penal Code. I am of opinion that the necessary facts to bring the case under the above section have not been established by the evidence for the prosecution. At the most he can be convicted of causing simple hurt under s 323 of the Indian Penal Code. No doubt the probability was that she had died in consequence of the injury received from the blow of the *moosal*, but in the absence of medical evidence it cannot be said that there is any proof of it. There is a good deal of room for conjecture and speculation, but conjecture is no proof. I am, therefore, constrained to hold that the guilt of the accused under s. 302 II of the Indian Penal Code has not been established.

I, therefore, set aside the conviction and sentence under that section and in lieu of it convict him under s. 323 of the Indian Penal Code and sentence him to one year's rigorous imprisonment.

Z. K. *Order accordingly.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No 417 OF 1925.

August 26, 1925.

Present:—Mr. Justice Kanhaiya Lal.

KADHORI—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 133 to 143, 202—U. P. Village Panchayat Act (VI of 1920), s. 72—Power to make local enquiry—Obstruction case—Procedure.

A Magistrate is competent under s. 72 of the U. P. Village Panchayat Act to make a local enquiry into an offence or charge covered by s. 202, Cr. P. C. But in a case where the question to be determined is whether any unlawful obstruction has or has not been made over a public pathway or other public place, he should follow the procedure laid down by ss. 133 to 143, Cr. P. C., and base his decision on the evidence adduced and not act outside such evidence solely on the report of the *panches* or on their local investigation.

Criminal reference made by the Sessions Judge, Mainpuri, dated the 22nd May 1925.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—Alongside a small public lane Kadhori has a house, and opposite that house stands the house of Mata Din. The house of Mata Din had a *chabutra* infront of it which he is said to have extended. Kadhori has also built a shop, which, according to his allegation, was built in the place of an old *chapper*, and according to Mata Din on the land forming part of the lane or pathway. The effect of these two constructions, it is stated, was that the lane was considerably narrowed. The Trying Magistrate found that both these constructions were encroachments newly made on the land and directed both of them to be removed. The evidence produced by Kadhori to show that he had built the shop on the site of an old *chapper* appears to have been disbelieved. Certain *panches* were asked by the Magistrate to make a local investigation and their report was that the shop had been newly built on land which formed a part of the lane or public pathway. The Magistrate examined Tewari Sheocharan Lal, the *Sarpanch*, who is also an Honorary Magistrate, and acting on the report of the *panches* he directed the removal of both the constructions.

The procedure adopted by the learned Magistrate was somewhat irregular. He had power under s. 72 of the U. P. Village Panchavat Act, VI of 1920, to make a local enquiry into an offence or charge covered by s. 202, Cr. P. C., but in a case like the present he had to follow the procedure laid down by ss. 133 to 143 of the Code and determine on the evidence adduced whether any unlawful obstruction had been made over a public pathway or other public place. He could not have acted outside such evidence solely on the report of the *panches* or on their local investigation to determine whether any old *chapper* existed in the place where the shop had been built and, if not, how far the encroachment extended. Beyond verifying his report Tewari Sheocharan Lal does not say whether he had any personal knowledge about the matter.

The case is, therefore, sent back to the Trying Magistrate with a direction to enquire afresh into the matter from the stage up to which the enquiry had last proceeded, and to determine how far the land or public pathway extended, and whether the encroachments had been newly made thereon, so as to obstruct the pathway and whether the public had suffered in consequence.

N. H. *Case sent back.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 414 OF 1925.

October 28, 1925.

Present :—Justice Sir N. R. Chatterjea, KT., and Mr. Justice B. B. Ghose.

KERAMAT MANDAL AND ANOTHER—ACCUSED—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s 162—Evidence Act (I of 1872), s. 165—Statement made to Police, admissibility of—Judge, power of, to question Investigating Officer—Jury trial—Admissibility of evidence—Duty of Judge.

The power conferred upon a Judge under s 165 of the Evidence Act cannot be exercised for the purpose of introducing evidence in contravention of the law. [p 453, col 2.

Under s. 162, Cr. P. C, statements made to a Police Officer are prohibited from being used for any purpose save as provided in the section; and there is no provision for allowing the Judge to use such statements for confronting the witnesses with them. To use the statements for this purpose is to contravene the provisions of s. 162 of the Code. [*ibid.*]

In introducing evidence in a trial by Jury the Judge must be very careful in order to avoid miscarriage of justice. [p 454, col 2]

Criminal appeal against an order of the Sessions Judge, Rajshahi.

Babus *Debendra Narain Bhattacharjee* and *Satindra Nath Mukherjee*, for the Appellants.

Mr. *Khondkar*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—This case* came up once previously before this Court on which occasion the conviction of the appellants was set aside and the case sent back for re-trial on the ground of erroneous admission of inadmissible evidence. The Court gave also certain directions as regard the framing of charges on the re trial. On this occasion also the appellants have been convicted on the unanimous verdict of the Jury under s. 366 and 376, Indian Penal Code, and sentenced to ten years' rigorous imprisonment, each under each section, the sentences to run concurrently.

On behalf of the appellants it has been contended by their learned Vakil that the present trial has also been vitiated on account of the use made by the Sessions Judge of the statements made by witnesses to the Police Officer during the course of investigation under Ch. XIV, Cr. P. C., in contravention of s. 162 of the Code. The learned Judge was of opinion that he was entitled to put question with regard to those statements in the exercise of the power conferred upon him by s. 165 of the Indian Evidence Act in the order to show that the witnesses had made contradictory statements to the Police Officer and before the Court. We have no doubt that the Judge was clearly wrong in making such use of the statements The power conferred on the Judge under s. 165, Evidence Act, cannot be exercised for the purpose of introducing evidence in contravention of the law. The last para. of s. 2 of the Evidence Act leaves the provisions of the Cr. P. C unaffected. Under s. 162, Cr. P. C., statements made to a Police Officer are prohibited from being used for any purpose save as provided in the section; and there is no provision for allowing the Judge to use such statements for confronting the witnesses with them. To use the statements for this purpose was to contravene the provisions of s. 162 of the Code. The learned Deputy Legal Remembrancer is unable to support the procedure adopted by the Sessions Judge.

The use of which the learned Vakil complains is primarily that of the statements made by Sukhlal (P. W. No. 13) to the Police Officer which was introduced with the evidence by a question put to the Sub-Inspector by the Judge, that on the night of the occurrence Joyhari and Kailash came to the witness and informed him that Belat, Keramat (the two appellants before us) and a few others had forceably taken away Adhar's wife from Adhar's *bari*, while he stated in Court that on the night of the occurrence Kailash and Jaihari came to him and said that they suspected Belat and Keramat of having taken away the woman. It is contended that this has occasioned a failure of justice, for if the Jury thought that Sukhlal was a truthful witness in the absence of this contradiction, the verdict might have been in favour of the accused. It is

*See 92 Ind. Cas. 439; 27 Cr. L. J. 263—[*Ed.*]

urged that the verdict must, therefore, be set aside and the case sent back for fresh trial. We are not prepared to accept this contention. The statement was with regard to such an unimportant matter and had such a remote bearing on the question in issue, and the contradiction not being at all vital. We are unable to hold that the admission of the evidence could have affected the verdict of the Jury in any way. Jaihari and Kailash were not eye witnesses to the occurrence. They only purported to state what they had heard from another witness Radhapyari. Whether they stated that the accused had committed the act or that they had been suspected to have done that act on the night of the occurrence seems to have a very little bearing on the positive evidence given as to the occurrence itself.

It is next urged that Sukhlal had given evidence that Binodini had immoral relations with the appellant Belat and that if this witness had been believed the verdict would have been otherwise. We are unable to accept this contention also for assuming that Binodini was a woman of immoral character, there was no reason whatsoever for her leaving her home for the whole night and leaving a child five months old uncared for as there was nothing to prevent her from carrying on the intrigue in the manner as was suggested she used to do before the day of occurrence ; nor is there any reason why she should have been found next morning at a distance from the village attempting to find her way home, in the condition in which the witnesses depose to have seen her hair dishevelled, eyes blood-shot and her body and cloth all muddy. There is no doubt, therefore, that she did not leave her home with the object of keeping an assignation even assuming that Sukhlal's evidence is true. But against this man's evidence, which is merely hearsay, there is the evidence of a large number of co-villagers who swore that Binodini was of good character, and we have no doubt that the suggestion as to her bad character is unfounded. On the whole we are unable to hold that there has been any failure of justice on account of the erroneous proceeding of the Judge. In this view we are not disposed to reverse the verdict of the Jury.

Before parting with this case, we must express our regret that the Sessions Judge has committed this lamentable error which was due to his not considering the recent amendments of the Code more carefully. This has caused us a great deal of trouble and much waste of time and might have caused further waste of public time and money and also harassment of witnesses if we had found it necessary to reverse the verdict of the Jury and direct fresh re-trial. The course adopted by the Judge is all the more regrettable because there was adequate and proper evidence in support of the case for the prosecution and the contradiction as the statement sought to be introduced was of no practical value. In introducing evidence in a trial with the aid of a Jury the Judge must be very careful in order to avoid miscarriage of justice. With these observations we dismiss the appeal.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 559 OF 1925.

November 6, 1925.

Present:—Mr. Justice Sulaiman.

BANWARI LAL—ACCUSED—APPLICANT

versus

JHUNKA—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 439, 476, 476-B—Civil Procedure Code (Act V of 1908), s. 115—Order by Civil Court making or refusing to make complaint—Appeal - Revision, nature of.

A petition for revision of an order passed by a superior Court under s 476-B, Cr. P. C., on appeal from an order of a Civil Court making or refusing to make a complaint, must be dealt with under s. 115, C. P. C , and not under s. 439, Cr. P. C. [p. 456, cols. 1 & 2.]

Criminal revision from an order of the Sessions Judge, Saharanpur, dated the 10th August 1925.

Mr. *Nehal Chand*, for the Applicant.

Dr. *N. C. Vaish*, for the Opposite Party.

JUDGMENT.—This is an application in revision from an order passed on appeal directing the prosecution of the applicant under ss. 193 and 471 of the Indian Penal Code. The applicant filed a suit on the basis of a promissory-note alleged to have been executed by the defendant and also produced a receipt purporting to be of the same date. The defendant denied the genuineness of these documents and denied that he had ever borrowed any money from the plaintiff. The promissory-note and the receipt were sent to the Thumb Impression

expert at the instance of the plaintiff, but the report received from the expert was that the impressions were too blurred to be decipherable. The plaintiff then stated before the Court that if the defendant took an oath on the Ganges water that he had not borrowed the money from the plaintiff he would agree to the suit being dismissed. The defendant agreed to take the oath. On the oath being taken by the defendant the Court without going into any further evidence dismissed the suit. Neither the plaintiff nor any witnesses on his behalf were examined. After the dismissal of the suit the defendant applied to the Trial Court for proceedings being taken against the plaintiff under s. 193 and s. 471 of the Indian Penal Code inasmuch as he had verified the plaint and filed documents which were said to be forged. The Trial Court declined to pass any such order. On appeal the learned Judge has reversed the order.

As the case would be merely one of oath against oath without any conclusive documentary evidence to prove that the pronote and the receipt were forgeries I might have inclined to interfere in revision on the criminal side if the application were, as it purports to be, under s. 439 of the Cr. P. C. On the other hand if this is a proceeding of a civil nature and my power of revision is confined to the provisions of s. 115 of the C. P. C, I would find it absolutely impossible to interfere, as there is neither any want of jurisdiction or any irregularity or illegality in the exercise of jurisdiction.

I have, therefore, to consider whether a revision from an order passed under s. 476-B by the superior Court relates to a proceeding within the meaning of s. 439 of the Cr. P. C.

Under the old Code a Full Bench of this Court *In the matter of the petition of Bhup Kunwar* (1) overruling several previous cases held "where an order is passed under s. 476 by a Civil Court, the case does not fall under s. 439 of the Cr. P. C., and the High Court has no power of interference in revision."

After some years a Full Bench of the Calcutta High Court came round to the same opinion in the case of *Har Prasad Das* v. *Emperor* (2). There it was held that s. 439 of the Cr. P. C., was inapplicable to a case where a Civil or Revenue Court had passed an order under s. 476.

The Full Bench case had of course been followed by this Court till the Code was amended. The amended Code has made certain alterations in ss. 195, 476, 439 and 537.

A Criminal Revision No. 428 of 1924 came up before Mukerji, J., who considered the question to be of some importance and referred it to a larger Bench. It appears that in the course of the argument he was informed that the general opinion now held is that the earlier view of this Court required reconsideration. I am not aware of the extent to which such opinion is held. The learned Judge suggested that the point required re-consideration in view of the fact that under s. 476-D an appeal is now allowed. The Bench before which the case went up however did not decide this question, but dismissed the application on the merits.

I have, therefore, to consider whether the amendment of the Cr. P. C. has made the Full Bench ruling of this Court no longer a good law.

Section 476 of the old Code as well as the corresponding section of the new Code empowers any Civil, Criminal or Revenue Court to take steps mentioned therein. It follows that merely because a Court is taking proceedings under s. 476 it cannot be supposed that that Court is necessarily a Criminal Court. A Civil Court exercising powers under s. 476 remains a Civil Court. Section 476 of the old Code did not provide for any appeal from an order passed by the first Court, but s. 476-D provides an appeal from an order passed by any such Civil, Revenue or Criminal Court to a Court to which such former Court is subordinate within the meaning of s. 195 (3). Then the superior Court is defined in s. 195 (3) of the new Code as being a Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court or in the case of a Civil Court from whose decrees no appeal ordinarily lies, the principal Court having ordinary original civil jurisdiction. It follows, therefore, that the superior Court to which appeals ordinarily lie and which is empowered under s. 476 B to hear an appeal cannot necessarily be deemed to be a Criminal Court. It can continue to be a Civil Court if it is in fact a Civil Court.

Section 435 of the Cr. P. C. empowers the

(1) 26 A. 249; A. W. N. (1904) 15; 1 Cr L. J. 73.
(2) 19 Ind. Cas. 197; 40 C. 477; 17 Cr. L. J. 245; 14 Cr. L. J. 197; 17 C. W. N. 647.

High Court to call for the record of any inferior Criminal Court, but it does not empower the High Court to call for the record of any Civil or Revenue Court. It cannot, therefore, be contended for a moment that the record of the superior Court under s. 476-D can be called for by the High Court under s. 435. It must, however, be noted that s. 439 is slightly wider in scope and covers cases where the record of proceeding has been called for by the High Court or which has been reported for orders or which otherwise comes to its knowledge. Even under the old Code some learned Judges interfered with an order passed under s. 145 of the Code although under s. 435 (3) the record of that case could not be called for. It would seem that the High Court, therefore, may interfere in revision under s. 439 even if it has not been empowered to call for the record under s. 435. But the view taken by the Full Bench of this Court referred to above was that s. 435—439 must be read together and that the word "proceeding" mentioned in s. 439 meant the same proceeding as is mentioned in s. 435. It may be that the word "proceeding" in s. 439 may mean the proceeding in any Criminal Court referred to in s. 435 or it may possibly mean any proceeding to which the Cr. P. C. is applicable. If the latter meaning were to be assumed perhaps the power of revision of the High Court might be wider, but the Full Bench accepted the view that the word "proceeding" meant proceeding in any Criminal Court and not necessarily any proceeding referred to in the Cr P. C. I am bound to follow that view and I see nothing in the amended Code which can alter the effect of that Full Bench ruling. The mere fact that now an appeal is provided to a superior Court cannot make that Court a Criminal Court nor can it make the [illegible] before that superior Court one which can be interfered with under s. 439.

Under the old Code there was one difficulty in the way of the view expressed by the Full Bench, namely, that s. 537-B assumed that a High Court could interfere on appeal or revision in cases of an irregularity in proceedings taken under s. 195 or s. 476. The Full Bench, however, took the view that that must refer to proceedings under s. 476 before a Criminal Court. No such difficulty now arises before me. Sub-clause B of s. 537 has altogether been deleted in the new s. 537. It is further to be noted that even in the old Code there was no mention of s. 476 in the old s. 439 but there was a mention of s. 195. In the corresponding section of the new Code even the mention of s. 195 has now been omitted. It is further clear that the substantial effect of an order under s. 476 is the filing of a complaint on behalf of the Court before a Magistrate. When an order is to be revised it would mean not only an order superseding the order of the lower Court but also an order directing the withdrawal of that complaint. Section 438 does not expressly empower the High Court to direct the withdrawal of a complaint which might have been filed by a subordinate Court. It is confined to the powers which are conferred on a Court of Appeal by ss. 423, 426, 427, 428 or 438. It, therefore, seems to me that the amendment of the Cr. P. C., has strengthened the view of the Full Bench rather than weakened it. I am accordingly of opinion that I have no power of interference on the criminal side.

The learned Counsel for the applicant has urged before me that I should exercise the power of superintendence conferred on the High Court under s 107 of the Government of India Act. I doubt very much whether the word "superintendence" could have been intended to mean the same thing as revision. I, however, consider it unnecessary to decide whether the word "superintendence" is used in an administrative sense or not. I do not think that this is a case in which an extraordinary power of the High Court, even if it were vested in it, should be exercised.

The application is accordingly dismissed.

Z. K. *Application dismissed.*

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 296 of 1925.

September 1, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Waller.

THOKALA SESHAMMA AND OTHERS —RESPONDENTS—APPELLANTS

versus

YELLATURI VENKAMMA—PETITIONER —RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 476 - Offence committed in course of judicial proceeding -

Complaint by Court after termination of proceedings, legality of—Delay, effect of—Complaint, when to be made.

The power conferred upon a Court under s. 476 of the Cr. P. C. to make a complaint to a Magistrate when any of the offences referred to in s. 195, cls. (*b*) and (*c*), appears to have been committed in or in relation to a judicial proceeding before it, is exercisable even after the termination of the proceeding in which the offence complained of is said to have been committed. [p. 458, col. 2.]

No hard and fast rule can be laid down as to within what time a complaint should be made under s. 476. If a Court after the lapse of a considerable time makes a complaint under s. 476 such complaint is open to the objection that it was made after an undue delay. Each case would depend upon its own circumstances. [*ibid.*]

The effect of the changes made in the Cr. P C. by the introduction of ss 476-A and 476-B is no longer to make it necessary that a proceeding under s. 476 should be a part of, or so soon after the termination of the judicial [illegible] as to make it a part of, the judicial proceeding. [p. 458, cols 1 & 2.]

Appeal against an order of the District Court, Kurnool, in O. P. No. 49 of 1924, dated the 5th February 1925.

Messrs. *A. Venkatarayaliah* and *L. Venkatanarasimha*, for the Petitioner.

Messrs. *A. C. Sampath Aiyangar* and *P. C. Parthasarathy Aiyangar*, for the Respondents.

JUDGMENT.—This is an appeal under s. 476-B against the complaint of the District Judge of Kurnool made under s. 476 of the Cr. P. C. Appellants Nos. 1 and 2 propounded a Will of one Sami Reddi in answer to a suit brought by the plaintiff for the recovery of the properties of Sami Reddi who died on 15th January 1922. The 3rd appellant is the writer and appellants Nos. 4 and 8 are the attestors of the Will. The Subordinate Judge came to the conclusion, after a full consideration of the evidence, that the Will was a forgery. On appeal the District Judge agreed with the Subordinate Judge in his conclusion that the Will was a forgery. The plaintiff's widow applied to the District Judge to take action under s. 476 of the Cr. P. C. The learned Judge has laid a complaint before the Sub-Divisional First Class Magistrate of Kurnool against the appellants for offences under ss. 467, 193 and 196 of the Indian Penal Code

The first point raised by Mr. Venkatarayaliah is that the District Judge acted without jurisdiction in laying a complaint about 4 months after he disposed of the appeal. He relies upon the Full Bench decisions in *Rahimadulla Sahib* v. *Emperor* (1) and *Aiyakannu Pillai* v. *Emperor* (2) and contends that the order of the District Judge should form part of the judicial proceeding in which the offence or offences are said to have been committed. The District Judge disposed of the appeal on 30th September 1924. The plaintiff's widow moved the District Court on 8th November 1924 for action under s. 476. The District Judge passed the order appealed against, on 5th February 1925. The decisions in *Rahimadulla Sahib* v. *Emperor* (1) and *Aiyakannu Pillai* v. *Emperor* (2) and the decisions following them have no application to a complaint under s. 476 of the present Cr. P. C. Those decisions were passed under the old Cr. P. C. of 1898. The present s 476 empowers a Civil, Criminal or Revenue Court, if it considers expedient in the interests of justice that an enquiry should be made into any offence referred to in s. 195 cls. (*b*) and (*c*) which appears to have been committed in or in relation to a proceeding in that Court, to hold such preliminary enquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing Section 476, therefore, contemplates only a complaint and not an order for proceedings against any person who, it thinks, has committed an offence. The wording of s. 476 of the old Code was different from the wording of the present s. 476. Section 476 of the old Code was as follows:—

"When any Civil, Criminal or Revenue Court is of opinion that there is ground for inquiring into any offence referred to in s 195, and committed before it or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary enquiry that may be necessary, may send the case for inquiry or trial to the nearest Magistrate of the First Class." Under the present Cr. P. C., it is not only the Court in which the offence was committed, but also the Court which hears an appeal from that Court, is entitled to proceed under s. 476 and the present section contemplates a party moving the Court by an application to take action under s. 476 In *Rahimadulla Sahib* v. *Emperor* (1) the

(1) 31 M. 140; 17 M. L. J. 584; 3 M. L. T. 79; 7 Cr. L. J. 54.

(2) 1 Ind. Cas. 597; 32 M. 49; 19 M. L. J. 42; 4 M. L. T. 404; 9 Cr. L. J. 41.

learned Chief Justice observes at page 144*:—

"I think there is considerable force in the observation of the Chief Justice that if months after the trial the Court may act under s. 476 it is difficult to appreciate the necessity of s. 195. As regards the general policy of the law, I agree with the view expressed by Geidt, J. 'I do not think'—the learned Judge observes:—'that it was ever intended that when the proceedings had terminated and passed beyond the ken of the Court, the attention of the Court should be subsequently redrawn by some private person to the fact that in those proceedings there had been committed some offence in contempt of the Court's authority or against public justice which deserved punishment. The commission of the offence and the desirability of a prosecution should be so patent as to move the Court at the time to take action without the stimulus of an application by some interested person."

The two reasons given by the learned Chief Justice are absent now. Under s. 195 of the old Code, sanction was granted to a party for prosecution, but the present s. 195 has done away with the sanction. The second reason that the Court should act *suo motu* without the stimulus of an application cannot apply to the present section, for it does contemplate an application being made by a party for initiation of proceedings. The words, "Whether on application made to it in this behalf or otherwise" have been introduced into the present section. In *Aiyakannu Pillai* v. *Emperor* (2) Sankaran Nair, J., holds that a proceeding under s. 476 does specifically authorise a Court proceeding under that section to make a complaint in writing signed by the Presiding Officer of the Court to a Magistrate of the First Class. Another reason assigned by Sankaran Nair, J., is that there is no appeal against an order under s. 476. The present s. 476-B does provide an appeal both against a complaint made under s. 476 as well as against an order refusing to lay a complaint before a Magistrate. It is clear from the wording of the present s. 476 that all the arguments which weighed with the learned Judges who decided *Rahimadulla Sahib* v. *Emperor* (1) and *Aiyakannu Pillai* v. *Emperor* (2) for coming to the conclusion that the proceeding under s. 476 should be a part of the judicial proceeding before it or at least so soon after the termination of the judgment proceeding as to make the order under s. 476 a part of the judicial proceeding, are met by the changes made in the said section and by the enactment of two new sections 476-A and 476-B. It is unnecessary to consider the other cases on the point, as we hold that the changes made in the Code have met the arguments advanced by the learned Judges for coming to the conclusion that the Court acted without jurisdiction, if it passed an order under s. 476 some time after the termination of the proceedings in which the offence complained of was said to have been committed. The case in *Maung Shwe Phwe* v. *Ma Me Hmoke* (3) does not help the appellant. No doubt, if the Court after the lapse of considerable time makes a complaint under s. 476, such complaint is open to the objection that it was made after an undue delay. Each case would depend upon its circumstances. No hard and fast rule can be laid down as to within what time, a complaint should be made under s. 476. If a Court disposes of a case on the last working day of a term and initiates proceedings under s. 476 on the first day of the re-opening of the Court after the long vacation, can it be said that the Court acts with undue delay. In this case the application was made within 40 days of the delivery of the judgment in the appeal. A similar application was made to the Subordinate Judge of Kurnool and as the appeal was then pending, he dismissed the application with the remark "that the petitioner, if advised, may renew his application after the litigation ends". The application was renewed before the District Judge after the disposal of the appeal and the District Judge gave notice to the counter petitioner and laid a complaint on 5th February, 1925. It cannot be said that, in the circumstances, there has been undue delay in instituting proceedings under s. 476.

The next contention of Mr. Venkatarayaliah is that there should be a finding that the appellants are guilty of an offence. The District Judge in his order dated 5th February 1925, has recorded a finding that the Will is a forgery and it is unnecessary that all the reasons given in the judgment should be repeated in an order in which he comes to the conclusion that a complaint should be laid before a First Class Magistrate.

*Page of 31 M.—[*Ed.*

(3) 85 Ind. Cas. 244, 3 R. 48; 3 Bur. L. J. 344; (1925) A. I. R. (R.) 195; 26 Cr. L. J. 509.

It is next argued that there should be a reasonable probability of the prosecution ending in a conviction and reliance is placed upon *Munuswamy Mudaliar* v. *Rajaratnam Pillai* (4) and the cases referred to therein. In the case of a sanction under the old s. 195 it was the duty of the Court to see that there was a reasonable probability of the prosecution ending in a conviction and to discourage frivolous and vexatious applications for sanction. In order to prevent a person who gets the sanction from misusing it, the Court had to take care to see that sanction was granted to proper persons. Such considerations do not apply to a complaint made by the Court, but the Court acting under s. 476 should not act capriciously or without proper grounds. Section 476-B by which an appeal is provided is a sufficient safeguard against frivolous complaints being made. Here, in this case, the District Court has preferred a complaint after due consideration of the evidence and after recording a finding that the Will propounded by appellants Nos. 1 and 2 was a forgery. When two Courts have given a concurrent finding that a Will is a forgery, it cannot be said that the Court has not acted with due care and caution and without considering whether there is a probability of the prosecution ending in a conviction. As the appellants are to be tried, for the offences with which they are charged, any strong expression of opinion by this Court on the merits of the case might prejudice them in their own trial. The concurrent finding of two Courts that the Will is a forgery is sufficient guarantee for the view that this is a fit case to be enquired into by a Magistrate.

The appeal is dismissed.

V. N. V. *Appeal dismissed.*

(4) 72 Ind. Cas. 340; 44 M. L. J. 774 at p. 778; 16 L. W. 505; (1923) A. I. R. (M.) 136; 45 M. 928; 24 Cr. L. J. 340.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 774 OF 1925.

October 24, 1925.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Campbell.

MADAT KHAN AND ANOTHER—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 97, 302—Death caused in pre-arranged fight—Murder—Private defence, right of.

Where members of two rival factions armed with deadly weapons take part in a pre-arranged fight, and deaths are caused on either side, no question of the exercise of the right of private defence arises, and all those who take part in the fight are guilty of the offence of murder. [p. 460, col. 1.]

Appeal from an order of the Sessions Judge, Attock at Campbellpore, dated 24th July 1925.

Sir *Mohammad Shafi*, KT., and Mr. *Abdul Aziz*, for the Appellants.

Mr. *Dalip Singh*, Government Advocate, for the Respondent.

JUDGMENT.

Shadi Lal, C. J.—On the afternoon of the 21st April 1925, a fight took place outside the village of Dhok Baz Gul in the Attock District between the members of two rival factions known respectively as Ashraf's party and Madat's party. The learned Sessions Judge finds, and his finding has not been seriously contested before us, that three men on each side participated in the fight. Taj Muhammad and Nur Muhammad, sons of Ashraf, and Nur Khan, his brother-in-law, were the members of Ashraf's faction who participated in this affair while on the opposite side the combatants were Madat and his two brothers, Faqir and Ghazan.

It is beyond dispute that all the six persons mentioned above were wounded, and that two of them, namely, Ghazan and Nur Muhammad succumbed to their injuries. Taj Muhammad and Nur Khan have been found guilty of the murder of Ghazan, and their adversaries Madat and Faqir have been convicted of the murder of Nur Muhammad, and the convicts have all been sentenced to suffer the penalty of death.

Now, the medical evidence makes it perfectly clear that two men on each side received bullet wounds, and that the combatants belonging to each of the rival parties received also wounds inflicted with spears and knives. There can, therefore, be little doubt that the members of each party were armed with a pistol, a spear and a knife; and I cannot accept the contention that neither Madat nor his companions attacked their adversaries with a pistol. It must be remembered that not only the deceased Nur Muhammad, but also his brother Taj Muhammad, received bullet wounds, and it is most unlikely that these wounds

were the result of misjudged firing by their own relative Nur Khan.

Two rival versions have been put forward before the Court, and each party have tried to minimize their own part in the transaction. These versions are set out in the judgment of the learned Sessions Judge, and after examining the arguments advanced by the learned Counsel, on both sides I have no hesitation in endorsing the conclusion of the learned Judge that the evidence produced in support of the rival stories is wholly unreliable and that both parties have suppressed important facts concerning the transaction.

It is common ground that a bitter enmity extending over nearly 12 years existed between the two families, and there is evidence to the effect that only a day or two before the incident in question shots were fired by one or more members of each party at their adversaries. Now, the witness Inayat deposes that on the morning of the 21st April he went to Ashraf to seek the latter's assistance in reaping his harvest, but that Ashraf expressed his inability to accede to the request because he had made an appointment to fight Madat. That the fight was a pre-arranged affair receives support, not only from the circumstances that the number of the combatants on each side was exactly the same, but also from the fact that they were armed with exactly similar weapons, namely, a pistol, a spear and a knife on each side. In view of this important circumstantial evidence corroborating the testimony of Inayat it is futile to contend that the learned Sessions Judge has invented a theory which is not supported by any evidence on the record. Indeed, the story of a pre-arranged fight between the two factions is the only rational version which is compatible with all the known circumstances of the case and satisfactorily accounts for the injuries sustained by the combatants.

No question of self-defence arises in a case of this character, and the prisoners, upon whom the onus rested, have failed to show that they were entitled to exercise the right of private defence. The convicts are clearly guilty of an offence under s. 302, Indian Penal Code, and there is no adequate ground which would justify interference with the discretion of the Trial Judge in the matter of the punishment imposed by him. Confirming, therefore, the sentences of death I dismiss both the appeals.

Campbell, J.—I agree that the appeals are dismissed and the sentences of death confirmed.

Z. K. *Appeals dismissed.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 666 OF 1925.

November 12, 1925.

Present:—Mr. Justice Kanhaiya Lal.

BAHADURA OR BAHADRE—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 173—Criminal Procedure Code (Act V of 1898), s. 160—Notice to attend enquiry, refusal to accept—Intentionally preventing service—Offence.

Refusal to accept a notice issued by a Police Officer under s. 160, Cr. P. C., requiring attendance at an enquiry does not amount to an offence under s. 173 of the Penal Code.

Criminal reference made by the Sessions Judge, Meerut, dated the 12th October 1925.

REFERRING ORDER.—This is an application against the order of a Magistrate convicting the applicant Bahadura of an offence under s 173 of the Indian Penal Code, and sentencing him to pay a fine of Rs. 5 or in default to undergo one week's simple imprisonment. The learned Magistrate has held that the applicant refused to receive a *safina* or to sign it in token of service. There is no dispute as to the fact. It is urged on behalf of the applicant that refusal to receive a *safina* does not constitute an offence under s. 173 of the Indian Penal Code. This is borne out by the commentaries and the Government Pleader has nothing to urge against the application. In these cirumstances I hold that the conviction of the applicant was illegal. The record will be submitted to the Hon'ble High Court for orders.

JUDGMENT.—A notice was issued by a Police Officer under s. 160 of the Cr. P. C. requiring the petitioner, Bahadura, to attend the enquiry. He is said to have refused to take the notice. He has been tried and convicted of an offence under s. 173 of the Indian Penal Code. This does not, however, amount to an offence of intentionally preventing service *Sahdeo Rai* v. *Emperor* (1).

(1) 46 Ind. Cas. 522; 40 A. 577; 16 A. L. J. 453; 19 Cr. L. J. 746.

The conviction and sentence are, therefore, set aside. The fine, if paid, will be refunded.

Z. K. *Conviction set aside.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 643 OF 1925.

October 3, 1925.

Present:—Mr. Justice Zafar Ali.

TEJA SINGH—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 133—Approver, statement of, value of—Confession brought about by pressure of relatives.

It is not safe to place any reliance upon the testimony of an approver who was prevailed upon by his relatives, who were members of a faction hostile to the accused, to make a confession and turn King's evidence.

Appeal from an order of the Sessions Judge, Lyallpur, dated the 9th April 1925.

Mr. *M. L. Puri*, for the Appellant.

Diwan *Ram Lal*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—The appellant Teja Singh, a young man of 25 years, has been convicted by the Sessions Judge, Lyallpur, of an attempt to cause grievous hurt by means of a bomb, inasmuch as he, in company with another youth, namely, Sewa Singh who turned King's evidence, exploded a bomb at midnight in the door of the *baithak* wherein the complainant lay asleep. The so-called bomb, it was found, contained no explosives but country gunpowder of an inferior quality. The evidence on which the conviction is based appears to be highly improbable and unworthy of credit. Kishen Singh according to the finding of the learned Sessions Judge is a scoundrel of the first water. He had admittedly a liaison with the mother of the appellant ever since the latter was a minor but now that he was major he naturally resented his illicit connection with her. Therefore, Kishen Singh's propensity to devise a plan to put Teja Singh out of his way should not have been lost sight of.

Now, his story was that on the night between the 15th and 16th October 1924 he was roused from sleep by the bursting of a bomb in the door of his *baithak* which was open. It is, however, unlikely in the first place that he should have gone to bed leaving the door open. Secondly, even if the whole thing was not a concoction, it is not likely that the perpetrators of the outrage were still within sight and could be identified when he came out from his *baithak*. However this may be, the Police Officer who made the investigation came to the conclusion that Kishen Singh was guilty of fabrication and took him into custody. He had been in the lock-up for 10 or 12 days when his friend Jagat Singh a retired *Risaldar* intervened on his behalf with the Superintendent of Police and the latter deputed another Police Officer, namely, Anup Singh Inspector, to investigate the case. The tables were turned as soon as the latter arrived at the spot. Jagat Singh according to his own showing was not a disinterested person. He admits that there are two factions in the village and that Kishen Singh is a partisan of his. He had once before, too, intervened with the Superintendent of Police on his behalf when he was under arrest for theft and later on he appeared as a witness in his defence. Teja Singh appellant belongs to the opposite faction. There is admittedly strong party feeling between the two factions so much so that Jagat Singh and his few adherents are boycotted by the rest of the villagers who constitute the other faction. Kartar Singh, father of Sewa Singh approver, is also a partisan of Jagat Singh but he was not in the village at the time of the occurrence and during his absence Sewa Singh had begun to associate with Teja Singh appellant. Kartar Singh came back probably on hearing of the case and was present when Anup Singh Inspector arrived. It appears that Jagat Singh and Kartar Singh put their heads together and prevailed upon Sewa Singh to make a confession and turn King's evidence. On the very day on which the Inspector arrived Sewa Singh appeared before him and confessed. As there was no other evidence available the Police Inspector fell in with the scheme of Jagat Singh.

Having regard to the circumstances under which Sewa Singh turned approver it is not safe to place any reliance on his testimony. Similarly Jagat Singh has shown himself to be quite unworthy of credit.

I, therefore, accept the appeal, set aside the conviction and sentence and direct that the appellant be released forthwith.

Z. K. *Appeal accepted.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISIONAL APPLICATION No. 175/4 OF 1925.

September 24, 1925.

Present:—Mr. Kennedy, J. C., and Mr. Tyabji, A. J. C.

CHANDIRAM AND OTHERS—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s 120B—Conspiracy, ingredients of—Overt act, value of.

The ingredients of the offence of conspiracy are:—

(1) That there should be an agreement between the persons who are alleged to conspire; and

(2) that the agreement should be:—

(*i*) for doing of an illegal act, or

(*ii*) for doing by illegal means an act which may not itself be illegal [[p. 462, co l. 1.]

Conspiracy is a substantive offence and has nothing to do with abetment. Although an overt act may be specified in the charge yet this is not (except when the end of the conspiracy is not to commit an offence) necessary. The overt act or acts is or are introduced not as partially constituting an offence but as giving information and example as to what the conspiracy was The offence is conspiracy. Nor is there any limit to the number of overt acts which can be given in the charge. [p. 462, cols. 1 & 2.]

It is not necessary that each conspirator should be aware of all the acts done by each of the conspirators in the course of the conspiracy. [p 462, col 2.]

It is, however, necessary that there should be one conspiracy and not a series of conspiracies and criminal acts unconnected by unity of intention. [*ibid.*]

Reference made by the District Magistrate, Larkana, dated 21st August 1925.

Mr. *C. M. Lobo*, Acting Public Prosecutor for Sind, for the Crown.

Mr. *Partabrai D. Punwani*, for the Accused.

JUDGMENT.—We think there has been some confusion in the Courts below as to the law of conspiracy:—

The ingredients of the offence of conspiracy are:—

(1) That there should be an agreement between the persons who are alleged to conspire; and

(2) that the agreement should be:—

(*i*) for doing of an illegal act, or

(*ii*) for doing by illegal means an act which may not itself be illegal.

It must be remembered that conspiracy is a substantive offence and has nothing to do with abetment. It is to be remembered also that though an overt act may be specified in the charge yet this is not (except when the end of the conspiracy is not to commit an offence) necessary. In any case the overt act or acts is or are introduced not as partially constituting the offence but as giving information and example as to what the conspiracy was. Nor is there any limit to the number of overt acts which can be given in the charge. The accused is not charged with committing them but with committing the offence of conspiracy in the course of which these events took place. It is thus clear that it may be specified in a charge that a certain act has been committed which could not possibly be committed by one of the alleged conspirators nevertheless such conspirator may be guilty of that conspiracy in the course of which such act was committed. Thus Lady Rochford might well have been charged with conspiracy to commit high treason in connection with the seduction of Anne Boleyn.

Again it is not by any means necessary that each conspirator should be aware of all the acts done by each of the conspirators in the course of the conspiracy. This necessarily follows from what has been said above. His offence is the conspiracy. The acts done by any of the conspirators in furtherance of the purpose of the conspiracy are merely indication of what the object of the conspiracy was.

What is necessary, however, is that there should be one conspiracy and not a series of conspiracies and criminal acts unconnected by unity of intention. It is quite possible that the same gang may commit conspiracy after conspiracy, all of the same nature yet actually unrelated. Again it is quite possible that there may be a band of conspirators working for a common criminal end and that for the purpose of that conspiracy they may find it necessary to procure the doing of unlawful acts by persons who are not members of the conspiracy. In that case, if the persons so seduced into unlawful acts are not aware of the conspiracy, the fact that they do unlawful acts does not make them members. Thus let it be supposed that a gang of men conspire to murder some one and to that end borrow a gun from a license-holder, who thus commits the offence of parting with his gun contrary to his license, but who imagines that the conspirators have borrowed the gun for *shikar*, that will not make the license-holder a conspirator.

In the present case it is necessary to find whether there was a conspiracy to defraud the Railway Company by a continual series of frauds all forming one fraud and not

being isolated acts. If that be the case it can be judged whether the accused were guilty of that conspiracy or whether they or any of them were so committing isolated crimes not knowing that such crimes formed part of the greater design. In the first case, it would not matter in the slightest whether some of the persons were to commit offences, *e.g.*, criminal breach of trust which others could not by the nature of things commit. It might quite well be the case, Lokumal was to go on making false applications for concession tickets and Chandiram to go on making false entries and taking the Company's money and yet they might both be members of a permanent conspiracy for defrauding the Railway.

In that case it does not matter whether there is evidence tending to show that certain offences were committed by other persons unknown to some one or other of the conspirators. That evidence would be perfectly relevent against all as tending to show the nature of the conspiracy and the method adopted for carrying out the objects of the conspiracy.

If, however, it proved that there was no conspiracy, but merely an unrelated series of crimes, unrelated, that is, by any common end, then none of the alleged conspirators would be guilty of the offence charged. In that case either the isolated offences would be such that if proved they could form the basis of a conviction in accordance with s. 237, Cr. P. C., in which case the guilty persons could be so convicted. Or on the other hand, the isolated offences might be of a kind which could not be so dealt with in which case an acquittal of the offence of conspiracy would be no bar to further proceedings on the true charge.

It would seem then that in the present case the accused are entitled to a decision. If they are conspirators they can be convicted, if they are not conspirators they can be acquitted of that charge. If not conspirators but liable to conviction under s. 237 for the individual offences specified, they can be convicted. If not, they can be acquitted. In either case, there seems no necessity on the part of the Sessions Judge to remand the case. He should decide it himself in the light of the above remarks. We, therefore, set aside his order of remand.

P. B. A.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 452 OF 1925.

November 4, 1925.

Present:—Mr. Justice Sulaiman.

CHHIDDA AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss 147, 149, 323 Unlawful assembly—Injuries inflicted by members—Rioting—Hurt—Convictions for separate offences, legality of

Section 149 of the Penal Code creates no substantive offence in itself. It is merely declaratory of the law and makes a person who has been a member of an unlawful assembly liable for the offences committed by any other member of it. But s 147 of the Code creates a substantive offence in itself and makes a person guilty of the offence of rioting as distinct from actually causing any injury or hurt. Similarly s. 323 of the Code creates a distinct offence in itself. Where, therefore, more injuries than one are caused by the members of an unlawful assembly they can be convicted of offences both under s 147 and under s 323, read with s 149 of the Penal Code. In such a case, as soon as the first injury is caused to any person, force is used and the offence of rioting is complete. Subsequent injuries though inflicted in pursuance of the same common object would be distinct injuries justifying a conviction under s. 323 [p. 464, col. 2]

Criminal revision from an order of the Sessions Judge, Muttra, dated the 22nd July 1925.

Mr. *S. C. Das*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is a criminal revision from convictions of the applicants under s. 147 and s. 323 read with s. 149 of the Indian Penal Code and sentences or imprisonment and fines. The learned Sessions Judge on appeal has reduced the sentence so as to make the sentences or imprisonment under the two sections concurrent.

It appears that the complainant Sri Ram who had obtained a decree against Tarsia and his son Loka applied for attachment of the property of his judgment-debtors, and in the company of a Commissioner, appointed by the Court went to the village to get the attachment effected. Naubat, one of the applicants, first tried to prevent the attachment on the ground that the cattle sought to be attached did not belong to the judgment-debtors but were his own property. The Commissioner, however, warned him that if he interfered he might come to grief. After some consultation Naubat did not prevent the Commissioner from attaching the cattle. But as soon as the attachment had been made and before the Commissioner left the place the accused Naubat

along with the other accused persons came out armed with *lathis* and raided the complainant Sri Ram. The complainant ran to the Commissioner who was only at a distance of some 10 yards from the house of the accused and requested him to protect him. The Commissioner, seeing the attitude of the accused, felt himself helpless to intervene at that stage. The assailants pursued the complainant Sri Ram for some distance, overtook him, attacked him and his brother Behari, and felled them down on the ground. Sri Ram received simple hurts with *lathis*. Both the Courts have accepted this story of the prosecution and have rejected the defence story, that the injuries were caused in self-defence. According to the medical evidence a large number of injuries were caused to the complainant and his brother though all of them were simple in their nature.

The main contention on behalf of the applicants is that their convictions under two separate sections of the Penal Code are illegal. The contention is that inasmuch as the act of rioting and of causing injuries to Sri Ram and his party was a part and parcel of one and the same event there should not be separate and distinct convictions and sentences. The learned Vakil for the applicants relied on the cases of the Lahore, the Calcutta and the Madras High Courts in support of his contention, but later on had to concede that some cases of this Court are against him. It is unnecessary for me to refer to the various cases of the other High Courts and point out the differences of opinion. But I may note that a Full Bench of the Bombay High Court has taken a different view and held that separate convictions under ss. 147 and 323 are not illegal, [*vide* the case of *Queen-Empress* v. *Bana Punja* (1).]

It is true that in the case of *Empress* v. *Ram Partab* (2) Straight, J., expressed the view that a member of an unlawful assembly, some members of which have caused grievous hurt, cannot lawfully be punished for the offence of rioting as well as for the offence of causing grievous hurt. This case was distinguished in the Full Bench case of *Queen-Empress* v. *Ram Sarup* (3). The latter case, however, is not directly in point because it was found there as a fact that the accused persons had besides taking part in the unlawful assembly committed individual acts of violence with their own hands. But the question was considered by a Divisional Bench of this Court in the case of *Queen-Empress* v. *Bisheshar* (4) and Edge, C. J., came to the conclusion that separate convictions under ss. 147 and 323 read with s. 149 were not illegal and that all that was necessary was to make sure that the provisions of s. 71 of the Indian Penal Code were not contravened. A similar view has been expressed recently by a single Judge of this Court in the case of *Dharamdeo Singh* v. *Emperor* (5).

There can be no doubt that s. 149 creates no substantive offence in itself. It is merely declaratory of the law and makes a person who has been a member of an unlawful assembly liable for the offences committed by any other member of it. But s. 147 is a substantive offence in itself and makes a person guilty of the offence of rioting as distinct from actually causing any injury or hurt. Similarly s. 323 is a distinct offence in itself. It would, therefore, seem obvious that there is nothing illegal in convicting a person of offences under both these sections. Some of the High Courts which have taken a contrary view have proceeded on the ground that so long as the hurt is not actually caused the offence of rioting does not come into existence. That argument may have some force in cases where only one hurt has been inflicted; but where several injuries have been caused and particularly on several individuals the rule is obviously inapplicable. As soon as the first injury was caused to any person, force was used and the offence of rioting was complete. Subsequent injuries though inflicted in pursuance of the same common object would be distinct injuries justifying a conviction under s. 323.

In the present case, had I been of opinion that the sentences passed were severe, I might have remitted the fine in at least one case, but the facts stated above show that the accused adopted an aggressive attitude and were wholly in the wrong, and they pursued and attacked the complainant decree-holder in the presence of the Commissioner and inflicted several injuries on him and his party. I, therefore, decline to interfere with the sentence. The application is accordingly dismissed.

Z. K. *Application dismissed.*

(1) 17 B. 260; 9 Ind. Dec. (N. S.) 170.
(2) 6 A. 121; A. W. N. (1883) 241; 3 Ind. Dec. (N. S.) 727.
(3) 7 A. 757; A. W. N. (1885) 195; 4 Ind. Dec. (N. S.) 885.
(4) 9 A. 645; A.W.N. (1887) 149; 5 Ind. Dec. (N. S.) 867.
(5) 35 Ind. Cas. 978; 14 A. L. J. 738; 17 Cr. L. J. 418.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 266 OF 1921.

October 28, 1924.

Present:—Mr. Justice Phillips and Mr. Justice Odgers.

A. S. PAKKIR MAHAMUD ROWTHEN AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

PICHAI THEVAN AND OTHERS—PLAINTIFFS NOS. 2, 4, 5 AND 6—RESPONDENTS.

Easements Act (V of 1882), s. 14—Easement, essentials of—Property, ownership in, claim of—Easements, whether can be claimed—Long user—Customary right—Public nuisance.

To create an easement there must be a dominant and a servient heritage - and the right acquired must be for the beneficial enjoyment of the dominant heritage [p 466, col 2.]

User under a claim of ownership of the property, in and over which such user is had, and which is negatived, cannot operate to found a right of easement over the property. [*ibid.*]

Chunilal Fulchand v. *Mangaldas Govardhandas*, 16 B. 592, 8 Ind. Dec. (N. S.) 874, followed

In the absence of a finding that the property is either private property or the property of the Government, a right of easement by prescription cannot be established over the property. [*ibid.*]

The acquisition of an easement by prescription must be by a definite person or persons either natural or juristic and a fluctuating and uncertain body of inhabitants like a particular community of a village, cannot acquire such right. [*ibid.*]

Lutchmeeput Singh v. *Sadaulla Nushyo*, 9 C 698; 12 C. L. R. 382, 5 Shome L R. 27, 4 Ind Dec (N S.) 1115, *Lord Rivers* v *Adams*, (1878) 3 Ex D 361, 48 L. J. Ex 47; 39 L. T. 39; 27 W. R. 381 and *Constable* v. *Nicholson*, (1863) 32 L J C P. 240 at p. 244, 14 C. B. (N. S.) 230; 11 W. R. 698, 143 E. R. 431, 135 R R. 672, relied on.

Secretary of State for India v. *Mathurabhai*, 14 B. 213; 7 Ind Dec. (N. S.) 600, distinguished

No right to the user of a public property can be acquired by custom, where the user amounts to a public nuisance. Such a custom is unreasonable. [*ibid.*]

Second appeal against a decree of the Court of the Additional Subordinate Judge, Ramnad at Madura, in Appeal Suit No. 19 of 1920, preferred against that of the Court of the District Munsif, Paramakudi, in Original Suit No. 1154 of 1916.

Messrs. *A. Krishnaswamy Iyer* and *M. Patanjali Sastri*, for the Appellants.

Mr. *N. K. Mohanarangam Pillai*, for the Respondents.

This second appeal came on for hearing on the 1st and 2nd August 1923, and the case having stood over for consideration till the 9th of August 1923, the Court (Odgers and Hughes, JJ.) delivered the following

JUDGMENT.

Odgers, J.—This was a representative suit brought by the plaintiffs on behalf of themselves and the other Hindu inhabitants of the village of Perungulam, Ramnad Taluk, against the defendants who are Muhammadans and settlers in that village. The plaintiffs are *Maravars* and they allege a right to throw seedlings into the tank adjoining the Ayyankoil at the *Mulaikottu* festival held every year. These seedlings are raised in the houses of the *Maravars*. Eight days after sowing they are thrown into the tank. The seedlings are watered with the water of the tank and are grown in mud pots and manured with dung. One of the plaintiffs' witnesses (P. W. No. 3) says that all kinds of animal excreta are used as manure. The plaintiffs put their right on two grounds: (1) Prescriptive title or easement by prescription as found by the lower Courts and (2) Custom. They ask for a declaration that the tank belongs to the Hindu community and for an injunction restraining the Muhammadans from obstructing the performance of the *Mulaikottu* ceremony. The defence traverses the plaint allegations and alleges that the right claimed cannot be acquired as the throwing of seedlings into the water pollutes it and renders it unfit for drinking purposes. The District Munsif finds against plaintiffs on the question of ownership but declared that the Hindus were entitled to throw the seedlings "*after washing them* so as to remove the dung manure sticking to it" and restrained the Muhammadans from interfering. The District Munsif decided that the Hindus had acquired an easement by prescription and that if the seedlings were thrown into the tank without removing the dung the water would be polluted. He discusses the varying standards of cleanliness in the matter of washing the seedlings and considers that the *Maravars* are not likely to be overscrupulous in the matter. If it is regarded as a custom, it may be unreasonable. There is no doubt that the Hindus have been throwing seedlings without washing into the tank for a long time—how long there is no evidence to say. There is also no doubt that the tank is not theirs and that it is the main, if not the only, drinking water supply for the village. The washing of the seedlings seems to have been introduced into the judgment and decree from certain proceedings in 1915, before the Sub-Divisional Magistrate, under s. 144, Cr. P. C. This was an order rescinding an

order of the Sub-Magistrate, Ramnad, restraining the throwing of these seedlings. The Sub-Divisional Magistrate found it was obviously improper to throw manure and earth into the tank and ordered the Sub-Inspector of Police to see that the seedlings were well-washed elsewhere and when cleaned should be thrown. Nothing is said in the plaint or the issues about throwing in washed seedlings. Plaintiff witness No. 3's evidence given in 1919 is that the seedlings are not washed to remove the manure though P. W. No. 4 says the manure is thrown on the bank. He does not say the seedlings are washed. Defendant witness No. 1 says the fact of throwing seedlings in to the water will render it unfit for drinking purposes. The order of the Sub-Divisional Magistrate is obviously one *ad hoc* and related to a single celebration of the festival. I can see no ground for thinking the condition of washing was one which could properly be incorporated in the decree when the right claimed is absolute and the question to be decided was one as to the existence of the right either as an easement or as a custom, The defendants appealed and in ground No. 4 of their grounds of appeal stated: "The lower Court should have held that no custom has been proved and the custom set up is unreasonable and opposed to public health and safety of the inhabitants of the village." The Subordinate Judge found (1) that the Hindus had no exclusive title to the tank, (2) the Hindus have performed the *Mulaikottu* ceremony in the tank for a very long time, (3) there is no evidence to show that the throwing of the seedlings (which the Subordinate Judge assumes are by order of the Magistrate "well washed") will pollute the water and the District Munsif was not justified in inferring this, (4) assuming the water would be polluted, have the Hindus established a customary right or right by way of easement? As it is nobody's case that the tank is public property he holds that the Hindus have acquired an easement by prescription and confirmed the District Munsif's decree. I think the Subordinate Judge is wrong in saying there is no evidence that the throwing of the seedlings pollutes the water for drinking purposes. See P. W. No. 3 and D. W. No. 1. The question is, are the lower Courts right in the view of the law they have taken as establishing an easement by prescription? They have neither of them come to a conclusion on the question of custom. The Subordinate Judge rightly says that if the tank be public and the throwing of the seedlings is a public nuisance no right could be acquired by long user [see *Municipal Commissioners of the Suburbs of Calcutta* v. *Mahomed Ali* (1). The acquisition of an easement by prescription is governed by s. 15, Easements Act:—"Where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right without interruption, and for 20 years the right. . . shall be absolute." To begin with has this right been enjoyed as an easement? An easement is defined in s. 4 of the Act as "a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own." The tank has clearly been held not to be the property of the Hindus. The defendants in their written statement seem to intend to plead (para. 31) that the tank is public. They apparently do not say it belongs exclusively to themselves. To create an easement there must be a dominant and a servient heritage—and the right acquired must be for the beneficial enjoyment of the dominant heritage. If the right claimed under s. 15 be against Government the period of user to be proved must be 60 years. The right is claimed primarily on the ground of ownership of the tank by the Hindus, but user under a claim of ownership of the tank, in and over which such user is had, and which is negatived, cannot operate to found a right of easement over the tank (*vide Chunilal Fulchand* v. *Mangaldas Govardhandas* (2). In the absence of a finding that the tank is either private property or the property of the Government, I am of opinion that a right of easement by prescription cannot be established. Another objection is taken for the appellants, *viz.*, that the acquisition by prescription must be by a definite person or persons either natural or juristic, and that a fluctuating and uncertain body like the *Maravar* inhabitants of this village cannot acquire. In *Lutchmeeput Singh* v.

(1) 7 B. L. R. 499; 16 W. R. 6 Cr.
(2) 16 B. 592; 8 Ind. Dec. (N. s.) 874.

Sadaulla Nushyo (3) it was held no defined or ascertained person had been in the continuous possession of a fishing right which had been exercised by the tenants of certain *Pargannahs*. In *Lord Rivers* v. *Adams* (4) a right to *profits a prendre* was claimed by the inhabitants of a parish. Kelly, C.B., said after holding that there could not be a custom in such a case, "And for the same reasons, and for other reasons, there cannot be a prescription, and there could not be a valid grant unto so fluctuating a body and a body so incapable of succession in any reasonable sense of the word so as to confer a right on each succeeding inhabitant." The learned Chief Baron also quotes Willes, J., in *Constable* v. *Nicholson* (5): "The prescriptive right is not claimed for a corporation or persons taking by succession (it was claimed there by the inhabitants of a township), but only for a fluctuating body of inhabitants. The prescription pleaded is a grant to that body, but not so as to have the effect of incorporating them. It is clear that such a right cannot exist." In *Secretary of State for India* v. *Mathurabhai* (6) the right of free pasturage was distinguished from these cases on the ground that such a right has always been recognized by Government as a right belonging to certain villages and must have been acquired by custom or prescription. This is a very different case and has, in my view, no bearing on the point. For these reasons I am of opinion that the finding of the lower Court that the right of throwing seedlings into the tank has been acquired by the Hindus as an easement by prescription is not in accordance with law and must be set aside. The question remains: Has the right been acquired by custom? The remarks of the District Munsif and Subordinate Judge on this point have already been set out. Neither of them records a finding on the point. If such a custom is established, various points will have to be considered as to its certainty and reasonableness (*inter alia*). If the tank is a public tank there will have to be considered whether the throwing of these seedlings is a nuisance. The case must go back to the Subordinate Judge for a finding in the light of the above judgment whether the right of throwing seedlings into the plaint tank at the *Mulaikottu* festival has been acquired by the plaintiffs (Hindus) by reason of a valid custom. Fresh evidence. Finding six weeks and objections seven days. Question of costs reserved.

(3) 9 C. 698; 12 C. L. R. 382; 5 Shome L. R. 27; 4 Ind. Dec. (N. S.) 1115.

(4) (1878) 3 Ex. D. 361; 48 L. J. Ex. 47; 39 L. T. 39; 27 W. R. 381.

(5) (1863) 32 L. J. C. P. 240 at p. 244; 14 C. B. (N. S.) 230; 11 W. R. 698; 143 E. R. 434; 135 R. R. 672.

(6) 14 B. 213; 7 Ind. Dec. (N. S.) 600.

I may add that I have no objection to the last paragraph in the judgment about to be delivered by my learned brother and the question may be reserved for argument if and when it arises, though I take leave to doubt at this stage if, a custom for doing a definite thing being established, it is open to a Court to decree a modification of it or something else.

Hughes, J.—I agree that no case of acquisition of right of easement by prescription has been made out and that the case must go back to the Subordinate Judge for a finding on the question whether the right of throwing seedlings into the plaint tank at the *Mulaikottu* festival has been acquired by the plaintiffs by reason of a valid custom and I agree that fresh evidence may be taken.

I would, however, reserve for decision, after receipt of the finding, any question that may arise as to whether the custom, if established, may be restricted in any of its incidents by incorporating a condition in the decree.

In compliance with the order contained in the above judgment, the Additional Subordinate Judge of Ramnad at Madura submitted the following

FINDINGS:—In obedience to the order of the High Court made in S. A. No. 266 of 1921 on 9th August 1923, I beg to submit the following finding on the point:—

"Whether the right of throwing seedlings into the plaint tank at the *Mulaikottu* festival has been acquired by the plaintiffs (Hindus) by reason of a valid custom?"

* * * * * * *

On the evidence I find that the plaintiffs *Maravars* have been throwing seedlings into the plaint urani indifferently with and without manure for a considerable period of time. It may safely be asserted that the practice has been in vogue for even over sixty years. There is no doubt that the throwing of the seedlings into the tank would certainly render the water unfit for

drinking purposes and much more so if they are thrown with manure.

The result is that I find that the custom has been well-established but that the custom is unreasonable in so far as it putrefies the urani water which is used by the public for drinking purposes.

This second appeal coming on for final hearing, after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the Subordinate Judge's finding that the custom is unreasonable and in allowance of the second appeal dismiss plaintiffs' suit with costs throughout.

V. N. V. *Appeal dismissed.*
N. H.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 391 OF 1923.
November 10, 1924.
Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

MAQSUD ALI AND OTHERS—PLAINTIFFS—APPELLANTS
versus
ABDULLAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Pre-emption—Wajib-ul-arz, *entry in, construction of—Preferential right of pre-emption.*

A *wajib-ul-arz* classified the different categories of pre-emptors as follows :—

(1) Own brothers ;
(2) Co-sharers in the same *patti* ;
(3) Co-sharers in other *pattis*

A later *wajib-ul-arz* gave only one classification of pre-emptors, namely :—"Own brothers and co-sharers of the village"; and it was provided that if none of these people wished to pre-empt, a sale may be made to strangers :

Held, (1) that the two *wajib-ul-araiz* must be read together inasmuch as the right of pre-emption recorded therein was in fact the same, the later record having been prepared in a less careful manner than the one which preceded it ; [p. 469, col. 1]

(2) that under the terms of the *wajib-ul-arz* an own brother of the vendor had a better right of pre-emption than a co-sharer in the village. [*ibid.*]

Second appeal from a decree of the Subordinate Judge, Meerut.

Mr. *Harendra Krishna Mukherji*, for the Appellants.

Messrs. *G. W. Dillon* and *Sheo Dihal Sinha*, for the Respondents.

JUDGMENT.—In this case we are concerned with the interpretation of two *wajib-ul-arzes*. The question to be decided is whether the plaintiff, who was Nasir Ullah Khan now represented by the present appellants, Maqsud Ali and others, was entitled to a preference in the matter of exercising a right of pre-emption.

The vendor of the property in dispute was own brother of Nasir Ullah, and the purchaser Kabul Khan who is now represented by two defendants, Ahsan Ali and Abdullah, was a co-sharer in the village and also a relation, but a distant relation, of the vendor.

The Court of first instance gave the plaintiff a decree for pre-emption on a finding that on the language of the record of custom as contained in the two *wajib-ul-arzes* the plaintiff as own brother of the vendor had better right than the vendee who was a co-sharer only and in any case a more distant relation.

The lower Appellate Court has reversed the finding of the Court of first instance on this point being of opinion that the plaintiff as own brother of the vendor had no better right.

Another question was raised in the Court of first instance. It was pleaded by the vendee, that the plaintiff had full knowledge of the sale sought to be pre-empted and that he had acquiesced therein so as to be no longer entitled to assert a claim for pre-emption. The Court of first instance held that the transaction now in dispute was carried out without the knowledge of the plaintiff and that there was no reason to debar him from maintaining the suit.

On this question of the consent or acquiescence of the plaintiff the judgment of the lower Appellate Court is silent.

We have decided to deal with this question of fact ourselves as it is not worth while sending the case back to the lower Appellate Court for finding. In all probability the case would come before some other Judge than the one who heard the appeal.

Dealing with the first question, namely, the preferential right of the plaintiff that has to be considered in connection with the two documents which are filed, Ex. 3 and Ex. C. Exhibit C is a copy of the document known as the *wajib-ul-arz* prepared by Mohar Singh.

In this document there is a classification of pre-emptors which reads as follows :—

(1) Own brothers;
(2) Co-sharers in the same *patti*;

(3) Co-sharers in other *pattis*.

The second document, namely, the copy of the *wajib-ul-arz* prepared at the time of Munshi Nasir Ali Khan, gives only one classification of pre-emptors, namely: "Own brothers and co-sharers of the village." It is provided that if none of these people wish to pre-empt a sale may be made to strangers.

The learned Subordinate Judge laid great stress on the *wajib-ul-arz* of Nasir Ali Khan that being later in date, although as we understand, the difference between the dates of the preparation of these two *wajib-ul-arzes* cannot have been more than six or seven years. The Judge was of opinion that on the language of the later *wajib-ul-arz* own brothers and co-sharers in the village were all lumped together in one category in such a way that a brother could have had no preferential right over any other person who happened to be a co-sharer in the village

On the other hand, it is equally clear that in the *Wajib-ul-arz* prepared by Mohar Singh the own brothers of the vendor stood in a category by themselves and had preferential right over other persons who were co-sharers in the *patti* or in the village.

We are not disposed to take the view taken by the Court below, and it seems to us that the two *wajib-ul-arzes* ought to be read together. We can hardly think that, having regard to the fact that the earlier record was made in favour of own brothers, the later record can have been correctly prepared if it is meant to indicate that the own brothers of the vendor were put on exactly the same footing as any other co-sharer in the village. It seems to us the more reasonable construction to adopt that the right of pre-emption recorded in these two documents was in fact the same, and all that appears is that when the later record was prepared it was prepared in a less careful manner than the one which preceded it. On the whole, we think that a distinct case is made out for holding that under the custom of pre-emption, which apparently is not denied, an own brother of the vendor has a better right to take the property than a co-sharer in the village. That being so, the late plaintiff Nasir Ullah was entitled to pre-empt.

There remains the other question which is a question of fact.

Nasir Ullah denied that he in any way acquiesced in the sale which he was seeking to pre-empt. The sale-deed in dispute was executed on the 9th February, 1921, and was registered on the same date. It is proved that on the same date, that is to say, 9th Eebruary, 1921, the plaintiff Nasir Ullah and his brother Muhammad Khan and one Daulat executed another sale-deed relating to property in another village and this deed was executed in favour of the same purchaser Kabul Khan.

It was sought by means of this later document and also by means of oral evidence, to show that the plaintiff was fully cognizant of the sale which he is now claiming to pre-empt, and that, therefore, his suit is not maintainable.

The document relating to the sale in suit was attested by two witnesses who were examined in Court. They deposed that the plaintiff was present on the 9th February, 1921, when both documents were being drawn up by the same scribe. They do not, however, say that the plaintiff was given any opportunity of taking the property or that such an offer having been made was refused by him. All that the evidence of witnesses amounts to is that he was present on the spot. Another witness was called who went further than this. He deposed definitely that the plaintiff was present when the sale-deed in dispute was executed and that he had been asked to take the property and had refused on the ground that he had not the money.

It is the fact that this second document ralating to the other village, a document which was registered on the 2nd of March, 1921, bears the signature of Nasir Ullah. He was asked in the witness-box to explain this and he deposed that he put his signature to it, not on the 9th February, 1921, but on the date on which the document was presented for registration, and this statement the Court of first instance believed. It would be difficult for us to differ on this matter with the finding of the first Court. There is something suspicious about this other document of 9th February, 1921, which is marked Ex. D. We have already mentioned that there were three vendors under this deed, Muhammad Khan, Nasir Ullah Khan and Daulat. The document as it stands bears the signature of Muhammad Khan and the thumb-impression of Daulat. Between these two signatures we find a second signature made by the vendor Muhammad Khan and underneath this is written the name of Nasir Ullah Khan. It looks to us, therefore, as if the signature of Nasir Ullah had been appended to this document at a later date and it is a suspicious

circumstance which has not been explained that the signature of one of the vendors should appear twice on the document. On the whole, we think that the Court of first instance was justified in coming to the conclusion that there was no reliable evidence to show that the plaintiff had acquiesced in the sale in dispute and that he was thereby debarred from asserting his claim for pre-emption. Our finding of fact is accordingly in agreement with that of the Court of first instance. It follows from this that the appeal is allowed. We set aside the decree of the Court below and restore the decree of the Court of first instance. The plaintiffs-appellants will be entitled to their costs here and in the lower Appellate Court and the costs in this Court will include fees on the higher scale.

We understand that after the first decree the pre-emption money was deposited in Court. Whether it is there yet or not we do not know, but if it is not, we think that the plaintiff ought to be given an opportunity to re-deposit the money. We give them two months' time from the date of this decree. In default of deposit so made the suit will stand dismissed with costs in all Courts including in this Court fees on the higher scale.

Z K. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 256 OF 1923.

August 3, 1925.

Present:—Mr. Justice Jackson.

NEELAM VENKATARATANAMMA—PLAINTIFF—APPELLANT

versus

VINJAMOORI VARAHA NARASIMHACHARU—DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), s. 49—Unregistered deed of gift, admissibility of—Possession, nature of—Intention to make gift, proof of.

An unregistered deed of gift affecting an interest in immoveable property cannot, by virtue of the provisions of s. 49 of the Registration Act, be received in evidence either to prove the fact of the gift or to prove that the possession of the donee over the property purported to be gifted was that of an owner and could be referred to the gift The deed can, at the most, be referred to as evidence of an intention to make a gift [p. 470, col. 2, p 471, col. 1.]

Second appeal against a decree of the Court of the Subordinate Judge, Cocanada, in A. S. No. 84 of 1921, preferred against that of the Court of the Principal District Munsif, Cocanada, in O. S. No. 32 of 1920.

Mr. *B. Satyanarayana*, for the Appellant.

Mr. *V. Govindachari*, for the Respondent.

JUDGMENT.—Appeal from the decree in A. S. No. 84 of 1921 on the file of the Court of the Subordinate Judge of Cocanada in O. S. No. 32 of 1920 on the file of the Court of the Principal District Munsif of Cocanada.

Plaintiff sues for certain portions of a house-site. Both Courts dismissed his suit and plaintiff appeals.

Issue No. II. Whether plaintiff was in possession within 12 years prior to suit, is a question of fact on which both Courts find against plaintiff; and he only seeks to traverse that finding in this second appeal by urging that the learned Subordinate Judge erred in accepting as evidence the unregistered gift deed Ex. V. There is no doubt that Ex V is a transaction affecting an interest in immoveable property and as such cannot be received in evidence unless it is registered. The Subordinate Judge, however, relying upon *Varada Pillai* v. *Jeevarathnammal* (1) has admitted the document for the purpose of proving that possession was adverse. In the reported case it was sought to prove a gift, for which there was no registered deed, by its recital in a petition which also had been registered. The Judicial Committee decided that the petition could not serve as proof of the gift, but turning to another question, what was the nature of Doraisami's possession, the petition could be admitted in evidence. Thus the petition was not evidence of a gift, but evidence that some one had petitioned on the footing of a gift. Care must be taken not to extend this principle too far. For instance, in the present case, the Court cannot receive Ex. V in evidence to prove a gift and then infer that the defendant's possession was adverse; and justify its acceptance of Ex. V on the ground that it confines itself to the inference and is not concerned with the fact of the gift; because the inference is only based upon the fact; and if the fact cannot be proved by the unregistered instrument, nothing can be proved on which to found an inference.

(1) 53 Ind. Cas 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C W. N. 346; 38 M. L. J. 313; 18 A. L J. 274; 43 M. 244; 46 I. A. 285, 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444 (P. C.).

But the document can go in, not to prove any definite gift, but to prove, for what it is worth, that there was talk of making some assignment at that date. That, at least, is how I interpret the ruling in *Varada Pillai* v. *Jeevarathnammal* (1). In *Veerappan* v. *Mylai Udayan* (2) I had occasion to examine this very question with the aid of the ruling in *Saraswatamma* v. *Paddayya* (3) and I observed: "In my opinion if the document is filed on the strict understanding that it must not evidence any transaction affecting immoveable property, its scope in the majority of cases will be very small. At most I think it will evidence, as observed by Venkatasubba Rao, J., an intention." In the present case, I doubt if Ex. V could evidence more than that the house site was too small to admit of a backyard, and the vendor was corresponding about it. But even on that assumption, and supposing that he read the whole document, I do not consider that the finding of the learned Subordinate Judge is vitiated. There is direct oral evidence of defendant's adverse possession and the District Munsif found in his favour even after rejecting Ex. V as inadmissible. There is no dispute about the exact areas occupied and Ex. V is really only useful in corroborating the oral evidence by showing that at the date when it was written, there was trouble about the insufficiency of the site. When it comes to considering the actual measurements in Ex. V they are of more help to the appellant than to the defendant because there are certain discrepancies between the original area in the document and that now occupied, *vide* para. 6 of the lower Appellate Court's judgment.

So it cannot be argued that the appellant was prejudiced by their consideration; and all that really operated upon the mind of the learned Subordinate Judge, in my opinion, was the part of Ex. V which can legitimately be regarded as evidence.

Accordingly I see no reason to remand the suit for fresh proceedings.

No other ground of appeal was raised or appears to be valid.

The appeal is dismissed with costs.

V. N. V.

Z. K. *Appeal dismissed*

(2) 87 Ind. Cas. 285; (1925) A. I. R. (M) 1097.
(3) 71 Ind. Cas. 274; 46 M. 349; 44 M. L. J. 45; (1923) A. I. R. (M.) 297, 18 L. W. 418.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 45 OF 1925
October 21, 1925.
Present :—Mr. Justice Sulaiman and Mr Justice Mukerji.
Pandit MULRAJ—PLAINTIFF—APPELLANT
versus
INDAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s 43, application of—Transfer by reversioner—Knowledge of transferee.

A mortgagee from a person who has, on the date of mortgage, only a reversionary interest in the property mortgaged, does not, if he is aware of mortgagor's true interest in the property, acquire any right in the property on the death of the life-estate-holder.

Pandiri Bangaram v *Kurumoory Subbaraju*, 8 Ind. Cas 388, 34 M 159, 8 M L T 285 and *Jagannath* v. *Dibbo*, 1 Ind Cas 818, 6 A L. J. 49 at p 51; 31 A. 53, followed

It is only when a transferee is led into the belief of absolute title on the part of the transferor and acts on the representation of the transferor, that he is entitled under s 43, Transfer of Property Act, to take advantage of the fact that the transferor later on becomes the owner of the property. If that were not so ss 6 and 43 of the Act would conflict.

Second appeal against a decree of the Additional District Judge, Saharanpur, dated the 22nd September 1924.

Messrs. *L. M. Banerji* and *N. P. Asthana*, for the Appellant.

JUDGMENT.—The facts involved in this appeal are as follows:—The appellant who was the plaintiff in the Court below obtained a mortgage from the respondent No. 1 Inder Singh in respect of several properties out of which only one is in dispute in this appeal. In this property Inder Singh had only a reversionary interest on the death of a certain lady at the date of the mortgage. After the mortgage the lady died and the contesting respondent, *viz.*, Babu Girdhari Lal, obtained at an auction-purchase this property. When the appellant put his mortgage into suit Babu Girdhari Lal raised the plea that the mortgage of the property in question by Inder Singh was invalid and did not convey any right to sell it. The appellant relied on s. 43 of the Transfer of Property Act and the question arose whether the plaintiff was or was not aware at the date of the mortgage of the fact that Inder Singh's interest in the property in question was only that of a reversionary and not that of an absolute proprietor. The lower Appellate Court has found in the clearest terms possible that the plaintiff was aware of the true interest of Inder Singh in the property.

Now the question is whether in the circumstances s. 43 of the Transfer of Property Act would apply and would entitle the plaintiff to sell the property. If the answer be in the affirmative a further question would arise whether Babu Girdhari Lal would be bound to give up the property in the circumstances of the present case.

We are, however, of opinion that s. 43 of the Transfer of Property Act does not apply in favour of the appellant. Section 43 is based on equitable principles. It is only when a transferee is led into the belief of absolute title on the part of the transferor and acts on the representation of the transferor, that he is entitled to take advantage of the fact that the transferor later on becomes the owner of the property. If that were not so ss. 6 and 43 of the Transfer of Property Act would conflict. Section 43 of the Transfer of Property Act opens with these words "where a person erroneously represents". The word "represents" clearly shows that the person in whose favour the equity is allowed to operate must have acted on the representation. The point has really been settled by numerous authorities and it would be enough to quote two cases only to support our decision, *vide Pandiri Bangaram* v. *Karumoory Subbaraju* (1) and *Jagannath* v. *Dibbo* (2).

In view of these decisions the other points raised in the grounds of appeal do not arise.

The appeal is dismissed under O. XLI, r. 11 of the C. P. C.

N. H *Appeal dismissed.*

(1) 8 Ind. Cas. 388, 34 M. 159, 8 M. L. T. 285
(2) 1 Ind. Cas. 818; 6 A. L. J. 49 at p. 51; 31 A. 53.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1496 OF 1922.
July 29, 1925.

Present:—Mr. Justice Jackson.

Karnam VENKATASUBBA RAO—
PLAINTIFF—APPELLANT
versus
ADINARAYANA RAO AND OTHERS—
DEFENDANTS—RESPONDENTS.

Inam, *service—Enfranchisement—Grant to member of joint family—Grant to Hindu widow and other persons—Estate conferred on widow—Absolute or limited estate.*

The enfranchisement of a service *inam* does not enure to the benefit of the joint family of the holder but only of the holder himself. [p. 473, col 1.]

Venkata Jagannadha v *Veerabhadrayya*, 61 Ind. Cas 667; 44 M 643, 41 M. L. J. 1, 34 C. L J. 16; 14 L. W 59, (1921) M. W. N. 401; 30 M. L. T. 14; 26 C. W. N 302; (1922) A. I. R. (P. C.) 96, 48 I. A. 244 (P C), relied on

When Government makes a grant to persons comprising a widow and her relations, there is no presumption that only a widow's estate is intended in case of the former [p. 472, col 2; p 473, col. 1.]

Where a service *inam* is enfranchised in the name of a Hindu widow and a number of other persons as an "estate in free-hold", and as "absolute property", the widow takes the property absolutely and not merely with the limited powers of a Hindu widow. [*ibid*]

Andukuri Venkataramadas v. *Pachigolla Gavarraju*, 70 Ind. Cas 677; 43 M. L. J. 153 at p. 156; (1922) M. W. N. 305, 16 L. W. 228, (1922) A I. R. (M) 173, 31 M. L. T. 154, distinguished.

Second appeal against a decree of the District Court, Anantapur, in A. S. No. 97 of 1921, preferred against that of the Court of the District Munsif, Anantapur, in O. S. No. 20 of 1920, (O. S. No. 17 of 1919, Penukonda, District Munsif's Court).

Mr. *B. Somayya*, for the Appellant.

Mr. *V. S. Narasimhachari*, for the Respondents.

JUDGMENT.—This is an appeal from the decree of the District Judge of Anantapur in A. S. No. 97 of 1921 on appeal from that of the District Munsif of Anantapur in O. S. No 20 of 1920. The plaintiff sued for a declaration that he and defendants Nos 1, 2 and 3 are the nearest reversioners to inherit the property of the late Ramappa and to recover possession of a quarter of the immoveable property described in the schedule attached to the plaint. Both the lower Courts dismissed his suit.

The first point for consideration is that taken by the learned Judge in his fourth paragraph whether the property shown in the title-deed Ex. G-1 is the absolute property of Savitramma or whether she only enjoyed a Hindu widow's estate in that property. The title-deed Ex. G-1 is perfectly clear. "The *inam* is now confirmed to you in free-hold," in other words "the *inam* will be your own absolute property." "You" and "your" referring to the six persons in the register, Ex. D-2 and the first of these six persons is Savitrama. It can only be held that "absolute property" in this document means with reference to Savitramma a widow's estate on two assumptions: (1) that the property dealt with is as a matter of fact, the property of the joint Hindu family and (2) that when Government makes

a grant to persons comprising a widow and her relations, Government must always be taken to imply that a widow's estate is intended. The first assumption as the learned District Judge points out has been rendered impossible by the Privy Council case in *Venkata Jagannadha* v. *Veerabhadrayya* (1). The ruling is to be found on page 655*: "Their Lordships are of opinion that the Full Bench was in error, *i. e.*, *Pingala Lakshmipathi* v. *Bammireddipalli Chalamayya* (2), that the case of a *karnam* stands on its own footing, and that the principles applicable thereto were properly decided in *Venkata* v. *Rama* (3), by the Full Court". Briefly the effect of *Venkata* v. *Rama* (3) is that a service *inam* does not enure to the benefit of the joint family of the holder but only of the holder himself; see page 271† "I think it may be taken that such lands were enfranchised in favour not of the family generally, but of the office-holder for the time being". And again at page 259†: "When the emoluments consisted of land, the land did not become the family property of the person appointed to the office whether in virtue of a hereditary claim to the office or otherwise. It was an appanage of the office inalienable by the office-holder and designed to be the emoluments of the officer into whose hands soever the office might pass."

And so in *Venkata Jagannadha* v. *Veerabhadrayya* (1) the Judicial Committee has laid down that when an *inam* title-deed is granted confirming lands to the holder of the office, his representatives and assigns, the lands are his separate property and are not subject to any claim to partition by other members of the family. This clearly excludes all conception of the joint family in such transactions. In granting an absolute property in the enfranchised *inam*, Government might have made out the title deed to one person or, as in the present case, to six persons, but there is no reason to suppose that they contemplated the joint family which, as shown above, had no interest in the property.

For the second assumption, the appellant relies strongly upon a remark in *Andukuri Venkataramadas* v. *Pachigolla Gavarraju* (4):

"In that case the title-deed was made out jointly in favour of the widow and the next reversioner which might be taken as an indication that the reversioner should take the estate on the widow's death and not the widow's heirs." Their Lordships do not go so far as to say it must be taken as an indication and it is difficult to see why any such assumption should be made unless it is to be held that Government think in the the terms of Hindu Law when Government state unequivocably this property shall be your absolute free-hold.

The meaning is unmistakable and the fact that the document happens to have been issued in India does not import the provisions or the ideas of Hindu Law. I, therefore, see no reason to traverse the decision of the learned District Judge on this point.

The only other question raised is whether the District Judge erred in law in his 5th paragraph in finding that the Diglott register only raised some presumption that Savitramma's portion in the property was family property inherited from her husband and in refusing to find it conclusively proved in the absence of further evidence. I consider the learned Judge's appreciation of this evidence perfectly correct and he was under no necessity in law to accept it as conclusive.

No other point was raised. The appeal accordingly fails on all grounds and is dismissed with costs.

V. N. V. *Appeal dismissed.*

N. H.

(1) 61 Ind. Cas. 667; 44 M. 643, 41 M. L. J. 1, 34 C. L. J. 16; 14 L. W. 59; (1921) M. W. N. 401; 30 M L. T. 14; 26 C. W. N. 302, (1922) A. I. R. (P. C) 96; 48 I. A. 244 (P. C.).

(2) 30 M. 434; 17 M. L. J 101; 2 M. L. T. 101.

(3) 8 M. 249 9 Ind. Jur. 185; 3 Ind Dec (N. S) 172.

(4) 70 Ind. Cas 677; 43 M. L. J. 153 at p. 156; (1922) M. W. N. 305, 16 L. W. 228; (1922) A. I. R. (M.) 173; 31 M. L. T. 154.

*Page of 44 M.—[*Ed.*]

†Pages of 8 M.—[*Ed.*]

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 106 OF 1925.

December 1, 1925.

Present:—Mr. Justice Mukerji.

MAHARAJ DIN AND OTHERS—PLAINTIFFS—APPLICANTS

versus

BHAIRON—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 4 (5), 167, Sch. IV, item 29—Suit to eject lessee of grove—Jurisdiction of Civil and Revenue Courts.

A suit to eject the lessee of a grove who has been paying a portion of the produce of the grove as rent, is a suit to eject a tenant and is cognizable by a Revenue and not by a Civil Court.

Civil revision from an order of the Munsif, East Allahabad, dated the 8th of September 1924.

Mr. *Brij Behari Lal*, for the Applicants.

Mr. *M. Mahmudullah*, for the Respondent.

JUDGMENT.—There is nothing in this case.

The plaintiffs in the Court of first instance are the applicants here. They alleged in the plaint that they were the proprietors of certain lands, that one Tika had planted a grove over the lands, that Tika died without heir and the grove went by escheat to the plaintiffs, that the plaintiffs from time to time let out the grove to different persons and lastly they let it out to the defendant-respondent, that they did not any longer want that the defendant should hold the grove and that, therefore, they asked for his ejectment. As for the rent, it was alleged in the plaint that the defendant handed over a portion of the produce of the grove as the rent.

The defendant pleaded, *inter alia*, that he was a grove-holder and not a mere tenant and that the suit was not cognizable by the Civil Court.

Both the Courts below have held that on the plaintiffs' own allegations the suit was not cognizable by the Civil Court.

I have no doubt that the Courts below were right. The suit was one for ejectment of a tenant. A tenant is defined as a person by whom rent is payable. Rent includes whatever is paid or rendered on account of, among other matters, groves. On the plaintiffs' own allegations, therefore, the defendant is a tenant of the plaintiffs and the suit for his ejectment must be brought in the Revenue Court and not in the Civil Court.

The application fails and is hereby dismissed with costs which will include Counsel's fees in this Court on the higher scale.

Z. K. *Application dismissed.*

PATNA HIGH COURT.

MISCELLANEOUS APPEAL.

December 12, 1924.

Present:—Justice Sir Jwala Prasad, Kt.

SITAL PRASAD SINGH AND OTHERS—APPELLANTS

versus

JAGDEO SINGH—RESPONDENT.

Court Fees Act (VII of 1870), s. 35, Sch II, Art. 11—Bihar and Orissa Government Notification No. 2576—Civil Procedure Code (Act V of 1908), ss 47, 144—Restitution, order relating to—Appeal—Court-fee payable.

An order under s. 144 of the C. P. C. comes within the purview of cl. (1) of s. 47 of the Code and a memorandum of appeal against such an order must, therefore, in accordance with the direction contained in the Notification No. 2576-L-A-25 of the Bihar and Orissa Government dated the 5th December 1921, be charged with the fee provided for in Art. 11 of Sch. II to the Court Fees Act. [p 476, col 1]

Messrs. *Rai Gur Saran Prasad, Raghunandan Prasad* and *Anand Prasad*, for the Appellants.

The Government Pleader, for the Respondent.

JUDGMENT.—This is a Reference by the Taxing Officer about the Court-fee to be paid upon the memorandum of appeal. The facts appear to be as follows:—

The appellants obtained a mortgage-decree against Gopi Nath Singh, Bodh Narayan, the *Mahanth* of Bodh Gaya and others. Bodh Narayan was a prior mortgagee, and the *Mahanth* was made a defendant as a subsequent purchaser. In execution of that decree some of the mortgaged properties were sold for Rs. 71,198 on 21st October 1918. Bodh Narayan also obtained a decree on his prior bonds making Harbans Narayan a defendant. He claimed Rs. 36,907-7-7 out of the sum realised by the auction-sale in the decree of Harbans Narayan. This was disallowed by the Subordinate Judge. Bodh Narayan then came up to this Court in appeal. That appeal was treated as one under s. 47 of the C. P. C. The order of the Subordinate Judge was set aside by this Court and Bodh Narayan was declared entitled to receive Rs. 36,907-7-7 out of the sale proceeds. Against the order of this Court there is an appeal pending before the Privy Council. During the pendency of the appeal in this Court the decree-holder Harbans Narayan had withdrawn the entire sale-proceeds of Rs. 71,198 on furnishing security. Bodh Narayan is dead, and his representative Har Ballabh Narayan Singh assigned the decree to Jagdeo Singh and he applied to the Subordinate Judge for an order that Sital Prasad, representative-in-interest of Harbans Narayan, who is dead, should deposit Rs. 36,907-7-7 in Court as ordered by the High Court. Sital Prasad opposed this petition and the matter came to this Court again. Upon the final order passed by this Court Sital Prasad deposited Rs. 36,907-7-7 in the Court on the 6th Feb-

ruary 1922. Jagdeo Singh applicant claimed, besides the aforesaid amount deposited by the decree-holder, interest and damages from 4th April 1919 the date on which the sum had been taken out of the Court by Harbans Narayan and others. His claim has been allowed by the Court below and the respondent has been asked to deposit Rs. 11,736 as interest. Against the order of the Subordinate Judge, Sital Prasad and others have preferred an appeal to this Court, with a Court-fee of Rs. 4 only. The Stamp Reporter reported that *ad valorem* Court-fee should have been paid upon the aforesaid amount of Rs. 11,736. This view has been accepted by the Taxing Officer. The appellant claims that he is liable to pay only the Court-fee already affixed by him on the memorandum of appeal. On account of this difference the matter has come to me as a Taxing Judge.

The point appears to be somewhat difficult, and the views of the High Courts have been divergent thereupon. The relevant sections in the C. P. C. upon this point are ss. 47 and 144. Section 144 corresponds with s. 583 of the C. P. C. of 1882. That section ran as follows:—

"When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this Chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred; and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for the execution of decrees in suits."

Section 244 of the old Code ran as follows:—"The following questions shall be determined by order of the Court executing a decree and not by separate suit (namely):—

(*a*) questions regarding the amount of any mesne profits as to which the decree has directed enquiry;

(*b*) questions regarding the amount of any mesne profits or interest which the decree has made payable in respect of the subject-matter of a suit, between the date of its institution and the execution of decree, or the expiration of three years from the date of the decree;

(*c*) any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof."

Section 583 which under the old Code occurred in Ch. XLI relating to appeals has now been re-placed by s. 144 of the C. P. C. under Part XI, headed 'Miscellaneous.' That section runs as follows:

"(1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal."

Section 47, cl. (1) which corresponds to s. 244, cl. (*c*) of the old C. P. C. runs as follows:—

"(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional Court-fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court."

Clauses (*a*) and (*b*) of s. 244 do not now find place in s. 47.

Section 35 of the Court Fees Act empowers the Government to reduce or remit the fees mentioned in the First and Second Schedules of the Act. Under this section the Governor-General in Council issued Notification No 4650 dated the 10th September 1889. Clause (6) of that Notification directed that the fees chargeable on appeals from orders under s. 244 of the C. P. C. (Act XIV of 1882), shall be limited to the amounts chargeable under Art. 2 of the Second Schedule,

By Notification No. 4344 S. R., dated the 6th October 1893, this was amended by direction that the fee chargeable on appeals from orders under cl. (c) of s. 244 shall be the amounts chargeable under Art. 2 of the Second Schedule to the Court Fees Act, 1870.

The present s. 35 of the Court Fees Act empowers the Local Government to reduce or remit the fees mentioned in the First and Second Schedules of the Court Fees Act. Under this power the Local Government issued Notification No. 2576-L-A-25, dated the 5th December 1921, directing that the fee chargeable on appeals from orders under s. 47 of the C. P. C. (Act V of 1908), shall be limited to the amounts chargeable under Art. 11 of the Second Schedule. Article 11 of the Second Schedule provides that on a memorandum of appeal, when the appeal is not from a decree or an order having the force of a decree and is presented to a High Court, the Court-fee chargeable is Rs. 4.

Section 2 of the C. P. C. (Act XIV of 1882), defined "decree" to include an order determining any question mentioned or referred to in s. 244 of that Code. Similarly, s. 2 of the present C. P. C. (Act V of 1908), defines "decree" as including orders determining any question within s. 47 of the Code. Prior to the present C. P. C., the relief by way of restitution was to be given by execution of the appellate decree under s. 583 of the old Code. Now under the present Code the relief by way of restitution is to be given by an application in the Court of first instance under s. 144 of the Code. Orders under s. 583 relating to restitution under the old Code of 1882 used to be appealable as if they were orders passed under s. 244 of the C. P. C. Therefore there was no necessity of making orders under s. 583 as being included in the definition of "decree". The present arrangement of the Code has taken out s. 583 of the old Code from the Chapter relating to appeals and has made a distinct provision in s. 144 under the heading "Miscellaneous". In order to remove any doubt as to whether orders under s. 144 would be appealable or not, such orders have been included in the definition of " decree" along with s. 47 of the Code.

In the case of *Gangadhar Marwari* v. *Lachman Singh* (1), Brett and Sharfuddin, JJ., held that an application for mesne profits made not by the plaintiffs but by the defendants against whom the suit had been dismissed, by way of restitution under s. 583, C. P. C., comes under s. 244 (c) of the Code, and that such application would be chargeable with Court-fees under Art. 11, Sch. II of the Act and not *ad valorem*.

In the unreported case of *Babu Shyamnandan Kishore Singh* v. *Rai Radha Krishna* (2), (Sharfuddin and Chapman, JJ) this view was upheld and it was held that an order passed under s. 144 of the C. P. C. came under the Notification, insamuch as such order under s. 144 of the present Code amounts to an order under s. 244 (c) of the old Code. They further held that the reference in the Notification to s. 244 (c) of the old Code must relate to s. 144 by virtue of s. 8 of the General Clauses Act. This was the view taken under the present C. P. C.

The matter was fully dealt with by Chatterjea, J., in the case of *Madan Mohan Dey* v. *Nogendra Nath Dey* (3). The learned Judge referring to the Notification referred to above puts the question to himself as to whether an order under s. 144 is an order which decides a question falling under s. 47 (1) of the present Code, and he replies that under s. 583 of the old Code an application for restitution was treated as an application for execution of the appellate decree, and it was expressly provided that the Court shall proceed to execute the decree passed on appeal according to the rules for execution of decrees in suits. It was accordingly held that an order under s. 583 fell within the provisions of s 244 (c), and, therefore, cl. (6) of the Notification applied. Continuing the learned Judge observes:

"It is true s. 144 of the present Code omits the provision that the Court is to proceed according to the rules prescribed for the execution of decrees in suits, but it expressly lays down that no suit shall be instituted for the purpose of claiming any restitution which can be obtained by application under the section. The Court in making restitution has to execute the decree of reversal (which necessarily carries with it the right to restitution even though the decree may be silent as to such restitution) in order to give effect to the

(1) 6 Ind. Cas. 125; 11 C. L J. 541.
(2) M A. No. 370 of 1913, decided on 20th December 1915.
(3) 39 Ind. Cas. 640; 21 C. W. N, 544.

reversal of the decree. That being so, an order under s. 144 comes under s. 47 (1) and cl. 6 of the Notification applies to such an order."

On the 26th March 1917 the matter was agitated in this Court upon the report of the Stamp Reporter and ultimately came up for the decision of the Taxing Judge (Roe, J.). The learned Judge expressed the view taken in the case of *Madan Mohan Dey* v. *Nogendra Nath Dey* (3) and directed that the Court-fee of Rs. 2 as was payable under the old Court Fees Act was sufficient (*vide* the unreported case of *Sheikh Kamaruddin Mandal* v. *Raja Thakur Barham* (4).

The Allahabad High Court has taken a contrary view: *vide Jagdip Narain Singh* v. *Mahant Keshogir* (5). That was an authority under the old Code.

Under the present Code and under the Notification of the Government of the United Provinces, Daniels, J., took the same view in the case of *Baijnath Das* v. *Balmukand* (6) and the reason given by him is as follows:—

"An application under s. 144 is no doubt one which carries out the intention of the Appellate Court's decree, but it does not directly execute that decree. What it does is to undo an execution wrongly granted by the Court below. In this case the High Court's decree was declaratory and could only have been executed in respect of costs. The appellant must, therefore, stamp his appeal *ad valorem*."

The learned Judge felt the inequity of levying *ad valorem* fee upon a miscellaneous application of this kind, and he observed as follows:—

"It is unlikely that the omission of orders under s. 144 from the Notification referred to above was due to deliberate intention. The exemption of appeals under s. 47 from an *ad valorem* fee dates back to a time when the Code of 1882 was in force. Under that Code, s. 583, an application by way of restitution was treated as a proceeding in execution and there was no need for a separate notification under the section corresponding to the present s. 144 It is probable that if the matter is brought to the notice of Government, Government will not consider it desirable to impose an *ad valorem* fee on a party who is merely asking the Court to right a wrong unintentionally done by the Court itself. I direct that a copy of this judgment be forwarded to Government with the suggestion that the provisions of para. (4) of the Notification should be extended to appeals from orders under s. 144."

The Notification of the Government of the United Provinces referred to by Daniels, J., exactly corresponds with the Notification of the Government of Bihar and Orissa already referred to, which makes the fee payable on appeals from orders under s. 47 of the present C. P. C. of 1908, one under Art. 11 of Sch. II. I am inclined to think that the Notification did not consider it necessary to include orders under s. 144. Whereas s. 583 of the old Code of 1882 has been removed from the category of the Chapter headed "Appeals" which gave relief by way of restitution to a party when the decree under which injury has been done to him has been set aside by the Appellate Court by executing the decree of the Appellate Court, the present s. 144 gives the same relief and prescribes the same *forum*, namely, the Court which passes the decree from which the relief is sought. Determination of a question arising under s. 144 will naturally relate to the execution, discharge or satisfaction of the decree either of the first Court or of the Appellate Court. If the first Court's decree has been discharged by the Appellate Court, the question arising under s. 144 will naturally be a question as to the discharge of the decree coming under s. 47 of the C. P. C. This view has been accepted by the Calcutta High Court under the present Code and the view is in consonance with reason, equity and justice so much so that even the learned Judge of the Allahabad High Court, Daniels, J. felt that if the interpretation was correct it requires to be set right by the Legislature. This province used to be governed formerly by the rules and practice obtaining in the Calcutta High Court, and the practice has been followed by this Court ever since in the matter with which we are at present concerned. The Taxing Judge (Roe, J.) in 1917 gave effect to the Calcutta view and held that the fee chargeable was one under Art. 11 of Sch. II of the Court-Fees Act. I as a Taxing Judge, am not prepared to go against the view of my predecessor-in-office. Whatever trouble there might have arisen in the interpretation due to s. 144 not being expressly included in the Govern-

(4) M. A. No. 142 of 1917.
(5) A. W. N. (1901) 180
(6) 82 Ind Cas. 321; 47 A. 98, 22 A. L. J. 881; L. R. 5 A. Civ. 773; (1925) A. I. R. (A.) 137.

ment Notification, it is, I think, amply obviated by the reason given by me above.

In a matter of this kind the decision of a Taxing Judge such as that of Roe, J., should be the rule of the Court and it should not be disturbed by his successor-in-office.

I, therefore, hold that the Court-fee paid is sufficient.

Z. K. *Order accordingly.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 899 OF 1924.

October 22, 1925.

Present:—Mr. Justice Daniels.

RAM NATH SINGH *alias* LAL SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

GAJADHAR LAL—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 54—Sale—Delivery of possession—Property already in possession of vendee.

In the case of an unregistered sale of property of rupees less than one hundred in value it is sufficient delivery of possession under s 54, Transfer of Property Act, that the property is already in the possession of the vendee.

Muthukaruppan Samban v. *Muthu Samban*, 25 Ind. Cas. 772, 38 M. 1158; 1 L. W. 754; 16 M. L. T. 344; (1914) M. W. N. 768; 27 M. L. J. 497, relied on.

Second appeal against a decree of the Second Subordinate Judge, Cawnpore, dated the 26th April 1924.

Mr. *Hazari Lal Kapoor*, for the Appellants.

Mr. *U. S. Bajpai*, for the Respondent.

JUDGMENT.—This was a suit for possession of groves standing on certain plots. The suit has been decreed as to possession by the Court below but remanded on the question of damages. The defendants have come up in second appeal.

Two pleas have been urged:—

(1) that the sale-deed of 1888 which forms the basis of the plaintiff's title to plots Nos. 2876, 2877 and 2883 was invalid for want of registration ;

(2) that the findings of the lower Appellate Court do not warrant its awarding to the plaintiff the trees of Nos. 2903 and 981.

As regards the first point, the sale-deed in question was for a sum of Rs. 32 only. The transfer could, therefore, be made either by a registered sale-deed or by delivery of the property. The Court below holds that the registration was unnecessary as the plaintiff was already in possession of the property under a mortgage. This view is supported by the ruling of the Madras High Court in *Muthukaruppan Samban* v. *Muthu Samban* (1). In that case the learned Judges held that if there was oral sale of the properties (and the same would apply to an unregistered sale), the fact that the vendee was already in possession would not render the sale invalid if the vendor by appropriate acts or declarations converted the possession of the vendee as mortgagee into one as purchaser.

The second plea is not borne out by an examination of the record. Both the plots in question are found to have been in possession of the plaintiff from a long time. No. 981 has been recorded in his name in the papers, 2903 corresponds, according to the judgment of the Court below, to the old numbers 2315 and 2316-1. 2316 was entered in the name of the plaintiff's grandfather as far back as the *khasra* of 1871. Nothing is said as to 2315, but as the dispute in this case relates not to the entire plots but to trees standing on certain parts of them there is nothing to show that the Court below was wrong in holding that the trees fall on the land which has been in possession of the plaintiff and his ancestors in 1871. It is for the appellant, especially in second appeal, to show that the judgment of the Court below is wrong.

For these reasons I dismiss the appeal with costs.

The cross-objections put forward by the respondents which attack findings of fact have no force and are accordingly dismissed.

No objection has been taken by the plaintiff to the form of the decree passed by the Court below, but I should like to point out to B. Triloki Nath for his future guidance that in such a case as this the proper course is to remand an issue as to the amount of damages under O. XLI, r. 25 instead of remanding the whole case under O. XLI, r. 23 as he has done.

N. H. *Appeal dismissed.*

(1) 25 Ind. Cas. 772; 38 M. 1158; 1 L. W. 754; 16 M. L. T. 344; (1914) M. W. N. 768; 27 M. L. J. 497.

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS APPLICATION No. 591 OF 1924

January 16, 1925.

Present :—Mr. Justice Martineau and Mr. Justice Zafar Ali.

DHANPAT RAI AND OTHERS—PLAINTIFFS—PETITIONERS

versus

KAHAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 110—Appeal to Privy Council—High Court maintaining decree of lower Court—Leave, when can be granted—Substantial question of law—Hindu Law—Compromise entered into by father, whether binding on son.

When the High Court maintains the decree of a lower Court it affirms the decision of the lower Court within the meaning of s. 110 of the C P. C, even though the two Courts differ in their findings on certain issues. Leave to appeal to the Privy Council in such a case can be granted only if there is a substantial question of law involved in the case.

A substantial question of law within the meaning of s 110 of the C. P. C. means a question of law in respect of which there may be a difference of opinion.

The general principle that a Hindu son is bound by a *bona fide* compromise entered into by his father for the benefit of the family is well-settled and is not a substantial question of law within the meaning of s. 110 of the C. P C.

Petition for leave to appeal to His Majesty in Council from the judgment and decree of Mr. Justice Martineau and Mr. Justice Zafar Ali, passed in Civil Appeal No. 199 of 1920, on the 25th June 1924.

Dr. *G. C. Naurang*, for the Petitioners.

Bakhshi *Tek Chand*, Mehta *Amin Chand*, Lala *Tirath Ram* and Lala *Madan Gopal*, for the Respondents.

ORDER.—This is an application for leave to appeal to His Majesty in Council from a decree of this Court dismissing an appeal from a decree of a Subordinate Judge. The value of the subject-matter in dispute exceeds Rs. 10,000.

It is contended for the applicants that, although this Court dismissed the appeal, yet as it decided the first issue in regard to the bar of s. 47, C. P. C. against all the three plaintiffs, whereas the Subordinate Judge had decided it in favour of two of the plaintiffs and against only one, this Court's decree should be held to have reversed the decision of the lower Court so far as two of the plaintiffs are concerned. We do not agree with this contention. When this Court maintains the decree of the lower Court it affirms the decision of the lower Court, even though the two Courts differ in their findings on certain issues. This matter was settled by their Lordships of the Privy Council in *Tassaduq Rasul Khan* v. *Kashi Ram* (1).

The only question is whether the appeal involves a substantial question of law. This Court's finding that plaintiffs Nos. 2 and 3 were really parties to the proceedings taken in execution of Ghulam Ali's decree is a finding of fact. The question whether s. 47, C. P. C., is a bar to the suit is, in our opinion, so clear from the section itself as not to admit of any doubt, and is, therefore, not a substantial question of law, which means a question of law in respect of which there may be a difference of opinion: *Gokal Chand* v. *Sanwal Das* (2).

Furthermore we held that the suit must fail, not only on account of the bar created by s. 47, C. P. C., but also because the plaintiffs are bound by the compromise entered into by Shiv Nath, the father of the first plaintiff, in good faith in the interest of the family, whereby he recognised the validity of the mortgage which the plaintiffs now seek to challenge. In regard to that matter also we think that no substantial question of law arises, as the general principle that a person is bound by a *bona fide* compromise entered into by his father is well-settled.

As the decision of the lower Court was affirmed by this Court and the appeal from this Court's decree does not, in our opinion, involve a substantial question of law we dismiss the present application with costs.

Z. K. *Appeal dismissed.*

(1) 25 A 109, 7 C W. N. 177; 5 Bom. L. R. 100, 30 I. A. 35, 8 Sar. P. C J. 337 (P C).

(2) 78 Ind. Cas. 317; 5 L. 260; 6 L. L. J. 180; (1924) A. I. R. (L) 473.

LAHORE HIGH COURT.

CIVIL APPEAL No. 929 OF 1924.

January 8, 1925.

Present :—Mr. Justice Campbell.

FATEH MAHOMED—PLAINTIFF—APPELLANT

versus

MITHA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Gift by father to minor son—

Transfer of possession — Registration—Transfer of Property Act (IV of 1882), s. 123.

A gift by a Muhammadan father to his minor son is complete when the deed of gift is completed and neither transfer of possession nor registration of the deed is necessary to complete it. [p 481, col. 1.]

Ramamirtha Ayyan v. *Gopala Ayyan*, 19 M. 433, 6 M. L. J. 207; 6 Ind. Dec. (N S) 1007, *Parbati* v. *Baij Nath Pathak*, 16 Ind. Cas 406; 35 A. 3, 10 A. L. J. 300 and *Venkati Rama Reddi* v. *Pillati Rama Reddi*, 38 Ind. Cas. 707; 40 M. 204: 31 M L. J. 690, 4 L. W. 465: 20 M. L. T. 450; (1917) M. W. N. 112, followed

The provision of the Transfer of Property Act that a valid gift can only be made by a registered deed does not apply to the Punjab. [*ibid.*]

Appeal from a decree of the District Judge, Dera Ghazi Khan, dated the 10th January 1924, confirming that of the Sub-Judge, Choti Zirin (Dera Ghazi Khan), dated the 16th July 1923.

Mr. *Behari Lal*, for the Appellant.

Mr. *Sleem*, for Mr. *Abdul Rashid*, for the Respondents.

JUDGMENT.—The facts out of which the present suit has arisen are as follows :—

One Mitha on the 30th of August 1921 executed a document which has been held by the lower Appellate Court to be a deed of gift, transferring to Fateh Mahomed, his infant son, an undivided share in a certain landed estate. Two days later on the 1st of September 1921 Mitha executed a sale-deed transferring by sale the same share to one Abdul Khaliq, a defendant in the suit, the price being Rs. 1,250. On the next day, the 2nd of September, this sale-deed was registered and on the 14th of September the mutation in favour of Abdul Khaliq the vendee was entered up by the *patwari*. The minor donee's paternal uncle, on the 5th of September presented the deed of gift of the 30th of August for registration, but on the 12th of October Mitha objected to its registration and the Sub-Registrar refused to register it. It was eventually registered on the 14th of November by order of the Registrar.

This suit is by Fateh Mahomed the minor donee for possession of the land. The Trial Court dismissed the suit on the ground that under Muhammadan Law the gift of an undivided share in property capable of division, is invalid. Appeal was made to the District Judge who did not sustain the finding of the Trial Court and held that this particular gift did not fall within the definition of *Musha*, the basic principle of which, he observed, is the exclusion of strangers and a valid gift of an undivided share of property could be made in favour of the son of the donor. In second appeal this pronouncement has not been challenged by the respondent Abdul Khaliq.

Before the learned District Judge, however, Abdul Khaliq supported the Trial Court's order on two different grounds. One was that the deed of gift having been registered against the consent of the executant was not properly registered and hence was not admissible in evidence. This objection was repelled by the learned District Judge and again his finding is not contested before me. The second ground was that the gift was not complete and had been revoked. Here the learned District Judge upheld the respondent and dismissed the appeal. The plaintiff has come here on second appeal.

The learned District Judge held that the deed of gift by s. 47 of the Registration Act took priority over the sale-deed, even though it was registered later than the latter, and that its registration was perfectly regular. He observed, however, that the real question was whether the gift was complete and he laid it down that in order to make the gift complete it was necessary for Mitha to do every thing to transfer the possession of the land to the son. No actual change of possession was necessary since the gift was by a father to his minor son; but it was very necessary for Mitha to have the deed of gift registered. Instead of doing so he proceeded to make a sale in favour of another person two days later. Thus the gift was not completed and Mitha had every right to revoke it.

In coming to this conclusion the learned District Judge relied upon *Ramamirtha Ayyan* v. *Gopala Ayyan* (1) where it was held that a deed of gift being a voluntary transfer remains a *nudum pactum* until the donor has done all that is necessary to make it legally complete; that to do so, it is necessary *inter alia*, that it should be registered, but that he can be no more compelled to register the deed than to execute it in the first instance. The registration contrary to the supposed donor's wishes of the deed under consideration was void and in such circumstances there was no gift.

This *dictum* was disapproved in *Parbati* v. *Baij Nath Pathak* (2) and the decision in

(1) 19 M. 433; 6 M. L. J. 207; 6 Ind. Dec. (N. S.) 1007.

(2) 16 Ind. Cas. 406; 35 A. 3; 10 A. L. J. 300.

Ramamirtha Ayyan v. *Gopala Ayyan* (1) was expressly overruled by a Full Bench of the Madras High Court in *Venkati Rama Reddi* v. *Pillati Rama Reddi* (3). It was there laid down that once an instrument of gift is duly executed, the Registration Act allows it to be registered even though the donor may not agree to its registration, and upon registration the gift takes effect from the date of execution. So far as the donor is concerned by executing the deed he does all that he need do, for registration can be effected even without his co-operation.

The above rulings, of course, were delivered in respect of cases where under the Transfer of Property Act a valid gift could only be made by a registered deed. There is no such law in this Province. The question for decision in this case is whether a complete gift was made on the 30th of August 1921 to the plaintiff, and really resolves itself into this. Did Mitha at the time when he executed that deed not intend to transfer the subject-matter to his son? The learned District Judge has not come to any finding about this intention but has held erroneously on the strength of a decision, which he was not aware had been overruled, that between execution of the deed and registration the donor was entitled to change his mind if he wished to do so, and that he "revoked" the gift. A gift, however, once made cannot be revoked and the question is whether or not this gift was actually made. No help towards the solution is to be gained from the ordinary rule that a gift to be valid must be accompanied by transfer of possession. The learned District Judge is correct in saying that that rule does not apply to a gift by a father to his infant son. This exception is laid down in para. 303 of Wilson's Muhammadan Law and is admitted by the learned Counsel for the respondent to prevail. Counsel does not dispute the ruling of the Full Bench of the Madras High Court referred to above that so far as conveyance by written instrument is concerned a donor does all that is necessary when he executes the deed of gift. He argues, however, that the facts of the sale two days later and of the subsequent refusal to assent to registration are proof that on the 30th of August Mitha had no intention to gift the land and drew up the deed merely for some ulterior motive.

In my judgment this contention has no force. It is an every day feature of ordinary life for a man to make up his mind to something on one day, and to change his mind the next day. This is what Mitha, who was examined as a defendant, practically admitted to have occurred in the present case, and Mitha was supporting not the plaintiff but Abdul Khaliq the vendee. In default of direct evidence to the contrary of which there is none, it must be presumed from the facts that Mitha paid Rs. 3 for a stamp paper, engaged a scribe, put his signature to the deed of the 30th of August, and had it attested formally by witnesses that at that time he intended what he caused to be set out in the deed.

The result of this finding coupled with those others of the learned District Judge which, as already stated, have not been challenged before me is that the appeal must be accepted and the plaintiff's suit must be decreed, I accept the appeal accordingly and give the plaintiff a decree for the land claimed together with costs throughout.

N. M. *Appeal accepted.*

(3) 38 Ind. Cas. 707; 40 M. 204; 31 M. L. J. 690; 4 L. W. 465; 20 M. L. T. 450; (1917) M. W. N. 112.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1720 OF 1922.

July 23, 1925.

Present:—Mr. Justice Phillips.

PUTHIA MADATHIL SUBRAMANIAM PATTER OF EANGANDIYUR AMSOM AND DESAM (DIED) AND OTHERS PLAINTIFFS—APPELLANTS

versus

EANGANDIYUR DEVASWOM URALAM AUTOLI NANI AMMA'S SON KARNAVAN VELU NAIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Trust, religious—Pro-note by trustees—Trust property, liability of.

Where the *uralars* of a *devaswom* execute a promissory note in their capacity as *uralars* reciting therein that the amount borrowed is due to the payee from the *devaswom*, the payee is entitled to proceed against the property of the *devaswom* on proof of existence of necessity for the loan.

Sundaresam Chettiar v. *Viswanatha Pandarasannadhi*, 72 Ind. Cas. 103; 45 M. 703, 31 M. L. T. 66; 16 L. W. 83; 43 M. L. J. 147; (1922) M. W. N. 414; (1922) A. I. R. (M.) 402, relied on.

Second appeal against a decree of the District Court, South Malabar, in A. S. No. 465 of 1921, preferred against that of the Court of the District Munsif, Ponnani, in O. S. No. 673 of 1919 (O. S. No. 906 of 1918 on the file of the Court of the District Munsif, Chowghat).

Mr. *K. P. Ramakrishna Iyer*, for the Appellants.

Mr. *K. P. M. Menon*, for the Respondents.

JUDGMENT.—This is a suit on a promissory note executed by the defendants, who are *uralars* of a *devaswom*. In the promissory-note, it is recited that the two defendants promise "in our capacity as *uralars* of the *devoswom* to pay" and again we have the recital "the amount that has been taken in cash is due to you from the *devaswom*." Notwithstanding this specific recital of the liability of the *devaswom* for the suit debt, the lower Appellate Court has held relying on *Swaminatha Aiyar* v. *Srinivasa Aiyar* (1), that the plaintiff is entitled only to a personal decree against the *uralars*. Since the District Judge delivered his judgment, another case of this Court has been reported, namely, *Sundaresam Chettiar* v. *Viswanatha Pandarasannadhi* (2) in which the facts are identical with the present case, namely, there was a distinct undertaking in the promise made by the *uralars* that the money was to be re-paid out of *devaswom* funds, that is to say, not only did they pledge their personal credit, but they entered into a contract with the plaintiff that the *devaswom* funds should be liable for the re-payment of the debt. These facts distinguish the present case from that reported in *Swaminatha Aiyar* v. *Srinivasa Aiyar* (1) and also that in *Ammalu Ammal* v. *Namagiri Ammal* (3). In this latter case the learned Judges refused to consider the question of liability of trustees of religious institutions and based their judgment on the liability of secular trustees and adopting the same argument as that adopted in the earlier case held that there was only a personal liability. This conclusion is based on the principles of English Law relating to trustees, but it is doubtful whether they are applicable in their entirety to persons like heads of *mutts* or managers of religious institutions who are not in the strict sense of the word trustees.

It is suggested for the respondents that because the earliest decision in *Srimath Daivasikamani Pandarasannidhi* v. *Noor Mahomed Routhan* (4) is doubted in *Swaminatha Aiyar* v. *Srinivasa Aiyar* (1), whereas it is to a limited extent approved in *Sundaresam Chettiar* v. *Viswanatha Pandarasannadhi* (2) that there is a divergence of opinion between the two Benches. But Krishnan, J., in *Sundaresam Chettiar* v. *Viswanatha Pandarasannadhi* (2) merely says that he is inclined to follow *Srimath Daivasikamani Pandarasannidhi* v. *Noor Mahomed Routhan* (4), "where the debt is not incurred purely on the personal liability of the debtors." This limitation of liabilities is the cardinal distinction between the present case and that in *Swaminatha Aiyar* v. *Srinivasa Aiyar* (1), where the authority of the prior decision was questioned. I am bound by the decision in *Sundaresam Chettiar* v. *Viswanatha Pandarasannadhi* (2) which is exactly in point and I may add that I see no reason to doubt its correctness.

I may here observe that in dealing with the facts of this case, I have taken one fact as assumed by both the lower Courts, namely, that there was necessity to borrow on behalf of the *devaswom*. That point has not been decided by either Court. It will, therefore, be necessary to remit the case to the District Munsif for decision of this issue and for final disposal in the light of the above remarks. The stamp on the appeal memo. will be refunded and the costs of this appeal will abide the result.

V. N. V. *Appeal allowed.*

N. H.

(1) 38 Ind. Cas. 172; 32 M. L. J. 259; 21 M. L. T. 91; 5 L. W. 323; (1917) M. W. N. 278.

(2) 72 Ind. Cas. 103; 45 M. 703; 31 M. L. T. 66; 16 L. W. 83; 43 M. L. J. 147; (1922) M. W. N. 444; (1922) A. I. R. (M) 402.

(3) 43 Ind. Cas. 760; 33 M. L. J. 631; 22 M. L. T. 391; 6 L. W. 722; (1918) M. W. N. 110.

(4) 31 M. 47, 17 M. L. J. 553; 3 M. L. T. 95.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. OF 1925.

December 1, 1925.

Present:—Mr. Justice Walsh and Mr. Justice Kanhaiya Lal.

In the matter of Musammat DURGA BAI —APPLICANT.

Guardians and Wards Act (VIII of 1890), ss. 31 (3) (d), 48—Order fixing sum to be spent on marriage—Discretion of Court—Appeal—Revision—Interference by High Court.

The question as to what sum the guardian of a

minor should be allowed to spend on the marriage of the minor is primarily a matter for the discretion of the District Judge. An order fixing such sum is made under s. 31 (3) (*d*) of the Guardians and Wards Act and is not open to appeal. The High Court will not, in such a case, interfere in revision under s. 48 of the Act.

Civil revision from an order of the District Judge, Agra, dated the 30th May 1925.

Mr. *Shabd Saran*, for the Applicant.

JUDGMENT.—This is an application in revision against an order made by the District Judge of Agra on the 30th of May last with regard to the disposition of the funds of certain minors by their guardian. The two children are aged respectively 13 and 14. The girl is 13, and the learned Judge, by the order complained of, has allowed Rs. 100 for the marriage of the girl, and Rs 50 for the education of the boy. The grounds for this application are that the sum of Rs. 100 is not adequate, and that having regard to the status of the ward and the customary expenditure upon marriage ceremonies in a Hindu family, at least Rs. 500 should have been awarded. It seems to us that *prima facie* there is something to be said for this contention. Rs. 100 is certainly small. On the other hand it sometimes happens that people, when left to their own devices, spend proportionately a larger sum than is prudent upon marriage ceremonies and we appreciate the fact that in all probability the Judge was desirous of preventing extravagance, and of protecting the interests of the minors during the remaining part of their tutelage, having regard to the total funds available for their benefit. These are matters strictly within the discretion of the District Judge, the Act having rightly vested jurisdiction in the District Judge, who is the principal Civil Court in the locality to decide what is best in such matters, having regard to the interests of the minors in the future as well as in the present. The learned Judge, in any event, is in a better position than the High Court to know what proportion of the funds available ought to be allowed to be expended upon an important event like a marriage. We have said all this in order to indicate that, while we feel that there is something to be said for the applicant, on the other hand we are bound to recognise that we are not really in a position to review an order of the Judge of this kind, and that the law has left it entirely in his discretion. It is admitted that the order, being one apparently under s. 31, sub-s. 3, cl. (*d*) is not an appealable order. We are asked to interfere under s. 48 which is equivalent to s. 115, C. P. C. We are of opinion that revision does not lie in a matter which is purely a question of amount, and a question of discretion in the Court below, and we do not think that the case cited from the Lahore Court, in which a Single Judge expressed an opinion, which was only a *dictum*, that a revision might lie, is an adequate authority to justify interference in revision. On the other hand we appreciate the motives which have led to this application, and we think that it is possible that the learned Judge after considering our observations might come to the conclusion on re-consideration that the amount might well be increased without injury to the future prospects of the minors.

We, therefore, direct that a copy of this order be sent to the learned Judge with an intimation that we think that the better course would be for him to give notice to the parties and re-open the matter with a view to considering whether the sum of Rs. 100 for the marriage expenses is insufficient. In form this application is rejected.

Z. K. *Application rejected.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 715 OF 1923.

August 13, 1925.

Present:—Mr Justice Jackson.

NARAYANASWAMI PILLAI—PLAINTIFF—PETITIONER

versus

GOPALAKRISHNA NAIDU—DEFENDANT—RESPONDENT.

Trustee—Debt, incurring of, by trustee—Suit after ceasing to be trustee—Proper decree.

Where a trustee incurs a debt without charging the trust properties, there is a presumption that the creditor lent the money on his personal credit. [p. 484, col. 1.]

Lakshmindrathirtha Swamiar v. *Raghavendra Rao*, 59 Ind. Cas 287; 43 M. 795 at p. 798; 12 L. W. 139, 39 M. L. J. 174 (1920) M. W. N. 558; 28 M. L T. 269 and *Sunlaresam Chettiar* v. *Viswanatha Pandarasannadhi* 72 Ind. Cas. 103; 45 M. 703; 31 M. L. T. 66; 16 L. W. 83, 43 M. L. J. 147; (1922) M. W. N. 444; (1922) A. I. R. (M) 402, followed.

In a suit by a plaintiff for recovery of money due for fireworks supplied to the defendant as trustee of a temple, the defendant is personally liable, even though on the date of suit he has ceased to be a trustee. [*Ibid.*]

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise a decree of the Court of the District Munsif, Negapatam, dated the 19th March 1923, in S. C. S. No. 107 of 1922.

Mr. *M. S. Venkatarama Iyer*, for the Petitioner.

JUDGMENT.—Plaintiff sued defendant for Rs. 95 for fire-works supplied to defendant as trustee of a temple. The District Munsif found the claim to be true, but unsuited the plaintiff on the ground that defendant was no longer trustee and the temple was liable. Plaintiff seeks to have the decree reversed. Defendant may have his remedy against the trust but it cannot be said that he is absolved from all liability to plaintiff by the mere fact that he has ceased to be trustee. Such a trustee has got his personal credit to pledge and the presumption should be that when he incurred a debt without charging the trust properties, the creditor lent the money on such personal credit. The principle would apply to an ordinary trustee who is not a *Sanyasi*. *Lakshmindrathirtha Swamiar* v. *Raghavendra Rao* (1). In *Sundaresam Chettiar* v. *Viswanatha Pandarasannadhi* (2) it is shown that the proper decree in cases of this sort is a decree for payment by the defendant personally and out of the temple funds.

The defendant does not appear to oppose this petition.

I reverse the decree of the lower Court and order that a decree issue as prayed for against the defendant with costs.

V. N. V. *Petition allowed.*

(1) 59 Ind. Cas. 287; 43 M. 795 at p. 798; 12 L. W. 139; 39 M. L. J. 174; (1920) M. W. N. 568; 28 M. L. T. 269.

(2) 72 Ind. Cas. 103; 45 M. 703; 31 M. L. T. 66, 16 L. W. 83; 43 M. L. J. 147; (1922) M. W. N. 444; (1922) A. I. R. (M.) 402.

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 1895 OF 1924.

January 28, 1925.

Present:—Mr. Justice Campbell.

Musammat BAGO—DEFENDANT—APPELLANT

versus

Mirza ROSHAN BEG—PLAINTIFF—RESPONDENT.

Land Acquisition Act (I of 1894), ss. 9, 11, 18, 30, 31—*Land acquisition proceedings—Dispute as to apportionment of compensation—Civil suit, maintainability of—Adjudication by Collector before award, effect of—Reference, application, for, before award, effect of.*

A civil suit between rival claimants about apportionment of compensation awarded under the Land Acquisition Act is maintainable where there has been no adjudication of the dispute by the Collector, nor a reference to the District Court. [p. 487, col 1]

[Case-law reviewed.]

An application made before the award is given by the Collector cannot be treated as one for reference to Court under s 18 of the Land Acquisition Act [*ibid.*]

Under s. 9 of the Land Acquisition Act an enquiry by the Collector into the respective interests of the various persons interested in the land must be made before giving the final award and any such adjudication made after the award is without jurisdiction. [p. 485, col. 2.]

Miscellaneous appeal from an order of the District Judge, Ferozepore, dated the 22nd May 1924, remanding that of the Fourth Class, Sub-Judge, Ferozepore, dated the 8th January 1924.

Lala *Fakir Chand*, for the Appellant.

Lala *Kanshi Ram*, for the Respondent.

JUDGMENT.—Certain land was owned jointly by two brothers, Roshan Beg and Khandal Beg. The latter died leaving a widow, and the Revenue Records showed the land was owned jointly by Roshan Beg and *Musammat* Bago, the widow. Steps were then taken by Government to acquire this land under the Land Acquisition Act. On the 11th of November 1922, Roshan Beg presented an application in writing to the Land Acquisition Collector stating that *Musammat* Bago held a half share in the land as a life-tenant in lieu of maintenance and that she was not entitled to any part of the price to be paid by Government for it. He asked that the whole price should be paid to him or else half the money deposited in some Bank and the interest given to *Musammat* Bago for so long as she lived.

On the 14th of November 1922 the Collector delivered his formal award under s. 11 of the Act in which he made no mention of the dispute between Roshan Beg and *Musammat* Bago. In the award statement of the same date the Collector entered the price of this land, namely, Rs. 1,451-13-6, as apportioned equally between Roshan Beg and *Musammat* Bago, *viz.*, Rs. 725-9-9 to each. Other statements attached to the award show that Rs. 725-9-9 was paid to Roshan Beg on the 15th of November and that *Musammat* Bago's money was entered as undisbursed owing to non-attendance.

On the 15th of November, but not before, the Collector proceeded to enquire into Roshan Beg's petition of the 11th of November and on that day he recorded *Musammat* Bago's statement claiming that half of the compensation should be paid to her because she and Roshan Beg were in separate possession of definite halves of the land. The order passed by the Collector on the same day, the 15th of November was that the amount due to *Musammat* Bago was to be kept in deposit and that the record of a criminal case in which Roshan Beg's son had been sentenced to death should be sent for.

Thereafter there were various adjournments, and it was not until the 23rd of February 1923, that the application came before the Collector for final decision. By that time the six weeks within which Roshan Beg could have applied for a reference to the Court under s. 18 had expired. Counsel appeared before the Collector for both *Musammat* Bago and Roshan Beg, and apparently arguments centered round the question whether the application of the 11th of November could be taken as one for a reference to the Court under s. 18. The Collector decided that it could not, because it did not expressly ask that the matter should be referred to the Court. He might also very well have added a second reason that the application had been presented before the award had been made. The Collector wound up his order by saying "I see no reason to go beyond the entries in the revenue papers and direct that the award (*sic*) may be divided in accordance with those entries."

On the 10th of March 1923, Roshan Beg instituted the suit of which this second appeal is the result, to recover from *Musammat* Bago Rs. 725-9-9. The Trial Court held that such a suit did not lie in view of the terms of the Land Acquisition Act and certain rulings which will be discussed presently. This decision was reversed on appeal by the learned District Judge who took the view that since the Collector's award did not adjudicate upon the claim of Roshan Beg against *Musammat* Bago he was entitled to maintain a suit for recovery of the money in a Civil Court. The appeal accordingly was accepted and the suit was remanded for decision on the merits. *Musammat* Bago has come to this Court on second appeal and her claim that the Trial Court had no jurisdiction to entertain the suit is supported by a decision of the Calcutta High Court printed as *Saibesh Chandra Sarkar* v. *Bejoy Chand Mohatap* (1).

The relevant provisions of the Land Acquisition Act are as follows:—Under s. 9 the Collector is obliged to serve notice of the intended acquisition on all persons known to be interested and to call upon them to appear and state amongst other matters the nature of their respective interests in the land. Presumably in response to such notice Roshan Beg put in his written application of the 11th of November. Under s. 11 on the day fixed for enquiry the Collector is directed to proceed to enquire into various matters including the respective interests of the persons claiming the compensation and to make an award under his hand of the true area of the land, the compensation which in his opinion should be allowed for the land, and the apportionment of the said compensation among all the persons known or believed to be interested in the land, of whom, or of whose claims, he has information, whether or not they have respectively appeared before him. Section 12 then lays down that that award shall be filed in the Collector's office and shall be final and conclusive evidence, as between the Collector and the persons interested, whether they have respectively appeared before the Collector or not, of the true area and value of the land, and the apportionment of the compensation among the persons interested. Section 18 of the Act provides that any person interested who has not accepted the award may, by written application to the Collector require that the matter be referred by the Collector for the determination of the Court, and this is to be done within six weeks of the date of the award if the person was present or represented before the Collector when the award was made. Under s. 30, when the amount of compensation has been settled under s. 11, if any dispute arises as to the apportionment, the Collector may refer such dispute to the decision of the Court. Section 31 requires the Collector to tender payment of the compensation awarded by him to the persons interested, and in the second sub-section it is provided that if they do not consent to receive the payment or if there be a dispute the Col-

(1) 65 Ind. Cas. 711; 26 C. W. N. 506; (1922) A. I. R. (C.) 4.

lector must deposit the amount of the compensation in the Court to which a reference under s. 18 would be submitted. There are three provisos to this sub-section, and the third is that nothing herein contained shall affect the liability of any person, who may receive the whole or any part of any compensation awarded under this Act, to pay the same to the person lawfully entitled thereto.

It will be observed that in the present case the Collector made his award under s. 11 before enquiring into the respective interests of Roshan Beg and *Musammat* Bago, a question which was raised before him four days previously by Roshan Beg. It appears then from the law above quoted that his adjudication after enquiry dated the 23rd of February 1923 was made without jurisdiction. Neither learned Counsel before me claims that this order can be read as part of the award. It cannot be an order on an application for review or modification of the award since it was on an application presented before the award was made. Apparently, therefore, the Collector, if he was not able to pass orders upon Roshan Beg's application of the 11th of November before he made his award, should have referred the question to the Court under s. 30.

So far as the true award of the 14th of November is concerned it contained an apportionment of the compensation between *Musammat* Bago and Roshan Beg, but this apportionment was made without any enquiry into their respective interests, such as s. 11 directs the Collector to make.

Most, if not all, of the rulings on the question whether disputes about the apportionment between private persons of compensation awarded under the Land Acquisition Act can be the subject of ordinary civil suits refer to the earliest case on the subject, *Raja Nilmoni Singh* v. *Ram Bandhu Rai* (2) which is a decision by their Lordships of the Privy Council. In those days the Act in force was X of 1870 which did not empower the Collector to decide any questions of apportionment of compensation, but obliged him in s. 38, if any dispute arose as to apportionment when the amount of compensation had been settled, to refer such dispute to the decision of the Court. Section 40 of the Act contained a proviso in practically the same words as the proviso to the present s. 31 (2) quoted above. In the case before their Lordships there had been a dispute between two parties about the apportionment of the compensation. The Collector had referred it to the Court and the Court had made an adjudication. One of the parties then brought another suit to set aside that adjudication. It was held that the proviso referred to above applied only to persons whose rights had not been adjudicated upon in pursuance of ss. 38 and 39, namely, the sections requiring the Collector to refer disputes about apportionment to the Court and the Court to decide them. The judgment wound up: "Their Lordships are of opinion that the provisions in this Act for the settling of compensation are intended to be final; and that the amount and distribution of the compensation having been settled in this case by a competent Court, and the decision not having been appealed against, the settlement is final, and the present suit cannot be maintained." Earlier in the judgment when explaining the necessity for the proviso in the Act their Lordships observed: "But it may happen, and frequently does happen, that the real owners, possibly being infants or persons under disability, do not appear, and are not dealt with in the first instance; and, therefore, a provision of this sort is necessary for the purpose of enabling the parties who have a real title to obtain the compensation money."

This ruling has been considered and interpreted in three decisions of the Calcutta High Court (*i*) *Srimati Punnabati Dai* v. *Rajah Pudmanund Singh Bahadur* (3), (*ii*) *Bhandi Singh* v. *Ramadhin Rai* (4) and (*iii*) *Saibesh Chandra Sarkar* v. *Bejoy Chand Mohatap* (1) and by the Punjab Chief Court in *Sher Khan* v. *Shamsher Khan* (5) which was followed in *Amolak Shah* v. *Charan Das* (6).

Rajah Nilmoni Singh v. *Ram Bandhu Rai* (2) is a case almost exactly parallel to the present case. There the plaintiff sued to recover compensation awarded under the Land Acquisition Act against the person who actually received the money. It was ruled that she (the plaintiff was a female)

(2) 7 C. 388; 4 Shome L. R. 263; 10 C. L. R. 393; 8 I. A. 90; 4 Sar. P. C. J. 234; 5 Ind. Jur. 388; 3 Ind. Dec. (N. S.) 799 (P. C.).

(3) 7 C. W. N. 538.
(4) 10 C W. N. 991; 2 C. L. J. 359.
(5) 37 P. R. 1905; 35 P. L. R. 1905.
(6) 17 Ind. Cas. 684; 52 P. R. 1913; 16 P. W. R. 1913; 14 P. L. R. 1912 Sup.

was not precluded from maintaining the suit merely by reason of her having appeared before the Collector in the acquisition proceedings, that the award of the Collector, who under s. 11 is, no doubt, authorised to deal with the question of apportionment, is declared by s. 12 of the Act to be final only as between the Collector on the one hand and the body of claimants on the other and not as between the claimants *inter se*, that a claimant is not precluded from advancing his or her claim against another claimant by suit in the Civil Court as provided by the last proviso to s. 31 (2) of the Act, and that to hold that he or she is so precluded would be to extend the doctrine of constructive *res judicata* a great deal too far. The learned Judges considered that this view was in accordance with that taken by their Lordships of the Privy Council in *Raja Nilmoni Singh* v. *Ram Bandhu Rai* (2) and interpreted that decision in its allusions to ss. 38 and 39 of the old Act as referring strictly to an adjudication of a Civil Court upon a reference by the Collector.

The same view was adopted and expressed more elaborately by Mr. Justice Mookerji in *Bhandi Singh* v *Ramadhin Rai* (4). With reference to s. 18 he observed that there was a difference between an objection relating to the measurement of the land or the amount of the compensation and one relating to the apportionment of the compensation among persons interested and that a question of the latter character could be determined either by a reference as comtemplated by s. 18 or else by a suit at the instance of a person who might lawfully be entitled as against another. This he appointed out was a question with which the Collector would have no concern whatsoever and he held that by reason of the 3rd proviso to s. 31 (2) the Land Acquisition Judge and the ordinary Court have practically concurrent jurisdiction to decide disputes about the apportionment of compensation. What he apprehended to be the rule deducible from *Raja Nilmoni Singh* v. *Ram Bandhu Rai* (2) was that if a litigant had made his choice and availed himself of a reference to the Court under s. 18, he could not again ask for an opportunity to litigate the same matter in the ordinary Court.

Both these decisions were dissented from in *Saibesh Chandra Sarkar* v. *Bejoy Chand Mohatap* (1). So far as *Bhandi Singh* v. *Ramadhin Rai* (4) was concerned the learned Judges pointed out with truth that in the particular case before him it was unnecessary for Mr. Justice Mookerji to consider whether the Special Court under the Land Acquisition Act and the ordinary Civil Courts have or have not concurrent jurisdiction. With every deference, however, I do not think that their dissent from what was held in *Srimati Punnabati Dai* v. *Rajah Pudmanund Singh Bahadur* (3) is very convincing. The learned Judges seem to have proceeded very largely upon what they considered it would be reasonable to hold was the intention of the Legislature when providing a special remedy in the Land Acquisition Court, whereas with all respect I venture to think that they should have looked rather to the actual term of the Act than to the probable intention of the Legislature. They emphasized the second passage quoted above from *Raja Nilmoni Singh* v. *Ram Bandhu Rai* (2) commencing. "But it may happen and frequently does happen" and they held that the application of the proviso to s 31 (2) must be limited to cases where the person is under disability or is not served with notice of the proceedings before the Collector. They further expressed the opinion that the reason why their Lordships of the Judicial Committee referred to the adjudication under ss. 38 and 39 of the old Act was that the Collector was then bound to refer any question of apportionment to the Court and that question had to be decided by the Civil Court. The case before them was whether a party served with notice under s. 9 who did not appear at all in the land acquisition proceedings and did not apply for any reference under s. 18 of the Act could afterwards maintain a suit in the ordinary Civil Court to recover compensation paid to another person. They decided that he could not do so because the proviso to s. 31 (2) has a strictly limited application and because it would not be reasonable to hold that the Legislature, having provided a special remedy in the Land Acquisition Court, intended to make it optional with a party to apply for a reference or to institute a suit in the ordinary Civil Court.

Sher Khan v. *Shamsher Khan* (5) is a Division Bench ruling and the facts of the case are not stated explicitly in the judgment. It was one of contention between two claimants for the apportionment of compensation, and it was held that, since the

plaintiffs' claim had been adjudicated on by the Collector and they did not within the prescribed time avail themselves of their right to demand reference to the Court under s. 18, they had exhausted their remedy and their separate suit in Civil Court had been rightly dismissed. *Raja Nilmoni Singh* v. *Ram Bandhu Rai* (2) was cited as authority for the view that the proviso to s. 31 (2) does not permit a person, whose claim had been adjudicated upon in the manner pointed out by the Act, to have that claim re-opened and again heard in another suit.

This case and *Amolak Shah* v. *Charan Das* (6) are distinguishable from the present case since in my view there has been no lawful adjudication by the Collector between Roshan Beg and *Musammat* Bago. If no definite point for decision had been put before him in the shape of Roshan Beg's application his apportionment might have been regular; but under s. 11 he was bound to make an enquiry into any question which arose regarding the interest of the several persons entitled to compensation and he did not do so in respect of the question raised by Roshan Beg until after he had made his award.

It remains to notice a Division Bench ruling of the High Court [*Chandu Lal* v. *Ladli Begam* (7)] in which it was held that where a Collector in his award had not adjudicated upon the claim of the plaintiff the latter's suit in a Civil Court for her proportionate share in the amount of compensation allowed was competent notwithstanding that she did not apply for a reference to the Court under s. 18 of the Act. The plaintiff in that case had not appeared before the Collector at all and it is not stated whether notice had issued to her. She herself asserted that she had had no knowledge of the acquisition proceedings. The learned Judge ruled that the proviso to s. 31 (2) clearly applied to such a case, they distinguihsed *Sher Khan* v. *Shamsher Khan* (5) and *Amolak Shah* v. *Charan Das* (6) and they cited with approval *Srimati Punnabati Dai* v. *Rajah Pudmanund Singh Bahadur* (3).

This last decision is not quite so directly in point as the learned District Judge took it to be, since in the present case Roshan Beg did receive notice and appear before the Collector and he is recorded as having accepted payment of a less amount than he now claims without protest other than what is contained in his previous application of 11th November. But the judgment fortifies me in my preference for what was laid down in *Srimati Punnabati Dai* v. *Rajah Pudmanund Singh Bahadur* (3) as against *Saibesh Chandra Sarkar* v. *Bejoy Chand Mohatap* (1). With some diffidence I suggest that the learned Judge, who decided the latter case, in considering the intention of the Legislature might have reflected upon the possibility of the Legislature, when framing the proviso to s. 31 (2), having intended that the comparatively important Court of the District Judge need not in every instance be seddled with the task of deciding every question arising between private individuals about the apportionment of petty sums, and that such individuals should be permitted to take their dispute to an inferior and possibly cheaper Court. After all the words in s. 18 are "may require" and not "shall require," and the expression "any person" in the third proviso to s. 31 (2) does not, in my humble judgment, carry the restricted meaning put upon it by the learned Judge, since the rest of the sub-section which the third proviso qualifies relates definitely to persons who have actually appeared before the Collector. In the present instance let it be taken that Roshan Beg accepted without any protest payment of the amount apportioned and tendered to him by the Collector. By the second proviso to s. 31 (2) he thereby disentitled himself from making an application for a reference under s. 18; but under the third proviso nothing contained in the second proviso can affect the liability of *Musammat* Bago, another person interested, to pay to Roshan Beg any part of the compensation to which he is lawfully entitled. And by what other means than by a suit in a Civil Court could Roshan Beg, who is shut out from a remedy under s. 18, enforce that liability? The words "nothing herein contained" in the third proviso must, it seems to me, cover everything that has gone before, including the second proviso.

If Roshan Beg accepted payment under protest, then the Collector prevented him from seeking any remedy under s. 18 by retaining the petition of the 11th November for his own subsequent decision and by failing to pass orders upon it until after the time limit for an application for a reference

(7) 49 Ind. Cas. 657; 83 P. R. 1919; 18 P. W. R. 1919.

had expired. It is to be noted too that the disputed amount which was withheld from Mi... Bago was deposited in the Treasury and not in the Court under s. 31 (2). All the equities, then, are in favour of Roshan Beg being permitted to sue in an ordinary Court to establish his claim.

There is of course a conflict between the view taken in *Srimati Punnabati Dai* v. *Rajah Pudmanund Singh Bahadur* (3) and that taken in the two Punjab rulings *Sher Khan* v. *Shamsher Khan* (5) and *Amolak Shah* v. *Charan Das* (6). The former is that the jurisdiction of the ordinary Civil Courts is ousted only when the claim of the aggrieved party has already been before the District Court on a reference under s. 18 or s. 30 of the Land Acquisition Act. The latter refuses such party any relief in a Civil Court if his claim has been adjudicated upon by the Collector and there has been no reference to the District Court. This divergence requires no examination in the present case, because for the reason above stated I do not consider that the Collector's award of the 14th November was an adjudication of Roshan Beg's claim.

I hold that the decision of the learned District Judge was correct and I dismiss the appeal with costs.

N. H. *Appeal dismissed.*

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL No. 115 OF 1924.

January 12, 1925.

Present:—Mr. Justice Pratt.

MA TOK AND OTHERS—APPELLANTS

versus

MA YIN AND OHTERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata *between co-defendants, conditions of—Limitation Act (IX of 1908), Sch. I, Art. 123—Suit by heir to recover share of estate of deceased from co-heirs—Limitation applicable.*

In order that a decision should operate as *res judicata* between co-defendants there must have been a conflict of interest between the co-defendants, and it should have been necessary to decide on that conflict in order to give the plaintiff relief appropriate to his suit and the judgment must contain a decision of the question raised as between the co-defendants defining the rights and obligations of the defendants *inter se.* [p. 490, col 1.]

There is no reason why a different aspect should be given to a claim for a distributive share of the estate of a deceased person against an administrator, who should have distributed the estate and given a share to the plaintiff but failed to do so, from the aspect of a similar claim against one or more heirs of a deceased person who should have amicably agreed to a partition of the estate and given a share to the plaintiff but have failed to do so. Such a suit is governed by Art. 123 of Sch. I to the Limitation Act. [p. 490, col. 2]

JUDGMENT.—Plaintiffs as surviving descendants of Ma Min Sin and Ma Kin, daughters of Po Kyu, deceased, sued Ma Tok and other representatives of Ko Hmu, a son of Po Kyu, the son of Ma Kin and others, for possession of half the estate of Po Kyu on payment of Rs. 750 being half the charges incurred by Ma Tok on litigation for recovery of the estate.

Plaintiffs' case was that Ma Tok held the lands on behalf of the co-heirs subject to discharge of the lien, which she possesses by reason of the expenses incurred by her on litigation in connection with the estate.

In a previous suit Po Ka sued Ma Tok and other representatives of Ko Hmu for one-fourth share of the estate of Po Kyu and obtained a decree. The suit went up to the Court of the Judicial Commissioner, who held that Ma Tok had admitted Po Ka's interest in the suit lands, and that Po Ka had proved that the lands belonged to the estate of Po Kyu, which remained undivided in the hands of Ko Hmu and his widow Ma Tok, and that consequently Po Ka was entitled to one-fourth of the estate on payment of one-fourth of the charges incurred by Ma Tok in connection therewith.

In the previous suit the present plaintiffs were co-defendants with Ma Tok. The Trial Court has found that the lands in suit were not part of the estate of Po Kyu; but on appeal the District Court has held that the finding of the Judicial Commissioner that the lands were ancestral property is binding in the present suit and that the subject-matter of it is, therefore, *res judicata.*

No doubt a finding in a previous suit may under certain circumstances be binding as between the defendants, but it is only with very strict reservations.

In *Nga Thet Tha* v. *Mi Kye Gyi* (1), it was laid down that where an adjudication between the defendants is necessary to give an appropriate relief to plaintiffs, there must be such an adjudication, and in such a case adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants; but for this effect to arise there must be a conflict of

(1) U. B. R. (1907-09), C. P. C., 5.

interest between the defendants *inter se*. I have studied the judgment of the learned Judicial Commissioner in Civil Appeal No. 404 of 1915 and it is quite clear to my mind that there was no adjudication as between Ma Tok and the plaintiffs in the present case.

The learned Judge distinctly used the expression that as against Ma Tok and her children, Po Ka was entitled to one-fourth. He nowhere came to an express finding that the present plaintiffs were entitled to a share as against Ma Tok.

The limits within which an adjudication can be *res judicata* as between co-defendants were clearly laid down by a Bench of the Calcutta High Court in *Jadav Chandra Sarkar* v. *Kailash Chandra Singh* (2). Three necessary conditions were there prescribed: (1) that there should be a conflict of interest between the co-defendants; (2) that it should be necessary to decide on that conflict in order to give the plaintiff relief appropriate to his suit; and (3) that the judgment should contain a decision of the question raised as between the co-defendants.

In the earlier Bombay case of *Ramchandra Narayan* v. *Narayan Mahadev* (3), it was held *inter alia* that there must be a judgment defining the rights and obligations of the defendants *inter se*. This ruling was followed by a Bench of the High Court at Lahore in *Mehra* v. *Devi Ditta Mal* (4), and it was pointed out that without necessity a judgment will not be *res judicata* as between defendants.

A similar view was taken by a Bench of the Bombay High Court in *Ganpatrao Balkrishn* v. *Vasudeo Dattatrya* (5)

I have no doubt that the law on the subject is correctly laid down in the judgments cited and that the conditions necessary to make the subject-matter of the present suit *res judicata* have not been fulfilled.

It may be a legitimate inference from the judgment of the Judicial Commissioner in the suit between Po Ka, the plaintiffs in the suit now under appeal and the defendant Ma Tok, that the property in suit is ancestral property and that the present plaintiffs have a right to a half share as against Ma Tok, but as I have already pointed out, there has been no express adjudication to this effect as between the co-defendants in that suit.

I am unable, therefore, to accept the view of the learned District Judge that the subject-matter of the present suit is *res judicata*.

Ma Tok obtained possession of the disputed property as the result of litigation about 1892.

How long before that Po Kyu died is not clear. It is to my mind incontestable that suit by co-heirs for a share against her has been long barred under Art. 123 of the First Schedule to the Limitation Act.

I entirely agree with the observation of Lentaigne, J., in *Maung Po Kin* v. *Maung Shew Bya* (6) (at page 415*), that there is no reason why a different aspect should be given to a claim for a distributive share against an administrator, who should have distributed the estate and given a share but failed to do so, from the aspect of a similar claim against one or more heirs who should have amicably agreed to partition of the estate and given a share but failed to do so.

The appropriate Article for suits against co-heirs for a share in the corpus of an inheritance is 123. I have little doubt that, had the applicability of Art. 123 been urged before the Judicial Commissioner, the result of Po Ka's suit would have been different.

Assuming that when Ma Tok obtained the estate by litigation, she was willing to give the heirs their legal shares on receipt from them of a proportionate share of the expenses incurred by her, and that she was legally bound to do so, yet there must be a limit to her willingness and to her obligation.

She cannot be expected to hold the estate for ever at the will and pleasure of the other heirs or their representatives.

The right to pay off a portion of her lien and obtain a share must be exercised within a reasonable time.

I am not prepared to hold that there was joint possession or that Ma Tok was merely a trustee for the plaintiffs. The learned Judicial Commissioner attached more importance to the admission of Ma Tok before the Settlement Officer in 1912 that Mi

(2) 34 Ind. Cas. 929; 25 C. L. J. 322; 21 C. W. N. 693.
(3) 11 B. 216; 11 Ind. Jur. 301; 6 Ind. Dec. (N. S.) 142.
(4) 62 Ind. Cas. 615; 2 L. 88; 3 L. L. J. 223.
(5) 73 Ind. Cas. 912; 47 B. 534; 25 Bom. L. R. 268; (1923) A. I. R. (B.) 203.
(6) 76 Ind. Cas. 855; 1 R. 405; (1924) A. I. R. (R.) 155
*Page of 1 R.—[*Ed.*]

Yin, first plaintiff, is interested in the estate than I am prepared to give. It cannot be treated as an unqualified admission that plaintiffs had a subsisting right to a share in the estate. Ma Tok may have said that Ma Yin had an interest, but she did not know the law of limitation, and her statement cannot be construed as an admission that Ma Yin still had a legal title enforceable in Court.

It seems to me it would be iniquitous after Ma Tok had peaceable possession of the estate for thirty years, having recovered it by litigation at her own expense, to allow other heirs to step in now and obtain a share, when they have slept on their rights for so long.

If their rights were conceded, no holder of ancestral estate which he had recovered or redeemed, would be safe so long as co-heirs, or their legal representatives survived, nor would his successors apparently until there has been an overt act rendering the possession adverse to the co-heirs.

The doctrine that an heir, who redeems or recovers ancestral estate with the consent, express or implied of the co-heirs holds on their behalf can be pressed too far.

In the present suit, however, plaintiffs have been held by both the Courts below to have failed to prove their claim on the merits. As I have held that the subject-matter of the suit is not *res judicata* the appeal must, therefore, succeed apart from the question of limitation.

I set aside the finding and decree of the District Court and restore the decree of the Sub-Divisional Court with costs throughout.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

APPEALS NOS. 144 AND 145 OF 1922 AND 3 OF 1923.

August 25, 1925.

Present:—Mr. Justice Phillips and Mr. Justice Ramesam.

ASANALLI NAGOOR MEERA AND OTHERS—PLAINTIFF AND HIS LEGAL REPRESENTATIVES—APPELLANTS

versus

K. M. MAHADU MEERA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 13—Foreign judgment—Submission to jurisdiction of foreign Court—Power-of-attorney to appear, whether amounts to submission—Person invoking jurisdiction of Foreign Court as plaintiff — Subsequent denial of jurisdiction—Estoppel—Ex parte *foreign decree, whether decision on merits*

The execution by a person of a power-of-attorney authorising his agent to appear and conduct for him litigation in a Foreign Court amounts to submission to the jurisdiction of such Court. [p. 491, col 2.]

Ramanathan Chettyar v. *Kalimuthu Pillay*, 18 Ind. Cas. 189; 37 M. 163, 24 M L. J. 619 and *Janothassain* v. *Mahamad Ohuthu*, 82 Ind. Cas. 424; 47 M. 877; 47 M. L. J. 356; 20 L. W. 677; (1925) A. I. R. (M.) 155, relied on.

A person who as plaintiff invokes the jurisdiction of a Foreign Court cannot afterwards be allowed to deny the jurisdiction of such Court as a defendant. [p. 492, col. 1.]

S. A No 1492 of 1920, followed.

An *ex parte* decree obtained in Foreign Court must be deemed to be a decree passed upon the merits when there has been no [illegible] defendant [*ibid*]

Janoothassan v [illegible] 82 Ind Cas. 425; 47 M. 877, 47 M L. J. 356; 20 L W. 677; (1925) A. I. R. (M) 155, followed.

Appeal against the decrees of the Court of the Subordinate Judge, Tuticorin, in Original Suits Nos 4, 3 and 5 of 1920.

Messrs. *A. Krishnaswamy Iyer* and *V. Narayana Iyer*, for the Appellants.

Mr. *K. Narasimha Iyer*, for the Respondents.

JUDGMENT.—These are appeals in suits filed on judgments obtained in the Colombo Court against a partnership whose members were the defendants or their predecessors-in-interest. The lower Court has found that the partnership did not submit to the jurisdiction of the Colombo Court, but as against some of the defendants there was jurisdiction because they individually submitted to that jurisdiction. It has been held in *Ramanathan Chettyar* v. *Kalimuthu Pillay* (1) and also in *Janoothassan* v. *Mahamad Ohuthu* (2), that the execution of the power-of-attorney authorising an agent to conduct litigation in a Foreign Court is a submission to jurisdiction. In the present case, it is clear from the deed of partnership and from the power of attorney by one of the managing partners Exs. H and J that the holder of the power was authorised to file suits, to defend suits and to carry on all manner of proceedings in the Courts in Ceylon. It is suggested for the respondents that these documents were not in force at the time these suits were filed, because the partnership has been dissolved. The only evidence we have on this point is the statement of the plaintiff that he thinks

(1) 18 Ind. Cas. 189; 37 M. 163; 24 M. L. J. 619.
(2) 82 Ind. Cas. 425; 47 M. 877; 47 M. L. J. 356; 20 L. W. 677; (1925) A. I. R. (M.) 155.

that the partnership was dissolved at about the time of the riots and the statement of the 2nd defendant that the business of the firm ended in 1914, but the 2nd defendant adds, "I did not authorise my partners there to contest the suits in Ceylon", thus implying that there was a parnership existing. On this evidence it is quite impossible to come to the conclusion that the partnership had been dissolved at the date on which the suits were filed. The mere fact that the partners ran away to India on account of the riots in Ceylon does not, as the Subordinate Judge remarks, terminate the partnership and in the absence of any other evidence that the partnership was terminated, we must hold that this deed of partnership and the power-of-attorney were in full force on the date of the suits. There is also an additional circumstance which would possibly give the Ceylon Court jurisdiction and that is the fact that the defendants firm actually filed suit in the Ceylon Court and having come in as plaintiffs can hardly be allowed as defendants to deny the jurisdiction which they themselves invoked and in this connection I would refer to a judgment in Second Appeal No. 1492 of 1920 (not reported). The question whether the plaintiff obtained an assignment of the decrees *benami* for the defendants firm was raised and contested in the Ceylon Court and consequently that finding is now conclusive under s. 13 of the C. P. C.

The respondents raised a further point that in a case in which there was no appearance, the decision cannot be said to have been upon the merits but this question has been fully discussed in *Janoothassan* v. *Mahamad Ohuthu* (2), to which one of us was a party and we are prepared to follow that decision again.

In the result the appeals must be allowed and there will be a decree in each case for the plaintiff as sued for with costs throughout.

V. N. V. *Appeals allowed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 118 OF 1925.

December 2, 1925.

Present :—Mr. Justice Mukerji.

GOKUL DAS AND OTHERS—PLAINTIFFS—APPLICANTS

versus

NATHU—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 20 (c)—*Suit to recover loan—Place of suing.*

In the absence of a contract to the contrary it is the duty of the borrower to seek out the lender for payment. In such a case the money is payable at the place where the lender resides or carries on business and a suit for the recovery of the money may, therefore, be brought at such place. [p. 493, col. 1.]

Civil revision from an order of the Judge Small Cause Court, Moradabad, dated the 8th May 1925.

Dr. *K. N. Katju*, for the Applicant.

JUDGMENT.—These two applications in revision may be disposed of by the same judgment as the facts are very similar.

The applicants who are plaintiffs in two different suits are money-lenders by profession and their practice of money-lending is something like this. They send *munims* or trusted servants of theirs with money to villages in different districts with instructions to lend money to people who might stand in need of borrowing. It is alleged that the defendants in these two cases borrowed money from the plaintiffs' agents, in one case in the District of Bareilly and in the other in the District of Shahjahanpur. The plaintiffs are residents of the District of Moradabad. The debtors did not pay and thereupon they brought the two suits for recovery of the money at Moradabad.

The defendants did not appear. The plaintiffs' agents who had lent the money in each case went into the witness-box and swore that there was an express agreement by the debtors that they would re-pay the loans at Moradabad. The agents further produced memoranda made in the account books of the plaintiffs to the effect that the borrowers had agreed to re-pay the money at Moradabad.

The learned Judge of the Small Cause Court disbelieved the evidence given to the effect that there was an express agreement to re-pay the money at Moradabad. The evidence was trustworthy and should have been accepted. He was of opinion that it was not likely to have been the case that the borrowers would come to Moradabad to make payment Evidently the learned Judge thought that the borrowers

had agreed to pay at their own homes where the loans were advanced.

Assuming that the evidence that the defendants had agreed to pay at Moradabad was untrustworthy, we have to rely on presumptions of law alone. For there is no evidence to show that the borrowers and the lenders had agreed that re-payment would be made only at the borrowers' place. The presumption of law was pointed out in the cases quoted by the learned Judge of the Small Cause Court himself, and it is this that in the absence of a contract to the contrary the borrower ought to seek out the lender for payment. The learned Judge was, therefore, not justified in ignoring the rulings of this Court. They were really not quite distinguishable specially the case reported as *Bangali Mal* v. *Firm Ganga Ram-Ashrafi Mal* (1).

I allow the applications in revision, set aside the decrees of the Court below and decree the plaintiffs' claim in each case against the defendants with costs and interests at 6 per cent. per annum from the date of the institution of the suit till recovery.

Z. K. *Applications allowed.*

(1) 71 Ind. Cas. 431; (1923) A. I. R. (A.) 465.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 126 OF 1925.

July 13, 1925.

Present:—Mr. Tyabji, A. J. C.

KALA GELLA AND OTHERS—PLAINTIFFS

versus

SHIVJI SON OF HAMIR AND OTHERS—DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 7—Proceedings, ex parte, *against defendant—Application to appear in suit, whether necessary—Procedure.*

Under the provisions of O. IX, C. P. C., if a defendant does not appear and so long as he is absent, the proceedings must necessarily be *ex parte* and under r. 6 of that Order, the Court is empowered to proceed notwithstanding that the defendant may be absent. Should, however, the defendant appear in the middle of the proceedings, by the very fact that he is present, the proceedings cease *thenceforth* to be *ex parte* and no application by him is necessary for being permitted to appear, but if on a late appearance he wishes to be placed in the same position as if he had appeared at the proper time, he should under r. 7 of the Order apply for permission to that effect. [p. 495, col. 2; p. 496, col. 1.]

Satyendra Nath Sen v. *Narendra Nath Gupta*, 81 Ind. Cas. 867; 39 C. L. J. 279; (1924) A. I. R. (C) 806, *Mannu* v *Tulshi*, 64 Ind. Cas. 958; 20 A L J. 39; (1922) A. I R. (A) 33 and *Bhagwat Prasad Tewari* v. *Muhammad Shibli*, 66 Ind. Cas 892; 20 A. L. J. 270; (1922) A. I. R. (A) 110, relied upon.

Newton v. *Kurneedhone*, 9 B. L. R. App 15, referred to.

Syud Mahomed Hossein v. *Shaikh Montogul Haq*, 18 W. R. 400, distinguished.

Mr. *Khanchand Gopaldas*, for the Plaintiff.

Mr. *Dhanjishah C. Agha*, for Defendant No. 3.

ORDER.—By an application dated 24th June 1925 the third defendant prays that this Court should "vacate the *ex parte* order passed against him and allow him to appear and defend the suit under O. IX, r. 7 and s. 151 of the C. P. C."

It was explained to me that the order that is sought to be set aside is an order of 11th May 1925, which I shall set out below, and which was passed in circumstances of which the record contains the following note made by the second Registrar on the 6th of May 1925:

"Service deemed good against defendant No. 3. Defendant called absent, call up for *ex parte* orders against defendant No. 3 on 11th May 1925."

The matter was accordingly brought up in Court on the 11th of May 1925 and what occurred is recorded in the following terms:

"Defendant No. 3 called absent *ex parte*."

I was inclined to consider this last note as a mere statement of fact, that the defendant, being called, did not appear, and that, therefore, the proceedings at that time and during his absence, were *ex parte*: the only proceedings that I understand took place on the 11th of May being that the defendant was called, and that on his not appearing this uncontroverted fact was recorded It was argued, however, that an order was made on the 11th of May whereby it was intended to inflict a sort of *diminutio capitis or stigma* on the third defendant who was thenceforth to be considered "*ex parte*." (The expression is not mine. I am unable to understand how a party can be *ex parte*. Proceedings of course may be *ex parte* if only one side appears). However, it be, it was argued that, owing to this order, the third defendant was under a disability from appearing in the suit instituted against him and that, if he did appear, the Court would be un-

able to consider him as otherwise than absent unless the order of the 11th of May was vacated on some such application as the present. The Court, it was said, was empowered to make such an order having such effect under O. IX, r. 7; and that the deleterious effects of the order affected not only the third defendant who was primarily subjected to it, but it affected the Court who could not hear what the third defendant may have to say unless it first held that he showed some sufficient cause for not having appeared on the previous occasion, presumably on the 11th of May.

The relevant provisions of the law are contained in the C. P. C., O. IX. The order begins by providing under r. 1 for the attendance of the parties on the day fixed in the summons for the defendant to appear and answer; and lays down (after containing some other rules not now relevant), that "where the plaintiff appears and the defendant does not appear when the case is called on for hearing, then, if it is proved that the summons was duly served, the Court may proceed *ex parte*." I will pause here to point out that it is under this rule that the Court is empowered in the first instance to proceed at all in the absence of one side, and on the appearance of the other side alone. Though the desirability, I might say, the necessity, of the Court having such powers to proceed *ex parte* is obvious, yet unless some such power were expressly given, it may well be argued that the Court would not have inherent powers to proceed *ex parte*, and that the existence of r. 6 of O. IX supports this contention.

The argument, however, before me is that the Court is not only empowered to proceed when the defendant is actually not in Court but to order that the proceedings shall thenceforth be *ex parte*. This contention is opposed to a fundamental principle on which our Courts purport to proceed that no man is to be judged without an opportunity being given to him of being heard. Thus even where bodies like castes and clubs have autonomous constitutions as regards their internal affairs and the Courts do not ordinarily interfere with their decisions in such matters yet if it is found, *e. g.*, that a member of a caste or a club is expelled without being given an opportunity of answering the allegations against him the Courts interfere on the ground that the proceedings are opposed to natural justice. But nothwithstanding this fundamental principle the contention was supported before me by elaborate and I may say at once, very able arguments with which I shall proceed to deal. As a preliminary I may remark that (though the argument was not so expressed before me), I have a shrewd suspicion that no small basis of the argument was that since the Legislature has used the foreign expression '*ex parte*' instead of saying "while only one party is present" or "notwithstanding that one of the parties is absent," therefore, the expression must have peculiar, perhaps I may say, magical effect.

The argument proceeds to the following effect, that under r. 6 (1) the Court may once for all decide that the hearing will in future be *ex parte* and that having done so, it may safely adjourn the hearing to another day. Then (it is argued) the hearing continues to be *ex parte*, notwithstanding that the defendant may thereafter appear: and in support of this proposition r. 7 is cited. That rule is in the following terms :—

"Where the Court has adjourned the hearing of the suit *ex parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance."

Under this provision, it is argued, that the defendant having failed to appear at one stage of the hearing, cannot be permitted to appear, or be heard, at another stage without assigning good cause for his previous non-appearance. But this argument entirely overlooks the gist of r. 7, which is indicated by the last line of the rule : the object of this rule is that if sufficient cause is shown for non-appearance the defendant may upon terms, be placed in the same position, retrospectively as if he had appeared at the earlier stage. This interpretation of r. 7 may not strike one immediately on a reading of it by itself but it seems to me that no doubt can be left as to this being its import when it is read in connection with the rest of the relevant rules, *viz*, rr. 6, 7, 11 and 13. It is obvious that if there are several defendants and one or more of whom appear and the others do not appear, r. 11 provides for the case : and then the Court

shall proceed and make its order with respect to the defendants who have not appeared only at the time of pronouncing judgment. The magical power of "making the defendant *ex parte*" (the expression I have put in inverted seems actually to be current in some quarters) these magical powers are evidently denied to the Court where there being more defendants than one any one of them appears. Numbers apparently prevail even against magic.

But further under r. 13 where the whole suit has been heard *ex parte* the defendant not having appeared at all the defendant may still appear and if the Court is satisfied that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court is directed to set aside the decree against him upon terms.

So that the argument in favour of the "*ex parte* order" theory must in the first instance admit its inefficacy where there are several defendants and any one appears and what is more important, must proceed to this length that under it a defendant who appears, say an hour after the so-called *ex parte* order has been made, must be placed in a worse position than a defendant who does not appear at all and who permits the Court to proceed with the whole suit and to pass an *ex parte* decree. For in the former case the defendant can in no way be placed in regard to the hour during which he was absent in such a position as if he had been present from the start, whereas a defendant who does not appear at all can come under r. 13 and have the whole hearing over again.

It was then suggested that O. VIII, r. 10 and O. XVI, r. 20 give power to the Court straight away to pronounce judgment again a party who fails to present a written statement, or to give evidence or produce a document in his possession: and that, therefore, a defendant who had failed to appear altogether may have the comparatively minor penalty inflicted on him of having the suit heard without being permitted to appear. But the rules referred to, have application only in the cases specified, which, it is obvious are cases of contumelious disregard of the Court's orders in matters within the defendant's power. They have no analogy to the present discussion.

These rules and provisions seem so simple that I feel as though I were merely labouring the obvious; and I cannot help being surprised at the ability and persistence (I mean to annex no offensive implication) with which a different view was pressed before me.

Reliance was placed on the rules of the Supreme Court of England, O. XII, r. 22; O. XIII, rr. 6 and 10; O. XXVII, rr. 5, 13 to show that the practice in England also allowed of proceedings being ordered to be *ex parte*. I am not sufficiently familiar with English procedure to make any use of this argument: but so far as I am able to judge the English practice is so different from that of India that no advantage is gained by comparing the two sets of rules.

Several authorities were cited to me and I shall deal with them shortly: *Syued Mahomed Hoosein* v. *Shaikh Montogul Huq* (1) was decided under the Code of 1859 in which the corresponding provision ended with the words that "the defendant may be heard in answer to the suit" whereas the addition of the final words of O. IX, r. 7 *viz.*, "as if he had appeared on the day fixed for his appearance," which were added in the Code of 1882 and retained in 1908 is very significant. These words and the context make the meaning perfectly clear. Even under the Code of 1859 a different view was taken in *Newton* v. *Kurneedhone* (2).

On the other hand there are three clear decisions which favour the view that I have taken *Satyendia Nath Sen* v. *Narendra Nath Gupta* (3) a judgment of Sir Asutosh Mookerji's; *Manu* v. *Tulshi* (4) *Bhagwat Prasad Tewari* v. *Muhammad Shibli* (5) in both these decisions Sir Pramade Charan Bannerji participated. The decision in *Bhagwat Pershad* v. *Mahomed Shilbi* (5) seems to be directly in point.

As I have explained above, the provisions of O. IX contain none of the absurdities that the plaintiff desires me to introduce in them. They are quite plain and clear: if the defendant does not appear, and so long as he is absent, the proceedings must necessarily be *ex parte;* and r. 6 empowers the Court to proceed, notwithstanding that he may be absent. Should the defendant ap-

(1) 18 W. R. 400.
(2) 9 B. L. R. App. 15,
(3) 81 Ind. Cas. 867; 39 C. L. J. 279; (1924) A. I. R. (C.) 806.
(4) 64 Ind. Cas. 958; 20 A. L. J. 39; (1922) A. I. R. (A.) 33.
(5) 66 Ind. Cas. 892; 20 A. L. J. 270; (1922) A. I. R. (A.) 110.

pear in the middle of the proceedings by the very fact that he is present, the proceedings cease thenceforth, to be *ex parte*; and the rules do not provide for any magic by which the defendant who has appeared should be made to disappear, but what r. 7 does provide is, that on a late appearance he may on terms be placed in the same position as if he had appeared at the proper time, *e. g.*, in regard to right to cross-examine a witness who may have been examined in his absence. Finally, r. 13 provides for the case where the defendant has failed to appear throughout even in that case the defendant may be placed in the same position as if he had appeared, *viz.*, the decree itself may be set aside and the whole proceeding commenced *de novo*.

For the reasons, that I have given, I am of opinion that there is no order against the third defendant which I can vacate. The application will, therefore, be dismissed.

The plaintiff asks that the application should be dismissed with costs. But it is evident to me that there has been some misunderstanding of the procedure, for which the applicant is not responsible. It was the plaintiff who supported the procedure which I hold to be misconceived. There will, therefore, be no order as to costs.

P. B. A.

Order accordingly.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 132 OF 1925.

December 3, 1925.

Present:—Mr. Justice Daniels.

ABDUL MAJID—DEFENDANT—APPLICANT

versus

WAHIDULLAH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O IX, rr. 8, 9—Dismissal for default—Restoration, application for, rejection of—Appeal—Appellate Court, power of, to decree suit to extent of admission—Decree on admission of claim, effect of.

On an appeal from an order refusing to restore a suit dismissed in default, the Appellate Court cannot make an order which the original Court could not legally have made. If the Appellate Court agrees with the Trial Court it must dismiss the appeal. If it differs from the Trial Court it should order the case to be restored either on terms or unconditionally. It has no jurisdiction to pass a decree in favour of the plaintiff. [p 496, col. 2.]

For the purpose of O. IX, r. 8, C. P. C., it is the net amount for which the defendant admits liability after deducting all payments alleged by him which has to be taken into account. [*ibid.*]

Civil revision against an order of the Third Additional Subordinate Judge, Aligarh, dated the 29th August 1925.

Mr. *M. A. Aziz*, for the Applicant.

JUDGMENT.—The plaintiff filed a suit against the defendant which was dismissed under O. IX, r. 8, as on the date of hearing the defendant was present but the plaintiff was absent. An application was made under O. IX, r. 9 to restore the case but was rejected. Against that order the plaintiff appealed to the District Judge. Both the original and the Appellate Court found that there was no sufficient cause for the plaintiff's absence on the date of hearing and that no case was made out for restoration. The learned Subordinate Judge who heard the appeal found, however, that the defendant in his pleadings had admitted the claim to the extent of Rs. 288. He, therefore, on the appeal before him passed a decree in favour of the plaintiff to the extent of Rs. 288.

The defendant in revision urges that the Appellate Court had no power to pass a decree in favour of the plaintiff on an appeal from an order refusing to restore the suit. This plea is correct and must prevail. The powers of a Court to which an application for restoration is made are stated in O. IX, r. 9. The Court may either dismiss the application if it finds that there was no sufficient cause for the plaintiff's non-appearance, or it may allow the application and restore the suit on such terms as it sees fit. On an appeal from an order refusing to restore the suit the Appellate Court cannot make an order which the original Court could not legally have made. If the Appellate Court agrees with the Trial Court it will dismiss the appeal. If it differs from the Trial Court it will order the case to be restored either on terms or unconditionally. The plaintiff's remedy if he considered that his suit had been wrongly dismissed to the extent of Rs. 288 was to file an appeal against the decree dismissing his suit and such an appeal is permitted by s. 96 of the Code. As a matter of fact the Court below is wrong even in saying that the defendant admitted the claim to the extent of Rs. 288. The defendant pleaded payment to the extent of Rs. 110 and admitted a balance of Rs. 178 only. For the purpose of O. IX, r. 8, it is the net amount for which the defendant admits liability after deducting all payments alleged by him which has to be taken into account.

The Court below has acted without jurisdiction in decreeing the plaintiff's claim to the extent of Rs. 288. I set aside its order and restore the order of the Munsif. The applicant will get his costs both in this Court and in the Court below.

Z. K. *Order set aside.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 46 OF 1925.

April 20, 1925.

Present:—Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.

THE OFFICIAL RECEIVER, TANJORE —PETITIONER—APPELLANT

versus

R. M. NAGARATNA MUDALIAR—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XX, r 11, cl. (2), O. XXXIV, r. 14—Security bond by judgment-debtor—Security, enforceability of, in execution—Hindu father, decree against—Sons of judgment-debtor also joining as parties to security bond, effect of—Provincial Insolvency Act (V of 1920), s 152—Money-decree-holder obtaining security in execution proceedings, whether secured creditor

Immoveable properties given by a judgment-debtor as security pursuant to an order made under O XX, r. 11, cl. 2, C. P. C, can be realised by the decree-holder in execution, unless there is anything in the security bond or the order of Court which precludes the security from being enforced in execution. [p. 499, col. 2; p 500, col. 1.]

Where the parties intended that the properties covered by the security bond should be realised in execution, the decree-holder is not bound to resort to a separate suit for the purpose [*ibid.*]

The provisions of O. XXXIV, r 14, C. P. C., are inapplicable to such a case and do not operate as a bar to the enforcement of the security bond in execution. [p. 498, col. 1]

Subramania Chettiar v. *Raja of Ramnad*, 43 Ind. Cas. 187; 41 M 327; 6 L. W. 762; (1917) M. W. N 872; 34 M. L. J. 84 and *Jyoti Prakash Nandi* v. *Mukti Prakash Nandi*, 81 Ind. Cas. 734; 51 C. 150; (1924) A. I. R. (C.) 485, relied on.

It would make no difference in the above case if a Hindu father alone is the judgment-debtor but the security bond is executed by the father and his undivided sons, as the latter could question the debt only if it were tainted with illegality or immorality. [p. 501, col. 1.]

The words "claim arising under the mortgage" have been substituted in O. XXXIV, r. 14, C. P. C., for the words "any claim whether arising under the mortgage or not" in the repealed s. 99 of the Transfer of Property Act. The effect of the alteration is to confine the prohibition against bringing the mortgaged property for sale, except by bringing a suit, to cases where a mortgagee has obtained a personal decree against the mortgagor on the mortgage-debt. The mortgage or charge mentioned in O. XXXIV, r. 14 must be a mortgage or charge existing prior to the decree and not created by the decree or one created by the act of parties subsequent to the decree [p 499, col. 1.]

Sowbagia Ammal v. *Manika Mudali*, 12 Ind Cas. 975, 33 M. 601; 22 M. L. T. 386; (1917) M. W. N. 782, 6 L. W. 701, and *Indramani Dasi* v. *Surendra*, 64 Ind. Cas. 852; 35 C. L. J. 61, (1922) A. I. R. (C) 35, relied on.

The exemption from the operation of s 52, Provincial Insolvency Act, given to secured creditors must be extended to money-decree-holders who have obtained securities in the course of execution who must also be treated as secured creditors for purposes of the section. [p. 501, col. 1.]

Appeal against an order of the District Court, East Tanjore at Negapatam, dated the 30th January 1925, in I. A. No. 50 of 1925, in I. P. No. 20 of 1924.

Messrs. *T. M. Krishnaswami Iyer* and *S. Panchapagesa Sastry*, for the Appellant.

Messrs. *S. Varadachariar* and *A. Ganesa Iyer*, for the Respondent.

JUDGMENT.

Venkatasubba Rao.—I shall briefly state the facts that have given rise to this appeal. Execution was taken out of a money-decree and the judgment-debtor agreed to pay the decree-holder interest at an enhanced rate and executed in his favour a security bond in respect of certain immoveable properties. As a result of this, an order was made postponing execution under O. XX, r. 11, C. P. C. The judgment-debtor was subsequently adjudicated an insolvent and on the decree-holder seeking to attach the properties secured and bring them to sale, the Official Receiver applied to the Insolvency Court for an order to stay the sale directed by the Executing Court. The application was refused by the District Judge of East Tenjore and this appeal has been filed questioning the correctness of his order.

Mr. Varadachariar, the learned Vakil for the decree-holder, objected that apart from the merits of the case the Insolvency Court would have no power to make an order binding upon the Court executing the decree. As on hearing full arguments on the other contentions raised we intimated that we were against the appellant, Mr. Varadachariar did not have to argue the point relating to the power of the Insolvency Court. I shall, therefore, proceed to deal with the case as if the objection to the property being sold had been raised before the Executing Court itself.

Mr. T. M. Krishnaswami Iyer the learned Vakil for the appellant advanced two main contentions:—

(1) A security of this kind cannot be enforced in execution, as to do so will contravene the terms of O. XXXIV, r. 14, C. P. C.

(2) That under s 52 of the Provincial Insolvency Act (V of 1920) the Executing Court on being informed that the judgment-debtor has become an insolvent is bound to stay the sale and direct the property to be handed to the Receiver in Insolvency.

I shall deal with these contentions in the order in which I have stated them.

The first contention is based on the terms of O. XXXIV r. 14, C. P. C. It runs, thus:—

"Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage .....". Every essential is wanting in this case. The section contemplates a mortgage and a decree. Under the section there must be first a mortgage and then a decree in respect of a claim arising under the mortgage. The position here is reversed. Long previous to the mortgage there was a decree and it was impossible that the decree could be in respect of a claim arising under a mortgage which was non-existent. The section, therefore, does not in terms apply.

Where the charge is created by the decree itself, O. XXXIV, r. 14 can have no application. See *Sawbajia Ammal* v. *Manika Mudali* (1) and *Indramani Dasi* v. *Surendra Nath Mondal* (2).

Where the security comes into existence subsequent to the decree, the principle applies *a fortiori* and O. XXXIV, r. 14, cannot be a bar.

In this connection I may notice two sets of cases to which reference has heen made at the bar:—

First, cases under s. 145, where in execution, security was sought to be enforced against a surety.

Second, cases under certain other sections of the Code where the judgment-debtor was the party against whom security was attempted to be enforced.

Let me first deal with cases under s. 145. In *Mukta Prasad* v. *Mahadeo Prasad* (3) the property of the surety was allowed to be sold in execution. The ground of the decision was that he rendered himself personally liable and his personal liability could be enforced by the very property given as security being attached and sold. In *Amir* v. *Mahadeo Prasad* (4) it was held that although the surety had made himself personally liable, the charge against the property could be enforced only by means of a regular suit. I may point out that though *Mukta Prasad* v. *Mahadeo Prasad* (3) was in this case distinguished, the ground of the distinction is wrong as what was attempted to be sold was not merely the judgment-debtor's equity of redemption. In *Chandrabati* v. *Babu Ram* (5) the bond created a personal liability but it was held that the property given as security could not be sold in execution although the personal liability of the surety could be otherwise enforced. In *Brojendra Lala Dass* v. *Lakshmi Narain Khanna* (6) s. 145 was held inapplicable as the surety had not undertaken any personal liability and the propeties were not allowed to be sold in execution. In *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (7) their Lordships of the Judicial Committee observe that if the surety has not rendered himself personally liable, s. 145 has no application; but when there is a personal liability undertaken the question is left open.

An examination of most of these cases will show that what is mainly said to be in the way of the security being enforced, is the repealed s. 99 of the Transfer of Property Act or the provision now corresponding to it, namely, O. XXXIV, r. 14, C. P. C.

These cases, in my opinion, may be easily disposed of as they deal with a specific section of the Code which gives express rights against a surety and what these rights are, must be determined with reference to that section alone. We are not now in this appeal concerned with s. 145.

I shall now deal with cases where a security bond was executed by a party to

(1) 42 Ind. Cas. 975; 33 M. 601; 22 M. L. T. 386; (1917) M. W. N. 782; 6 L. W. 701.
(2) 64 Ind. Cas. 852; 35 C. L. J. 61; (1922) A. I. R. (C.) 35.
(3) 33 Ind. Cas. 982; 38 A. 327; 14 A. L. J. 865.
(4) 38 Ind. Cas. 33; 39 A. 225; 15 A. L. J. 76.
(5) 27 Ind. Cas. 365; 19 C. W. N. 178.
(6) 29 Ind. Cas. 149; 19 C. W. N. 961.
(7) 55 Ind. Cas. 530; 42 A. 158; 22 C. C. 212; 6 O. L. J. 682; 38 M. L. J. 302; 18 A. L. J. 263; 22 Bom. L. R. 521; 46 I. A. 228; 13 L. W. 82 (P. C.)

tho suit itself. In *Shyam Sunder Lal* v. *Bajpai Jainarayan* (8) an application was made by the defendant judgment-debtor for stay of execution and it was granted upon his giving security in the sum of Rs. 10,000. By the security bond which was executed, certain properties were mortgaged as security for the due performance of the decree. The decree-holder applied for realisation of the decree amount by sale of the properties comprised in the bond. Section 99 of the Transfer of Property Act was relied on by the judgment-debtor who opposed the application. It was held that that section was not a bar as the bond was not addressed to the decree-holder but was in favour of the Court and that, therefore, there was no mortgage created.

In *Tokhan Singh* v. *Girwar Singh* (9) the judgment-debtors executed a bond to the Registrar of the Court as security for the costs of the respondents in appeal to the Privy Council. They sought to enforce the security by selling in execution of the decree for costs the property comprised in the bond. It was held that a valid mortgage was created and that under s. 99 of the Transfer of Property Act, the security could not be enforced without the institution of a regular suit.

Although *Shyam Sundar Lal* v. *Bajpai Jainarayan* (8) was distinguished in *Tokhan Singh* v. *Girwar Singh* (9) on the ground that in the former case the bond was given to the Court and in the latter it was executed to the Registrar, these decisions are in truth irreconcilable.

Section 99 of the Transfer of Property Act has been replaced by O. XXXIV, r. 14 of the C. P. C. The repealed section ran thus :—

"Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under s. 67 ....."

Order XXXIV, r. 14, has been reproduced in an earlier part of this judgment.

The effect of the alteration is to confine the operation of the rule to cases where a mortgagee has obtained a personal decree against the mortgagor on the mortgage debt. In such a case, the mortgagee can have the property sold only by instituting a regular suit for sale. The Madras High Court in *Subramania Chettiar* v. *Raja of Ramnad* (10), recognising the effect of this alteration has held that the provision now in force does not stand in the way of the property given as security being sold in execution. In that case immoveable property was given by a judgment-debtor as security for the due performance of a decree pursuant to an order made under O. XLI, r. 5 (3), C. P. C., and it was held that the property could be sold in execution. In that case immoveable property was given by a judgment-debtor as security for due performance of a decree, pursuant to an order made under O. XLI, r. 5 (3) C. P. C., and it was held that the property could be sold in execution without recourse being had to an independent suit. I may mention that in *Baij Nath Goenka* v. *Sia Ram Das* (11) the Calcutta High Court held that s. 99 did not operate as a bar. This was decided later than *Shyam Sundar Lal* v. *Bajpai Jainarayan* (8) and *Tokhan Singh* v. *Girwar Singh* (9) and previous to *Subramania Chettiar* v. *Raja of Ramnad* (10). The referring Judges advert to the conflict of authority and indicate a clear preference in favour of the view that the property can be sold in execution.

In the most recent case, *Jyoti Prakash Nandi* v. *Mukti Prakash Nandi* (12), the view of the Madras High Court has been followed.

The weight of authority, therefore, supports the view that security given by a judgment-debtor can be enforced and the property covered by the bond be sold in execution.

In the cases mentioned above, security was not taken under O. XX, r. 11 and on this ground it may be contended that there is no direct authority on the question raised. But in principle is there any difference? Order XX, r. 11, contemplates a complete or qualified stay of execution and some of the sections, at any rate, considered in those cases provide similarly for stay of execution. If the view of the law taken in those cases is correct, the fact that in the present case, the security bond was taken under O. XXI, r. 11, makes no difference and we must hold that the decree-holder in execution of his decree and without being

(8) 30 C. 1060; 7 C. W. N 914.
(9) 32 C. 494; 9 C. W. N. 372; 1 C. L. J. 118.
(10) 43 Ind. Cas. 187; 41 M. 327; 6 L. W. 762. (1917) M. W. N. 872; 34 M. L. J. 84.
(11) 18 Ind. Cas. 900; 17 C. L. J. 267.
(12) 81 Ind. Cas. 734; 51 C. 150; (1924) A I. R. (C.) 485.

compelled to file a regular suit can bring the property to sale.

In regard to cases that arise under O. XX, r. 11, the principle may be thus stated. Unless it is shown that the security was taken in satisfaction of the decree, it was presumably intended that the order made should be capable of execution. If on a construction of the order, the Court comes to the conclusion that the decree is not satisfied and there is no bar created which precludes the decree from being executed, it is the duty of the Court to allow execution by enforcing sale. Whether it be regarded that what is sought to be executed is the original decree itself or an executable order made under the special provision of the law contained in O. XX, r. 11, it makes very little difference.

In *Subramania Chettiar* v. *Raja of Ramnad* (10) the learned Judges took the view that it is not only the right of the decree-holder to bring the property to sale in execution but that under s. 47, C. P. C., the remedy by way of regular suit is not open to him. It is not necessary to rest my judgment on this ground.

General considerations were strongly pressed before us both in favour of and against the acceptance of this view.

In *Tokan Singh* v. *Girwar Singh* (9) at page 50 * and in *Amir* v. *Mahadeo Prasad* (4) page 228† the view that it is impolitic to sell the property in execution is set forth In the first case Mookerjee, J., says thus :—"It is quite conceivable for instance that after a property has been given in security by the judgment-debtor an interest may be acquired in it by other persons; if it is sold in execution of the decree...it would in such a case be necessarily sold behind the back of persons interested who would have no opportunity of redemption and their interest would not be prejudiced by the sale and they would be entitled to enforce their claim by independent suits".

Weighty reasons are given for the view I am disposed to take by the referring Judges in *Baij Nath Goenka* v. *Sia Ram Das* (11). The provision is embodied in the law for the protection of the decree-holder and it must be interpreted to operate to his advantage. By refusing to sell the property in execution, far from securing to the decree-holder the due execution of his decree the Court renders the decree itself incapable of execution against the property covered by the security. This is clearly unjust This view is shared by the learned Judges who decided *Subramania Chettiar* v. *Raja of Ramnad* (10), for to quote their very words "It would be a most mischievous state of law if such a thing (a mortgage suit) were necessary and it would fetter the discretion of the Court in accepting immoveable property as security"..... ....In my opinion if it is permissible to advert to such general considerations the balances of convenience is clearly in favour of the view taken by the Calcutta Judges and the learned Judges of this Court.

Mr. Varadachariar suggested that if there are subsequent encumbrancers their right will be to proceed against the surplus money, if any. On the other hand, Mr. T. M. Krishnaswami Iyer urged that such encumbrancers will be entitled to redeem the purchaser at the sale I do not propose to express any opinion on this point as this has only a remote bearing on the question to be decided, in the appeal.

Then arises the question, is there any thing in the security bond or the order of the Court which precludes the security from being enforced in execution? In my opinion there is no obstacle created. On the contrary, the effect of the security bond seems to recognise this right of the decree-holder. The debtor renders himself personally liable, creates the charge and covenants that the security bond shall be in force till the decree is entirely satisfied. The order of the Court recites the fact that the security bond has been executed. On a construction of the bond and the order, I am of the opinion that the parties intended that the security should be capable of being realised in execution.

I have now disposed of the first contention raised by Mr. Krishnaswami Iyer. I shall proceed to deal with the second contention, namely, that based upon s. 52 of the Insolvency Act. Under that section, where after execution has issued, the Executing Court receives notice of the insolvency of the judgment-debtor, it is bound to direct the property if in its possession to be delivered to the Receiver in insolvency. It is conceded by Mr. T. M. Krishnaswami Iyer that this does not apply to mortgage-decree holders and this is obvious enough. But he says that the decree in question being a money-decree, the fact that the decree-holder is a secured creditor makes no difference and that s. 52 applies. I am unable to agree

*Page of 23 C.—[*Ed.*]
†Page of 39 A.—[*Ed.*]

Section 52 is somewhat generally worded, but it must receive construction not repugnant to the general scheme of the Act, namely, to save the rights of secured creditors. It is sufficient to refer in this connection to s. 28 (6), s. 47 and s. 51 (2). There is nothing in the wording of these sections to show that money decree-holders who have obtained security are excluded. Under s. 2 creditor is defined as including a decree-holder, debt as including a judgment debt and secured creditor is described as a person holding a mortgage charge or lien on the property of the debtor as security for a debt due from him. I am clearly of the opinion that s. 52 does not apply.

I have so far dealt with the two main contentions raised on behalf of the appellant. There is a subsidiary point which has been taken on his behalf and I shall now proceed to deal with it. It is said that the decree was passed against the father only but that the bond was executed by the father and the sons and that, therefore, the property cannot be sold in execution. There might be some force in the argument if the bond had been executed not by the sons of the judgment-debtor but by others. But in the present case the decree-holder's right is not enlarged nor is the liability of the executants affected by reason of the existence of the security bond. It was executed by the father as the guardian of his minor sons and whether they were parties to it or not, their right would still be the same, namely, to question the debt if it is tainted with illegality or immorality. The circumstance that sons are also parties to the bond, therefore, makes no difference.

The order appealed against must be upheld and the appeal fails and is dismissed with costs.

Madhavan Nair, J.—The facts of the case are fully set out in my learned brother's judgment. The first question arising for our decision is whether the immoveable properties given by the judgment-debtor as security pursuant to an order made under O. XX, r. 11, cl. 2, C. P. C., can be realised by the decree-holder in execution or can only be realised in a separate suit.

The material portion of the security bond runs as follows:— "..... Whereas on your petition attchment has been ordered of our lands in Tenkarai Isranu for the said decree amount, whereas you have consented to our request not to proceed with the attachment and sale, we have hereby given as security to you for the amount of Rs. 12,620-4-0 being the amount up to date under the said decree our properties as mentioned in the schedule ... . We shall pay you without trouble or compulsion the above said decree amount, etc., according to the terms of the *kararnama* petition (*viz.*, petition under O. XX, r. 11, of the C. P. C.) .... If we do not pay you accordingly, you shall execute the said decree according to the terms of the *kararnama* petition, and for the balance, if any, after what is so realised by you, we undertake to pay you up to the limit of Rs. 12,620-4-0 on the security of the said properties and on our personal responsibility". The circumstances relating to the execution of the security bond clearly show that the parties to the security bond intended that if the attachment and sale of the properties became necessary it should be done in execution. The security bond was executed after attachment was ordered; the judgment-debtor made himself personally liable; and the bond is to remain in force till the decree is fully satisfied. The security is intended to be operative if the judgment-debtor does not pay the decree amount and interest. Provision for the contingency of non-payment being made by the security bond, the parties could not have meant that when such contingency arose they should institute a separate suit to realise the properties covered by the bond. There can he no doubt that the parties intended that the properties should be realised if necessary in execution. But whatever be the intention of the parties, if there is any legal impediment in the way of realisation by execution, then the decree-holder will have to realise his security only by means of a separate suit. It has been strenuously argued by Mr. T. M. Krishnawami Iyer on behalf of the appellant that O. XXXIV, r. 14 of the C. P. C. operates as a bar to the enforcement of the security in execution.

(1) Rule 14 of O. XXXIV provides as follows:—

"Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit, notwithstanding anything contained in O. II, r. 2". The words "claim arising under the mortgage" have been substituted in this

rule for the words "any claim whether arising under the mortgage or not" in the repealed s. 99 of the Transfer of Property Act. The effect of this alteration is to confine the prohibition against bringing the mortgaged property for sale except by bringing a suit, to cases where a mortgagee has obtained a personal decree against the mortgagor on the mortgage debt. Obviously the rule in terms does not apply to the present case. "The language of the rule makes it clear that the rule does not apply unless the decree obtained by the holder of the mortgage or charge falls within the description of a decree for payment of money in satisfaction of a claim arising under the mortgage or charge. The mortgage or charge mentioned...must obviously be a mortgage or charge existing prior to the decree and not one created by the decree" [see *Indramani Dasi* v. *SurendraNath Mondal* (2)] or one created by the act of parties subsequent to the decree.

Having regard to the important change introduced by O. XXXIV, r. 14, it has been held in *Sowbagia Ammal* v. *Manika Mudali* (1), *Indramani Dasi* v. *Surendra* (2) and *Brajasunder Deb* v. *Sarat Kumari* (13) that where a maintenance decree provided that the allowance in the decree should be charged on certain immoveable properties, such properties could be sold in execution of the decree and that there was no necessity to bring a separate suit for sale. The decision in *Subramania Chettiar* v. *Raja of Ramnad* (10) is an instance of a case where the security was given by the judgment-debtor after a decree. In that case immoveable property was given by a judgment-debtor as security for the due performance of the decree in compliance with an order made under "O. XLI, r. 5 (3)" and the question was raised whether such property can be realised by the decree-holder in execution or can only be realised by a separate suit. In view of the alteration of the language contained in O XXXIV, r 14, it was held that the provision contained in that rule did not operate as a bar and that the decree-holder can realise the property in execution. The learned Judges observe "There is no need in such a case that there should be anything in the nature of a mortgage suit for sale under s. 67 of the Transfer of Property Act with all the expense and delay which would be thereby involved. It would be a most mischievous state of law if such a thing were necessary and it would fetter the discretion of the Court in accepting immoveable property as security for the execution of the decree." In the Order of Reference to the Full Bench in *Baij Nath Goenka* v. *Sia Ram Das* (11) the learned Judges while discussing the principle underlying the provisions of s. 545, cl. (c) of the old C. P. C. point out that the provisions embodied in the law for the protection of the decree-holder must be interpreted to operate to his advantage and express their inclination to accept the view that the properties covered by the security bond executed pursuant to an order under that section could be realised in execution of the decree without instituting a separate suit On this question, the view of the Madras High Court in *Subramania Chettiar* v. *Raja of Ramnad*, (10) has been followed in the most recent case in Calcutta reported as *Jyoti Prakash Nandi* v. *Mukti Prakash Nandi* (12).

In my view the principle underlying the decision in *Subramania Chettiar* v. *Raja of Ramnad* (10) which relates to the realisation in execution of properties covered by security bond executed after a decree may well be applied to the decision of the present case, though the security bond here has been executed not under O. XLI, r. 5 but only under O. XX, r. 11, cl. (2). It has been argued that an order passed under O. XX, r. 11, cl. (2) is incapable of execution. Whether this is so, or not, is largely a question of the construction of the order and of the intention of the parties as may be gathered from the circumstances relating to the making of the order. I have already pointed out at the commencement of my judgment that there can be no doubt that the parties in this case intended that in the event of non-payment by the judgment-debtor the properties covered by the bond should be realised in execution. Execution being postponed by the order made under O. XXI, r. 11, cl. (2) which provided also for the taking of a security bond to meet the possible contingency of non-payment by the judgment-debtor, I fail to see when such contingency arises how the Court can refuse execution unless there be some legal impediment compelling the Court to disallow it.

All the cases discussed above show that if O. XXXIV, r. 14, does not operate as a bar, then the decree-holder can proceed against the secured properties by execution.

(13) 38 Ind. Cas. 791; 2 P. L. J. 55; (1917) Pat. 67; 3 P. L. W. 202.

But it is argued by Mr. Krishnaswami Iyer that even then, in this case, the properties charged cannot be sold in execution because the minor sons of the judgment-debtor who were not parties to the suit have joined in the execution of the security bond, their father representing them as guardian. There is no force in this contention. The new parties are not strangers but only the sons by the judgment-debtor. In view of the fact that the judgment-creditor is not seeking to sell under the security bond any interest which he could not otherwise have sold, I think this objection must be overruled.

Before I pass on to consider the second argument, I may state that it is unnecessary to discuss the decisions in *Mukta Prasad* v *Mahadeo Prasad*, (3) *Amir* v. *Mahadeo Prasad* (4), *Raj Raghubar Singh* v. *Jai Indra Bahdur Singh* (7) quoted by the appellant's learned Vakil in connection with his argument regarding the bar created by Order XXXIV, r. 14, as all these cases dealt with securities given by third parties under s. 145 of the C. P. C.

The second question for decision arises in connection with the argument based on s. 52 of the Provincial Insolvency Act. According to that section, where execution of a decree has issued against any property of a debtor which is saleable in execution and before it has been actually sold, notice is given to the Executing Court that an insolvency petition by or against the debtor has been admitted, then the Executing Court is bound, on application to that effect, to direct the property if in the possession of the Court to be delivered to the Receiver. It is argued by Mr. Krishnaswami Iyer that the decree which is sought to be enforced in this case being a money decree, s. 52, of the Act applies and that, notwithstanding the fact that a security has been executed in favour of the decree-holder subsequent to the decree, his client is entitled to apply to the Executing Court to deliver over the property in question to him. Although a secured creditor is not expressly excluded from the operation of this section, it seems to me that the section does not affect him. The Provincial Insolvency Act takes special care to preserve the power of secured creditors to realise or otherwise deal with their securities, as may be seen from the ss. 28 (6) and 51 (2). The exemption from the operation of the section which must be understood to have been thus given to secured creditors must, in my opinion, be extended to money-decree-holders who have obtained securities in the course of execution, as in the present case. It is conceded that s. 52 does not apply to mortgage decree holders. In my opinion nothing in that section affects the rights of money decree-holders who have obtained securities in respect of the property covered by such securities. They must also be treated as secured creditors for purposes of the section [see also s. 2 (*a*) and (*e*) of the Act.] The argument based on s. 52 must, therefore, be overruled.

In the result, I agree with my learned brother that the order appealed against must be upheld and the appeal must be dismissed with costs.

V. N. V.
N. H. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 104 OF 1925.
December 3, 1925.
Present:—Mr. Justice Mukerji.
Sheikh MUHAMMAD ISMAIL—
PLAINTIFF—APPLICANT
versus
VAHIDUDDIN—RESPONDENT—
OPPOSITE PARTY.

Contract Act (IX of 1872), s. 23—Pro-note for withdrawal of non-compoundable case, suit on, whether maintainable—Public policy.

It is against public policy to receive money or a promise to receive money in consideration of an agreement to stifle a criminal prosecution for a non-compoundable offence. [p. 504, col. 1.]

Plaintiff was prosecuting one *K* for a non-compoundable offence, and in consideration of the defendant executing a pro-note in his favour for a certain sum of money withdrew the complaint with the permission of the Court. In a suit to recover the amount of the pro-note:

Held, that the suit was not maintainable inasmuch as the consideration for the pro-note being opposed to public policy was illegal. [*ibid.*]

Civil revision from an order of the Judge, Small Cause Court, Agra, dated the 22nd of April 1925.

Mr. *S. K. Dar*, for the Applicant.

Dr. *M. Waliullah*, for the Opposite Party.

JUDGMENT.—This revision arises out of a suit for recovery of money brought on a promissory-note dated the 10th of August 1923 admittedly executed by the respondent in favour of the plaintiff-applicant.

The Court below has found in effect that the plaintiff was prosecuting one Khairatullah for cheating, before cheating was made a compoundable offence. The plaint-

iff, on consideration of the respondent giving the promissory-note for the sum of Rs. 400, withdrew the complaint with the permission of the Court. On this finding the learned Judge held that the suit on the promissory-note was not maintainable as it was against public policy to receive money or a promise to receive money in consideration of an agreement to stifle a criminal prosecution.

In this Court it has been urged that there is not only the promissory-note but also the additional facts that on three occasions the respondent admitted his liability for the debt and on the third occasion also sent by money order a sum of Rs. 173 in part-payment. The point for consideration is whether the subsequent acknowledgments of the liability and the part-payment take the case out of the rule. Mr. Dar has argued that these acknowledgments and payment have materially affected the position of the applicant and that, therefore, he should succeed. He has, however, been unable to show that the applicant's civil remedy, if any, against Khairatullah has been lost owing to any conduct on the part of Wahiduddin the respondent. The promissory-note is dated the 10th of August 1923 and it is quite possible that the civil remedy against Khairatullah is still open. There is nothing to show that Wahiduddin prevented the plaintiff from prosecuting his civil remedy against Khairatullah. Further, it appears that parties should be taken to have known the legal consequence of the transaction and if the plaintiff contented himself with giving up his claim against Khairatullah he must be taken to have known the fact that his claim on the promissory-note against Wahiduddin was not enforcible in a Court of Law. In any view of the case the judgment of the Court below seems to have been right.

It appears that the suit involved two other items, small ones, and one of the pleas taken is that the Court below has not decided the plaintiff's claim as to those items. It has, however, been conceded before me to-day that no evidence was adduced as to those two items.

The application fails and is hereby dismissed with costs.

Z. K. *Application dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 435 OF 1922.

January 22, 1925.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

SANKARALINGA MUDALIAR AND OTHERS—RESPONDENTS NOS. 1 TO 3 AND LEGAL REPRESENTATIVES BY THE FIRST APPELLANT—APPELLANTS

versus

THE OFFICIAL RECEIVER OF TINNEVELLY—PETITIONER—RESPONDENT.

Execution of decree—Hindu joint family—Attachment of co-parcener's interest before judgment—Death after decree and before execution—Right of survivorship if defeated—Decree, construction of—Charge, creation of.

An attachment before judgment of the interest of a co-parcener in a Hindu joint family property, followed by a decree, will, in the event of his death subsequent to the decree and before execution, have the effect of precluding the accrual of title by survivorship as against the attaching creditor, in the same way as an attachment after decree, so that the surviving co-parceners can take the property only subject to the claims of the attaching creditor. [p. 507, cols. 1 & 2.]

[Case-law considered.]

Muthusami Chetty v. *Chinnammal*, 24 Ind. Cas 320; 26 M. L. J. 517 and *Thadi Ramamurthi* v. *Moola Kamiah*, 24 Ind. Cas. 667; 16 M. L. T. 123; (1914) M. W. N. 733, followed.

Subrao Mangesh v. *Mahadevi Bhatta*, 21 Ind Cas. 330, 38 B. 105 at p. 110; 15 Bom. L. R 848 and *Sunder Lal* v. *Raghunandan Prasad*, 83 Ind Cas. 413; 3 Pat. 253; 5 P. L. T. 135; (1924) A. I. R. (Pat) 465, dissented from

Where a compromise decree stated that the plaintiffs would recover the amount "from the defendants and also by the sale of the properties now under attachment before judgment by the Court without having any necessity for re-attachment, and from the defendants' other properties, and that the attachment before judgment would continue in force until the whole amount was paid according to the compromise decree:

Held, that the decree did not constitute a charge on the properties and did not confer on the decree-holders any higher rights than those of money-decree-holders who had effected attachment of those properties for executing their decrees. [p. 506, col. 1.]

Appeal against an order of the District Court, Tinnevelly, dated the 13th of July 1922, in C. M. P. No. 566 of 1918, in I. P. No. 5 of 1917.

Mr. *S. T. Srinivasa Gopalachari*, for the Appellants.

Messrs. *Marthandam* and *Chidambaram*, for the Respondent.

JUDGMENT.

Madhavan Nair, J.—This is an appeal against the order of the District Judge of Tinnevelly in C. M. P. No. 566 of 1918 on his file in which the Official Receiver of Tinnevelly was the petitioner. The appellants, who were respondents

Nos. 1 to 3 in the lower Court had brought a suit, O. S. No. 206 of 1913, in the District Munsif's Court of Ambasamudram against seven defendants, all members of a joint Hindu family. Pending the suit they applied for and got an attachment before judgment of the joint family properties. The suit was compromised and a *razi* decree Ex. I, was passed on the 23rd of September 1914 which provided that the defendants therein should pay into Court Rs. 2,100 with interest within the 15th of April 1915 and that, in default, the attached properties might be sold and the amount realised. It also provided that the attachment before judgment which has already been made would continue until the amount fixed by the decree was paid. Defendants Nos. 1 and 7 in that suit died subsequent to the decree. After their deaths an execution application was filed in the District Munsif's Court by the decree-holders, the present appellants, and an order for sale of the attached properties was made. Defendants Nos. 2 to 6 in the suit were also ordered as the legal representatives of the deceased defendants Nos. 1 and 7. A petition for adjudicating defendants Nos. 2 to 6 as insolvents was presented to the District Court of Tinnevelly on the 31st of January 1917 and they were adjudicated insolvents by order of that Court dated the 23rd of March 1917. The attached properties were sold in Court-auction on the 28th of June 1918 in pursuance of the orders of the District Munsif and were purchased by the 4th respondent in the lower Court. The Official Receiver who was not a party to the sale proceedings, filed the petition out of which this appeal arises, saying that as the insolvents' assets had vested in him on the order of adjudication, the subsequent sale is not valid and binding on him and that the sale should, therefore, be set aside. There was also an alternative prayer to the effect that, if for any reason the sale could not be set aside, the decree-holders should be compelled to refund to him the amount they realised in execution.

The District Judge on the first occasion held that he, sitting as a Judge exercising insolvency jurisdiction, had no power to examine the validity or otherwise of an execution sale held by another Court, and, therefore, dismissed the petition. On appeal, however, by the Official Receiver to this Court (C. M. A. No. 128 of 1919) this decision was set aside and the petition was remanded to the lower Court for fresh disposal. The District Judge has now held that the sale itself could not be set aside as the auction-purchaser, 4th respondent in the lower Court purchased the property *bona fide* and was, therefore, entitled to the protection given to *bona fide* purchasers by s. 34 (3) of the Provincial Insolvency Act, III of 1907, but he has granted the alternative prayer referred to above, *i. e.*, he directed the decree-holders, the present appellants, to refund to the Official Receiver, the respondent before us, for the benefit of the whole body of creditors the sum of Rs. 3,153-2-0 realised by them in execution. He also gave them leave to rank as unsecured creditors in the subsequent insolvency proceedings before the Official Receiver. Against this order of the District Judge the decree-holders have filed the present appeal; the Official Receiver has filed a memorandum of objections stating that the sale should also have been set aside as the auction-purchaser could not in the circumstances of this case be considered to be a *bona fide* purchaser.

Two points have been urged before us by Mr. S. T. Srinivasagopalachariar, the learned Counsel for the appellants, *viz.*, (1) that on a proper construction of Ex. I, the *razi* decree, a charge has been created on the attached properties in his clients' favour and that, therefore, the properties vest in the Official Receiver only subject to his clients' rights under the decree and (2) that even if there is no such charge, inasmuch as two out of seven judgment-debtors had died after the attachment before judgment and also after the decree such prior attachment followed by the decree prevents the shares of the two deceased co-parceners from surviving to the rest and that, therefore, those shares do not vest in the Official Receiver on the insolvency of the remaining co-parceners as they had never vested in the insolvents themselves. He urges, therefore, that the Official Receiver had not rights at least as regards two-sevenths of the properties sold and that his clients were entitled to retain at least two-sevenths of the purchase-money realised.

As regards point No. (1), Ex. I only states that the defendants should pay into Court within a prescribed time the decree amount with interest and that, in default of pay-

ment, the plaintiffs should recover the amount "from the defendants and also by the sale of the properties now under attachment before judgment by the Court without having any necessity for re-attachment and from the defendants' other properties, and that the attachment before judgment should continue in force until the whole amount is paid according to this compromise decree". These provisions do not, in our opinion, constitute a charge on the properties and do not confer on the decree-holders any higher rights than those of money-decree-holders who have effected an attachment of those properties for executing their decrees.

As regards point No. (2) the learned Counsel for the appellants has strongly relied upon a decision of the Privy Council reported as *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1) in support of his argument that the attachment before judgment in this case followed as it was by the decree prevented the shares of the deceased co-parceners from surviving to the rest. As it appears to us that the answer to the question now raised depends really upon a correct understanding of the principle laid down by the Privy Council in the above case, it is necessary to consider the exact scope of that decision and to examine how the principle indicated therein has been understood and applied in subsequent decisions. In that case the father had executed a mortgage of properties belonging to the joint family consisting of himself and his two sons. The mortgagee brought a suit on his mortgage against the father and got a decree ordering the sale of the property. In execution of the decree the property was attached and an order to carry out the sale was made. Subsequent to this but before the date fixed for the sale, the father died and the execution proceedings were thereafter continued against the sons who objected to the sale putting forward their claims as co-parceners under the Mithakshara Law. The Executing Court referred them to a separate suit and the properties were sold. In the suit by the sons to set aside the sale it was found that the nature of the debt was such as not to be binding on them. The Privy Council set aside the sale as regards the sons' two-thirds share but sustained the sale to the extent of one-third which on a partition in his lifetime would have fallen to the share of the father. It may be stated that the reason for upholding the sale with regard to the one-third share was not that the mortgage executed by the father could be held to be binding on the estate to the extent of his own share because their Lordships expressly leave this point open. In their Lordships' own words the reason for the decision was that "at the time of Adit Sahai's (father's) death, the execution proceedings under which the *mouza* had been attached and ordered to be sold had gone so far as to constitute, in favour of the judgment-creditor, a valid charge upon the land, to the extent of Adit Sahai's undivided share and interest therein, which could not be defeated by his death before the actual sale." It is true that in the Privy Council case there were not only a decree and an attachment in execution of the decree but also an order for sale of the properties before the death of the judgment-debtor; but in the very next sentence their Lordships state that "they are aware that this opinion is opposed to that of the High Court of the North-Western Provinces, in the case of *Goor Pershad* v. *Sheodeen* (2)." In that case there was only a decree and an attachment in execution of the decree but no order for sale before the judgment-debtor's death and it was held that the judgment-debtor "had no property in the house in suit available after his death in execution of decree for the satisfaction of the judgment debt." The Privy Council in expressly dissenting from this decision must, we think, be considered to have in effect held that an attachment in execution of a decree before the judgment-debtor's death would prevent his share from surviving to his other co-parceners though no order for sale had been made prior to his death. That this is the true scope of the Privy Council decision has been recognised by more than one decision of this Court *vide- Bailur Krishna Rau* v. *Lakshmana Shanbhogue* (3) and *Thadi Ramamurthi* v. *Moola Kamiah* (4). It may be mentioned that in *Bailur Krishna Rau* v. *Lakshmana Shanbhogue* (3), also there was not only an attachment in execution of the decree but an order for sale before the judgment-debtor's death, but the learned

(1) 5 C. 148; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.).

(2) 4 N. W. P. H. C. R 137.

(3) 4 M. 302; 1 Ind. Dec. (N. S.) 1046.

(4) 24 Ind. Cas. 667; 16 M. L. T. 123; (1914) M. W. N. 733.

Judges indicate that the decision of the Privy Council would cover even a case where there was no such order, for they state at page 307*, "in declaring that the ruling they were pronouncing was opposed to that of the High Court in the case cited, the Privy Council in effect pronounced that the interest of the judgment-debtor had, by the attachment, been brought under the control of the Court for the purpose of executing the decree so as to preclude the accrual of a title by survivorship in the event of the death of the judgment-debtor before an order for sale was made. In the case before the Court it appears the order for sale was made before the death of the judgment-debtor, but, whether this be so or not, we feel ourselves bound by the ruling of the Privy Council." In *Thadi Ramamurthi* v. *Moola Kamiah* (4) there was only an attachment in execution of the decree but no order for sale before the judgment-debtor's death The lower Court in that case had dismissed the suit on the ground that, as the judgment-debtor who was an undivided co-parcener died before the order for sale was made, his interest survived to the defendant and was not available to the plaintiff for sale. The High Court in allowing the second appeal refers to *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1), *Bailur Krishna Rau* v. *Lakshmana Shanbhogue* (3) and *Lakskmana Aiyar* v. *Srinivasa Aiyar* (5) and states that the question was concluded by authority. Regarding the Privy Council case the learned Judges observe thus : "In the case before the Privy Council it is true that not only was there an attachment but also an order to carry out the sale before the death of the co-parcener. But in the course of their judgment, the Judicial Committee expressed their dissent from a judgment of the North-West Provinces High Court in which it was held that, while the co-parcener had died after his interest in the property was attached but before an order for sale was made, there remained no interest in the judgment-debtor which could be brought to sale." In *Muthusami Chetty* v. *Chunammal* (6) it is stated that 'It has been repeatedly decided by this Court, that attachment alone without an order for sale precludes the accrual of the title by survivorship in the event of the death of the judgment-debtor after attachment and before the order for sale."

It has been brought to our notice that the learned Judges in *Zemindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati etc., Devastanam* (7) state at page 442* that the decisions in *Bailur Krishna Rau* v. *Lakshmana Shanbhogue* (3) and *Lakshmana Aiyar* v. *Srinivasa Aiyar* (5) cannot be relied upon in view of the decision of the Privy Council in *Moti Lal* v. *Karrabuldin* (8) to the effect that an attachment merely prevented alienation and did not give title. They also state that the same view was taken in *Sankaralinga Reddi* v. *Kandasami Thevan* (9). These observations have been noticed and commented upon in two later cases of this Court reported as *Murugaiya Mudaliar* v. *Ayyahorai Mudaliar* (10) and *Thadi Ramamurthi* v. *Moola Kamiah* (4). These decisions, with which we respectfully agree, render it unnecessary for us to discuss the matter afresh. In *Thadi Ramamurthi* v. *Moola Kamiah* (4), which has already been noticed above, the learned Judges state: "In *Sankaralinga Reddi* v. *Kandasami Thevan* (9) the decision in *Bailur Krishna Rau* v. *Lakshmana Shanbhogue* (3) was not dissented from, but it was expressly pointed out that under that decision the attachment has the effect of preventing the property passing by survivorship, and the fact that the attaching creditor does not, by attachment, create such a charge on the property as to acquire priority over other creditors coming in, is in no way opposed to this view. This also is what was decided in *Zemindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, etc., Devastanam* (7) wherein it was held that no charge was created by the attachment in favour of the creditor as against a subsequent creditor. There is, no doubt, an observation in *Zemindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, etc., Devastanam* (7) that the decision in *Bailur Krishna Rau* v. *Lakshmana Shanbhogue* (3) is opposed to this view. But whether that is so or not, no dissent was expressed from the decision to the effect that the attachment precludes the accrual of title by survivorship. The observation of their Lordships of the Privy Council in *Moti Lal* v. *Karrabuldin* (8)

(5) 8 M. L. J. 64.
(6) 24 Ind. Cas. 320; 26 M. L. J. 517.
*Page of 4 M.—[*Ed.*]

(7) 2 Ind. Cas. 18; 32 M. 429; 19 M. L. J. 401.
(8) 25 C 179; 24 I. A. 170; 1 C. W. N. 639; 7 Sar. P. C. J. 222; 13 Ind. Dec. (N. S.) 121 (P. C.).
(9) 30 M. 413; 17 M. L. J 334; 2 M. L. T. 365.
(10) 9 Ind Cas. 286; 9 M. L. T. 96.
*Page of 32 M.—[*Ed.*]

relied upon in *Zemindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, etc., Devastanam* (7) has no reference to this question. That such is the effect of this decision seems to be borne out by the judgment in *Murugaiya Mudaliar* v. *Ayyathorai Mudaliar* (10) in which the learned Judges say that the case of *Zemindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati etc., Devastanam* (7) had reference to the question whether in the circumstances of that case the judgment-creditors who had obtained orders of attachment were in a stronger position than those who had not obtained such orders." In the light of the above remarks, the observation in *Subrao Mangesh* v. *Mahadevi Bhatta* (11) that the proposition laid down in *Bailur Krishna Rau* v. *Lakshmana Shanbhogue* (3) has no longer the support of the Madras High Court is not correct. In this connection we would only add that, having regard to the decision of the Privy Council in *Motilal* v. *Karrabuldin* (8) it must now be taken that the words "charge" used by their Lordships in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1) in the passage extracted by us must be understood only in a general and not in the strictly legal sense (see also Mayne's Hindu Law, para. 332 9th edition).

Thus it will be seen that the decision in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1) and the later decisions of this Court establish the position that an attachment in execution of the judgment-debtor's interest in joint family property will, in the event of his death subsequent to such attachment preclude the accrual of title by survivorship as against the attaching creditor.

In the present case, the attachment was before judgment. The judgment-debtor died after the decree but before any order for sale was made. The question is whether the fact that the attachment was before judgment makes any difference as regards the application of the above principle. There is a direct authority in *Muthuvelu Chetti* v. *Chinnammal* (6) that it does not make any difference. In that decision it was held that an attachment before judgment has the effect of preventing the interest of the deceased judgment-debtor from passing by survivorship in a case where the judgment-debtor dies after the decree. The reason is thus stated by the learned Judges: "When a decree is passed subsequently it is unnecessary to attach the property again and the prior attachment renders the property available for sale in execution. An attachment followed by a decree, therefore, preculdes the accrual of the title by survivorship for the same reasons as an attachment after decree"

It has, however, been argued by the learned Vakil for the respondent that the decisions in *Subrao Mangesh* v. *Mahadevi Bhata* (11) and *Sunder Lal* v. *Raghunandan Prasad* (12) take a contrary view and that they should be followed in preference to the Madras cases. *Subrao Mangesh* v. *Mahadevi Bhatta* (11) is, no doubt, a direct decision in his favour, but with all respect we feel unable to follow that decision. In that case the learned Judges begin their judgment by stating that the determination of the case before them depends on the correct construction of the Privy Council judgment in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1). They then distinguish that case by saying that there, there had been not a mere attachment before judgment but an attachment in execution and an order for sale. They also seem to think that their Lordships of the Privy Council use the word "charge" in the passage extracted by us in its strict legal significance *vide* page 107*. We have already stated that, in our opinion, their Lordships in effect held that an order for sale was not essential for defeating the survivorship and that it is not right to understand the word "charge" as having been used in the strict legal sense. The learned Judges seem to deduce from the Privy Council decision that some step should be taken in execution which will have the effect of defeating the survivorship but what that step exactly is, in a case where there has already been an attachment before judgment and a decree following it prior to the judgment-debtor's death, they do not state. If as we have shown above a mere attachment in execution is, according to the Privy Council, enough to defeat the survivorship, and if in a case where there has been an attachment before judgment and a decree follwing it there need not be any further attachment after the decree-*vide* O. XXXVIII, r. 2 of the C. P. C. we fail to see what further step

(11) 21 Ind Cas. 330; 38 B. 105 at p. 110; 15 Bom. L. R. 848.

(12) 83 Ind. Cas. 413; 3 Pat 250; 5 P. L. T. 135; (1924) A. I. R. (Pat) 465.

*Page of 38 B.—[*Ed.*]

such a decree-holder should take in order to bring matters to the stage where a mere attachment in execution has been made. The learned Judges then rely on a decision of this Court in *Ramanayya* v. *Rangappayya* (13) for the position that an attachment before judgment has not the effect of defeating the survivorship and observe that though in that case the defendant had died before the decree, it does not make any difference whether he dies before or after the decree. This observation does not seem to us to be sound. It is true that until a decree is passed an attachment before judgment could not operate to render the attached property available for sale in execution, but if a decree is also passed before the defendant's death, it is unnecessary to attach the property again and the prior attachment renders the property available for such sale. The decision in *Ramanayya* v. *Rangappayya* (13) has been referred to and distinguished in a later case in *Muthusami Chetty* v. *Chunammal* (6) which has not been noticed by the Bombay High Court. In *Ramanayya* v. *Rangappayya* (13) itself the learned Judges clearly indicate that an attachment before judgment would become operative as soon as a decree is passed and that, if the defendant had died subsequent to the decree, they would have held that such prior attachment would defeat the survivorship.

We might also notice that it has been held in *Ganu Singh* v. *Jangi Lal* (14) that the effect of an attachment of property under the C. P. C. whether made before or after decree is the same, provided that in the former case a decree is made for the plaintiff at whose instance the attachment takes place. see page 533*. In the same judgment it has been observed that " the main object of an attachment before judgment is to enable the plaintiff to realise the amount of the decree, supposing a decree is eventually made, from the defendant's property".

For the above reasons we must hold, dissenting from *Subrao Mangesh* v. *Mahadevi Bhatta* (11) and following *Muthusami Chetty* v. *Chunammal* (6), that an attachment before judgment followed by a decree prior to the judgment debtor's death has the effect of precluding the accrual of title by survivorship as against the attaching creditor in the same way as an attachment after decree. This, however, should not be interpreted to mean that the operation of survivorship is altogether stopped by reason of the attachment whether before or after decree for, if the attaching creditor does not execute his decree, or if the entire property is not needed to satisfy the decree, then the property or the surplus, as the case may be, will go to the other co-parceners. The decision discussed above should, in our view, be only taken to mean that the other co-parceners take the property subject to the claims of the attaching creditor.

With regard to the decision in *Subrao Mangesh* v. *Mahadevi Bhatta* (11) it might also be mentioned that, while discussing the Privy Council case, the learned Judges seem to make a point of the fact that in the case before them there was no actual sale of the property even after the judgment-debtor's death and seem to indicate that, if there was such a subsequent sale, the prior attachment might preclude the operation of survivorship *vide* page 109*. We do not think that the Privy Council decision justifies the drawing of such a distinction; but, in view of the fact that in the present case there has been an actual sale after the judgment-debtor's death, it is not necessary to discuss the matter any further.

The other case relied upon by the respondent is the one in *Sunder Lal* v. *Raghunandan Prasad* (12) which follows *Subrao Mangesh* v. *Mahadevi Bhatta* (11.) In that case it was found as a fact that there was no attachment before judgment and also that the defendant died just after the hearing of the suit and before the judgment, see page 256†. The occasion, therefore, for considering the question as regards the effect of an attachment before judgment in a case like the present did not actually arise though the learned Judge states that an attachment before judgment does not rank in the same position as an attachment after judgment. They simply follow the decision in *Subrao Mangesh* v. *Mahadevi Bhatta* (11) and this case, therefore, does not carry us any further.

In the result, the lower Court's decree will be modified by a direction that the appellants are entitled to retain two sevenths of the purchase-money realised by the sale of the properties and are bound to refund only the balance to the Official Receiver for

(13) 17 M. 144; 6 Ind. Dec. (N. S.) 99.
(14) 26 C. 531; 13 Ind. Dec. (N. S.) 941.

*Page of 26 C.—[*Ed.*]

*Page of 38 B.—[*Ed.*]
†Page of 3 Pat.—[*Ed.*]

the amount that they have thus to refund and for any further claims that they may have, as regards interests and costs, they will rank as unsecured creditors in the insolvency proceedings before the Official Receiver The parties will receive and pay proportionate costs throughout.

Wallace, J.—I am in general agreement with my learned brother as to the conclusion to be properly deduced from the case-law quoted before us, *viz.*, that an attachment before judgment, when followed by a decree passed prior to the death of the judgment-debtor co-parcener prevents, as against the rights of the attaching creditor the accrual of the survivorship right to the surviving co-parceners. But I should like to say, though it is not necessary for the present disposal of this case, that I consider that the language used in cases, *Bailur Krishna Rau* v. *Lakshmana Shanbhogue* (3), *Thadi Ramamurthi* v. *Moola Kanniah* (4) and *Muthusami Chetti* v. *Chunammal* (6), on which we rely, is too broad if interpreted literally. I do not think that these cases intended to lay down more than that, so far as concerns the attaching decree-holder's right to hold the share of the deceased co-parcener liable for his debts, it is not defeated by the survivorship right, and not any general principle that whenever there is an attachment of co-parcenery property followed by, or preceded by a decree, the survivorship right of co-parceners to that property is barred. Obviously, for example, if the attaching decree-holder's debt, and the debts of other decree-holders who are entitled in law to take advantage for themselves of the attachment made by another decree-holder are satisfied and there remains a surplus out of the share of the deceased judgment-debtor co-parcener, that surplus will accrue by survivorship to the other co-parceners. The proposition that an attachment plus decree will in all cases and until the cessation of the attachment prevent the accrual of the survivorship right does not, I think, necessarily follow from the cases quoted and is a proposition which leads to many practical difficulties in partition and other proceedings. I think the correct way of stating the law is that the accural of survivorship is not prevented but operates subject to the prior rights of the attaching decree holder and other decree-holders who are entitled to take advantage of their attachment to have their decree debts satisfied in execution proceedings against what was the share of the deceased judgment-debtor co-parcener. The control over that share which the Court has by virtue of the attachment will be used by it for that end and will not be related until the end is attained. It is this exercise of this control which, in my view, constitutes the "valid charge over the property of which the Privy Council speaks in the *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1) case which "charge" must spring out of the attachment which puts the property under control of the Court and not out of any subsequent step in execution; only the attachment, if before judgment must have been followed up by a decree passed before the death of the judgment-debtor co-parcener since it is the decree which declares the extent of the right which the attaching creditor has against the property.

I agree in the order proposed by my learned brother.

V. N. V. *Decree modified.*
N. H.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 14 OF 1925.
November 24, 1925.
Present:—Mr. Justice Sulaiman and Mr. Justice Mukerji.

Babu RADHA KISHUN AND OTHERS—PLAINTIFFS—APPELLANTS
versus
KASHI NATH—DEFENDANT—RESPONDENTS.

Oaths Act (X of 1873), s. 9—Parties agreeing to abide by statement of referee—Examination of referee—Omission—Referee, whether can be re-examined.

There is nothing in the Oaths Act which declares that once a referee, by whose statement the parties have agreed to abide, has been put upon his oath and has been examined, he cannot be re-called and re-examined, if all the points which are necessary to be established for the decision of the case have not been put to him. [p. 511, col. 2.]

First appeal from an order of the Subordinate Judge, Ghazipur, dated the 5th December 1914.

Messrs. *K. Verma* and *A. Pandey*, for the Appellants.

JUDGMENT.

Mukerji, J.—This appeal arises out of a suit for closing of certain windows and other reliefs and has been directed against an order of remand.

It appears that when the case came before the Court for trial, the parties agreed that it should be decided according to the evidence of one Babu Anand Prasad. Babu

Anand Prasad was accordingly examined as a referee with the consent of the parties and he made certain statements. The learned Munsif was of opinion that the evidence given by Babu Anand Prasad covered the whole controversy between the parties and would justify a disposal of all the issues raised. He accordingly partially decreed the suit and partially dismissed it. The parties appealed and both the appeals were disposed of by a single judgment of the learned Subordinate Judge. The learned Judge was of opinion that the statement of Babu Anand Prasad was not sufficient for the disposal of the case and he remanded the suit to the Court of first instance for disposal. He directed that the referee should be re-called and should be re-examined on all the matters that were left in darkness owing to the referee not being questioned. He further said that if there were any points on which the referee could not throw any light, those points must be decided on evidence adduced by the parties.

As there were two appeals before the Subordinate Judge, two appeals have been filed in this Court. But in this Court the appellants in both the cases are the plaintiffs. It has been argued before us that the statement of Babu Anand Prasad was enough for the disposal of the entire suit. It is not necessary for us to examine that statement in detail. It is sufficient to say that we agree with the Court below that further light was necessary on the controversy between the parties. That being so, the question is whether the referee could be called again and examined.

The parties are agreed that if there be any point which cannot be disposed of according to the statement of the referee, evidence may be led on those points by the parties. The main question for disposal in these cases is whether the referee can, as a matter of law, be re-called and re-questioned.

It appears to me that there is nothing in the Oaths Act which declares that a referee cannot be re-examined if all the points which would be necessary to be established are not put to him. It was argued on behalf of the plaintiffs that they had agreed to the examination of Babu Anand Prasad only at that particular moment when he was before the Court and their agreement to abide by his statement came to an end the moment the referee was examined. The learned Counsel for the appellant has relied on the case of *Thoyi Ammal* v. *Subbaroya Mudali* (1). As I read that case, I find therein no authority for the proposition which the learned Counsel for the plaintiffs would have established. In that case it was said that the statement of the referee was not sufficient for the disposal of the case and the Court simply said that the facts which remained unproved must be proved in the ordinary way by way of evidence. It is not clear from the judgment whether the referee was unable to throw further light on the case or whether he was not at all available or whether it was possible to re-examine him and to obtain more information from him, if he could give it. That being the case, it cannot be inferred from what was stated by the Judges, that the Court held that the referee could not be examined again. On the other hand, the dictum of the learned Judges of this Court who decided the case of *Mahabir Prasad Misr* v. *Mahadeo Dat Misr* (2) would go to show that this Court was of opinion that if the referee was still alive and available, he could be examined again, in the case of there arising a further necessity for elucidation of the matters in dispute.

There is nothing in the Oaths Act which says that the reference to the referee comes to an end as soon as the referee has been once examined. In the case of reference to arbitration we know that an award may be referred back to the arbitrator for his decision if he leaves anything undecided. The same rule ought to be followed. For, as already stated, there is nothing in the Oaths Act to prevent the application of this rule. In the circumstances I would dismiss both the appeals and uphold the order of remand.

Sulaiman, J.—I agree. The question whether a referee by whose statement the parties have agreed to abide can be re-examined if certain points were omitted in his statement, is apparently not covered by any direct authority. The appellants' learned Vakil relies on the case of *Thoyi Ammal* v. *Subbaroya Mudali* (1) where it was remarked: "If the matter stated affords sufficient material for the decision of the suit, a decree may be passed on the facts thus conclusively proved. If the facts so proved are not sufficient for the decision of the case, *such further facts as are necessary*

(1) 22 M. 234; 8 Ind. Dec. (N. S.) 167.
(2) 13 A. 386; A. W. N. (1891) 143; 7 Ind. Dec. (N. S.) 246.

must be proved, in the ordinary way, by evidence adduced on both sides. The facts proved by the special oath are, however, conclusively proved, and the further evidence must, in our opinion, be limited to matters not proved by the oath."

On the other hand the respondent's Vakil relies on a remark in the judgment in *Mahabir Prasad Misr* v. *Mahadeo Dat Misr* (2). "Although I should always be strongly disinclined to assist a party to an agreement under the Oaths Act in getting out of it, yet I am bound to see that the object of the parties when they entered into it has been satisfactorily accomplished by the deposition of the referee, and, if that object has not been accomplished, then that *a further deposition should be obtained*, or, if that is impossible, as is the case here, owing to the Raja's death, that the question should be tried in the ordinary way by the Court."

The examination of both these cases, however shows that both these remarks were *obiter dicta* and it was not necessary to decide the point. In the Madras case the referee was the plaintiff himself and he might have been expected to be in a position to fill up the gaps. The learned District Judge, however, had remanded the case for a trial *de novo* and the Madras High Court merely decided that the statement of the plaintiff as the referee must be regarded as conclusively proving the facts deposed to by her and that the further evidence should be confined to other matters. Neither party apparently asked for a re-examination of the referee and the point accordingly was not expressly decided.

In the Allahabad case the referee was dead, and no question of his re examination arose.

It has been contended before us that once the oath was taken by the referee the agreement was fully carried out and if either party is unwilling to accept as conclusive any further statement of the referee such further statement should not be forced on him. But if this contention were to be accepted the result would be that as soon as the referee has left the witness-box he cannot be re-called even by the Trial Court though some material statement has been accidentally omitted. It is impossible to accept this as the correct position under the Oaths Act. If the Trial Court has power to re-call a referee there seems to be no good ground on principle why the same power should not be exercised by the Appellate Court, if it comes to the conclusion that his statement is not complete and exhaustive.

Of course if a party were to show good ground why the referee should not be examined again the Court may under special circumstances refuse to re-call him in order to fill up gaps in his statement, as it is the duty of both parties to see that his statement completely covers all the points in dispute. In this case, however, I see no good ground why the referee should not be asked to clear up certain points left vague by him.

By the Court.—Both these appeals are dismissed and the order of remand is upheld with costs including in this Court fees on the higher scale.

Z. K. *Appeals dismissed.*

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL No. 188 OF 1924.

January 15, 1925

Present:—Mr. Justice Pratt.

MAUNG SET KHAING—APPELLANT

versus

MAUNG TUN NYEIN AND OTHERS—RESPONDENTS.

Malicious prosecution—Damages, suit to recover—Reasonable and probable cause, absence of—Malice, proof of.

In order to succeed in a suit to recover damages for malicious prosecution the plaintiff must prove malice as well as absence of reasonable and probable cause. [p. 513, col. 2.]

Where a prosecution is obviously false and not instituted in good faith the Court will infer malice, but where a prosecution has been instituted under a *bona fide* belief that the accused has committed an offence even though that belief is mistaken, the plaintiff cannot obtain a decree unless the prosecution was malicious as well, even if enquiry had shown that no offence was committed. [*ibid.*]

JUDGMENT.—The defendant in the Trial Court was working the Tongyi Fishery of which his son was lessee.

The defendant had himself purchased the lease of the fishery for two years previously. He found the plaintiffs fishing in a channel, which he believed to be the Pakka Yo forming a part of his fishery, but which, it was subsequently proved was not a part of his fishery and was not the Pakka Yo.

He made a report to the *thugyi* and, by his advice, to the Police, to the effect that the plaintiffs had been caught fishing in

the Pakka Yo, which was part of his fishery.

The Police prosecuted for theft and the result of the trial was that the accused, plaintiffs, were acquitted.

The plaintiffs sued for damages for malicious prosecution in the Township Court.

The Trial Court held that as the defendant believed that the 'Yo' was the Pakka Yo and part of his fishery, there was reasonable cause for his complaint.

It also found that there was no malice on the part of the defendant and dismissed the suit.

On appeal the District Court held that the defendant, had he made any inquiries before reporting to the Police would have found that the water in which the plaintiffs were fishing was no part of his fishery.

The learned District Judge found accordingly that the prosecution was instituted wihout reasonable cause.

As, however, the mere institution of a prosecution without reasonable and probable cause is not sufficient to justify a decree, if the defendant honestly believed that the accused (plaintiffs) had committed a criminal offence, it was necessary to find that the prosecution was malicious and the first Appellate Court has come to a finding on this point.

I regret I am not quite able to follow the reasoning by which the learned District Judge has come to the conclusion that there was malice.

He observes that unless the sole object of the prosecution was to bring the offender to justice, there would be malice unless reasonable and probable cause were proved.

He proceeds to state that the object of the prosecution in the present case was solely to protect his own interests and that he was unable to hold that any sinister motive was proved.

Then follows a somewhat vague sentence:—

"An honest belief that the defendant was justified in informing the Police does not absolve him unless he could prove reasonable and probable cause, combined with a real desire to serve the ends of justice rather than his own private interests" and the conclusion drawn is "I am, therefore, bound to hold that in the present case malice was proved."

The conclusion does not seem to follow from the premises, and the absence of a real desire on the part of the defendant to serve the ends of justice rather than his own private interests does not necessarily involve malice.

On the District Judge's own showing the object of the prosecution was solely to protect the defendant's own interests, and there was no sinister motive.

This is practically a finding that there was no malice.

To protect one's own interests is not necessarily malicious and is not incompatible with a real desire to serve the ends of justice.

In reality the Judge's view seems to be that malice is a necessary corollary from the absence of reasonable and probable cause.

But this is not a correct view of the law.

There must be malice as well as an absence of reasonable and probable cause.

No doubt where a prosecution is obviously false and not instituted in good faith, the Courts will infer malice, but where a prosecution has been instituted under a *bona fide* belief that the accused has committed an offence, even though that belief is mistaken, the plaintiffs cannot obtain a decree unless the prosecution is malicious as well, even if inquiry would have shown that no offence had been committed, *vide Quinn* v. *Leathem* (1).

Actual malice has not been proved and it cannot be inferred from the fact that the defendant made no inquiries before making a report; nor from the fact that he charged the plaintiffs with theft. From his point of view the plaintiffs were stealing his fish.

Both Courts were satisfied that the defendant believed, when he made the report that the plaintiffs were fishing in a part of the Tongyi Fishery, though, as a matter of fact, they were not.

The Police did not investigate this point or they would have found there was no ground for a criminal prosecution, and if the Magistrate had gone into this point at the beginning of the proceedings, he would have found that there was no ground for framing a charge.

It is the plaintiffs' misfortune that the Police prosecuted them without making any inquiry into the boundaries of the defendant's fishery.

It is to my mind impossible on the evidence to hold that the prosecution was

(1) (1901) A. C. 495; 70 L. J. P. C. 76; 85 L. T. 289; 50 W. R. 139; 65 J. P. 708; 17 T. L. R. 749.

malicious, and, unless malice is proved or can be inferred, the suit was bound to fail.

I set aside the finding and decree of the District Court and restore the finding and decree of the Township Court with costs in all Courts.

The cross-objection must also be dismissed with costs.

Z. K. *Cross-objection dismissed.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 36 OF 1925.

November 24, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Mukerji.

MUHAMMAD IBRAHIM—INSOLVENT—APPELLANT

versus

RAM CHANDRA—VENDEE JAGAT RAM, VAKIL—RECEIVER—RESPONDENT.

Provincial Insolvency Act (V of 1920), ss. 35, 61 (6)—Annulment of adjudication—Payment of debts in full—Release of debt, whether payment—Interest subsequent to date of adjudication, whether must be paid.

Even an unconditional release of his debt by a creditor does not amount to a payment in full of the debt within the meaning of s. 35 of the Provincial Insolvency Act. [p. 515, col. 1.]

Before the provisions of s 35 of the Provincial Insolvency Act can be availed of, all the debts of the insolvent must be discharged in full. Interest subsequent to the date of the adjudication, though it cannot be taken into account at the time of the first distribution of the dividends, has to be paid out of the assets of the insolvent if they are sufficient for the purpose, and is, therefore, a part of the debt. Such interest must be paid before the benefit of s. 35 can be claimed. [p. 515, col. 2.]

First appeal from an order of the District Judge, Saharanpur, dated the 19th of January 1925.

Messrs. *Iqbal Ahmad* and *Ram Nama Prasad*, for the Appellant.

Mr. *Nehal Chand*, for the Respondents.

JUDGMENT.—This is an appeal against the Receiver from an order refusing to annul the appellant's adjudication. Muhammad Ibrahim was adjudged insolvent on the 24th of April 1919 and his property vested in the Official Receiver. On the 13th of February 1922 the Receiver entered into a contract for sale of a certain house with Ram Chandra for a sum of Rs. 3,000 and received Rs. 500 as earnest money. When he proceeded to sell this property, an objection was filed by the insolvent's wife claiming this house as her own property. Protracted proceedings followed and ultimately on the 29th of January 1924 the High Court decided against the wife, Rashida Khatun. A subsequent application for review also proved infructuous. On the 3rd of July 1924 the insolvent filed an application purporting to be under s. 38 of the Insolvency Act setting forth a composition scheme. In this he stated that he was able to procure money from his relations and would pay up all the debts that were entered in the schedule. It appears that his son made payments out of Court to various creditors and obtained receipts from them. Among these creditors was one Rura Mal. His receipt bears date the 4th of September 1924. Under this receipt Rura Mal no doubt admitted that he had received the amount due under his decree and promissory-note and that not a single shell remained due. On the 13th of September 1924 Rura Mal filed an application in the Court stating that he had received re-payment of his debts from the insolvent's son Abdul Hai and that he had no objection to the insolvent's application being granted. It appears that the debts of other creditors were also paid or discharged. On the 13th of September 1924 a statement was made by the insolvent's Vakil that his application under s. 38 should be treated as an application under s. 35 and that the annulment of the insolvent's adjudication should be ordered inasmuch as all the debts had been paid in full. Notice of this application was ordered to be issued. The report of the Receiver was in favour of the insolvent, but Rura Mal came forward and claimed interest on his debt and also certain expenses which he had incurred in connection with the appeal in the High Court. The Receiver, however, asked for Rs. 399 as his remuneration and expenses. On the 7th of December 1924, the learned District Judge came to the conclusion that all the debts had not been discharged inasmuch as interest due to Rura Mal had not been paid. He accordingly declined to order the annulment of the insolvent's adjudication. Subsequently the insolvent informed the Court that the house should not be sold for Rs. 3,000 as other persons were prepared to offer Rs. 5,000 and Rs. 6,000 and prayed that the sale be stayed. The District Judge forwarded the application to the Receiver to take steps but it reached him too late as the sale-deed in favour of Rura Mal had been registered half an hour earlier. On this

the learned Judge refused to set aside the same.

The insolvent appeals from both the order dated the 9th of December 1924 and the last order dated the 19th of January 1925 and has obtained the leave of the High Court to appeal.

The first point to consider in First Appeal from Order No. 37 is as to whether he was entitled to an annulment. Section 35 of Act V of 1920 requires that where in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full, the Court shall, on the application of the debtor, or of any other person interested, by order in writing, annul the adjudication. This is not a case where it can be said that the debtor ought not to have been adjudged insolvent. The contention of the insolvent is that the debts of the insolvent have been paid in full, inasmuch as although some amount of interest might have been outstanding, Rura Mal had given a complete and full discharge of his debts We agree that the receipt and the application purported to give a full discharge of the debt, but even an unconditional release by a creditor cannot amount to a payment in full of the debt within the meaning of s. 35. This was the view clearly expressed in the English case *In re Keet* (1) which has been followed by Indian High Courts, *vide in re Subrati Jan Mahomed* (2) and *Briji Kessoor Laul* v. *Official Assignee of Madras* (3). It is, therefore, clear that the mere release of the balance of the debt due to Rura Mal did not amount to a full payment so as to entitle the insolvent to an annulment. It has been argued on behalf of the appellant that Rura Mal would not have been entitled to any interest on his debt subsequent to adjudication and that such subsequent interest is not included within the expression "the debts of the insolvent" contained in s. 35. Under s. 48, sub-cl. 2 of the Act the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled is not prejudiced after all the debts proved have been paid in full. In s. 61, sub-cl. 6 it is provided that where there is any surplus after payment of the foregoing debts it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of six percentum per annum on all debts entered in the schedule. It is noteworthy that s. 38 does not use the words "proved debts or debts entered in the schedule." It must, therefore, be taken that before s. 35 can be availed of, all the debts of the insolvent must be discharged in full. Subsequent interest, though it cannot be taken into account at the time of the first distribution of the dividends, has to be paid out of the assets if sufficient, and is, therefore, a part of the debt. It is clear, therefore, that there was a sum of money due to Rura Mal which might have been released but was certainly not paid, though the principal sum and interest up to the date of adjudication had been paid. First Appeal from Order No. 37 of 1925, therefore, fails and is accordingly dismissed but without costs as no one appears for the respondents.

The sale which is sought to be set aside took place in pursuance of a previous contract of sale dated the 13th of February 1922. While the insolvency proceedings were pending the property vested in the Receiver and he had full power to dispose of it. The execution of the sale was delayed owing to proceedings taken by the insolvent's relations. It may be that some two years afterwards the value of the property had risen higher and some persons came forward to make higher offers. This, however, did not justify the Receiver to go back upon his original contract for sale. No stay order was passed by the District Judge and the sale took place at a time when there was no prohibition against it. When the order of annulment has been upheld we are unable to hold that the sale should be set aside. This appeal also fails and is dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) (1905) 2 K. B. 666; 74 L. J. K. B. 694; 93 L. T. 259; 54 W. R. 20; 12 Manson. 235; 21 T. L R. 615.

(2) 20 Ind. Cas, 859; 38 B. 200; 15 Bom. L. R. 748.

(3) 52 Ind. Cas. 979; 37 M. L. J. 244; 26 M. L. T. 221; (1919) M. W. N. 795; 10 L. W. 640; 43 M. 71.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1644 OF 1922.

February 26, 1925.

Present :—Mr. Justice Odgers.

C. VENCATACHARIAR—PLAINTIFF—APPELLANT

versus

BONTHAM PACHAYAPPA CHETTY AND OTHERS—DEFENDANTS Nos. 1 TO 4—RESPONDENTS.

Construction of document—Grant of income of property, whether grant of property itself.

A grant of the income of certain property without any limitation is a grant of the property itself. [p. 517, col. 1.] *Iyar*, 68 Ind.

Vaithinatha Aiyar v. *Thayagaraja Ax* v *Greener*, Cas. 631; 41 M. L. J. 20 at p. 29, *Manno* (1872) 14 Eq. 456 at p. 462; 27 L. T. 408, *Mayer*, *Alderson* and *Burgesses of Southmolton* v. *Attorney-General*, (1854) 5 H. L. C. 1 at p. 31, 10 E. R. 796, 23 L. J. Ch. 567; 18 Jur. 435; 101 R. R 1, followed

Second appeal against a decree of the District Court, Salem, in A. S. No. 89 of 1916, preferred against a decree of the Court of the District Munsif, Dharmapuri, in O. S. No. 315 of 1915.

Mr. *K. V. Krishnaswami Iyer*, for the Appellant.

Mr. *B. Somayya*, for the Respondents.

JUDGMENT.—This was a suit for partition and delivery with mesne profits of one-third of the permanent lease-hold village of Pacharahalli. The suit was decreed by the District Munsif. On appeal to the learned District Judge of Salem it was held that the plaintiff was not entitled to one-third of the village but only to one-third of the income On the hearing of the second appeal Mr. K. V. Krishnaswami Iyer appeared for the plaintiff-appellant, and Mr. Somayya for the respondents Nos. 1 to 4 intimated that his clients had no interest and took no part in the argument. I have accordingly heard the appeal as an *ex parte* decree matter. The plaint agreement of the 4th September 1845 has apparently disappeared and we are thrown back for its terms on a recital in the judgment in O. S. No. 569 of 1887 in the District Munsif's Court of Tiruppattur. The District Munsif there says :—"Its contents are to the effect that in consideration of the advances made in kind and in money to the tenants of the villages by Sesha Iyengar, Krishna Iyengar agreed to divide the income in cash and *waram* of the said villages with Sesha Iyengar, in the proportion of two to one, to give the latter accounts as to produce, *waram* etc,. of the two villages and in the result to conduct the affairs of the villages in consultation with Sesha Iyengar. The document closes with a final clause to the effect that the contracting parties should divide between them any loss relating to these villages in the proportion mentioned." Krishna Iyengar's interest is now vested in the defendants and Sesha Iyenger was the appellant's father. In Second Appeal No. 1307 of 1890, Ex A (2), Wilkinson and Handley, JJ., held that with regard to this agreement. "We see no reason to doubt that the grantor who was the uncle of the grantee intended to alienate and did alienate in perpetuity to his nephew a one-third share of the village which he held on permanent lease in consideration of services rendered and in all probability out of natural affection." In Ex. L, Varadachari, the son of Krishna Iyengar, the grantor, refers to the present plaintiff as our co-parceners Venkatachari and others. "That is a deed of collateral security dated 1896. In a plaint Ex. D in O. S. No. 663 of 1901 on the file of the District Munsif's Court of Tirupattur the present plaintiff and others brought a suit claiming one-third share in the villages and in Ex. D. (1) the written statement of the first defendant Varadachari in the same suit he pleaded. "In any case the plaintiffs are entitled only to one-third share in the said villages." In an affidavit Ex. F. (1) in O. S. No. 530 of 1907, E. P. No. 1038 of 1908, in the same District Munsif's Court Varadachari refers to the two-thirds share belonging to him in the said village and also in the same document states "after excluding the one-third share belonging to the plaintiffs in the permanent, *ijara* village of Pacharahalli, I sold etc. This seems to me to be sufficient to show that what was really granted was not only one-third share in the income but one-third of the village itself and that was what both parties in the past have thought was the meaning of the agreement. The learned District Judge refer to a certain suit O. S. No 2 of 1913, Ex. I, and says that "the present plaintiff and the present defendants were arrayed as against each as rival purchasers in a Court-auction of that two-third share right which was admittedly the property of their mutual judgment-debtor, the vendor of the present defendants in this case" and held that the rights in the present village are not concluded by Ex. E. He did not consider the Exhibit I have referred to. The law that a gift of the income may under

circumstances amount to a gift of the corpus may be seen, for example in *Mayor, Aldermen and Burgesses Co. of Southmolton* v. *Attorney-General* (1) where Lord St. Leonards said: "As regards the law, if the rents of the estate are given, they represent the estate. If the rents are given in certain proportions, so as to exhaust the whole of the present rents, and if no one is entitled to be benefited more than another beyond that which is specifically given, that is a representation of the estate itself in those proportions" And in *Mannox* v. *Greener* (2) Vice Chancellor Malins said. "Now it has been argued in this case that a gift of the income of real estate does not pass more than a life-estate, but I think it is thoroughly settled that before the Wills Act a devise of the rents and profits passed a real estate for life. That being the case, that which would give a life-estate before the Wills Act, by the 28th section of that Act, gives now a fee simple." These two English authorities have been referred to in a judgment of this Court reported in *Waithinatha Aiyar* v. *Thayagaraja Aiyar* (3) when it was held that a gift of the income of property without any limitation is a gift of the property itself.

A question has been raised as to the applicability of s. 54 of the C. P. C. The learned District Judge held that it was a right to income only that was to be partitioned; I fail to see why it should affect the question that the leases were not registered when the estate was so registered In the District Judge's view s. 54 had no application. I think in this respect the learned District Judge was wrong in my view expressed above and that, therefore, s. 54 could apply.

The lower Appellate Court's decree must be reversed and that of the District Munsif restored (as modified below) with costs in this Court against 5th respondent. Respondents Nos. 1 to 4 who were the only appellants in the lower Appellate Court must pay the present appellant's costs in the lower Appellate Court. As to future mesne profits, respondents Nos. 1 to 4 will be liable to plaintiff up to date of sale by them to 5th respondent—from that date the latter will be liable to plaintiff.

V. N. V.

Z. K. *Appeal allowed.*

(1) (1154) 5 H. L. C. 1 at p. 31, 10 E. R. 793; 23 L. J. Ch. 567; 18 Jur. 435; 101 R. R. 1.

(2) (1872) 14 Eq. 456 at p. 462; 27 L. T 408.

(3) 68 Ind. Cas. 631; 41 M. L. J. 20 at p. 29.

BOMBAY HIGH COURT.

CIVIL REFERENCE No. 4 OF 1925.

August 18, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

THE COMMISSIONER OF INCOME-TAX, BOMBAY

versus

M. H. SANJANA & Co., LTD.

Income Tax Act (XI of 1922), s. 25 (3)—Business transferred from one proprietor to another, whether discontinued—Refund of tax.

Income tax is chargeable on the profits of a business and it is immaterial if there is any change in the person who carries on a business, so long as the business is continued. [p 519, col 1]

Section 25 (3) of the Income Tax Act is applicable only to cases in which a business is discontinued entirely and not to cases in which it is transferred from one set of proprietors to another. The question to be decided under the section is whether the *business* is discontinued and not whether it is discontinued by a particular person. [p. 518, col 1.]

Where a Company carrying on a business sells the business, including the good will and the benefit of all running contracts, to another Company, the ownership and management of the business is changed, but the business is not *discontinued*, the purchaser Company succeeds to the business and continues it. Section 25 (3) of the Income Tax Act has, therefore, no application to such a case. [p 519, col. 2.]

Reference made by the Commissioner of Income-Tax, under s. 66 (2) of the Indian Income-Tax Act.

Mr. *Kanga*, Advocate General, (with him Mr. *A. Kirke-Smith*, Government Solicitor), for the Commissioner of Income Tax.

Sir *Chimanlal Setalvad*, KT., for the Assessees.

JUDGMENT.

Macleod, C. J.—This is a case stated by the Commissioner of Income Tax under s. 66 (2) of the Income Tax Act XI of 1922 and referred to the High Court with the opinion thereon of the Commissioner, at the instance of the assessees, the liquidators of Messrs. M. H. Sanjana & Company, Limited (in voluntary liquidation), hereinafter called the Company. The Company was started in 1919 to carry on the business of merchants, commission agents, contractors, suppliers of stores, shipchandlers, etc., and did so until the end of the year 1922, when it was resolved to take it into voluntary liquidation.

On February 21, 1923, the liquidators entered into an agreement with Ahmedbhoy Currimbhoy and Albert Raymond on behalf of a new Company to sell to the new Company when incorporated the business including all the stock-in-trade, furniture, fittings, machinery, and plant, motor cars, buildings and lands, the lease of the office

remises at Elphinstone Circle, the goodwill of the business including all trade marks and the benefit of all running contracts.

By an agreement dated July 20, 1923, between the Company and its liquidators of the first part, Ahmedbhoy Currimbhoy and Albert Raymond of the second part, and the new Company of the third part the above mentioned agreement was adopted. The business which uptill that time had been carried on by the assessees began to be conducted by the new Company. For the year April 1, 1922, to March 31, 1923, the Company was assessed to income-tax and super-tax on the profits amounting to Rs. 3,79,408 for the calendar year 1921. At the time of the assessment for the year 1923-24 the assessees submitted the accounts of the Company for the period January 1, 1922, to November 30, 1922, disclosing a profit of Rs. 1,99,208. The assessees claimed under s. 25 (3) of the Act that they were not liable to pay any tax on their profit, and that on the other hand as regards the assessment for 1922-23 they were entitled to substitute the profits of Rs. 1,99,208, for the eleven months up to December 1, 1922, in place of the profits of Rs. 3,79,408 for the year 1921 and get a refund of the tax overpaid.

This claim for a refund was disallowed on the ground that s. 25 (3) of the Act was applicable only to cases in which a business was discontinued entirely and not to cases in which it was transferred from one set of proprietors to another, and that under s. 26 of the Act the new Company as successors to the business were liable to be taxed on the profits made by the Company in 1922 and they were taxed accordingly. The question on which the opinion of the Court is required is not very succinctly stated in the letter of reference.

I should prefer to express it as follows:—

On the facts of the case are the assessees entitled to claim the refund they ask for under the provisions of s. 25 (3) of the Income Tax Act of 1922?

Section 25 (3) only refers to a business which was in existence at the commencement of the Act, namely, April 1, 1922.

If such a business is discontinued no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance. And the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period.

In this case the term "previous year" meant the year ending December 31, 1921.

It would appear then that the assessees could claim that the income, profits and gains of the previous year, namely, Rs. 3,79,408, should be deemed to be the income, profits and gains of the period between the end of the previous year and the discontinuance. Then an assessment should be made on the basis of the income profits and gains of the said period, and if an amount of tax had already been paid in respect of the income, profit and gains of the previous year, exceeding the amount payable on the basis of such assessment, a refund of the difference was payable.

I understand that on a proper construction of these words that the assessees, though the Company had paid in 1922-23 income-tax on the profits for the year 1921 amounting to Rs. 3,79,408, if the Compony discontinued its business during the year 1922-23, were entitled to substitute the profit of Rs. 1,99,208 for the eleven months up to December 1, 1922, in place of the profit of Rs. 3,79,408 and claim a refund. If that is the real meaning of the section, to my mind it has been expressed in the least intelligible way. I should have thought it would have been simpler to say that if a business in existence on April 1, 1922, is discontinued in any particular year, and has already paid tax on the profits of the previous year it becomes entitled to be assessed on the profits for the year in which it is discontinued, so that if those profits are less than the profits of the previous year, a refund is payable. However, the question before us is whether the assessees are entitled to resort to s. 25 (3) and we are not concerned with the relief they may be entitled to if they are so entitled. The assessees contend that because the Company stopped its business, they were entitled to relief, that as the Company went into liquidation its corporate powers ceased, and its assets became distributable amongst its creditors, and lastly that if they were not entitled to relief, the benefit of s. 25 (3) of the Act could not be given in any case.

All these arguments are based on a misapprehension of the scheme of the Act.

By s. 6 certain heads of income, profits and gains shall be chargeable to income-tax, of which 'business' is one. Business is

defined by s. 2 (4), and by s. 2 (2) an assessee is defined as a person by whom income-tax is payable. By s. 10 (1) the tax shall be payable by an assessee under the head "business" in respect of the profits or gains of any business carried on by him.

In the case of a Company by s. 22 (1) the principal office shall present to the Income-Tax Officer a return of the total income of the Company for the previous year, and under s. 23 the Income-Tax Officer makes the assessment, and determines the sum payable by the assessee.

By s. 26 when any change occurs in the constitution of a firm or where any person has succeeded to any business, profession or vocation, the assessment shall be made on the firm as constituted or on the person engaged in the business, profession or vocation as the case may be, at the time of the making of the assessment.

As then the tax is chargeable on the profits of a business, it makes no difference if there is any change in the person who carries on the business so long as the business is continued. There is no necessity to go beyond the facts of this case, where it is admitted that the business was continued, the management only passing from the old Company and its liquidators to the new Company when the agreement of June 20, 1923, was completed. Exactly the same question was raised in *Bartlett* v. *Inland Revenue Commissioners* (1). The owner of a business sold it to a Company. Under the provisions of s. 24 sub s 3 of the Finance Act, 1907, he claimed that he was only chargeable with tax on the actual amount made in the year of discontinuance and there was no power to go back on the three years average. Scrutton, J., said (page 693*): "The answer to that appears to me to be very simple. The trade was not discontinued in the year. The trade was sold to a Company and continued during the whole year; and in my view, therefore, s. 24 of the Act of 1907 has no application to this case." I would answer the question I have framed above in the negative.

The assessees must pay the costs of the reference.

Coyajee, J.—The statement of the case drawn up by the Commissioner of Income-tax and referred to this Court clearly sets out the material facts. In the year 1919 the Company, Messrs. M. H. Sanjana & Co. Ltd., commenced business in Bombay as merchants, commission agents, contractors, suppliers of stores, shipchandlers, mechanical engineers, etc. About the end of the year 1922 it was resolved to take the Company into voluntary liquidation. Its business was then sold to another Company, the Consolidated Mills Stores Co., Ltd. The sale included buildings and lands, the lease of the office premises, all the stock-in-trade, machinery, plant, furniture and fittings, the goodwill of the business including all trademarks and the benefit of all contracts entered into between the vendor Company and various other Companies. The business was then continued by the Consolidated Mill Stores Co., Ltd.

For the year 1922-23 M. H. Sanjana & Co., Ltd., were assessed to income-tax and super-tax on profits amounting to Rs. 3,79,408 for the calendar year 1921. At the 1923-24 assessment the Company (in voluntary liquidation) submitted its accounts showing a profit of Rs. 1,99,208 from January 1, 1922, up to November 30, 1922. They now claim that as their business is discontinued, they are entitled to substitute the profit of Rs. 1,99,208 in place of the profit of Rs. 3,79,408 on which the tax has been levied, and ask for a refund of the difference. They rely upon the provisions of s. 25 (3) of the Indian Income-Tax Act, 1922, which says: "Where any business, profession or vocation which was in existence at the commencement of this Act, and on which tax was at any time charged under the provisions of the Indian Income Tax Act, 1918, is discontinued," etc. The section grants relief if the condition which it lays down is fulfilled. The question arising for consideration then is: whether this business which was in existence on April 1, 1922, has been "discontinued"? On the facts of this case it is clear that when the Company sold the business, including the goodwill and the benefit of all running contracts, to the Consolidated Mills Stores Co., Ltd., the ownership of the business was changed, but the business was not "discontinued." The purchaser Company succeeded to the business and continued it—a case which is provided for by s. 26. It was, however, contended on behalf of the assessees, that when they sold the business, it was "discontinued" at any rate so far as they were concerned, and they are, therefore, entitled to claim a refund of the overpaid tax. But the language of the section

(1) (1914) 3 K. B. 686; 84 L. J. K. B. 686.

*Page of (1914) 3 K. B.—[*Ed.*]

is clear; and the question arising under it is—whether the *business* was discontinued; and not—whether the business was discontinued *by* A. B. In this case the transfer of ownership left the continuance of the business wholly unaffected. In my opinion, therefore, the assessees are not entitled to claim the refund which they ask for.

Z. K. *Answer accordingly.*

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1145 OF 1922
AND
CIVIL MISCELLANEOUS PETITION NO. 1565 OF 1925.

April 15, 1925.

Present:—Mr. Justice Phillips.

THIRUMALAI PILLAI AND OTHERS—PLAINTIFFS NOS. 1, 2, 4 TO 7—APPELLANTS IN S. A. No. 1145 OF 1922—PETITIONERS IN C. M. P. No. 1565 OF 1925

versus

ARUNACHELLA PADAYACHI AND OTHERS—DEFENDANTS NOS. 1 AND 2—RESPONDENTS IN BOTH.

Civil Procedure Code (Act V of 1908), s. 2 (11), O. XXII, r 10—Legal representative—Trustee, whether legal representative of preceding trustee—Death or retirement of trustee—Addition of succeeding trustee as party to suit—Devolution of interest—Limitation—Lessor and lessee—Lease for term of years—Deposit of cash with lessor to be appropriated to last year's rent—Subsequent conversion of cash into Government pro-notes by consent of parties—Depreciation in value of notes—Loss, liability for.

A trustee of an institution is not a legal representative of his predecessor-in-office within the meaning of s. 2 (11), C. P. C. [p. 521, col. 1]

Where a trustee who is a party to a suit either retires or dies and is succeeded in office by another by election or otherwise, there is a devolution of interest pending suit under O. XXII, r. 10, C. P. C., and such succeeding trustee can be added as party to the suit under the said provision apart from any question of limitation. [*ibid.*]

Sundaresam Chettiar v. *Viswanatha Pandara Sannadhi*, 72 Ind. Cas. 103, 45 M. 703; 31 M. L. T. 66; 16 L. W. 83; 43 M. L. J. 147; (1922) M. W. N. 444; (1922) A. I. R. (M.) 402, *Ratnam Pillai* v. *Nataraja Desikar*, 84 Ind. Cas. 200; 46 M. L. J. 341; 19 L. W. 367; (1924) M. W. N. 361; (1924) A. I. R. (M.) 615; 34 M. L. T. 31, relied on.

A lessee for a term of 5 years deposited a sum of money equivalent to one year's rent with the lessor on the understanding that the amount would be applied in payment of the last year's rent. Soon after, by consent of both parties, Government promissory notes were purchased for the cash deposit. But by the time the lease terminated, the notes had considerably depreciated in value. On a question arising as to who was to bear the loss arising from the said depreciation in value:

Held, that the cash deposit belonged to the lessee and the conversion of cash into Government pro-notes had not, in the absence of any special agreement, the effect of transferring the property in them from the lessee to the lessor. The property in the notes being the lessee's, when they depreciated in value, he ought to bear the loss [p. 522, cols. 1 & 2.]

IN S. A. No. 1145 OF 1922.

Second appeal against a decree of the District Court, East Tanjore, at Negapatam, in A. S. No. 57 of 1921, (A. S. No. 754 of 1920, on the file of the District Court of West Tanjore), preferred against the decree of the Court of the District Munsif, Shiyali, in O. S. No. 1565 of 1925.

IN C. M. P. No. 1565 of 1925.

Petition praying that in the circumstances stated in the affidavit filed herewith, the High Court will be pleased to direct the amendment of the cause title in the said Second Appeal No. 1145 of 1922, by omitting from the records of the said Second Appeal No. 1145 of 1922, the names of (1) A. [illegible] (2) Dewan Bahadur [illegible] Chettiar and (3) O. Thanikachellam Chettiar and entering in the record of the said second appeal, the names of (1) P. V. Nataraja Mudaliar, (2) P. T. Kumaraswamy Chettiar and (3) Vavila Venkateswara Sastrulu either as appellants or respondents.

Mr. *S. T. Srinivasagopalachari*, for the Appellants.

Mr. *S. Muthiah Mudaliar*, for the Respondents.

JUDGMENT.—This is an appeal by the trustees of the Pachayyapas Charities to recover rent from the respondents. The appeal was filed by all the nine trustees, but, since the appeal was filed, two of the appellant-trustees have died and one has retired. Of the two trustees who died, one died only on 21st March 1915, and, therefore, there is plenty of time to bring in his legal representative or the person on whom his interest has devolved, but objection is taken by the respondents that No. 6 Mr. Ethiraja Mudaliar, having died in 1923 and No. 5 Sir P. T. Thiagaraja Chettiar, having retired on 29th April 1924, the application to bring in the three trustees who have since been elected on the Board is out of time and that, therefore, the appeal should be dismissed *in limine*. The contention for the respondents is that the new trustees who have been appointed by election to fill the places of those who have died or retired are their legal representatives within the meaning of s. 2,

cl. (11) of the C. P. C., but in that section we find that "legal representative" includes "where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued." When Mr. Ethiraja Mudaliar died, his estate as trustee devolved on no one, unless it can be deemed to have devolved on the surviving trustees, who are parties to this appeal. Certainly it cannot be said that his estate devolved on his death on a person who was subsequently elected to fill his place. The act of the electors can certainly confer no retrospective power on the person elected so as to vest the estate of the deceased in him. So far as No. 5 is concerned his office became vacant by retirement and not by death. On the date of his retirement, the person subsequently elected to succeed him was certainly not his legal representative within the meaning of s. 2, cl. (11), C. P. C. Consequently these persons, now sought to be added as appellants, do not come within the meaning of "legal representative." For the appellants, it is contended that O. XXII, r. 10 is applicable and I see no reason why it should not be so. The estate of the deceased trustees has devolved on these persons by the act of the electors done in pursuance of the scheme framed by this Court and it appears to me that it is a case of devolution of interest during the pendency of a suit. A similar view was held by a Bench of this Court in *Sundaresam Chettiar* v. *Viswanatha Pandara Sannadhi* (1) and by another Judge in *Ratnam Pillai* v. *Nataraja Desikar* (2). I see no reason to differ from the view and hold that these persons can be added as parties under O. XXII, r. 10.

In these circumstances, it is unnecessary to discuss the further question whether the trustees who have all along been on record can be allowed to continue the appeal on behalf of the whole body of trustees without adding the trustees subsequently elected.

Coming to the merits of the appeal, two points are argued. The appellants claim firstly the loss which they have suffered owing to the depreciation of Government promissory-notes deposited by the defendants in respect of the lease which they obtained from the appellants. The second question relates to the amount of water-rates payable by the defendants. As regards the second point I may say that, on a construction of the lease, defendants are liable to pay water-rate for water taken to *punja* lands, for water taken for second crop on *nanja* lands; and for water taken to *poramboke*. The learned Judge has only considered one of the provisions of the lease which relates to *poramboke*, but does not appear to have considered the earlier clauses at all, and the learned Judge's judgment is not supported by the respondent's Vakil who admits that the construction put upon the document by him is incorrect. In this respect, the Munsif's decree must be restored.

The more important point is the question of depreciation of Government promissory-notes. When the respondents obtained the lease, they deposited a sum of Rs. 5,300 with the appellants. This amount was equivalent to one year's rent of the lands, the lease being for five years. Soon after the deposit was made, the appellants wrote to the 1st defendant and suggested that the money should be converted into Government promissory-notes. Defendant agreed to this course in his letter of 30th April 1913 saying "Accordingly I am willing to purchase and keep Government bonds bearing $3\frac{1}{2}$ per cent. per annum." Subsequently, the actual lease deed was executed on 26th May 1914 and that deed contains the following recital, "As the understanding is that Government promissory-notes should be purchased and kept for the said cash deposit, etc." So far, the documents show clearly that the defendant agreed to the purchase of Government promissory notes on his behalf as the equivalent of the cash deposit made by him, and the method in which that deposit was to be applied is mentioned in the lease deed, Ex. B. The question really at issue is whether these promissory notes which have depreciated very considerably by the end of the lease when the deposit had to be applied in payment of the last year's rent, belonged to the appellants or respondents. It is not disputed that the cash deposit belonged to the respondent and it is on record that the respondent agreed to that cash deposit

(1) 72 Ind. Cas. 103; 45 M. 703; 31 M. L. T. 66; 16 L. W. 83; 43 M. L. J. 147; (1922) M. W. N. 444; (1922) A. I. R. (M.) 402.

(2) 84 Ind. Cas. 200; 46 M. L. J. 341; 19 L. W. 367; (1924) M. W. N. 361; (1924) A. I. R. (M.) 615; 34 M. L. T. 31.

being converted into Government promissory notes. It is difficult, therefore, to understand the contention that this conversion of cash into notes had also the effect of transferring the property in them from the respondent to the appellant unless there was some contemporaneous agreement to that effect. The learned Judge does not appear to have considered at all the question of the property in those promissory-notes and has based his decision on certain findings as to what the defendants understood. I may say at once that in several cases, apart from the condition as to payment of water-rate, the learned Judge has obviously misconstrued the documents. In one case, namely, Ex. 9, he apparently has only read the document perfunctorily, for he gives its contents accurately as mentioned on the docket, but when the document itself is read it appears that the docket is not accurate and it would appear that the learned Judge has relied solely upon the docket without reading the actual document. That by itself would be sufficient to vitiate his judgment but it is also clear that he has not applied his mind in the right direction. The learned Judge starts by thinking it a most extraordinary thing, that, when Government promissory notes stood at about 98, the appellants should have purchased notes of the face value of Rs. 5,500 instead of notes of the face value of Rs. 5,300 considering the cash already in their hands was sufficient to purchase notes to the extent of nearly Rs, 5,500 (plus interest accrued to date) in view as they said, to secure against loss by depreciation. If there were depreciation below the price at which they purchased and notes only of Rs. 5,300 were purchased, the appellants might be put to great loss as the security would be inadequate. As it is, even after taking this precaution, the value of the notes has fallen far below the amount due by the defendants. There was, therefore, nothing surprising in the appellants purchasing notes of the value of Rs. 5,500. The main ground for finding that defendants were not liable for the depreciation is that there was no understanding on their part that they would be liable for any depreciation in value, but when a man owes promissory-notes, he must know that, if they depreciate in value, he will be liable for such depreciation and not a third party, unless there is an agreement to the contrary. His misunderstanding on this point, if there was any, would be merely due to ignorance of ordinary business principles of which any man should be deemed to have knowledge. Every man knows that he is responsible for the condition of his own property and when that changes, the responsibility is his and not that of a third party. Whether the defendants really understood their position or not is immaterial in this case. The property in the notes was theirs and, therefore, when the notes depreciated they must bear the loss.

An attempt has been made to show that the property in the notes was not defendants' and reliance is placed on a letter by the Bank to the trustees. How that could effect a transfer of property, I do not understand. The contention is quite worthless. The defendants accepted the change in the nature of their property and had never repudiated it any time. They are, therefore, liable for this depreciation. The appellants would have been entitled to realise the security in their hands, at the end of the lease, but, as a matter of fact, they merely credited the market value of the notes at that date and asked the defendants to pay the balance, in fact, they even offered to return the notes if the defendants would pay the proper amount in cash. The Judge was, therefore, quite wrong in saying that the defendants were never consulted before the Government promissory-notes were sold. This is yet another question of fact in which the Judge is completely wrong. Considering all these circumstances, the judgment appears to be most unsatisfactory.

The decree of the lower Appellate Court must be set aside and the decree of the District Munsif restored with costs both here and in the lower Appellate Court.

V. N. V. *Appeal allowed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 121 OF 1925.
December 3, 1925.
Present:—Mr. Justice Daniels.
GANGA DHAR-BAIJ NATH—OPPOSITE PARTY—APPLICANTS
versus
BOMBAY-BARODA AND CENTRAL INDIA RAILWAY—APPLICANT—RESPONDENT.
Provincial Small Cause Courts Act (IX of 1887),

s. 17—Ex parte *decree, application to set aside—Tender of decretal amount—Deposit made after expiry of limitation—Substantial compliance.*

An application to set aside an *ex parte* decree was presented on the last day of limitation at about 3 P. M. It was accompanied by a tender of the amount payable under s. 17 of the Provincial Small Cause Courts Act, but as no payments were passed by the treasury after 12 noon, the money was not actually deposited in the treasury till the following day:

Held, that there was a substantial compliance with the provisions of s. 17 of the Provincial Small Cause Courts Act.

Civil revision from an order of the Additional Judge, Small Cause Court, Cawnpore, dated the 11th May 1925.

Dr. *N. C. Vaish*, for the Applicants.

JUDGMENT.—This is a revision under s. 25 of the Provincial Small Cause Courts Act. The question raised is whether there was a sufficient compliance with s. 17 of that Act in presenting an application to set aside an *ex parte* decree. The application was presented on the last day of limitation at about 3 o'clock. It would appear from the judgment of the Court below that it was accompanied by a tender of the amount payable under s. 17, but as no payments are passed by the treasury after 12 o'clock in the day the tender was not returned to the applicant or the money actually deposited in the treasury till the following day. I agree with the Court below that this was a substantial compliance with the provisions of s. 17. The applicant did every thing that was possible for him to deposit the money at the time of presenting the application, and it was only owing to the particular rules in force of the local treasury that it could not be deposited till next day. The principle of the ruling [*Munna Lal* v. *Radha Kishan* (1)] relied on by the Court below is applicable. I accordingly dismiss the revision but without costs as the respondent is unrepresented.

Z. K. *Revision dismissed.*

(1) 30 Ind. Cas. 186; 13 A. L. J. 793; 37 A. 591.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 288 OF 1923.

July 31, 1922.

Present:—Mr. Justice Jackson.

SHIVA AITHALA—DEFENDANT—APPELLANT

versus

RANGAPPAYA AITHALA—PLAINTIFF—RESPONDENT.

Hindu Law—Widow of divided member—Funeral expenses.

Under the Hindu Law, where a widow of a divided member of a Hindu family dies, without having any self-acquired property of her husband, the relations responsible for her maintenance, and not necessarily those who perform the ceremony, are liable to pay for her funeral expenses, in like proportion as the maintenance itself.

Second appeal against a decree of the Court of the Subordinate Judge of South Kanara, in A. S. Nos. 34 and 35 of 1922, preferred against a decree of the Court of the Principal District Munsif, Mangalore, in O. S. No 95 of 1920.

Mr. *B. Sitaramarao*, for the Appellant.

Mr. *K. Y. Adiga*, for the Respondent.

JUDGMENT.—The short point in this second appeal is who is to defray the funeral expenses when a widow dies being a member of a divided Hindu family, and not being in enjoyment of any self-acquired property of her husband. The widow was being maintained by her husband's nephew and great nephew each of whom contributed half. The lower Courts have ruled that they should pay for her funeral in like proportion and this seems logical and equitable. If the family were not divided they would pay at this rate. There is no direct authority on the point but Sir E. J. Trevelyan has deduced a similar rule from such authority as exists. See Hindu Law, 2nd Edition, page 88. I see no force in the contention that the relation who performs the ceremony under the Hindu Law must necessarily pay for it. In a joint family the son does not pay for the funeral of his father. Accordingly I confirm the decree of the lower Appellate Court and dismiss this appeal with costs.

The respondent files memorandum of objections and wishes an issue to be tried which was not previously framed and finds no place in the pleadings, whether under the partition of 1875 defendant was bound to pay the amount claimed irrespective of the receipts upon which until now his claim has been based. I consider that this new point cannot be raised at this late stage. The memorandum of objections is dismissed with costs.

V. N. V. *Both Appeal and Memorandum*
N. H. *of objections dismissed.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 268 OF 1922.

August 24, 1925.

Present:—Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.

UNNAMALAI AMMAL AND ANOTHER—DEFENDANTS NOS. 1 AND 10—APPELLANTS

versus

ABBOY CHETTY AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Alienation by managing member for proper purposes—Recital that properties were self-acquired, effect of.

The managing member of a joint Hindu family executed a mortgage of certain family properties for purposes binding on the family but recited in the mortgage-deed that the mortgaged properties were his absolute properties. In a suit on the mortgage.

Held, that since the mortgage purported to be of the entire interest in the properties and the mortgagor had the legal capacity to execute a mortgage of the entire interest binding on the family, the interest mortgaged was of the entirety which the executant was capable of conveying and not merely of his share in the properties and the recital that the executant was the owner must be treated as surplusage. [p. 525, col. 1]

Sankaranarayanam Pillai v. *Rajamani*, 83 Ind. Cas. 196; 47 M. 462; 46 M. L J 314; 34 M. L T. 152; (1924) A. I R. (M) 550; 20 L. W 357, *Sabapathy Chetty* v. *Ponnusawmy Chetty*, 28 Ind. Cas. 365, followed.

Balwant Singh v. *Rev. Rockwell Clancy*, 14 Ind. Cas. 629; 34 A. 296; (1912) M. W N 462; 11 M L T. 344; 9 A. L. J. 509, 15 C. L. J. 475; 16 C W. N. 577; 23 M. L J 18, 14 Bom. L. R. 422; 39 I. A. 109 (P. C), distinguished.

Appeal against a decree of the Court of the District Judge, South Arcot, dated the 30th January 1922, in O. S. No. 11 of 1921.

Mr. *S. T. Srinivasagopalachariar*, for the Appellants.

Messrs. *A. Krishnaswamy Aiyar* and *K. R. Rama Aiyar*, for the Respondents.

JUDGMENT.—This suit has been brought to enforce three mortgages evidenced by Exs. A, B and D. Audi and Ramaswami were father and son. A and B were executed by Ramaswami and D was executed after Ramaswami's death by Audi and Ramaswami's widows the first defendant and another. Subsequent to the execution of these mortgages, the first defendant obtained a decree for maintenance against Audi and in execution of it she and her father the 10th defendant became the purchasers of the properties which had been previously mortgaged.

In regard to the first two deeds, the question is, did the interest of Audi pass to the plaintiffs, the mortgagees. They were executed by Ramaswami, the son, but the lower Court has found, and we agree with the finding, that he was the manager of the family. As regards the question whether the monies were borrowed for family purposes, the learned Judge relying mainly on oral evidence and probabilities has come to the conclusion that they were not so borrowed. He however has failed to give effect to the admission contained in the later document Ex. D. It is very clearly stated in it that the monies under A and B were borrowed by Ramaswami for purposes binding on the family and as we have said it was executed not only by Audi but also by the 1st defendant. No reason has been shown why this admission should not be acted on. It must be remembered that evidence in the suit was given long after the transaction, whereas the interval of time between Exs. A and B on the one hand and D on the other was only four years. The lower Court has however come to the conclusion that A and B are binding upon the share of Audi but for a different reason. It has held that by Ex. D, Audi ratified the mortgages A and B. This view may be open to question but we agree with the conclusion of the lower Court.

Next we have to deal with Ex. D. It was executed shortly after the death of Ramaswami. The consideration, namely, Rs. 4,000 was made up thus:—

	Rs.
(1) Balance of interest due under Exs. A and B ...	382
(2) Balance due by Ramaswami for goods supplied	130
(3) Cost of stamp for Ex. D	20
(4) Amount received in cash	3,468
TOTAL ...	4,000

The plaintiffs admitted that the fourth item was not due as they had not paid it and so no question arises in regard to it. Regarding the other three items, the Court has held against the plaintiff. This finding cannot be supported. There is a clear admission of Audi (Ex. E) which the lower Court has somehow overlooked. According to that, all the sums excepting the last were received by the executants. The first item of D is the balance of interest due under A and B. This item having been

disallowed, the learned Judge directed that interest upon A and B should be calculated as if credit for interest in D had not been given. As we are holding that the first item in D is due, it will not be necessary to adopt this course. In calculating interest under A and B credit must be given for the amount of interest included in D. As regards D, our conclusion is, that the first three sums are due and they will carry interest at the rate provided in the document.

There remains lastly the question of law raised by Mr. Srinivasagopalachari, the learned Counsel for the appellants. He has contended that in Exs. A and B Ramaswami described the properties as absolutely belonging to him but as a fact he was entitled only to a half share, the mortgages must operate only on that share. We cannot accept this contention. The properties that were mortgaged were the entire properties and not Ramaswami's share in them. The description given shows that it was the entire property that was intended to be mortgaged. The recital that the executant was the owner may be treated as surplusage. Not only did he purport to mortgage the entire property, but on our finding he possessed the legal capacity to do so. As the manager of the family he was competent to enter into a transaction binding on the whole property. There were thus three elements present *first*, he purported to mortgage the whole property, *secondly*, he was legally competent to do so and *thirdly*, there is nothing in the document to repel the natural inference that what was intended to be conveyed was the whole property. *Sankaranarayanam Pillai* v. *Rajamani* (1) and *Sabapathy Chetty* v. *Ponnusawmy Chetty* (2) are clear authorities for the position that in the circumstances the interest conveyed should be held to be that which the executant was capable of conveying. *Balwant Singh* v. *Rev. Rockwell Clancy* (3) strongly relied on by the learned Counsel was distinguished in those two cases, and we adopt the observations on this matter in the judgment in those cases. We may observe that *Sabapathy Chetty* v. *Ponnusawmy Chetty* (2) is almost on all fours with the present.

The decree of the lower Court is modified and the following decree is substituted. There will be a mortgage decree for the amounts due under A and B. There will similarly be a mortgage decree for the amount due under D. The plaintiffs will first bring to sale the properties in A and B for the amounts due under them. If after satisfaction of those mortgages there is any balance, that will be applied towards the debt under D. The properties mentioned in D will be sold only in the event of any balance remaining even after the monies have been so applied.

The appellants will pay the respondents the costs of the appeal. There will be no order as to costs in the memorandum of objections.

V. N. V.
Z. K. *Decree modified.*

(1) 83 Ind. Cas. 196; 47 M. 462; 46 M. L. J. 314; 34 M. L. T. 152; (1924) A. I. R. (M.) 550; 20 L. W. 357.
(2) 28 Ind. Cas. 365.
(3) 14 Ind. Cas. 629; 34 A. 296; (1912) M. W. N. 462; 11 M. L. T. 344; 9 A. L. J. 509; 15 C. L. J. 475; 16 C. W. N. 577; 23 M. L. J. 18; 14 Bom. L. R. 422; 39 I. A. 109 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 391 OF 1925.
November 24, 1925.
Present:—Mr. Hallifax, A. J. C.
In re DIGAMBAR—APPLICANT.

Court Fees Act (VII of 1870), Sch I, Art. 12—Succession certificate—Provident fund, whether exempt from Court-fees.

Money standing to the credit of a deceased person in a Railway Provident Fund passes to his nominee and does not form what can properly be called an asset of the estate of the deceased. It is, therefore, exempt from the Court-fees payable for a Succession Certificate under Art. 12, Sch. I, of the Court Fees Act.

Application for revision of an order of the Additional District Judge, Bilaspur, dated the 12th November 1925.

Mr. *G. R. Deo*, for the Applicant.

JUDGMENT.—Mr. G. R. Deo has been heard for the applicant. It appears from Bengal Revenue Circular No. 4 of January 1922, that the matter of the liability to duty of a sum standing to the credit of a deceased person in a Railway Provident Fund was referred by the Board of Revenue of Bengal to the Advocate-General and the Board agreed with him in holding that Provident Fund money is exempt from duty and that the Administrator has nothing to do with this fund, which passes to the nominee even if there is no Adminis-

trator, it does not form what can properly be called an asset of the estate. In this view I concur. It has, however, been brought to my notice in a previous case that the Bengal Nagpur Railway Campany perhaps for its own protection, ordinarily refuses to pay this money without Letters of Administration. The amount will, therefore, be mentioned among the assets, but no Court fee will be recovered on it. The order that a Court-fee is to be paid is set aside. The proceedings will continue.

Z. K. *Order set aside.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1148 OF 1923.

September 30, 1925.

Present:—Mr. Justice Devadoss.

PERIA NAMBI SRINIVASACHARIAR —PLAINTIFF No. 1—PETITIONER

versus

KUNA RAMASAMY NAICKER AND OTHERS —DEFENDANTS AND PLAINTIFFS Nos. 2 TO 3 —RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92, suit under—Damages for misconduct of trustee.

Although in a suit under s. 92, C. P. C., a decree may be passed against a trustee in office to account for the income of the property in his possession, a claim for a specific sum in damages on account of loss to the trust by the misconduct of the trustee is not one of the reliefs falling within the scope of the section.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order, dated the 12th March 1923, of the Court of the Subordinate Judge, Dindigul, in O. S. No. 74 of 1920.

Mr. *K. Rajah Iyer*, for the Petitioner.

Mr. *M. Patanjali Sastri*, for the Respondents.

JUDGMENT.—This is an application to revise the order of the Subordinate Judge of Dindigul directing payment of Court-fee on the amount mentioned in the plaint as damages on the ground that the proper Court-fee was not paid. The first plaintiff has preferred this petition.

The contention of Mr. Rajah Iyer, for the petitioner, is that the order of the Subordinate Judge was without jurisdiction inasmuch as his client was entitled to ask in a scheme suit for an account against the trustee. No doubt in a scheme suit a decree may be passed against the trustee in office to account for the income of the property which was under his management. But in this case what the plaintiff has done is to ask for a specific sum to be paid by the defendant as damages for the loss caused to the said *devasthanam* by the defendants' misconduct. Claiming damages on account of misconduct is not one of the reliefs under s. 92, C. P. C.

If the plaintiffs wanted the defendant to account for the income of the institution of which the said defendant was the manager, he should have been asked to submit an account relating to his management. Prayer (*b*) of para. II of the plaint does ask for an account of the management. But prayer (*c*) wants the defendant to pay Rs. 53,000 and odd as damages for the losses caused to the *devasthanam* during his management. As this is made on a different footing from the ground of accountability of a trustee for the income of the property which was under his management, I think the order of the learned Subordinate Judge is right and I dismiss the civil revision petition with costs.

It is open to the plaintiffs to file another suit after obtaining the consent of the Advocate-General for such reliefs as they deem proper.

V. N. V. *Petition dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2017 OF 1924.

January 23, 1925.

Present:—Mr. Justice Campbell.

Musammat AISHAN—PLAINTIFF—APPELLANT

versus

THE MUNICIPAL COMMITTEE, LAHORE, THROUGH THE SECRETARY—DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), s. 17 (1) (d)—Lease reserving yearly rent.

A mere recital of an annual rate of rent in a lease does not constitute it a lease reserving a yearly rent within the meaning of s. 17 (1) (d) of the Registration Act. [p. 527, col. 1.]

Muhammad Mosam Khan v. *Bakhtawar*, 70 P. R. 1895 and *Kanwar Ranzor Singh* v. *Chippal*, 37 P. R. 1900; P. L. R. 1900 p. 303, followed.

Second appeal from a decree of the District Judge, Lahore, dated the 16th April 1924, reversing that of the Munsif, First Class, Lahore, dated the 27th July 1922.

Mr. *G. S. Salariya*, for the Appellant.

Lala *Madan Gopal*, for the Responden t

JUDGMENT.—The question before the lower Appellate Court was whether a certain plot of land was the property of the plaintiff or of the defendant, and the learned District Judge held largely on the strength of a certain document that it was the property of the defendant.

In second appeal for the first time the objection has been raised that the document is compulsorily registrable as a lease reserving a yearly rent, and without registration is not admissible in evidence to affect the property to which it refers. I have examined the document. If it is a lease it is determinable at any time at the will of the landlord, and it has been held more than once that the mere recital of an annual rate of rent in such a lease does not constitute it a lease reserving a yearly rent within the meaning of s. 17 (1) (*d*) of the Registration Act, *vide Muhammad Mosam Khan* v. *Bakhtawar* (1) and *Kanwar Ranzor Singh* v. *Chippal* (2).

A second contention has been put forward that the document has not been proved to have been executed by the ostensible executant Nawab, but the finding of the learned District Judge to that effect is one of fact and the suggestion that it is based on no evidence at all has no force. I dismiss the appeal with costs.

N. H. *Appeal dismissed.*

(1) 70 P. R. 1895.

(2) 37 P. R. 1900; P. L. R. 1900 p. 303.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 83 OF 1924.

August 17, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

GAJANAN NARAYAN PATKAR—DEFENDANT—APPELLANT

versus

JIVANGIRI CHAMELGIRI—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), s. 17—Transfer of Property Act (IV of 1882), s. 54—Sale-deed—Agreement to re-convey—Registration, whether necessary.

Where a registered sale-deed is followed by an agreement to re-convey, and the latter can be treated as an altogether separate transaction from the sale-deed itself, then under s. 54 of the Transfer of Property Act, the agreement vests no interest in the property in favour of the vendor and does not require to be registered. But if the agreement to re-convey is really a part and parcel of the transaction of sale, which is only partly evidenced by the registered deed of sale, then the agreement to re-convey must also be registered. In other words, when a transaction is evidenced by a document which is in effect divided into two parts, one of which is registered and the other is not, then the law looks to what is the real transaction between the parties, and demands that the whole document evidencing that transaction must be registered, whether it consists of one part or two. [p. 528, col. 2.]

Per *Coyajee, J.*—The question whether an agreement to re-convey immoveable property exceeding Rs. 99 in value does or does not require to be registered must, in each case, be decided on a consideration of the contents of the document itself and of such facts as might be proved for the purpose of showing in what manner the language of the document is related to existing facts. Proximity of time, or even the identity of the dates of the two documents, is not the decisive circumstance in all cases. [p. 529, col. 2]

First appeal from the decision of the Joint First Class Subordinate Judge at Thana, in Suit No. 493 of 1922.

Mr. *A. G. Desai*, for the Appellants.

Mr. *G. N. Thakor*, (with him Mr. *J. G. Rele*), for Respondent No. 1.

JUDGMENT.

Macleod, C. J.—The plaintiff sued for specific performance of a contract for the sale of certain immoveable properties by the defendants on their passing a sale-deed to him, and for possession.

The document on which the plaintiff sued is Ex. 30 and is dated March 17, 1897. It is addressed to four persons, Govindgiri, Pitambargiri, Chamelgiri and Harigiri, the four *chelas* of Guru Daulatgiri. It runs as follows:—

"On March 2, 1897, we have jointly purchased from you the property. After having got registered an arbitration award amongst ourselves about that property and after you have paid off all your personal debts due to us, every one of us will, to the extent of his own rights separately pass to every one of you a separate agreement to sell one-fourth portion of the property purchased from you, the period for the said agreement being one of twenty one years. When every one of you pays, after 21 years, his one-fourth share of the amount according to the agreement of sale, every one of us will pass to every one of you a separate sale-deed at your expense. The same will be passed either to you or to your legal heirs or to the executors of your will."

Then there are detailed the shares which the purchasers under the document referred to in this Exhibit should take, and for

which they were to pass sale-deeds to the various *chelas* as stated therein

We are only concerned in this case with the father of the plaintiffs now deceased, *viz.*, Chamelgiri to whom Naro Balkrishna Patkar was to pass a sale-deed to the extent of a 4-annas share. The first defendant is the son of Naro and the second defendant is his daughter-in-law.

The main question argued in the case was whether this Exhibit is admissible in evidence for want of registration. The Judge said:—

"The defendant had contended that this *potchiti* required to be registered. No authority was shown in support of that contention. Exhibit 30, *potchiti*, by itself did not create, declare, etc., any right, etc., to or in the immoveable property, it merely notified that after certain contingencies a *satekhat* bargain paper, agreeing to reconvey would be passed. The writing is not thus compulsorily registrable under s. 17 of the Registration Act."

If the document is to be considered as an agreement to obtain a *satekhat*, then it would be barred by limitation. The suit can only proceed on the basis that the document itself is an agreement to re-convey. In 1909 a suit was brought on this document together with the sale-deed dated March 2, 1907, on the ground that the two constituted a mortgage, and the property was sought to be redeemed. That suit was dismissed. From the evidence in that case it was shown how Ex. 30 came to be executed. Although the sale-deed is dated March 2, 1897, it was really executed after Ex. 30. The *chelas* would not execute the sale-deed until they obtained the agreement from their creditors. It is obvious, therefore, that these documents evidence one transaction, and, therefore, the principle which was laid down in *Bala Khandapa* v. *Sadashiv Hari Chivati* (1), after a consideration of the decision in *Mir Gazi* v. *Miya Ali* (2), would be applicable. Each case must stand on its own facts. If the agreement to reconvey can be treated as a separate transaction, as it was in the case last cited, then under s. 54 of the Transfer of Property Act, it vests no interest in the property and need not be registered. But if the document which has not been registered, is really a part and parcel of the transaction, which is only partly evidenced by the registered document, then it is clear that the other document also requires to be registered. In other words, when a transaction is evidenced by a document which is in effect divided into two parts, one of which is registered and the other is not, then the law looks to what is the real transaction between the parties, and demands that the whole document evidencing that transaction must be registered, whether it consists of one part or two.

The result is that, in our opinion, Ex. 30 is not admissible in evidence for want of registration. That disposes of the case. The appeal will be allowed with costs throughout.

Coyajee, J.—This suit was instituted by Chamelgiri Guru Daulatgiri Gosavi for specific performance of an agreement, Ex. 30, dated March 17, 1897, to sell certain immoveable properties. Chamelgiri having died, the respondents were brought on the record as his legal representatives, and the suit was proceeded with.

The facts of the case, so far as they are now material, may be briefly stated. In March 1897, Chamelgiri and three other persons executed a deed of absolute sale, (Ex. 33), conveying certain properties to Naro Balkrishna Patkar (father of defendant No. 1) and two others. On March, 17, 1897, the purchasers signed the document, Ex. 30, by which they agreed to reconvey the same properties to the vendors in the manner and subject to the conditions therein stated. In the year 1909 the vendors brought a suit (No. 93) against the purchasers alleging that the said two documents taken together constituted a mortgage, and claiming that they were entitled to redeem it. The suit failed on the ground that Ex. 33 was an absolute conveyance and that the two documents could not be so read as to convert the transaction into one of mortgage.

The plaint in this case was presented on December 2, 1922. The suit was resisted on the grounds, among others, that: (1) the agreement, Ex. 30, was not enforceable by law; (2) it was not admissible in evidence for want of registration; and (3) the claim was barred by the law of limitation. All those contentions failed in the Trial Court, and the plaintiff obtained a decree for specific performance of the agreement and for possession of the suit properties on his paying to the defendants the sum of

(1) 64 Ind. Cas. 294; 23 Bom. L. R. 1066
(2) 28 Ind. Cas. 132; 16 Bom. L. R. 582; 38 B. 703.

Rs. 7,249-12-0. The case of defendant No. 2 need not be separately considered.

From that decree, the defendants have brought this appeal, and their main contention is that as the document, Ex. 30, had not been registered, it could not be received as evidence of any transaction affecting the immoveable property comprised therein, and that, therefore, it could not be made the foundation of a suit for specific performance.

The plaintiff refers to the sale-deed (Ex. 33) in the second paragraph of his plaint, and then in the fifth paragraph he says:—

"At the time of the execution of the sale-deed mentioned in cl. 2, it was agreed between Patkar, Raikar and Pradhan, the vendees on one hand, and Chamelgiri, Pitambargiri, Govindgiri and Harigiri vendors on the other, that the vendees should reconvey the properties sold to the vendors and the terms thereof which were agreed upon were as under: . . . A writing about the aforesaid conditions was passed on March 17, 1897, by Naro Balkrishna Patkar, Mahadeo Krishna Raikar and Ramchandra Bajirao Pradhan to Chamelgiri, Govindgiri, Pitambargiri and Harigiri."

No oral evidence, we understand, was led in the case. Naro Balkrishna Patkar died some time before this suit was filed; his evidence was, therefore, not available. Chamelgiri died while the suit was proceeding; he was not examined, but the evidence given by him in the earlier suit No. 93 of 1909 was received and marked as Ex. 39 in this case. Its admissibility was not questioned before us. That evidence clearly shows that although, the sale deed bears date March 2, it was not signed by the vendors until after they had obtained the agreement (Ex. 30) on the 17th. He said: "I went to Alibag on the 17th for registering the document, (that is, the sale deed). We affixed our signatures to the document in the Registrar's office. Those signatures were made after the counter-agreement (now Ex. 30) was taken. The counter-agreement was made on that very day." Chamelgiri has given the reasons why he and the other vendors would not execute the sale-deed unless and until the purchasers agreed by a separate document (Ex. 30) to reconvey the property, that is, not to deal with the property as full owners for a period of twenty-one years. The transaction, then, was one and indivisible, it was to be found partly in one document and partly in the other. Exhibit 33 purports to be a deed of absolute sale and has been duly registered. Exhibit 30, which purports to limit the purchasers' interest in the property conveyed under the former document has not been registered. This latter document came under s. 17 (1) (*b*) of Act III of 1877 and its registration was compulsory; it did not fall within the exception contained in s. 17 (*h*) of that Act which now corresponds to s. 17 (2) (*v*) of Act XVI of 1908: *Achutaramaraju* v. *Subbaraju* (3). The facts of this case distinguish it from those cases in which a registered-deed of absolute sale is followed, soon or late, by an unregistered agreement to reconvey the same property. The question whether an agreement to reconvey immoveable property exceeding Rs. 99 in value does or does not require to be registered must, in each case, be decided on a consideration of the contents of the document itself and of such facts as might be proved for the purpose of showing in what manner the language of the document is related to existing facts. Proximity of time, or even the identity of the dates of the two documents, is not the decisive circumstance in all cases.

Respondent's Counsel relied on: (*i*) *Bhagwan Sahai* v. *Bhagwan Din* (4), (*ii*) *Vaman Trimbak Joshi* v. *Changi Damodar Shimpi* (5) and (*iii*) *Mir Gazi* v. *Miya Ali* (2). It is sufficient to say that the facts of this case, as set out above, are entirely different. It is true that in each of those three cases, the two documents under consideration bore the same date; and, moreover, in cases (*ii*) and (*iii*) the agreement had not been registered. But in all the three cases, the documents embodied, each a separate and distinct transaction. Whereas, in this case there is but one transaction and it is contained partly in a registered document and partly in an unregistered one. In *Bhagwan Sahai's case* (4), the plaintiff sued to redeem certain property on the ground that a deed of absolute sale of the property and a contemporaneous agreement to reconvey it within a period of ten years, constituted a mortgage. The Courts in India found in favour of the right to redeem. The Privy

(3) 25 M. 7; 11 M. L. J. 370.
(4) 17 I. A. 98; 12 A. 387; 5 Sar. P. C. J. 557; 6 Ind. Dec. (N. S.) 992 (P. C.).
(5) 91 Ind. Cas. 360; 27 Bom. L. R. 1261; 49 B. 862.

Council reversed their decree and dismissed the suit on the ground that it was not a case of mortgagor and mortgagee, but one of an absolute sale with a right to re-purchase within a period of ten years. The question whether an unregistered agreement to reconvey property exceeding Rs. 99 in value could be made the basis of a suit for specific performance was not raised and was, therefore, not considered (see the facts set out at pages 98 and 99*.)

In *Bala Khandapa* v. *Sadashiv Hari Chivati* (1), the plaintiff sued to recover possession of certain property on the basis of a sale-deed (Ex. 22) and an agreement to reconvey (Ex. 23). Their Lordships held that the document (Ex. 23) could not be treated as a separate document entirely apart from the sale-deed, and that it required to be registered. The learned Chief Justice said (page 1067†):—

"The plaintiff has to prove that he is entitled to get a reconveyance from the defendant, and he could only prove that by evidence, and unless Ex. 23 can be exhibited he must fail. He can only succeed if he can satisfy the Court that Ex. 23 was an entirely separate transaction from Ex. 22, since it will be conceded that if the defendant as owner of the property had, after the sale had been executed, agreed to reconvey the property to the plaintiff after a certain date, that might be a document which need not be registered. That was the view taken by this Court in *Mir Gazi* v. *Miya Ali* (2), though in that case the two documents were simultaneously executed, and the Court came to the conclusion that the two must be treated as separate, so that the second document was nothing more than an ordinary agreement to sell. I should consider myself that that was a very extreme case."

In this case the document (Ex. 30) was obtained by the vendors before they executed the sale deed Ex. 33, it purports, as indeed it was intended, to limit the purchasers' interest in the immoveable property conveyed under Ex. 33; it, therefore, required to be registered; and being unregistered it could not be made the foundation of a suit for specific performance.

For these reasons I agree in the order proposed by my Lord the Chief Justice.

Z. K. *Appeal allowed.*

*Pages of 17 I. A.—[*Ed.*]

†Page of 23 Bom. L. R.—[*Ed.*]

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 51 OF 1924.

September 22, 1924.

Present:—Mr. Baker, J. C.

KISAN—DEFENDANT—APPLICANT

versus

Musammat JASODABAI—PLAINTIFF—NON-APPLICANT.

Limitation Act (IX of 1908), Sch. I, Art. 75—Instalment bond—Whole amount becoming due on default—Limitation, commencement of.

Where an instalment bond provides that on default in the payment of two instalments the whole amount due under the bond shall become payable, and default is made in the payment of two instalments, a suit to recover the amount of the bond is governed by Art. 75 of Sch I to the Limitation Act, and limitation begins to run from the date on which the second instalment in respect of which default was made became due.

Revision against the decree of the Small Cause Court, Nagpur, dated the 27th November 1923, in Civil Suit No. 539 of 1923.

Mr. *G. R. Pradhan*, for the Applicant.

Mr. *W. R. Puranik*, for the Non-Applicant.

ORDER.—The only point in this case is one of limitation. The defendant executed a bond for Rs. 375 in favour of plaintiff on 3rd October 1915. Rs. 25 were repaid immediately and the balance was re-payable by seven instalments of Rs. 50 each, payable in *Kartik Shuddh* 15th every year, beginning from *Fasli* 1326 (1916). On failure of any two instalments the whole was to become payable.

The plaintiff brought a suit on the bond on 22nd March 1923, alleging that the instalments for 1326, 1327 and 1328 (1916, 1917 and 1918) had been paid and those for 1919 and 1920 had not been paid. The last payment was in March 1921 on account of the instalment for 1328. The defendant denied any payment subsequent to 1916.

The Small Cause Court Judge found that the instalments of 1327 and 1328 were paid as stated by plaintiff and awarded plaintiff's claim.

Defendant applies in revision on the ground that the alleged payment by defendant being neither a payment of interest as such or a part of payment of principal in the hand of defendant could not operate to save limitation under s. 20 of the Limitation Act.

It is further argued that the mere payment and acceptance of an overdue instal-

ment will not operate as a waiver and reference is made to *Ballabhdas* v. *Dalipsingh* (1).

Neither of these pleas was urged in the Small Cause Court where the defendant simply denied any payment after 1916 and stated he was not in Nagpur during subsequent years

The case is governed by Art. 75 of the Limitation Act and the cause of action arises when the default is made. Section 20 of the Limitation Act has no application. The Small Cause Court Judge has found that the instalments for *Fasli* 1327 and 1328 were paid. The cause of action arose when the instalments of 1329 and 1330 were not paid. The suit must be brought within three years from the date when the instalment of 1330 fell due which was *Kartik Shuddh* 15th, 1330. (26th November 1920.) The suit was brought in March 1923 and is in time.

It is argued that overdue instalments were to carry interest and so there was no full payment of the instalment of 1328. It was, however, accepted as a payment of the instalment in full.

The application is dismissed with costs.

Z. K. *Application dismissed.*

(1) 12 Ind. Cas. 741, 7 N. L. R. 147.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 404 OF 1925.

November 3, 1925.

Present:—Mr. Justice LeRossignol.

RULDU RAM—DEFENDANT—APPELLANT

versus

SURAIN SINGH AND OTHERS—PLAINTIFFS AND NANDA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Land Redemption and Foreclosure Regulation (Bengal) (XVII of 1806)—Punjab Land Revenue Act (XVII of 1887, s. ..) Mutation Entry in Revenue Records, entry in—Presumption—Redemption suit—Burden of proof.

Where in the case of a mortgage comprising a stipulation by way of conditional sale, the mortgagee purports to take foreclosure proceedings and a mutation is thereafter recorded in the Revenue Records showing that the mortgagee's rights have been converted into full proprietary rights, the burden is nevertheless upon the mortgagee, in a suit for redemption brought by the mortgagor, to prove that his mortgage right has been converted by foreclosure proceedings in accordance with law into a full proprietary right. The only onus thrown upon the plaintiff in such a case is to show that there was a mortgage and that it was granted within sixty years of suit. Once this is established, it would rebut the *prima facie* presumption of correctness of the Revenue Record entry, and the onus would then be on the defendant to show that the revenue entry is in fact correct and that there was a proper and legal foreclosure.

Second appeal from a decree of the Additional District Judge, Amritsar at Lahore, dated the 18th November 1924, reversing that of the Subordinate Judge, Third Class, Amritsar, dated the 7th March 1923.

Lala *Moti Sagar*, R. B, and Lala *Amar Nath Chona*, for the Appellant.

Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit to redeem a mortgage of land granted in the year 1882. The mortgage was with possession and comprised a stipulation by way of conditional sale. The suit has been decreed by the Courts below on the ground that, though foreclosure proceedings in the suit were had in 1885, no record of those proceedings, with the exception of a mere entry in a register that notice was served on the mortgagor, is forthcoming, and the oral evidence to the effect that the notices were in accordance with law and that all the formalities required by the Regulation were observed has been rejected. In other words, the Courts below have held that there were no valid foreclosure proceedings and the mortgage consequently is still subsisting.

In 1888, after foreclosure proceedings, a mutation was written up to convert the mortgagee right into a full proprietary right. Bagu, the mortgagor, appeared before the attesting officer and denied receipt of consideration for the mortgage. He did not assert that the foreclosure proceedings were not in order, and since that date the quondam mortgagee has been in possession and regarded as proprietor. In 1902 Ruldu Ram, the quondam mortgagee, sold 37 *kanals* 8 *marlas* out of the land mortgaged to an uncle of one of the present plaintiffs who are reversioners of the mortgagor Bagu who died childless. The vendee is not one of the plaintiffs. Consequently it is not contended for the appellant with any vigour that there is any question of estoppel, but it is urged that, inasmuch as the entry in the Revenue Record is a *prima facie* evidence of the full proprietary right of the defendant, the burden of proving that there was no valid foreclosure lay upon the plaintiffs.

The plaintiffs-respondents referred to *Narendra Narain Singh* v. *Dwarka Lal*

Mundur (1) and *Madho Pershad* v. *Gajudhar* (2) which lay down that the quondam mortgagee is fixed with the onus of proving the validity of the foreclosure proceedings, but it is noteworthy that in both those cases the plaintiff was the quondam mortgagee who was out of possession and who came into Court seeking possession within a short time of the foreclosure proceedings. Reference is also made to *Indar* v. *Asa Singh* (3) where the rule is cited that neither mortgagor nor mortgagee, by adverse act, can bar the right of the other. None of these rulings is of any direct help in the present case. Admittedly it lies upon the mortgagee to prove that his mortgage right has been converted by foreclosure proceedings in accordance with law into a full proprietary right, and the finding in this case is that such valid foreclosure proceedings have not been established. But the question for this Court's decision is whether in this case, in which the mortgagor's representatives are the plaintiffs, the burden of proving that the foreclosure proceedings were invalid does not lie upon them by reason of the mutation proceedings of 1888 and the presumption of correctness that attaches to the entry in the Revenue Record.

In my opinion the only onus thrown upon the plaintiffs is to show that there was a mortgage and that it was granted within sixty years of suit. This rebuts the *prima facie* presumption of correctness of the Revenue Record entry and the defendants are then fixed with the liability for showing that the revenue entry is in fact correct and that there was a proper and legal foreclosure. The Courts below on the evidence might have held that the foreclosure proceedings were good, but they have come to the opposite conclusion and the finding is one of fact.

For the foregoing reasons it must be taken that there were no legal foreclosure proceedings and the mortgage is still subsisting. I accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 3 C. 397; 1 C. L. R 369; 5 I. A. 18; 3 Suth. P. C. J. 480; 3 Sar. P. C. J. 771; 2 Ind Jur. 117; 1 Ind. Dec. (N. S.) 839 (P. C)

(2) 11 C 111; 11 I. A. 186; 8 Ind. Jur 694; 4 Sar. P. C. J. 574; Rafique and Jackson's P C. No. 85; 5 Ind. Dec. (N. S.) 832 (P. C.).

(3) 65 P. R. 1908; 90 P. L. R. 1908; 113 P. W. R. 1908

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 111 OF 1925.

November 30, 1925.

Present:—Mr. Justice Daniels.

THE BOMBAY BARODA AND CENTRAL INDIA RAILWAY—DEFENDANT —APPLICANT

versus

MESSRS. GULABBHAI BHAGWANDAS—PLAINTIFFS—OPPOSITE PARTY.

Carriage of goods—Railway Company—Freight charged at maund-rates, whether can be subsequently calculated at wagon-rates.

Where a Railway Company at the time of consignment agrees to charge freight on the basis of calculation at maund-rates and grants a Railway receipt on that basis, it cannot subsequently demand freight on the basis of a calculation at wagon-rates and *vice versa*.

Civil revision from an order of the Additional Judge, Small Cause Court, Cawnpore, dated the 14th May 1925.

Messrs. *Shiva Prasad Sinha* and *S. S. Sastry*, for the Applicant.

Dr. *M. L. Agarwala*, for the Opposite Party.

JUDGMENT.—This is a revision against a decree of the Small Cause Court. The goods were consigned at maund-rates. The freight charged in the Railway receipt was Rs. 211. At destination the Railway claimed an additional sum of Rs. 219 on the ground that the goods occupied a full eight-wheeled wagon. The Judge of the Small Cause Court has decided that this overcharge was not justified as the Railway Company were not entitled to alter the basis of calculation at maund-rates on which the Rail receipt was granted to a calculation at wagon-rates or *vice versa*. This view is supported by the Full Bench decision in *Chunni Lal* v. *Nizam's Guaranteed State Railway Co.* (1). The learned Pleader for the applicant states that there is a mistake in the judgment in saying that the charge has been made at wagon-rates, but I find that the passage in the judgment is reproduced verbatim from the statement made by the defendant's Vakil in the Court below. Even if the applicant's case is correct and the Railway are charging on a conventional amount of maunds 320 because the goods occupied a complete wagon, this does not appear to me to make any difference in principle. The view taken by the Court below was, in my opinion, correct, and I dismiss this revision with costs.

Z. K. *Revision dismissed.*

(1) 29 A. 228; 2 M. L. T. 42; A. W. N. (1907) 21; 4 A. L. J. 80.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 679 OF 1923.

October 15, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Waller.

KALLIAKKAL—PETITIONER

versus

PALANI KOUNDAN AND ANOTHER—RESPONDENTS.

Civil Procedure Code (A[illegible] IX, O XXI rr. 97 to 101—Execution [illegible] IX, application of—O. XXI, r. 97, proceedings under, whether execution proceedings.

Order IX, C. P. C., has no application to execution proceedings.[p. 534, col. 2]

[Case-law considered]

Proceedings under O XXI, rr 97 to 101, C P. C., are proceedings in execution and O IX is inapplicable to them. [p. 534, col 1]

A Court, therefore, has no jurisdiction to set aside under O. IX, r. 13, C. P. C., an *ex parte* order directing, free from obstruction, delivery of property to an auction-purchaser in execution of a decree. [p 534, col. 2]

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order of 30th November 1922 of the Court of the District Munsif, Namakal, in R. E. A. Nos. 943 and 962 of 1922, in R. E. P. No. 539 of 1921, in O. S No. 562 of 1918.

Mr. *S Varadachariar*, for the Petitioner.

Mr. *L. S. Veeraraghava Iyer*, for the Respondents.

JUDGMENT.

Devadoss, J.—The only question in this revision petition is whether O. IX, r. 13 applies to execution proceedings. The District Munsif of Namakal passed an *ex parte* order on 26th October 1922 directing delivery of property free from obstruction. Defendants Nos. 5 and 6 applied on 9th November 1922 to set aside the *ex parte* order. The District Munsif set aside the *ex parte* order and passed a fresh order. The auction-purchaser who is also a decreeholder has preferred this civil revision petition. The question for decision is, was the order of the District Munsif setting aside his previous *ex parte* order passed without jurisdiction?

The answer to the question depends upon the wider question whether O. IX applies to execution proceedings. There are several cases on the point which are not all reconcileable. In *Tirthasami* v. *Annappayya* (1) Muthuswami Iyer, J., held that Chaps. VII and XIII of the old Code did not apply to execution proceedings. He rested his conclusion upon the Explanation to s. 647 of the Code of 1882. By Act VI, s. 4, of 1882 an Explanation was added to s. 647. This Explanation was enacted on account of the view held by the High Courts of Allahabad and Bombay that s. 647 corresponding to s. 141 of the present Code applied to execution proceedings. The Explanation is in these terms: "This section does not apply to applications for the execution of decrees, which are proceedings in suits." The Privy Council held in *Thakur Prasad* v. *Fakir Ullah* (2) that independently of the Explanation, s. 647 did not apply to applications for execution but only to original matters in the nature of suits, such as proceedings in Probates, [illegible] and so forth. Muthuswami Iyer, J., held in *Tirthasami* v. *Annappayya* (1) that the dismissal of an *ex parte* did not bar a fresh application for execution. In *Balasubramania Chetti* v. *Swarnammal* (3) Benson and Sundara Iyer, JJ., held that O. II, r. 2 did not apply to execution proceedings. They observe at page 201:*—"It could not have been the intention of the Legislature to apply to Execution proceedings provisions laid down with regard to suits only. The procedure to be followed in appeals and *ex parte* applications is specifically laid down in the C. P. C. section 141 is intended to apply to other proceedings in Civil Courts, such as Probate, etc.," Justice Ayling and Justice Seshagiri Iyer, JJ., followed this decision in *Somasundaram Pillai* v. *Chokkalinga Pillai* (4) In *Kajuluri Swami* v. *Chintalapati Surya Razu* (5) Mr. Jackson, J., held that O. IX, r. 9 did not apply to orders passed in execution proceedings.

There are several cases which support the contention that O. IX is applicable to execution [illegible] In *Subbiah Naicker* v. [illegible] (6) Alying and Sadasiva Iyer, JJ., were of opinion that O. IX, r. 13, applied to execution proceedings. The point did not directly arise in that case, but the learned Judges held "orders in execution which came under s. 47, C. P. C., are decrees as defined in s. 2 of the Code and hence *ex parte* orders passed in

(1) 18 M. 131; 6 Ind. Dec. (N. S.) 441

(2) 17 A 106; 5 M. L J 3, 22 I. A 44; 6 Sar. P. C. J. 526; 8 Ind. Dec. (N S) 393 (P C)

(3) 21 Ind. Cas. 32; 38 M 199, (1913) M. W. N. 685; 14 M L. T 196; 25 M. L J 367

(4) 38 Ind. Cas 806; 40 M. 780; 5 L. W. 267.

(5) 81 Ind. Cas. 841; 47 M. L J. 269; 20 L. W. 192; (1924) M W. N. 672; (1925) A. I. R. (M) 126.

(6) 22 Ind Cas 899; 37 M 462; 26 M. L. J 189; (1914) M. W N 205; 1 L W. 251.

*Page of 38 M.—[Ed.]

execution are *ex parte* decrees and O. IX, r. 13 provides generally for the setting aside of *ex parte* decrees and not only for the setting aside of those classes of *ex parte* decrees which are not also orders passed under s. 47 in execution proceedings." In *Chindambara Chetty* v. *Kandasami Goundan* (7) the point was not decided, though Oldfield, J., in his referring order refers to the conflicting authorities on the point. The learned Chief Justice observed at page 780* "I desire to say that our decision in this case must be taken to be confined to the particular facts of this case, that is to say, that where you have nothing more than the non-attendance at the hearing of an application to settle the terms of a sale proclamation, the respondent cannot be taken to be estopped by reason of that non-attendance on the principle of *res judicata* from thereafter denying the liability of the property to execution". The decision in *Kali Shettathi* v. *Shama Rao* (8), relied upon by Mr. Veeraraghavier does not help him. For, in the former, the point was not decided and in the latter Oldfield and Sadasiva Iyer, JJ., held that O IX of the C. P. C., did not apply to execution proceedings.

There is a conflict of opinion in the other High Courts also. In *Hari Charan Ghosh* v. *Manmatha Nath Sen* (9), Jenkins, C. J. and Ray, J., held that O. IX, r. 13, C. P. C. was not applicable to a proceeding under rr. 100 and 101 of O. XXI. The learned Chief Justice after going into the history of s. 647 and the reason for enacting s. 4 of the Act VI of 1882 observes: "But after this alteration in the law, the Privy Council by a case, *Thakur Prasad* v. *Fakir Ullah* (2) decided on s. 647 as it stood before the Explanation was added, that the section did not apply to execution proceedings. The purpose of the Legislature in omitting that Explanation was to do away with that which was shown to be unnecessary by the Privy Council decision and to rely upon the terms of the section as interpreted by the Privy Council." This decision is a direct authority for the contention of Mr. Varadachariar for the petitioner that r. 13 does not apply to execution proceedings. A Full Bench of the Patna High Court in *Bhubaneswar Prasad Singh* v. *Tilakdhari Lal* (10) held that O. IX, r. 9 did not apply to an order dismissing for default an application to set aside, under O. XXI, r. 90, a sale held in execution of a decree. In that case, all the cases bearing on the question whether O. IX applies to execution proceedings, are collected. Though the learned Judges do not discuss in detail all the cases, they give sufficient reasons for their conclusions that O. IX has no application to execution proceedings. In *Sheonandan Chowdhury* v. *Debi Lal Chowdhury* (11) it was held that O. IX, r. 4 of the C. P. C., applied to an application under O. XXI, r. 100, which had been dismissed for default. With great respect, I am unable to follow the reasoning of the learned Judges. They observe at page 378.* "An application under O. XXI, r. 100, is not an application in execution proceedings, but is an original matter in the nature of a suit, and, in my opinion, the decision of the Judicial Committee in the case cited is an authority for the proposition that O. IX, r. 4 would apply by force of s. 141 to original matters in the nature of suits." All matters in execution are governed by O. XXI; O. XXI is headed "execution of decrees and orders" and applications under rr. 97, 99, 100 and 101 are applications to the Executing Court in the course of execution. It is difficult to understand why they cease to be proceedings in execution by the mere fact that the applications are made not by the decree-holder, but by other persons. It is the Court which executes the decree following the procedure laid down in O. XXI that entertains applications under rr. 97, 100 and 101. This view that after sale, proceedings in execution are not strictly execution proceedings is held by some of the learned Judges of the Calcutta High Court. In *Diljan Mihha Bibi* v. *Hemanta Kumar Roy* (12) it was held: "An application for setting aside an execution sale is not an application for execution, but in the nature of an original proceeding which is not excluded from the purview of s. 141 of the C. P. C. Such application, if dismissed for default, can be restored under O IX, r. 9 of the C. P. C." In *Bhuben Behari Nag Mazumdar* v. *Dhirendra Nath Banerji* (13) the same

(7) 74 Ind. Cas. 155; 46 M. 768; (1923) M. W. N. 571; 45 M L. J. 346; 18 L. W. 757; (1924) A. I. R. (M.) 1.
(8) 37 Ind. Cas. 229; 5 L. W. 124; 21 M. L. T. 297.
(9) 19 Ind. Cas. 683; 41 C. 1; 18 C. W. N. 343.
*Page of 46 M.—[*Ed.*]

(10) 49 Ind. Cas. 617; 4 P. L. J 135; (1919) Pat. 75.
(11) 71 Ind. Cas 484; 2 Pat 372; 4 P. L. T. 93; 178 at L R. 134; (1923) A. I. R (Pat.) 239; (1923) Pat. 78
(12) 29 Ind. Cas. 395; 19 C. W. N. 758.
(13) 33 Ind. Cas. 581; 20 C. W. N. 1203.
*Page of 2 Pat.—[*Ed.*]

view was held. In *Ramappa Chettiar* v. *Ekambara Padayachi* (14) Venkatasubba Rao, J., held "A petition to restore a claim petition, dismissed for default of appearance, of the petitioner, is maintainable and not barred by O. XXI, r. 63, C. P. C."

When a decree-holder of an auction-purchaser is resisted in obtaining possession of immoveable property by a person in possession, he may make an application to the Court complaining of such resistance or obstruction under r. 97. If the Executing Court is satisfied that the obstruction was caused by the judgment-debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property and if there is still further resistance, it may make the necessary order to enforce delivery of the property If the Court is satisfied that the resistance or obstruction was occasioned by any person other than the judgment-debtor claiming on good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application (r. 99). Where any person other than the judgment-debtor is dispossessed of immoveable property by the holder of a decree for possession or by the auction-purchaser, he may make an application to the Court complaining of such dispossession. If the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put in possession of the property. Rule 103 gives the right to the person against whom an order is made under rr. 98, 99 or 101 to institute a suit to establish the right which he claims to the present possession of the property, but subject to the result of such suit, if any, the order shall be conclusive. In considering the question whether the general provisions of the Code apply to execution proceedings, we must not overlook the fact that a right of suit is given under r. 103 to persons against whom an order is passed. In the case of parties to the decree, an appeal is provided under s. 47 of the C. P. C. and in the case of persons who are not parties to the decree, against whom an order is passed in execution, and in the case of the decree-holder or auction-purchaser against whom an order is passed in favour of persons not parties to the decree, a suit is provided. In the face of the clear wording of r. 103 it is difficult to understand why any proceeding after the property is brought to sale should be considered as something different from execution proceedings under O. XXI. On a careful consideration of all the cases, I have no hesitation in holding that proceedings under rr. 97, 98, 99, 100 and 101 are execution proceedings and, therefore, O. IX does not apply to them. The order of the District Munsif setting aside an *ex parte* order was passed without jurisdiction. The civil revision petition is allowed and the order, dated 30th November 1922, is set aside and that, dated 26th October 1922, is restored with costs throughout.

Waller, J.—I agree and have nothing to add.

V. N. V. *Petition allowed.*
N. H.

(14) 79 Ind. Cas. 818; 19 L. W. 685; 47 M. L. J. 13; (1924) M. W. N. 479; 47 M. 651; (1924) A. I. R. (M.) 5; 31 M. L. T. 309.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 78 OF 1925.
November 26, 1925.
Present:—Mr. Justice Mukerji.
GANPAT RAI—DEFENDANT—APPLICANT
versus
FIRM KANI RAM-MUNNA LAL—PLAINTIFF AND KEDAR NATH—DEFENDANT—OPPOSITE PARTY.

Presidency Towns Insolvency Act (III of 1909), ss 30 (1), 32—Composition scheme, acceptance of—Annulment of adjudication, effect of—Debts not proved, whether discharged.

By the combined operation of ss. 30 (1) and 32 of the Presidency Towns Insolvency Act, the acceptance by the Court of a scheme of composition and the consequent annulment of adjudication operates as a discharge of the insolvent from all debts which were provable in insolvency but which have not been brought before the Insolvency Court. [p. 536, col. 2.]

Civil revision from an order of the Judge, Small Cause Court, Cawnpore, dated the 4th February 1925.

Mr. *Ram Nama Prasad*, for the Applicant.

Mr. *Shambhu Nath Seth*, for the Opposite Party.

JUDGMENT.—This petition in revision is on behalf of the defendant and raises a question of law on which so far as this country is concerned, there does not appear to be any authority.

It appears that the defendant-applicant was adjudicated an insolvent by the Calcutta High Court on the 22nd of June 1921. He presented a scheme of composition which was ultimately accepted by the High Court and the adjudication was annulled on the 27th of September 1923. The respondents had a money claim as against the petitioner on the allegation that the latter obtained goods from them from time to time between the 15th of July 1916 and the 19th of June 1921, that he paid a portion of the price, and a small balance was still due with interest. On the completion of the insolvency proceedings, by a suit instituted on the 3rd of July 1924, the respondents claimed a sum of Rs. 109 and odd alleged to be due to them, in the Court of Small Causes at Cawnpore. The defendant denied the claim and pleaded, *inter alia*, that the insolvency proceedings barred the suit. The learned Judge held that the defendant was liable and he further held that the proceedings in insolvency were no bar to the maintenance of the suit.

The question that has been argued before me is whether the insolvency proceedings were a bar or not. The learned Judge thought that as the adjudication had been annulled the right of suit revived. This is a view which, however, has not been supported.

The answer to the question raised must depend on the interpretation of ss. 30 and 32 of the Presidency Towns Insolvency Act, being Act III of 1909. The earlier section runs as follows:—

"If the Court approves the proposal, the terms shall be embodied in an order of the Court, and an order shall be made annulling the adjudication, and the provisions of s. 23, sub-ss. (1) and (3) shall thereupon apply, and the composition or scheme shall be binding on all the creditors so far as relates to any debt due to them from the insolvent and provable insolvency".

It has not been denied that the respondents' claim was one which was 'provable in insolvency'. Section 32 has to be read along with s. 30 as it makes the meaning of s. 30 (1) clear. It runs as follows:—

"Notwithstanding the acceptance and approval of a composition or scheme, the composition or scheme shall not be binding on any creditor so far as regards a debt or liability from which, under the provisions of this Act, the insolvent would not be discharged by an order of discharge in insolvency, unless the creditor assents to the composition or scheme."

Reading the two sections together it appears to my mind that the acceptance of a scheme of composition operates as a discharge of the insolvent from all debts which were provable in insolvency, but which have not been brought before the Insolvency Court. A comparison of the language used in these two sections with the language of s. 45, will, in my opinion, leave no room for doubt that this interpretation is the correct interpretation. The sections in the English Law (Bankruptcy Act, 1914) which correspond with ss. 30 (1) and 32 of the Indian Act are ss. 16 and 17. The language employed in s. 16 (13) is very similar to the language employed in s. 30 (1) of the Presidency Towns Insolvency Act and s. 17 of the English Law corresponds with s. 32 of the Indian Act. Under the English Law it has been held that where a composition scheme is accepted and approved the debtor would get the same relief as is given by a discharge, *vide* *Flint* v. *Barnard* (1) and *Seaton* v. *Lord Deerhurst* (2).

On the language of the Act and on authority it is clear, therefore, that the suit in the Court below was not maintainable.

If we look to the principle of the whole enactment we shall at once see that this would be the only rule consistent with practicability. When a debtor takes shelter in an Insolvency Court, he cannot have complete protection unless a duty be cast on all the unsecured creditors of his to come forward and prove their claim to the Insolvency Court. If it be within the competence of such creditors to keep back their debts, so that, the rule of limitation permitting, they might come forward with their claims after the insolvent has been discharged or has managed to formulate a scheme for the payment of all scheduled creditors, the very object of the law of insolvency enactment would be frustrated.

I hold, therefore, that the suit of the plaintiffs was not maintainable in the Court below.

The learned Counsel for the respondents has urged that even though the Court below was in error, this Court should not exercise its discretionary power of revision in this particular case. He urged that his was a

(1) (1889) 22 Q. B. D. 90; 58 L. J. Q. B. 53; 37 W. R. 185.

(2) (1895) 1 Q. B. 853; 64 L. J. Q. B. 430; 14 R. 523; 72 L. T. 453; 43 W. R. 436; 59 J. P. 357, 2 Manson 355.

just debt and the passing of the decree would not entitle him to enforce the claim as against the insolvent, but would entitle him to go before the trustees under the scheme of composition and to obtain such relief as may be available. I do not quite see the force of this argument. There is nothing on the record to show that the respondents were unaware of the insolvency proceedings. The decree, if left outstanding, would be a source of constant trouble to the petitioner, although he may have done everything that was in his power to pay his creditors. There are no materials before me to enable me to find out clearly under what circumstances the plaintiffs' claim happens to be left out of the schedule prepared in the insolvency proceedings. According to the petitioner only a sum of Rs. 4-8 was due to the respondents, while on the respondents' own showing only a sum of Rs. 33-10-9 was due to them as a principal amount. The major portion of the claim due is said to consist of interest. I do think in the circumstances I ought to refrain from exercising my powers in revision.

The result is that I set aside the decree of the Court below and dismiss the respondents' suit. The respondents will pay the petitioner's costs throughout.

Z. K. *Decree set aside.*

BOMBAY HIGH COURT.

CROSS-APPEALS NOS. 163 AND 164 OF 1924.

August 18, 1925.

Present:—Mr. Justice Fawcett and Mr. Justice Coyajee.

VISHVANATH SHAMBA NAIK—DEFENDANT—APPELLANT

versus

RAMKRISHNA MARTOBA KASBEKAR—PLAINTIFF—RESPONDENT.

Landlord and tenant—Mulgeni *tenure—Liability of land to inundation—Abatement of rent—Equity, justice and good conscience—English Law, principles of, whether to be followed.*

The holder of a *mulgeni* tenure in the Bombay Presidency cannot claim abatement of rent in respect of lands comprised in the tenure, which have not been entirely washed away or covered by sea-water or rendered entirely useless for cultivation by their liability to inundation by sea-water, but whose productive powers have deteriorated from such liability to inundation. [p. 539, col. 2.]

Per Fawcett, J.—In determining a suit according to "equity, justice and good conscience" the principles of English Law, applicable to a similar state of circumstances, unless shown to be inapplicable to Indian society and circumstances, should be taken as a guide. [p. 540, col 2.]

Appeals against the decision of the District Judge, at Karwar, in Appeal No. 138 of 1922, reversing that of the First Class Subordinate Judge at Karwar, in Civil Suit No. 218 of 1921.

Mr. *G. P. Murdeshwar*, for the Appellant.

Mr. *Nilkant Atmaram*, for the Respondent

JUDGMENT.

Coyajee, J.—The plaintiff, (respondent in Second Appeal No. 163 of 1924), who holds the suit land on *mulgeni* tenure under the defendants at a fixed and invariable rent, sues for an abatement of his rent on the ground, *inter alia*, that the land has now become exposed to inundation from the sea. The Trial Judge dismissed his suit. But on appeal his claim was allowed by the learned District Judge, who says:—

"Appellant relies on *Subramania Pathan* v. *Kattanbath Rama* (1). Respondents reply that the lease then in question was one for twenty years and that the same principle cannot apply in the case of a perpetual tenancy; the proper remedy is a surrender of the tenancy which respondents are willing to accept. Appellant, however, has a right, which practically amounts to ownership. He is not willing to surrender it and defendants' readiness to accept the surrender shows that the land is not without value. The Madras case quoted recognizes the principle of abatement in such cases and the question of the length of the tenancy does not appear to be material. The order for abatement may be limited to the period during which the reason for abatement continues. There is evidence that the suit land has deteriorated and that the rents of surrounding lands have decreased; this evidence may, in the circumstances, be accepted. I hold, therefore, that the appellant is entitled to abatement on the ground of deterioration due to inundation from the sea."

He, therefore, declared that as the suit land had deteriorated on account of the inundation of the sea, plaintiff was entitled to an abatement of $7\frac{2}{3}$ *khandis plus* five annas six pies cash; the declaration to remain in force until it was shown that for any reason the suit land should bear a higher rental. The main question for consideration in this appeal is whether on the facts of this

(1) 53 Ind. Cas. 397; 43 M. 132, 10 L. W. 367; 26 M L. T. 266; 37 M. L. J. 654, (1920) M. W. N. 153.

case the plaintiff is entitled to proportionate abatement.

It is urged for the defendants that the general rule is that the tenant takes the demised premises subject to any defects existing in them at the time of the letting; and to any events which subsequently affect their value (Halsbury's Laws of England, Vol. XVIII, s. 962). This rule is, however, subject to exceptions; and it is urged that in the events that have happened the plaintiff's only remedy is the one to be found in s. 108 (*e*) of the Transfer of Property Act, 1882, which is in these terms:

"If by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void."

The provisions of that section, however, are not in terms applicable to this case for two reasons: (1) the Act was not extended to the Bombay Presidency until January 1, 1893; therefore, its provisions do not affect the rights and liabilities arising out of the legal relation which in this case was constituted by the agreement (Ex. 39), in the year 1889 (see s. 2); and (2) this being a lease for agricultural purposes, the provisions of s. 108(*e*) do not apply to it (s. 117). That being so it is contended for the plaintiff that his right to claim abatement is founded on the principles of natural justice and equity and that it was recognized in this country before the enactment of the said Act. The plaintiff's contention, it is said, derives support from the judgment of Sir Barnes Peacock, C.J., in *Sheik Enayutoollah* v. *Sheik Elaheebuksh* (2). In that case the tenant sued for an abatement of his rent upon the ground that a part of his land had been washed away, and that a part of it had been covered with sand. The learned Chief Justice referred to the following passage in Bacon's Abridgment, 7th Edition, Vol. VII, page 63 (page 43*):

"..if part of the land be surrounded or covered with the sea, this being the act of God, the tenant shall not suffer by it, because the tenant, without his default, wants the enjoyment of part of the thing which was the consideration of his paying the rent; nor has the lessee reason to complain, because, if the land had been in his own hands, he must have lost the benefit of so much as the sea has covered."

His Lordship then proceeds (page 43*):

"We think that that rule is founded on the principles of natural justice and equity, that if a landlord let his land at a certain rent to be paid during the period of occupation, and the land is, by the act of God, put in such a state that the tenant cannot enjoy, the tenant is entitled to an abatement. The first question then is, whether there was any stipulation in the *kabuliyat*, which precluded the tenant from claiming abatement if, by the act of God, any portion of his land were washed away."

The case was then directed to be sent back to the first Court to try upon the merits, whether the *kabuliyat* contained any stipulation that the tenant should not have an abatement, if part of the land should be washed away. Then comes the following passage on which the plaintiff relies (page 44*):

"If the Judge find that the terms of the *kabuliyat* do not preclude the tenant from claiming an abatement in proportion to the land washed away, the case will have to be tried upon the merits, whether any portion of the land was washed away, and whether any portion of it was subsequently regained, because on that will depend whether the tenant is entitled to any and what abatement. If the land was re-formed, the abatement would cease from the time the regained land became as good as it was before; if it was not so good, the tenant would be entitled to an allowance for the injury done by the act of God. With regard to the land alleged to have been covered by sand, the Judge of the first Court will have to enquire if that portion was covered by sand, and thereby deteriorated, or rendered wholly useless; because if the land has been deteriorated, or rendered wholly useless by the act of God, the tenant would be entitled to an abatement, provided, there was no stipulation to the contrary in the *kabuliyat*."

I was at one time inclined to think that the plaintiff's contentions did derive support from the observations quoted above. On further consideration, however, I agree with my learned brother in the view that the learned Chief Justice was dealing with a case where a part of the land had been completely washed away, and another part

(2) W. R. 1864, Act X Rul. 42.

*Pages of W. R. 1864.—[*Ed.*]

had been covered with sand so as to render it wholly useless for cultivation. The judgment of Sir Barnes Peacock was followed in *Subramania Pathan* v. *Kattambath Rama* (1) as being in accordance with principles of natural justice. But that was a case of a portion of the demised premises becoming unfit for cultivation by reason of inundation from the sea. In *Uma Sunkur Sirkar* v. *Tarini Chunder Singh* (3) the *patnidar* was allowed abatement of rent on the ground that part of the land included in the *patni* tenure had been acquired by the Government for public purposes, although the *kabuliyat* executed by him contained the provision that he would make no objection on the score of diluvion or any other cause to pay the rent fixed or reserved by (the) *kabuliyat*. The ground of the decision was that the parties must be taken to have left the question as to abatement of rent to the general law of the country. It was, however, a case of total loss of enjoyment of a part of the land held under the *patni* lease.

The general rule is thus enunciated in Story's Equity Jurisprudence, 3rd English Edition, s. 101 (page 48):—

"In matters of positive contract and obligation, created by the party (for it is different in obligations or duties created by law), it is no ground for the interference of equity, that the party has been prevented from fulfilling them by accident; or, that he has been in no default; or, that he has been prevented by accident from deriving the full benefit of the contract on his own side... The reason is, that he might have provided for such contingencies by his contract, if he had so chosen; and the law will presume the intentional general liability, where he has made no exception."

In this country Courts have long recognized the tenant's right to an abatement of rent where the property demised is lost, wholly or in part, by causes beyond his control. In this case, the lower Court finds that the productive capacity of the land has decreased by reason of the inundation, but the land has not become wholly unfit for cultivation. Local laws, applicable to various other provinces (*e. g.*, the Punjab Tenancy Act, 1887, and the North-Western Provinces Tenancy Act, 1901) do enable a tenant to sue for abatement of rent of the ground that the productive powers of the land held by him have been decreased by causes beyond his control. There is no such enactment in force in this Presidency, and the plaintiff has not alleged or proved such usage.

On a fuller consideration of the subject, I concur with my learned brother in the order which he has proposed in Second Appeal No. 163. It follows that Second Appeal No. 164 fails and must be dismissed with costs. The only question argued in that appeal was—what rent was the plaintiff liable to pay from 1915-1916 to 1920-1921? The defendant obtained a decree for the stipulated rent for that period in Small Cause Suit No. 494 of 1921. That suit was decided in accordance with the findings recorded by the Trial Court in this case. The decree is not appealable. Moreover, if the plaintiff is not entitled to an abatement, he is liable to pay the stipulated rent.

Fawcett, J.—In this case, the main question is whether abatement of rent can be claimed for land, which has not been entirely washed away or covered by sea-water, or rendered entirely useless for cultivation by its liability to inundation by sea-water. The facts found here are that the land can still be cultivated but its productive powers have deteriorated from its liability to inundation at high water. Paddy can still be raised though of an inferior kind to that formerly grown.

There is no legislation in the Bombay Presidency such as there is in other parts of India, (*cf.*, Bengal Act VIII of 1885, ss. 38 and 52; Bengal Act VI of 1908, ss. 35 and 36; Central Provinces Act XI of 1898, ss. 15 and 18; Madras Act I of 1908; ss. 36, 39 and 42; Oudh Act XXII of 1868, ss. 18, 29 and 35B; Punjab Act XVI of 1887, ss. 20—26; United Provinces Act II of 1901, ss. 41—48) which permits of abatement of rent in the case of such deterioration as opposed to the case of total loss of the land held on tenancy, or part thereof. The Bombay Land Revenue Code also contains no provisions for abatement of assessment, except in the case of land, not less than half an acre in extent, being lost by diluvion (s. 47 of Bombay Act V of 1879, as amended by Bombay Act IV of 1913).

The contract between the parties gives no ground for a revision of the rent because of this deterioration. It fixes the rent "from generation to generation," *i.e.*, in perpetuity: and (so far as its terms are

(3) 9 C. 571; 11 C. L. R. 366; 4 Ind. Dec. (N. S.) 1028.

concerned) just as the landlord could not claim to enhance the rent because the land became more productive from some accidental circumstance after the '*mulgeni*' lease was granted, so in principle, I think the grantee cannot claim a reduction of rent because of the deterioration of the soil. The Bombay Gazetteer (Kanara), Vol. XV, Part II, page 186, describes '*mulgenidars*' like the plaintiff as "a class of people...who on condition of the payment of a specified invariable rent to the *muli* or landlord and his successors obtained from him a prepetual grant of a certain portion of land to be held by them and their heirs for ever....The landlord and his heirs were precluded from raising the rent of the permanent lessee." It also points out that a difficulty arose out of the Survey Settlement sometimes fixing an assessment in excess of the rent fixed in the *mulgeni* deed, and consequently "most of the *mulgeni* deeds executed since the Survey began to contain the stipulation, that if the assessment is increased the lessee will pay the enhanced amount." The *mulgeni* lease in this case (Ex. 39) contains this latter stipulation; and an inference, therefore, arises that (at any rate so long as the land leased remained available for cultivation) the fixed rent should be invariable and not liable to enhancement except in the one case stipulated for, *viz.*, the Government assessment being increased.

Prima facie, therefore, it seems to me to be a case where the English Law should be followed. This is that (subject to certain well-defined exceptions) the rent fixed by agreement must be paid, although the lessee suffers from an uncontrolable circumstance like the one under consideration. Thus Addison's Law of Contracts, 11th Edition, page 674, states the law as follows:—"Although, therefore, houses become ruinous and fall down, and fences and crops be destroyed by floods, or burned by lightning or accidental fire, or be thrown down by enemies, yet is the tenant liable to pay the rent so long as the land remains to him, and his legal title to the occupation and use thereof continues." I may refer also to Halsbury's Laws of England, Vol. XVIII, Art. 962 at page 481, and the case of *Earl of Meath* v. *Cuthbert* (4) which relates to premises near the sea-shore, that became devastated by the sea, but not "altogether and inevitably submerged." It is only when a part of the premises leased is entirely lost by inundation of the sea that English Law allows an abatement of rent on that account: *cf*, Halsbury's Laws of England, Vol. XVI, Art. 964 at page 484. This is on the principle stated in Bacon's Abridgment, 7th Edition, Vol. VII, page 63, that "it seems extremely reasonable that, if the use of the thing (demised) be entirely lost or taken away from the tenant, the rent ought to be abated or apportioned, because the title to the rent is founded upon this presumption, that the tenant enjoys the thing during the contract."

The principles of English Law, applicable to a similar state of circumstances, unless shown to be inapplicable to Indian society and circumstances, are to be taken as a guide in determining a suit according to "justice, equity and good conscience" under s. 26 of the Bombay Regulation IV of 1827, *cf.*, *Webbe* v. *Lester* (5), *Varden Seth Sam* v. *Luckpathy Royjee Lallah* (6) and *Waghela Rajsanji* v. *Shekh Masludin* (7). I can see no sufficient ground for holding the English Law inapplicable to the condition of a case like the present, especially in view of the intended permanency of the rent that I have already mentioned.

Nor do I think that there is any real authority for a different rule being applied in India, apart from special legislation on the subject, such as I have already alluded to. In *Sheik Enayutoollah* v. *Sheik Elaheebuksh* (2) the Court expressly follows the rule laid down in the Bacon's Abridgment that I have mentioned, and says (page 43*):—"We think that that rule is founded on the principles of natural justice and equity, that if a landlord let his land at a certain rent to be paid during the period of occupation, and the land is, by the act of God, *put in such a state that the tenant cannot enjoy*, the tenant is entitled to an abatement" Accordingly it was held that unless there was any stipulation in the agreement of tenancy to the contrary, the tenant was entitled to an abatement of rent for any part of the land washed away. It is true that an inquiry was also ordered whe-

(4) (1876) Ir. R. 10 C. L. 395.

(5) 2 B. H. C R. 52 at p. 56.

(6) 9 M. I. A. 303; Marsh. 461; 1 Suth. P. C. J. 480; 1 Sar. P. C. J. 857; 19 E. R. 756.

(7) 11 B. 551 at p. 561; 14 I. A 89; 11 Ind. Jur. 315, 5 Sar. P. C. J. 16; 6 Ind. Dec. (N. S.) 364 (P. C.).

*Page of W. R. 1864.—[*Ed.*]

ther some of the land (page 44*) "was covered by sand, and thereby deteriorated, or rendered wholly useless," because in that case also there would be a similar right to abatement; but this must be read with the first sentence of the judgment which says (page 43*) "the appellant sues for an abatement of his rent, upon the ground that... a part of it (*i.e.*, his land) had been covered with sand, from which we understand that it was *so covered with sand as to have been rendered wholly useless.*" The words "deteriorated or rendered wholly useless" at the end of the judgment can, therefore, be read as equivalent to "deteriorated so as to be rendered wholly useless;" and it is, I think, unreasonable to think that Sir Barnes Peacock, intended to make a departure from the rule that there must be an *entire* loss of enjoyment, which is the evident basis of his judgment. If he did intend this, then he was probably thinking of s. 18 of Act X of 1859, which is mentioned in his judgment and which specifically allowed an occupancy *raiyat* to claim an abatement not only for loss of land "by diluvion or otherwise," but also "if the value of the produce or the productive powers of the land have been decreased by any cause beyond the power of the *raiyat.*" But this is improbable, as he was dealing with the case on the basis that the appellant, not having a right of occupancy could not rely on this s. 18.

I know of no other authority that can be cited, apart from its being based on some statutory right like the one just mentioned, for allowing abatement for mere deterioration of the productivity of the land. *Subramania Pathan* v. *Kattambath Rama* (1) which is relied upon by the District Judge in his judgment, was a case of land flooded by sea-water and so rendered unfit for cultivation. *Sukhraj Rai* v. *Ganga Dayal Singh* (8) also appears to have been a case of permanent deterioration rendering the land totally unfit for cultivation (see at pages 666, 667 and 669); and even if it were not, there are statutory provisions enabling the Courts of the Central Provinces to allow abatement. *Uma Sunkur Sircar* v. *Tarini Chunder Singh* (3) which is also referred to in my learned brother's judgment, is a case of *loss* of the land by its acquisition by Government held to be "*ejusdem generis* (of the same kind) with diluvion" (see at page 572*).

The plaintiff is, no doubt, under s. 26 of the Bombay Regulation IV of 1827, entitled to rely on "the usage of the country in which the suit arose;" but no such usage was pleaded in the plaint or attempted to be proved at the trial. An usage can of course be established by judicial authority. But I can see no sufficient ground for holding that it is part of the general law of the country recognized by the Courts, that a tenant can get abatement of rent for anything less than *total unfitness* of part of his land for cultivation, falling within the rule in Bacon's Abridgment that I have mentioned. The mere fact that statutory rights to abatement of rent on a lesser ground like that now in question have been created in other Provinces, does not justify the view that such a right exists, as part of the general law of the country. On the contrary, I think, it indicates that it was considered necessary to legislate, in order to create such a right. The enactments are in an ordinary form, not in that of affirmatory legislation.

Accordingly, as there is no legislation in force here to help the plaintiff-respondent, I think that the District Judge was not justified in law in reversing the Trial Court's decree, dismissing the plaintiff's suit with costs. I would, therefore, allow the Appeal No. 163 of 1924, reverse the lower Appellate Court's decree, and restore the Trial Court's decree with costs against the plaintiff-respondent in this Court and the lower Appellate Court.

I agree with my learned brother that Second Appeal No. 164 of 1924 fails and should be dismissed with costs.

Z. K. *Appeal dismissed.*

(8) 63 Ind. Cas. 219; 6 P. L. J. 665 at p. 666; 2 P. L. T. 569; (1922) Pat. 132; (1922) A. I. R. (Pat.) 169.

*Pages of W. R. 1864—[*Ed.*]

*Page of 9 C.—[*Ed.*]

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 49 OF 1923.

September 23, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Waller.

RACHARLA NARAYANAPPA—PETITIONER—APPELLANT

versus

KONDIGI BHEEMAPPA AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 10, 24, 25—

Debtor's petition to be adjudicated insolvent—Prima facie *evidence of inability to pay debts—Inquiry as to reality of debts, whether proper.*

When a person presents a petition to be adjudicated an insolvent, the petition itself is treated as an act of bankruptcy under the Insolvency Law. And where he states that his liabilities are more than his assets, that must be taken as *prima facie* evidence that he is unable to meet his liabilities which is the [illegible] has to consider for the purpose [illegible] debtor an insolvent.

No inquiry ought to be held at that stage as to the reality of the debts. Such an inquiry into the *bona fides* of the insolvent is proper only when he applies for discharge and not before.

Appeal against an order of the District Court, Anantapur, in I. P. No. 4 of 1922.

Mr. *B. Somayya*, for the Appellant.

Mr. *C. V. Ananthakrishna Iyer*, for the Respondent.

JUDGMENT.—This is an appeal against the order of the District Judge of Anantapur, dismissing the appellant's petition to be adjudicated an insolvent. The appellant stated in his petition that he had debts to the extent of Rs. 25,018-4-0 and that his properties were worth about Rs. 10,000; and he further stated that he was unable to meet his liabilities. The learned Judge dismissed his application on the ground that he was not satisfied, that the petitioner was unable to pay his debts. When a person presents a petition to be adjudicated an insolvent that petition itself is treated as an act of bankruptcy under the Insolvency Law. And when he says that his liabilities are more than his assets, that must be taken as some evidence that he is unable to meet his liabilities.

Under s. 24 of the Provincial Insolvency Act where a debtor is the petitioner, he shall be required to furnish such proof as to satisfy the Court that there are *prima facie* grounds for believing the same. Under s. 25, the Court shall dismiss the petition if it is not satisfied of his right to present the petition. In this case, the learned Judge has taken evidence to consider whether some of the debts mentioned in his petition are real debts. Such an enquiry should not be held for the purpose of considering whether the application of the appellant should be granted or not. An enquiry into the *bona fides* of the insolvent should be held when he comes up for discharge and not before. What the Court has to do is to see whether *prima facie* the person applying to be adjudicated insolvent is unable to pay his debts. It cannot be said in this case that the appellant was able to pay his debts at the time when he made his application to the lower Court. On the evidence on record, we do not think there are no *prima facie* grounds for believing that the appellant is unable to pay his debts.

We set aside the order of the District Judge and remand the petition for fresh disposal.

We make no order as to costs.

V. N. V.

Appeal allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 502 OF 1924.

August 21, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

BALSHET MAHADSHET YEKAWDE —DEFENDANT—APPELLANT

versus

HARI BABURAO RANE—PLAINTIFF —RESPONDENT.

Bombay Khoti Settlement Act (I of 1880), s. 33, r. II (l) (b)—Landlord and tenant—Rent payable—Bot-khat, *entry in, value of—Arrangement, unauthorised, between* khot *and tenant, whether can be enforced*

The whole scheme of s 33 of the Bombay Khoti Settlement Act is to prevent arrangements being made in an unauthorised way by the *khots* with the tenants contrary to the terms of the *bot-khat*. Rule II (1) (*b*) under the section provides that if there is any agreement between the parties after the amount of rent has been fixed in the *bot-khat*, then the parties should appear in person or by duly authorised agent before the Recording Officer and consent to the entry being made altering the terms under which the tenant holds the lands. Where the agreement is not given effect to in this manner, the rights and obligations of the parties continue to be regulated by the terms of the entries contained in the *bot-khat* and the agreement cannot be given effect to. [p. 543, cols. 1 & 2; p. 544, col. 1]

Second appeal from a decision of the First Class Subordinate Judge, A. P., at Ratnagiri, in Appeal No. 67 of 1923, confirming a decree of the Joint Subordinate Judge at Deoghad, in Civil Suit No. 486 of 1921.

Mr. *A. G. Desai*, for the Appellant.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff sued to recover possession of the suit property alleging that the same belonged to him, having been rented by the defendant under a rent-note dated May 5, 1913. The defendant raised various defences to which I am not going to refer in detail. It is sufficient to say in passing that they did defendant little credit, and only raised a prejudice

against him in the Courts. In the Trial Court he attempted to show that the *lavanchitti*, Ex. 12, was obtained by misrepresentation, but failed to prove that. So it was held that he was bound by the *lavanchitti*, and that he forfeited his occupancy rights by having failed to pay rent for five years.

It cannot be disputed that the defendant's name was in the *bot-khat* as an occupancy tenant, paying rent according to the appraisement. That would give the plaintiff *khot* about eight maunds of paddy annually. According to the lease the tenant had to give six maunds and was not liable to enhancement. But the Judge omitted to notice that the defendant had to pay assessment, and as the cash payment for six maunds was Rs. 12, and the assessment was Rs. 4-0-6, it seems obvious that the rent payable under the *lavanchitti*, taken together with the assessment, was practically the same as the defendant had to pay under the *bot khat*. The Trial Judge gave the plaintiff a decree directing that the defendant should deliver possession of the land described in the plaint, and pay Rs. 72 as rent for the six years in arrears. He further directed an inquiry with regard to mesne profits.

In appeal the Judge said that the only point was whether the *lavanchitti* had been fraudulently obtained by the plaintiff as alleged by defendant. He found that issue in the negative, and agreed in other respects with the Trial Court. Only he thought that as plaintiff has taken Rs. 100 from the tenant when the *lavanchitti* was passed, the plaintiff ought to pay back that sum before taking possession.

I do not think that either of the Courts below recognised the importance of the *bot-khat* which is the record under the Khoti Settlement Act of the terms according to which various classes of occupants hold their lands. Section 33 says "rent payable to the *khot* by privileged occupants shall be as follows:" There are three classes mentioned: *Dharekari: QuasiDharekari*, and any permanent tenant. Rent would be payable "in each case according to the terms of the entry in the Survey Record made in respect thereof, and for the time being applicable thereto, under the following rules." Rule II (1) (*b*) provides that if there is any agreement between the parties after the amounts have been fixed in the *bot-khat*, then the parties should appear in person or by duly authorized agent before the Recording Officer and consent to the entry being made altering the terms under which the tenants held the lands.

It seems to me that the whole scheme of s. 33 of the Khoti Settlement Act is to prevent arrangements being made in an unauthorised way by the *khots* with the tenants contrary to the terms of the *bot-khat*. And in this case if the defendant had admitted that he held as occupancy tenant according to the terms of the *bot-khat*, and was bound to pay rent according to those terms, he would have had the Courts entirely in his favour. Unfortunately he denied the validity of the *lavanchitti*, he denied apparently the plaintiff's title as *khot*, and he asserted that he was entitled to hold the land on payment of assessment only. We think that the right which lay in the plaintiff was to recover the rent as fixed in the *bot-khat*, and that the *lavanchitti* was not a valid document, as it had not been registered before the Recording Officer.

The result will be that the plaintiff is entitled to recover rent according to the *bot-khat*. There is no reason why the defendent, considering his conduct, should not be ordered to pay Rs. 72 which are in arrears according to the *bot-khat*. The plaintiff, however, has already recovered Rs. 100 under the terms of the *lavanchitti*. Therefore, we leave the order for payment of Rs. 72 as it stands in the decree of the lower Court, and we also declare that the defendant is entitled to set-off any money paid by him to the plaintiff under the *lavanchitti*. In other respects the suit is dismissed, but without costs.

Coyajee, J.—I agree in holding that the *lavanchitti* sued upon in this case is not valid and binding on the defendant. In the year 1890 there were disputes between the *khots* of this village and the tenants. A decision was arrived at by the Settlement Officer, and in accordance with that decision entries were made in the Settlement Records. It is clear then that this *lavanchitti* executed by the plaintiff *khot* in favour of the defendant in the year 1913, was an attempt to modify those entries. The third issue framed in this suit was: "Can plaintiff challenge the entry in Survey Records and is not defendant an occupancy tenant in respect of the lands in suit?" The Trial Judge says: "The defendent ceased to be an occupancy tenant the moment he obtained the lease, Ex. 12, and

his relations with the plaintiff were governed by the lease and not by the provisions of the Khoti Act; hence the fact that he is described as an occupancy tenant in the *bot-khat* does not help him to repudiate the lease, Ex. 12." He accordingly passed a decree directing the defendant to deliver to the plaintiff possession of the suit-lands and to pay Rs. 72 as arrears of rent. On appeal, the defendant raised, among others, the same question, but the Appellate Judge did not deal with it. I am unable to agree with the view of the Trial Judge. It was not contended before the lower Court that the defendaut had resigned his land. The *bot-khat* continues to show his permanent tenancy. He is liable to pay rent according to the terms of the entry made in the Survey Record. The agreement as to rent contained in the *lavanchitti* was not given effect to in the manner provided by s. 33, r. II (*b*), of the Khoti Settlement Act. In my opinion, the rights and obligations of the parties continue to be regulated by the terms of the entries contained in the Settlement Records.

Z. K. *Decree amended.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 150 OF 1925
WITH
CIVIL RULE No. 482-M OF 1925.
June 1, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Chakravarti.

SURENDRA NATH DAS GUPTA AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

SATYENDRA NATH BHATTACHARJYA AND OTHERS—AUCTION-PURCHASERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47; O. XXI, r. 98—Auction-sale—Obstruction by judgment-debtor—Proceedings by purchaser—Decree-holder, whether party—Order deciding questions between decree-holder and judgment-debtor—Appeal, whether lies.

An order passed under O. XXI, r. 98, C. P. C., on proceedings initiated by the auction-purchaser against the judgment-debtor is not appealable. Such an order does not become appealable even though the Court decides any question as between the decree-holder and the judgment-debtor which would really be quite foreign to the proceedings. [p. 545, col. 1.]

Aduram Haldar v. *Nakuleswar Rai Chowdhury*, 49 Ind. Cas. 137; 29 C. L. J. 48 and *Sasibhushan Mookerjee* v. *Radhanath Bose*, 25 Ind. Cas. 267; 19 C. W. N. 835; 20 C. L. J. 433, relied on.

In proceedings under O. XXI, r. 98, C. P. C., taken by an auction-purchaser against the [illegible] the decree-holder *qua* the decree-holder is really not a party. The question is merely between the judgment-debtor and the auction-purchaser, and any questions that might arise between the judgment-debtor and the decree-holder cannot be raised, and any decision passed relating to them is not binding as between them under s. 47 of the Code. [*ibid.*]

Appeal against an order of the District Judge, Chittagong, dated the 18th of March 1925, reversing that of the Subordinate Judge, Second Court of that District, dated the 20th of September 1924.

Babu *Nripendra Chandra Dass*, for the Appellants.

Babus *Jogesh Chandra Roy* and *Paresh Chandra Sen*, for the Respondents.

JUDGMENT.

Chakravarti, J.—This is an appeal by the judgment-debtor against an order of the District Judge of Chittagong, dated the 18th March 1925. The facts are these. The properties of the judgment-debtors were put up to sale in execution of a mortgage-decree obtained by the respondents-mortgagees. In execution of that decree the lands described in the boundaries of the mortgage-deed were sold and purchased by the decree-holders. The decree-holders obtained possession of the properties purchased by them at the auction-sale. In the proceedings in execution the purchasers were obstructed by the judgment-debtors and by an application proceedings under O. XXI, r. 98 were initiated. That application was made by the auction-purchaser and was headed as an application under O. XXI, r. 98, C. P. C. The learned Subordinate Judge passed an order adverse to the auction-purchasers and it purported to have been made under the said rule. Against that order the auction-purchasers preferred an appeal to the District Judge. The learned District Judge in that appeal construed the decree, the mortgage-bond and the sale certificate and made an order in favour of the auction-purchasers and reversed the order made by the Subordinate Judge. The present appeal, as I have already stated, is by the judgment-debtors against that order of the learned District Judge.

The first point argued in this appeal was that the appeal before the learned District Judge was incompetent as the Code did not allow an appeal against an order passed under O. XXI, r. 98. The learned Vakil for the respondents argued that the appeal was competent because

the questions were decided between the decree-holders and the judgment-debtors under s. 47, C. P. C., and not merely questions under O. XXI, r. 98. There is a large number of cases on the point in controversy, and I shall refer only to some of them, that is to the cases of *Aduram Haldar* v. *Nakuleswar Rai Chowdhury* (1) and *Sasibhushan Mookerjee* v. *Radhanath Bose* (2). In these cases the view that was taken was that in these proceedings the decree-holder *qua* decree-holder was really not a party. The question was merely between the judgment-debtor and the auction-purchaser and any question which might arise between the judgment-debtor and the decree-holder could not be raised and any decision which was passed relating to the construction of the decree would not be binding against the decree holders. In that view when proceedings were initiated by the auction-purchaser under O. XXI, r. 98 and the matter was decided under that rule it must be held that the order was passed under that rule. As any order passed under that rule is not appealable, the appeal before the learned District Judge was not competent and any question which had been decided by the learned Subordinate Judge in the order that he passed as to the construction of the decree or, in other words, a decision on the rights of the decree-holder as against the judgment-debtor was foreign to the proceedings which were before him. Any such judgment would not be binding upon the decree holder. Following the principle laid down in the cases I have cited, I think, the order passed by the District Judge in appeal was passed without jurisdiction, as no appeal lay before him.

The result, therefore, is that we set aside his order and restore the order of the learned Subordinate Judge. As I have already stated it must be distinctly understood that any view taken by the learned Subordinate Judge would not be binding against the decree-holders as decree-holders. The appeal is, therefore, allowed. But in the circumstances of the case there will be no order as to costs.

No order need be passed in the Rule which was merely for the stay of execution during the pendency of this appeal.

Cuming, J.—I agree.

N. H. *Appeal allowed.*

(1) 49 Ind. Cas. 137; 29 C. L. J. 48.
(2) 25 Ind. Cas. 267; 19 C. W. N. 835; 20 C. L. J. 433.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 246 OF 1924.
September 22, 1925.
Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

CHANDULAL MAGANLAL—DEFENDANT—APPELLANT
versus
MOTILAL HARILAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 97—Preliminary decree—Appeal—Final decree passed during pendency of appeal—Procedure.

When an appeal is filed against a preliminary decree, but no stay of proceedings is asked for, and a final decree is passed by the Trial Court during the pendency of the appeal against the preliminary decree, the proper course for the appellant in such a case is to put an appeal on the file against the final decree, or at least to inform the Appellate Court, when the appeal against the preliminary decree comes on for hearing, that a final decree has been passed. [p. 546, col. 1.]

First appeal from the decision of the First Class Subordinate, Judge, at Ahmedabad, in Civil Suit No. 1324 of 1923.

Mr. *R. J. Thakor*, for the Appellant.

Mr. *B. G. Rao*, for Mr. *G. S. Rao*, for the Respondent.

JUDGMENT.

Macleod, C. J.—In this case the plaintiff sued to recover Rs. 6,721 and costs and interest on the footing of a registered mortgage-deed, dated January 23, 1923, for Rs. 6,500. The defendant admitting the mortgage pleaded that he had not received a certain sum of Rs. 2,600 as a part of the consideration. The First Class Subordinate Judge held that this plea was bad, and directed that after taking an account of what was due on the mortgage the defendant should pay Rs. 6,721 and costs of the suit with interest at nine per cent. from the date of suit till re-payment within six months from the date of the decree. In default plaintiff to recover this sum by the sale of the mortgaged property. That decree was passed on April 10, 1924.

An appeal was filed to this Court from that decree and was heard on August 21, 1925. In the meantime, the defendant not having paid the decretal amount, the plaintiff applied for a decree absolute, and accordingly a decree was passed for the sale of the mortgaged property. In the appeal against the preliminary decree which came before this Court, we were not told that the decree had already been made absolute, and that an order had been made for the sale of the property. Consequently in dis-

missing the appeal we directed that the time for payment should be extended by six months from the date of our judgment.

The respondent's Pleader now asks us to delete that order. The exact legal position, when an appeal is filed against a preliminary decree, but no stay of proceedings is asked for, and a final decree is passed in the lower Court without any appeal being filed therefrom, is somewhat obscure. It seems to me that the proper course for the appellant in such a case is to put an appeal on the file against the decree absolute, or in any event to inform the Court, when the appeal against the preliminary decree comes on for hearing, that a decree absolute has been made. It may not be that the Appeal Court is debarred from hearing the appeal from the preliminary decree merely on account of the Court below having passed a final decree. But to avoid the difficulties which may arise when no application has been made for stay of proceedings, it would certainly be desirable that, in any case where a preliminary decree is passed, and a party appeals against that decree, when the Court below passes a final decree, he should file an appeal against that decree.

In this case if the property had already been sold before the decision of the Appeal Court, it is difficult to see how this Court could have set aside the sale. But we think the fairest order to be made now is that the respondent-mortgagee should add his costs of the postponed sale and of the application if any to the mortgage, and that the appellant-mortgagor should have one month from this day to pay what is due. In default the respondent can proceed to get the property sold. The respondent must pay the costs of this application if any.

We make it clear that the mortgagee is entitled to his decretal amount and interest and all his costs, charges and expenses. Those must be paid if the mortgagor desires to avoid the sale of the property.

Coyajee, J.—I agree.

Z. K. *Order accordingly.*

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 26 OF 1925.

November 25, 1925.

Present :—Mr. Justice Mukerji.

Sheikh ATA HUSAIN—JUDGMENT-DEBTOR—APPELLANT

versus

Syed MUSTAFA HUSAIN AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s.145, O. XXV, r. 1 (3)—Security for costs—Bond hypothecating property—Enforcement of security—Procedure—Execution.

Plaintiff was required to give security for costs and appellant who offered himself as surety executed a bond that if the plaintiff failed to obey the order of the Court with regard to the payment of costs, certain property of the surety specified in the bond would be liable for the satisfaction of the order and that if the property proved insufficient for the purpose the surety would himself be liable. Plaintiff's suit was dismissed and plaintiff was ordered to pay the costs of the suit. Defendant took out execution for costs and applied for sale of the property hypothecated by the surety:

Held, (1) that on the language of the bond executed by the surety the defendant was not bound to proceed first in execution against the plaintiff and only on his failure to obtain satisfaction from the plaintiff to proceed against the surety;

(2) that there was no mortgage of his property by the surety and that the proper procedure to enforce the liability of the surety under the bond was to proceed in execution by sale of the hypothecated property.

Execution first appeal against a decree of the Subordinate Judge, Allahabad, dated the 22nd November 1924.

Mr. *Damodar Das*, for the Appellant.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—Two points of law have been raised in this appeal and a third point, also of law, has been argued with the permission of the Court.

It appears that *Musammat* Amrit Bibi, the respondent No. 2, brought a suit for recovery of her alleged dower-debt from the decree-holder, respondent No. 1, Mustafa Husain, who was in possession of some of the property of the late husband of *Musammat* Amrit Bibi, as an heir to his wife, the daughter of *Musammat* Amrit Bibi's husband. While the suit was pending, Mustafa Husain obtained an order from the Court to the effect that the plaintiff *Musammat* Amrit Bibi must furnish security for his costs. This security was furnished by the appellant Ata Husain. He gave a bond hypothecating a certain property, on the 25th of April 1922. The suit was decided against *Musammat* Amrit Bibi and Mustafa Husain has taken out execution for costs,

He applied for the sale of the property hypothecated by Ata Husain and also he applied for the attachment and sale of certain other property, said to belong to *Musammat* Amrit Bibi.

Ata Husain objected to the execution proceeding against him and his case is that he is liable only after *Musammat* Amrit Bibi has been compelled to pay and has failed to do so and that a failure on the part of the decree-holder to execute the decree against *Musammat* Amrit Bibi amounted to a release of his liability. The point urged for the first time is that the appellant's liability can be enforced by a suit and not in execution.

As regards the plea that execution should proceed at first against the lady, we have to look to the language of the bond itself. The bond says that if the lady failed to obey the order of the Court the property of the surety would be liable and also he himself in case the property proved insufficient. There is no provision for the principal debtor being proceeded against as a condition precedent to execution against the surety. This disposes of also the connected plea that by not proceeding against the principal debtor the surety has been discharged. Section 139 of the Contract Act does not apply to the facts of the case. It is true that the learned Judge of the Court below suspected that the judgment-debtor *Musammat* Amrit Bibi had been won over by the decree-holder Mustafa Husain who is her son-in-law. But that Court did not arrive at any definite finding. I agree with the Court below that the question of collusion is immaterial. Even if there be any collusion the decree-holder has done nothing, no overt act by which it can be said that the principal debtor has been released from liability to the decree-holder or that any remedy of the surety against the principal debtor has been impaired. It is clear, therefore, that the two points taken in the grounds of appeal cannot succeed.

The third question is whether s. 145 of the C. P. C. applies and there can be no execution of the decree by sale of the property charged, in the execution department. This question cannot be decided without having regard to the language of the bond executed by the appellant. It is to be noted that there is no mortgage in the legal sense of the term. The appellant said in the bond that the Court had called upon Amrit Bibi to furnish security for costs to the amount of Rs. 600 and that, therefore, the appellant was offering himself as a surety agreeing that the amount of costs payable by the lady might be realised by sale of the property hypothecated and the balance from him personally. It is clear, therefore, that there is no mortgage in the proper sense of the term. There is no mortgagee and in the language of their Lordships of the Privy Council, the Court not being a juridical person it cannot be sued, it cannot take property and it cannot assign the mortgage : *vide*, *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (1). The bond before the Privy Council was in language very similar to the language of the bond now before me. The learned Counsel for the appellant has relied on the case of *Amir* v. *Mahadeo Prasad* (2) and it was urged that the Court might assign the mortgage to anybody in order that the mortgage might be enforced by a regular suit. As was pointed out in the course of the argument, the observations in the case of *Amir* v. *Mahadeo Prasad* (2) of Richards, C. J. at page 227,* that the bond could only be enforced by a regular suit brought by the Court itself or by some person to whom the Court could transfer the mortgage for the purpose of instituting the suit, go counter to the observations of their Lordships of the Privy Council already quoted. The position, therefore, is this that there is a liability undertaken by the appellant and there ought to be some method of enforcing the same. The method can be by way of execution alone as there is nobody to enforce the mortgage by means of a suit. This was the opinion of their Lordships of the Privy Council in the case of *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (1) and a similar view was taken by a Bench of this Court in *Beti Mahalakshmi Bai* v. *Badan Singh* (3). I hold that the surety bond given in the present case can be enforced by execution alone and, therefore, the order of the Court below was correct.

The appeal fails and is hereby dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 55 Ind. Cas. 550; 42 A 158 at p. 167; 22 O. C. 212; 6 O. L J 82; 38 M. L. J. 302; 18 A. L. J. 263; 22 Bom. L. R. 521; 46 I. A. 228; 13 L. W. 82 (P. C.)
(2) 38 Ind. Cas. 33; 39 A. 225; 15 A, L. J. 76.
(3) 74 Ind. Cas. 927; 22 A. L. J. 604; 45 A. 649; (1924) A I R (A) 105.

*Page of 39 A.—[*Ed.*]

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL
No. 65 OF 1925:
September 16, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

G. I. P. RAILWAY COMPANY—
DEFENDANTS—APPELLANTS
versus
CHANDULAL SHEOPRATAP—
PLAINTIFF—RESPONDENT.

Railways Act (IX of 1890), ss. 77, 140—Suit against Railway—Notice to officer other than Agent, validity of.

The mere fact that the Agent of a Railway Company constitutes a department for the registering and investigation of claims, and that a claim is preferred to that department, does not absolve the person making the claim, if he intends to sue the Railway Company, from giving notice to the Company as prescribed by s. 77 read with s. 140 of the Railways Act.

When a person claiming against a Railway Company must be presumed to know that he must do a certain act in a certain way within a fixed time, without which preparatory step a suit will not be competent, he is not prevented from taking that step because he has been told that his claim is receiving attention and no further answer is received before the expiry of the period of limitation. On the contrary the fact that his claim is not being attended to is sufficient to warn him that if he wants to prosecute his claim in Court he must do what the law requires.

Appeal against the decision of Mr. Justice Shah.

Mr. *Kanga*, Advocate-General, (with him Mr. *Daphtary*), for the Appellants.

Mr. *Binning*, for the Respondent.

JUDGMENT.—In Suit No. 966 of 1923 the defendants raised an issue whether the plaintiff delivered a notice of his claim as required by ss. 77 and 140 of the Indian Railways Act.

On June 15, 1922, the plaintiff wrote to the Deputy Traffic Manager that the bales had not been received and requesting him to settle the claim.

On June 23, the letter was acknowledged, and it was intimated that the claim would receive attention.

On October 23, the plaintiff was informed that his claim could not be accepted as the goods were burnt accidentally by fire. This information would not have reached the plaintiff within six months from the date the goods were consigned.

On November 25, the plaintiff wrote to the Agent of the defendant Company giving notice of his claim. The learned Judge held that the first notice given to the Deputy Traffic Manager was a notice to the Railway Administration on the ground that there was a Department in the Traffic Manager's Office which dealt with claims, to which claims addressed to the Agent would be sent for disposal. As the Railway Administration had constituted a separate department for dealing with claims and that department kept a register of claims to which the Agent had access at any time, a notice to the Traffic Manager was a notice to the Railway Administration. With due respect that may be equity but it is not logic.

Section 140 of the Indian Railways Act defines when notice has to be given under the Act to the Railway Administration, how that notice has to be given, and the mere fact that the Agent constitutes a department for the registering and investigation of claims, cannot deprive the Railway Company of the protection given to it by the Act against suits on claims of which due notice as provided by the Act has not been given to it.

In my opinion the notice of June 15, 1922, was not a notice to the Railway Administration. It might be argued that where the Traffic Manager delayed for four months before informing the plaintiff that his claim could not be entertained, the Company had by their own action induced the plaintiff to refrain from sending a notice under s. 77 to the Railway Company. But when a person claiming against a Railway Company must be presumed to know that he must do a certain act in a certain way within a fixed time, without which preparatory step a suit will not be competent, he is not prevented from taking that step because he has been told that his claim is receiving attention and no further answer is received before the expiry of the six months. On the contrary the fact that his claim is not being attended to is sufficient to warn him that if he wants to prosecute his claim in Court he must do what the law requires.

On a strict interpretation of the law I feel compelled to hold that the point raised by the defendant Company was competent, and was fatal to the plaintiff's case.

Z. K. *Appeal allowed.*

OUDH CHIEF COURT.

EXECUTION OF DECREE APPEAL No. 37 OF 1925.

November 30, 1925.

Present :—Mr. Justice Hasan and Mr. Justice Raza

Babu BASANT RAI BHANDARI—PLAINTIFF—DECREE-HOLDER—APPELLANT

versus

Lala SALIK RAM—DEFENDANT—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss 68, 70—Execution of decree—Decree transferred to Collector for execution—Order of Collector—Appeal—Revision

Under the rules framed by the U P Local Government under s 70 (1), C P C., no appeal lies to the Chief Court against an order passed by a Collector in discharge of his powers in the execution of a decree transferred to him for execution under s 68 of the Code Under s 70 (2) of the Code, therefore, the Chief Court can exercise neither appellate nor revisional jurisdiction in respect of such an order

Appeal against the judgment and order of the Subordinate Judge, Bahraich, dated the 5th March 1925.

Mr. *Bishambhar Nath*, for the Appellant

Messrs. *Radha Krishna* and *Rudra Datt Sinha*, for the Respondent.

JUDGMENT.—This is an appeal from the order dated the 5th of March 1925 passed by the Subordinate Judge of Bahraich. The facts are as follows :—

The appellant holds a decree of sale on a mortgage as against the respondent. Under s. 68 of the C. P. C, the decree was transferred to the Collector for execution The Collector instead of proceeding to sell the property has made a lease of it by the terms of which he has provided for the satisfaction of the decree in several instalments. To this course adopted by the Collector the decree-holder took objection by an application presented to the Subordinate Judge, who had originally passed the decree for sale. The Subordinate Judge rejected that application by the order now under appeal.

We are of opinion that no appeal lies to this Court. Under s. 70, sub-s. 2 (1), of the C. P. C. the Local Government has framed rules as to the venue of appeal against orders made by the Collector in discharge of his powers under s. 68. This Court is not the Court to which an appeal would lie under those rules. Therefore under sub s. (2) of s. 70 of the Code this Court has neither appellate nor revisional jurisdiction over the orders passed by the Collector. The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 716 OF 1924.

August 19, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

FULCHAND MOHANLAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

HARILAL NANSA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s 9—Jurisdiction of Civil Courts—Question relating to caste property—Division of opinion among members of caste, effect of

Where in a suit between the members of a caste the question at issue is not a matter relating to the internal administration and affairs of the caste, but to the property of the caste, a Civil Court has jurisdiction to entertain the suit, and this jurisdiction is not excluded merely because there has been a division of opinion in the caste [p 550, col 2.]

Second appeal from the decision of the Joint Judge, Ahmedabad, in Appeal No. 434 of 1922, reversing a decree of the Subordinate Judge, at Ahmedabad, in Civil Suit No. 159 of 1921

Mr. *Dhirajlal Thakor*, (with him Mr. *R. J. Thakor*), for the Appellants.

Mr *G N. Thakor*, (with him Mr. *H. V. Divatia*), for the Respondents.

JUDGMENT.

Macleod, C. J.—The plaintiffs sued for a declaration that they had a right to manage the suit Wadi, to let it to tenants and to realize the rent, that defendants Nos. 1 and 2 had not such a right, and to get a permanent injunction against them and to restrain them from making any such use.

The plaintiffs alleged that they and defendants Nos 1 and 2 belonged to the Modh Ganchi caste of Kalupur Panchpura, and that the caste owned the suit Wadi. There was a caste meeting convened on December 12th, 1920, to pass some resolutions in respect of the caste, as defendants Nos. 1 and 2 and one Vallabh had unauthorizedly got the management and did not submit accounts, and the property had been wasted. They further alleged that the caste entrusted the *vahivat* of the property to the defendants, and they were bound to hand it back to the plaintiffs in accordance with the caste resolutions.

Defendants Nos. 1 and 2 contended that two factions existed in the caste, that the plaintiffs' faction had no right to have the management and that the jurisdiction of the Court was excluded.

The Trial Judge held that the plaintiffs did not prove that the two factions in the

Kalupur Panchpura caste had amalgamated, and he accordingly dismissed the suit.

In appeal, the Judge said: "Considering all facts I am satisfied that there was a re-union of the factions in 1969 V. S., 1913 A. D., that the plaintiffs are members of the caste and that it is in accordance with the resolution passed by a majority at a meeting, of which, the minority defendants Nos. 1 and 2 had perfect and legal notice and at which they could have had their say, if they choose to do so, that the present suit is filed. If defendants Nos. 1 and 2 choose to absent themselves and remain away they must thank themselves for the consequences." That is a finding by the Judge that there were not two sections or factions in the caste in the sense that the caste was split up into two divisions, so that a meeting of one section or faction would not bind the members of the opposite faction, and that, therefore, jurisdiction of the Court was not excluded.

The appellants have relied upon the Full Bench decision in *Nemchand* v. *Savaichand* (1). There the plaintiffs, who were certain members of the Shravak caste at Surat, asked for a decree giving them half the compensation granted by the Collector in regard to certain shops belonging to the caste which had been divided into two factions, the plaintiffs forming one, and the defendants the other, of such factions. The Court confirmed the decree of the District Judge who held that the question involved was a caste question not cognisable by the Civil Court.

We think that case is only an authority for this proposition, that when members of a caste, who have filed a suit in connection with caste property, have admitted that there has been a division of the caste so that they only ask to be held entitled to the division of the property, and to a decree to the extent of half of what was the caste property, then it can be said that really the caste has been divided in such a way that the question how the caste property is to be divided is one which the Courts cannot decide. No reasons for the Full Bench decision are reported and with all due respect without reason it can hardly be said to be convincing. In any event it cannot be extended beyond the facts of the case.

But in *Lalji Shamji* v. *Walji Wardhman* (2), although there was a division of opinion in the caste, it was held that the question at issue was not a matter relating to the internal administration and affairs of the caste, but to the property of the caste and so the Court had jurisdiction to interfere. That is the principle which I understand has always been followed by this Court.

It follows then that the jurisdiction of the Court is not excluded in every case in which there has merely been a division of opinion in the caste. Otherwise as soon as there is such a division on a particular question, no Court would have any jurisdiction to decide the question, with the result that the only way the question could ultimately be decided would be by resort to force.

It seems to me that in this second appeal it is only a question of fact whether or not the caste was split up and could be considered to be two separate entities, so that the question relating to the caste could not be decided by the Court. But from the finding of the Appellate Judge it would appear that the caste was not really divided into two factions, that although some members would not agree with the opinion of the other members of the caste, still the caste remained as a caste, and could meet together when the minority might have an opportunity of protesting against the resolutions moved by the majority. The mere fact that they might vote against such resolutions cannot of itself result in the splitting up of the caste into two factions so that the question relating to caste property could no longer be decided by the Court.

The plaintiffs here had the authority of the caste at their meeting to take these proceedings for the preservation of the property belonging to the caste, and it seems to me they are entitled to get the decree which the Appellate Court gave them against defendants Nos. 1 and 2. They must be taken merely to be holding out against the wishes of the caste with regard to the management of the caste property.

The appeal will be dismissd with costs.

Coyajee, J.—I agree in holding that the decision of the lower Appellate Court is right. on the ground that the question arising in this case is not a question be-

(1) 5 Bom. 84*n*; 3 Ind. Dec. (N. S.) 58 (F. B.)

(2) 19 Bom. 507; 10 Ind. Dec. (N. S.) 339.

tween two distinct sections of the Modh Ghanchi Caste of Kalupur Panchpura, but that the suit was brought against defendants Nos. 1 and 2 personally.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 79 OF 1925.

November 25, 1925.

Present:—Mr. Justice Mukerji.

BATUK NATH—APPLICANT

versus

JUGAL KISHORE AND ANOTHER—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XXII, r. 10—Decree against widow of deceased debtor—Birth of posthumous son—Legal representative, who is—Execution, whether can proceed against son.

A creditor brought a suit against the widow of a deceased debtor to recover the debt and obtained a decree. Subsequent to the date of the decree the widow gave birth to a son The decree-holder sought to execute the decree against the son as the legal representative of the deceased debtor.

Held, that on the analogy of the provisions of O. XXII, r 10, C P C, the son who really represented the estate of the deceased debtor must now be treated as his legal representative and that execution could, therefore, proceed against the son [p 552, col 1.]

Civil revision from an order of the Subordinate Judge, Muttra, dated the 12th February 1925.

Mr. *S. C. Das*, for the Applicant.

Mr. *N. P. Asthana*, for the Opposite Parties.

JUDGMENT.—This revision raises a question of law on which there does not appear to be any direct authority. The matter is not, it further appears, covered by any direct rule of procedure contained in the C. P. C.

The facts are these. One Pancha was indebted to one Jugal Kishore. Pancha having died Jugal Kishore brought a suit to recover his money against Pancha's widow *Musammat* Kota When decree was passed, the widow was pregnant and she gave birth to a child, the petitioner before me, a few months later. The decree-holder sought to execute his decree against the widow and obtained an attachment of certain properties. Pancha's brother Sancha for himself and as the guardian of his nephew, the petitioner Batuk Nath, preferred an objection apparently under O. XXI, r. 58 of the C. P. C. and it succeeded. The decree-holder brought a suit under r. 63, O. XXI of the C. P. C. and this suit was dismissed for default. His appeal was still pending before the District Judge when that learned Officer disposed of the present matter

Having been unsuccessful in executing his decree against *Musammat* Kota, the decree-holder's representative (decree-holder having since died) sought to execute the decree by bringing Batuk Nath on the record as the legal representative of his deceased father Batuk Nath came forward with a number of objections, only one of which has been so far decided, *viz.*, whether he could be properly brought on the record as the legal representative of the deceased Pancha. The Courts below have agreed that Batuk Nath, if the execution is continued against him, would be entitled to prefer any objection that he may have to the execution of the decree.

The sole question for decision by me is whether the Courts below were right in allowing the execution to proceed against Batuk Nath.

As already mentioned there is no clear authority either way on the point and the matter is not covered by any clear rule of enacted law. The matter is one of first impression.

Mr. Das in his able argument has urged that substitution of Batuk Nath would really mean passing of a decree against the petitioner and that the Court below was not justified in so acting. He relies on the case of *Ashi Bhushan Dasi* v. *Pelaram Mandal* (1). In that case a creditor sued an infant on the allegation that he was the adopted son of the deceased debtor. The infant was impleaded under the guardianship of the widow of the deceased. Subsequently it transpired, as the result of another litigation, that the infant had not been adopted by the deceased. The creditor then sought to execute the decree against the widow of the deceased on the ground that she represented the estate and that she had virtually been a party to the suit. The learned Judges repelled the contention and held that a decree against a person who was not the legal representative of the deceased could not be turned into a decree against the widow of the deceased.

The facts of this case are entirely different. Here the suit was brought against

(1) 21 Ind. Cas 519; 18 C. W. N. 173, 18 C. L. J, 362.

a person who was then *de facto* and *de jure* the legal representative of the deceased debtor. The decree was, therefore, obtained against a person who represented the estate of the deceased. On the birth of Batuk Nath, by operation of law, the estate devolved on him and he became the sole representative of his deceased father. The case is very similar to the illustration given by the learned Counsel for the resp· ident, *viz.*, where subsequently to the ing of a decree against a widow, she es an adoption and thereby divests her f of her husband's property, the decree ı treated as binding on the son unless, of course, he can show that the decree was obtained by collusion or fraud. Again, when an estate is represented by a Hindu widow and she dies and a reversioner comes in, the decree passed against the widow is treated as binding on the reversioner except under circumstances which need not be considered here. The present case is really very similar to the illustration given by Mr. Asthana. On the analogy of the provisions of O. XXII, r. 10 the person who really represents the estate at a particular moment ought to be treated as the legal representative of the deceased debtor.

I am of opinion that the Courts below were right. Before I leave I would like to point out with some emphasis that no other question so far has been decided by the Courts below and it is open to the applicant to put forward any other objection that he may have to the execution of the decree, *e. g*, a plea of *res judicata* etc.

The petition in revision is dismissed with costs.

Z. K. *Petition dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 81 OF 1925

September 15, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

SHRI GOVERDHANLALJI MAHARAJ—DEFENDANT—APPELLANT

versus

SHRI CHANDRAPRABHAVATI—PLAINTIFF—RESPONDENT.

Letters Patent (Bom.), cl 15—Finding that suit is maintainable, whether "judgment"—Appeal, whether lies

A finding that a suit is maintainable and should proceed, even though embodied in a formal decree, is not a "judgment" within the meaning of cl. 15 of the Letters Patent of the Bombay High Court, and is not, therefore, open to appeal [p 553, col 1.]

Per *Coyajee, J*—The word "judgment" in cl. 15 of the Letters Patent of the Bombay High Court means a judgment or decree which decides the case one way or the other in its entirety, and does not mean a decision or order of an interlocutory character, which merely decides some isolated point, not affecting the merits or result of the entire suit. [p. 553, cols 1 & 2]

Appeal against the decision of Mr. Justice Mirza.

Sir *Chimanlal Setalvad* (with him Messrs. *Kanga*, Advocate-General, *B. J. Desai* and *Mulla*), for the Appellant.

Mr. *Coltman*, (with him Mr. *Jayakar*), for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff filed this suit with a view to get the terms of the consent decree, passed on June 13, 1912, whereby *inter alia* her maintenance was fixed at Rs 2,000 per every two months, varied, on the ground that circumstances had arisen which justified her asking for an increase. The defendant in his written statement submitted that the suit was not maintainable, that the sum payable to the plaintiff had been fixed by a consent decree and could not be altered without the consent of the defendant.

A preliminary issue was raised in a somewhat unintelligible form, *viz.*, whether the suit was not maintainable as alleged in para. 1 of the written statement. After hearing arguments on that issue, the Judge came to the conclusion that the suit was maintainable, and as the parties were not ready to go on with the hearing, the further hearing of the suit had to be adjourned.

But it appears that on that decision an order was drawn up as follows:—"The suit being this day called on for judgment this Court doth declare that this suit is maintainable."

Against that decision the defendant has filed an appeal. The respondent has taken an objection that no appeal lies as there is no judgment before this Court within the meaning of that word under cl. 15 of the Letters Patent. Whether a decision is a judgment or not is a question which very often arises, and, I have no desire myself to add to the literature which has accumulated thereon The judgment of *Justice of the Peace for Calcutta* v. *Oriental Gas Company* (1) is always referred to. But the attempt made therein to define judgment does not

(1) 8 B. L R. 433; 17 W. R. 364.

seem to have prevented in each case in which the question has arisen, lengthy arguments being brought forward to show whether the particular decision before the Court was a judgment or not. After considering very carefully what was set forward as a definition of 'judgment' in that case, I prefer myself to consider each decision as it comes before me, and to form my own opinion whether it is a judgment or not for the purpose of deciding whether an appeal lies. For the purposes of this case to my mind the distinction between decisions and orders thereon which stand by themselves, and decisions on a single issue in a suit, is a very real one. It is not desirable on general principles that a suit should be tried piecemeal, and a decision on an issue to the effect that the trial of the suit should proceed can never to my mind amount to a judgment.

If in this case the Judge had decided that the suit was not maintainable and had dismissed the suit, then undoubtedly an appeal would lie against that decision. But in this case the Judge has decided that the suit should proceed. He will then consider the remaining issue in the suit, whether the plaintiff should be granted in the circumstances of the case increased maintenance or not, and when he has decided that question there will be a judgment, against which all the arguments which are now sought to be raised against the decision on this issue can be placed before the Court. We are not shutting out the defendant from any objection which he may eventually be advised to raise against the final decree in the suit. We are merely pointing out that so far nothing has been decided with regard to the rights and liabilities of the parties, there is only a decision that the suit should proceed, and against that decision no appeal lies.

The appeal will be dismissed with costs.

Cross-objections will be dismissed with costs in the sense that they fall with the appeal.

Coyajee, J.—I concur and will add that while it is best not to attempt to define the expression "judgment" as used in cl. 15 of the Letters Patent, a correct guidance on the subject is to be found in the view expressed by Sir Richard Garth, C. J., in *Ebrahim* v. *Fuckhrunnissa Begum* (2). His Lordship said (page 534*): "I think that word 'judgment' means a judgment or decree which decides the case one way or the other in its entirety, and that it does not mean a decision or order of an interlocutory character, which merely decides some isolated point, not affecting the merits or result of the entire suit" In this case what the learned Trial Judge has done is to direct that the trial of the suit should proceed. In the circumstances I agree in holding that it is not a 'judgment' within the meaning of that word in cl. 15 of the Letters Patent.

Z. K. *Appeal dismissed.*

(2) 4 C. 531; 3 C P. R 311, NInd Dec (N S) 337

*Page of 4 C.—[*Ed.*]

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 381 OF 1925.

December 2, 1925

Present:—Mr Findlay, Officiating J. C.

MUHAMMAD IBRAHIM RIZA—PLAINTIFF—APPELLANT

versus

YADO AND ANOTHER—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 2 (7)—Receipt given by lessor—Lease—Registration

A receipt granted by a lessor, reciting that the lessee had paid a certain earnest-money and taken a lease of certain property, for a certain term, for a certain amount, payable in specified instalments, containing a recital that a formal lease-deed would be executed next day, as no stamp was available at the time, is a "lease" within s 2 (7) of the Registration Act and is inadmissible in evidence without registration [p 554, col 1]

Panchanan Basu v *Chandi Charan Misra*, 6 Ind Cas 443, 37 C 808, 14 C W N 874 and *Hemanta Kumari Debi* v *Midnapore Zemindari Co*, 53 Ind Cas 534, 47 C 485, 37 M L J 525, 17 A L J 1117, 24 C W N. 177, (1920) M W N 66, 27 M L T 42, 11 L W. 301, 46 I A 240, 22 Bom L R 488 (P C), relied on

Kedar Nath v *Shanker Lal*, 78 Ind Cas 934, 36 A 303, 22 A L J 185, (1924) A. I R (A) 514, L R 5 A. 80 Civ, distinguished

Appeal against the decree of the District Judge, Nagpur, dated the 27th January 1925, in Civil Appeal No 53 of 1925.

Messrs. *M. B. Kinkhede*, R. B., and *A. V. Wazalwar*, for the Appellant

JUDGMENT.—The main contention urged on behalf of the plaintiff-appellant is that the receipt (P. 1) is not a *kabuliyat*, as it is held to be by the learned District Judge. It is urged on behalf of the appellant that the lease is not the sole repository of the terms of the agreement between the parties and that there was, in reality, a prior oral lease. I have found it difficult

to entertain the suggestion in view of the terms of the receipt. These terms include the following pertinent matters :—

(*a*) That the lessee has taken a lease of the fields specified for the *Fasli* years 1334-35.

(*b*). That the consideration was Rs. 1,200.

(*c*). That Rs. 30 were paid as earnest-money on the date of execution and that Rs. 300 would be paid on 11th February 1924, Rs. 600 in December 1924 and Rs. 270 in 1924.

The receipt further contained a recital that a formal lease deed would be executed next day, a stamp not being available at the time.

I concur with the learned District Judge in thinking that the present receipt cannot be taken out of the definition of "lease" under s. 2 (7) of the Registration Act on the authority of the decisions in *Panchanan Basu* v. *Chandi Charan Misra* (1) and *Hemanta Kumari Debi* v. *Midnapore Zemindari Company*(2). So far as the terms of the receipt go, they expressly imply a definite and fixed lease for a specific period. In *Kedar Nath* v. *Shanker Lal* (3) what was decided was that a registered *kabuliyat* executed by the lessee is not sufficient to bestow title upon him and cannot be considered a lease within the meaning of s 105 of the Transfer of Property Act. Here, however, the plaintiff has come to Court, in effect, relying upon this document (P. 1). He alleges that the defendants are in possession of the property and have not paid Rs. 300 due on 11th February 1924. In those circumstances it seems to me that the receipt in question must be considered as an acknowledgment that the lease has been given and, this being so, it would come under "*kabuliyat*" or "undertaking to cultivate or occupy" within the meaning of definition in s. 2 (7) of the Registration Act. This being so and being unregistered, it is clearly inadmissible in evidence.

So far as the alternative contention urged in appeal is concerned, *viz*, that the suit might be regarded as one for damages for use and occupation, *cf. Sheo Karan Singh* v. *Parbhu Narain Singh* (4), I find myself in full agreement with the decision of the lower Appellate Court and have nothing to add to its remarks.

The appeal is dismissed without notice to the respondents

N. H. *Appeal dismissed.*

(1) 6 Ind. Cas 443; 37 C. 808, 14 C. W. N. 874

(2) 53 Ind Cas. 534; 47 C. 485; 37 M L. J. 525; 17 A. L. J 1117; 24 C. W. N. 177; (1920) M. W. N. 66; 27 M. L T 42, 11 L. W. 301; 46 I. A. 240; 22 Bom. L. R 488 (P. C)

(3) 78 Ind Cas 934; 36 A. 303, 22 A. L. J. 185; (1924) A. I. R. (A.) 514; L. R. 5 A. 80 Civ.

(4) 2 Ind. Cas. 211; 31 A. 276; 6 A. L. J. 167; 5 M. L. T 347.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 650 OF 1924.

August 27, 1925.

Present:—Sir Norman Mecleod, KT., Chief Justice, and Mr. Justice Coyajee.

SHIDRAJ BHOJRAJ DESAI—DEFENDANT—APPELLANT

versus

RENAKI KONDA MAHAR—PLAINTIFF—RESPONDENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879)—Execution of decree—Death of judgment-debtor—Legal representative, whether can prove status as agriculturist

Where a judgment-debtor dies after decree but before execution proceedings are completed, it is open to his legal representative to prove that he was an agriculturist and thus claim the benefit of the provisions of the Dekkhan Agriculturists' Relief Act

Second appeal from the decision of the Acting District Judge, Belgaum, in Appeal No. 94 of 1923, reversing an order of the Subordinate Judge at Athni, in Darkhast No. 196 of 1918.

Mr. *M. V. Bhat*, for the Appellant.

Mr. *H. B. Gumaste*, for the Respondent.

JUDGMENT.—In this case a decree was passed in Suit No. 4 of 1917 in the Court of the Second Class Subordinate Judge at Athni against, amongst other persons, one Thalya Mahar. He died soon after the decree was passed on September 27, 1917, and his widow was placed on the record. On June 1, 1918, a *darkhast* was filed against her. Her husband was not described in the proceeding which was *ex parte* against him as an agriculturist and the widow died before the *darkhast* came on for decision. The present applicant is the daughter of Thalya and she applied to be declared as an agriculturist so that she could obtain the privileges of that status in the execution proceedings. The Trial Court ordered the sale of the property and attachment to proceed.

In appeal the Acting District Judge set aside that order and directed the Subordinate Judge to find on the issue as to whether the applicant was or was not an agriculturist, and if it was found that she was an agriculturist to grant the appropriate relief.

If Thalya had survived, in the execution proceedings he would have been allowed to prove his status as an agriculturist under the decision in *Rudrappa Sanvirappa Mensinkai* v. *Chanbasappa Mallappa Bhusad* (1). There is no reason, therefore, why the fact that he died before the execution proceedings were completed should prevent his legal representatives from proving that they were agriculturists so as to enable them to obtain the relief provided by the Act. It would have to be proved that the applicant was an agriculturist at the date of the decree, and an enquiry as regards that fact has been directed by the District Judge. We think that order was right and the appeal must be dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 80 Ind Cas. 162, 26 Bom. L. R. 153, (1924) A. I. R (B.) 305.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 127 OF 1925.

December 3, 1925.

Present:- Mr. Justice Daniels.

GHISSU—DEFENDANT—APPLICANT

versus

AMIR ALI KHAN—PLAINTIFF—OPPOSITE-PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XLI, r. 25—Appeal—Finding misread—Revision

Where a lower Appellate Court completely misreads the findings of the Trial Court, it acts with material irregularity in the exercise of its jurisdiction, and its order is open to revision

Civil revision from an order of the Additional District Judge, Shahjahanpur, dated the 14th of April 1925.

Mr. *Harnandan Prasad*, for the Applicant.

Mr. *Mukhtar Ahmad* for Mr. *Iqbal Ahmad*, for the Opposite Party.

JUDGMENT.—This revision is pressed on the ground that the Court below has entirely misread the findings submitted to it on a remand under O. XLI, r. 25. An examination of the record shows this to be correct. The issues remitted were:—

(1) Are the plots in suit situated in *Mahal* Basti Begam ?

(2) Did the defendant ever pay rent to the *zemindar* of Azizganj; and if so on what ground ?

The learned District Judge says, "The finding on the first issue is in the affirmative, and on the second is in the negative." In fact the finding on the first issue was in the negative. The learned Munsif found that the land in suit must be held to be in Azizganj. He also found that the *zamindar* of Azizganj had been collecting rent. Through what extraordinary mistake the error crept into the learned Judge's judgment it is difficult now to know. The learned Judge in treating the findings as being the opposite of what they really were acted with material irregularity in the exercise of his jurisdiction. The best course will be to set aside his decree and direct him to re-hear the appeal, and this order I accordingly pass. Costs will abide the result.

Z. K. *Decree set aside.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 52 OF 1925.

September 3, 1925.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

DEVJI PADAMSEY—PLAINTIFF —APPELLANT

versus

THOMMADRA ERIKALAPPA—DEFENDANT—RESPONDENT.

Ex parte decree, suit to set aside—Fraud—Failure to file affidavit of documents—Decree against party not in default, legality of

In a suit filed by *M* against *T*, the latter filed a written statement and a counter-claim not only against *M* but also against three other persons including *D* *M* failed to obey an order made in the suit to file his affidavit of documents, whereupon *T* applied for and obtained an order dismissing *M's* suit and decreeing *T's* counter-claim *ex parte* not only against *M* but also against the other parties including *D* who were not in default *D* brought a suit to set aside the *ex parte* decree as against him

Held, (1) that *T* was guilty of fraud on the Court in applying for and obtaining an *ex parte* decree against *D* and the other persons who were not in default, [p 556, col 1]

(2) that so far as these persons were concerned the *ex parte* decree was a nullity, [*ibid*]

(3) that it was open to *D* to sue to set aside the *ex parte* decree and his suit must succeed [p 556, col. 2]

Appeal against the decision of Mr. Justice Mirza.

Mr. *Kanga*, Advocate-General (with him Mr. *Pandya*,) for the Appellant.

Mr. *J. H. Vakeel*, (with him Mr. *B. J. Desai*), for the Respondent.

JUDGMENT.—Maganlal Padamsey filed a Suit No. 1953 of 1920 against one Thommadra Erikalappa. Thommadra filed a written statement and counter-claim not only against Maganlal but against three other persons including Devji Padamsey, the present plaintiff-appellant. Maganlal failed to obey the order made in the suit to file his affidavit of documents, whereupon Thommadra applied for an order that in default of the affidavit the plaintiff's suit should be dismissed, and that he should be held entitled to an *ex parte* decree on his counter-claim not only against Maganlal but against the other defendants to the counter-claim who were not in default. That order unfortunately was made, but it was obviously a wrong order, which the defendants other than Maganlal to the counter-claim were entitled to treat as a nullity, and all the proceedings under that order, the putting down the suit for an *ex parte* decree against these defendants to the counter-claim, and the passing of a decree against them *ex parte* were absolute nullities against these defendants including Devji Padamsey, who has now brought this suit to set aside the *ex parte* decree passed against him.

The defendant relies on the fact that there was no concealment of the true facts, because, when the case came on for hearing, the Chamber order was put in as Ex. F. and the Judge was entitled to presume that was a proper order passed against all the defendants to the counter-claim. But the defendant to this suit Thommadra cannot now rely upon that order under which he was enabled to obtain a decree against the defendants other than Maganlal, and it would certainly be a fraud on the Court, that he obtained a decree against the present plaintiff Devji Padamsey in such a way. It is clear then that the fraud on the Court lay in obtaining the order against the present plaintiff and his other co-defendants to the counter-claim, which Thommadra must or certainly ought to have known, could not in any way be binding on Devji and his co-defendants. It is unfortunate that Devji was absent when Counsel was instructed on the last day available to ask that the *ex parte* decree should be set aside. Counsel moved late in the day and the Judge directed that the application should be adjourned and renewed the next day on affidavit. As Devji was still absent, apparently the application could not be renewed, and Devji had to file the present suit. As a matter of fact there was no necessity for an affidavit, the defect in the proceedings was clear on the record. It would certainly be a very extraordinary thing if Devji should be liable on a decree passed against him in such circumstances, without any remedy being open to him to get the decree set aside.

We must allow the appeal and set aside the decree passed against this defendant with costs throughout.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 70 OF 1925
AND
CIVIL REVISION PETITION No. 106 OF 1925.
September 9, 1925.

Present:—Justice Sir Charles Gordon Spencer, KT., and Mr. Justice Madhavan Nair.

SIVAN PILLAI AND ANOTHER—
APPELLANTS IN C. M. No. 70 OF 1925 AND PETITIONERS IN C. R. P. No. 106 OF 1925
versus
T. S. VENKATESWARA IYER—
RESPONDENT IN BOTH.

Civil Procedure Code (Act V of 1908), ss. 47, 92—Scheme framed by Court—Order in pursuance of scheme—Appeal, whether lies—Trustee, removal of, not provided for in scheme—Procedure

An order made by a Court in the exercise of a power given to it by a provision in a scheme framed in a suit under s 92, C P C, is not an order made in execution and is not appealable under s. 47 of the Code. [p. 557, col 2]

Lokasikhamani Mudaliar v. *Thiagaroya Chettiar*, 38 Ind Cas. 415, 5 L. W. 596; (1917) M. W N. 420; *Runganatha* v *Krishnaswami*, 75 In.l. Cas 189; 18 L. W. 237; (1923) M W N 654; 47 M. 139; (1924) A. I. R. (M.) 369, *Sevak Jeranchod Bhogilal* v. *Dakore Temple Committee*, 87 Ind. Cas 313, 49 M. L. J. 25; 23 A. L. J. 555; (1925) A. I. R. (P. C) 155; L. R 6 A. (P C.) 117; (1925) M W. N 474; 2 O. W. N. 535; 41 C. L. J. 628; 22 L W. 246; 27 Bom. L. R. 872 (P. C.), followed.

In the absence of any provision in a scheme for the removal of a trustee, a separate suit must be brought for the purpose. [p. 557, col. 1.]

Appeal and revision petition against an order of the District Court, Tinnevelly, in I. A. No. 992 of 1923 in O. S. No. 4 of 1905.

Mr. *T. M. Krishnaswami Iyer*, for the Appellants.

Mr. *K. V. Sesha Aiyangar*, for the Respondent.

JUDGMENT.

Spencer, J.—The revised decree in this scheme suit as passed on March 16th, 1906 by the learned District Judge of Tinnevelly (now Mr. Justice Phillips) provided that the trustee should hold office for a term of 7 years renewable at the Will of the villagers and the Court. New trustees were to hold office upon nomination by the villagers of Tiruvannathapuram and Timmarajapuram, subject to the approval of the District Court. More than twice 7 years had passed, when the matter came up again before the District Judge of Tinnevelly in November 1924. At that time, there was a *mahazar* dated 16th December 1922, signed by several villagers asking the Court to approve of the nomination of Venkatarama Iyer. There was another *mahazar* dated 15th December 1923, asking the Court to appoint Venkateswara Iyer, the trustee hitherto in office. While that was pending, the present petitioner and appellant Sivan Pillai, who claimed to have an interest in the trust, filed a petition supporting the candidature of Venkatarama Iyer. The District Judge dismissed the petition and from his order this is an appeal or a revision. So far as the records show, the District Judge was in error in stating that the 4th respondent was to be treated as holding office for the third term. He seems to have failed to appreciate that under the scheme, it was necessary to have a nomination by the villagers and an approval by the Court before any trustee could be appointed or his term renewed. The District Judge might have called upon the villagers to make a nomination of the person considered by the villagers to be the most fit to be appointed as a trustee upon the expiry of the term of Venkateswara Iyer, and if the nomination so made by them had his approval, he might have appointed the nominee. It does not appear whether there was any such nomination and confirmation. But the District Judge made an order disposing of the petitions of Venkatarama Iyer and of Sivan Pillai. The petition of the former was that the present trustee should be removed. That request could not be granted by the District Judge upon a petition of this nature. For the removal of a trustee, it would be necessary to bring a separate suit, in the absence of any provision in the scheme for his removal. Upon Sivan Pillai's *i. e*, the petitioner's petition it is not clear what order the District Judge could have made other than to dismiss it, as it was not competent. The scheme does not provide for independent petitions being put in to support the candidature of various claimants for the office of trustee As the District Judge has not acted without jurisdiction or committed any material irregularity in his order dismissing the petition, we cannot interfere in revision.

As regards the appeal, there is a preliminary objection that no appeal will lie. In the light of the recent Privy Council decision in *Sevak Jeranchod Bhogilal* v. *Dakore Temple Committee* (1) and the decisions of this Court in *Lokasikhamani Mudaliar* v. *Thiagaroya Chettiar* (2) and *Runganatha* v. *Krishnaswami* (3) I am of opinion that an appeal will not lie against the order made by a Court, as in this case exercising a power given to it by a provision in the scheme and that such an order is not an order made in execution. In *Prayaga Doss Jee Varu* v. *Tirumala Purisa Srirangacharyulu* (4) there is an observation that the order to be made by a District Court, in that case appointing a treasurer in a scheme of management of a *devasthanam*, should be considered as an order made in execution. But in view of the decision of the Privy Council to which I have referred, I do not think we are bound by that observation which was made with reference to the circumstances of the particular scheme concerned in that case. The appeal and the revision petition are dismissed. As the District Judge's order was somewhat ambiguous, there will be no order as to costs.

Madhavan Nair, J.—I entirely agree with the order proposed by my learned brother. I will just say a few words only about the preliminary objection. In view of the decision of the Privy Council in *Sevak Jeranchod Bhogilal* v. *Dakore Temple Committee* (1), I think it must be held that the order is not subject to appeal under s. 47, C. P. C. In that case it was held by the Privy Council that an order passed by the District Judge affirming or

(1) 87 Ind. Cas. 313, 49 M. L J 25, 23 A L J 555; (1925) A I R. (P C.) 155, L R. 6 A (P. C) 117; (1925) M W N 474, 2 O W N 535, 41 C. L J. 628, 22 L. W. 216, 27 Bom L R 872 (P. C.).

(2) 38 Ind. Cas. 415, 5 L. W. 596; (1917) M W N 420.

(3) 75 Ind. Cas. 189, 18 L W 237; (1923) M W. N. 664, 47 M 139; (1924) A. I R. (M) 369.

(4) 31 M. 406; 4 M. L. T. 92.

disaffirming the rules made by a Committee of management in pursuance of directions in a scheme settled by it, cannot be made the subject-matter of an appeal under s. 47, C. P. C. The order that is now complained against comes within the scope of that ruling. In this order, the learned District Judge refused to accept the nomination by the villagers of one Venkatarama Iyer in pursuance of a "scheme" settled under s. 92, C. P. C., and treated the present trustee as continuing in the office. Mr. T. M. Krishnaswami Iyer who appears for the appellant has sought to distinguish the Privy Council case, on the ground, that what their Lordships stated in that case amounted to this only, namely, that applications with regard to the scheme decree settled in that case should have been made to the Privy Council, as the scheme decree was one finally passed by the Privy Council. I cannot accept this argument. There is no justification for such a contention in the judgment itself. The argument involves the assumption that the Privy Council decree is still not a final and complete decree, that the Privy Council should be considered to have given directions to the District Court to frame rules and to submit the District Court's recommendations and that it is for the Privy Council to pass orders after receiving such recommendations from the District Court. Such an argument was put forward in *Prayaga Doss Jee Varu* v. *Thirumala Purisa Srirangacharyulu* (4) and it is thus met by the learned Judges who overruled the argument: "It is true that their Lordships have statutory authority to make references under s. 17 of the Privy Council Act, 3 and 4 Will. IV, Cap. 41, in which case the referee would have to report to their Lordships, and the case would be adjourned pending the receipt of the report as in *Hutchinson* v. *Gillespie* (5) but in the present case it is, we think, clear from the judgment and the order that their Lordships did not intend to make any such reference but disposed of the appeal finally, leaving the directions contained in their judgment to be executed in the usual manner". I think similar observations may be made in this case also with reference to the suggestion made by Mr. T. M. Krishnaswami Iyer.

This Court has already held in a decision in *Lokasikhamani Mudaliar* v. *Thiagaroya Chettiar* (2) which was followed in *Kunganatha* v. *Krishnaswami* (3) that directions given effect to under the provisions of the scheme cannot be made the subject-matter of an appeal under s. 47, C. P. C. See also the unreported decision in *Vythilinga Mudaliar* v. *Mahadeva Iyer* in Civil Revision Petition No. 645 of 1924. Two decisions, *viz.*, *Ponnambala Tambiran* v. *Sivaganana Desika Gnana Sambandha Pandara Sannadhi* (6) and *Prayaga Doss Jee Varu* v. *Tirumala Purisa Srirangacharyulu* (4), have been relied upon by the learned Vakil for the appellant in support of his argument. It may be pointed out that the proceedings referred to in the decision in *Ponnambala Tambiran* v. *Sivagnana Desika Gnana Sambanda Pandarasannadhi* (6) did not relate to any scheme which was settled by the Court under s. 92, C. P. C and, therefore, that decision is not obviously applicable. As regards *Prayaga Doss Jee Varu* v. *Tirumala Purisa Srirangacharyulu* (4) I agree with my learned brother in thinking that after the Privy Council decision in *Sevak Jeranchod Bhogilal* v. *Dakore Temple Committee* (1) it cannot be relied upon as an authority to show that the order in this case is appealable under s. 47, C. P. C.

V. N. V. *Appeal and Petition dismissed.*

Z. K.

(5) (1838) 2 Moo. P. C. 243; 12 E. R. 997.

(6) 17 M. 343; 21 I. A. 71; 6 Sar. P. C. J. 434; 6 Ind. Dec. (N. S.) 238 (P. C.).

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 100 OF 1925.

November 25, 1925.

Present:—Mr. Justice Mukerji.

PANCHAM LAL AND OTHERS—DEFENDANTS—APPLICANTS

versus

MUHAMMAD YAQUB KHAN AND OTHERS—PLAINTIFFS—OPPOSITE PARTIES

Civil Procedure Code (Act V of 1908), s. 115, O. XXIII, r. 1—Suit dismissed on question of technicality—Appeal—Withdrawal of suit—Revision

Where a suit is dismissed on a question of technicality and on appeal the Appellate Court allows the suit to be withdrawn with liberty to bring a fresh suit, the High Court will not interfere with the order in revision.

An error of judgment is not a ground for interference in revision.

Civil revision from an order of the Additional Subordinate Judge, Farrukhabad, dated the 23rd March 1925.

Mr. *N. P. Asthana*, for the Applicants.

Mr. *M. N. Raina*, for the Opposite Parties.

JUDGMENT.—I do not think I should interfere in this case in revision. Certain minors brought a suit for recovery of a certain property on the strength of a deed of gift alleged to have been executed by their mother, who is said to be still alive, in their favour. The deed of gift was a registered document. But the learned Munsif returned it because a marginal witness had not been called to prove it. The executant of the deed was a Muhammaden and the registration was enough to give it validity. The document had been proved otherwise than by the examination of a marginal witness. A further question was whether the father who executed the document on behalf of his wife had an authority. There was a mutation of names in favour of the minors. It was really a question of technicality on which the suit of the plaintiffs failed because the power of attorney had not been filed. In the circumstances, I am not in a position to say that the Judge, in allowing the plaintiffs to withdraw their suit, acted without jurisdiction. He may have committed an error of judgment and even of that I am not quite sure.

The petition is dismissed with costs which will include Counsel's fees in this Court on the higher scale.

Z. K. *Petition dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 2, 4, 7, 3, 5 AND 6 OF 1924.

April 15, 1925.

Present:—Mr. Dalal, J. C.

QAMAR JAHAN BEGAM AND ANOTHER —DEFENDANTS—APPELLANTS

versus

MUNNEY MIRZA—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 95—Limitation Act (IX of 1908), Sch. I, Arts 115, 120, 132—Decree for arrears of maintenance charged on immoveable property—Decree paid off by one of several judgment-debtors—Charge—Suit to enforce charge—Limitation, commencement of—Interest, whether can be recovered—Charge, whether can be enforced against bona fide *purchaser for value—Notice to husband, whether notice to wife.*

The provisions of s. 95 of the Transfer of Property Act are not confined to usufructuary mortgages where the mortgagee obtains possession, but the words as to possession are to be read as applying to cases where it is possible from the nature of the mortgage to obtain possession. [p. 560, col. 1.]

Where in order to avoid the sale of certain property charged with the payment of a maintenance allowance, one of the judgment-debtors against whom the decree for arrears of maintenance has been obtained pays off the decree, he obtains a charge on the property in respect of the amount of the shares of the other judgment-debtors which they were liable to pay under the decree A suit to enforce such a charge is governed by Art 132 of Sch I to the Limitation Act and the period of limitation begins to run from the date of the payment by the plaintiff. So far, however, as a claim to interest on the amount paid by the plaintiff on behalf of the defendants is concerned, the claim would be governed by Art 115 of Sch I to the Limitation Act and not by Art 120 and interest would be recoverable only for three years. [p. 561, col. 1.]

Such a charge cannot, however, be enforced as against an auction-purchaser who has purchased the property in good faith for value without notice. [p 561, col. 2.]

In India the knowledge of a husband cannot be treated as tantamount to the knowledge of the wife who is a *pardanashin* lady. [*ibid.*]

First appeal against the judgment and decree passed by the Additional Sub-Judge, Lucknow, dated 17th September 1923 in Suit No. 259/102 of 1922.

Mr. *Anant Prasad Nigam*, for the Appellants.

Messrs. *M. Wasim* and *D. K. Seth*, for the Respondent.

JUDGMENT.—These six appeals are filed from decrees in two suits of contribution Nos. 258 and 259 of 1922. The suits were brought by one Munney Mirza for contribution. Two persons Babban Lal and Mohammad Asghar obtained two decrees for arrears of *guzara* charged upon immoveable property. Munney Mirza was one of the defendants and paid off the decretal amounts thereby saving the immoveable property from sale. He came to Court on the allegation that such payment gave him a charge on the property to recover proportionately their shares from the other defendants. There were several defendants and a separate decree was desired against every one of them by sale of the property in his possession.

Appeals Nos. 3, 4 and 7 relate to suit No. 258. Appeal No. 2 is filed by two of the defendants Qamar Jahan Begam and Roshan Jahan Begam. Appeal No. 4 is filed by one of the defendants Dwarka Nath, while Appeal No. 7 is filed by the plaintiff Munney Mirza against one of the defendants Abida Begam against whom his suit was dismissed by the Trial Court. Appeals Nos. 5, and 6 are corresponding appeals relating to suit No. 259.

In the appeals by the two ladies and Dwarka Nath the common grounds are (1) that the suit was barred by limitation and (2) that interest on the money due was recoverable only for three years prior to the institution of the suit and not for 6 years prior to that date as has been held by the lower Court.

There is an additional ground in the appeal by the ladies that in Appeal No. 3 there is a miscalculation which resulted in each of the ladies being made to pay Rs. 111-12-3 in excess of what was due from her.

The plea of limitation cannot, in my opinion, be sustained. Section 95 of the Transfer of Property Act lays down that where one of several mortgagors redeems the mortgaged property and obtains possession thereof he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expense properly incurred in so redeeming and obtaining possession. There is no question that Munney Mirza did redeem the mortgaged property by paying off the decretal amounts in both the decrees. The Privy Council has finally settled that the provisions of this section are not confined to usufructuary mortgages where the mortgagee obtains possession but the words as to possession are to be read as applying to cases where it is possible from the nature of the mortgage to obtain possession [*Yakub Ali Khan* v. *Kishan Lal* (1)]. It is interesting to note that the section was so interpreted first of all by a Single Judge of this Court in 1901 [*Ghulam Maula Khan* v. *Banno Khanam* (2).] Subsequently in 1903 this view was adopted by a Bench of the Allahabad High Court in *Bhagwan Das* v. *Har Dei* (3). The judgment of their Lordships of the Privy Council was delivered in 1905. In *Ibn Hasan* v. *Brijbhukan Saran* (4) Mr. Justice Banerji pointed out that even apart from the provisions of s. 95 such a payment by one of the judgment-debtors raises a charge on the property. [*Ibn Hasan* v. *Brijbhukan Saran* (4).] There can thus be no doubt as to the creation of a charge.

The next question is whether the charge is created from the date of payment or whether the judgment-debtor who makes the paymant is subrogated to the rights of the decree-holder and his period of limitation runs from the date of the decree-holder's mortgage. A Bench of the Calcutta High Court has held in favour of the view of subrogation which appears to be supported by observations in Ghose's Law of Mortgage [*Raj Kamini Debi* v. *Mukanda Lal Bandapadhya* (5).] The learned commentator deals with the subject at page 397 of the Law of Mortgage Vol. I, 5th Edition. He details the remedies open to the person acquiring the charge and says :—"He may sue simply for reimbursement, if the defendant is personally liable, within the period prescribed for such suits by the Statute of Limitation" (that is, 3 years under Art. 99 of the Limitation Act). "He may also sue to enforce the right of the mortgagee to follow the mortgaged property but in such case he would occupy the same position as the mortgagee, supposing he had not been redeemed, and was the plaintiff in the suit. The period of limitation will not be either longer or shorter."

If this view is adopted the appeal will succeed because the charge in favour of the original decree-holders Babban Lal and Mohammad Asghar arose in 1910.

I am, however, of opinion that the view expressed by the learned commentator is not supported by the authority of Indian cases except the cases in the Calcutta Weekly Notes already referred to. A Bench of this Court held in *Makhdum Khan* v. *Judi* (6) that the period of limitation runs from the date when the redeeming co-mortgagor sets up his adverse title. Here the case was not similar to the one before us because the suit was one for redemption and not for sale. The argument however would apply, first as a redeeming co-mortgagor must redeem within 12 years of the payment by one of the mortgagors, the mortgagor who paid can enforce his charge within that time. In the case of *Bhagwan Das* v. *Har Dei* (3) of the Allahabad High Court already referred to it was held that the suit was governed as to limitation by Art. 132 of the Limitation Act. The same was the view of Mr. Justice Banerji in the case of *Ibn Hasan* v. *Brijbhukan Saran* (4). In the nature of things there will be no merit in acquiring a charge if the limitation is to run from the date of the mortgage which is

(1) 28 A. 743; A. W. N. (1906) 216.
(2) 4 O. C 273
(3) 26 A. 227; A. W. N. (1904) 3.
(4) 26 A. 407 at p. 443; A. W. N. (1904) 740; 1 A. L. J. 148.
(5) 57 Ind. Cas. 868; 25 C. W. N. 283.
(6) 9 O. C. 91.

paid off because in most cases the suit on the prior mortgage will be filed about the time when the period of limitation is to end. In such cases the judgment-debtor who saves the property by paying off the entire decretal amount will have no security and will be relegated to a right of a personal decree only. I hold that the period of limitation started to run from the date of the payment of the two decrees by Munney Mirza in 1913 and that, therefore, the present suits instituted in 1922 are within time.

As to question of interest the argument on behalf of the respondent was that there was no Article which provided for it and that, therefore, Art. 120 will apply. The argument on behalf of the appellants was that Art. 115 applied and that interest by way of damages could be recovered only for three years and no more. Article 115 provides limitation for compensation for the breach of any contract expressed or implied not in writing, registered and not herein specially provided for. I am of opinion that the language of this Article will meet the present case. Here compensation is claimed for breach of an implied contract that the co-mortgagor would be recouped for the money paid by him on behalf of the other mortgagors. It is, therefore, not necessary to seek the aid of Art. 120. I hold that interest was recoverable for three years only.

The contention as to miscalculation by the lower Court is correct. In one case the value of the property held by the two ladies is assessed at Rs. 97,000 for the purposes of contribution and in another suit at half that amount. The plaintiff ought to have noticed this conflict in the original decrees obtained by Babban Lal and Mohammad Asghar and arrived at a common basis for valuing the property. It will be bringing a Court of law into ridicule to value the same property for the same year at one figure in one suit and at double that figure in another suit instituted at the same time. The appellant ladies are entitled to reduction as claimed.

I next come to the appeals filed by Munney Mirza against *Musammat* Abida Begam, Appeals Nos. 7 and 6. The lower Court held that *Musammat* Abida Begam was *bona fide* purchaser for value without notice of the charge of Munney Mirza. It, therefore, dismissed Munney Mirza's suit against her. It was argued as a general principle that the charge can be enforced even against *bona fide* purchasers without notice. Such is not the view adopted by this Court. There is a ruling of a Single Judge of this Court to the contrary effect. The learned Judicial Commissioner, now Mr. Justice Lindsay held in *Parbhu Dayal* v. *Babban Lal* (*i*) that such a charge could not be enforced as against the auction-purchaser who is a *bona fide* purchaser for value without notice. Rulings were quoted in conflict with this opinion: they are of the Allahabad High Court. One of them *Maina* v. *Bachchi* (8) was referred to by the learned Judicial Commissioner in *Parbhu Dayal* v. *Babban Lal* (7) and dissented from. There is a subsequent ruling of a Bench of the Allahabad High Court *Mahadeo Prasad* v. *Anandi Lal* (9). In that judgment some cases of the Calcutta High Court in agreement with the ruling of this Court are quoted. There is thus conflict of authority between the Allahabad and Calcutta High Courts and I see no reason to refer the matter to a Bench of two Judges when a judgment exists for the guidance of this Court delivered by a Judge of acknowledged merit. The next question is whether the lady respondent *Musammat* Abida Begam had notice of the charge of Munney Mirza. There is some evidence to show that her husband was aware of the charge under which Babban Lal and Mohammad Asghar sued for the recovery of arrears of *guzara* money. First of all, the knowledge of the husband cannot, specially in India, be treated as tantamount to knowledge of the wife, a *pardanashin* lady ; secondly, knowledge of the charge under the Will of Darogha Wajid Ali falls short of the knowledge which must be imputed to the lady before it can be decided that she had notice of the plaintiff's charge. There is nothing to indicate her knowledge of Munney Mirza having paid the decrees of Babban Lal and Mohammad Asghar. I hold that she was a *bona fide* purchaser for value without notice.

In the result I dismiss Appeals Nos. 6 and 7 with costs. Appeal No. 3 is decreed to the extent of Rs. 223-8-6 with interest calculated by the lower Court on this amount for six years. It is further decreed

(7) 23 Ind. Cas. 867, 1 O. L. J. 43
(8) 28 A 655; 3 A. L. J. 551; A. W. N. (1906) 165.
(9) 92 Ind. Cas. 348; 22 A. L. J. 887; L. R. 5 A. 749 Civ.; (1925) A. I. R. (A.) 60; 47 A. 90.

for half of the balance of interest because I have held that interest is permitted for three years only and not for six years. The rest of the appeal is dismissed. Parties shall receive and pay costs according to their success and failure. As to Appeals Nos. 2, 4 and 5 they are decreed with respect to half the interest made payable by the lower Court by Kamar Jahan Begam and Roshan Jahan Begam and Dwarka Nath (in Suit No. 258 with respect to the two ladies and in Suits Nos. 258 and 259 with respect to Dwarka Nath). The rest of these appeals are dismissed. Parties shall receive and pay costs according to their success and failure.

Z. K. *Order accordingly.*

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 290 OF 1925.

September 29, 1925.

Present:—Mr. Rupchand Bilaram, A. J. C.

TAHILRAM TARACHAND—PLAINTIFF

versus

VASSUMAL DEUMAL AND ANOTHER—DEFENDANTS.

Civil Procedure Code (Act V of 1908), s 36, O. XII, r. 6—Admission, judgment on—Procedure—Decree, whether must be drawn up.

In order to enable a plaintiff to apply for judgment under the provisions of O XII, r. 6, C. P. C, it is not necessary that he should relinquish that part of the claim or relief which is not admitted by the defendant He is entitled to judgment to the extent of the admission made by the defendant [p 563, col. 1.]

Premsukdas Assaram v *Udairam Gungabux*, 44 Ind. Cas. 233, 45 C 138; 22 C W. N 204; 28 C L J 498, and *Ellis* v. *Allen*, (1914) 1 Ch 904 at p. 908, 83 L. J. Ch. 590; 110 L T 479, referred to.

United Telephone Co v. *Donohoe*, (1886) 31 Ch. D. 399; 55 L. J. Ch. 480; 54 L. T. 34, 34 W. R 326, distinguished.

On a judgment being passed under O. XII, r 6, C. P. C., it is not necessary to have a decree drawn up. The plaintiff can in such a case enforce payment in execution proceedings under s. 36, C. P. C. [*ibid.*]

Application under O. XII, r. 6, C. P. C.

Mr. *Isardas Udharam*, for the Plaintiff.

Mr. *Tarachand Khimandas*, for the Defendants.

JUDGMENT.—The plaintiff has applied under O. XII, r. 6, C. P. C., for judgment against defendant No. 1 for Rs. 1,131-12 on the admission made by him in his pleading.

The plaintiff's suit is one for recovery of Rs. 1,990-15-0 and interest due thereon being the sum said to have been found due on a settlement of accounts of a dissolved partnership and shown in the *potamel* which was copied out in the partnership cash book and said to have been signed by the parties. According to the plaintiff's case the cash book is in the possession of the defendants and that both the defendants who were partners in the business are liable to him for payment of the amount found due. The defence of defendant No. 2 is that there was a settlement of partnership accounts by which it was agreed that whatever sum be found due to the plaintiff was to be paid to him by defendant No. 1. The defence of defendant No. 1 on the other hand is that a *potamel* was drawn and copied out in the cash book but it was neither agreed to nor signed by the parties, that he is not aware if that *potamel* showed this amount to be due that the cash book is not with him and that if the accounts are to be taken the sum due to the plaintiff would be Rs. 1,131-12-0 which he is ready and willing to pay. From this defence it appears that he has undertaken the liability to the plaintiff for the amount which may be found due or at any rate to pay the amount which he admits to be due. The admission of liability to the extent of Rs. 1,131-12-0 is as clear as it could possibly be. It is, however contended by the learned Pleader for defendant No. 1 that the plaintiff cannot claim judgment for the amount admitted to be due unless he gives up the balance of his claim and reliance has been placed on the decision in *United Telephone Co.* v. *Donohoe* (1). In this case which related to an infringement of a patent the defendant admitted ten instances of the infringment complained of but denied that he had committed others. Thereupon the plaintiffs moved for judgment upon the admissions in the pleadings and the Court of first instance granted the injunction sought against the infringement by the defendant of the plaintiff patent but refused an inquiry as to damages. The Court of Appeal held that the plaintiffs were entitled to damages but limited it to the ten instances of infringement admitted on the ground that the judgment having been obtained upon a motion for judgment upon the pleadings, the plaintiffs were bound to take the negative as well as the affirmative allegations therein. As pointed out by Sanderson, C. J., in *Premsukdas Assaram*

(1) (1886) 31 Ch. D. 399; 55 L. J. Ch. 480; 54 L. T. 34; 34 W. R. 326.

v. *Udairam Gungabux* (2) the question whether the Judge who in the first instance heard the application would have had jurisdiction to give judgment on the admission and to allow the plaintiffs to proceed to prove the rest of their claim as to the other alleged infringement if such an application had been made was not before the Court and that, therefore, the case of the *United Telephone Co.* v. *Donhoe* (1) is no authority for the proposition that the plaintiff can move for judgment only on his relinquishing the rest of his claim or relief.

The very object of this rule is to enable a party to obtain speedy judgment at least to the extent of the relief which according to the admissions of the defendant the plaintiff is indubitably entitled and the rule has been made wide enough to afford relief not only in cases of admissions made in the pleadings but also of admissions made *de hors* the pleadings. The expression "or otherwise" used in this rule does not mean "or otherwise under O XII", *vide* the observations of Sargeant, J., in *Ellis* v. *Allen* (3) on the interpretation of the corresponding English Rule, O. XXXII, r. 6, Rules of the Supreme Court. To limit the rule to cases where the plaintiff accepts the admission of the defendant as a whole either in respect of the claim as a whole or any distinct and separate part of the claim where such admission is made in respect of such distinct part would be to deprive the rule of its utility and to enable a dishonest defendant to dictate terms to the plaintiff.

On the merits, I have no hesitation in holding that this is a fit case in which I should in the exercise of the discretion vested in me by this rule pass judgment for Rs. 1,131-12-0 against the defendant No. 1 on the admission made by him and reserve liberty to the plaintiff to proceed with the rest of his claim against both or either of the defendants and I order accordingly. I allow the plaintiff costs of one hearing. It is not necessary to have a decree drawn up on this judgment as I consider that it is open to the plaintiff to enforce payment of the amount hereby awarded as an order in execution proceedings by virtue of s. 36, C. P. C.

P. B. A. *Order accordingly.*

(2) 44 Ind. Cas. 233, 45 C. 138, 22 C. W. N. 204, 28 C. L. J. 498.

(3) (1914) 1 Ch. 904 at p. 908, 83 L. J. Ch. 590; 110 L. T. 479.

CALCUTTA HIGH COURT.

APPLICATION IN ORIGINAL CIVIL SUIT No 559 OF 1917.

November 25, 1924.

Present:—Sir Sanderson, KT., Chief Justice, and Mr. Justice Buckland

GOBIND LAL DUTT—APPLICANT

versus

OFFICIAL ASSIGNEE OF CALCUTTA —RESPONDENT.

Limitation Act (IX of 1908), ss 5, 12—Calcutta High Court Rules, Ch XVI, r 27—Appeal filed beyond time—Extension of time—Delay in getting decree drawn up—Application for office copy of decree, effect of

Before an appeal can be filed, the decree or order must be drawn up and the would-be applicant must obtain a copy of the decree or order, which it is his duty to file with the memorandum of appeal [p. 565, col 2]

By reason of r 27, Chap XVI of the Calcutta High Court Rules, if the party in whose favour a decree has been made does not apply to have the decree drawn up within four days from the date of the decree any party to the suit may apply to have the decree drawn up [p 564, col 2]

It is not sufficient for a person desiring to appeal to put in a requisition for an office copy without taking any steps to have the decree drawn up This does not afford ground for extension of time under s 5, Limitation Act, in the case of an appeal filed beyond time on account of delay in obtaining copy of the decree [p 565, col 1]

Time which need not have elapsed, if the appellant had taken reasonable and proper steps to obtain a copy of the decree or order, could not be regarded as 'requisite' time within sub-s. (2) of s. 12 of the Limitation Act [p 565, col 2]

Kamruddin Hyder v. *M N. Mitter*, 89 Ind. Cas. 277; 52 C 342, (1925) A. I R. (C) 735, followed.

Application against an order of the Registrar, High Court, refusing to admit memorandum of appeal in Original Civil Suit No. 559 of 1917, decided by Mr. Justice Pearson, on the 6th June 1924.

Messrs. *B. K. Ghose* and *A. N. Bose*, for the Appellant.

Mr. *M. N. Kanjilal*, for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is an application on behalf of Gobind Lal Dutt, who was the defendant in the suit, that the memorandum of appeal against the judgment and decree in the suit, dated the 6th of June 1924, which was presented on behalf of Govind Lal Dutt on the 15th of November 1924 and which was not accepted by the Registrar, should be admitted.

The material dates are as follows: The decree was made on the 6th of June 1924, as I have already mentioned, in favour of the Official Assignee against the present applicant.

On the 11th of June a requisition for an office copy of the decree was made by the attorney of the applicant Gobind Lal Dutt.

Nothing further was done until the 7th of August 1924 when a requisition for drawing the decree was made on behalf of the plaintiff.

This decree was drawn up, finally settled, and signed on the 16th of November 1924. The stamps necessary for the office copy were furnished on the 12th of November and the memorandum of appeal was presented on the 18th of November : on the 19th it was rejected by the Officiating Deputy Registrar on the following ground:— "As the requisition for drawing up the decree was not given within twenty days from the date of the decree, this memorandum cannot be accepted."

The learned Counsel who appeared for the applicant stated that he was bound to admit that the memorandum was not presented within the time specified by the Limitation Act and that it was necessary for the applicant to obtain extension of time.

The ground upon which he based his application for extension of time was that "before the 11th of June 1924 one Surendra Narain Bhaduri, who is a clerk in the service of the applicant's attorney, was informed by one Benoy Krishna Mukerji— the Court clerk of Messrs. Fox and Mandal, who were the attorneys for the plaintiff— that the requisition had been duly given for drawing up the said decree by the plaintiff's attorneys and that relying on the said information and as the said requisition for the office copy was accepted by the office, he (Surendra Narain Bhaduri) assumed that the requisition for the drawing up of the said decree had been duly given by the said plaintiff's attorneys and that he did not make any further enquiry as to whether such requisition had been actually given."

An affidavit has been filed on behalf of the plaintiff, sworn by Benoy Krishna Mukerji, the clerk in the employ of Messrs. Fox and Mandal, who is referred to in he petition verified by Surendra Narain Bhaduri : and, in para. 5, it is stated as follows :—

"With reference to the allegations made in para. 5 of the affidavit I emphatically deny that before the 11th June 1924 or on any other day I informed the said Surendra Narain Bhaduri or any other person of the office of Mr. J. K. Dutt that requisition had been duly given for drawing up of the said decree by us. I say that the statement is an absolutely unfounded one and has been made to cover up laches. I further say that the said Surendra Narain Bhaduri did not even know my name and on or about the 18th of November, 1924, he asked me what my name was. This I now think was then done with a view to put in my name in the affidavit as his alleged informant."

There is, therefore, a direct conflict of testimony as to whether the information, upon which the applicant relies, was given by Benoy Krishna Mukerji to Surendra Narain Bhaduri.

In my judgment it is impossible for us upon the materials which are now before this Court to hold that that information was in fact given. The result is that this application must be decided upon the basis that the allegation as to the information referred to in Surendra Narain Bhaduri's petition is excluded from consideration.

The question then arises whether there are any other circumstances connected with this application which would justify this Court in holding that the applicant has satisfied the Court that he had sufficient cause for not preferring the appeal within the prescribed period as provided by s. 5 of the Limitation Act.

Now, it is well-known that by reason of r. 27, Chap. XVI of the High Court Rules, if the party in whose favour a decree has been made does not apply to have the decree drawn up within four days from the date of the decree, any party to the suit may apply to have the decree drawn up within one month thereafter.

In my judgment, the applicant or his attorney ought to have taken proper steps to ascertain whether an application had been made by the plaintiff to have the decree drawn up.

In this connection I desire to draw attention to the decision of this Court in *Kamruddin Hyder* v. *M. N. Mitter* (1) which was given on the 13th August 1924.

In that case reference was made to the judgment of the Judicial Committee of the Privy Council in *Pramatha Nath*

(1) 89 Ind. Cas. 277; 52 C. 342; (1925) A. I. R (C.) 735.

Roy v. *Lee* (2), in which the following passage occurs:—"In their Lordships' opinion, no period can be regarded as requisite under the Act, which need not have elapsed if the appellant had taken reasonable and proper steps to obtain a copy of the decree or order."

In this case, as I have already said, it is admitted that neither the applicant nor his attorneys made any application to the Registrar's office to ascertain whether the plaintiff had in fact sent in a requisition to have the decree drawn up.

The applicant's attorney made a requisition to the Court's office on the 11th June (five days after the decree was made) for the purpose of obtaining an office copy of the decree. Neither the attorney nor his clerk made any enquiry at the Court's office as to whether a requisition for drawing the decree had been made by the plaintiff. If such an enquiry had been made, it would have been ascertained that no requisition for drawing the decree had been made by the plaintiff. such information having been obtained, if the applicant intended to appeal, it would have been his duty to make a requisition for the decree to be drawn up. In my judgment, time elapsed, which need not have elapsed if the applicant had taken reasonable and proper steps to get the order drawn up and to obtain an office copy

If we were to hold that it was sufficient for the present applicant, desiring to appeal, to put in a requisition for an office copy without taking any steps whatever to have the decree drawn up in the event of the plaintiff not so doing, it seems to me that the provisions of the Limitation Act might be avoided.

I am, therefore, not satisfied that the applicant had sufficient cause for not preferring the appeal within the prescribed time.

For these reasons the application must be dismissed with costs.

Buckland, J.—I agree, and as this matter is being decided with reference to a point upon which, so far as I am at present aware, there has hitherto been no decision I desire to add a few words as to the principle involved.

(2) 63 Ind Cas 960, 31 M L. T 193, (1922) A I R (P. C) 352, 4 U. P. L. R (P C) 103, 43 M L J. 765, 21 A. L J 118, 37 C L J 86, 18 L W 53, (1923) M. W. N 526, 49 I A 307, 49 C 999, 27 C. W. N. 156 (P. C.).

Before an appeal can be filed, the decree or order must be drawn up and the would-be applicant must obtain a copy of the decree or order, which it is his duty to file with the memorandum of appeal. As stated, it is open to the party in whose favour the decree or order has been made, to furnish a requisition in writing for the order or decree to be drawn up. If he does not do so within four days from the date of the decree or order the other party may do so within one month thereafter. Consequently under the rules of this Court, it is open to a would-be appellant to have the decree or order drawn up.

It has been decided in the case of *Pramatha Nath Roy* v. *Lee* (2) by the Judicial Committee of the Privy Council affirming the judgment of the learned Chief Justice and Mr Justice Chitty that "time which need not have elapsed if the appellant had taken reasonable and proper steps to obtain a copy of the decree or order could not be regarded as 'requisite' time within sub-s. (2) of s. 12 of the Indian Limitation Act (IX of 1908)." Consequently it is now not open to question that a party who desires to prefer an appeal against a decree or order must apply for a copy of such decree or order within twenty days—the period of limitation for preferring an appeal. The point is whether or not, even though he may have applied for such copy within time, he may be excused if he has not within the prescribed period filed a requisition for the decree or order to be drawn up. In my opinion, the principle applies equally to the filing of the requisition to draw up the decree or order.

The case to which I have referred relates to the copy of the order but it was held there by the learned Chief Justice that if the defendant desired to appeal from the order he should have applied to have the order drawn up and for a copy of the order in accordance with the rules of this Court.

The principle, it appears to me, is incontestably equally applicable to the preparation of the decree or order. There cannot be one principle applicable to the decree or order and another applicable to the copy for which the would-be appellant has to apply It would be illogical and inconsistent to insist on his applying within twenty days for a copy of a document which it is within his power to have prepared and then to

excuse him on the ground that he is not equally bound within that time to take steps for the preparation of the original.

N. H. *Application dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1163 OF 1922.

April 6, 1925.

Present:—Mr. Justice Phillips.

K. V. SUBRAMANIA IYER AND OTHERS—PLAINTIFF'S LEGAL REPRESANTATIVES—APPELLANTS

versus

SHUNMUGAM CHETTIAR AND OTHERS—DEFENDANTS NOS 2 TO 7 AND LEGAL REPRESENTATIVE OF THE 1ST DEFENDANT—RESPONDENTS.

Limitation Act (IX of 1908 as amended by Act XXVI of 1920), Sch I, Art 177—Limitation, period of—"Ditto," meaning of—Evidence Act (I of 1872), s 78—Proof of Act -Publication in Gazette of India *—Publication by Superintendent of Government Printing—Preference.*

The period of limitation under Art 177 of Limitation Act IX of 1908 remained at six months even after the amending Act XXVI of 1920. [p 567, col 2]

The word "Ditto" opposite to Art 177 in the Limitation Act of 1908 was equivalent to the words "six months" and when the word "Ditto" was allowed to stand without alteration after the amendment of 1920, the meaning of the word could not be held to have been changed. [p 567, col. 1]

Gobind Das v. *Rup Kishore*, 77 Ind. Cas 409, 4 L. 367; 6 L. L. J. 25, (1924) A. I R. (L.) 65, followed.

Alice Georgina Skinner v. *Mukarram Ali Khan*, 92 Ind. Cas. 330, (1925) A. I. R (A) 77, L R. 5 A 607 Civ. and *Husenuddin Nurddin* v. *Dulakshidas Kesavlal*, 77 Ind. Cas. 474, (1923) A I. R. (B) 299, not followed.

Under s. 78 of the Evidence Act the publication in the *Gazette of India* is the proper method of proving an Act and if there is a conflict between such a publication and a publication by the Superintendent, Government Printing, Calcutta, preference must be given to that in the *Gazette of India*. [p. 566, col 2, p. 567, col 1]

Second appeal against a decree of the District Court, West Tanjore, in A. S. No. 238 of 1920, preferred against that of the Court of the Temporary Subordinate Judge, Tanjore, in O. S. No. 52 of 1919.

Messrs. *T. M. Krishnaswami Iyer* and *A. V. Viswanatha Sastry*, for the Appellant.

Messrs. *V. C. Seshachariar*, *K. Bashyam Iyengar*, *M. S. Venkatarama Iyer* and *P. S. Narayanaswami Iyer*, for the Respondents.

JUDGMENT.—In this case the 1st respondent in A. S. No. 238 of 1920 on the file of the District Court of Tanjore died during the pendency of the proceedings. An application was put in within three months for bringing on record his legal representative, but that application appears to have been dismissed on the ground that *batta* was not paid, and it now appears that the non-payment was entirely due to the negligence of the appellant's Vakil's clerk. A subsequent application was put in three and a half months after the 1st respondent died, asking for the restoration of the first petition and also for bringing on record a certain lady as the 1st respondent's legal representative. That petition was dismissed on the assumption that in so far as it prayed for the addition of the legal representative it was out of time and also on the ground that there was no sufficient reason for restoring the original petition.

The main question that is now raised in second appeal is whether the Judge was right in considering that the second application was out of time, namely, whether the period prescribed for such an application is six months, or only 90 days. The application is one under Art. 177 of the Schedule to the Limitation Act, and in the Limitation Act of 1908, the period prescribed is six months. In 1920 an amending Act was passed, and the question is whether that amending Act reduced the period of six months to 90 days, or left it at six months. The Allahabad and Lahore High Courts are both of opinion, that the period remains at six months notwithstanding this amending Act, whereas the Calcutta and Bombay High Courts are of the contrary opinion. In the case reported in *Gobind Das* v *Rup Kishore* (1) the matter has been very carefully discussed and it was found that if the words of the amending Act, XXVI of 1920, were applied to the Act of 1908 as originally published in the *Gazette of India*, the period of limitation under Art. 177 would remain at six months. It appears that the other copies of the Act printed by the Superintendent of Government Printing, Calcutta, are paged differently, and in them against Art. 177 the word "Ditto" appears. The result of the amendment of Art. 176 which reduces the period of limitation to 90 days would have the effect of making Art. 177 read as having reduced the period similarly, namely, to 90 days. The amending Act, therefore, has a different effect if applied to the Original *Gazette of India* publication or if applied to subsequent publications of Act IX of 1908. Under s. 78 of the Evidence Act, there can be no doubt that the publication in the

(1) 77 Ind. Cas. 409; 4 L. 367; 6 L. L. J. 25; (1924) A. I. R. (L.) 65.

Gazette of India is the proper method of proving the Act and if there is a conflict between the two publications, preference will certainly be given to that in the *Gazette of India*. The later publications do not purport to be published by the authority of the Government of India, but are printed by the Superintendent, Government Printing, India

There is also another argument used by the Allahabad High Court in *Alice Georgina Skinner* v. *Mukarram Ali Khan* (2), and that is that Act XXVI of 1920 makes no specific reference to Art. 177 and consequently it can only be deemed to amend that Article by implication, namely, by altering the period under Art. 176 and retaining the word "Ditto" against Art. 177. This view has not been adopted both by Calcutta and Bombay High Courts on the ground that it was the intention of the Legislature to amend Art. 177. Nothing appears to that effect in the preamble of the amending Act and there is no reference to Art. 177 in the body of the Act. The word "Ditto" opposite to Art. 177 in the Act of 1908 was equivalent to the words "six months" and when that word "Ditto" is allowed to stand without alteration after the amendment of 1920, it is difficult to understand why its meaning should have been changed. Consequently, even if the word "Ditto" were to remain as in the subsequently published copies of the Act, its original meaning would not be changed unless the Legislature had declared its intention to alter it. On all these grounds I respectfully agree with the decisions of the Lahore and Allahabad High Courts. The Bombay case in *Husenuddin Nurddin* v. *Dulakshidas Keshavlal* (3), contains only a very brief judgment based on the fact that the amending Act is applicable to the published Acts and not to the Act as printed in the *Gazette of India* and does not meet the arguments mentioned above. The Calcutta decision is that of a Single Judge who by the reason of the view, he takes is so constrained to reject altogether the Act as published originally in the *Gazette of India* as being "not an accurate and true version of the Act which the Legislature enacted." When the Evidence Act distinctly lays down that this is the method of proving an Act of the Legislature, I regret that I cannot agree, with the view of the learned Judge that an Act so proved is not an accurate and true version. He goes further to hold that the Act can be proved by a means which is not contemplated in the Evidence Act and that such a proof is preferable to the proof laid down by the Statute. With all respect, I cannot agree in this view. I, therefore, follow the decision of the Lahore and Allahabad High Courts, that the period of limitation under Art. 177 remained at six months even after the amending Act, Act XXVI of 1920. That being so, the learned District Judge was wrong in treating the second petition of the appellant as being out of time. The prayer for the restoration of the first petition was unnecessary The main prayer was to bring on record a legal representative and the application being within time, the prayer ought to have been granted.

I must, therefore, set aside the decree of the lower Appellate Court and remand the suit to that Court for the hearing of the appeal after bringing on record the 1st respondent's legal representative. Costs will abide the result.

Court-fee on the second appeal will be refunded.

V. N. V. *Suit remanded.*
N. H.

(2) 92 Ind. Cas. 330; (1925) A. I. R. (A) 77; L. R. 5 A. 607 Civ.
(3) 77 Ind. Cas. 474; (1923) A. I. R. (B.) 299.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 105 OF 1925.
November 26, 1925.
Present:—Mr Justice Mukerji.
RAM SARAN DAS—APPLICANT
versus
GIRDHARI LAL AND OTHERS—OPPOSITE PARTIES

Civil Procedure Code (Act V of 1908), s 115, O. XXI, r 90—Limitation Act (IX of 1908), Sch I, Art. 166—Execution of decree—Sale, application to set aside—Particulars, additional, supplied after expiry of limitation—Appellate Court, refusal of, to consider particulars—Revision

Within thirty days from the date of an auction-sale, the judgment-debtor applied to set aside the sale on the ground of material irregularity in the publication and conduct of the sale which had resulted in the property being sold for a very small sum After the expiry of thirty days the judgment-debtor made another application pointing out that two heavy encumbrances had been shown in the sale proclamation whereas no such encumbrances existed on the date of the proclamation. The First Court found that this was a fact and on that ground set aside the sale On appeal, the lower Appellate Court holding that the First Court was not

authorised to look into the matters contained in the later application inasmuch as that application had been made more than thirty days after the sale, set aside the order made by the First Court

Held, (1) that the later application merely supplied additional particulars of the material irregularity alleged in the first application and that the lower Appellate Court, therefore, had jurisdiction to consider the allegations made in the later application; [p 569, col. 1.]

(2) that the refusal of the lower Appellate Court to consider the later application amounted to material irregularity in the exercise of jurisdiction and that the order of the lower Appellate Court must, therefore, be set aside in revision [*ibid*]

Civil revision from an order of the Third Additional Subordinate Judge, Aligarh, dated the 31st of January 1925.

Mr. *Hem Chandra Mukerji*, for the Applicant.

Mr. *P. L Banerji*, for the Opposite Parties.

JUDGMENT.—This is an application to revise an order of a Subordinate Judge of Aligarh who on appeal set aside an order of the Munsif setting aside a sale held in execution of a decree.

It appears that a certain property of the judgment-debtor was advertised for sale and a sale actually took place on the 17th of September 1924. The judgment-debtor, who is the petitioner before the Court, on 14th October 1924 took exception to the sale on the ground that there was material irregularity in the publishing and conducting of the sale and that the price fetched was consequently too small. On the 25th of October 1924 the petitioner made an application pointing out that two encumbrances to the total amount of Rs. 5,807, had been shown in the sale proclamation, whereas no such encumbrances actually existed at the date of the advertisement. The Munsif found that this was a fact and on that ground he set aside the sale.

On appeal the learned Subordinate Judge held that the learned Munsif was not authorised to look into the matters contained in the application of the 25th of October 1924 inasmuch as that application had been made more than thirty days after the sale. He relied on the case of *Harbans Lal* v. *Kundan Lal* (1).

There can be no doubt that the learned Subordinate Judge has misread the ruling. All that was laid down there was that when an application is made for setting aside the sale on the ground of material irregularity in publishing and conducting a sale and consequent substantial loss it is not open to the judgment-debtor to rely on some other ground for the same purpose. In the case quoted the application of the judgment-debtor to set aside the sale failed on the ground of material irregularity. But the learned Judges in the Courts below did set aside the sale on the ground that there had not been effected an attachment previous to the sale. This Court pointed out that this was a new point entirely beyond the scope of s. 311 of the old C. P. C.

In this case the application was based on the ground of material irregularity and it was only by way of additional particulars that it was pointed out that two heavy encumbrances which did not exist had been notified.

On the merits, therefore, the applicant has a very good case. If the applicant succeeds the case will have to go back to the Court of first instance because the lower Appellate Court has remarked that the auction-purchaser had no opportunity of meeting the allegation that the encumbrances notified did not in fact exist.

Mr. Peary Lal Banerji on behalf of the respondent auction-purchaser has taken up the plea that no revision lay and he relies on the Full Bench case of *Yad Ram* v. *Sunder Singh* (2). That case is clearly distinguishable from the case before me. In that case the question arose whether a certain party had a right to apply to set aside the sale. The Judge in the Court below followed a ruling of this Court and held that the applicant could not make an application for setting aside a sale. The question was whether in so acting the Court below acted with material irregularity in the exercise of its jurisdiction. It was held that it did not.

In this case, the learned Judge of the Appellate Court had to consider whether the allegation made on the 25th of October 1924 could or could not be taken into consideration in deciding the application made on 14th October 1924. The learned Judge while purporting to follow a ruling of this Court really misread that ruling and refused to consider the application of the 25th of October 1924. If the learned Subordinate Judge had considered the application of the 25th of October 1924 and had come to the conclusion rightly or wrongly that he

(1) 21 A. 140, A. W. N. (1898) 212; 9 Ind. Dec. (N. S.) 799.

(2) 74 Ind Cas 778; 21 A. L J. 313; (1923) A. I. R. (A.) 392, 45 A. 425 (F. B.).

should not consider the application because the judgment-debtor had no right to apply for an amendment of his previous application I should have held that no revision lay. But the learned Subordinate Judge did not at all consider the application of the 25th of October 1924. He had the jurisdiction to consider the matter and he refused to consider it. In doing so he acted with material irregularity. I hold that a revision does lie.

The result is that I allow the application, set aside the order of the Court below and also the order of the Court of first instance and send back the case to the Court of first instance. The application of the applicant to set aside the sale will be considered after the auction-purchaser, Girdhari Lal, has been given an opportunity to meet the allegations made in the applications dated the 14th of October 1924 and the 25th of October 1924. The learned Munsif would treat the application of the 25th of October 1924 as an application to amend the previous application of the 14th of October 1924 and will decide whether or not he would allow the earlier application to be amended by the addition of the allegations contained in the petition of the 25th of October 1924. Costs in this Court and in the lower Appellate Court will abide the result.

Z. K. *Application allowed.*

LAHORE HIGH COURT.

CIVIL REVISION No. 93 OF 1925.

May 15, 1925

Present:—Mr. Justice Coldstream.

BULLI MAL—PLAINTIFF—PETITIONER

versus

JHABBA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O I, r 10—Suit by one partner to recover debt due to firm—Partners, others, whether necessary parties—Refusal of other partners to join—Procedure

In a suit by one partner in a firm to recover a debt due to the firm, the other partners are necessary parties.

Where in such a suit the other partners refuse to join as plaintiffs, the correct procedure is to join them as defendants.

Petition for revision of an order of the Senior Sub-Judge, Ambala, dated the 10th November 1924, affirming that of the Sub-Judge, Fourth Class, Jagadhari, dated the 24th June 1924.

Mr. *Shamair Chand*, for the Petitioner.

Mr. *Anant Ram*, for the Respondents

JUDGMENT.—One Bulli Mal brought a suit against Jhabba and Niranjan Singh to recover Rs. 51-8-0, alleged to have been borrowed by the defendants jointly, with interest thereon amounting to Rs. 77-4-0 and the costs of a notice Re. 0-9-0. Jhabba admitted having borrowed Rs. 50 from the Firm of Bulli Mal-Biru Mal, but pleaded that the debt had been discharged by payment to Biru Mal. Niranjan Singh pleaded that he borrowed only Rs. 25 along with Jhabba and that he had re-paid this sum to Jhabba.

On the pleadings the Subordinate Judge framed a preliminary issue: "Is there a firm known as Biru Mal-Bulli Mal?" The issue was decided in the affirmative and the Subordinate Judge passed an order to the effect that "the plaintiffs should make the necessary amendment of their (*sic*) plaint in the name of the Firm of Bulli Mal-Biru Mal." The plaint was not amended, but Biru Mal stated in Court that he was not concerned in the transaction The Court proceeded with the trial and found that the debt had been discharged by payment to Biru Mal. It dismissed the suit on the ground that the suit was bad for misjoinder as Bulli Mal could not sue without joining his brother Biru Mal, and that the debt had been discharged by payment to Biru Mal.

The Senior Subordinate Judge dismissed the appeal holding that Bulli Mal could not sue alone, but without going into the question whether the debt had actually been discharged or not. The plaintiff has petitioned this Court for revision and it has been argued before me that the suit could not properly be dismissed merely on the ground that Biru Mal had not been joined as a plaintiff, for Biru Mal had signified that he was not prepared to sue.

I think that the procedure of the Trial Court was wrong When Biru Mal refused to be joined as a plaintiff the correct procedure would have been to join him as a defendant, for it is clear that, on the finding that he was a partner with his brother in business, he was a necessary party to the proceedings. There was no refusal on the part of the plaintiff to join him either as plaintiff or as defendant.

I accept the petition, set aside the orders of the lower Courts and return the case to the Trial Court with a direction that Biru Mal should be asked whether he is prepared to join as a plaintiff. If he wishes to be

joined as a plaintiff he should be so joined, and if he refuses, he should be joined as a defendant, and the case decided according to law. Costs will follow the event.

Z. K. *Petition accepted.*

MADRAS HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION.
ORIGINAL PETITION No. 170 OF 1919.
July 22, 1925.

Present:—Mr. Justice Srinivasa Aiyangar.

TULASIDASS GOVINDJEE—PLAINTIFF
versus
MADHAVADASS LALAJEE AND OTHERS—RESPONDENTS.
In re LILADHAR SAIT—PETITIONER.

Guardians and Wards Act (VIII of 1890), s 41—Minor, death of—Application by person claiming as heir for delivery of property, maintainability of—Dispute as to succession.

Where a minor in respect of whose property a guardian had been appointed under the Guardians and Wards Act dies and there is a dispute or even the likelihood of a dispute relating to the succession to his estate the Court has no powers under s 41 of the Guardians and Wards Act to determine the succession and thereupon make any orders for granting delivery of possession of the minor's property or for rendering of accounts by the guardian [p. 570, col 2]

A Court acting under the Guardians and Wards Act is *functus officio* when the minor dies. Any disputes or rights with regard to the property of the minor should thereafter be litigated in the ordinary Tribunals, though in simple cases where no contest can arise, the Court may have the power under s 41 of the Act to make simple orders for delivery of property. [p. 571, col. 1.]

Mr. *K. S. Jayarama Iyer*, for the Petitioner.

JUDGMENT.—I am clearly of the opinion that this application is incompetent. The minor for whose person and property, the guardian had been appointed in this matter is now admitted to be dead and the petitioner now before me claims under an assignment from the son of the deceased second respondent and I am told that the second respondent's son had a right so to assign a share in the property, because it is alleged that on the death of the minor, the son of the second respondent became one of the reversionary heirs to the estate. When the application came on for hearing before me last week, I intimated to the learned Vakil for the petitioner, Mr. Jayarama Iyer, that I had my doubts whether such an application would be maintained under the Guardians and Wards Act after the death of the minor. I have now been referred to the case of *Nataraja Pillai* v. *Subbaraya Pillai* (1). In that case, Oldfield and Sadasiva Iyer, JJ., held that the words "for any cause" in cl. 3 of s. 41 of the Guardians and Wards Act were wide enough to cover the case of the death of a minor, though such a contingency is not contemplated or provided for in the previous portion of that section. With all respect, I am constrained to state that I very much doubt the correctness of that decision but being a decision of a Bench of this Court I cannot regard it as anything but binding on me. But, for the purpose of this application, it is unnecessary for me finally to hold whether or not the view of the law as set out in that decision is correct. In that case, what the learned Judges said was that the section applied and it was within the discretion of the lower Court to make or to refuse to make an order of the kind referred to therein. Even though the section might apply to cases of the death of a minor, still, I am clear in my mind that the section is applicable only to simple cases where there can be no doubt whatever about the succession to the minor and about the items of property which belong to the minor or the accounts relating to the management of the estate. When, however, there is a dispute relating to succession or the likelihood even of a dispute as to succession, in my judgment, the Court has no powers under the Guardians and Wards Act to seek to determine the succession to a deceased minor and thereupon make any orders for granting delivery of possession of property. Further the prayers in this application are far from being identical with the reliefs asked for apparently in the application with the order on which the learned Judges were dealing in the case in the Madras Weekly Notes. The section clearly speaks merely of orders being passed for the delivery of any property in the possession of the guardian or under his control and also for the delivery of any accounts in his possession or control. The prayers in this present application are for rendering of the accounts. The phrase "rendering of the accounts" means an order against the guardian for an account as in a suit for an account and cannot possibly mean the delivery of account books alone. It is also admitted that O. S No. 2 of 1924 on the file of the Additional Subordinate Judge of Coimbatore is now pend-

(1) 51 Ind. Cas. 529; (1918) M. W. N. 440.

ing to determine the succession to the minor's estate. In the face of the admitted fact that the succession to the minor's property is under litigation, or in other words, when the question is pending before another Court of competent jurisdiction for the purpose of determining the person who would be entitled to the property it is impossible to accept the contention that the Court that appointed the guardian of the person and property of the minor would have jurisdiction to make such an order as is asked for.

I am also surprised at prayer No. 2 for the removal of the guardian from the office when, *exconcessu*, his powers as guardian have ceased under s. 41 of the Guardians and Wards Act and that is the very basis of the contention before me.

The third prayer is still more strange, that the Court should appoint a fit and proper person to be in charge of the estate. I certainly think that a Court acting under this enactment is really *functus officio* when the minor dies Any disputes or rights with regard to the property of the minor should be litigated in the ordinary Tribunals of the country. It may be that in simple cases where no contest arises or can arise, the Court having regard to the fact that it appointed a particular person as guardian and entrusted him with the management of the property may make simple orders for the purpose of the delivery of the property. But I do not think even such a provision can be extended to include the determination of doubtful or disputed rights to the property of a deceased minor.

It is not for me to suggest what course the petitioner should adopt. I should have thought that the remedy would have been obvious to any one who looked at the facts and circumstances of the case that the petitioner would have been well-advised to have gone to the Coimbatore Court and applied for the appointment of a Receiver who would have been able either to get such reliefs as might be needed or else to enforce such rights by proper proceedings. I must, therefore, dismiss the present application.

V. N. V. *Application dismissed.*

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 96 OF 1925.

November 30, 1925.

Present:—Mr. Justice Mukerji

Babu ATMA RAM—APPLICANT—APPELLANT

versus

Lala NANAK CHAND AND OTHERS—OPPOSITE PARTIES—RESPONDENTS.

Execution of decree – Mortgage-decree—Sale held without compliance with condition precedent, validity of—Auction-purchaser, position of—Sale set aside—Purchase-money, whether can be directed to be re-paid—Inherent power of Court—Civil Procedure Code (Act V of 1908), ss. 144, 151

Where an auction-sale takes place in the exercise of a jurisdiction vested in a Court, a third party purchaser cannot be bound by the result of any further litigation relating to the decree Where, however, the terms of a decree itself do not justify a sale of the property, the sale cannot hold good merely because the Court had pecuniary and territorial jurisdiction over the property, even if the auction-purchaser is a *bona fide* purchaser, in the sense that he is a third party purchaser who had no notice of the facts of the case [p 572, col 2, p 573, col 1]

Where a mortgage-decree lays down a condition precedent which must be complied with before the mortgaged property can be sold, and the property is sold without such compliance, the sale cannot be allowed to stand [p 573, col 1]

Where certain property which has been sold in execution of a decree obtained on a prior mortgage is subsequently sold in execution of a decree obtained on a puisne mortgage and the subsequent sale is set aside at the instance of the purchaser at the previous sale in a proceeding to which the judgment-debtor, the decree-holder, the previous purchaser and the subsequent purchaser are all parties, the Court has inherent power to direct the decree-holder to pay back to the auction-purchaser the amount paid by the latter as the price of the property [*ibid*]

Execution first appeal against a decree of the Subordinate Judge, Bulandshahr, dated the 24th of November 1924.

Mr. *K. C. Mital*, for the Appellant.

Messrs. *P. L. Banerji* and *Panna Lal*, for the Respondents.

JUDGMENT.—This is an appeal by an auction-purchaser in the following circumstances.

One Mahbub Ali Shah was the original owner of a certain share in the property described as $6\frac{1}{3}$ *sihams*. He mortgaged four *sihams* out of the aforesaid share to his wife Sultana Begam as a first mortgagee and then he mortgaged the entire $6\frac{1}{3}$ *sihams* to the respondent decree-holder Peary Lal. Sultana Begam obtained a decree for sale and it appears that in her suit Peary Lal was not a party. Sultana Bagam's decree was executed and the four *sihams* share mortgaged was sold and was

purchased by the respondents Nanak Chand and *Musammat* Parbati. Peary Lal then brought his own suit. The order that was passed in the decree that followed was that the property mortgaged might be sold, but, if Peary Lal wanted to sell the property purchased by Nanak Chand and *Musammat* Parbati, he must pay them a sum of Rs. 20,000 as a condition precedent to the sale. Peary Lal never paid the sum of Rs. 20,000, but brought to sale a $2\frac{1}{3}$ *sihams* share, with the allegation that this was a property which could be sold without previous payment of any money. Nanak Chand and *Musammat* Parbati objected to the sale. They said that the property which was going to be sold was really a part of the property which they had purchased in execution of a decree passed on the prior mortgage.

While this objection of Nanak Chand and *Musammat* Parbati was still undisposed of the share advertised for sale was brought to sale and was purchased by the appellant Atma Ram. The objection was decided in due course on the 9th of December 1922 and it was dismissed. The sale was confirmed on the 12th of December 1922. Nanak Chand and *Musammat* Parbati filed an appeal to this Court against the order dated the 9th of December 1922. It having transpired that the property had in the meantime been sold. Atma Ram, the auction-purchaser, was made a party in appeal. A Division Bench of this Court found on appeal that the judgment of the Subordinate Judge was very unsatisfactory, set it aside and remanded the objection to the Court below for disposal. The Court below had three parties before it, *viz*, Atma Ram the auction-purchaser, Nanak Chand and *Musammat* Parbati, the objectors and the decree-holder, Peary Lal. It came to the conclusion that the property sought to be sold was really a part of the property which had been purchased by Nanak Chand and *Musammat* Parbati and that, therefore, the property could not be sold in execution of Peary Lal's decree without the payment ordered. It accordingly set aside the sale and ordered that the objectors be put in possession. As regards the purchase money the Court remarked that Atma Ram might recover it by a regular suit.

Atma Ram in his appeal contends that he is a *bona fide* purchaser for value and the sale could not be set aside. He further contends that if the sale be set aside he should be paid back the price deposited by him in Court and that he should not be relegated for his remedy to a suit.

On the first question raised the learned Counsel for the appellant has cited several cases. They are :—

Rewa Mahton v. *Ram Kishen Singh* (1), *Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan* (2), *Peary Lal* v. *Hanif-un-nissa Bibi* (3), *Nazhat ud-Daula Abbas Husain Khan* v. *Dilband Begam* (4) and *Shivlal Bhagwan* v. *Shambhuprasad Parvatishankar* (5).

On the strength of these cases it has been argued that a *bona fide* purchaser at an auction-sale was not to be defeated simply because, later on, it turned out that the decree was not a right one. There can be no doubt that these cases lay down that where there is an executable decree and the Court has the jurisdiction to execute it, a sale, made to a third party, who purchases without notice, would hold good although the decree may be reversed later on in appeal or otherwise. The principle is clear. Where a sale takes place in the exercise of a jurisdiction vested in a Court, a third party purchaser cannot be bound by the result of any further litigation relating to the decree. In my opinion, however, the principle laid down in these cases has no application to the *facts* of the present case. This was a decree which was not executable at all as against *Musammat* Parbati and Nanak Chand. As Mr. Seth has rightly put, it is a misnomer to call Nanak Chand and *Musammat* Parbati, judgment-debtors. The decree was virtually a combined decree for redemption and sale. Nanak Chand and *Musammat* Parbati had stepped into the shoes of *Musammat* Sultana Begam who had not been redeemed. There was a bar, according to the judgment, to the sale of the property purchased by Nanak Chand and *Musammat* Parbati till the mortgage, on which they relied as a shield, had been paid off. The decree was, therefore, a combined decree for redemption and sale. It is wrong to say that the Court was seised of the jurisdiction to execute the decree and could sell the property in the exercise of its

(1) 14 C. 18; 13 I A. 106, 10 Ind. Jur 428; 4 Sar. P. C. J 746, 7 Ind. Dec. (N. S.) 13 (P. C.).
(2) 10 A. 166; 15 I A. 12; 5 Sar. P. C. J. 129; 6 Ind. Dec (N S) 112 (P. C.).
(3) 34 Ind. Cas. 303, 38 A. 240; 14 A. L. J. 302
(4) 21 Ind. Cas. 570; 16 O C. 225
(5) 29 B. 435; 7 Bom. L. R. 585.

jurisdiction. If the decree did not permit of the sale of the propery, the mere fact that the Court had pecuniary and territorial jurisdiction would not permit it to go contrary to the terms of the decree and sell the property. In my opinion, the terms of the decree itself did not justify a sale of the property and the sale cannot hold good, even if the appellant be a *bona fide* purchaser, in the sense that he is a third party purchaser who had no notice of the facts of the case. The result would be that the sale must be set aside.

The second question is whether on the sale being set aside the appellant should be relegated to a suit for recovery of his money or whether the money could be refunded to him under the present proceedings. It seems to me that, in the circumstances that had happened, the Court below was right in making what was virtually an order for restitution, *viz*, in passing an order that Nanak Chand and *Musammat* Parbati shall be put in possession of their property which had been taken away from them as a result of sale and subsequent delivery of possession to Atma Ram. I have held that the Court had not acquired jurisdiction to sell the property and the sale, therefore, was a void one. The restitution must be complete and the decree-holder, if he has taken away the money, must hand it back to the appellant. If the money still be in deposit in Court the Court will, of course, hand it over to the appellant. I may note that O. XXI, r. 91, has no application to the facts of the present case. A purchaser who may wish to have a sale set aside on the ground that the judgment-debtor had no saleable interest would have only thirty days within which to apply from the sale. In this case the auction-purchaser maintained that the sale should be upheld and it was not till the Court held that the sale was void that his right to refund of the purchase-money arose. He could not, therefore, avail himself of the provisions of the Code. I do not see why the appellant should be relegated to a suit for his remedy when all the three persons concerned are parties to the present proceedings. The matter is only one of procedure and it strikes me that if there be no other rule applicable, the rule enacted in s. 151 of the C. P. C. would be ample justification for ordering a refund of the purchase money in the present proceedings. Any objection to re-payment of the money that the decree-holder might have, could be urged in the present proceedings and he would not benefit at all by a regular suit being instituted against him. He has not shown any valid cause why he should not refund.

I allow the appeal in part and modify the decree of the Court below. I dismiss the appeal so far as it is aimed against the order of the Court below setting aside the sale and ordering restitution of the property to Nanak Chand and *Musammat* Parbati. I modify the order of the Court below so far as it relegates the appellant for his remedy to a suit. I order the decree-holder Peary Lal to pay back the appellant the entire purchase-money paid by the latter into Court without deducting therefrom any poundage-fee or other costs accessory to a sale. He will also pay interest at 6 per cent per annum from the date of his recovery of the money out of Court The appellant must have the entire money which he paid into Court and interest.

The appellant must pay the respondent Nanak Chand and *Musammat* Parbati the costs of the appeal and Peary Lal respondent must pay one-half of the costs incurred by Atma Ram in his appeal. Peary Lal must pay his own costs. The costs in this Court will include Counsel's fees on the higher scale.

Z. K. *Appeal allowed*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 438 OF 1924.

September 22, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Waller.

CHITTAMMAL AND ANOTHER—APPELLANTS

versus

PONNUSAMI NAICKER AND ANOTHER—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss 4, 56—Official Receiver, powers of—Stranger in possession of property—Insolvent not entitled to present possession—Power of Court to disposses—Remedy—Question of title, decision of—Procedure

The position of the Official Receiver under the Provincial Insolvency Act is the same as that of a Receiver appointed under O XL, C P C [p 574, col. 2.]

The Insolvency Court, therefore, cannot, acting under s. 56 of the Provincial Insolvency Act, direct any person to deliver up property in his possession

to the Official Receiver unless the insolvent is entitled on the date of such application to the present possession of such property. If a title is set up by the person in possession, it is open to the Court on a proper application being made under s. 4 of the Act to try the issue whether the insolvent is entitled to the property or not [*ibid*]

Where an order is passed under s. 56 (3) of the Provincial Insolvency Act it does not determine the rights of the parties and though the Judge may incidentally determine the question, yet it cannot be said that the question is finally determined [p. 575, col. 1]

No body other than the Official Receiver can move under s. 4 of the Provincial Insolvency Act unless the Official Receiver is unwilling to act and the Court authorises a creditor or any other person interested in preserving the insolvent's estate to act under that section in the name of the Official Receiver [*ibid.*]

The power given to an Insolvency Court by s 4 of the Provincial Insolvency Act is subject to the provisions of the Act, one of which is the proviso to s. 56 (3) which is in the way of the Court removing any person from the possession of property whom the insolvent has no present right to remove. [p. 575, col. 2.]

Appeal against an order of the District Court, Tinnevelly, dated the 4th November 1924, in I. A. No. 265 of 1923, in I. P. No. 17 of 1921.

Mr. *K. Bhashyam Iyengar*, for the Appellant.

Mr. *K. R. Rangasami Iyenger*, for the Respondent.

JUDGMENT.

Devadoss, J.—This appeal is against the order of the District Judge of Tinnevelly directing the appellants to hand over possession of the property in their possession to the Official Receiver and his lessee. The first respondent herein is the lessee of the property from the second respondent who is the Official Receiver of Tinnevelly. The appellants were in occupation of the property in dispute from the year 1897. The respondents applied to the District Judge for an order under s. 56 of the Provincial Insolvency Act directing the appellants to hand over possession of the property in dispute to the respondents on the ground that the property was the property of the insolvent The learned Judge has passed an order under s. 56 (3) in favour of the respondents. The question for consideration is whether such an order can be passed against persons who claim adversely to the insolvent. Section 56, cl. 3, 2nd paragraph is in these terms :—

"Provided that nothing in this section shall be deemed to authorise the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove," An application under s. 56 is made for the purpose of realisation of the property of the insolvent. If a person is in possession of the property on behalf of the insolvent, or claims under the insolvent, possession of such property may be taken under the orders of the Court by the Official Receiver. But where the person in possession claims adversely to the insolvent, or where he is able to show that the insolvent is not entitled to present possession, the Court has no power to proceed under s. 56, for the second paragraph of cl. 3 specifically says that "nothing in this section shall be deemed to authorise the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove." The corresponding provision in the Presidency Towns Insolvency Act is s. 58; and cl. 2 of that section puts the matter beyond doubt. It is as follows :—

"The Official Assignee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the insolvent, be in the same position as if he were a Receiver of the property appointed under the C. P. C. of 1908, and the Court may, on his application enforce such acquisition or retention accordingly."

The position of the Official Assignee is, therefore, the same as that of a Receiver appointed under the C. P. C. Order XL, r. 1 (2) is as follows :—

"Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove."

The power of the Court under the Provincial Insolvency Act, s. 56 is not any higher than the power of the High Court under the Presidency Towns Insolvency Act s. 58. The Court, therefore, cannot, acting under s. 56, direct any person to deliver up property in his possession to the Official Receiver unless the insolvent is entitled on the date of such application to the possession of such property. If a title, however, flimsy is set up by the person in possession, the Court should not act under s. 56. It is open to the Court on a proper application being made under s. 4 of the Provincial Insolvency Act to try the issue whether the insolvent is entitled to the property or not. But in order to enable the Court to do that a proper application

ought to be made under s. 4 of the Provincial Insolvency Act, and the other side should be asked to plead thereto.

In this case it is suggested for the respondents that, though the application was made under s 56, it must be deemed that the enquiry was held under s. 4 and the order was made under that section. But it is clear from the 6th paragraph of the District Judge's order that he passed the order only under s. 56 (3) and we cannot import into it something which is not there. If the application was one under s. 4 the first respondent should not have been made a party. Nobody other than the Official Receiver can move under s. 4, unless the Official Receiver is unwilling to act and the Court authorises a creditor or any other person interested in preserving the insolvent's estate to act under that section in the name of the Official Receiver.

It is again urged that the question of the title of the appellant has been gone into and has been found against and, therefore, it is unnecessary that there should be a fresh proceeding under s. 4. When an order is passed under s. 56 (3) it does not determine the rights of the parties and though the Judge may incidentally determine the question, yet it cannot be said that the question is finally determined. It would not be right to allow a loose procedure to obtain in insolvency proceedings. The law of Insolvency is not properly understood in the *moffusal* and it would not be right on the part of the Court to adopt a loose procedure for the purpose of realising the estate of the insolvent such a procedure would lead inevitably to hardship and to an unsettled state of the law.

In regard to the merits, it is unnecessary to say much. The appellants were in possession of the property from 1897. They claim to have been in possession of the property by virtue of an arrangement in the family. It is urged by Mr. Bhashyam Iyenger that no registered document is necessary for a family arrangement. If the appellant could show that there was a proper arrangement they would be entitled to retain possession of the property against the insolvent and against the Official Receiver.

On behalf of the respondents it is urged that the first appellant is dead and, therefore, the second appellant, the daughter of the first appellant, has no right to be in possession of the property. This question again will have to be gone into fully and in the absence of an investigation into the title of the second appellant it would not be right to deprive her of the possession of the property and drive her to a suit. If the order is to be construed as an order under s. 4 a suit would be barred ; If it is construed as an order under s. 56 (3) the order is illegal in asmuch as the insolvent is not entitled to present possession of the property.

In a recent case it was decided by Spencer, J., and myself that the power given by s 4 of the Insolvency Act is subject to the provisions of the Act, one of which is the proviso to s. 56 (3) which is in the way of the Court removing any person from the possession of property whom the insolvent has no present right to remove.

The appeal is allowed and the order of the lower Court is set aside with costs throughout.

Waller, J.—I agree that, where there is a dispute as to the insolvent's title, s 56 cannot be invoked. For, in order that that section may be resorted to, the insolvent must have an immediate right to remove from possession. Proceedings, therefore, should have been taken under s. 4.

V. N. V.
Z. K. *Appeal allowed.*

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND APPEAL No. 16 OF 1924.
September 25, 1925
Present:—Mr. Kennedy, J. C., and Mr. Tyabji, A. J. C.
PARUMAL THAWERDAS—APPELLANT
versus
Musammat MAKHAN—RESPONDENT.

Civil Procedure Code (Act V of 1908), s 47—Execution of decree—Death of decree-holder—Legal representative, determination of—Procedure—Hindu Law—Separated brother, whether legal representative in presence of widow

When a decree-holder has died and some person appears asking to be allowed to execute the decree as the legal representative of the deceased decree-holder, the Executing Court itself should under s 47 of the C. P. C. decide who the legal representative of the deceased decree-holder is and should not refer the applicant to separate proceedings.

If the person who claims to be the legal representative of the deceased decree-holder produces a Probate or Letters of Administration or any such general conclusive proof of his status, the Court need not go further and should accept that as conclusive, but if there is no such evidence, the Executing Court itself should make an inquiry and come to a decision

Where a separated Hindu dies leaving a widow his brother cannot be regarded as his legal representative and cannot be allowed to execute a decree obtained by the deceased.

Appeal against the judgment and decree of the Assistant Judge, Hyderabad (Sind), dated the 17th December 1923.

Mr. *Tahilram Maniram*, for the Appellant.

Mr. *Srikishendas H. Lulla*, for the Respondent.

JUDGMENT.—In this case one Harumal obtained a decree against one Allah Bachayo Harumal died and Parumal made an application to execute the decree. The Court of the Sub-Judge of Mirpur Khas did not decide whether Parumal was the legal representative of Harumal but referred him to Court asking him to get a succession certificate The judgment-debtor was not satisfied with this and appealed to the District Court, Hyderabad, which found that Parumal was not the legal representative of Harumal and found also that in asmuch as Harumal had left widows Parumal could be in no case the legal representative of Harumal and, therefore, dismissed the execution application filed by Parumal as being incompetent with costs. Againat that Parumal comes here.

The question dealing as it does with the matter of a legal representative is one which is still left wrapped up in almost total obscurity by the Code. But it would seem that when a decree-holder has died and some person appears asking to be allowed to execute that decree as representing the decree-holder then it is under s. 47 necessary that the Court itself should decide who the legal representative of the deceased person is? It is true that no machinery is laid down by the Code as to how the investigation is to be held nor is it anywhere indicated what the effect of such finding would be if the person that the Court decides to be the legal representative ultimately turns out not to be such. But that is a defect which is found not only in the case of decrees but even in the case of suits. The fact remains that it is the business of the Executing Court itself to decide who the legal representative is. If the claimant who claims to be the legal representative, produces a Probate or a Letter of Administration or any such general conclusive proof of his status then the Court certainly need not go further and should accept that as conclusive. But if there is no such evidence then it is not for the Court to refer to the applicant to separate proceedings, but it must itself make up its mind after such enquiry as may be possible. Therefore, it is clear that the first order of the Sub-Judge of Mirpur Khas was wrong and he should himself have decided whether Parumal was or was not the legal representative of Harumal. Apparently he was of the opinion that Parumal was not the legal representative of Harumal although that is not clearly laid down, but it is on this particular point that the decision of the District Court turns. There it is found that Parumal was separate from Harumal and that Harumal left widows. In such a case it is clear that while those widows exist or until Parumal has been in some way able to obtain some power to act on behalf of the deceased Harumal, Parumal cannot be the legal representative of Harumal and is, therefore, not entitled to proceed with this execution application. It is not, therefore, necessary to discuss as to what are the rights of the brother of a deceased Hindu whether separate or joint in respect of the separate or undivided property of the deceased for that is wholly beside the question. What is wanted is to find out who the legal representative of Harumal is, not who the heir of reversioner is and it seems quite clear on the present evidence before us that Parumal is not the legal representative of Harumal, and, therefore, the order of the District Court dismissing the application to execute Harumal's decree seems correct.

We, therefore, dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No 51 OF 1925.

May 25, 1925.

Present:—Mr. Justice Martineau and Mr Justice Zafar Ali.

RAM KARAN AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 162, 288—Statement made by witness to Police, how far relevant—Statement made before Magistrate—Conflicting statements—Evidence, value of

A statement made by a witness to the Police during the course of investigation is relevant only for the purpose of contradicting the testimony of the witness given at the trial, and any statement previously made by a witness before a Magistrate, including a statement made before the Committing Magistrate which has not been transferred to the Sessions record under the provisions of s 288, Cr P C, is relevant only for the purpose of contradicting or corroborating the statement made by the witness at the trial [p 581, col 2.]

No reliance can be placed on the statement of a witness made at the trial when it is in hopeless conflict with the previous statements of the witness. [p. 582, col 2]

Criminal appeal from an order of the Sessions Judge, Gurgaon, dated the 18th October 1924.

Bakshi *Tek Chand*, Lalas *Anant Ram Khosla* and *Jagan Nath*, for the Appellant.

Mr. *Des Raj Sawhny*, for Government Advocate, for the Respondent.

JUDGMENT.—The appellants Amin Chand and his nephews Ram Karan and Piare Lal have been convicted of six murders which were committed in the house of one Pahlad, a *Bania* at Gurgaon, on the night of the 20th 21st May 1924, and have been sentenced to death for each. They have also been sentenced to seven years' imprisonment each for attempting to murder Pahlad's wife Chambeli and her infant daughter Shanti, who is also called Sano. One Dial Das has been similarly convicted and sentenced, but has not appealed, so that his case is before us only under s. 374 of the Cr. P. C. for consideration of the question as to the confirmation of the sentences of death. One Panna Lal was also tried for the offences, but has been acquitted.

Pahlad, who was one of the persons murdered and was a collateral of the appellants, was about 23 years old at the time of his death. He had been left an orphan at the age of two or three, and Bucha Mal, a brother of the appellant, Amin Chand, was appointed his guardian. Bucha Mal and his brother and nephews lived in Gurgaon Sadar, about a mile or a mile and a half from the town, and Pahlad lived with them after his father's death. Bucha Mal managed Pahlad's estate and had him married in 1917. Early in 1922 Bucha Mal was discharged from the guardianship on Pahlad coming of age, but Pahlad and his wife continued living with Bucha Mal and, after Bucha Mal's death in October or November 1922, with his widow Gulab Dei and Ram Karan's son Kundan, whom Bucha Mal had adopted.

On the 1st August 1923 Pahlad entered into an agreement with the appellants to give them a shop in exchange for a plot of land on which he wanted to build a house, and two deeds were drawn up, one executed by Pahlad and the other by the appellants, but the proposed exchange was not carried out and Pahlad built his house on another plot of land adjoining Piare Lal's house, which had been bought for him during his minority by Bucha Mal, and the agreement between Pahlad and the appellants was cancelled on the 6th March 1924 Pahlad began building his house in October or November 1923, and moved into it with his family on the 15th February 1924 when the lower storey had been completed. After they had moved into the house plague broke out at Ballabgarh, where Chambeli's home was, and her sister Ramon (aged 11) and her cousins Khacheru and Shib Charan (aged 9 and 7 respectively) came from there to Gurgaon and stayed with Chambeli. A boy of 14 named Amar Singh, whose father-in-law Zorawar was a collateral of Pahlad, also came to Gurgaon on account of plague breaking out in his village, and he slept sometimes at Pahlad's house and sometimes at Ram Karan's.

For about two months before the murders a *Sadhu*, named Gobind Das, had come from Jaipur State, and been living at Gurgaon in the house or in the *Dharmsala* of Panna Lal. He posed as a physician and as a person possessing occult powers, among which was the power of ensuring that a child to be born to a woman should be a son. For some three weeks before the murders he visited Pahlad's house and treated Chambeli, as she was expecting her confinement and wanted a son. He used to come to the house at 7 or 8 in the evening and recite *mantras* after dark over an axe and a *gandasa* which he had with him, and to apply *sandhur* to

Chambeli's forehead. After reciting the *mantras* he used to leave the axe and the hatchet in the kitchen. He used sometimes also to sleep at the house. Dial Das is said to be Gobind Das' brother or *Chela* and to have come to Gurgaon a few days before the murders. No *mantras* were recited by Gobind Das on the night of the 20th May, but Chambeli says that he came during the daytime and asked her for 1¼ *seers* of gold as his reward for treating her and that she promised to give it to him.

It may be noted in cross-examination she said that he wanted to be paid immediately as he had finished the *mantras*, but in re-examination she altered her statement on that point.

On the night of the 20th May Pahlad, his wife's cousins Khacheru and Shib Charan, and the boy Amar Singh slept in a room in the upper storey of Pahlad's house, and Chambeli, her children Anguri (aged 5) and Shanti (aged 1½ or 2) and her sister Ramon slept on the ground flour in a *dalan* on the left, *i.e*, on the western side, of the court-yard. Early the next morning Pahlad, Khacheru, and Shib Charan were found lying murdered in the room in which they had slept, and Amar Singh was found there wounded and unconscious. Anguri and Ramon had also been murdered, the body of the former being found on a bed in the *dalan* in which they had slept, and that of the latter on the ground in the kitchen, which is on the right side, *i.e.*, the eastern side, of the court-yard. Chambeli was found lying wounded and unconscious in the north-east corner of the court-yard, and her child Shanti was lying near her with a wound on the forehead. There were marks of blood on the northern and eastern walls near which Chambeli was lying. The injuries received by the persons killed and wounded were incised wounds, and had apparently been inflicted with the axe which Gobind Das used to have with him, as it was found lying bloodstained near Ramon's body. The *gandasa* was not found. Gobind Das had disappeared and he has not been traced.

The Assistant Surgeon, Doctor Chandarbansi, went to Pahlad's house at 5-15 or 5-30 in the morning on hearing of the occurrence, and had Amar Singh and Chambeli and her child Shanti taken to the hospital. Amar Singh died in the hospital without recovering consciousness. The child's wound was not serious, and Chambeli's life was saved, though she had been very seriously injured. Chambeli recovered consciousness in about twenty-four hours, but for many days after she could not speak, both her jaws having been fractured. She remained in the hospital till the 10th July when she was discharged.

The Sub-Inspector Rahim Bakhsh, who investigated the case, got some of the people of Gurgaon to form a *panchayat* to try and find out who the murderers were, and on the 25th May in consequence of the opinion given by the members of the *panchayat* and on account of the rumours which reached him he arrested the three appellants as well as Kundan and Dial Das. Panna Lal was arrested on the 22nd June.

With regard to the motive for murders it is alleged by the prosecution (1) that there was ill-feeling between the appellants and Pahlad, (2) that the appellants had suffered losses and were in urgent need of money, (3) that Pahlad was demanding payment of the money which they owed him and they could not pay, and (4) that Pahlad was a rich man, and that as his reversioners they stood to gain considerably by his death.

With regard to the first point Nathi (P. W. No. 34), who was a partner of Pahlad, mentions a quarrel between Piare Lal and Pahlad about a matter of removing a lime grinding mill from the land which the appellants were to give in exchange for Pahlad's shop, but even if there was this quarrel it does not seem to have been at all serious, for Nathi says that it happened some four months before the murders and that Pahlad and the appellants used to meet one another as relations after it.

The learned Sessions Judge thinks the fact of Pahlad building a house for himself and moving into it before it was complete shows that there must have been quarrels between members of the two families. But it was perfectly natural for Pahlad to want to have a separate house for himself and his family, and when they moved into it the lower storey was complete and there was plenty of accommodation for them. Chambeli, no doubt, says that they moved into the new house because of quarrels between the families, but the quarrels which she speaks of between the women were only ordinary verbal quarrels and she admits that she knows of no dispute between her husband and the appellants except in

regard to the proposed exchange of the plot of land for a shop. She also says that even after the quarrels the appellants and the women of their family used still to pay visits to Pahlad's house. That Pahlad and his family continued to be on friendly terms with the appellants is indeed shown by the fact, admitted by Chambeli, that when the lower storey of her husband's new house was completed, he gave a feast as a house warning which the appellants attended.

We are unable to agree with the Sessions Judge that the cancellation of the agreement for exchanging a shop belonging to Pahlad with land belonging to the appellants caused ill-feelings. He says that the shop must have been worth much more than the land, but this is a pure assumption not warranted by any evidence. Nor is there anything to justify his view that the conditions in the agreement in regard to the house which Pahlad had intended building on the land which he was to get were onerous, and that a hard bargain must have been driven with Pahlad. The conditions appear to us to have been quite natural and reasonable. Afterwards when Pahlad changed his mind and decided to build on the land which had been bought for him by Bucha Mal the appellants consented to cancel the agreement. That they cancelled it of their own free-will was expressly stated by them in the endorsement to which they appended their signatures on the deed, Ex. P, executed by Pahlad. An endorsement in similar terms was written on the counter-part P-Q which had been executed by the appellants, and this was signed by Pahlad. There is no evidence whatever to show that any pressure was brought to bear on the appellants in the matter of the cancellation of the agreement.

The prosecution has made a point of the fact of Pahlad having applied on the 19th March 1924 for a gun license, but there is no evidence to show that it was through fear of the appellants that he asked for the license. The application was rejected on the 2nd April, and no steps appear to have been taken by Pahlad for obtaining protection for himself against the appellants, nor did he present any petition or complaint against them.

The Sessions Judge has referred to the fact that Piare Lal's two sons died of small-pox a few days before the murders and that Pahlad went on with the building of the northern wall of his house, which adjoined Piare Lal's house, during their illness and after the death of the eldest son. He infers from this that the relations between Pahlad and Piare Lal were strained, but the further fact which he mentions that Pahlad stopped the building on the 18th May as soon as Piare Lal asked him to do so shows that such an inference is not justified.

He also says that there is no evidence to show that Pahlad went to condole with Piare Lal when his sons died or that he attended the funeral ceremonies, but the simple reply to this is that there is also no evidence to show the contrary.

We are of opinion, therefore, that the prosecution has failed to prove that the appellants bore any ill-will towards Pahlad.

Coming next to the matter of the appellants' financial position, we note in the first place that the Sessions Judge has made a mistake in thinking that the income tax paid by them shows that their annual income was only about Rs. 5,000. He has apparently confused the tax which they paid with that which was paid by Pahlad. The income-tax paid by the appellants' firm at Gurgaon and their branch firm at Pachparwa amounts to Rs. 691-12 and this would represent an annual income of about Rs. 22,000.

In the second place the learned Judge is wrong in thinking that it has been shown that the appellants' firms were not doing well and were in urgent need of money. He is impressed by the fact that large sums had been sent by the appellants' head firm at Gurgaon—Sil Chand-Shasi Ram, to the branch firms and had not been re-paid. But these sums were sent in the ordinary way to the branch firms for investment in the businesses, and the fact that they remained invested in these firms and were not sent back does not in the least show that the money was lost or that the firms were in a shaky condition. It is in no way shown that the firms had been incurring losses and that the appellants needed money urgently on that account. On the contrary the persons in charge of the various firms have been examined and have produced the accounts and the *chithas* prepared from them, while the *chithas* prepared from the Gurgaon firm's books of which the Police had taken possession, have also been produced, and all this evidence goes to show that the firms are prospering and have no bad debts.

A rough idea of the extent of the appellants' business is given by Ram Singh, (P. W. No. 25) who says that the Gurgaon firm has dealings to the extent of about half a lakh, and that the branch firms have dealings to the extent of about two or two-and-a-half lakhs.

Only two debts are shown to have been due from the appellants. One was Rs.12,000, which they had borrowed from Kanhiya (P. W. No. 28) in January 1924. He took no receipt or writing of any kind from the appellants when he advanced the money, a fact which shows the good credit which they enjoyed, and he made no demand for payment. He has explained that the loan was taken in the ordinary course of business as the appellants dealt in grain and used to take advances when they were buying grain and to re-pay them, when it was sold. The other debt was one of Rs. 7,000 borrowed from Pahlad in January 1922. For this loan also no writing had been taken, and it is not stated by Chambeli or Pahlad's partner, Nathi (P. W. No. 34), or any other prosecution witness that Pahlad had asked the appellants to re-pay him. Kundan (D. W. No. 8), the son of Ram Karan and the adopted son of Bucha Mal, says that Pahlad had asked for the return of his money about 3 or 4 months before the murders, but also says that Pahlad subsequently said that he did not want the money then and would take it later. Even if Pahlad was wanting to be re-paid the appellants could have raised the money without any difficulty either by selling some of the grain of which they had large stocks, or by utilising part of their cash balances, or by borrowing. There is lastly the theory that the appellants thought that they would gain substantially by exterminating Pahlad and his family. Their share by inheritance in the property left by Pahlad would be $\frac{1}{8}$th, or if Kundan's share is included 3/16th, and we are not impressed by the view taken by the Sessions Judge that they might have believed that their share would be greater. In coming to a conclusion as to the amount of Pahlad's property he has relied on a *chitha* in Pahlad's books in which Pahlad's assets are shown as of a total value of Rs. 74,546, but this *chitha* (No. 1 on page 6 of Paper-Book B) is undated while there is another one (No. II on page 7), bearing a date corresponding to the 5th December 1923, according to which the assets were of the value of Rs. 42,239. *Chitha* No. I must apparently relate to an earlier period as it contains an entry of Government promissory notes, which are not mentioned in *chitha* No. II and had, therefore, presumably been sold before *chitha* No. II was written. There is no mention of any cash in *chitha* No. II, nor is there any proof that Pahlad had any cash in his house or shop at the time when he was murdered. The learned Judge appears to have over-estimated the value of the property which would come to the appellants as their share in the inheritance. Moreover, a long period was bound to elapse before they could obtain their share, as the property would have first to be partitioned. The theory that in such circumstances the appellants planned the murders of Pahlad and all his family, to whom they bore no ill-will, and without the prospect of gaining any immediate advantage appears to us to be wildly improbable. It is particularly improbable that Piare Lal would have taken part in these crimes just after he had lost two of his sons, of whom one died on the 16th and the other on the 19th May.

No adequate motive has, in our opinion, been established for the appellants to commit the crimes of which they have been convicted.

We come now to the evidence as to the commission of these crimes. This consists of the statements of two witnesses, *viz*, Pahlad's widow, Chambeli and one Hardwari, who is the son of a sister of Bucha Mal's widow Gulab Dei and had been living in Gurgaon for about two months. Hardwari's story is briefly this:—He slept sometimes at Kundan's house and sometimes at Pahlad's. On the night of the murders he had gone to Pahlad's house to have a talk, and while he was there Gulab Dei called out to him to bring his *razai* and come and sleep at Kundan's house. He intended doing so, but Amar Singh persuaded him to stay at Pahlad's house, so he slept there in the same room as Pahlad and the boys. In the middle of the night he was roused by hearing Pahlad cry out, and saw him standing up and Panna Lal and Dial Das holding him by the arms, while Ram Karan and another man stood by. He also saw Gobind Das with an axe in his hand, and saw him strike Pahlad on his face. Hardwari says he lay down and hid his face in the *razai*, and then heard

cries and sounds of blows. After a little while he raised his head and looked round and saw nobody in the room except Pahlad, Khacheru, Shib Charan, and Amar Singh, who were lying there. The place was covered with blood. He went downstairs into the court-yard, and as he was going down heard some body call out that a man was running away and then heard a voice reply "Let him go as it is probably Hardwari." He unchained the door, left the house, and went to Kundan's house, where he went to sleep. The Sessions Judge has discussed Hardwari's statement and held it to be unreliable, and we cannot agree with Mr. Sawhny's contention that the statement ought to have been believed. Without going into details we think that there are at least three strong reasons for rejecting Hardwari's statement. Firstly it is highly improbable that the murderer or murderers, who showed an intention to kill everybody in the house, would have allowed Hardwari to escape. Secondly, it is incredible that Hardwari would not have raised an outcry and that he would have gone quietly back to Kundan's house and gone to sleep without saying a word of what had occurred to any one. Thirdly, it is admitted that for nearly a month Hardwari, though repeatedly questioned about the murders, persisted in denying all knowledge of them and in denying that he had slept at Pahlad's house on the night on which they were committed It was not till the 18th June that he told his story about having witnessed the murder of Pahlad, and that was after being confronted with Chambeli, who had on the previous day made a statement in which she mentioned Hardwari's presence on the night of the murders. That statement put Hardwari into a very awkward position, for if he continued to deny having slept at Pahlad's house and seen the murders, he ran the risk of being prosecuted himself. He had to give evidence about the murders for his own safety. It is obviously impossible in such circumstances to believe his evidence.

It remains to consider the evidence of Chambeli, on which the convictions of the appellants are based. Her statements were recorded on three different occasions before she made her statement to the Committing Magistrate. Her statement was recorded for the first time on the 4th June by Sub-Inspector Rahim Bakhsh. She was then not capable of making more than an extremely brief statement, in which she said merely who the murderers were and who had been present upstairs, and gave no account of what had happened. She was questioned by the Superintendent of Police on the 11th June, but no statement was then recorded. Her condition from that time was steadily improving, but it was not till the 17th June that she made a detailed statement, which was recorded by the Deputy Commissioner. Another detailed statement was recorded after that, *viz*, on the 24-25th June, by the Sub-Inspector. It is necessary to point out here a grave error into which the lower Court has fallen. The statements made by Chambeli to the Sub-Inspector of Police are relevant only for the purpose of contradicting her present testimony, and the statements made to the Deputy Commissioner and to the Committing Magistrate only for the purpose of contradicting or corroborating that testimony (no order, it may be noted, having been passed for the deposition before the Committing Magistrate to be admitted as evidence under s. 288 of the Cr. P. C.). But the Sessions Judge has treated all those statements as though they were substantive evidence like the statement made by the witness at the trial, and one consequence of this error has been that Dial Das has been convicted although there is no evidence against him other than the statement of Hardwari which the learned Judge himself has rejected Chambeli in her evidence at the trial has not mentioned Dial Das as having taken part in the murders or as having been present when they were committed, and it is apparently only on account of her having incriminated him in two of her former statements that he has been convicted.

The story told by Chambeli at the trial is as follows:—

She, her children, and Ramon slept in the *dalan*, she herself and the child Shanti on one bed, and Anguri and Ramon on another. Her husband Pahlad was out when they went to bed, but he returned at about 9 or 10, and his wife unchained the outer door for him and he went upstairs Shortly after midnight Chambeli was awakened by hearing her husband call out "*mar gera.*" She could not see him or the other persons who were upstairs from where she was. She immediately went upstairs. There is a balcony upstairs which runs all round

court-yard, and she went along the southern balcony past a *rasoi* to the door of the room in which her husband and the boys were sleeping, and there she saw her husband sitting in the room on the floor bleeding from an injury on the back of the neck. Gobind Das, whom Chambeli calls the Babaji, was standing by him and he struck him on the side of the neck with *gandasa* or an axe that he had in his hand. Chambeli looked round and then noticed Panna Lal standing on the balcony near a barred window of the *rasoi* and the three appellants standing on the western balcony in front of the room that is over the *dalan* in which she had been sleeping. She reproached Panna Lal and then either fell or was pushed from the balcony into the court-yard below. Soon after she had fallen and while she was still conscious the Babaji came down and struck her with the weapon he had, and, she then lost consciousness. In cross-examination, however, she altered this part of the story and said that she lost consciousness on seeing her husband bleeding and fell from the balcony, and then regained consciousness and sat up and moved a foot or two away from the place where she had fallen, and that then the Babaji came down and struck her and she again lost consciousness.

Now there are glaring inconsistencies between this statement and her previous statements. Even the extremely brief statement which she made on the 4th June to the Sub-Inspector was inconsistent with the statement subsequently made at the trial in that it mentioned the Babaji's *chela* as one of the murderers besides the Babaji himself.

In the statement which she made to the Deputy Commissioner on the 17th June she said that on hearing her husband's cry she sat up in bed and called out to him. There was the sound of beating upstairs and she could see the Babaji standing with a *gandasa* in his hand. *She sat still* for fear of being killed. *About an hour after the appellants and Panna Lal came on to the roof, and she then went upstairs and found her husband lying dead.* She lost consciousness and fell down into the court-yard. Then, changing her statement on this point, she said she became senseless after she had fallen and that she did not know who struck her. The inconsistencies between this statement and the one made at the trial are patent.

A different story again was related by her to the Sub-Inspector on the 25th June, when she said that on her husband crying out she went upstairs and *saw the Babaji and his chela striking her husband,* and the appellants and Panna Lal standing outside on the balcony. She reproached Panna Lal and *then went downstairs. She went upstairs* again and found her husband lying dead, but none of the other men there. She then fell down from the balcony and became unconscious.

We think it is impossible to place any reliance on the statement made by Chambeli at the trial when it is in such hopeless conflict with her previous statements. The Sessions Judge has recognised the glaring contradictions in her statements and he thinks that they are accounted for by the serious injuries which she had received, but we cannot agree with him. We grant the possibility of her memory being at first affected by the injuries and of the facts coming back to her mind gradually, but though the injuries might thus account for an event being omitted in one statement and mentioned in a later one they in no way explain contradictions in the statements.

Then the learned Judge says that there was no reason for Chambeli to name innocent persons as murderers. But in the first place it is clear from the evidence that while she was in the hospital various persons came to see her or were put in charge of her, so that it is not impossible that she may have been tutored, and her readiness to act on any hint that might have been conveyed to her in regard to the murderers is shown from her conduct on the 27th June at a parade which was held in the jail for the identification of Dial Das. The note P. G. written by Mr. Gurmukh Singh Mongia, the Magistrate who conducted the identification, shows what happened. Chambeli completely failed to identify Dial Das as she picked out three other men, one after another, who were totally unlike Dial Das in appearance. The Magistrate then sat down to write his note with his back slightly towards Chambeli and some people began asking why she had not been able to identify the man. She then said, while the Magistrate was writing, that she could now identify the man and she pointed out Dial Das. In the second place, even if Chambeli was not actually tutored, she probably heard while she was in hospital

that the appellants were suspected of being concerned in the murders and had been arrested; and she may have thus become impressed with the belief that they were guilty and have implicated them on that account. It is noteworthy that she has improved her story in regard to the appellant's complicity in the murders, for, while according to her statement of the 17th June they appeared on the scene long after her husband's murder, in her evidence in Court she makes out that they were standing on the balcony while her husband was being murdered in the room.

The Sessions Judge thinks that Chambeli would not have invented the story of falling from the balcony into the court-yard when she could have said that she came down the stairs. But the explanation that suggests itself is that she had to invent the story in order to account for her being found lying wounded and unconscious in the court yard. According to the story told in the first detailed statement that she made, *viz*, the statement of the 17th June, she went upstairs long after her husband had been murdered, and the Babaji was not there when she got upstairs. At all events she made no mention of his being present there at the time and if she had mentioned his presence she would have been faced with the difficulty of accounting for his not killing her on the spot when he was no longer occupied with killing her husband or the other persons who were in the room with him. The Babaji not being there she could not say that he ran after her down the stairs and struck her down in the court-yard, and she was, therefore, driven to the necessity of saying that she fell from the balcony into the court-yard and lost consciousness. In her statement of the 25th June she changed her story and said that when she got upstairs she saw her husband being murdered, and that she then came down the stairs. But she had to bring in the story of the fall which she had told to the Deputy Commissioner on the 17th June, and in order to do this she was obliged to say that she went upstairs a second time. At the trial, however, she denied having gone upstairs more than once and made out that she lost consciousness on seeing her husband murdered and fell down from the balcony. It is important to note in this connection the discrepancies in her statements as to whether she lost consciousness before or after the fall from the balcony, and also a further contradiction to be found in her statement before the Committing Magistrate according to which she threw herself down from the balcony in despair.

The Sessions Judge has referred to the fact that Chambeli had a contusion on one of her knees, but that could have been caused by her falling on the ground when her assailant struck her in the court-yard.

Apart from the discrepancies in Chambeli's statement the story that she fainted and fell from the balcony into the court-yard is improbable for other reasons. One is that if she had had such a fall, the balcony being more than 12 feet above the court-yard, she would probably have had a miscarriage as she was more than six months pregnant. Another is that the story of her falling from the southern balcony does not explain how she came to be found in the morning lying unconscious, not near the southern wall of the court-yard but in the north-eastern corner about 2½ feet from the north and east walls. She says in cross-examination in her evidence at the trial that after the fall she regained consciousness and moved away a foot or two, but this is an improvement on what she had said before, and besides she does not say that she moved right into the far corner of the court-yard, which, it may be noted, is 15 feet square.

Then it seems hardly credible that Chambeli could have reached the room where her husband was in time for her to see what she says she saw. Her husband had received at least one blow when she was awakened by his cry, and she had to cross the court-yard, go up the stairs, and then go some way along the southern balcony to get to the room. One would naturally suppose that by that time Pahlad would have been despatched, and yet according to Chambeli he had received only the wound at the back of the neck and was sitting when she arrived.

There is another important point also. Chambeli does not say that she took the child Shanti upstairs with her, and naturally she would not have done so. Besides, if she had had the child with her when she fell from the balcony, the child would have been injured by the fall, whereas she had no injury except the wound inflicted by her mother's assailant. The child would, therefore, have been left lying on the bed in the *dalan*, yet in the morning she was found lying wounded beside her mother in the

court-yard. No explanation of this is forthcoming on the prosecution theory. All the facts are, on the other hand, explained by the defence theory, which is that the murderer entered the *dalan* while Chambeli and the children were there, and first attacked and murdered Anguri, that meanwhile Chambeli picked up Shanti and ran out along with Ramon into the court-yard, that the murderer pursued them, struck down Chambeli in the corner of the court-yard, and wounded her and Shanti and then went into the kitchen where Ramon had taken refuge, and killed her and threw the axe down beside her.

Further it appears to be highly improbable that the appellants would have been present on the balcony at the time when the murders were being committed. If, as is alleged by the prosecution, they had hired Gobind Das to murder Pahlad and his family they would have surely taken care not to appear on the scene at all.

It is argued for the prosecution that as the outer door of Pahlad's house was chained Gobind Das must have been introduced into the house by Piare Lal from the roof of Piare Lal's house. But the argument is based on the assumption that Gobind Das had not been sleeping in Pahlad's house on the night of the murders. Although Chambeli professes to have no recollection of the Babaji having come to the house and slept there she admitted before the Committing Magistrate that he had slept there that night on the roof of the upper storey.

We need not discuss the question of the possible motive for the crimes, but we may observe that it is by no means necessary that the murderer must have been, as contended by the learned Public Prosecutor, hired by other persons to commit them.

Our conclusion for the reasons given above is that the evidence of Chambeli is, like that of Hardwari, absolutely untrustworthy and that there are the strongest reasons for disbelieving her story, and for believing that she did not go upstairs or see what happened upstairs, but that she remained downstairs in the *dalan* until the murderer came there. There is no other evidence to support the case for the prosecution.

We, accordingly, accept the appeals of Ram Karan, Amin Chand and Piare Lal, set aside all the convictions and sentences and acquit them, both of the offences under ss. 302-149 and of those under ss. 307-149 of the Indian Penal Code. Also under s. 376 of the Cr. P. C., we set aside the convictions of Dial Das for the offences under ss 302-149 of the Indian Penal Code, and the sentences of death passed on him and acquit him of those offences. Further, acting under the provisions of s. 439 of the Cr. P. C., we set aside the conviction of, and the sentences passed on, Dial Das for the offences under ss. 307-149 of the Indian Penal Code, and acquit him of those offences.

Z. K. *Appeal accepted.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 472 OF 1925.

August 6, 1925.

Present:—Mr. Justice Kanhaiya Lal.

KHAMANI AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 500—Defamation—Degradation in caste—Privilege.

A statement by the accused to certain members of the caste that the complainant had become a sweeper by reason of his having shaken hands and associated with sweepers, is defamatory and is not privileged where it does not represent the decision formally arrived at by a *panchayat* held to consider the matter.

Criminal revision from an order of the Sessions Judge, Bareilly, dated the 25th July 1925.

Mr. *S. C. Das*, for the Applicants.

JUDGMENT.—The applicants have been convicted of an offence under s. 500 of the Indian Penal Code and sentenced to pay a fine of Rs. 51 each or in default simple imprisonment for four months. It appears that there was a procession taken out at Bareilly in November last in which various classes of people including some sweepers had joined. One of the persons who joined the procession was Mangli Prasad who belonged to the *Bhurji* caste. The three petitioners have been found to have told different persons of the same caste that if they associated with Mangli Prasad they would refuse to smoke or drink with them as Mangli Prasad had become a sweeper, by reason of his having shaken hands and associated with sweepers in that procession. It is argued here that the Trial Court had no jurisdiction, and that the three accused ought not to have been joint-

ly tried, but none of these points were taken in the Courts below. If there were any substance in these objections, they would, undoubtedly, have been urged in the Courts below. It is also stated that the statements made were not *per se defamatory*, and that they were made in good faith and were privileged. The imputation made clearly suggested that Mangli Prasad was not fit to be associated with by reason of his having joined that procession or shaken hands with the sweepers. It cannot, however, be said that if he had done so, he had thereby become a sweeper, and the effect of the imputation must, undoubtedly, have been to lower his position or character in the estimation of his caste fellows. The imputation would have been privileged, if a *panchayat* of the caste had been held to discuss the matter, and the decision arrived at the *panchayat* communicated to the persons interested therein, but it has been found that there was no *panchayat* held to consider the matter, and no decision formally arrived at which would give it the protection claimed. One of the witnesses deposes that all the three accused joined together in warning him that if he associated with Mangli Prasad they would refuse to smoke or drink with him, as Mangli Prasad had become a sweeper. A joint trial under these circumstances is not open to any objection. The application is rejected.

N H. *Application rejectd.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 449 OF 1925.

November 13, 30, 1925.

Present :—Mr. Justice Sulaiman.

INDAR SINGH—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (XLV of 1860), s 403—Criminal misappropriation—Repudiation of trust—Sapurddar *of attached property—Failure to deliver property—Covenant for delivery of price—Civil liability*

Section 403, Penal Code, is in no way restricted to appropriating property to one's own use If a trustee repudiates the trust and asserts that he now holds the property on behalf of a person other than the one who entrusted him with it, he has misappropriated the property just as much he would have been said to misappropriate it if he had been putting forward his own claim to it. [p. 586, col. 1.]

When a Receiver attaches property and entrusts it to some person he does not purport to sell it to him or dispose it of at that time The Receiver may not even be in a position to know its true value The intention of the parties is that the articles should be returned in specie or produced at the time when the auction sale is to take place The covenant in the *sapurdnama*, that the person entrusted with the property would be liable to pay a certain amount in case he fails to deliver the property, is more by way of security than because the property is transferred to him with liberty to dispose it of or withhold it In such cases it is the true intention of the parties which must be taken into account Therefore, if the property is not produced the *sapurddar* is guilty of criminal misappropriation It is not a case of mere civil liability [p 586, col 2]

The mere fact that there is a civil liability does not necessarily absolve one from criminal liability [*ibid*]

Criminal revision from an order of the Additional Sessions Judge, Moradabad, dated the 21st July 1925.

Mr *M N. Raina*, for the Applicant

The Assistant Government Advocate, for the Crown

JUDGMENT.—(*November 13, 1925*).—This is a criminal revision from a conviction of the accused under s 406 of the Indian Penal Code. The facts are as follows :—One Harbans was declared an insolvent and Lala Ram was appointed Receiver of his estate in January 1925 The Receiver attached certain heads of cattle belonging to the insolvent and made them over to the applicant after taking a *sapurdnama* from him. The Receiver first fixed the 13th February for sale and three days earlier he sent a notice to the applicant to produce the cattle at the place where the auction was to take place, but the notice was returned unserved and no auction took place. On this the Receiver fixed another date for sale and sent a fresh notice to the applicant but even on that date the cattle were not produced, nor did the applicant turn up. Subsequently the Receiver received a notice from the applicant to the effect that the cattle attached by the Receiver did not belong to the insolvent but belonged to his brother who had filed an objection in the Execution Court and that the Receiver had no right to attach them The Receiver replied that the applicant was bound to produce the cattle and he had no right to stop their production even if the insolvent's brother had filed an objection. To this the applicant replied that *sapurdnama* was not binding on him and that he in fact filed a complaint under s. 420 of the Indian Penal Code in respect of it. On such reply being received the Receiver with the permission

of the Additional District Judge filed a complaint out of which this revision has arisen.

The complaint filed by the accused under s. 420 was dismissed summarily and he has not had that order revised. At the trial of the present case the accused denied that any cattle of Harbans had in fact been attached or handed over to him and he even denied a proper execution of the *sapurdnama*. The Courts below, however, have found these questions of fact against the applicant. I must, therefore, assume that the heads of cattle had actually been attached by the Receiver and made over to the applicant, who executed a *sapurdnama* in respect of them.

The learned Vakil for the applicant has argued, firstly, that no offence under s. 406 was committed as there has been no misappropriation, and secondly that in view of a clause in the *sapurdnama* for the payment of the price of the cattle there was no criminal misappropriation.

The applicant has not put the cattle to his own use nor has he disposed of them dishonestly. What has happened is that he is holding them still as trustee, but he is denying that he is holding them on behalf of the Receiver from whom he had taken them. He now asserts that the cattle belong to another person on whose behalf he holds them. Misappropriation has not been expressly defined in the Indian Penal Code. The illustrations to s. 403 all relate to cases where a person appropriates the article to his own use, but the illustrations cannot be taken to limit or narrow the scope of s. 403 itself. It seems to me that if a person sets apart an article for the use of another person, of which article he is a trustee of the complainant, he misappropriates it even though he has not put it to his own use. Section 403 is in no way restricted to appropriating property to one's own use. If a trustee repudiates the trust and asserts that he now holds the property on behalf of a person other than the one who entrusted him with it, he has misappropriated the property just as much he would have been said to misappropriate it if he had been putting forward his own claim to it. The applicant got possession of the cattle from the Receiver and undertook to return them to the Receiver. When subsequently he repudiated the right of the Receiver to attach the cattle and asserted that they really belonged to the insolvent's brother and that he would not hand them over to the Receiver he must be deemed to have committed a misappropriation.

As regards the second point the relevant portion of the *sapurdnama* is as follows :— "Whenever the Court or the Receiver demands the production of the attached property I shall deliver the same without objection. If for any reason I fail to deliver them then I shall pay the price, Rs.950 " The argument of the learned Vakil for the applicant is that when it was clearly stipulated that in case of failure to deliver the cattle the applicant would be liable to pay their price amounting to Rs. 950 his default cannot amount to a criminal misappropriation, and that at best his liability was only a civil liability. But the mere fact that there is a civil liability does not necessarily absolve one from criminal liability. When a Receiver attaches property and entrusts it to some person in the village he does not purport to sell it to him or dispose it of at that time. The Receiver may not even be in a position to know its true value. The intention of the parties is that the articles should be returned in specie or produced at the time when the auction-sale is to take place. The covenant that the accused would be liable to pay a certain amount is more by way of security than because the property is transferred to him with liberty to dispose of it or withhold it. In such cases it is the true intention of the parties which must be taken into account. There can be no doubt that in this case it could never have been the intention of the Receiver that the property attached should not be actually produced when the auction is to take place. If such property is not produced the insolvent as well as the creditors may suffer for it cannot be known beforehand what actual price would be fetched at the sale.

I would dismiss the application.

The conduct of the accused has been both obstinate and stupid. Had he returned the heads of cattle when his prosecution began it would have been possible to take a lenient view so far as the sentence is concerned, as the accused is a very old man. The learned Vakil for the applicant has stated before me that his client expressed his readiness to deliver the heads of cattle, etc, and that even now he is prepared to hand over the same. If the heads of cattle and other articles were delivered

to the Receiver I would be prepared to interfere with the sentence. I accordingly allow this case to stand over for a fortnight. If by that time the cattle, etc, have been delivered to the Receiver and a duly sworn affidavit is filed before me stating that the delivery has been made, I would reduce the sentence. Put up for orders after two weeks.

(*November 30, 1925*).—The affidavit of Nain Singh son of Indra Singh shows that the accused has returned to the Receiver all the articles which were entrusted to him except two bullocks which have died and that he has paid to the Receiver Rs. 130 as their price and that in addition he has paid Rs. 300 on account of the expenses and costs incurred in prosecuting the criminal case. In view of these circumstances as indicated in my previous order I uphold the conviction but reduce the sentence to the period already served. The bail-bond is cancelled and he need not surrender.

N H. *Application dismissed.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 330 OF 1925.

April 17, 1925.

Present:—Mr. Justice Abdul Raoof.

WASAL—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s 457—Burglary—Conviction based on production of non-identifiable articles, legality of.

Complainant's shop was broken into and a quantity of cotton and some pieces of cloth were stolen, but complainant did not furnish the Police with a list of the articles which had been stolen Accused was seen next morning in the village carrying bundles of cloth He was subsequently arrested and produced a bag of cotton and certain pieces of cloth of an ordinary character which any cloth merchant might be expected to stock and sell, but which were claimed by the complainant as belonging to him

Held, that the evidence against the accused was of an inconclusive character and was not sufficient to support a conviction under s. 457 of the Penal Code

Petition for revision of an order of the Sessions Judge, Ferozepur, dated the 20th January 1925, affirming that of the Magistrate, First Class, Muktsar, District Ferozepore, dated the 14th December 1924.

Dr. *Nand Lal*, for the Petitioner.

Mr. *J. N. Bhandari*, for the Government Advocate, for the Respondent.

JUDGMENT.—On the night between 11th and 12th November 1924 a burglary was committed at the shop of Gurditta. The shopkeeper came to his shop in the morning and found that the lock had been broken open and certain articles such as *kapas* and a quantity of cloth were removed. He lodged a First Information Report but did not produce a list of the missing articles as on account of confusion in the shop he was unable to prepare a list. Three persons, *viz.*, Wasil, Jhaggar and Jamal Din were tried for the offence and were convicted by the Magistrate under s. 457, Indian Penal Code. Two of the convicted persons, *viz.*, Wasil and Jamal Din appealed but their appeals have been dismissed by the learned Sessions Judge, Ferozepore. One of them, *viz.*, Wasil has come up in revision to this Court. The only evidence against him is that he produced a bag of *kapas* and a *ghara* containing a quanity of the stolen cloth. The recovery list, Ex. P-C, contains the list of the articles which are as follows:—

1. White *gabrun phuldar*.
2. White *doria* with green *theka*.
3. White *gabrun* with green stripes.
4. *Latha* black.
5. White *gabrun* with black line.
6. *Latha* white without number.
7. *Latha* white.
8. *Gabrun* with lace, green coloured.
9. *Gabrun* with black line.
10. One bag of *kapas*.

These articles were really incapable of identification. The complainant Gurditta, however, gave evidence and identified those articles as belonging to him. Such articles are of ordinary character and any cloth merchant may stock them and sell them. It is impossible to say with certainty that the cloth and the *kapas* produced belonged to Gurditta and had been stolen from his shop. The conviction, therefore, cannot be sustained upon this piece of evidence. It is, however, contended on behalf of the Crown that the three accused persons were seen by Bhag Singh, P. W. No. 7, in the early morning shortly after the burglary somewhere in the village carrying bundles of cloth and that this evidence coupled with the evidence relating to the production of the articles proves the guilt of the petitioner. I am unable to accept this contention, Un-

less it is established beyond all possible doubt that the bundles contained the goods stolen from the shop of Gurditta or that the articles produced by Wasil were the stolen property belonging to Gurditta the conviction cannot be allowed to stand. The evidence against the accused was wholly insufficient and inconclusive.

I, therefore, accept this petition for revision, set aside the conviction of Wasil and direct that he be forthwith released.

Z. K. *Petition accepted.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 492 OF 1925.
August 14, 1925.
Present:—Mr. Justice Kanhaiya, Lal.
Thakur KASHI PRASAD—ACCUSED—APPLICANT
versus
EMPEROR THROUGH RAM SUNDER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s 250—Frivolous or vexatious complaint—Compensation, award of

Under the Cr P. C of 1898 as amended in 1923, compensation can be awarded to the accused when the complaint is shown to be false and either frivolous or vexatious and it is not necessary to show that it is both frivolous and vexatious.

Ram Singh v *Mathura*, 14 Ind. Cas. 599, 34 A. 354, 9 A L. J 308, 13 Cr. L J, 247, distinguished.

Criminal revision from an order of the Sessions Judge, Gorakhpur, dated the 1st June 1925.

Mr. *Kumuda Prasad*, for the Applicant.

JUDGMENT.—The applicant Kashi Prasad brought a complaint against the opposite party which was found to be false and brought on account of enmity. The learned Trying Magistrate ordered the accused to pay Rs. 50 as compensation. The contention here is that no such compensation can be awarded unless the complaint is shown to be frivolous and vexatious, and reliance is placed on the decision in the case of *Ram Singh* v. *Mathura* (1). That case was, however, decided under the old Cr. P. C. The alteration since made covers a case where the complaint is shown to have been false and either frivolous or vexatious. The complaint in the present instance has been found to have been false and brought on account of enmity, and s. 250 of the Cr. P. C. justified the Magistrate in awarding compensation under the circumstances. The application is rejected.

(1) 14 Ind. Cas. 599; 34 A. 354, 9 A. L. J. 308; 13 Cr. L. J 247.

N. H. *Application rejected.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 195 OF 1925.
September 20, 1925.
Present:—Mr. Kennedy, J. C., and Mr. Tyabji, A. J. C.
EMPEROR—PROSECUTOR
versus
GULAB AND ANOTHER—ACCUSED.

Bombay Abkari Act (V of 1878), s. 43 (1) (a)—Importation of foreign liquor—Punishment, appropriate.

On conviction under s. 43 (1) (*a*) of the Bombay Abkari Act the more appropriate form of punishment is imprisonment and not fine.

Reference made by the District Magistrate, Larkana, dated the 21st August 1925.

Mr. *C. M. Lobo*, Acting Public Prosecutor, for the Crown.

Mr. *Partabrai D. Punwani*, for the Accused.

JUDGMENT.—The accused persons were convicted under s. 43 (1) (*a*) of Act V of 1878. The Second Class Magistrate of Labdaria finding that these two persons had imported foreign liquor from Kalat, inflicted upon each of them a fine of Rs. 100 or in default to undergo rigorous imprisonment for six weeks. This fine has been paid.

The case was referred here by the District Magistrate of Larkana on the ground that the sentence is inadequate.

It being necessary to ascertain in the first place whether the accused were properly convicted, we are of the opinion that it is not shown that Gulab was guilty of the charge, namely, that he imported the foreign liquor. He was a cartman and although his behaviour is suspicious, yet it by no means follows that even if he was aware that he was committing an *abkari* offence he imported the liquor. It is just as possible he may have been removing this liquor from some depot in British India to some depot in British India. We think, it is impossible to uphold his conviction of the offence of importing liquor. We, therefore, set aside the conviction on him, acquit and

discharge him and direct that his fine should be refunded.

As regards the question of Ali Mardan, we are not inclined to set aside the finding of the lower Court. It seems clear enough that this accused ran away as soon as challenged. This indicates that he had a guilty knowledge as to what the cart contained. The natural inference is that he had been the importer for some time. And if that inference is incorrect it is for him to say how and under what circumstances he came into the possession of the liquor. We think, therefore, his conviction is right.

We are of the opinion that fine is an inappropriate sentence in a case like this. If the convict is a poor man, it means a great and excessive hardship not only to himself but also to his family. But as a general rule, the fine is very little deterrent because it is clear when importation on so large a scale as in the present case takes place, there must be some wealthy men behind it who are well able to pay fines in order to secure services of poor men. The only chance, therefore, of depriving such confederates of the services of their willing agents is to inflict punishment on these agents which cannot be lightened by any act of their principals Therefore it seems to us that in such cases the more appropriate form of punishment is one of imprisonment. And the present case seems to be particularly a flagrant case.

On the whole, therefore, we enhance the sentence passed by the Second Class Magistrate, Labdaria and under s. 43 (1) (*a*) sentence Ali Mardan to three months' rigorous imprisonment. The fine, if paid, to be refunded.

Z. K. *Sentence enhanced*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No 697 OF 1925.
November 10, 1925.
Present:—Mr. Justice Daniels.
KRISHNA GOPAL—ACCUSED—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Arms Act (XI of 1878), s. 19 (f)—Illegal possession of arms—Arms found in room attached to office frequented by many people—Lessee, whether in possession

The upper storey of a house used as the office of a certain Society, which was rented in the name of the accused, was raided by the Police and a pistol and a certain number of cartridges were found at the bottom of a grain bin in a room at the back of the kitchen which had no doors. The accused was not present at the time of the search, but three other members of the Society, to one of whom the key of the house had been made over by the accused, were present

Held, that it could not be said that it had been proved beyond reasonable doubt that the pistol and cartridges were in the possession of the accused

Criminal appeal from an order of the Sessions Judge, Jhansi, dated the 19th August 1925

Dr. *N. C. Vaish*, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—In this case Krishna Gopal Sharma has been convicted of an offence under s. 19 of the Arms Act. The upper storey of a house at Jhansi forming the Local Congress office was raided by the Police on 31st May last and a Mauser pistol and 64 cartridges were found in the bottom of a grain-bin in a room at the back. The room was behind the kitchen and had no doors. The upper storey was rented in the name of the accused. The accused, however, was not present at the time, and it is said that he had gone to Cawnpore five days before At the time of the raid the key was in possession of Ajodhya Prasad to whom the accused had handed it over. There were two other members of the Local Congress present in the upper storey at the time of the search. It is further in evidence that the particular room in which the pistol and cartridges were found has no doors to it. The question is whether this is sufficient to prove beyond reasonable doubt that the pistol and cartridges were in the possession of the accused. It does not seem to me that it is. The evidence does not exclude a reasonable possibility of a pistol having been placed there by some other of the persons who frequented the rooms or even by Ajodhya Prasad in whose possession they were at the time. The learned Sessions Judge has felt the difficulty, and the circumstance which he considers decisive is that some days afterwards the accused was arrested in possession of a revolver with cartridges of the same brand as those found in the Congress rooms. Even this, however, is not to my mind decisive, unless it is shown that the cartridges were of a peculiar kind such as no other frequenters of the Congress rooms was likely to have. It might easily be that more than one person frequenting these rooms was in possession of unlawful arms and that the type of cartridge used by both of them was the same. The case is one of some difficulty, but the evidence is, in my opinion, not

quite sufficient to bring home the possession of the unlicensed arms to the accused. I, therefore, accept his appeal and set aside the conviction and sentence in this case.

Z. K. *Appeal accepted.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 202 OF 1925.

September 21, 1925.

Present:—Mr. Kennedy, J. C., and Mr. Tyabji, A. J. C.

L. A. MORRISON—APPLICANT

versus

H. M. CROWDER AND OTHERS—OPPONENTS.

Criminal Procedure Code (Act V of 1898), ss. 202, 439—Refusal to issue process—Revision—Notice to accused, whether necessary.

It is not obligatory on a Superior Court to give any notice to a person against whom a Magistrate has refused to issue process under s 202 of the Cr P C., when proceedings are being taken to revise that order.

Application to revise an order of Mr. Raymond, A. J. C., dispensing with notice of a revision application against an order of the City Magistrate, Karachi.

Mr. *D. N. O'Sullivan*, for the Applicant.

Mr. *Motiram Idanmal*, for the Opponents.

Mr. *C. M. Lobo*, Acting Public Prosecutor, for the Crown.

JUDGMENT.—In this case one Crowder brought a serious accusation against one Morrison in the Court of the City Magistrate, Karachi. The City Magistrate held an investigation, apparently under s. 202, Cr.P.C., and as a result of that enquiry came to the conclusion that he should not issue process. It is not necessary for the purposes of the present application to make any remark as to the expediency of the procedure adopted, and far less the propriety of the order. Crowder being dissatisfied with that order has made a revisional application on the Sessions Court side which came up before my brother Raymond, A. J. C. Raymond, A. J. C., admitted this application to a regular hearing and directed issue of a notice to Morrison. Shortly after that order the complainant having represented to the Court that Morrison is no longer in India, the Court directed notice to be dispensed with. And it is this order that the applicant Morrison now seeks to set aside.

There is nothing in the Code to make it necessary for a Superior Court to give any notice to any person against whom a Magistrate has refused to issue process under s. 202, when proceedings are being taken to revise that order. It is obvious that although one Magistrate may refuse to issue process another Magistrate may do so and process may thus be issued without the necessity of upsetting the order of the first Magistrate. It would be impossible to arrest any criminal if we accept the view that once any Magistrate has refused to issue process that is to give such criminal immunity from all processes for ever. No doubt notice is generally given when it is proposed to upset an order under s. 202 but that is mere matter of convenience and of equity. It is in no way obligatory for the Court so to issue notice.

The order of Raymond, A. J. C., therefore, dispensing to issue of notice was a perfectly good order in the circumstances and was made on due cause shown, it being represented to him that the opponent had left India. The circumstances which made it appear that it was difficult to serve notice rendered it very undesirable to delay the enquiry until notice had been issued.

We, therefore, dismiss this application.

Z. K. *Application dismissed.*

LAHORE HIGH COURT.

CRIMINAL MISCELLANEOUS CASE No. 58 OF 1925.

March 3, 1925.

Present:—Justice Sir Henry Scott-Smith, KT.

EMPEROR—APPLICANT

versus

GHULAM MOHAMMAD AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 497, 498—Bail—Policy of law.

The policy of the law is to allow bail in case of under-trial prisoners rather than to refuse it.

It is no ground for refusing bail that to grant it would prejudice the case.

Mr. *Petman*, for the Accused.

ORDER.—I have seen the record and do not consider that the case is of such a serious nature that bail should be refused. The only reason given by the Magistrate for refusing bail is that to grant it would be prejudicing the case. This is not correct. The present policy of the law is to allow the bail in the case of under trial prisoners rather than to refuse it.

Accused may be released on bail with one surety each in Rs. 500.

Z. K. *Order accordingly.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 647 OF 1925.
November 18, 1925.
Present:—Mr. Justice Daniels.
EMPEROR—PROSECUTOR
versus
Musammat KESAR—ACCUSED—
OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s 562—Penal Code (Act XLV of 1860), s 309—Attempt to commit suicide—Release on security—Revision—Order, whether can be set aside.

Section 562 (3), Cr. P. C., empowers the High Court in the exercise of its powers of revision to set aside an order under s. 562 and substitute a sentence of imprisonment

An attempt to commit suicide should not be treated lightly.

Criminal reference made by the District Magistrate, Jhansi, dated the 14th of October 1925.

REFERRING ORDER.—In the case of *Emperor* v. *Musammat Kesar*, under s. 309 of the Indian Penal Code, the Magistrate convicting the accused has dealt with the case under the provisions of s. 562, Cr. P. C., and taken security from her for her appearance if called on within one year.

It is proved that the accused jumped into a well merely in consequence of a quarrel with a woman neighbour in which abuse only was exchanged. The Magistrate considers that her object was to cast ignominy on the person she had quarrelled with.

I consider that no adequate punishment has been awarded and that the law has not been vindicated.

There is an increasing tendency among Magistrates to avoid punishing attempts of suicide. The law is clear but it is rapidly becoming a dead letter. If s. 309 is to be retained it must be enforced, and I feel that if it is to be enforced a pronouncement is required from higher authority than mine.

I, therefore, refer this case to the Hon'ble High Court for orders. I have selected it for reference because there can be no plea for the accused that she acted in desperation induced by suffering or shame.

The Magistrate will make such representation in support of his judgment as he may wish.

Dr. *N. C. Vaish*, for the Opposite Party.

JUDGMENT.—For the reasons given by the District Magistrate I accept this Reference and substitute a sentence of fourteen days simple imprisonment for the order under s. 562 of the Cr. P. C. passed by the Court below. Dr. Vaish for the applicant has referred me to a ruling of the year 1914, *Emperor* v *Ghasite* (1), in which it was held that the only procedure open to the High Court in such a case was to order a re-trial. The law has since been amended, and s 562, sub-s (3), empowers the High Court in the exercise of its powers of revision to set aside an order under s. 562 and substitute a sentence of imprisonment.

Z K. *Reference accepted.*

(1) 26 Ind. Cas 635, 37 A 31, 12 A. L. J. 1244, 16 Cr. L J. 43.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 540 OF 1925.
December 1, 1925.
Present:—Mr. Justice Sulaiman.
KALAP NATH—ACCUSED—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Police Act (V of 1861), s 34 (4)—Supplying water to public and receiving tips—Water, whether "exposed for sale"

A person who sets up a *chauki* (wooden board) with an earthen jar filled with water on a public place and supplies water to all those who want it, cannot be said to expose the water for sale within s 34 (4) of the Police Act, merely because sometimes some of the persons who take water do voluntarily give tips to him

The expression "exposes for sale" in s 34 (4), Police Act, implies that every person who takes any quantity of the thing exposed has to pay for it.

Criminal reference made by the Sessions Judge, Benares, dated the 27th July 1925.

REFERRING ORDER.—The applicant, Kalap Nath, has been convicted by a Magistrate, First Class of Benares, under s. 34, cl. (4) of Act V of 1861 and sentenced to a fine of Re 1 or in default to undergo one day's simple imprisonment till the rising of the Court. The case was tried summarily by the Magistrate. The applicant has come in a revision challenging the propriety of the conviction both on facts and law.

The accused was charged and convicted under s. 34 (4) of Act V of 1861. This section provides that any person who commits any of the offences mentioned thereafter to the obstruction, inconvenience and annoyance, risk, danger or damage of the residence or of the passengers is punishable under that section. In cl. (4) of the Act is mentioned as "any person who exposes any goods for sale". In the present case it was alleged that the accused had kept a *chauki* with an earthen jar over it and was supplying water to those who wanted it, and that it was on the public road. On the side of the

prosecution, was examined one Muhammad Hafiz, Head Constable, who took the accused to the *thana*. In his evidence he did not mention that the water was being supplied for price paid. There was no other evidence to show that the water was exposed for sale and unless this fact was proved the accused could not be convicted. The Trying Magistrate has come to an erroneous finding on this point and his reasonings are peculiar and illogical. One of the accused's witnesses Baijnath Prasad Vyas, happened to state, "sometimes *Brahmans* who supply water get some alms". The Trying Magistrate referring to this portion of the evidence jumped to this conclusion "*Brahmans* supplying water at *pausara* get alms". Later on he remarked in the judgment "his statement that *pausarawalas* get alms is true. Therefore though the water over the *chauki* was not technically exposed for sale the idea is that alms should be given in return for the drink which amounts to much the same thing". I am unable to follow the logic of the reasoning as it cannot be said by any stretch of language that the water was exposed there for sale. The witness had made a general statement that sometimes *Brahmans* who supply water get some alms which does not mean that the applicant was selling water. It was proved that he was employed by a lady to supply water during the hot month of May which is usually done by Hindus who consider it a maritorious act to supply water to those who require it. The water is never sold. If the man who supplies the water happens to be a *Brahman* it is quite possible that some of those who drink water may sometimes give him something as alms. But that fact alone would not convert the free supply of water into one for sale. It is also very doubtful whether the *pausara* was installed on a public road and there is nothing to refute the defence evidence that it did not obstruct the way of the passers-by and that the *pausara* was adjacent to a well at the place where it had been maintained during the previous years. Even if the *pausara* was kept on the public way the accused could not be convicted of an offence under s. 34, cl. (4) of the Police Act unless it was proved that the water was exposed for sale. He may be guilty of an offence under some other Act but not under s. 34 of the Police Act. There is absolutely no evidence that the water was exposed for sale and the finding of the lower Court is entirely erroneous. The conviction of the applicant was improper and although the matter is trifling but I think in the ends of justice the conviction should be quashed.

ORDER.—Under s. 438 of the Cr. P. C. I report the case for the orders of the Hon'ble High Court with the recommendation that the conviction may be set aside. The record will be submitted to the Hon'ble High Court with such explanation as the Trying Magistrate may like to offer.

Mr. *P. L. Banerji*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is a Reference by the Sessions Judge of Benares recommending that the conviction and the sentence passed on the accused under s. 34 (4) of Act V of 1861 should be set aside. The accused is apparently a servant of some lady who deputed him to supply water to all who wanted it at a public place. He set up a *chauki* (wooden board) with an earthen jar filled with water over it and supplied water to all those who wanted it. According to the order of the Judge it is not clear whether this board was set up on a public way nor is it clear whether it obstructed the way of the passer-by. But it is not disputed that it was set upon a public open space. Although sometimes some of the persons who took water did voluntarily give tips, it is difficult to say that water was actually *exposed for sale* within the meaning of sub-cl. (4) of the section. The expression 'exposes for sale' implies that every person who takes any quantity of it has to pay for it. This obviously is not what used to happen. The witnesses have merely stated that 'sometimes *Brahmans* who supply water get some alms'. This does not show that the water which is supplied is exposed for sale. All that I have to decide in this case is whether an offence under s. 34 (4) was committed. In holding that no such offence was committed, I am by no means suggesting that the accused was not guilty of any other offence under some other Act, nor am I suggesting that he was in any way justified in occupying a part of the public ground in the way he did. I accordingly accept the Reference and setting aside the conviction and sentence passed on the accused acquit him of the offence with which he was charged. I direct that the fine, if paid be refunded.

N. H. *Reference accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No 107 OF 1923.

June 24, 1925.

Present :—Mr. Justice Cuming and Mr. Justice Chakravarti.

BASHIRULLA BHUIYA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MEAJAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss 16, 74—Landlord and tenant—Kabuliyat—*Interest, high rate of—Undue influence—Penalty*

In the absence of any evidence that at the time when a *kabuliyat* was executed, the landlord exercised undue influence over the tenant and that the latter was not a free agent, the landlord is entitled to recover interest on arrears of rent at the rate stipulated in the *kabuliyat*

Appeal against a decree of the District Judge, Noakhali, dated the 19th of June 1922, affirming that of the Munsif, First Court at Lakshmipore, dated the 24th of June 1920.

Babu *Nagendra Nath Chaudhury*, for the Appellants.

Babus *Hem Kumar Bose* and *Biraj Mohan Majumdar*, for the Respondents.

JUDGMENT.

Cuming, J.—In the suit out of which this appeal has arisen the plaintiffs sued the defendants for recovery of arrears of rent and cesses alleged to be due for the years 1323 to 1325 for a certain *howla jama* at an annual rent of Rs. 9-9 0 with interest at the rate of 75 per cent. per annum under a registered *kabuliyat* dated the 1290 *B. S.* corresponding to 1884.

The Court of first instance decreed that plaintiffs' suit as against defendants Nos. 3 and 6 on contest and *ex parte* against the other defendants at the rate of Rs. 9-9 0 per annum inclusive of cesses with damages at the rate of Rs. 25 per cent. He did not allow interest at the rate of Rs. 75 per cent. per annum as claimed by the plaintiffs. The plaintiffs appealed to the District Court. That Court held that cesses were included in the rent, and it further held that the plaintiffs were not entitled to interest at the rate of Rs. 75 per cent per annum on the ground that the stipulation to pay interest at the rate of Rs. 75 per cent. per annum was entered in the *kabuliyat* as a threat to ensure punctual realization of the rent and on this ground he dismissed the appeal.

The plaintiffs have appealed to this Court on the question of interest. They contend that they are entitled to the interest at the *kabuliyat* rate, that unless the defendants can show that the parties did not contract on equal terms or that one party was in a position to exercise undue influence over the other and took unfair advantage of the other they are entitled to the interest at the *kabuliyat* rate.

I think the appellants are entitled to succeed. No attempt has been made by the defendants to prove that at the time when the contract was entered into the plaintiffs were in a position to dominate the defendants and to exercise undue influence over them to induce them to enter into the contract, and that the defendants were not free agents in entering into the contract. The defendants having failed to prove this the plaintiffs are clearly entitled to the interest at the rate stated in the *kabuliyat*.

The appeal is, therefore, decreed and the decree of the lower Appellate Court is modified to this extent that the plaintiffs are entitled to interest at the rate of Rs. 75 per cent. per annum down to the date of the institution of the suit in the place of the damages at the rate of Rs 25 per cent. as allowed by the lower Appellate Court.

The appellants are entitled to the costs of this appeal and the proportionate costs in the two lower Courts.

Chakravarti, J.—I agree.

Z. K. *Appeal allowed: Decree modified.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 338 OF 1923.

September 30, 1924.

Present.—Mr. Justice Ramesam and Mr Justice Jackson

TADEPALLI SUBBA RAO—DEFENDANT No. 1—APPELLANT

versus

MOTAMARI LAKSHMINARAYANA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Execution of decree—Mortgage-decree—Sale of properties, order of—Mortgagee, right of.

A mortgagee decree-holder is entitled to bring the mortgaged properties to sale in execution of his decree in any order he chooses whatever his motives may be. It is immaterial to his rights that the mortgagor had since the mortgage sold one of the mortgaged properties to some third person.

Appeal against an order of the District Court, Kistna, at Masulipatam, in E P. No. 24 of 1923, in O. S. No. 21 of 1921, on the file of the Court of the Subordinate Judge, Masulipatam.

FACTS.—The plaintiff, a mortgagee decree-holder, applied by petition for execution of his decree and prayed that a proclamation for sale may be issued in respect of the mortgaged immoveable properties under O. XXI, r. 66, C. P. C., and that they should be sold in a particular order and the amount collected and paid to the plaintiff. Objection was raised for the judgment-debtor that the first item which he had sold away ought to be sold first, but the Court directed the sale of the properties in the order in which decree-holder desired. The judgment-debtor appealed.

Mr. *P. Somasundaram*, for the Appellant.

Messrs. *T. Ramachandra Row* and *S. Subramanya Sastri*, for the Respondents.

JUDGMENT.—Assuming an appeal lies which is doubtful, we cannot interfere with the order of the Court below. The mortgagee is entitled to bring the properties to sale in any order he chooses. We cannot scrutinise his motives and even on the allegation of the appellant, there is nothing improper in those motives. The mortgagee cannot be in a worse position as to his rights because one of the mortgagor's properties has been purchased by some other person. The appeal is dismissed with costs of first respondent.

V. N. V.
N. H. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 51 OF 1923.
September 4, 1925.
Present:—Mr. Justice Odgers.

GONNABATHULA THAMMAYYA, BEING MINOR BY HIS NATURAL FATHER AND NEXT FRIEND GONNABATHULA AUDEYYA —PLAINTIFF—APPELLANT
versus
GONNABATHULA CHINNAYYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence—Inadmissible evidence, whether can be admitted by consent of parties—Proof, mode of—Waiver.

The consent of parties cannot make a piece of evidence relevant and admissible, which is not relevant and admissible under the provisions of the Evidence Act [p 595, col 2.]

It is open, however, to the parties to waive the benefit of those provisions of the Evidence Act which lay down the mode of proof of a document or statement, which, if proved, would be relevant. [*ibid.*]

Second appeal against a decree of the Court of the Additional Subordinate Judge, Vizagapatam, in A. S. No. 96 of 1922, (A. S. No. 335 of 1921, on the file of the District Court, preferred against that of the Court of the District Munsif, Yellamanchilli, in O. S. No. 131 of 1920.

Mr. *B. Somayya*, for the Appellant.

Mr. *V. Govindarajachari*, for the Respondents

JUDGMENT.—The question in this suit was whether the plaintiff had been adopted by one Chinnayya before his death in September 1918. The District Munsif came to the conclusion on the evidence before him that the plaintiff was so adopted. On appeal to the Subordinate Judge, the Subordinate Judge came to a different conclusion on the evidence. It is contended in second appeal that the conclusion which the Subordinate Judge came to was influenced by the reception in evidence of Ex. A and Ex. II. These were attempted to be put in before the learned District Munsif but were rejected. Therefore, application was made to the Subordinate Judge to admit these. Exhibit A is a public copy of the deposition of P. W. No. 3 (4th defendant herein) before the Revenue Inspector. The request to admit this Ex. A was made by the respondent, and on that application the learned Subordinate Judge makes this note :

" P. L. N., who argues the case for the appellant's learned Vakil, has no objection to have the document marked. Mark this as an exhibit on the plaintiff's side A."

As to Ex. II this is a statement made by the natural father of the adopted boy and the Judge's note on the petition to admit that is :

" There is no objection to the statement made by the natural father".

The question I have to consider is whether the consent or want of objection by which Exs. A and II, were admitted in evidence by the Subordinate Judge is valid or whether as contended for by Mr. Somayya for the appellant the documents would naturally become evidence if and when they were put to the witness either to corroborate or

contradict them. In other words, is the consent to the reception of these matters simply a waiver of formal proof or does it go to the root of the matter and is it an attempt to make evidence of what is really not evidence under the provisions of the Evidence Act? I may at once say that Ex A is sought to be put in under s. 157 and Ex II, under s. 145. Several cases have been quoted, for instance *Bhavamma* v. *Ramamma* (1). By s. 145 of the Indian Evidence Act, the credit of a witness may be impeached by proof of his former inconsistent statements, and before a witness can be impeached he must be given an opportunity of making any explanation which is open to him. And further in *Bal Gangadhar Tilak* v. *Shri Shriniwas Pandit* (2) documents had been used for the purpose of contradicting witnesses without calling their attention to the portion of the documents so used. These depositions in a criminal case were imported in bulk into a civil enquiry as to a question of adoption Their Lordships of the Privy Council held that there were no circumstances in that case to bring the matter within the purview of s 33 of the Evidence Act, nor any warrant for using the documents for the purpose of either contradicting or discounting the evidence of the witnesses given in the suit. There is no question there of any consent or waiver of objection. On the other hand in a Full Bench case in this Court *Jainab Bibi Saheba* v. *Hyderally Saheb* (3), it was held that the evidence recorded in a previous proceeding between the same parties may be made admissible in a subsequent proceedings by their consent. Coutts Trotter, J, there said :—"It is clear that in this country neither an omission by an Advocate to object to the giving of irrelevant and inadmissible evidence, nor the failure of the tribunal to exclude it of its own motion, will validate a decree based on material which the Evidence Act declares to be inherently and in substance irrelevant to the issue. A wholly different question arises where the objection is not as to the nature and quality of the evidence in itself, but merely as to the mode of proof put forward"

And the learned Judge holds that "consent can cure what would otherwise be a defective method of letting in evidence in its substance and context relevant and germane to the issues"

I am of opinion that this is what has happened in the present case, namely, that there has been consent or waiver of objection to the mode in which these statements which are admittedly relevant under the Evidence Act should be admitted to the record An earlier case in *Inugunti Prakasa Rajaningaru* v *Yeranki Venkata Rao* (4) is to the same effect. There the learned Judge says —

"The facts admitted in evidence being themselves relevant, the provisions of law intended to test the credibility of witnesses or to enable the Trying Judge to make the test himself are not of such an important character that parties cannot waive the benefit of those provisions".

I am, therefore, of opinion that the learned Subordinate Judge was justified in receiving these oral statements Exs. A and II, and in estimating the oral statements made by the witnesses in the light of the statements made by them in these documents.

The second appeal must, therefore, be dismissed with costs.

V. N V.

Z. K. *Appeal dismissed.*

(1) 21 Ind Cas 319, 38 M 160, 25 M L J 360 (1913) M. W N 800

(1) 78 Ind Cas 176, 19 L W 205, (1924) M W N 270, 34 M L T. 555; (1924) A. I R (M) 537

(2) 29 Ind Cas 639, 39 B 441 at p. 461, 13 A L J. 570, 19 C W N 729, 17 Bom L R 527, 22 C L J 1; 29 M. L J 34; 18 M L T 1, (1915) M W. N. 484, 2 L W. 611, 42 I A 135 (P C)

(3) 56 Ind. Cas. 957; 43 M. 609, 38 M L. J. 532; 28 M. L. T. 23; (1920) M. W. N. 360; 12 L. W. 64.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND APPEAL No. 640 OF 1925.

October 27, 1925

Present.—Mr. Justice Campbell

MUNSHI RAM—DEFENDANT—APPELLANT

versus

BHAGWAN DAS, PROPRIETOR OF THE FIRM THAKUR DAS-NATHU MAL—PLAINTIFF, KUNJ BEHARI LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch I, Art 83—Principal and agent—Suit by agent for re-imbursement—Limitation

A suit by a commission agent for re-imbursement of losses paid on behalf of his principal is governed by Art 83 of Sch I to the Limitation Act, and limitation in respect of each item begins to run from the date of damnification. [p. 596, col. 2, p. 597, col. 1.]

Miscellaneous second appeal from an order of the Additional District Judge, Hoshiarpur, dated the 8th December 1924, reversing that of the Subordinate Judge, Second Class, Hoshiarpur, dated the 4th February 1924.

Lala *Fakir Chand*, for the Appellant.

Diwan *Mehr Chand*, for the Plaintiff-Respondents

JUDGMENT.—This was a suit to recover the losses alleged by the plaintiffs to have been sustained by them in certain dealings in lac which they undertook as commission agents on behalf of the defendants. The first Court held that the suit came within the scope of Art. 83 of the Indian Limitation Act and that the plaintiffs had failed to prove that it was within time. On appeal the learned Additional Judge held that Art 64 was the Article applicable and that the suit was within time, since by Punjab Act I of 1904 the period of limitation under that Article was enlarged to six years.

One of the defendants challenges this finding in second appeal.

The plaintiffs made on behalf of the defendants two purchases, each of 100 maunds of lac, in Mirzapur, one in August and the other in September, 1916. Delivery was to be on the 15th October 1916. On that date an entry was made in the plaintiff's account book by which the defendants acknowledged a balance of Rs. 2,550 against them and agreed to re-pay it with interest at 8 annas per cent. per mensem. The plaintiff set forth this in his plaint describing the account as "*Hisab yaddasht zabani mutabiq kharid-o-farokht*" and stated that on the one contract a loss of Rs. 1,875 had been estimated and on the other a loss of Rs. 1,450. To these sums Rs. 225 commission was added and the total came to Rs. 3,550. From this were deducted two payments of Rs. 500 each made in advance by the defendants and thus the balance against them was Rs 2,550. The plaint went on to set forth other and subsequent accounts which ignored the balance of Rs. 2,550 and commenced afresh with the charge of Rs. 3,550 against the defendants. They were debited further with Rs. 2-5 miscellaneous charges for telegrams. etc, Rs. 713 7-9, described as the actual loss subsequently ascertained as having been incurred on one of the contracts, and an extra charge of Rs 71-8 for commission on the other contract. On the other side the defendants were given credit for Rs. 1,000 (the two advance payments of Rs. 500 each), for Rs. 492-8 representing a subsequent advance payment for yet another transaction which had not materialized, and for Rs. 1,875 which had been the estimated loss calculated on the 15th October 1916 of the transaction on which the actual loss was afterwards found to Rs. 713-7-9 only. The plaintiffs in due course produced their books showing these accounts set forth as described after the signed balance. The learned Additional Judge observed that the plaint had been unhappily worded but that, in his opinion, the claim was not one by a commission agent for the re-imbursement of losses paid on behalf of his principal but a suit on accounts stated in writing signed by the defendants, that is to say, the account balanced on the 15th October 1916. The subsequent accounts he regarded merely as certain sums credited later in good faith by the plaintiffs thinking that the defendants were entitled to them. He held that from the 15th October 1916 the risk on the two contracts had become that of the plaintiff, and that the defendants could not have been called upon to pay more than Rs. 2,550 if the losses had been found later on to exceed that sum.

A flaw in this view is that the plaintiff actually claimed Rs. 71-8 as commission in addition to the commission item of Rs. 225 included in the balance. In my opinion the claim made in the plaint was not based on the balance at all, but mention of the balance was only designed to meet a possible plea that the transactions were mere gambling transactions and the claim was made on other and subsequent figures which superseded and ignored the balance altogether.

The suit was not one for money payable on accounts stated between the parties instituted within six years of the date on which the accounts were stated in writing signed by the defendants.

I hold the decision of the first Court to have been right, that Art. 83 governed the suit. This decision is supported by *Manghi Ram* v. *Firm of Saran Das-Maman Chand* (1) and by other subsequent rulings. It has been urged by the learned Counsel for the respondents that in any case under Art. 83 the suit would be in time in respect of the claim for Rs. 713-7-9 but all that

(1) 26 Ind. Cas. 415; 23 P. R. 1915; 35 P. W. R. 1915; 100 P. L. R. 1915.

appears regarding this is a statement by the plaintiff that the amount was debited against the defendants in his books on the 31st July 1919. There is no evidence of when the plaintiff actually had to pay it and I agree with the first Court that the plaintiff has failed to prove the date of damnification in respect of any of his claim.

I, therefore, accept the appeal and dismiss the suit with costs throughout.

Z. K. *Appeal accepted.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 415 OF 1922

October 6, 1925.

Present.—Mr Justice Devadoss and Mr. Justice Waller.

MUHAMMAD MOHIDEEN MARACAYAR —APPELLANT

versus

RAMANADHAN CHETTIAR AND ANOTHER —RESPONDENTS

Civil Procedure Code (Act V of 1908), O XXI, r 90—Execution of decree—Property sold as belonging to judgment-debtor—Previous sale by judgment-debtor—Application by judgment-debtor to set aside auction-sale, maintainability of

Where, in execution of a decree, certain property is sold as belonging to the judgment-debtor, the latter is entitled to maintain an application to set aside the sale on the ground of material irregularity in the publication and conduct of the sale, and the application cannot be thrown out on the ground that the judgment-debtor had prior to the date of the auction sold the property to a third person and had thus ceased to have an interest in the property

Appeal against an order of the Court of the Subordinate Judge, Mayavaram, in E. A. No. 210 of 1922, dated the 22nd August 1922, in O. S. No. 4 of 1921, on the file of the Court of the Subordinate Judge, Negapatam.

Mr. *K. Rajah Iyer*, for the Appellant.

Mr. *A. Krishnaswamy Iyer*, for the Respondents.

JUDGMENT.—This is an appeal against the order of the Subordinate Judge of Mayavaram dismissing the appellant's petition for setting aside a sale under O. XXI, r. 90. The Subordinate Judge dismissed the application on the ground that the judgment-debtor had no interest in the properties, he having sold them to Velu Pillai before the date of auction sale. The properties were sold as those belonging to the appellant. If the properties did not belong to him, the decree-holder could not have brought them to sale in execution of his decree and the Court could not have sold the properties as those belonging to the appellant It cannot, therefore, be said that, when he applies under r 90 of O. XXI to have the sale set aside on the ground of irregularity in publishing and conducting the sale, his interests are not affected. Rule 90 is wide in its terms. It says "the decree-holder or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it." Here the property was sold as the property of the appellant and we fail to see how they ceased to be his properties before the date of sale If he had any interest at the time when the properties were sold, it cannot be said that his interest in them had ceased by virtue of the sale which would prevent his applying r. 90. We think the order is bad in law and we set it aside and direct the Subordinate Judge to restore the application to file and dispose of it on the merits. Costs of the appeal will be provided for by the lower Court when it disposes of the application.

V. N. V *Appeal allowed.*

Z. K.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2647 OF 1924.

December 1, 1925.

Present:—Mr. Justice Campbell.

Rao Sahib Chaudri NAND RAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

ISHAR AND OTHERS—PLAINTIFFS—RESPONDENTS

Punjab Tenancy Act (XVI of 1887), ss 50, 77 (3) (g), (i)—Limitation Act (IX of 1908), s 18—Landlord and tenant—Dispossession of tenant by landlord—Suit by tenant to recover possession—Jurisdiction of Civil and Revenue Courts—Fraud—Extension of limitation

Sub-clauses (*g*) and (*i*) of s 77 (3) of the Punjab Tenancy Act cover all conceivable causes of litigation between a landlord and his tenant *qua* tenant, and an ex-tenant in that capacity, can look for no relief outside the Revenue Courts

If a tenant, who has been wrongfully dispossessed of his tenancy in the circumstances mentioned in s 50 of the Punjab Tenancy Act, allows the period of one year prescribed by that section to expire without

bringing a suit in the Revenue Court, he loses his remedy altogether, and by the combined operation of ss 50 and 77 (3) (*g*) is debarred from bringing a suit for recovery of possession or for compensation or for both in a Civil Court

In a suit by a tenant to recover possession of his holding from which he has been dispossessed by the landlord, it is not any alleged fraud by which dispossession was carried out by the landlord which is pertinent for the purposes of s 18 of the Limitation Act, but the fraud by which the plaintiff has been kept from the knowledge of his right to institute a suit

Second appeal from a decree of the District Judge, Hissar, dated the 30th June 1924, affirming that of the Munsif, First Class, Hissar, dated the 1st August 1924.

Mr. *Shamair Chand*, for the Appellants.

Pandit *Nanak Chand*, for the Respondents.

JUDGMENT.—The plaintiffs in this suit alleged themselves to be occupancy tenants of certain land and the defendants to be the landlords. They sued for possession on the ground that in 1917 at a time when the plaintiffs had arranged for the cultivation of the occupancy tenancy by sub-tenants, the defendants landlords got a mutation sanctioned removing the plaintiffs' names from the record as occupancy tenants and thereby dispossessed them. The suit was for possession of the land comprised in the tenancy.

The defendants pleaded that the plaintiffs had lost their rights of occupancy by abandonment.

Both Courts below have concurred in decreeing the plaintiffs' claim In second appeal the objection is raised for the first time that the suit was cognizable by a Revenue Court and not by a Civil Court. It is obvious that this is so.

The alleged dispossession took place on the 15th December 1917 and the suit was instituted on the 11th January 1921. In a precisely similar case of *Mahindar Singh* v. *Allah Ditta* (1) it was held that cases of this nature are fully covered by the decision in the Full Bench case of *Akbar Hussain* v. *Karam Dad* (2). In the judgment of Mr, Justice Shah Din in the latter case it is laid down that if a tenant, who has been wrongfully dispossessed of his tenancy in the circumstances mentioned in s. 50 of the Punjab Tenancy Act, allows the period of one year prescribed by that section to expire without bringing a suit in the Revenue Court, he loses his remedy altogether, and by the combined operation of ss. 50 and 77 (3) (*g*) is debarred from bringing a suit for recovery of possession or for compensation or for both in a Civil Court. This pronouncement was made after considering the observations of Sir Meredith Plowden in the referring order to P. R 1891 [*Kesar Singh* v. *Nihal Singh* (3)], and it appears to me to be conclusive in respect of the present suit. In the same case *Akbar Hussain* v. *Karam Dad* (2) it was rightly pointed out by Rossignol, J., that s. 77 (3) (*g*) and (*i*) appear to cover all conceivable causes of litigation between a landlord and his tenant *qua* tenant, and that an *ex*-tenant, in that capacity, can look for no relief outside the Revenue Courts.

In the present instance the plaintiffs allege themselves to be tenants who have never abandoned their tenancy and the suit is not cognizable by a Civil Court.

I have been asked to consider the facts that no previous objection to jurisdiction was raised and that fraud was alleged in the plaint in deciding whether an order should be passed under s. 100 (3) of the Punjab Tenancy Act and the decree of the first Court ordered to be registered as that of an Assistant Collector. No specific allegation, however, is made in the plaint of the particular fraud by which dispossession was concealed from the plaintiffs by the defendants, and for purposes of s. 18 of the Limitation Act it is not the alleged fraud by which dispossession was carried out which is pertinent, but the fraud by which the plaintiffs have been kept from the knowledge of their right to institute a suit. As for the failure of the defendants to raise the question of jurisdiction before, it is not contended that this precludes me from going into this question in second appeal, and in view of the rulings of this Court cited above, to which I adhere, it would be vexatious to order otherwise than that the suit should be dismissed. I accept the appeal and dismiss the suit with costs throughout as being a suit which the lower Courts had no jurisdiction to hear.

Z. K. *Appeal accepted.*

(1) 78 Ind. Cas. 346; (1924) A. I. R. (L.) 539.
(2) 48 Ind. Cas. 8; 90 P. R. 1918.
(3) 45 P. R. 1891.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 109 OF 1925
AND
CIVIL REVISION PETITION No. 208 OF 1925
AND
CIVIL MISCELLANEOUS PETITION No. 1170 OF 1925.

April 3, 1925.

Present:—Sir Victor Murray Coutts-Trotter, KT., Chief Justice, and Mr. Justice Wallace.

CHOCKALINGAM PILLAI AND ANOTHER —DEFENDANTS NOS. 2 AND 3—PETITIONERS—APPELLANTS

versus

P. K. P. S PICHAPPA CHETTIAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O VI, r. 17, O XL, r. 1—Suit to enforce agreement to execute simple mortgage—Receiver, whether can be appointed—Suit for specific performance of agreement to sell—Amendment of plaint to include prayer for possession, whether permissible

In a suit for specific performance of an agreement to execute a simple mortgage, it is not competent to the Court to appoint a Receiver pending suit to take charge of the property in suit and thus do by way of receivership what it would not be entitled to do even by way of decree

It is open to the Court in a suit for specific performance of an agreement to sell immoveable property also to give a decree for possession In such a suit it is not an improper exercise of discretion for the Court to allow the plaint to be amended so as to include an express prayer for possession

Appeal against an order of the Court of the Additional Subordinate Judge, Ramnad at Madura, in I. A. No. 42 of 1925, in O. S. No. 39 of 1924 and petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, to revise an order of the Court of the Additional Subordinate Judge, Ramnad at Madura, in I. A. No. 295 of 1924, in O. S. No 39 of 1924, and petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an order directing stay of all further proceedings by the Receiver appointed in O. S. No. 39 of 1924, on the file of the Court of the Additional Subordinate Judge, Ramnad at Madura, pending disposal of A. A. O. No. 109 of 1925, preferred to the High Court against an order of the said Court of the Additional Subordinate Judge, Ramnad at Madura, in I. A. No. 42 of 1925, in O. S. No. 39 of 1924.

Messrs. *T. R. Ramachandra Iyer* and *K. S. Venkataramani*, for the Appellants.

Messrs *K. R. Venkatarama Iyer* and *Watrap S. Subramania Iyer*, for the Respondents.

JUDGMENT.—This appeal is against the order of the Additional Subordinate Judge of Ramnad at Madura appointing a Receiver in respect of the schedule properties in the suit which, according to the plaintiff's case, the defendants Nos. 1 to 3 had contracted to sell to him, and of the B schedule properties in the plaint which, according to the plaintiff, the defendants Nos. 1 to 3 had agreed to mortgage to him by simple mortgage. The suit is a suit for specific performance *inter alia* of this contract to sell and to execute a simple mortgage. Mr. T. R. Ramachandrier for the appellant contends that at any rate so far as the B schedule properties are concerned, it is not open to the lower Court to appoint a Receiver, the point being that the lower Court cannot by way of receivership do what it would not be entitled to do even by way of decree. At the highest, the plaintiff is entitled if he succeeds only to a simple mortgage on these properties, and having obtained this simple mortgage he could not immediately sue for possession. He is not entitled on the simple mortgage to possession. The most he could do is to enforce a sale on foot of the mortgage. We think that this argument is sound and that the lower Court was not justified in appointing a Receiver so far as the B schedule properties are concerned.

So far as the A schedule properties are concerned, Mr. T. R. Ramchandrier has also argued that the lower Court has exercised its discretion improperly in appointing a Receiver in respect of properties of which the plaintiff, in the first instance at least, is only asking for specific performance of sale and not for possession. Subsequently, however, the plaintiff was allowed to amend his plaint and put forward a prayer for possession of these properties also. A civil revision petition has been filed here against this amendment of the plaint and we deal with this now. Various rulings of this Court have been quoted to us, as also Form 47 of the First Schedule to the C. P. C., which set out that it is open to the Court in a suit for specific performance of sale, also to give a decree for possession. We are not, therefore, prepared to say that the lower Court exercised its discretion wrongly in permitting the amendment of the plaint and allowing the plaintiff to add a prayer for possession of the A schedule properties. That being so, the plaintiff's prayer for possession will

stand, and in these circumstances we do not think we can say the lower Court exercised its discretion wrongly when it appointed a Receiver in respect of those properties, a decree for possession of which the plaintiff would be entitled to if he succeeds.

In these circumstances we dismiss C. R. P. No. 208 of 1925. No order as to costs.

As regards C. M. A. No. 109 the lower Court's order is set aside so far as the B schedule properties are concerned and the Receiver, if he has taken over charge of these properties must be discharged of it. No order as to costs.

V. N. V. *C. M. A. partly allowed.*
Z. K. *C. R. P. dismissed.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 31 OF 1925.
November 19, 1925.
Present:—Mr. Justice Sulaiman and Mr. Justice Mukerji.

MUMTAZ ALI—PLAINTIFF—APPELLANT
versus
ALLAH BANDA—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s 104 (f), O. XXIII, r 3, O XLIII, r 1 (m), Sch II, paras 20, 21—Arbitration—Award—Decree on award—Appeal—Remand—Appeal, second, whether lies

During the pendency of a suit the plaintiff made what purported to be an application under para 20 of Sch II, C P C, stating that the matter in suit had been referred to arbitration and that an award had been made and requesting that the award may be filed and a decree passed in accordance with it. Defendant filed objections denying any valid reference to arbitration or the making of any valid award The Court took evidence and decided that a valid reference and a valid award had been made and passed a decree in terms of the award On appeal the lower Appellate Court held that no award had been made and remanded the case to the first Court for trial according to law On second appeal by the plaintiff·

Held, (1) that the order of the Trial Court although in form a decree, must be treated as an order directing that the award be filed, and that as such it was open to appeal,

(2) that even if it was regarded as an order recording a compromise it was still an order open to appeal;

(3) that the appeal preferred by the defendant to the lower Appellate Court must, therefore, be treated as an appeal from an order, with the result that no second appeal was competent.

First appeal from an order of the Additional Subordinate Judge, Meerut, dated the 3rd December 1924.

Mr. *Haribans Sahai*, for the Appellant.
Mr. *S. A. Haider*, for the Respondent.

JUDGMENT.—This purports to be a first appeal from order of remand. In the course of a pending suit, while a Commissioner was appointed by the Court to draw up a sketch plan, the parties are alleged to have agreed to refer their dispute to two arbitrators who went to the spot and made two marks on the land to indicate the line which should be drawn beyond which the defendant's construction should not extend. On the 22nd of April 1924 an application purporting to be one under Sch. II, r. 20 of the C. P. C., was filed by the plaintiff with a request that the alleged award made by the arbitrators should be filed in Court. Objections were filed on the 26th of April denying any valid reference to the arbitrators or the making of any valid award. The Court of first instance took evidence and decided that a valid reference and a valid award had been made. But instead of passing first an order directing the award to be filed and then passing a decree in terms of it it passed a composite order decreeing the plaintiff's claim in terms of it. An appeal was preferred by the defendant to the lower Appellate Court purporting to be an appeal from the decree so passed by the learned Munsif. There is no reference in the judgment of the lower Appellate Court that the respondent's Vakil took the objection that no appeal lay to it. The lower Appellate Court came to the conclusion that the arbitrators had not made any award. It accordingly remanded the case to the Court below for trial according to law.

There can be no doubt that no appeal lies from a decree which is passed in terms of an award except in so far as it is at variance with the award. In this case there was a composite order passed by the Munsif and it is impossible to hold that the defendant was not entitled to any relief. Even if the order of the first Court were taken to be an order recording a compromise an appeal would lie from that order. In our opinion this case is on all fours with the ruling in *Jagat Pande* v. *Sarwan Pande* (1). The appeal to the Court below must be treated as an appeal from an order, with the result that no second appeal lies to this Court.

As there has been some confusion owing to the way in which the appeal was describ-

(1) 88 Ind. Cas 76; 23 A. L. J 440; L. R. 6 A. 350 Civ.; (1925) A. I. R. (A.) 401; 47 A. 743.

ed in the lower Appellate Court, we direct that the parties bear their own costs of this appeal.

Z K. *Order accordingly.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1264 AND 1265 OF 1923.

June 9, 1925

Present.—Justice Sir Ewart Greaves, KT., and Mr. Justice B B. Ghose.

ADAM SARDAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

BISWESWAR DAS AND OTHERS—PLAINTIFFS—RESPONDENTS

Bengal Tenancy Act (VIII of 1885), s 105—Civil Procedure Code (Act V of 1908), O XLI, r 27—Landlord and tenant—Assessment of additional rent for additional area—Memorandum of measurement, admissibility of—Appeal—Additional evidence, admission of—Procedure

In a proceeding under s 105 of the Bengal Tenancy Act for assessment of additional rent for additional area, a document purporting to be a memorandum of measurement, which bears no date and about which it is not shown under what circumstances it was prepared, cannot be admitted in evidence

An application was put in before an Appellate Court asking that a document attached to the application should be admitted in evidence The only order passed on the application was, "file with the record"

Held, that the document was not properly admitted in evidence

Appeals against the decrees of the Special Judge, Jessore, dated the 19th of January 1923, modifying those of the Assistant Settlement Officer, Magura, dated the 10th of June 1922

Babu *Profulla Kamal Das*, for the Appellants.

Mr. *Sarat Chandra Basak* (with him Babus *Kanai Dhone Dutt* and *Sudhansu Sekhar Kar*), for the Respondents.

JUDGMENT.—These two appeals are by the defendants against the decisions of the Special Judge of Jessore modifying the decision of the Assistant Settlement Officer The proceedings out of which these appeals arise were proceedings under s 105 of the Bengal Tenancy Act by the landlord for enhancement of rent under the provisions of s. 52 of the Bengal Tenancy Act and also for the assessment of additional rent for additional area. The plaintiffs' case under s. 52 failed but in the lower Appellate Court, the learned Judge has allowed additional rent for additional area and he has arrived at his conclusion by admitting in evidence a certain document, a memorandum which is referred to in his judgment as showing the standard of measurement in Mahmudshahi *Parganna*. One ground of appeal by the defendants in these two appeals is that this memorandum should not have been admitted in evidence in the Appellate Court and the document is further attacked on the ground that there is nothing to show that the measurement stated in the memorandum was the measurement prevailing at the time the land was originally let out, that is, in the years 1866 and 1898 and it is further objected that there is no evidence to show in what circumstances the memorandum was prepared. We think this objection is well founded. The document has been produced before us —or rather a certified copy thereof It bears no date and there is nothing to show how and under what circumstances it was prepared. Some suggestion was made on behalf of the respondents that it was prepared under the provisions of s 92, subs. (3) of the Bengal Tenancy Act. There is nothing to show this and under the circumstances, we do not think that the document should have been admitted in evidence It is suggested, however, that three rent suits were tried together and, by consent, the evidence taken in one was to be treated as evidence in the other suits, and that by inadvertance this memorandum was only marked in the suit in which evidence was taken, but this is really a conjecture and is not founded on any certainty and we do not think that we should be justified in acting upon it. Moreover, it appears that the document was not properly admitted in evidence by the Appellate Court. The record shows that a petition was put into which the document was attached asking that it should be admitted in evidence and that on this petition the only order which was made was "file with the record." Under the circumstances, it seems to us that the document was not properly admitted and that the learned Judge should not have acted upon it. Moreover, even if it was admitted, for the reasons which I have already stated, it does not seem to us that it is a document which could have been relied on having regard to the absence of any evidence of the circumstances under which it was prepared.

For these reasons, we think, that the appeals must succeed. We, accordingly, set aside the decrees of the lower Appellate Court and restore the judgment of the learned Assistant Settlement Officer. The defendants-appellants will be entitled to their costs of this appeal and in the lower Appellate Court. Hearing-fee 3 gold *mohurs* in each case.

Z. K. *Appeals allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2354 OF 1924.

May 25, 1925.

Present:—Mr. Justice Abdul Raoof.

MUNICIPAL COMMITTEE, FEROZEPORE CITY—DEFENDANT—APPELLANT

versus

MILKHI RAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Appeal, second—Mala fides, *whether question of fact—Interference by High Court*

A finding that a certain action of a Municipality was prompted by *mala fides* is a finding of fact, and cannot be questioned in second appeal

Second appeal from a decree of the District Judge, Ferozepore, dated the 15th June 1924, affirming that of the Junior Subordinate Judge, Ferozepore, dated the 9th October 1923.

Sheikh *Niaz Muhammad*, for the Appellant

Lala *Jagan Nath Aggarwal*, and Mr. *Mukand Lal Puri*, for the Respondents.

JUDGMENT.—This appeal has arisen out of a suit for injunction against the Municipal Committee of the Ferozepur City restraining them from constructing a drain through the compound of the plaintiffs. It is an admitted fact that an alternative scheme for another drain prepared by a retired Engineer Sultan Singh had been approved. The Municipal Committee by passing a certain resolution in spite of the report of competent authorities that the scheme prepared by Sultan Singh was most appropriate and less expensive approved the scheme prepared by one Muhammad Nawaz Khan. The objections raised by the plaintiffs were overruled as being barred by time. Hence the present suit was instituted on the main ground that the Municipal Committee had acted *mala fide*. The issue to be decided in the case was whether the action of the Municipal Committee was *mala fide* and whether the plaintiffs are entitled to maintain the suit. Both the Courts below have concurrently found that the action of the Municipal Committee was *mala fide*. The lower Appellate Court, after examining all the relevant authorities on the question raised in the case and after considering the various resolutions passed by the Municipal Committee from time to time on the subject and after discussing the evidence on the record, recorded the following finding :—

"This action of the Municipality was tainted with *mala fides*. It was arbitrary, capricious, wanton, oppressive and unreasonable."

Mr. Jagan Nath, the learned Counsel for the respondent, has contended that this is a finding of fact which cannot be interfered with in second appeal. Mr. Niaz Muhammad, on the other hand, has contended that these are conclusions drawn from the facts found and may be properly treated as raising questions of fact. On the facts found by the lower Appellate Court one can come to no other conclusion than that arrived at by the Court below. In *Abdul Samand* v. *Municipal Committee of Delhi* (1) the learned Judges held that the finding as to *bona fides* under circumstances similar to those in the present case was a finding of fact. In my opinion there is no room for interference in second appeal.

I, therefore, dismiss the appeal with costs.

The preliminary objection which was raised before Mr. Justice Harrison was not pressed before me because it was frankly admitted by Mr. Jaggan Nath, the learned Counsel for the respondents that a resolution was passed authorising Muhammad Nawaz Khan to file the appeal.

Z. K. *Appeal dismissed.*

(1) 35 Ind Cas. 377, 75 P. R. 1916, 140 P. L. R. 1916, 154 P. W. R. 1916.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No 369 OF 1924.
September 3, 1925.
Present:—Mr. Justice Devadoss and Mr Justice Waller.
M. A. R. R M. P. MUTHU VEERAPPA CHETTIAR—PETITIONER—CREDITOR—APPELLANT
versus
U. K. SIVAGURUNATHA PILLAI—DEBTOR—RESPONDENT.

Provincial Insolvency Act (V of 1920), s 24—Hindu Law—Joint family—Debts incurred by father—Sons, whether can be adjudicated insolvents

In the case of a joint Hindu family, if the father incurs debts and dies, the other members of the family do not stand towards him in the relation of heirs, they only succeed to him and the debts are binding upon them In such a case the other members are liable to be adjudicated insolvents in respect of the debts incurred by the father

Appeal against an order of the District Judge, Coimbatore, dated the 28th August 1924, in Insolvency Petition No. 43 of 1924

Mr. *M. Patanjali Sastriar*, for the Appellant.

Messrs. *T. R. Ramachandra Iyer* and *P. Balakrishna Menon*, for the Respondent.

JUDGMENT.—This is an appeal against the order of the District Judge of Coimbatore dismissing the appellant's application to adjudicate the respondent an insolvent. The learned Judge dismissed the application on the ground that the respondent should not be adjudicated in respect of his father's debt, as there was no personal liability on the part of the respondent in respect of such debt. The petitioner in his petition alleged that the respondent was pressed to pay the debt due to him and he requested the petitioner to give him time to collect the outstandings and pay him. Taking advantage of the time given to him, he made certain alienations in favour of certain creditors which the petitioner alleges to be fraudulent preferences. There is nothing in the Insolvency Act which prevents the undivided members of a joint Hindu family from being adjudicated insolvents in respect of debts due by the family. Each case would depend upon its circumstances. If the petitioner makes the necessary allegations and proves them, then the Court would be justified in adjudging the members of a joint family insolvents. In the case of a joint Hindu family, if the father incurs debts, and dies, the other members of the family do not stand in the relation of heirs; they only succeed to him and the debts are binding upon them. It was laid down by a Bench of this Court in *V. S. Rm Chokalingam Chettiar* v. *Tiruvenkatasami*, C. M A No 47 of 1916 that the relation of creditor and debtor existed between the lender and the members of a joint family in respect of debts incurred by the family That being so, there was no reason why the lower Court should not have enquired into the matter and disposed of the petition on the merits. We, therefore, set aside the order and direct the District Judge to restore the petition to file and dispose of it according to the provisions s. 24 of the Provincial Insolvency Act. Costs will abide the result.

V. N. V
Z K.

Case remanded.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No 524 OF 1924.
December 14, 1925.
Present —Mr Justice Misra and Mr Justice Ashworth.
THE BENGAL NORTH-WESTERN RAILWAY—DEFENDANTS—APPELLANTS
versus
BANSI DHAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Carriage of goods—Railway Company—Risk Note B—"Robbery from running train," whether includes theft—"Wilful neglect," meaning of—"Running train," meaning of

The expression "robbery from a running train" in Risk Note B used in the transmission of packages on the Railway does not include theft or taking without force It has its technical meaning assigned to it by the Penal Code. [p 606, col 1]

De Rothschild v *Royal Mail Steam Packet Company*, (1852) 21 L J Ex 273, 7 Ex 734, 86 R R 813, 155 E R 1115 and *Latham* v *Rutley*, (1823) 107 E R 290, 2 B & C 20, referred to

East Indian Railway Company v *Fazal Elahi*, 85 Ind Cas 474, L R 6 A 59 Civ, (1925) A I R (A) 273, 47 A 136, *East Indian Railway Company* v *Nathmal-Behari Lal*, 39 Ind Cas 130, 39 A 418, 15 A L J 321, *G I P Railway Co* v *Firm Bhola Nath-Debi Das*, 70 Ind Cas 854, 45 A 56, (1923) A I R (A) 79 and *Gopal Rai-Phul Chand* v *G I P Railway Co*, 82 Ind Cas 313, 46 A 837, (1924) A I R (A) 621, L R 5 A 575 Civ, not followed

'Wilful neglect' as used in the Risk Note B may be taken to be the failure of a person to take any reasonable measures that he was aware or should have been aware were likely to lessen the risk of loss of a consignment or a portion of it [p. 606, col 2]

R v *Downs*, (1876) 1 Q B D 25 at p 30, 45 L. J M C 8, 33 L T 675, 25 W R 278, 13 Cox C C 111, referred to.

The term 'running train' in Risk Note B does not

signify that the train must actually be in motion. If the train is on its journey from one destination to another, that is, from junction to junction it cannot be said that the train is not a running train simply because it stops either on the road-side station or at any place between the road-side stations [p. 608, col. 1]

Second appeal from a decree of the District Judge, Gonda, dated the 22nd October 1924, reversing that of the Subordinate Judge, Bahraich dated the 9th February 1923.

Mr. *G. N. Mukerji*, for the Appellants.

Mr. *B. N. Srivastava*, for the Respondents.

JUDGMENT.

Ashworth, J.—This second civil appeal arises out of a suit brought by the plaintiff-respondent against the Bengal North Western Railway Company, through its Agent at Gorakhpur, for damages for non-delivery of one out of four packages of cloth booked from Howrah on the East Indian Railway to be delivered at Nanpara on the Bengal North Western Railway Company. The Subordinate Judge of Bahraich dismissed the claim on the findings that—

(*a*) The fact that the defendant-Railway Company had carried the goods by another route than that specified was not proved to have increased the risk of loss,

(*b*) The loss of consignment was due to theft on a running train from liability for which the Railway was protected by the terms of the Risk Note B.

In first appeal the District Judge reversed this decision. He held that the Risk Note only protected the Railway from liability for robbery from a running train and not from theft from a running train. He held that the plaintiffs had sustained the burden of proving wilful neglect by the Railway Company as it was proved that the steps taken to secure the goods against loss by theft were inadequate. In this second appeal the following questions arise for determination.

Did the carriage of the goods by a longer route and a different route from that specified in the contract amount to failure on the part of the Railway Company to take the care required by s 151 of the Contract Act and, if so, can this be pleaded in second appeal ?

As to this I hold that in second appeal the finding of the first Court cannot be reversed, namely, that the change of route did not call for any extra risk of loss, a finding with which I should be disposed to agree on the facts.

Does the expression in the Risk Note "robbery from a running train" mean robbery from a train in motion or robbery from a train from "junction to junction" (to adopt the explanation submitted by the Railway)? In view of my findings on the other questions it is not really necessary to decide this. It may, however, be pointed out that the term "running train" must be construed in the ordinary sense of the expression as used by the public inasmuch as the Railway Company did not put forward any evidence to show that the term was a technical term with a special meaning. Thus construed, however, I am of the opinion that if the meaning merely had been a train in motion, the expression "a train in motion" would have been used and not a "running train." I am disposed to hold that a train is still a running train even though it stops on stations en-route and certainly even though it stops on stations en-route and certainly even though it stops when held up by a signal. In adopting this meaning I am following a view taken in *East Indian Railway Company* v. *Fazal Elahi* (1) by Mr. Justice Boys of the Allahabad High Court. The case is reported in 85 Indian Cases 474.

Is the word "robbery" in the expression "robbery from a running train" merely equivalent to the word "theft"? This is one of the most important questions in this case. There is no doubt considerable authority for holding in the affirmative. I have been referred to *East Indian Railway Company* v. *Nathmal-Behari Lal* (2). It is there stated that the Judges, Richard, C. J., and Banerji, J., although it was perhaps unnecessary for the decision of the case, doubted very much whether the expression "robbery from a running train" in the contract meant anything else than an ordinary theft. It will be seen that this view was merely an *obiter dictum*, and was supported by no reasoning or explanation. Again in *G I. P. Railway Co., Ltd.* v. *Firm Bhola Nath-Debi Das* (3) Mr. Justice Ryves states that he disagreed with the view of the Judge of the Court of Small Causes which was that robbery from a running train meant some

(1) 85 Ind Cas. 474; L. R. 6 A. 59 Civ; (1925) A I. R (A) 273; 47 A. 136

(2 39 Ind. Cas. 130; 39 A. 418; 15 A. L. J. 321.

(3) 70 Ind. Cas. 854; 45 A. 56; (1923) A. I. R. (A.) 79.

thing very much more serious than theft from a running train, and that the idea of the contract was to protect the Railway from being liable for an attack by a band of robbers, an accident of the same category as some unexpected act of providence and expressed his own opinion as follows:—

"It seems to me that robbery as used really is synonymous with theft and not in the sense as defined in the Penal Code.'

It appears to me that in this pronouncement Mr. Justice Ryves after setting forth an excellent reason for the contrary view has dismissed that view without giving any reason for doing so except his own impression. I am next referred to *Gopal Rai-Phul Chand* v. *G. I. P. Railway Co.* (4). In this case Justices Daniels and Neave held robbery synonymous with theft merely on the basis of the two decisions mentioned. They furnish no other reason for so holding. Again I am referred to a ruling of the Madras High Court, *B. B. and C. I. Railway Co., Ltd* v. *Firm Nattaji Pratapchand* (5) In this case at page 80* Mr. Justice Ramesam states "I assume robbery in the Form B is equivalent to theft". He bases this assumption upon the case already mentioned, *G. I P. Railway Co, Ltd.* v. *Firm Bhola Nath Debi Das* (3). Thus it will be seen that in none of these rulings is the *ratio decidendi* set forth. That the view taken, however, was not merely a capricious view can be shown by reference to an English case, namely, the case of *De Rothschild* v. *Royal Mail Steam Packet Company* (6). This case was cited by the respondent as authority for holding that robbery in a Risk Note should not be construed as synonymous with theft. The case does not support this contention thus generally expressed, though, in my opinion, it does supply an argument for holding that "robbery" as used in this Risk Note is not synonymous with theft. It will be observed that in this Risk Note B the word "robbery" is preceded by the word "fire" in the clause, "provided the term 'wilful neglect' be not held to include fire, robbery from a running train or any other unforeseen event or accident". In that case Pollock, C. B., pointed out that he agreed with the contention that the word "robbers" in Risk Notes generally must be construed according to the ordinary meaning of the word, and not in the technical sense given to the word by the English Law and by some of the English Statutes, for two reasons. One was that the technical meaning was a felonious taking from a person by another, and that it could not be considered applicable to the case where packages were not in the personal presence of the Railway Company or their servants The other reason was that there were many English Statutes where the meaning given by various decisions to the expression robbers or robbery was much more comprehensive than the technical meaning, and included the taking without force After, however, making these remarks about Risk Notes in general—Pollock, C. B. added that "Considerations applicable to Risk Notes in general must be modified by considerations of the particular circumstances under which a particular Risk Note was made." He held that in the case before him the circumstances and also the conjunction of the word "robbers" with the word "pirates" was sufficient to indicate that the parties did not mean the defendant Company to be exempted from pilfering by thieves. From this ruling then I obtain the conclusion that "robbery" in ordinary parlance would include the taking without force, but that the adoption of the ordinary meaning might be negatived by the particular context of an agreement. Another English case which is instructive is *Latham* v. *Rutley* (7). In this case the expression of the contract was "fire and robbery excepted" The Judge left to the Jury the question whether robbery would include theft of the parcel at the wagon office in London before despatch by train, and the Jury decided that it would not cover this. The only importance of this case is that the meaning of the word "robbery" was left to the Jury. Now it appears to me that the reasoning set forth in the case of *De Rothschild* v *The Royal Mail Steam Packet Company* (6) for holding that robbery in Risk Notes generally will include theft without violence is not applicable in India. The definition of robbery in India is by reference to the definition of theft, and the definition of theft is "taking..... ...out of the possession of any person."

(4) 82 Ind Cas 313, 46 A 837, (1924) A. I R (A) 621, L R 5 A 575 Civ

(5) 87 Ind. Cas 79, 48 M L J 400, (1925) M. W. N. 186, 21 L W. 728, (1925) A. I R (M) 745

(6) (1852) 21 L. J. Ex. 273, 7 Ex. 734, 86 R R 813; 155 E R. 1145

(7) (1823) 107 E. R. 290, 2 B. & C. 20.

*Page of 87 Ind. Cas.—[*Ed.*]

Goods may be in the possession of a Railway Company even though they will not be on its person or on the person of its servants. Again in India we are not embarrassed, so far as I am aware, by any Statutes using the word "robbery" in the sense "theft without violence". On the other hand ever since the passing of the Indian Penal Code in 1860 with its definition of robbery as theft with violence or show of violence it is reasonable to suppose that the public would attach to the word robbery the technical meaning. Again it is to be observed that this Risk Note B is one which, under s. 72 (2) (*b*) of the Indian Railways Act (IX of 1890), has to be in a form approved by the Governor General in Council. This means that it has to be passed by the Legal Advisers of the Government of India. It appears to me inconceivable that the Legislative Department of the Government of India would allow the expression "robbery" to be used where it was intended to express "theft." Lastly it will be seen in Risk Note B that the word "robbery" immediately follows "fire" and that it is followed by the words "or any other unforeseen event or accident." Theft without violence cannot be considered as an unforeseen event or accident. I consider that the context in any case would prevent the word "robbery" from being construed as synonymous with theft without violence.

On the evidence should the defendant Railway Compamy be held liable for the loss of the package, as a loss attributable to wilful neglect on its part or on the part of its servants? The decision of the previous question disposes of the plea that there cannot have been wilful neglect within the meaning of the Risk Note. But the question remains whether on the facts such wilful neglect is proved. The established facts are that the package must have been stolen on the Bengal and North Western Railway line between Itiathok and Gonda, and that it was probably stolen when the train was brought to a stop by an interstation signal or when it was travelling slowly and that the wagon containing the consignment was only secured by a sealed label and by no lock. On these facts the lower Court found wilful negligence established and as a question of fact. On behalf of the appellant Railway Company it is not urged that the wagon door could not have been more securely fastened, but it is urged that the securing of wagons by locks is a practical impossibility for various reasons and has been proved such by trial. I will assume, (without admitting in the absence of evidence on the point) that the Railway could not introduce the use of locks universally without dislocation of their arrangements for transfer of packages or without incurring expense inconsistent with the present rules for carriage. But if this is so, I consider that this impossibility may furnish a case for alteration of the law or for variation of the terms of the Risk Note (used in this case), but it will furnish no defence to the present claim. Wilful neglect as used in the Risk Note may be taken to be failure of a person to take any reasonable measures that he was aware or should have been aware were likely to lessen the risk of loss of a consignment or a portion of it. see the remarks of Lord Coleridge in *R.* v. *Downs* (8). Now it may make all the difference what measures are reasonable whether we are considering the total body of consignments received by a Railway Company or only a particular consignment from a single individual. The argument of the impracticability of introducing a general system of locks is based on consideration of the former and not on the latter. It is obviously practicable to lock a single wagon, and it cannot be doubted that if the Railway Company were only concerned with a single wagon load it would secure the doors of the wagon by a safer method than a mere sealed label. I consider that s. 151 of the Contract Act read with s. 148 requires that the conduct of the Railway Company should be judged on the consideration, merely of the one consignment. Section 151 reads "In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under simlar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed". Section 148 defines a "bailment" as the "delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them." The care, therefore, that the Railway Company has to take is the same care that a man of ordinary prudence would

(8) (1876) 1 Q. B. D. 25 at p. 30; 45 L. J. M. C. 8; 33 L. T. 675; 25 W. R. 278; 13 Cox C. C. 111.

take of the single consignment. It cannot invoke considerations arising from the volume of the Railway business. Any man of ordinary prudence when carrying a single consignment of a goods worth Rs. 1,000 would secure the wagon by something more effectual than a sealed label. I hold that the lower Appellate Court was entitled to come to a finding that there was wilful neglect on the finding that the wagon was only secured by a sealed label. I prefer in this respect to follow the decision of the Allahabad High Court in the case of *Bengal and North Western Railway Company* v. *Haji Mutsaddi* (9) rather than the decision in *Firm Bhagai Ram-Bhadur Ram* v. *Bengal North-Western Railway* (10). I do not agree with the later decision so far as it holds that no finding of wilful neglect would be based on the failure of a Railway Company to secure a wagon by anything better than a sealed label on one side. In second appeal I hold that I am bound by the finding of fact of the lower Appellate Court that there was wilful neglect which finding does not appear to me to have been vitiated by any disregard of any rule of law or by any self-misdirection on the part of the Judge.

I would, therefore, dismiss the appeal with costs.

Misra, J.—I am of the same opinion. It appears to me that there are only three points involved in the appeal. They may be stated as follows:—

(1) Whether the Railway Company was guilty of wilful neglect?

(2) Whether the word "robbery" used in the Risk Note Form B includes "theft"?

(3) Whether the word "running train" would include a train stopped on the way while going from one destination to another?

I proceed to give my opinion with regard to each of these points.

Regarding the first point it appears to me that the burden of proving wilful neglect by the Railway Administration or its servants initially lies on the plaintiff, but the plaintiff is entitled to ask the Court to infer it from the fact that steps taken by the Company to secure goods against loss of theft were inadequate. It was contended before us on behalf of the Railway Company that it would be impossible for the Company to secure large number of wagons in a goods train by means of padlocks, still more so by means of padlocks which would not be liable to being tampered with. This may be correct to some extent. Indeed it has been held so in many cases, but I feel—if the liability of the Railway Company is that of an ordinary bailee as defined in s. 151 of the Contract Act, it being only modified to the extent stated in the Risk Note, the Railway Company must show that they did all that they could do in order to protect the goods bailed to them from loss or destruction. It appears to me that merely sealing the wagon is not affording sufficient protection to the goods conveyed by those wagons from being stolen. It may be that the securing of the wagons by padlocks cannot afford complete protection against theft or pilfering, but it must be admitted that it certainly affords greater protection than merely leaving those wagons unlocked. As stated by the learned District Judge it was brought to his notice by the representative of the Railway Company present in his Court that after having tried the patent locks they have now invented a system of locking which ensures immunity from theft. If at the time that such padlocks were introduced the Railway Company had taken all the care which it was their duty to take they should have given evidence to show that they did take that amount of care. For instance if they had shown that they kept a sufficient number of men ready to watch the train in case it was stopped either at the station or at any place between two stations, it could be said on behalf of the Railway Company that they had done all which was in their power to do.

I am, therefore, of opinion that the Railway Company in merely sealing the wagons but not fastening them in a way so as to protect them from being opened while on the way they were guilty of what is termed in the Risk Note as wilful neglect. I am supported in this opinion by the judgment of Kanhaiya Lal, J. C., in the case of *Rohilkhand and Kumaon Railway C.*, v. *Baj Raj* (11), in which the learned Judge followed the decision of the Allahabad High Court reported as *Bengal and North Western Railway Co.* v. *Haji Mutsaddi* (9) quoted by my learned brother in his judgment.

Regarding the second question I entirely agree with the view taken by my learned

(9) 7 Ind. Cas. 160; 7 A. L. J. 833.

(10) 87 Ind. Cas. 215; 1 O. W. N. 766; (1925) A. I. R. (O.) 631.

(11) 72 Ind. Cas. 428, 10 O. L. J. 58, 9 O. & A. L. R. 421; (1923) A. I. R. (O.) 212.

brother who has discussed the entire aspect of the question in great detail. It is impossible to argue that the Legislature in using the word "robbery" intended to use it in the sense conveyed by the word "theft." It is needless to say that the word "robbery" implies violence while "theft" does not import any such notion. Reading the word "robbery" in the light of the context of the Risk Note in which the word occurs, it appears that the idea was to indicate the loss of goods in a manner in which it would be impossible for the Railway Company to avoid it. It could be too much to expect from the Railway Company to engage either on the road-side stations or on the running trains staff enough to protect the trains from violent attacks which one would expect in the case of a robbery. It, therefore, appears to me to be reasonable to infer that when the word "robbery" was used in the Risk Note it was intended to cover the case of a loss of goods which was due to violence.

Regarding the third point relating to the definition of the word "running train" I am of opinion that the term does not signify that the train must actually be in motion. If the train is on its journey from one destination to another that is from junction to junction, to use the common expression, it cannot be said that the train is not a running train simply because it stops either on the road-side station or at any place between the two road-side stations.

Under these circumstances, it appears to me that in the case which we have before us, the Railway Company did not take sufficient care of the goods as they were expected to take of them in law and they were, therefore, guilty of wilful neglect. They cannot protect themselves by alleging that the goods were lost in the way while the train was running, in other words to avail themselves of the clause entered in the Risk Note by virtue of which the Railway Company would be protected if there occurred a "robbery in the running train."

I, therefore, concur in the order proposed by my learned brother.

Regarding the cross-objection filed by the plaintiff relating to costs the learned District Judge has given cogent reasons in his judgment for disallowing the costs of the suit to the plaintiff and I am not prepared to interfere with his discretion in this matter in second appeal. I would, therefore, dismiss the plaintiff's cross-objection as well.

The appeal and the cross-objection both fail and are dismissed with costs.

By the Court.—The appeal is dismissed. The cross-objection is also dismissed with costs.

G. H. *Appeal dismissed.*
N. H.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 333 OF 1925.
December 1, 1925.
Present:—Mr. Justice Dalal and
Mr. Justice Boys.

LALMAN AND ANOTHER—OBJECTORS—APPELLANTS
versus
Chaudhri SHIAM SINGH—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIV, r 5—Mortgage suit—Preliminary decree—Appeal—Final decree, when can be passed

Where an appeal has been preferred against a preliminary decree passed in a mortgage suit, a final decree can be passed only after the preliminary decree has been confirmed or varied by the Appellate Court and has become conclusive between the parties [p. 609, col 1]

Execution first appeal from a decree of the Subordinate Judge, Mainpuri, dated the 1st of June 1925.

Mr. *U. S. Bajpai*, for the Appellants.

Mr. *Baleshwari Prasad*, for the Respondent.

JUDGMENT.—A preliminary decree for sale of property was passed by the first Court of the Subordinate Judge of Mainpuri on the 15th of April 1921. The defendant mortgagor appealed against this decree to this Court on the 22nd of July 1921. While the appeal was pending the mortgagee applied under O. XXXIV, r 5 (2) of the C. P. C. for a final decree for sale and such a final decree was passed by the Subordinate Judge on the 19th of August 1922. The appeal to this Court was dismissed with costs on the 13th of February 1924.

The mortgagee applied to the Court of the Subordinate Judge for execution of the final decree dated the 19th of August 1922 and to the amount of that decree he added the amount of costs granted by this Court under its decree dated the 13th of February 1924. The lower Court directed execution to take place though the judgment-debtor objected on the ground that the final decree

of the 19th of August 1922 was not one binding between the parties as it was obtained on the basis of a preliminary decree which had not become final between the parties.

This is an appeal from an order in the execution department passed by the Subordinate Judge for the sale of property. The first ground of appeal raises the objection that the final decree of the 19th of August 1922 had been obtained before the preliminary decree between the parties became conclusive and so no execution proceedings can be taken on the basis of that final decree. We think that this argument must prevail on the basis of the Full Bench decision of this Court in *Gajadhar Singh* v. *Kishen Jiwan Lal* (1). It was held in that case by three learned Judges of this Court that the right of the plaintiff in a suit for sale to apply for a final decree accrued when the decree of the High Court was passed and not on the expiry of the six months allowed for payment by the Court of first instance The learned Judge, Mr. Justice Banerji, who delivered the judgment of the Court reconsidered a decision he had previously delivered as a member of a Bench of two Judges in *Madho Ram* v. *Nihal Singh* (2). The learned Counsel for the respondent here desired the Court to hold that the Full Bench judgment only covered the question of limitation and that a mortgagee was at liberty to apply for a final decree either on the basis of the preliminary decree of the Trial Court or on the basis of the preliminary decree of the High Court in appeal. This argument is specifically negatived by the learned Judge, Mr. Justice Banerji. He said "It seems to me that O. XXXIV, r. 5 of the C. P. C. contemplates the passing of only one final decree in a suit for sale upon a mortgage. The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties. When an appeal has been preferred, it is the decree of the Appellate Court which is the final decree in the cause". It is clear, therefore, that there can be only one final decree in a suit for sale and not more than one and that this final decree can be passed only after the preliminary decree has been confirmed or varied by this Court in appeal. The learned Counsel for the respondent further argued that though the mortgagee may not have the right to apply for a final decree there was an inherent jurisdiction in the Court to grant such a decree even wrongly. According to him, therefore, the final decree of the 19th of August 1922, is binding between the parties and the mortgagee is entitled to execute it. The simple answer to it is that the mortgagee does not come merely on the basis of that decree as having been passed in his favour rightly or wrongly. He includes in his application for execution the costs awarded to him by the High Court as well and it is clear that he has in contemplation the correct final decree which ought to be passed in the suit. Such a correct decree has not yet been passed so there can be no question of its execution.

The Bench ruling in the case of *Dambar Singh* v. *Kallyan Singh* (3) referred to by the respondent's learned Counsel does not apply here. In that case application was made for a final decree for sale after the preliminary decree had received final adjudication from this Court and the right had accrued to the decree-holder to apply for a final decree. Through some mistake the decree-holder did not include the costs of the two Appellate Courts in his application for a final decree and in substance the final decree embodied the terms of the preliminary decree of the Trial Court. In the present case, the final decree was obtained when the right had not accrued to the decree-holder to apply for one. Secondly, in the other case, execution had once before been taken out of the final decree to which the judgment-debtor had made no objection and had actually paid a portion of the decretal amount. Objection was taken when execution was taken out for a second time and the principle of *res judicata* was applied against the judgment-debtor, because, to quote the words of the learned Judges "when the first application for execution was made he did not raise this objection." In the case before us it is the first execution of the final decree which is objected to and stay of execution in the Trial Court at the request of the judgment-debtor did not imply an acceptance of the decree by him.

There will be no hardship to the respondent in applying for a final decree on foot of the preliminary decree of this Court

(1) 42 Ind. Cas 93; 39 A. 641, 15 A. L. J. 734.
(2) 30 Ind. Cas. 494; 38 A. 21; 13 A. L. J. 985.
(3) 65 Ind. Cas 799; 20 A L. J. 170; (1922) A I. R, (A.) 27; 44 A 350

of the 13th of February 1924 because the application will still be within limitation.

In the result we decree this appeal and reject the respondent's application for execution of the final decree of the 19th of August 1922. Having regard to the circumstances of the case we pass no orders as to costs.

Z. K. *Appeal accepted.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 553 OF 1923.

September 21, 1925.

Present:—Mr. Justice Spencer and Mr. Justice Madhavan Nair.

THE MUNICIPAL COUNCIL, TUTICORIN, BY ITS CHAIRMAN—DEFENDANT—PETITIONER

versus

T. SHUNMUGHA MOOPANAR—PLAINTIFF—RESPONDENT.

Madras District Municipalities Act (V of 1920), s. 249, Sch. V, cl. (o)—"Grain," whether includes rice and broken rice.

The word "grain" in cl. (*o*) of Sch. V to the Madras District Municipalities Act does not include rice and broken rice. [p, 610, col. 2; p. 612, col. 1.]

Cotton v. *Vogan*, (1896) A. C. 457, 65 L. J. Q. B 486; 74 L. T. 591; 61 J. P. 36, followed.

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise a decree of the Court of the District Munsif of Tuticorin, dated 18th December 1922 in S. C. S. No. 858 of 1922.

Mr. *B. Sitaram Rao*, for the Petitioner.

Mr. *M. S. Vaidyanatha Iyer*, for the Respondent.

JUDGMENT.

Spencer, J.—The Tuticorin Municipal Council which through its Chairman preferred this revision petition, resolved to require wholesale dealers in grain to take out licenses under s. 249 of the Madras District Municipalities Act (V of 1920) and accordingly published a notification under s. 328 in the Tinnevelly District Gazette. The respondent, who was one of such whole-sale dealers, paid the fees demanded of him under protest, and brought a suit in the Small Cause Court to recover what was illegally collected from him. He succeeded in obtaining a decree for a portion of his claim. The District Munsif held that he was not liable to take out licenses for godowns in which rice and broken rice, etc., were stored for the whole sale trade but only for grain stores. It is contended for the petitioner that the word "grain" in Sch. V (*o*) to the Act includes rice and broken rice.

The District Munsif observed:—"Paddy without husk is rice. Rice is not a seed and does not sprout out Hence rice or broken rice cannot be called a grain". If the District Munsif meant by this that the distinction between grain and rice depended on the existence or absence of the power of germination, I think he went near the mark without hitting it. The germ or seed is in the rice. The outer husk merely serves as a protection from water and other external agencies which would penetrate and destroy the germ.

In the English language "corn" which is derived from the same Latin word "*granam*" as "grain" is commonly used to mean the grain of certain cereals, especially wheat in England, and maize in America, while growing. Thus an Englishman would speak of a field of growing wheat as a field of corn, but he would never include other plants grown from seed such as turnips clover, mustard etc., under the head of "corn." After the wheat is harvested and threshed, it is still corn and it is sold in a corn market, but after it has gone through a mill and become flour or meal, the individual corns or grains cannot be distinguished and a substance is produced which is not corn or grain but something else. This meaning of the word "grain" was brought out in a case that went up to the House of Lords and is reported in *Cotton* v. *Vogan* (1) Lord Herschell in interpreting the meaning of the words which occur in the Metage on Grain Act of 1872, "In respect of all grain brought into the Port of London for sale", observed "if the Legislature had intended to include what had always been regarded and treated as manufactured articles, such as flour and meal, as distinguished from the natural products of the earth-*untreated except by gathering* the language would have *been altogether* different."

Using similar language I would say that if the Madras Legislature intended to include in Sch. V (*o*) rice and broken rice, which have gone through a certain process, as distinguished from the natural products

(1) (1896) A. C. 457; 65 L. J. Q. B. 486; 74 L. T. 591; 61 J. P. 36.

of the earth untreated except by gathering, the storing of which without a license may be prohibited by any Municipal Council, they would have used more explicit language to denote their meaning. In cls. (*b*) and (*q*) (proviso) the word "paddy" occurs and in cl. 1 the word "flour" is used. There is, therefore, no reason to regard the word "grain" in cl. (*o*) as being used in the comprehensive sense of all articles of commerce into which grain can be turned by some process or other. The use of the *Tamil* word "*daniyam*" in the translation of the notification as the equivalent of "grain" strengthens the respondent's case. A trader who sells rice may be called a grain merchant and his merchandise may in a loose sense be called grain when it includes both grain and rice, but rice is strictly not grain, and the separate entity of the grains by a process of disintegration disappears when they are converted into broken rice For these reasons I consider that there is no occasion to interfere with the District Munsif's decree. The civil revision petition is dismissed with costs.

There is no substance in the objection taken in the memorandum of cross-objection, that the notification was not published full sixty days before it was enforced as required by s 249 of the Act. There was evidence before the Court that the Gazette notice must have been published on January 30th to come into force on April 1st, and the District Munsif accepted that evidence. The memorandum of objections is dismissed with costs

Madhavan Nair, J.—I agree. The main question for decision in this civil revision petition is whether "rice" *i.e.*, paddy without husk and "broken rice" come within the meaning of the term "grain" found in cl. (*o*) of Sch. V of the District Municipalities Act. In the course of the argument we have been referred to well-known English Dictionaries, such as Murray's Oxford Dictionary, Chamber's Twentieth Century Dictionary, Webster's Dictionary, etc., wherein the word "grain" has been explained. According to Murray's Dictionary the word "grain" is derived from the root *granum* which means "seed." From this, the inference is sought to be drawn "that an article to be called grain" should have the power to germinate or sprout and since this power is absent in rice which is husked paddy, it is argued that rice cannot be called "grain" but I am not quite sure whether this distinction can be accepted as a safe test because it involves the assumption that the presence or absence of "husk" is the main determining factor in the matter of germination, whereas it is well-known that rice contains the seed which germinates or sprouts, while the husk present in paddy merely serves to protect it from destruction during germination.

In a case under the Metage on Grain (Port of London) Act of 1872 (c. c.) s. 4 the House of Lords had to consider whether maize and oats imported with a view of their being first subjected to a process of grinding or crushing before sale would be "grain" brought into the Port of London for sale within the meaning of s 4 of the Act. By s. 2 of that Act, "grain is defined to mean corn, pulse and seeds, except the following seeds when brought into the Port of London in sacks or bags, that is to say, linseed, rapeseed, millet seed, etc. With reference to the argument of Mr. Dankwart's that maize and oats sold after being subjected to the process of grinding and crushing might come within the definition of 'grain" contained in the Statute, Lord Herschell pointed out in his judgment that "if it (Legislature) had intended to include what had been always regarded and treated as manufactured articles, such as flour and meal, as distinguished from the natural products of the earth untreated except by gathering, the language would have been altogether different to that which is to be found in the Statute." From this it may be inferred that the meaning of the term "grain"should be confined to *natural products of the earth untreated except by gathering* Lord Watson stated that "the result of that process was that the substances operated upon ceased to answer the statutory description of a dutiable article" Though the decision was given with reference to the definition of the word "grain" contained in a special Statute, I think the description of the term "grain" in Lord Herschell's judgment is sufficiently general and may well be used for the purposes of the present case also Judged by this test "rice" which is paddy subjected to the process involving the removal of husk, and "broken rice" cannot strictly be called "grain," Mr. Sitarama Rao for the petitioner invited our attention to the definition of the word "grain" contained in s. 456 of the Merchants Shipping Act, 57 & 58, Vict. C. 60,

That section defines "grain" to mean any corn, rice, paddy, pulse seed. etc. But the section itself makes it clear that this is a special definition applicable to provisions of the part of the Act specially dealing, with the "carriage of grain cargo." Obviously, this definition cannot be of much help in deciding the present case.

Under s. 209 of the District Municipalities Act, "Act V of 1920, the Council may publish a notification in the District Gazette and by beat of drum that no place within the Municipal limits or at a distance within three miles of such limits shall be used for any one or more of the purposes specified in Sch. V without the Chairman's license and except in accordance with the condition specified therein....." Section 328 states that "Every notification under this Act shall be published in the Official Gazette of the District in which the Municipality is situated both in English and in a vernacular language of the District." That the Legislature *never intended to include "rice" and "broken rice"* within the meaning of the term "grain" appears to be clear from the fact that in the notification in *Tamil* published by the Municipality in pursuance of the above provisions of the Act, the word *dhanyam* is used as the *Tamil* equivalent of the English word "grain." *Dhanyam* as generally understood in the *Tamil* language does not mean "rice" (see Winslow's Dictionary).

For the above reasons I am inclined to hold that "rice" and "broken rice" do not come within the meaning of the term "grain in cl. (o) the Sch. V of the District Municipalities Act. The decision of the District Munsif is right and the civil revision petition should be dismissed with costs.

I agree that the memorandum of objections should also be dismissed with costs.

V. N. V. *Petition dismissed.*

Z. K.

OUDH CHIEF COURT.

FIRST EXECUTION OF DECREE APPEAL No. 13 OF 1925.

December 14, 1925.

Present:—Mr. Justice Ashworth and Mr. Justice Misra.

GANGA BAKHSH SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

MAULA BUX SINGH—DECREE-HOLDER—PLAINTIFF—RESPONDENT.

Principal and agent—Agent guilty of fraud—Action of agent whether binding on principal—Fraudulent statement of agent of decree-holder that decree has been satisfied—Judgment-debtor privy to fraud—Decree-holder, whether bound

A principal is bound only by acts done by his agent on his behalf in good faith and not by his fraudulent actions when a third person who relies upon such actions is himself a party to the fraud. [p 614, col 1]

Shipway v *Broadwood*, (1899) 1 Q B 369, 68 L. J. Q B 360, 80 L T 11, 15 T L. R 145, *Smith* v *Sorby*, (1878) 3 Q. B. D 552*n*, Bowstend on Agency, sixth Edition page 383, also Pollock and Mulla's Indian Contract Act, sixth Edition, page 748, referred to

If no payment of a decree is actually made by the judgment-debtor and if as a result of collusion between the agent of the decree-holder and the judgment-debtor, a fraudulent application containing wrong facts is put in by the agent, the decree-holder cannot be deemed in law to be bound by such an application. [*ibid*]

Application dated 12th January 1923 to the effect that no money had been paid either to the decree-holder or to his *Mukhtar* Sant Prasad and that the proceedings and certificate of payment dated 6th January 1923 in satisfaction of the decree dated the 14th May 1921 to the amount of Rs. 8,946-14-10 were bogus. Hence enquiry be made in the matter.

Messrs. *H. K. Ghosh*, and *A. P. Sen*, for the Appellant.

Mr. *Zahur Ahmad*, for Mr. *Naimatullah*, for the Respondent.

JUDGMENT.—This is an appeal from an order of the learned Subordinate Judge, Bara Banki, dated the 23rd of December 1924 cancelling a certificate of payment, dated the 6th of January 1923, under which satisfaction of a decree to the amount of Rs. 8,496-14-10 had been recorded.

The facts of the case are as follows :—

On the 27th of February 1919 a preliminary decree for sale was passed on the basis of a compromise in favour of Maula Bakhsh Singh, the respondent, against Ganga Bakhsh Singh, the appellant and others for Rs. 9,904-6-3. Out of the total sum so decreed Rs. 7,478 8-3 was to be paid by one set of defendants consisting of Ganga Bakhsh Singh and Mahindra Bahadur Singh, the two appellants in this Court.

The remaining sum was to be paid by another set of defendants consisting of Jagnnath Bakhsh Singh and others. The decree was made absolute on the 14th May 1921. Subsequently on an application by the decree holder the sale-decree was transferred to the Collector of the District. On the 6th of January 1923 the respondent-decree-holder's *Mukhtar*, Sant Prasad, applied to the lower Court that as he had been paid Rs. 8,496-14-10 out of Court by Ganga Bakhsh Singh, the judgment-debtor-appellant, the said payment should be certified in full satisfaction of the decree and that the share of one anna and four pies belonging to him be exempted from sale. This application contained an endorsement of identification of Sant Prasad, the general agent of the decree-holder, by one Ram Suchit Vakil of Bara Banki and it was presented and verified before the Court by the said agent of the decree-holder on the same date, namely, the 6th of January 1923. Although the payment was only of a part of the decree, yet it is surprising to find that the order recorded in the order-sheet on the same date was to the effect that full satisfaction of the decree be recorded and that the execution record be recalled from the Collector's Court. It is not possible for us to follow this order which was passed by the then Subordinate Judge of Bara Banki, M. Gokul Prasad On the 12th of January 1923, that is, 6 days later Maula Bakhsh, the decree-holder, presented an application to the Court signed by him and his *Mukhtar*, Sant Prasad, to the effect that no money had been paid to either of them and that the previous proceedings under which satisfaction of the decree had been recorded were bogus and should be set aside. Another application to the same effect was presented by him and his agent Sant Prasad on the 15th of January 1923. This application was also signed by both of them. In this application he again clearly stated that no money had been received either by him or his agent, that the entire proceedings were bogus; that after an inquiry into the matter by the Court the satisfaction of the decree already recorded be cancelled, and that the proceedings in execution should be started and the property mortgaged, sold to realise the decretal amount. Both these applications were put up before the Court on the 16th of January 1923 and the Court ordered that notice of the application should go to the judgment-debtor, the general-agent Sant Prasad, and the Pleader who identified him and the case fixed for hearing on the 3rd of February 1923. Before the date fixed for hearing Sant Prasad, the agent of the decree-holder, filed an application declaring the correctness of the contents of the application made by him on the 6th of January 1923 and alleging that the money had been received from the judgment debtor through his general agent, Jagdeo Singh, out of Court and that on the subsequent application of the 15th of January 1923 his signature had been obtained by force (*zabardasti*). On the 3rd of February 1923 the case was not ready for hearing owing to the want of service on the judgment-debtors and after several adjournments it came up before the Court on the 12th of May 1923, on which date the Pleader for the judgment-debtors denied the allegations made by the decree-holder in his application and contended that the money had been paid to Sant Prasad, his general agent, who had authority to receive the amount. On that date the judgment-debtors also filed a receipt signed by Sant Prasad and attested by witnesses reciting the receipt of Rs. 8,496-14-10 from Ganga Bakhsh Singh through Jagdeo Bakhsh Singh his general-agent. This is marked as Ex.-A 9 and is denied by the decree-holder who said that it was a collusive and fraudulent receipt

The learned Subordinate Judge framed an issue to the effect whether the application dated the 6th of January 1923 and the receipt, Ex. A 9 were *farzi* and fraudulent as alleged by the decree-holder and whether any payment had been made to him. A date was then fixed for taking evidence and such of the evidence as was produced by the parties was recorded either by the Court or on commission on that and subsequent dates. The Court then passed the order under appeal, that the certificate of payment dated the 6th of January 1923 in satisfaction of the decree to the extent of Rs 8,496 14-10 under the receipt, Ex. A9, of the same date be cancelled as the certificate and the receipt both were bogus transactions.

On appeal it is now contended that the finding of the learned Subordinate Judge is not correct, that the money was actually paid by the judgment-debtors to the decree-holder, that the certificate of payment recorded by the general agent of the decree-holder was genuine and that the decree

should be declared to have been satisfied to the extent of the amount paid.

It is clear that if no money was actually paid by the appellant to the agent of the decree-holder and if the said agent fraudulently and collusively on having been bribed by the judgment-debtor admitted in Court the receipt of the decretal amount, his action could not be binding upon his principal, the decree-holder. It is a well established rule of law that a principal is bound only by acts done by his agent on his behalf in good faith and not by his fraudulent actions when a third person who relies upon such actions is himself a party to the fraud, *vide Shipway* v. *Broadwood* (1), *Smith* v. *Sorby* (2) and Bowstend on Agency, sixth Edition, page 383, also Pollock and Mulla's Indian Contract Act, sixth Edition, page 748. If, therefore, no payment was actually made by the judgment-debtor and if as a result of the collusion between the agent and the judgment-debtor, a fraudulent application containing wrong facts was put by the agent in Court, the decree-holder cannot be deemed in law to be bound by such an application. We, therefore, proceed to decide the question whether the story of the alleged payment by the judgment-debtor through his agent Jagdeo Singh to Sant Prasad, the general agent of the decree-holder, is correct or not. In order to prove the payment the judgment-debtor filed Ex. A9 which is the receipt signed by Sant Prasad and which recites the receipt of the money by him. He also examined two out of three marginal witnesses to the receipt, namely, Chhedan (W. No 3) and Mangli Prasad (W. No. 6) as well as *Pandit* Ram Suchit Pleader who had identified Sant Prasad, Jagdeo Bakhsh Singh, his own agent through whom the money is alleged to have been paid and lastly his brother-in-law (*sala*) Kunwar Hazari Singh, who, it is stated, had advanced to the appellant the money which is said to have been paid to the agent of the decree-holder. Sant Prasad, the said agent of the decree-holder was also examined ; he is witness No. 9. The evidence of this man was put before us at great length. We read it carefully but we feel that it is untrustworthy and cannot be relied upon. The surrounding circumstances, moreover, relating to the payment of this money are so suspicious that we do not think that the story of payment alleged by the judgment-debtor is a true one. It seems to us to be quite improbable that such a large sum of money should have been paid by the judgment-debtor to the decree-holder outside the Court. It is in evidence that a large number of decrees previously obtained against the appellant had not been paid off and that the appellant was living in a chronic state of indebtedness. The question which we, therefore, put to the learned Counsel for the appellant was, where the appellant had got all this money from ? His reply was that the appellant had got the money from one Kunwar Hazarai Singh, his brother-in-law (*sala*) living in Pilibhit District. We have read his evidence with great care and it appears to us that the learned Subordinate Judge was right in rejecting it. Kunwar Hazari Singh is a big landholder in the said district owing shares in no less than 69 villages. He was asked to file his account books and to show from them whether he had paid this amount of money. His reply was that he kept no accounts himself and the only account which was kept by his *ziledars* was the account of his income but not of his expenses. It is impossible to believe that a big landlord of the status of Kunwar Hazari Singh could have carried on the management of his estate without keeping accounts. The non-production of account books by him is a very suspicious circumstance and affords convincing proof that no payment was ever made. We might here refer to another unfortunate matter in connection with this witness. The appellant till a very late stage of the case did not suggest that the money had been obtained by him from Kunwar Hazari Singh but contented himself with the allegation that his financial position was sound, and he was in a position to pay the decretal amount himself. It, therefore, appears to us that the story of alleged loan from Hazari Singh was a pure afterthought.

Regarding the evidence of the witnesses examined by the appellant we find that their story is that the decretal money had been paid in currency notes eighty-five in number, each being of Rs. 100 face value. It is however very surprising to find that the receipt (Ex.-A9) does not mention that the money was paid in currency notes much less their number. Absence of any mention of this fact in the receipt put forward by the appellants as evidence of the pay-

(1) (1899) 1 Q. B. 369, 68 L J. Q. B 360; 80 L. T. 11; 15 T L R 145.
(2) (1878) 3 Q. B. D. 552*n*.

ment of the decretal amount goes to show that the story of the witnesses produced by the appellants is a concocted one. We may also mention that although the decree-holder, Maula Bakhsh Singh, himself went into the witness-box and deposed that the story of the alleged payment by the judgment-debtor was false, yet it is remarkable that the appellant, Ganga Bakhsh Singh, did not see his way to give evidence. Sant Prasad whom the decree-holder examined as a witness on his behalf also stated on oath that he had not received the money, but the man is thoroughly untrustworthy and we can place no reliance on his statement one way or the other.

We, therefore, come to the conclusion that the story of the appellant regarding the alleged payment is false and no payment was ever made by him. The judgment of the learned Subordinate Judge is correct, and we affirm it.

The appeal fails and is, therefore, dismissed with costs.

G H. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 385 OF 1925.

October 2, 1925.

Present:—Mr. Justice Phillips.

VADAPALLI VARADACHARYULU—PETITIONER

versus

KHANDAVILLI NARASIMHACHARYULU—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss 94, 151, O XXXIX, rr 1, 2—Injunction restraining execution of decree, whether can be granted—Inherent power of Court

On an application in a pending suit by the plaintiff for an injunction restraining the execution of a decree obtained by the defendant against the plaintiff's father

Held, that the Court had no jurisdiction to grant the injunction either under O XXXIX, or under s 94 or s 151, C. P C [p 615, col 2]

When the C. P C makes provision for a certain procedure it must be deemed to be exhaustive in that respect and the provisions of s 151 of the Code cannot be invoked in opposition to those provisions. [p. 616, col. 1]

Gadi Neelaveni v. *Mavapparedi Gari Narayana Reddi*, 53 Ind Cas 847, 43 M 94, 37 M. L J. 599, 26 M. L. T. 377; 10 L. W 606; (1920) M W. N 19, *Krishnaswamy Naidu* v. *Chengalroya Naidu*, 76 Ind. Cas 836, 47 M. 171; 18 L. W. 870, 45 M. L J. 813; 33 M L. T. 207; (1924) A. I. R. (M.) 114 and *Joshi Sahib Prakash* v. *Jhinguria*, 78 Ind. Cas. 416; 46 A 144; (1924) A I. R. (A) 446, relied on

Under s 94, C. P C, the Court is given power to issue injunctions provided the rules make provision for the exercise of that power The rules are contained in O XXXIX of the Code and s 94 must, therefore, be read subject to the rules contained in that Order. [p 615, col 2]

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order of the District Court, Godavari, at Rajahmundry, dated the 2nd April 1925, in C. M. A. No. 1 of 1925, preferred against an order of the Court of the Subordinate Judge, Amalapur, dated 1st January 1925, in I. A. No. 808 of 1924 in O. S. No. 79 of 1924.

Mr. *K. Ramamurthi*, for the Petitioner.

Mr. *K. Kameswara Rao*, for the Respondent.

JUDGMENT.—This is a petition for revising an order of the District Court of Godavari refusing to grant an injunction restraining the execution of a decree obtained by the defendant against the plaintiff's father. The Subordinate Judge held that he had no jurisdiction to grant such an injunction and this view was upheld by the District Judge.

It is now contended that such an injunction will come under O. XXXIX, either r. 1 or r. 2. It certainly cannot come within the language of r. 1, for there is no suggestion that the property of which delivery is to be given is in danger of being wasted, damaged or alienated. It is then argued that r. 2 would be applicable and that this is an injunction to restrain the defendant from committing "other injury of any kind." The alleged injury is the execution of a decree lawfully obtained. In order to hold that, that does constitute an injury, it is necessary to hold that, that decree is illegal, for, if the decree is legal, the defendant has every right to execute it and in doing so cannot be said to commit any injury.

It is then argued that s. 94, C. P. C., is wider than O. XXXIX and covers the present case, but I think that contention must be at once negatived in view of the language of the section which says "in order to prevent the ends of justice from being defeated the Court may, if it is so prescribed," that is to say, the Court is given power provided that the rules make provision for the exercise of that power. The section is clearly governed by O. XXXIX which contains the rules prescribed.

A further contention is put forward that the injunction may be granted under the inherent powers of the Court under s. 151, C. P. C., and the petitioner relies on a decision of the Lahore High Court, *Kanshi Ram* v. *Sharaf Din* (1). The reason for holding this view is not very clearly stated in that judgment and it appears to be opposed to the principles adopted by a Full Bench of this Court in *Gadi Neelaveni* v. *Marappareddi Gari Narayana Reddi* (2) followed in *Krishnaswamy Naidu* v *Chengalroya Naidu* (3) and in the case of *Joshi Sahib Prakash* v. *Jhinguria* (4). The principle there laid down is that when the Code makes provision for a certain procedure the Code must be deemed to be exhaustive in that respect and the provisions of s 151 cannot be invoked in opposition to these provisions. Here the Code lays down in s. 94 that the Court shall only have power if it is given by rules framed under the Code. It, therefore, seems to me impossible to hold that when rules have been framed to give the Court power, further power should be given by s. 151. If then the principle laid down in the Full Bench of this Court is correct and I see no reason to doubt its correctness, it is applicable to this case also, and the District Judge was right in his order.

I may add that from the facts put before me here, although they were not considered by the lower Courts, the petitioner does not seem to have much ground for his present complaint.

The petition is dismissed with costs.

V. N. V. *Petition dismissed.*

Z. K.

(1) 73 Ind. Cas. 909; (1923) A. I R (L) 144.
(2) 53 Ind Cas 847; 43 M. 94, 37 M L J 599, 26 M. L. T. 377, 10 L. W 606, (1920) M W N 19
(3) 76 Ind. Cas. 836, 47 M. 171, 18 L W. 870; 45 M. L. J. 813, 33 M L. T. 207, (1924) A I.R (M) 114
(4) 78 Ind. Cas. 416, 46 A. 144, (1924) A. I. R. (A) 446.

— —

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 496 OF 1923.

June 15, 1925.

Present:—Justice Sir Babington Newbould, KT, and Mr Justice Graham.

CHANDRA KUMAR GUHA—PLAINTIFF—APPELLANT

versus

ELAHI BUKSHA AND OTHERS—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Abatement of suit—Rent suit—Joint tenants—Non joinder in appeal—Inconsistent decrees

Although a plaintiff landlord can sue any one of his joint tenants for the rent, where he does not do so, but makes all of them parties to the suit, he cannot, in case of his failure to join any of the defendants or his representatives as respondents to the appeal, contend that as he had the option to sue any of the joint tenants or his representatives, his appeal would not abate

When the effect of not joining some of the defendants to a suit as respondents to the appeal would in case of the success of the appeal, be the passing of two inconsistent decrees, the appeal would abate.

Appeal against a decree of the Additional District Judge, Noakhali, dated the 1st of August 1922, modifying that of the Officiating Munsif, Additional Court, Lakhipur, dated the 21st of January 1921.

Dr. *Radha Benode Pal*, Babus *Bhupendra Kishore Ghose* and *Hem Kumar Bose*, for the Appellant.

Babu *Jitendra Kumar Sen Gupta*, for Babu *Mahendra Kumar Ghose*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for rent. The plaintiff brought a suit against 14 defendants claiming from them rent with interest on the arrears at the rate of 75 per cent. per annum. The plaintiff's case is that the tenancy was created in favour of two persons, Amanuddin and Mona Gazi who executed a *kabuliyat* and that the defendants had succeeded to the interest of these two persons by inheritance and purchase. One of the defendants died before the institution of the suit and the heirs of this defendant were not properly summoned. The suit was decreed in full against the remaining defendants by the Court of first instance. Against this decree an appeal was preferred by four of the defendants, the three sons and the widow of Mona Gazi. The appeal was decreed and the lower Appellate Court decided that the stipulation for payment of interest at 75 per cent. with damages and various other *abwabs* must be held to be hard and penal and that the plaintiff was entitled to get damages at 12 per cent. per annum instead of interest at the rate of 75 per cent. per annum on the arrears. Against this decision the plaintiff has appealed to this Court and has joined as respondents to this appeal only those four defendants who appealed to the lower Appellate Court.

A preliminary objection has been taken on behalf of these defendant-respondents that the appeal is not maintainable in the absence of the other defendants. On behalf

of the appellant this objection is met by the contention that as the original *kabuliyat* was executed by the two tenants, Amanuddin and Mona Gazi, they were jointly and severally liable to the rent and it was open to the landlord to sue either and that he is entitled now to claim relief against the representatives of Mona Gazi alone. This contention fails on the ground that though it was optional with the plaintiff appellant to sue the representatives of either of the joint tenants he did not frame his suit in this form. Further on the pleading that the defendants are the representatives of the original tenants by inheritance and purchase it is not apparent that the defendants who are respondents in this appeal are all the representatives of Mona Gazi

A further objection to the appellant's action in not joining the other defendants is that if this appeal is decreed there will be two inconsistent decrees, a decree for arrears of rent with damages at 12 per cent. against some of the tenants and a decree for arrears of rent with interest at 75 per cent per annum against the four respondents in this appeal

We, therefore, hold that the objection of non-joinder is fatal to this appeal which is accordingly dismissed with costs

N. H. *Appeal dismissed*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No 1344 OF 1922.

July 1, 1925

Present:—Mr. Justice Adami and Mr. Justice Sen

JITENDRA NATH CHATTERJEE AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat JASODA SAHUN AND ANOTHER —PLAINTIFFS—RESPONDENTS

Contract Act (IX of 1872), s 74—Penalty, when arises—Ejectment suit—Compromise decree—Stipulation to pay enhanced rent after expiry of term, whether penal—Doctrine of penalty, whether applicable to stipulation contained in decree

A penalty under s 74 of the Contract Act can only follow some breach of contract or obligation [p 619, col 1]

The doctrine of penalties is not applicable to stipulations contained in decrees Those who, with their eyes open, have made alternative engagements and invited alternative orders of the Court, must, if they fail to perform the one, perform the other, however greatly severe its terms may be. [p. 619, col. 2.]

An ejectment suit was compromised and the compromise decree provided that the defendants would be entitled to occupy the premises in suit for a period of eleven years on payment of a yearly rent of Rs 400 and that if they wanted to occupy the premises after the expiry of the term, without taking a fresh settlement, they shall pay rent at Rs 100 per month

Held, that the intention of the parties was that if the defendants wanted to occupy the premises after the expiry of the term, they could either take a fresh settlement or remain in occupation without a fresh settlement on a rent of Rs 100 per month which the parties at that time thought would be a fair rent after the lapse of 11 years and that, therefore, no question of any penalty arose. [p 619, col 1]

Appeal against a decision of the District Judge, Bhagalpur, dated the 27th July 1922, confirming that of the Subordinate Judge, Bhagalpur, dated the 28th May 1921.

Messrs. *Hasan Imam*, *S. M. Mullick* and *S. C. Mozumdar*, for the Appellants.

Messrs *P C. Manuk*, *S. N. Palit* and *N. N. Sen*, for the Respondents.

JUDGMENT.

Adami, J.—The plaintiffs in this case sued the defendants for house rent at the rate of Rs. 100 per month with interest from January 1918 to December 1920.

It appears that some 11 or 12 years previous to the suit the predecessor of the plaintiffs had sued the defendants and sought to eject them from the premises which are within the Municipality of Bhagalpur The suit was compromised and in April 1907 a decree was passed in terms of the compromise. Clauses 4, 5, 7 and 8 of the compromise included in the decree are to the following effect:—

"(4) That from January 1907 to December 1917 the defendants shall be entitled to occupy the premises mentioned in the plaint and pay rent at four hundred rupees per year (Rs. 400) payable in four instalments of Rs. 100 each from January 1907 to December 1917 and the plaintiff shall have no right to eject the defendants from the premises for that period, namely, before December 1917. The defendants will, however, be at liberty to vacate the said premises at any time within the said period of 11 years on giving six months' notice to the plaintiff."

"(5) That if the defendants want to occupy the premises after the expiry of 1917, without taking a fresh settlement, they shall have to pay rent at Rs. 100 per month."

"(7) That when the defendants give up the premises, they shall be bound to restore the premises to the condition in which

it was at the time it was first settled with them."

" (8) That the plaintiff shall be bound to keep the premises in good repair during the period of said 11 years."

After 1917, the defendants continued to occupy the premises : they did not take a fresh settlement and held over until the date of the suit.

The defence to the suit was that cl. (5) was a covenant for renewal and the stipulation that defendants would have to pay Rs. 100 per month, if they wanted to occupy the premises without taking a fresh settlement, was by way of a penalty; they claimed the right to continue paying rent at the rate of Rs. 400 a year.

The question in the suit was whether cl. (5) was a renewal clause and whether the stipulation as to payment of rent at Rs. 100 per month was by way of penalty. The learned Subordinate Judge held that cl. (5) did not contain a covenant for renewal of the lease, but that a fresh lease with fresh terms and rent could be taken at the expiry of the term of the lease. He held that the defendants did not execute any fresh *kabuliyat*, nor did they give notice to the appellant of their intention of doing it. He decreed the plaintiff's suit.

The learned District Judge came to the same opinion ; he held that there was no covenant for renewal and that cl. (5) was not a penalty clause. He allowed interest only from the 27th December 1920, when a notice was served on the defendants by the plaintiff.

Mr. Hasan Imam before us argues that cl. (5) contains a covenant for renewal and that the stipulation as to payment of a monthly rent of Rs. 100 is penal. He contends that cl. (5) means that the defendants have the right to a renewal of the lease on the same terms if they do not want to take a fresh settlement, and that the stipulation as to payment of the monthly rent of Rs. 100 is intended only to force them to take a fresh settlement At least, if his contention is that the defendants have a right to renew the lease on the same terms, if they do not want a fresh settlement, it is difficult to understand what action the penalty would be attached to unless it is a failure to take a fresh settlement. He relies on the cases of *Guru Prosanna Bhattacharjee* v *Madhusudan Chowdhury* (1), *Secretary of State for India* v. *Forbes* (2) and *Lani Mia* v. *Muhammad Easin Mia* (3) with regard to the question of renewal. In my opinion, none of these three decisions altogether meets this case.

In the first one the real question at issue was with regard to the meaning of the words *dosra bundbust*, that is to say, whether they meant a second settlement on the same terms or a different settlement. The words in the lease were: " On the expiry of the term I shall take a *dosra bundbust*;" the lease was in Bengali. It was held that where there is a covenant for renewal, if the option does not state the terms of the renewal the new lease would be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof except as to the covenant for renewal itself.

In the second case the lease provided that after the expiry of the term the lessor would have power to re-settle the land with the lessee on a fair rent. It was held that the last clause was intended to be a covenant for renewal and that the Government was entitled only to alter the rent on renewal.

In the third case the lease contained a covenant that upon the expiry of the term the tenant would take a fresh settlement and that the landlord would grant him such settlement.

None of these cases, as I have said, meets the present case. It is clear from the clauses I have cited that the lessee was given three options, he could either leave the premises at the end of the term, or he could take a fresh settlement, meaning thereby a settlement on fresh terms as to rent, or he could hold on at a rent which was arranged to be at the rate of Rs. 100 a month.

The decree and the compromise were drafted in English and the meaning of a fresh settlement is clear. It meant that the parties would meet and agree to the terms on which the lease was to be renewed. The clauses taken as a whole show that the plaintiffs were indifferent whether the defendants left at the end of the 11 years or stayed on. It was agreed that if they did want to stay, they must either take a fresh settlemnet or remain on paying a rent which the parties evidently agreed would

(1) 64 Ind. Cas 824; 26 C. W. N. 901; 35 C. L. J. 87.

(2) 17 Ind. Cas. 180; 16 C. L. J. 217.

(3) 33 Ind. Cas. 448; 20 C. W. N. 948.

be a fair one after the lapse of 11 years, at the rate of Rs. 100 per month.

The case is almost exactly similar to the case of *Gunpat Singh* v. *Josodhur Singh* (4). There the *kabuliyats* stated that after the expiry of a term of five years the defendant would cease to have any right to retain possession, but in case he failed to execute a fresh *kabuliyat*, the landlords should have power to realise rent at Rs. 5 per *bigha* on the strength of the said *kabuliyats* and the defendants would have no objection to that. It was held that the plaintiffs were entitled to demand rent at the rate of Rs 5 a *bigha* and the stipulation of payment of rent at that rate was not a penalty by reason of the non-execution of fresh *kabuliyats*. It has been sought to compare this last cited case with the case of *Abdul Aziz* v. *Karu* (5), but the latter is quite a different case. It was there provided that the tenant should give up the land on the expiry of the term and, if upon the expiry of the term, he claimed a right of occupancy or caused a claim to be put up by any other person, he would be liable whilst holding over to pay a higher rent. It was held that the clause as regards the payment of higher rent being in the nature of a penalty was not enforces able. The penalty in that case was for the tenant's action in setting up a right of occupancy and claiming to be not liable to ejectment. That case too does not affect the question of renewal but only that of penalty. In my mind it is quite clear that what the parties intended was that if the defendants wanted to occupy the premises after the expiry of 1917 they could either take a fresh settlement or remain in occupation without a fresh settlement on a rent of Rs. 100 per month which the parties at that time thought would be a fair rent after the lapse of 11 years.

With regard to the question of penalty, it is hard to understand how the clause as it is framed could be construed to intend a penalty. There was no obligation on the defendants to occupy the house or to take a fresh settlement and a penalty under s. 74 of the Contract Act will only follow some breach of contract or obligation. There is no obligation in the present case. Mr Hasan Imam has relied on the case of *John Pierpont Morgan* v. *Ramjee Ram* (6), where it was held that where a lease contains a stipulation that the lessee shall pay mesne profits at an unduly high rate on failure to give up the land, which formed the subject-matter of the lease on the expiry of the term, the Court has power to alter the rate agreed upon as being in the nature of a penalty, but in that case there was an obligation for the tenant to leave at the end of the term and the penalty was to cover any action of the *raiyat* in refusing to give up the land on the ground that he had an occupancy right.

However, in the present case it has to be remembered that cl. (5) forms part of a decree, and I need only refer to the case of *Shirekuli Timapa Hegda* v. *Mahablya* (7). It was there held that the doctrine of penalties was not applicable to stipulations contained in decrees In that judgment Birdwood, J , cited the followiug remarks made by West, J., in the case of *Balprasad* v. *Dharnidhar Sakharam* (8):—" The principles which govern the enforcement of contracts and their modification, when justice requires it, do not apply to decrees which, as they are framed, embody and express such justice as the Court is capable of conceiving and administering. The admission of a power to vary the requirements of a decree once passed would introduce uncertainty and confusion. No one's rights would, at any stage, be so established that they could be depended on, and the Courts would be overwhelmed with applications for the modification, on equitable principles, of orders made on a full consideration of the cases which they were meant to terminate It is obvious that such a state of things would not be far removed from a judicial chaos ; and as ordinary decrees are thus unchangeable, so we think are those in which through a special provision for the convenience of parties, their own disposals of their disputes are embodied. The doctrine of penalties is not applicable to such a class of cases, and those who, with their eyes open have made alternative engagements and invited alternative orders of the Court, must, if they fail to perform the one, perform the other, however greatly severe its terms may be."

The defendants, therefore, cannot but forward the doctrine of penalties in the present case considering that they held

(4) 20 Ind Cas. 516, 17 C L. J 590.
(5) 21 Ind Cas. 443; 18 C. L J 95
(6) 56 Ind Cas. 366, 5 P L. J. 302; (1920) Pat. 168; 1 P. L. T. 310,
(7) 10 B. 435, 5 Ind Dec (N s) 678
(8) 10 B 437*n*, Unrep P J B H. C. R. (1874-7) 668, 5 Ind Dec. (N. s) 679*n*.

their premises under the terms of the compromise embodied in the decree.

With regard to the question of interest which forms the subject of the cross-appeal, in my opinion, the learned District Judge was quite correct in disallowing interest previous to the 27th December 1920 not because the interest should be reckoned only from the date of notice but because the increase in the rent is so large that I think it is only fair that the defendants should not be called upon to pay more by way of interest.

I would dismiss the appeal and cross-appeal with costs.

Sen, J.—I agree.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION
APPLICATION IN CIVIL SUIT No. 827 OF 1922.
September 11, 1924.

Present.—Mr. Justice Devadoss.

R. K. ABDUL RAHIMAN SAHIB & CO.—PLAINTIFFS

versus

MESSRS. SHAW WALLACE & CO.—DEFENDANTS

Insolvency—Suit by insolvent continued by Official Assignee—Dismissal of suit—Costs, whether payable personally by Official Assignee

Where during the pendency of a suit the plaintiff becomes an insolvent and the Official Assignee continues the action knowing that it is wholly unsustainable, or where in the conduct of the action he is guilty of any conduct, which a prudent man would not be a party to, it would be open to the Court to direct the Official Assignee, to pay the costs of the action personally But where there is a *bona fide* dispute and the facts are such that it would not be easy to decide, whether the bankrupt has a good case or not, the Official Assignee should not be made to pay the costs personally out of his pocket. [p. 620, col 2]

In re Williams & Co, Ex parte Official Receiver, (1913) 2 K B 88; 82 L J K B.459; 108 L T. 585; 20 Manson 21, 57 S. J 285, 29 T L. R 243, followed.

Mr. *G. Krishnaswami Iyer*, for the Plaintiffs.

Mr. *N. Rajagopalan*, for the Defendants.

JUDGMENT.—This is an application by the defendants, for bringing the decree into conformity with the judgment and for making the Official Assignee pay the costs of the action personally and for other relief. In my judgment* I held that the defendants were entitled to the costs of the action. Mr Rajagopalan, who appears for the defendants, contends that the decree is not in conformity with the judgment, inasmuch as the decree contains the words, "from and out of the estate of the first plaintiffs, adjudicated insolvents in his hands." It is urged that when the Official Assignee is a party to a suit, the proper order to make is to make him pay the costs personally. Mr Rajagopalan relies upon *Borneman* v. *Wilson* (1), *London School Board* v. *Wall* (2), *Hill* v. *Cooke Hill* (3) and also *In re Suresh Chunder Gooyee* (4). These cases do not support the contention of the defendants. It is in the discretion of the Court, which decides the case, to direct the Official Assignee, or the trustee in bankruptcy, to pay the costs personally. If the action is by the insolvents and the Official Assignee continues the action, knowing that the action is wholly unsustainable, or that in the conduct of the action he is guilty of any conduct, which a prudent man would not be a party to, then it would be open to the Court, to direct the Official Assignee. to pay the costs of the action personally. But where there is a *bona fide* dispute and where the facts are such that it would not be easy to decide, whether the bankrupt has a good case or not, the Official Assignee if he acts *bona fide*, should not be made to pay the costs personally, that is, out of his pocket ; but he is entitled to have an order made, to pay the costs out of the estate. In this case, there was a *bona fide* dispute and the question was not free from difficulty. After a protracted argument, I came to the conclusion that the plaintiffs were not entitled to succeed in the action. That being so, I think the Official Assignee was well advised in continuing the suit, after the plaintiffs became insolvent; and this is not a fit case in which the Official Assignee should be directed to pay the costs of the action personally. In this connection, I may refer to a case reported in *In re Williams & Co., Ex parte Official Receiver* (5). When I delivered my judgment, I did not intend that the Official Assignee should pay the costs personally. The decree, as drawn up, is correct ; but the costs of the defendants should be paid, out of the estate and they should not be asked to rank as

*See 84 Ind. Cas.—[*Ed.*]

(1) (1885) 28 Ch D. 53; 54 L. J. Ch 631; 51 L. T. 728; 33 W. R. 141.
(2) (1891) 8 Morrell 202.
(3) (1916) W. N. 61.
(4) 51 Ind Cas 654; 23 C. W. N. 431
(5) (1913) 2 K B. 88; 82 L. J. K B. 459; 103 L. T. 585; 20 Manson 21; 57 S. J. 285; 29 T. L. R. 243.

creditors in respect of the costs they have incurred in the suit. This application is dismissed, but without costs.

V. N V. *Application dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

FOREIGN COURT DECREE No 58 OF 1922
EXECUTION MISCELLANEOUS APPLICATION No. 464 OF 1924.
April 8, 1925.

Present.—Mr Rupchand Bilaram, A J. C.

MESSRS. LANGLEY BILLIMORIA AND CO —DECREE-HOLDERS—PLAINTIFFS
versus
FIRM OF LAKHMICHAND-GOPALDAS [illegible]—JUDGMENT-DEBTORS—DEFENDANTS.

Civil Procedure Code (Act V of 1908), ss 39, 42, 46—Transfer of decree for execution—Court to which decree transferred, whether can issue precept

A Court to which a decree has been transferred for execution is not competent to issue a precept under s 46 of the C P C

Mr. *Pahlajsing B. Advani*, for the Applicant

ORDER.—This decree has been transferred by the Bombay High Court to this Court for execution. The judgment creditors have obtained attachment of certain debts and certain moveable property within the ordinary jurisdiction of this Court. They have upto now realized nothing. On November 27, 1924, they obtained a precept from this Court for attachment of certain immoveable properties at Shikarpur outside the ordinary jurisdiction of this Court. This order was passed under a misapprehension as to the nature of the decree and the effect of s. 46, C. P. C. The period for which the precept was in force has expired. The judgment-creditors have repeated their application for a fresh precept.

Section 46, C. P. C., enables a judgment-creditor to apply for a precept to "the Court which passed the decree" Admittedly this Court has not passed the decree. It is urged that this section is to be read with s. 42 of the Code which confers on this Court in executing this decree the same powers as the original Court and the issue of a precept is only a step in execution of the decree. I am not prepared to hold that s. 42 of the Code is intended to enlarge the scope of s. 46 or that sufficient reasons exist for deviating from the ordinary rules of construction of interpreting this section literally. The provisions of s. 46 have for the first time been introduced in the Code of 1908, and are intended to provide for *interim* attachment of the property of the judgment-debtor pending the transfer of the decree to the Court within whose jurisdiction such property is. The Bombay High Court which passed the decree and not this Court, is competent to order this decree to be transferred to the Shikarpur Court for execution. The fact that the decree has been transferred to this Court for execution has not deprived the Bombay High Court of its powers either to act under s. 46, C. P C., or to issue simultaneous execution within its own jurisdiction or even to order the transfer of this decree to the Shikarpur Court for simultaneous execution. There is no prejudice to the judgment-creditors in being required to apply for a precept to the High Court of Bombay.

The literal meaning to be attached to the words "the Court which passed the decree" is not repugnant to the general purview of the Act and there is nothing to show that it was intended to be enlarged by reading into the section the words "or the Court to which the decree has been transferred for execution." I must, therefore, reject this application as incompetent.

P. B. A. *Application rejected.*

MADRAS HIGH COURT.

REFERRED CASE No. 12 OF 1924.
September 1, 1925.

Present —Mr. Justice Devadoss and Mr. Justice Waller.

K. KALIBA SAHIB AND OTHERS—PLAINTIFFS
versus
SUBBARAYA AYYAR—DEFENDANT.

Provincial Small Cause Courts Act (IX of 1887), s 28—Civil Procedure Code (Act V of 1908), O VII, r 10—District Munsif exercising small cause jurisdiction, whether bound by judicial order of District Judge on appeal from Revenue Court—Order of District Judge holding suit as cognisable by Civil Court, effect of

A District Munsif acting as a Small Cause Court Judge is subject to the administrative control of the District Court under s 28 of the Provincial Small Cause Courts Act, but he is not bound by an order

of the District Judge passed in his judicial capacity on an appeal from a Revenue Court.

Where, therefore, a District Judge on appeal from a Revenue Court holds that a suit is cognisable by the Civil Court, and in pursuance of such order the plaint is presented in the Court of a District Munsif on the small cause side, the latter is not bound by the order of the District Judge, and is at liberty to hold that the suit is not cognisable by a Civil Court [p. 622, col. 2.]

Case stated under rr. 1 and 6 of O. XLVI of Act V of 1908 by the District Munsif, Negapatam, in S. C. No. 159 of 1924 on his file for the orders of the High Court on the point whether said Small Cause Suit No. 109 of 1924 is triable by the District Munsif in pursuance of the order of the District Court, East Tanjore, at Negapatam, when that District Munsif's Court had already held that it had no jurisdiction to try the said suit.

Mr. *R. Kuppusami Aiyar*, for Plaintiffs Nos. 1, 3 and 7.

Mr. *V. K. Srinivasa Aiyangar*, for the Defendant.

JUDGMENT.—This is a reference by the District Munsif of Negapatam under O. XLVI, rr. 1 and 6 of the C. P. C., and the question referred is in these terms:—

"Is not this Court competent to proceed with the trial of this suit in pursuance of the order of the District Court in C. M. A. No. 101 of 1923 preferred against the order of the Revenue Divisional Officer when this Court on its small cause side had already held that it had no jurisdiction to try this suit."

The suit was brought in the District Munsif's Court on its small cause side by the trustees of Nagore Durga for rent. The defendant contended that the property in his possession formed part of an estate and that a Civil Court had no jurisdiction to try the case. The District Munsif held that he had no jurisdiction to try the case and directed that the plaint be returned to the plaintiffs for presentation to the proper Court. The plaint was presented to the Revenue Divisional Officer and he held that the defendant was not a *raiyat* under Act 1 of 1908 and directed the return of the plaint to the plaintiffs. Against this order of the Revenue Divisional Officer, the plaintiffs appealed to the District Court of Negapatam and the District Judge held that the Revenue Court had no jurisdiction and that the Civil Court had jurisdiction to try the case. The plaint was again presented to the District Munsif. The District Munsif was confronted with his previous order that the Civil Court had no jurisdiction and the order of the District Judge that the Revenue Court had no jurisdiction and that the Civil Court had jurisdiction to try the case. The order of the District Court on appeal from the Revenue Divisional Officer is not binding on the District Munsif. The District Munsif evidently was under the impression that he being subordinate to the District Judge was bound by his order. The District Munsif acting as a Small Cause Judge is subject to the administrative control of the District Court under s. 28 of the Provincial Small Cause Courts Act, but he is not bound by an order of the District Judge passed in his judicial capacity on an appeal from the Revenue Court As we are of opinion that the order of the District Judge in C. M. A. No. 101 of 1923 is not binding upon the District Munsif he is at liberty to pass any order he likes, either party will be entitled to move this High Court against the order of the District Munsif and the decision of the High Court in revision against the order of the District Munsif will bind the District Munsif as well as the District Court. It is not necessary that the question referred to us should be answered at this stage. The papers will be returned to the District Munsif.

V. N. V.

Z. K. *Papers returned.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 109 OF 1925.

December 2, 1925.

Present:—Mr. Justice Mukerji.

FIRM CHANDRABHAN PRAKASHNATH —PLAINTIFF—APPLICANT

versus

EAST INDIAN RAILWAY COMPANY —DEFENDANT—OPPOSITE PARTY.

Railways Act (IX of 1890), ss 75, 80—Goods requiring to be insured consigned for carriage over two Railways—Non-delivery · Suit for compensation against Railway other than that to which goods consigned—Insurance, absence of—Loss, proof of—Liability of Railway Company

In a suit to recover compensation from a Railway Company for the non-delivery of articles of special value, consigned to the Company for carriage the latter can claim protection under s. 75 of the Railways Act only if it is proved that the articles have been lost If the articles are still in the possession of the Railway Administration and it fails to deliver the articles, it cannot take advantage of the provisions of s. 75. [p. 623, cols. 1 & 2.]

Where, however, the suit is brought not against the Railway to which the goods were delivered, but against a Railway over whose system they had subsequently to be carried, the suit is maintainable, under s 80 of the Railways Act, only on the assumption that the goods have been lost while in the custody of such Railway, and the latter is, therefore, entitled to claim the protection of s. 75 of the Act, without any further proof of the loss of the goods [p 623, col. 2, p. 624, col 1]

When goods delivered to a Railway Company for carriage are not forthcoming for delivery at the destination and their whereabouts are not known, it must be assumed that they have been lost [p 624, col. 1]

Civil revision from an order of the Judge, Small Cause Court, Agra, dated the 14th of March 1925.

Dr. *K. N. Katju*, for the Applicant.

Mr. *Ladli Prasad Zutshi*, for the Opposite Party.

JUDGMENT.—This is an application in revision by a plaintiff firm whose suit against the East Indian Railway Company has been dismissed by a learned Judge of the Small Cause Court.

It appears that a consignment of glass bangles consisting of six bundles was sent to the address of the plaintiff from Wadi Bunder in Bombay for delivery at Ferozabad. Out of the six bundles only four were delivered. It was with respect to the two bundles not delivered that the suit was brought for compensation.

The learned Judge found that at the Tundla Railway Station, the goods had been handed over to the East Indian Railway Company and that, therefore, the East Indian Railway Company would be responsible for the compensation. He, however, held that glass bangles of the value consigned were, under the law liable to be insured for their safe conveyance and that there being no insurance and there being no declaration of the value and the contents of the bundles the defendants were not liable.

No evidence has been adduced by the respondents to prove that the two bundles out of six were actually lost by them. That being the case, the learned Counsel for the applicants contends that it is quite possible that the two bundles are still in the custody and possession of the respondents and that unless and until they prove that the bundles have been lost, they cannot take advantage of the rule that they are not responsible for the loss of those articles which should have been insured, but which have not been insured. There can be no doubt that if the articles be still in the possession of the Railway Administration and if they have failed to deliver the articles in their possession they cannot take advantage of s. 75 of the Railways Act. It is only when the articles have been *lost* by them that the respondents can claim protection under s. 75 of the Railways Act.

In answer to this contention the learned Counsel for the respondents has pointed out that it must be taken that the goods have been lost while in transit on the Railway of the defendants as otherwise he contends, the suit would not at all be maintainable against the respondents. It is conceded on behalf of the applicant that the plaint was wrong in the statements it contained, *viz.*, the goods had been handed over to the East Indian Railway Administration at Bombay. As a matter of fact, the Railway Administration to whom the goods were handed over was the Great Indian Peninsula Railway. East Indian Railway were, therefore, not a contracting party with the plaintiff firm. Under s. 80 of the Railways Act a suit can be brought for compensation for loss of goods against either the party to whom they were delivered for conveyance or the party on whose Railway the loss occurred. East Indian Railway not being the contracting party can be held responsible only on the ground that it was on their Railway that the loss of the goods occurred. It is urged that if the respondents are to be held liable they can be held liable only on the assumption that the goods were lost while on their Railway. The case of *G. I. P. Railway* v. *Sham Manohar* (1) has been cited in support of this view.

In my opinion, the contention of the learned Counsel for the respondents is sound. On behalf of the applicants it has been urged that supposing there was a misdelivery of the goods by the East Indian Railway at Ferozabad, that Administration could be held liable under s. 80 of the Railways Act. I am not prepared to express any opinion on the hypothetical case put before me by the learned Counsel for the applicants. It may be that misdelivery of property by East Indian Railway would make them liable under s. 80 of the Railways Act. But even then the loss would be loss by the Railway Company although it would also be a loss to the owner. To give the word "loss" its plain meaning, when a certain article de-

(1) 14 Ind. Cas. 803; 34 A. 422; 9 A. L. J. 492.

livered to the Railway Company is not forthcoming for delivery at the destination and its whereabouts are not known one would say that the article has been lost. In order to make East Indian Railway Company liable the plaintiffs must allege that the goods were lost by something done by or by some neglect of the East Indian Railway Administration. If that be so, the loss is equally a loss within the meaning of s. 75 of the Railways Act. The loss was of a part of goods of the value of over Rs. 100 and of a kind which was liable to be insured. The result is that non-insurance makes the claim unmaintainable.

I hold that the revision has no substance and must fail and is hereby dismissed with costs which will include Counsel's fees in this Court on the higher scale.

Z. K.

Revision dismissed.

MADRAS HIGH COURT.

STAMP REGISTER No. 14383 OF 1924.

August 18, 1925.

Present:—Mr. Justice Phillips and Mr. Justice Ramesam.

In re TIRUVANGALATH NELLYOTON PAIDAL NAYAR AND OTHERS—PLAINTIFFS APPELLANTS.

Court Fees Act (VII of 1870), s. 7, (ix), Sch. I, Art 1—Suit for redemption of kanom*—Decree for possession on payment of mortgage amount and value of improvements—Appeal re value of improvements—Court-fee payable*

The principle of the Court Fees Act is that the plaintiff should pay a Court-fee in proportion to the value of the relief he seeks That value if possible, is determined in money but where there is no money value or the money value is uncertain, the Act provides rules according to which the valuation shall be made. [p. 625, col. 1]

The value of an appeal is not in all cases the value of the suit as originally filed, but may be the value of the relief granted by the decree which the appellant wishes to get rid of [p 625, col 2.]

Where in a suit for redemption of a *kanom*, a decree for possession was passed on payment of the amount of mortgage and the value of improvements and an appeal was filed which related only to the value of improvements payable:

Held, that s. 7, ix of the Court Fees Act was inapplicable and that Court-fee was payable on the memorandum of appeal not on the mortgage amount but *ad valorem* on the amount in dispute in appeal under Art. 1 of Sch. I to the Court Fees Act. [p. 625, cols. 1 & 2.]

Reference under Court Fees Act, 29 M. 367; 16 M. L. J. 287, *Nepal Rai* v. *Debi Prasad*, 27 A. 447; 2 A. L. J. 105; A. W. N. (1905) 40, *In re Parkodi Achi*, 68 Ind. Cas. 444; 45 M. 246; 14 L. W. 624; 41 M. L. J 587, (1921) M. W. N 854; 30 M. L. T. 88; (1922) A. I. R (M) 211 and *Lekh Ram* v *Ramji Das*, 57 Ind Cas. 215, I L 234, followed.

Stamp reference on the question which is the subject-matter in dispute in the second appeal sought to be preferred against the decree of the District Court, North Malabar, in A. S. No 135 of 1923, preferred against a decree of the Court of the Additional District Munsif, Tellicherry in O. S. No. 324 of 1921 whether the enhanced amount of compensation to which alone the appeal relates or the right to redeem, which was the subject-matter of the suit.

Mr. *K. P. Ramakrishna Iyer*, for the Appellant.

Mr. *C. V. Anantakrishna Iyer*, for the Government.

JUDGMENT.

Phillips, J.—This is a reference under s. 5 of the Court Fees Act. The plaintiff filed a suit for redemption of a *kanom*. He obtained a decree for recovery of possession of property, subject to payment of the *kanom* amount and the value of improvements. In appeal, there is no dispute as to plaintiff's right to redeem but he appeals against the value allowed for improvements. The question is:—What is the proper Court-fee payable on the memorandum of appeal?

The reference has been made, because as a matter of practice, the Taxing Officer has been following the decision in *Reference under Court Fees Act s. 5*, (1) where it was held that the claim for improvements being merely incidental to the decree for possession, the Court-fees payable was that prescribed by s. 7, cl. ix of the Court Fees Act, *viz.*, on the principal amount of the mortgage. It appears, on a reference to the papers in that case, which was an ejectment suit that the right to eject was in dispute in appeal as well as the claim for improvements; but in answering the reference, this Court held that even where the question raised is as to the value of the improvements, the appellant should not be called upon to pay any fee other than that payable in a suit for possession of land. This dictum is *obiter* and has not been followed in later cases. We have now to determine whether the practice in accordance with this *dictum* is correct. The payment of compensation for improvements under the Malabar Tenants' Compensation Act is similar in nature to the payment of money

(1) 23 M. 84; 8 Ind. Dec. (N. S.) 453.

due under a mortgage, for, until such a payment is made, the landlord or mortgagor, as the case may be, cannot recover possession. This case, therefore, is similar to a redemption suit where the amount of mortgage money payable is in dispute. The principle of the Court Fees Act is that the plaintiff should pay a Court-fee in proportion to the value of the relief he seeks That value, if possible, is determined in money but where there is no money value or the money value is uncertain, the Act provides rules according to which the valuation shall be made. Section 7 deals with the valuation of suits only, except in cl. (iv) where the valuation of an appeal is also provided for, that clause deals with cases where the money value of the relief cannot be ascertained.

The general provision in respect of appeals is Art. 1, Sch I which provides that the fee shall be paid in accordance with the amount or value of the subject-matter in dispute and it is clear from the language that the words "in dispute" must relate to the dispute in appeal and not in the original suit. It would thus appear that the word "suits" mentioned in s. 7 does not include appeals and this was pointed out in *Reference under Court Fees Act*, 1870 (2), where a case similar to the present one was considered. It was there held that, when an appeal in a redemption suit related only to the amount of mortgage money payable, the fee must be calculated with reference to the amount in dispute in appeal. This case exactly covers the present reference and it is not quite clear why it has not been followed by the Taxing Officer It purports to follow a case in *Nepal Rai* v. *Debi Prasad* (3) and dissents from a contrary decision in *Pirbhu Narain Singh* v. *Sita Ram* (4) The view in *Nepal Rai* v. *Devi Prasad* (3) was also followed in *Bajı Lal* v. *Gobardhan Singh* (5) and *Raghbir Prasad* v. *Shanker Bux Singh* (6). There are cases in this Court which seem to support *Reference under Court Fees Act, s 5* (1), *Zamorin of Calicut* v. *Surya Narayana Bhatta* (7), *Reference under Court Fees Act, s 5* (8) and *Sekharan Nair* v *Kongot Eachoran Nair* (9).

In all these cases as well as in *Reference under Court Fees Act, s 5* (1), the question of the right to redeem or the right to eject was in issue. The decision in *Zamorin of Calicut* v *Narayana Bhatta* (7) has reference to a suit and not to an appeal and consequently s 7, cl (ix) is directly applicable. *In Reference under Court Fees Act* s. 5 (8) the reference was made in connection with an appeal but the judgment deals only with the question of suits In *Sekharan Nair* v. *Kongot Echaran Nair* (9) the right to redeem was in issue and it was held that, where the only question raised in appeal is as to the amount payable, the memorandum of appeal would come under Art 1 of Sch. I for the purpose of computing the Court-fee. In *In re Garapati Butchi Seethayamma*, (10) the right to recover land was in issue in the suit but the learned Judge in his judgment recognised that the current of authority is clearly in favour of the view that the value of an appeal is not in all cases the value of the suit as originally filed, but the value of the relief granted by the decree which the party wishes to get rid of. That this is the correct view is clear from the frame of the Court Fees Act which provides means for determining the value of the relief sought, such value cannot always be accurately determined by the plaintiff, when he files the suit, but can in many cases be definitely fixed in appeal, after the decree has been passed, the value being the difference between the amount stated in the decree and the amount sought by the plaintiff. It is only in very rare cases that an appeal cannot be definitely valued and such cases are provided for in s. 7 cl. (iv). There may be other instances and then, one would naturally look to the provisions of the Act relating to suits in order to ascertain the value of the appeal.

The principle laid down in *Reference under Court Fees Act 1870* (2) has been adopted in *In re Porkodi Achi* (11) and also by the Allahabad High Court as mentioned above, and by the Lahore High Court in *Lekh Ram* v. *Ramji Das* (12).

(2) 29 M. 367, 16 M. L J 287.
(3) 27 A. 447, 2 A L. J 105, A. W N. (1905) 40
(4) 13 A. 94, A. W. N (1890) 231, 7 Ind Dec. (N S) 59.
(5) 1 Ind Cas 1000, 31 A 265, 6 A L J 155.
(6) 21 Ind. Cas. 723, 36 A. 40, 11 A L. J. 1016 (F. B.).
(7) 5 M 284, 2 Ind Dec (N. S) 198
(8) 14 M. 480; 5 Ind. Dec. (N. S.) 335.
(9) 3 Ind Cas 459, 20 M L. J 121, 6 M L T 245.
(10) 85 Ind Cas 405, 21 L W 15, 47 M L J 919; (1925) A I R (M) 323, 48 M 652
(11) 68 Ind Cas 444, 45 M 246, 14 L W 624, 41 M L. J. 587; (1921) M W N 854; 30 M. L. T. 88; (1922) A I R. (M) 211.
(12) 57 Ind. Cas. 215; 1 L. 234.

We, therefore, accept the ruling in *Reference under Court Fees Act, 1870* (2) and find that the Court-fee payable in the present instance must be determined in accordance with the value of improvements which the appellant seeks to avoid. Time for paying the additional Court-fee is extended to 28th August, 1925.

Ramesam, J.—I agree.

V. N. V. *Reference answered.*

Z. K.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 206 OF 1920.

June 10, 1925

Present:—Mr. Justice Adami and Mr. Justice Sen.

HITENDRA SINGH AND OTHERS—PETITIONERS

versus

MAHARAJADHIRAJ OF DARBHANGA—OPPOSITE PARTY.

Court Fees Act (VII of 1870), ss 5, 12—Court-fee payable on memorandum of appeal—Taxing Officer, order of—High Court, interference by—Refund of excess fee levied

The High Court has no power or jurisdiction to interfere with an order passed by the Taxing Officer settling the amount of Court-fee payable on a memorandum of appeal, which order is final and against which there is no power of appeal, review or revision Even if the Court is of opinion that the Court-fee levied is in excess of that payable under the law, it has no power to order a refund of the excess amount levied

Application for refund of excess Court-fees paid on the memorandum of appeal in Appeal No. 206 of 1920.

Messrs. *S. M. Mullick* and *L. K. Jha*, for the Petitioners.

Mr. *Sultan Ahmed*, Government Advocate, for the Opposite Party.

JUDGMENT.—This is a petition for the issue of a certificate by the Court for the refund of Rs. 2,427-8, paid as Court-fee on a memorandum of appeal filed before this Court.

The petitioners filed a suit on the 24th July 1918 paying a Court-fee of Rs. 572-8. They lost the case in the Trial Court and appealed to this Court, paying again the same Court-fee as had been paid on the plaint. The matter was reported by the Stamp Reporter to the Taxing Officer and the Taxing Officer decided that the Court-fee due on the memorandum of appeal was Rs 3,000 and the petitioners accordingly paid the deficit.

When the appeal came before a Bench of this Court the matter of the Court-fee payable on the plaint was considered and it was decided that the Court-fee of Rs. 572-8 was sufficient.

It is now claimed that by reason of the decision of a Bench of the Court the petitioners are entitled to a refund of Rs 2,427-8.

It has been settled by this Court in a series of decisions, namely, *Ram Sekhar Prasad Singh* v. *Sheonandan Dubey* (1) and *Sheopujan Rai* v. *Kesho Prasad Singh* (2) as well as in the case of *Ram Sumran Prasad* v. *Gobind Das* (3) that in a case like this, this Court has no power or jurisdiction to interfere with the order passed by the Taxing Officer which is final and against which there is no power of appeal, review or revision. These cases conclude the matter and prevent us from interfering or in any way holding that the decision of the Taxing Officer was incorrect, and his decision must stand. We have, therefore, no power to order a refund of the Rs. 2,427-8.

The petitioners are entitled to some sympathy owing to the difference in the decision between the two authorities and the best that they can do is to move the Board of Revenue to grant a refund or some alleviation in the matter.

The application is rejected.

Z. K. *Application rejected.*

(1) 68 Ind Cas 316, 2 Pat 198, (1922) Pat 337, 4 P L T 71, 1 Pat L R. 25, (1923) A I R. Pat 137

(2) 76 Ind Cas 347, 2 Pat 919 at p. 924, 5 P L. T 315, (1924) A I. R (Pat) 310.

(3) 68 Ind Cas 700, (1922) Pat. 291, 4 U. P. L R. (Pat) 75, 3 P. L T. 701, (1922) A. I. R. (Pat.) 615, 1 Pat L R. 1; 2 Pat. 125

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1356 OF 1919.

September 1, 1925.

Present—Mr Justice Devadoss and Mr. Justice Waller.

ALELLA KESAVARAMAYYA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

VISAMSETTI VENKATANARASIMHA AND OTHERS—DEFENDANTS—RESPONDENTS

Limitation Act (IX of 1908), s. 19—Pro-note, invalid, whether can be used as acknowledgment.

When a person borrows a certain sum of money and executes a promissory-note he executes it for the consideration received by him and when it is executed in respect of a consideration already passed it is an acknowledgment of the liability to pay the amount mentioned in the note [p 627, col 2]

Though a promissory-note made payable to bearer cannot be enforced as being invalid, it can nevertheless be used as evidence of an acknowledgment of liability under s 19 of the Limitation Act so as to save the bar of limitation [*ibid*]

Nachimuthu Chetty v *Andiappa Pillai*, 42 Ind Cas 706, 6 L W 630, (1917) M W N 778 and *Natarajulu Naicker* v *Subramanian Chettyar*, 69 Ind Cas 939, 45 M 778, (1922) M W N 450, (1922) A I R (M) 181, 16 L. W 705, 43 M L J 695, followed

Second appeal against a decree of the District Court, Kistna at Masulipatam, in A S. No. 122 of 1918, preferred against a decree of the Court of the Subordinate Judge, Bezwada, in O S No 83 of 1916

Mr. *K. Krishnamachariar*, for the Appellants

Mr. *K. Venkataswami Naidu*, for the Respondents

JUDGMENT.—The only question in this second appeal is whether the suit is barred by limitation. The plaintiffs are the sons of Venkayya Garu and sue the defendants who are the members of the Committee called Sri Kannika Parameswari Visyam Chetty Venkataratnam Hindu High School Committee for a certain sum alleged to be due to the plaintiffs. The Subordinate Judge gave a decree in favour of the plaintiffs. On appeal the District Judge at Masulipatam dismissed the suit on the ground that it was barred by limitation

The defendants who are the members of the Sri Kannika Parameswari Visyam Chetty Venkataratnam Hindu High School Committee, took over the management of the Hindu High School at Bezwada with all its assets and liabilities from another Committee called Sri Kannika Parameswari Hindu High School Committee in November 1915. Both the Committees were registered under the Registration of Societies Act, 1860 Venkayya advanced considerable sums of money for the upkeep of the school and for certain buildings connected with the school and the committee of the school authorised two of its members to execute a promissory-note in his favour for the amount due. Exhibit E was executed on 18th November 1913 The suit was filed on 14th November 1916. The promissory note was found to be invalid as it was made payable to bearer. The plaintiffs rely upon s. 19 of the Limitation Act and wish to treat Ex. E as an acknowledgment in writing and signed by the agent of the debtors duly authorised in their behalf The contention of Mr Varadachariar for the respondents is that the executants of Ex E were not authorised to make an acknowledgment under s. 19 of the Limitation Act Exhibit D-3 which is dated 17th November 1917, he contends is not an acknowledgment, for it only authorises two members of the Committee to execute a promissory-note. D-3 is the resolution of the Committee authorising the President and the Secretary and a member of the Committee (Gopal Rao) to execute a promissory-note for the sum of Rs 3,500 to Venkayya Pantulu. D 3 is not an acknowledgment of liability In pursuance of the authority Ex. E was executed on 18th November 1913 Exhibit E, therefore, is an acknowledgment of liability of the Committee to the extent of Rs 3,500 to Venkayya It is not necessary that in the promissory-note itself the fact that it is an acknowledgment should be recited, the execution of the note itself is in acknowledgment of the liability. When a person borrows a certain sum of money and executes a promissory-note he executes it for the consideration received by him and when it is executed in respect of a consideration already passed it is an acknowledgment of the liability to pay the amount mentioned in the note It was held in *Nachimuthu Chetty* v *Andiappa Pillai* (1) that though a promissory note cannot be enforced as offending against s 26 of the Paper Currency Act, it can nevertheless be used as evidence of an acknowledgment of liability. This case was followed in *Natarajulu Naicker* v. *Subramaniam Chettyar* (2). Exhibit E mentions the proceedings of the Committee and recites the fact that it is executed on behalf of the Committee. Exhibit E, therefore, is an acknowledgment of liability within the meaning of s. 19 of the Limitation Act and the suit filed within 3 years of it is not barred by limitation

The appeal is allowed and the lower Court will try the other issues in the case. The appellants will be entitled to the costs of the second appeal.

V. N. V. *Appeal allowed.*

Z. K.

(1) 42 706, 6 L W. 630, (1917) M W N 778.

(2) 69 Ind Cas 939, 45 M 778, (1922) M W. N. 450, (1922) A. I. R. (M.) 181, 16 L. W. 705, 43 M. L. J. 695.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 220 OF 1924.

June 19, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

VISHVANATHBHAT ANNABHAT PUJARI—PLAINTIFF—APPELLANT

versus

MALLAPPA NINGAPPA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 28—Place of registration—Portion of property included in deed within jurisdiction of Sub-Registrar—Intention to re-convey such portion, effect of—Registration, validity of—Dekkhan Agriculturists' Relief Act (XVII of 1879), s 3—Suit to set aside sale—Relief, whether can be granted.

Where a portion of the property comprised in a deed of transfer is within the jurisdiction of a sub-Registrar, he has jurisdiction to register the deed, and evidence cannot subsequently be led to show that the intention of the parties was to re-convey such portion to the transferor after registration of the deed had been effected. Even on proof of such intention the registration of the deed would not be rendered invalid [p 628, col. 2, p 629, col 1]

The Dekkhan Agriculturists' Relief Act gives extraordinary reliefs in certain cases which are specified in the Act These include a suit for redemption but not a suit to set aside a sale-deed In a suit of the latter kind, therefore, the plaintiff is not entitled to take advantage of the provisions of the Act [p 629, col 2]

Second appeal from the decision of the Assistant Judge at Dharwar, in Appeal No. 71 of 1921, reversing that of the Subordinate Judge, at Hubli, in Suit No. 117 of 1919.

Mr. *S. R. Parulekar*, for the Appellant.

Mr. *Nilkant Atmaram*, for the Respondents.

JUDGMENT.—This is an appeal from the decision of the Assistant Judge of Dharwar, who, reversing the decree of the Trial Court, dismissed the plaintiff's suit with costs throughout. The suit was one to recover possession of the plaint land with costs and future mesne profits, on the ground that the plaint land belonged to the plaintiff. His mother during his minority purporting to act as his guardian had sold the land to one Ningappa, the deceased father of defendants, on August 2, 1905. The sale was sought to be set aside on three grounds: (1) that the sale-deed was a fraud on registration; (2) that the sale was not for the benefit of the plaintiff; and (3) that the sale was of the nature of a mortgage and the amount of consideration had already been paid off from the profits of the land.

The fraud on registration set up by the plaintiff is based on the fact that only a portion of the land in the sale-deed was within the jurisdiction of the Sub Registrar of Navalgund, who registered the sale-deed, and it is alleged that that land was inserted in the deed merely for the purpose of giving jurisdiction to the Sub-Registrar, the intention of the parties being that it should be re-conveyed to the vendor. The Judge in the Trial Court said:

"The circumstances in which the two sale-deeds seem to have been passed lend support to the allegation that the insertion of the plot of ground in the sale-deed now in suit was merely with a view to give jurisdiction to the Sub-Registrar of Navalgund to register the deed. Besides Chidambarbhat, who is examined by the defendants, swears that the object of the insertion of the plot in the deed was merely to give jurisdiction to the Sub-Registrar of Navalgund, and that the parties to the sale-deed in suit had no intention to alienate the said plot by the deed, and that the sale to him by Ningappa of the plot was *benami* for Bhagirthibai."

Exhibit 84 is the deed which transferred the plot to Chidambarbhat, the *benamidar* for plaintiff's mother

The appellant relies for his argument that there was a fraud on registration on two cases *Harendra Lal Roy Chowdhri* v. *Haridasi Debi* (1) in which it was held that none of the properties appearing in the document to be registered was within the jurisdiction of the Registrar, and, therefore, registration was invalid; and *Biswanath Prasad* v. *Chandra Narayan Chowdhuri* (2), in which it was proved that the transferor had no title to the property mentioned in the transfer-deed which would bring it within the jurisdiction of the Registrar. Neither of those cases is applicable to the facts in the present case. But the appellant wishes us to extend those decisions to the facts before us. We are concerned at present with the registration of the sale-deed. The Registrar had jurisdiction to register that document, because a portion of the property mentioned in the deed was within his jurisdiction. Clearly, if no property belonging to the transferor appearing in the document to be registered is within the jurisdiction of the Registrar, registration by such Registrar of that document would be invalid. But we are not prepared to go further and say

(1) 23 Ind. Cas 637, 41 C. 972, 27 M. L. J. 80; (1914) M. W. N 462, 16 M L. T. 6, 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L R. 400; 12 A. L. J. 774, 1 L. W. 1050, 41 I. A. 110 (P. C).

(2) 63 Ind. Cas. 770, 48 I. A. 127; 48 C. 509 (P. C.).

that evidence can be led with regard to the intention of the parties at the time the principal document was registered, to deal again with the portion of the property which was within the jurisdiction of the Registrar and which rendered its registration valid.

The next question is whether the sale was for the benefit of the plaintiff. It has been found that the plaintiff's mother sold the property in order to pay off a mortgage and, from the facts found, it was certainly desirable in the interests of the plaintiff that the mortgage should be paid off, as the profits of the land mortgaged were more than the interest on the mortgage, provided they could be realized

The appellant, however, objects to the payment made by his mother as being excessive. There is no evidence that it was excessive, as the appellant took no steps to prove that on a proper mortgage account being taken the amount paid by the plaintiff's mother was too much. Evidence was called to show that certain tenants had paid full rent to the mortgagee between 1902 and 1905. As the Judge remarks, they could not produce the receipts of such payment. However, that may be, the onus would certainly lie on the appellant, if he seeks to dispute his mother's action to prove that she had over-paid the mortgagee. But even then that would not affect the position of a *bona fide* purchaser for value It would be sufficient for him to inquire whether there was, as a matter of fact a mortgage to be paid off. He would not be bound to follow the purchase money, and ascertain that it was properly disposed of by the plaintiff's guardian

The last point urged by the plaintiff was that the sale by his mother was of the nature of a mortgage That question was ruled out by the Trial Judge on the ground that the Dekkhan Agriculturists' Relief Act did not apply at the date of the sale-deed, relying on the decision in *Chanbasayya* v *Chennapgavda* (3). Since the decision of the Appellate Court in this case, the decision in *Chanbasagya* v. *Chennapgavda* (3) was overruled by a decision of the Full Bench. Therefore, there was no objection to the plaintiff's contention that he should be allowed to prove that the sale was in reality a mortgage transaction between his mother and the purchaser if the suit was one in which the question could be raised. But this is not a suit for redemption. This is a suit to set aside a sale-deed. Therefore, this is not a suit falling within the class of suits specified in the Dekkhan Agriculturists' Relief Act, and the plaintiff is not entitled to take advantage of its provisions As pointed out in *Bachi* v. *BickhhandJiomal* (4) the Dekkhan Agriculturists' Relief Act gives extraordinary reliefs in certain cases which are specified in the Act. These include a suit for redemption. As this is not a suit for redemption, any relief granted by the Act is not open to the plaintiff The appeal, therefore, fails and must be dismissed with costs.

Z K *Appeal dismissed.*

(3) 54 Ind. Cas. 693, 44 B. 217, 22 Bom. L. R. 44.

(4) 9 Ind Cas 393, 13 Bom L R 56, 13 C L J, 69, 8 A L J 105, 9 M L T 199, 15 C W N 297, 21 M L J 89, (1911) 2 M W N 59 (P. C)

PATNA HIGH COURT.

APPELL FROM ORIGINAL DECREE No. 98 OF 1922.

November 3, 1925.

Present:—Mr. Justice Das and Mr Justice Adami.

BHATU RAM MODI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

FOGAL RAM—PLAINTIFF—RESPONDENT.

Mesne profits, decree for—Ascertainment of mesne profits, application for, nature of—Dismissal of application, legality of—Limitation

An application for the ascertainment of mesne profits is an application in the suit itself and the law of limitation has no application to it, so long as the suit is a pending suit [p 631, col. 1]

Where a claim for mesne profits has been decreed, an application for ascertainment of mesne profits cannot be dismissed, inasmuch as the dismissal of the application would amount to a dismissal of the suit which has already been decreed [*ibid*]

Appeal against a decision of the Subordinate Judge, Hazaribagh, dated the 21st January 1922.

Messrs. *Sultan Ahmed* and *S. N. Dutt*, for the Appellants.

Messrs *S. M. Mullick* and *B C. De*, for the Respondent.

JUDGMENT.

Das, J.—On the 25th August 1915 the Ramgarh Raj obtained a decree for possession of certain properties, for mesne profits up to the date of the decree "at the rate of the rent fixed in the lease with interest thereon at the rate specified in the said lease" and for subsequent profits "at the

full rate recoverable under the law." The Ramgarh Raj obtained possession of the properties on the 22nd February 1916 and it, therefore, became entitled to mesne profits at the rate of rent up to the 25th August 1915 and at the full rate from the 25th August 1915 to the 22nd February 1916.

On the 23rd December 1915 the Raj presented an application for execution claiming Rs. 2,866 14-0 mesne profits for eleven years up to the date of the decree and Rs. 1,069-11-9 as mesne profits from the date of the decree up the 23rd December, 1915. The application was presented as a simple application for execution of the decree, the Raj and its legal advisers having overlooked the fact that under the C. P. C. of 1908 ascertainment of mesne profits was a proceeding in the suit itself Certain proceedings were taken and certain properties of the judgment-debtors were sold in this execution, but an objection having been taken the sale was set aside on the 8th December 1917 and the decree-holder was directed to file fresh execution. On the 13th August 1919 another execution case was started by the Raj. On the 11th November 1919 this was rejected as infructuous, because certain substitutions had not been effected. On the 7th March 1920 the third execution case was started. The judgment-debtors now for the first time raised the objection that mesne profits could not be ascertained in execution and that there was no application for ascertainment of mesne profits and that the application for execution could not be converted into an application for ascertainment of mesne profits. On the 17th April 1920 the Court dismissed this application as barred by limitation. The Court also held that the proceeding could not continue, as mesne profits had not been ascertained which must be ascertained in a proceeding in the suit itself. The decision of the Court. on the question of limitation, was subsequently set aside by that Court on review and that decision was upheld by this Court Having regard to this decision Fogal Ram who meanwhile had purchased the decree from the Raj instituted the present proceedings on the 29th April 1920 for the ascertainment of mesne profits. His application has succeeded and the jugment-debtors appeal to this Court and they contend that having regard to the previous orders, namely, those passed on the 8th December 1917, 11th November 1919 and the 17th April 1920 the present application was not maintainable. The matter was heard before my learned brother and myself on the 5th May 1925 when we delivered judgment agreeing with the contention of the appellants. Mr. B. C. De thereafter appeared before us before we had signed the judgment and he asked for permission to argue the matter again before us. We acceded to the request and we have heard the parties fully to-day. In my opinion having regard to the arguments which have been advanced before us to-day, we must affirm the decision of the lower Court and dismiss this appeal

The short point which falls to be considered is whether there is any power in a Court to dismiss an application for ascertainment of mesne profits. It is contended before us by Mr. Susil Madhab Mullick that a decree having been passed for ascertainment of mesne profits it was not competent to the Court at any stage to dismiss those proceedings, it being beyond the power of a Court to dismiss a claim which had already been decreed, and it was contended that if the previous applications be regarded as applications for the ascertainment of mesne profits, then the dismissal of those applications were from one point of view illegal and that in any case they could not prevent the decree-holder from inviting the Court to carry into effect the decree of the High Court dated the 25th August 1915 This view is supported by the decision of the Judicial Committee in *Lachmi Narayan Marwary* v. *Balmukund Marwary* (1). That decision was pronounced in suit for partition. A preliminary decree for partition was made and all that remained to be done was to carry the partition into effect. The Subordinate Judge accordingly fixed a date for hearing the parties as to how the partition was to be effected and gave them notice, but the plaintiff did not appear on the date fixed and thereupon the Subordinate Judge dismissed the suit for want of further proceedings. With reference to what was done by the Subordinate Judge their Lordships said as follows:—"After a decree has once been made in a suit, the suit cannot be dismissed unless the decree

(1) 81 Ind Cas 747, 5 P. L T 623; (1924) A. I R. (P C) 198, 35 M L T 143, 47 M. L J 441, 20 L W. 491, (1924) M W N 707; 10 O & A L R 1033, 26 Bom. L. R 1129, 22 A. L. J. 990, 40 C L J. 439, 51 I A 321, L R 5 A (P C) 171, 29 C. W. N. 391; 1 O. W. N. 629, 4 Pat. 61 (P. C.).

is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside. After a decree any party can apply to have it enforced," and then their Lordships said this:—"If, for instance, the Subordinate Judge had made an order adjourning the proceedings *sine die*, with liberty to the plaintiff to restore the suit to the list on payment of all costs and Court-fees thrown away, it would have been a perfectly proper order."

Now it seems to me that this case decides the present controversy between the parties The decree of the 25th August 1915 in terms gave a decree to the plaintiff for mesne profits There was, therefore, a valid decree which was operative and which the Court had to carry into effect. That decree was not set aside and it seems to me that the proceedings for the ascertainment of mesne profits could not be dismissed, for the dismissal of those proceedings would operate as a dismissal of the suit which had already been decreed by the Calcutta High Court.

The question only arises as it is contended before us that although in form the previous applications may have been applications for execution of the decree, in substance they were applications for ascertainment of mesne profits I hold that if they were applications for the ascertainment of mesne profits, their dismissal was *ultra vires* and that it was open to the plaintiff to ask the Court to ascertain the mesne profits It is well-established that an application for mesne profits is an application in the suit itself and that the law of limitation has no application to it so long as the suit is a pending suit.

Mr. Sultan Ahmed ingeniously argued before us that a distinction should be drawn between a suit and a claim which may be involved in the suit He admits that the suit having been decreed it was not in the power of the learned Subordinate Judge to dismiss the suit, but he contended before us that the claim for mesne profits stood on a different footing. I am unable to agree with this contention. The only part of the suit that remained was that dealing with the question of mesne profits payable to the plaintiff; and in any view the claim for mesne profits had in distinct terms been decreed by the Calcutta High Court and that being so, that claim could not be dismissed by the learned Subordinate Judge.

I would accordingly dismiss this appeal. There will be no order as to costs.

It was brought to our notice that the lease does not provide for the payment of any interest. That being so, the plaintiff will be only entitled to mesne profits at the rate of rent fixed in the lease up to the date of the decree

Adami, J.—I agree.

Z. K. *Appeal dismissed.*

RANGOON HIGH COURT.

CIVIL MISELLANEOUS APPEAL No. 112 OF 1924.

March 30, 1925

Present:—Mr Justice Heald and Mr. Justice Chari.

L. A. R. ARUNCHELLAM CHETTIAR—APPELLANT

versus

U PO LU—RESPONDENT.

Civil Procedure Code (Act V of 1908), O XL, r 4, O XLIII, r 1 (s)—Receiver—Order determining liability of Receiver on accounts and directing payment—Appeal, whether lies

An appeal is a creature of Statute and unless the right of appeal is specially conferred by some law, no one has a right to appeal [p 632, col 1]

The operative part of r 4 of O XL, C P C, is the part which enables the Court to attach and sell the Receiver's property, cls (*a*), (*b*) and (*c*) of the rule give only the grounds on which such an order can be made Unless, therefore, an order is made under the operative part of the rule, no appeal would lie under r 1 (*s*) of O XLIII of the Code [*ibid*]

An order determining the liability of the Receiver and directing him to pay a certain sum of money into Court is not open to appeal either at the instance of the Receiver or at the instance of any other party. [p 632, col 2]

Appeal against an order of the District Court, Myaungmya, in C. M No 79 of 1916.

Mr. *Anklesaria*, for the Appellant.

Mr *Oehme*, for the Respondent.

JUDGMENT.—One P V. D. V. Muthiah Chetty filed a mortgage suit against L. A. R Arunachellam Chetty. He applied for and obtained an order for the appointment of a Receiver of the mortgaged properties. U Po Lu, a Pleader, was appointed Receiver. A mortgage-decree was passed by the District Court, but that decree was set aside in appeal by the Chief Court, which dismissed plaintiff's suit The mortgagor applied for and obtained, by way of restitution, delivery of some of the properties but he could

not, naturally, obtain delivery of a launch which had sunk. Another launch was delivered to him in such a condition that it was of little value. On the 16th of November, 1922, the Receiver was asked to file a full report He took time to file his report and when he did file it, his report was found unsatisfactory. On the 15th of December, 1922, he was asked to file full accounts. He filed his accounts on the 5th of January 1923, and after many adjournments, Mr. Ghose, on behalf of the mortgagor on the 9th of June 1923, filed his written objections to the Receiver's accounts. In that statement of objections, he drew attention to various items in respect of which the Receiver was liable to him and also challenged his accounts He ended up his statement with a prayer that either the Receiver be ordered to pay all losses or sanction be granted to the objector to sue the Receiver for damages. The learned District Judge held an enquiry and on the 28th April 1924, he passed an order directing the Receiver to pay within a month the sum of Rs. 4,760.

Against this order the mortgagor, L A. R. Arunachallem appeals. The Receiver has also filed a memorandum of objections. The question to consider is whether such an appeal lies. An appeal is a creature of Statute and unless specially given by some law no one has a right to appeal. Order XLIII, r. 1, deals with appeals from orders and cl. (*s*) makes orders under r. 1 or r. 4 of O. XL appealable. Thus all orders passed in respect of the appointment of a Receiver would be appealable and also orders under r. 4 of O. XL. Rule 4 of O. XL, provides that when a Receiver fails to submit his accounts or fails to pay an amount ordered or causes loss to the property, the Court may direct his property to be attached and sold. No such order for the attachment of the Receiver's property has been made in this case. Mr. Anklesaria for the appellant argues that on default being made in any of the acts enumerated as (*a*), (*b*) and (*c*) of r. 4 of O. XL there is a default within the meaning of that rule and an appeal lies. This argument is obviously unsound. The operative part of r. 4 is the part which enables the Court to attach and sell the Receiver's property and cls. (*a*), (*b*) and (*c*) give only the ground on which such an order can be made. It is, therefore, idle to argue that an appeal would lie when no order is made under the operative part of the section.

It is not necessary to deal with the authorities on this point at length and we will draw attention only to the recent cases. In *Ganesh Lal* v. *Kumar Satya Narayan Singh* (1), a Receiver was found liable for a certain amount and he filed an appeal against the order containing that finding. The learned Judges held that no appeal lay since the finding was not accompanied by an order under r. 4 of O. XL. This, it is true, was an appeal by the Receiver, but in a later case of the same High Court, *Samhautta* v. *Bhagwati Singh* (2), the appeal was instituted by the party seeking to hold the Receiver liable. The Court of the District Munsif had held that the Receiver was liable only to account for the year 1916 but in appeal the Subordinate Court enlarged the order by directing that the Receiver should furnish accounts for 1917 and 1918 also. The Patna High Court in revision set aside the order of the lower Appellate Court on the ground that no appeal lay to it. In a recent case, *Palaniappa Chetty* v. *Palaniappa Chetty* (3) a Bench of the Madras High Court took the same view as the Patna High Court following the two cases above cited. In the Madras case, also, the Receiver was ordered to pay a certain sum of money into Court and he appealed against that order. The appeal was an appeal by the Receiver but the reasoning in the case shows that no appeal would lie even when the party challenging the Receiver's account is the appellant. In *Shriniwas Kuppuswami Mudaliar* v. *Waz* (4) the facts of the case are different. There are some passages in it which may be used as supporting the position that an appeal would lie when relief is refused against the Receiver, but these remarks are *obiter* and were merely what the learned Judges thought to be an application of the principle in the decision of *Zipru* v. *Hari* (5) which deals, however, with an entirely different point.

It is not for us to speculate as to the reason why the Legislature has thought fit not to give a right of appeal in such cases. Possibly it is because the aggrieved

(1) 54 Ind Cas 207, 4 P. L J. 636, (1920) Pat 35.
(2) 55 Ind Cas 15; 5 P L J. 97, (1920) Pat. 121.
(3) 65 Ind Cas. 403; (1921) M. W. N 806; (1922) A. I R (M) 234
(4) 59 Ind. Cas. 421; 45 B. 99, 22 Bom. L. R. 1126.
(5) 42 Ind. Cas. 73; 42 B. 10; 19 Bom. L. R. 774.

party has a remedy by suit after obtaining the leave of the Court. It is enough for our purpose that no appeal is, as a matter of fact, given, and the appeal must, therefore, fail and is dismissed with costs, five gold *mohurs*. As the substantial appeal has failed, the memorandum of objections must also fail and is dismissed.

Z. K. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT

October 20, 1925

Present :—Lord Blanesburgh, Lord Darling and Sir John Edge

RAM PROTAP CHAMRIA—PLAINTIFF—APPELLANT

versus

DURGA PROSAD CHAMRIA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch II, paras. 1, 2, 15—Reference to arbitration in pending suit—Matters outside scope of suit, whether can be referred - Award in excess of matters referred, validity of—Conclusions influenced by extraneous matters, effect of

In a pending suit a Court has no power to refer to arbitration any questions between the parties to the suit other than those in question in the suit, or any questions in which any one not a party to the suit is concerned. [p 635, col 2]

It is incumbent upon arbitrators acting under an order of reference made under paras 1 and 2 of Sch II, C P C, to comply strictly with its terms The Court does not by making the order of reference, part with its duty to supervise the proceedings of the arbitrators acting under the order [p 636, col 1]

An award made under such an order otherwise than in accordance with the authority conferred upon the arbitrators by the order, is "otherwise invalid" and may be set aside by the Court under para 15 of Sch II, C P C [*ibid*]

An award made in pursuance of an order of reference made in a pending suit, the conclusions of which are dictated or coloured by the view taken by the arbitrators of other questions between the parties or some of them to which the suit had no reference cannot be upheld [p 636, col 2, p 637, col 1]

Appeal from an order of the Calcutta High Court (Mukerjee and Rankin, JJ.), dated the 19th July 1923, and printed as 83 Ind. Cas. 300, affirming an order of the same Court, Original Civil Jurisdiction (Greaves, J), dated the 24th July 1922

Messrs. *L. De Gruyther, K. C*, and *W. Wallach*, for the Appellant.

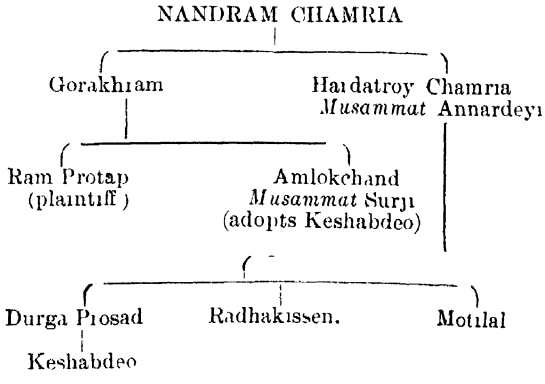
Mr. *W. H. Upjohn, K. C*, Sir *George Lowndes, K. C.*, and Mr. *K. V. L. Narasimham*, for the Respondents.

JUDGMENT.

Lord Blanesburgh.—This appeal is from an order of the High Court of Judicature at Fort William in Bengal, exercising appellate jurisdiction and in effect affirming an order made by Mr Justice Greaves, sitting in the exercise of the ordinary original civil jurisdiction of the Court Both were orders propounded in a suit for the dissolution of a partnership, and their result was to set aside an award of arbitrators so far as that award affected to deal with matters in question in the suit The appellant upholds the award and asks that the orders setting it aside be discharged

The circumstances are somewhat involved and, in detail, elaborate It will be possible, however, as their Lordships hope, to state the facts in a summary form without endangering such accuracy as is requisite for the purposes of their judgment.

The disputants are descendants of one Nandram Chamria, and their disputes are to a large extent, although not altogether, traceable to questions concerning the division of the estate of one of his sons—Hardatroy Chamria—whose position in the family with his relationship to the parties before the Board appears in the following pedigree, taken from the judgment of Mr. Justice Mookerjee in the Appeal Court.



The suit, No. 120 of 1922, related to a business of brokers and bankers carried on under the style of Hardatroy Chamria and Company. The business originally had been started by Hardatroy alone Some years later he took into it, first as an assistant, then as a partner, his nephew, the plaintiff and present appellant, Ram Protab Chamria. The appellant's share as a partner was, in its origin, two annas, subsequently, it became one of five annas Later still, the appellant's brother, Amlokchand, was admitted a partner with a two annas

share. He died, however, in 1911, and after his death the business was carried on by Hardatroy and the appellant together, Hardatroy being treated as possessed of an eleven annas' share and the appellant of the remaining share of five annas. By an indenture, dated the 1st October 1916, and made between Hardatroy and the appellant, it was agreed that this partnership should continue for 20 years. There is no further reference in the appellant's plaint to the two annas' share which belonged to Amlokchand at the time of his death. The appellant appears to treat it as merged in the shares of himself and Hardatroy. This position, however, is not accepted by the representative of Amlokchand's estate, as will later appear.

Amlokchand left no issue but he was survived by his wife the respondent, *Musammat* Surji, and on her expressing a desire to adopt as a son to her deceased husband, Hardatroy's youngest son Motilal, Hardatroy, so it was alleged by the appellant, agreed, with the appellant's consent, to admit Motilal to the firm setting aside for his benefit a two annas' share out of his own share of eleven annas. This arrangement, however, if it became effective at all, was almost immediately superseded by an agreement in writing, dated the 16th November, 1916, to which Hardatroy, his three sons, the appellant and *Musammat* Surji were privy or parties and under which in effect Hardatroy retired from the firm and it was agreed that the business should, as from 1st January, 1917, belong in stated shares to the appellant, to the son to be taken in adoption by *Musammat* Surji, and to the three sons of Hardatroy, *viz*, Durga Prosad, Radhakissen and Motilal—with a variation in interest as between these three, if Motilal proved to be the son to be taken in adoption to Amlokchand as contemplated

By an agreement of even date entered into by *Musammat* Annardeyi, Hardatroy's wife, and his three sons, but to which the appellant was not a party, an arrangement was embodied with reference to the division of his property on the death of Hardatroy, an event then apparently regarded as imminent. The property dealt with by this agreement in terms extends to Hardatroy's interest in the partnership, although that interest appears to have been disposed of, and differently, by the agreement already set forth. It is stated in this second agreement that it had become necessary in order to settle the disputes which had arisen regarding the rights of Durga Prosad who, unlike each of his younger brothers, was an adopted son and not a natural son of Hardatroy.

In the following month Hardatroy died. The appellant's case, as set forth in his plaint, then was that the business since the date when the first agreement of the 16th November, 1916, became operative, had been carried on upon the basis of that agreement but that *Musammat* Surji had not adopted Motilal. On the contrary, she had put forward Keshabdeo, a son of Durga Prosad, as the son whom she had adopted to her late husband. The appellant disputed both the *factum* and the validity of such adoption, further alleging that Durga Prosad had drawn out of the firm about twenty-one lacs without the knowledge of any of the parties, that he had taken forcible possession and refused inspection of the partnership books, that he was making unauthorised entries therein to suit his own purposes and that he had been guilty of gross misconduct in the affairs of the partnership and towards the partners. Accordingly, the appellant claimed dissolution of the partnership, accounts and a Receiver. He cited as defendants to the suit, Durga Prosad, Radhakissen and Motilal, *Musammat* Surji and Keshabdeo. It will be noted that Annardeyi, Hardatroy's widow, is not a party to the proceedings.

The plaint was filed on 12th January 1922. No written statements have ever been put in, but it may, their Lordships think, be fairly gathered from his plaint that the only questions which the appellant, at all events, desired to raise in the suit were, first: whether the adoption of the infant defendant Keshabdeo had ever taken place; whether it was valid if it had; and who, on either view, were the persons interested and in what shares in the partnership, which was treated as one constituted by the agreement of the 16th November 1916; and secondly: whether the allegations made by the appellant against Durga Prosad were, if established, sufficient to entitle the appellant to the decree of dissolution which he sought.

But these did not comprise all the matters of difference then existent in the family of Nandram Chamria. First of all, in the appellant's own immediate branch of it, there was apparently a serious dispute between

him and *Musammat* Surji upon the question whether the appellant and Amlokchand were joint or separate in estate, there was another as to the rights of each brother in the ancestral or self-acquired property of their father Gorakhram; there was a third as to the claim of *Musammat* Surji to certain Company shares standing in the name of the appellant. Next there was a question with Amlokchand's representatives in which not only the appellant but the estate of Hardatroy was concerned namely, whether Amlokchand's estate was entitled to his two annas or some other share in the partnership as carried on prior to the 1st January 1917, and at whose expense In Hardatroy's branch of the family again there were further serious questions, as to the validity of the second agreement of the 16th November 1916, as to the extent of his widow Annardeyi's property, and as to the rights and interests in the property of Hardatroy, both of his widow and his three sons respectively

The most striking feature of this second and third sets of disputes in relation to the question now before the Board is the interest in them of Annardeyi who, as has been pointed out, was not a party to the suit at all. Nor can it fairly be gathered from its terms, as their Lordships think, that any of these questions are either raised or foreshadowed in the appellant's plaint It may well be that some of them would have been mooted in one or other of the written statements of the defendants when put in. But this must still remain in the region of conjecture It suffices to say that none of them have so far become matters in question in the suit.

After the plaint was filed the adult members of the family appear to have come to the conclusion that all the questions in difference amongst them should be referred to arbitration, and on the 11th May 1922, Annardeyi, Ram Protab, Durga Prosad, Radhakissen, Motilal, together with Keshabdeo, by *Musammat* Surji on his behalf, executed a document addressed to Rai Sew Prosadji Toolsan Bahadur, Rai Narang Raiji Khaitan Bahadur, Bansidharji Khaitan, Jugal Kissoreji Birla and Sew Prosadji Gorodiya, appointing them arbitrators "for the settlement of all matters in dispute amongst ourselves" agreeing to accept whatever the arbitrators might decide with reference to the said disputes and in "respect of the proceedings taken in Court with regard to this matter before this day" agreeing that the proper parties would make in accordance with the directions of the arbitrators such applications as the arbitrators might think necessary

The terms in which this document is couched suggest very cogently to their Lordships' minds that it was so far, at all events, the intention of all the parties to it that the proceedings in the suit should become merely ancillary to the arbitration, if indeed they were not thereby to be entirely superseded. And if the application made to the Court had been that all proceedings in the suit should be stayed and an order in these terms had been made thereon, that doubtless would have been the result But the application actually made to the Court was not of that nature It took the form of a petition presented in the suit by the appellant purporting to act with the approval of all parties and referring to the agreement of the 11th May 1922, as "an agreement to refer all matters in dispute between them", and it prayed, in effect, that the matters alluded to in the agreement should all be remitted to arbitration in accordance with its terms

But whatever may have then been the desire of the parties, including it may well be even Annardeyi, and whatever may have been the belief of the arbitrators as to the terms of the order actually made, the Court had on that application no power to refer to arbitration any questions between the parties to the suit other than those in question in the suit or any questions in which was concerned any one not a party to the suit Nor did it exceed its powers in this matter for by its order made on the 23rd May 1922, although not actually drawn up until the following month, what the Court did was to refer all matters in difference *in the suit between the parties to the suit* to the final decision of the arbitrators named in the agreement of the 11th May, 1922, in terms of that agreement, with consequential directions applicable to such a reference, the minor defendant, Keshabdeo, being given liberty to appear in the proceedings through his attorney

In their Lordships' judgment the decision of this appeal really turns upon the effect of that order properly interpreted. It was an order made in pursuance of paras 1 and 3 of the Second Schedule to the C. P C, and in the exercise of a power thereby given to the Court to refer to arbitration

matters in difference in a suit defined by itself in the order of reference. It is incumbent upon arbitrators acting under such an order strictly to comply with its terms The Court does not thereby part with its duty to supervise the proceedings of the arbitrators acting under the order. An award made otherwise than in accordance with the authority by the order conferred upon them is, their Lordships cannot doubt, an award which is "otherwise invalid" and which may accordingly be set aside by the Court under para. 15 of the same Schedule.

The difficulties in this case have all arisen from the fact that the arbitrators (misled it may well be by the attitude of the parties at the time of their appointment) have not fully appreciated the importance of the fact that some of the questions consensually submitted to them were already the subject-matter of a pending suit to which one of the persons appointing them was not even a party.

The arbitrators did not wait for the Court's formal order on the application of the 23rd May. They proceeded at once with the arbitration, and on the 27th May 1922, they published their award. That award not only dealt with all the disputes above detailed but it is clear on its face that the arbitrators in no way discriminated between those disputes which were at issue in the suit and those which were not. The order of the 23rd May is recited as one:—

"By which all matters in dispute between the parties were referred to our arbitration provided that the arbitration is to be in terms of the said agreement, dated the 11th May 1922, and that the attorney for the guardian *ad litem* of the infant defendant be allowed to represent him."

And it is clear to their Lordships from the terms of the award itself—and there is extrinsic evidence to the same effect—that in reaching their conclusions the arbitrators took a comprehensive view of the family situation and made an award which doubtless they regarded as just on the whole and as a whole, but which probably they would not, in any of its parts, have themselves made precisely in the same terms, if the dispute thereby dealt with had alone or separately been submitted to them for adjudication.

To illustrate by a striking example what their Lordships mean, they would point to the shares to be taken in the new partnership provided for by the award. These precise shares have apparently no counterpart in the shares taken in the dissolved partnership according to either of the agreements with reference thereto which the arbitrators themselves find to be binding on the parties.

The award, an elaborate document, has been carefully analysed by the learned Judges in the Courts in India. It is not necessary that their Lordships should again go through it in detail. It finds both of the agreements of the 16th November 1916 to be binding: it declares that the appellant and Amlokchand were not joint but separate in estate and—a finding which vitally concerns the estate of Hardatroy—that they are respectively entitled to a five-annas and a two-annas share in the partnership business up to the 31st December 1916: that the adoption of Keshabdeo was valid: while, with special reference to the partnership business, the award declares that the partnership is to be dissolved with effect from the 30th June 1922: it provides for a new firm being constituted as from the 1st July, 1922: it prescribes the shares in which the old partners are to be interested therein, and with reference to that partnership declares that in case any of the partners do not agree to the prescribed conditions he shall inform the firm in writing, whereupon his capital will be returned to him and his connection with the firm shall cease and his share be taken up equally by the remaining partners. This last is the only provision in the award for the satisfaction of the claims against the property and assets of the dissolved partnership of any partner who does not choose to come into the new partnership. The award contains elaborate further provisions for the adjustment of the other disputes above referred to.

In their Lordships' judgment such an award is in no true sense one made in obedience to the order of the 23rd May, 1922 While it would not be easy to segregate the findings with reference to the matters in question in the suit from those not so in question—the findings in which Annardeyi was interested from those in which she was not—it is, their Lordships think, impossible to uphold an award in relation to a suit the conclusions of which were plainly coloured, if not dictated, by the view taken by the arbitrators of other questions between the

parties or some of them to which the suit had no reference.

Taking even a narrower view of the matter the award so far as it purported to constitute a new partnership, giving to a party who refused to come into it only rights which were far below those to which as a member of a dissolved partnership he was entitled was not in their Lordship's judgment an award in any way contemplated or authorised by the order of reference.

To the award when published *Musammat* Surji as guardian *ad litem* of Keshabdeo, took strong exception, and on the 5th July 1922, gave notice to the other parties to the suit of an application by her for an order that the award should be set aside or modified or corrected by expunging therefrom all passages relating to matters that were not in question in the suit. On that application Mr Justice Greaves by order, dated the 24th July 1922, set aside the award in so far as it purported to deal with matters referred to in the suit His order, as above stated, was affirmed by the Appellate Court by an order, dated the 19th of July 1923. Mr. Justice Greaves based his decision primarily upon the view that the provisions of the award relating to the new partnership were quite unauthorised and invalid. The Appellate Court based their decision upon the ground that it was really impossible according to the Statute Law of India that one and the same arbitration should be held as Rankin, J , expresses it .—

"As to the matters within the jurisdiction of the Court and matters without the jurisdiction of the Court between the parties to the suit and between them and other persons under the Code provided by the Indian Arbitration Act and under the Code provided by the Second Schedule under the superintendence and control of the Judge who has seizen of the suit and of the Judge disposing of business under the Indian Arbitration Act. partly upon an order of reference and partly under an agreement."

Their Lordships desire to reserve their opinion upon the question whether there may not be exceptions to that comprehensive statement.

They are satisfied, however, for the reasons they have given, that the order actually made by one Court and affirmed by the other was, in this case, the proper order to be made.

They will accordingly humbly advise His Majesty that this appeal therefrom should be dismissed and with costs.

Z K. *Appeal dismissed*

Solicitors for the Appellant.—Messrs *W W Box & Co.*

Solicitors for the Respondents—Mr. *H S. L. Polak.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 443 OF 1924.

December 14, 1925.

Present:—Mr Justice Ashworth and Mr. Justice Misra.

RAM SHANKAR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

LAL BAHADUR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

" *Hindu Law—Widow—Accretions—Limited title of husband—Acquisition of fuller title—Admission by widow—Reversioners, whether bound—Decree on admission, effect of*—Mawat *grant, nature of*

Accretions made by a Hindu widow to her husband's estate partake of the nature of that estate It is of little moment whether this rule of law is one of Hindu Law or is based on s 90 of the Trusts Act The rule has been ascribed to the doctrine of graft [p 639, col 1]

Keech v *Sandford*, (1726) 2 W & T (7th Ed) 693, 25 E R 223, Sel Cas T King 61 and *Kashi Prasad* v. *Inda Kunwar*, 30 A 490 at p 495, 5 A L J 590, A. W N (1908) 222, referred to

Where a Hindu widow in possession of her husband's property, in which the latter had an estate of a limited nature, obtains a fuller estate in the property, the fuller title is an accretion to her estate as a widow and cannot be regarded as her *stridhan* [p 638, col 2]

There is a presumption in law that a person takes possession under title rather than as a trespasser and, on the death of her husband, a Hindu widow taking possession of her husband's property must be held to do so as a Hindu widow [*ibid*]

A Hindu widow cannot make an admission in derogation of the rights of the reversioners which has or may have the effect of destroying the estate of the reversioners This is governed by the same rule as applies to wrongful alienation A decree of a Court based (without contest) on such an admission is as void or voidable as the admission [p 639, col 1]

A *mawat* grant in Oudh is heritable, but not transferable [p. 639, col 2]

Second appeal against a decree of the District Judge, Fyzabad, dated the 16th August 1924, confirming that of the Sub-Judge, Sultanpur, dated the 16th January 1924.

Messrs. *Hyder Husain* and *B. N. Srivastava*, for the Appellants.

Messrs. *A. P. Sen* and *H. K. Ghosh*, for the Respondents.

JUDGMENT.

Ashworth, J.—This second appeal arises out of a suit brought by the plaintiffs-appellants against the defendants-respondents for possession of, and mesne profits in respect of, certain property. The plaintiffs have been unsuccessful in both the lower Courts.

The origin of the estate in question was a grant by the Maharaja of Ajudhia on the 22nd January 1864 of the land in question to one Halbal Singh. The grant was in consideration of the death of the father of the grantee in the service of the Maharaja, and is called a *marwat* grant. Such a grant has been held to be hereditary (*i. e.*, not resumable) but non-transferable: see *Kalka Bukhsh Singh* v *Sheo Ratan* (1) and *Siya Ram* v. *Salik* (2). On the death of Halbal Singh his widow *Musammat* Baijnath Kuer obtained possession of the property. The Ajudhia estate on the 11th April 1913 sued the widow for resumption but compromised the suit after the present defendants, Lal Bahadur Singh and Rampal Singh, had, at their own request and with the consent of the widow, been joined as defendants on the allegation that their father Balkaran Singh had been adopted as a son by Halbal Singh. The compromise was that the widow and these alleged sons of the adopted son of Halbal Singh should hold the property in under-proprietary right in consideration of a rent. It was dated 28th August 1913. A decree was passed in accordance with the compromise. It declared, (in virtue of the power to do so, conferred on the Court in a resumption suit of this nature by s. 107-H of the Oudh Rent Act XXII of 1886) the title of the widow and of these two persons to hold the land as under-proprietors on a stated rent. On the 20th July 1914 the widow and these two persons (as they were minors they were represented by their natural mother as guardian) executed a usufructuary mortgage of the property in favour of one Jagatpal Singh, a real brother of the widow. He has died issueless and the two male defendants claim to have succeeded to his mortgagee rights as his nearest relations. The lower Courts have held that by virtue of the compromise decree dated the 28th August 1913 the widow *Musammat* Baijnath Kuer and the two defendants acquired a new and independent title to the property which could not be held to be an accretion to the original estate of Halbal Singh. For the appellants it was contended, and is contended in this appeal, that the effect of that compromise decree was merely to enlarge the estate left by Halbal Singh which was held at the time by *Musammat* Baijnath Kuer as his widow, that in the circumstance that there was no adoption of the father of the defendants Balkaran Singh by Halbal Singh, the defendants can get no advantage from the compromise decree, and that the plaintiffs as reversioners of Halbal Singh were entitled to succeed to his estate on the death of the widow, whose mortgage to her brother was invalid for want of proof of necessity. In this appeal we are bound by the finding of fact that the plaintiffs are reversioners of Halbal Singh. No attempt also having been made to prove that the mortgage by *Musammat* Baijnath Kuer to her brother was for necessity, we must hold that mortgage invalid so far as it was one made by the widow. Only two questions arise. The first is whether the compromise decree gave the lady Baijnath Kuer a new and independent title in the property. I hold that it did not do so. On the death of Halbal Singh the widow must be held to have obtained or retained possession of the property as his widow. There is a presumption in law that a person takes possession under title rather than as a trespasser. Here it would appear that she had a title to retain the property of the grant on the ground that it was a heritable grant. Even if the heritability of the grant to Halbal Singh could be called in question, it is clear from *Musammat* Baijnath Kuer's pleadings in the resumption case brought by the Ajudhia estate that she set up a title derived from her deceased husband. Her possession (and possession alone is a title available against all but the rightful owner) was possession as a Hindu widow. It was only by reason of her title to the property as Hindu widow that she obtained the fuller estate of an under-proprietor under the compromise decree of the 28th August 1913. This fuller title was clearly an accretion to her estate as widow and cannot be regarded as her *stridhan*. We may note that even if it were her *stridhan* the plaintiffs might have claimed that it devolved on her husband's heirs, but they have not claimed on

(1) Sel Dec No 18 of 1910
(2) 77 Ind. Cas. 352, 10 O. L. J. 335; 10 O. & A. L R. 172; (1924) A. I. R. (O.) 124; L. R. 5 A. (O.) 13 Rev.

this ground It is established by law that accretions made by a Hindu widow to her husband's estate partake of the nature of that estate. It is of little moment whether this rule of law is one of Hindu Law (see para. 267 of Gour's Hindu Code, 2nd Edition) or is based on s. 90 of the Indian Trusts Act. The rule has been ascribed to the doctrine of graft as enunciated in the leading English case of *Keech* v. *Sandford* (3) and in the case of *Kashi Prasad* v. *Inda Kunwar* (4). I hold, therefore, that the lower Courts were wrong in their decision of this question which must be answered in the negative.

The second question is whether the inclusion of the two defendants as parties to the compromise decree vested in them a title independent of the widow. They were made parties to that suit and decree on the allegation that by reason of the adoption of their father by Halbal Singh they were grandsons of Halbal Singh and his reversioners. The present plaintiffs were no parties to the suit and the decree. As against them the defendants have failed to prove the adoption or their position as successors of the estate of Halbal Singh This being so, the plaintiffs can treat the joinder of the defendants as parties to the resumption suit and to the compromise decree as an unlawful and voidable act on the part of the widow designed to alter the succession. It was only owing to the consent and admission of widow that the defendants were so joined as parties A Hindu widow cannot make an admission in derogation of the rights of the reversioners which has or may have the effect of destroying the estate of the reversioners This is governed by the same rule as applies to wrongful alienation. A decree of a Court based (without contest) on such an admission is as void or voidable as the admission. A title decree resulting in these circumstances from an illegal admission of a Hindu widow can obviously possess no higher validity than a sale by a Court in execution of a decree procured by an illegal confession of judgment on the part of a Hindu widow, where the purchaser is aware of the illegality of the confession of judgment It could not be maintained that the latter could be upheld , nor can the former. The second question is, therefore, also decided against the respondents.

I, therefore, hold that the suit of the plaintiffs-appellants should have been decreed

Misra, J.—I agree with the order which my learned brother proposes to pass in the case. I wish to add a few remarks It was contended on behalf of the respondents that the deed of grant (Ex. 2) did not confer heritable rights on the grantee and if the widow, Baijnath Kuer, took possession of the property after the death of her husband Halbal Singh she cannot be deemed to have succeeded to the grant by right of inheritance The argument was to the effect that if the lady took possession adversely and not by right of inheritance she could not be considered to have taken it for the benefit of the reversioners The words used in the grant were relied upon to show that the rights conferred under it were not heritable If the rights conferred under it were not heritable and if the widow did not succeed by virtue of inheritance and if she could not in that case be considered to have taken the property for the benefit of the reversioners, any interest that she acquired must be deemed to have been acquired for her own benefit and could not be considered to be an accretion to the estate available to the reversioners I have considered this argument but it appears to me that there is no substance in it The *marwat* grant in Oudh always implies the idea of its being a heritable grant Mr. Sykes in his introduction, appended to his learned work The compendium of Oudh Taluqdari Law, states on page 186 that at the time of the regular settlement in the Province "*marwat*" grant was always understood to be a grant which could not be resumed and was always to be inherited by the heirs of the grantee That such a grant is heritable was held in a decision of the Board of Revenue in *Kalka Bakhsh Singh* v *Sheo Ratan* (1) and in a decision of the late Court of the Judicial Commissioner of Oudh reported as *Siya Ram* v. *Salik* (2).

The deed of grant specifies the nature of that grant by calling it expressly by the name of *marwat*. It, therefore, appears to me to be clear that the *marwat* grant which was in possession of her husband, Halbal Singh, by right of inheritance after his death and it is not correct to say that

(3) (1726) 2 W. & T (7th Ed) 693, 25 E. R 227, Sel Cas T King 61.

(4) 30 A. 490 at p. 495; 5 A. L. J. 590; A. W. N. (1908) 222.

she succeeded to the property in any other capacity than that of a Hindu widow. It is also clear from the written statement filed by her in the redemption suit wherein she definitely stated that she had succeeded to the property in suit in the capacity of the widow of Halbal Singh after his death. If, therefore, *Musammat* Baijnath Kuer succeeded to the grant by right of inheritance and if by virtue of her being in possession of that grant as a Hindu widow she acquired by compromise with the Ajudhia estate complete under-proprietary rights, those rights must be deemed to have been acquired by her for the benefit of the reversioners of her husband.

This is founded on the principle enunciated in the English cases, *Keech* v. *Sandford* (3) and *Yem* v. *Edwards* (5). Apart from the decision of the Allahabad High Court reported as *Kashi Prasad* v. *Inda Kunwar* (4) quoted in the judgment of my learned brother, there are a number of decisions of the Madras High Court on this point in which the same view of law has been taken, I would only mention a few of them, *Narasimha Charlu* v. *Srinivasa Charlu* (6), *Gunnaiyan* v. *Kamakchi Ayyar* (7), *Vangala Dikshatulu* v. *Vangala Gavaramma* (8) and *Subbaraya Chetty* v. *Aiyaswami Aiyar* (9).

It was also contended that because the respondents were impleaded in the resumption suit and because they were parties to the compromise by virtue of which under-proprietary rights were conferred by the Ajudhia estate it should not be held that those rights were acquired by the defendants for the benefit of the reversioners. I examined this point carefully and on doing so I find that the contention has no force as will appear from the facts which I proceed to give

On the 11th of April 1913, the Ajudhia estate brought a suit for resumption (*vide* Ex. 7) against Baijnath Kuer. On the 30th of Mav 1913, she filed a written statement (*vide* Ex. 8). On the 12th July she filed an application alleging that the father of the defendants-respondents had been adopted by her husband Halbal Singh and on the same date the Court passed an order impleading the present defendants as parties in that case (*vide* Exs. 14 and 9). On the 28th August 1913 a compromise was arrived at between all the defendants including Baijnath Kuer on one side and the Ajudhia estate on the other (*vide* Ex. 12) and the Court then passed a decree granting under-proprietary rights to the defendants (*vide* Ex. 11). In all these proceedings *Musammat* Baijnath Kuer continued to remain a party in the case Her name was never struck out from the record. If, therefore, by her allegations the defendants were added as a party and if any benefit accrued by virtue of a compromise entered into by them with the Ajudhia estate, *Musammat* Baijnath Kuer continuing a party to the suit, the benefit must be deemed to have accrued for the benefit of the estate represented at the time by Baijnath Kuer and the defendants. The defendants were not impleaded in an any other capacity but as representing the adopted son of Halbal Singh and if they acquired any benefit by virtue of such a possession they must be prepared to give up that benefit to the reversioners of Halbal Singh who have now been found entitled to this estate, the defendants having failed to establish the title of their father an adopted son of Halbal Singh. I am, therefore, of opinion that the under-proprietary rights acquired by the defendant must inure to the benefit of the reversioners of Halbal Singh and the plaintiffs having now established the said title are now entitled to that benefit.

I, therefore, agree that this appeal should be decreed and the decree of the Courts below dismissing the suit should be set aside and that the plaintiffs' suit decreed with costs in all the Courts.

By the Court.—The appeal is allowed and the suit of the plaintiffs is decreed with costs throughout.

N. H. *Appeal allowed.*

(5) (1857) 44 E. R. 855; 1 De G. & J. 598, 27 L J. Ch 23; 4 Jur. (N. S.) 647, 6 W. R. 20; 118 R. R. 249
(6) 6 M. L. J. 119.
(7) 26 M. 339.
(8) 29 M. 13.
(9) 1 Ind. Cas. 749; 32 M. 86; 5 M. L. T. 80.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 312-B OF 1924.
November 26, 1925.

Present:—Mr. Findlay, Officiating J. C.

GOPILAL BHAWANIRAM—PLAINTIFF —APPELLANT

versus

PANDURANG AND OTHERS—DEFENDANTS —RESPONDENTS.

Contract Act (IX of 1872), ss. 23, 65—Company

prohibited by law—Dissolution, suit for, whether maintainable—Void contract—Consideration, recovery of, suit for—Limitation, operation of.

A Company whose formation is prohibited without registration under the Companies Act, cannot, if unregistered, be recognised by the Courts as having any legal existence, and no suit is maintainable for its dissolution at the instance of any partner entering into the same with his eyes open. [p. 643, col. 1.]

The time at which an agreement is discovered to be void, so that the cause of action to recover the consideration may arise under s 65 of the Contract Act, in the absence of special circumstances, is the date of the agreement. [*ibid*.]

Bai Diwali v *Umedbhai Bhulabhai Patel*, 36 Ind Cas 564; 40 B 614, 18 Bom. L R 773 and *Javerbhai Jorabhai* v *Gordhan Narsi*, 28 Ind Cas 442, 17 Bom. L. R 259 at pp. 265, 266, 39 B. 358, relied on

Appeal against the decision of the District Judge, Amraoti, dated the 8th July 1924, in Civil Appeal No. 23 of 1924.

Sir Dr. *H. S. Gour* and Mr. *V. R. Brahma*, R. S, for the Appellant.

Sir *B. K. Bose*, Messrs. *R. N. Rudra*, *A. V. Khare* and *W. B. Pendharkar*, for the Respondents.

JUDGMENT.—The plaintiff-appellant Gopilal Bhawaniram sued some 31 defendants including the present defendants-respondents Pandurang Govind and Bapu Lingappa in the Court of the Subordinate Judge, Darwha, under the following circumstances.

In 1903, the plaintiff and 29 other persons mentioned in schedule A attached to the plaint had formed themselves into a Company or Association for the purpose of carrying on a cotton ginning business and had established a factory for the purpose. The shares of the Company were of Rs. 250 each, and plaintiff held four such shares. The Company was not duly registered, but, inspite of this, it carried on its business for some time. In schedule C attached to the plaint, the alleged assets of the business were stated. The present suit was brought for dissolution of the partnership and for recovery by the plaintiff of his proportionate share from the assets of the business. The 4th, 5th and 6th defendants stated that they also wanted dissolution, but other contesting defendants raised a preliminary objection that as the Company was not registered the suit was not maintainable at law. The Judge of the first Court accordingly framed two issues dealing with the preliminary objection. These were as follows:—

(1) Whether the suit was or was not maintainable under s. 4 of the Indian Companies Act, 1913?

(2) Whether para. 4-D (2) of the plaint entitled the plaintiff to sue for the reliefs mentioned in para. 10 thereof inspite of the above specified section of the Companies Act.

Paragraph 4-D (2) of the plaint may be stated as follows:—

"Besides this the plaintiff begs to state as follows, even if the Court holds, for any reasons whatsoever, that the partnership having been found to be illegal, cannot be dissolved:—The plaintiff and the other partners have engaged their moneys in the partnership, and the partners have transformed the said moneys into the moveable and immoveable property mentioned in schedule C, and the estate thus transformed belongs to the partners, and it was on behalf of the partners that the defendants Nos. 1 and 2 took the same into their possession in their capacity as managers on 25th September 1919. It is the right of the plaintiff to get the partnership business discontinued and to recover the amount invested by him in the partnership from the sale-proceeds of the property mentioned in schedule C, proportionately to his share. On 26th August 1922 the plaintiff asked the defendants Nos. 1 and 2, by a written notice, to act accordingly, but as they gave no reply, the plaintiff has brought this suit praying that the property mentioned in schedule C be sold, and that the amount of his share be given to him, or that the partnership be dissolved in the aforesaid manner. The cause of action arose at place Darwha, on 26th August 1922 and often subsequently."

The Subordinate Judge held that the Indian Companies Act of 1882 was applicable to Berar in 1903, and that an association like the one we are concerned with was compulsorily registrable with the Registrar of the Joint Stock Companies at Amraoti, as the said association consisted of more than 20 persons. He accordingly held that s. 23 of the Contract Act applied to the case, the initial contract bringing the association into existance being illegal and opposed to public policy. Relying on the decision of Stanyon, A. J. C., in *Akola Gin Combination* v. *Northcote Ginning Factory* (1), he held that, whether the suit was regarded as one for dissolution of partnership or for a proportionate part of the profits and assets of the association corresponding to plaintiff's interest therein, it did not

(1) 26 Ind. Cas. 613; 10 N. L. R. 98.

therefore, lie as the partnership was *ab initio* illegal. He further held that the present suit could not be regarded as one for contribution or for the recovery of subscription for a common fund. In any event as regards this latter point be held that the fact of plaintiff having delayed bringing this suit for some twenty years deprived him both in law and equity of any claim to relief. The plaintiff's suit was accordingly dismissed on these preliminary points.

The plaintiff appealed to the Court of the District Judge, East Berar. The Judge of the lower Appellate Court relying on a decision of the Allahabad High Court in *Ram Kumar* v. *Nem Chand* (2) reported in an unauthorised publication, confirmed the decision of the first Court and dismissed the appeal. The plaintiff has now come up on second appeal to this Court.

It has been candidly admitted by the learned Counsel for the appellant that the present association became illegal in consequence of its non-registration under the Indian Companies Act. What has been urged, however, on behalf of the appellant is that what the law prohibits is the carrying on of the business but that it is nevertheless open to the plaintiff to press for liquidation and re-distribution of funds. I have been referred in this connection by Counsel for the appellant to remarks which appear in the 9th Edition of Lindley on Partnership at pages 144-145. These remarks are as follows:—

"If money is paid by *A* to *B* to be applied by him for some illegal purpose, it is competent for *A* to require *B* to hand back the money if he, *B*, has not already parted with it and the illegal purpose has not been carried out either wholly or in part. Although, therefore, the subscribers to an illegal Company have not a right to an account of the dealings and transactions of the Company and of the profits made thereby, they have a right to have their subscriptions returned; and even though the moneys subscribed have been laid out in the purchase of land and other things for the purpose of the Company the subscribers are entitled to have that land and those things re-converted into money, and to have it applied as far as it will go in payment of the debts and liabilities of the concern, and then in re-payment of the subscriptions In such cases no illegal contract is sought to be enforced; on the contrary the continuance of what is illegal is sought to be prevented."

It is urged that on the remarks stated in the passage quoted, the present suit is maintainable and there should be a remand of the case. In this connection I have also been referred to the following statement made by plaintiff's Pleader on 20th August 1923, which is as follows:—

"The plaintiff maintains that s. 4 of the Companies Act is no bar to the present suit. Even if it is held to be barred under s. 4 of the Act plaintiff has stated in the plaint that his money has been converted into moveable and immoveable property now in possession of defendants Nos. 1 and 2 on behalf of other partners. The plaintiff claims that he is entitled to the proceeds of the properties according to his share."

It has also been suggested that the principle underlying the decision of Prideaux, A. J. C., in *Narayan* v. *Motisa* (3) is applicable to the present case. It has been alleged that the plaintiff should not be penalised because the managers of the Company had failed to do their duty in having the Company registered, *cf.*, *Harnath Kuar* v. *Indar Bahadur Singh* (4).

As regards the time from which limitation would run in the event of the suit being maintainable, it has been contended on behalf of the appellant that time would run from when the contract was discovered to be void, *cf.*, *Srinivasa Aiyar* v. *Seshv Iyer* (5) and *Mathura Mohan Saha* v. *Ram Kumar Saha and Chittagang District Board* (6).

On behalf of the respondents it has been urged that the present association must be deemed to have had no existence in the eye of the law. The various members of the association, it is said, combined together and formed the so-called Company with their eyes open contributed money, bought land and set up a factory in which a cotton ginning business was carried on for some time. It is suggested that the members of the association did this with their eyes

(2) 61 Ind. Cas. 447; 19 A. L. J. 836.

(3) 78 Ind. Cas. 343; 20 N. L. R. 87, (1924) A. I. R (N) 132

(4) 71 Ind Cas 629, 45 A. 179, (1922) A. I. R (P. C.) 403, 9 O & A. L R. 270; 9 O L J. 652, 44 M L. J. 489: 37 C L J. 346; 27 C. W. N. 949, 50 I. A. 69, 18 L. W 383, 26 O C. 223; 33 M L. T. 216, 5 P. L. T. 281; 2 Pat L R 237 (P. C)

(5) 41 Ind. Cas 783; 41 M. 197; 6 L. W. 42; 34 M. L. J. 282.

(6) 35 Ind. Cas. 305; 43 C. 790; 23 C. L. J. 26; 20 C. W. N. 370.

open and yet failed to register the Company. By so doing the members of the association as a whole deliberately disobeyed or ignored the law and in these circumstances no relief can be granted. In support of this position a decision in *In re Padstow Total Loss and Collusion Assurance Association* (7) is relied on. That decision was to the effect that where an association of more than twenty persons had been formed and was not registered, its formation was forbidden by the Companies Act, 1862, and that the Courts, therefore, could not recognise it as having any legal existence and the order for winding it up must be discharged.

For my own part I am unable to see that the remarks quoted above in Lindley on Partnership, supported as they are by the English cases quoted therein, can give any help to the present appellant In the present instance the partnership was for a considerable time carried on in defiance of the law. The money subscribed was utilized for the purposes of the factory and the objects of the Company were fulfilled to the utmost. It seems to me utterly impossible in the circumstances of the present case to assume that the plaintiff was, as he now alleges, in utter ignorance of the illegality of the association upto the 25th August 1922 when he gave formal notice for the winding up of the Company. The plaintiff cannot be presumed to be ignorant of the law and he is as much responsible as the respondents for the breach of the law which has occurred In *Ananda Mohan Roy* v *Gour Mohan Mullick* (8) their Lordships of the Privy Council laid down that the time at which an agreement is discovered to be void so that a cause of action to recover the consideration may arise under s 65 of the Indian Contract Act, in the absence of special circumstances, is the date of the agreement, *cf*, *Bai Diwali* v. *Umedbhai Bhulabhai Patel* (9) and *Javerbhai Jorabhai* v *Gordhan Narsi* (10). From this point of view also the plaintiff's suit which at the best would have lain under Art. 62 of First Schedule of the Limitation Act, is, in my opinion, long since barred. There can be no question but that the present association it regarded as a Company was illegal from the first and that the contract was, therefore, *ab initio* void It is utterly impossible in the circumstances of the present case to attempt to saddle the responsibility for the illegality only on the managers of the Company. All the so-called partners must be considered as responsible therefor.

Nor can I see that the attempt to disguise the relief which the plaintiff really claims by calling it instead of a suit for dissolution of partnership one for return of subscriptions, for contribution, can possibly make any difference in the legal aspect of the case This different description of the relief claimed is only a different way of asking for what is in effect a dissolution of partnership. It has been suggested that Art 96, Limitation Act, applies to the case, and that the present suit even if regarded as one for contribution or the like would still be within time as the plaintiff only came to know of the mistake in 1922. In my opinion the plaintiff must be presumed to have had actual or constructive notice of the illegality from the first and there can be no question of holding that the plaintiff as against the present respondents or any of them is innocent in this matter. From both points of view, therefore, the present suit cannot be maintained. As a suit for dissolution of partnership it was clearly bound to fail, because of the illegal nature of the association If the suit could be regarded as one for contribution and for return of subscription, plaintiff's remedy is long since barred by limitation. The judgment and decree of the lower Appellate Court are, therefore, correct and the present appeal is dismissed. Appellant must bear the respondents' costs. Costs in the lower Courts as already ordered.

N. H. *Appeal dismissed.*

(7) (1882) 20 Ch D 137, 51 L J Ch 344, 45 L T. 774, 30 W R 326

(8) 74 Ind Cas 499, 50 C 929, 21 A L J 718, 4 P. L T. 609, (1923) A I R (P C) 189, (1923) M W N. 803, 45 M L J 617, 25 Bom L R 1269, 33 M L T 365, 50 I A 239, 28 C W. N 713, 40 C L J 10 (P C).

(9) 36 Ind Cas 564, 40 B 614, 18 Bom. L R. 773.

(10) 28 Ind Cas. 442, 17 Bom. L. R. 259 at pp. 255, 266; 39 B. 358.

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 315 OF 1925.

November 17, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Mukerji.

Mirza MUHAMMAD ZAKARIA—JUDGMENT-DEBTOR—APPELLANT

versus

B. KISHUN NARAIN—DECREE-HOLDER AND MUHAMMAD HAFIZ AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss 2 (2), 47, 115, O XXI, r 66—Execution of decree—Sale proclamation—Notification of incumbrance—Appeal, whether lies—Revision

Under O. XXI, r. 66, C. P. C., an Executing Court is bound to notify in the sale proclamation all incumbrances which *prima facie* exist on the property which is ordered to be sold Where a person claiming to be a mortgagee of such property intimates his claim to the Court and the Court directs that the claim should be notified in the sale proclamation, the order is not open to appeal and cannot be challenged in revision. [p 644, col. 2; p. 645, col 1]

An order passed by an Execution Court under O XXI, r 66, C. P C., prescribing the manner in which a proclamation of sale should be drawn up on application made, is not open to appeal under the provisions of O XLIII of the Code [p 644, col 2]

Section 47, C P C., must be read with s 2 of the Code and the effect of reading both the sections together is not to make every order passed by the Execution Court appealable but only such orders appealable as determine the rights of the parties to the execution with regard to all or any of the matters in controversy in suit. [p 645, col 1]

Execution first appeal from a decree of the Subordinate Judge, Agra, dated the 6th of July 1925.

Mr. *G. N. Kunzru*, for the Appellant.

Messrs. *S. K. Dar* and *N. P. Asthana*, for the Respondents.

JUDGMENT.

Sulaiman, J.—This purports to be an execution first appeal from an order dated the 6th of July 1925 passed by the Execution Court. It appears that a mortgage-decree for sale was in execution and a proclamation of sale was prepared and issued in the first instance under O. XXI, r. 66. The date for the sale was fixed as the 9th of July 1925. Three days before this date the respondent Muhammad Hafiz who was till then no party to the execution proceedings filed an application in the Execution Court praying that a certain mortgage-deed dated the 14th of September 1910 in his favour be notified. In his application he set forth the fact that on a previous occasion he had instituted a suit for the recovery of the principal amount due on his deed but that suit was ultimately dismissed. He then recited a passage from the judgment of Mr. Justice Walsh who was one of the learned Judges who disposed of the appeal in the High Court, to the effect that 'it by no means follows from the decision (dismissing the suit) that there is no subsidiary liability from the defendant to the plaintiff to pay interest so long as the principal is outstanding', and then after referring to the judgment passed by their Lordships of the Privy Council referred to the covenant in the mortgage-deed under which there was a liability on the mortgagor to pay interest. He then prayed 'as ordered by the Hon-ble High Court the condition mentioned above may be notified at the time of the sale'. An objection was raised on behalf of the judgment-debtor but the learned Subordinate Judge without deciding as to whether there was or was not any existing liability ordered that 'the notification asked for be allowed subject to the amendment that the claim for principal under the bond of the 14th of September 1910 is no longer recoverable by suit'.

The report of the *amin* does not expressly mention in what language he made the notification, but it may be assumed for the purpose of this revision that the notice was given as ordered by the learned Subordinate Judge.

The judgment-debtor has appealed from this order.

A preliminary objection has been taken that no appeal lies. I am of opinion that this objection is well-founded. Muhammad Hafiz was not a party to the execution proceedings. Neither the decree-holder nor the judgment-debtor admitted the validity of this prior mortgage. The contesting respondent intimated to the Court that his mortgage should be notified. The order passed by the Court was obviously under O XXI, r. 66 with a view to include in the proclamation sale an incumbrance to the property. The validity of the mortgage was not considered by the Court or decided by it. Any order passed by the Court under r. 66 directing the way in which a proclamation of sale should be drawn up on application made, is not made appealable under O. XLIII of the Code. *Prima facie*, therefore, no appeal would lie. The learned Vakil for the appellant, however, has urged before us that inasmuch as this order was passed by an Execution Court and related to the execution of a

decree it is appealable within the meaning of s 47. Section 47 must be read with s. 2 and the effect of reading both the sections is not to make every order passed by the Execution Court appealable but only such orders appealable as determine the rights of the parties to the execution with regard to all or any of the matters in controversy in suit. By this order neither the rights of the judgment-debtor nor of the decree-holder were determined by the Execution Court. No appeal, therefore, lies.

The learned Vakil for the appellant has asked us to treat this appeal as an application in revision and interfere with the order.

Two objections have been raised. The first is that the Court below should not have entertained an application from a person who was no party to the execution proceedings, and the second is that it was entertained at such a late stage as to prejudice the judgment-debtor. The application of the contesting respondent was made by way of an intimation to the Court and the Court was under O XXI, r 66 bound to show all incumbrances which *prima faice* existed on the property which was ordered to be sold. It is, therefore, impossible to hold that the Court had no jurisdiction to take note of an alleged claim. If the notification merely informed the auction-purchasers that there was a claim being put forward on behalf of Muhammad Hafiz on the basis of this old mortgage, which claim, however, was not admitted by the decree-holder or the judgment-debtor then there was no harm in the notification. On the other hand if the notification amounted to any mis-statement or mis representation, that may be a good ground for setting aside the sale, under O. XXI, r. 90, as it would then amount to an irregularity.

Similarly the fact that this amendment was made only a few days before the sale may be a ground for setting aside the sale if the judgment-debtor succeeds in establishing that substantial injury has been caused in consequence of the lateness of the order. That too is a matter which can be disposed of in the proceedings under O. XXI, r. 90.

It is to be noted that pending this appeal the sale has actually taken place and any directions now made with regard to making the notification clear would be altogether useless and futile. I am, therefore, of opinion that it is impossible to interfere in revision at this stage.

I would, therefore, dismiss this appeal.

Mukerji, J.—I entirely agree that no appeal lies and that in the circumstances of this case I am not prepared to entertain the appeal as a revision from the order of the learned Subordinate Judge dated the 6th of July 1925.

Briefly, the matter stands thus. Kishun Narain held a mortgage-decree against Zakaria and others. In execution of the decree a sale notification was issued fixing the 9th of July 1925 for sale · On the 25th of May 1925, certain persons Muhammad Hafiz and others, came in with a petition that certain terms contained in a prior mortgage held by them should be notified. The decree-holder and the judgment-debtor both objected but the learned Judge allowed the application subject to a certain modification It appears that Muhammad Hafiz and others held a prior mortgage dated the 14th of September 1910 over some at least of the properties which were going to be sold at the instance of Kishun Narain. They had obtained a decree for interest which had accrued under the mortgage. Subsequently they brought a suit for the recovery of the principal amount and the interest which subsequently accrued This second suit of theirs failed in this Court and also in the Privy Council on the ground that O. II, r. 2 of the C. P. C. barred the suit. Certain observations had been made by one of the learned Judges who heard the appeal in this Court indicating that Muhammad Hafiz and others might still have some remedy. The Privy Council expressed no opinion. Muhammad Hafiz and others, however, still entertain a hope to recover something on foot of the mortgage and they accordingly made their prayer. The learned Subordinate Judge, after hearing the parties, made the order as already indicated

Now the question is whether an appeal is entertainable. As pointed out by my learned brother, it is not every question that arises between a decree-holder and a judgment-debtor that is appealable. In order that it may be appealable, it must be a decree and must come in s. 2 of the C P. C. Be that, however, as it may in this particular case, the decree-holder and the judgment-debtor were at one in

attempting to defeat the claim of Muhammad Hafiz and others. It is clear, therefore that, by no stretch of imagination, can the case be brought within the purview of s. 2 and s. 47 of the C. P. C. No appeal, therefore, lies.

Coming to the question of revision I fail to see what irregularity has the Judge committed. The Judge was bound, in the interest of intending purchasers, to give them as much information as possible about the property which he was going to sell. If Muhammad Hafiz and others had a *bona fide* claim, it did not matter whether it was going to succeed or going to fail. The Judge could not enter into that intricate question. He was, in my opinion, bound to tell the intending purchasers, that there was such a claim and that they might beware of it. The order, therefore, was perfectly correct and it is not open to question by way of revision.

It has been urged upon us that the order was passed very late and that it was likely to frighten the intending purchasers. As may be guessed, the sale proclamation was issued long before the 6th of July, for the 9th of July had already been fixed for sale. If it be a fact that owing to the late notification of the claim, any intending purchaser has been frightened, not knowing clearly what was the matter, it would be a matter for the Subordinate Judge to enquire in a proceeding, if any, has been taken, under O. XXI, r. 90 of the C. P. C. That has nothing to do with the case before us, at present.

I agree, therefore, that the appeal should be dismissed and there is no good ground for treating the appeal as a petition of revision.

By the Court.—The appeal is dismissed with costs. We allow Rs. 50 as Counsel's fees for the respondents Muhammad Hafiz and others.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 10 OF 1924.

November 24, 1925.

Present: Mr Findlay, Officiating J. C., and Mr. Prideaux, A J. C.

SHANKAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

PANDURANG AND OTHERS—PLAINTIFFS—RESPONDENTS

Hindu Law—Widow, alienation by—Suit to challenge alienation brought after lapse of many years, effect of—Necessity—Bona fide *enquiry*

In a suit by the reversioners of a deceased Hindu to challenge an alienation made by the widow of the deceased, brought after the lapse of many years from the date of the alienation, it is incumbent on the Court, in weighing the evidence on either side, to remember the difficulty under which the respective parties labour, particularly as regards the ascertainment and production of evidence on the matters dealt with in the case. [p 648, col 2]

If an alienee from a Hindu widow before embarking on the transaction has made reasonable and *bona fide* enquiry and has satisfied himself to the best of his knowledge and belief that legal necessity exists, the real existence of such legal necessity in point of fact is not a condition precedent to his success in a suit brought by the reversioners of the widow's deceased husband to challenge the alienation [p 649, col 1]

Appeal against the decision of the Additional District Judge, Nagpur, dated the 20th October 1923, in Civil Appeal No. 20 of 1923.

Sir Dr. *H. S Gour* and Mr. *Bobde*, for the Appellants

Messrs. *M. Gupta* and *V. D. Kale*, for the Respondents

JUDGMENT.—The twelve plaintiffs-respondents filed the present suit in the Court of the Additional District Judge, Nagpur, under the following circumstances. They claimed to be the nearest reversioners of one Sakharam Kolte who died in 1873. Sakharam left no issue, his widow Radhabai alone surviving him. She inherited from her husband a 16 annas share in *Mauzas* Deoli and Khapri (Nagpur). On 30th March 1892, she sold 8-annas share in each of these villages to the defendant-appellant No. 1's elder brother. A fortnight later, she mortgaged the remaining 8-annas share in both the villages for Rs. 700 to the same vendee, and eventually sold him the latter shares also on 30th September 1895 for Rs. 1,435. Under a private arrangement 1-anna share of the second 8 annas share was taken back by Radhabai nearly a year after the sale of 1895. The plaintiffs thus sued for possession of 15-annas share in two villages named, both now having been amalgamated into a single village named *Mauza* Deoli Peth.

The plaintiffs' allegations were that the above mentioned sale and transaction were executed without legal necessity and were not binding on them as nearest reversioners. At a partition between defendant No. 1 and his elder brother, the property fell to the former's share; hence the defendant No. 1 and his minor son were sued as being in joint possession of the property. Apart from preliminary objections about the value of the Court-fee payable and the like, the defendants' position was that the plaintiffs were not the nearest reversioners. They further pleaded that both the sale and mortgage of 1892 and the sale of 1895 were for legal necessity, and further that the sale and mortgage transactions of 1892 were consented to by one Gopal Govind Kolte who represented himself then as being the nearest reversioner. Other incidental pleadings were raised on behalf of the defendants, and these will be referred to later as far as may be necessary.

On the issues which arise on these pleadings the Additional District Judge came to the following findings:—

(*a*) that the plaintiffs were the nearest reversioners of Sakharam;

(*b*) that neither the sale or mortgage of 1892 were for legal necessity,

(*c*) that Gopal Govind Kolte had consented to the two transactions of 1892, but he was not then the nearest reversioner and his consent is not binding on the present plaintiffs-respondents;

(*d*) that the sale of 1895 was not for legal necessity;

(*e*) that the plaint was properly stamped;

(*f*) that the plaintiffs can only claim an account of the profits for the period following the date of the suit being filed;

(*g*) that the defendants have not been proved to have made any improvements in the property.

A decree was accordingly passed in favour of the plaintiffs subject to their paying Rs. 160-1-4 to the defendants in respect of the alleged losses incurred by defendant No. 1's brother during three years he had managed the villages on Radhabai's behalf.

The defendants have now appealed to this Court. On the appeal coming on for hearing, ground No. 7 which was to the effect that the consent of Gopal Govind to the sale and mortgage of 1892 was effectual was not pressed. Similarly also as regards the 9th ground, in which it was urged that, even if the two sales and mortgage attacked in this suit were held not to be binding on the plaintiffs, they were entitled to a refund of the amount of the consideration paidby them in the transactions mentioned. There thus in effect remain four points for consideration in this appeal. The four positions taken upon on the appellants' part may be summarised as follows:—

(1) that the plaintiffs have failed to prove that they are the nearest reversioners of Sakharam;

(2) that for some 30 years the plaintiffs have lain low and taken no action in the present matter; although this may not amount to technical acquiescence on their part, a less rigid standard of proof should be demanded of the defendants in view of the time which elapsed, and the difficulty of now procuring apposite evidence in support of their defence;

(3) that even if legal necessity has not been categorically proved, there has been ample proof that the defendants' predecessors in-title, before embarking on the transactions now sought to be attacked, made reasonable *bona fide* enquiry and that this was in the circumstances sufficient,

(4) that there was legal necessity for the transactions in question.

We will deal first with the allegations that the plaintiffs have failed to establish that they are Sakharam's nearest reversioners It has been urged on behalf of the appellants that, as the plaintiffs claim as collateral heirs, it was incumbent on them to show who the common ancestor was, *cf.*, *Kedarnauth Doss* v. *Protab Chunder Doss* (1). In the present case Keshao is alleged to be the common ancestor, and it has been urged that the plaintiffs have failed to prove their relationship to him. The relevant evidence in this connection is that of the first four witnesses for the plaintiffs, while the connected genealogical table is given in para. 2 of the plaint. As regards P. W. No. 1 Sitaram, our attention has been drawn to the fact that he described Sakharam as the son of Keshao, whereas he was really his grandson, Jagannath his father having intervened. That the witness erred in this respect is perfectly clear and he very naturally made the consequent mistake that Chimnaji and Sakharam were real brothers, whereas the real fact was that Chimnaji and Jagannath were real brothers. The witness appar-

(1) 6 C. 626, 8 C. L. R. 238; 3 Ind. Dec. (N. S.) 407.

ently erred also in showing Damodar as the descendant of Ramchand. On the whole we are of opinion that s ps of the kind mentioned made by a man of 60 years, who is talking to events and circumstances which for the most part he must have learnt from his father or others when he was a very young man, cannot be too seriously regarded when made in an exhaustive examination such as this witness underwent. The main point urged against P. W. No. 2 Yado is that, being a plaintiff, his evidence should be regarded as interested. For our own part, we consider that his explanation of how he knew that Chimnaji and Jagannath were brothers, *viz.*, from the fact that his father used to offer *pindas* and oblations to them, makes his evidence particularly cogent. We cannot regard his explanation of how he prepared the genealogical tree partly from information which came to him from Bapurao and partly from his own knowledge as unsatisfactory. It is particularly significant that in cross-examination he definitely averred that his father Balaji used to take the names of his father, grandfather and great-grandfather, while offering *pindas*. As regards P. W. No. 3, Bapurao, he says he had prepared a genealogical table in about 1903 or 1904, as it was required for the purposes of a suit he was engaged in, and he gives a plausible and satisfactory explanation that he had been able to find a helpful genealogical tree bearing on the matter in question in a revenue case relating to *Mauza* Takarghat. We look on the evidence of this witness as particularly valuable and we see no reason why he should be disbelieved. The 4th witness on the point is Balkrishna (P W. No 4) who is the priest of the Kolte family. The father of the witness also before him occupied a similar position. It is suggested that, because the witness says that in Hindu marriages only the names of three immediate ancestors of each party to the marriage are recited, his personal knowledge cannot carry the genealogical tree back to Kesha. But if his evidence be read as a whole, it is clear that he has had an intimate knowledge of the greater number of persons in the family tree for many years back. When the evidence of these four witnesses is read as a whole, it seems to us that the lower Court, for the reasons given by it, was amply justified in holding that the plaintiffs have established that they are the nearest reversioners of Sakharam. It is notable that the appellants have not only not given any rebutting evidence, but they have not offered even any definite allegation as to any other particular person being the nearest reversioner rather than the plaintiffs. So far as this ground of appeal is concerned, therefore, we see no reason for interference.

We now pass to the next point which has been urged on behalf of the appellants, *viz.*, that although there may be no question of technical acquiescence in the present suit, the fact that the plaintiffs have delayed so long in filing it should have considerable weight attached to it in weighing the evidence on record because of the great difficulties the defendants now labour under in proving legal necessity and the like. Their Lordships of the Privy Council in *Hunoomanpersaud Panday* v. *Babooee Munraj Koonweree* (2) alluded to a similar matter. It seems to us, however, that this consideration cuts both ways. Just as it may be comparatively difficult for the defendants now to procure convincing and specific evidence on a question like that of legal necessity or enquiry, so also the plaintiffs labour under a similar difficulty. We are quite willing, however, to admit that, in a case like the present, in weighing the evidence on either side, it is incumbent on us to remember the difficulty under which the respective parties labour particularly as regards ascertainment and production of evidence on the matters dealt with in the case. Beyond this, we do not find it possible to go. There is admittedly no question of estoppel in the present case nor even of technical acquiescence. The plaintiffs were in the line of reversioners, but had only *a spes successionis*. *Musammat* Radhabai died on 21st October 1920 and the present suit was filed within some 15 months of that date. It was clearly not incumbent on them to file the suit during *Musammat* Radhabai's lifetime and, from their point of view, there might have been great difficulties and disadvantages in doing so.

We pass, therefore, to the next position taken up on appeal, *viz.*, that it would be sufficient for the defendants to show that they have made reasonable enquiries as to the existence of the legal necessity, and that if this were established that they were

(2) 6 M. I. A 393, 18 W R 81*n*; Sevestre 253*n*; 2 Suth. P. C. J. 29, 1 Sar. P. C. J. 552; 19 E. R. 147 (P. C.).

entitled to be absolved, even if, it should afterwards be ascertained that the result of the reasonable and *bona fide* enquiry was a mistaken one. We accept the principle that if a creditor, before embarking on transactions such as we are concerned with here, has made reasonable and *bona fide* enquiry and has satisfied himself to the best of his knowledge and belief that legal necessity exists, the real existence of such legal necessity in point of fact is not a condition precedent to the success of the defendants. That principle is clearly laid down in s. 38 of the Transfer of Property Act and the illustration thereto.

We proceed, therefore, to discuss whether there has been proof of such reasonable *bona fide* and thorough enquiry as the circumstances of this case would have demanded of D W. No 7 Sir Gangadar Rao Chitnavis We may say at once that the high position and attainments of this gentleman as revealed in his evidence would not make us regard the evidence as anything but unimpeachable It is happily, however, not necessary for us to have to offer any criticism of his evidence in this connection Not unnaturally a gentleman like D. W No 7 cannot remember all the details connected with the transactions. He says when he was approached by Radhabai and others, he had enquiries made by some of three persons, *viz*, Annaji Chitnavis, Vasudeopant both his servants and one Narayanrao Vele, a head clerk of Deosthan estate which was in his charge. According to the witness the enquiry was to be on three points, the condition of the villages, their price and the necessity of selling the property As regards the last point it was reported to the witness that the sale had to take place to satisfy a debt due to Hajarin. As regards the latter purchase the witness says that Radhabai had herself told him that she was indebted to Kukday and others and had also incurred losses in managing the villages. In cross-examination, however, the witness candidly admitted that he could give little or no details of the result of the enquiries made. He could not say whether any written report was submitted or not, and he seems to have no correct recollection of the amount of debt in which Radhabai was involved. The evidence of D. W. No. 8 (Harba) the *kamdar* of the last witness does not seem to us to carry the question of enquiry much further. According to him Anna Sahib had made notes of the enquiries, but none such were produced. Indeed the evidence of this witness strongly suggests that at that time he was a mere underling and cannot have taken a leading part in the enquiry Taking the evidence of these witnesses as a whole, there is an irresistible conclusion we are led to, *viz*, that only a cursory and superficial enquiry was made both as to Radhabai's debt and the necessity for alienation and also as to who the nearest reversioners were. The enquiring parties seem to have stumbled early upon Gopal Govind Kolte, and to have assumed that he was the nearest reversioner, whereas we feel convinced that a more thorough and searching enquiry would have shown that there were others still nearer. We may point also an all important point in the evidence of D. W. No. 7 Sir Gangadhar Rao Chitnavis He seems to have been under the impression that the debt due to Hajarin dated from her (Radhabai's) husband's time That was not so. The mortgage-deed (Ex. 1 D-3) shows that the debt was a fresh one and D. W. No. 1 (Bajirao) so far confirms this view. This only goes to show the superficiality of the enquiries made both on the question of legal necessity and as to who the nearest reversioners were. Our own belief is that the central point of the enquiry was as to the value of the villages and the likelihood of the transactions being a profitable one or not from the point of view of the future creditor, and we are convinced that the lower Court's finding in this connection is a correct one. We do not think there is any proof whatever of such reasonable and *bona fide* enquiry as would discharge the burden of proof which rested on the defendants in this connection.

We now pass to the next point for decision in this appeal, *viz.*, as to whether there was actual legal necessity for the transactions in suit or not. It has been urged in this connection on behalf of the appellants that there are indications on record that Sakharam was not too well off himself. We have been referred to the fact that D. W. No 2 Madho says that Sakharam worked as *Dewanji* of Rajaram *thekadar* of Wardgaon Again D. W. No. 4 Balaji says that Sakharam, while he was on Rajaram's properties, acquired village Deori and had asked this witness to lend him Rs. 500 or Rs. 600 for the said purchase. We think pieces of evidence like this are not neces-

sarily indicative of a theory that Sakharam was badly off. On the contrary, his taking up work as *Dewanji* and his acquiring *Mouza* Deori would be equally consistent with the theory that he was a pushing business-man anxious to make money in as many ways as he could. It has been suggested that the villages in suit were petty ones and were a losing concern; that they have proved a losing concern since Sakharam's death is sufficiently obvious. But we are far from being convinced that this was the case in Sakharam's lifetime. It has been suggested that Ex. P-5 the *Jamabandi* for *Mouza* Khapri for 1893 only shows some 21 acres of *sir* and *khudkasht*, but if Ex. P-7 be examined, it would be seen that the actual area of *sir* and *khudkasht* was very much more. A glance at the totals given in Ex. 1-D-1, the sale-deed, of 30th March 1892 leads to the same conclusion. There are other indications that *Musammat* Radhabai, after her husband's death, was comfortably off at first for sometime. The evidence of P. W. No. 6 Lahanu suggests that he used to lend money and had acquired two fields in another village (Takalghat). P. W. No. 7 Sitaram's evidence is to the same effect, *viz.*, that Sakharam had a grain pit and was apparently fairly well-to-do. Even, therefore, if the property in suit were not very large or a profitable one, the indications all are that during Sakharam's lifetime, things went well and probably continued to go well for some little time after his death. In this connection, it is pertinent to observe that, even if the property did not yield a large income, *Musammat* Radhabai had only herself to maintain. She seems thereafter to have brought in both her brothers to manage the property—a somewhat extravagant measure—it would appear in view of its comparative smallness. It is not part of our business to trace out the precise reason why Radhabai went down into the morass of financial difficulties. But apart from the very common circumstances that a property like the present deteriorates when, under the circumstance prevailing in this country it is managed by a woman, we opine to the view that one specific cause for embarrassment was that she incurred a lot of expense in connection with the marriage of her brother. This was needless, and was utterly an unjustifiable expense. The sale deed (Ex. 1-D-1) of 1892 contains no recital whatever as to for what the consideration of Rs. 1,200 was required for.

We have already said that there is no proof that Sakharam left any debt at his death in 1873. It is in 1888 for the first time that we find *Musammat* Radhabai executing the possessory mortgage-deed in favour of *Musammat* Krishnabai for Rs 900 cash borrowed. There is not a bit of evidence to show that this amount was borrowed for legal necessity, and we may remark here incidentally that we would have expected Sir Gangadhar Rao Chitnavis or his agents to have carefully examined this transaction and the necessity therefor. On the contrary they do not seem even to have demanded a sight of the mortgage-deed of 1888. So far as the mortgage-deed of 1888 is concerned, there is a total absence of evidence as to the purpose for which the money was borrowed, or to which it was applied. The evidence of D. W. No 2 Madho far from proving legal necessity in this connection, rather goes to show that Sakharam died well off. For 15 years after Sakharam's death there is no evidence that the widow was involved in financial difficulties, but the indications all are that owing to unwise or unscrupulous management as well as to extravagance she gradually went down the hill, and the 1888 mortgage-deed marks the first prominent mile stone in this connection. We find ourselves in complete agreement with the finding of the Additional District Judge that no legal necessity for the sale deed of 1892 has been made out.

There is another aspect of this matter which demands consideration. As soon as the sale-deed of 1892 had been executed, the vendee paid up the Rs. 1,450 due on Krishnabai's mortgage-deed of 1888 Even had this debt been regarded as falling within the category of legal necessity, is it possible for one moment to regard the method of satisfying the debt as a prudent one on the part of a widow like Radhabai? If she had sold a 10 annas share out and out, it would have been possible to satisfy the debt wholly. Instead of this what was done was that on 30th March 1892 a 8 annas share was sold out and out. Only a fortnight later, the remainder of the property was mortgaged, and three years later as a result of this mortgage Radhabai lost everything except the 1-anna share already referred to which was returned to her. Meanwhile it is significant to observe that the defendants' predecessors-in-title for 3 years after 1892 managed the property. In those cir-

cumstances, we find it difficult to imagine that the sale of 30th March 1892 and the mortgage of 13th April 1892 only a fornight later were isolated transactions We do not regard this case as one of a prudent and careful woman who mortgaged only a half first and was driven by force of circumstances to encumber the balance a few days later and eventually to sell the balance

The sale-deed of 1895 was made up of the following items :—

Rupees	1,055	7	9	due on the 1892 mortgage;
„	180	0	0	cash of Vishnu Daji,
„	160	1	4	lost in managing the villages during three years; and
„	40	0	0	expenses of the stamp and registration, etc.

The great part of it went to the old mortgage and, as we have already seen, legal necessity has not been established with reference thereof. No copy of the decree of Vishnu Daji has been filed, and it is impossible to say what its nature was. From this point of view, therefore, we are unable to disturb the findings arrived at by the lower Court on the questin of legal necessity. The weight of the evidence and all the probabilities of the case go to show that *Musammat* Radhabai sometime after her husband's death either mismanaged the estate or allowed it to be mismanaged by others and probably also fell into extravagant ways and incurred expenditure which was in the circumstances not permissible. It is equally clear that the defendants' predecessors-intitle made no proper enquiry into the existence of legal necessity for the transactions entered into with *Musammat* Radhabai The plaintiffs are, in our opinion, entitled to succeed in the suit and the lower Court's judgment is confirmed in this connection The appeal accordingly fails and is dismissed with costs. Appellants must bear respondents' costs.

A cross-objection has been filed by the respondents to the effect that they should not have been ordered to pay, as a condition precedent to their acquiring possession of the subject in suit, Rs 160 1-4 said to have been lost during Sir Gangadhar Rao Chitnavis's management of the village from 1892 to 1895. We are not satisfied that there has been any sufficient proof with regard to this item. Apparently for a good many years after Sakharam's death, the widow and her brothers between them managed to carry on the management of the villages with comparative success. From the account entries we have no sufficient details regarding this alleged item of loss and it must be remembered that the village was managed, as it was, apparently as a result of a private understanding. The mortgage of 1892 was not a possessory one. In those circumstances we do not think the defendants are entitled to a refund of Rs. 160-1-4 in question and the following phrase will be deleted from the judgment of the lower Court —

"The possession of 7-annas share in *Mouza* Deoli is subject to payment by the plaintiffs to the defendants of Rs. 160-1-4 with interest thereon at Rs. 12 per cent. per annum from the date of suit till payment"

The cross-objection filed by the respondents will succeed in appeal, and the appellants will also bear the costs of the respondents' cross-objection

Z K *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No 95 OF 1921.

November 25, 1925.

Present:—Mr Justice Martineau and Mr. Justice Fforde

Lala LAL CHAND AND OTHERS—DEFENDANTS—APPELLANTS

versus

HANS KUMAR AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS

Pre-emption—Custom · Instances in neighbouring mohallas, *value of*—Mohalla Serai *Mangal Sain, Jhelum City*

Instances of the exercise of the right of pre-emption in neighbouring *mohallas* are not sufficient to prove that the custom of pre-emption exists in the locality in which the property in suit is situate [p 652, col 2]

The custom of pre-emption does not exist generally throughout the town of Jhelum, nor does it exist in the block known as *Mohalla Serai* Mangal Sain which is a part of the old Chakla *Mohalla* [p 653, col 1]

First appeal from the decree of the Senior Sub-Judge, Jhelum, dated the 25th October 1920.

Dr *Nand Lal*, and Messrs. *A. R Kapur* and *Ilemi J. Rustomji*, for the Appellants.

Mr *Mukand Lal Puri* and Lala *Amar Nath Chona*, for the Respondents.

JUDGMENT.—The plaintiffs in this case sued for possession, by right of pre-

emption, of a house in the town of Jhelum which was sold in 1919 by defendant No. 1 and the husband of defendant No. 2 to defendant No. 3 and the predecessor-in-title of defendants Nos. 4 to 7. They claim pre-emption by virtue of their ownership of a *serai* called *Serai* Mangal Sain, which is contiguous to the house sold and allege that the custom of pre-emption prevails throughout the town. The defendants contend that there is a sub-division of the town called *Mohalla Serai* Mangal Sain in which the house in suit is situate and they deny that the custom of pre-emption exists therein or in any part of the town. The Subordinate Judge has found that the town is not sub-divided and that the custom of pre-emption exists generally in the town, including the locality in which the house is situate and he has accordingly given the plaintiffs a decree. The vendees have appealed and there are cross-objections by the plaintiffs in regard to the amount of the Pleader's fee awarded to them.

There is no force in an argument which has been put forward as to the plaint not having been properly presented. The important question is whether the custom of pre-emption has been proved to exist in the locality in which the house is situate.

We cannot accept the statements of some of the plaintiffs' witnesses as to the house in suit, being in the Bagh *Mohalla*. This house, the plaintiffs' *serai*, and a few other houses and shops form a block which is bounded on all sides by roads. There is a road between this block and the Bagh *Mohalla* on the north, and we think that the learned Subordinate Judge is right in regarding the *serai* block as a portion separate from the Bagh *Mohalla*. The evidence of the special *Kanungo* shows that it is a part, not of the Bagh *Mohalla*, but of an area which was known in 1860 as the Chakla *Mohalla*. That area is no longer known as a separate *mohalla*, but now comprises, in addition to *Serai* Mangal Sain, several *bazars* with distinctive names, and according to the defendants' witnesses the *serai* block alone is now called the Chakla *Mohalla*. The *serai* block appears to be too small an area to constitute a sub-division of the town, although it is not really material for the decision of the case whether it is a sub-division or not. Jhelum is, as the learned Subordinate Judge has observed, a town of recent growth There has not been a single instance of the exercise of the right of pre-emption in the particular block in which the house is situate, nor is there even any evidence to show that the custom existed in any part of the old Chakla *Mohalla* in which this block was included. The plaintiffs must, therefore, in order to succeed, prove that the custom prevails generally throughout the town, for instances which have been adduced of the exercise of the right of pre-emption in the neighbouring Bagh *Mohalla* and Naya *Bazar* are not sufficient to prove that the custom exist in the locality in which the house in suit is situate We proceed then to examine the judicial decisions relied upon as proof of the generality of the custom. These are mentioned as Nos. 20, 24, 25, 27, 28, 30, 31 and 33 in the lower Court's judgment No. 20. The Munsif who decided this case said in his judgment (page 46, line 3 of the paper-book) that the custom of pre-emption generally obtained in Jhelum City, but the point was not in issue, as the existence of the custom in the locality in which the house in suit was situate was not denied, and the dispute was whether the plaintiffs' right was superior to that of the vendee. The Munsif's expression of opinion that the custom prevailed generally in the city does not appear to have been based on any evidence and was superfluous.

No. 24.—In this case, although reference was made to certain judgments which the Munsif said (pages 62 and 63 of the paper-book) disclosed that the custom of pre-emption prevailed generally in Jhelum City, the finding was merely that the custom was proved to exist in the *mohalla* (*Mohalla* Ramzan Bakhsh) in which the house in suit was situate, and this was really the point in issue, and not whether the custom prevailed throughout the town.

No. 25.—Here also the issue was whether the custom prevailed in the *Mohalla* Madrassawala in which the house was situate, and the finding (page 59) was that it prevailed "in" the town and in the Madrassawala *Mohalla*. There was no finding that the custom prevailed "throughout" the town, and that point did not arise. The evidence given also appears to have been of instances in only three *mohallas* in the town.

No. 27.—This is similar to No. 26. The issue was merely whether the custom existed in the Naya *Bazar*, and the finding (page 71) was that the custom existed in Jhelum City and, therefore, could be presumed to exist in the Naya *Bazar*.

No. 28.—This case related to a house which was in either Ramzan *Mohalla* or the Madrassa *Mohalla* The First Court had decided that no custom of pre-emption existed in the sub-division in which the house was situate. In the appeal Mr. Prenter held (page 85) that there were no recognised sub-divisions in Jhelum City at all, and said that he was inclined to think that the rulings of the Courts during the last 50 or 60 years made it almost impossible for the custom now to be denied in any quarter of the city. We cannot attach weight to that observation, as Mr. Prenter did not refer specifically to any particular rulings, and the question whether the custom of pre-emption existed in all parts of the city did not arise for decision.

No. 30.—It was decided in this case that the custom of pre-emption existed in the Naya *Mohalla* which was an extension of the city of Jhelum on the north. The Subordinate Judge said in his judgment (page 90) that the existence of the custom in the city of Jhelum was an uncontested fact, but this cannot be taken to mean that the existence of the custom in all parts of the city was admitted.

No. 31.—In this case, as in Nos. 25 and 26, the Court found (page 80) that the right of pre-emption existed "in" Jhelum, but not that it existed in every part of the town, and the instances of which evidence was given all related to *Mohalla* Mallahan, in which the house in suit was situate.

No. 33.—The judgment of the first Court in this case is printed at page 66 of the paper-book and that of the Appellate Court on page 73. Here again there was no finding that the custom existed throughout the town and the question in dispute was only whether it prevailed in the Toya *Mohalla*.

There are, on the other hand, certain decisions against the existence of the custom. In one (page 99) it was found by the Additional Divisional Judge that there was no proof of the existence of the custom in Jhelum City, and in another (page 96) the Divisional Judge found that the custom was not proved to exist in the Naya *Bazar*.

Our conclusion is that the plaintiffs have failed to prove that the custom of pre-emption exists either throughout the town of Jhelum or in the particular locality in which the house in suit is situate. We accordingly accept the appeal, reverse the decree of the lower Court and dismiss the suit with costs throughout.

The cross-objections are dismissed.

Z. K. *Appeal accepted.*

MADRAS HIGH COURT.

APPEAL SUIT No. 90 OF 1922.

February 27, 1925.

Present —Justice Sir Charles Gordon Spencer, KT, and Mr Justice Odgers.

B. S. MAHADEVA IYER AND OTHERS —DEFENDANTS NOS. 10, 6 AND 7— APPELLANTS

versus

RAMAKRISHNA REDDIAR AND OTHERS —PLAINTIFFS NOS. 1 TO 4—DEFENDANTS —RESPONDENTS.

Contract Act (IX of 1872), ss 263, 264—Limitation Act (IX of 1908), s 20—Partnership, dissolution of —Authority of one partner to pay debts—Notice of dissolution to strangers, want of, effect of

So long as a partnership continues, it is a part of the ordinary course of partnership business to pay partnership debts, and, therefore, it would ordinarily be sufficient to prove that a debt paid was a partnership debt and that the person who paid the interest on it or part of the principal was a partner, in order to give an extended period of limitation under s 20 of the Limitation Act [p 655, col. 1,]

But even after a partnership has become dissolved, so far as strangers are concerned a partnership dissolved is a partnership in being, unless and until they receive notice of dissolution, and, in the case of old customers with the partnership, express notice of the same is necessary and in the absence of it an acknowledgment by one partner is binding on the other partners [*ibid*]

Chundeechurn Dutt v. *Eduljee Cowasjee Binnee*, 8 C. 678, 11 C L. R 225, 4 Ind Dec (N S) 437, relied on.

Appeal against the decree of the Court of the Subordinate Judge, Ramnad at Madura, in O. S. No. 38 of 1920.

Messrs. *A. Krishnaswami Iyer* and *K. Krishnaswami Iyengar*, for the Appellants.

The Advocate-General and Mr. *A. N. Krishna Iyengar*, for the Respondents.

JUDGMENT.

Odgers, J.—In this case the plaintiffs are the sons of one S. V. Manavala Reddiar who died about 1915 and they sue the defendants who are, as to defendants Nos. 2 to 4, the undivided sons of defendant No. 1 and as to defendants Nos. 6 and 7, the undivided sons of defendant No. 5 Defendant No. 1 and defendant No. 5 carried on business in partnership in cotton and money-lending under the style of "P. K. N." Firm. Defendant No. 1 borrowed from Manavala

Reddy Rs. 10,000 from his family funds, in his (defendant No. 1's) capacity as managing partner on 26th August 1914. The suit is brought on the promissory note executed thereupon (Ex. A).) Defendant No 1 is also alleged to have made and endorsed a payment of Rs. 1,000 for interest on 16th August 1917 thus saving limitation. The defence is that the partnership between defendant No. 1 and defendant No. 5 had ceased to the knowledge of plaintiffs long before 16th August 1917 and had been dissolved by a decree in a suit for dissolution (O. S. No. 7 of 1918) brought by defendant No. 5, the capitalist partner, against defendant No 1. The decree decided that the partnership was dissolved as from 11th March 1915. Consequently defendant No. 1 had no anthority to bind his former partner in 1917 by an endorsement of part payment in order to save limitation. It is, no doubt, clear law that after dissolution no ex-partner has power to do any act to bind another ex-partner, *cf.*, *Watson* v. *Woodman* (1), where the Vice-Chancellor held that it was not there proved that the two parties concerned had so intended that they should for the purposes of that suit be deemed to have continued partners. In *Rajagopala Pillai* v. *Krishnasami Chetti* (2) it was held that the fact that a partnership is being wound up is by itself insufficient to authorise a surviving partner to bind the representatives of a deceased partner. But in the present case it is clear that as regards third parties (in the position of the plaintiffs) there was no notice, express or constructive, given of dissolution and s. 264 of the Contract Act is clear that in the absence of such notice, persons dealing with a firm are entitled to assume that the partnership still continues [*Chundee Churn Dutt* v. *Eduljee Cowasjee Bijnee* (3), *Giovani Gorio & Co.* v. *Vallabh Das Kalianji* (4).] Therefore plaintiffs were still entitled even after 1915 to regard the partnership between defendant No. 1 and defendant No. 5 with whom they have dealt for 15 years as subsisting. The question then arises, had defendant No. 1 authority to bind his firm by making this payment. My own opinion is that as, in the case of a mercantile firm as here, each partner is entrusted by his co-partners with a general authority to do any act necessary for or usually done in carrying on the business of such partnership, a partner's authority extends to making an acknowledgment by part-payment so as to bind his partners. I am fortified in this opinion by that of Kumaraswami Sastri, J., in his referring judgment in *Pandiri Veeranna* v. *Grandhi Veerabhadraswami* (5). However a question has been raised on limitation with regard to the provisions of s. 21 (2) of the Limitation Act which runs as follows :—

"Nothing in the said sections renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed or of a payment made by, or by the agent of, any other or others of them."

These words have been construed in *Pandiri Veeranna* v. *Grandhi Veerabhadraswami* (5) by the Full Bench of this Court There the learned Judges say "It is important to notice the exact wording of s. 21 (2) of the Limitation Act The section does not say that a person shall not be liable on an acknowledgment signed by the partner by reason only of his being a partner but by reason only of a written acknowledgment signed by his partner; and it amounts to saying that if you have no more than written acknowledgment signed by one defendant the fact that the other defendant is his partner cannot affect the latter's liability. You would obviously have a case where one partner signed an acknowledgment in respect of a gambling debt of his own; but for the sub-section, proof of the acknowledgment would be sufficient to fix the other partner with liability, a conclusion manifestly repugnant both to sense and justice." (Page 434*) Here there is no question that the part payment was in respect of a partnership debt (Ex. A). There is also ample evidence from the surrounding circumstances which we are entitled to look at [*Pandiri Veeranna* v. *Grandhi Veerabhadraswami* (5)] for the conclusion that there was express authority for defendant No. 1 to make the acknowledgment to rebut the possible validity of the contention that from the wording of s. 21 (2), Limitation Act, there is no presumption in India, that a partner has

(1) (1875) 20 Eq 721, 45 L J Ch 57; 24 W. R. 47.
(2) 8 M L J 261
(3) 8 C 678, 11 C. L R 225; 4 Ind Dec. (N. s) 437.
(4) 30 Ind Cas. 864; 17 Bom. L. R. 762.
(5) 45 Ind. Cas. 18; 41 M 427 at p. 431; 34 M. L. J. 373, 23 M L T. 261, (1918) M. W. N. 285; 7 L. W. 552

*Page of 41 M.—[*Ed.*]

power to acknowledge, though the validity of this contention is at least doubtful after the exposition of the sub section by the Full Bench Plaintiff witness No. 3 a clerk of appellants' (defendants') firm swears that the entry in Ex. E (1) showing the payment of Rs 1,000 on 16th August 1917 was made under the orders of defendants Nos. 1 and 5, he also states that the partnership has not been wound up or the account settled. Defendant No. 5 himself applied for a loan to the South Indian Bank in 1915 (Ex. G) in which he sets out the present loan. Exhibit H is the defendant No. 5's plaint in the dissolution suit against respondent No. 1. He says that since his (defendant No. 5's) father's death in 1907, defendant No. 1 and another assistant partner, conducted the entire business. Defendant No. 5 was obliged to rely on defendant No. 1 for the conduct by him of all matters connected with the partnership and all such things as the collection of outstandings, etc. In Ex. F dated 6th February 1918 the present appellant admits that defendant No 1 has to pay a share of the debt due to Manavala Reddi. There is also a correspondence between the Receiver in the dissolution suit and the Vakil of Manavala Reddi's sons which shows that at first at any rate the appellants were willing to discharge their half of the suit debt and did not question their liability to do so. There is no doubt on the evidence, which there is no reason to discredit, that never until this suit was brought did appellants dispute their liability nor suggest that defendant No. 1 was not authorised to make the acknowledgment. The proviso of s. 21 (2) of the Limitation Act as construed by the Full Bench can, therefore, have no application to the present case. I am, therefore, of opinion, that the Subordinate Judge was correct in the conclusion he came to and I would dismiss this appeal with costs of plaintiffs (respondents Nos. 1 to 3). Costs not to come out of partnership assets.

Spencer, J.—I agree that the appeal must be dismissed with costs and I will give my reasons in my own language. Defendants Nos. 6 and 7 sons of 5th defendant, who died during the suit, appeal and 10th defendant is the Receiver in O. S. No. 7 of 1918.

From the terms of the reference in *Pandiri Veeranna* v. *Grandhi Veerabhadraswami* (5) it appears that the Full Bench had not to consider the effect of s. 21 (2) of the Limitation Act upon acknowledgments of debts and payments saving limitation by partners with express reference to the circumstance of the partnership being a continuing one or one that had been dissolved at the time of acknowledgment or payment. The learned Judges observed that they saw nothing in the sub-section to make it necessary to suppose that it was intended to apply to transactions conducted in the ordinary course of partnership. They overruled *Valasubramania Pillai* v. *Ramanathan Chettiar* (6). So long as a partnership continues, it is a part of the ordinary course of partnership business to pay partnership debts, and, therefore, it would ordinarily be sufficient to prove that the debt in question was a partnership debt and that the person who paid the interest on it or part of the principal was a partner in order to give an extended period of limitation calculated from the date of payment as against all the other partners. Even after dissolution, s. 263 of the Contract Act provides that the rights and obligations of the partners continue in all things necessary for winding up the business, and from s. 265 it appears that payment of the firm's debts is part of the business of winding up. But after a partnership has become dissolved, it may not be the particular duty of every person who has been a partner to pay and acknowledge debts of the firm, as by arrangement that may be done by the Court, or by a Receiver or by one of the ex-partners acting as agent for the others. So far as strangers are concerned, a partnership dissolved is a partnership in being, unless and until they receive notice of dissolution. In the case of old customers, like the plaintiffs in this case, express notice is necessary [*vide Chundee Churn Dutt* v. *Eduljee Cowasjee Bijnee* (3) and Pollock and Mulla's Commentary on s. 264]. It has not been proved by the evidence in this case that the plaintiffs received any notice of the partnership of defendants Nos. 1 and 5 having become dissolved on 11th March 1915 or indeed on any date before 16th August 1917 when the payment of Rs. 1,000 was made by 1st defendant to 2nd plaintiff according to his evidence as P. W. No. 4 and the ledger Ex. E (1). For some unaccountable reason no issue as to limitation was directly raised in the lower

(6) 2 Ind. Cas. 309, 32 M. 421, 5 M. L. T. 102.

Court. Plaintiff witness No. 3 who was clerk of the firm, says that the firm's business was closed on 14th *Thai, Rakshasa*, corresponding to January 27th 1916, but the defendant who as authorised agent of his father, 5th defendant, brought O. S. No. 7 of 1918 on the file of the Sub-Court of Ramnad against 1st defendant to obtain a declaration that the partnership terminated on 11th March 1915 did not present the plaint in that suit to the Court before 1st February 1918 (see Ex. H). In para. 11 of the plaint the 5th defendant states that he was dependent on the 1st defendant for all matters connected with the business of the firm such as the collection of outstandings even after 10th March 1925 pending the settlement of the accounts.

Fifth defendant in Ex. G a loan application made to the South Indian Bank, and 7th defendant in his affidavit (Ex. F) and in his letter (Ex. D-2) to the Receiver admitted that the debt due to the plaintiffs was a partnership debt of the P. K. N. firm, and P. Ws. Nos. 3 and 4 deposed, without being contradicted or shaken in cross-examination, that the payment of Rs. 1,000 was a joint payment by both 1st and 5th defendants and that the entry in the accounts was made under the authority of both of them. This is quite enough to fix all the appellants with liability and to save limitation. I agree in the proposed order for costs.

V. N. V. *Appeal dismissed.*

N H.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2304 OF 1921.

December 23, 1924

Present:—Mr. Justice Harrison and Mr. Justice Zafar Ali.

ZIADA AND OTHERS—DEFENDANTS—APPELLANTS

versus

GURDAS RAM—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 132—Mortgage-deed—Mortgagor at liberty to pay at any time—Commencement of limitation for mortgagee

Where, according to the terms of the mortgage-deed the mortgagor is at liberty to pay at any time, the mortgagee is equally at liberty to foreclose and his limitation under Art. 132 of Sch. I to the Limitation Act begins to run at once. [p. 657, col. 1.]

Appeal from a decree of the Senior Sub-Judge, Shahpur at Sargodha, dated the 31st May 1921.

Mr. *Zafrulla Khan*, for the Appellants.

Messrs. *Nanak Chand* and *C. L. Mathur*, for the Respondent.

JUDGMENT.—The ancestor of the defendants in this case charged the land in suit by several mortgage-deeds. The defendants made an application under the Redemption of Mortgages Act and obtained an order for possession on payment of Rs. 700 only, this being the principal sum charged by the first mortgage. The plaintiff-mortgagee thereupon brought this suit for a declaration that the amount payable under the various deeds was Rs. 13,620 and the land could only be redeemed on payment of this amount. The decree given by the Sub-Judge was that the total charges amounted to Rs. 12,235, two small items having been disallowed on account of improvements to a well and a third so called mortgage.

The defendants appeal, urging that the whole of the suit except so far as it relates to the first mortgage is barred by time. The first mortgage is usufructuary, or almost entirely usufructuary, that is to say, the amount secured was Rs. 700; out of this interest was payable on Rs. 50, and the rent and profits of the land were to be taken as equivalent to the interest on the balance of Rs 650. Counsel for the appellant now admits that the whole of the interest claimed as well as the principal is due on this mortgage, or a total of Rs. 1,873 and urges that nothing should have been allowed on the second mortgage, the date of which was the 11th of August 1894, the first mortgage having been executed in May 1892 and the period therein fixed being 10 years, that is to say, up till 1902.

On the first mortgage limitation has been saved at regular intervals by the appropriation of the profits and rents towards the greater part of the interest, and the contention of Counsel for the respondent is that the words "all the conditions laid down in the previous mortgage-deed shall also apply to the present mortgage-deed"—saved limitation in the second also The clause in the second mortgage runs as follows:—"All the conditions laid down in the previous mortgage-deed shall also apply to the present mortgage-deed. The mortgaged property shall be redeemed only

when I pay up to the mortgagees the present mortgage-money with interest along with the mortgage charges due under the previous deeds as stipulated therein. I shall have no authority whatsoever to redeem the mortgaged property or to alienate it in any way without paying up the mortgage-deed along with those of the previous ones. I shall be at liberty to pay at any time the money due under the present mortgage-deed. I shall have no authority to transfer in any way, the mortgaged property to any other person unless the money due under the present mortgage-deed is paid. The mortgagees-shall also be competent to realise the mortgage-money due under the present deed along with those of the previous ones recited therein from the mortgaged property, other property of mine from my person."

Had the deed concluded with the first sentence of this clause, or even with the first three sentences, there would have been great force in the respondent's contention. This portion of the deed, however, is wholly negatived by what follows "I shall be at liberty to pay at any time the money due under the present mortgage-deed." But Counsel contends, the concluding portion which runs: "The mortgagees shall also be competent to realise the mortgage-money due under the present mortgage-deed along with those of the previous ones recited therein from the mortgaged property, etc.," restores the *status quo ante* and makes the first portion of the clause operative and conclusive. In our opinion, the words "along with those of the previous ones" are only used to indicate that the money reliable on the second mortgage is a charge on the property just as much as the money secured by the first mortgage, and the words do not mean that the mortgagee is debarred from realising his money on the second mortgage unless he sues at the same time to realise on the first.

The all important words are to the effect that the mortgagor is at liberty to pay at any time. The mortgagee was also, therefore, equally at liberty to foreclose and his limitation under Art. 132 began to run at once. Counsel's argument that inasmuch as he was forced to bring this suit by the proceedings before the Revenue Officer he should be treated as a defendant while he is a plaintiff has no force in our opinion.

The total charge, therefore, amounts to Rs. 1,873 and we accept the appeal in so far as to give the plaintiff a decree to the effect that the mortgage charges on the land in suit amount to this sum. Under the circumstances of the case we leave the parties to bear their own costs.

The cross-objections have not been pressed and are dismissed.

R. L. *Appeal partly accepted.*

OUDH CHIEF COURT.

FIRST CIVIL APPEAL No. 73 OF 1924.

December 15, 1925.

Present:—Mr. Justice Stuart and Mr Justice Hasan.

Musammat SARTAJ KOER—PLAINTIFF—APPELLANT

versus

MAHADEO BUX *alias* CHUTAI—DEFENDANT—RESPONDENT.

Custom, proof of—Wajib-ul-arz, *entry in, value of*—*Succession*—"Malik", *meaning of*—*Widow, estate taken by*—Kayasthas *of village Khanpur Khabura, District Rai Bareli*

A Settlement Officer in recording custom in a *wajib-ul-arz* has to perform duties which the Government orders him to perform One of these duties is to record customs as the Settlement Officer finds them and not as he might think they ought to be When, therefore, it is not shown by reliable evidence that the Settlement Officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of the custom is ambiguous, the record in a *wajib-ul-arz* of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen. [p 659, cols. 1 & 2]

Where a devisee or a donee is described as a "*malik*," he has a full right of alienation unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred. [p 660, col. 2]

A clause in a *wajib-ul-arz* relating to the succession to the estate of a deceased proprietor ran as follows —"If included amongst the wives one wife has sons and the others have none then such wives as have no sons shall take shares for the period of their lives, and after the deaths of such wives the sons of the other wives shall be *malik* of such shares and if there be no wife with sons, then the wives of the deceased shall become *malik* over the inheritance of the deceased in equal shares".

Held, that the meaning of the concluding portion of the clause was that where a proprietor had left only one wife without a son, that wife would become absolute owner with right of transfer over the whole of his property [p 661, col. 1]

Among *Kayasthas* of village Khanpur Khabura, in the Rae Bareli District, a widow, in the absence of sons, succeeds to the estate of her deceased husband as an absolute owner with full powers of alienation, [*ibid.*]

First appeal against the judgment and decree of the Subordinate Judge, Rae Bareli, dated the 1st September 1924.

Messrs. *M Wasim* and *Rajeswari Prasad*, for the Appellant.

Messrs *A. P. Sen*, *Bishambhar Nath Srivastava* and *Har Gobind Dayal*, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal. The plaintiff Sartaj Kuar is the daughter of a certain Gurprasad Kayastha who died in 1895 in proprietary possession of the whole of the village of Mubarakpur and Khandepur and a 1 anna 4 pies share in the village of Khanpur Khabura. He died without male issue leaving a widow Batasa Kuar and two daughters, the plaintiff-appellant Sartaj Kuar and Sukhdei. Sukhdei who was married to a man called Debi Bakhsh had four sons one of whom was Mahadeo Bakhsh. Batasa Kuar succeeded to her husband's interests. Under a compromise made by her prior to 1905 she gave up a full proprietary share of 2-annas in Mubarakpur and Khandepur to a certain Mahu Narain a collateral relative of her deceased husband. This left her with a 14-annas share in Mubarakpur and a 14-annas share in Khandepur. On the 13th October 1905 she executed a deed of gift of the 14-annas share in Mubarakpur and 14-annas share in Khandepur, the 1 anna 4 pies share in Khanpur Khabura and a house in Mubarakpur in favour of her grandson Mahadeo Bakhsh. Batasa Kuar died on the 23rd April 1923. Mahadeo Bakhsh obtained possession over the property the subject of the deed of gift (according to his assertion) prior to the death of his grand-mother. In 1923 Sartaj Kuar instituted the suit out of which the present appeal arises for possession of the property which was the subject of the deed of gift. The suit was against Mahadeo Bakhsh. Her suit was dismissed by the Subordinate Judge of Rae Bareli on the 27th August 1924 upon two main findings. The first was that Batasa Kuar had executed the deed of gift in question fully understanding what she was doing. The second finding was that under a family custom Batasa Kuar had full proprietary title to the property transferred. The appeal contests the validity of these two findings.

In respect of the first finding we have it established upon the evidence that the deed of gift of the 13th October 1905 was executed by Batasa Kuar. The deed is on the record as defendant's Ex. A 23. Its translation is printed on Part III, page 78, of the Printed Book. It was properly stamped and registered. The evidence in support of its execution is the evidence of Mahadeo Bakhsh defendant respondent which is contained in Part I, page 27, of the Printed Book. His evidence is as follows:—

"*Musammat* Batasa Kuar executed the deed of gift in my favour. I was present at the time of execution of the deed. Ram Adhin, Sheo Sakat Rai and Randhir Singh attested the deed. Girja Prasad was the scribe of the deed. *Musammat* Batasa put her mark on the deed in the presence of myself, the scribe and the attesting witnesses. The three attesting witnesses signed the deed in my presence and in the presence of Batasa Kuar. The three attesting witnesses and the scribe are dead. The deed was registered in my presence, and she said to Sub-Registrar in my presence that she had executed the deed Ganga Prasad Brahman was the *Mukhtiar* of Batasa Kuar. He wrote Batasa Kuar's name on the deed of gift with her permission. The deed was read out to Batasa Kuar by Girja Prasad who explained it to her before she was asked to sign the deed. Sheikh Shahabuddin Sahib, the late Pleader of this Court, prepared the draft of the deed of gift.

"(Exhibit A-23 shown). This is the deed executed by Batasa Kuar. She put her mark on the deed at two places (witness points them out). The three attesting witnesses signed it in my presence. (Witness identifies them).

"I got this deed of gift back from the Registration Office for Batasa Kuar said that the deed should be returned to me. I have been in possession of the property from the time of gift."

Musammat Batasa Kuar gave evidence in a suit on the 5th of August 1909. Her deposition is defendant's Ex. A-11 and will be found on Part III, pages 88 and 89, of the Printed Book. While this deposition contains some slight divergences from the conditions of the deed of gift it supports absolutely the contention of the defendant-respondent that the lady had with full knowledge of what she was doing made a deed of gift in his favour and put him in possession. We accept the finding of the learned Subordinate Judge as correct to the effect that *Musammat* Batasa Kuar executed the deed of gift and executed it with full knowledge as to what she was doing. We

further find that Mahadéo Bakhsh was put in possession during the lady's life time

We now come to the contention which is to the effect that Batasa Kuar had no power of transfer and that the deed of gift is accordingly now invalid. In the absence of the custom set forward by the defendant-respondent Batasa Kuar as a widow of a Hindu governed by the Mitakshara Law would not ordinarily have had the power of transferring the property by gift for a period beyond her life time. The defendant-respondent has met this plea by asserting the family custom and in the opinion of the learned Subordinate Judge he has established its existence The first point that we have to consider is whether the evidence established the existence of any custom in derogation of the ordinary Hindu Law and the next point which we have to consider is even if a custom is established whether it justifies the transfer by gift. In respect of the question as to proof of custom the evidence is contained almost entirely in the *wajib-ul-arz* of the village of Khanpur Khabura (plaintiff's Ex. 5) a translation of which will be found at Part III, pages 23 and 24, of the Printed Book The learned Counsel for the appellant has argued that the Court would not be justified in finding upon the basis of this *wajib-ul-arz* alone that a custom exists The principles which should guide us in arriving at decision on this point have been laid down very clearly by their Lordships of the Privy Council in *Balgobind* v. *Badri Prasad* (1). This is a decision of the 10th May 1923, and it, in our opinion, gives a final pronouncement upon the point, on which there was formerly some difference of opinion, as to the method by which the value of the evidence afforded by an entry as to custom in a *wajib-ul-arz* in Oudh should be determined. This appeal related to an alleged custom in a village in Gonda in the Province of Oudh. Its existence depended upon an entry in one *wajib-ul-arz*. At page 201* their Lordships stated :—

" It is quite true that a custom is not established by an ambiguous statement of it in a *wajib-ul-arz*." They continued later ;

" Settlement Officers in recording customs in *wajib-ul-araiz* have to perform duties which the Government orders them to perform.

" One of these duties was to record customs as the Settlement Officer found them, and not as he might think they ought to be. When it is not shown by reliable evidence that the Settlement Officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of the custom is ambiguous, the record in a *wajib-ul-arz* of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen.

" There was no evidence to prove or even to suggest that the Settlement Officer in stating the custom as he did in the *wajib-ul arz* had in any way neglected his duty in ascertaining what the custom was, or was misled as to the custom ; nor was there any evidence given in this suit in denial of or at variance with the custom.

" Their Lordships find that the custom excluding daughters and their issue from inheritance was proved."

We now proceed to examine the *wajib-ul-arz* which has relation to the matter before us It was drawn up on the 19th July 1865 at the time of Settlement. The first paragraph gives the history of the village. Khanpur Khabura which was the principal village of the family, to which Gur Prasad belonged, had been in the possession of this family from the beginning of the 17th century. This family held the hereditary office of *qanungo*. The family had received certain special privileges in holding the village revenue free. The first paragraph states these privileges and states how the village had remained with the family for 250 years The *wajib-ul-arz* was verified by 20 members of the family including Gur Prasad himself It continued to lay down in the fourth paragraph a custom of succession. We shall interpret the custom of succession later but we find here that there is nothing to show that the Settlement Officer neglected to perform his duty in recording the custom as he found it. There is nothing to show that he recorded what he thought ought to be the custom instead of what was the custom There is nothing to show that he was misled in recording the custom. We shall consider later whether the custom was or was not ambiguous

The words which we have to interpret have been translated in part by the learned Subordinate Judge and translated completely by a translator of this Court. The translator's translation is inaccurate. The translation of the Subordinate Judge is

(1) 74 Ind. Cas 449, 50 I A 196.

*Page of 50 I. A.—[*Ed.*]

fairly accurate but only gives a portion of the relevant matter. We prefer to translate these words ourselves. This is our translation :

"If there are in existence several wedded wives of the deceased co-sharer and there have been sons from each wife in varying numbers then the inheritance shall be divided with reference to the number of wives on the principle of *jurabant* as follows:—

"Where there is in existence a wife with only one son and where the remaining wife has more than one son the sons of the first named and the sons of the second named shall severally take possession of one moiety of the estate of the deceased" (a more literal translation of the last passage would be "where a wife has only one son he will take possession of one-half share of the deceased's inheritance and where the remaining wife has more than one son all such sons will take possession of the remaining half of the inheritance of the deceased" "if included amongst the wives one wife has sons and the others have none then such wives as have no sons shall take shares for the period of their lives, and after the deaths of such wives the sons of the other wives shall be *malik* of such shares and if there be no wife with sons, then the wives of the deceased shall become *malik* over the inheritance of the deceased in equal shares."

We have advisedly left the word *malik* for the present in vernacular as the most important question for decision in this appeal is its interpretation. The interpretation of this word has been before the Courts on many occasions. We consider, however, that the meaning which should be given to it in judicial proceedings has now been established beyond doubt by two decisions of their Lordships of the Privy Council of the year 1921. The first of these will be found in the report of *Bhaidas Shivdas* v. *Bai Gulab* (2). There the word *malik* was used in a Will made in the *Gujrati* language. There would appear to be no difference in the meaning of the words as used in *Gujrati* and as used in the *wajib-ul-arz* under consideration. Lord Buckmaster on page 6* of the decision said :—

"There is no dispute that the word that was used in cl. 3 as the original word of gift was the word '*malik*' which could be appropriately used to constitute the wife absolute owner. It is not that the word is a 'term of art', it does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be ; and in the context of the present Will their Lordships think the estate was absolute."

In the subsequent decision of *Sasimon Chowdurain* v. *Shib Narayan Chowdhury* (3) their Lordships were interpreting a Will made by a Hindu of Behar in *Urdu*. The *Urdu* used in the Will was *Urdu* similar to that used in the *wajib-ul-arz* under consideration. This decision reviewed all the most important decisions in which the word '*malik*' had been interpreted, commencing with the decision of their Lordships themselves in *Moulvie Mahomed Shumsool Hooda* v. *Shewukram* (4). At page 35* the decision states :—

"It appears from some of the decisions to which their Lordships have referred and from the judgment of the Board in *Bhaidas Shivdas* v. *Bai Gulab* (2) that the term '*malik*', when used in a Will or other document as descriptive of the position which a devisee or donee is intended to hold, has been held apt to describe an owner possessed of full proprietary rights, including a full right of alienation, unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred, but the meaning of every word in an Indian Will must always depend upon the setting in which it is placed, the subject to which it is related, and the locality of the testator from which it may receive its true shade of meaning, and their Lordships can find nothing in the quoted decisions contrary to this view".

According to this decision, which settles the matter finally, a devisee or donee described as a "*malik*" has a full right of alienation unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred. The learned Counsel for the appellant has argued that nowhere have their Lordships of the Privy Council considered the meaning of the word *malik* in a *wajib-ul-arz* in Oudh. That is so, but the portion of a *wajib-ul-arz*

(2) 65 Ind. Cas. 974; 49 I. A 1; 26 C. W. N 129; 15 L. W. 412; 20 A. L. J. 289, 42 M. L. J. 385 (P. C.).

(3) 66 Ind. Cas. 193; 49 I. A. 25.

(4) 2 I. A. 7; 14 B. L. R. 226; 22 W. R. 409; 3 Sar. P. C. J. 405 (P. C.).

*Pages of 49 I. A.—[*Ed.*]

in Oudh which contains a custom of succession is clearly a document of the same nature as the documents to which their Lordships were referring. There is much force in the remark of the learned Subordinate Judge that the parties who dictated the custom were literary *Kayasthas* and it was not likely that the words were used loosely. He has further rightly laid great stress upon the fact that the position of the sons of a deceased co-sharer is described as that of "*malik*" and that the position of the widows of a deceased co-sharer who has no sons is also described as that of "*malik*." We agree with him that it is impossible to construe the *wajib-ul-arz* in such a manner as to make the position of the sons other than that of the position of absolute owners with a right to transfer, and this being the case, it seems to us impossible to hold that the position of widows, when there are no sons, is other than the positionof absolute owners with a right of transfer. The learned Counsel for the appellant has further argued that, even if this view be accepted, there is nothing in the *wajib ul-arz* which would give to the widow of a deceased co-sharer in a case, such as the present, in which he left only one widow an absolute estate. Here we are against him. We can only interpret the words which we translate if there be no wife with sons then the "wives of the deceased shall become absolute owners with a right of transfer over the inheritance of the deceased in equal shares" as containing a statement that where the deceased co-sharer has left only one wife without a son, that wife became an absolute owner with right of transfer over the whole property. This is not an inference. The plural includes the singular, and it would be contrary to all right rules of interpretation, in our opinion, to hold that the custom did not affect a single wife without a son.

We are now in a position to consider the point which we have left over. Is the custom so asserted ambiguous? We do not find any ambiguity. The custom contained in this *wajib-ul-arz* is a custom which lays down a succession which in many ways is not the succession provided by the Mitakshara Law. The principle of *jurabant* is contrary to the principle of succession under the Mitakshara Law. The creation of an absolute estate in the widow is also contrary to the Mitakshara Law. But there is no ambiguity. The meaning is perfectly clear. We can now conclude our decision. We find that the custom asserted by the defendant-respondent was recorded by the Settlement Officer, there being no reliable evidence in fact there being no evidence of any kind-that the Settlement Officer neglected to perform his duty or recorded what he thought ought to be the custom or was misled in recording the custom, that there is no evidence in rebuttal of the custom so recorded, and that the words not being ambiguous the evidence in the *wajib-ul arz* alone is sufficient to establish the custom. This custom governed not only the property of the family in the village of Khanpur Khabura but the property of the family situated in other villages. Under this custom Batasa Kuar had the right to transfer by deed of gift the property which she did so transfer by the deed of 13th October 1905 The appeal, therefore, fails and is dismissed with costs.

Z K. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1686 OF 1922.

July 28, 1924.

Present:—Mr. Justice Jackson.

KOYYALAMUDI CHINNAYYA AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

KOYYALAMUDI MANGAMMA, MINOR, REPRESENTED BY NANDIGAM VEERAYYA—PLAINTIFF No. 1—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Appellate Court—Additional evidence, admission of—Finding of fact—Appeal, second—Interference by High Court

Where an Appellate Court has relied for its decision upon a document which is inadmissible in evidence, a Court of second appeal would be justified in remanding the case for decision to the Appellate Court with a direction to exclude that document from its consideration But where an Appellate Court although it admitted as additional evidence certain documents in appeal did not base its finding upon them, a finding of fact arrived at by that Court will not be interfered with by the High Court in second appeal. [p. 662, col 2, p 663, col 1.]

Second appeal against a decree of the Court of the Additional Subordinate Judge, Ellore, in A. S. No. 181 of 1921, preferred against a decree of the Court of the Additional District Munsif, Ellore, in O. S. No. 262 of 1920.

Mr. *P. Bapuraju*, for the Appellants.

Mr. *V. Suryanarayana*, for the Respondents.

JUDGMENT.—This is a second appeal from the decree of the Court of the Additional Subordinate Judge of Ellore in A. S. No. 181 of 1921 preferred against the decree in O. S. No. 262 of 1920 on the file of the Additional District Munsif of Ellore.

The lower Appellate Court decreed the suit and defendants Nos. 1 and 2 appeal.

The plaintiffs sue for recovery of possession of certain properties and for mesne profits alleging that the properties fell to the share of the 1st plaintiff's husband in a partition held in 1911, and the question whether there was such a partition (Issue No. 1) has been decided in the affirmative by the lower Appellate Court. It is a question of fact which ordinarily cannot be raised in second appeal but the appellants contend that the lower Appellate Court wrongfully admitted as evidence the documents Exs. P, P (1) and P (2) and was influenced by these documents without giving the appellants an opportunity of showing that they were forged. The District Munsif in his 4th paragraph rejected these documents with the following remarks: "It is said that subsequent to his death partition lists were drawn up setting forth the properties which had been allotted to each of the brothers. These partition lists were sought to be exhibited in the case but as they purported to be deeds of partition and not mere partition lists and as they were unstamped and unregistered they were not allowed to be filed in the case". In his 7th paragraph the learned Subordinate Judge settles the question of rejection of these lists thus: "On going through the lists, I find that the language used does not amount to a deed of partition declaring a divided status and allotting properties to the several co-parceners. And the evidence shows that the actual partition took place a year before the lists were prepared and these lists were simply notes as regards the property that fell to each share. I do not think the lower Court is right in rejecting these documents". Accordingly he admitted them as being simply notes as regards the properties which fell to each share. If they are nothing more than that, the documents can have no evidentiary value. Prosecution Witness No. 1, 1st plaintiff's next friend, merely states that partition lists were prepared and there is no evidence as to who wrote or signed Ex-P series. I am asked to find that the learned Subordinate Judge assumed, when he admitted these documents that they were signed by the persons by whom they purported to be signed and treated them as important admissions by the defendants that there had been a partition. Of course, if he had made any such assumption without taking any evidence in the matter, this case would obviously have to be remanded. But I do not think that he did anything of the sort. I gather that he said the documents might be filed as mere notes and then considered whether apart from these documents there was sufficient evidence of partition. He refers to the evidence of P. Ws. Nos. 1 and 2 and Exs. A and A (1). He considers the discrepancies in the evidence of P. Ws. Nos. 1 and 2 but notes that the *kist* has been paid separately as appears from Exs. C and D series. He finds ample evidence as regards the separate enjoyment of the property and he observes that the evidence of defendants was discredited by the lower Court.

In his summary of the evidence he makes no mention of Exs. P, P (1) and P (2) or of any admission contained therein. I find that he admitted them for what they are worth and as in that stage of the proceedings they were worth nothing at all he dismissed them from his mind. Therefore, I do not find that the lower Court considered Exs. P, P(1) and P (2) or was in any way influenced by them. The finding of fact cannot be assailed on that ground.

The cases cited by the appellants are distinguishable. In *Govindan Nair* v. *Govindan Nair* (1) it was held that the Judge did not refer to two documents of importance and, therefore, the case was returned for a fresh finding; but in the present case the Judge referred, if at all, to documents of no importance. In *Sumitra Kuer* v. *Ram Kair Chowbey* (2) it was held that "Where an Appellate Court has relied for its decision upon a document which is inadmissible in evidence, a Court of second appeal would be justified in remanding the case for decision to the Appellate Court with a direction to exclude that document from its consideration". But here the Ex. P series are clearly admissible in evidence if they are treated

(1) 15 Ind. Cas 103; (1912) M W. N 821

(2) 57 Ind Cas 561, 5 P L J 410; 1 P. L. T. 702; (1921) Pat. 17.

(3) 28 Ind. Cas. 11; (1914) M. W. N. 795; 1 L. W. 771.

simply as notes and as I have observed above the Court, as a matter of fact, did not rely upon them in coming to the decison. *Ariya Muthu Pillai* v. *Sennaya Pillai* (3). Here the Court had proceeded very largely on a consideration of evidence admitted during the hearing of the appeal in contravention of O. XLI, r. 27, of the C. P. C., which again has no application to a case where the Court has properly admitted evidence, and as a matter of fact, has not proceeded on the consideration of it.

In *Ujir Ali Sirdar* v. *Shadhai Behara* (4) it is laid down "The High Court cannot, on second appeal, look at the evidence to decide if the remaining evidence in a case after that which has been improperly admitted, is rejected, is sufficient to warrant the finding of the Court below".

This principle will apply if agreed with the appellant's assumption that the Court below had been materially influenced by Ex P series and had regarded them as containing important admissions by the defendants. But since I hold that the Court below paid no attention to Ex. P series and certainly did not regard them as containing admissions, there is no need to decide whether the remaining evidence is sufficient to warrant the finding of the Court

On all the questions raised the second appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

(4) 68 Ind. Cas. 1033, 35 C L J. 182, (1922) A. I. R. (C) 185

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 28-B OF 1923

September 30, 1924.

Present:—Mr. Baker, J. C.

NARAYAN AND OTHERS—DEFENDANTS —APPELLANTS

versus

DHUDABAI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O XXII, r. 4—Mortgage suit—Joint mortgagors—Death of one mortgagor—Legal representatives not brought on record —Abatement, extent of—Hindu Law—Joint family—Mortgage by co-parcener—Foreclosure decree—Birth of son to mortgagor, effect of—Partition suit by purchaser —Procedure.

The failure in a mortgage suit to bring on record the heirs of one of the joint executants of the mortgage-deed, who has died during the pendency of the suit, does not result in the abatement of the suit as a whole, but only as regards the share of the deceased whose heirs would not be bound by the decree passed in the suit [p. 664, col 2]

Where a Hindu co-parcener has mortgaged his share in the family property the birth of a son to him after a final foreclosure decree has been passed against him at the suit of the mortgagee does not operate retrospectively and cannot reduce the share of the co-parcener, the whole of which would pass to the mortgagee-decree-holder [p 665, col 1]

The purchaser of an unascertained share of joint family property must bring a suit for partition in which the whole of the joint family property should be included and all necessary parties joined In a suit of that nature, the Court in making the partition would endeavour to give effect to the alienation and so to marshal the family property among the co-parceners as to allot that portion of the family property or so much of it as may be just to the purchaser. [p 665, col 2]

Ishrappa Ganap Hegde v *Krishna Putta Shankar Hegde*, 67 Ind Cas 833, 24 Bom L R 428, 46 B 925; (1922) A I R (B) 413 and *Dhulabhai Dabhai* v *Lala Dhula*, 64 Ind Cas 115, 46 B 28, 23 Bom L R 777, (1922) A I R (B) 137, relied on

Appeal against a decree of the Sub-Judge, Yeotmal, dated the 31st October 1923, in Civil Suit No 22 of 1922.

Mr. *M. B. Niyogi*, for the Appellants.

Mr. *B R Pendharkar* and *R R Jaywant*, for the Respondent

JUDGMENT.—This appeal raises several points of law. Defendants Nos. 4 and 5, Tukaram and Govind, are brothers. Defendants Nos 1 and 2 are sons of defendant No 4 and defendants Nos. 3 and 6 are sons of defendant No 5.

Defendants Nos. 4 and 5 and Laxman, son of defendant No. 4, mortgaged their shares of the joint family property to plaintiff's father Hiralal in 1912. Hiralal brought a suit on the mortgage and obtained a preliminary decree on 11th November 1915. Two days before the passing of this decree, defendant Laxman died and no application was made for bringing his heirs on record. Subsequently Hiralal died and the plaintiff, who is his heir, was brought on record. A final decree for foreclosure was passed on 6th August 1918.

Defendants Nos. 1 and 2, who are sons of defendant No. 4, and defendant No. 3, who is son of defendant No. 5, filed Suit No. 16 of 1918 against plaintiff on the allegation that the decree in the mortgage suit was obtained by fraud and was not binding on them, and were successful, their shares in the property being held not subject to the decree in the mortgage suit.

The plaintiff being obstructed in getting possession of the property foreclosed, brought the present suit for partition and

possession of the property mortgaged by the original mortgagors.

It was contended on behalf of the defendants that the heirs of Laxman not having been brought on record within time in the mortgage suit, the whole suit should have abated and must in any case abate as regards Laxman's share which was 2 annas, and that the share of defendant No. 5 Govind was lessened by the birth of a son to him on 13th November 1919. This son is Wasudeo, defendant No. 6 in the suit.

Defendants admitted the plaintiff's claim to the extent of the share of Tukaram which is 2 annas and of Govind which is 2 annas 8 pies.

The First Class Subordinate Judge, Yeotmal, held that the decree in the mortgage suit No. 14 of 1915 was not a nullity because Laxman's heirs were not brought on record and that it abated to the extent of Laxman's share only, and that plaintiff got 6 annas share by the said decree, *viz.* 4 annas in the share of defendant No. 5 Govind and 2 annas in the share of defendant No. 4 Tukaram, and that she should be put in possession of her share, preferably out of the property mentioned in Sch. A, by partition.

Defendants appeal against this decree.

The principal contention raised by the appellants is that the whole mortgage suit should have abated as Laxman's heirs were not brought on record.

They rely on *Subramania Aiyar* v. *Vaithinatha Aiyar* (1). That is a case of a sole defendant and will not apply to the present case.

It is contended that when the rights of parties are joint and indivisible, the absence of one of such parties will vitiate the whole trial. When a defendant dies and his rights survive to his legal representative the absence of his legal representative will vitiate the suit.

Reference is made to *Raj Chunder Sen* v. *Ganga Das Seal* (2), this was a partnership suit and so the cause of action did not survive against the remaining respondents alone, and to *Imam-ud-Din* v. *Sadarat Rai* (3). In that case it was admitted that the cause of action did not survive against the other respondents.

On behalf of respondent it is contended that Laxman's father Tukaram was already on record as executant and was representing the joint family and that it was held in *Rameshwar* v. *Bhangilal* (4), that the result of a current of decisions is that when a Hindu father, a member of a joint family, sues or is sued, it is to be presumed that he sues or is sued in a representative capacity. I may remark that this presumption does not seem to me to arise here. Laxman, the son, was one of the executants of the mortgage and was made a defendant. The other sons, defendants Nos. 1 and 2, were not joined and have subsequently succeeded in getting their shares released from the mortgage. It is not stated in the plaint in Suit No. 14 of 1915 that Tukaram was sued as manager.

The respondent further relies on *Moti* v. *Kanhya* (5), *Sheo Shankar Ram* v. *Jaddo Kunwar* (6) and *Krishnanand Nath Khare* v. *Raja Ram Singh* (7)

These are all cases in which admittedly the manager was sued, and I am doubtful if they will apply to a case where Laxman was himself an executant of the bond and was made a party to the suit.

Assuming however that Laxman's heirs were necessary parties, the failure to join them as defendants would not result in the dismissal of the whole suit.

I have referred to Gour's Transfer of Property Act, Vol II, paras. 2151-2, on this question and the conclusion arrived at is that the effect of non-joinder is to leave the interests of the party omitted unaffected.

This is the view in Madras: *cf. Sivathi Odayan* v. *Ramasubbayyar* (8), and is supported by the Privy Council, *cf. Umes Chunder Sircar* v. *Zahur Fatima* (9) and *Hari Kissen Bhagat* v. *Veliat Hossein* (10).

In these circumstances I agree with the finding of the lower Court that the suit on the mortgage would not abate as a whole, but only as regards the share of Laxman, whose heirs are not bound by the decree against him. It is true that one of the heirs was his father defendant No. 4, but his brothers defendants Nos. 1 and 2 were not on record. The share of Laxman has, as

(1) 31 Ind Cas 198, 38 M 682.

(2) 34 C. 487, 1 A L. J. 145, 8 C W N 442, 31 I. A. 71; 14 M. L J. 117; 8 Sar P. C. J. 623 (P C.).

(3) 5 Ind, Cas. 897; 32 A. 301; 7 A. L. J. 928.

(4) 32 Ind Cas 996; 12 N. L R 45

(5) 4 Ind. Cas 797, 5 N. L R. 181 at p. 187.

(6) 24 Ind. Cas 504, 36 A 383; 18 C W. N. 968; 16 M. L T. 175, (1914) M. W. N. 593; 1 L W. 645; 20 C. L J 282, 12 A. L. J. 1173; 16 Bom. L. R 810, 41 I A 216 (P C).

(7) 66 Ind Cas. 150, 44 A. 393; 20 A L. J. 233; (1922) A. I. R (A) 116

(8) 21 M 64, 8 M L. J. 21; 7 Ind. Dec (N. S) 402.

(9) 18 C 161, 17 I. A 201; 5 Sar. P. C J. 9 Ind. Dec. (N. S) 110 (P, C.).

(10) 30 C. 755; 7 C, W. N. 723.

a matter of fact, been excluded from the mortgage.

The next point raised on behalf of the appellants is that the share of defendant No. 5 must be diminished by the birth of a son to him (defendant No. 6). He was not born at the date of the mortgage-decree, but he was alive at the date of the present suit for partition.

The learned Pleader for appellants relies on *Ramnath* v. *Sitaram* (11) and *Nanjaya Mudali* v. *Shanmuga Mudali* (12), and it is contended that the alienor's share fluctuates by birth and death.

In Civil Suit No. 16 of 1918 it has been held that what was passed by the mortgage was the right, title and interest of the executants, and the shares must be determined at the date of partition. The effect of the birth of Wasudeo defendant No 6 is to reduce the share of his father by Re 0-2 8

It is also contended that in any case at the date of the alienation the wives of both Tukaram and Govind (defendants Nos 4 and 5) were living, and would have been entitled to a share on partition.

It is not necessary to go into this last question which raises a difficult point of law as to the right of a wife to get a share on partition during the life of her husband, because this point was never raised in the pleadings and we do not know whether at the date of the mortgage defendants Nos. 4 and 5 had wives living.

With regard to the first point, the birth of defendant No. 6 as affecting his father's share, it is to be noted that the foreclosure decree was passed in 1918 and possession was actually given to plaintiff in July 1919. Wasudeo defendant No. 6 was born in November 1919 after his father's right in the property had already passed. He cannot, therefore, question it: *cf. Sardar Singh* v. *Ajit* (13) and *Jairam* v *Venkat rao* (14).

The subsequent birth of Wasudeo does not operate retrospectively. It is contended on behalf of the appellants that they do not wish to challenge the alienation and they rely on the observations in *Nanjaya Mudali* v *Shanmuga Mudali* (11). But in that case there had been no decree. In the present case the interests of defendant No. 5 had passed to the plaintiff before the birth of Wasudeo, who therefore acquired only an interest in the family property as it stood at the date of his birth.

I do not, therefore, see any reason to differ from the finding of the lower Court on this point.

The next point raised is that plaintiff is not entitled to get anything out of the property which was not mortgaged, that is out of the property mentioned in Sch. C.

It was contended by the defendants that in a partition suit all the property must be brought into hotch-pot and, therefore, the property mentioned in Sch. A was added The course adopted by the lower Court is precisely that laid down in *Ishrappa Ganap Hegde* v. *Krishna Putta Shankar Hegde* (15), which is a case relied on by the appellants, *viz.*, that the purchaser of an unascertained share of joint family property must bring a suit for partition in which the whole of the joint family property should be included and all necessary parties joined. In a suit of that nature the Court in making the partition would endeavour to give effect to the alienation and so to marshal the family property among the co parceners as to allot that portion of the family estate, or so much of it as may be just, to the purchaser *cf.* also *Dhulabhai Dabhai* v. *Lala Dhula* (16). This is what has been done in the present case.

The result is that the appeal fails and is dismissed with costs.

Z K. *Appeal dismissed.*

(15) 67 Ind Cas 833, 24 Bom L R. 428, 46 B. 925; (1922) A I R (B) 413

(16) 64 Ind Cas 115, 46 B 28, 23 Bom. L. R. 777, (1922) A I R (B) 137.

(11) 74 Ind Cas. 81, 19 N. L R 147; (1923) A I. R. (N) 288.

(12) 22 Ind. Cas 555, 26 M L. J. 576, 15 M. L. T 186; (1914) M W. N 356; 3 M. 8684

(13) 2 C P. R. 141.

(14) 65 Ind. Cas 658; (1922) A. I R (N.) 101; 5 N. L. J. 66.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 25 OF 1925.

November 25, 1925.

Present:—Mr. Justice Raza.

SARDA BUX SINGH—DEFENDANT—APPELLANT

versus

KANDHIA BUX—PLAINTIFF—RESPONDENT.

Mortgage—Redemption—Amount in dispute—Absence of tender- Dismissal of suit, whether justified—Interest —Contract rate excessive—Court, whether can reduce interest

Where the amount to be tendered for redemption is in dispute the mortgagor's suit for redemption cannot be dismissed on the ground that no tender was made. [p 686, col 1]

Barma Bakhsh v *Suraj Singh* 5 O. C. 127, referred to

Karim Bakhsh v. *Idu Shah*, 40 Ind Cas 381, 4 O L J 334, distinguished.

A Court has no power to reduce the contractual rate of interest solely on the ground that it is excessive. [p 666, col 2.]

Fazal Azim v *Girdhari Lal*, 69 Ind Cas 657, 9 O. L. J 442, (1923) A. I. R. (O) 8, referred to.

Mata Din v, *Ahmad Ali*, 24 Ind Cas. 874, 1 O. L. J. 263, distinguished.

Second appeal against a decree and judgment of the Sub-Judge, Partabgarh, dated the 26th September 1924, setting aside that of the Munsif, Partabgarh, dated the 13th May 1924.

Mr. *Radha Krishna*, for the Appellant.

Mr. *Ganga Dayal Khan*, for the Respondent.

JUDGMENT.—This appeal arises out of a redemption suit. The plaintiff executed a possessory mortgage in favour of the defendant's ancestor in respect of some trees for Rs. 10 bearing interest at Rs. 6 4-0 per cent. per mensem, on the 7th July 1897. The plaintiff sued to redeem the mortgage without payment of any sum on the allegation that the mortgage money which amounted to Rs 10 only was paid off by the appropriation of five mango trees which had been cut by the mortgagee. The defence was that no trees were cut, that Rs. 210 5-0 were due to the defendants on account of principal and interest and that the suit was not maintainable as no tender was made in the *khali fasl*. The first Court dismissed the suit on the ground that no tender was made in the *khali fasl*. The learned Subordinate Judge decreed the plaintiff's claim for redemption on payment of Rs. 5 only. The defendant has appealed challenging the findings on the points decided against him. I am not prepared to accept the contention that no cause of action for redemption arose in the favour of the respondent because the mortgage-money was not tendered in *khali fasl*, as pointed out in the case of *Barma Bakhsh* v. *Suraj Singh* (1): "Where there is a real dispute as to the amount due and the mortgagor tenders what turns out to be an insufficient amount or makes no tender at all, his suit for redemption should not be dismissed on the ground that no tender was made." In this case no tender could have been made for the amount of the mortgage-money was in dispute. The amount of interest was in dispute and the appropriation and cutting of five trees was also in dispute. The ruling in *Karim Bakhsh* v. *Idu Shah* (2) cannot help the defendant in this case. The mortgaged property in that case consisted of certain agricultural plots. The mortgage in the present suit is a mortgage of trees only.

The learned Subordinate Judge has found that the mortgagee cut down some trees of the value of Rs. 5 (so far as the plaintiff's share is concerned) and should account for the sum. The finding on that point has not been questioned in this appeal. The appellant contends however that he is entitled to the interest claimed, under the terms of the mortgage deed in suit. I have read the deed in suit, Ext A-1, carefully. In my opinion the defendant's contention must be accepted. The deed shows clearly that the mortgage was executed for Rs. 10 bearing interest at Rs. 6-4 per cent. per mensem. The mortgagee was allowed to take the produce of the grove and it was further provided by the deed that the mortgage would be redeemed on payment of the principal money together with interest at the stipulated rate mentioned above in any *khali fasl*. I do not agree with the learned Subordinate Judge that interest at the rate stipulated in the deed was to be charged only when the mortgagee lost the usufruct of the trees mortgaged. The rate of interest is of course excessive but the Court cannot help the plaintiff when the deed clearly provides for payment of interest at the rate in question, at the time of redemption. As pointed out in *Fazal Azim* v. *Girdhari Lal* (3) a Court has no power to reduce the contract rate of interest solely on the ground that it is excessive.

The respondent's learned Counsel has referred to the ruling in *Mata Din* v. *Ahmad Ali* (4) but that ruling is inapplicable to this case. The mortgagee is in possession of the mortgaged property and he claims interest under the terms of the deed. I see no reason why the deed should not be enforced. The plaintiff should have to pay Rs. 215-5-0 if he wants to redeem the property in suit.

I allow the appeal and setting aside the decree of the lower Appellate Court decree the plaintiff's claim for redemption on payment of Rs 215 5 0. The amount should be paid within six months from this date, *i. e.*, on or before the 25th May 1926. If

(1) 3 O. C. 127.

(2) 40 Ind Cas 381; 4 O L J. 334.

(3) 69 Ind Cas. 657; 9 O L J. 442 (1923) A. I. R. (O.) 8

(4) 24 Ind. Cas 874; 1 O L J 263.

such payment is not made on or before the above mentioned date the mortgaged property shall be sold Parties will bear their own costs in this Court and also in the lower Courts.

G. H. *Appeal allowed.*

RANGOON HIGH COURT.

CIVIL REVISION No 201 OF 1924.
May 14, 1925
Present :—Mr. Justice Das
MAUNG PO SEIK AND ANOTHER—APPELLANTS
versus
U NANDIYA AND ANOTHER—RESPONDENTS

Civil Procedure Code (Act V of 1908), O XXI, r 97—Execution of decree—Possession, delivery of—Investigation in anticipation of obstruction, legality of

Rule 97 of O XXI, C P C, contemplates the Court ordering investigation after the Bailiff has been obstructed in giving possession in terms of the decree Where, however, a person from whom obstruction is apprehended puts in an application to the Court claiming that the property, whose possession has been ordered to be delivered to the decree-holder, is his property and that he is not bound by the decree, there is nothing wrong in the Court anticipating the obstruction and ordering an investigation under r 97 of O XXI

Civil revision against an order of the Township Court, Maubin, in C. E. No 293 of 1924

Mr. *The Tun*, for the Appellants.

Mr. *Thein Maung*, for the Respondents

JUDGMENT.—In this case the petitioner obtained a decree for possession of a piece of land and of a *kyaung* standing on the same land The decree was by consent, and the defendant in that suit consented to the Court ordering the demolition of this *kyaung* by a Court Official The plaintiff then applied for execution of the decree and for a direction ordering the Bailiff to demolish the *kyaung*. The Court issued an ordinary delivery order. After that the Court was informed that the *kyaung* in question was in possession of certain *pongyis* and that the said *pongyis* would shortly put in an application contesting the plaintiff's right to take possession and demolish this *kyaung*. On that application the Court stayed the execution of the order passed by it and subsequently the respondents put in an application claiming the *kyaung* to be their property and stating that they are not parties to that suit and that the decree in that case was not binding on them.

The Court thereupon held that this is a proper case for investigation under O. XXI, r. 97. It is true that Order contemplates the Court ordering the investigation after the Bailiff has been obstructed to giving possession in terms of the decree. But I do not think, under the circumstances of this case, that the Court was wrong in anticipating the obstruction and ordering an investigation under O. XXI, r. 97

I, therefore, dismiss the application with costs.

Z. K. *Application dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No 2 OF 1925.
November 6, 1925.
Present —Mr Rupchand Bilaram, A. J C
MOOLJI MURARJI SUNDERJI—APPELLANT
versus
M C PINTO AND ANOTHER—RESPONDENTS.

Contract Act (IX of 1872), s 132 Evidence Act (I of 1872), s 92 Co-executants of negotiable instrument—Parol evidence to prove that one of them was surety, admissibility of

Where two persons join together in executing a bill or a promissory-note making themselves jointly and severally liable therefor, there is nothing to prevent one of them from proving by parol evidence that he is the surety and the other the principal debtor, provided that he does not thereby intend to affect the right of the creditor to demand immediate payment from either or both of the co-obligors or joint promisors [p 668, col 2]

Pooley v *Harradine*, (1857) 110 R R 666, 7 E. & B. 431, 26 L J. Q B 156, 3 Jur (N S) 488, 5 W R 405; 119 E R 1307 and *Central Bank of India* v *Nadirshaha Mehta*, 79 Ind. Cas 445, (1924) A I R (S) 13 relied upon.

Appeal against an order of the Official Receiver, dated the 7th January 1925.

Mr *Nadirshah Naoroji*, for the Appellant.

Mr *Fatehchand Assudamal*, for Respondent No. 1.

JUDGMENT.—This is an appeal against the order of the Official Receiver rejecting the claim of the appellant Moolji Morarji as secured creditor over a sum of Rs 2,532-1-7 It arises out of the following facts:—

The Firm of Haribhoy Oodowji now insolvent had an account with Messrs Cox & Co., Bankers, for discounting their bills, and as security for the due payment of the amount standing to their debit in the said account, they deposited the title-deeds of one of their immoveable properties by way of equitable mortgage with Messrs. Cox & Co, who in their turn agreed to accommodate them to the extent of Rs 1,20,000.

The appellant had also an account with

Messrs. Cox & Co. and had likewise deposited title-deeds of his properties to secure the due payment of the amounts debited to his account.

Messrs. Haribhoy Oodowji and the appellant both joined together in borrowing a sum of Rs. 30,000 from Messrs. Cox and Co., on two bills executed by them jointly and each of them appropriated to his own use the sum of Rs. 15,000. Messrs. Haribhoy Oodowji became insolvent before the due date of the payment of the two bills. The appellant retired one of the two bills and requested Messrs. Cox & Co. to recover the amount of the other bill in the first instance from the property of the insolvent contending that he was only a surety for the amount. This Messrs. Cox & Co. declined to do. They recovered the amount of the 2nd bill also from him and in reply to the protest of the appellants' Pleaders they said as follows:

"With regard to the last part of your letter all we can say is that if your client is entitled in law to the benefit of the security held by us, we will continue to hold the same and to have recourse to it after our entire indebtedness is satisfied."

The property was subsequently sold by Messrs. Cox & Co. as secured creditors, and after the rest of their claim against the insolvent was satisfied, there was a surplus of Rs. 2,532-1-7 in their hands; which they handed over to the Official Receiver duly intimating to him that the appellant claimed a preferential right over it, as surety and as such entitled to the benefits of the security held by them.

The Official Receiver has declined to recognize the claim of the appellant as a secured creditor and has retained the money with himself for the benefit of the general body of the creditors of the insolvents. On the evidence and the inferences to be drawn therefrom, there can be no doubt, that the appellant and the insolvents were each of them a surety for the other to the extent of a moiety of the amount borrowed on the two bills and that they had joined together as co-executants to afford a greater security to Messrs. Cox & Co., who were at liberty to fall back on either of them for payment of the whole amount on the due date. It is equally clear on the evidence of Mr. Leslie Smith, the Manager of Messrs. Cox & Co., that the equitable mortgage created by the insolvents extended to all bills discounted by them, whether such bills were executed by the insolvents alone or jointly with others and that the whole sum of Rs. 30,000 was debited to the insolvents as a contingent liability in the account, Ex. 10, which was the subject of the equitable mortgage. It would, therefore, appear that the whole sum of Rs. 30,000 and a portion of a moiety thereof appropriated by the insolvents to their own use, was *inter alia* secured by the equitable mortgage of their property.

It is urged on behalf of the Official Receiver that it is not open to the appellant to give oral evidence to vary the terms of the dishonoured bill, which terms are in writing, and to prove that the appellant joined in the bill as a surety only. This argument is based on a misconception of facts. The bill contains a joint promise by the two executants to pay to their creditors the amount of the bill jointly and severally and so far as the express promise goes it may not be varied by parol evidence. The bill does not declare in express terms the rights of the co-obligors *inter se*, and there is nothing in law to prevent one of them to prove such terms by parol evidence, provided that he does not thereby intend to affect the rights of the creditor to demand immediate payment from either or both of the co-obligors or joint promissors. *Pooley* v. *Harradine* (1) and *Central Bank of India* v. *Nadirshaha Mehta* (2).

The joining together of two persons in executing a bill or a promissory-note in favour of the person who advances money on such bill or note, though one of them is the principal debtor and the other is surety, is one of the common cases contemplated by s. 132, Indian Contract Act, and is referred to in the illustration to that section. Section 132 and the illustration read as follows:—

"Section 132—Where two persons contract with a third person to undertake a certain liability and also contracts with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the 2nd contract, although such third person may have been aware of its existence.

(1) (1857) 110 R R. 666; 7 E. & B 431; 26 L. J. Q. B 156, 3 Jur. (N. S) 488; 5 W. R. 405; 119 E. R. 1307

(2) 79 Ind. Cas. 445; (1924) A. I. R. (S.) 13.

Illustration.

A and B make a joint and several promissory-note to C. A makes it, in fact, as surety for B and C knows this at the time the note is made. The fact that A to the knowledge of C, made the note as surety for B, is no answer to a suit by C against A upon the note"

The section prevents the co-obligor to qualify his immediate liability to the creditor but goes no further and does not debar him from claiming his rights as a surety under the subsidiary contract referred to in the section and declared by the Legislature in the subsequent sections which follows including s. 141 of the Act. If Messrs. Cox & Co. had acceded to the request of the appellant they were indubitably entitled to retain the surplus sale-proceeds in part-payment of the dishonoured bill as secured creditors. The appellant has paid the amount and is, therefore, entitled to the same lien which Messrs. Cox & Co., had over the surplus sale-proceeds.

I am of opinion that the Official Receiver was in error in rejecting the appellant's claim. I allow the appeal with costs and order that the costs of the appellant do come out of the estate of the insolvents.

P. B. A. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1947 OF 1924.

January 28, 1925.

Present:—Mr. Justice Campbell.

ROSHAN LAL MINOR THROUGH HIS MOTHER *Musammat* DURGA DEVI—PLAINTIFF—APPELLANT

versus

Seth RUSTOMJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu law—Joint family—Alienation—Manager's powers—Benefit of estate—Necessity

The manager of a joint Hindu family has an implied authority to do whatever is best for all concerned, the test being whether the transaction is one into which a prudent owner will enter in order to benefit the estate. [p. 670, col. 1.]

The term necessity not only covers a case of actual pressure on an estate or a danger to be averted by prompt discharge of liabilities but an act benefitting the estate as well [p 670, col 2]

Brij Narain Rai v *Mangla Prasad Rai*, 77 Ind Cas. 689; 46 A. 95; 21 A. L J. 934; 46 M. L J. 23; 5 P L T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L W. 72; 2 Pat. L. R. 41; 10 O. & A L. R. 82, (1924) A I R. (P. C.) 50; 33 M L. T. 457; 26 Bom. L R. 500, 11 O L. J. 107; 51 I. A. 129; 1 O. W. N 48; 41 C L. J. 232 (P. C.), *Nagindas Maneklal* v. *Mahomed Yusuf Mitchela*, 64 Ind. Cas. 923; 46 B. 312; 23 Bom. L. R. 1094; (1922) A. I. R. (B.) 122, *Hunoomanpersaud Panday* v. *Babooee Munraj Koonweree*, 6 M. I. A. 393; 18 W R. 81*n*, Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar P C J. 552, 19 E R. 147, *Sheotahal Singh* v. *Arjun Das*, 56 Ind Cas 879, 1 P L T 136,, (1920) Pat 155, and *Sahu Ram Chandra* v *Bhup Singh*, 39 Ind Cas 280, 39 A 437, 21 C W. N. 698, 1 P. L. W. 557; 15 A L J 437, 19 Bom L. R. 498, 26 C. L. J 1, 33 M. L. J. 14, (1917) M W. N. 439, 22 M. L T. 22, 6 L. W. 213, 44 I. A 126 (P C), referred to.

Appeal from a decree of the District Judge, Lahore, dated the 14th April 1924, reversing that of the Senior Sub-Judge, Lahore, dated the 25th August 1922.

Diwan *Mehr Chand* and Lala *Kahan Chand*, for the Appellant.

Lala *Durga Das*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit by a son to challenge a sale of 2 *kanals* 9 *marlas* of land by his father at the rate of Rs. 1,000 per *kanal*. The findings of the lower Appellate Court are that the plaintiff and the vendor formed a joint Hindu family at the time of the sale and that the transaction was for the benefit of the estate. The suit was dismissed on these findings.

In second appeal two arguments have been addressed to me. The first is based on the summary set forth by their Lordships of the Privy Council in *Brij Narain Rai* v. *Mangla Prasad Rai* (1) of the circumstances in which the managing member of a joint undivided family can alienate or burden the estate. The first of these is stated to be that he cannot alienate or burden the estate except for purposes of necessity and it is contended that the term "necessity" represents actual pressure on an estate or danger to be averted by prompt discharge of liabilities, etc, and that an act of improvement of the estate cannot come within its scope. Against this view the lower Appellate Court has cited two rulings both of which are apposite. The first is *Nagindas Maneklal* v. *Mahomed Yusuf Mitchela* (2) where adult co-parceners had sold a dilapidated house. The family was in fairly good circumstances and it was not necessary to sell the house but the house yielded no income. It was held that the agreement of sale was binding on the minor co-parceners and that there was no reason to put a restricted interpretation

(1) 77 Ind. Cas 689, 46 A. 95; 21 A. L. J. 934; 46 M. L. J 23; 5 P L. T. 1; 28 C W. N. 253; (1924) M. W. N. 68; 19 L W. 72, 2 Pat. L R. 41; 10 O. & A. L. R. 82, (1924) A. I R. (P. C.) 50; 33 M. L. T 457; 26 Bom. L. R. 500; 11 O. L. J. 107; 51 I. A. 129; 1 O. W. N. 48; 41 C. L. J. 232 (P. C).

(2) 64 Ind. Cas. 923; 46 B. 312; 23 Bom. L. R. 1094; (1922) A. I. R. (B.) 122.

upon the word "necessity" so as to exclude a case like that before the Judges. Mr. Justice Fawcett expressed the opinion that there was no authority for holding that legal necessity was confined entirely to cases where debts are to be paid or there is other financial pressure, and he cited in support of this view the observations of their Lordships of the Privy Council in *Hanoomanpersaud Pandey* v. *Babooee Munraj Koonweree* (3) which recognized the power of the manager for an infant heir to charge an estate not his own "in case of need or for the benefit of the estate." The second case was a decision by the Patna High Court printed as *Sheotahal Singh* v. *Arjun Das* (4) and dated the 10th of March 1920. There joint family property had been mortgaged in order to pay the premium for a 7 years' lease which was held to have resulted in considerable benefit to the joint family. It was argued before the learned Judges that later decisions of the Judicial Committee had modified the rule laid down in *Hanoomanpersaud Pandey* v. *Babooee Munraj Koonweree* (3) and that the present rule requires a calamity affecting the whole family or necessity for its actual support or indispensable religious duties to justify an alienation. A large number of authorities was examined in connection with this argument and the conclusion, reached was that there had been no modification of the previous rule and that the manager of a joint family has an implied authority to do whatever is best for all concerned, the test being whether the transaction was one into which a prudent owner would enter in order to benefit the estate.

The learned Vakil for the appellant before me has urged that in *Sahu Ram's case* (5) the rule had been stated in the restricted form which he put forward. This is not so, for on page 444* the correct and general principle is said to be that if the debt was not "for the benefit of an estate" then the manager should have no power either of mortgage or sale of that estate in order to meet such a debt, and elsewhere allusion is made to "estate or family necessity," and in explaining the term "necessary purposes" the following passage occurs:—"The principle in regard to this is analogous to that of the power vested in the head of a religious endowment or *muth* or of the guardian of an infant family. In all of the cases where it can be established that the estate itself that is under administration demanded, or the family interests justified, the expenditure, then those entitled to the estate are bound by transaction." This definition certainly does not exclude what might be described as benefit to the estate.

The second argument is that there was no benefit to the estate in the present case but the findings of fact of the lower Appellate Court are against this contention. They are that a fancy price was obtained for the land, that the land was yielding no income to the joint Hindu family and that the sale proceeds were invested in five years' cash certificates bringing in interest at the rate of Rs. 150 per annum. The sale was effected in May 1920. The lower Appellate Court took notice of the fact that the actual cash certificates had not been produced in the Trial Court, but it held that this was not necessary as there was no reason to disbelieve the statement of the witness Bhagwan Das who said that the investment had actually been made. An attempt has been made to re-agitate this point and the statement has been made to me that the cash certificates were actually called for by the plaintiff in the Trial Court. This statement, however, is proved from the record to be incorrect.

Neither finding of the learned District Judge that the transaction was for the benefit of the estate, and that under Hindu Law it binds the plaintiff can be interfered with, and I dismiss the appeal with costs.

R. L. *Appeal dismissed.*

(3) 6 M. I A. 393; 18 W R 81*n*; Sevestre 253*n*; 2 Suth P. C. J. 29, 1 Sar. P. C. J. 552, 19 E R 147.
(4) 56 Ind Cas. 879; 1 P L T 136, (1920) Pat 155
(5) 39 Ind. Cas. 280, 39 A 437, 21 C. W N 698; 1 P. L W 557; 15 A L. J 437; 19 Bom L R 498; 26 C L. J. 1; 33 M. L. J. 14; (1917) M W. N. 439; 22 M L. T. 22, 6 L W 213, 44 I. A 126 (P. C)

*Page of 39 A.—[*Ed.*]

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 324 OF 1925.
December 14, 1925.
Present:—Mr. Justice Ashworth and Mr. Justice Misra.
INDARPAL SINGH—PLAINTIFF—APPELLANT
versus
KALLOO AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Price fixed in good faith—Finding

of fact—Appeal, second—Finding, whether can be challenged.

Where a Court of first appeal disbelieves the witnesses produced by a pre-emptor in support of his allegation that the price mentioned in the sale-deed was not fixed in good faith, its finding that the price was fixed in good faith cannot be challenged in second appeal. [p 672, col 1]

Second appeal against a decree and judgment of the District Judge, Rai Bareli, dated the 4th April 1925, modifying that of the Additional Subordinate Judge, Partabgarh, dated the 31st July 1924.

Mr. *H. D. Chandra*, for the Appellant.

Mr. *Bishambhar Nath Khanna*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption brought by the plaintiff-appellant, Indarpal Singh, on the basis of a sale deed dated 2nd June 1922, executed by one Naghai Singh and another in favour of the respondents. The sale-deed related to a share in village Chandarbhan, *Patti* Gokul Sah, District Partapgarh, and was for a sum of Rs. 2,400 The plaintiff alleged that the consideration stated in the sale-deed was fictitious, and that the price actually agreed upon between the parties to the sale was Rs 1,800. He, therefore, claimed pre-emption of the property sold on payment of the said sum of Rs. 1,800. In defence, the title of the plaintiff to pre-empt was denied, and it was contended that the price entered in the sale-deed was fixed in good faith, and that the plaintiff could not be allowed to pre-empt on payment of any sum less than Rs. 2,400, the price entered in the sale-deed. The Trial Court, the Additional Subordinate Judge of Partabgarh, by his judgment dated the 31st July 1924, held that the plaintiff was entitled to pre-empt and decreed the suit on payment of Rs. 1,800 being of opinion that the price entered in the sale-deed had not been fixed in good faith and that the sum of Rs. 1,800 was the price which had actually been agreed upon and which was the fair market value of the property sold. Against this decree the defendants-respondents appealed to the Court of the District Judge of Rae Bareli, who, by his decree dated 4th April 1925, set aside the judgment of the Trial Court, and held that the price mentioned in the sale-deed was the actual price which had been agreed upon between the parties, and on that finding, he varied the decree of the Trial Court by passing a decree for pre-emption on payment of Rs. 2,400.

The plaintiff now comes up in second appeal to this Court, and on his behalf it is contended that the finding of the lower Appellate Court should not be accepted, inasmuch as the appellant in this Court had produced evidence sufficient to discharge the burden of proof that lay upon him. It is contended that, in accordance with the ruling laid down in a decision of the late Judicial Commissioner's Court of Oudh, *Dwarka* v. *Ludar* (1), in a suit for pre-emption only very slight evidence is required of the plaintiff to support his allegation, that the price entered in the sale-deed was not the true price, in order to shift the burden of proof on the vendee. We have to examine how far that contention, pressed on behalf of the appellant, can be entertained in second appeal.

There were three witnesses produced by the appellant in the Trial Court, namely, Mata Bhik and Sita Ram, the two attesting witnesses to the sale-deed in suit, and Naghai Singh, one of the vendors. The story narrated by the two marginal witnesses above mentioned was disbelieved by the Trial Court. That Court, however, believed the evidence of the vendor, Nagahi Singh, and, taking other facts into consideration, came to the conclusion that the consideration stated in the sale-deed was a fictitious consideration. In appeal the learned District Judge agreed with the Trial Court in its view that the evidence of the two marginal witnesses was untrustworthy and could not be relied upon. He went a step further, however, and disbelieved the evidence of the vendor, Naghai, also. He stated in his judgment :

"Naghai Singh also has not spoken the truth and is not worthy of credit."

The result at which the learned District Judge arrived was, that he disbelieved all the witnesses produced in the case by the plaintiff-appellant, and was of opinion that the plaintiff had altogether failed to prove that he had given even the slight evidence of want of good faith in the statement of the price entered in the sale-deed, as laid down in the ruling quoted above. In these circumstances, there is no point of law left in the appeal. It was for the lower Appellate Court to have accepted or not the evidence of Naghai Singh, the

(1) 4 O. C. 217.

vendor. It could not see its way to accept that evidence, and came to a finding of fact that there was no evidence which had been produced in the case by the plaintiff sufficient to justify him in shifting the burden of proof on to the other side. It, therefore, appears to us to be clear that the finding of fact arrived at in this case by the lower Appellate Court cannot be disturbed in second appeal.

We, therefore, direct that the appeal should stand dismissed with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 532 OF 1922.

October 7, 1924.

Present:—Mr. Justice Jackson.

ADDEPALLI KONDAYYA—PLAINTIFF—APPELLANT

versus

YANDRU VEERANNA—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 118—Transfer of piece of land in lieu of grant of right of easement—Registered deed, whether necessary.

A transaction by which a person agrees to permit another to rest the beams of a structure on his wall and to open cupboards therein in exchange for a piece of land of the value of less than Rs. 100 need not be in writing registered, where each party has delivered possession to the other

The grant of an easement is not a transfer of ownership of immoveable property.

Bhagwan Sahai v. *Narsingh Sahai*, 3 Ind. Cas. 615, 31 A. 612; 6 A. L. J. 871, relied on.

Second appeal against a decree of the Court of the Subordinate Judge, Cocanada, in A. S. No. 45 of 1921, preferred against a decree of the Court of the Additional District Munsif, Cocanada, in O. S. No. 105 of 1919.

Mr. *C. Rama Rao*, for the Appellant.

Mr. *P. Somasundaram*, for the Respondent.

JUDGMENT.—Appeal from the decree of the Subordinate Judge of Cocanada in A. S. No. 45 of 1921.

The plaintiff and defendant entered into an oral agreement whereby the defendant was permitted to rest the beams of a structure upon plaintiff's wall, and to open certain cupboards in the said wall, in exchange for land which plaintiff added to his property. Plaintiff alleges that the full amount of land has not been made over to him, and sues to have the cupboards and beams removed. The lower Appellate Court has found that less land than what is alleged by plaintiff was agreed to be exchanged, and that defendant has fulfilled his part of the agreement. Accordingly it has dismissed plaintiff's suit and plaintiff appeals.

Two points have been argued.

(1). The lower Appellate Court's finding on the facts is not based upon any evidence (10th ground of appeal).

(2). The exchange pleaded by defendant is not valid since there was no registered document and no delivery (2nd ground).

I do not find that the lower Appellate Court proceeded without regard to the evidence. Appalaswami (D. W. No. 3) says that the land given in exchange extended to the west as far as the line in continuation of the western boundary of the western verandah of plaintiff's house and to the north of the red line in Ex. "B." That is the triangular section south of the new wall and north of the red boundary line which the Subordinate Judge finds to have been the portion surrendered by defendant and this finding on the evidence cannot be traversed in second appeal.

It is a very small trip of land admittedly below Rs. 100 in value (District Munsif's judgment, para. 7). Therefore, there is no question of the necessity of a registered document. Each party has delivered possession to the other, the defendant by allowing plaintiff to wall off the triangle of land, and the plaintiff by constructing the cupboards on defendant's side of the wall and having them available for his use. Therefore, the exchange is valid, and plaintiff has no right to oust the defendant. As regards the other grounds of appeal, (grounds Nos. 2 and 3), if an exchange for defendant's land plaintiff has only obtained an easement (and the transfer of the portion of his wall occupied by the cupboards is not a transfer of tangible property), then there is no question of plaintiff's transferring (apart from creating) any immoveable property either tangible or intangible. The only transfer would be the transfer of defendant's triangle, and the transaction is on the same footing as it would be if plaintiff had given cash instead of an easement in exchange for this land. This point, that the grant of an easement is not a transfer of ownership, is laid down

in *Bhagwan Sahai* v. *Narsingh Sahai* (1), the ruling quoted by the lower Appellate Court. The Subordinate Judge may have overlooked that the other side of the bargain, the transfer of defendant's land, is a transfer of ownership, but to establish that transaction proof of delivery is sufficient because, as I showed above, its value is well below Rs. 100.

Ground No 4 —And if plaintiff has transferred tangible property by the transfer of the cupboard space, then again, its value is so small that proof of delivery is sufficient

Ground No 5 —There is no such finding. The site "all along the northern side" which the Subordinate Judge finds was intended to be given is just that triangle which I have explained above and that has been given.

Grounds Nos 7 and 8 do not arise and there is no question of onus.

The appeal fails on all grounds and is dismissed with costs.

V. N. V. *Appeal dismissed*

(13) 3 Ind Cas 615, 31 A 612, 6 A L J 871

OUDH CHIEF COURT.

FIRST MISCELLANEOUS APPEAL No 11 OF 1925.

December 15, 1925

Present:—Mr. Justice Ashworth and Mr. Justice Misra

Lala GAURI SHANKAR—CREDITOR—APPELLANT

versus

R. J. DECRUZE—INSOLVENT—RESPONDENT.

Provincial Insolvency Act (V of 1920), s 28—Civil Procedure Code (Act V of 1908), s 60—Provident Funds Act (IX of 1897), s 2 (4)—"Compulsory deposit", meaning of—Deposit paid out to insolvent—Attachment

A "compulsory deposit" within the meaning of s 2 (4), Provident Funds Act, is such deposit only so long as it remains in the fund, and not after it has been paid over to the person to whose credit it had hitherto stood [p 674, col 1]

Therefore, a compulsory deposit under the Provident Funds Act, after it has been paid out of the funds to an insolvent, is not exempt from attachment. [*Ibid*]

Nagindas Bhukandas v *Ghelabhai Gulabdas*, 56 Ind Cas. 449 & 450, 44 B 673, 22 Bom L. R. 322, dissented from

Appeal against an order of the Fourth Additional District Judge, Lucknow, dated the 5th March 1925.

Mr. *M. Wasim*, for the Appellant.

Mr. *Ram Shankar*, for the Respondent.

JUDGMENT.—This is an appeal from an order of the Fourth Additional Judge of Lucknow in insolvency proceedings. The insolvent, R J De Cruze, resigned his position as an employee in the Oudh & Rohilkhund Railway. A sum of Rs. 4,800 standing to his credit in the provident fund was then returned to him He had at an earlier date been made an insolvent, but had not been discharged A creditor, the appellent, asked (no Receiver having been appointed) to be allowed to attach this sum. The lower Court, relying on the case of *Nagindas Bhukandas* v *Ghelabhai Gulabdas* (1), upheld this contention. The question in this appeal is whether the lower Court was right in doing so.

The decision relied upon appears to us to be on all fours with the present case, but we regret that we are not disposed to follow it. It was admitted in the judgment of the Bombay Court that, under s. 16 (4) of the Provincial Insolvency Act III of 1907, which is identical with s. 28 (4) of the present Act, V of 1920, all property acquired by an insolvent after the date of adjudication and before his discharge, shall forthwith vest in the Court or Receiver, and it was remarked that, at first sight, it would appear that these words in their literal construction are free from any doubt But the Bombay High Court refused to adopt a literal construction on two grounds The first ground was that in the English case, *Cohen* v *Mitchell* (2), the English Court had declined to follow the literal construction of ss 44 and 54 of the English Bankrupty Act on the ground of inconvenience and the Bombay High Court pointed out, that in a previous case decided by the Bombay High Court, *Alimahamad* v. *Vadilal Deychand* (3), the Court had allowed itself the same measure of freedom. It suffices to say that the earlier Bombay case was distinguishable both from the later Bombay case and from the present case, inasmuch as in that case the insolvent had transferred property in good faith acquired by him after the adjudication order to a third party for value. It was not pleaded in this case that the provident fund money had passed out of the control of the insolvent. In the later Bombay case, however,

(1) 56 Ind. Cas. 449 & 450; 44 B 673, 22 Bom. L. R. 322

(2) (1890) 25 Q B D 262, 59 L J. Q. B. 409, 63 L. T 206, 38 W R 351, 7 Morrell 207

(3) 53 Ind. Cas. 197; 21 Bom. L. R. 849, 43 B, 890,

it has been held, that neither the Official Assignee nor the Official Receiver (and similarly the Court) has any claim to money drawn by an insolvent as his provident fund from a Railway Company. The English ruling *Cohen* v. *Mitchell* (2) the decision in *Nagindas Bhukandas* v. *Ghelabhai Gulabdas* (1), was based on other considerations. It invoked s. 4 of the Provident Funds Act, 1897, which is still in force. This section provides that neither the Official Assignee nor Receiver, appointed under Ch. XX of the C. P. C. shall be entitled to or have any claim on a compulsory deposit. The present s. 57of the Provincial Insolvency Act V of 1920, takes the place of s. 351 of the C. P. C. of 1882 as regards the appointment of Receivers. The Bombay High Court expressed the opinion that the words "shall be entitled to or have any claim on any such compulsory deposit," would bar a claim to a compulsory deposit, even after it had been paid over to the insolvent. In so doing we consider that the Bombay High Court ignored the definition of "compulsory deposit" contained in s. 2 (4) of the Provident Funds Act, IX of 1897. The definition runs as follows :—

"'Compulsory deposit' means a subscription or deposit which is not repayable on demand, or at the option of the subscriber or depositor, etc." In our opinion the words "repayable on demand" clearly show that a compulsory deposit is only a deposit so long as it remains in the fund, and not after it has been paid over to the person to whose credit it had hitherto stood.

The respondent's Counsel invoked sub-s. (5) of s. 28 of the Provincial Insolvency Act, V of 1920. This provision excludes from attachment of property which is exempted by the C. P. C., 1908. Turning to the C. P. C., 1908, we find that s. 60 (1), proviso *(k)*, exempts from attachment all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1897, for the time being applies, in so far as they are declared by the said Act not to be liable to attachment, but we have already stated that the Provident Funds Act, 1897, only exempts compulsory deposits, and that the definition of compulsory deposit will not include money after it has been paid out of the funds to an insolvent. The C. P. C., does not, therefore, carry us any further or assist the insolvent.

We are not concerned here with deciding whether the Bombay High Court in its earlier decision, quoted above, was right in holding that the Receiver could not interfere with property once it was tranferred to a third party in good faith for consideration by the insolvent after an order of adjudication. It is obvious that money paid over by an insolvent to his wife, as is alleged to have been the case in respect of this money by appellant's Counsel, cannot come under this description of property. For the above reasons, dissenting from the decision in *Nagindas Bhukandas* v. *Gelabhai Gulabdas* (1), we allow this appeal with costs, and direct the lower Court to take into consideration the appellant's application on its merits.

N. H. *Appeal allowed.*

LAHORE HIGH COURT.

CIVIL REVISION NO. 224 OF 1923.

January 7, 1925.

Present:—Mr. Justice Harrison.

FIRM BIHARI LAL-JAI NARAIN—PLAINTIFF—PETITIONER

versus

HAR NARAIN DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch I, Art. 85—Principal and commission agent—Account, mutual, open and current

A suit on an account by a commission agent, who received goods from the defendant and also discounted his *hundis*, showing a shifting balance sometimes in favour of one and sometimes in favour of the other is a suit on a mutual, open and current account, and is governed by Art. 85 of Sch I to the Limitation Act [p 675, col 1]

Ratan Chand-Jawala Das v *Asa Singh-Bagha Singh*, 62 Ind Cas 898, 4 L L J 217, (1922) A I R. (L) 188, *Ratan Chand-Jwala Das* v *Asa Singh-Bagha Singh*, 59 Ind. Cas 669, 3 U. P L R (L.) 3, 26 P. W. R 1921, 31 P L R 1919 and *Namberumal Chetty* v. *Kotayya*, 21 Ind Cas 773, 14 M L T 498, relied on

Manghi Ram v *Firm of Ram Saran Das Maman Chand*, 26 Ind. Cas 415, 23 P R 1915, 35 P. W. R. 1915, 100 P L R 1915, distinguished

Revision from an order of the Judge, Small Cause Court, Delhi, dated the 23rd January 1923.

Bakhshi *Tek Chand*, for the Petitioner.

JUDGMENT.—In this case the plaintiff's suit has been dismissed as barred by limitation under Art. 83 and a revision from that order is before me.

The facts are briefly that the plaintiff

sued on a lengthy account showing a shifting balance, sometimes in favour of the petitioner and sometimes in favour of the other. He was a commission agent and as such received goods from the defendants and also discounted the defendants' *hundis*, and he claimed on these facts that his suit was governed by Art 85 The Trial Court has relied on *Manghi Ram* v *Firm of Ram Saran Das-Maman Chand* (1), in which the facts are not identical, for apparently there was no mutual, open and current account in that case and the transactions between the parties were confined to certain *hundi* transactions. Counsel for the petitioner has relied on *Ratan Chand-Jwala Das* v *Asa Singh-Bagha Singh* (2), *Ratan Chand-Jwala Das* v. *Asa Singh-Bagha Singh* (3) and *Namberumal Chettu* v. *Kotayya* (4), the last of which is exactly in point and indeed the facts are identical with the small distinction that in that case the plaintiff advanced monies to defendant out and out whereas in this case he merely discounted the *hundis*, the result being the same.

Following these authorities I find that although the parties have had dealings as commission agent and principal in virtue of the mutual open and current account which relates both to these dealings and to the *hundi* transactions the suit is governed by Art. 85, and, therefore, is within time.

I accept the revision, set aside the finding of the Trial Court and return the case for decision on the merits. Costs of the petitioner will be paid by respondents

N. H. *Revision accepted.*
Case returned.

(1) 23 Ind Cas 415, 23 P R 1915, 35 P W R 1915, 100 P L R 1915
(2) 62 Ind Cas 898, 4 L. L J 217, (1922) A I R (L) 188
(3) 59 Ind Cas 669, 3 U P L R (L) 3, 26 P W R 1921, 31 P L R 1919
(4) 21 Ind. Cas 773, 14 M L T 498

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No 275 OF 1925.
November 9, 1925.

Present:—Mr. Justice Stuart, Chief Judge, and Mr. Justice Misra.

Musammat RAISUNNISA WIFE OF ABDUL MAJID—PLAINTIFF—APPELLANT
versus
ZORAWAR SAH—DEFENDANT—RESPONDENT.

Mortgagor and mortgagee - Deed, simple, executed by mortgagor in favour of mortgagee—Mortgagor, heirs of, whether bound Limitation—Claim by way of defence - Limitation, whether can be pleaded

A simple deed executed by the mortgagor in favour of the mortgagee and containing the stipulation that the money taken under it shall be paid at the time of the redemption of the mortgage can be enforced against the heirs of the mortgagor

Ram Adhin Misra v *Sitla Bakhsh Singh*, 25 Ind Cas 905, 17 O C 303, *Har Pershad* v *Ram Chander*, 63 Ind Cas 750, 44 A 37, 19 A L J 807, 3 U P L R. (A) 139, (1922) A I R (A) 174, *Allu Khan* v *Roshan Khan*, 4 A 85, A W N (1885) 133, 2 Ind Dec (N S) 674, *Hari Mahadaji Savarkar* v *Balambhat Raghunath Khare*, 9 B 233, 5 Ind Dec (N S) 155 and *Gaya Prasad* v *Rachpal*, 70 Ind Cas 66, 9 O L J 484, 4 U P L R (O) 110, (1923) A I R (O) 24, referred to

It is a settled rule of law that no limitation can be pleaded against a claim made by way of defence [p. 677, col 1]

Naunidh Lal v *Mahadeo Singh*, 65 Ind Cas 401, 25 O C 134, 8 O L J 640, (1922) A I R (O) 58, referred to

Second appeal against the judgment and decree of the Subordinate Judge, Bara Banki, dated the 10th February 1925, upholding that of the Munsif, Fatehpur, dated the 1st September 1924.

Mr. *Ghulam Hasan* for Mr. *A. Rauf*, for the Appellant

Mr *Bisheshar Nath*, for the Respondent.

JUDGMENT.

Misra, J.—This is a second appeal arising out of a suit for redemption brought by the plaintiff-appellant against the defendant-respondent and certain other persons. The facts so far as they are material for purposes of this appeal are as follows —

One Jam Ali executed, on the 17th June 1865, a usufructuary mortgage for Rs. 50 in respect of certain lands, situate in village Karmulapur, District Bara Banki, in favour of one Lodhey, the father of defendants Nos. 2 and 3 It was stipulated in the deed that the profits of the property mortgaged were to be appropriated by the mortgagee in lieu of interest. Subsequently, under a deed executed on the 17th January 1870, the said Jam Ali borrowed a sum of Rs. 150 from the same Lodhey agreeing to pay the said amount by instalments and in case the money was not paid at the stipulated time it was to be paid with interest at 2 per cent. per mensem at the time of redemption. It was also stipulated in this deed that without the payment of the money borrowed thereunder the mortgagor would not be entitled to redeem the property mortgaged under the deed of 1865. The plaintiff-appellant, *Musammat* Raisunnisa, who seeks redemption, is one of the

heirs of Jam Ali, the original mortgagor, being one of his grand-daughters and who is admitted for the purposes of this litigation, by the parties to be the sole heir and representative of Jam Ali, the mortgagor. The defendant-respondent, Zorawar Sah, is also admitted to be the sole representative of the mortgagee.

The contest mainly centred round the deed of the 17th January 1870. Its genuineness was denied by the appellant; it was urged on her behalf that the deed, even if genuine, did not create any charge on the property in suit and she was not liable to pay the money due under it. It was also contended that the deed being unregistered, could not operate as a charge on the property mortgaged and that, in any case, she was not bound to pay the amount of money due under it since the claim regarding that amount was barred by limitation. The last plea was not raised in either of the Courts below, but has been urged for the first time here.

The Trial Court, the Munsif of Fatehpur, by his decree dated the 1st of September 1924, decided that the deed of 1870 was genuine and that the plaintiff was bound to pay the money due under it. He accordingly decreed the plaintiff's claim for redemption directing her to pay the principal sum of Rs. 50 due under the deed of 1865 and Rs. 1,878 due under the deed of 1870.

The plaintiff appealed against this decree to the Court of the Subordinate Judge of Bara Banki and the learned Subordinate Judge by his decree dated the 10th February 1925 has confirmed the decree of the Trial Court and dismissed the plaintiff's appeal.

The plaintiff has again appealed to this Court and the contentions raised on her behalf are three-fold;

First, that the deed of the 17th January 1870 cannot be construed as a deed of further charge;

Secondly, that even if it be construed as a deed of further charge it cannot be operative as such, being unregistered; and

Thirdly, that the claim under the said deed is barred by limitation.

In respect of the first contention reliance is placed on behalf of the appellant mainly on a ruling of the late Court of the Judicial Commissioner of Oudh reported in *Ram Adhin Misra* v. *Sitla Bakhsh Singh* (1) in which it was held that because in the body of the deed in dispute in that case there was nothing to show that any interest in immoveable property was transferred it could not be considered as other than a simple bond for the payment of the money received and that the fact that the executant of the deed covenanted that he should not be allowed to redeem the mortgage until he had satisfied the deed, did not render the deed a deed of mortgage or a deed of further charge, and the fact that the deed was described as a deed of further charge had not the effect of making it such a deed. This was the view promulgated by my learned brother, Mr. Justice Stuart, who decided that case. The view held in that case has now to be accepted with caution in view of a later Full Bench decision of the Allahabad High Court in *Har Pershad* v. *Ram Chander* (2). My learned brother was also a member of the Bench which decided that case and it appears that he has very much modified the view that was taken by him in the above Oudh case. It is, however, not necessary for me to come to a definite decision on this matter in this case, since the learned Counsel for the respondent did not press the contention that the deed was a deed of further charge.

It is also unnecessary to decide whether the deed can be considered to be a valid deed in spite of its not having been registered, but I may point out that in the year 1870 no Registration Act was in force in the Province of Oudh, the first Registration Act introduced in this Province being Act VIII of 1871. Till the introduction of the said Act registration in this Province was governed by the registration rules promulgated by the Judicial Commissioner of Oudh and under those rules it was not compulsory to register deeds like the one before us.

The main point which has been argued on both sides in this Court is whether the deed, considering it to be a simple deed, can be enforced against the appellant. I have no doubt, in my mind, that the plaintiff-appellant being one of the heirs and representatives of the original mortgagor, Jam Ali, cannot escape the liability of the payment under the deed in dispute. I am supported in this view by decisions of the various High Courts as well as by

(1) 25 Ind. Cas. 905; 17 O. C. 303.

(2) 63 Ind. Cas. 750; 44 A. 37; 19 A. L. J. 807; 3 U. P. L. R. (A.) 139; (1922) A. I. R. (A.) 174 (F. B.).

those of the late Court of the Judicial Commissioner of Oudh, *vide Allu Khan* v. *Roshan Khan* (3), *Hari Mahadaji Savarkar* v. *Balambhat Raghunath Khare* (4), *Gaya Prasad* v. *Rachpal* (5) and *Naunidh Lal* v. *Mahadeo Singh* (6) and also the Oudh case first quoted in the earlier part of this judgment.

It also appears to me that there is no force in the plea of limitation raised by the learned Counsel for the appellant. Turning to the deed in question I find that it provides that the money borrowed under it was to be paid in instalments and that in case the instalments provided for, were not paid on due dates specified therein, the mortgagor was to pay the sum due under the deed with interest at the time of redemption. It is, therefore, clear that the mortgagee was clearly entitled to wait for the money due under this deed and is competent to demand it now when redemption is being sought for against him. It is not competent to the appellant to plead limitation in regard to a claim put forward by the defendant-respondent under this deed, because it is a settled rule of law that limitation cannot be pleaded against a claim made by way of defence. If any authority were needed in support of the point I would quote a case decided by a Bench of the late Court of the Judicial Commissioner of Oudh of which my learned brother, Mr Justice Stuart, was a member. It is reported in *Meharban Singh* v. *Raghunath Singh* (7).

I am of opinion that there is no force in this appeal.

I, therefore, dismiss the appeal with costs.

Stuart, C. J.—I agree with my learned brother as to the order passed in this appeal, and add that my views as to the interpretation and effect of deeds of this nature will be found in my decision in *Har Pershad* v. *Ram Chander* (2).

N. H. *Appeal dismissed*

(3) 4 A 85, A. W. N. (1885) 133, 2 Ind Dec. (N. S) 674.
(4) 9 B 233, 5 Ind Dec (N S) 155
(5) 70 Ind Cas 66, 9 O L J 484; 4 U P L R. (O) 110, (1923) A. I. R (O.) 24.
(6) 65 Ind Cas 401, 25 O. C 134, 8 O L J. 640; (1922) A I R (O) 58
(7) 49 Ind Cas. 115, 5 O. L. J 768.

RANGOON HIGH COURT.

SPECIAL FIRST APPEAL No. 15 OF 1925
June 4, 1925.

Present:—Mr. Justice Rutledge and Mr Justice Heald.

M. S. S. CHETTYAR FIRM—APPELLANTS
versus
MA TIN TIN—RESPONDENT

Civil Procedure Code (Act V of 1908), O XXI, r 2 —Agreement not to execute decree—Adjustment of decree—Certification, absence of, effect of

An agreement by a decree-holder not to execute the decree amounts to an adjustment or satisfaction of the decree and unless it is certified in accordance with the provisions of r 2 of O XXI, C P C, it cannot be recognised by the Executing Court as a bar to execution

Appeal against an order of the Small Cause Court, Rangoon, in C. E. No. 5166 of 1924

Mr *B. K Naidu*, for the Appellants.

Mr. *U Sein Tun Aung*, for the Respondent.

JUDGMENT.—In Suit No 1268 of 1921 in the Court of Small Causes, Rangoon, appellant obtained a decree against respondent and two others, namely, Po U and respondent's husband V. Paul, for Rs 2,000 (with interest) alleged to be due on a promissory note for Rs 5,000 executed by Po U and Paul, respondent having guaranteed payment of that amount.

Recently appellant applied for execution against respondent by attachment and sale of certain furniture belonging to her in Rangoon.

Respondent objected to his application on the ground that in consideration of her paying in full the amount of the decree which appellant had obtained against the same defendants in another suit, appellant had agreed not to take out execution of the decree in the present suit against either her or her husband.

Appellant admitted that the decree in the other suit had been satisfied, but he said that the money was paid by one Po Hman and not by respondent and he denied that he entered into any such agreement as that alleged or that such agreement if made would be effective.

The learned Judge of the Small Cause Court, after hearing the evidence called by the parties, held that the agreement was proved and dismissed appellant's application for execution.

Appellant appeals on the grounds that the agreement was not proved and that even if it was, it could not be recognized by the

Court executing the decree because, it had not been certified under O. XXI, r. 2.

Respondent's learned Advocate replies that the agreement did not amount to satisfaction or adjustment of the decree and that, therefore, there was no bar to its recognition.

We have no doubt that such an agreement would amount to an adjustment or satisfaction of the decree as against respondent, and that as it was not certified it could not be recognized as a bar to execution.

We, therefore, set aside the lower Court's order dismissing appellant's application and direct the Court to deal with the application according to law.

Respondent will pay appellant's costs in this Court—Advocate's fee to be two gold *mohurs*.

Z. K. *Application dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 232 OF 1925.

December 2, 1925.

Present:—Mr. Findlay, Officiating J. C.

GOPAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KRISHNARAO—DEFENDANT—RESPONDENT.

Nuisance - Latrine—Test.

The question as to whether a latrine constitutes a nuisance from the legal point of view, must be judged by general standards on the principle enunciated in the legal maxim *lex non favet votis delicatorum*, and a particular latrine cannot be such a nuisance if latrines of the sort are common all over the city. [p 678, col 2.]

Appeal against a decree of the Additional District Judge, Nagpur, dated the 24th January 1925, in Civil Appeal No. 86 of 1924.

Mr. *M. R. Bobde*, for the Appellants.

JUDGMENT.—The facts of this case are sufficiently clear from the judgments of the lower Courts. What has been urged on behalf of the appellants is that on the facts proved in this case a legal inference of a private nuisance should have been drawn, and in this connection I have been referred to the decision in *Bai Bhicaiji* v. *Perojshaw Jiwanji* (1). I may say at once that the facts of that case are very dissimilar from those of the present one. In the Bombay case a large set of stables for hackney carriages and their horses were put up close to the plaintiff's residence. Here, on the other hand, we are dealing with a crowded portion of Nagpur City, in which the provision of a private latrine for most of the houses is practically a necessity. The previous latrine of Krishnarao was apparently built to the south of his house, whereas the present one is to the west. The latrine trap is only some 15 feet from the plaintiffs' door, but, on the other hand, the evidence shows that it has been constructed on the latest principles and that the trap for removing sewage is concealed from any one standing at the plaintiffs' door by a wall, and opens towards the north.

It is true that the evidence of Dr. Sen shows that he had originally recommended the original site for the latrine but the Building Sub-Committee apparently sanctioned the present site. I have considered the evidence of the 3 expert witnesses and it does not seem to me to make out a case of a private nuisance. One has a certain amount of sympathy with a person of the plaintiffs' position, but in the present congested state of Nagpur City it seems to me that it would be a serious matter to predicate of the present latrine that it constitutes a private nuisance. So far as one can judge from the map, the same proposition might apply equally well to any and every other possible site for the latrine opening, as it must do, on to a public road for convenience of removal of the sewage by the Municipal sweepers. Happily, therefore, it does not seem necessary for me, from the legal point of view, to hold that the latrine in question constitutes a nuisance of the kind the plaintiffs allege. Dr. Sen's opinion is that it is not such a nuisance, and Dr. Paranjpe (D. W. No. 1) is also of the similar opinion.

The question of whether a latrine like the present constitutes a nuisance from the legal point of view, must be judged by general standards and, as Stanyon, A. J. C., pointed out in *Municipal Committee of Saugor* v. *Nilkanth* (2) "*lex non favet votis delicatorum.*" Now, in the present instance the facts are that latrines of the sort are common all over Nagpur City. They are what may be termed an evil necessity. In

(1) 33 Ind. Cas. 192; 40 B. 401; 17 Bom. L. R. 1040.

(2) 31 Ind. Cas. 62, 11 N. L R. 132.

the congested state of Nagpur City it is almost inevitable that such latrines or their trap doors may be in close proximity, or even in view of dwelling houses, although every endeavour is presumably made to avoid this In the present instance any site adopted for the latrine would probably cause annoyance to the occupant of some adjoining house were he as fastidious as the plaintiffs. It is further clear that the latrine constructed is of an improved type and that every effort has been made to reduce any nuisance caused thereby

In the circumstances I think the lower Courts were correct in holding that a private nuisance has not been established and the appeal is dismissed without notice to the respondent

G. R. D. *Appeal dismissed*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No 268 OF 1925.

December 7, 1925

Present:—Mr Justice Stuart, Chief Judge, and Mr. Justice Misra.

KIDAR NATH—PLAINTIFF—APPELLANT

versus

BHIKHAM SINGH AND OTHERS—DEFENDANTS—RESPONDENTS

Hindu Law Joint family Mortgage High rate of interest Legal necessity Burden of proof Second appeal Discretion of lower Court - Interference

The burden of proving that the rate of interest provided for in a mortgage-deed executed by a member of a joint Hindu family is justified by legal necessity lies on the mortgagee [p 680, col 1]

Nawab Nazir Begam v *Rao Raghunath*, 50 Ind Cas. 434, 41 A 571, 36 M L J 521, 17 A L J 591, 23 C W N 700, 21 Bom L R 484, 26 M. L T 40, 30 C L. J 86, (1919) M W. N 498, 1 U P L R (P C) 49, 46 I A 145 (P C) and *Dargahi* v *Rajeshwari Pershad*, 48 Ind Cas 753, 21 O C 265, referred to

No interference is justified in second appeal with a discretion exercised by the lower Courts, unless it is shown that the discretion was exercised in an unreasonable manner [p 680, col. 2]

Second appeal against the judgment and decree of the District Judge, Hardoi, dated the 11th February 1925, confirming those of the Sub-Judge, Hardoi, dated the 26th November 1924.

Mr. *Salig Ram*, for the Appellant

Mr. *Motilal Saksena*, for Respondents Nos. 2 and 3.

JUDGMENT.

Misra, J.—This appeal arises out of a suit for possession brought by the plaintiff-appellant, Kedar Nath in respect of a *zemindari* share mortgaged to him under a mortgage-deed dated 8th June 1909. The suit was decided by the Subordinate Judge of Hardoi on the 26th of November 1924. The Subordinate Judge allowed the defendants to redeem and decreed the suit only in case the defendants did not choose to redeem the property. His decree has been confirmed by the District Judge of Hardoi by his decree dated the 11th February 1925.

The mortgage-deed on the basis of which possession was claimed by the plaintiff-appellant was executed by Bhikham Singh, defendant No 1, and his brother Sumer Singh, father of the defendants Nos. 2 and 3, for Rs 326 bearing interest at 12 per cent. per annum compoundable yearly in favour of the plaintiff's father since deceased. The mortgagee was entitled under the terms of the mortgage to take possession of the mortgaged property in case that mortgage was not redeemed within the period of 3 years fixed in the mortgage-deed. Bhikham Singh alone executed two deeds of further charge each for Rs. 100 one on the 30th June, 1914, and the other on the 10th November 1917

The defendants Nos. 4 to 8 were also made parties to the suit as subsequent transferees.

The defendant No. 1 Bhikham Singh did not contest the plaintiff's claim and defendants Nos 2 and 3 claimed redemption in the present suit and the plaintiff did not dispute their right. The case was tried *ex parte* against defendants Nos. 4 and 5 while defendants Nos 6 to 8 expressed their willingness to pay all the money due on the mortgage-deed and the deed of further charge. The real contesting defendants in the case were defendants Nos. 2 and 3 who claimed redemption in the case and contended that the rate of interest provided in the mortgage-deed could not be enforced as it was not justified by legal necessity. On the date the issues were framed in the case by the Trial Court the plaintiff's Pleader expressly stated before the Court that the plaintiff had no objection to allow the defendants to redeem the property mortgaged in this suit

The point that remained for decision in the case was the rate of interest which the defendants should be asked to pay in case they chose to redeem the property. The learned Subordinate Judge came to the con-

clusion that the rate of interest provided in the deed was not justified by legal necessity and so reduced it to 12 per cent. per annum simple. His decree was confirmed by the learned District Judge in appeal.

In second appeal before us only two points are urged on behalf of the appellant; the first was to the effect that it was not within the jurisdiction of the Courts below to pass a decree for redemption in a suit in which the appellant claimed possession of the property; the second was to the effect that the rate of interest provided in the deed was a fair rate of interest and should not have been reduced by the Courts below. A subsidiary question regarding the costs of the suit was also raised which would be discussed at the end of our judgment

On the first point we are clearly of opinion that the contention raised by the learned Pleader on behalf of the appellant cannot be sustained. We have indicated in the earliest portion of our judgment that the plaintiff's Pleader expressed willingness on behalf of his client to allow the defendant to redeem the property and it was in these circumstances that the Trial Court passed a decree for redemption in favour of the defendant In fact of this clear attitude taken on behalf of the plaintiff-appellant we cannot now allow him in second appeal to raise the contention that the Courts below had no jurisdiction to decree redemption in the present suit. We, therefore, overrule that contention.

On the second point the law as laid down by their Lordships of the Privy Council is quite clear. In *Nawab Nazir Begum* v. *Rao Raghunath* (1), quoted in his judgment by the learned District Judge, their Lordships of the Privy Council laid it down that it was incumbent on those who supported the mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow but it was not unreasonable to borrow at such a high rate and upon such terms and if it was not shown that there was any necessity to borrow at the rate and upon such terms as contained in the mortgage-deed that rate and those terms cannot stand. It is, therefore, clear that the burden of proving that the rate of interest provided for in the deed was justified by legal necessity lay on the plaintiff. There was no evidence given by him in proof of such necessity. The only evidence to which our attention was drawn by the learned Pleader on behalf of the plaintiff-appellant was that in a previous deed of mortgage executed by the grandfather of Bhikham Singh the same rate of interest was provided for as in the deed in suit and that the said deed formed part of the consideration of the deed in question in the present suit. We, however, do not consider that that could be considered as the evidence of the legal necessity regarding the rate of interest provided for in the deed in suit. There may be necessity for contracting a loan at a particular rate of interest and at a certain time and yet there may be no necessity for contracting a loan at the same rate at some other time subsequently. We, therefore, hold that the plaintiff-appellant failed to establish that the rate of interest stipulated in the mortgage-deed in suit was justified by legal necessity Both the Courts below have exercised their discretion by reducing the interest from 12 per cent. per annum compoundable half yearly to 12 per cent. per annum simple and no argument has been addressed to us to justify us in holding that the discretion was exercised wrongly or in an unreasonable manner. Unless it can be shown that the discretion exercised by the Courts below was exercised in an unreasonable manner no case will have been made out for interference by us, in appeal [*vide Dargahi* v. *Rajeshwari Pershad* (2)].

We, therefore, maintain the decision of the Courts below on the point of legal necessity as well.

Regarding the question of costs it was urged before us that the Courts below while allowing the defendants to redeem the property should have ordered them to pay costs of the suit as well, declaring them to be a charge on the property to be redeemed. The Trial Court ordered that the plaintiff's costs in either case should be paid by the defendants Nos. 1 to 3. The defendants Nos. 4 to 8 who are subsequent transferees were not ordered to pay costs of the suit We find that no separate costs were incurred by the plaintiff owing to the defendants Nos. 4 to 8 having been impleaded in the case. The trial against them was *ex parte* and no case has been made out for allowing costs

(1) 50 Ind. Cas 434, 41 A 571; 36 M L J 521; 17 A. L. J 591; 23 C. W N. 700, 21 Bom L R 484; 26 M. L T 40, 30 C L. J 86; (1919) M. W N 498, 1 U. P. L. R. (P C) 49, 46 I. A. 145 (P C).

(2) 48 Ind. Cas. 753; 21 O. C. 265.

to the plaintiff against those defendants We also find that the question of costs, in the form in which it has been raised before us, was not raised before the learned District Judge in appeal. We, therefore, reject this contention relating to costs in second appeal.

The appeal, therefore, fails and we dismiss it with costs.

Stuart, C. J.—I concur.

N. H. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

June 19, 1925.

Present—Lord Shaw, Lord Carson, Sir John Edge and Mr Ameer Ali

Raja BHUPENDRA NARAYAN SINGH BAHADUR—APPELLANT

versus

MADAR BAKHSH SHEIKH, SINCE DECEASED, AND OTHERS—RESPONDENTS.

Bengal Patni Taluks Regulation (VIII of 1819), ss 8, 10—Patni sale—Notice, service of—Failure to comply with requirements of sections—Sale, validity of

Failure to comply strictly with the requirements of ss 8 and 10 of the Bengal Patni Taluks Regulation is fatal to the validity of a *patni* sale

Appeal from a decree and judgment of the Calcutta High Court, affirming that of the Court of the District Judge, Birbhum.

Sir *Lowndes, K. C.* and Mr. *B. Dube*, for the Appellant

Mr *E. B. Raikes*, for the Respondent.

JUDGMENT.

Lord Shaw.—Their Lordships have heard the argument of Sir George Lowndes in this case. He has traversed ground which has been for many years familiar in Bengal. The only question in the case is whether ss 8 and 10 of the Regulations referred to were complied with

The only point that now remains on the appeal is, there having been no general notice put up as the Act requires, whether the objection under s. 10 of the Regulations is not instantly fatal to the present appellant's case. Their Lordships, having heard the argument, think that nothing has been pleaded which would induce them to vary the opinion which has been delivered by the Courts below. In their Lordships' opinion the appeal accordingly ought to be dismssed and they will humbly advise His Majesty accordingly.

Z. K *Appeal dismissed*

Solicitors for the Appellant.—Messrs. *W. W. Box & Co.*

Solicitor for the Respondent.—Mr. *E. Mackie*.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 322 OF 1925.

December 14, 1925

Present:—Mr Justice Ashworth and Mr Justice Misra.

CHANDRIKA PRASAD SON OF JAGANNATH—DEFENDANT—APPELLANT

versus

NAZIR HUSAIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Charge, deed of—Excessive interest—Admission of propriety of interest

A co-parcener of a Hindu joint family cannot be allowed to impugn the rate of interest in any deed to which he himself is a party, or where by his statements or conduct, he must be deemed to have admitted the propriety of the rate [p 682, col 1]

Where a co-parcener executes a deed of further charge, in which he recites earlier deeds of further charge executed by other co-parceners, he should be inferred to have admitted their validity in every respect, and cannot be allowed subsequently to set up that the earlier deeds were for an excessive rate of interest [*ibid*]

Appeal against the judgment and decree of the Second Additional Sub-Judge, Lucknow, dated the 27th February 1925, confirming those of the Munsif, District Lucknow, dated the 23rd September 1924.

Messrs *Ganga Dayal* and *Murari Lal*, for the Appellant.

Mr *Bishehswar Dayal Srivastava*, for Respondent No. 1.

JUDGMENT.—This appeal arises out of a suit brought by the transferee of the interest of two mortgagors. The deed in question was dated the 1st of March 1909 and was a usufructuary mortgage for Rs. 800 re-payable in 12 years. It is not now in dispute that by four subsequent mortgages set forth in the judgment of the lower Appellate Court, the principal sum secured by the mortgage-deed was increased by Rs. 510 together with interest It is, however, a question to be decided in this appeal whether the lower Courts were right in reducing the rate of interest secured by these four deeds of further charge The second point is whe-

ther under the terms of the parent deed, the mortgagors were liable for a sum in respect of a certain area which had remained in their possession. The third point is whether the lower Courts should have awarded interest from the date up to which its decree directed payment to be made to the date of actual realization of payment. The last point is whether the lower Courts were right in refusing to award the costs to the mortgagee.

As to the first question Exs. A2 and A3 are deeds of further charge executed by Subh Karan Singh, the elder mortgagor, on his own behalf and on behalf of his brother, Naurang Singh, who was then a minor. The rate of interest might have been challenged by Naurang Singh. So far from doing so we find that Exs. A4 and A5 which are by Naurang Singh on behalf of himself and his brother Subh Karan Singh (who was at the time in Jail) recite the fact of the execution of the deeds Exs. A2 and A3 and profess to be further charges in addition to the charges created by those first two deeds. We are of opinion that where a co-parcener executes a deed of further charge in which he recites earliest deeds of further charges by which act we hold that he should be inferred to have admitted their validity in every respect he cannot be allowed subsequently to set up that the earlier deeds were for an excessive rate of interest. Apart from this, it may be stated that the rate of interest in all the four deeds was the same. Neither brother could, therefore, have been allowed to contend that what he himself thought a proper rate was not a proper rate for his brother to fix. The transferees of the brother can be in no better position than the brother. The lower Appellate Court appears to us to have gone wrong in ignoring the fact that the execution of these deeds of further charge at the same rate precludes a case being set up by the mortgagors that the rate was excessive. The decisions quoted by the lower Appellate Court refer, we understand, to cases where a co-parcener who is not a party to a deed by another co-parcener, would resist the rate agreed to by that other co-parcener as being unnecessary. They are no authority for allowing the rate of interest in any deed to be impugned by a co-parcener who was himself a party to that deed or must be deemed by his statements or conduct to have admitted the propriety of the rate.

As to the second point, whether the mortgagors were liable for use and occupation of the land reserved for their possession, the deed of mortgage of the 1st March 1909 contains no provision for the mortgagors retaining possession of any land. It contains a provision that before redemption all claims against the mortgagors in favour of the mortgagee must be settled, but there is no evidence in this case to show what were the terms on which possession of this small area was retained by the mortgagor. The possession must have been retained with the assent of the mortgagee, but we cannot infer that any rent was payable, or, if so, what rent is payable. We, therefore, hold that no claim in respect of this land has been made out against the mortgagors and the lower Courts were right in refusing to debit the mortgagor with any sum on this account.

The third point raised is whether future interest should be allowed from the date on which by the decree of the lower Courts the mortgage-money was to be re-paid and the date of actual realization thereof. We find nothing in O. XXXIV, r. 7, or in the prescribed form for a preliminary decree (given as No. 5 of Appendix D of the C. P. C.) that empowers a Court to award such interest. The appellant's learned Pleader, however, in the course of his arguments abandoned contest on the matter, and so without deciding the question from a legal point of view we reject this point taken in the grounds of appeal

The last point to be decided is whether the lower Courts should have awarded the appellant mortgagee his costs. In the first appeal the appellant failed to raise a question of his costs in the first Court and he cannot, therefore, be allowed to claim them in second appeal. As to his costs in the lower Appellate Court and in this Court, we think that he should get them in proportion to his success, there being given no reason by the lower Appellate Court for withholding them.

We note that the decree of the first Court does not agree with its judgment. The decree should have been one providing, in default of payment of the sum decreed on the date fixed, for the property being sold inasmuch as the mortgage was a usufructuary one. This was ordered in the judgment. By some mistake the decree-writer has framed a decree directing that the plaintiff should be debarred from the right to redeem.

Accordingly we allow this appeal in part

with costs to the appellant in both the lower Appellate Court and this Court in proportion to his success in this appeal. The plaintiff-respondent will also get his costs in the lower Appellate Court and in this Court in proportion to his success here. The order passed by the first Court as to costs will, however, stand. We extend the time for payment to six months from to day and direct the office to prepare now a decree under O. XXXIV, r. 7, according to this judgment providing for redemption of the property by payment within the said time of the money due, and for sale thereof, in default.

N. H. *Appeal partly accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 178 OF 1925.

October 27, 1925.

Present:—Mr. Hallifax, A. J. C.

INDAL AND OTHERS— APPLICANTS

versus

DEBI AND ANOTHER—NON-APPLICANTS.

Provincial Small Cause Courts Act (IX of 1887), Sch II, cl (8)—Transfer of Property Act (IV of 1882), s 105—Easements Act (V of 1882), s 50—Allowing cattle to pass through field on payment—License or lease—Suit for recovery of amount—Small Cause Court, jurisdiction of.

An agreement by a person to pay a certain quantity of grain every year to the cultivator of a field on account of the damage to be sustained by him owing to the cattle of the former passing over a strip of land in his field, is not a license but a lease, as it creates a right in such person, which could be exercised by his transferees or his servants and could not be revoked by the grantor [p 683, col 2]

A suit for recovery of value of such grain is, therefore, a suit for the rent of a field and is not triable by a Small Cause Court [*ibid.*]

Application for revision of an order of the Small Cause Court Judge, Dhamtari, dated the 27th March 1925, passed in C. S. No. 48 of 1925.

Mr. *M. Y. Sharif*, for the Applicants.

Mr. *P. C. Dutt*, for the Non-Applicants.

JUDGMENT.—It is alleged in the plaint that all the eight defendants agreed in December 1922 that they would pay the plaintiff a certain quantity of *urad* on the 3rd of March every year on account of the damage to be sustained by him by his allowing them to take their cattle or carts over a strip of land one chain long and half a chain wide in one of his fields and another strip six chains long and twenty links wide in the next field, which also belongs to him. In answer to the objection that the suit was for rent and was not triable by a Small Cause Court the plaintiff's Pleader re-stated the case in these words. "The defendants are given a license to pass over the plaintiff's land. The claim is for license fee and not for rent. The suit is triable in this Court. The agreement was to pay 2½ *khandies urad* every year so long as the defendants took their cattle through the plaintiff's land. During the last 3 years in suit the defendants have been taking the cattle through plaintiff's land."

The agreement alleged satisfies the definition of a lease in s. 105 of the Transfer of Property Act and the payment alleged to have been promised that of rent in the same section. The definition of a license in s. 52 of the Easements Act is a negative definition, and it is at times difficult to distinguish between a license and a lease or an easement. But this particular agreement created a right in the defendants which could be exercised by their transferees or their servants or agents and could not be revoked by the grantor. It is apparent then from ss 56, 59 and 60 of the Easements Act that it cannot be a license. There is no suggestion that it is an easement. It must, therefore, be held to be lease, and the payment claimed is rent.

This stage of the case is slightly complicated by the fact that the eighth defendant Bhangi admitted the claim in the lower Court and that both he and the plaintiff Debi were represented by the same Counsel in this Court, a matter of which the learned Counsel himself was unaware till it was brought to his notice. He was asked to state the case for each of his clients separately, on the supposition that the decree against the applicants would be set aside for want of jurisdiction in the lower Court, and after consulting them urged on behalf of the plaintiff Debi that the whole decree ought to stand against Bhangi, and on behalf of Bhangi that he ought to be ordered to pay only one-eighth of the amount claimed, as he never meant to admit his liability for more than that. The position is ridiculous, and the whole decree must be set aside. If Bhangi desires to avoid further proceedings, he can easily do so by paying the share of the amount claimed which he admits is due by

him, and the suit can go on against the remaining defendants for the rest.

The decree of the lower Court is set aside and it is ordered that the plaint shall be returned to the plaintiff for presentation in a Court having jurisdiction to try his suit. All the costs heretofore incurred by the applicants in both Courts will be paid by the plaintiff. The defendant Bhangi will pay his own costs. The Pleader's fee allowed in the lower Court is the grotesque sum of ten pies less than two rupees. In this Court it will be twenty five rupees.

G. R. D. *Decree set aside.*

PATNA HIGH COURT.

CIVIL APPEAL No. 38 OF 1923.

July 24, 1925.

Present :—Mr. Justice Ross.

BALARAM MANJHI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JAGANNATH MANJHI AND OTHERS—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), ss 115, 151, O XLI, r. 23—Remand, order of, affecting decision of whole suit—Appeal, whether lies—Revision—Error of law—Partition, suit for—Property omitted by oversight—Procedure

An order of remand which is not confined to a preliminary point but affects the decision of the whole suit, must be deemed to have been made in the exercise of the inherent powers of the Court and is not open to appeal. [p. 684, col. 2]

An error of law does not affect the jurisdiction of the Court and does not furnish a ground for interference in revision. [p. 685, col. 1]

Where in a partition suit one of the properties which ought to be partitioned is, by oversight or for any other reason, left unpartitioned, it is open to the parties to draw the attention of the Court to the omission and to get a direction from it in the matter [*ibid.*]

Appeal from a decree of the Sub-Judge, Purulia, dated the 30th November 1922, reversing that of the Munsif, Raghunathpur.

Mr. *Achalendra Nath Das*, for the Appellants.

Mr. *Subal Chandra Mazumdar*, for the Respondents.

JUDGMENT.—This is an appeal against an order of the Additional Subordinate Judge of Purulia reversing a decision of the Munsif of Raghunathpur and remanding a partition suit for allotment of *hasil* land and *bagan* according to the principles laid down in the judgment.

A preliminary objection is taken on behalf of the respondents that this is not a remand under O. XLI, r. 23 nor under r. 25: it is remand under the inherent power of the Court and no appeal lies: *Raghunandan Singh* v. *Jadunandan Singh* (1) On behalf of the appellants it is contended that the order is a remand under O. XLI, r. 23. It seems to me plain that this is not a case of a suit being disposed of upon a preliminary point. The order of remand goes on to the whole principle on which the partition is to be made and there is no question of any preliminary point; it affects the whole decision of the whole suit. The remand must, therefore, be taken to have been made under the inherent powers and no appeal lies.

I am then asked by the appellants to treat the appeal as an application in revision. The question then arises as to whether there is any point of jurisdiction. The contention on behalf of the appellants is that the parties having agreed to the allotment as made by the Commissioner, the Subordinate Judge had no jurisdiction to alter; and, secondly, that the Subordinate Judge had no jurisdiction to lay down a principle of partition which is against the settled law. Reference was made to a passage in the Commissioner's report where he says: "Both the parties requested me to divide that *chak* according to their respective shares keeping them in possession of their lands as far as practicable and accordingly I divide the *chak* keeping the parties in possession of their lands as far as possible." Evidently the partition made by the Commissioner did not meet the wishes of the parties because it was objected to when the report came before the Munsif. The objection of the defendant was that as he had reclaimed more of the *danga* land he ought to be left in possession of it. It cannot be, therefore, said, with any show of reason, that the allotment made by the Commissioner was agreed to by the parties. All that the parties agreed to was that they should be left in possession as far as possible, but from the manner in which this agreement was applied in practice there is no reason to suppose that the parties agreed to the allotment because in fact objection was taken to the partition actually made.

(1) 43 Ind. Cas. 959; 3 P. L. J. 253, 4 P. L. W. 449.

With regard to the principle of law, reference was made on behalf of the appellants to the decision of the Judicial Committee in *Midnapur Zamindary Co.* v. *Naresh Narayan Roy* (2) where it was laid down that if a co-sharer purchases any *jote* right in the lands held in common by the co-sharers such a purchase will be held to have been a purchase for the benefit of all the co-sharers, and it is contended that the view that the Munsif took was right, namely, that if the defendant expended money, on reclaiming the *danga* land which was held in common tenancy, he did so at his own risk and that the reclamation would be for the benefit of the joint property. On the other hand there is a decision reported as *Kallian Banerji* v. *Modhusudun Banerji* (3) where, in precisely similar circumstances to the present, the principle adopted by the learned Subordinate Judge was laid down by the Calcutta High Court. In any case if the learned Subordinate Judge was in error in this part of his judgment it is merely an error of law and does not affect his jurisdiction

It was further contended that he had acted without jurisdiction in directing a partition of the *Bagan* because the *Bagan* was not partitioned by the Commissioner and no objection was taken on this score before the Munsif. It seems true that this objection was not taken before the Munsif; but the partition was to be a partition of the whole property and, if by oversight or for any other reason one of the properties was left unpartitioned I think that it was open to the parties to draw the attention of the learned Subordinate Judge to the omission and to get a direction from him in the matter.

In my opinion this appeal as a second appeal does not lie and must be dismissed with costs ; nor can it succeed as an application in revision

Z. K. *Appeal dismissed*

(2) 80 Ind Cas 827, (1924) A I R (A) 144, 51 C 631; 51 I. A 293; 47 M L J 23, 26 Bom L R 651, 35 M. L. T 169, 23 A L J 76, 29 C. W N 34, 20 L. W. 770, (1921) M W. N 723, L R. 5 A (P C.) 137, 3 Pat L. R. 193, 6 P L. T. 750 (P. C).

(3) 8 C. L. R. 259.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 331 OF 1924.

November 23, 1925.

Present —Mr Justice Misra

Lala MAHADEO PRASHAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM PHAL—DEFENDANT—RESPONDENT.

Adverse possession—Co-sharers—Ouster

In the case of co-owners the possession of one co-owner is in law the possession of the other co-owners as well, and it is not possible for one co-owner to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster can bring about that result [p 686, col 2]

The fact that a co-sharer has been in exclusive possession of the joint house and has been making repairs to it, is not enough to constitute ouster [p 687, col 1.]

A co-sharer has a right to repair the whole of the house, and, if he does so, his act cannot be considered to be an act of such an hostile character that it may be considered as equivalent to a denial on his part of the title of the other co-owner or co-owners [*ibid*]

Second appeal against a decree of the Subordinate Judge, Fyzabad, dated the 30th April 1924, setting aside that of the Munsif, Fyzabad, dated the 9th October 1923.

Mr. *Naimullah*, for the Appellants.

Mr. *Wasim*, for the Respondent.

JUDGMENT.—This is a second appeal arising out of a suit brought by the plaintiffs-appellants for possession by partition of a half share in a house situated in *Mohalla* Rakabganj, Fyzabad. The plaintiffs alleged that Sheo Ghulam, their predecessor-in-interest, purchased the half share in the house in dispute at an auction-sale in the year 1904, that they had obtained possession through Court and had been in possession of their half share since then. They now wanted their share to be partitioned. The defendants admitted the purchase made by Sheo Ghulam but pleaded that he never obtained possession over the share purchased by him and that they had throughout remained in possession of the said half share and thus had acquired title to it by adverse possession. They also pleaded that they had spent Rs. 575 in rebuilding the house and in case the plaintiffs be held entitled to a decree for possession of their share they should be made liable to pay half of this amount.

The Trial Court, the Munsif of Fyzabad, found that Sheo Ghulam had obtained possession of the share purchased by him through Court and had also succeeded in

obtaining actual possession thereof He, however, found that it was not established that the plaintiffs had remained in continuous possession of their share but that could not affect their title inasmuch as the possession of the defendants was that of co-owners and as such could not be considered to be adverse to the plaintiffs. He, therefore, overruled the plea of adverse possession and gave the plaintiffs a decree for possession by partition of their half share in the house. He, however, decreed possession subject to the payment of Rs. 194-0-7½ on account of their half share out of Rs. 388-1-3 which sum he held as proved to have been spent by the defendants on repairs and the new construction of the house in dispute.

On appeal the learned Subordinate Judge of Fyzabad came to a different conclusion. He held that the plaintiffs were never in actual possession of the share purchased by their predecessor-in-title Sheo Ghulam and thus the defendants had obtained title to their half share by adverse possession. He consequently allowed the appeal and dismissed the suit of the plaintiffs.

In second appeal it is contended before me that the decision of the learned Subordinate Judge on the question of adverse possession is wrong. It is contended on behalf of the plaintiffs that it having been established that Sheo Ghulam took possession of the property through Court and that he had remained for sometime in actual possession over half the share purchased by him the finding as to adverse possession could not be sustained. In support of this contention the learned Counsel for the appellants relied on *Corea* v. *Appuhamy* (1), *Ahmad Raza Khan* v. *Ram Lal* (2) and *Nadir Singh* v. *Anpurna Kunwar* (3).

On behalf of the respondents it is contended that under the circumstances established in the case adverse possession of the defendants over the half share purchased by Sheo Ghulam, the predecessor-in-interest of the plaintiffs-appellants, had been established and reliance is placed on a decision of the Calcutta High Court in *Lokenath Singh* v. *Dhwakeshwar Prasad Narayan Singh* (4).

(1) (1912) A. C 230, 81 L. J P. C 151; 105 L. T. 836.
(2) 26 Ind. Cas 922; 13 A. L J. 204, 37 A 203.
(3) 56 Ind. Cas. 759; 7 O L J. 282, 2 U P. L R (O) 113.
(4) 27 Ind. Cas. 465; 21 C. L. J. 253; 20 C. W. N. 51.

I have taken time to consider my judgment. After considering the rulings cited on both sides I have come to the conclusion that this appeal must succeed and the plaintiffs appellants should be given a decree for possession of the half share in the house in dispute claimed by them. It is now well settled by numerous authorities that in the case of co owners the possession of one co-owner is in law the possession of the other co-owners as well, and that it is not possible for one co-owner to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster can bring about that result. It was urged on behalf of the respondents that circumstances in this case established adverse possession and in this connection reference was made to the judgment of Mookerjee, J., in the Calcutta case quoted above. In order to understand that the case actually decides, I will quote the following passage from the said judgment pages 257* and 258*:

"Every co-tenant has the right to enter into and occupy the common property and every part thereof, provided that in so doing he does not exclude his fellow-tenants or otherwise deny to them some right to which they are entitled as co-tenants ; and they, on their part, may safely assume, until something occurs of which they must take notice and which indicates the contrary, that the possession taken and held by him is held as a co-tenant, and is in law the possession of all the co tenants, and not adverse to any of them. It cannot be questioned, however, that one co-tenant may oust the others and set up an exclusive right of ownership in himself ; and an open, notorious, and hostile possession of this character for the statutory period will ripen into title as against the co-tenants who were ousted. Thus, although, as a general rule, the possession of one co-tenant is not deemed adverse to the other co-tenants the existence of the relation of co-tenancy does not preclude one co-tenant from establishing an adverse possession in fact as against the other co-tenants; and though the co-tenant enters in the first instance without claiming adversely, his possession afterwards may become adverse. In order to render the possession of one co-tenant adverse to the others, not only must the occupancy be under an exclusive claim of ownership, in denial of the rights of the other co-ten-

*Pages of 21 C. L. J.—[*Ed.*]

ants, but such occupancy must have been made known to the other co-tenants, either by express notice or by such open and notorious acts as must have brought home to the other co-tenants knowledge of the denial of their rights. The same principle is involved in the familiar statement that to enable one of several cotenants to acquire title by adverse possession as against the others, his possession must be of such an actual, open, notorious, exclusive, and hostile character as to amount to an ouster of the other co tenants, that is, must have been such as to render him liable to an action of ejectment at the suit of the co-tenants"

I have, therefore, to decide in this case as to whether the possession of the defendants-respondents over the half share purchased by the predecessor-in-title of the appellants has been of such an open, notorious, exclusive and hostile character as to amount to an ouster of the plaintiffs. Thus only facts which have been established in this case are that the defendants have been in actual possession of the house that they have been alone making repairs in it and that a short time before the institution of the suit when certain portions of the house fell down they built them afresh In my opinion the acts enumerated above do not constitute act of adverse possession on the part of the defendants of a nature and for a period so as to extinguish the rights of the plaintiffs-appellants. If the defendants merely remained in occupation of the whole house and went on repairing it, that cannot be considered to be an action on their part which may be considered as tantamount to a denial of the title of the plaintiffs-appellants A co-sharer has a right to repair the whole of the house, and, if he does so, his act cannot be considered to be an act of such an hostile character that it may be considered as equivalent to a denial on his part of the title of the other co-owner or co owners. As to the new construction it is alleged that it was made only a short time before the institution of the suit. I am, therefore, of opinion that according to the rule of law laid down in the above noted Calcutta case relied upon by the respondents adverse possession on their behalf has not been established.

The learned Counsel for the plaintiffs-appellants has not denied his cliens' liability to pay the amount decreed by the Trial Court as payable by them to the defendants in respect of their half share in the money spent by them on account of repairs and fresh construction.

I accordingly allow the appeal set aside the decree of the learned Subordinate Judge and restore that of the learned Munsif with costs in this and the lower Courts

N. H. *Appeal allowed.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 111 OF 1924.

August 20, 1925

Present —Mr Justice Jackson

SUGGUSETTY SUBBAYYA—PETITIONER —APPELLANT

versus

IRUGULAPATI GANGAYYA—COUNTER-PETITIONER—RESPONDENT.

Evidence Act (I of 1872), s 114—Limitation Act (IX of 1908), s 20—Payment towards decree—Payment towards interest—Denial of payment—Presumption—Extension of limitation

Ordinarily one does not split up the principal and interest in a decree, and, where a judgment-debtor makes a payment towards the decree it is a fair presumption to make that the payment was made towards both principal and interest for purposes of s 20 of the Limitation Act Each case, however, must be decided on its own facts

Mohammad Abdullah Khan v *Bank Instalment Company Ltd*, 2 Ind Cas 379, 31 A 495, 6 A L J 611, distinguished

Where a judgment-debtor, who has made a payment towards the decree, denies the fact of the payment it may be presumed, that it was his knowledge that he paid off principal and interest which drove him to falsehood

Appeal against an order of the Court of the Additional Subordinate Judge, Bezwada, in A S. No 34 of 1924, preferred against an order of the Court of the District Munsif, Nuzvid at Bezwada, in O. S. No. 80 of 1916, of the file of the Court of the District Munsif, Bezwada

Mr. *Ch Raghava Rao*, for the Appellant.

Mr. *P. Satyanarayana*, for the Respondent.

JUDGMENT.—The only question raised in this appeal is really one of fact whether the payment on which the respondent relies to save limitation was made on account of interest. The best evidence in such a matter is the evidence of the payer himself and if he had gone into the box and explained how he came to pay the Rs. 25, for principal only, the task of judging

this question might have been considerably lightened. Unfortunately, he chose to deny payment altogether which the lower Appellate Court finds to be untrue. It is then driven to presumptions and presumes from the evidence of the decree-holder's clerk that the money was paid towards the decree, and that that includes principal and interest. I think that is a fair presumption, because ordinarily one does not split up the principal and interest in a decree. Another presumption was open to the learned Subordinate Judge, that if petitioner lied, he had something to conceal; and possibly, it was his knowledge that he paid for principal and interest when he paid towards the decree which drove him to falsehood. Each case must be decided on its own facts; and merely because a presumption has been unfounded in one case, as that which is discussed in *Mohammad Abdullah Khan* v. *Bank Instalment Company Ltd.* (1), it does not follow that a presumption may not be made in another case. In the Allahabad case, the Judges say that the presumption will not enable them to hold that the payment was made for interest; not, that in all cases it is invalid. The appeal is dismissed with costs.

V. N. V.

N. H. *Appeal dismissed.*

(1) 2 Ind. Cas. 379; 31 A. 495; 6 A L. J. 611.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL No. 298 OF 1924.

June 5, 1925.

Present:—Mr. Justice Das.

MAUNG HAN AND ANOTHER—APPELLANTS

versus

KO OH—DEFENDANT No. 3—RESPONDENT.

Transfer of Property Act (IV of 1882), s 100—Landlord and tenant—Lien for rent over produce—Mortgage of crops—Mortgagee taking with notice, effect of.

A person who accepts a mortgage over standing crops from a tenant with notice that the landlord has a lien over the crops for the payment of rent, takes subject to such lien.

It is the usual practice in Burma for landlords to have a lien over the paddy reaped by the tenants over their lands.

Second appeal against a decree of the District Court, Bassein, in Civil Appeal No. 18 of 1924.

Mr. *Ba Thein*, for the Appellants.

Mr. *Leang*, for the Respondent.

JUDGMENT.—The appellant in this case rented out to the first and second defendants a piece of land at a rental of 260 baskets of paddy, the condition being that their rental should be a first charge on the produce of the land This agreement was subsequently embodied in a document signed by the first and second defendants. The first and second defendants in consideration of the sum of Rs. 1,000 mortgaged by registered deed the crops of the land to the third defendant who is the respondent in this appeal.

When the paddy was reaped both the plaintiff and the third defendant went to the place where paddy was stored and demanded their several claims from the first and second defendants. The first and second defendants asked the plaintiff to accept less than what was really due to him, and, on plaintiff's refusal, made over all the paddy to the third defendant. The plaintiff then filed the present suit claiming that he was entitled to a lien over the paddy and that the third defendant was liable to pay him the value of 260 baskets of paddy due to the plaintiffs.

The third defendant admitted that he knew that the land was rented from the plaintiff and also that he knew that the rental was 260 baskets of paddy. Before the paddy was delivered to him, he knew that the plaintiff claimed a lien over the paddy and that the first two defendants admitted the lien of the plaintiff.

It is the usual practice in this country for landlords to have a lien over the paddy reaped by the tenants over their lands, and if the respondent had made the slightest enquiry, he would have discovered that, in this case, the tenants had agreed to give the lien to the landlords. He admits that before he took away the paddy he knew of the existence of this lien. That being so, I think the plaintiffs are entitled to a decree against the third defendant also.

I allow the appeal and set aside the decree of the lower Appellate Court and modify the decree of the Court of first instance by giving a decree against the third defendant also. The plaintiff-appellants will get their costs in all Courts.

Z. K. *Appeal allowed.*

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No 29 OF 1925.
July 30, 1925
Present :—Mr. Justice Fawcett and
Mr. Justice Coyajee.
EMPEROR—PROSECUTOR
versus
MANANT K. MEHTA—ACCUSED

Criminal Procedure Code (Act V of 1898), ss 233, 234, 235, 423, 439—Penal Code (Act XLV of 1860), ss 408, 477A—Criminal breach of trust—Falsification of accounts—Separate transactions—Misjoinder of charges—Illegality—Notice to enhance sentence—Objection as to legality of trial, whether can be taken—Revision—Re-trial, whether can be ordered

The language of sub-s (6) of s 439, Cr P C, is very wide and it is open to an accused person who has been called upon to show cause against an enhancement of sentence to raise any point that might be urged against his conviction either to a Court of Appeal or to a Revisional Court It is, therefore, competent to an accused person in such a case to urge that his trial was illegal owing to misjoinder of charges [p 689, col 2, p 691, col 1]

Where a person is charged with committing one act of criminal breach of trust and also with falsifying accounts with a view to conceal that particular defalcation, the two may be said to form part of the same transaction Where, however, an accused person is charged with three separate acts of breach of trust and three separate acts of falsification of accounts, one in respect of each act of breach of trust, the charges cannot be tried together in one trial, as there are three separate transactions in respect of each act of breach of trust coupled with the corresponding falsifying of accounts, and the two offences are not offences of the same kind [p 690, cols 1 & 2]

Where the High Court sets aside a conviction in revision on the ground that the trial was illegal, it has power to direct a re-trial [p 692, col 2]

Criminal reference made by the Additional Sessions Judge, Surat, in the matter of conviction and sentence passed by the City Magistrate, First Class, Surat.

Mr. *S S. Patkar*, Government Pleader, for the Crown.

Sir *Chimanlal Setalvad* and Mir *G. N. Thakor* (with him Mr. *R. J. Thakor*), for the Accused.

JUDGMENT.

Coyajee, J.—The accused, who, at the material time, was the Manager of the Surat Branch of the Industrial and Exchange Bank of India, was tried in the Court of the First Class Magistrate at Surat on a charge which alleged as follows.—

"That you, on or about the period December 1, 1921, to October 31, 1922, being the Manager of the Surat Branch of the Industrial and Exchange Bank of India, wilfully and with intent to defraud the Bank, altered the entries in certain books of accounts of the Bank and omitted to have certain entries made, and misappropriated the amounts as shown below, *viz.* —

On December 1, 1921, .. Rs. 2,149-9-3
On March 11, 1922, . Rs. 1,500-0-0
On October 31, 1922, Rs. 2,400-0-0

and thus committed criminal breach of trust in respect to the said amounts and thereby committed offences punishable under ss. 408 and 477-A of the Indian Penal Code, and within my cognizance."

The Magistrate convicted him under ss 408 and 477-A in respect of the first two items in the charge, and awarded punishment for each of the four offences.

On appeal the Additional Sessions Judge reversed the conviction and sentence for the offence of criminal breach of trust in respect of the first item, but the rest of the appeal was disallowed. In the opinion of the learned Judge, however, the punishment was grossly inadequate, he accordingly made a reference to this Court. Notice was then given to the accused to show cause why his sentence should not be enhanced, and it has now come before us for hearing In showing cause, Counsel for the accused contends that his client was charged and tried at one and the same trial for more than three distinct offences which, moreover, were not all of the same kind; the trial was, therefore, illegal, as being in contravention of the provisions of s 233, Cr P C, and the conviction was contrary to law. This question was not raised at the trial, and the first question is whether the contention is now competent. In my opinion it is. The contention, if made good, vitiates the whole trial.

Section 439 (6), Cr. P. C, says.—

"Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-s. (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction."

The language of the enactment is wide, and there is no justification for giving it a restricted meaning.

The contention, then, is that the charge alleges more than three distinct offences; it is not covered by s. 234 of the Code, inasmuch as the offences of criminal breach of trust and of falsification of accounts are not offences of the same kind; and it cannot fall under s. 235, because there are three defalcations committed on different occasions, and the false entries connected with

one defalcation cannot be said to form part of the same transaction with the other defalcations and falsifications In my opinion this objection is well founded and must prevail. In *Emperor* v. *Nathalal* (1) the accused was charged at one trial with criminal breach of trust in respect of seventeen sums of money, and also with falsifying accounts with intent to defraud ; this Court set aside the conviction and sentence, and directed a new trial on the ground that there was a misjoinder of charges in contravention of s. 234. The learned Judges say (page 434*): "In the present case two offences of distinct character have been joined in the same charge and the charge under s. 477-A includes a number of distinct offences in excess of three as provided by s. 234." In *Kasi Viswanathan* v. *Emperor* (2) a similar view was expressed, namely, that it is illegal to try a person on a charge which alleges three distinct acts of criminal breach of trust and three distinct acts of falsification of accounts. The authority of this case was followed in *Raman Behary Das* v. *Emperor* (3) where the learned Judge observes (page 726†):—"It is impossible to take a series of false entries referring to three different defalcations in the same trial although it might be possible to try three defalcations in one charge, or to try a whole series of falsified accounts in one charge. The two could not be combined in the manner in which they have been combined in this case."

The learned Government Pleader has sought to justify the trial on the ground that although the offence of criminal breach of trust is not of the same kind as the offence of falsification of accounts, here we have a series of acts so connected together as to form but one transaction; that ss. 234 and 235 (1) which form exceptions to the general rule, affirmed in s. 233, are not mutually exclusive; and that, therefore, s. 235 (1) must be read with s. 234. I am unable to accept this contention. It may be conceded that where a person is charged with committing one act of criminal breach of trust and also with falsifying accounts with a view to conceal that particular defalcation, the two may be said to form part of the same transaction. But the facts in this case are different. They would form at least three separate transactions, and, as pointed out in the Madras case above referred to (page. 329*) "there is no provision of the Code which says that all offences committed within one year in the course of three separate transactions may be tried at one trial." Reliance is, however, placed on the decision of this Court in *In re Bal Gangadhar Tilak* (4). That case, however, is distinguishable. For there, the trial proceeded on three charges, one under s. 124-A with respect to an article published by the accused on May 12, 1908, and one under s. 124-A and another under s. 153-A as to an article published by him on June 9, 1908. The accused was convicted. He, thereupon, appealed to this Court for leave to appeal to the Privy Council on the ground among others, that (page 225†) :—

"The learned Judge acted illegally in trying your petitioner at one and the same trial for at least three offences, not of the same kind and not committed in the same transaction, contrary to the express provisions of s. 233 of the Cr. P. C. and in opposition to your petitioner's objection, thereby vitiating the whole trial and rendering it illegal, null and void *ab initio*."

The learned Judges held that the charges fell within the scope of s. 235 (1). They then proceeded to consider whether s. 235 (2) or s. 236 could not be made use of in co-operation with s. 234, and observed (page 238†):—

"We find it difficult to believe that the Legislature intended that a joint trial of three offences under s. 234 should prevent the prosecution from establishing at the same trial the minor or alternative degrees of criminality involved in the acts complained of. For these reasons we think that the exceptions are not necessarily exclusive; and that ss. 235 (2) and 236 may be resorted to in framing additional charges where the trial is of three offences of the same kind committed within the year."

It is clear then that the particular question now arising before us did not arise in that case. It is, however, discussed by this Court in the later case of *Emperor* v. *Lalji Bhanji* (5). There the accused had committed only one act of criminal breach of trust and the accounts alleged to have been falsified related to that particular

(1) 4 Bom. L. R. 433.
(2) 30 M. 328; 17 M. L. J. 141, 2 M. L. T. 177; 5 Cr. L. J. 341.
(3) 22 Ind Cas. 729; 41 C. 722, 15 Cr. L. J. 153, 18 C. W. N 1152.
(4) 2 Ind Cas. 277, 33 B. 221; 10 Bom. L. R. 973; 9 Cr. L. J. 226, 4 M L. T. 45.
(5) 15 Ind. Cas. 645; 14 Bom. L. R. 306; 13 Cr. L. J. 501.

*Page of 4 Bom. L. R.—[*Ed.*] †Page of 41 C.—[*Ed.*]
*Page of 30 M.—[*Ed.*] †Pages of 35 B.—[*Ed.*]

act. The learned Judges explained and distinguished the decisions in *Emperor* v *Nathalal* (1) and *Kasi Viswanathan* v. *Emperor* (2) on that ground.

The learned Government Pleader has also referred us to s. 222 (2) In this case, however, the charge was in respect of three distinct acts of criminal breach of trust No charge was framed in accordance with the provisions of that section. Moreover, the section refers only to offences of criminal breach of trust or dishonest misappropriation of money, and has no application to the charge as framed in this case

For these reasons, I hold that the error has wholly vitiated the trial; we set aside the conviction and sentence and direct a new trial.

Fawcett, J.—In this case I agree with my learned brother that the point as to illegality of the trial in which the accused was convicted can be raised under subs (6) of s 439, as being "cause against his conviction." Those are very wide words and there is nothing in the sub-section to limit their generality. We are sitting as a Court of Revision, and any point that the accused might urge against his conviction either to a Court of Appeal or to a Revisional Court is, I think, open to him.

The learned Government Pleader submitted that in any case the embezzlements and falsifications of accounts charged against the accused were part of the same transaction, because the evidence shows that from the very commencement of his employment he had an intention to commit such offences, and there was, therefore, a continuity of purpose, linking all the offences charged against him. I think that argument is clearly unsustainable. It was considered in a somewhat similar case by this Court in *Ramnarayan Amarchand* v. *Emperor* (6). There the accused were charged with preparing false balance-sheets of a certain Company for the years 1912 and 1913, and were tried at one trial on both the charges and convicted and sentenced. On appeal it was held that there was a misjoinder of charges, for the preparation of the balance-sheets for the years 1912 and 1913 could not be regarded as forming the same transaction within the meaning of s. 235 of the Cr. P. C. A similar argument was put before the Court, and Heaton, J., on this point says as follows (page 736*):—

"Now here there were jointly tried matters relating to two totally distinct affairs, one being the balance-sheet for the year 1912, the other the balance-sheet for the year 1913. It is said that both of them were prepared in pursuance of a policy of deception, that the Company was really insolvent as early as the year 1910 and that the subsequent balance-sheets were prepared falsely with the deliberate purpose of concealing this practical insolvency; and it is said that because this was so, the preparation of these two balance-sheets for successive years was in reality but one transaction. The word 'transaction' used in the Cr. P. C. is not defined. Its meaning has frequently been illustrated by cases which are in the books, but in the long run we have to deal with every case that arises on its own facts. Knowing the general idea of the words 'the same transaction,' we have to determine whether these words do or do not apply to the particular facts of a particular case. Here it seems to me that to apply the words 'the same transaction,' to these two separate proceedings is to confuse the meaning of those words with the idea of things that are done in pursuance of a conspiracy. From the prosecution point of view it is perfectly correct to say that both these balance sheets were prepared in pursuance of a conspiracy. One only has to think over the matter, a little carefully, however, to see that this idea of a conspiracy covers a very great deal that cannot be included in the idea of 'the same transaction.' If we were to take those words as covering a case of this kind, it would lead us to treat the same acts of misconduct or fraud, however, often repeated, as constituting the same transaction, if there was the same general purpose underlying the repeated acts. But something far more definite than that is required, before separate proceedings can be brought within the meaning of the words 'the transaction.' "

I entirely endorse that reasoning. Similarly in a case dealt with by the Madras High Court, *Choragudi Venkatadri* v. *Emperor* (7), it was held that.—

"Where a Company is formed with the object of defrauding the public, it cannot be said that distinct acts of embezzlement committed in the course of several years

(6) 52 Ind Cas 481, 21 Bom L R 732, 20 Cr L J 657.

*Page of 21 Bom. L. R.—[*Ed.*]

(7) 5 Ind. Cas. 847, 33 M. 502; (1910) M W. N. 65; 7 M. L. T. 299, 20 M. L. J. 220, 11 Cr. L. J. 258.

form part of the same transaction by reason of such general object."

Therefore that contention, in my opinion, entirely fails.

In regard to the ruling of this Court in *In re Bal Gangadhar Talik* (4) I agree with the remarks of my learned brother. The particular case which the Court had to deal with there was one where the same offence fell under two different sections of the Indian Penal Code, and the exact point now before us was not then under consideration. There obviously is a difference between the case of such alternative charges, which do not increase the number of acts underlying the charges, and the present case, where the acts are doubled. The former case is analogous to that dealt with in s. 236, which allows any number of alternative charges in respect of a single act or series of acts to be made at one trial: *cf.*, *Begu* v. *Emperor* (8). Therefore, I think, there is no sufficient ground for our taking a different view from that taken not only by the Calcutta, Madras and Allahabad High Courts, but also by this Court in *Emperor* v. *Nathalal* (1). No doubt this view provides rather a trap for Magistrates. In the case of alleged embezzlement, there is generally evidence of falsification of accounts to conceal that embezzlement, and unless the Magistrate knows, or has his attention drawn to, the rulings of the Courts about the illegality of joining three charges of embezzlement with three charges of connected falsification of accounts, he not unnaturally thinks, they can be the subject of one trial (which certainly is convenient) and is very likely to fall into the error that has occurred in this case. If the Magistrate had been aware of the danger and exercised a little more care, he might, I think, at any rate, according to the view adopted in *Raman Behary Das* v. *Emperor* (3), have legally framed his charge so as to comprise only one offence of criminal breach of trust for the aggregate amount alleged to have been embezzled and one other offence for the entire falsification of the accounts in regard to that embezzlement. It is rather absurd that we now have to hold that the trial is illegal on this objection which was never urged in the Trial Court or in the Court Appeal, and where there is clearly no ground for saying that the accused has been in any way prejudiced. However we have no option, and I agree with my learned brother that the conviction of the accused not only in the Magistrate's Court, but also as modified by the Sessions Judge, must be set aside Fine, if paid, to be refunded.

We have heard the accused's Counsel on the further steps to be taken. He draws our attention to the remarks of Batty, J., in *Emperor* v. *Jethalal* (9). We are of opinion, however, that we clearly have power to direct a re-trial under s. 439, read with s. 423, Cr. P. C., and that, as the accused has chosen to raise this point of illegality, there are no sufficient grounds for holding that he should not suffer the ordinary consequences. We think that this is a case where the Court should direct a re-trial, and we leave it to the prosecution to say exactly on what particular charge or charges the re-trial should take place. But regard must, of course, be had to the necessity of having one trial either in regard to not more than three alleged offences of criminal breach of trust or one trial as to one alleged offence of criminal breach of trust and the alleged falsification of accounts in regard to that breach of trust.

We wish to add that we think the attention of Government should be drawn to this case, with a view to its being considered whether the Government of India should not be moved to amend the Code, in the form of an illustration to s. 234 or otherwise so as to obviate difficulties of the kind that have arisen in the present case. We think that obviously in this case (and probably in all such cases) there is really no prejudice to an accused, if he is allowed to be tried in one trial for three separate offences of criminal breach of trust committed within one year and also three separate but connected offences of falsification of accounts in regard to those breaches of trust. Regrettable delay and expenditure are entailed by the present law as interpreted by the Courts, which frequently necessitate the upsetting of trials and in consequence either the re-trial of the accused or his getting off scot-free.

A copy of our judgments should be sent to the Local Government accordingly.

Z K. *Re-trial ordered.*

(8) 88 Ind. Cas. 3; 48 M. L. J. 643; 2 O. W. N. 447; 41 C L. J. 437; 27 Bom. L. R. 707, 3 Pat. L. R 95 Cr; (1925) A. I. R. (P. C.) 130, 6 L. 226; 23 A. L. J. 636; (1925) M. W. N. 418; 26 Cr. L. J. 1059; 7 L. L. J. 324 (P. C.).

(9) 29 B. 449 at p. 467; 7 Bom. L. R. 527; 2 Cr. L. J. 480.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 196 OF 1925.

September 21, 1925.

Present :—Mr. Kennedy, J. C., and Mr. Tyabji, A J. C.

EMPEROR—PROSECUTOR

versus

MATHRO—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 562, object of—Discretion, exercise of, principles relating to.

The sole intention of s 562 of the Cr P C is that an accused person who is convicted of a crime should be given a chance of reformation which he would lose by being incarcerated in prison. The powers conferred by this section should not be used for the purpose of showing favour to any particular class of persons and in the exercise of these powers a Magistrate should see that the crime that the accused person has committed does not indicate that he is rather a fortunate habitual than a true first offender

Reference made by the District Judge, Sukkur, dated the 24th August 1925.

Mr. *C. M. Lobo*, Acting Public Prosecutor, for the Crown.

Mr. *Partabrai D. Punwani*, for the Accused.

JUDGMENT.—In this case the accused Mathro was convicted by the City Magistrate, Sukkur, of receiving stolen property and he was directed to enter into a bond under s. 562, Cr. P. C. The District Magistrate thought this punishment insufficient and has referred the case here.

We are reluctant to interfere with the discretion of the Trial Magistrate under s. 562. But this is a case in which we should have interfered had it not been for the fact that owing to the efforts of the accused a great part of the stolen property has been recoverd.

It is necessary, however, to point out to Magistrates who are given the powers of s. 562, that it is not conferred upon them for the purpose of showing favour to any particular class of persons. The sole intention of the section is that the accused person now a convict should be given a chance of reformation which he would lose being incarcerated in prison. The exercise of this discretion does need a considerable sense of responsibility in the Magistrate. Should he make a bad use of this discretion far from reforming an offender he will be a cause of corruption of many. Punishment is not awarded to a criminal only for vindictive purposes. It is awarded to the criminal that the fate of the convict punished may be deterrent to others. If the Magistrate by a misuse of s. 562 causes to spring up in the minds of young people an impression that they can with impunity commit serious offences because they will get off with no punishment then it is obvious that this misuse of beneficial power is a means on the contrary of increasing crime. It may well be that many a young man who would have lived a virtuous life had he been certain that his first offence if serious would meet with due punishment may be led by the exception that he will even if detected escape with no punishment into a criminal course of life. He has already the chance that his first efforts may be undetected. It is, therefore, at least necessary in dealing with a so-called "first offender" to see that the crime he has committed does not indicate that he is rather a fortunate habitual than a true first offender. Therefore Magistrates in applying s. 562 should be very careful to consider the wording of the section and should not allow themselves to be misled into the use of this section by misplaced leniency and sympathy.

These remarks are general. We do not say that these considerations were not present to the mind of the Magistrate in this particular case. Indeed had it been the case that there had been this misuse of powers it certainly would have been our duty to rescind the order of the Magistrate and thereon to inflict punishment upon the accused. Certainly the accused in many ways does not seem to be a person worthy of much sympathy. It is, however, probable that the restoration of the property was due to a belief that the section would be applied. It is hoped that the present proceedings will be a lesson to him and he will hence forward tread the path of virtue and not of crime. On the whole, therefore, we refuse to interfere.

Z. K. *Answer accordingly.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 594 OF 1925.
November 6, 1925.
Present:—Mr. Justice Sulaiman.
BENI RAM—ACCUSED—APPLICANT
versus
EMPEROR THROUGH HIRA LAL—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 500—Defamation—Challenged statement—Precedents—Subordinate Courts, duty of.

A person who maliciously makes a defamatory statement in respect of another, in the presence of several persons, is guilty of defamation, notwithstanding that he makes the statement on being challenged to do so by the person defamed. [p 695, col 1]

A Subordinate Court is bound by the ruling of a superior Court, however unsound it may appear to it unless it is expressly contrary to any statutory provision of law which was not brought to the notice of the superior Court, or unless it has been overruled. [p 694, col. 2.]

Criminal revision from an order of the Sessions Judge, Agra, dated the 17th of July 1925.

Sir *C. Ross Alston*, for the Applicant.

Mr. *Nehal Chand*, for the Opposite Party.

JUDGMENT.—This is an application in revision from a conviction of the accused under s. 500 of the Indian Penal Code and a sentence of fine. The facts are not now much disputed. The complainant has a nephew whose daughter is of marriageable age. The accused wanted his son to get married to this girl but the complainant refused to comply with his request. The Courts below have found that this refusal was the cause of a malicious feeling in the mind of the accused. That finding has to be accepted. The accused arranged the betrothal of the girl with a relation of one Babu Lal and the marriage was about to take place. The complainant heard from various persons that the accused had been defaming him and telling people that he was keeping a woman *Brahmin* by caste as his mistress and was a bad character and that if the marriage of his nephew's daughter were to take place the members of his caste would not join. The complainant accordingly sent for the accused on the 16th of November 1924 in the presence of several persons who were sitting there and challenged him. The accused, in the presence of every one, made the following statement: "Hira Lal is a bad character and keeps a woman as his mistress and if he will join in the marriage of the girl of his nephew the *biradari* will not join." On this the complaint was filed. The accused originally denied having made any such statement and the Trying Magistrate not only admitted evidence as to this statement having been made but also allowed evidence to come on the record as regards some previous defamatory statements made by the accused, though he was charged only with the statement made by him on the 16th of November 1924. The accused further led evidence to substantiate the defamatory statement that the complainant was keeping a *Brahmin* woman. The Magistrate, however, found that though a woman was employed by the complainant she was employed as a maid servant and that it was not proved that she was a kept woman of the complainant. He pointed out that the witnesses for the defence were making statements on presumptions and that there was no direct evidence to prove the truth of the accused's statement

In appeal the position taken up by the accused that he had not made the defamatory statement was abandoned, and the learned Vakil who appeared for him pressed only the plea of justification and privileged occasion. With regard to this the learned Judge first remarked: "I am doubtful whether such a change can be sustained as a matter of law, in spite of the observation of a Single Judge of the High Court in *Umed Singh* v. *Emperor* (1) in which he did not purport to lay down any principle of law." With regard to this passage in the judgment I must remark that a Subordinate Court is bound by the ruling of a superior Court, however unsound it may appear to it unless it is expressly contrary to any statutory provision of law which was not brought to the notice of the superior Court, or unless it has been overruled. It may, however, be pointed out that the plea of justification urged by the accused was not altogether a new plea inasmuch as evidence had been led by him at the trial to substantiate the statement allowed to have been made by him, but it may be that the learned Judge had in his mind the plea of a privileged occasion.

I must accept the finding of the Appellate Court that the accused had a malice against the complainant and that he made the statement which he has not been able to substantiate. The accused cannot be protected merely because he may imagine that

(1) 77 Ind Cas 424; 22 A. L J 79, 25 Cr. L. J. 472, (1924) A. I. R. (A.) 694; L. R. 5 A. 55 Cr.

he had some ground for believing that his statement was justified

The learned Counsel for the applicant has argued that inasmuch as the accused's statement was made in answer to a question put to him by the complainant he cannot be held guilty This contention cannot be accepted. If the accused made the statement in the presence of a number of persons even if he had been challenged by the complainant he made that statement at his peril.

Lastly it has been contended that the defence evidence which has not been rejected by the Courts below suggests that the statement might have been justified. I am, however, bound by the finding of the Appellate Court that the truth of the statement has not been substantiated. I accordingly dismiss this application.

N. H. *Application dismissed.*

MADRAS HIGH COURT.

REFERRED TRIAL No 94 OF 1924
CRIMINAL APPEAL No 641 OF 1924.
January 14, 1925
Present:—Sir Victor Murray Coutts Trotter, KT, Chief Justice, and Mr. Justice Madhavan Nair

In re KANNAMMAL *alias* MAUNAMMAL—PRISONER

Criminal Procedure Code (Act V of 1898), s 342—Examination of accused, object of—Practice—Warning to accused, desirability of

The object of s 342 (1), Cr P C, is to give an opportunity to the accused, if he so desires, to tender any explanation he likes of his part in the case that is presented against him It is extremely desirable that Magistrates should follow the practice of English Courts of warning an accused person when they invite his explanation under s 342 of the Code that he is not obliged to say anything unless he desires to do so [p 696, col 2]

Trial referred by the Court of Session of the Chingleput Division for confirmation of the sentence of death passed upon the said prisoner in Case No. 23 of the Calendar for 1924.

CRIMINAL APPEAL No. 641 OF 1924.

Appeal by the prisoner against the said sentence.

Mr. *Sambasiva Rao*, for the Defence.

The Public Prosecutor, for the Crown.

JUDGMENT.—[The accused was a widow some 29 years of age who was undergoing a course of training to fit her to be a teacher in the Government Training School at Conjeevaram. She decoyed one of the pupils of the school about 9 or 10 years of age, took her to a place 10 miles, had her ornaments taken off and afterwards sold them to two goldsmiths and received the sale-proceeds The next morning the child's body was found floating in water some 4 miles from the place and was very much decomposed It was clear the child died of asphyxia and the balance of probability was that the child was dead before the body was put into the tank The accused while she admitted that she was a party to removing the ornaments denied the murder and stated that the removal was at the instance of a person to whom the child's father owed money. On a consideration of the evidence, the Court came to the conclusion that the accused was responsible for the murder of the child to hush up the robbery she committed by taking the ornaments The sentence of death was accordingly confirmed]

We should like to add a word on one matter which arose during the trial.

By s. 342 (1) of the Cr P C. the Committing Magistrate of the Court at the trial is entitled to put questions to the accused. Chief Justice Sir John Wallis and one of us have held in a decision which, so far as we know, is unreversed, *In re Abibulla Rowthan* (1) that the object of that section is to give opportunity to the accused if he so desires to tender any explanation he likes of his part in the case that is presented against him. Sub-section (2) of that section runs as follows .—

"The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them ; but the Court and the Jury (if any) may draw such inference from such refusal or answers as it thinks just "

In that state of things a Full Bench of this Court has held in *In re Varisai Rowther* (2) in that particular case it was in the interests of the accused although we cannot think otherwise than that it will more often be greatly to his detriment, that the direction that the Judge shall ask the accused what he desires to say is mandatory and not discretionary

There is no provision in the Code for the

(1) 30 Ind Cas 447, 39 M 770, (1915) M. W N. 413, 2 L W 939; 16 Cr L J 623

(2) 73 Ind Cas 163, 46 M 419, 44 M L J 567, 17 L. W 722, 32 M L T 385, (1923) M. W N. 477, (1923) A. I. R. (M.) 609, 24 Cr. L. J. 547.

accused being warned of the consequence of the statement he makes. The main consequence, of course, would be that the statement he makes must be given in evidence against him.

We contrast with that the provision of 11 & 12 Victoria, Ch. 42, s. 18 which runs as follows:—

"After the examination of all the witnesses on the part of the prosecution of a person brought before any Justice or Justices of the Peace, charged with any indictable offence, shall have been completed, the Justice of the Peace, or one of the Justices, by or before whom such examination shall have been so completed as aforesaid, shall, without requiring the attendance of the witnesses read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: 'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial,' and whatever the prisoner shall then say in answer thereto shall be taken down in writing, and read over to him, and shall be signed by the said Justice or Justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards upon the trial of the said accused person, the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the Justice or Justices...before such accused person shall make any statement, shall state to him and give him clearly to understand, that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat." The first thing we desire to observe is that the English Act says that the statement made by the prisoner in such circumstances may be given in evidence against him. It is within the experience of all Barristers who have practised in the English Criminal Courts that the prosecution will always put in the statement of a man as part of their case when it helps him or amounts to a denial of the charge. But there are cases in which an accused person makes a foolish incriminatory statement, not understanding the position he is in, where prosecuting Counsel, with that sense of fair play which, we may say, invariably characterises them, they think it is in the interests of the man himself not to put in the statement. They always point out the statement to the presiding Judge and he understands why it is the prosecuting Counsel does not think it fair to let the statement of the prisoner go before the Jury. If the Judge thinks it ought to go in, he says so.

It seems to us that it would be a salutory amendment of the Indian Law if it were not compulsory to put in such a statement. If there were any danger of prosecutors unfairly keeping back a statement that helped the accused, the Judge is there to insist on its being put in. Further, we think it is extremely desirable that some such form of caution as is prescribed by 11 & 12 Victoria should be introduced into the Cr. P. C. The form in which this woman was invited to make a statement by the Committing Magistrate in this case was as follows:—

"You have heard all the statements of the prosecution witnesses; you have heard read all the records filed in Court on the side of the prosecution. What explanation do you offer for it."

That seems to us a most undesirable method of inviting the accused person to make a statement. He is not warned that it will be usable in evidence against him; he is not warned that, if he does not wish, he need not offer any explanation whatever. We think it is extremely desirable that Magistrates should follow the practice of warning accused persons when they invite their explanation under s. 342 of the Code that they are not obliged to say anything unless they desire to. The object of the section should be to give them an opportunity if they so desire, to explain their conduct and further warn them that anything they say will be put in evidence against them at their trial.

The Local Government will necessarily have this judgment before them when the question of confirmation comes up and they may possibly consider it advisable to approach the Government of India to amend the law in this respect and bring it into conformity with the very careful provisions

of the Indictable Offences Act intended to safeguard the liberty of the subject

V. N. V. *Appeal dismissed.*

Z. K.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 608 OF 1925.

November 30, 1925.

Present:—Mr Justice Sulaiman

BABU AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY

Cattle Trespass Act (I of 1871), s 24—Cattle pound—Illegal seizure of cattle—Rescue—Offence

Before a conviction under s 24 of the Cattle Trespass Act can be sustained, it is necessary to prove that the cattle which has been rescued for the cattle pound was liable to be seized under the Act

Criminal Reference made by the Sessions Judge, Muttra, dated the 19th September 1925.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is a Reference by the Sessions Judge of Muttra recommending that the conviction of the accused under s. 24 of the Cattle Trespass Act (I of 1871) should be set aside. A report was made by the pound-keeper that the accused had removed a mare from the cattle pound 10 minutes after it had been put into it. The pound-keeper did not make any entry in his register as regards this mare although before he put it into the pound he ought to have made such an entry. The accused was tried summarily and the evidence does not disclose on whose land it had trespassed and who had brought the mare to the pound. On the other hand the accused's statement was that the two accused themselves had brought this mare along with a horse because otherwise they would not have found it possible to bring the horse to the pound The learned Magistrate in a summary trial has convicted the accused on a finding that they removed the mare out of the cattle pound without a finding that it had been properly seized Before a conviction under s. 24 can be sustained it is necessary to prove that the cattle which has been rescued was liable to be seized under this Act. The circumstances of the case are very curious and in the absence of any statement by the pound-keeper or any reference to it in the judgment that this mare had been rightly seized under the Act the conviction cannot be upheld. If the accused themselves had brought their own mare to the cattle pound and after the horse had gone inside they took the mare out no offence was committed. I accordingly accept the Reference and setting aside the convictions and sentences passed on the accused acquit them of the charge and direct that the fines, if paid, be refunded.

N. H. *Conviction set aside.*

PATNA HIGH COURT.

CRIMINAL REVISION No 327 OF 1925

August 13, 1925

Present:—Mr. Justice Macpherson.

THE BENGAL NAGPUR RAILWAY COMPANY, LTD—PETITIONER

versus

Shaikh MAKBUL—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss 209, 211, 493, 495, 539—Railways Act (IX of 1890), s 145 (2)—Criminal trial—Public Prosecutor, right of precedence of—Pleader authorised by Agent of Railway to conduct prosecution, position of—Case triable by Court of Session and Magistrate—Commitment, when justified—Affidavit sworn before Presidency Magistrate, Calcutta, whether admissible in Patna High Court

Section 145 (2) of the Railways Act only entitles a person authorized by the Agent of a Railway to conduct prosecution on behalf of the Railway Administration, to do so without the permission of the Magistrate, which would, except for the provision, be required under s 495 of the Cr P C *Prima facie*, neither s 145 (2) of the Railways Act nor s 495 of the Cr P C affects s 493 of the latter enactment which deals with the right of appearance and precedence of the Public Prosecutor before any Court in which any case of which he has charge is under trial [p 700, col 1]

Where the Public Prosecutor has charge of a prosecution, a Pleader instructed by a private person, including the Agent of a Railway Administration, must act under the directions of the Public Prosecutor [*ibid.*]

Section 145 (2) of the Railways Act contemplates mainly, if not exclusively, prosecutions for offences under that enactment, that is to say, private prosecutions undertaken by the Railway Administration in which the Public Prosecutor does not appear as distinguished from public prosecutions undertaken or taken over by the State and in particular prosecutions under the Penal Code [*ibid*]

Where a Magistrate is inquiring into a case which is triable both by the Court of Session and by himself, he has a discretion to commit the case to the Court of Session or to try it himself [p 701, col. 1]

If the maximum sentence provided for the offence is within the powers of the Magistrate, a commitment would only be justifiable on very special grounds [*ibid*]

Affidavits sworn before a Presidency Magistrate of Calcutta are not admissible in the Patna High Court. [p. 702, col. 1]

Messrs. *C. C. Das* and *S. N. Chatterji*, for the Petitioner.

The Government Advocate, for the Crown.

Messrs. *Ali Imam* and *G. P. Das*, for the Opposite Party.

JUDGMENT.—This Rule was issued on an application in revision by the Bengal Nagpur Railway Company, Limited, that the Court should direct that the representative of the applicant authorised by the Agent of the Railway under s. 145 (2) of the Indian Railways Act, 1890, has the right to conduct the prosecution in the case of *Crown* v *Sheikh Makbul* under s. 304-A of the Indian Penal Code which is pending in the Court of the Deputy Magistrate of Balasore and further should direct that the case be committed to the Sessions. At the hearing a further prayer has been made that if the case be not committed to the Sessions it be transferred to another district on the ground that the Magistrate is biassed against the applicant. All the prayers are opposed by the Crown and by the accused, but after perusing the report of the Deputy Magistrate and the affidavit on behalf of the accused and hearing the Government Advocate on behalf of the Crown I have found it unnecessary to call upon Sir Ali Imam for the accused.

The circumstances are briefly these. About 5-40 A. M. on the 9th November 1924, there was a collision at the southern level crossing of the Cuttack Railway Station, on the Bengal Nagpur Railway between the Madras mail and a motor lorry driven by the accused which resulted in the death of two and severe injuries to one or more passengers of the motor lorry. About 6 A. M. a Head Constable gave information of the occurrence to the Sub-Inspector of Railway Police at Cuttack Railway Station and the latter proceeded under s. 174 (c) of the Cr. P. C., to hold an inquest on the persons killed and came to the conclusion that the gateman of the level crossing, a servant of the applicant, was responsible for the accident. While the Sub-Inspector was conducting this inquiry, the Station Master at Cuttack sent an "all concerned" message somewhere about 8 A. M. and the Superintendent of Police thereafter handed his copy to the Sub-Inspector who treated it as a first information under s. 154 of the Cr. P. C. Eventually the Police sent up the accused Sheikh Makbul, the driver of the lorry, and the trial began in the Court of a Deputy Magistrate of Cuttack. The prosecution case is that the accused forced his way on to the Railway by opening the western gate and injured the gateman, who opposed, while the defence is that the western gate was open and, therefore, the applicant is responsible for the accident. The applicant deputed a Vakil from Howrah to conduct the prosecution, but though it is alleged by the applicant that the Magistrate permitted the Vakil to conduct the prosecution, the allegation is incorrect, the fact being that the Public Prosecutor was in charge of the prosecution and conducted it, and under his direction the representative of the Railway took some part in examining witnesses in the absence of the Public Prosecutor. Exception was taken by the accused to the participation of the Railway Vakil on the score of unfairness in his methods. The Magistrate, however, filed the petition of accused, framed a charge under s. 304-A, against him and called upon him to cross examine. The accused thereupon moved the Circuit Court then in Session at Cuttack for a transfer of the case to some other District and the applicant filed a similar petition on the ground that the master of accused holds a prominent position in Orissa. The applications were heard by Ross, J., who transferred the case to Balasore and further made the following order:

"It should be noted that the conduct of the prosecution should be in the hands of the Public Prosecutor. The petitioner has taken objection to the part taken in the trial by the Pleaders representing the Railway Company. The learned Government Pleader, however, has explained this by saying that he was in charge of the case under the orders of the District Magistrate and that the Pleaders retained by the Railway Company were only acting under his instructions and during his absence. So long as this is clearly understood there is no objection to this being done but the conduct of the prosecution should be in the hands of the Public Prosecutor."

The applicant makes it a grievance that this order was passed while the Vakil of the Railway was engaged in another Court, but it is clear from the applicant's petition that an attempt made on behalf of the applicant to induce the learned Judge in

Chambers to alter the order was unsuccessful.

When the trial began at Balasore the Vakil for the applicant presented a formal authorization under s. 145 (2) of the Railways Act from the Agent of the Railway to conduct the prosecution, but the Court refused to entertain his prayer to take the lead in view of the order of the High Court quoted above. Because of the representation made by the applicant in his application for transfer of the trial from Cuttack, the Crown had in order to secure impartiality, specially introduced a Public Prosecutor from outside Orissa to conduct the prosecution of the accused. This special Public Prosecutor conducted the case in accordance with his own ideas of what is just and proper, and while taking full advantage of assistance pressed upon him by the representatives of the Railway refused to place himself unreservedly in their hands In particular the Public Prosecutor opposed a commitment to the Sessions and declined to put questions which had only a bearing on the civil liability of the applicant in suits instituted against the latter by passengers travelling in the lorry driven by accused, a state of affairs of which the applicant unjustifiably makes a grievance.

The prosecution having examined thirty-one witnesses, the Trying Magistrate expressed an intention of committing the case to the Sessions. The accused, however, claimed the right to cross-examine all the prosecution witnesses before commitment and thereupon the Magistrate, considering that, if cross-examination were to take place in his Court, it would be useless to commit, gave up the idea and framed a charge under s 304-A for trial in his own Court.

He also declined to accede to a prayer on behalf of the applicant that an additional charge be framed under s 124 of the Railways Act Obviously a charge under s 124, which punishes with fine up to Rs 50 for the opening of a Railway gate in certain circumstances was unnecessary in law so that the point has no significance and need not be further discussed At the stage at which applicant obtained the present rule the cross-examination which had extended to nine or ten full days had just been concluded and the defence having declined to adduce evidence the case had been fixed for argument prior to judgment.

Mr. C. C. Das, appears for the applicant, claims an order in his favour on substantially the following three grounds.

(1) that the Trying Magistrate has illegally withheld permission to conduct the prosecution from the Vakil appointed under s. 145 (2) of the Railways Act,

(2) that the Trying Magistrate has exhibited bias against the applicant; and

(3) that though the offence under s. 304-A of the Indian Penal Code is triable by a Magistrate as well as by the Court of Sessions, a higher punishment may be given by the latter

The third submission has no weight. The maximum term of imprisonment for the offence is within the powers of punishment of the Magistrate, and if his powers in respect of fine are limited to Rs. 1,000 while those of the Sessions Court are unlimited, it is clear that in the circumstances of the case an appropriate sentence of fine would not exceed Rs 1,000

As regards the first point, it is clear that in view of the order of Ross, J , it was not open to the Magistrate to eliminate the Public Prosecutor and entrust the conduct of the case to the representative of the applicant Mr Das would draw a distinction between the *vakalatanama* filed by the Vakil for the Railway in the course of the proceedings at Cuttack, which was before Ross, J., and the subsequent mandate of the Agent under s. 145 (2) of the Railways Act. But in fact no distinction exists except that the latter is more formal. In the *vakalatnama* the Vakil is, in so many words, authorized by the Agent of the Bengal-Nagpur Railway Company to conduct the prosecution in the case against Sheikh Makbul, accused, under s 304-A of the Indian Penal Code. The circumstances had in fact not altered and it was not open to the Magistrate to ignore the orders passed by the High Court in the case.

Accordingly the question of the position of a Vakil appointed by the Agent of the Bengal Nagpur Railway Company under s. 145 (2) to conduct the prosecution in this case in preference to the Public Prosecutor does not properly arise at this stage, the point having already been decided on the same materials by this Court against the contention of the Railway Company, it being explicitly directed that the conduct of the prosecution shall be in the hands of the Public Prosecutor. The first point, therefore, fails It is not, therefore, necessary to express a final opinion on the sub-

ject, but one may say that the indications, are strongly against the claim in that regard of the applicant. Section 145 (2) only entitles a person authorized by the Agent of a Railway to conduct prosecution on behalf of the Railway Administration, to do so without the permission of the Magistrate, which would, except for the provision, be required under s. 495 of the Cr. P. C. *Prima facie*, neither s. 145 (2) of the Railways Act nor s. 495 of the Cr. P. C. affects s. 493 of the latter enactment which deals with the right of appearance and precedence of the Public Prosecutor before any Court in which any case of which he has charge is under trial. The Public Prosecutor has charge of the prosecution under discussion and the Pleader instructed by a private person, including the Agent of a Railway Administration, to prosecute a case of which the Public Prosecutor is in charge shall, it is enjoined, act under the directions of the Public Prosecutor. The entire propriety of such a provision, which could hardly be better demonstrated than in the present instance, is in favour of the interpretation. Then again. I am unable, as at present advised, to accept the view that there is no force in the argument advanced by the learned Government Advocate that s 145 (2), of the Railways Act contemplates mainly, if not exclusively, prosecutions for offences under that enactment, that is to say, private prosecutions undertaken by the Railway Administration in which the Public Prosecutor does not appear as distinguished from public prosecutions undertaken or taken over by the State and in particular prosecutions, such as the present, under the Indian Penal Code.

Before dealing with the allegation of bias on the part of the Magistrate, it is expedient to indicate more fully than has been done above, what the case for the prosecution and the case for the defence is. At the level crossing there are drop-gates and the western and the eastern gates are about 134 feet apart. Two lines of Railway are within the crossing, the westmost being a goods line passing close to the western gate and the other being the main line passing close to the eastern gate. The prosecution case is that some one opened the western gate which had been closed by the gateman because the Madras mail was about to pass, and the accused drove his lorry towards the eastern gate knocking down the gateman who tried to stop him. The defence case is that the western gate was standing open and that the accused drove his lorry through it, it being the rule that the crossing is open unless both gates are closed. Obviously, therefore, the Railway is at least as deeply concerned with its prospective civil liability, if the gate was in fact open, as with the criminal liability of the accused, and the point of view of its representative is materially different from that of a Public Prosecutor and from that of a Judge presiding in the Court. It is clear that the former addressed himself amid considerable difficulties created by the representative of the applicant to securing impartial justice, therein acting in accordance with the best traditions of his office. It is right in the circumstances to quote here with approval the view of the Magistrate: "He has conducted the case very ably and impartially, and with perfect fairness to both parties. He has not identified himself wholly with the Railway version of the case, and so the Railway Pleaders are dissatisfied with him. The Railway Company is an interested party in this case and so he should not ally himself with them."

The allegation of bias on which a commitment to the Sessions or a transfer to another Court was claimed, was supported by four instances, two of which appear in each of the two petitions of the applicant. They are: (1) that the Magistrate did not grant the conduct of the prosecution to the applicant's representative; (2) that the case was not committed to the Sessions in accordance with the original intention of the Magistrate; (3) that, on 25th June the Magistrate asked the Police Sub-Inspector, before he went into the witness-box for cross-examination: "Why did you not send up the gateman?" and (4) that on the 26th June, when the representative of the Railway was moving a petition for the production of a letter alleged to have been sent on the day of occurrence by the Assistant Station Master to the Civil Surgeon of Cuttack requesting the latter to examine the injuries of the gateman, the Magistrate made a remark which showed that he was prejudiced against the applicant and such as, it is suggested, he would not, if he had not been influenced by high official opinion, have expressed when the matter was subjudice.

The first instance has already been discussed and it has been determined that the

Magistrate's action was entirely proper, the order of the High Court on the point being conclusive in this trial. As regards the second instance, the Magistrate had a discretion to commit the case or to try it himself. In view of the maximum sentence, however, a commitment would only be justifiable on very special grounds, and it is obvious that if the Magistrate made any mistake, it was in at all contemplating commitment. When the accused expressed the intention of cross-examining all the prosecution witnesses, the Court could not but see that a commitment would result in an unwarrantable waste of public time without any advantage to anybody, and rightly re-considering the matter exercised a sound discretion in rejecting the idea of commitment to the Sessions. It must also be remembered that the Public Prosecutor argued against commitment. Even if the Magistrate had not exercised a sound discretion in changing his mind, it could not fairly be contended that the order, though unfavourable to the applicant, exhibits even the faintest trace of bias. It was entirely proper not to commit the case to the Sessions

As to the third instance cited, there was nothing in the casual enquiry of the Magistrate that was not, in the circumstances, entirely reasonable. The Sub-Inspector who held the inquest had formed the opinion that the western gate was not closed as asserted by the prosecution, but was open, as stated by the defence, and the Court would have failed in its duty if it did not obtain from the Police Officer who had recorded such an opinion, the reason for not placing on trial the gateman, who, if the Police Officer's opinion was correct, must be responsible for the occurrence The Magistrate did not give expression to any opinion.

I accept the version of the Magistrate as to the fourth incident It appears that the representative of the applicant was pressing for the production of a letter on the ground that it would show how the gateman received his injuries. The Magistrate pointed out that the letter could not be legally taken in evidence in proof of the manner in which the gateman had received his injuries and in the course of the discussion remarked. "Supposing it were written in that letter that the gateman had come by his injuries by being knocked down by accused's lorry, do you think I will have to implicitly believe it? When such a serious Railway accident takes place, your Railway people can write anything and I cannot take it as true without proof" Apart from other considerations, I fail to see how this remark indicates bias or the influence of high official opinion (as to the latter there is not the slightest trace of anything to support it, and it is wholly groundless and should not have been asserted) The Magistrate only points out that the mere fact that a Railway subordinate has written something will not make it evidence or show it to be true

Moreover, the facts clearly show that in calling after great delay and towards the end of the cross-examination for the letter, and describing it as an important document, the representatives of the applicant then sought to make much out of nothing at all, as indeed is sought now. No mention was made of the letter in examination-in-chief In cross-examination the gateman says he carried no letter and the Assistant Station Master says he did not even see the gateman during that day except shortly after the accident. The first mention is in cross examination of the Station Master who merely says that he asked the Assistant Station Master to write such a letter The Assistant Surgeon cannot re-call it The Civil Surgeon, though wired to, was unable to produce it and the case of the Crown is that it does not exist, and that in any case its evidentiary value would be slight There is in fact medical evidence as to the injury to the gateman, and the Assistant Station Master has himself been examined, so that the only value of the letter would be to show that his deposition is in accordance with his statement in the letter. The Magistrate is manifestly right in his view that an interested party like the applicant, who, as all the indications show, was pressing the case in a manner not consonant with the impartial conduct of criminal cases by the Crown or a public authority, who should comply strictly with the law of evidence and procedure, more especially in a matter where the Vakil for the applicant was pursuing a course wherein he had not the support of the Public Prosecutor or under whose directions the Statute enjoins that he shall act. Mr. C. C. Das, indeed, concedes that the letter is practically valueless as evidence. What he objects to is the remark of the Magistrate. But the remark,

in my judgment does not contain any indication whatever of prejudice or amount to anything more than a demand that the prosecution should prove its case to the satisfaction of the Magistrate by admissible evidence. A similar rebuff to an unreasonable demand by the prosecution, especially when as in this case unreasonably urged or at a later stage, is not infrequently and with justice administered to a Public Prosecutor without implying any prejudice on the part of the Judge.

In my opinion bias and prejudice have not only not been proved but have been abundantly disproved. The trial appears to have been properly conducted by the Public Prosecutor and by the Magistrate, any difficulties arising being attributable to unseemly ardour on the part of the representatives of the applicant.

Accordingly no ground has been established on the merits for granting any of the prayers made by the applicant.

The Rule is accordingly discharged and the trial should proceed and the case be disposed of without any avoidable delay.

I add that I have dealt with the case as if it had come regularly before the Court, but it is to be observed that the affidavits in the case being sworn before Presidency Magistrates of Calcutta are not admissible in this Court under the interpretation, in *Ramchandra Madak* v. *King-Emperor*, Criminal Revision No. 255 of 1925, of s. 539 of the Cr. P. C., and that the application might also have been rejected on that ground.

Z. K. *Rule discharged.*

RANGOON HIGH COURT.

CRIMINAL REVISION No. 104-B OF 1925.

June 2, 1925.

Present.—Mr. Justice Das.

MAUNG TUN U—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107, 112—Security to keep the peace—Initial order—Substance of information received not recorded, effect of—Jurisdiction of Magistrate to take proceedings Surety, rejection of, ground for—Time for furnishing security—Duty of Magistrate

A Magistrate acting under s 107, Cr P C, must, under s. 112 of the Code, make an order in writing setting forth, *inter alia*, the substance of the information received A failure to comply with this provision would deprive a Magistrate of jurisdiction to take proceedings under s 107. [p 703, col 1]

A person against whom an order is passed under s 107, Cr P C, must be given sufficient time to furnish security [p 702, col 2]

As long as the security offered by a surety is ample, the Court is bound to accept the same, without enquiring into the politics of the person standing surety. [*ibid*]

If the Magistrate is not satisfied with the sureties tendered, he should reject them within a reasonable time, so as to give the accused an opportunity of offering fresh sureties [p 702, col 2, p 703, col 1]

Criminal revision being review of an order of the Sub-Divisional Magistrate, Prome, in Cr. T. No. 269 of 1924.

Mr. *Mg Ni*, for the Petitioner.

JUDGMENT.—In this case the accused was called upon under s. 107, Cr. P. C., to show cause why he should not enter into a bond in the sum of Rs. 3,000 with four sureties on the ground that he is likely to commit a breach of the peace and disturb the public tranquillity and doing wrongful acts that may occasion a breach of the peace by prohibiting people from paying capitation tax and arranging to make demonstrations in large crowds.

The notice was served on the accused on the 3rd of October 1924, and he was called upon to show cause immediately. The order was passed on the same day, and the accused was sentenced to simple imprisonment for one year on the same day, as he was unable to furnish security.

The learned Magistrate in his diary remarks that "the accused is unable to furnish sufficient security although sufficient time is given." I cannot understand how the learned Magistrate could expect any person to furnish four sureties of Rs. 3,000 each on the very day on which notice to show cause was issued to him, and the order passed. Persons against whom orders are passed under s. 107, Cr. P. C., must be given sufficient time to furnish security.

It appears from the record that the Magistrate refused to accept the sureties offered by the applicant simply because they were *Wunthanu* members. The Magistrate had no justification in doing so. As long as the security is ample, the Court is bound to accept the same without enquiring into the politics of the person standing surety.

In this case the sureties were tendered on the 6th of October 1924, but no orders were passed accepting or rejecting them till the 6th of January 1925. This delay is inexcusable. The Magistrate, if he was not

satisfied with the sureties tendered, should have rejected them within a reasonable time so as to give the accused an opportunity of offering fresh sureties.

The accused again offered sureties on the 9th of January. No orders were passed on that by the Sub-Divisional Magistrate up to date, the explanation of the Sub-Divisional Magistrate being that the case had not been received back by him yet That is no explanation at all. The Sub-Divisional Magistrate must have known what the orders of the Sessions Judge were, and he should have passed orders on the application by the accused within a reasonable time By this unreasonable delay the accused had been kept in custody from the 3rd of October till his release by the order of this Court This Court on the 5th March 1925, ordered that the petitioner may be released pending disposal of this application on his own bond in Rs. 2,000 with two sureties in Rs. 1,000 each.

The order of this Court was clear enough, but still the Sub-Divisional Magistrate sent it back to this Court through the District Magistrate stating that the High Court's order did not expressly state as to whether the surety was to be accepted. This Court thereupon passed peremptory orders that the order directing the release of the petitioner on bail is perfectly clear and should be immediately complied with. It is only then that on the 25th of March the accused was released on bail. It is regrettable that all this delay should have occurred in accepting the sureties tendered by the petitioner. Section 112, Cr. P. C, requires that the Magistrate, when acting under s. 107, shall make an order in writing setting forth the substance of information received, the amount of the bond to be executed, the terms for which it is to be in force, and the number, character and class of surety required.

There is nothing on the record in this case recording the substance of the information received by the Magistrate before he proceeded to act under s. 107. All that he records in his diary is "Case under s. 107, Cr. P. C., with D. M.'s sanction sent up from Hmawza. *P. S.* Accused present. Order drawn up and explained to accused. Six witnesses examined, etc. Order passed." This is not a compliance with the provisions of s. 112, Cr. P. C, and the Magistrate acted without any jurisdiction in calling upon the accused to show cause. Moreover the evidence does not disclose a case for the petitioner to be bound down under s. 107, Cr. P. C.

The order of the Sub-Divisional Magistrate is set aside, and the accused's bail-bond will be cancelled.

Z. K *Order set aside.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS PETITION No 76 OF 1925

December 19, 1925

Present.—Mr. Findlay, Officiating J. C.

SHAIKH KARIM AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss 426, 497—Bail application rejected by Sessions Judge—Powers of High Court to grant—Respectability of accused and sufficiency of security, whether ground for granting bail—Suspension of sentence, when to be granted

The High Court has power to grant bail under s 426 (2) of the Cr P C, after an application for the same made after a conviction by a Magistrate has been rejected by the Sessions Judge But the Court will only interfere with the discretion exercised by the Sessions Judge in refusing bail if that discretion was manifestly wrong or if in fact no discretion has been exercised [p 704, col 1]

The principle which should guide the High Court in dealing with such an application, is whether there are reasonable grounds for believing that the applicant has committed the offence in question. [p. 704, col 2]

Although the High Court has unfettered powers to grant bail, yet in exercising these powers the High Court ought to have regard to the limitations imposed on lower Courts in this connection [*ibid*]

The mere previous respectability of a man is *per se* no sufficient reason for granting bail after he has been convicted of a criminal offence [p 704, col. 1]

The question of grant of bail is not only to be dealt with from the point of view of there being likelihood or not of the accused person absconding [*ibid*]

In the absence of very special cause, no order for a suspension of sentence should be passed, as the result of such an order is that if the appeal fails finally the convicted person only serves the original period of his sentence less the period of suspension [p 704, col 2]

Application for grant of bail against an order of the Sessions Judge, Nagpur, dated the 16th December 1925.

Mr *P. C. Dutt*, for the Applicants.

ORDER.—The applicant Shaikh Karim, along with 9 other co-accused, applicants Shaik Hasan, Abdul Mannan, Muhammad Ishaq, Muhammad Sharif, Shaikh Abbas, Abdul Sattar, Shaikh Dilawar, Shaikh Sardar and Wazir Khan, whose applications are

disposed of by this order, has been convicted by the Sub-Divisional Magistrate, Kamptee, on 16th December 1925 of offences punishable under ss. 147 and 296, Indian Penal Code, and sentenced to concurrent terms of six months' rigorous imprisonment. Pending the lodging of an appeal in the Sessions Court an application to that Court was made for bail, and the Sessions Judge has rejected the said application on 16th December 1925. It is pertinent to notice that in the said application the only grounds alleged for granting bail was that the applicants were respectable persons, some of them being people of substance; that the case was a trivial one and that the applicants were willing to give ample security.

On the first point I would only desire to remark that the mere previous respectability of a man is *per se* no sufficient reason for giving bail when he has been convicted of a criminal offence. On the second point, the case was, according to the prosecution, one of an organised attack by Muhammadans on a Hindu religious procession, which resulted in a general riot; it is impossible from any point of view to describe such a case as a trivial one. As regards the applicants being able to afford reasonable security, the question of grant of bail is not only to be dealt with from the point of view of there being likelihood or not of the accused persons absconding.

In the applications to this Court a variety of grounds dealing with questions of fact and law have been advanced. I need hardly say that it would be undesirable, in the interests of the applicants themselves, if not impossible, for this Court at the present stage to enter into details on such matters. In argument before me some reference has been made to an alleged legal flaw in the trial with reference to an application made on behalf of the applicants under s. 162, Cr. P. C. That, again, is a matter which I must decline to enter into at the present stage.

The power of this Court to grant bail, even in a case like the present, is undoubted: *cf.*, s. 426, sub-s. (2), Cr. P. C. This Court will, however, only interfere with the discretion exercised by the Sessions Judge in refusing bail, if that discretion was manifestly wrong or if, in fact, no real discretion has been exercised. There is nothing to show in the Sessions Judge's order that either of these conditions have been fulfilled. I have, however, read the judgment of the Magistrate and it seems to me that in the careful and elaborate judgment he has written, there are good *prima facie* grounds for supposing the applicants to have been guilty of the offences charged. It may be that the Sessions Judge, when he hears the appeal, may come to a contrary finding, but, as the case stands at present, it is impossible for me to hold that there are not reasonable grounds for believing the applicants to be guilty of the offences of which they have been convicted. In *Sourindra Mohan Chuckerbutty* v. *Emperor* (1) Stephen and Carnduff, JJ., pointed out that although the High Court has unfettered powers to grant bail, yet in exercising these powers the High Court ought to have regard to the limitations imposed on lower Courts in this connection.

It is true that s. 497, Cr. P. C., as now amended, only provides that a person accused of a non-bailable offence shall not be released on bail if there appear to be reasonable grounds for supposing that he has been guilty of an offence punishable with death or transportation for life. We are here, however, concerned with men who have been actually convicted, and in those circumstances the principle, which will necessarily guide this Court, will be whether there are reasonable grounds for believing that the applicants committed the offences in question. In the present case, therefore, on the materials which it is open or desirable for me to consider at present, I cannot see any sufficient reason for granting bail: *cf.*, *King-Emperor* v. *Badri Prasad* (2).

It has been suggested to me that failing bail, the execution of sentences on the applicants might be suspended. This request also I am not prepared to grant. As s. 426, Cr. P. C., stands, the result of a suspension of sentence is only that if the appeal finally fails, the convicted person only serves the original period of his sentence less the period of suspension. Such an order should, in my opinion, only be passed when very special cause is shown.

All 10 applications are accordingly dismissed.

Z. K. *Applications dismissed.*

(1) 6 Ind Cas. 8; 37 C. 412; 14 C. W. N. 512; 11 Cr L J. 217.

(2) 5 A. L. J. 419; A. W. N. (1908) 195; 8 Cr. L. J. 49.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1064 OF 1925

October 27, 1925.

Present.—Mr Justice Addison.

THE FIRM RADHA KISHEN-CHUNI LAL, THROUGH RAUNKI RAM—PLAINTIFF —APPELLANT

versus

THE FIRM AHSA MAL-ISHAR DAS, THROUGH LAKHMI CHAND—DEFENDANT —RESPONDENT

Civil Procedure Code (Act V of 1908), Sch II, paras 20, 21- Contract Act (IX of 1872), s 251— Arbitration Award—Reference and existence of dispute, whether can be enquired into Partnership—Partner, whether can make reference—Receiver, appointment of, effect of

On an application being made under para 20 of Sch II, C P C, it is open to the Court to enquire whether there was any matter in dispute between the parties to be referred to arbitration and whether there was, as a matter of fact, any reference to arbitration by the parties [p 706, col 2]

One partner in a firm has no authority to enter into an agreement to refer a dispute, to which the firm is a party, to arbitration [p 707, col 1]

Where a Receiver has been appointed to wind up the affairs of a partnership, to collect all outstandings, to pay debts and to distribute the surplus, a partner of the firm has no authority to refer to arbitration a question relating to the liability of the firm to pay a sum of money to a third person [p 707, col 2]

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Jhelum, dated the 26th January 1925

Dr. *Nand Lal*, for the Appellant

Mr. *Dev Raj Sawhney*, for the Respondent.

JUDGMENT.—An application was made on the 13th August 1924 under Sch. II, paras. 20 and 21, C. P. C., by the Firm Radha Kishen-Chuni Lal through Raunki Ram, purporting to be its manager, against the Firm Ahsa Mal-Ishar Das, through Lakhmi Chand son of Ganda Mal, described as its managing partner, to file an award dated the 13th August 1924 and to have it made a decree of the Court. The application was made the same day the award was written and when it was presented the two persons described as the managers were present as well as the arbitrator. According to the award two persons were partners of the Firm Ahsa Mal-Ishar Das, namely, Lakhmi Chand son of Ganda Mal, who purported to be its managing partner, and another Lakhmi Chand son of Ishar Das and the arbitrator awarded Rs. 10,743, against the Firm Ahsa Mal-Ishar Das in favour of the Firm Radha Kishen-Chuni Lal with interest at 12 per cent. per annum till payment. In spite of the large amount involved Lakhmi Chand son of Ganda Mal signed the award and also agreed that it should be filed in Court. On the 31st October 1924 it came to the notice of the Court from the statement of Raunki Ram that he had only been a paid servant of the plaintiff Firm Radha Kishen-Chuni Lal which had ceased to exist three years before the alleged arbitration He also disclosed that Radha Kishen, one of its two partners, was dead and that he had no power-of-attorney from its other partner Chuni Lal, who was his brother-in-law. In fact Raunki Ram signed the agreement to refer and signed the award, and put in the application to the Court only on the alleged oral instructions of Chuni Lal and it is obvious that he had no power to do these acts The Court thereupon ordered notice to issue to the defendant Firm Ahsa Mal Ishar Das, at Karachi, and to Chuni Lal, but Lakhmi Chand son of Ganda Mal at once volunteered a statement to the Court that the defendant firm had been closed or dissolved, though he used to institute and defend suits on its behalf. He added that the share-holders were —

Himself, *i e* Lakhmi Chand, son of Ganda Mal, Re. 0-5-4

Lakhmi Chand son of Ishar Das, . . Re. 0-10-8. He also said that the dealings of that firm came to him on an award. Accordingly the Court summoned the other Lakhmi Chand and Chuni Lal.

Chuni Lal did not appear on the 25th November 1924 but Lakhmi Chand son of Ishar Das did On that date Raunki Ram further disclosed that Chuni Lal and Lakhmi Chand son of Ganda Mal were true brothers, so that he was the brother-in-law of both of them By the consent award, therefore, the dissolved firm, in which Chuni Lal was a partner, got an order against the dissolved firm in which his brother Lakhmi Chand son of Ganda Mal, was a partner to the extent of one-third, for a large sum of money with interest. Chuni Lal ultimately appeared on the 13th December 1924 and admitted that his firm was closed or dissolved some five years before and that Radha Kishen, the deceased partner, had left a minor son, who, however, had no connection with the firm. He further said that he had orally authorised his brother-in-law Raunki Ram to act for him and that the defendant firm had been closed for three or four years. Lakhmi Chand son of Ganda Mal made a

further statement on the 13th December 1924 that Ahsa Mal-Ishar Das was not yet dissolved and that he was full owner of that firm by both the arbitration awards though this goes against his own consent award. He admitted that Kimat Rai had been appointed by the Court of the Judicial Commissioner, Karachi, as Receiver of the Firm Absa Mal-Ishar Das to collect outstandings and pay debts with what he collected. He also said that he had got no authority from the Receiver to enter on this arbitration and that the other Lakhmi Chand son of Ishar Das used to give assent to what he did, though it was not asserted that he assented to this arbitration.

The other Lakhmi Chand son of Ishar Das appeared on the 25th November 1924 by Counsel who filed a written statement and made an oral one. He objected that Raunki Ram could not carry on the suit on the oral instructions of Chuni Lal. This was certainly correct but when Chuni Lal came forward later, the position changed at least as far as the suit is concerned. It was further stated (1) that there was no reference to arbitration on behalf of either of the two firms, and (2) that there was no dispute between them so that there could be no reference. It was further explained that the Firm Ahsa Mal-Ishar Das was dissolved in November 1917 by an award filed in the Court of the Judicial Commissioner. Ishar Das died in February 1918 when his son and heir Lakhmi Chand, son of Ishar Das, was 13 years old. A fresh dispute arose then and the same arbitrator Kimat Rai, settled it by a second award in October 1918 and it became a rule of the Court on 15th October 1919. Both the Lakhmi Chands, one being represented by his mother, then moved the Judicial Commissioner that Kimat Rai should be appointed Receiver to recover the outstandings and discharge the liabilities of the partnership, details of which were given in a list prepared by Lakhmi Chand son of Ganda Mal, which was, however, not admitted necessarily to be correct by the other Lakhmi Chand. The Receiver finally had to distribute the surplus of the dissolved partnership between the parties, *i. e.*, between the surviving partner Lakhmi Chand son of Ganda Mal and the son of the deceased partner, Lakhmi Chand son of Ishar Das. The Judicial Commissioner accordingly appointed Kimat Rai, Receiver with the powers noted above in December 1919. All this is supported and proved by the copies of the joint application of the parties concerned and the order passed by the Judicial Commissioner together with a copy of the list of assets and liabilities referred to above, which are upon this record.

It is perfectly clear that all the parties knew the contentions marked (1) and (2) above on behalf of Lakhmi Chand son of Ishar Das and the Court then proceeded to determine them, after noting on the 13th December 1924 that the parties had made the statements and given the evidence they desired. A date was then fixed for arguments, and on the 26th January 1925 the Court dismissed the application on the grounds (1) that there was no reference to arbitration on behalf of the alleged firm, though there was an attempt by the two brothers, Chuni Lal and Lakhmi Chand, and their brother-in-law Raunki Ram, to defraud the other Lakhmi Chand and (2) that there was no matter in dispute between the two firms to be referred to arbitration. Relying on the opening words of para. 21 of the Second Schedule of the C. P. C, it held that that was sufficient to dispose of the application. Against this decision the plaintiff firm through Chuni Lal has filed this appeal.

The Court also appears to have commenced proceedings under s. 476, Cr. P. C., for this Court was moved to stay them, pending this appeal.

It was argued before me that the Court erred in not framing issues and allowing parties to produce evidence. The above discussion is sufficient to dispose of this contention. The parties knew what was in issue and said they had no further statements to make or evidence to give. A date was fixed for arguments and the case was argued on these two points, and no attempt was made to say that there was any other evidence to produce. There is thus no force in grounds Nos. 6 and 7 of the appeal. The merits of the case were obviously not affected in these circumstances and s. 99, C. P. C., in any case applies.

It was next argued (grounds Nos. 8 and 9) that the Court had no power to decide the two matters it did but was confined to deciding any objections under paras. 14 and 15 of the Second Schedule, C. P. C. This is obviously wrong for the opening words of para. 21 of the Second Schedule were inserted to set at rest this question, as to which different views had been taken

by some of the High Courts. See also *Ganesh Singh* v. *Kashi Singh* (1) and *Firm Mansa Ram-Gordhan Das* v. *Firm Mangal Sain-Duni Chand* (2) (Lahore High Court) and *Dip Chand* v. *Sahibdino* (3). The case reported as *Sassoon and Co.* v. *Ramdutt Ram-Kissen Das* (4) is not against this view as it was a case under the Indian Arbitration Act and not under the C. P. C. *Pokhardas Jashiomal* v. *Forbes Forbes, Campbell & Co.* (5) is not in point for the same reason.

The first five grounds of appeal amount to this that there was a valid reference of a disputed matter to arbitration on behalf of both of the firms. It was held in *Ram Bharose* v. *Kalu Mal* (6) that one partner cannot enter into an agreement to refer, the reasoning being based on s. 251 of the Contract Act The English authorities are admittedly to the same effect. The Madras High Court has taken a similar view in *Chandooru Pannayya* v *Venugopala Rice Factory Co., Ltd.* (7) and *Venkatachellam Chetty* v. *Ramanathan Chetty* (8). There is a full discussion of this question by the Calcutta High Court in *Mohamad Akbar* v. *Dwarka Nath* (9). In it the plaintiffs sued as legal representatives of a deceased partner to have the partnership wound up. It was held that it was the duty of the surviving partners to take all steps necessary for the completion of their unperformed engagements (See s 263 of the Contract Act). But, after the death of one partner, it was held that a dispute between the partnership and a third party could not be referred to arbitration by the surviving partners. This decision was based on the Indian, English, and United States judicial decisions and it is on all fours with the present case.

On behalf of the appellant I was referred to *Ghaznavi & Co.* v. *Budge-Budge Jute Mills* (10) in which it was held that an award was not bad for the facts that it was made against a firm without ascertaining who were the parties liable as the new C. P. C provided for suits against firms in the firm's names, That ruling obviously is of no help in the special circumstances of this case Besides it was a compulsory reference under the terms of the contract. Similarly, *Sukha Nand* v, *Behari Ram-Ishar Das* (11) and *Bishambar Mal-Pala Mal* v. *Firm Ganga Sahai Nihal Chand* (12) are obviously not in point. I, therefore, hold that there was no reference to arbitration on behalf of either of the firms named and that the application to file the award was consequently rightly dismissed under the opening words of para. 21 of the Second Schedule, C. P. C.

This case is even stronger than the one reported as *Mohamad Akbar* v *Dwarka Nath* (9) as a Receiver is in existence winding up the partnership affairs of Ahsa Mal-Ishar Das under the Court of the Judicial Commissioner. It has been proved that he has been given full powers to collect all outstandings and to pay debts and to distribute the surplus. It was, therefore, not possible for Lakhmi Chand son of Ganda Mal to refer a question as to whether the defendant firm owed anything to any one See Pollock and Mulla's Contract Act, 5th Edition, page 807.

It was also argued by the respondent's Counsel that there could have been no matter in dispute to refer to a arbitration as in the list handed over by Lakhmi Chand son of Ganda Mal himself to the Receiver, this debt is not included and as any debt due by the dissolved firm must have been time-barred before August 1914. In the absence of any other evidence this contention must also prevail. The list in question has been proved and there is nothing to rebut it.

I have already shown that it has not been established that the whole of the business of Ahsa Mal Ishar Das has been handed over to Lakhmi Chand son of Ganda Mal by the two awards referred to but that on the contrary a Receiver is liquidating this firm. Even in the award it is stated that both the Lakhmi Chands are partners in it. Likewise it is not established that Chuni Lal is the sole proprietor of Radha Kishen-Chuni Lal with full powers as regards it. If only the two brothers Chuni Lal and Lakhmi Chand son of Ganda Mal were meant to be involved, it

(1) 28 A 621; A W N (1906) 136.
(2) 65 Ind. Cas 497, A. I R. 1922 Lah 149.
(3) 12 Ind Cas 639, 5 S L R 92.
(4) 70 Ind. Cas 777; 50 C. 1; A I R 1922 P. C. 374; 37 C L J. 336: 44 M. L. J. 758, 27 C W. N. 660, (1923) M. W. N. 372, 18 L. W. 537, 49 I A 366 (P. C.).
(5) 19 Ind. Cas. 363, 6 S L R. 127.
(6) 22 A. 135; A. W. N. (1900) 12; 9 Ind. Dec. (N. s) 1120.
(7) 43 Ind. Cas. 508, 22 M. L. T 520; 7 L. W. 114; (1918) M W. N 51.
(8) 59 Ind. Cas. 501, 12 L. W. 228, (1920) M. W. N. 502; 39 M. L. J. 269.
(9) 6 Ind. Cas. 63; 11 C. L. J. 658;] 14 C. W. N. 1106.
(10) 25 Ind. Cas. 955.
(11) 68 Ind. Cas 750; A. I R. 1923 Lah. 103.
(12) 71 Ind. Cas. 734; 5 L. L. J. 5; A. I. R. 1923 Lah. 212.

would have been easy for them to get an award against one brother in favour of the other. This disposes of all the grounds argued.

In the result this appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 320 OF 1924.

July 4, 1925.

Present:—Mr. Hallifax, A. J. C.

MANSARAM—PLAINTIFF—APPELLANT

versus

BUDHU AND ANOTHER—DEFENDANTS—RESPONDENTS.

C P Tenancy Act (I of 1920), s 104, Sch II, Art 1, scope of—Dispossession of tenant by other than landlord—"Tenant," whether includes holder of Survey Number in Sambalpur Territory

Section 104 and Art 1 of the Second Schedule of the C P Tenancy Act apply to all suits for possession by a person claiming to be a tenant, irrespective of the fact as to whether the person keeping him out of possession is the landlord of the village or any other person

The holder of a Survey Number in the Sambalpur Territory is a "tenant" within the meaning of Art 1 of Sch II to the C P. Tenancy Act

Appeal against a decree of the District Judge, Bilaspur, dated the 30th April 1924, in C. A. No. 50 of 1921.

Mr. *M. R. Bobde*, for the Appellant

Messrs. *G. R. Deo* and *T. Y. Dehankar*, for the Respondents.

JUDGMENT. (*July 4, 1925.*)—There is no basis whatever for the opinion expressed in the judgment of the lower Appellate Court that s. 104 and Art 1 of the Second Schedule of the Tenancy Act of 1920 apply to a suit by a person claiming to be a tenant only when it is against the landlord of the holding he claims. The contrary could hardly be more clearly expressed than in the words of Art. 1 of the Schedule. The learned Judge also contradicts himself on this point in that portion of the judgment in which he finds that the plaintiff's suit is not barred by the rule of limitation because it was filed within two years of his dispossession by the defendants.

The facts are these: In 1911 the defendant Budhu transferred in some way or other to the plaintiff Mansaram the Survey Numbers in a village in the Sambalpur Territory of which he was the holder, and Mansaram remained in possession of them and paid the rent for them to the Gaontia till November 1921. In 1915 one Ramprasad to whom Budhu had transferred a part or the whole of the land held by Mansaram sued the latter for possession. Mansaram pleaded that he was the tenant, and the suit was dismissed. Budhu was a witness for the plaintiff in that case and, therefore, had notice not later than 1915 that Mansaram was asserting a hostile title, even if he had till then held permissive possession under Budhu. Mansaram remained in possession as the tenant recognised by the Gaontia till November 1921 when he was ousted by Budhu, and he filed the suit for possession out of which this appeal arises on the 6th of July 1923.

It is the opinion of the learned Judge of the lower Appellate Court that the holder of a Survey Number in the Sambalpur Territory is not included in the word "tenant" as used in Art 1 of the Second Schedule of the Tenancy Act, 1920, and that the period of limitation for a suit by him to recover possession of a Survey Number of which he claims to be the holder is 12 years. It has been held, therefore, that Budhu did not lose his rights in the holding by being out of possession for more than two years between 1915 and 1921 This, of course, implies that the learned Judge was further of opinion that s. 35 (2) of the Tenancy Act, 1898 also did not apply to such a person.

This view of the matter is based on reading the second Explanation attached to the definition of a tenant in cl. (11) of s. 2 of the Tenancy Act, 1920, which is the same as that attached to cl. (14) of s. 2 of the Act of 1898, as meaning that the holder of a Survey Number in the Sambalpur Territory is to be treated as a tenant so far as the Gaontia is concerned but for no other purposes I can see very little reason for such an interpretation of the words used in the two Acts, but if it were correct it would follow that the holder of a Survey Number in the Sambalpur Territory had all the rights and privileges of the holder of one in Berar including the unrestricted right of transfer and it is beyond doubt that he has not got these rights. The interpretation is, therefore, wrong and Budhu had ceased to be the holder of the Survey Numbers in dispute in this case long before November 1921 when he took forcible possession of them from Mansaram, whether

we apply the Tenancy Act of 1920 or that of 1898.

The decree of the lower Appellate Court will be set aside and that of the first Court will be restored. The Pleader's fee in this Court will be twenty rupees.

(*July 8, 1925*)—The order for the payment of costs was accidently omitted from this judgment The whole costs in all three Courts will be paid by the defendants.

N. H. *Decree set aside*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No 1370 OF 1921.

February 23, 1925

Present —Mr. Justice Abdul Raoof and Mr Justice Harrison

MAHTAB SHAH—DEFENDANT—APPELLANT

versus

ALI HAIDAR SHAH AND OTHERS - RESPONDENTS

Punjab Courts Act (VI of 1918), s 41 (3) Appeal, second Certificate granted on mistaken grounds, validity of

Where a District Judge grants a certificate under s 41 (3) of the Punjab Courts Act with regard to a question of custom for the reason that the appellant is anyhow appealing on the question of the ancestral nature of the land and that it is advisable that he should be given a certificate in order that he might agitate every question which has arisen in the case and it is not stated in the certificate that the various requirements of the section have been fulfilled, the certificate is bad and will be ignored by the High Court

Second appeal from a decree of the District Judge, Rawalpindi, dated the 14th February 1921, reversing that of the Munsif, First Class, Rawalpindi, dated the 23rd October 1920

Mr *Aziz Ahmad* and Chaudhri *Zafarulla Khan*, for the Appellant

Mr *M L Puri*, for the Respondents

JUDGMENT.—The plaintiffs in this case are the collaterals in the third degree of one Latif Shah and they pray for a declaration that a gift made by him to a very distant relative, named Mahtab Shah, shall not affect their reversionary rights The suit was dismissed by the Trial Court but the appeal to the District Judge was successful and a decree has been given as sought for.

On second appeal, which is supported by a certificate, Counsel contends, in the first place, that the plaintiffs have not proved the property in suit to be ancestral, and, in the second, that the gift is valid.

We find that the second and main question cannot be argued as we hold that the certificate given by the District Judge does not comply with the requirements of s 41 (3) of the Punjab Courts Act The District Judge granted this certificate for the reason that the appellant was anyhow appealing on the question of the ancestral nature of the land, and, therefore, the Judge appeared to think it advisable that he should be given a certificate in order that he might agitate every question which had arisen in this case It is not stated that the various requirements of the section have been fulfilled and, as the grounds on which the certificate is granted are wholly mistaken, we must ignore it

The question remains whether the plaintiffs have or have not established the ancestral nature of the land The pedigree-table is to be found on page 23 of the judgment of the District Judge It is an admitted fact that the land in suit was held by Sher Muhammad, the common ancestor. It is also an admitted fact that it was held by his grandson Latif Shah, and in the year 1860 by Jawaya Shah, father of the donor. It is also admitted by the defendants that Latif Shah was succeeded by his two daughters, and Jawaya Shah, therefore, must have inherited from his mother It is well established law under these circumstances that the woman merely acts as conduit pipe, and that the ancestral nature of the land is not affected by the fact that she takes a place in the line of succession We agree with the learned District Judge in finding that the plaintiffs have established beyond all doubt that the land in suit is ancestral, and we dismiss the appeal with costs

Z K *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 102 OF 1923

February 27, 1925

Present —Mr Justice Wallace

PARAKKAT DEVASWOM TRUSTEES OF K P. VEERARAGHAVA IYER AND OTHERS—APPELLANTS

versus

VENKATACHALAM VADHAYAR AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)

Step-in-aid of execution—Decree against trust—Appointment of fresh trustee—Execution application against trustee on record—Bona fide *petition—Burden of proof—Precedents—Reported and unreported decisions.*

The removal under a decree of a trustee from office comes into operation not from the date of the decree but from the date on which the trustee is removed from actual possession. So long as he is not removed and remains in possession of the property, he is the proper judgment-debtor to be on record for purposes of execution of a decree against the trust [p. 711, col. 1.]

A *bona fide* application to execute a decree against the judgment-debtor on record is in accordance with law even though it is subsequently discovered that at the time of the application he had ceased to be the proper person to be proceeded against. [*ibid*]

Samia Pillai v *Chockalinga Chettiar*, 17 M. 76; 4 M. L. J. 8; 6 Ind. Dec. (N S) 52, *Balkishen Das* v *Bedmati Koer*, 20 C 388; 10 Ind. Dec (N. S) 263 and *Ramasawmi Chettiar* v *Oppilamani Chetti*, 4 Ind Cas 1059; 33 M. 6; 6 M. L. T 269, 19 M. L. J. 671, relied on

The burden of proving that the judgment-debtor named in the decree has ceased to be the real judgment-debtor for purposes of execution and that the application impleading the person on record is not *bona fide* is on the person who sets up that such application is not in accordance with law. [p. 711, col. 2]

In the case of a conflict between a reported and an unreported decision, the proper course is to follow the reported decision. [p. 711, col 1]

Appeal against an order of the District Court, South Malabar, in A. S. No. 523 of 1922, preferred against that of the Subordinate Judge, Ottapalam, in Execution Petition No. 123 of 1922.

Mr. *K. Kuttikrishna Menon*, for the Appellants.

Messrs. *N. A. Krishna Iyer* and *T. S. Anantharaman*, for the Respondents.

JUDGMENT.—The question in this appeal is whether the execution petition is barred by time. The decree sought to be executed is the final decree in O. S. No. 36 of 1912 on a hypothecation bond executed by certain persons. The bond was executed by them, as trustees or owners of a certain *Devaswom*. At the time that suit was pending another suit, O. S. No. 12 of 1912, to declare that the trust was a public trust and to remove the above persons was going on. On 9th July 1914 a decree to remove them was passed. The final decree in O. S. No. 36 of 1912, the hypothecation decree against the property was passed on 30th September 1914. Three execution petitions were put in to execute this final decree. The first was put in on 20th July 1915 and was dismissed, because *batta* was not paid. The second was put in on 26th June 1918 and was rejected for the same reason. The third was put in on 20th June 1921 and is the execution petition now under appeal.

The appellants are the present trustees who were put into office in the place of the original judgment debtors by force of the decree in O S. No. 12 of 1912 at sometime which is not known. They contend *in limine* that the decree in O. S No. 36 of 1912 now under execution was not against the trust property at all; but I am not prepared to accept this contention, for the decree clearly is in the first instance, against the trust property. It is further contended that the decree is a nullity, it being pointed out that the decree removing the original trustees was passed some two months before the final decree against them. But it is clear that this contention cannot arise unless the respondents show that the judgment-debtors in O. S. No. 36 of 1912 had been, as a matter of fact, removed, in consequence of the decree in O. S. No 12 of 1912, sometime prior to the final decree in O. S. No. 36 of 1912 and that some other trustees or Receiver had been appointed in their place who could have been brought on the record as the legal representatives of the original trustees before the final decree was passed. This fact the appellants have not attempted to show. It is a question of fact which ought to have been heard and decided by the first Court; and in the absence of any evidence to prove that fact it cannot be reasonably contended that the decree in O. S. No. 36 of 1912 is a nullity.

The next contention is based on very much the same argument. Appellants contend that the execution petition dated 20th July 1915 was not in accordance with law, because the proper judgment debtors were not on record in that petition, as that petition was put in against the judgment-debtors named in the decree a year or so after the decree for their removal had been passed. It is said that a Receiver was appointed in O S No. 12 of 1912 on 16th February 1915 some five months before the date of the first execution petition; but again, the appellants have not attempted to show that this Receiver took charge or that the trustees, who were the original judgment-debtors, were actually ousted by him from the property prior to the date of this first execution petition.

The lower Appellate Court accepts the view that the original judgment-debtors

were not the proper party respondents to the execution petition because they had been dismissed by the decree in O. S No 12 of 1912 on 9th July 1912 but it nevertheless held that the execution petition was in accordance with law. I do not agree with the lower Appellate Court in its view that the removal of the original trustees came into operation from the date of the decree and not from the date, whatever date it be, on which the trustees were removed from actual possession So long as they were not removed and they remained in control of the property cannot be contended that they were not the proper judgment debtors to be on record in the execution petition. Suppose for example that no Receiver or new trustee was appointed for some months after the passing of the decree in O S No. 12 of 1912. It could not be held that there was no judgment-debtor at all against whom any execution petition could be brought during that period The crucial date on which the trustees cease to be actual judgment-debtors is that on which they were ousted from the control of the trust property. What that date is does not appear. It is clear that the duty of the appellants was to establish that date and they have not chosen to do so. It cannot, therefore, be concluded that on the date of the execution petition of 1915 the original trustees were not the proper judgment-debtors. Therefore there is no proof that this execution petition was not against the proper judgment-debtors.

Even if it were against the wrong judgment debtors it would not be invalid as a step-in-aid so long as the executing decree-holder *bona fide* believed that they were still the proper judgment-debtors. According to law, so far as laid down in this Presidency, a *bona fide* application to execute a decree against a particular judgment-debtor is in accordance with law even though it is subsequently discovered that the judgment-debtor was dead at the time of the application; see *Samia Pillai* v. *Chockalingi Chettiar* (1). An unreported case of this Court, C M A No. 185 of 1902, has been brought to my notice which takes an opposite view but in such cases the proper course is to follow the reported decision. The same principle has been laid down in *Balkishen Das* v. *Bedamati Koer* (2) where it was held that an application made against persons who were not the legal representatives of the deceased judgment debtor was valid if the decree-holder *bona fide* believed that they were the legal representatives see also *Ramasawmi Chettiar* v *Oppilamani Chetti* (3) The High Court of Allahabad takes a different view which this High Court so far has not accepted see *Jnanendra Nath Basu* v *Nihalo Bibi* (4); but compare this with *Mahomed Hussain* v. *Enyat Hussain* (5)

Now as the application of 1915 was put in against the judgment-debtors named in the decree the Executing Court in the absence of evidence to the contrary could not but decide that the execution petition was in accordance with law. It is not its business to go outside the decree and enquire whether the judgment-debtors named in that decree were still the proper judgment-debtors in 1915 The presumption is that the execution petition was in accordance with law, and it was admitted as such by the Court and notice issued therein The parties who now wish to contend that it was not, were bound to prove it, and for that purpose they must first establish that the judgment-debtors named in the decree were no longer the real judgment debtors That, as noted, they have not attempted to do. Unless and until they proved that fact, it was not the business of the decree-holders to prove that they nevertheless *bona fide* believed that the judgment-debtors named in the decree were still really the judgment-debtors. It is not, therefore, open to the appellants who have not established the fact necessary to throw on the decree-holders the onus of proving their *bona fides*, to put forward now any contention that the execution petition of 1915 was not *bona fide*

A further contention has been put forward that the decree under execution was a fraudulent decree come to by collusion between the mortgagee and the original trustees. But, obviously that objection cannot be taken in execution. The real judgment-debtor is the trust; and the representatives of the trust cannot attack it in execution proceedings. If they want to set aside the decree they must institute appropriate proceedings

I am, therefore, of the opinion that the

(1) 17 M 76, 4 M L J 8, 6 Ind Dec. (N. S) 52.
(2) 20 C. 388 at p. 393; 10 Ind. Dec. (N. S.) 263.
(3) 4 Ind. Cas. 1059, 33 M 6, 6 M L T. 269; 19 M. L J. 671
(4) 6 Ind Cas 33, 32 A 404, 7 A L J 512
(5) 24 Ind. Cas. 473; 36 A 482, 12 A L J. 830.

order of the District Judge is right and dismiss this appeal with costs of respondents Nos. 1 and 2.

V. N. V.

N. H. *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No 2586 OF 1922.

December 2, 1925.

Present:—Mr. Justice Zafar Ali and Mr. Justice Addison.

MESSRS RAGHUNATH DAS RAM SARUP—DEFENDANT—APPELLANT

versus

MESSRS. SULZER BRUDERER AND Co,—PLAINTIFF—RESPONDENT.

Arbitration - Award, suit to enforce Contract containing arbitration clause, validity of, whether can be questioned—Procedure—Piecemeal trial of suit, undesirability of

In answer to a suit to enforce an award, made on a reference in pursuance of an arbitration clause contained in a contract alleged to have been entered into between the parties, it is open to the defendant to plead that there was no completed contract between the parties and that consequently the arbitration clause could not come into operation This objection goes to the root of the whole matter and must be determined along with any other issues in the suit [p. 713, col. 1]

The practice of trying an important case piecemeal tends to lead to protracted litigation and serious inconvenience and to involve the parties in heavy costs if the case is taken repeatedly on appeal to a superior tribunal. [p. 714, col 2]

First appeal from a decree of the Senior Sub-Judge, Delhi, dated the 18th July 1922.

Bakhshi *Tek Chand* and *Lala Kahan, Chand* for the Appellant.

Mr. *Prem Lal*, and Lala *Ram Kishore*, for the Respondent.

JUDGMENT.—The plaintiff sued the defendant on the allegations that the defendant on the 8th January 1920 placed an indent with him for 5 cases of grey merino on certain terms, that the indent was duly accepted by the plaintiff within the prescribed period of sixty days; that the goods were shipped by the plaintiff; but that the defendants raised frivolous objections which were referred by the two parties to arbitrators who disagreed and that thereupon they were duly referred to an umpire who gave an *ex parte* award in the plaintiff's favour. This award was to the effect that the defendant should take up and pay for the goods. It was alleged that the sum payable on this award, though it was not actually fixed was Rs. 36;925-15-9 and this with future interest was claimed on its basis. In the alternative it was claimed that this sum was due for the price of the goods apart from the award.

The defendant admitted the indent but denied that it had been accepted within the period prescribed. There was thus no completed contract. The submission to the two arbitrators was admitted but the appointment and proceedings of the umpire were alleged to be illegal, so that the award was invalid. The other pleas do not require mention at present except that plaintiff's Counsel replied that the indent had been accepted within the prescribed period and that in any case the defendant had accepted his client's acceptance as due acceptance. These allegations were denied by defendant's Counsel and the Court proceeded to frame the following issues:—

(1) Was an umpire validly appointed and did he give an award?

(2) If so, is it invalid and not binding on the defendants?

(3) To what amount is plaintiff entitled under the award?

(4) Was there a completed contract between the parties?

(5) Is defendant estopped from impugning the contract?

(6) Was plaintiff ready and willing to perform his part of the contract? Did defendant break it? If so, how and when?

(7) Was defendant excused from accepting the goods under the circumstances of the case?

(8) Had the property in the goods passed to the defendant?

(9) If so, does not a suit lie for the price of the goods as framed?

Later it added the following two issues:—

(10) What goods and under what circumstances have been parted with? What is the effect thereof on plaintiff's claim?

(11) To what amount for price, charges and interest are plaintiffs entitled and at what rate of exchange?

When the first nine issues were struck the Court ordered the parties to produce their evidence on the first three issues only, though later evidence was also allowed on Issues Nos. (10) and (11) as being supplementary to the first three issues. It would seem that this order was verbally objected to when it was made; while before evidence was commenced, defendant's Counsel again tried to get the order changed to allow of evidence

being given on all the issues. He was overruled and he then put in a written application to the same effect. This also was refused. The Court then proceeded to judgment on the issues mentioned and holding that the award was valid, found that Rs. 32,683 2 6 were due on it. A decree for that sum with future interest at 9 per cent. per annum was given to the plaintiff with a lien on the goods. Against this decision the defendant has filed this appeal

It was argued by the learned Counsel for the appellant that Issues Nos (4) and (5) went to the very root of the matter as they involved the question of the jurisdiction of the arbitrators and that it was, therefore, illegal to shut out all evidence on these two issues and to decide the suit only on issues Nos (1) to (3). The Trial Court itself seems to have felt this difficulty, for, though it confined the case to issues Nos (1) and (3), it entered into a discussion of issues Nos (4) and (5) in its judgment at pages 73 and 74 of the paper book. It said there that the indent, which contained an agreement to refer disputes to arbitration, was admitted It did not add that the acceptance of that indent by the plaintiff-respondent which was necessary to make it a complete contract was denied. It then went on to say that in the correspondence not a word was said as to the contract not having been completed, although both sides appointed arbitrators This was a discussion of issues Nos (4) and (5), evidence as to which had been excluded

In *Sasoon & Co*, v. *Ramautt Ramkissen Das* (1) their Lordships of the Privy Council held that a suit was maintainable to contest an award when the objection was the want of jurisdiction in the arbitrator. In *Firm Jainaram-Babu Lal* v. *Firm Narain Das-Jain Mal* (2) it was held at pages 305*-306* that the question of the *factum* or the validity of the contract was not within the cognizance of the arbitrators, and that the arbitration clause assumed that there was a valid and binding contract between the parties, that is, that the arbitration clause, which is part of the contract, falls if the contract falls. It was sought to distinguish these authorities on the ground that in them the arbitration had been *ex parte* throughout. But in the present case the effect of their having been a submission to arbitration is clearly included in issue No (5), which should, therefore, have been decided after recording evidences, and after issue No (4) had been decided

In *Tayabally Abdul Hussain* v *James Finlay & Co* (3) the Sind Judicial Commissioners also held that a party dissatisfied with a private award could contest it, when it was sought to enforce it under the Indian Arbitration Act, by taking such objections as that Act allowed but that that remedy was not his sole remedy. He could also bring a suit, thereafter, to set aside the award on the ground that no contract, providing for a reference to arbitration was made or that it if made, was not enforceable by reason of fraud or misrepresentation *Ridha Kisen Khetry* v *Lukhmi Chand Jhawar* (4) (especially at page 548) is also in point.

In the case of above authorities the suit was brought by the party objecting to the award, but that clearly makes no difference. In the present case, the umpire's *ex parte* award was simply to the effect that the buyers should take up and pay for the goods. It was useless to file such an award in Court under the Indian Arbitration Act as no sum was fixed in it as due and certain calculations had, therefore, to be made and rates of exchange ascertained The plaintiff, therefore, came into the regular Courts on the umpires' award In these circumstances it was within the defendants' rights to attack the award on all possible grounds.

It was urged, however, by the learned Counsel for the plaintiff-respondent that his plaint proceeded on two causes of action, paras (4) to (7) disclosing the cause of action on the award, and the other paras dealing with the claim independently of the award, that defendants' plea as to there being no completed contract referred to the second part of the claim which arose only if the award was set aside; and that the initial submission to arbitration was admitted and that all that was pleaded as regards the claim on the award was that the arbitration proceedings were invalid on various grounds This argument, though ingenuous, cannot be accepted It was in para (2)

(1) 70 Ind Cas 777, 50 C 1, A. I R 1922 P C 374, 37 C L J 336, 44 M L J 758, 27 C W. N 669, (1923) M. W. N. 372, 18 L W 537, 49 I A. 366 (P. C).

(2) 69 Ind Cas 585, 3 L. 296, A. I R. 1922 Lah 369

*Page of 3 L.—[*Ed.*]

(3) 80 Ind Cas 939, 17 S L R 15, A I R 1924 Sind 105

(4) 56 Ind Cas. 541 at p. 548, 31 C. L. J 283; 24 C. W. N. 454.

of the plaint that it was stated that the indent had been accepted, by the plaintiff within the prescribed period of 60 days. This was prior to any mention of an award. Similarly in para. (2) of the pleas the defendant at once denied that there was a completed contract as the indent had not been accepted within 60 days. The order of the pleas had to follow the plaint. Later, in replying to the paras. of the plaint dealing with the award it was admitted that two arbitrators, who disagreed, were appointed while it was added that the appointment of the umpire was invalid. Then in the further pleas, it was again denied that there was a completed contract. It is true that it might have been added for the sake of clearness that there could be no valid submission to arbitration as there was no completed contract, but the meaning was clear enough, namely, that, as there was no completed contract, the whole suit went.

This becomes even clearer when the statements of Counsel before issues are examined. Plaintiff's Counsel stated that the indent was accepted two days before the prescribed period ended and that in any case the defendant accepted plaintiff's acceptance as due acceptance. Both these allegations were denied by the opposing Counsel. Issues Nos. (4) and (5) embody this part of the case and the whole suit depends on the findings on these issues and the legal effect thereof. The fact that there was a submission to arbitration may be evidence on this part of the case, but in the absence of other evidence it is impossible to decide these issues. No question arises as to the defendant having accepted the order of the Trial Court confining the trial to the three first issues. It is clear from the Court's order, dated the 20th April 1922, that this objection was probably taken at the very time the order was passed and that defendant certainly objected before any evidence was recorded, and finally put in a regular petition when his objections were not heeded.

It follows that the Trial Court has erroneously decided the first three issues as being preliminary issues, the decisions of which were sufficient for the disposal of the case, whereas issues Nos. (4) and (5) may go to the root of the case. We, therefore, accept the appeal and setting aside the decree of the Trial Court, remand the suit under O. XLI, r. 23, C. P. C., for decision according to law. The Court-fee on appeal will be refunded. Other costs will be costs in the cause.

In conclusion we would refer to *Yatindra Nath Chaudhury* v. *Hari Charan Chaudhuri* (5) where the practice of trying an important case piecemeal was deprecated as tending to lead to protracted litigation and serious inconvenience and to involve the parties in heavy costs if the case is taken repeatedly on appeal to a superior tribunal.

Z. K. *Appeal accepted.*

(5) 26 Ind. Cas. 954; 20 C. L. J. 426.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2253 OF 1922

July 28, 1925.

Present:—Mr. Justice Chakravarti.

TARAMONEE CHOUDHURANI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHEIK ELIM AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s 105—Settlement of rent—Suit to recover rent at rate settled—Plea of denial of settlement proceedings—Fraud, plea of, absence of—Notice, service of, whether can be enquired into

In answer to a suit to recover rent at the rate settled in proceedings under s. 105 of the Bengal Tenancy Act, defendant denied that there was any such proceedings and stated that if any order under s .105 had been obtained it was not binding upon him There was no plea of fraud and no issue was raised in the suit as to the validity or otherwise of the proceedings under s 105

Held, (1) that in the absence of a plea of fraud it was not open to the Court to try the question as to whether there was any service of notice on the defendant or not in the proceedings under s 105 of the Bengal Tenancy Act,

(2) that if the defendant wished to challenge the proceedings under s. 105 on the ground of non-service of notice, he ought to have questioned the proceedings before the Settlement Officer, or by way of proceedings appropriate for such relief or by appeal, and that it was not open to him to do so in answer to the present suit.

Appeal against a decree of the Subordinate Judge, Fourth Court, Mymensingh, dated the 31st July 1922, reversing that of the Munsif, Third Court, Mymensingh, dated the 9th January 1922.

Babus *Gobinda Chandra De Roy* and *Jatindra Nath Sanyal*, for the Appellants.

JUDGMENT.—The suit out of which this second appeal by the plaintiffs arises was for recovery of rent. The plaintiffs claimed rent at the rate of Rs. 13-4 per

annum as was settled in proceedings under s. 105 of the Bengal Tenancy Act. The defence of the defendants was that the rent payable was at the rate of Rs 4-13 a year They denied that there was any proceeding under s. 105 of the Bengal Tenancy Act and also stated that if any order under s. 105 was obtained in secret it was not binding upon them.

The only issue raised in the case was "Can the plaintiffs recover rent at the rate of Rs. 13-4". No issue was raised as to the validity or otherwise of the proceedings under s. 105 at all.

The Court of first instance found that there was no fraud as regards the proceedings under s. 105 and held that the defendant was bound by the order under s 105 which showed that the rent settled was Rs 13-4 per annum The first Court further found that the defendants produced no *dakhilas* to show that the rent was paid at the rate of Rs 4-13 as alleged by them The Trial Court, therefore, gave a decree to the plaintiff for the rent claimed at the rate of Rs. 13-4 per annum On appeal by the defendant No. 1 the learned Subordinate Judge reversed the decree of the Munsif and gave a decree for rent at the rate of Rs 4 13.

The learned Vakil who appears for the plaintiffs-appellants has contended before me that the judgment of the learned Subordinate Judge was erroneous because the Court had made a new case for the defendants upon which no issue was raised Next he contended that a mere finding on the denial of the defendants that no notice was served does not affect the validity of the order under s. 105 and lastly it was contended that the lower Appellate Court was in error in enquiring as to whether the order under s. 105 was passed upon sufficient evidence.

It is to be regreted that the respondents did not appear before me.

It appears to me that the judgment of the learned Subordinate Judge cannot be maintained. As I have already stated no issue was raised by the defendants on the question of validity or otherwise of the order under s. 105. The Court of first instance found that there was no fraud in the proceedings. The lower Appellate Court on the denial of the defendants, that there was any proceedings under s. 105 held that that was enough to show that the proceedings under s. 105 were not binding upon the defendants. In the absence of any fraud which was not even alleged in the written statement or taken in the grounds of appeal before the lower Appellate Court and not found by that Court it was not open to the learned Subordinate Judge to try the question as to whether there was any service of notice or not in the proceedings under s 105. The learned Subordinate Judge does not deal with any evidence as to non-service of notice in the proceedings under s 105. All that he found is upon the denial of the defendants that there was any service. If the defendants wished to challenge the proceedings under s 105 on the ground of non-service of notice it was not open to them to do so in the present proceedings. They ought to have, if they chose, questioned the proceedings before the Settlement Officer or by way of proceedings appropriate for such relief or by appeal. A decree relied upon by a party can be challenged on the ground of fraud or want of jurisdiction. No question of want of jurisdiction arises here, and as there was no issue as to the proceedings under s. 105 being vitiated by fraud and there was no finding that there had been any fraud sufficient in law to take away the force of the order made under s 105, I think, therefore, the learned Subordinate Judge, upon the findings arrived at, was not justified in not giving legal effect to the order under s 105 and that effect was that as between the plaintiffs and the defendants Rs 13 4 was settled as the rent payable by the defendants to the plaintiffs.

I think the learned Subordinate Judge was not justified in interfering with the judgment of the Court of first instance. I, therefore, set aside the decree made by the learned Subordinate Judge and restore that of the first Court with costs in all Courts.

Z K. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No 707 OF 1924.

March 26, 1925.

Present:—Mr. Justice Kumaraswami Sastri.

A. V. K MAYAPPA CHETTIAR—PLAINTIFF—PETITIONER

versus

N K L. KOLANDAIVELU CHETTIAR AND ANOTHER—DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Specific Relief Act (I of 1877), ss. 18 (b), 27 (a)

—*Transfer of Property Act (IV of 1882), s. 83—Suit for specific performance—Contract to sell—Vendor impeaching mortgage by predecessor-in-title—Mortgagee, whether proper party—Vendee, whether entitled to deposit mortgage-money in Court—Indemnity bond, suit on—Actual damage, whether necessary*

The general rule is that in a suit for the specific performance of a contract to sell, persons who do not claim under the parties to the contract and are strangers to it or persons claiming adversely to both the parties, ought not to be made parties [p. 718, col 1.]

A person setting up a mortgage in his favour executed by the predecessor-in-title of a vendor, who impeaches it as being a sham transaction and without consideration, is, however, a person whose title could be displaced by the vendor and against whom, therefore, the contract to sell could under s 27 (c) of the Specific Relief Act be specifically enforced In such a case the just and proper course would be to implead also as party to the suit the person who claims to be a mortgagee and to adjudicate on all the questions in the suit itself so as to enable the purchaser to be free from all future risk and liability [*ibid*]

Bugata Appala Naidu v. *Chengalvala Jogiraju*, 32 Ind Cas 237, (1916) 1 M W. N 77, *Rangayya Reddi* v. *Subramanya Aiyar*, 40 Ind Cas 429, 40 M 365, 32 M L J 575, 5 L W 797, 21 M L T 385 and *Ahmedbhai* v *Dinshaw*, 12 Ind Cas 813, 13 Bom L R 1061, referred to

A person who has merely obtained in his favour an agreement to sell property cannot file a suit for redemption of a mortgage on it and is, therefore, not entitled to deposit in Court the mortgage-money under s 83, Transfer of Property Act [p 718, cols 1 & 2]

In order to enable a person to sue on an indemnity clause it is not necessary that actual damage should be caused before the party affected can act [p 717, col 2]

Wolmershausen v *Gullick*, (1893) 2 Ch 514, 3 R 610, 68 L T 753 and *Eastern Shipping Co* v *Quah Beng Kee*, (1924) A C 177, 93 L J P C 72, 130 L T 462, 10 T L R 109, relied on

Petition, under s 115 of Act V of 1908, praying the High Court to revise the finding of the Court of the Temporary Subordinate Judge, Devakottah, in O S. No. 6 of 1921, dated the 6th September 1924.

Messrs. *A. Krishnaswamy Iyer* and *M. Patanjali Sastri*, for the Petitioner.

Messrs. *A. Srinivasa Iyengar* and *S R. Muthuswamy Iyer*, for the Respondents.

JUDGMENT.—This is an application to set aside the order of the Subordinate Judge who dismissed the suit as against the second defendant holding that he was an improper party. The suit was filed by the plaintiff to enforce specific performance of a contract to purchase certain property for Rs. 70,000. There was a mortgage over the property created by the predecessor-in-title of the first defendant, who was the person who contracted to sell the suit property to the plaintiff, for a principal sum of Rs. 50,000. The first defendant denied that the mortgage was binding on the property on the ground that it was a fraudulent and collusive transaction entered into by the predecessor-in-title through whom he claims for the purpose of defrauding the creditors and that any consideration passed for that mortgage. The plaintiff, who had agreed to purchase the properties, got a *varthamanam* letter, Ex. C, whereby the first defendant agreed to indemnify the plaintiff against all claims by third persons. The plaintiff in this suit joined both the first defendant who was the person with whom he entered into the contract to sell, and the second defendant who was the person who claimed as a mortgagee under a mortgage created by the predecessor-in-title of the first defendant for a principal sum of Rs. 50,000 the interest on which would amount to a great deal more, the defendants *inter se* disputing the validity of the mortgage, the first defendant saying that there was no mortgage which can be enforced against the property and the second defendant that it was a valid mortgage.

Now the difficulty in this case is as to what the plaintiff has to do? If the second defendant is discharged from the suit, the plaintiff would be in the position of having to pay the second defendant the full mortgage-money which the first defendant may draw out, and the day after there might be a suit against the plaintiff on the mortgage under which the second defendant claims, and, if the first defendant's case that the mortgage was fictitious or a sham transaction is not true, then the plaintiff would have to pay that amount over again. It was suggested that the plaintiff might pay the money in Court under s 83 of the Transfer of Property Act and leave it to the defendants to fight out the question; but the trouble is that the plaintiff on the date of the suit was merely an individual in possession of an agreement to sell and s. 54 of the Transfer of Property Act says that a contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties and that it does not of itself, create any interest in or charge of such property; the plaintiff, therefore, is a person who, by reason of the agreement to sell, has no interest in the property.

As regards the paying of money into Court under s. 83, the section states that

the person who can deposit in Court would be a person who could file a suit for redemption. It says that the mortgagor or any other person entitled to institute such suit (that is a suit to redeem) may deposit the money into Court. Section 91 enumerates the persons who may redeem and a person who has merely got an agreement to sell the property does not fall under any of these categories. So that, the remedy under s. 83 is not open to the present plaintiff.

Turning to the Specific Relief Act, we find in cl (c) of s. 27, (which states against whom a contract can be specifically enforced) that it can be enforced against "any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant." In this case the first defendant, if his case is true, can file a suit against the second defendant to have that mortgage declared invalid and not binding, so that he can displace a title which was created by his predecessors in-title Section 27, therefore, seems to me to provide for a case like the present and enable the plaintiff to file a suit against the first defendant who executed the agreement to sell and the second defendant who claims under a title of the first defendant, which title the first defendant can file a suit to displace, on the ground that it was a fraudulent transaction brought about to defraud the creditors and that no consideration passed therefor. It seems to me that, in a case like the present, the only convenient course would be to allow both the first defendant, who executed the agreement, and the second defendant, who claims under an encumbrance, to be joined as parties, whereby the dispute between the person who claims an interest in the property as a mortgagee may be settled. That is the only safe way of keeping the plaintiff really indemnified. In that suit if it is decided that the mortgage is valid, the money which the plaintiff has paid into Court under the decree would be appropriated in such a way as to keep the plaintiff free from all future troubles. I see very little justice in making the plaintiff, in a suit like this, pay the money into Court, and allowing the defendant to draw the money and then leaving the plaintiff at the mercy of the person who claims under a mortgage which he can enforce later on with interest for the intervening period, for that would be the result of striking out the second defendant in a case like this and letting the suit to proceed against the other party.

Reference was made to the fact that in the *varthamanam* letter there is actually a promise to indemnify the plaintiff against any loss ultimately sustained, and that, till the loss is sustained, the plaintiff has to pay the money and take his chance of getting it back or not under the indemnity clause. I think the decisions cited by Mr. Patanjali Sastri, are in favour of the view that it is not necessary that actual damage should be caused before the party affected can act. In *Wolmershausen* v *Gullick* (1) and *Eastern Shipping Co* v *Quah Beng. Kee* (2) the person who was ultimately to pay was made a party The case of the plaintiff here is this He has got an agreement to sell, that the person who has got to sell denies that there is any mortgage on the property which is binding on it, and there is the second defendant who claims under a mortgage not executed by a stranger claiming a paramount title but by the predecessor-in title of the first defendant. There is also an indemnity clause in the *varthamanam* letter saying that he should be indemnified against any loss he may sustain if rival claims were established. Now, the plaintiff naturally says "I am ready to pay money to the first defendant as I am bound to do under the contract. If there is any mortgage, I am entitled to see that the money is paid to the discharge of the mortgage, so as to give me a clear title. Therefore let that question be decided before the money is paid into Court." Clause 18 (c) of the Specific Relief Act says.—"Where the vendor professes to sell unencumbered property, but the property is mortgaged for an amount not exceeding the purchase-money, and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a conveyance from the mortgagee." I see there is nothing either in justice or in equity to compel this to be done by a separate suit, and where the vendor says that there is no mortgage which he has to redeem and that the mortgage set up was a sham transaction, I see nothing to prevent that question being tried if the suit for specific performance itself by

(1) (1893) 2 Ch. 514, 3 R. 610, 68 L T 753.
(2) (1921) A C. 177, 93 L. J. P. C. 72, 130 L. T. 162; 40 T. L. R. 109.

making the person who claims a title a party to that suit, where that party claims under a sale created by the vendor's predecessors-in-title. Having regard to these considerations it seems to me that, in cases like the present, the just and proper course will be to implead the person who claims to be a mortgagee and to adjudicate on all these questions in the suit itself so as to enable the purchaser to be free from all future risk and liability. Unless I am compelled to hold by any provisions of the C. P. C., or the Specific Relief Act that such a suit would be bad, I do not see why the most general principles as to not making persons not parties to a contract parties should stand in the way. There can be no objection to the general rule that persons who do not claim under the parties to a contract and are strangers to it should not be made parties There is also the other rule that persons claiming adversely to both the parties to a suit for specific performance or for redemption of a mortgage ought not to be made parties. Applying these general principles to the facts of a case like the present it is difficult to see how it can be said that a person, who claims under a mortgage created by the predecessor-in title of the person who agrees to sell, claims an interest which is hostile to both parties or that he is a person who ought not to be joined under any provisions of the C, P. C. The Specific Relief Act makes ample provision for protection of the interests of the person who agrees to buy the property subject to encumbrances. Reference was made by the respondent to the case reported as *Bugata Appala Naida* v. *Chengalvala Jogiraju* (3). That was a case where a suit for specific performance was filed against a person who agreed to sell and against a mortgagee on a mortgage created by the person who contracted to sell the property. The mortgage was with possession. The learned Judges in that case stated that there was misjoinder as regards the mortgagee dealing with the disputes between the mortgagee and the mortgagor. They say "Further as the 1st defendant now disputes the validity of the mortgage, the amount due thereunder will be paid into Court by the plaintiff under s. 83 of the Transfer of Property Act, and if, within three months, the 1st defendant has not taken proceeding to set aside the mortgage and to establish his right to the money, it will be paid over to the mortgagees." But the learned Judges unfortunately failed to see that s. 83 would not cover a case like that, because the vendee (the plaintiff) could not pay the money into Court under that section as he had no right to redeem the property. With great respect, it seems to me that that remedy would not help the parties in this case, because they may be met by the objection that the money could not be paid into Court under s. 83. Cases have been referred by the respondents' Vakil which relate to paramount titles set up by a person not a party to the contract, for example, *Howard* v. *Miller* (4). That was clearly a case where the person claiming the property was not a party to the contract but a person who claimed adversely both to the vendor and to the vendee. The cases reported as *Rangayya Reddi* v. *Subramanya Aiyar* (5) and *Ahmedbhai* v. *Dinshaw* (6) are cases where joint family property was agreed to be sold, and it was held that the co-owners who disputed the validity of the transaction were not proper parties. The claim was by persons not parties to the contract but by persons who claimed adversely both to the person who contracted to sell and to the person who contracted to buy. I do not think that these cases afford much help in a case where there is a mortgage created by the predecessor-in-title, which mortgage is attacked, and there is a dispute between the vendor and the vendee as to the validity of that mortgage. It seems to me that considerations of justice and equity demand that in such a case there should be one suit filed to adjudicate all matters in dispute and, as I find no decided cases which actually decide the present question, I do not see why the suit as framed should not go on.

I reverse the order of the Subordinate Judge and direct that he proceed to try the suit as framed according to law. It will be open to him in the process of the suit to direct any monies which the parties are legally bound to pay to be paid into Court and to pass such orders as to taking security or on payment as he thinks fit.

(3) 32 Ind. Cas. 237; (1916) 1 M. W. N. 77.

(4) (1915) A. C. 318; 84 L. J. P. C. 49; 112 L. T. 403.

(5) 40 Ind Cas. 429; 40 M. 365; 32 M. L. J. 575; 5 L. W. 797; 21 M. L. T. 385.

(6) 12 Ind. Cas. 813; 13 Bom. L. R. 1061.

I allow the petition with costs against the second respondent.

V. N. V. *Petition alloued.*
N. H.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL No. 260 OF 1924.
April 30, 1925.
Present.—Mr Justice Das
MAUNG MYA DIN—APPELLANT
versus
MAUNG YE GYI AND ANOTHER—RESPONDENTS.

Buddhist Law, Burmese—Adoption—Minor, whether can adopt

Adoption is a contract under which a person takes another with certain objects and confers certain rights Hence, to be able to adopt a person must be of age and able to contract A minor is not, therefore, legally empowered to adopt any person

Second appeal against the decree of the District Court, Henzada, in Civil Appeal No. 148 of 1923.

Mr. *Sen*, for the Appellant.

Mr. *Kyaw Htoon*, for the Respondents

JUDGMENT.—The appellant in this case filed a suit for possession of two pieces of land belonging to his step-sister Ma Ngwe Bwin. The lands in question were in the possession of the maternal aunt of Ma Ngwe Bwin. She resisted the claim of the plaintiff on the ground that she had adopted Ma Ngwe Bwin when Ma Ngwe Bwin was seven months old, and that, therefore, she was entitled to these pieces of land as heir of Ma Ngwe Bwin, Ma Ngwe Bwin having died without any children or other direct heirs.

If Ma Ngwe Bwin had been adopted by the defendant, Ma Nyun, then it is admitted that Ma Nyun would be entitled to the estate of Ma Ngwe Bwin.

Both the lower Courts held that Ma Ngwe Bwin had been adopted by the defendant, and, therefore, dismissed the plaintiff's claim.

Ordinarily these findings would be binding on this Court as two concurrent judgments, but both Courts have overlooked the fact that, at the time of the alleged adoption, Ma Nyun was, according to her own statement, only 15 years old, living with her parents.

Ma Nyun's case is that it was then that she adopted Ma Ngwe Bwin with a view to inherit.

I am of opinion that a minor cannot adopt any person To be able to adopt a person must be of age, and able to contract. Adoption, after all, is a contract under which a person takes another with certain objects, and confers certain rights, and I do not think that a minor is legally empowered to adopt any person.

No evidence of notoriety has been produced in this case The only evidence regarding the adoption is the giving and taking of the child, who was at that time seven months old, by Ma Nyun, and the child's living with Ma Nyun together since. There is nothing extraordinary in a child living with an aunt and grand-mother on the death of her own mother

There is also another fact which goes to show that there could not have been any adoption. It is admitted that Ma Ngwe Bwin inherited a quarter share of her father's estate on his death. It is impossible to believe that, if Ma Ngwe Bwin had been adopted, she would have been allowed to take a share in the natural father's estate

Under these circumstances I must hold that Ma Nyun was incapable of adopting Ma Ngwe Bwin at the time, she says she did, and that Ma Ngwe Bwin had not any property by her.

I, therefore, set aside the decrees of both the Courts, and the plaintiff will get a decree for possession of 12 85 acres of paddy land as claimed in the plaint.

The defendants claim having spent some money for the funeral expenses of Ma Ngwe Bwin, and also claim that Ma Ngwe Bwin owed them some money. These claims of the defendants cannot be gone into in this suit, but must be tried in a separate suit If the defendants have any such claim they are at liberty to file a suit for the recovery of it from the estate of Ma Ngwe Bwin.

The plaintiff has failed to prove that the defendant has received the rental of the paddy land, namely, 220 baskets of paddy, and that part of his claim will be dismissed. The plaintiff will get costs in all Courts.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 90 OF 1924.

October 9, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Waller.

MULUGU CHENGAYYA—PLAINTIFF—APPELLANT

versus

ARUVELU DEVASANAMBAGARU AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law Joint family - Alienation by manager —Failure to describe himself as such—Interest conveyed

Where a person purchases property from a *de facto* manager of a joint Hindu family and there is nothing in the document to show that the manager conveyed only his share or that he reserved the share of anybody from being conveyed, both the parties to the conveyance must be presumed to have intended that the interest of the whole family should be conveyed by it [p 720, col 2]

The mere fact that the vendor did not describe himself as managing member is not a circumstance which should be taken as militating against such presumption [*ibid*]

Balwant Singh v *Rev. Rockwell Clancy*, 11 Ind Cas 629, 34 A 296 at p 298, (1912) M W N. 462, 11 M L T. 344, 9 A L J. 509, 15 C. L. J. 475, 16 C W N 577, 23 M L J 18; 14 Bom L R 422, 39 I A. 109 (P C), distinguished

Letters Patent Appeal against the judgment and decree of Mr. Justice Krishnan, dated the 12th March 1924, in S. A. No. 895 of 1921, preferred against the decree of the Court of the Subordinate Judge, Chittor, in A. S. Nos. 46 and 47 of 1920, preferred against that of the Court of the District Munsif, Tirupati, in O. S. No. 1016 of 1914.

Mr. *B. Somayya*, for the Appellant.

Mr. *N. Chandrasekhara Iyer*, for the Respondents.

JUDGMENT—The question in this appeal is whether the plaintiff's share was sold by the 6th defendant to the 1st defendant under sale-deeds Exs. VII and III. The contention of Mr. Somayya for the appellant is that the 6th defendant sold the property as his and that he did not sell the property as the manager of the joint Hindu family and, therefore, he could not have validly conveyed the share of the plaintiff. He places great reliance upon the evidence of P. W. No. 3, the son of the 1st defendant. In his evidence he stated that it was believed at the time of the sale that the plaintiff had been adopted into another family. From this the appellant wants us to infer that the 6th defendant sold only his share of the family property. The circumstances are these. The plaintiff and the 6th defendant are brothers. The property of the family was sold for paying off the debts of their father and in the documents there is no mention that the right of the 6th defendant alone was sold. No doubt there is no mention in it that the 1st defendant conveyed the properties under Exs. VII and III as managing member of the joint Hindu family. But the question is where the *de facto* manager of a joint Hindu family conveys the property without any reservation and without restricting the right conveyed to his own share, whether the Court should presume that the vendee contracted to buy and the vendor contracted to sell the interest of the whole family in the property The proper presumption in such a case would be that where a vendee firm purchases property from a *de facto* manager of the joint Hindu family and there is nothing in the document to show that the manager conveys only his share or that he reserves the share of anybody from being conveyed, both the parties to the conveyance intended that the whole interest of the family should be conveyed by it. Here in this case there is an additional circumstance that the debt for which the sales were effected was a debt binding both upon the plaintiff and upon 6th defendant. The purpose being one which could bind both the plaintiff and the 6th defendant, the mere fact that the vendor did not describe himself as the managing member of the joint Hindu family is not a circumstance which should be taken as militating against the presumption that what the *bona fide* purchaser bought was the whole interest of the joint family in the property conveyed to him. Mr. Somayya places great reliance upon *Balwant Singh* v. *Rev. Rockwell Clancy* (1). The facts of that case are different from those of the present In that case the vendor claimed the property as impartible property belonging to him alone. It was held that he could not have intended to convey the interest of the younger brother whose right he denied in the document itself. Their Lordships of the Privy Council found that the brother was a minor at the time and, therefore, his consent to the sale was of no avail to the vendee. They also found that the mortgage was not made by Sheoraj Singh as the manager of the

(1) 14 Ind. Cas 629; 34 A. 296 at p 298; (1912) M. W N 462, 11 M L T. 344· 9 A. L J 509; 15 C L J. 475; 16 C. W. N. 577; 23 M. L. J. 18; 14 Bom. L. R, 422; 39 I. A. 109 (P. C.).

family or in any respect as representing Maharaj Singh. Here when the 6th defendant conveyed the property, he did not deny the right of the plaintiff, nor did he hold out that he was the only person interested in the property. The case in *Ammani Ammal* v. *Ramasami Naidu* (2) does not help the appellant. It is unnecessary to consider the cases quoted by Mr. Chandrasekhara Iyer such as *Maharaj Singh* v. *Balwant Singh* (3), *Gottukkula Surapa Raju* v. *Gottumkkula Venkayya* (4) and *Audimula Mudali* v. *Alamalammal* (5) in the view we have taken of the case. We consider the judgment of the learned Judge to be correct and dismiss the Letters Patent Appeal with costs ftwo sets one to the 1st defendant and the other to the 5th defendant's legal representatives.

V. N. V. *Appeal dismissed.*

N. H.

(2) 51 Ind. Cas 57; 10 L W 75, 37 M. L J. 113; (1919) M. W. N 866.

(3) 28 A 508 at p 517, 3 A L J 274, A. W N. (1906) 117.

(4) 32 Ind. Cas. 802, (1915) M. W. N. 908

(5) 36 Ind. Cas. 365, 4 L W. 126, (1916) 2 M. W. N. 115.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1059 OF 1924.

December 18, 1924.

Present:—Mr. Justice Harrison.

THAKAR SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

INDAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharers—Nature of right in joint property—Sale of definite portion by one—Rights of others

So long as partition has not taken place, each co-sharer has a share in every fragment and portion of the joint holding and if his rights are infringed by his co-sharer alienating a definite portion of the joint holding, he is entitled to a decree for a declaration that he is joint owner of the portion alienated. [p 722, col. 1.]

Lachman Das v *Sunder Das*, 124 P. R. 1879, referred to.

Second appeal from a decree of the District Judge, Lahore, dated the 5th January 1924, modifying that of the Sub-Judge, Third Class, Lahore, dated the 29th January 1923.

Lala *Daulat Ram*, for the Appellants.

Malik *Mahomed Hussain*, for the Respondents.

JUDGMENT.—Indar Singh, who owns half of a joint holding, executed a sale-deed conveying a definite portion of this undivided joint holding to his vendee Ganda Singh. The plaintiffs being the owners of the other half brought this suit for possession of one half of the area sold, and for a declaration that regarding the other half the alienation would not affect their reversionary rights. The suit was dismissed by the Trial Court, and on appeal the District Judge held that Rs. 100 only of the consideration money had passed, and was shown to have been for necessity, and agreed with the lower Court in holding that the suit by the co-sharers for possession of one half of the area sold did not lie and that their only remedy was for partition.

The plaintiffs have appealed from both points. As regards the item of Rs. 100, which is recited to have been required for the payment of an old mortgage, they challenge the truth of the allegation that there ever was a mortgage. It is shown by the Revenue Records that in 1897 a mutation was entered regarding a mortgage effected by the father of the present plaintiffs in favour of the present vendee, and that there was not a mere casual order is shown by the fact that whereas the father of the present plaintiffs purported to charge the share of his nephews also the mortgage was disallowed so far as those nephews were concerned. This creates a strong presumption as to the genuineness of the mortgage Counsel points out that the special *Kanungo* speaks of the mortgage as of the year 1892, but it is not clear whether this was the same mortgage, or whether there has been some error in the description and the date given. He further relies on the fact that the sale deed mentions a deed, whereas the mortgage of 1897 was oral. I think this is all very immaterial, and find it is fully proved that a mortgage for a small sum was effected by the father of the plaintiffs and was a valid charge, and after this lapse of time it is impossible to effect any further proof of necessity beyond its execution.

As to the second point, Counsel relies on *Lachman Das* v. *Sundar Des* (1) and Counsel for the respondent has not been able to show any sort of authority against this clear and, I think, self evident exposition of

(1) 124 P. R. 1879.

the law. So long as partition has not taken place each co-sharer has a share in every fragment and portion of the joint holding, and if his rights are infringed by his co-sharer alienating or selling them, he is entitled to a decree at any time to the effect that he is a joint owner of any portion alienated, sold or charged. This is not the same thing as saying that he is entiteld to physical possession of that portion without partition, but he is always entitled to his decree.

I, therefore, accept the appeal in so far only as to give the plaintiff a decree for joint possession of the land in suit, *i.e.*, for half of the land in suit. Under the circumstances, I order that the parties bear their own costs. For the rest the appeal is dismissed.

R. L. *Appeal dismissed.*
N. H.

OUDH CHIEF COURT.

FIRST EXECUTION OF DECREE APPEAL No. 62 OF 1925
November 3, 1925.
Present:—Mr. Justice Ashworth and Mr. Justice Misra.

SHANKAR BAKSH—JUDGMENT-DEBTOR—APPELLANT
versus
Musammat TALUQDEI—DECREE-HOLDER—RESPONDENT.

Decree, execution of—Decree, whether can be questioned

Parties in an execution case cannot call in question the validity of a decree as actually framed or impugn the jurisdiction of the Court that framed it. Nor is it open to a party in an execution case to go behind the plain and obvious meaning of a decree. [p 723, col. 1.]

Hemanta Kumari Debi v *Midnapur Zemindari Co*, 53 Ind Cas. 534; 47 C. 485, 37 M. L J 525, 17 A. L. J. 1117; 24 C W N 177, (1920) M. W N 66, 27 M. L. T. 42, 11 L W. 301, 46 I. A. 140, 22 Bom. L. R 488 (P C.), referred to

Appeal from an order of the Subordinate Judge, Bahraich, in Miscellaneous Suit No. 129 of 1925, dated the 29th August 1925.

Mr. *M. Wasim*, for the Appellant.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—This appeal arises out of an order of the Subordinate Judge of Bahraich in an execution case dismissing the appellant's objection to execution of a certain decree, dated 21st July 1922. The facts of the case are as follows: One *Musammat* Taluqdei was the donee under a deed of gift executed by Thakur Mandhatta Singh her father. The present appellant is the son of Mandhatta Singh. He brought a suit for a declaration that the deed of gift was void. That suit was compromised. The compromise was to the effect that the deed of gift should be declared invalid, but that *Musammat* Taluqdei should be given land amounting to 75 *bighas* out of the property comprised in the deed of gift, and also out of other property. The compromise provided for a Commissioner, one Babu Sheo Gopal, allocating specific plots to the lady. On this compromise being filed a preliminary decree was drawn up stating the terms of the compromise, and directing the person named to select the plots. After he had selected the plots, a further and final decree was passed awarding the lady *Musammat* Taluqdei the specific plots. The decree ran in the following terms:

"And in accordance with the conditions entered in the report of the Commissioner, the defendant No. 1 be given possession over these plots."

The lady put in an application for execution of this decree by delivery of possession. An *ex parte* order was passed directing that possession should be given to her and possession was in fact given to her. The present appellant was, however, given notice by the Court, and, in response to this notice, he appeared in Court and objected to the delivery of possession being given, on the ground that the decree should not have incorporated any order for the delivery of land not comprised in the deed of gift, which formed the subject-matter of the suit.

The Subordinate Judge has written a lengthy judgment considering the law upon the subject. We do not consider it necessary to refer to any decision except that of *Hemanta Kumari Debi* v. *Midnapur Zemindari, Co.* (1). On pages 497 and 496* their Lordships of the Privy Council drew attention to the terms of s. 375 of the C. P. C. (Act XIV of 1882) which have been replaced by O. XXIII, r. 3 (Act V of 1908). Their Lordships pointed out that it was not proper for a Court to allow the opera-

(1) 53 Ind. Cas. 534; 47 C 485; 37 M. L. J. 525; 17 A. L. J. 1117; 24 C. W. N. 177; (1920) M. W. N. 66, 27 M L. T. 42; 11 L. W. 301; 46 I. A. 240; 22 Bom. L. R. 488 (P C.)

*Pages of 47 C.—[*Ed.*]

tive part of a decree to go beyond the actual subject-matter of the existing litigation, and they added that it might be that a decree which infringed this rule was incapable of being executed outside the lands of the suit.

We do not consider that this last remark throws any doubt on the well established view that parties in an execution case cannot call in question the validity of a decree as actually framed or impugn the jurisdiction of the Court that framed it.

An attempt has been made by the appellant's Counsel to construe the final decree of which execution has been allowed as merely a declaratory decree in regard to the land which was not comprised in the deed of gift called in question in the suit. The language, however, of this final decree appears to us to be plain, and to direct that possession should be given. It cannot be construed as merely declaring title on the basis of the compromise. It is not open to a party to an execution case to go behind the plain and obvious meaning of a decree.

For the above reasons we dismiss this appeal with costs.

N. H. *Appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS APPEAL No 1316 OF 1924.

January 23, 1925.

Present:—Mr. Justice Harrison.

BANTU *alias* HAR BHAJAN DAS—PLAINTIFF—APPELLANT

versus

LEHNA DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Declaration, suit for—Temporary injunction, grant of

A temporary injunction can be granted in a suit for declaration [p 724, col 1]

Bishun Prashad Pathak v *Sashi Bhusan Misra*, 73 Ind Cas 294: A. I R 1923 Pat 133, 2 Pat L R 17, distinguished

Kanshi Ram v. *Sharf Din*, 63 Ind. Cas. 161, (1922) A I R (L) 356, followed

Appeal from an order of the Senior Sub-Judge, Sheikhupura, dated the 24th March 1924.

Lala *Badri Das*, R. B., for the Appellant.

Mr. *Mukand Lal Puri*, for the Respondents.

JUDGMENT.—The question in this appeal is whether the Senior Sub-Judge has passed a suitable and proper order under the circumstances of the particular case, which was before him. One Bantu minor claiming to be the fourth *chela* of one Nihal Das deceased and in virtue of an oral gift in his favour brought this suit against certain individuals and the Shromani Gurdwara Probhandak Committee for a declaration that he was entitled to a fourth share as the joint holding. By a separate application he prayed for an injunction restraining the defendant Committee from realising rents of the land in suit from the tenants. The findings of the Senior Sub-Judge were that at the time the suit was instituted, namely, 27th November 1922, the plaintiff was actually in possession through his tenants and this in spite of the fact that on the 24th of October 1922 the Collector had held that the Committee was in possession The Court further held that subsequent to the institution of the suit, the defendant Committee had taken possession of a part of the land and that the tenants were willing to pay rent to either side if and when a decision were given by a competent authority as to who was the landlord. The Senior Sub-Judge held, therefore, that the suit for a declaration lay, and that on these facts the injunction prayed for should not be given but he ordered the defendant Committee to give security for Rs. 3,000, per annum apparently for an indefinite time and until the case was finally decided for the re-payment of any rents realised by them He pointed out that difficulties must arise at the time of making recoveries that the plaintiff was a minor and the Committee was a registered body with no funded capital, but he passed this order as he stated that he apprehended that the grant of the injunction prayed for was likely to lead to the mismanagement of the property and other disputes. At the same time he passed a further order directing the plaintiff to give security for a sum of Rs. 1,500 for the costs of the case. No order was passed calling upon the defendant to give such security although the Sub-Judge held that the defendants had no property beyond the income derived from religious institutions which was spent on certain objects as soon as it was realised.

Counsel for the plaintiff appellant points out that under O XXV, r. 1. security could not be demanded from him, the plaintiff, as he has a residence in British India. This is so and I set aside so much of the

order as refers to the plaintiff. So far as the defendant is concerned it is urged that because it is laid down in *Bishun Prashad Pathak* v. *Sashi Bhusan Misra* (1) that a temporary injunction should not be granted in a suit in which the ultimate result would not be the granting of a permanent injunction or in other words that because the same principles govern the granting of a temporary injunction as the granting of a permanent injunction it follows that a temporary injunction can never be granted in a suit for a declaration. This is going too far and in *Kanshi Ram* v. *Sharf Din* (2) a temporary injunction was so granted in a suit for a declaration. The defendant relies chiefly on the fact that mutation has been recorded in his favour but this, I think, goes for very little, if anything against the finding of the Sub-Judge that the plaintiff was in possession at the time of the institution of the suit and the conduct of the defendant in ousting him to the extent of collecting rents from his tenants shows that he is not entitled to any particular sympathy. This case has already lasted for two years and may be expected to last very much longer. A suggestion made that both parties should agree to pay all rents realised by them into Court till the decision of the case is not acceptable to the defendant and under the circumstances it appears to me that the peculiar facts of this case do justify the granting of the injunction sought. I am not passing any order as to possession being given to the plaintiff by the defendant Committee, there is no question of physical possession by either party. The injunction I grant is to restrain the defendant Committee from realising any rents due from the tenants who are in cultivating possession of the land in suit.

I set aside both orders demanding security.

The costs of this appeal will be paid by the respondent Committee to the appellant.

N. H. *Order accordingly.*

(1) 73 Ind. Cas. 294; A. I. R. 1923 Pat. 133, 2 Pat. L. R. 17.
(2) 66 Ind. Cas. 161; A. I. R. 1922 Lah. 356.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 465 OF 1922.
September 23, 1925.
Present :—Mr. Justice Devadoss and Mr. Justice Waller.

KOMARASAMI CHETTI—PLAINTIFF—APPELLANT
versus
SUNDAR MUDALIAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O XXII, r. 9 (2)—Abatement, application to set aside—Delay—Sufficient cause—Appellate Court, interference.

Where on an application to set aside an abatement, the Court after a consideration of all the circumstances holds that the delay in making the application has not been satisfactorily accounted for and dismisses the application, the Appellate Court will not interfere with the order of dismissal.

Appeal against an order of the District Court, South Arcot, in I. A. No. 84 of 1922, in O. S. No. 11 of 1918, on the file of the Court of the Additional Temporary Subordinate Judge, Cuddalore (O. S. No. 10 of 1916 on the file of the District Court, South Arcot).

Mr. *T. V. Muthukrishna Iyer*, for the Appellant.

Mr. *C. Padmanabha Iyengar*, for the Respondents.

JUDGMENT.—The only question in this appeal is whether the delay in presenting the application to the lower Court for setting aside the abatement should be excused or not. The appellant is the adopted son of the decree holder who died on the 30th January 1919. The decree was passed on the 12th November 1918. The appellant applied for execution of the decree on the 2nd November 1921. The District Judge held that there was no executable decree. Thereupon the appellant filed the present application out of which this appeal arises. His contention is that he was mistaken as regards the nature of the decree and he thought it was an executable decree and that was why he did not make the application before November 1921, for setting aside the abatement. He attained majority on the 4th June 1921.

From 4th June 1921 to 2nd November 1921 it does not appear that he consulted any Vakil and he was misled by reason of the advice given by the Vakil. It is suggested on behalf of the respondent that, inasmuch as the time for setting aside the abatement had long passed, the appellant wanted to try and induce the Court to hold that the decree was an executable one and when he

found the Court would not uphold his contention, he filed this application. There may be some truth in this suggestion but we are not satisfied that the appellant has satisfactorily explained the delay of five months in presenting this application. The lower Court on a consideration of the circumstances has refused to excuse the delay in the case. We are not prepared to differ from the finding of the lower Court that the appellant has not sufficiently explained the delay. We, therefore, dismiss the appeal with costs.

V. N. V.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 438 OF 1924.

December 23, 1924

Present:—Mr. Justice Scott-Smith.

BUTA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GHULAM MUHAMMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Exchange Widow's powers—Suit for declaration challenging exchange—Second appeal—Certificate, whether necessary—Punjab Courts Act (VI of 1918), s 41

In a suit for a declaration that an alienation effected by a widow is without necessity and will not affect the reversionary rights of the plaintiffs, a second appeal is competent without a certificate, as no question of existence or validity of a custom is involved therein, because admittedly a widow cannot effect an alienation except for necessity

Customary prohibition against alienations by a widow is not confined to cases of sales and mortgages but applies to those of exchanges as well

Nihali v *Lehna*, 9 Ind Cas 675, 2 P R 1911; 46 P. L. R. 1911, 27 P. W R 1911, referred to

Second appeal from a decree of the District Judge, Jullundur, dated the 22nd December 1923, reversing that of the Munsif, First Class, Nawan Shahr, dated the 17th November 1922.

Sheikh *Azim Ullah*, for the Appellants.

Mr. *Anant Ram*, for the Respondents.

JUDGMENT.—This is a second appeal from the order of the lower Appellate Court dismissing the appellants' suit for a declaration that an exchange of certain land effected by *Musammat* Niamte, the widow of their collateral, should not affect their reversionary rights on the ground that the exchange had not resulted in any detriment to the estate. Counsel for the respondents raised a preliminary objection to the effect that no second appeal was competent in the absence of a certificate; but there is no question as to the existence or validity of any custom in this appeal. Admittedly a widow cannot effect an alienation except for necessity when the case is governed by custom. It is explained in previous rulings of this Court and the Chief Court. The land given in exchange was one plot near the village *abadi*, whereas that received in exchange consisted of three plots at some distance from the *abadi*, and, therefore, *prima facie* it appears that the land received in exchange is less valuable than that given. But even supposing that there was no detriment to the estate still the widow could only make an exchange of land for a necessary purpose. It was so pointed out in the case of *Nihali* v. *Lehna* (1), where at page 5* the following passage occurs —

'It is also urged that the customary prohibition against alienations by a widow only applies to cases of sale and mortgage and not to cases of exchange, but no authority in support of this argument is quoted, and, in our opinion, it is necessity alone which can justify any sort of alienation by a widow. We are aware of no authority to the effect that a widow can make exchanges even for improvement. She is bound to preserve the estate, and it appears to us that to allow the proposition that she can effect exchanges for the mere purpose of improving it or getting a large income from it, would be to open the door to all sorts of rash speculations and enterprises which might prove highly injurious or inconvenient to the reversioners."

No authority to the contrary has been cited by Counsel for the respondents. The mere fact that the two appellants' share in the land exchanged will only be very small does not appear to me to affect their rights in any way Moreover, the other reversioners, who did not join in the suit and who have been made defendants pleaded that the exchange was detrimental to their rights.

I, therefore, accept the appeal, and setting aside the order of the lower Appellate Court restore that of the Trial Court decree-

(1) 9 Ind Cas 675, 2 P R. 1911; 46 P. L. R. 1911; 27 P W R. 1911

*Page of P. R. 1911.—[*Ed.*]

ing the plaintiffs' claim with costs throughout.

R. L. *Appeal accepted.*
N. H.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 450 OF 1923.
August 25, 1925.
Present:—Mr. Justice Devadoss
and Mr Justice Waller.

BOHISETTI MAMAYYA—RESPONDENT—APPELLANT
versus
THE OFFICIAL RECEIVER, GUNTUR—PETITIONER—RESPONDENT.

Provincial Insolvency Act (V of 1920), s 53—Fraudulent preference—Intention of insolvent—Creditor's motive, whether material

In a case of fraudulent preference it is not necessary for the Official Receiver to make out that the property alienated was undervalued. The gist of fraudulent preference lies in preferring one creditor to another when the insolvent is unable to meet his liabilities fully

In such a case the Official Receiver has only to make out the intention of the insolvent. The intention or motive of the creditor is immaterial Even if the creditor takes a *bona fide* sale from the insolvent in discharge of a debt to him, that does not make the transaction a valid transaction if the intention or the view of the insolvent is to prefer that creditor to others

Appeal against an order of the District Court, Guntur, dated the 19th April 1923, in I. A. No. 32 of 1922, in I. P. No. 59 of 1918.

Messrs. *S. Varadachariar, K. Ramamurthy* and *K. Kameswara Rao*, for the Appellant.

Mr. *N. Rama Rao*, for the Respondent.

JUDGMENT.—This appeal is against the order of the District Judge of Guntur setting aside the alienation in favour of the appellant made by the insolvent on 29th September 1918 under Ex. I. Mr. Varadachariar, for the appellants, contends that the sale is a *bona fide* sale for adequate consideration. The learned Judge has attached importance to the fact that the properties sold were undervalued. In a case of fraudulent preference it is not necessary for the Official Receiver to make out that the property alienated was undervalued. The gist of fraudulent preference lies in preferring one creditor to another when the insolvent is unable to meet his liabilities fully. In this case the creditor presented a petition to adjudicate the insolvent on the 19th December 1918 and on the 10th March 1919 the insolvent presented an application for being adjudicated an insolvent. It is also in evidence that the insolvent alienated almost all the properties in his possession between the date of Ex. I and the date on which the petition for adjudication was filed by the creditor. The appellant is a relation of the insolvent, his wife being the niece of the insolvent's wife, and, as the learned Judge remarks, there was no pressure by the appellant on the insolvent for the payment of his debt. The consideration for Ex. I is partly a debt due to the appellant and partly a debt due to the Bank which the appellant was asked to pay. As a considerable portion of the consideration was a debt due to the appellant, the sale to him of the insolvent's property was with a view to prefer him to other creditors. There is another circumstance which also goes to show that the sale was not a *bona fide* sale. The insolvent who sold his dwelling house to the appellant is now in possession of the same under a rental agreement, Ex IX, taken in the name of his son. A person in embarrassed circumstances, who has a number of liabilities to meet does not think of selling his dwelling house first unless it be to put it out of the reach of his creditors. The insolvent sold not only the dwelling house, but also about 21 acres of land and bricks about 50,000 and the standing crops which the learned Judge values at Rs. 750. All these are circumstances going to show that the object of the insolvent was only to prefer the appellant to other creditors. In cases of fraudulent preferences the Official Receiver has only to make out the intention of the insolvent. The intention or motive of the appellant is immaterial. Even if the creditor takes a *bona fide* sale from the insolvent in discharge of a debt to him, that does not make the transaction a valid transaction if the intention or the view of the insolvent is to prefer that creditor to others.

We agree with the learned Judge in holding that the transaction is void as being fraudulent and we dismiss the appeal with costs.

V. N. V. *Appeal dismissed.*
Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1 to 2 OF 1923.

June 22, 1925.

Present :—Mr. Justice Chakravarti.

BAIKUNTHA NATH KAR AND ANOTHER—PRINCIPAL DEFENDANTS—APPELLANTS

versus

ADHAR CHANDRA PAIN—PLAINTIFF AND ANOTHER—*Pro forma* DEFENDANT—RESPONDENTS.

Hindu Law—Minor—De facto *guardian, alienation by, validity of—Burden of proof—Adequacy of price—Court, duty of.*

Under the Hindu Law an alienation of a minor's property by a *de facto* guardian may be valid, if it is otherwise justified Where, however, a *de facto* guardian alienates the minor's property in the presence of a legal guardian, the Court must be satisfied that the legal guardian refused to act for the minor and to protect his interest, and that unless the *de facto* guardian acted for the minor irreparable loss to the minor would have been the result of the inaction of the legal guardian [p 728, col 2, p 729, col 1]

It is not for the person who challenges a sale on behalf of a minor to show that the price was inadequate, it is for the guardian to show that he made all possible endeavours to sell the property at a proper price and that the price which he obtained was the best possible procurable one [p 729, col 2]

In a case where the interest of the minor is concerned, the case ought not to be decided simply on the questions raised by the parties, but the Court has to satisfy itself, in the interest of the minor, that the sale was a proper sale and the Court must insist upon the purchaser to satisfy it that circumstances justifying a sale of the minor's property did really exist [*ibid*]

Appeal against a decree of the District Judge, Bankura, dated the 10th of February 1923, reversing that of the Munsif, Second Court, Bishnupur, dated the 6th September 1922.

Mr. *Mohendra Nath Roy* and Babu *Charu Chandra Ganguly*, for the Appellants.

Babu *Norendra Krishna Bose*, for the Respondents.

JUDGMENT.—The suit out of which this appeal by the principal defendants arises was brought by the plaintiff for a declaration that the lands in suit belonged to him and also for an injunction staying sale of the property in execution of a decree obtained by the defendants for money. The plaintiff alleged that the property in suit consisting of about 3 *bighas* belonged to one Baidya Nath, that Baidya Nath had borrowed Rs. 140 from the plaintiff by signing a *hatchitta* and that on Baidya Nath's death, plaintiff pressed for payment of the money due to him. The father of the widow of Baidya Nath, who was a minor acting as a *de facto* guardian of the widow arranged to pay Rs. 40 in cash and also executed a *kobala* for the disputed lands in favour of the plaintiff in satisfaction of the remaining Rs. 100 of the debt. The plaintiff further stated that he was in possession of the land in suit since the date of his *kobala*, that the defendants after the death of Baidya Nath instituted a suit for money in the Court of the Munsif of Bishnupur, that in execution of the decree obtained by them in that suit the lands covered by his *kobala* were attached and that on such attachment the plaintiff filed a claim in the execution case which, the plaintiff alleged, was not registered for reasons not known to him. The plaintiff, therefore, brought the present suit for the reliefs already stated.

The defendants resisted the plaintiff's claim and challenged the plaintiff's conveyance as a collusive sale without any consideration. The defendants further alleged that the main object of the transfer was to defraud the creditors of Baidya Nath, that the father of the widow of Baidya Nath was not her legal guardian and that there was no necessity for the sale of the property by the minor widow and, therefore, the sale was invalid and that the property as belonging to Baidya Nath was liable to satisfy the decree obtained by the defendants.

The learned Munsif raised several issues of which I shall mention only two :

Is the plaintiff's *kobala* valid, genuine and for consideration ?

Had minor's father any legal right to execute the *kobala* ? Is it valid in law ?

The learned Munsif recorded his findings on the first issue in these terms : "Considering the evidence on the record and the circumstances of this case, I am of opinion that the *kobala* was without consideration and a colourable transfer by which the plaintiff acquired no rights to the disputed land". In arriving at this conclusion the learned Munsif found that no consideration for the *kobala* did actually pass. The learned Munsif disbelieved the payment of Rs. 40 in cash and he also totally disbelieved the story of any debt due under the *hatchitta* which, he found, was not a genuine document. In considering the *bona fides* of the *kobala* the learned Munsif, to quote his own words, said as follows : "It is significant to note that the *kobala*, Ex. 2 was executed under some-

what strange circumstances—and I should say, with some undue haste. Baidya Nath died on 10th *Pous*. The stamp for the *kobala* was purchased on 16th *Pous*, 31st December 1920, and on the very date the *kobala* was executed. Defendants Nos. 1 and 2 instituted their suit on the 3rd January, 1921, and the *kobala* was registered on the 8th January, 1921. The attachment of the property was on 29th January, 1921".

"The *kobala* was, therefore, executed only 5 days after Baidya Nath's death even according to plaintiff's version. I find no explanation for this hurry especially when it appears that Baidya Nath left moveables of considerable value in his shop. Evidently Baidya Nath was a shop-keeper and had a good stock in his shop. Defendants have proved that these articles were sold soon after his death and this *kobala* was executed and also another *arpannama* was executed with respect to other properties of Baidya Nath. These circumstances lead me to think that Ex. 2 was a colourable deed".

The learned Munsif further found that the annual yield of this property was about Rs. 80 a year, and that Rs. 100 for which the plaintiff purchased the property was an inadequate value. The learned Munsif concluded by a finding that the *kobala* was really antedated.

As to the second point, the learned Munsif pointed out that although the father of the minor was not the legal guardian as the brother of Baidya Nath who was the legal guardian did not claim to be the guardian of defendant No. 3, the father although he had obtained no certificate of guardianship under the Guardians and Wards Act was a *de facto* guardian and as such he could legally execute a conveyance, subject to the restrictions which have been laid down in the case of *Hunoomanpersaud Panday* v. *Babooee Munraj Koonweree* (1). On the findings which the learned Munsif had arrived at, he dismissed the plaintiff's suit without entering into the question as to whether there was justifying necessity for a conveyance on behalf of the minors.

On appeal by the plaintiff the learned District Judge has reversed the decree of the Munsif and granted a decree to the plaintiff. The learned District Judge, it appears to me, came to the following conclusions; first, that no adequate motive for collusion on the plaintiff's part with the father of the minor has been disclosed; secondly, that Baidya Nath was indebted to the plaintiff; thirdly, that the price paid for the property was not inadequate; fourthly, that Rs. 40 was paid in cash; that the *kobala* was a genuine transfer as between the plaintiff and the father of the minor on her behalf, although it may be that it was intended to give preference to the plaintiff over the other creditors of Baidya Nath. On these findings the learned District Judge as I have already stated reversed the decree of the learned Munsif and decreed the plaintiff's suit.

On behalf of the defendants-appellants Mr. Roy has contended, first, that the alienation by the father, while the legal guardian was the brother, was invalid; secondly, that the learned District Judge was in error in giving effect to a conveyance by a *de facto* guardian and was in error in doing so without finding that there was any pressure upon the property or that there was any legal necessity for the sale. It was further contended that the learned District Judge's finding that the value of the property was not inadequate was not sufficient in the absence of a finding that the property was sold for an adequate and full price for the benefit of the minors; and it was generally contended that the findings arrived at by the learned District Judge are not sufficient in law to justify the upholding of a sale of the immoveable property by a *de facto* guardian of the minor, especially in view of some of the findings by the Trial Court were not interfered with in appeal.

As to the first point, the learned Advocate relied upon the passage in Trevelyan on Minority at page 93. He also quoted a passage from Macnaughten's Principles of Hindu Law. These authorities merely lay down that husband's heirs are the legal guardians of a minor widow and the father is not. No authority has, however, been cited to show that any alienation if otherwise good is invalid under Hindu Law, simply because the alienation was made by a *de facto* guardian and not by a guardian *de jure*. On the contrary there are authorities which show that an alienation by a *de facto* guardian may be valid if such an alienation is otherwise justified. But in a case like this it is the duty of the *de facto* guardian to satisfy the Court that the legal guardian refused to act for the minor and

(1) 6 M. I. A. 393; 18 W. R. 81*n*; Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R 147.

to protect her interest and that unless the *de facto* guardian acted for her, irreparable loss to the minor would have been the result of the inaction of the legal guardian. In this case Baidya Nath's brother was the legal guardian of the minor widow and was her next reversioner and he was the person most interested in the payment of Baidya Nath's debts. The plaintiff has not given any explanation as to why he approached the minor's father and not her brother-in-law.

As to the other questions raised by the appellants I shall deal with them together and not separately, as it appears to me that the objection really amounts to this. The findings of the learned District Judge are not sufficient for justifying a sale by a *de facto* guardian and that the learned District Judge has failed to appreciate the real points which arise in a case like this and consequently the learned District Judge has not considered them The law as to the power of a guardian of a minor to alienate the property of his ward was clearly and definitely laid down by the Judicial Committee of the Privy Council in the case of *Hunoomanpersaud Panday* v. *Babooee Munraj Koonweree* (1) At page 423* their Lordships observed " The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in a particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by a precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded". Now what are the circumstances of this case. Baidya Nath died on the 25th of January the plaintiff a creditor under a *hatchitta* executed by Baidya Nath pressed for payment of the money, according to the plaintiff, immediately after the death of Baidya Nath and the father of the minor forthwith agreed to execute this conveyance on behalf of the minor and sold 3 *bighas* of paddy lands belonging to the minor. The Munsif found (a finding not set aside by the learned District Judge) that Baidya Nath left considerable moveable properties. The learned District Judge does not consider what pressure was there upon the estate left by Baidya Nath to justify a sale of the immoveable property. It is not shown and in fact there was no time for it, that any attempt was made to pay off the debt by sale of the moveable properties. The onus of proof in a case like this is entirely upon the purchaser to justify the sale. Except proving that he had a claim for Rs. 140 and except showing that he, as a creditor of the dead man, threatened the minor with a litigation before even the period of mourning was over, what real necessity has the plaintiff established for the sale of this land. The guardian has given no explanation as to whether or not it was possible for him to pay this debt out of the moveable properties left by the deceased. We do not find any definite information as to what the value of the stock in the shop of Baidya Nath was ; there is no finding as to what was the benefit which was conferred upon the minor by this sale in haste , nor do we find that the guardian made any attempt to find out if there was any other purchaser willing a pay a higher price. It is not for the person who challenges the sale on behalf of the minor to show that the price was inadequate, but it was for the guardian to show that he made all possible endeavours to sell the property at a proper price and that the price which he obtained was the best possible procurable one In this case there was no time between the death of Baidya Nath and the date of the *kobala* for any such endeavour by the guardian. In a case where the interest of the minor is concerned, the case ought not to be decided simply on the questions raised by the parties, but the Court has to satisfy itself, in the interest of the minor, that the sale was a proper sale and the Court must insist upon the purchaser to satisfy it that circumstances justifying a sale of the minor's property did really exist. In my opinion the mere fact that there was a debt to be paid did not justify the guardian straight off to sell the immoveable property of the minor. The learned Vakil for the respondents relied upon the case of *Adhar Chandra Dutt* v. *Kirtibash Bairagee* (2) But the facts of this case are quite different. The sale was of property in which the minor owned a share in the joint property and the guardian transferred the minor's share along with the other co sharers who were *sui juris* and who

*Page of 6 M I. A.—[*Ed.*]

(2) 6 Ind. Cas 638, 12 C L. J. 586.

considered the sale was necessary and a proper one in the circumstances of the case.

It appears that the fourth issue raised by the Munsif, was " Had the minor's father any legal right to execute the *kobala* ? Is it valid in law? " The view that the learned Munsif took that there was no debt due to Baidya Nath and that the *kobala* was not a genuine document it was not necessary for him to go into this question. But the learned District Judge having overruled the Munsif on that finding ought to have tried this issue Evidently the learned District Judge has overlooked it. I think, therefore, that the learned District Judge should try this issue.

It appears from the judgment of the learned Munsif that the defendants in their defence challenged the conveyance of 3 *bighas* of paddy lands for Rs. 140 on the ground that the price was grossly inadequate. The learned Munsif found that the annual yield of the land was Rs. 80 and, therefore, the alleged consideration was grossly inadequate. As I understand the finding of the learned District Judge he thinks, in spite of the admission of the plaintiff in possession, that the income was about Rs. 24 per year and that the price was not inadequate. Here also the learned District Judge missed the real point It was for the plaintiff to show that the price was adequate and the best obtainable. Here the price was less than six times the income of this land. In Bengal so far as I know any price less than 20 times of the income would be inadequate. The plaintiff was to show that the price paid was fair considering the price prevalent in the neighbourhood.

On the whole, therefore, I think that the learned District Judge has not approached the case from a proper point of view and has misapprehended the real point for trial and has altogether omitted to try the main issue in the case. For the reasons given in my judgment, I think the judgment and decree of the learned District Judge should be discharged and the appeal should be re-heard in the light of the observations made in my judgment.

The appellants are entitled to the costs of this appeal and other costs will abide the result.

Appeal allowed : Case remanded.

Z. K.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 936 OF 1923.

August 13, 1924.

Present:—Mr. Justice Jackson.

POTHI ANNAPURNAYYA—PLAINTIFF —RESPONDENT—PETITIONER

versus

POTHI NAGARATNAMMA MINOR BY NEXT FRIEND AND FATHER NUNE SUBBAYYA AND OTHERS—PETITIONERS —DEFENDANTS NOS. 1 TO 4—RESPONDENTS.

Court Fees Act (VII of 1870), s 7 (iv) *(c)—Suits Valuation Act (VII of 1887), s 8—Civil Procedure Code (Act V of 1908), O. VII, r 1– Suit for injunction and appointment of Receiver—Valuation for purposes of jurisdiction and Court-fee– Court-fee payable.*

Order VII, r 1, C. P C, requires that a plaint shall contain a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of Court-fees It is not contemplated that the subject-matter shall be given two values, one purely arbitrary and fanciful for the purposes of jurisdiction, and one in strict conformity to the real value for the purposes of Court-fees [p 731, col 1]

In either case the valuation should conform to reality Therefore when a plaint contains a valuation for purposes of jurisdiction it is a natural assumption that the same valuation would apply, if it were necessary to have a valuation for an *ad valorem* Court-fee. [*ibid,*]

A suit for an injunction and the appointment of a Receiver falls within the purview of s 7 (*iv*) (*c*) of the Court Fees Act, and under s 8 of the Suits Valuation Act, the value of such a suit for purposes of Court fees and jurisdiction must be the same. [p 731, cols 1 & 2]

Where in such a suit the plaint does not state the valuation put by the plaintiff upon the relief sought, and there is no valuation for the purpose of computing *ad valorem* Court-fees, the value for the purposes of jurisdiction must also be taken to be the value for purposes of Court-fees [*ibid.*]

Petition under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, to revise an order of the Court of the Subordinate Judge, Bezwada, in C. M. P. No. 741 of 1923 in O S. No. 6 of 1923.

Mr. *P. Satyanarayana*, for the Petitioner.

Mr. *P. Somayya*, for the Respondents.

JUDGMENT.—Petition against the order of the Court of the Subordinate Judge of Bezwada on C. M. P. No 741 of 1923 in O. S. No. 6 of 1923. Petitioner filed a plaint valued for the purposes of jurisdiction at Rs 10,000 and with a Court-fee of Rs. 100 on the assumption that he was at liberty to put his own value on the suit which was for the appointment of a Receiver, and for an injunction restraining the defendant a widow from wasting her estate. In the light of *Nandan Mal* v. *Salig Ram* (1) and *Aruna-*

(1) 63 Ind. Cas. 34 at p. 36; A. I. R, 1922 Lah, 233.

chalam Chetty v. *Rangasawmy Pillai* (2) the learned Subordinate Judge has held that plaintiff must pay an *ad valorem* fee and that is now admitted. The order concludes: "In the present case he has valued the suit at Rs. 10,000 for purposes of jurisdiction. So he cannot give another valuation for purposes of Court-fee". To this, petitioner objects urging that he is at liberty to give another value for purposes of Court fee. I see from C. M C. No 942 of 1923 that the petitioner applied to amend his plaint and the Subordinate Judge ordered that he should first pay the Court-fee

It is difficult to say that the order of the Court is *ultra vires* or that he has exercised his jurisdiction with material irregularity. Order VII, r. 1 (*i*) requires that a plaint shall contain a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of Court-fees It is not contemplated that the subject-matter shall be given two values, one purely arbitrary and fanciful for the purposes of jurisdiction and one in strict conformity to the real value for the purposes of Court fees.

In either case the valuation should conform to reality. Therefore, when a plaint contains a valuation for purposes of jurisdiction it is a natural assumption that the same valuation would apply, if it were necessary to have a valuation for an *ad valorem* Court-fee.

The case cited by petitioner in *Sailendranath Mitra* v. *Ramcharan Pal* (3) is not quite in point. There, for purposes of jurisdiction the suit had been valued at Rs. 1,200 and the Court-fee leviable under s 7, sub-s (*x*) cl. (*c*), Court Fees Act, was on a value of Rs. 32. It was held that Rs 32 and not Rs. 1,200 was the value for the purposes of jurisdiction. In the present suit the Court-fee leviable under s. 7, cl. (*iv*) (*c*) is according to the amount at which the relief sought is valued in the plaint. Plaintiff has not stated the amount, but as this value, whether determined for the computation of Court-fees, or whether for the purposes of jurisdiction shall be the same (see s. 8 Act VII of 1887), it is taken to be at Rs 10,000 the amount which plaintiff has stated for the purposes of jurisdiction

If the plaintiff had entered as his value for jurisdiction Rs 10,000 and his value for *ad valorem* Court-fee, say Rs. 5,000 following the ruling in *Sailendranath Mitra* v. *Ramcharan Pal* (3) the Court, no doubt, would take Rs 5, 000 as the value for purposes of jurisdiction. But if the plaintiff enters as his value for jurisdiction Rs 10,000 and owing to his misreading of the Court Fees Act omits an *ad valorem* valuation altogether considering that the two valuations must be the same, the Court is justified in assuming that Rs 10,000 would also be the *ad valorem* valuation

Nor does plaintiff really contest this position, his plea being merely one of fact, that he has made a gross blunder in giving Rs. 10,000 as his figure. If he had reckoned the valuation for jurisdiction more carefully and put it say at Rs 5,000 or whatever he thinks fair he would have no objection at all to the Court's carrying that figure over to the valuation for Court-fees

In the circumstances, I consider that the Subordinate Judge was acting within his discretion in asking petitioner to pay the Court-fee according to his own figure and then if he wished to correct any error in his plaint to proceed by way of amendment.

The petition is dismissed with costs.

V N V.

Z K. *Petition dismissed.*

(2) 28 Ind. Cas. 79, 38 M 922; 28 M. L J. 118; (1915) M. W. N. 118; 17 M L T. 154

(3) 66 Ind. Cas 268; 25 C. W N 768; 34 C. L. J. 94.

LAHORE HIGH COURT.

CIVIL APPEAL No 2170 OF 1924.

January 27, 1925

Present:—Mr Justice Martineau.

NIHAL SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SECRETARY, GURDAWARA GURU TEGH BAHADUR—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art 62—Provincial Small Cause Courts Act (IX of 1887), Sch II, Arts 18, 35 (11)—*Suit for recovery of offerings—Limitation—Nature of suit—Second appeal*

A suit for the recovery of offerings of a shrine from a person who has wrongfully appropriated them is governed by Art 62 of Sch I to the Limitation Act

Ramasami Naidu v. *Muthusamia Pillai*, 48 Ind Cas. 756, 41 M 923, 35 M L J 581, (1918) M. W. N 796, *Mahabir Prasad* v *Parsandi*, 74 Ind Cas 939, 21 A. L J 345, 45 A 410, A I R 1923 All 532 and *Biman Chandra Dutta* v *Promotho Nath Ghose*, 68 Ind. Cas 94; 49 C 886, 36 C L. J 295, A I R. 1922 Cal. 157, referred to.

Such a suit as the above falls under Art 18 of the Second Schedule to the Provincial Small Cause Courts

Act as it relates to a trust, and also probably under Art. 35 (*ii*), so that it is an unclassed suit, and not a small cause, and a second appeal, therefore, lies

Appeal from an order of the District Judge, Hoshiarpur, dated the 10th July 1924, remanding that of the Sub Judge, Fourth Class, Una, dated the 23rd February 1923.

Lala *Fakir Chand*, for the Appellants.

Sheikh *Niaz Mahomed*, for the Respondents.

JUDGMENT.—The plaintiff in this case, who is the Secretary of the Gurdwara Guru Tegh Bahadur at Anandpur, sues to recover the sum of Rs. 299 2 3 said to have been received by the 2nd defendant as an agent of the 1st defendant from the Nabha State as an offering for the shrine during the period from the 12th April 1913 to the 12th April 1918. The Trial Court dismissed the suit as barred by limitation under Art. 62 of the First Schedule to the Limitation Act, but the Additional Judge, on appeal, has held that the case is governed by Art. 89 and has remanded it for decision on the merits. The defendants had filed a second appeal.

Counsel for the respondent has taken a preliminary objection that the suit is a small cause of a less than Rs. 500 in value and, therefore, no second appeal lies. The suit, however, falls under Art. 18 of the Second Schedule to the Provincial Small Cause Courts Act as it relates to a trust, and also probably under Art. 35 (*ii*), so that it is an unclassed suit, and not a small cause, and a second appeal, therefore, lies.

The lower Appellate Court is wrong in applying to the case Art. 89 of the First Schedule to the Limitation Act, as there is no allegation by the plaintiff that either of the defendants was his agent The question remains whether Art. 62 applies.

For the respondent *Ramasami Naidu* v. *Muthusamia Pillai* (1) is cited in which it was held that in an action for money had and received there must be privity of a legal recognizable nature between the plaintiff and the defendant It appears that there is such privity existing in this case, as the defendants, according to the plaintiff, held the money in trust for the shrine. In *Mahabir Prasad* v. *Parsandi* (2) where rent of property was recovered by a person not entitled in law to recover it, it was held that he must be deemed to have realised the money for the real owner's use; and in *Biman Chandra Dutta* v. *Promotho Nath Ghose* (3) was held that the form of suit indicated by Art. 62 was applicable where the defendant had received money which in justice and equity belonged to the plaintiff under such circumstances as in law rendered the receipt of it a receipt by the defendant to the use of the plaintiff.

I agree, therefore, with the view of the Sub-Judge, that the suit is governed by Art. 62 and is consequently barred by limitation. I accept the appeal, reverse the decree of the Additional Judge, and restore that of the Sub-Judge dismissing the suit. The respondent will pay the appellant's costs throughout.

N. H. *Appeal accepted.*

(1) 48 Ind Cas 756; 41 M. 923; 35 M. L J. 581; (1918) M W. N. 796

(2) 74 Ind Cas 939; 21 A L. J 345; 45 A. 410; A. I. R. 1923 All. 532.

(3) 68 Ind Cas 94, 49 C. 886, 36 C. L J. 295; A. I. R. 1922 Cal. 157.

OUDH CHIEF COURT.

FIRST MISCELLANEOUS APPEAL No. 53 OF 1925.

December 16, 1925.

Present:—Mr. Justice Ashworth and Mr. Justice Misra.

CHANDOO—APPELLANT

versus

MURLIDHAR AND OTHERS—RESPONDENTS.

Estoppel — Compromise — Execution proceedings—Civil Procedure Code (Act V of 1908), O XXI, rr. 89, 90.

A judgment-debtor filed an application under O. XXI, r 90, C P. C. for withholding confirmation of the sale in execution owing to certain irregularities. Subsequently he applied under r. 89 for leave to avoid the sale by deposit of 5 per cent. of the purchase-money. Both applications came for hearing on the same day, and the Pleader for the purchaser represented that the judgment-debtor could not maintain his second application unless he withdrew his first one. The judgment-debtor, thereupon, withdrew his application under r. 90 and his application under r. 89 was granted by the Court. [p. 733, cols. 1 & 2.]

It was urged by the purchaser in appeal that the application under r. 89, made in the presence of the application under r. 90, being void *ab initio*, the withdrawal of the application under r 90 would only leave it open to the judgment-debtor to make a new application under r. 89. He could not by withdrawal of his application under r. 90 give retrospective validity to his application under r. 89 :

Held, that the appellant was not entitled to call in question the order of the lower Court allowing the

respondents' application under r. 89 in the light of the statement of his Pleader which statement either amounted to a compromise in the proceedings or to an admission which would estop the applicant from questioning the validity of the Court's order [p 735, col. 1]

Appeal against an order of the Subordinate Judge, Mohanlalgunj, (Lucknow), dated the 4th April 1925.

Mr. *Zahur Ahmad*, for the Appellant.

Messrs. *Ram Bhroselal*, *R. N. Shukla*, *Raj Bahadur*, *M. Wasim* and *Mahesh Prasad*, for the Respondents.

JUDGMENT.—This is an appeal by an auction-purchaser, Chandoo, from an order of the lower Court allowing the judgment-debtor's application under O XXI, r. 89 of the C. P. C, to have the sale set aside on deposit by him of a sum equal to 5 per cent. of the purchase-money.

The facts of the case are as follows:— The decree in respect of which the sale, or alleged sale, took place is dated the 28th July 1919, and was a decree for sale on the basis of a mortgage. The preliminary decree was made absolute nearly two years later on the 22nd July 1921. The application for execution by sale was made by the decree holder on the 4th July 1923. The actual holding of the auction-sale continued from the 16th to the 25th February 1925. On the 9th of March 1925, Murli Dhar, a judgment-debtor by transfer of a portion of the interest of the original judgment-debtor filed an application under O. XXI, r. 90, that the sale was invalid owing to the property having been sold in one lot contrary to the orders of the Court, and owing to other irregularities. Five days later he added a further reason for withholding confirmation of the sale, that in fact no sale had taken place. The 28th of March 1925 was fixed for hearing this application under r. 90. Before that date arrived, namely, on the 24th March 1925, the judgment-debtor, Karim Bux, applied under r. 89 for leave to avoid the sale by deposit of 5 per cent of the purchase-money. On the 28th of March, both the application under r. 90 and that under r. 89 were put up before the Court, and the hearing in respect of them was adjourned to the 4th April. On that date, the parties appeared, one B. Ganga Dayal Khare appearing as Pleader for the purchaser, the present appellant. This Pleader represented that the judgment-debtor could not maintain his application for avoidance by deposit under r. 89 unless he withdrew his application under r. 90. The judgment-debtor Murli Dhar, thereupon, withdrew his application under r. 90 and his application under r. 89 was granted by the Court. It is against this order of the Court that the present appeal is preferred.

In this appeal the first point raised by the appellant purchaser is that he is not bound by anything stated to the Court on the 4th April by Ganga Dayal Khare, inasmuch as that Pleader had no authority from him to appear for him on that day, or make any representation. The argument is, that Ganga Dayal Khare was merely engaged on the 14th March 1925 to resist the application under r. 90, and that he had no authority to agree to the granting of the application under r. 89. We consider that there is no force in this objection The *vakalatnama* of Ganga Dayal Khare shows that he was engaged for "*dawa uzurdari ijrai digri*", that is to say in respect of the objection of the execution of the decree. We consider that this language was quite wide enough to justify Ganga Dayal Khare in appearing, not only in connection with the application under r. 90, but also in connection with the application under r. 89. As both applications were heard together and on the same day, it would, as a matter of fact, have been impossible for him to appear in respect of one without appearing in the other.

The next ground raised by the appellant is that any admission or statement made by Ganga Dayal Khare on the 4th April was merely an expression of his opinion as to the law. That opinion, so far as it can be construed as an admission that the application under r 89 was in order and valid, was incorrect, and a party cannot be bound by any admission of his Pleader as to law, inasmuch as the parties must be presumed to know what is correct law. Another objection taken is that no statement by Ganga Dayal Khare can be held to be an estoppel against the appellant, inasmuch as estoppel cannot be invoked to defeat any expressed provision of the law. It is urged that the application under r. 90 was void *ab initio* by reason of cl. (2) of r. 89, which enacts not merely that a person may not prosecute an application under r. 89 without withdrawing his previous application under r. 90, but provides that he may not

make such an application. It is urged again that the application under r. 89 made on the 24th March 1925 having been invalid for this reason on that date, the withdrawal of the application under r. 90 would only leave it open to the judgment-debtor to make a new application under r. 89. He could not by withdrawal of his application under r. 90 give retrospective validity to his application under r. 89. On the 9th April the time had elapsed within which the judgment-debtor could make any application under r. 89. Now we are not disposed to deny the correctness of the two propositions of law, that an estoppel cannot be invoked to defeat an express provision of law, or that no compromise or agreement can prevent the law of limitation from taking effect. We are, however, of the opinion that neither of these propositions of law are relevant to the present case, in view of the construction which we place upon the lower Court's order of the 4th April 1925. That order runs as follows:—

"B. Parbhu Dayal, Pleader, states that the money deposited by the J. D. is sufficient, and that the deposit was made within time. B. Ganga Dayal Khare Pleader dittos the statement of D. H.'s Pleader. He, however, urges that the J. D. cannot deposit the money, unless he withdraws his petition under O. XXI, r. 90, C. P. C. As he has already deposited the money so he cannot take advantage of the section. If he withdraws the petition under O. XXI, r. 90 he can take advantage of the deposit."

"Murli Dhar J. D. states that his petition under O. XXI, r. 90 may be dismissed under the circumstances."

"Murli Dhar J. D. has deposited the decretal amount plus 5 per cent. of the purchase-money in Court within the period prescribed by law under O. XXI, r. 89, C. P. C. The sale is, therefore, set aside. The surplus, if any, will be returned to the J. D. (*i. e*, Murli Dhar)".

It will be observed that the words "if he withdraws the petition under O. XXI, r. 90 he can take advantage of the deposit" are ambiguous, if we look at the circumstances of the case. When we consider that the two applications were up before the Court, these words leave it doubtful whether they should be construed to mean that the purchaser's Pleader was merely expressing an opinion on the law, or was in effect agreeing to withdraw objection of the application under r. 89, if the application under r 90 dropped. As this ambiguity is a latent one, we are entitled to go to outside evidence to decide which meaning should be attached to the words. When we do so, we can have no doubt that the latter interpretation is the true one. An objection had been taken by the judgment-debtor and by would-be purchaser that there had in effect been no sale. When we look at the proceedings, there appears to be on the face of the record a strong probability that this was so. The *nazir*, who was the auctioner, had reported on the 24th of February the two highest bids. The Court passed an order accepting the highest bid, whereas the proper order should have been that the *nazir* should make one last offer in open sale, and accept the highest bid if any better offer were given. It must have been observed to the appellant purchaser that he ran a great risk of the sale being declared invalid, in which case he would derive no advantage from the property having been knocked down to him at a low figure. By withdrawing opposition to the application under r. 89, he would at any rate get 5 per cent. of the purchase price tendered by him. It is to be observed that the order of the lower Court, which we have just quoted, does not contain any reference to the fact that the application under r. 89 was invalid in its inception by reason of the previous application under r. 90, nor does it contain any reference to the question of limitation. We, therefore, construe this order of the Judge to mean that the purchaser withdrew all contest, in other words confessed judgment in respect of the application under r. 89. So construed no legal question arose. It is incorrect to suggest that, where a compromise or confession of judgment prevents any consideration of legal bars, it is invalid on the ground that, if the legal question had been gone into, a legal bar would have been obvious.

Whether we are to regard the order of the lower Court in the light of an order recording a compromise under O. XXIII, r. 3, or merely as the recording of a statement of the purchaser, which would operate as an estoppel, appears to us of small moment. There does not appear any reason why it should not be regarded in the light of the former. Order XXXIII, r. 3 applies to suits, but under s. 141 of the Code the procedure applicable to suits, as far as it can, should

be made applicable in miscellaneous proceedings.

Our finding then is that the appellant is not entitled to call in question the order of the lower Court allowing the respondents' application under r. 89 in the light of the statement of his Pleader made on the 4th April, which statement either amounted to a compromise in the proceedings or to an admission which would estop the applicant from questioning the validity of the Court's order.

For these reasons we dismiss this appeal with costs.

N. H. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 173 OF 1925.

December 2, 1925.

Present:—Mr. Findlay, Officiating J. C.

CHANDRABHAGA BAI AND ANOTHER—PLAINTIFFS—APPLICANTS

versus

BAKARAM—DEFENDANT—NON-APPLICANT.

Provincial Small Cause Courts Act (IX of 1887), 25—Order returning plaint—Title to immoveable property involved—Erroneous finding—Revision—Interference by High Court.

A High Court is entitled to interfere in revision under s 25 of the Provincial Small Cause Courts Act with an order returning a plaint for presentation to the proper Court

Under this section the duty of the High Court is to see whether the particular decree or order complained of is according to law

A Small Cause Court fails to exercise a jurisdiction vested in it in returning a plaint for presentation to the proper Court on the ground that the plaintiff's success or failure in the suit depended upon a question of proof or disproof of title to immoveable property, where the question of title does not really arise

Application for revision of an order of the Judge, Small Cause Court, Nagpur, dated the 23rd April 1925, in Civil Suit No. 268 of 1925.

Mr. *M. R. Bobde*, for the Applicants.

ORDER.—The plaintiff-applicant No. 1, the widow of Nago's case was that her husband had let the house in suit to the non-applicant Bakaram. The non-applicant's case was that Nago's aunt *Musammat* Mani was presumably the landlord. The lower Court, in view of this conflict, held that the question of relief in the suit depended on the proof or disproof of title to the immoveable property and accordingly returned the plaint to the plaintiff for submission to an ordinary Civil Court.

I think this action on the part of the Small Cause Court was quite premature until the Judge thereof had definitely adjudicated upon the question of who the non-applicant's lessor was On that point there might have been at least two findings, if not more, *viz*, that Nago was the lessor or that *Musammat* Mani was the lessor. On either alternative an entirely different set of legal incidents would arise If Nago was lessor, a presumption might arise under s 116 of the Indian Evidence Act. If *Musammat* Mani was the lessor, it is possible although not inevitable, that it might be found necessary to send the case to the ordinary Civil Court Moreover, in this connection even if *Musammat* Mani was the actual owner but the lease had been taken actually from Nago and if possession had been given by him and rent paid to him, the question of whether the defendant was entitled to put forward the defence which she did in the present case, would still require consideration: *cf.*, *Meer Jangoo* v. *Chote Sahib* (1) and *Prabhat Chandra Chatterji* v *Bijoy Chand Mahatap* (2).

It is, however, urged on behalf of the non-applicant that even if the lower Court exercised a wrong discretion in returning the plaint as it did, this Court is not entitled to interfere on the revisional side. The decision in *Subalram Dutt* v. *Jagadananda Majumdar* (3) has been quoted in support of this position. Personally, with all respect I am not prepared to follow this decision. I prefer the view taken in the later case of *Umesh Chandra Paladhi* v. *Rakhal Chandra Chatterjee* (4). The other view seems to me to put an unnecessarily arbitrary meaning on the word "decided" in s 25 of the Provincial Small Cause Courts Act. Even, however, apart from this the order of the Small Cause Court, of which revision is now sought, decides the case finally so far as that Court is concerned

I may point out further here that under s. 25 the duty of this Court is to see

(1) 8 Ind Cas. 1124, 6 N. L R. 161
(2) 75 Ind Cas. 89, 50 C. 572, A I. R 1924 Cal. 84.
(3) 1 Ind Cas 288, 13 C W N 403
(4) 10 Ind. Cas. 8, 15 C. W. N. 666, 14 C L. J. 118.

whether the particular decree or order complained of was according to law. Now, if the Judge of the lower Court was wrong in holding that the plaintiff's success or failure in this suit depended upon a question of proof or disproof of title to immoveable property, it seems to me indubitably to follow that the Court failed to exercise a jurisdiction vested in it in returning the plaint as it did. From this point of view, therefore, the order cannot be said to be according to law. I am, therefore, of opinion that it is open to this Court to interfere in the circumstances of the present case.

The order of the lower Court, dated 23rd April 1925, is accordingly reversed and the suit is remanded to that Court for disposal on the merits with advertence to the above.

Z. K. *Case remanded.*

RANGOON HIGH COURT.

SECOND CIVIL APPEAL No. 437 OF 1924.

May 22, 1925.

Present:—Mr. Justice Das.

MG. PO KIN AND OTHERS—APPELLANTS

versus

MG. PO OH AND ANOTHER—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 120—Suit for specific performance, dismissal of—Suit to recover loan—Limitation.

Defendant handed over a piece of land to the plaintiff as security for a loan, the agreement between the parties being that if the defendant failed to re-pay the loan within three years, the land would be conveyed to the plaintiff. Plaintiff continued in possession of the land and after the expiry of the three years filed a suit for specific performance of the agreement to convey, which was dismissed. He then brought a suit to recover the amount of the loan:

Held, that the suit was governed by Art. 120 of Sch. I to the Limitation Act, and that the cause of action arose when the suit for specific performance was dismissed.

Second appeal from a decree of the District Court, Payapon, in Civil Appeal No. 46 of 1924.

Mr. *Ankelsaria*, for the Appellants.

Mr. *Ba Tin*, for the Respondents.

JUDGMENT.—The point for determination in this case is whether the suit is barred by limitation.

This was a suit for the recovery of Rs. 1,188 from the defendants. The facts relevant to the present case are as follows: There was a sum of Rs. 1,188 due to the plaintiff for moneys advanced to the defendants from time to time. In 1916 the defendants purported to hand over a piece of land to the plaintiff as security for this loan, and the agreement between the parties was that if the defendants failed to re-pay the said sum within three years, the land would be conveyed to the plaintiff. The defendants failed to re-pay the money within three years, and the land remained in the possession of the plaintiff. In 1920 the present appellant filed a suit, being Suit No. 81, to recover possession of the land. It may be stated here that there was no document evidencing the mortgage of the land to the present plaintiff. The respondents also filed a suit, being Suit No. 116 of 1920 for specific performance of the agreement by which the defendants had agreed to convey the land to the plaintiff on their failure to redeem within three years. Both suits were heard together and ultimately the High Court in Special Second Civil Appeal No. 26 of 1922 decided that, as there was no document of mortgage, the present appellant was entitled to get back possession of the land because he was admittedly the original owner of the land, and dismissed the present plaintiff's suit. The respondents then filed the present suit for the recovery of this sum of Rs. 1,188.

The appellant's contention is that the suit is barred by limitation. His case is that as the cause of action for the recovery of the money arose in 1919, the three years had expired, and that the suit is, therefore, barred. His case is that Arts 62, 115 and 97 of the Limitation Act apply and that under any of these articles the suit is barred.

The respondent's contention is that either Art. 97 or Art. 120 applies to the facts of the case.

There can be no question that, if there is no specific Article of the Limitation Act applying to the facts of this case, the only Article that could apply would be Art. 120, and, if Art. 120 applies, it is admitted that the suit is within time. I am of opinion that Art. 120 applies to the facts of the case. Even if Art. 97 be held to apply I think the suit would still be within time because it is only after the decision of the High Court that the cause of action for the present suit can be said to arise. The judgment of the High Court was delivered on the 8th January 1923.

The appeal is, therefore, dismissed with costs.

Z. K. *Appeal dismissed.*

RANGOON HIGH COURT.

CRIMINAL MISCELLANEOUS APPLICATION No. 51 OF 1925.

July 20, 1925.

Present.—Mr. Justice Rutledge, Chief Justice, and Mr. Justice Brown.

T. F. R. McDONNELL—PETITIONER

versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), ss. 499, Excep 9, 500—Defamation—Statement made by Advocate, whether privileged - Absolute privilege, doctrine of, whether applicable—Malice, proof of—Advocate, position and duties of

Section 499 of the Penal Code is meant to be universal and the English Law of absolute privilege does not apply in this country to statements of Advocates in judicial proceedings [p 738, col 2]

It is, however, for the public good that a person charged with the responsibility of an Advocate should, so far as may be, feel unfettered by any control other than that of the Presiding Judge, in the use of every weapon placed at his disposal by the law for the defence of the liberty of his client [p 739, col 2]

Exception 9 to s 499 of the Penal Code must, therefore, be interpreted accordingly, and it is the duty of a Court when a complaint is made against an Advocate or Legal Practitioner for defamation that it should presume that the remark was made on instructions and in good faith, and unless circumstances clearly show that it was made wantonly, or from malicious or private motives, the complaint should not be entertained [*ibid*]

Even if the circumstances suggest recklessness or malice, further enquiry should be made and an opportunity, if possible, should be given to a Legal Practitioner to offer an explanation before summons is issued against him [*ibid*]

Per *Brown, J*.—A definite pronouncement of the Indian Legislature is not liable to be overridden by the provisions of the Common Law of England. [p 740, col. 1]

The law as to absolute privilege is not applicable to the Criminal Law of defamation in India The Indian Penal Code is a complete Code in itself It is to a large extent founded on the Common Law of England, but the ordinary criminal offences in this country are punishable, not because they would be offences under the English Common Law, but because they have been declared to be offences punishable under the Penal Code Section 499 defines the criminal offence of defamation The section is quite clearly wide enough in certain circumstances to make statements made by Advocates in the exercise of their profession amounting to criminal defamation punishable under s 500. There are a number of exceptions set forth in s 499, and any statement falling within those exceptions does not amount to criminal defamation. But any statement which does not fall within any of these exceptions, and which otherwise satisfies the terms of the general definition in the section is quite clearly declared by s 499 read with s. 500 to be punishable. [p. 739, col. 2, p. 740, col 1]

If an Advocate is to carry out his duties to his client, he must frequently have to make imputations or statements, the correctness of which he has not had the time or opportunity to verify, and it is a very fair presumption in ordinary cases that a statement or imputation so made by an Advocate in the course of judicial proceedings is made, not for the purposes of defamation, but in good faith, for the protection of the interests of his client In such a case, therefore, to establish an offence of criminal defamation it is necessary not only to show that a defamatory statement has been made, but that it has been made maliciously, wantonly, or with some improper motive A Magistrate should refuse to take cognizance of a complaint in such a case unless there is some allegation of malice, wantonness or improper motive. [p 740, col 2]

Mr. *N M. Cowasjee, amicus curiæ*, for Rangoon Bar Association.

JUDGMENT.

Rutledge, C. J.—This is an application by Mr. McDonnell to quash the criminal proceedings instituted on the complaint of Ponniah Pillay in the Court of the District Magistrate of Insein, or, in the alternative, to transfer the case for trial by the District Magistrate of Rangoon.

The facts of the case leading up to the present application are as follows:—

Mr. McDonnell, one of the leading Advocates of this Court, who has practised with repute and distinction in Rangoon for over twenty years, was engaged in the defence of one V M. Abdul Rahman, who was being prosecuted last year before the District Magistrate of Insein. In the course of his address on the 8th of September 1924, at the close of the prosecution case, he asked that his client should be discharged, and was asked by the Magistrate: "Who is Ponniah Pillay?" Mr. McDonnell answered that his name was down on the C. I. D records, and that he was employed by Cassims (the complainant). On a protest from Mr Gaunt, Assistant Government Advocate, Mr. McDonnell reiterated the statement that he was employed by Cassims to help in their litigation work, and that, as he had already said, he was on the C. I. D. records.

Ponniah Pillay filed a complaint for defamation, under s. 500 of the Indian Penal Code, before the District Magistrate, Insein, through Mr. Patel, Advocate, on the 12th of September 1924, alleging, *inter alia*, that Mr. McDonnell had defamed the complainant by making the above-mentioned imputation intending to harm or having reason to know that such imputation would harm the complainant's reputation.

It may be noted that neither in his complaint, nor in his examination by the Magistrate did the complainant charge Mr. McDonnell with either malice or wanton recklessness. Mr. McDonnell has stated that his answer to the Magistrate was on

written instructions which he had no reason to disbelieve.

The Magistrate thought fit to issue summons, which owing to Mr. McDonnell's absence in Europe on leave, could not be served until last month.

For reasons, which will hereafter be given, I am of opinion, that the Magistrate should not have issued summons, and the proceedings will accordingly be quashed.

If the applicant had been satisfied to base his case upon the very extensive, but still qualified, privilege, which an Advocate enjoys under the Indian Penal Code, the question might be dealt with quite briefly. But Mr. McDonnell, not so much on behalf of himself as on behalf of the profession to which he belongs, and Mr. N. M. Cowasjee, whom we have heard as *amicus curiæ* on behalf of the Rangoon Bar Association, have asked us to concur in the decision of the Madras High Court and declare that any statement of an Advocate during the course of judicial proceedings is absolutely privileged. This was the position taken up by a Full Bench of that Court in the case of *Sullivan* v. *Norton* (1). The basis of that decision has been very fully stated in *Potaraju Venkata Reddy* v. *Emperor* (2), another Full Bench case of the same High Court. No doubt that was a case not of an Advocate, but of a witness. But the learned Judges came to the conclusion that it was not the intention of the Legislature, in enacting the Indian Penal Code, to exclude the application of the English doctrine of "absolute privilege" from the law of defamation in India.

Speaking personally, I should be glad if I had been able to find myself in agreement with the Madras decision, as I think that the legal profession might very well be left to the control not merely of the Judge before whom they plead, but also to the very real supervision and powers which this Court enjoys through the provisions of the Legal Practitioners Act and the Letters Patent. But I am unable to find any valid basis for the doctrine that the Legislature, in enacting the Indian Penal Code, intended to leave untouched the provisions of the English Common Law on the question of defamation.

(1) 10 M. 28; 33 Ind. Dec. (N. s.) 770 (F. B.).
(2) 14 Ind. Cas. 659; 36 M. 216; (1912) M. W. N. 476; 13 Cr. L. J. 275; 11 M. L. T. 416; 23 M. L. J. 39.

It has been urged that, as s. 5 of the Indian Penal Code states: "Nothing in this Act is intended to repeal vary, suspend, or affect any of the provisions ..... of any special or local law"; and that, as the English Law with regard to defamation was in existence at the time of the passing of the Code in 1860, it comes under the head of special or local law. I am unable to accept this argument. As I understand it the types of law covered by this phrase are such as the Opium Act, or the Gambling Act, and not a vast system like the English Common Law. If the argument were well-founded, there would not seem to be any occasion for inserting s. 77, which gives protection to a Judge and which, though wide, is not quite absolute. If he were absolutely privileged by reason of the application of the English Common Law, it would be idle and confusing to insert in the Code the provisions of s. 77.

This argument has been dealt with and dismissed in the judgment of a Full Bench of the Calcutta High Court in *Satis Chandra Chakrabarti* v. *Ram Dayal De* (3). No doubt this was a case of a party or witness, but on this particular point it is equally applicable to the case of an Advocate. There are decisions of Single Judges in this Province, *viz.*, *Mya Thi* v. *Henry Po Saw* (4) and *Meer Burks* v. *Maung Hla Pe* (5) to the like effect.

I am consequently of opinion that s. 499 of the Indian Penal Code is meant to be universal in its application That being so, the English Law of absolute privilege does not apply in this country to statements of Advocates in judicial proceedings. Nor do I think it is necessary that it should, if the position of an Advocate is clearly grasped by the various tribunals of this country.

In the words of Lord Brett, M. R., in *Munster* v *Lamb* (6): "A Counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider whether the facts with which he is dealing are true or false. What he has to do, is to argue as best as he can, without degrading himself, in order to maintain the proposition which shall carry

(3) 59 Ind Cas. 143; 48 C. 388; 32 C. L. J. 94; 24 C. W. N. 982; 22 Cr. L. J. 31 (F. B.).
(4) 3 L. B. R. 265.
(5) 49 Ind. Cas. 109; 3 U. B. R. (1918) 101; 20 Cr. L. J. 125.
(6) (1883) 11 Q. B. D. 588; 52 L. J. Q. B. 726; 49 L T. 252, 32 W. R. 248; 47 J. P. 805.

with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform."

A Bench of the High Court of Bombay, in the case of *Emperor* v *Purshottamdas Ranchhoddas* (7) observes: "Therefore when a Pleader is charged with defamation in respect of words spoken or written while performing his duty as a Pleader, the Court ought to presume good faith and not hold him criminally liable unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as Pleader for an indirect purpose."

I do not think I could get anything which more correctly summarizes the position than the following passage from the judgment of Imam and Chapman, JJ., in the case of *Nikunja Behari Sen* v. *Harendra Chandra Sinha* (8).

"In our opinion the Magistrate should have dismissed the complaint. It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interest of the person making it or of any other person (Indian Penal Code, s. 499, Exception 9). A Pleader is entitled to the presumption that the questions he asks in cross-examination are asked in good faith for the protection of the interest of his client The presumption, therefore, is that a question asked in cross-examination making an imputation affords no ground for a criminal prosecution. To rebut this presumption it is not sufficient merely to allege that the client knew the imputation to be untrue for the duty of the Pleader is to present his clients' case. So far, at any rate, as the purposes of a prosecution for defamation are concerned, it would be wholly unreasonable to say that it is the duty of a Pleader to enquire whether his client's case is true or false. To rebut the presumption of good faith in such a case there must be convincing evidence that the Pleader was actuated by an improper motive personal to himself and not by a desire to protect or further the interests of his client in the cause No such motive was suggested in the present case.

"The view which we have taken is supported by the case of *Upendra Nath Bagchi* v. *Savi* (9).

It is for the public good that a person charged with the responsibility of an Advocate should, so far as may be, feel unfettered by any control other than that of the Presiding Judge, in the use of every weapon placed at his disposal by the law for the defence of the liberty of his client. The provisions of the Exception 9 to s. 499 of the Indian Penal Code must be interpreted accordingly."

The learned Judges were, in that case, dealing with a question put in cross-examination, but it applies equally to an answer as in the present case made by an Advocate to a question from the Court, or, indeed, to any remarks made by an Advocate while addressing the Court.

It is the duty, therefore, of a Court when a complaint is made against an Advocate or Legal Practitioner for defamation that it should presume that the remark was made on instructions and in good faith; and unless circumstances clearly show that it was made wantonly, or from malicious or private motives, the complaint should not be entertained. I go further and say that even if the circumstances suggest recklessness or malice, further enquiry should be made and an opportunity, if possible, should be given to a Legal Practitioner to offer an explanation before summons is issued.

If Courts should entertain cases under s. 500 of the Indian Penal Code, as in this case, without any such safeguard, I agree with the petitioner and Mr. Cowasjee that the position of an Advocate in this country would become intolerable.

For the above reasons, I am of opinion that the proceedings must be quashed.

Brown, J.—I concur in the order proposed, and also in the finding that the law as to absolute privilege is not applicable to the Criminal Law of defamation in India. The Indian Penal Code is a complete Code in itself. It is to a large extent founded on the Common Law of England, but the ordinary criminal offences in this country are punishable, not because they would be

(7) 9 Bom. L. R. 1287; 6 Cr. L. J. 387.
(8) 20 Ind. Cas. 1008; 41 C. 514; 14 Cr. L. J. 528; 18 C. W. N. 424.
(9) 1 Ind Cas 147; 36 C. 375; 13 C. W. N. 340, 9 C. L. J. 259; 9 Cr. L. J. 165.

offences under the English Common Law, but because they have been declared to be offences punishable under the Indian Penal Code. Section 499 defines the criminal offence of defamation. The section is quite clearly wide enough in certain circumstances to make statements made by Advocates in the exercise of their profession amounting to criminal defamation punishable under s. 500. There are a number of exceptions set forth in s. 499, and any statement falling within those exceptions does not amount to criminal defamation. But any statement which does not fall within any of these exceptions, and which otherwise satisfies the terms of the general definition in the section is quite clearly declared by s. 499 read with s. 500 to be punishable. Section 2 of the Code states that every person shall be liable to punishment under this Code. When the Legislature has thus in definite terms declared that a person shall be punishable, it seems to me to be idle to reply that it is highly desirable in the public interests that in certain circumstances that person should not be punishable, as that person would not be punishable under the Common Law of England. I know of no authority for the view that a definite pronouncement of the Indian Legislature in clear and unmistakable terms is liable to be overridden by the provisions of the Common Law of England. I agree with the learned Chief Justice in his interpretation of s. 5 of the Code, and it has not been suggested that any other portion of the Code is an authority for the special privilege claimed.

Their Lordships of the Privy Council held in the case of *Baboo Gunesh Dutt Singh* v. *Mugneeram Chowdhry* (10) that so far as witnesses are concerned the law of absolute privilege did apply in any action for civil damages. But there is no enactment by the Indian Legislature as to the circumstances in which a civil action for defamation would lie, and there is nothing to bar the application of the general principles of justice, equity and good conscience in such case. It is true that in the course of their judgment their Lordships remark: "The ground of it is this: that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be indictment for perjury." These words may suggest that witnesses would not be liable on a criminal prosecution for defamation. But that was not the question before their Lordships for their decision, and I do not understand it to be suggested that their Lordships did really decide that point.

In my opinion the provisions of the Indian Penal Code on the point are perfectly clear, and the rule obtaining in England as to the absolute privilege of Advocates, witnesses and parties in judicial proceedings is not applicable to a criminal prosecution for defamation in India.

But I am in entire agreement with the learned Chief Justice as to the applicability of the provisions of the ninth Exception to s. 499 of the Code to the circumstances of the present case. It is quite obvious that if an Advocate is to carry out his duties to his client, he must frequently have to make imputations or statements, the correctness of which he has not had the time or opportunity to verify, and it is a very fair presumption in ordinary cases that a statement or imputation so made by an Advocate in the course of judicial proceedings is made, not for the purposes of defamation, but in good faith, for the protection of the interests of his client. In such a case, therefore, to establish an offence of criminal defamation it is necessary not only to show that a defamatory statement has been made, but that it has been made maliciously, wantonly, or with some improper motive. It follows that a Magistrate should refuse to take cognizance of a complaint in such a case unless there is some allegation of malice, wantonness or improper motive. No such allegation has been made in the present case either in the written complaint or in the statement made by the complainant when examined by the Magistrate under the provisions of s. 200 of the Cr. P. C.

The Magistrate should, therefore, have dismissed the complaint under the provisions of s. 203.

And it is obvious that if Advocates are to be liable to promiscuous prosecutions of this nature, even though the ultimate result of the prosecution may be an acquittal, their position will be an impossible one. The case is, therefore, one in which the interests of justice call for interference by this Court in revision.

(10) 11 B. L. R. 321; 17 W. R. 283; 2 Suth. P. C. J. 547; 3 Sar. P. C. J. 179 (P. C.).

I agree that the proceedings in this case must be quashed.

Z. K. *Proceedings quashed.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 524 OF 1925

November 30, 1925.

Present:—Mr. Justice Sulaiman.

NARAIN DAS AND ANOTHER—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss 190 (c), 191, 537- Cognizance taken by Magistrate on his own knowledge or suspicion—Procedure—Failure to inform accused of right to be tried by another Magistrate—Illegality

Where a Magistrate takes cognizance of a case otherwise than on a complaint or the report of a Police Officer, he must be deemed to have taken cognisance of it upon his own knowledge or suspicion under cl (c) of s 190, Cr P C, and in such a case it is his duty under s 191 of the Code to inform the accused that he can, if he wishes, be tried by another Magistrate. [p 741, col 2]

Section 191, Cr P C, is imperative and a failure to comply with its provisions is an illegality which vitiates the trial and not a mere irregularity which is cured by s 537 of the Code [*ibid*]

Criminal Reference made by the Sessions Judge, Cawnpore, dated the 8th of August 1925.

Mr. *A. P. Dube*, for the Applicants

Dr. *M. Waliullah*, Assistant Government Advocate, for the Crown.

JUDGMENT.—This is a Reference by the Sessions Judge of Cawnpore recommending that the convictions of the accused Narain Das and Chhote Singh and the sentences passed on them should be set aside and they be either discharged or a retrial ordered.

The bullock in question belongs to a family of which Narain Das is a senior member. Chhote Singh accused is his *mukhtar-am*. The animal was employed for driving a cart employed in connection with the proprietor's brick-kiln. The bullock was first found wounded in the month of February 1925 and the driver Ramdeo was prosecuted and convicted and a fine inflicted on him. It is not probable that the owner and the *mukhtar am* came to know all the circumstances of the prosecution. In spite of this conviction a Constable again found the bullock being worked in a cart on the 3rd of April last while severely wounded. This time the driver was one Mania Singh who was prosecuted and a fine imposed on him. In the course of the trial the learned Magistrate came to know the names of the proprietor and his *mukhtar-am* and issued summonses to them. They have been convicted and sentenced by the same learned Magistrate.

The learned Sessions Judge has pointed out three irregularities in the trial of this case For the purposes of this reference it is sufficient to consider only one of these. There was no formal complaint before the Magistrate nor was there any report in writing made by any Police Officer against the present accused within the meaning of sub-cls. (*a*) and (*b*) of s 190 (1). The taking of cognizance of the offence must, therefore, have been under sub-cl. (*c*) of that sub-section. The learned Magistrate in his explanation has suggested that inasmuch as Police Officers were examined as witnesses in the case against Mania Singh he received information from them and not from any person other than a Police Officer. But if the case did not fall under sub-cls. (*a*) and (*b*) of s. 190 (1) then it must be deemed that the Magistrate took cognizance of the offence upon his own knowledge or suspicion that such offence had been committed. In that case also the taking of cognizance of the offence would fall under sub-cl. (*c*). In this view s. 191 became applicable and it was the duty of the Magistrate to inform the accused that he was entitled to have the case tried by another Court. This admittedly was not done. Section 191 is imperative and it says that the accused shall before any evidence is taken be informed, etc. It has been held in several cases by this Court that a failure to inform the accused under s. 191 is not a mere irregularity which is cured by s. 537, but that it vitiates the trial. I may refer only to the cases of *Emperor* v. *Chedi* (1) and *Chander Sen* v. *Emperor* (2).

It has been pressed upon me that no retrial should be ordered, but in view of the fact that there was a previous prosecution of the driver Ramdeo which resulted in his conviction, I am of opinion that a re-trial should take place. The convictions of the two accused and their sentences are accordingly set aside and the case is sent back

(1) 23 A. 212; A. W. N. (1905) 253, 2 A. L. J. 745; 2 Cr L J 809

(2) 73 Ind. Cas. 576, 21 A. L. J. 89, A. I. R. 1923 All. 383; 24 Cr. L. J. 656.

for re-trial. The District Magistrate may either try the case himself or send the case for trial to any competent Magistrate other than the learned Magistrate who tried it before.

Z. K. *Convictions set aside.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 211 OF 1925.

October 27, 1925.

Present:—Mr. Kincaid, J. C., and Mr. Kennedy, A. J. C.

JEOMAL AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss 109, 110, 514—Security for good behaviour—Conviction—Order of forfeiture, whether can be made subsequently—Bond under ss 109 and 110, whether void

A security bond given in pursuance of an order binding over a person both under ss. 109 and 110, Cr. P. C., is not void [p. 743, col 1.]

Where a person who has been put on security for good behaviour is convicted of an offence involving a forfeiture of the surety bond, it is not incumbent upon the Magistrate who convicts him to pass an order of forfeiture of the bond there and then Such an order may be passed at any subsequent time. [p 743, col 2]

Application to revise an order of the District Magistrate, Sukkur, dated the 5th August 1925, confirming that of the City Magistrate, Sukkur, dated the 27th June 1925.

Mr. *Motiram Idanmal*, for the Applicants.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT.

Kincaid, J. C.—The facts of this case are shortly as follows:—

A certain Ramji son of Kishnomal was bound over by the Court of the City Magistrate of Sukkur under ss. 109 and 110 of the Cr. P. C. to be of good behaviour for a period of 12 months and two persons Jeomal who was Ramji's brother and one Jaromal Gurditsing stood sureties for him in the sum of Rs. 200 each The bond was executed by the principal and by the sureties on the 12th of November 1923. On the 9th of August 1924 that is before the period of 12 months had expired Ramji was convicted by the same learned City Magistrate under s. 380, Indian Penal Code and was ordered to undergo 12 months' rigorous imprisonment. On the 20th of January 1925 the learned Magistrate forfeited Ramji's bond for Rs. 200 and on the 27th of June 1925 he forfeited the bonds of the two sureties. Against this decision of the learned Magistrate the sureties appealed to the District Magistrate, Sukkur. On the 5th of August 1925 the learned District Magistrate confirmed the order of the City Magistrate. The sureties have now moved this Court to revise the District Magistrate's order on the 5th August 1925.

The main point raised by the learned Pleader for the applicants is that the order of forfeiture should have been passed at the same time as the order of the 9th of August 1924 by which the learned City Magistrate convicted Ramji under s. 380. The learned Pleader finds support in his argument in the Full Bench decision of the Punjab Chief Court, *Emperor* v. *Mawaz* (1). The learned Judges of the Punjab Chief Court observed as follows:

"We think it is a legitimate inference that, if a Magistrate, who has knowledge of the fact that the person before him has, by his conduct, forfeited his bond, does not make any order for forfeiture, he must be taken to have decided not to take action on the bond in respect of that particular breach of the peace, and that he cannot thereafter reconsider and add to his order by directing forfeiture of the recognizance."

With the utmost deference to the learned Judges who delivered the judgment we find ourselves unable to agree with it. We notice moreover that the learned Judges themselves made the following admission:

"There is, it is true, nothing in s. 514 of the Code to debar a Magistrate, who has convicted a person of an offence which involves the forfeiture of the bond, from subsequently taking action against that person by forfeiting the bond in question, but, in our opinion, the spirit of the section is in favour of the view taken by Sir William Clark and by the Judges of the High Court of Calcutta in *In re Ram Chundra Lalla* (2) and *In re Parbutti Churn Bose* (3)."

We are most respectfully of the opinion that if there is nothing in the section to debar a Magistrate from taking a particular line of action it does not lie within the province of a superior Court to reverse his

(1) 18 Ind. Cas 403; 14 Cr L. J. 67; 7 P. W. R 1913 Cr, 39 P L. R. 1913, 13 P. R 1913 Cr.
(2) 1 C. L. R 134.
(3) 3 C. L. R. 406; 2 J. G. 29.

decision. We are supported in our view by the considered judgment of Mr. Justice Knox and Mr. Justice Aikman of the Allahabad High Court in the case of *Emperor* v. *Raja Ram* (4). Their Lordships referred to the two Calcutta rulings. In *In re Ram Chunder Lalla* (2) and *In re Parbutti Churn Bose* (3) but they went on to make the following remarks.

"In both these cases it was laid down that when the Magistrate deciding a case of an offence attended with violence is cognizant of the fact that the person convicted is under a recognizance to keep the peace, and does not proceed at once to take steps to forfeit the recognizance, he cannot do so subsequently. With all deference to the learned Judges who decided these cases we find ourselves unable to follow them. We find nothing in the language either of the Cr. P. C of 1872 or in the wording of the present Code which lays down any such limitation".

The wording of s. 514 is indeed of the widest character. "Whenever it is proved to the satisfaction of the Court, etc."

The next point raised by the learned Pleader was that under the ruling, *In re Rangasami Pillai* (5) a person cannot be bound over both under ss. 109 and 110. That, no doubt, was the view of the learned Judges of the Madras High Court, nevertheless they did not hold that a bond under both ss. 109 and 110 was void. They merely set aside the order binding the persons concerned under s. 109 and they confirmed the order under s. 110. The matter, therefore, seems to us purely a techincal one and in any case we are not dealing with the order but merely with the surety bond and its execution.

Lastly the learned Pleader has urged that we should reduce the amount which the learned Magistrate has sought to recover from the sureties. We, however, do not think that we should interfere with the learned Magistrate's discretion. This is not a case where the sureties have bound themselves to pay the principal's bond in case he makes default. The sureties here have bound themselves that the principal shall be of good behaviour for a period of 12 months. If during those 12 months the principal misbehaves himself and is convicted like Ramji was on the 6th of August 1924 we cannot see why his sureties should not forfeit the Rs. 200 each as they agreed to do when he was bound over on the 12th of November 1923.

We, therefore, reject this application and confirm the order of the learned City Magistrate.

Kennedy, A. J. C.—I agree. I am fortified, in my opinion, as to the time when the bond can be enforced by the consideration of cl. (7) of s. 514. If the bond is broken by the commission of a criminal offence by a person so bound cl. (7) provides that commission of that offence may be proved by a production of a certified copy of the judgment of the Court convicting him. If as laid down by the Punjab Chief Court it was the duty of the Court so convicting him to enforce the bond and if no other Court could do so cl. (7) would be meaningless.

As regards the question of limitation the man bound and his sureties contract that he will not commit an offence within the fixed time. If he does so commit an offence or cease to be of good behaviour then there is nothing in the Code to prevent the penalty being executable at any time. It would be preposterous to suppose that the principal and his sureties should go free because the principal commits some grave offence with such skill that he is not detected till after the period of the bond had elapsed yet that is the conclusion which necessarily follows if we accept the ingenious argument of the applicant's Pleader. It may be that hardship might possibly be caused by the exaction of stale claims against the subject but if that becomes the general practice no doubt the Legislature will interfere.

In the meanwhile I would dismiss this application.

Z K. *Application dismissed.*

(4) 26 A. 202; A. W. N. (1903) 237; 1 Cr. L. J. 564.

(5) 30 Ind. Cas. 455; 38 M. 555; 16 Cr. L. J. 631.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 621 OF 1925.

November 17, 1925.

Present:—Mr. Justice Daniels.

EMPEROR—APPLICANT

versus

DAULAT SINGH AND ANOTHER—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), ss. 438, 438—Sessions Judge, order of—District Magistrate, power of, to make reference to High Court.

Section 435, Cr. P. C., does not authorise a District Magistrate to make a reference to the High Court questioning the propriety of an order passed by a Sessions Judge. His proper course when he considers that action is necessary in such a case is to move the Government to file an application in revision.

Criminal Reference made by the District Magistrate, Bareilly, dated the 10th October 1925.

Mr. *Saila Nath Mukerji*, for the Opposite Parties.

JUDGMENT.—This is a Reference by the District Magistrate of Bareilly submitted through the Sessions Judge asking this Court to modify in revision an order passed by the Additional Sessions Judge in a case under s. 110 of the Cr. P. C. Section 435 does not authorise the District Magistrate to make any such reference. He can refer the proceedings of any inferior Court but he is not entitled to question the propriety of an order passed by a Court of Session. His proper course when he considers that action is necessary is to move the Government to file an application in revision. This has been pointed out many times by this Court and by other High Courts, *e. g.*, *Emperor* v. *Jamna Bai* (1), *Emperor* v. *Ganga* (2) and *Emperor* v. *John Francis Lobo* (3). The reference is also made very late. The order complained of was passed on 22nd October 1924. The reference of the District Magistrate was not made till the 10th October 1925. The period for which the accused were originally bound over had already expired when the reference was made. The delay is not explained and would in itself be a sufficient ground for refusing to interfere.

Let the record be returned.

Z. K. *Record returned.*

(1) 28 A 91, 2 A L J 589, A. W. N. (1905) 198; 2 Cr. L. J. 515.

(2) 23 Ind. Cas 1007; 36 A. 378, 12 A. L. J. 519, 15 Cr. L. J. 407.

(3) 36 Ind. Cas 577, 41 B. 47, 18 Bom. L. R. 796; 17 Cr. L. J. 529.

OUDH CHIEF COURT.

CRIMINAL REVISION No. 192 OF 1925.

December 17, 1925.

Present:—Mr. Justice Stuart, Chief Judge

E H. PARAKH—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Contract Act (IX of 1872), s. 171—Factor, meaning of—Factor's lien.

The word "factor" in India as in England means an agent entrusted with the possession of goods for the purpose of selling them for his principal. [p. 329, col 1]

A factor is entitled under s. 171 of the Contract Act to retain as security for a general balance of account, any goods bailed to him. [p. 745, cols. 1 & 2.]

Criminal Revision against an order of the District Magistrate, Partabgarh, dated the 12th November 1925, issuing notice to the applicant to show cause against his prosecution under ss. 183 and 186, Indian Penal Code.

Messrs. *J. Jackson* and *Ram Prasad Varma*, for the Applicant.

JUDGMENT.—This is an application by E. H. Parakh, proprietor of the firm Edulee and Co., Motor Engineers and Coachbuilders to set aside an order issued by the District Magistrate of Partabgarh directing him to show cause why he should not be prosecuted under the provisions of ss. 183 and 186 of the Indian Penal Code for offering resistance to the taking of property by the lawful authority of a public servant, and voluntarily obstructing a public servant in the dischage of his public functions. The facts are these: In the year 1922 Raja Amarpal Singh a *taluqdar* of the Partabgarh District entrusted the applicant's firm with a motor car of American make called a "Moon." Car apparently under verbal instructions for sale. The exact terms which governed the transaction will be found in a letter of the 18th April 1923 from the Raja to the firm which is as follows:—

"Dear Sirs,

As to the Moon Car I have placed with you for sale, please sell it at a figure between Rs. 8,000 and Rs. 9,000 and credit proceeds that you realise towards payment of Chevrolet Car account which has not yet been paid." I am informed by the learned Counsel for the applicant that the firm was unable to sell the car as at that time it was very difficult to sell a second hand car and as the Raja had placed a high reserve upon it. The car is said to have been worth about Rs. 12,000 when new and in these circumstances it would, of course, be difficult to sell it at a reserve of 2/3rds of its original cost. The car remained with the applicant's firm unsold till September of this year when the Court of Wards took over the management of the Raja's estate. On the 23rd September 1925 the Manager of the Court of Wards

wrote to the applicant's firm stating that the Raja's affairs were now under their management, and asking whether the car in question had been repaired, and when it would be expected back. The Manager of the Court of Wards was clearly under a misapprehension in respect of the suggestion as to repairs, for the car had not been sent to the applicant's firm for repair but for the purpose of being sold. On the 30th September 1925 the applicant wrote to the Special Manager stating that the car had been placed with his firm for sale and enclosing a copy of the Raja's letter of the 18th April 1923. By this date the account in connection with the car amounted, according to the applicant, to Rs 1,008 13-0. On the 23th October 1925 the Special Manager replied to the applicant directing him to submit his claim in accordance with the provisions of s. 17 of the Court of Wards Act. This section lays down that creditors of a ward must notify their claims in writing within six months of the date of notice of assumption of management The applicant replied on the 26th October to the Special Manager that he considered that he had already notified his claim and he further said that he would not deliver the car until the account was paid. His refusal to deliver the car until the account was paid was clearly based upon a factor's lien under the provisions of s. 171 of the Indian Contract Act (IX of 1872). The word "factor" in India as in England means an agent entrusted with the possession of goods for the purpose of selling them for his principal. Before this letter of the 26th October 1925 had been received the Deputy Commissioner had sent a letter to the applicant dated 27th October which was in continuation of the letter of the 23rd October in which he said that the estate being in charge of the Court of Wards it was necessary to consider his claim in a judicial manner as laid down in the Court of Wards Act, and also stating that it was not open to the applicant to detain the car which he said he understood was being used by the applicant's firm for its own purposes. The letter concludes with the remark that if the car were not delivered immediately civil and criminal proceedings would be started against the applicant. As this letter from the Deputy Commissioner ignores the provisions of the Indian Contract Act upon the subject it is well to note what these provisions are. In s. 171 it is stated that factors may, in the absence of a contract to the contrary, retain as security for a general balance of account, any goods bailed to them. It was open to the Deputy Commissioner of Partabgarh, as it will be open to him still, to question the applicant's claim to retain the car as a factor until the balance of his account has been paid But this letter does not question his claim, it ignores it. The applicant replied to this letter of the 27th upon the 29th and here he recorded his inability to deliver the car until his account was settled He modified his position in the later part of his letter by stating that he did not want an immediate settlement but only a recognition that his charges were not excessive. He denied absolutely that he had used the car for his own purposes, and asked to be furnished with the name of the Deputy Commissioner's informant so that he might be able to deal with him. The next letter that I find is one from the Deputy Commissioner which although dated the 6th October was clearly sent on the 6th November. It apparently is a reply not to the letter of the 29th October but to the letter of the 26th October. It states that it is a reply to the letter of the 28th October. I cannot find that there was any letter of the 28th October. In this letter the Deputy Commissioner lays down his views as to what is the necessary amount of proof before the Court of Wards can, in his opinion, settle the debts of their wards, and indicated his intention of questioning the applicant's bill upon every item. Apparently after this letter was sent the applicant's letter of the 29th October was put up before the Court of Wards office for consideration. I find upon the file a Head Clerk's report of the 12th November 1925 suggesting that action should be taken against the applicant under s. 174 of the Indian Penal Code. This is a section under which a person can be prosecuted for non-attendance in obedience to an order from a public servant, and its applicability is not easily seen because at that period the applicant had never been ordered to attend anywhere. The Head Clerk's note was placed before the Special Manager who noted thereon "this is a very serious matter and means wilful disobedience to Court's order." The reference to the Court is presumably the Court of Wards. The Deputy Commissioner on the

same date directed as District Magistrate a notice to issue to the applicant to show cause why he should not be prosecuted. The notice was issued and the 2nd December 1925 was fixed for proceedings. The applicant who is the Manager of a large business in Lucknow sent a Counsel to show cause why he should not be prosecuted. The Railway journey from Lucknow to Partabgarh takes about 3½ hours The Deputy Commissioner as District Magistrate refused to listen to the Counsel passing the following order: "Application is rejected. The man must put in an appearance personally. I also notice that he has not yet complied with the orders issued to him to deliver the car. He is represented by Counsel, who has been directed to instruct his client to arrange for the delivery of the car at Partabgarh at once. I am refraining from issuing a warrant for his person as it is possible that he may have been under some delusion about his liability. His Counsel has been instructed to inform his client for personal appearance on the 8th at Baispur." Baispur, I am given to understand, is distant 20 miles by road from Partabgarh. At this period the applicant filed an application before this Court which directed stay of proceedings.

I do not express an opinion as to the amount which is due to the applicant in respect of the Moon Car, but there can be no doubt as to the fact that his plea that under a factor's lien he is entitled to retain the car until the general balance of his account is settled is a plea which cannot be ignored. In respect of the criminal charges which the Deputy Commissioner proposes to make against him it is sufficient to say that the applicant cannot possibly be considered to have offered any resistance to the taking of any property by the lawful authority of any public servant nor can he be considered to have voluntarily obstructed a public servant in the discharge of his public functions. I find hard to understand how the Magistrate was able to convince him that anything done by the applicant could possibly have rendered him liable to prosecution under the Criminal Law. I, therefore, quash the whole proceedings and direct the record to be returned.

N. H. *Proceedings quashed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 862 OF 1925.

November 21, 1925.

Present:—Mr. Justice Zafar Ali.

CHIRAGH DIN—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 193—Criminal Procedure Code (Act V of 1898), ss 195, 476—Perjury—Statement literally true—Complaint, whether should be made

A Court is not justified in making a complaint of perjury against a person in respect of a statement which is literally and strictly speaking true.

Criminal appeal from an order of the District Judge, Sialkot, dated the 7th August 1925.

Dr. *Nand Lal*, for the Appellant.

Mr. *D R. Sawhney*, Public Prosecutor, for the Respondent.

JUDGMENT.—This is an appeal from an order of the District Judge of Sialkot accepting an application under s. 476-A, Cr. P. C., for making a complaint against the appellant under s 193, Indian Penal Code.

The facts are briefly as below:—

Two cross-cases between the same parties, one for a specified sum and the other for rendition of accounts, were pending in two different Courts:—Chaudhuri Chiragh Din appellant being the plaintiff in the former and defendant in the latter. In the case in which he was the defendant the plaintiffs offered to abide by his statement if made on the oath proposed by them. He agreed to make the statement on that oath and a Commissioner was appointed to record his statement after administering the oath. But he omitted to appear before the Commissioner and subsequently when questioned in the other Court whether he had agreed to make a statement on oath he stated that he had agreed to do so in that case only but not with regard to the one instituted by him. This was literally and strictly speaking true, but as the two cases were interdependent the decision in the one would have governed the other also. Such being the facts, the Court below was not justified in ordering prosecution of Chiragh Din for perjury. I, therefore, accept the appeal and direct the withdrawal of the complaint.

Z. K. *Appeal accepted.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASES NOS. 779 OF 1924 AND 55 OF 1923.
(CRIMINAL REVISION PETITIONS NOS. 651 OF 1924 AND 52 OF 1925.)
August 6, 1925.
Present:—Mr. Justice Jackson.
RUKMANI AMMAL—PETITIONER
versus
MUTHUSWAMI REDDI—RESPONDENT.

Penal Code (Act XLV of 1860), s. 405—Criminal breach of trust—Nominal sale of engine by person entrusted, whether amounts to offence.

Accused who was entrusted with an engine executed a nominal sale-deed therefor to a third person but the engine was not removed from its place and was still available to the true owner who suffered no loss by the sale.

Held, that on these facts a conviction of the accused for criminal breach of trust was not sustainable [p 748, col. 1.]

Petitions, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Cuddalore, in Criminal Appeal No. 66 of 1924, preferred against that of the Court of the Stationary Second Class Magistrate, Cuddalore, Taluk, in C. C. No. 108 of 1924.

Mr. *V. L. Ethiraj*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—The petitioner has been fined Rs. 50 (Sub-Magistrate and Sub-Divisional Magistrate of Cuddalore, in C. C. No. 108 and C. A. No. 66 of 1924) for criminally misappropriating an agricultural engine valued at Rs. 2,000. Admittedly he borrowed this engine under Ex. A from his relation Muthuswami Reddi, P. W. No. 1, who says that he was looking after it for the real owner Muthuswami Reddi, P. W. No. 4. The petitioner says that he also had a lease of the engine from Muthuswami Reddi Ex. II, which the lower Appellate Court seems prepared to concede, para. 4. The alleged breach of trust was the sale of this engine by petitioner to his aunt, the wife of Muthuswami Reddi's brother, D. W. No. 1. This witness says that the engine is family property. He is disbelieved but unless the lower Courts accepted some theory of a family quarrel, it is difficult to understand why they inflicted such paltry sentences The Sub-Magistrate fined the petitioner Rs. 100 which the Sub-Divisional Magistrate reduced to Rs. 50. If a man criminally misappropriates property of another worth Rs. 2,000 it is not an extenuating circumstance to plead that he and his victim are closely related; the extenuating circumstance would be that there has been no real misapplication.

This is the point taken in this petition. Petitioner was given domination over the property by Muthurama Reddi and it is urged he has not converted it to his own use, or disposed of it by selling it to his aunt, a mere paper transaction nor has he caused any wrongful loss to its owner Muthuveera Reddi for whom the engine is still available. No one complains that the aunt has suffered wrongful loss.

The question for determination may be pinned to illustration (*b*) of s 405, Indian Penal Code. If *A* sells the furniture by a deed of sale to *B* but does not remove it, and if *B* makes no complaint, can *Z* complain that there has been criminal breach of trust.

How far wrongful loss or gain has resulted to *A* or *B* from the sale to *B* is not in question. Therefore it would not be a dishonest sale, unless it could be proved that *A* intended *B* to remove the furniture and so cause loss to *Z*. In the case of furniture it would not be difficult perhaps to prove such dishonesty; but it is more difficult in regard to an engine which no one moved or apparently intended to move from the place where Muthurama Reddi allowed the petitioner to put it.

Suppose that instead of an engine it had been land over which the petitioner had been given dominion and in respect of which he executed a sale-deed to a third person, would that be criminal breach of trust as defined by s. 405? Section 403 refers in terms to moveable property, and it has been ruled that s. 404 must be read with it as also limited to moveable property, *Reg.* v. *Girdhar Dharamdas* (1). In *Jugdown Sinha* v. *Queen-Empress* (2) it has been held that property referred to in s 405 must as in s. 403 be moveable property and that, as it has been ruled in *Reg.* v. *Girdhar Dharamadas* (1) criminal breach of trust cannot be committed in respect of immoveable property As matter of fact the Bombay ruling as I have shown above, makes no reference to criminal breach of trust, and the Calcutta ruling must, I think, be based on the general assumption that if a man cannot move a thing away, he cannot dishonestly convert it to his own use. In the majority of cases that assumption may be correct but the

(1) 6 B H. C. R. Cr. 33.
(2) 23 C. 372; 12 Ind. Dec. (N. S.) 248.

wording of s. 405 is very comprehensive and I think it dangerous to lay down any absolute rule. For the purpose of this case, it is sufficient to find that although the lower Courts have not said so in so many words the sentences inflicted show that they regarded the case as essentially civil in character, and, moreover, there is no clear proof of intention to cause wrongful loss either to Muthurama or to Muthuveera Reddi. In fact the lower Appellate Court has given no finding of dishonesty; it merely records that the petitioner disposed of the engine "in violation of the trust" obviously something more than breach of trust is necessary to bring the case within the purview of a Criminal Court. For the above reason, I set aside the conviction and order the fine to be refunded. No order under s. 577, Cr. P. C., is necessary in these circumstances and the propriety of that passed by the Sub-Divisional Magistrate (which I now cancel) need not be questioned. I would only observe that before passing it he would have been well-advised to give notice to the parties concerned.

V. N. V.

Z. K. *Conviction set aside.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 251 OF 1925.

November 26, 1925.

Present:—Mr. Kincaid, J. C., and Mr. Lobo, A. J. C.

SIDIK—ACCUSED—APPLICANT

versus

EMPEROR (AHMAD ALI AND OTHERS) —OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 350—Transfer of case—De novo *trial, what is—Procedure*

Where a case in which a charge has been framed is transferred to the Court of another Magistrate and under the proviso to s. 350 (1) of the Cr. P. C. the accused claims a *de novo* trial the Magistrate *must re-commence* the trial and *not* merely allow further cross-examination of the complainant and other prosecution witnesses and generally proceed with the case from the stage where the charge was framed.

Tanguturi Sriramulu v. *Nalam Krishna Row*, 25 Ind. Cas. 1001; 38 M. 585, (1914) M. W. N 646; 16 M. L. T. 303; 27 M. L. J. 589; 15 Cr. L. J. 673, distinguished.

Hnin Yin v. *Than Pe*, 44 Ind. Cas. 337; 9 L. B. R. 92; 19 Cr. L. J. 321; 11 Bur. L. T 58, relied upon.

Sobh Nath Singh v. *Emperor*, 12 C. W. N. 138; 6 Cr. L. J. 431, referred to.

Application, under s. 439, Cr. P. C., directing the Resident Magistrate, Kotri, to proceed with the case pending before him under s. 363, Penal Code, from the stage of charge.

Mr. *T. V. Thadhani*, for the Applicant.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT.—In this revisional application the facts are that the applicant filed a complaint before the Sub-Divisional Magistrate of Kotri on which the Sub-Divisional Magistrate on 1st September 1924 issued process under s. 363, Indian Penal Code. Apparently after hearing the evidence for the prosecution, the Sub-Divisional Magistrate framed a charge against the accused in the case on the 1st of June 1925. On 16th June 1925 he transferred the case to the Resident Magistrate, Kotri, he being himself under orders of transfer. Before the Resident Magistrate, the accused in the case exercising the option given to them by the proviso to s. 350, Cr.P. C., claimed what is usually known as a *de novo* trial. The learned Resident Magistrate has acceded to their request and proposes to hold a *de novo* trial. Against this order, the applicant who is the complainant in the case, applies, in revision to this Court and the point made by his Counsel before us is that the learned Resident Magistrate has no right to re-examine and re-cross-examine the prosecution witnesses in the case; that under s. 350 all he can legally do is to allow further cross-examination of the complainant and the other prosecution witnesses, and generallly to proceed with the case from the stage where the charge was framed.

Section 350 of the Cr. P. C. appears to us to be perfectly clear as to what the duties of a Magistrate are to whom a case has been transferred by another Magistrate who has heard it in part. Under cl. (1) of that section the Magistrate has a discretion to re-summon the witnesses and *re-commence* the inquiry or trial. If, however, he does not do so *suo motu*, he is bound to do so if asked by the accused under proviso (*a*) to s. 350 which states "In any trial the accused may, when the Second Magistrate commences his proceedings, demand that the witnesses or any of them be re summoned and re-heard." Whether, therefore, the Second Magistrate acts under sub s. (1) of s. 350 and exercises his discretion in allowing a *de novo* trial or whether the accused demands a *de novo* trial under the

proviso it is clear that the Second Magistrate has to re-summon the witnesses and re-hear them. It is argued that the word "re-hear" is to be interpreted as equivalent to "hear further." We do not find anything in s. 350 to support such a contention.

Counsel for the applicant argued that the ruling reported as *Tanguturi Sriramulu* v. *Nalam Krishna Row* (1) supported his interpretation of the section. A perusal, however, of the ruling makes it clear that this is not so. All that is then decided is that the Second Magistrate cannot ignore the charge framed by his predecessor and that whatever order he passes after re-summoning and re-hearing the prosecution witnesses is an order of acquittal and not one of discharge.

On the other hand the case reported as *Hnin Zin* v. *Than Pe* (2) a decision of the Lower Burma Chief Court which followed the ruling of the Calcutta High Court in *Sobh Nath Singh* v. *Emperor* (3) is directly against the contention of Counsel for the applicant. In that case, a Magistrate after hearing the evidence of the prosecution had framed a charge. The case was then transferred to another Magistrate who re-summoned the witnesses for the prosecution, read over to them their previous depositions and allowed them to be further cross-examined. It was held that this was clearly no compliance with the law; that the right given to the accused by s. 350 was in order that he might have the very great benefit of the Magistrate having the witnesses examind and cross-examined in his presence so that he might see and note their demeanour and manner of giving evidence, and that when the accused claims a *de novo* trial the Magistrate must *re-commence* the trial.

We are of opinion that there is no substance in this revisional application which we, therefore, reject.

Z. K. *Application dismissed.*

(1) 25 Ind. Cas. 1001; 38 M 585, (1919) M. W N 646; 16 M. L. T. 303; 27 M L. J. 589; 15 Cr L J. 673.

(2) 44 Ind Cas. 337, 9 L. B R. 92; 19 Cr. L. J. 321, 11 Bur. L. T. 58.

(3) 12 C. W. N. 138; 6 Cr. L. J. 431.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1535 OF 1924.

January 7, 1925.

Present:—Mr Justice Abdul Raoof.

DIWAN CHAND AND ANOTHER—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Legal Practitioners Act (XVIII of 1879), s 36, action under - Necessity for caution—Defence evidence

Section 36 of the Legal Practitioners Act being drastic and somewhat exceptional, a great deal of care and caution is necessary before taking action under it and the person affected must be given full opportunity of producing defence evidence

Petition for revision of an order of the District Magistrate, Gujrat, dated the 13th October 1924.

Mr. *Anant Ram*, for the Petitioners.

The Government Advocate, for the Respondent.

JUDGMENT.—On the complaint of the Bar Association, Gujrat, the petitioners were called upon to show cause why their names should not be included in the list of touts. The petitioners filed written statements and in support of their defence they applied to the Court to summon a large number of witnesses out of whom only some were examined by the Court and the rest were not Twenty-six witnesses were put down in the list of Abdul Hak petitioner out of whom only two were summoned and examined. Out of eighteen witnesses of Diwan Chand petitioner four only were summoned and examined. Seventeen witnesses were common to both the petitioners out of whom only seven were summoned and examined. As to the rest the Court probably acting under s. 257 of the Cr. P. C. held that as the petitioners intended to cause delay and vexation the summoning of all the witnesses was not necessary. After considering the case on the materials before it the Court declared the petitioners to be touts.

The provisions of s. 36 of the Legal Practitioners Act are somewhat exceptional and of a drastic nature, and a great deal of care and caution is necessary before action is taken against anybody. The petitioners complain that full opportunity was not given to them to meet the case for the prosecution. In my opinion there is force in this contention. I, therefore, accept this petition for revision and send this case back to the learned District Magis-

trate with the direction that it may be placed upon its original number, that the petitioners be given full opportunity to produce evidence and that the case should be decided after the consideration of their full defence.

R. L. *Petition accepted.*
N. H.

MADRAS HIGH COURT.

CRIMINAL REVISION CASES NOS. 411 AND 412 OF 1925.
(CRIMINAL REVISION PETITIONS NOS. 345 AND 346 OF 1925.)
August 7, 1925.
Present:—Mr. Justice Devadoss and Mr. Justice Waller.

IN CR. REV. CASE NO. 411 OF 1925.
R. V. KALIAPPA GOUNDAN AND OTHERS —ACCUSED—PETITIONERS.
IN CR. REV. CASE NO. 412 OF 1925.
R. V. MANIAM SELLAPPA GOUNDAN AND OTHERS—ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V of 1898), ss 439, 494—Withdrawal of case, application for, rejection of—Discretion of Court—Revision

Where a Sessions Judge in rejecting an application by the Public Prosecutor, under s. 494, Cr. P. C, to withdraw a case, exercises a judicial discretion in a proper way, the High Court will not interfere with his order in revision.

Petitions, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the order of the Court of the Additional Sessions Judge, Coimbatore, dated the 26th June 1925, and made in Sessions Cases Nos. 51, 52 and 53 of 1925.

Dr. *Swaminathan*, for the Petitioners.

The Public Prosecutor, for the Crown.

ORDER.—These are applications to revise the order of the Additional Sessions Judge of Coimbatore refusing permission to withdraw Sessions Cases Nos. 51, 52 and 53 of 1925. Dr. Swaminathan contends that the learned Judge has misdirected himself as to what he should do in a case of this kind. The application was made by the Public Prosecutor under s. 494 and he gave certain reasons for the withdrawal of the cases. The Sessions Judge has considered the reasons and has come to the conclusion that these cases were not fit cases for withdrawal. He relies upon the decision in *Rajani Kanta Shaha* v. *Idris Thakur* (1), and says that where there is evidence against the accused which, if believed, would end in conviction, it would not be proper to give permission to withdraw a case under s. 494. But that is not the only reason which would guide a Court in granting or refusing permission. In this case the learned Additional Sessions Judge has exercised his discretion in refusing permission and we cannot say that he has improperly exercised his discretion. The reasons that he gives may not be the only reasons for an order of this kind but that is no ground for saying that he has not exercised a judicial discretion in granting or refusing permission to withdraw a case where a Judge has exercised judicial discretion in the proper way, the High Court will be very reluctant to interfere with his discretion and we, therefore, decline to interfere with his order. The petitions are dismissed.

V. N. V.
Z. K. *Petitions dismissed.*

(1) 64 Ind Cas 280; 48 C 1105; 25 C. W N. 615, 34 C L. J. 51, 22 Cr. L. J 760

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 133 OF 1925.
October 17, 1925.
Present:—Mr. Kincaid, J. C., and Mr. Kennedy, A. J. C.

NAZAR SHAH—APPELLANT
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 397—"Uses," meaning of—Use of handle of axe, whether use of deadly weapon.

The word "uses" in s. 397 of the Penal Code should be construed in a wide sense so as to include not merely cutting, stabbing or shooting (as the case may be) but also carrying the weapon for the purpose of overawing the person robbed. [p 751, col. 2.]

Nga I v *Emperor*, 14 Ind. Cas 651; 13 Cr L. J. 267; 5 Bur. L. T. 9; 6 L. B. R 41, referred to.

A hatchet being a deadly weapon, it will be deemed to have been used as a deadly weapon whether it is its head or handle that is used. [p. 751, col 2]

Appeal against the judgment of the Additional Sessions Judge, Hyderabad, (Sind), dated the 25th August 1925.

Mr. *Motiram Idanmal*, for the Appellant.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT.—The facts of this case have been dealt with exhaustively in the able judgment of the learned Additional Sessions Judge. They are shortly these :

The complainant Assanmal was going to

Mehar village on the 1st of February 1925. He had taken with him his wife and his son, a little boy aged five. On the 2nd of February they were going through the jungle when they were stopped by a man who caught hold of the reins of their horse and robbed them of Rs. 12 in cash, a trunk, some clothes and some ornaments.

That night Assanmal took his wife and his son to a village called Razi Jatoi. There he informed the *mukhi* Duhladinomal, Bansimal a *zemindar* and one Umed Ali *kamdar* of Mahomed Khan not only that he had been robbed but that he had been robbed by the accused Nazar Shah. The next morning he went to Kazi Ahmed where he made a similar report to the *mukhi* Gianmal The third day he went to Nawabshah reaching it in the evening. On the 4th day he told the story to *mukhi* Hotchand, who took him to the District Superintendent of Police, Nawabshah. The District Superintendent of Police recorded Assanmal's complaint (Ex. V) and forwarded it for investigation to the Sub-Inspector of Kazi Ahmed, Abdul Rehman (Ex. 14). Assanmal showed him the scene of the crime and the Sub-Inspector prepared a *mashirnama*, recorded various statements and arrested Nazar Shah. The Police sent Nazar Shah to the First Class, Magistrate, who convicted him under s. 394 of the Indian Penal Code and sentenced him to undergo 12 months' rigorous imprisonment. The learned Sessions Judge thinking that the offence was graver than that for which the accused had been tried ordered his committal. On the 25th of August 1925 he convicted Nazar Shah under s. 397 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for seven years.

Against this decision the present appeal has been filed. We have listened with great interest to the arguments advanced on the appellant's behalf by his Pleader, Mr. Motiram. We do not think, however, that on the facts it is possible to differ from the views of the learned Additional Sessions Judge and of the learned Magistrate, who held that it was Nazar Shah who robbed Assanmal. Enmity has been alleged but that has been very ably dealt with by the learned Additional Sessions Judge. As regards the late reporting of the crime, it must be borne in mind that the complainant had received a sharp blow from the handle of the axe and that both he and his wife must have suffered a severe shock, when robbed in broad day-light in the jungle.

The legal point pressed with great ability by the learned Pleader deserves more consideration. The learned Pleader's argument amounts to this. Although a hatchet is a deadly weapon, still it was not used as a deadly weapon by the appellant. He did not use the axe head but used the axe-handle. An axe handle is not, in any sense, a deadly weapon. Giving the matter our best consideration, we do not think that we can accept this argument. Had the axe-handle been separated from the axe head, it might have been said that it was not a deadly weapon But the evidence is that it was an entire axe and an axe cannot be described in any other way than as a deadly weapon. The whole point has been amply and carefully considered by Mr. Justice Twomey in the case of *Nga I* v. *Emperor* (1). The learned Judge observed "It may be argued that to 'use' a stabbing weapon is to stab some person with it, to 'use' a cutting weapon is to cut some person with it, and to 'use' a gun is to shoot at some person with it .... But it is not clear that the word 'uses' in s. 397 should be interpreted with such strictness The very next s 398 imposes a minimum punishment of seven years' imprisonment on persons convicted of merely carrying a deadly weapon when attempting to rob It seems probable that the Legislature intended to impose the same minimum where the robbery is actually completed. I am inclined to think, therefore, that the word 'uses' in s. 397 should be construed in a wide sense so as to include not merely cutting, stabbing, shooting (as the case may be) but also carrying the weapon for the purpose of overawing the person robbed."

In this case, we have but little doubt that had Assanmal offered any serious resistance, Nazar Shah would have used the axe head and not the axe-handle. Overawed by the deadly weapon carried by Nazar Shah, Assanmal made no resistance, so Nazar Shah effected his purpose by a mere blow with the handle. Now, if the offence committed by Nazar Shah falls under s. 397, the Legislature requires his imprisonment for not less than seven years. This is the sentence which the learned Additional Sessions Judge has passed upon the appel-

(1) 14 Ind Cas. 651; 13 Cr L. J. 267, 5 Bur. L. T. 9; 6 L. B. R. 41.

lant and it is not in our power to reduce it.

We, therefore, confirm the lower Court's finding and sentence and dismiss this appeal.

P. B. A.

Z. K. *Appeal dismissed.*

RANGOON HIGH COURT.

CRIMINAL APPEAL No. 545 OF 1925.

June 30, 1925.

Present:—Mr. Justice Godfrey.

AH KHAUNG—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss 256, 342, 537—Examination of accused—Further cross-examination of prosecution witnesses—Omission to examine accused—Illegality

The examination of a witness cannot be regarded as completed until the last stage at which the law authorizes its continuance has been passed, that is to say, until any supplementary cross-examination which the Court may allow is over So that under s 342, Cr P. C, an accused person has a right to be examined and to state his case after the further cross-examination of prosecution witnesses, even though he has already been examined before the charge was framed and he was called on for his defence. This right is fundamental and an omission to so examine the accused is an illegality which vitiates the trial and not a mere error or irregularity which can be cured by s. 537 of the Code.

Criminal appeal from an order of the Second Additional Magistrate, Rangoon, in Cr. Reg. No. 312 of 1925.

JUDGMENT.—The appellant in this case was convicted by the Second Additional Magistrate, Rangoon, under s. 326, Indian Penal Code, of causing grievous hurt to one Ah Sein by stabbing him with a knife, and was sentenced to two years' rigorous imprisonment on the 15th May 1925.

It is contended on his behalf on appeal, firstly, that the trial is vitiated by the failure of the Magistrate to comply with the provisions of s. 342, Cr. P. C., and secondly, that the evidence generally does not warrant the conviction. Section 342 provides, amongst other things, that the Court shall, for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

From the Magistrate's record it appears that the appellant was examined and questioned on the case on the 28th April and was charged and called on for his defence on the 2nd May. On the 13th May, however, he re-called for cross-examination the principal witness for the prosecution and was not further examined by the Court thereafter. This is the non-compliance with the provisions of s. 342, Cr. P. C., complained of. Those provisions are clearly obligatory; but the difficulty arises when read in conjunction with the provisions of s. 256, Cr P. C., which provides for the recalling of witnesses for the prosecution by an accused for cross-examination and under which it has been held that it is discretionary with the Court to allow them to be recalled for that purpose at a later stage and at any period of the defence. As pointed out by Oldfield, J., in *In re Madura Matha Vannian* (1), the examination of a witness cannot be regarded as completed until the last stage at which the law authorizes its continuance has been passed, that is to say, until any supplementary cross-examination which the Court may allow. So that an accused person would have a right to be examined and to state his case after the further cross-examination of prosecution witnesses, even though he has already been examined before the charge was framed and he was called on for his defence. That is the conclusion come to by the learned Judge in that case, and he further points out that that right is fundamental and that the omission to so examine him cannot be regarded as a mere error or irregularity, which could be cured by s. 537, Cr. P. C. The same view has been adopted in *Gulzari Lal* v. *Emperor* (2), where it was held that the omission vitiated the conviction, and in *Remembrancer of Legal Affairs, Bengal* v. *Satish Chandra Roy* (2), where the Court came to a like conclusion.

For the reasons before appearing and upon these authorities it is clear that the appellant's conviction must be set aside. I am not prepared to hold, however, upon the evidence as it stands that there is no case against him as it is urged and I accordingly set aside his conviction and direct his re-trial. It would obviously be undesirable in view of this direction to discuss the criticisms that have been offered on the evidence. The re-trial should, of course, be before another Magistrate.

Z. K. *Re-trial directed.*

(1) 71 Ind. Cas. 252; 45 M. 820; 16 L. W. 420; 43 M. L. J. 402; (1922) M. W. N. 601; A. I. R. 1922 Mad. 512; 24 Cr. L. J. 124.

(2) 71 Ind. Cas. 51; 49 C. 1075; 24 Cr. L. J. 3; A. I. R. 1923 Cal. 164; 39 C. L. J. 31.

(3) 83 Ind. Cas. 495; 51 C. 924; 39 C. L. J. 411; A. I. R. 1924 Cal. 975; 26 Cr. L J. 15.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 11 OF 1922.

August 25, 1925.

Present:—Mr. Justice Phillips and Mr. Justice Ramesam.

THANAPPA CHETTY AND OTHERS—DEFENDANTS—APPELLANTS

versus

ESUF KHAN SAHIB AND ANOTHER—PLAINTIFFS AND DEFENDANT No. 1—RESPONDENTS.

Landlord and tenant—Lands, classification of, according to permanent or shifting character of cultivation—Poll tax and plough tax, whether rent—Right of cultivator to minor produce—Madras Estates Land Act (I of 1908), s 3 (2) (d)—Villages in hilly tracts, granted in inam, whether estate

Prima facie a tenant, whatever his status as a tenant may be, *i e*, whether he is an occupancy tenant or a tenant from year to year or a tenant-at-will, is entitled to the produce of the land included in the tenancy so long as the tenancy subsists [p 756, col 1]

The lands in a *jaghir* in certain hilly tracts in the South Arcot District were classified according as the cultivation was permanent or shifting The revenue of the *jaghirdar* was not derived on any system of land assessment The land which each cultivator cultivated from time to time was not measured and assessed to rent The cultivators paid a plough tax, an impost of a fixed amount per plough being collected on the number of ploughs a man used They also paid a poll tax levied on the individuals of the male sex Each man cultivated where he liked and as much as he liked reclaiming the land by clearing the jungle and leaving it for a new plot when the fertility of the soil was exhausted

Held, (1) that the revenue described as poll tax and plough tax must be regarded as rent and the relationship of landlord and tenant subsisted between the *jaghirdar* and the cultivators, [p 755, col 1]

(2) that in the absence of a custom to the contrary, the cultivators were entitled to the minor produce from the lands brought under actual cultivation and the fact that before cultivating new lands formal permission was taken from the *jaghirdar* made no difference [p. 756, cols 1 & 2]

Where a number of villages in hilly tracts were granted in *inam* and there was no evidence to show either that only the revenue of the hills was granted or that the grantee did not own the *kudivaram*

Held, Per *Ramesam, J*, that the villages did not constitute an "estate" within the meaning of s 3 (2) (*d*) of the Madras Estates Land Act [p. 755, col 1]

Second appeal against a decree of the District Court, South Arcot, in Appeal Suit No. 131 of 1918, preferred against that of the Court of the District Munsif, Tirukoilur, in O. S. No. 1368 of 1914.

Messrs. *C. V. Anantakrishna Iyer* and *A. V. Viswanatha Sastry*, for the Appellants.

Messrs. *T. Rangachariar* and *C. Padmanabha Iyengar*, for the Respondents.

JUDGMENT.

Ramesam, J.—This appeal arises out of a suit for the declaration of the plaintiffs' right to the whole minor produce in the villages of Pudur *Jaghir*, and for injunction and damages. The *jaghir* of Pudur otherwise known as Ariya Goundan *Jaghir* is one of the five estates situated in the Kalroyan Hills. The Hills are partly in the Salem District and partly in the South Arcot District. This suit *jaghir* also is partly in the South Arcot District and partly in the Salem District. The first defendant is the present *jaghirdar* or the proprietor of the estate. The plaintiff was the lessee for six years from the first defendant of the minor produce of the *jaghir* under a registered lease-deed, Ex.-A dated 24th August 1908, which took effect from 10th July 1909 to 9th July 1915. The lease has since been extended under another deed dated 5th December 1918, Ex. B, for 25 years, *i e.*, from 9th July 1915 to 10th July 1920. Defendants Nos 6 to 63 are the cultivators of the entire lands in the *jaghir*. They claim a right to the minor produce and defendants Nos. 6 to 63 have entered into an agreement to sell it exclusively to the second defendant. The plaintiff alleges that the action of the defendants amounted to a denial of the plaintiff's right and caused damage to him and sues for the declaration and the other reliefs already mentioned The first defendant, Polighar supports the plaintiff.

The lands in the *jaghir* are classified as (1) Olavakkadu that is, actually cultivated, permanently with ploughs; (2) Ponalkadu, *i. e*, lands under shifting cultivation, (3) Natham, *i. e*, house sites and backyards, (4) Alankadu, *i. e*, jungles. The suit was originally for a declaration of the plaintiff's right to the minor produce in all the lands of the *jaghir* and the defendants have similarly asserted their right to the minor produce in all the lands including even Alankadu. But in the course of the trial before the District Munsif, the defendants have given up their right to the lands comprised in the description Alankadu. Before us the plaintiff has given up the right claimed in respect of Natham, so that the dispute before us relates only to Olavakadu and Ponalkadu lands. Both the District Munsif and the District Judge granted the declaration and injunction prayed for by the plaintiff. As to damages while the District Munsif gave a decree, the District Judge reversed it in appeal. In this second appeal the appellants are either defendants Nos. 3 to 63 or their legal representatives.

The revenue of the Polighar is not derived on any system of land assessment. The land which each cultivator cultivates from time to time is not measured and assessed to rent, nor is the value of the produce he raises computed and a share taken by the Polighar. The cultivators pay a plough tax, an impost of Rs. 1-4 0 per plough being collected on the number of ploughs a man uses. They also pay a poll tax levied on the individuals of the male sex. Married men pay Rs. 2 and bachelors annas 8. Each man cultivates where he likes and as much as he likes reclaiming the land by clearing away the jungle and leaving it for a new plot when the virgin fertility of the soil is exhausted. Land under such shifting cultivation is known as Ponalkadu. Near the village some more lands have come under permanent cultivation and these are called Olavakadu, the natural development of shifting cultivation.

The first point raised before us by the learned Vakil for the appellants is that the suit *jaghir* is an estate within the meaning of the Madras Estates Land Act of 1908. The District Munsif held that it is not an estate. On appeal the District Judge thought that it was unnecessary to give any definite finding on this point and he discusses the question of occupancy right on both alternative positions, *i. e.*, whether the Estates Land Act applies or does not apply. An estate is defined in s. 3, cl. (2) of the Estates Land Act. As the suit *jaghir* is not a permanently settled estate or a temporarily settled *zemindary*, (or a sub-division of such an estate or *zemindary)* it does not fall under cls. (*a*) and (*b*). As it is not an unsettled *jaghir*, it does not fall under cl. (*c*). Therefore, it does not fall also under cl. (*e*). The only possible clause under which the suit estate could fall is cl. (*d*). Clause (*d*) runs thus:—

"Any village of which the land revenue alone has been granted in *inam* to a person not owning the *kudivaram* thereof, provided that the grant has been made, confirmed or recognised by the British Government, or any separated part of such village."

Here there is no grant of a single village but an estate consisting of several villages. The South Arcot Gazetteer says at page 30 that the Ariya Goundan Estate consists of fourteen villages. Assuming that the fact that the grant was of a number of villages and not of a single village does not stand in the way of their satisfying the definition in cl. (*d*), we have next to see whether the other parts of the clause are satisfied. The learned Vakil for the appellants points out that the suit estate is a *jaghir*. It has been so described in the Schedule to the Madras Impartible Estates Act both under the heading of South Arcot and the heading of Salem. He refers to the decision in *Raghojirao Saheb* v. *Lakshmanrao Saheb* (1), where their Lordships of the Privy Council say:

"The lands had been formerly *jaghir*. But this term implied no grant of the soil, but a personal grant only of the revenue to the grantee. The *marathi* equivalent to the term *jaghir*, namely, *saranjam*, came in course of time to be applied to the lands"

He also refers to Baden Powell and Logan's Salem Manual (II). The suit estate was enfranchised in 1866. (See Exs. C and D). Exhibit D is headed "account relating to the villages which have been assigned and are being enjoyed by Polighar, Ramappa Ariya Goundan" Column 3 refers to the 14 villages which are enjoyed in the hilly tracts. In col. 12 we have got "There are no documents of title." There is a foot-note as follows:—

"As the said 14 villages are situate on the hills, they have never been surveyed and no *thiva* has been fixed". Exhibit C is the *inam* register and there is a foot-note in it similar to that in Ex. D column 3 is headed "The annual income derived from the 14 villages in the hilly tracts of Kallakurichi Taluk". In col. 1 the plough tax and the poll tax are mentioned. In column 22 the entry is: "In the absence of any accounts showing the area of the villages and their assessment, the only course is to adopt the revenue raised by the Polighar as the assessment on the villages."

These documents, Exs. C and D, do not refer to the suit estate as a *jaghir*, nor is there any trace in them of the fact that only the revenue of the hills was granted as *inam* to the original grantee. As the District Judge observes much reliance cannot be placed on a name especially where the earlier history of the *jaghir* is involved in considerable obscurity. The District Munsif thought that the original grantee was a bandit or a robber chief; but as already observed we have no information as to the origin of the estate except that Ariya Goundan held no *kavali* under the Government, but

(1) 16 Ind Cas. 239; 36 B. 639 at p. 658; 16 C. W. N. 1058; 23 M. L. J. 383; 12 M. L. T. 472, (1912) M. W. N. 1140; 14 Bom. L. R. 1226; 17 C. L. J. 17; 39 I. A. 202 (P. C.).

he paid a small *nazzar* or *peshkash* of Rs. 37-5-2 which was probably imposed in consequence of his holding no office. On these facts I am unable to distinguish this case from the case in *Suryanarayana* v. *Patana* (2), and the entries in Exs C and D of this case from Oake's Inam Register of that case (see page 1020)*. If so all the 14 villages must be regarded as granted to the original grantee and cl. (*d*) becomes inapplicable. But assuming for a moment that the grant was of the revenue and not the villages, the next question is whether the grant was to a person "not owning the *kudivaram* thereof". The burden of proving this is upon those who contend that the Estates Land Act is applicable. [*Vide Nainapillai Marakayar* v. *Ramanathan Chettiar* (3)]. There is no evidence in the case, nor can there be having regard to the history of the estate and the only information we have about the suit estate. In these circumstances it is difficult to hold that it has been proved that the suit estate is an estate to which the Estates Land Act applies.

The learned District Judge considered the question whether the defendants paid any rent to the *jaghirdar* and whether the relationship of landlord and tenant existed between the *jaghirdar* and the cultivating defendants; and he found that so far as Olavakadu lands were concerned there can be no occupancy right in them. As to Ponalkadu lands in connection with this point the defendants relied on two former judgments of this Court, Ex. XVI and XVIII. Exhibit XVIII was the only judgment considered by the District Judge. The District Judge after quoting the judgment of the High Court says, "The actual circumstances of those suits are not disclosed.....In any case it has no application here, where the poll-tax is not the equivalent of rent." Exhibit XVIII was a judgment in a batch of second appeals which arose in Salem District where a number of suits were filed for enforcing acceptance of *pattas*, the plaintiff being a mortgagee from Annamalai Goundan, the owner of Chinna Kalrayan Nad which is also one of the estates mentioned in the schedule to the Madras Impartible Estates Act under the heading of Salem. On a perusal of the *South Arcot Gazetteer* page 3, we find that the nature of the *jaghir* in South Arcot or Salem is practically the same. It is observed that "a great part of the Kalrayans is indeed situated within the Salem District and the boundary line between the latter and South Arcot passes along the top of them". Then the author gives the tradition of the five brothers dividing the hills among themselves, then he observes: "The south and south-western parts which happen to be the highest of the whole, were taken by Peria Kalvi Rayan and so were called after him the Periya Kalvi Rayan or Periya Kalrayan Hills, the lower slopes to the west of Salem, which chance to be the less elevated part, similarly became the Chinna Kalrayan Hills .... Ariya Goundan becoming the name of the northern part of the range."

Thus there is no doubt that the Chinna Kalrayan Hills and the suit *jaghir* were similar in tenure, and Ex. XVIII which related to the former shows that the High Court regarded the relationship between the cultivators and the *jaghirdar* as one of tenant and landlord. It is true that Ex. XVIII was passed in second appeal by a single Judge of this Court under O. XLI, r. 1. Benson, J., observes:

"I think the District Judge is right. The payments are evidently made as rent for the occupation of land calculated at so much per head, instead of so much per acre, which is the ordinary way in most cases. The second appeal is dismissed". That this is the true view of the revenue derived by the *jaghirdar* is also seen from the *inam* account, Ex. D and Register, Ex C already referred to. In col. 3 of Ex. D we have. 'The *tirva* which is collected in respect of the *punja* land for 53 ploughs at Rs. 1-4 0 per plough is Rs. 66-4-0". Then the poll-tax is referred to per head and both the items are totalled as Rs. 209 4-0 and referred to as the revenue. Though the revenue is described as poll-tax, it must be regarded as rent, this method of assessment being found convenient by the cultivators and the *jaghirdar*. Exhibit XVI was not referred to by the District Judge but was referred to by the District Munsif. It is the judgment in Second Appeals Nos. 2033 of 1910 and 260 and

(2) 48 Ind. Cas. 689, 41 M 1012, 45 I. A 209, 25 M L. T. 30; (1918) M. W N. 859; 23 C. W. N 273, 9 L W. 125; 29 C. L. J. 153, 1 U P. L R. (P. C) 11, 36 M L. J. 535, 21 Bom. L. R 517; (1919) M. W. N. 463 (P. C).

(3) 82 Ind. Cas 226; 47 M. 337; A. I. R. 1924 P. C 65; 19 L W. 259; 22 A. L J 130, 34 M. L. T 10, (1924) M. W. M. 293, 46 M. L J. 546, 10 C. & A. L R 464; 28 C. W. N. 809; 51 I. A. 83; L. R. 5 A. (P. C.) 33 (P. C.).

*Page of 41 M.—[*Ed.*]

261 of 1911. The suit was by the assignee of the Poligar for the enforcement of *patta* with certain restrictions relating to the cutting of trees and related also to the Chinna Kalrayan Hills. This judgment also leads to the same conclusion as Ex. XVIII. In the face of Exs. XVI and XVIII it is difficult to say that there is no relationship of landlord and tenant between the Poligar and the defendants and the District Judge is wrong in saying that "the ruling has no application where the poll tax is not the equivalent of rent." He has started with the assumption that the poll tax is not the equivalent of rent, and having said this, was of opinion that Ex. XVIII has no application to the present case; but Ex. XVIII shows that the poll-tax should be regarded as the equivalent of rent. Thus his judgment is vitiated by his misconstruction of Ex. XVIII.

We, therefore, start with the footing that the defendants are the tenants of the *jaghirdar* and we have to consider the question of right to the minor produce from this footing. The lower Appellate Court found on a discussion of the oral and documentary evidence that the Poligar is entitled to all the minor produce in the Palayam. In the form in which the Courts below discussed the question no doubt it is a question of fact; and if we are not satisfied with the findings of the lower Appellate Court we can only call for fresh findings. But as I have already pointed out the findings are vitiated by the conclusion of the Courts below that there is no relationship of landlord and tenant between the Poligar and the cultivators. I have come to the conclusion that there is such a relationship and starting from that footing, if there is any question of fact to be found we have to call for a finding. But it seems to me that what remains is a pure question of law. *Prima facie* a tenant, whatever his status as a tenant may be, *i. e.*, whether he is an occupancy tenant or a tenant from year to year or a tenant-at-will, is entitled to the produce of the land, included in the tenancy so long as the tenancy subsists. This is too elementary to need discussion. It is difficult to conceive what a tenancy is for, if the tenant is not to be entitled to the produce of the land. We are not concerned here with the right to cut trees, as to which the question may be a little more difficult. The suit before us relates only to the minor produce, *viz.*, Murabolams, Muradu, Pungan seed, Nux Vomica, Takarai seed, Seeran seed, Poochan seed, Konnai bark, Honey, Honey Wax, Sombai bark, Kapilipodi, Sural bark. In the case of such produce which can be gathered from land, *prima facie* the tenant is entitled to it. Is there any reason why in this particular case the cultivating tenants are not entitled to it? If any question of usage or custom can arise in this case, it is the plaintiff who claims to be the lessee from the Poligar that has to show such usage or custom by which he and not the cultivating tenants are entitled to the minor produce of the land actually under the tenant. The District Munsif found that under the custom prevailing in the *jaghir* the first defendant is entitled to the minor hill produce. The District Judge also gave a similar finding. The fact, that before cultivating the Ponalkadu land formal permission of the *jaghirdar* is taken proves nothing, nor is there any question of acquiring prescriptive rights. Both the District Munsif and the District Judge rely on certain leases of certain minor produce. The District Munsif relied upon Exs. P and S which are dated 1866 and 1872 for the purpose of making out a usage extending over a considerable period of time. But these documents, Exs. P and S, are so perfectly general that it is impossible to infer any right to minor produce from them. Exhibit P is a lease for cutting teak wood, spokes for wheels and for felling Vengai and other trees produced within certain boundaries. It makes no reference to the minor produce at all. Similarly Ex. S refers to all kinds of trees inclusive of those of Galnut, Sural, save those of jack fruit and tamarind as grown on "Pendakarainadu". Here again there is no specific reference to the minor produce. It is very difficult to see how these documents militate against the tenants' right to the minor produce. If these two are excluded, the documents relating to minor produce begin from Ex. Y dated 1890. But it is impossible to make out from the documents beginning from 1890 and ending with 1904 that an ancient, valid and binding usage is proved. We have got only four documents, Exs. Y, Y1 and M and N. Even these documents are general as to the area of the land covered by them. For instance Ex. Y refers to the produce in certain villages in Irugarainadu of Jagirmalai in Puduralailka. Particulars of villages are given; about 21 villages are enumerated. But it is possible that the minor produce

covered by the lease related only to Alankadu *i. e*, the hills and the jungle outside the cultivated land (Olavakadu and Ponalkadu). Alankadu is so much more in extent than the cultivated land that it is scarcely worthwhile to specially mention Olavakadu and Ponalkadu for the purpose of exclusion. At any rate a document like this does not bind the cultivating tenant, nor can it prove who took the produce of the lands under an individual tenant. Similar remarks apply to Y(1), M and N. The oral evidence is useless as it was adduced to prove enjoyment in accordance with the documents. I have, therefore, come to the conclusion that it is impossible to find in the evidence any usage by which the ordinary presumption of law entitling the tenant to enjoy the produce of his own land was displaced and the Poligar first defendant became entitled to collect all the minor produce even in lands under the tenants. Of course when I say that the tenants are actually entitled to minor produce on Ponalkadu, I refer to land which was actually under the cultivation of a tenant and therefore, which has not been abandoned, The moment a Ponalkadu land is abandoned, it is absorbed into the general Alankadu

For all the above reasons, the plaintiff is not entitled to the declaration of his rights to the minor produce of Olavakadu lands and Ponalkadu lands during the time they retain that character The plaintiff has given up his right to Natham He is entitled only to a declaration in respect of the produce of Alankadu.

The decree in favour of the plaintiff will, therefore, be modified accordingly. The plaintiff will bear the costs of the appellants here and in the lower Appellate Court. In the first Court each party will bear their own costs as they put forward extravagant claims which they afterwards had to modify.

Phillips, J.—I agree with the order proposed by my learned brother but I prefer to reserve my opinion on the question whether the suit *jaghir* is or is not an estate within the meaning of the Estates Land Act, as its determination is not necessary for the decision of this appeal which is based on the ordinary law of landlord and tenant.

V. N. V. *Decree modified.*

OUDH CHIEF COURT.

FIRST CIVIL APPEAL No. 12 OF 1924.

December 10, 1925.

Present:—Mr. Justice Ashworth and Mr Justice Raza.

RAM PHER SINGH, MINOR, AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

SHEO SARAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Vendor, title of, assertion of—Vendor not in possession at time of sale—Sale, what amounts to—Conveyance in consideration of price and promise to do certain things, whether sale—Transfer of Property Act (IV of 1882), s 54

In order to succeed in a suit for pre-emption, the pre-emptor must assert title in the vendor, and the fact that there was a conveyance by the vendor to the vendee which amounted to a sale The vendee *qua* vendee and as against the pre-emptor is estopped from denying the title of his vendor, and so, for the purposes of a pre-emption suit, the title must be assumed to exist in the vendor, if it is alleged by the pre-emptor to exist [p 758, cols. 1 & 2]

The deed of conveyance, however, must clearly profess to sell the property, and not merely be a promise to sell the property in the future It makes no difference whether the vendor was out of possession or in possession at the date of the sale, nor does it make any difference whether there was a small or large chance of his getting his title acknowledged in Court [p 758, col 2]

In order, however, that a transaction should amount to a sale it is necessary that there should be a price paid or promised or part paid and part promised, which means that the price must be stated in or ascertainable at the time of the deed [*ibid*]

A conveyance in consideration of a price and also a promise to do certain things, the doing of which will cost an indefinite sum of money, is not a sale [p 759, col 1]

Appeal against a decree of the Subordinate Judge, Sultanpur, dated the 22nd October 1923

Mr *H Husain*, for the Appellants.

Mr *A. P Sen*, for the Respondents.

JUDGMENT.—This first appeal arises out of a suit brought by the plaintiffs-appellants for pre-emption on the basis of a sale-deed dated 18th January 1922, Ex. 1, executed by *Musammat* Jagwanta Kuar, widow of Parag Singh, in favour of defendants respondents Nos. 2 to 6. This sale-deed sets forth that the vendor was entitled to the property of her husband, Parag Singh, but that two persons, Kalka Singh and Mahadeo Singh, had fraudulently obtained from the widow an agreement allowing the greater part of her husband's estate to be entered in their names in the village papers, only a small portion being entered in the widow's name. It goes on to say that she wanted to get this agreement set aside but had not the funds. She, therefore, sold

nine-tenths of her interest in the property of her husband to the defendants-vendees, who were to bear all the expenses of the litigation required to set aside the agreement. The lower Court held that this did not amount to a sale of interest in the property, but merely to a sale of her chances of success in a law suit, and on the authority of Privy Council cases, *Ranee Bhobosoonduree Dossee* v. *Issur Chunder Dutt* (1) and *Abdul Wahid Khan* v. *Shaluka Bibi* (2), held that in such circumstances, the sale-deed gave the plaintiffs-appellants no right of pre-emption. It may be mentioned that the plaintiff-appellant, Bhagwan Bux Singh, is a son Mahadeo Singh, one of the persons in whose favour the agreement mentioned above had been made by the widow.

The appellants rely upon two decisions of a Single Judge [Mr. S. R. Daniels of the Judicial Commissioner's Court, *Balwant Singh* v. *Lallu Ram* (3) and *Gajadhar Prasad* v. *Manra Khan* (4)]. In these two cases it was held that a right of pre-emption may arise in cases in which the vendor is out of possession, and litigation is necessary to recover possession of the property, provided that the sale is a genuine sale of the property and not a mere sale of a share in a law suit. The respondents, on the other hand, rely upon the case *Mirza Mohammad Abbas Ali Khan Bahadur* v. *A. Quieros* (5), where it was held that pre-emption would not arise where the property sold was not in the possession of the vendor at the time, and the vendor had only a doubtful right to recover it. This case also was based on the contingent nature of the purchase price paid. It purported to be based on the Privy Council case of *Abdul Wahid Khan* v. *Shaluka Bibi* (2).

In order to succeed in a case of pre-emption, there can be no doubt that the pre-emptor must assert title in the vendor, and the fact that there was a conveyance by the vendor to the vendee which amounted to a sale (or a foreclosure on a mortgage). In the Privy Council case the pre-emptor denied at the outset the title of the vendor, and consequently their Lordships held that there could be no sale on the plaintiff's own admission, because *according to the plaintiff-pre-emptor's own case*, the vendor was not selling a right in the property, but merely a share in a law suit. The decision of their Lordships of the Privy Council must not be construed, as it appears to have been construed by one of the Judges in the case, *Mirza Mohammad Abbas Ali Khan Bahadur* v. *A. Quieros* (5), as meaning that, whenever the title of the vendor was in doubt, the sale should be considered a sale of a share in a law suit and not a sale of property. Again the deed of conveyance, must clearly profess to sell the property, and not merely be a promise to sell the property in the future. [See *Ranee Bhobosoonduree Dossee* v. *Issur Chunder Dutt* (1)]. We agree with Mr. Daniels in *Gajadhar Prasad* v. *Manra Khan* (4), that it makes no difference whether the vendor was out of possession or in possession, nor does it appear to us to make any difference whether there was a small or large chance of his getting his title acknowledged in Court The pre-emptor is bound to assert the title of the vendee in order to claim pre-emption. The vendee *qua* vendee and as against the pre-emptor is estopped from denying the title of his own vendor, and so, for the purposes of the pre-emption suit, the title must be assumed to exist if alleged by the pre emptor to exist. But it is necessary in order for a transaction to amount to a sale that there should be, as stated in s. 54 of the Transfer of Property Act, IV of 1882, a price paid or promised or part paid and part promised, which means that the price must be stated or ascertainable at the time of the deed. Paragraph 7 of the sale-deed on which the claim to pre-emption is based is as follows ;—

" Consideration money of this deed is the sum which the vendees shall have to spend in conducting this suit from the beginning up to the end as well as their labour and loss (in conducting their suit). Amount of expenses in the suit is at present estimated to be Rs. 2,500 but it must remain clear, that if more than this amount is required for the expenses the vendees shall have to meet that sum and if the expenses are less than this amount then I shall not be entitled to get the surplus from the vendees. For the purpose of stamp the entire consideration money of this deed is fixed to be Rs. 10,000 half of which amount to Rs. 5,000, this includes labour and trouble on the part of the vendees." This does not satisfy

(1) 18 W. R. 140; 11 B. L. R. 36; 3 Sar P. C. J. 136 (P C).
(2) 21 C. 496; 21 I. A. 26; 6 Sar. P. C. J. 399; Rafique & Jackson's P. C. No. 134, 10 Ind. Dec (N. s.) 961 (P. C.).
(3) 49 Ind. Cas. 462; 6 O. L. J. 29.
(4) 66 Ind. Cas. 684; 8 O. L. J. 403; 4 U. P. L. R. (O) 41; A. I. R. 1922 Oudh 156.
(5) 9 O. C. 86.

the condition just stated. The conveyance is not a sale-deed. At the best it is a conveyance in consideration of a price and also a promise to do certain things, the doing on which will cost an indefinite sum of money. It is unnecessary to consider whether such a deed of conveyance is one that can be held in India to operate as a transfer, or merely as evidence of a promise to transfer. It is not a sale-deed, and does not give rise to a right of pre emption.

On these grounds, we hold that the lower Court rightly dismissed the suit, and we dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS APPEAL No. 1566 OF 1924.

January 8, 1925

Present:—Mr. Justice Campbell

NOOR DIN—PLAINTIFF—APPELLANT

versus

SULAKHAN MAL—DEFENDANT—RESPONDENT

Civil Procedure Code (Act V of 1908), s 60 (c)—House of agriculturist in city—Exemption from attachment—Occupation, meaning of

A house of an agriculturist in a city in which he spends his nights and to which he brings his cattle every night from the lands cultivated by him, is exempt from attachment, notwithstanding the fact that he owns two other houses on his lands expressly meant to be used for agricultural purposes

The words "occupied by" in s 60 (c), C P C, mean "lived in by" or "used for agricultural purposes by"

Radhakisan Hakumji v *Balwant Ramji*, 7 B 530, 8 Ind Jur. 146, 4 Ind Dec (N. S.) 357 and *Jivan Bhaga* v. *Hira Bhaiji*, 12 B. 363, 6 Ind Dec (N S) 726, distinguished

Attar Singh v *Bhagwan Das*, 2 Ind Cas 983, 65 P. R 1909; 104 P W R 1909, 141 P L R 1909, referred to.

Appeal from a decree of the Senior Sub-Judge, Lahore, dated the 28th May 1924.

Mr. *Nihal Chand Mehra*, for the Appellant.

Lala *Tirath Ram*, for the Respondent.

JUDGMENT.—This is a case where a judgment-debtor Nur Din objected to the attachment in execution of a decree of his house in Lahore City on the ground that it was exempt under s. 60 (c) of the C. P. C.

The objector proved that agriculture was his chief occupation, that he cultivated land a mile or 1½ miles from the house in question and that every night he took his cattle home to this house and spent the night in it. It was, however, elicited in evidence that the objector owns two other houses in the vicinity of his agricultural land, but it was stated that one of them was in the possession of mortgagees.

The lower Court has rejected the petition on the grounds that the objector was bound to prove that the city house was occupied by him *bona fide* for the purpose of agriculture and that the bare fact that after doing his day's work in the villages he brings his cattle with him to the city house because the village is *becheragh* is not sufficient to show that the city house is occupied by him as an agriculturist, especially when he has got houses on his lands expressly meant to be occupied and used for agricultural purposes.

There is nothing in s. 60 to justify such an interpretation of its terms, and of the ruling quoted by the learned Senior Subordinate Judge in support of his finding *Radhakisan Hakumji* v. *Balwant Ramji* (1) and *Jivan Bhaga* v *Hira Bhaiji* (2) are not in point at all, and *Attar Singh* v. *Bhagwan Das* (3) is in favour of s. 60 (c) being taken to mean what it says

Mr. Justice Johnstone laid down that the words "occupied by" mean "lived in by" or "used for agricultural purposes by."

The present house is the permanent residence of the judgment-debtor who is an agriculturist and, therefore, even if the words of s. 60 (c) should be read as meaning belonging to an agriculturist and occupied by him as such, the house in question undoubtedly is occupied by an agriculturist as such, for agriculturists like other people must have some place to lay their heads at night, and if an agriculturist has a house in a city a mile from his land there is no reason on earth why he should not use it as his ordinary residence.

I accept the appeal and order that the house be exempted from attachment. The appellant will have his costs in both Courts.

R L. *Appeal accepted.*

(1) 7 B 530, 8 Ind Jur. 146; 4 Ind. Dec. (N. S.) 357.

(2) 12 B. 363, 6 Ind. Dec. (N. S.) 726.

(3) 2 Ind Cas 983, 65 P. R. 1909, 104 P. W. R. 1909; 141 P. L R. 1909.

PRIVY COUNCIL.

APPEAL FROM THE COURT OF THE RESIDENT, HYDERABAD, DECCAN.

October 20, 1925.

Present:—Viscount Finlay, Lord Carson and Lord Blanesburgh.

FIRM OF *Rai Bahadur* BANSILAL-ABIRCHAND—PLAINTIFF—APPELLANT

versus

GHULAM MAHBUB KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 10 (c) - Place of suing—Suit to recover loan—Duty of debtor to find and pay creditor, limits of—Jurisdiction, plea of, not raised before Court of first appeal, whether can be taken in second appeal.

A plea of want of jurisdiction of the Trial Court, raised in that Court but not taken in the Court of first appeal, may nevertheless be raised in second appeal. [p. 761, col 1.]

The duty of a debtor to find and pay his creditor is duly imposed upon him when the creditor is within the realm. [p 762, col. 1]

Plaintiff, a money-lender, carrying on business in British India, advanced a loan to the defendant, a resident of a Native State, which was made re-payable by instalments in the Native State. Plaintiff instituted a suit in a British Court to recover the loan

Held, that as no part of the obligation was assumed or was to be discharged by the defendant in British India, the British Court had no jurisdiction to entertain the suit [p. 762, col. 1.]

Appeal from the Court of the Resident at Hyderabad, Deccan.

Messrs. *L. De Gruyther, K.C*, and *B. Dube*, for the Appellant

Messrs. *George Lowndes, K. C.*, and *E. B. Raikes*, for the Respondents.

JUDGMENT.

Lord Blanesburgh.—This is an appeal by the plaintiff from a judgment and decree, dated the 27th September 1922, of the Court of the Resident at Hyderabad, reversing a decree, dated the 22nd November 1921, of the Assistant Resident there, and restoring, albeit on other grounds, a decree made by the Civil Judge of Secunderabad, dated the 8th July 1919.

The suit was commenced by the appellant in the Court of that Judge in September 1911. Its purpose was to recover money lent by him so long ago as 1891 to the grandfather of the first respondent with re-payment guaranteed, so it was alleged by the late Sir Asman Jah, Prime Minister of Hyderabad, whose estate is represented in the suit by his son, the second respondent. The borrower, the alleged surety, and their respective representatives were, or are, all residents in Hyderabad, the capital of the Nizam's Dominions. The appellant, however, has a place of business at Secunderabad, a neighbouring British cantonment, and asserting that the loans were both made and re-payable there, he claimed that his suit in respect of them was cognizable by the local British Court.

But this was not the appellant's only reason for invoking that jurisdiction—if he could successfully do so. In the Courts of the Nizam his demands had long since been barred by lapse of time. In the British Court, however, he claimed to be entitled to escape from the operation of the Indian Limitation Act—an Act otherwise entirely applicable to the case—on the ground that the residence of the defendant in Hyderabad was a "foreign" residence which took his claim against them outside the Statute although their residence was in fact only six miles away.

In the Courts below many matters of fact were canvassed. Most of these, concluded by concurrent findings, were before their Lordships treated as settled, and the arguments were addressed to one question only, *viz*, was the Court of the Civil Judge of Secunderabad entitled to entertain the suit at all?

That learned Judge had held that he had jurisdiction in the matter, but he dismissed the suit, holding on the view taken by him of the facts, that the appellant had been re-paid all that was due to him.

The appellant appealed to the Assistant Resident at Hyderabad. His appeal was resisted only by the second respondent, and he, it is stated, did not there raise again his objection to the jurisdiction of the Court taken before the Trial Judge, and certain at least it is that the learned Assistant Resident made no reference to the point in his judgment, by which the claim of the appellant was in effect allowed in full. The second respondent then appealed to the Resident, and he, taking up the consideration of the question afresh, held that the Civil Judge of Secunderabad had no jurisdiction in the matter. On that ground he allowed the appeal and dismissed the plaintiff's suit, expressing, however, at the same time his concurrence with the findings of fact of the Assistant Resident where these were at variance with the findings of the Trial Judge. The plaintiff again appeals.

At the outset their Lordships would express their entire concurrence with the

learned Resident in his observations upon the importance of this question of jurisdiction in such a case as the present. The respondents are both of them subjects of the Nizam, from whose cession, as the learned Resident points out, the jurisdiction of the Secunderabad Court practically proceeds. In the circumstances, and especially where, as here, the liability or non-liability of such defendants may actually depend upon it, the question of jurisdiction becomes of first importance, different in character from such a question when it arises merely as between one Court and another in British India. And, while their Lordships would not here have upheld, even if it had been pressed, the contention raised in his printed case by the appellant that this question of jurisdiction decided by the Trial Judge in his favour, and not re-opened before the Assistant Resident, must now be treated as concluded against the respondents, they are gratified to record that that contention was not persisted in before the Board. Indeed, as they have already said, the arguments before them were confined to its discussion.

Its determination turns solely upon the question whether, in this case, within the meaning of s 20 (c) of the C. P. C., the cause of action wholly or in part arose within the local limits of the Civil Judge of Scunderabad. The facts upon which the answer depends lie in a small compass.

In 1891 Muhammad Ala-ud din Khan, deceased, grandfather of the first respondent, was *Silladar* of Sir Asman Jah Bahadur, Prime Minister of the Nizam Having agreed to purchase 100 horses to form part of the bodyguard of the Prime Minister Ala-ud-din borrowed from the plaintiff Rs. 40,000 to pay for them, and arranged with the *Paigah* of the Minister for re payment of the loan with interest by monthly instalments by means of deductions from his salary in the manner which is thus described in a communication addressed on the 29th July 1891, by the Secretary of the Minister to the Pay Office of the *Paigah* :—

"The said *Silladar* for purchasing the horses has borrowed from Rai Bahadur Bansilal Abirchand the sum of Rs. 40,000 with interest at 1½ per cent., and has assigned the liability to pay the principal and interest by monthly instalments of Rs. 1,000 upon this Secretariat. Wherefore you had better pay to the person who may bring the *chitti* of the said *Sowcar* the sum of Rs. 1,000 every month."

The promise made to the plaintiff, the fulfilment of which was thus directed, was contained in a note which had been addressed by the same Secretary to the plaintiff on 21st July 1891 in which it is stated that "every month at the time of distribution of pay of the force, after taking receipt of Khan Sahib a sum of Rs. 1,000 will be paid from the *ilaqa* to the plaintiff's *ilaqadar*, who may bring *chitti* signed by the plaintiff without any objection or prevention from the *Sarkari* Treasury until the principal and interest are fully liquidated.

In these terms was the promise of the Treasury made, and their Lordships are willing to accept without deciding that, as alleged by the plaintiff, they constituted a contract of suretyship Ala-ud-din being the principal debtor

His own obligation as such is expressed in a bond of the 25th July 1891 in which he promises the plaintiff :

"That in re-payment of the said sum (Rs. 40,000) and until the principal and interest is re-paid one instalment of a sum of Rs. 1,000 will be reaching you every month from out of the distribution of the pay of the force Accordingly I have also caused a guarantee to be made for the said sum of money by means of a *rubkar* dated the 21st July 1891 from the office of the Secretary of Revenue. The instalment of Rs. 1,000 which has been agreed will reach you directly from the Treasury irrespective of the fact whether there is any saving from out of the salary of the horses or not . There will be no failure in the instalments reaching you. If for any reason perchance one instalment is defaulted the said *Sowcar* will have power to sell immediately the horses by auction and recover and pay himself the total amount."

A further advance of Rs. 5,000 was made by the plaintiff on 9th August 1891 and a final advance of Rs. 7,628 on the 6th June 1894. These for present purposes may be treated as having been made on the same terms.

As to their meaning and effect their Lordships are not in doubt. The Treasury or surety re payment is to be made to the plaintiff or his representative at the office of the Treasury at Hyderabad and the instalments, which in the principal-debtor's

bond are described as "reaching" the plaintiff are the very instalments of which payment is so to be made. There is no promise either by the principal debtor or the surety to make any payment at Secunderabad, and so far as the principal-debtor is concerned the bond above abstracted is the only promise on his part which is forthcoming. It is quite true that on failure of any instalment there is doubtless an implied promise by him to re-pay the loan. But there is no implied promise to re-pay it at Secunderabad. Even by British law the duty of a debtor to find and pay his creditor is only imposed upon him when the creditor is within the realm. And the plaintiff has not contended that if there be any such duty at all imposed by Indian Law upon a debtor it extends in this respect further than in England. Accordingly, so far as the principal-debtor is concerned there is no obligation upon him, either express or implied, to make any payment to the plaintiff at Secunderabad.

Nor so far is there any such obligation assumed by the surety.

But it is contended, and the Trial Judge took the view that such an obligation is to be found in two documents written in the year 1904, one on the 30th March, addressed by the Treasury Secretary of the appellant, and the other, on the 13th April, addressed by one department of the Prime Minister's establishment to another, a copy being forwarded to the appellant.

Their Lordships do not consider it necessary to discuss these documents in detail. They are satisfied that they were never intended to alter the contractual obligations of the surety. At most they indicated a substituted arrangement to be continued only so long as was convenient; there was neither intention to alter nor any consideration present for the alteration of the obligations as they then existed.

It follows that in their Lordships' judgment no part of the obligations either of the principal-debtor or of the surety was to be discharged at Secunderabad. And no obligation was assumed there. No part of the plaintiff's cause of action accordingly arose within the local limits of the Court of the Trial Judge. He had no jurisdiction to entertain the suit, and in their Lordships' judgment the decree of the learned Resident was quite right.

Their Lordships accordingly will humbly advise His Majesty that this appeal there from be dismissed with costs.

Z. K. *Appeal dismissed.*

Solicitors for the Appellants:—Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents:—Messrs. *Lattey & Hart.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1335 OF 1924.

January 8, 1925

Present: —Mr. Justice Campbell.

LADHA SINGH—DEFENDANT—APPELLANT

versus

SUNDAR SINGH—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), s 17, construction of—Further charge for less than Rs. 100—Registration—Mortgage—Interest—Charge

Section 17 of the Registration Act must be strictly construed and unless a document is clearly brought within its purview non-registration is no bar to the document being admitted in evidence In cases of doubt, the benefit of doubt must be given to the person who wants the Court to receive the document in evidence [p 763, col. 2]

Attra v. *Mangal Singh*, 65 Ind Cas. 264; 2 L. 300; 4 L. L J 1; 27 P. L. R 1922; A I R. 1922 Lah 43, followed

A deed creating a further charge for less than Rs. 100, which does not supersede the previous mortgage and substitute a new one consolidating the previous one, is not compulsorily registrable [p 763, cols 1 & 2]

A mortgagee is entitled to treat interest due under a mortgage as a charge upon the property in the absence of a contract to the contrary and to refuse redemption unless it is included in redemption price. [p 763, col 2.]

Aulia Khan v. *Kanshi Ram*, 17 Ind Cas 677; 45 P. R 1913; 25 P. W. R 1913, 145 P. L. R 1913 and *Jwala Singh* v. *Teja Singh*, 71 Ind. Cas. 801, (1924) A. I R (L) 273, not followed

Ganga Ram v. *Natha Singh*, 80 Ind. Cas. 820; 5 L. 425, A. I R. 1924 P. C 183, 22 A. L J. 688; 47 M. L J 64. 20 L W. 101, 26 Bom L. R. 750, 10 O. & A. L. R 771; 35 M L. T. 141; (1924) M. W. N. 599; 2 Pat. L. R 257; 11 O. L. J. 534; 6 L. L. J. 551, 51 I. A. 377; 1 L. C. 446; L. R. 5 A. P. C.) 133, 6 P L. T. 97; 1 O. W. N. 469; 29 C. W. N. 558 (P. C.), followed.

Second appeal from a decree of the Additional District Judge, Amritsar at Gurdaspur, dated the 7th February 1924, affirming that of the Subordinate Judge, Third Class, Tarn Taran, District Amritsar, dated the 8th January 1923.

Lala *Fakir Chand*, for the Appellant.

Mr. *Duni Chand*, for Mr. *Ganpat Rai*, for the Respondent.

JUDGMENT.—This judgment will dispose of Second Appeals Nos. 1335 and 1336 of 1924.

There were two suits for redemption of two mortgages of two plots of land which were executed on the 25th June 1906 One mortgage was for Rs. 500 in favour of Sohan Singh and the other was for Rs. 300 in favour of Ladha Singh. In both suits the mortgagees represented that a further charge had been created in the sum of Rs. 56 by an unregistered-deed of the 2nd March 1911. The lower Appellate Court has held that the unregistered-deed was inadmissible in evidence for want of registration and that the transaction recorded in it could not be proved. It held further that if the deed was admissible the interest claimed by the mortgagees on the principal sum of Rs. 56 was not a charge upon the mortgaged land. Redemption was allowed on payment of Rs. 800 due on the two former deeds but as the plaintiff had deposited Rs. 850 in Court this was actually the sum which the mortgagees obtained.

In both cases the mortgagees have appealed. Rupees 212 are claimed on the unregistered deed, *i. e.*, Rs. 6, the balance of principal and Rs. 206 interest and this amount is equally divided between the two mortgagees. It has been urged that both the decisions of the lower Appellate Court described above are contrary to law.

In regard to the question of compulsory registration the learned Additional Judge has held that the document of the 2nd March 1911 effected a consolidation of the two previous mortgage-deeds and has the effect of increasing the charge on either plot by a sum certainly exceeding Rs 100, the consequence of which was that the bond was inadmissible in evidence for want of registration. I do not comprehend the reasoning of the learned Additional Judge and no further light is thrown upon it by the learned Vakil for the respondent who has asserted that the finding is right but has not been able to quote me any authority in support of it. I have examined the terms of the document carefully and am unable to say that its effect is more than to create a further charge of Rs. 56 upon the two previously mortgaged plots. If it required registration it must have purported or operated to create, declare, assign, limit or extinguish some right, title or interest in immoveable property of the value of Rs. 100 and I cannot see that it does this. In *Attra* v. *Mangal Singh* (1) the learned Judges declared it to be a well established rule of construction that s. 17 of the Registration Act being a disabling section must be strictly construed that unless a document is clearly brought within its purview non-registration is no bar to the document being admitted in evidence and that if there is no doubt on the subject the benefit of the doubt must be given to the person who wants the Court to receive the document in evidence. The contents of the deed in question are not those of a document superseding the previous mortgage contracts and substituting an entirely fresh contract and the words cited by the learned Additional Judge in his judgment mean no more, in my opinion, than that the redemption price of the two previous mortgages was increased by a further sum of Rs. 56. I hold that the document was not one which comes within the scope of s 17 of the Registration Act.

The stipulation about interest immediately followed the words quoted by the learned Additional Judge and were as follows :—'*aur sud fi sadi do rupaya mahwari dena mukarir kiya hai*'. The learned Additional Judge decided that this was a separate sentence which had nothing to do with the previous sentence providing for redemption and that there was not the remotest indication in the deed that interest had also to be paid before redemption could be effected. For this conclusion he relied upon *Aulia Khan* v. *Kanshi Ram* (2) and *Jwala Singh* v. *Teja Singh* (3). The latter case certainly supports him, but in my judgment it must be taken to have been overruled by the decision of their Lordships of the Privy Council in *Ganga Ram* v *Natha Singh* (4). It was there held that a mortgagee is entitled to treat interest due under a mortgage as a charge upon the mortgaged property in the absence of any contract to the contrary and that it is most important

(1) 65 Ind Cas 254; 2 L. 309, 4 L. L. J. 1; 27 P. L. R. 1922; A I R. 1922 Lah 43
(2) 17 Ind. Cas 677; 45 P. R 1913; 25 P. W R. 1913; 145 P L R 1913
(3) 71 Ind Cas. 801; A I. R 1924 Lah. 273.
(4) 80 Ind Cas 820, 5 L. 425; A I R 1924 P. C. 183; 22 A. L J. 688; 47 M. L J. 64; 20 L. W. 101; 26 Bom L. R. 750, 10 O & A L. R. 771; 35 M. L. T. 141; (1924) M. W. N. 599; 2 Pat. L. R. 257; 11 O. L. J. 534, 6 L. L. J 551; 51 I. A 377; 1 L. O 446; L. R. 5 A. (P. C.) 133; 6 P. L. T. 97; 1 O. W. N. 469; 29 C. W. N. 558 (P. C.).

that this general rule should not be shaken in any particular.

Accordingly I accept both appeals and in each case modify the decree by directing that the redemption price to be paid by the plaintiff shall be increased by Rs. 106. The appellants will have their costs in this Court and in the lower Appellate Court.

R L. *Appeals accepted.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 484 OF 1924.

December 8, 1925.

Present:—Mr. Justice Raza and Mr. Justice Hasan.

PARBHUDAYAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

Babu LALTA DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Succession—Property held by yati—*Disciples, rights of.*

A *bairagi faqir*, or a *yati*, may hold private property. [p. 765, col 1.]

On the death of a *yati* his preceptor, and in the absence of the preceptor, the disciples of the *yati* would succeed to any private property left by him. [*ibid.*]

Appeal against the judgment and decree of the District Judge, Gonda, dated the 31st October 1924, reversing that of the First Subordinate Judge, Bahraich, dated the 21st April 1923.

Messrs. *Haidur Husain* and *K. P. Misra*, for the Appellants.

Mr. *Bisheshar Nath*, for the Respondents.

JUDGMENT.—This is the defendants' appeal from the decree of the District Judge of Gonda, dated the 31st of October 1924, which reversed the decree of the First Subordinate Judge of Bahraich, dated the 21st of April 1923.

The decision of this case has been made difficult by the manner in which the Trial Court as well as the Court of Appeal has dealt with it. The case as set forth in the plaint is extremely simple and is free from any controversial point of law if its true nature were understood and firmly grasped. The plaintiffs-respondents' case was that the property in suit belonged to Baba Janki Das and that on his death they were entitled to succeed under the ordinary Hindu Law to the estate of Baba Janki Das. Baba Janki Das was admittedly a *Bairagi faqir* or in other words a *sanyasi*. The title, on which the plaintiffs rested their claim of inheritance, consisted of the fact that they were the disciples of Baba Janki Das. To this simple case the defendants replied that the property in suit originally belonged to one Baba Ram Charan Das, that it was held by Baba Janki Das with the permission of the defendants and that the defendants were the rightful heirs of the estate of Baba Ram Charan Das.

In order to appreciate the relevency of the defence to the suit we have to state some facts antecedent to the title of Baba Janki Das to the property in suit on which the plaintiffs rely. One Baba Ram Charan Das was a *sanyasi bairagi* or a *yati*. That he belonged to such a sect of mendicants leads to the presumption that he must have been a member of the twice born classes. On his death in 1894, he was buried by his two disciples, Ram Ghulam Das and Baba Janki Das, who erected a *samadh* or tomb over the place where the body was lain. It is found by both the Courts below that Ram Ghulam Das and Baba Janki Das also set up a temple and then established an annual fair at the spot. Ram Ghulam Das died in 1897. He was succeeded by his co-disciple brother, Baba Janki Das, in the possession and management of the estate, which the two disciples had brought into existence. Baba Janki Das died on the 20th November 1918 and, as already stated, the plaintiffs claim succession to Baba Janki Das.

The Courts below have introduced into this case the question of custom regulating the succession to this temple as if it were a *mutt* or *asthan* of ancient times, the succession to which would be regulated by the rules of practice that were observed in such institutions We think that that was a diversion which was not permitted by the pleadings in the case. At the hearing of the appeal before us the line of attack taken was that the custom, on which the finding of the Court of Appeal rests, was not established. In support of this argument which, according to our judgment, was irrelevant, a large number of cases decided by their Lordships of the Privy Council were cited to establish the proposition that the succession to a particular *mutt* depends upon the rules of usage applicable to that *mutt*.

The findings of the Courts below are not clear on certain questions, but in the cir-

cumstances of the case and having regard to the evidence, there can be no doubt that the following facts have been established:—

The property in suit consists of certain moveables in the shape of clothes and other articles of domestic needs and of certain items of immoveable property, for instance, the temple, garden, tank and other appurtenance of a similar nature. The immoveable property, to which reference has just now been made, was the outcome of the joint exertions of Ram Ghulam Das and Baba Janki Das. On the death of Ram Ghulam Das in 1897 Baba Janki Das entered into undisputed possession of the estate then in existence and finally Baba Janki Das having held possession of all these properties from the year 1897, died, in 1918 There is no proof, direct or indirect, of any dedication of these properties in the true sense of the term. We must, therefore, hold that the plaintiffs have succeeded in establishing this fact that the properties in suit belonged to Baba Janki Das as his private property. Baba Janki Das being himself a *faqir* naturally treated the temple and its appurtenances in a spirit of religious devotion, but that fact did not deprive him of his ownership in those properties. It is further admitted that the plaintiffs are the *chelas* of Baba Janki Das. The simple question of law which, therefore, arises in the appeal is whether properties held by Janki Das can be inherited by the present plaintiffs under any rule of Hindu Law. It is not denied that a *bairagi faqir* or an ascetic or even a *yati* may hold private property of his own and we have found, as already stated, that Baba Janki Das held the properties in suit in that character.

The rule of inheritance applicable to the present case is given in all the books of Hindu Law. We will first of all refer to the Institutes of Yajnavalkya. In the Chapter relating to the division of property among heirs the 140th couplet is translated as follows:—

"The preceptor, a qualified disciple, a brother of the same religious persuasion and an associate in holiness (one living in the same hermitage and belonging to the same order), shall, in order, inherit (*i.e.*, the next succeeding in the absence of the previous person), the properties (books, clothes, etc.) of a Vanaprastha, *Yati*, and a *Brahmacharin* (religious student)."

We have already held that Baba Janki Das was a *yati*. We have also held and indeed it is admitted that the two plaintiffs are the disciples of Baba Janki Das. We are, therefore, of opinion, that the plaintiffs have succeeded in making out their title to the property, to which they laid claim in this suit. The rule of law, which we have quoted from Yajnavalkya, is stated in other books of Hindu Law also. Sastri's Hindu Law, 1924 Edition, page 688; Ram Krishna's Hindu Law, 1913 Edition, page 166. Ghose's Hindu Law, 1st Edition, pages 917 and 918 and Gour's Hindu Code, 2nd Edition, page 1052. The view of law, which we have taken, is also supported by a decision of the late Court of the Judicial Commissioner in the case of *Drigbijai Singh* v *Mahant Bishambar Das* (1)

The appeal fails and is dismissed with costs.

Z K *Appeal dismissed.*

(1) 3 O C 281

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No 1457 OF 1924.

January 15, 1925.

Present:—Mr. Justice Campbell.

MUNICIPAL COMMITTEE, NOTIFIED AREA, TARN TARAN THROUGH PRESIDENT AND SECRETARY OF MUNICIPAL COMMITTEE, TARN TARAN—DEFENDANTS—APPELLANTS

versus

MUL RAJ—PLAINTIFF—RESPONDENT.

Punjab Municipal Act (III of 1911), ss. 172, 193—Tacit sanction—Erection of building

The tacit sanction provided for by s 193, Punjab Municipal Act, covers only erections of buildings entirely within the bounds of a person's own land but does not cover a projection or structure overhanging or encroaching upon any street or road. [p 766, col 2]

Municipal Committee of Delhi v *Devi Sahai*, 62 P R 1907, 105 P. L. R. 1908, 147 P. W. R. 1907, followed.

Second appeal from a decree of the District Judge, Amritsar, dated the 25th February 1924, affirming that of the Sub-Judge, Fourth Class, Tarn Taran, dated the 9th July 1923.

Dewan *Mehr Chand*, for the Appellants.

Mr. *Lalchand Mehra*, for the Respondent.

JUDGMENT.—This second appeal arises out of the following situation:—

The plaintiff in the suit applied to the

Notified Area Committee, Taran Taran, on the 13th of November, 1922, under s. 189 of the Punjab Municipal Act for permission to erect a certain building. The building included a certain *chhajja*. The Municipal Committee passed an order refusing permission but this was on the 15th of January 1923, after the expiry of the two months referred to in the proviso to s. 193. The plaintiff proceeded to build the *chhajja* and the Committee then demolished it acting under s. 172 of the Act. The demolition was actually carried out after the plaintiff had filed his present suit for an injunction restraining the Committee from interfering with his *chhajja*.

The Trial Court held that s. 172 did not apply since the *chhajja* was not a projection over a street and the plaintiff was given a decree for the injunction prayed for and the defendant Committee was ordered to re-build the *chhajja*. Appeal was made to the learned District Judge. He held firstly that the well and *thara* overhung by the *chhajja* came within the definition of a street as contained in Punjab Act III of 1911. Secondly, he held that under s. 183 (proviso) the Municipal Committee by failure to pass orders on the plaintiff's application for two months were to be deemed to have sanctioned the building of the *chhajja* absolutely and thirdly the learned District Judge altered the injunction for re-building the *chhajja* into a decree for Rs. 100 compensation.

The Committee have come to this Court in second appeal. The learned District Judge with reference to his second finding wrote in his judgment: "As the Committee failed to pass orders and thus sanctioned the proposed building absolutely, it was in my opinion unnecessary for the plaintiff to receive any further permission, whether written or otherwise, for the purposes of s. 172. There is no authority for interpreting the very wide expression relating to 'absolute sanction' in s. 193 in such a way as to exclude the 'written permission' required by s. 172."

The learned District Judge's attention was not directed to *Municipal Committee of Dehli* v. *Devi Sahai* (1) a decision by a Division Bench of the Chief Court which contains the direct authority which he found lacking. It was there ruled that a tacit sanction provided for by what corresponded then in the law to s.193 covers only erection, or re-erection of buildings entirely within the bounds of a person's own land, but does not cover a projection or structure overhanging or encroaching upon any street or road.

The learned Counsel for the plaintiff-respondent has not attempted to distinguish *Municipal Committee of Delhi* v. *Devi Sahai* (1) but has supported the learned District Judge's decision on the ground that his finding about the *thara* and well being a street is incorrect. There can, however, be no interference with this finding. The definition of street in the present Act is extraordinarily wide, and the learned District Judge held on evidence that the well and *thara* are an erection which lies on the side of the roadway upto the boundaries of the adjacent property and that they are not private property.

The result is that the case came within s. 172 of the Act and the plaintiff is entitled to no relief. The appeal is accepted and the plaintiff's suit is dismissed with costs throughout.

K. L. *Appeal accepted.*

(1) 62 P. R. 1907; 105 P. L. R. 1908; 147 P. W. R. 1907.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 191 OF 1924.

May 11, 1925.

Present:— Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice Maung Ba.

MAHOMED SIDDIQ—APPELLANT

versus

LI KAN SHOO—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 55—Vendor and purchaser—Defect in title, whether "material defect"—Fraudulent concealment of defect—Possession, failure to give—Sale, whether can be cancelled.

A defect in title is a "material defect" within the meaning of those words as used in s 55 of the Transfer of Property Act. [p 767, col. 2]

Where a vendor of immoveable property fails to disclose to the purchaser a defect in the title which the latter could not have himself discovered, or fails to deliver possession of the property sold to the purchaser, the latter is entitled to cancel the sale and to sue to recover the purchase-money paid by him together with the incidental expenses incurred by him. [*ibid.*]

First appeal against a decree of the Original Side in C. R. No. 396 of 1923.

Mr. *Vertannes*, for the Appellant.

Mr. *Bannerji*, for the Respondent.

JUDGMENT.—The defendant-appellant is the son-in-law of one Mg. Po Sin. On

the 28th August 1922 he purchased the house and land in question from his father-in-law. The site was leased from the Development Trust and the lease is in favour of Po Sin alone. On the 4th of December 1922 the defendant-appellant purported to convey this property to the respondent for Rs 7,500 and a registered deed was executed and the purchase price paid. Then the respondent, who had bought the property with a view of enlarging an adjoining property of his, sought to obtain possession. He found that one Ma Kin was in possession of a part of the house. We are informed by the appellant's Counsel that his client gave the respondent such possession as the property admitted of by taking him to Ma Kin, who agreed to attorn to the respondent. As, however, Ma Kin would not vacate the premises, the respondent brought a suit in the Small Cause Court alleging that she was his tenant. This was apparently done because the conveyance having been executed and registered, no title remained in the appellant on which he could sue. He, however, gave evidence in favour of the respondent in the respondent's case that Ma Kin was his tenant That suit was dismissed and the respondent, being unable to obtain possession of the property, has brought the present suit to recover the purchase price paid with interest and including stamp fees and registration fees. The plaintiff alleges that Ma Kin claims to be the wife of Mg. Po Sin and that she refuses to give possession. He further alleges that the defendant was aware of Ma Kin's claim and fraudulently concealed the fact when purporting to sell the house to him. The learned Judge in the Court below has held that there is no defence to the suit and has granted a decree as prayed. He held that the allegation of fraud was unnecessary. It is admitted that the appellant was bound to give possession had the respondent demanded it; but it is urged that he never demanded it and so the appellant was relieved of that duty. It is further urged that a plea of fraudulent concealment was essential in that the conveyance had been executed.

The matter falls within the purview of s. 55 of the Transfer of Property Act. By sub-s. (1) (*a*) the seller is bound to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not, aware and which the buyer could not, with ordinary care, discover. By sub-s. (1) (*f*) the buyer is bound to give such possession of the property as its nature admits. By sub s (2) the seller is to be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same and the last sentence of the section lays down that an omission to make such disclosure as is mentioned in sub s. (1) (*a*) is fraudulent.

As has been pointed out, the title to the property as disclosed in the title-deeds from the beginning lay in Mg Po Sin. The fact that there were tenants who occupied the house may have been known to the respondent; but we are unable to hold that he must have been put on an enquiry as to whether Ma Kin was the legal wife of Mg. Po Sin or whether she was laying claim to any portion of the property. The defect in this case was a defect in the title and that is included in the words "material defect." [*Haji Essa Sulleman* v. *Dayabhai Paramanandas* (1)] We must, therefore, hold that this material defect would not have been discovered by the respondent and that the duty rested on the seller to disclose this defect and that his omission to do so is, therefore, fraudulent. In the next place by sub-s (2) the seller must be taken to have contracted that he was the owner of this property and that he had power to transfer it It seems impossible to hold that the appellant was not required to give possession to the respondent. The purpose for which the property was bought was one which required complete possession and it is admitted that appellant went to the respondent to give him possession, but respondent did not take any possession. There was thus a contract between the parties which is in effect tantamount to a covenant for a title. [*Basaradd Sheikh* v. *Enajaddi Moleah* (2)]. There was the duty to give possession which has not been given and there was fraudulent concealment of a material defect in the title.

Under these circumstances the decree of the Court below must be confirmed and this appeal dismissed with costs throughout. The respondent must return to the appellant the conveyance that has been executed.

Z. K. *Appeal dismissed.*

(1) 20 B 522; Chitty's S. C C R. 460; 10 Ind. Dec. (N. S.) 913

(2) 25 C. 298, 2 C. W. N. 222, 13 Ind. Dec (N. S.) 200.

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 264 OF 1925.

December 10, 1925.

Present:—Mr. Justice Sulaiman.

LALLU SINGH—OBJECTOR—APPELLANT

versus

Rai Bahadur Pandit GUR NARAIN—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s 2 (12)—Realizations made by person in wrongful possession—Decree for future mesne profits from date of suit—Arrears of rent collected during pendency of suit, whether must be paid over—Profits, meaning of

With regard to collections in villages the word "profits" includes realisations of arrears of past years as well as for current years

Defendant was in wrongful possession of plaintiff's village properties and made realisations Plaintiff obtained a decree against the defendant "for future mesne profits from the date of the suit." During the period subsequent to the institution of the suit, defendant had made collections of arrears of rent for past years and also rents for the current year

Held, that under the decree the plaintiff was entitled to recover whatever rents had been realised by the judgment-debtor in the years in question irrespective of the fact whether those were arrears of rent for previous years or whether they were on account of the current year.

Execution first appeal against a decree of the Subordinate Judge, Mainpuri, dated the 17th of March 1925.

Mr. *A. Sanyal*, for the Appellant.

Mr. *Baleshwari Prasad*, for the Respondent.

JUDGMENT.—This is an execution first appeal by the defendant judgment-debtor arising out of a suit in which the plaintiff obtained decree for "future mesne profits from the date of the suit" to be ascertained in the execution department. The defendant was in wrongful possession of the plaintiff's village properties and made realisations. During the period subsequent to the institution of the suit he made collections of arrears of rent for the past periods and also rents for the current year. The learned Subordinate Judge has held that under the decree the plaintiff is entitled to recover whatever rents have been realised by the judgment-debtor in the years in question irrespective of the fact whether those were arrears of rent for previous years or whether they were on account of the current year. In appeal before me it is contended that only such arrears as were collected by the defendant for the period subsequent to the institution of the suit should have been decreed. It is urged that there was no decree for the previous years and the defendant, therefore, was entitled to appropriate those rents even though he collected them subsequently during the year of the pendency of the suit.

Under s. 2 (12), C. P. C., the expression "mesne profits" of properties is defined as being profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom together with interest on such profits. It is clear, therefore, that the decree-holder is entitled to whatever profits the defendant in wrongful possession did actually receive. Had he not been in wrongful possession he would not have been allowed to realise the arrears of rent. The total amount realised by him during the period is, therefore, the amount which he actually received as profits of that property. Furthermore, it may be pointed out that with regard to collections in villages the word "profits" has always been intended to include realisations of arrears for past years as well as for current years. In the case of *Nand Kishore* v. *Ram Ratan* (1) Mahmood, J, pointed out that under the Rent Act the word "profits" meant "not only rent in respect of the years to which the rent relates but also to such arrears of rent as are actually realised by the *lambardar* during the year to which such suit may relate." The same conception of profits is the basis of the decision of the Full Bench case of *Sheo Ghulam* v. *Salik Ram* (2) where collections of arrears for past years were deemed to be a part of the profits for the year during which they were collected so as to give a fresh start of limitation to co-sharers. The same meaning is also attached to "profits" in Art. 109 of the Limitation Act.

I am accordingly of opinion that the view taken by the learned Subordinate Judge was correct. I dismiss this appeal with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) A. W N. (1887) 250.

(2) 84 Ind. Cas. 158; 22 A. L J 610; A. I. R. 1924 All. 481; 46 A. 791; L. R. 5 A. 189 Rev.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No 1193 OF 1924

January 8, 1925.

Present:—Mr Justice Campbell.

ABDUL QADIR AND OTHERS—DEFENDANTS—APPELLANTS

versus

ILAHI BAKHSH AND OTHERS—PLAINTIFFS—RESPONDENTS

Civil Procedure Code (Act V of 1908), s 11—Res judicata—*Mixed question of law and fact—Custom, question of.*

A decision on a mixed question of law and fact cannot be re-agitated in a subsequent suit [p 769, col 2]

The question whether by custom the right to receive the offerings at a shrine is alienable or not is a mixed question of law and fact [*ibid*]

First appeal from a decree of the District Judge, Sialkot, dated the 8th February 1924, confirming that of the Sub Judge, Fourth Class, Sialkot, dated the 27th February 1923.

Bakhshi *Tek Chand*, for the Appellants.

Lala *Badri Das*, R. B, and Sheikh *Mahomed Munir*, for Sheikh *Niaz Mahomed*, for the Respondents

JUDGMENT.—A preliminary objection that no appeal lies has no force. It is suggested that the suit is of the nature cognizable by Courts of Small Causes, and since the value of the subject-matter does not exceed Rs. 500, s 102 of the C P C applies. The plaint, however, contains a prayer for an injunction and as framed the suit for that reason could not have been tried by a Court of Small Causes. The objection is overruled

The origin of the suit is as follows:—

Nur Din, the father of defendants Nos. 1 and 2 and Abdul Qadir and Abdul Aziz, defendants Nos. 3 and 4 who are *majawars* of a certain Muhammadan shrine in Sialkot, on the 2nd of July 1906, mortgaged to a Hindu—one Chuni Shah—certain property including their share in the offerings made at the shrine The suit is based upon that mortgage and is brought by the successors-in interest of Chuni Shah for Rs. 278 which is alleged to represent the mortgagee's share of the offerings for a certain period.

The principal plea of the defendants was that the rights in these offerings were inalienable and amongst others the three following issues were framed:—

(2) Is the right in the offerings alienable?

(3) Cannot the defendants raise objections as to the right being non-transferable?

(4) Whether s. 11 of the C. P. C. operates as a bar to this suit?

The previous suit referred to was one brought in 1912 by Chuni Shah for Rs. 310, the mortgagee's share of the offerings, and the defendants were Nur Din and Abdul Qadir, Abdul Aziz and a fourth man, Taj Din, who was said to be the person who actually collected the offerings The third issue in that suit was. is the income from the offerings of the *khankah* not alienable? and this was decided in the negative, namely, that the offerings were alienable. It has been held by both the Courts below that this decision is *res judicata*. In the present suit, on the issues above quoted the suit has been dismissed in consequence. The only question for decision in second appeal is whether there is in fact any *res judicata*

It was argued before the learned District Judge and repeated in the present memorandum of appeal, that the transfer of a share in the offerings in suit was an act opposed to public policy and contrary to the trusts of the Muhammadan religion, and the case for the appellants is that because the previous decision was on a point of law there is no *res judicata*. Mr. Tek Chand for the appellants concedes that the case law on s 11 of the C P C, may be summarized as follows When the previous question in issue which has been decided is one purely of fact all High Courts are agreed that it cannot be re-agitated. They also agree that it cannot be re-agitated when the question is a mixed one of law and fact, but when it is a question of pure law there is a distinct conflict of opinion, and there is no direct authority in any pronouncement by this Court or by the Chief Court.

Mr Badri Das contends that the question is a mixed one of law and fact, and I think that he is right. The Court in the previous suit decided that the rights in the offerings were alienable because a custom prevailed sanctioning such practice, and the origin of the custom lay in certain instances of alienation which were held to have occurred. According to s 5 of the Punjab Laws Act in questions regarding any religious usage or institution the first rule of decision must be any custom applicable to the parties concerned, and thus the former decision was that by reason of the existence of a custom the alienation then in question and now in question was legal. The ques-

tion of the existence of a custom or at any rate of this particular custom is, in my view, a mixed question of law and fact, because the instances which are the basis of the finding are undoubted facts. Therefore, I come to a contrary decision to that of the Court which decided the case of 1912.

On the question of the alienability of the rights to the offerings would involve disturbance of a finding of mixed law and fact and indeed principally of fact, namely, the existence of a particular custom applicable to this particular religious institution.

The decision, therefore, of the lower Appellate Court was correct and the appeal must fail. It is dismissed with costs.

N. H. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1124 OF 1923.

September 30, 1925.

Present :—Mr. Justice Devadoss.

AYYARU PILLAI—DEFENDANT No. 1—PETITIONER

versus

VARADARAJA PILLAI AND ANOTHER—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art 182 (5)—Step-in-aid of execution—Assignee decree-holder—Recognition of assignment, application for.

An assignee decree-holder can apply only to the Court which passed the decree for being recognised as the assignee of the decree and he cannot make an application only for the purpose of being recognised as an assignee decree-holder. His application must be one for execution and, therefore, if he does not apply for execution, his application would not be considered to be a proper application [p. 770, col 2]

An application by an assignee decree-holder to the Court executing the decree, stating that the decree had been transferred to him, and requesting it to send back the records of the case to the Court which passed the decree "for the purpose of further conducting the suit" is a step-in-aid of execution within the meaning of cl. (5) Art. 182 of Sch. I to the Limitation Act. [*ibid.*]

Krishnayyar v. *Venkayyar*, 6 M. 81, 2 Ind. Dec. (N. S.) 334 and *Manorath Das* v. *Ambica Kanta Bose*, 1 Ind. Cas. 57; 9 C. L. J 443, 13 C W N. 533, relied on.

Petition, under s 25 of Act IX of 1887, praying the High Court to revise an order of the Court of the Subordinate Judge, Tanjore, dated the 15th September 1923, in E. P. No. 356 of 1923 in S. C. No. 493 of 1915.

Mr. *Ramaswami Iyer*, for the Petitioner.

Mr. *K. R. Rangaswami Iyengar*, for the Respondents.

JUDGMENT.—This is a petition to revise the order of the Subordinate Judge of Tanjore recognising the assignment of the decree in favour of the petitioner in the lower Court. The contention of Mr. Ramaswami Iyer for the petitioner is that it was not competent for the assignee decree-holder to make the application he did to the Court executing the decree The decree was passed on 12th April 1915 by the Subordinate Judge's Court, Tanjore. It was transferred for execution to the District Munsif's Court of Tanjore by an application, dated 18th July 1916. The assignee decree-holder applied to the District Munsif's Court on 10th February 1920 for the issue of notice to the defendant under O. XXI, r. 22, and asked "that the records may be transferred along with a certificate to the Subordinate Judge's Court, Tanjore for the purpose of further conducting the suit". In it he also stated that the decree had been transferred to him by assignment. The question is, whether this is an application which it is competent for the assignee decree-holder to make. If he was competent to make the application it would be a step-in-aid of execution under Art. 182 (5) of the Limitation Act. It is well-settled that an assignee decree-holder can apply only to the Court which passed the decree for being recognised as the assignee of the decree and it is also settled that he cannot make an application only for the purpose of being recognised as an assignee decree-holder. His application must be one for execution and, therefore, if he does not apply for execution, his application would not be considered to be a proper application. In this case, he asked that the records be sent to the other Court for the further conduct of what he calls a suit and I suppose he meant by it for the execution of the decree. It has been held in *Krishnayyar* v. *Venkayyar* (1) that if a decree-holder applies to the Executing Court to send the records to the Court which passed the decree, that application is a step-in-aid of execution and saves limitation. Whether a transferee decree-holder can make a similar application is the question. In order that his claim as assignee decree-holder may be recognised, it is necessary that the papers should be sent back to the Court which

(1) 6 M. 81; 2 Ind. Dec. (N. S.) 334.

passed the decree. It is admitted that the assignee decree-holder was subsequently recognised to have got a proper assignment of the decree by the Subordinate Judge's Court, Tanjore which passed the decree In order to get that relief, his application to the Executing Court to send back the papers to that Court is a competent one. I think, in order to enable the Court which passed the decree to recognise him as the assignee decree-holder, it was necessary for that Court to have the records sent up by the Executing Court and an application for that purpose, I think, comes within the expression of "step-in-aid of execution". In this case, the application was not by the assignee decree-holder for execution to the Executing Court which no doubt he was incompetent to make till his assignment was recognised. But in order that the Court which passed the decree may pass an order under O. XXI, r. 16, it was necessary though it might not be so in every case, at least in this case, that the papers should have been sent back. I hold, therefore, that this application was a proper one which the assignee decree-holder was competent to make in this connection. I would like to refer to the case reported as *Manorath Das* v *Ambica Kanta Bose* (2). In that case an application which was made by a person who got a title to a decree by operation of law and who made an application before the Court which passed the decree recognised him as being entitled to execute the decree, was a proper application. In this view of the case I think the order of the lower Court is correct and this petition is dismissed with costs.

V. N. V. *Petition dismissed.*

N. H.

(2) 1 Ind. Cas. 57; 9 C L. J. 443, 13 C. W. N. 533.

RANGOON HIGH COURT.

SPECIAL FIRST CIVIL APPEAL No. 207 OF 1924
AND
CIVIL REVISION No. 249 OF 1924.
May 19, 1925.

Present:—Mr Justice Rutledge and Mr. Justice Heald.

J. A. SAVARESE—DEFENDANT—APPELLANT
versus
THE *Wakf* ESTATE OF ISMAIL AHMAD MADA—PLAINTIFF—RESPONDENT.

Rangoon Rent Act (II of 1920), s. 13—Enhancement of rent—Consent of tenant, effect of—Illegal excess recovered by landlord—Set-off, tenant whether entitled to

Neither acquiescence nor consent on the tenant's part can entitle the landlord to make an enhancement of rent in contravention of the provisions of the Rangoon Rent Act

Where a landlord has recovered rent in excess of the rent legally payable under the Act, the tenant is entitled to set off the amount so recovered by the landlord as against the rent which accrues due subsequently.

Special first appeal against the decrees of the Rangoon Small Cause Court, in C. R. Nos. 5246 and 4957 of 1924.

Mr. *J. C. Ray*, for the Appellant.

Mr. *Rahman*, for the Respondent.

JUDGMENT.—In the first of these cases the defendant-appellant appeals from a decree of the Small Cause Court and in the second petition by way of revision against a decree of the same Court ejecting him from rooms E and L of No 31, Lewis Street, Rangoon, on the ground that the defendant was not ready and willing to pay rent to the full extent allowable by the Rangoon Rent Act.

The case has not been satisfactorily tried and the then learned Judge seems to have overlooked very important provisions of the Rent Act In his judgment he remarks that "the plaintiff's conduct was rather reprehensible in that he had enhanced the rent frequently and by leaps and bounds." But the law is on the plaintiff's side.

It seems that the defendant has been a tenant of the premises for 11 years and from the Rent Controller's finding the rent of room E on 1st April 1918, was Rs. 45 a month and room L was Rs. 50. The plaintiff purchased the building in which these two rooms are, in March 1922, and at the time he admits that the rent of room E was Rs. 50. By January 1923, he increased the rent to Rs. 70 and by July 1923, to Rs. 100. In January 1923, he increased the rent of room L from Rs. 50 to Rs. 70. He pleads that the tenant consented to these increases. We dare say he may have done so under threat of eviction. But it is clear that neither acquiescence nor consent on the tenant's part can make the landlord's action legal. The only rent allowable to the landlord was Rs. 45 for room E and Rs. 50 for room L until he got the Rent Controller to fix a different rent. It is clear that he never went to the Rent Controller And when the tenants, in February 1923, petitioned the Controller, the landlord took

eviction proceedings against the leader, one Petit, with the result that several of the others, including the present appellant, signed petitions consenting to the increased illegal rents and asked that their petitions for fixing standard rents be withdrawn. None of these proceedings seem to have put the then Small Cause Court on enquiry, and he assumed that there was a free consent on the part of the tenants. For one reason or another the cases dragged on before the Rent Controller from 3rd February 1923, till 5th September 1924, over 18 months, when he fixed the rent of room E at Rs. 56-4-0 and room L at Rs. 50.

The defendant's case is that he was ready and willing to pay the rent allowable by the Act and that he has stopped payment because the amount illegally obtained by the landlord he was entitled to set off against the accruing rent. Section 13 undoubtedly gives him this right subject to the conditions therein expressed. The Court below ought to have gone into this question and decided whether there was still a balance due after deduction of the amount for which defendant was entitled to credit. The materials before us are not sufficiently ample to allow this to be done now. Nor, in our opinion, is it necessary. The landlord's behaviour in increasing the rent and in trying to prevent the tenants from availing themselves of the redress which the law gives them is extortionate and reprehensible to the last degree.

Taking all the facts into consideration we hold the appellant-petitioner was ready and willing to pay rent to the full extent allowable by the Rangoon Rent Act and had not lost the protection of that Act. The judgment and decrees of the Small Cause Court are set aside and the plaintiff-respondent's suits are dismissed with costs in both Courts. Advocate's fees in this Court, five gold *mohurs*.

Z. K. *Appeal and revision allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 826 OF 1923
CONNECTED WITH
SECOND CIVIL APPEAL No. 825 OF 1923.
June 5, 1925.
Present:—Mr. Justice Boys and
Mr. Justice Banerji.
December 1, 1925.
Present:—Mr. Justice Boys and
Mr. Justice Dalal.

Chaudhuri SHIB NARAIN—
—PLAINTIFF—APPELLANT
versus
GAJADHAR AND OTHERS—DEFENDANTS
—RESPONDENTS.

Mortgage—Prior and subsequent mortgages—Redemption—Interest, whether must be paid along with principal—"Girwi," whether means usufructuary mortgage

The meaning of the word *"girwi"* is not restricted to a usufructuary mortgage [p 773, col. 2]

A deed of second mortgage recited the first mortgage and declared that the mortgagor should not be entitled to redeem the first mortgage without discharging the second loan also

Held, that the second mortgage was in the nature of an additional mortgage hypothecating the property and that the mortgagor was not entitled to redeem the first mortgage without at the same time discharging the second. [p. 774, col. 2.]

A deed of second mortgage recited the amount borrowed and the rate of interest and then stated that "this money" shall be paid when the amount due on the prior mortgage is paid and the prior mortgage is redeemed There was no stipulation that the interest was to be added to the principal, and permission was granted to the mortgagee to sue for interest separately.

Held, (1) that the expression "this money" in the deed included the principal money together with interest, [p 775, col 2]

(2) that the permission granted to the mortgagee to sue for interest separately was an additional privilege granted to the mortgagee and that he was not bound to sue separately for interest; [*ibid*]

(3) that the mortgagor was, therefore, bound to pay the entire amount of interest to the mortgagee at the time of redemption. [*ibid.*]

Second appeal from a decree of the District Judge, Agra, dated the 15th February 1923.

Messrs. *Braj Nath Vyas* and *Baleshwari Prasad*, for the Appellant.

Messrs. *U. S. Bajpai* and *N. P. Asthana*, for the Respondents.

JUDGMENT.

Boys and Banerji, JJ.—(*June 5, 1925*).—This is a plaintiff's appeal. The suit was by one Shib Narain, who had purchased the rights of the mortgagor, for redemption of a usufructuary mortgage dated the 21st of May 1864 made by Govind Prasad in favour of Chaudhri Behari Lal.

This mortgage was for a sum of Rs. 500

and was admittedly a usufructuary mortgage.

It had been followed by a second mortgage on August 14th 1864 for Rs. 200 in favour of the same mortgagee. It recited the first mortgage for Rs. 500 and further declared that the mortgagor should not be entitled to redeem without discharging the second loan also.

This was again followed by a third mortgage on June 1st, 1867, in favour of the same mortgagee. It recited the prior total debt of Rs. 700; it referred to a subsequent "*mashrut ul rahn*" document for Rs. 200 which was being taken back (and with which we are no further concerned) and then said that Rs 99 was being taken in cash and for this total Rs. 299 the mortgagor was executing this fresh *mashrut ul-rahn* (the deed itself contains this description) document, and it was further declared that the executant would pay this Rs. 299 first before discharging the earlier debt, and would pay up all interest before taking possession.

These three mortgages we will refer to hereafter as the first, second and third mortgages.

On the 23rd of August 1880 an agreement was signed between one Baldeo, the father of Gajadhar, the principal defendant-respondent in this case, and Chaudhri Behari Lal, the mortgagee above named, in which Chaudhri Behari Lal is said to have recognised Baldeo as half owner in at any rate the first mortgage, and one of the questions we have to decide is whether this agreement recognised him as half owner of the second and third mortgages also

On the 6th of December 1914 the heirs of Govind Prasad, the mortgagor, sold the equity of redemption to Shib Narain, the present plaintiff, who is the son of the deceased Chaudhri Behari Lal the mortgagee. The result of this transaction was that Shib Narain became the sole owner of half the property, and owner of the equity of redemption in regard to Baldeo's half.

On the 5th of December 1919 Shib Narain filed this suit for redemption, in respect of the first mortgage, of the half mortgaged to Baldeo He alleged that he had deposited certain monies under s. 83 of the Transfer of Property Act; that the defendant refused to withdraw the amount; and that now, on the other hand, there was due to him, Shib Narain, a sum of Rs. 650. The defence was that the defendant Gajadhar, son of Baldeo, now deceased, was also entitled to a half share in the second and third mortgages, and further that the first mortgage could not be redeemed without prior or at least simultaneous discharge of the second and third. Both points were decided against the plaintiff by both Courts and the suit was dismissed *in toto*.

Three points arise for determination in this case.

First, whether the defendant Gajadhar, son of Baldeo, is entitled under the agreement of the 23rd of August 1880 to a half share only in the first mortgage, or also to a half share in the second and third mortgages.

The second question is, whether the defendant could insist upon the discharge of the second and third mortgages at the same time as the redemption of the first usufructuary mortgage.

The third question is, if it be held that the plaintiff could only obtain redemption of the first mortgage on condition that he also discharged the second and third, could he now be given a decree in respect of all three mortgages when he had only asked for redemption in regard to the first.

We will consider first the agreement of 1880. That contains the words :—"*Girwi ki 70 bighas 4 biswas*", and later the words :—*Hamaro tumharo jo hissa brabar ka hai*". It is urged for the appellant that the word "*girwi*" indicates that this acknowledgment of equal shares could refer only to mortgages of the nature of a usufructuary mortgage and could not refer to the second and third mortgages We see no justification for this restriction of the term, but we may add that even if that were a justifiable interpretation of the word, there is authority in the judgment of Mr. Justice Banerji in *Har Pershad* v. *Ram Chander* (1), for holding that even the second and third mortgages in this case may be regarded as usufructuary mortgages. It is not, however, necessary to press that, for, as we have said, there is nothing in the word "*girwi*", so far as we are aware, to restrict it to a usufructuary mortgage. On the other hand we think that the words "*girwi ki*" were here only used as descriptive of all the mortgagee rights of the parties in the property specified as distinguished from their vendee rights in other property referred to as "*bainamah ki.*"

(1) 63 Ind Cas 750, 44 A. 37, 19 A L. J. 807, 3 U. P. L. R. (A.) 139; A. I. R. 1922 All. 174 (F. B.)

Further for the appellant reliance was placed on an admission said to have been made by the defendant Gajadhar in cross examination, that his right to possession was only based on the first usufructuary mortgage-deed. This would clearly not be sufficient to preclude him from maintaining that the three mortgages were really one. It is obvious that in one sense his claim for possession would be based on his first usufructuary mortgage. The statement was, moreover, brought out in cross-examination, but in examination-in-chief he had already definitely asserted his claim to be based on all the three mortgages We hold, therefore, that the defendant had in fact a half share in all three of the mortgages, and we decide this question against the appellant.

The second question is, can the defendant compel simultaneous redemption of the second and third mortgages The plaintiff-appellant claims that he cannot. It is urged for him that he need not redeem simultaneously the later mortgages, unless they " consolidated the old and the new transactions." It would seem that of this class of case there may be three types :— Where it is suggested (1) that the first mortgage cannot be redeemed unless the second mortgage is first or simultaneously redeemed ; (2) that the second mortgage cannot be redeemed unless the first mortgage is first or simultaneously redeemed, and (3) that neither the first nor the second can be redeemed separately. The present case is alleged by the defendant to be of the first type, with this addition that there is a third mortgage which bears to the first two the same relation that the second bears to the first.

We will consider first whether the first mortgage can be redeemed without redeeming the second.

We have set out at the commencement of this judgment the terms of the deeds sufficiently for the present purpose.

In support of his claim to redeem the first mortgage alone, the appellant relies on *Bhartu* v. *Dalip* (2) and *Kesar Kunwar* v. *Kashi Ram* (3). In *Bhartu* v. *Dalip* (2), it is clear that the restrictive agreement embodied in the later mortgage was misread and the effect of the particular decision was explained away in the later decision by the same learned Judge in *Brij Lal Singh* v. *Bhawani Singh*, (4) which we shall notice later when considering the cases that support the respondent. The other case reported as *Kesar Kunwar* v. *Kashi Ram* (3) relied on for the appellant helps him no more In that case it was only held that (assuming that, if the second mortgage was not time-barred, the defence would be a good one that it must be paid off before redeeming the first mortgage) where there was a provision that the first mortgage should not be redeemed without paying off the second, and the second was in fact barred by limitation, the Court could not possibly allow the defendant to rely on the condition as to first discharging the second mortgage and so in fact enable him to secure payment of a debt which he had allowed to become time-barred.

For the defendant-respondent reliance was placed on *Ranjit Khan* v. *Ramdhan Singh* (5), *Brij Lal Singh* v. *Bhawani Singh* (4) and *Har Pershad* v. *Ram Chander* (1). We are perfectly satisfied that on the terms of the second mortgage it is governed by the principles laid down in the three cases that we have quoted; that it is in the nature of an additional mortgage hypothecating the property, and that on the principles laid down in those three cases the plaintiff mortgagor was not entitled to redeem the first mortgage without at the same time discharging the second.

The case of the third mortgage is even more clear. In that the expression "*mashrut ul-rahn*" specifically occurs, and as regards this mortgage Counsel for the appellant has not found it possible to resist seriously the contention of the defendant that this third mortgage must be discharged before or simultaneously with redemption of the first.

As to the third question it has similarly not seriously been contended that the plaintiff could obtain redemption of the first mortgage and discharge the second and third on his prayer as at present framed, in which the relief asked for has only referred to the first mortgage. But it is urged on his behalf that we should allow him now even at this stage to amend his plaint, and remand the case to the lower Court for determination of the question as to how much is due on all three mortgages together. This course was permitted in *Brji Lal Singh* v. *Rhawani Singh* (4) though it appears not to

(2) 3 A. L. J. 672 A. W. N. (1906) 278.
(3) 30 Ind. Cas. 777; 37 A. 634; 13 A. L. J. 889.
(4) 7 Ind Cas 115; 32 A. 651; 7 A. L. J. 821.
(5) 2 Ind. Cas. 859; 31 A 482; 6 A. L. J. 654.

have been followed in the earlier case reported as *Ranjit Khan* v. *Ramdhan Singh* (5).

We think that such a prayer should not be too readily granted; that in view of the decisions to which we have referred the law as interpreted by this Court at any rate should be well enough known. In the present case, however, we are prepared to accede to the prayer. We have, therefore, given the appellant permission to amend the plaint so as to ask for relief as regards the second and third mortgages also, and, that amendment having been made, we remand this case to the Court of first instance through the lower Appellate Court under O. XLI, r. 25 with directions to take such further evidence as may be necessary, and to determine the amount that may be due by the plaintiff to the defendant on foot of all three mortgages. On return of the finding the usual ten days will be allowed for filing objections.

On receipt of the finding Dalal and Boys, JJ., on December 1, 1925, delivered the following

JUDGMENT.—This suit was remanded by this Bench under O. XLI, r. 25 of the C. P. C to permit the plaintiff-appellant to amend his plaint and include the other mortgages therein. This was done and the lower Appellate Court has decided that Rs. 4,913 is due by the plaintiff for the purpose of redemption of all the three mortgages. The plaintiff is owner of half the mortgagee rights and he has sued for the redemption of only half of the property. The amount, therefore, which he will have to pay will be half of Rs. 4,913.

The other objection to the finding of the lower Appellate Court relates to the amount of interest payable on the bond of 14th August 1864. Interest is calculated on that amount at the simple rate of Rs. 1-4 0 per cent. per mensem from the date of the bond, 14th August 1864 up to the date on which the lower Court prepared the account that is 21st of July 1925 The amount of interest comes to Rs. 1,828 It is argued here on behalf of the plaintiff appellant that interest would be recoverable by the defendants only for 12 years, that is, Rs 360. The bond contains a stipulation that the mortgagee may sue for the interest due on this bond separately. On this ground the plaintiff's case is that the suit for interest for a period of more than 12 years is time-barred. We have read the terms of the bond and do not accept this contention. In the bond the amount borrowed is stated and then the rate of interest and it is stated after this that the money shall be paid when the amount due on the prior mortgage is paid and the prior mortgage is redeemed. The words used are *yih rupiya*, this money. According to the plaintiff's Counsel this term denotes only the principal amount and not the interest because as pointed out by him there is no stipulation that the interest was to be added to the principal Finally, there is the permission granted to the mortgagee to sue for interest separately. We are of opinion that this is an additional privilege granted to the mortgagee and he was not bound to sue separately for interest. If he was satisfied with the security and permitted the interest to accumulate there was no bar to that procedure according to the terms of the bond In ordinary acceptance of the term "this money" would include the principal amount together with interest. We disallow objection No 1.

In the result we decree the plaintiff's suit for redemption on payment of Rs. 2,456-8-0. A preliminary decree for redemption shall be prepared under O XXXIV, r 7 of the C. P. C Interest shall run at bond rates on the two bonds of 1864 from the 21st of July 1925 up to six months from to-day's date On non payment of the money within the time specified the usual result shall follow. The mortgagee-respondents shall receive their costs of all the Courts-costs according to the valuation of the property including fees here on the higher scale.

Z K. *Appeal accepted.*

RANGOON HIGH COURT.

CIVIL REVISION No 224 OF 1924.

June 18, 1925.

Present:—Mr. Justice Das.

MA SHEWE U—APPLICANT

versus

MA SHIN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s 115—Limitation Act (IX of 1908), s 6—Application dismissed as barred by time—Benefit of minority ignored—Revision

Petitioner's application for leave to sue *in forma pauperis* was rejected on the ground that the suit was barred by time, but in arriving at this conclusion that Court overlooked the provisions of s 6 of the Limitation Act to the benefit of which the petitioner was entitled:

Held, that the order rejecting the petitioner's application was liable to be set aside in revision

Civil revision from an order of the Sub-Divisional Court, Thaton, in C. M. No. 5 of 1924.

Mr. *Hla Pe*, for the Applicant.

Mr. *Auzam*, for the Respondent.

JUDGMENT.—In this case petitioner had applied for leave to sue as a pauper in the Court of the Sub-Divisional Judge of Thaton. Her suit was based on a claim to a share of inheritance left by her parents. The defendants in that suit admitted that the petitioner was a pauper but contested her right to sue as a pauper on the ground that her claim was barred by limitation. The lower Court dismissad the application on the ground that the petitioner's claim was barred by limitation. The lower Court entirely overlooked the provisions of s. 6 (1) of the Limitation Act. Amittedly the petitioner was a minor when her cause of action arose and she came of age less than 12 years before the filing of the suit. Section 6 (1) of the Limitation Act clearly applies in her case and her suit is within time.

The order of the lower Court is set aside, and the petitioner is granted leave to sue as a pauper.

Z. K. *Petition allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 539 OF 1924.

April 28, 1925.

Present :—Mr. Justice Odgers.

V. TIRUMALACHARIAR—PLAINTIFF—PETITIONER

versus

ATHIMOOLA KARAYALOR AND OTHERS—DEFENDANTS NOS. 2 TO 6 AND 1 TO 7—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s 115, O. IX, r. 13—Ex parte *decree, application to set aside—Engagement of Pleader in other Court, whether sufficient cause—Discretion of Court—Revision—Decree against several defendants having separate interests—Application by some to set aside decree—Procedure.*

It is not an invariable rule that the absence of a Pleader owing to his engagement elsewhere is a sufficient cause for setting aside an *ex parte* decree, but the High Court will not in revision interfere with the discretion of the Court of first instance in setting aside an *ex parte* decree on that ground [p. 777, col. 1.]

Where a plaintiff impleaded several persons as parties to a suit on the ground that they were severally in possession of the assets of a deceased person, and an *ex parte* decree was passed against all of them, on an application by some only of the defendants to set aside the *ex parte* decree·

Held, that it was not open to the Court to set aside the decree as against the defendants who had not applied to set aside the decree. [p. 777, col. 2.]

Petition, under s. 115 of Act V of 1908, praying the High Court to revise an order of the Court of the Subordinate Judge, Tinnevelly, in I. A. No. 10 of 1924, in O. S. No. 120 of 1921 (in O. S. No. 73 of 1923 on the file of the Court of the Second Additional Sub-Court, Tinnevelly).

Mr. *S. Rajagopalachari*, for the Petitioner.

Mr. *S. Ramasami Iyer*, for the Respondents.

ORDER.—This was a suit by the plaintiff against seven defendants. I understand that the suit is for specific performance of a contract entered into by the husband of the 1st defendant and the plaintiff. The suit is also in the alternative for the value of the land. The deceased was one Nambi Khone, the 1st defendant is his widow, the 2nd defendant his nephew, 3rd defendant is the son of the 2nd defendant, defendants No. 4 to 6 are the sons of a brother of the 2nd defendant and the 7th defendant is the daughter of the deceased. These persons are all said to have in their hands certain assets of the deceased Nambi Khone under some arrangement made in his lifetime, called a settlement. The suit was called on for trial on the 24th October 1923 before the Subordinate Judge, Mr N. S. Natesa Iyer The defendants No. 1 and 7 and defendants Nos. 2 to 6 had different Vakils on the record. When the case was taken up, the Vakil for the plaintiff was not there and neither of the Vakils for the defendants was there. The plaintiff, however, went into the box and examined himself and one other witness and an *ex parte* decree was the result. A petition was then put in to the succeeding Subordinate Judge Mr. R. Nageswara Iyer on the 7th February 1924 by the defendants Nos. 2 to 6 only to set aside the *ex parte* decree and restore the suit to file. The learned Subordinate Judge was inclined to believe that the petitioner's Vakil was engaged elsewhere when the suit was taken up and was of opinion that that amounted to a reasonable cause for non-appearance of the petitioners on the days in question. He, therefore, set aside the *ex parte* decree obtained as against all the defendants.

Two points have been argued before me in revision. The first is that the Judge has no jurisdiction to treat the absence of a practitioner as a sufficient cause for not appearing when the suit was called on for hearing under O. IX, r. 13 (*a*) and consequently that even if the petitioner-plaintiff is wrong on this point the *ex parte* decree ought not to have been set aside as a whole but only with regard to the defendants Nos 2 to 6 who requested that it should be so set aside. I am far from saying that if I were hearing this case on the Original Side I should hold as an invariable rule that the absence of a Pleader is a sufficient cause for setting aside the *ex parte* decree. But it is a very different thing to say that the learned Subordinate Judge acted without jurisdiction or with material irregularity in regarding that as a sufficient cause for doing so. With regard to the absence or presence of Pleaders, the parties were in much the same boat before the Subordinate Judge, and I am not inclined to interfere in revision with his discretion in regarding the absence of the Pleader of the defendants Nos. 2 to 6 as a sufficient cause for non-appearance. I, therefore, think that with regard to this part of the case the civil revision petition must be dismissed. But there is one point where I think the Subordinate Judge had made an omission with regard to the defendants Nos. 2 to 6. The defendants Nos 2 to 6 should pay the plaintiff's costs up to date before the suit is taken on the file in the Sub-Court.

With regard to defendants Nos. 1 and 7, I am not prepared to say that the cause of action is necessarily joint and indivisible as against them. The plaintiff has, I dare say, quite wisely made defendants everybody that he can possibly conceive would have any assets of the deceased Nambi Khone, and there is no doubt that he hopes to catch some of the assets any how in the hands of these defendants. I think the case really falls within the principle laid down by Mr. Justice Krishnan in the case reported as *Narayanaswamy Iyer* v. *Doraiswamy Pathar* (1). There the suit was one to obtain possession of separate items of property from separate sets of defendants. I think really that is the case here as it is perfectly plain that although the defendants are related by blood, they are, of course, in no sense a joint family nor is there any allegation as far as I know that they are living together or anything of the kind so that I think that with regard to defendants Nos. 1 and 7 the learned Subordinate Judge was wrong. They did not petition either in the lower Court or here. The *ex parte* decree, therefore, is not set aside as regards them. The petitioner will get his costs from defendants Nos 1 and 7 in this Court.

V. N. V. *Order modified.*
Z. K.

(1) 65 Ind. Cas. 343; (1921) M. W. N. 795.

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL No 209 OF 1924.

June 8, 1925

Present:—Mr. Justice Rutledge and Mr. Justice Heald.

MAUNG SAN PWE AND ANOTHER—APPELLANTS

versus

HAMADANEE AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s 64—Attachment—Property sold by judgment-debtor before attachment—Conveyance executed during attachment, effect of.

What is aimed at in s 64, C P C, is the transfer of a beneficial interest, delivery of property or any payment [p 778, col 2]

Where a judgment-debtor sells certain property, receives the purchase-money and hands over possession of the property to the purchaser before the property is attached, but the sale-deed is executed after the attachment is made, the transaction is not brought within the purview of s 64, C P C, inasmuch as at the date of attachment there was no beneficial interest in the property left in the judgment-debtor, he being at most possessed of the bare legal title which he was bound to convey on demand to the purchaser [*ibid*]

Special second appeal from a decree of the District Court, Tharrawaddy, in C. A. No 112-A of 1923.

Mr. *Robertson*, for the Appellants.

Mr. *Paw Tun*, for the Respondents

JUDGMENT.—Appellants sued respondents for a declaration that they were owners of a plot of paddy land, part of holding No. 47 of 1922-23 of Kyakatdan Kwin Their case was that that holding belonged to one Maung Shan who mortgaged it to the 1st appellant's mother, the respondent Ma Yeik, that in 1917 Maung Shan agreed to sell seven acres out of that holding, being the land now in dispute, to appellants for Rs. 1,000, that appellants then paid Rs. 50 as part of the price, that

at that time it was agreed between Maung Shan, Ma Yeik, and appellants that the balance of the price should be payable by appellants by yearly instalments and that appellants should pay interest on it, that in accordance with that agreement appellants paid an instalment of Rs 200 to Ma Yeik and received possession of the seven-acre plot, that since then he had been in possession of that plot and had been paying revenue on it, that, thereafter, on the 3rd of March 1918, Maung Shan sold the whole holding to Ma Yeik by registered deed, that the mutation of names was effected so that the holding now stands in the name of Me Yeik, that Ma Yeik agreed to convey the seven-acre plot to appellants on payment of the price in full, that appellants had paid the price in full, that Ma Yeik had duly executed a registered conveyance of the seven-acre plot in favour of appellants, that the plot was accordingly put into appellants' names, that thereafter one Po Tu, agent of the 1st respondent, a transferee of a decree, against Ma Yeik, brought the whole holding to sale in execution of that decree, that the 3rd respondent, Paw Tun became the purchaser of the holding at the Court auction, and that appellants were owners of the seven-acre plot and were entitled to a declaration of their title.

Ma Yeik did not contest the suit, but gave evidence for appellants

The respondent, Pa Tun, suggested that the sale of the land by Ma Yeik to appellants was a sham and fraudulent transaction He said that he bought the land at the Court auction and was put into possession and that he thereby acquired a good title.

The 1st respondent also pleaded that the conveyance by Ma Yeik to appellants was fraudulent and collusive and that appellants were never in possession of the property.

The Trial Court found that appellants succeeded in proving that Maung Shan agreed to sell the plot to them for Rs. 1,000 that appellants then paid Rs. 250 as part of the price, that they subsequently paid the price in full, that Ma Yeik conveyed the plot to appellants, that although that conveyance was made after the holding had been attached in execution, the attachment was illegal and invalid, and that appellants had acquired a good title to the land

The 1st respondent appealed and the lower Appellate Court agreed with the Trial Court that appellants succeeded in proving the agreement to sell and the payment of the price in full, but held that the Trial Court was not entitled to consider the validity of the attachment because appellants had not themselves questioned it, and that because the conveyance from Ma Yeik to appellants was made after the property had been attached, the conveyance was void under s 64 of the Code.

Appellants appeal on the grounds that the District Court was wrong in holding that the conveyance was void under s. 64, and ought to have held that the attachment was invalid.

The conveyance from Ma Yeik to the appellants, Ex B, was registered on the 25th June 1921. From Ex. 2, which is a certified copy of the diary in Civil Execution No. 25 of 1921 of the District Court of Tharrawaddy, the attachment of the property was effected on or before the 8th June 1921, when the warrant is stated to be returned duly executed But some years before this date, the judgment-debtor had agreed to sell the land in question to appellant and he had been given possession and had paid for the same at the time, partly in cash and, as to the balance of Rs. 750, by a promissory note bearing interest at Rs. 1-8-0 per cent. per mensem. And this promissory note from the evidence had been discharged some months before the attachment. Consequently at the time of the attachment Ma Yeik had no beneficial interest in the land in question. She was at most possessed of the bare legal title which she was bound to convey on demand to her purchaser. [Transfer of Property Act, s. 55 (1) (*d*)].

In these circumstances, appellant was owner with a good possessory title.

In our construction of s. 64 of the C. P. C. what is aimed at is the transfer of a beneficial interest, delivery of property or any payment. None of these things took place in the present case. And we consider that to hold the section to apply so as to defeat the appellants' present claim would be stretching the letter of the section so as to defeat the spirit.

For these reasons we allow the appeal and restore the decree of the Sub-Divisional Court. The appellants will have costs throughout.

Z. K. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1603 OF 1924.

January 20, 1925.

Present:—Mr. Justice Campbell.

Mian TAJ MOHAMMAD—PLAINTIFF—APPELLANT

versus

FARID KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art 13—Suit for cesses improperly collected—Second appeal

Article 13 of Sch. II to the Provincial Insolvency Act applies only when the claim is directly against the person who is primarily liable to pay the cesses or dues and by whom they are originally payable and a suit against a person who has improperly collected the dues from the party primarily liable is beyond its scope Therefore, no second appeal lies in such a suit.

Harnam v *Gandu*, 81 P R 1889, *Jowahir Singh* v *Sardar Man Singh*, 84 P R 1892 and *Pohla* v *Pertap Singh*, 2 P R 1887, referred to

Appeal from a decree of the District Judge, Multan, dated the 8th March 1924, confirming that of the Fourth Class Sub-Judge, Mailsi, District Multan, dated the 30th June 1923

Lala *Mehr Chand Mahajan* for Kanwar *Dalip Singh*, for the Appellant.

Lala *Amar Nath Chona* for Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—This judgment will dispose of Civil Appeals Nos. 1603, 1604 and 1605 of 1924. In each case the value of the subject-matter of the original suit did not exceed Rs. 500 and the preliminary objection is raised that no second appeal lies by virtue of s. 102 of the C. P. C.

All three suits were of the same nature. The plaintiff, Taj Mohammad, is the *lambardar* of *Mauza* Burana in the Multan District. In 1903 he brought a suit against the Hindu *panchayat* of the village and against his co-*lambardar* Mohammad Khan for a declaration that he was entitled to Re. 8-6-0 per cent. of the *dhart* or weighment dues and he obtained a decree on appeal. Since then Mohammad Khan the co *lambardar* has died and the post held by him has been brought under reduction. The present plaint alleges that Farid Khan son of Mohammad Khan has gone on realising his father's share of the weighment dues since the latter's death, that is to say, another Re. 8-6-0 per cent. and the suits are for recovery from him of those realisations for various periods on the ground that the *lambardar* or *lambardars* alone have a right to them and that they have been improperly collected by Farid Khan who is not a *lambardar*.

The question for decision is whether the suits come within Art. 13 of the Second Schedule to the Provincial Small Cause Courts Act. If they do not, a second appeal is barred by s. 102 of the C. P. C. read with s. 15 (2) of the Provincial Small Cause Courts Act.

It has been held repeatedly that to apply Art. 13 the claim should be directly against the person who is primarily liable to pay the cesses or dues and by whom they are originally payable and that a suit against a person who has improperly collected the dues from the party primarily liable is not within the scope of Art. 13. This has been made clear, *inter alia*, in *Harnam* v. *Gandu* (1), *Jowahir Singh* v *Sardar Man Singh* (2) and *Pohla* v. *Pertap Singh* (3) Indeed the previous suit referred to above was ruled by the Chief Court to be a small cause in spite of the fact that it was for a declaration [*Vide Mohar Singh* v. *Taj Mahamed* (4)]. This latter decision may or may not be correct but the other judgments are quite definite on the point.

The learned Counsel for the appellant can do no more than to rely upon an *obiter dictum* in *Harnam* v *Gandu* (1), which contains the observation that a claim of the kind dealt with where the bone of contention really is the title of the defendant to the dues received by him, might be framed in such a manner as not to be cognizable by a Small Cause Court as for instance, if the suit had been to establish an exclusive right as against the defendant to discharge the functions of the office to which the dues were payable during a specific period and for damages for infringement of that right. The present suits as framed, however, cannot be called suits to establish a right on the part of the plaintiff to discharge the functions of the office of *lambardar*. It is true that the plaintiff has inserted the word "*harja*" in describing the sums which he claims but that fact cannot help him

I dismiss all the three appeals with costs.

R. L. *Appeals dismissed.*

(1) 81 P R. 1889.
(2) 84 P R 1892
(3) 2 P R 1887.
(4) 18 Ind Cas 532, 120 P R 1912, 64 P. W. R 1913; 105 P. L. R 1913

RANGOON HIGH COURT.

CIVIL REVISION No. 88 OF 1925.
June 19, 1925.
Present:—Mr. Justice Doyle.
M. A. SHAKUR—PETITIONER
versus
MUNICIPAL CORPORATION OF RANGOON—RESPONDENT.

City of Rangoon Municipal Act (VI of 1922), ss. 12, 14—Civil Procedure Code (Act V of 1908), s. 115—Reference to Small Cause Court—Revision—Agreement by Municipal Councillor to supply materials to Municipal contractor, effect of

The High Court has jurisdiction to revise a decision of the Chief Judge of the Rangoon Small Cause Court given on a reference under s 14 of the City of Rangoon Municipal Act. [p. 780, col. 2; p. 781, col. 1]

A Municipal Councillor who was a brick manufacturer contracted to supply bricks to a contractor to whom the Municipal Corporation had given a contract to build a market There was nothing to show that when the Corporation gave the building contract to the contractor the Councillor knew that the contract for the supply of bricks would fall to his share

Held, that the Municipal Councillor was not disqualified by reason of the contract for the supply of bricks from sitting and acting as a Councillor. [p. 782, col. 1]

Civil revision from an order of the Small Cause Court, Rangoon, in Municipal Reference No. 20 of 1925.

Mr. *Eusoof*, for the Petitioner.
Mr. *Cowasjee*, for the Respondent.

JUDGMENT.—Under s. 14 of the City of Rangoon Municipal Act, the Municipal Corporation of Rangoon made a reference to the Court of Small Causes, Rangoon, stating that Mr. M. A. Shakur was a Councillor of the Municipal Corporation and a large manufacturer of bricks; that, during the Councillorship of Mr. M. A. Shakur, the firm of Messrs. A. C. Martin & Co., obtained, from the Corporation, a contract for the erection of an extensive construction known as "part B" of the new Municipal Market, which would involve the use of a large quantity of bricks; and that Mr. M. A. Shakur had entered subsequently—If the terms of the reference given are actually correct—into a contract with Messrs. Martin & Co. to supply them with bricks and had been supplying bricks to Messrs. A. C. Martin & Co., to be used for the erection of the said buildings. The Municipal Corporation, therefore, desired the Small Cause Court of Rangoon to decide whether, under s. 12 (*f*) of the City of Rangoon Municipal Act, Mr. M. A. Shakur had become disqualified from being a Councillor, inasmuch as he had, directly or indirectly, a share or interest in the contract of Messrs. A. C. Martin & Co.

The learned Chief Judge of the Small Cause Court of Rangoon pointed out that s. 12 (*f*) reproduces the wording of a similar provision in the English Municipal Corporations Act of 1882. He admitted that reported cases on the question were relevant to the enquiry, but was of opinion that the question was one of fact, which, in each case, must be determined on its own merits. He quoted the words of Atkin, L. J., in *Lapish* v. *Braithwaite* (1) on the intention of the section, and held, on the principle enunciated by Atkin, L J., that Mr. Shakur could not possibly be disinterested in the contract of Messrs. Martin & Co. on the ground that his advice as a Corporator on the quality of bricks used by Messrs. Martin & Co. would not be disinterested; and that his opinion, as regards the original giving of the contract to Messrs. Martin & Co, with the possible, if not probable, anticipation of a beneficial contract for the supply of bricks to come, could not also be disinterested

On behalf of Mr. Shakur it is now urged that the learned Chief Judge of the Small Cause Court erred in law in holding that the petitioner had a share or interest in the contract of Messrs Martin & Co, with the Corporation; and that he failed to see that there was nothing on the record to show that any benefit flowed from the contract to the petitioner. It will be unnecessary to deal with the other grounds now taken in revision.

A preliminary objection was raised that under s. 14 of the Rangoon Municipal Act, the decision of the Chief Judge of the Rangoon Small Cause Court on the matter now under consideration was final and that, therefore, this Court has no jurisdiction.

I am unable to distinguish this case from the case of *Mahommed Ebrahim Moolla* v. *Jandass* (2), in which it was held that, although s. 18 of the Rangoon Rent Act enacts that the decision of the First Judge of the Court of Small Causes of Rangoon shall be final when disposing of a reference under the Rangoon Rent Act, this does not prevent the High Court from acting under s. 115 of the C. P. C.

(1) (1924) 41 T. L. R. 14, 93 L. J. K. B. 1123; 131 L. T. 586, 88 J P. 187; 22 L. G. R. 665; 69 S. J. 70
(2) 70 Ind. Cas. 135; A. I. R. 1923 Rang. 94; 11 L. B. R. 387; 1 Bur. L. J. 138 (F. B.).

It is suggested that the reasoning on which the learned Chief Judge of the late Chief Court of Lower Burma based his decision in *Mahomed Ebrahim Moolla* v. *Jandass* (2)—a decision which was concurred in by the other two Judges who formed the Bench—had been impugned by the Full Bench judgment in *Mohideen* v *Bukshi Ram* (3); and that the present matter should, therefore, be referred for the decision of a Full Bench.

It is true that it can now no longer be held that the Rent Controller is a Court, but it does not, therefore, follow that the learned Chief Judge of the Small Cause Court, Rangoon, in deciding a reference, does not act as a Court, and I do not consider that the conclusions of the learned Chief Judge on this point have been in any way impaired by the recent Full Bench decision. The objection as to the jurisdiction of this Court can, therefore, not be sustained

The learned Chief Judge of the Small Cause Court undoubtedly went beyond the record when he suggested that Mr. Shakur's opinion in connexion with the giving of the original contract to Messrs Martin & Co. was likely to be impaired by his subsequent contract with Messrs. Martin & Co., to supply bricks

In the absence of any evidence that Mr. Shakur had any knowledge that the contract for bricks with Messrs. Martin & Co, was likely to fall to his share—and it must be remembered that no allegation as to this has been made by the Municipal Corporation of Rangoon—no presumption could arise that Mr. Shakur's independence of opinion, when the original contract was being decided upon, was likely to be impaired.

As regards the principles on which the learned Chief Judge of the Small Cause Court based his opinion that Mr. Shakur's Municipal probity was, in the future, likely to be tainted by the existence of the brick contract, it is perhaps unfortunate that the learned Judge, whose opinion he quoted, was in a minority in *Lapish* v. *Braithwaite* (1), in the course of which judgment Atkin, L. J.'s remarks appear.

The learned Chief Judge of the Small Cause Court was of opinion that certain circumstances might arise in the future in which Mr. Shakur would be placed in a position in which he would have to decide as to his duty to the Corporation or his duty to his own interests. There is nothing on the record to show how imminent that possibility is, and, in the event of the possibility being merely a remote one, the reasoning of the learned Judge of the Small Cause Court loses most of its weight.

He has said that each case must be decided on its own merits as one of fact; but he himself has based his decision on surmise.

The case of *Lapish* v. *Braithwaite* (1) was a Court of Appeal case and the majority opinion in that case would not support the decision of the learned Judge of the Small Cause Court The case of *Norton* v. *Taylor* (4), which was cited before the learned Chief Judge of the Small Cause Court, but which was not adverted to in his judgment, a Privy Council case.

The principles on which the decision of their Lordships of the Privy Council in that case was based apply with equal or greater force to the case now under consideration.

In *Norton* v. *Taylor* (4), the circumstances were as follows —

Mr. Taylor was elected an Alderman of Sydney on 1st December 1902, and continued as such until 1st December 1908, when he was re-elected, being appointed Lord Mayor of Sydney on 9th December 1904. In 1902 the Sydney Municipality invited tenders from contractors for the execution of works, which included the supply of wood troughing. During the absence of Mr. Taylor and without his knowledge, his partner, in June 1902, entered into a verbal arrangement with Messrs. Henley & Co., for the supply of timber to them In February 1903. Messrs. Henley & Co., tendered with others for the execution of works for the Municipality, and towards the end of 1904, Mr. Taylor's firm began to supply the timber to Messrs Henley & Co.

Thus at the time when Mr. Taylor became an Alderman, and subsequently Lord Mayor of the Sydney Municipality, his firm was actually supplying timber to a firm which was engaged in setting up an electric lighting installation on behalf of the Sydney Municipality.

The argument which has been adduced by the learned Chief Judge of the Small Cause Court to show how dangerous it was from the point of view of public policy for Mr.

(3) 91 Ind. Cas. 627; 3 R. 410.

(4) (1906) A. C 378; 75 L. J. P. C. 79; 94 L. T. 591; 70 J. P. 433, 22 T. L. R. 450

Shakur to remain a member of the Rangoon Municipality would apply with greater force to the case of Mr. Taylor, who after a contract had been obtained by his firm for the supply of materials to the firm for setting up an electric lighting installation, became not only an Alderman, but actually the Lord Mayor of the Sydney Municipality. Nevertheless, the Lord Chancellor, in delivering judgment, said that he did not consider that Mr. Taylor was liable merely for supplying materials to the contractor who chose to buy them from him without any sort of understanding or arrangement that he should do so. "Courts of Justice," he added "in such cases would be vigilant to observe evidence of any concert to enable a civic officer to derive benefit from a contract". He concluded that, as there was no proof to show the liability of the respondent, the appeal to the Privy Council should be dismissed.

In the present case there is the same absence of evidence. Under the circumstaces, therefore, I must set the order of the learned Chief Judge of the Small Cause Court aside.

On the reference I hold that Mr. Shakur is not disqualified from being a Councillor of the Municipal Corporation of Rangoon.

The costs of this reference, three gold *mohurs*, will be paid by the respondent Municipality.

Z. K. *Order set aside.*

MARDAS HIGH COURT.

LETTERS PATENT APPEAL No. 106 OF 1924.

October 9, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Waller.

PATTAMAYYA—DEFENDANT—APPELLANT

versus

PATTAYYA *alias* KRISHNAYYA SHANBHUGA AND OTHERS—PLAINTIFFS NOS. 2 TO 4 AND 6—RESPONDENTS.

Limitation Act (IX of 1908), Sch I, Arts 181, 182—Execution petition, recording of—Application to revive—Limitation—Joint decree—Decree against several defendants—Some reliefs common against all and some separate—Decree, whether joint.

There is no provision of law by which an Executing Court can lodge an execution petition or record it, or strike it off for what is called the statistical purposes, and it cannot dismiss the application for the reason that it is long pending. The Executing Court is bound to follow the procedure laid down in the Code and an execution petition which is ordered to be recorded must be considered as pending and the right to apply for its continuance accrues from day to-day. [p. 783, col. 1]

Ayisa Umma v. *Puttiyapurayil Kumnachumkandi Abdulla*, 76 Ind Cas. 126; (1923) M. W. N. 670, A. I. R 1924 Mad 178; 19 L. W. 613, relied on.

A decree is a joint decree if any one of the reliefs granted under the decree is against the defendants jointly, even though some other reliefs may be given against each defendant separately, so that an application to execute the decree against one defendant as to one relief saves limitation against all defendants in respect of all reliefs [p. 785, col. 1.]

Subramania Chettiar v *Alagappa Chettiar*, 30 M. 268; 2 M. L T 189 and *Barada Kinkar Chowdhury* v. *Nabin Chandra Datta*, 4 Ind Cas. 408; 11 C. L. J. 83; 14 C W. N. 465, followed.

Practice of striking off or lodging execution petitions for statistical purposes condemned. [p. 784, col 1]

Letters Patent appeal against an order of Mr. Justice Jackson, in C. M. S. A. No. 38 of 1923, dated 22nd July 1924, and reported as 84 Ind. Cas. 897, against an order of the Court of the Subordinate Judge, South Kanara, in A. S. No. 7 of 1922, preferred against that of the Court of the District Munsif, Udipi, in R. E. P. No. 704 of 1921, in O. S. No. 77 of 1903.

Mr. *T. M. Krishnaswami Iyer*, for the Appellant.

Mr. *K. Srinivsa Rao*, for the Respondents.

JUDGMENT.

Devadoss, J.—The only question in this appeal is whether the decree-holder's application for execution is barred by limitation. The facts are briefly these: The respondents herein obtained a decree in O. S. No. 77 of 1903 on 28th September 1903. It is admitted that the application for execution in R. E P. No. 323 of 1915 on 11th March 1915 was within time. The Court ordered delivery of the properties to the decree-holders on 21st July 1915 Third persons objected to the delivery. The objection was removed and item No. 3 was delivered to them on 27th March 1916 and the Court passed an order on that day "the 3rd item was delivered to the petitioners and the petition was recorded" A suit was filed by the obstructors and a temporary injunction was granted against the delivery of item No. 2. The suit was ultimately dismissed on 18th December 1916 and consequently the temporary injunction ceased to be in force from that date. The respondent filed an execution application on 3rd September 1921 and prayed for delivery of item No. 2 from the 10th defendant. Both the lower Courts dismissed the application as being barred by time and Jackson, J., held in *Puttayya* v. *Puttanayya* (1) that the

(1) 84 Ind. Cas. 897; 20 L. W. 585; 47 M. L. J. 608; A. I. R. 1925 Mad. 152; (1925) M. W. N. 298.

application was within time. Hence this appeal by the 10th defendant.

The first contention is that the present application filed nearly six years after the application of 1915 is barred by limitation and it is urged that if this application is to be treated as an application to record the execution application of 1915 it should have been filed within three years of 18th December 1916 when the obstruction to execution was removed. The order of the District Munsif on the application of 1915 is "the third item was delivered to the petitioners and the petition was recorded." The question is whether the order amounts to a dismissal of the application. The present C. P. C. does not contemplate the passing of such an order. When an execution application is filed, if it is in order, it has to be disposed of on the merits; if it is barred by limitation or if the decree has been satisfied or if the applicant is not the decree-holder's assignee or his legal representative or if the decree-holder does not help the Court in executing the decree, or omits to do anything which the Court directs him to do, the application will have to be dismissed unless for proper reasons the Court adjourns the application. If the decree-holder is not able to do a thing allowed by the Court, the Court has to give him further time.

There is no provision of law by which the Executing Court could lodge the petition or record it, or strike it off for what is commonly called the statistical purposes. The Executing Court is bound to follow the procedure laid down in the Code and it cannot dismiss the application for the reason that it is long pending. If there is obstruction to the execution of the decree, the Court ought to adjourn the petition till the removal of the obstruction. It does not matter how long the obstruction continues If a temporary injunction is issued against a Court executing a decree, the Court should stay its hands till the injunction is dissolved or till the suit in which it is granted is disposed of. If a permanent injunction is granted, against the execution of the decree, then the application for execution will have to be dismissed. If the Executing Court adjourns the petition from time to time, it will enable the decree holder to inform the Court as to the progress of the suit or proceeding in which the temporary injunction is granted and as soon as it is informed that the obstruction has been removed the Courts should proceed to dispose of the application according to law. It is to prevent dilatory proceedings and the long pending of execution applications that O. XXI, r 57 has been enacted. It lays upon the decree-holder the duty of helping the Court to execute the decree in his favour and if by reason of the decree holder's default the Court is unable to proceed further with the execution application, it shall either dismiss the application or for sufficient reasons adjourn the proceedings to a future date. Upon the dismissal of such an application the attachment shall cease. Under the old Code if the properties were once attached and the application for execution was subsequently dismissed, the attachment did not necessarily cease to have effect. If, instead of following the procedure laid down by the Code, the Executing Court orders that the petition be loged or recorded, or struck off, such an order is not one sanctioned by the Code and it only amounts to this: petition is adjourned *sine die*. In this view the petition of 1915 is still on the record of the executing Court and the petition of 1921 is not a further application for execution, nor is it an application to revive that of 1915, for that is still on the file and no application is required to revive an application which is pending. It is an incorrect use of language to speak of reviving a petition which has not been dismissed. If the application has been improperly dismissed, an application would be necessary to revive it, *viz.*, where the dismissal is not on the merits or for the default of the decree-holder but for the statistical purposes or on account of obstruction which would take time to remove. As the application of 1915 is still pending, the application of 1921 was only intended to call the attention of the executing Court to the fact that the execution application had to be proceeded with. The argument that if a Court lodges or records an execution application it should be regarded as pending and that there will be no time limit for asking the Court to proceed with it, obviously overlooks the fact that it was not the decree-holder that stood in the way of the execution being proceeded with but that the Court kept the matter pending without taking the necessary steps. When a Court keeps a matter pending, a party should not suffer by reason

of the dilatoriness of the Court or by an action of the Court not sanctioned by the law. The remedy to prevent long pendency of applications for execution is to adjourn the applications from time to time and to have them brought up for orders. If that is done, the Court would be in a position to know whether the execution could be proceeded with or not, and as soon as the obstruction is removed the Court would be able to proceed with the execution according to law.

Great reliance is placed by Mr. T. M. Krishnaswami Iyer on *Suppa Reddiar* v. *Avudai Ammal* (2) where a Full Bench of this Court held that if an execution application is improperly dismissed, a subsequent application to revive or continue the application is governed by Art. 178 of the old Limitation Act corresponding to Art. 181 of the present Act. This case is distinguishable from the present, for here the application of 1915 was not dismissed. In *Chalvadi Kotiah* v. *Poloori Alimelammah* (3) the Executing Court dismissed an execution application without notice to the parties on the ground that the execution had been stayed by the order of the District Court. Miller and Munro, JJ., held that the order of dismissal amounted to no more than a direction to the officers of the Court to remove the proceedings from the pending list, and observed at page 76*:—

"that so long as proceedings initiated by the decree-holder are pending, his right to apply for their continuance accrues from day to day, *i. e.*, on every day on which the Court does not *suo moto* continue them. The right to apply will then not be barred till three years have elapsed after the proceedings have ceased to be pending."

In *Subba Chariar* v. *Muthuveeram Pillai* (4) Benson and Abdur Rahim, JJ., follow the decision of Miller and Munro, JJ., in *Chalvadi Kotiah* v. *Poloori Alimelammah* (3). The principle of these cases is that if an execution application is pending, a subsequent application is not an application under Art. 181 but an application asking the Court to continue the proceedings in a pending application. The decision in *Ayisa Umma* v. *Puttiyapurayil Kunnachunkandi Abdulla* (5) to which one of us was a party is in point. It was held in that case that an order of dismissal of an execution petition for statistical purposes did not amount to a dismissal of the petition but that the petition should be considered as pending. I hold that the application of 1915 is still pending and, therefore, there is no bar to its being proceeded with.

In this connection I must express my strong disapproval of the practice of striking off or lodging an execution application for statistical purposes. The sooner it is stopped the better it would be for the parties as well as for the Courts executing decrees.

The next point urged is that the decree is not a joint decree and, therefore, the application of 1918 and of 1920 for execution against the 9th defendant do not save the bar of limitation, so far as the 10th defendant is concerned. In view of my decision on the first point it is unnecessary to deal with this point at length. The relevant portion of the decree is as follows:—

"Plaintiffs do recover from defendants Nos. 9 and 10 possession of the plaint property with buildings thereon described below; plaintiffs do recover from the 9th defendant future rental, etc., and plaintiffs do recover from the 10th defendant future rental, etc." The argument is that inasmuch as the decree directs the 9th and 10th defendants to pay mesne profits severally, it is not a joint decree but a several decree, and the application for execution against the 9th defendant cannot be treated as an application in a joint decree. Where a defendant is directed to pay a certain sum to plaintiff and another defendant is directed to pay a similar sum or a different sum to the plaintiff, the decree is not joint decree; but where a decree directs that *A* and *B* shall pay a certain sum to the plaintiff and further directs that *A* should pay another sum and that *B* should pay another sum and that *A* and *B* should bear their own costs, the decree is a joint decree against *A* and *B*. The decree is a joint decree if any one of the reliefs given in the decree is against the defendants jointly even though some other reliefs may be given against each defendant separately. Explanation I to Art. 182 of the Limitation Act is in these terms:—

"But where the decree or order has been passed.....jointly against more persons than one, the application, if made against any

(2) 28 M. 50 (F. B.)
(3) 31 M. 71; 18 M. L. J. 46, 3 M L. T. 329.
(4) 14 Ind. Cas. 264, 36 M. 553, 24 M. L. J. 545.
(5) 76 Ind. Cas. 126, (1923) M. W. N. 670, A. I. R. 1924 Mad. 178; 19 L. W. 613.

*Page of 31 M.—[*Ed.*]

one or more of them, or against his or their representatives, shall take effect against them all."

This explanation should be liberally interpreted, and according to its terms the present decree is a joint decree. In *Subramania Chettiar* v. *Alagappa Chettiar* (6) it was held that where a decree awards mesne profits against *A* and *B* jointly and costs jointly against *A*, *B* and *C*, an application to execute the decree for mesne profits against *A* and *B* keeps alive the right to execute the decree for costs against *C* under part 2 of para. 2, Explanation 1 to Art. 179 of Sch. II to the Limitation Act. This case was followed by a Bench of the Calcutta High Court in *Barada Kinkar Chowdhury* v. *Nabin Chandra Datta* (7). The facts of that case are very similar to those of the present The decree in this case is a joint decree and the present application against the 10th defendant is not barred by limitation by reason of the application of 1918 and 1920. I find this point against the appellant.

In the result the Letters Patent appeal is dismissed with costs

Waller, J.—On the first point I agree that, on the authorities no other conclusion is possible, though the position does seem to me to be highly unsatisfactory if the decree-holder had presented an application directly after the close of the intervening litigation (as he should have been forced to do) and that application had been dismissed early in 1917, his present application would have been long out of time. Having done nothing to prosecute his first application for six years, he is, on the authorities, still in time.

Something should, of course, be done to put an end to this method of adjourning execution applications *sine die*. If they are held up by some other proceedings, they should be adjourned either for definite period of six months each, or till the date of the closing of the other proceedings.

On the 2nd point also I agree.

V. N. V.

Appeal dismissed.

(6) 30 M. 268, 2 M. L. T. 189

(7) 4 Ind. Cas. 408; 11 C. L. J. 83, 14 C. W. N. 465.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 378 OF 1925.

December 14, 1925.

Present.—Mr. Findlay, Officiating J. C

SHEIKH BADAL—PLAINTIFF—APPLICANT

versus

ABDUL RAHIM AND ANOTHER—DEFENDANTS—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), O XXXIII, r 1—"Other than his necessary wearing apparel and the subject-matter of the suit", scope of—Pauperism—Burden of proof

The words "other than his necessary wearing apparel and the subject-matter of the suit" in the Explanation to r 1 of O. XXXIII, C P C, only apply in a case where no specific Court-fee is prescribed, and do not qualify the first part of the explanation as well [p 785, col 2]

Krishnabai v *Manohar*, 30 B. 593 at p 597, 8 Bom. L R 671, followed

Bai Balagauri v *Motilal Ghelabhai*, 72 Ind Cas 224, 47 B 523, 25 Bom L R 199, A I R 1923 Bom. 247 and *Chandan Singh* v *Laxman*, 90 Ind Cas 919, 21 N L R 98, A I R 1925 Nag 438, distinguished.

The onus to prove pauperism rests on the person who applies for leave to sue as a pauper [p 786, col 1]

Application for revision of an order of the Additional District Judge, Nagpur, dated the 23rd October 1925, in Civil Suit No. 2 of 1925.

Mr. *G. R. Deo*, for the Applicant.

Messrs. *B. V. Pradhan* and *R. N. Padhye*, for Non-Applicants Nos. 1 and 2.

ORDER.—In this case the Additional District Judge decided in his preliminary finding, dated 2nd March 1925, that the present plaintiff-applicant was liable to pay *ad valorem* Court-fees on his claim in view of the fact that he is admittedly in possession of part of the property in dispute but that his title thereto is denied: *cf. Bhaddoo* v. *Saddoo* (1). Thereafter, on his being ordered to pay *ad valorem* Court-fees, the applicant asked for permission to sue as a pauper; this application was dismissed by the Additional District Judge on 23rd October 1925.

The main contention urged on appeal is that the words "other than his necessary wearing apparel and the subject-matter of the suit" in the Explanation to r. 1, O. XXXIII, C. P. C., qualify the first part of the explanation as well. The contention seems an impossible one on a mere reading of the explanation in question. The latter words of the explanation only apply in a case where no specific Court-fee is pre-

(1) 81 Ind. Cas. 766; 20 N. L. R. 43; A I. R. 1924 Nag. 86.

scribed. In the present instance it having been found that *ad valorem* Court-fees are exigible, the only question which arises is whether the applicant has sufficient means to enable him to pay the said Court-fee. If authority were required on this question, it is to be found in *Krishnabai* v. *Manohar* (2).

On the question of whether the evidence on record justifies the conclusion that the applicant had no sufficient means to pay the Court-fee, it must be remembered that the onus to prove pauperism rests on the applicant himself. The oral evidence produced by him is worse than useless and, indeed, by implication injures his case. In addition to this there was a clear admission in para. 7 of the plaint that he was in possession of part of the property in suit, while in the plaintiff's rejoinder it was also admitted that he was living in one of the houses in suit and, as will be seen from the schedule attached to the plaint, the minimum value of any one of the seven houses concerned is Rs. 2,000.

The *ratio decidendi* in *Bai Balagavri* v. *Motilal Ghelabhai* (3) was entirely different. In that case Macleod, C. J., pointed out that the offer of the defendant to produce in Court certain ornaments and cash belonging to the plaintiff, the value of which was in excess of the sum required for payment of Court-fees, could not alter the position as regards the plaintiff's financial status at the moment when he applied for leave to sue as a pauper. It was, however, distinctly pointed out therein that it would still be open to the defendant to have the matter re-considered under r. 9 (*b*), O. XXXIII, C. P. C. Thus the decision quoted is in principle entirely opposed to the contention urged on behalf of the applicant, for in the said decision there was a clear admission that the cash and property in question, which formed part of the subject-matter, could be taken into account in calculating the plaintiff's means. I am unable to see how the decision in *Chandan Singh* v. *Laxman* (4) gives the applicant the slightest help. That decision laid down that the ownership or possession of an occupancy holding does not operate as a bar to an applicant's suing *in forma pauperis*. The decision, in short, is entirely inapplicable to the facts of the present case.

It is true that in the present case the defendants have not been able to produce specific evidence as to the amount of the applicant's means, but the implications which arise from the oral evidence produced by the applicant himself, he, for example, stated in cross-examination that he is the sole heir of the property in suit and that its value is a lakh as well as his definite statements in the plaint and pleadings as to his being in actual possession of an appreciable part of the property in dispute, fully justify, in my opinion, the finding of fact arrived at by the Additional District Judge that the applicant is not a pauper in the sense that he has not sufficient means to file the suit in the ordinary way.

I, therefore, see no cause to interfere and dismiss the application. The applicant must bear the non-applicant's costs.

Z. K. *Application dismissed.*

(2) 30 B. 593 at p. 597; 8 Bom. L. R. 671.
(3) 72 Ind. Cas 224; 47 B. 523; 25 Bom. L. R. 199; A. I. R. 1923 Bom. 247.
(4) 90 Ind. Cas. 949; 21 N. L. R. 98; A. I. R. 1925 Nag. 438.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPLICATION No. 57 OF 1925.

May 22, 1925.

Present:—Sir Sydney Robinson, KT., Chief Justice.

CHAN ELLIAM—APPLICANT

versus

NEO THEIN THEONG—OPPOSITE PARTY.

Limitation Act (IX of 1908), s 5—Application, delay in filing—Time spent in obtaining copy not required to be filed—Extension of time—Sufficient cause.

Delay in filing an appeal cannot be excused on the ground that it was due to time spent in obtaining a copy which was not required to be filed along with the memorandum of appeal.

Mr. *Villa*, for the Applicant.

JUDGMENT.—This is an application for a declaration that this case is a fit one for further appeal.

There was a second appeal before my brother Lentaigne and his decision was dated 23rd March 1925. This application, therefore, should have been filed by the 22nd April. It was not filed until the 1st of May. I am asked to excuse the delay because petitioner applied for a copy of the lengthy judgment to take advice as to whether there were any just grounds for a re-

view of judgment or for such an application as the present one. There was no other necessity for obtaining a copy which the rules do not require shall be filed with the application. The points involved were well known and Counsel could at once have drafted the application, but petitioner went to other Counsel who knew nothing of the case. I see no reason to excuse the delay.

The application is, therefore, dismissed as time barred.

Z. K. *Application dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No 1 OF 1924.

October 30, 1925

Present:—Mr. Ashworth, A J. C., and Mr. Neave, A J C.

KALLU MAL—DEFENDANT—APPELLANT

versus

PARTAB SINGH—PLAINTIFF—RESPONDENT

Set-off—Cross-claim—Equitable set-off—Hindu Law—Illegal act of father—Sons, liability of—Decree, form of

A executed a sale of certain property in favour of *B* and put him in possession of it He further agreed to indemnify him in the event of his losing possession The vendee lost possession upon a suit having been brought by the relatives of *A* to set aside the sale Subsequently the vendee brought a suit to recover the consideration-money and the defendant-vendor claimed equitable set-off in the shape of deduction on account of the profits realised by the vendee during his period of possession

Held, (1) that the suit was one under Art 97 of Sch. I of the Limitation Act for money paid upon an existing consideration which afterwards failed, [p 789, col 1]

(2) that the claim for profits was not a cross-claim arising out of the same transaction such as could be described as a claim to an equitable set-off and, therefore, could not be allowed. [*ibid*]

Hanuman Kamat v *Hanuman Mandur*, 19 C 123; 18 I A 158, 6 Sar P. C. J. 91, 9 Ind Dec (N. S) 527 (P. C.), followed.

Niaz Gul Khan v. *Durga Prasad*, 15 A. 9, A. W N (1892) 115, 7 Ind Dec (N. S) 720, *Nand Ram* v *Ram Prasad*, 27 A 145; A W N. (1904) 193, 1 A L J. 529, *Chisholm* v. *Gopal Chander Surma*, 16 C 711, 8 Ind Dec. (N. S) 470, *Kishorchand Champalal* v. *Madhowji Visram*, 4 B. 407, 5 Ind Jur. 320, 2 Ind. Dec (N. S) 777, referred to

The test of liability of a Hindu son for an illegal act committed by his father would rather be the purpose for which the father's act was committed than the legality of the act itself. [p. 789, col 2.]

Where a sale made by a Hindu was set aside as being without family necessity and the vendee being deprived of possession sued to recover the purchase-money by proceeding against the family property in the hands of the son of the vendor who had been brought on the record as the legal representative of his father who died during pendency of the suit

Held, that the proper decree to pass would be a decree against the son as the legal representative of his father and capable of execution against him so far as he held property which was liable to attachment under the Hindu Law for his father's debts [p. 790, col 1]

Gajodhar Bakhsh v *Gauri Shankar*, 61 Ind Cas 205, 8 O L J 81 and *Nutasayyan* v *Ponnusami*, 16 M 99, 3 M L J. 1, 5 Ind Dec (N S) 776, referred to

Durbar Khachar v *Khachar Harsur*, 32 B 348, 10 Bom L R 297 and *Ratan Lal* v *Birjbhukan Saran*, 61 Ind Cas 774, distinguished

Appeal against the judgment and decree of the Subordinate Judge, Bara Banki, dated the 25th September 1923.

Mr. *Risheshar Nath*, for the Appellant.

Messrs *Niamatullah*, *Motilal Saksena*, *Wasi Hasan* and *Naimullah*, for the Respondent.

JUDGMENT.—This is an appeal against an order of the Subordinate Judge of Bara Banki granting the plaintiff-respondent a decree for Rs. 10,037-8 0 with costs and interest on part of the decretal amount against the appellant Kallu Mal.

The appellant's father Jagmandhar Das on the 21st March 1917 executed in favour of the plaintiff-respondent a sale-deed in respect of a village Siroli Gang which he had himself acquired at a Court sale. The consideration entered in the sale-deed was Rs. 16,000 of which Rs. 6,000 was paid in cash, the balance Rs. 10,000 being left as a mortgage on the property in the vendor's favour. The mortgage deed provided for payment of Rs. 10,000 by instalments of Rs. 2,500 a year. The sale-deed contained a clause under which the vendor undertook to indemnify the vendee in the event of his losing possession of the village for any reason and empowering him to realize any money that might in such a contingency be found due to him from the vendor or his heirs and representatives together with costs and damages.

The plaintiff was placed in possession of the village and in the course of the next year paid Rs. 1,900 on account of the instalments due under the mortgage.

On the 19th March 1918 a suit was instituted against him by the brothers and nephews of the vendor Jagmandhar Das to have the sale set aside and to recover possession of the village on the ground that it was joint family property and that the

sale was not for the benefit of the family. This suit was decreed and after an unsuccessful appeal the plaintiff-respondent lost possession of the village on the 15th of September 1920. On the 22nd of May 1922 he filed the present suit to recover the consideration, amounting in all to Rs. 7,900 which he had actually paid and for costs incurred in the litigation with the family of Jagmandhar Das and the expenses of the sale. In addition to this he claimed interest at 12 per cent. The total amount for which he asked was Rs. 12,617-12-3.

Jagmandhar Das died during the pendency of the suit and his son Kallu Mal, the present appellant, and a grand-son were substituted as his legal representatives. The lower Court has exempted the grandson from liability.

The learned Subordinate Judge has granted a decree for the amount of consideration actually paid and for the greater part of the costs claimed in the plaint. He has allowed interest at 6 per cent. on Rs. 1,018-8 0 the amount of the costs which had so far been realized from the plaintiff.

Three grounds have been taken in appeal:—

1. That the lower Court ought to have deducted from the amount awarded to the plaintiff the sums which he realized from the village while he remained in possession of it.

2. That nothing should have been allowed to the plaintiff on account of expenses of litigation as at the time of the sale Rs. 2,000 was left with him for this purpose.

3. That in view of the finding that the sale-deed was not executed for legal necessity it should have been held that the joint family property would not be liable for the claim.

The second ground may be dealt with first. The consideration entered in the sale-deed was Rs. 16,000. The defendant, however, pleaded that the real consideration was Rs. 18,000 and that by an oral agreement between the parties Rs. 2,000 had been left with the plaintiff for payment of his expenses in the event of any litigation arising over the transfer. Such an oral agreement is obviously inadmissible in evidence under s. 92 of the Evidence Act. Further, the evidence which has been adduced to prove it is absolutely worthless. Even if accepted at its face value, it would prove no more than that five years before the sale took place there had been negotiations between the parties in which Rs.18,000 was named as a price which the plaintiff would be willing to pay.

The first ground of appeal is the one on which most emphasis has been laid. The plaintiff was in possession of the village for about $3\frac{1}{2}$ years from March 1917 to September 1920. During that period he enjoyed the profits and is alleged to have cut down large quantities of timber. In the written statement the defendant has estimated the amount realized by the plaintiff from the village at Rs. 9,774 4 0 and has claimed in para. 19 a set-off to this amount. The learned Subordinate Judge has held that the sum claimed is not an ascertained sum within the meaning of O. VIII, r. 6 of the C. P. C, and that the defendant has not paid any Court fee on it. He has further held that a claim for mesne profits might be made by the brothers and nephews of Jagmandhar Das who had the sale set aside. Accordingly, he has found that this money is not legally recoverable by the defendant in this case and has decided against him on this point without going into proof.

In the written statement this amount is claimed as a set-off, but it is contended for the appellant that it ought not to be so described but as a claim to deduction. In any case it has been held in numerous cases *e g*, *Niaz Gul Khan* v. *Durga Prasad* (1), *Nand Ram* v. *Ram Prasad* (2), *Chisholm* v. *Gopal Chander Surma* (3) and *Kishorchand Champalal* v. *Madhowji Vishram* (4), that O. VIII, r. 6, of the C. P. C., is not exhaustive but that Courts can allow an equitable set-off if the amount claimed arises out of the same transaction even though the sum claimed is not an ascertained sum. The transaction in the present case was the sale to the plaintiff and all the subsequent proceedings up to his dispossession under the decree. The plaintiff has re-paid himself for his losses over the sale by the income which he had received from the land.

We are unable to accede to these propositions. This suit, as was held by their Lordships of the Privy Council in *Hanuman Kamat* v. *Hanuman Mandur* (5), is one

(1) 15 A 9; A. W N. (1892) 115; 7 Ind. Dec. (N. S.) 720

(2) 27 A 145; A W N (1904) 193; 1 A. L. J. 529.

(3) 16 C 711, 8 Ind Dec (N S) 470

(4) 4 B 407, 5 Ind Jur 320; 2 Ind Dec (N S.) 777

(5) 19 C 123, 18 I. A. 158; 6 Sar. P. C. J 91; 9 Ind Dec. (N. S.) 527 (P. C.).

under Art. 97 of Sch. I of the Limitation Act for money paid upon an existing consideration which afterwards failed. The transaction out of which it arose was a sale Section 55, cl. (2) of the Transfer of Property Act provides that "The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same." There was in addition a special indemnity clause in the sale-deed in suit By virtue of the sale the plaintiff got possession of the land and the defendant received the purchase-money and had the use of it. It cannot be said that the plaintiff is liable to account to the defendant for the profits of the land during the period for which he held it as owner under the sale-deed. Nor can it be said that the claim for these profits is a cross-claim arising out of the same transaction such as could be described as a claim to an equitable set-off Any claim to mesne profits might be made by the parties who had the sale set aside on the ground that it was voidable or void as against them but not by the vendor or his legal representative. We hold that the appellant is not entitled to set off anything against the plaintiff's claim.

With regard to the third ground of appeal the appellant's argument is that the sale was set aside as void. In effecting such a sale Jagmandhar Das committed an illegal act. For such an act his son, the present appellant, cannot be held responsible and is not liable for the consideration except to the extent of his father's assets which may be found in his hands The joint family property is certainly not liable The learned Subordinate Judge has passed a decree against the appellant Kallu Mal without any qualifications and has refused to decide against what property it can be executed. In this it is contended he was wrong

For the doctrine that a sale of joint family property by father is void *ab initio* reliance is placed on *Gajodhar Bakhsh* v. *Gauri Shankar* (6) That, however, was a case of a mortgage and in it reference is made to the Privy Council ruling already referred to above [*Hanuman Kamat* v. *Hanuman Mandur* (5)] in which it was held with some hesitation that such a sale was not necessarily void but only voidable.

(6) 61 Ind. Cas. 205; 8 O. L. J. 81.

Durbar Khachar v. *Khachar Harsur* (7) and *Ratan Lal* v. *Birjbhukan Saran* (8) have been cited as instances in which a son was not held liable to pay debts due from his father on account of illegal acts committed by him. In the former, however, the father's act was a tort which it was found resulted in no benefit to the estate which came into the hands of the son, while in the latter the debt was a penalty incurred by the father and the Commentators on Hindu Law are all agreed that a son is not liable for fines inflicted on his father. These two cases are, therefore, readily distinguishable from the present case.

The test of liability would seem rather to be the purpose for which the father's act was committed than the legality of the act itself. In *Natasayyan* v. *Ponnusami* (9) was held that the sons were bound to discharge the debt due under a decree passed against their father for money dishonestly retained by him from persons to whom he was accountable in respect of it. It was observed in the judgment in that case that " the son is not bound to do anything to relieve his father from the consequences of his own vicious indulgences, but he is surely bound to do that which his father himself would do were it possible, *viz*, to restore to those lawfully entitled money he has unlawfully retained."

Again it is important to notice that the present case has been decided against the appellant as the legal representative of his father. It was instituted against Jagmandhar Das and it was only on his death that under O XXII, r. 4, of the C. P. C, the appellant was made a party as his father's legal representative. Under cl. (2) of that rule he could only make a defence appropriate to his character as legal representative of the deceased defendant That is to say, he could put forward no plea which his father could not have put forward. The question of the property which can be affected by the decree is, as has been pointed out by the learned Subordinate Judge, one for the Execution Court to decide. Sections 52 and 53 of the C. P. C. are clear on this point

The order of the lower Court is not as clearly worded as it might be in this respect We amend it by making the decree one against Kallu Mal as the legal repre-

(7) 32 B 348, 10 Bom. L. R. 297.
(8) 61 Ind Cas 774
(9) 16 M. 99; 3 M L. J. 1; 5 Ind. Dec. (N. s) 776.

sentative of his father and capable of execution against him so far as he holds property which is liable to attachment under the Hindu Law for his father's debts. In other respects the appeal is dismissed with costs.

G. H. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 482 OF 1924
AND
APPEAL AGAINST ORDER No. 373 OF 1924.
October 5, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Waller.

KANNURI VENKATA SIVA RAO AND OTHERS—COUNTER-PETITIONERS—DEFENDANTS—PETITIONERS

versus

CHITTOORI RAMA KRISHNAYYA—PETITIONER—PLAINTIFF—RESPONDENT.

Madras Village Courts Act (I of 1889 as amended by Act II of 1920), s. 78—Rules framed by Madras Government, rr. 18, 64—Forum, *creation of, for deciding disputes as to election to* panchayat—*Suit in Civil Courts challenging validity of election, whether maintainable—Power to make rules to regulate appointments and elections, whether includes power to appoint Tribunal to decide objections to elections—Defect in qualification of members*—Panchayat *Court, working of*

Where a public body has been created by Statute and that Statute empowers Government to frame rules for its working, it is open to the Government to create a *forum* for the purpose of deciding disputes as to elections directed to be carried out under the Statute and thereby to exclude the jurisdiction of the Ordinary Civil Courts. [p. 791, col. 1]

Kona Thimma Reddi v. *Secretary of State for India*, 78 Ind. Cas. 91, 47 M 325, 19 L. W 59, 46 M L J 60, (1924) M W N 146, A I. R. 1924 Mad 523 and *Bhaishankar Nanabhai* v. *Municipal Corporation of Bombay*, 31 B 604, 9 Bom. L R 417, followed

Under s. 78 of the Madras Village Courts Act, which empowers the Governor-in-Council to make rules to regulate the appointments or elections of Presidents and other members of the *Panchayat* Courts, it is a necessary part of this power of regulation that Government should appoint a Tribunal to enquire into and decide objections to such elections. [*ibid.*]

Under r 18 of the rules framed by the Madras Government under s. 78 of the Act objections to an election to a village *panchayat* have to be made within a prescribed time to the Revenue Divisional Officer, whose order, or that of the Collector, thereon is final and not liable to be contested by suit or otherwise. [p. 790, col. 2.]

A Civil Court has, therefore, no jurisdiction to entertain a suit challenging the validity of such elections. [p. 791, col. 1.]

Rule 64 of the rules framed by the Madras Government under s 78 of the Madras Village Courts Act provides fully for the competency of the proceedings of *Panchayat* Courts despite defects in their constitution or in the qualifications of their members. [p. 790, col. 2.]

Revision petition to revise an order of the Court of the District Munsif, Bezwada, in I. A. No. 203 of 1924, in O. S. No. 98 of 1924.

Mr. *L. A. Govindaraghava Iyer*, for the Petitioners.

Mr. *P. Satyanarayana Rao*, for the Respondent.

JUDGMENT.—This revision petition arises out of a suit filed in the Court of the District Munsif, Bezwada. The object of the suit was to obtain a declaration that the election of the defendants as members of the *Panchayat* Court of Bezwada was void. Pending the trial of the suit, the plaintiff applied for a temporary injunction restraining the defendants from entering upon their duties as *panchayatdars*. The District Munsif decided that he had jurisdiction to entertain the suit and proceeded to grant the injunction applied for. The result, but for the interference of this Court, might have been to deprive the citizens of Bezwada for several years of the services of a *Panchayat* Court. Rule 64 of the rules framed by Government under the Village Courts Act provides fully for the competency of the proceedings of *Panchayat* Courts despite defects in their constitution or in the qualifications of their members, so that it was as unnecessary as it was undesirable for the District Munsif to have passed the order he did.

Apart from that, we are of opinion that he had no jurisdiction to entertain the suit. Rules have been framed by Government under the Act to regulate the election of *panchayatdars*. Rule 18 (*a*) lays down that objections to an election shall be made within 7 days after the election to the Revenue Divisional Officer, who shall inquire and except in certain cases which are to be referred to the Collector, pass orders. Sub-s. (*b*) declares that the orders of the Revenue Divisional Officer and the Collector respectively shall be final and not liable to be contested by suit or otherwise. It does not appear that, the plaintiff made any attempt to comply with these rules. Instead of doing so, he has resorted to a method of contesting the election, which has been expressly excluded by the rules. The law on the subject has been stated in *Kona Thimma Reddi* v. *Secretary of State for*

India (1) to which decision one of us was a party. It is this That when a public body has been created by a Statute and that Statute empowers Government to frame rules for its working, it is open to Government to create a *forum* for the purpose of deciding disputes as to elections directed to be carried out under the Statute and thereby to exclude the jurisdiction of the ordinary Civil Courts. The same principle is laid down in *Bhaishankar Nanabhai* v. *Municipal Corporation of Bombay* (2)· "Where a special Tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that Tribunal's jurisdiction to determine those questions is exclusive. It is an essential condition of those rights that they should be determined in the manner prescribed by the Act, to which they owe their existence. In such a case there is no ouster of the jurisdiction of the ordinary Courts for they never had any." In this case, the jurisdiction of the Courts has been excluded by express words

It is, of course, argued that the rules framed under s 78 of the Act are *ultra vires*. That section empowers the Governor-in-Council to make rules to "regulate the appointments or elections of Presidents and other members of the *Panchayat* Courts" It is, we think, a necessary part of this power of regulation that Government should appoint a Tribunal to enquire into and decide objections to such elections

The revision petition is allowed with costs throughout.

V. N V. *Petition allowed.*

Z K.

(1) 78 Ind Cas 91, 47 M 325, 19 L W 59, 46 M L J 60, (1924) M W N 116, (1924) A I R (M) 523

(2) 31 B. 604, 9 Bom. L R 417.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No 1195 OF 1924.

January 8, 1925

Present:—Mr. Justice Campbell.

ABDUL QADIR AND OTHERS—DEFENDANTS—APPELLANTS

versus

ILAHI BAKHSH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17, construction f—Benefit of doubt.

Section 17 of the Registration Act must be strictly construed and if there is any doubt whether a document is clearly brought within its purview, the benefit of the doubt must be given to the person who wants the Court to receive it in evidence

Attra v. *Mangal Singh*, 65 Ind Cas 254, 2 L 300, 4 L L J 1, 27 P L R 1922, A I R 1922 Lah 43, followed.

Second appeal from an order of the District Judge, Sialkot, dated the 8th February 1924, reversing that of the Sub-Judge, Fourth Class, Sialkot, dated the 27th February 1923.

Bakhshi *Tek Chand*, for the Appellants.

Lala *Badri Das*, R. B, and Sheikh *Mahomed Munir*, for Sheikh *Niaz Mahomed*, for the Respondents.

JUDGMENT.—The only question for decision in this second appeal is whether the lower Appellate Court has decided correctly that a certain lease is admissible in evidence and is not compulsorily registerable under s 17 (1) (*d*) of the Indian Registration Act.

The material portion of the lease is as follows.—

"*Maian kih . . . ek kothri wa ek dalan bila saqf bamai sahn waqia Shahr Sialkot bakadar kiraya mabligh Rs 18 sal lekar ikrar mah bamah ada karte jawenge: ba adam adai kiraya murtahan mazkur ko ikhtiyar hoga kih makanat se bedakhal kar dewe* "

It is argued by the learned Advocate for the appellants, that this lease unmistakeably reserves a yearly rent within the meaning of s 17 (1) (*d*). For the respondents it is contended that on a proper construction, the lease reserves a monthly rent and is only a lease from month to month, I agree with the latter contention, because it is quite clear that no sum was to be *paid* as rent by the year and because the word "*bakadar*" used before the words "*kiraya mabligh Rs. 18 sal lekar*" is very indefinite.

In any case, I would say this is an instance to which the rule emphasised in *Attra* v *Mangal Singh* (1), applies, namely, that s 17 of the Registration Act must be strictly construed and that if there is any doubt whether a document is clearly brought with its purview, the benefit of the doubt must be given to the person, who wants the Court to receive the document in evidence.

I, therefore, dismiss the appeal with costs.

N. H. *Appeal dismissed.*

(1) 65 Ind Cas 254; 2 L 300, 4 L. L J. 1, 27 P. L. R. 1922, A. I. R. 1922 Lah. 43.

MADRAS HIGH COURT.

APPEAL AGAINST ORDERS NOS. 411 AND 401 OF 1921.

September 7, 1923.

Present:—Mr. Justice Spencer and Mr. Justice Venkatasubba Rao.

RAMAKKA—COUNTER-PETITIONER—PLAINTIFF—APPELLANT IN A. A. O. No. 411 OF 1921 AND RESPONDENT IN A. A. O. No. 401 OF 1921

versus

V. NEGASAM—PETITIONER—DEFENDANT No. 4—RESPONDENT IN A. A. O. No. 411 OF 1921 AND APPELLANT IN A. A. O. No. 401 OF 1921.

Civil Procedure Code (Act V of 1908), ss 2 (12), 141, O. XVIII, r 1, O XXVI, r. 11—Mesne profits, inquiry as to—Burden of proof—Right to begin—Commissioner—Omission to record evidence, effect of—Evidence Act (I of 1872), s 145—Witness, whether can be cross-examined with reference to previous deposition

In a proceeding for ascertainment of mesne profits, the amount of the profits which the person in occupation has actually received is a matter within the peculiar knowledge of that person and, under s 106 of the Evidence Act the burden of proving the amounts actually received will lie on the person who received them, but the burden of proving the profits that the person in occupation might have received will lie on the person who claims them [p 793, col 1]

Order XVIII, r. 1, C P C., is applicable to such a proceeding by virtue of s. 141 of the Code and the person claiming the profits must adduce his evidence first. If the person claiming the profits adduces no evidence, no mesne profits can be awarded to him at all [*ibid*]

Krishna Mohun Basak v. *Kunjo Behari Basak*, 9 C. L R. 1, *Dinobundhoo Nundee* v *Keshub Chunder Ghose*, 3 W R Mis 25 and *Brojendro Coomar Roy* v *Madhub Chunder Ghose*, 8 C. 343, 4 Ind Dec (N. s) 219, relied on.

A Commissioner appointed under O XXVI, r. 11, C. P C., is bound to record in writing the evidence taken by him Information given to the Commissioner by persons who are not called as witnesses and in the absence of parties to the suit and whose statements are not reduced to writing is not legal evidence upon which the Commissioner can act [p 793, col 2; p 795, col 1]

Harvey v. *Shelton*, (1844) 7 Beav 455; 49 E R 1141, 13 L. J Ch 466, 64 R R 116 and *Walker* v *Frobisher*, (1801) 6 Ves. Jun. 70, 31 E R. 943, 5 R R. 223, relied on.

Per *Venkatasubba Rao, J.*—Under s. 145 of the Evidence Act a witness may be cross-examined as to previous statement made by him in writing without such writing being shown to him or being proved. Only if it is intended to contradict him by the writing his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him [p 794, col. 2.]

Appeals against an order of the District Court, Anantapur, dated the 5th April 1921, in Interlocutory Application No. 95 of 1920 (in O. S. No. 31 of 1912 on the file of the District Court of Bellary).

Mr. *L. A. Govindaraghava Aiyar*, for the Appellant.

Mr. *B. Somayya*, for the Respondent.

ORDER.

Spencer, J.—This was an application by the 4th defendant for mesne profits on the extent of land in the enjoyment of the plaintiff between the date of the decree in the first Court and the decision of the appeal. The matter was referred by the District Judge to a Commissioner to ascertain the amount of mesne profits due. The Commissioner directed the plaintiff to adduce her evidence first, on the ground that she had been in possession of the property and was thus in the best position to state how much profit she had obtained. The plaintiff's Pleader refused to open his case, upon which the petitioner's witnesses were examined and the case was closed. Meanwhile, the counter-petitioner (plaintiff) applied to the District Court to direct the Commissioner to record her evidence. The District Judge in an order on the interlocutory application decided that the Commissioner was right and refused the counter-petitioner's request.

The questions now before us are (1) whether the District Judge was right in giving the petitioner mesne profits upon 15 acres 42 cents of wet land and (2) whether he was right in not allowing the appellant an opportunity to adduce her evidence. As regards the exent of the land, the plaintiff's Pleader relies on an admission made by the 4th defendant in another suit, O. S. No. 393 of 1916, that she (plaintiff) was only in possession of 8 acres 47 cents, and he argues that the petitioner is not entitled to get mesne profits on a larger extent than what he admitted that she was in possession of. The circumstances under which the statement was made in the other suit have not been proved. The Judge relied on the extent as given in the delivery warrant and I think he was right in doing so.

On the second point, I am of opinion that the Commissioner and the District Judge were in error in requiring the plaintiff to open her case. Order XVIII, r. 1, C. P. C., which is applicable to miscellaneous proceedings through s. 141, lays down that the plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff. In a case like the present, where the 4th defendant is the person claiming mesne profits, he is in

the position of a plaintiff, as it is his petition that is the foundation of the proceedings and, if he adduces no evidence at all, no mesne profits can be awarded to him. Section 2, cl. (12), defines mesne profits as those profits which a person in wrongful possession of such property actually received or might, with ordinary diligence, have received. The profit which a person actually received is a matter within the peculiar knowledge of that person and, under s 106 of the Evidence Act, the burden of proving the amounts actually received will lie on the person who received them; but the burden of proving the profits that the person in occupation might have received will lie on the person who claims them. The cases cited for the respondent, *Brojendro Coomar Roy* v. *Madhub Chunder Ghose* (1) and *Dinobundhoo Nundee* v. *Keshub Chunder Ghose* (2) do not go further than to show that it lies on the person who actually received mesne profits to show how much he received. These two cases are not authorities for saying that it is for the person in occupation to prove what mesne profits should be awarded, which is a very different thing. In *Krishna Mohun Basak* v *Kunjo Behari Basak* (3) it was observed that there may be cases in which the defendants in a suit for mesne profits may properly be called upon to produce their accounts and to give information upon facts within their special knowledge, but that, under the provisions of s. 179, C. P C. of 1879, which corresponds to O XVIII, r 1, the right to begin was with the plaintiff and the appellant's contention that it was for the defendant to begin was not entitled to any consideration

The counter petitioner applied to the District Judge to be allowed to examine her witnesses and this application was refused As the case cannot be satisfactorily disposed of without hearing the evidence on both sides, I think it is necessary that we should send the case back to the District Judge and ask him to record such evidence as the counter-petitioner may produce on her side and such further evidence as the petitioner may adduce on the same points

Another error into which the Commissioner has fallen which has been referred to in the course of argument is the fact that he obtained information from certain persons whose evidence was not recorded by him. The Judge considered that this information was admissible I am of opinion that the Commissioner was entitled to base his report on his local inspection and also upon the crop experiment conducted by him, but that any evidence that he took should have been recorded in writing Order XXVI, r 10, requires that he should reduce to writing the evidence taken by him. Information given by witnesses which is not reduced to writing is not legal evidence upon which the Court can decide. If either of the parties desires to have the benefit of the statements of those persons from whom the Commissioner obtained information, they should now cite them as witnesses, otherwise, the District Judge should come to a conclusion on the rest of the evidence before him without any reference to such unrecorded statements The District Judge is directed to return his revised findings within three months. Ten days for objections.

Venkatasubba Rao, J.—I agree and I wish to add a few words. The plaintiff filed a suit for the recovery of certain property and obtained judgment In pursuance of it she took possession of 15 acres and 42 cents of wet land with which we are mainly concerned In appeal the judgment was reversed and the 4th defendant now seeks restitution of mesne profits I may note that the 4th defendant by way of restitution already obtained 15 acres of wet land from the plaintiff There is no need to refer to the dry land claimed so far as this judgment is concerned. The first question that had to be decided by the lower Court was whether mesne profits were to be given in respect of 15 acres of wet land or merely in respect of 8 acres which the plaintiff said was the extent of the land she had taken possession of from the 4th defendant The lower Court, having regard to the plaint, the decree, the execution proceedings and the delivery warrant, came to the conclusion that the plaintiff was accountable for mesne profits in respect of 15 acres of wet land. The matter was fully dealt with by the District Judge and it is sufficient to say that the lower Court rightly allowed mesne profits in respect of 15 acres and odd so far as the wet land is concerned.

The next question is, what is the proper amount of mesne profits? The District

(1) 8 C. 343, 4 Ind Dec (N. s) 219.
(2) 3 W R. Mis. 25.
(3) 9 C. L. R. 1.

Judge referred the matter of the ascertainment of the mesne profits to a Commissioner. This is, what the District Judge says in his preliminary order; "under O. XXVI, r. 9, C. P. C., I resolve to appoint a Commissioner to make a local investigation and ascertain the amount of mesne profits which may be awarded to the 4th defendant on the above mentioned extent of land comprised in the items specified in para. 2 *supra* after examining witnesses and receive any documentary evidence which the parties may produce before him." When the enquiry was taken up by the Commissioner the plaintiff contended that the 4th defendant should begin and adduce evidence on the ground that the burden was upon him to make out what the mesne profits allowable to him were. The Commissioner ruled that the plaintiff was the party who was to begin, thus implying that the burden of proof was upon the plaintiff. The plaintiff's Vakil declined to call evidence objecting to the ruling and allowed the 4th defendant to examine his witnesses. The latter's case was closed on 13th February 1921 when the plaintiff apparently made an application to be allowed to examine her witnesses at that stage. The Commissioner refused to request. Thereupon, on the 16th February 1921, the plaintiff applied to the District Court to be allowed to examine her own witnesses and the District Judge decided that the ruling of the Commissioner was right and rejected the plaintiff's application Before I deal with the objection that relates to this, I may advert to certain other matters that transpired before the Commissioner himself.

The plaintiff desired to cross examine the 4th defendant with reference to a certain allegation made in the latter's written statement in another proceeding The Commissioner disallowed the plaintiff's request and on application by the plaintiff to the District Judge, the order of the Commissioner was confirmed.

Exception is taken to the report of the Commissioner on another ground Under the impression that he could gather information by instituting enquiries regarding the correct amount of mesne profits and act upon such information, he interviewed several *raiyots* and others and collected their opinion and based his conclusions *inter alia* upon the information so obtained.

Next it is said that the Commissioner conducted certain experiments. He had the crop harvested. He confined himself to two small plots of land, and on the results obtained, he based his calculations in regard to the whole land. It has been argued before us that the Commissioner was wrong in adopting this procedure

I shall deal shortly with these objections. In regard to the last objection it seems to be untenable. It has been pointed out that the two plots were selected out of the entire lands and it has not been shown that the yielding capacity of the other portions which are adjacent to the plots selected is different.

In regard to the objection that the Commissioner was wrong in refusing to allow the plaintiff to cross examine the 4th defendant in respect of a statement made by the latter in a previous proceeding, the objections must be upheld. Under s. 145 of the Evidence Act a witness may be cross examined as to previous statement made by him in writing without such writing being shown to him or being proved Only if it is intended to contradict him by the writing his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him The Commissioner refused to allow cross-examination on the ground that the document which contained the previous statement was not produced. The plaintiff was entitled to cross examine the 4th defendant in regard to his previous statement without showing the latter the document Only if it became necessary to contradict the 4th defendant his attention should be called to the writing. The Commissioner acted clearly wrongly in this respect. On another ground the Commissioner's order is sought to be justified. It is said that, when the preliminary order was passed, the Court refused to attach any weight to the 4th defendant's previous statement, and, for that reason, the Commissioner also was justified in refusing to allow questions to be asked in regard to it

This position is entirely wrong. The Court when passing the preliminary order declined to make any inference from the previous statement as regards the extent of the land in the 4th defendant's possession The writing was sought to be used before the Commissioner for altogether a different purpose, the purpose being to ascertain the probable yield.

The contention that the Commissioner was not justified in obtaining information in

the absence of the parties must be upheld. The Court is not entitled to act on information received in the absence of the parties, nor can it base its judgment on its own knowledge of the facts. The law on this subject is well-settled, Lord Langdale, M R, observes in *Harvey* v. *Shelton* (4) "In every case in which matters are litigated, you must attend to the representations made on both sides and you must not in the administration of justice, in whatever form, whether in the regularly constituted Courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decisions of the Judge, which means are not known to the other side." To say that the Commissioner could have come to the same conclusion on the other material before him is no answer. If the case is brought within the general principle that the Judge's mind may, by a possibility, have been biassed, there is a sufficient objection. See *Dobson* v. *Groves* (5) and *Walker* v *Frobisher* (6).

The only other point that remains to be dealt with has reference to the objection that the ruling of the Commissioner in regard to the right to begin is wrong. The District Judge expressed the opinion that the ruling was correct. The 4th defendant claims in this proceeding mesne profits from the plaintiff. Section 2, cl. (12) of the C. P. C, defines mesne profits thus.

"Mesne profits of property means those profits which the person in wrongful possession of such property actually received *or might with ordinary diligence have received therefrom*" It will be seen that mesne profits are not merely profits which a person in wrongful possession has actually received. The argument, therefore, that the amount of profits actually received is within the knowledge of the person in possession and that, therefore, the latter should, in the first instance, give evidence is clearly untenable. In a suit for mesne profits the burden is always held to be on the plaintiff to prove the amount. This is the recognized practice. The proceeding before us is really in the nature of a suit for mesne profits. No ground has been shown why this practice should be departed from. The Commissioner's ruling that the plaintiff should begin is tantamount to a decision that the burden of proof is upon the plaintiff. From the nature of the controversy, what the parties were disputing about, was not in regard to the right to begin but the duty to begin. I am of the opinion that the 4th defendant was bound to adduce evidence in the first instance regarding the amount of mesne profits.

[See *Krishna Mohun Basak* v. *Kunjo Behari Basak* (3)]

I, therefore, hold that the Commissioner as well as the District Judge were wrong in regard to this matter.

Now that we have decided that the ruling is incorrect what follows? It has been contended on behalf of the 4th defendant that the plaintiff's Vakil having refused to adduce evidence when he was called upon to do so, he should not be allowed an opportunity to examine his witnesses. This contention I am unable to understand. When the Commissioner gave a ruling, the plaintiff took a risk in refusing to accept it. But what is the extent of the risk that she took? She took the risk of the ruling of the Commissioner being ultimately pronounced to be correct. If it should be held to be correct by the final Tribunal the plaintiff not having examined her witnesses when she ought to have done so she would, of course, be completely debarred from adducing any evidence whatsoever. But this is the only risk that the plaintiff took. Immediately the 4th defendant's case was closed, the plaintiff's Vakil made an application that he should be allowed to let in evidence. The effect of our decision is that the plaintiff should give evidence only after the 4th defendant had closed his case. It, therefore, follows that the plaintiff should be allowed to examine her witnesses at the close of the 4th defendant's case. The following passage from Taylor on Evidence, Vol I, page 291, s. 388 has been relied upon by the 4th defendant: "The question respecting the right to begin is a matter of practice and regulation upon which the presiding Judge must exercise his discretion; and the Court will not interfere with his decision unless it be clearly proved, not only that the ruling on this point was manifestly wrong, but that it has occasioned substantial injustice." This passage would certainly be of assistance to the 4th defendant, if the plaintiff accepting the ruling of the Commissioner

(4) (1844) 7 Beav 455, 49 E R. 1141, 13 L J. Ch 466; 64 R R 116.
(5) (1844) 6 Q B. 637, 14 L J. Q B. 17; 66 R R 509; 11 5 E. R 239.
(6) (1801) 6 Ves Jun. 70, 31 E. R. 943; 5 R. R. 223

had given evidence in the first instance. In that case the Court, although it came to the conclusion that the ruling was incorrect, would not ordinarily interfere with the final decision in the suit. But here the plaintiff did not accept the ruling and refused to examine the witnesses before the 4th defendant gave evidence. In the circumstances, the passage relied upon has no bearing. I have disposed of all the objections taken to the procedure adopted by the Commissioner. I am of the opinion that it is clearly necessary to have another finding in regard to the amount of mesne profits.

I agree with the order that has been proposed by my learned brother.

In compliance with the order contained in the above judgment, the District Judge of Anantapur submitted the following

FINDING.—In A. A. O No. 411 of 1921 the High Court has directed me "to record such evidence as the counter-petitioner may produce on her side and such further evidence as the petitioner may adduce on the same points," *viz*, on the question of the amount of mesne profits due from the one to the other, and to submit a revised finding

* * * * * * *

A sum of Rs. 295 4 0 has, therefore, to be deducted from the figure arrived at above, leaving Rs. 854-12-0. Interest at 6 per cent. per annum on the sum, from dates of realization up to the date of this finding amounts to Rs. 273-7-8—in all Rs. 1,128-3 8. My finding is that this sum is due from the counter petitioner to the petitioner in respect of mesne profits

---

These Appeals against Order Nos. 411 and 401 of 1921 coming on for final hearing after the return of the finding of the lower Court in Appeal against Order No. 411 of 1921, upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—The District Judge's finding is based mainly upon the lease-deeds executed in respect of the lands upon which mesne profits accrued during the years that the defendant was out of possession We have heard no good reasons for doubting the genuineness of these documents, and if they are genuine, they afford the best possible evidence of the amount of profits.

The counter-petitioner does not press her objections as to interest. We accept the District Judge's findings.

As regards the costs of the Commission and the costs of the proceedings in the District Court we think that each party may fairly be asked to pay a moiety of all the costs incurred in the lower Court including the Commissioner's fee, seeing that the Commissioner's enquiry was not wholly to the advantage of either side and that the petitioner in the result is to get about half of what he originally claimed.

Civil Miscellaneous Appeal No. 401 of 1921 is dismissed with costs.

Civil Miscellaneous Appeal No. 411 of 1921 is allowed. Each side to pay and receive proportionate costs.

V. N. V. *Appeal No. 411 allowed.*
Z K *Appeal No. 401 dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No 327 OF 1924.
December 14, 1925.
Present:—Mr. Findlay, Officiating J. C.
MAROTRAO—PLAINTIFF—APPELLANT
versus
MUNICIPAL COMMITTEE, NAGPUR
—DEFENDANT—RESPONDENT

C P Municipal Act (XVI of 1903), ss 24, 66, 68—Cow-shed, whether building—Application for permission to build—Procedure—Meeting of members to deal with application for permission, whether essential—Defect, whether curable—Lease of nazul plot by Municipal Committee for purpose of building—Committee, whether can refuse to sanction construction—Appeal—Decree in favour of appellant, when can be set aside

A cow shed erected on posts and having no foundations is a 'building' within the meaning of the word as used in the C P Municipal Act of 1903 [p 798, col 1]

Section 68 of the C P Municipal Act of 1903 refers to land and houses which are the property of the Government and can have no application in the case of a *nazul* plot leased out for a term of years for building thereon by a private individual [*ibid*]

Under s 66 of the C P. Municipal Act of 1903 a person whose application to a Municipal Committee for permission to build has not been sanctioned within a month of its being made has to remind the Committee of this fact and if after a further period of 15 days no reply is received, the Committee is to be deemed to have sanctioned the proposed building. This will not, however, entitle such person to erect another structure of an entirely different nature from that adumbrated in his application for permission to build [p 798, col. 2]

Section 66 of the C. P. Municipal Act of 1903 contemplates a sanction given by the Committee or Building Sub-Committee in its corporate capacity and it is not legal to dispense with a meeting of the body for obtaining a sanction by the expedient of obtaining the opinions of individual members by circulating the

Papers The omission to call a meeting is not curable by s 24 of the Act [p 799 cols 1 & 2]

The lease of a *nazul* plot by a Municipal Committee for the purpose of building thereon cannot supersede the statutory provisions contained in s 66 of the C P Municipal Act of 1903 relating to the grant of permission to build, and can in no way estop the Municipal Committee from refusing to allow any building to be erected on the plot or insisting on keeping it vacant, on grounds relevant under Ch VI of the Act [p 799, col 2]

Where a suit is partially decreed, and the plaintiff files an appeal against that portion of the decree by which his suit has been dismissed, the Appellate Court has no power to set aside the decree granted in favour of the plaintiff in the absence of an appeal or cross-objection by the defendant [p 800, col 1]

Appeal against a decree of the Additional District Judge, Nagpur, dated the 28th April 1924, in Civil Appeal No. 84 of 1923

Mr *M. R Bobde*, for the Appellant.

Mr *R N. Padhye*, for the Respondent.

JUDGMENT.—The plaintiff-appellant filed the present suit in the Court of the 2nd Munsif, Nagpur, for a perpetual injunction restraining the defendant-respondent, Municipal Committee of Nagpur, from removing the structure shown in the plan attached to the plaint and also for a direction to it to sanction the said construction. The suit was filed under the following circumstances —

Nazul plot No. 551 was put up to auction and the plaintiff being the highest bidder obtained a thirty years' lease thereof on payment of Rs 17 premium and an annual ground-rent of Rs 2-2 0. The lease applied for was for building purposes and it was let out for such a purpose, and under the terms thereof a dwelling house had to be commenced within one year from the date of the lessee obtaining possession and had to be completed within three years. On 10th January 1922 the plaintiff gave notice to the Municipal Committee of his intention to build a house according to a plan sent therewith. Having received no reply he sent a reminder on 11th February 1922. Thereafter, the defendant Committee on 23rd February 1922 informed the plaintiff that his plan was rejected as the locality was congested. The plaintiff appealed to the Municipal Committee which, by a resolution No. 130, passed on 19th August 1922, rejected the appeal In the meantime, the plaintiff had erected on part of the site a cow-shed, and the Committee called upon him to demolish it. The plaintiff, under an apprehension that the Committee would enforce the said order, accordingly filed the present suit.

The pleas offered by the defendant-Committee are sufficiently clear from the 1st Court's judgment. On the issues which arose on those pleadings, the Munsif held that the lease granted to the plaintiff was for building purposes and that it was open to the lessor to forfeit the lease and claim re-entry if the terms thereof were not carried out. The Munsif further held that the Committee could refuse to sanction the construction of any particular building on the site in question on the ground that it would be prejudicial to the health, safety or convenience of the public or of people living in the vicinity, but, if this were done, the defendant-Committee would be liable for compensation It was further held that the defendant-Committee was not estopped from declining to allow the building because of their consent given to the *nazul* officer that the site could be let out for building purposes The cow-shed in question was further held to be a building and was unauthorised as well as undesirable in the interests of sanitation and public health. In those circumstances the Munsif passed a decree, dismissing the plaintiff's suit for an injunction and ordering him to remove the structure in question on payment of Rs. 70 compensation.

The plaintiff appealed to the Court of the Additional District Judge, Nagpur, and that Court in the end dismissed the suit wholly and disallowed the Rs 70 compensation ordered to be paid to the plaintiff. This curious result was arrived at because the plaintiff in his appeal before the Additional District Judge urged that the first Court was wrong in awarding him compensation.

The plaintiff has now come up on second appeal to this Court. One or two preliminary points may at once be dealt with. An additional ground of appeal was filed on 2nd December 1925 to the effect that the cow-shed in question was not a building. It is said to have no foundations at all and merely stands on posts It is true that in the old Municipal Act, which is the one applicable, there was no elaborate definition of "building" such as is contained in s. 3 (*a*) of the Municipal Act of 1922, but I find it wholly impossible to entertain this suggestion. As a glance at Ch. VI will show (*cf.*, section 64) huts are regarded as buildings, and any contention that the cow-shed such as the appellant has raised is not a building seems to me contrary to the

dictates of both Common Law and sense. What is a building, must always be a question of degree and circumstances, and in view of the number of houses in this country, which are erected of fragile materials apart from brick and stone work, there cannot be the slightest, question, in my opinion, but that the structure in question amounted to a building for the purposes of the old Municipal Act. Decisions like those in *Emperor* v. *Muhammad Yusuf* (1) and *Kamta Nath* v. *Municipal Board of Allahabad* (2) are, it need hardly be said, entirely inapposite to the facts of the present case. In the one Allahabad case moveable planks placed over a drain temporarily during the day were held not to constitute a building, and in the second one a canvas screen enclosing a certain space adjoining a house was similarly regarded. These cases, therefore, give the appellant no chance of success and it is perfectly clear that for the purposes of the Municipal Act of 1903 the cow-shed in question constituted a building.

Another contention offered on behalf of the appellant is, in my opinion, an equally useless one, that is, that as the *nazul* land in question is in reality the property of His Majesty, ss. 59 to 67 of the Municipal Act of 1903 had no application thereto. It seems to me that s. 68 cannot possibly protect the appellant in this connection. The reference is very obviously to land and houses which are the property of His Majesty, but the provision can have no application in the case of a *nazul* plot specifically let out for a long term of years for building thereon by a private individual.

As I have already pointed out, the plaintiff-appellant, first of all, gave notice of his intention to build on 10th January 1922: *cf.* D-1. Under s. 66 of the Municipal Act of 1903 the person giving such notice has to wait for a month. If at the expiry of that time no reply is received, he has to communicate once more with the Municipal Committee and draw their attention to the said fact. If after a further period of 15 days no reply is received, the Committee is to be deemed to have sanctioned the proposed building. In this connection I would, first of all, point out that the appellant in his notice (D-4), dated 11th February 1922 did not comply with either the spirit or the letter of s. 66 (3). On the contrary, in this notice he stated that as he had received no reply, he was proceeding with the erection of a hut on the spot in question. The hut erected by him was in no sense even approximately the house of which he had originally given notice to build. It was a *kachcha* erection or shed without foundations, for the erection of which no previous permission had even been solicited from the Municipal Committee. It is utterly impossible on any reasonable consideration to regard the said hut, as in any way, a commencement of the building for which he had originally applied for sanction. The original building was to be a *pakka* one with a foundation and was to be constructed of bricks. The cow-shed erected was of a totally different nature and, if the original building were ever to be constructed on the said site, it is perfectly obvious that the cow-shed would have first of all to be pulled down. The argument, therefore, that this cow-shed may be regarded as a commencement of the permanent building seems to me to be utterly beside the point and to be quite opposed to the facts on the record. From this point of view alone the appellant's case was obviously bound to fail, for it is perfectly clear that, without even soliciting permission he proceeded to build a structure of an entirely different nature from that adumbrated in his application of 10th January 1922. D-4, as I have already shown, cannot, in the circumstances, be regarded as a reminder within the meaning of s. 66 (3) of the Municipal Act of 1903. On the contrary, it was a document which amounted to an express defiance of the Municipal Committee that the appellant was forthwith proceeding with the construction of an utterly unauthorised building. From this point of view, therefore, the Municipal Committee was fully justified in treating the erection in question as one built without sanction and in ordering its demolition under s. 66, sub-s. (5).

On receipt of the notice (D-4,) the Municipal Committee issued a warning (D-3) to the appellant not to proceed with the *chhappar*, while on 23rd February 1922 the appellant was informed that his request for building the house in question was refused on the ground that the site and the locality were congested.

While, on the view I have already taken above, the appellant was bound to fail in any

(1) 40 Ind. Cas. 317; 39 A. 386; 15 A. L. J. 290; 18 Cr. L. J. 669.

(2) 28 A. 199 A. W. N. (1905) 252; 2 A. L. J. 676; 2 Cr. L. J. 793.

event, it may be of interest to examine the case on the assumption of a very forced and fanciful view of the facts of this case that the cow-shed might be regarded as a commencement of the original building for which sanction was asked on the 10th of January 1922. In this connection my attention has been drawn to para. 2 of the written statement of the respondent filed in the lower Appellate Court on 14th March 1924. It is urged that the procedure adopted in rejecting the appellant's application was illegal in that admittedly there was no meeting of the Building Sub-Committee to whom the powers of sanction in this connection have been delegated and that all the Engineer did was to circulate the papers to a majority of the members of such Building Sub-Committee who endorsed on them their opinions that the application should be refused It has been urged on behalf of the appellant that this procedure was invalid and that, in the circumstances, the appellant was entitled to assume that the buliding was sanctioned. The lower Appellate Court has held that s. 24 of the Municipal Act of 1903 would have cured this irregularity It has been urged on behalf of the appellant that the Building Sub-Committee as such passed no order and that there were, therefore, no proceedings taken under the Act, which would be curable under s. 24 of the Act. From the lagal point of view I am of opinion that this contention urged on behalf of the appellant is, undoubtedly, correct Section 66 obviously contemplates a sanction given by the Committee or Building Sub-Committee in its corporate capacity and it is not possible to dispense with such sanction given at a meeting of such Committee or Sub-Committee by the expedient of circulating the papers to individual members. For obvious reasons it would seem to me highly inexpedient that any such idea should prevail. On any question members consulted individually might well agree that the application should not be sanctioned, but, if they met together, it is perfectly possible that, as a result of the arguments or views of some or any of the members of the Committee or Sub Committee, when meeting and discussing the question together, such a body might well have taken a different view of the matter. In my opinion, therefore, although this finding on the legal question involved does not affect the final fate of the appeal, the lower Appellate Court was wrong in thinking that the defect in question was curable or cured by s. 24. I may further point out in this connection that when the doing of any act on behalf of the Municipal Committee becomes emergent, a special provision therefor exists in s. 22 of the Act of 1903

Another argument was offered on behalf of the appellant to the effect that the defendant-Committee being a party to the lease given by Government in respect of the site in question a lease given for house building purposes it was incompetent to the Committee to refuse to sanction a construction on the site This argument seems to me one which it is wholly impossible to accept and were there any basis whatever for it, it would lead to a *reductio ad absurdum* in Municipal administration. The lease in question can in no way supersede the statutory provisions contained in s 66, and the letter (P-5) in no way estops the Municipal Committee from refusing to allow any building on grounds relevant under Ch VI of the Act The fact that the Committee were on 19th August 1921 willing to approve of the lease of the land for building purposes, would in no way estop them from refusing to sanction any particular erection thereafter, and indeed, if circumstances had changed and it became in their opinion inexpedient to allow any building whatever on the site. I am equally of opinion that they would be entitled to enforce their later opinion, although in this instance the necessary concomitant would be the payment of compensation to the lessee in question.

It has further been urged on behalf of the appellant that the action of the Municipal Committee was in this case capricious and arbitrary, that they were in reality showing favouritism to S N. Kulkarni who had originally applied for the lease of the site in question and it has been urged that on this ground this Court would be entitled to interfere: *cf*, *Taluk Board, Bandar* v *Mallikarjuna Prasada Naidu* (3). In this connection it has been urged that in April 1922 Kulkarni, who lives in an adjoining house, was allowed to erect a latrine on the site. For my own part, I am wholly unable to find any such circumstances as would give rise to any suggestion of capricious or arbitrary action in this connection Latrines are a necessary evil in the case of the houses of persons of some standing who own or occupy

(3) 61 Ind Cas. 497; 44 M. 156, 12 L W. 585; (1920) M. W. N. 748; 28 M. L. T. 440; 40 M. L. J. 91.

houses in the Nagpur City. The two latrines which Messrs. Kulkarni and Deokar were allowed to build were apparently erected on the least objectionable site possible and it is a very different proposition indeed to suggest that because such conveniences have to be provided, however, intrinsically undesirable they may be, the plaintiff is equally entitled to erect a cow-shed on the open plot in the congested locality in question. I see not the slightest reason for holding in favour of the appellant on this point.

On the main grounds, therefore, the plaintiff-appellant must clearly fail in his suit. Even If there was a flaw in the way in which the Municipal Committee dealt with the appellant's application, he clearly failed to comply with the fundamental provisions of s. 66 (3) of the Municipal Act of 1903 in proceeding with the erection of the cow-shed as announced in his notice of 11th February 1922.

The last point to be considered was the disallowance by the lower Appellate Court of the compensation of Rs. 70 to be paid to the appellant. On this point I think the procedure of the lower Appellate Court was undoubtedly incorrect. No cross-objection had been filed by the Municipal Committee with reference to the allowance of Rs. 70 compensation, and I think such a cross-objection was a necessary precedent to the said relief having been granted: *cf.*, *Rangamlal* v. *Jhandu* (4). It is true that in para. 4 of the petition of appeal to the lower Appellate Court it was alleged that the Munsif was wrong in awarding compensation, but what the appellant was obviously tilting at therein, was the fact that his main relief had been refused and that he had only been granted such compensation.

The decree of the lower Appellate Court will, therefore, be modified by the restoration of the provision for compensation contained in the decree of the first Court. On other grounds the appeal fails. As regards costs in view of the partial success and failure of the appellant in this Court I order the costs in this Court to be borne by the parties as incurred. Costs in the lower Courts will be borne as already ordered.

Z. K. *Decree modified.*

(4) 11 Ind. Cas. 640; 34 A. 32; 8 A. L. J. 1111.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 500 AND 501 OF 1924.

April 9, 1925.

Present:—Mr. Justice Odgers.

KOMMAREDDI RAMACHANDRAYYA AND OTHERS—DEFENDANTS—PETITIONERS

versus

VODURY VENKATRATNAM—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VII, r. 10—Order returning plaint for presentation to proper Court for want of jurisdiction—Application to withdraw portions of claim, so as bring it within Court's pecuniary jurisdiction—Amendment—Power of Court to re-admit plaint—Review—Notice to party affected, necessity of

Where a plaint was ordered to be returned for presentation to the proper Court on the ground that the value of the subject-matter of the suit exceeded the pecuniary limits of the jurisdiction of the Court to which it had been presented and the plaintiff thereupon applied to be allowed to withdraw his claim to certain portions of the property mentioned in the plaint which had the effect of bringing the plaint within the pecuniary jurisdiction of the latter Court.

Held, that the Court had the power to allow the plaintiff to amend the plaint and re-admit it as amended [p 801, cols. 1 & 2.]

Karumbar Pandrapandaram v. *Audimula Ponnapundaram*, 3 Ind Cas. 725, 33 M. 262, 6 M. L. T 261, followed.

Kannusami Pillai v *Jagathambal*, 46 Ind. Cas. 265; 41 M. 701 at p. 708, (1918) M. W N 497, 24 M. L. T. 46, 8 L. W. 145, 35 M L J. 27, not followed.

Where a plaint is ordered to be returned for presentation to the proper Court within a specified time, it is not open to the Court without notice to the defendant to review its order and give additional time to the plaintiff for payment of additional Court-fees. [p 801, col. 2]

Petitions, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the orders of the Court of the Principal District Munsif, Ellore, dated the 26th April 1924, in I. A. No. 857 of 1924, and C. M. P. No. 882 of 1924, respectively in O. S. No. 704 of 1923.

Mr. *Chenchiah*, for Mr. *P. Venkatramana Rao*, for the Petitioners.

Mr. *V. Suryanarayana*, for the Respondent.

JUDGMENT.—In this case a certain suit, O. S. No. 704 of 1923, was filed in the Court of the Principal District Munsif of Ellore, for the recovery of certain properties. It was alleged that the suit had been under-valued and the District Munsif held a preliminary enquiry into the valuation of the items of property involved and came to the conclusion that the market value was over Rs. 5,000. The plaint was

ordered to be returned to the plaintiff who was given 7 days' time for presentation to the proper Court. This order was made on the 31st March 1924. On the 1st April 1924 the plaintiff presented a petition asking for 15 days' time for filing additional stamp for the plaint. No notice of this application was given to the defendants and on the 2nd April the Principal District Munsif purported to review his decision of the 31st March and granted the prayer in the petition of the 1st April giving the petitioner 7 days' time in which to pay the Additional Court-fee. I am of opinion that as regards C R. P. No. 500 of 1924 the learned District Munsif was clearly not entitled to review his order at least without notice to the other side. Therefore C. R. P. No. 500 must be allowed with costs.

A more important question arises in C. R. P. No. 501 of 1924 On the 3rd April, one day after the petition for review above referred to, the plaintiff asked to be allowed to withdraw his claim to 4 items of properties mentioned in the plaint schedules and to amend the plaint in such a manner that it would conform to the monetary jurisdiction of the District Munsif's Court, and the District Munsif by his order of the 26th April 1924 held that no final order had been passed on the plaint and that by his order of the 2nd April the District Munsif intended to set aside the original order for the immediate return of the plaint. The petition was allowed and the plaintiff was permitted to withdraw his claims and amend his plaint accordingly. The question is, had the learned District Munsif jurisdiction to pass the order he did? In passing I may state that I am very doubtful whether the District Munsif was right in his view as to the effect of the order of the 2nd April and I am more than doubtful as to the correctness of his view that no final order has yet been passed on the plaint. In this connection, I am pressed with two decisions of the Court. The first is the one reported in *Karumbar Pandrapandaram* v. *Audimula Ponnapundaram* (1) which is a decision by Mr. Justice Abdur Rahim in a case which I am bound to say, strikes me as very similar to the present. In that case there was an enquiry as to the value. It was found that the suit was under-valued and the plaint was returned for presentation to the proper Court. The plaintiff amended his plaint by correcting the valuation and striking off some of the properties so as to bring the claim within the jurisdiction of the District Munsif. The District Munsif thereupon re-admitted the plaint and the question for decision was, had he power to do so. The learned Judge decided that he had and his decision was confirmed in Letters Patent appeal by a Bench of this Court. On the other hand, there are observations of Sadasiva Iyer, J., in *Kannusami Pillai* v. *Jagathambal* (2) in the course of which he says: "It also stands to reason and principle that a Court which has no jurisdiction over a suit cannot pass any valid orders in such a suit except orders which the Statute expressly empowers it to pass, such as the order returning the plaint to be presented to the proper Court which it is specifically empowered to pass by O. VII, r. 10, and orders as to costs incurred before it, as to which also there is a special provision in s. 35." And again, "the Court of first instance had no jurisdiction to pass any judicial order in the suit after it had once arrived at the conclusion that the suit as brought was beyond its jurisdiction except to return it for presentation to the proper Court." The other learned Judge, (Oldfield, J.,) does not base his judgment on these grounds. Therefore, although if I may say so, I am in entire agreement with the extracts that I have quoted from the judgment of Sadasiva Iyer, J., and if the matter were *res integra* to me I should certainly decide it in the same manner, I feel that I cannot distinguish the facts of the present case from *Karumbar Pandrapandaram* v. *Audimula Ponnapundaram* (1). Mr. Chenchiah endeavoured to do so by saying that what we have in *Karumbar Pandrapandaram* v. *Audimula Ponnapundaram* (1) was practically two suits. The plaint was returned, then the matter dropped and then it was amended and presented again as an entirely fresh matter. I do not think that the statement of the facts as narrated by the learned Judge in his judgment bears out this distinction. The case was referred to by Mr. Justice Sadasiva Iyer and distinguished by him in *Kannusami Pillai* v. *Jagathambal* (2). It may be that it was distinguished on some-

(1) 3 Ind. Cas. 725; 33 M. 262; 6 M. L. T. 261.

(2) 46 Ind. Cas. 265; 41 M. 701 at p. 708, (1918) M. W. N. 497; 24 M. L. T. 46, 8 L. W. 145; 35 M. L. J. 27.

thing like the same lines as I have indicated. The learned Judge in distinguishing the case seems to lay stress on the fact that the plaintiff put in an unnecessary petition stating that he relinquished his claim to the first property. On the whole and not without hesitation, I have come to the conclusion that I am bound by the decision in *Karumbar Pandrapandaram* v *Audimula Ponnapundaram* (1) and that, therefore, this civil revision petition must be dismissed with costs.

V N. V. *Petition dismissed.*

Z. K.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1014 OF 1924.

August 24, 1925.

Present .—Mr. Justice Phillips.

K. VENKATA NARASIMHA RAO—

DEFENDANT No. 1—PETITIONER

versus

HEMADU SURYANARAYANA—

PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s 141, O IX —Suit, application to restore, dismissal of, for default —Petition to set aside dismissal, maintainability of

Proceedings under O. IX, C. P C, relate to questions independent of the suit, to be determined on evidence as to matters quite irrelevant to the suit and are, therefore, covered by s 141, C P C Order IX, therefore, applies to applications made under O IX itself, so that where an application to restore a suit is dismissed for default, a petition lies under O. IX to set aside the dismissal.

Thakur Prasad v. *Fakir Ullah*, 17 A 106, 5 M L. J. 3, 22 I A. 44, 6 Sar P C J. 526, 8 Ind Dec (N S) 393 (P. C.), *Bepin Behari Saha* v *Abdul Barik*, 35 Ind Cas. 613; 44 C. 950, 21 C W N. 30, 24 C. L J 446, *Abdul Rahman Shah* v. *Shahana*, 58 Ind. Cas. 748; 1 L 339; 82 P W. R 1920, 1 L. L J 188 and *Lallabhai Vajeram* v. *Bai Magangavri*, 18 B. 59, 9 Ind Dec (N. S) 548, relied on.

Ramgulam Singh v. *Sheo Deonarain Singh*, 51 Ind Cas. 152; 4 P. L J. 287, not followed

Petition, under s 115 of Act V of 1908, praying the High Court to revise an order of the Court of the District Munsif, Avanigaoca at Masulipatam, in M. P. No. 1271 of 1923, in I A. No. 2641 of 1922, in O. S. No. 825 of 1921.

Mr. *P. Satyanarayana Rao*, for the Petitioner.

Mr. *P. Somasundaram*, for the Respondent.

JUDGMENT.—The only question that arises here is whether O. IX applies only to suits or whether, by reason of s. 141, it also applies to applications made under O. IX itself. In this case an application to restore a suit was dismissed for default and a subsequent petition was filed to set aside that dismissal. The subsequent petition has been allowed and the original petition under O. IX is now under enquiry.

The contention for the appellant is that the Court has no jurisdiction to treat the second application as one to which O. IX is applicable. In *Thakur Prasad* v. *Fakir Ullah* (1) it was laid down by the Privy Council that s. 647 of the Code of 1882, which is equivalent to s. 141 of the present Code, included original matters in the nature of suits such as proceedings in probates, guardianships and so forth and did not include executions. The question at issue in that suit was whether execution petitions were included in that section, and it was definitely laid down that they were not so included. What was held to be included were original matters in the nature of suits but this statement is not exhaustive. It is argued that an application under O. IX is not an original matter in the nature of a suit. It certainly is not a petition in a suit, for the suit is no longer on the file. It relates to a question quite independent of the suit and one which has to be determined on evidence as to matters which would be quite irrelevant to the suit. In this sense it seems to me to come within the meaning of the Privy Council's observations that s. 647 includes original matters in the nature of suits. This view has been taken by the Calcutta High Court in *Bepin Behari Saha* v. *Abdul Barik* (2) by the Lahore High Court in *Abdul Rahman Shah* v. *Shahana* (3) and by the Bombay High Court in *Lallabhai Vajeram* v. *Bai Magangavri* (4). There is one authority to the contrary, *i. e.*, *Ramgulam Singh* v. *Sheo Deonarain Singh* (5) which purports to follow a Full Bench of that Court reported at page 135* of the same volume [*Bhubaneswar Prasad Singh* v. *Tilakdhari Lal* (6)] but that Full Bench ruling in

(1) 17 A. 106, 5 M. L J. 3, 22 I. A. 44; 6 Sar. P. C. J. 526; 8 Ind. Dec. (N. s.) 393 (P C.).

(2) 35 Ind. Cas. 613, 44 C. 950; 21 C. W. N. 30; 24 C. L. J. 446.

(3) 58 Ind. Cas. 748; 1 L. 339; 82 P. W. R. 1920, 1 L. L. J. 188.

(4) 18 B. 59; 9 Ind. Dec. (N. s.) 548.

(5) 51 Ind. Cas. 152; 4 P. L. J. 287.

(6) 49 Ind. Cas. 617; 4 P. L. J. 135; (1919) Pat. 75

*Page of 4 P. L. J.—[*Ed.*]

effect only repeated the decision of the Privy Council in *Thakur Prasad* v. *Fakir Ullah* (1) where the question for determination was whether an execution petition would come under O. IX. The Division Bench which purported to follow the Full Bench ruling have not discussed the question at length but merely purport to follow the Full Bench which, with all respect, hardly covered the point in issue With all respect, I agree with the rulings I have mentioned above and hold that the Court had jurisdiction to entertain this petition.

The revision petition must, therefore, be dismissed with costs.

V. N. V. *Petition dismissed.*

N. H.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 155 OF 1925.

October 21, 1925.

Present:—Mr. Hallifax, A J C.

RAMCHANDRA—APPLICANT

versus

LAKSHMAN AND ANOTHER—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), O XXI, r 92—Execution of decree—Sale in favour of person other than decree-holder—Decree satisfied, effect of

A decree becomes dead as soon as it is satisfied as between the parties to it, but that cannot affect the vested rights of others [p 804, col. 1.]

An auction-sale to a person other than the decree-holder is not affected by the fact that the decree is subsequently set aside on appeal or is satisfied after the date of the sale [p 804, col. 2]

Nilkanth v *Yeshwant*, 65 Ind Cas 331, 18 N L R 134, A I. R 1922 Nag 248, dissented from

Mul Chand v *Mukta Prasad*, 10 A 83, A W N (1887) 287, 6 Ind Dec (N. s) 56, *Sonba* v *Ganesha*, 17 Ind Cas 887, 8 N. L R 182 and *Khushalchand* v *Nandram*, 12 Ind Cas 572, 13 Bom L R 977, 35 B 516, distinguished

Zain-ul-Abdin Khan v *Muhammad Asghar Ali Khan*, 10 A. 166, 15 I. A 12, 5 Sar P C J 129, 6 Ind Dec (N s) 112 (P C), followed.

Application for revision against the decision of the District Judge, Wardha, dated the 2nd March 1925, in Civil Suit No. 51 of 1923.

Mr. *M. R. Bobde*, for the Applicant.

Mr. *M. B. Niyogi*, for the Non-Applicants.

ORDER.—A house belonging to Lakshman, the first opponent of this application for revision, was put to sale in execution of a decree against him by the second opponent Vishwanath, and was bought by the applicant Ramchandra on the 3rd of July 1924. On the 9th of the same month the judgment-debtor Lakshman lodged an objection under r 90 of O. XXI of the C. P. C. based on allegations of irregularities in publishing and conducting the sale. The enquiry went on till the 20th of December 1924 on which day orders on the objection were to have been passed It is mentioned in the case that in the interval the judgment-debtor had sold the house to one Sayaji, but that fact does not seem relevant.

On the 20th of December, nearly six months after the sale, a sum equal to five per cent. of the purchase money was deposited in Court, and the decree-holder and the judgment-debtor informed the Court that the decree had been fully satisfied. The learned Judge, in accordance with the decision in *Nilkanth* v *Yeshwant* (1) then dismissed the application for execution, thereby setting aside the sale. The appeal of the auction-purchaser Ramchandra was dismissed by the District Judge, who followed the same ruling, as he was bound to do, and Ramchandra has now applied to this Court for revision of that judgment.

Though the decision of the matter in *Nilkanth* v *Yeshwant* (1) is undoubtedly correct, I am, with all respect, unable to agree with the reason stated for it. In that case the auction-sale was held on the 3rd of November 1919, and on the 17th of that month the decree-holder alone appeared in Court and said that he had given the judgment-debtor two months' time for payment. On the same day a sum equal to five per cent. of the purchase-money was deposited in Court, whether by the decree-holder or the judgment-debtor is uncertain and also immaterial. The contract between the objector and judgment-debtor would probably have to be regarded as full payment of the decree for the purposes of cl. (*b*) of r. 89 (1) of O. XXI, but anyhow the balance was paid on the 25th of November 1919, which is well within 30 days of the sale.

In that case it was held in the lower Appellate Court that as the application under r. 89 had not been made by any person having an interest in the property, the sale could not be set aside and the Court was bound to confirm it. Kotval, A. J. C., was inclined to the view that an

(1) 65 Ind. Cas. 331; 18 N. L. R. 134; A. I. R. 1922 Nag. 248.

application by the judgment-debtor was implied in what actually took place. But he refrained from deciding the case on that ground because there was another reason which gave the same result. My learned brother said: "Where a decree is admitted by the decree-holder to be satisfied it ceases to exist as a decree capable of execution The very foundation of the powers of a Court to execute a decree, namely, the existence of a decree capable of execution, having disappeared, the Court's powers in execution also cease, and confirmation of the sale which is a proceeding in execution cannot be ordered: *vide Khusalchand* v. *Nandram* (2) and *Mul Chand* v. *Mukta Prasad* (3)". It may be mentioned that the first of these cases is also published in Volume 35 of the Bombay Series of the Indian Law Reports at page 516.

A decree is certainly dead as soon as it is satisfied as between the parties to it, but that cannot be allowed to affect the vested rights of others. If that view of the law is correct in its application to the present case, or as applied to that in which it is stated, then Art. 166 of Sch. I of the Limitation Act is a dead letter with reference to r 89 (1) of O. XXI of the C P. C., and indeed so is cl. (*a*) of that rule; at any time before a sale is confirmed, it may, or rather must, be set aside on payment of the decretal money, even after the expiry of the period of 30 days from the sale and without payment of the sum mentioned in cl. (*a*) of r. 89 (1).

The wide proposition stated does not seem to me to be supported by the rulings cited nor by that in *Sonba* v. *Ganesh* (4) in which Stanyon, A. J. C., cited with approval the Bombay case mentioned by my learned brother in *Nilkanth* v. *Yeshwant* (1). In *Mul Chand* v. *Mukta Prasad* (3) the Allahabad case mentioned, the decree was set aside in appeal some months after the sale, and the purchaser was the decree-holder himself. The latter fact, as will be shown later, distinguishes that case from this even more completely than the former.

Khushalchand v. *Nandram* (2), the Bombay case mentioned, was concerned with the proceedings of a Collector in execution, and a sale of the property in his hands by the judgment-debtor. The statement of the proposition under discussion here was *obiter* and the basis of the decision was the view that the re-transfer of the case to the Civil Court by the Collector must relate back to the date on which satisfaction of the decree was certified to him, because on such certification he could do nothing else but re-transfer the case. I have in another case respectfully dissented from even that view, but anyhow the decision has no bearing on the present case.

In *Sonba* v. *Ganesh* (4) the only reference to the Bombay case is as follows: "The moment the decree is satisfied in or out of Court, the Collector's power is at an end, and the incompetency to transfer created by s. 325-A of the 1882 Code ceases: *Khushalchand* v. *Nandram* (2)." This was a casual remark going beyond the matter for decision in the case itself and, taken literally, beyond the Bombay ruling.

But the question was settled long ago by the judgment of the Privy Council in *Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan* (5) decided in the same year and reported in the same volume of the Indian Law Reports as the Allahabad case that has been discussed. It is, therefore, not necessary to submit to a Bench the question of the correctness of the officially published ruling of this Court in *Nilkanth* v. *Yeshwant* (1). In that case their Lordships held that sales, made in execution of a decree which was set aside in appeal afterwards, must hold good if they are made to a person who was not a party to the decree, but not if they are made to a decree-holder or a person claiming under him.

If then the death of a decree by its being set aside in appeal cannot be allowed to interfere with a sale under it to a purchaser who was no party to it, still less can it do so when its death is due only to its satisfaction. The order of the lower Appellate Court will accordingly be set aside and the sale will be confirmed. All the applicant's costs in all three Courts will be paid by the opposite party. No costs were allowed to the applicant in either of the Courts below, as the application for execution was dismissed in the first Court and the appeal was dismissed without notice to the respondents in the lower Appellate Court, so that no Pleader's fee has been stated. The applicant, however, did engage a Pleader in both the Courts below, and the ordinary

(2) 12 Ind. Cas. 572; 13 Bom. L. R. 977; 35 B. 516.
(3) 10 A. 83; A. W. N. (1887) 287; 6 Ind. Dec. (N. S.) 56.
(4) 17 Ind. Cas. 887; 8 N. L. R. 182.
(5) 10 A. 166; 15 I. A. 12; 5 Sar. P. C. J. 129; 6 Ind. Dec. (N. S.) 112 (P. C.).

Pleader's fee on Rs. 1,435, the price paid by applicant for the property, is Rs. 71-12-0. The Pleader's fee in this Court will be a hundred and fifty rupees.

Z. K. *Order set aside.*

MADRAS HIGH COURT.

LETTERS PATENT APPEALS NOS. 64, 65 AND 66 OF 1924.

August 28, 1925.

Present:—Mr Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.

KOYYALAMUDI SUBBANNA AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

KODURI SUBBARAYUDU AND ANOTHER—PLAINTIFFS—RESPONDENTS

Negotiable Instruments Act (XXVI of 1881), ss 28, 29—Pro-note executed by guardian of minor—Personal liability, whether excluded—Pro-note executed as executor—Liability, extent of—Sections 28 and 29, difference between

On a negotiable instrument only the executant is liable The question that has in each case to be determined is, on a fair construction, who is the executant of the document? Is the executant in truth the principal although the agent's signature appears on the bill or is the executant the agent although the principal is named? The intention may be inferred from the whole of the instrument [p 806, col 1]

Under s 28, Negotiable Instruments Act, an agent signing a pro-note is *prima facie* liable on the note but he may exclude his liability by indicating on the note that he signs as agent or that he does not intend to incur personal liability In each case the question is, are the words sufficiently unequivocal to indicate that the agent has not made himself personally liable? [*ibid*]

Section 28 of the Negotiable Instruments Act in terms applies only to the single case of principals and agents, but the principle of the section is applicable to the cases of guardians and wards [p 807, col 1.]

Where the guardians of a minor who executed a pro-note on behalf of the minor recited in the body of the note that the debt was due by the minor's father and that they were appointed guardians by him but in the operative part they made themselves personally liable

Held, that their personal liability was not clearly and unequivocally excluded and the executants were personally liable. [*ibid*]

The language of s 29, Negotiable Instruments Act, is widely different from that of s. 28 of the Act. Firstly, under s 28 it is sufficient to indicate that personal liability is excluded, but under s. 29 there must be express words limiting the liability and secondly, under s. 28 the agent's liability may be altogether excluded whereas under s 29 the executor's liability can only be limited to the extent of the assets [p. 807, col 2]

The applicability of s 29, Negotiable Instruments Act, does not depend on the question whether the executant is in fact the legal representative of a deceased person. It is enough if the note purports to have been executed by the executant in his capacity as legal representative, such as that of an executor of the estate of a deceased person [p 807, col. 2]

A person who executes a pro-note as executor appointed under a Will, is personally liable thereunder, unless he expressly limits his liability to the extent of the assets received by him as such [p 807, cols 1 & 2]

Letters Patent Appeals against the judgment of Mr. Justice Krishnan, dated the 22nd February 1924, in S. A Nos 998, 999 and 1000 of 1921, reported as 85 Ind. Cas. 457, preferred against the decrees of the Court of the Additional Subordinate Judge, Rajahmundry, in A S Nos 3, 4 and 5 of 1920, (A S Nos. 152, 153 and 154 of 1919 District Court, Godaveri), O S Nos 805, 781 and 780 of 1917, Temporary District Munsif's Court, Razole at Amalapuram

Messrs. *A Krishnaswami Iyer, B Satyanarayana* and *K. N Nayagopala Sastri*, for the Appellants.

Mr. *P Somasundaram*, for the Respondents.

JUDGMENT.

Venkatasubba Rao, J.—These three appeals have been filed against the judgment of Krishnan, J. Defendants Nos. 2 and 3 are the executants of the promissory notes in question In some notes they described themselves as the guardians of the first defendant, in others as executors under his father's Will. The first defendant was and continues to be a minor. The second and third defendants are respectively the maternal uncle and the brother-in-law of the first defendant. The plaintiffs in these suits asked for a decree against the first defendant to the extent of the assets of his father's estate and against defendants Nos. 2 and 3 personally. It is not necessary to say what the decision of the Trial Court was but the Subordinate Judge dismissed the suits against defendants Nos. 2 and 3 and passed decrees against the first defendant to the extent of the assets of his father. The plaintiffs preferred second Appeals to the High Court and Krishnan, J, in all the three suits passed decrees against defendants Nos. 2 and 3. As the first defendant had not appealed to the High Court, the decree against him was not disturbed. Defendants Nos. 2 and 3 have

filed the present Letters Patent Appeals. They contend that they are not liable on the promissory notes.

On a negotiable instrument only the executant is liable. This proposition admits of no doubt. The question that has in each case to be determined is on a fair construction, who is the executant of the document? As Chalmers says, "It is often difficult to determine whether a given signature is the signature of the principal by the hand of an agent, or the signature of the agent naming a principal". Section 22, Law of Bills of Exchange, 8th Edition, page 91.

The law relating to negotiable instruments differs from the ordinary law of contracts in several respects. The liability must be determined on the wording of the note and in each case the question is:—Is the instrument so drawn in form as to make the executant liable or the principal liable? In other words, who is the real executant of the document? Is the executant in truth the principal although the agent's signature appears on the bill or is the executant the agent although the principal is named?

So far as the Indian Law is concerned, s. 28 of the Negotiable Instruments Act enacts the rule of law applicable to agents. The material portion of the section runs thus:—

"An agent who signs his name to a promissory note...without indicating thereon that he signs as agent, or that he does not intend thereby to incur personal responsibility is liable personally on the instrument".

Under this section an agent signing the note *prima facie* is liable but he may exclude his liability by indicating on the note that he signs as agent or that he does not intend to incur personal liability. In each case the question is, are the words sufficiently unequivocal to indicate that the agent has not made himself personally liable?

Section 28 of the Indian Act is in one respect strikingly different from s. 26 of the Bills of Exchange Act, 1882. The English Act requires that the words indicating that the personal liability is excluded must be added to the signature itself. The Indian Act is less rigorous and from the whole of the instrument the intention may be inferred.

The most useful case on the subject is *Firm of Sadasuk-Janki Das* v. *Kishan Pershad* (1). Their Lordships of the Judicial Committee point out that as the document passes from hand to hand it is of the utmost importance that the responsibility is made plain and can be instantly recognised. The English theory of bills, as Chalmers observes in his introduction to the work already quoted, is the banking or currency theory and in England, bills have developed into a perfectly flexible paper currency. It follows, therefore, that as the note passes from hand to hand the real name of the person liable upon it must be disclosed.

In the light of this principle, I shall first examine the promissory note in Letters Patent Appeal No. 66 of 1924. The note is signed by the two guardians. Their representative character is not disclosed in the signature. In regard to the body of the note, the following points are no doubt in favour of the appellants:

(1) The debt is mentioned as having been originally due by the minor's father.

(2) It is stated that their ward is a minor and that they were appointed guardians.

But the language in the opening portion of the note is ambiguous It is susceptible of two meanings; literally it means that the guardians are executing the note because their ward is a minor What may be said to be the idiomatic meaning is, that the guardians are executing the note on behalf of the minor.

In the operative part of the note, they make themselves unconditionally liable. They said "We shall pay, either of us on demand". Who are referred to by this word 'We'? The words in the preamble being doubtful and there being no ambiguity in regard to the signature, the proper view to take is, that any one reading the note will reasonably connect the word "we" with the names appearing at the bottom of the note.

It is true that the debt of the minor's father is mentioned in the body of the document. But, on this, does it necessarily follow that the executants are not personally liable? Supposing the guardians had been pressed for payment of the debt and they undertook to pay the amount personally themselves, can it be said that such

(1) 50 Ind Cas 216; 46 C. 663, 29 C. L. J. 340; 17 A. L. J 405, 25 M. L. T. 258, 36 M. L. J. 429; 21 Bom L. R 605, 1 U P L. R (P. C.) 37, (1919) M. W. N. 310; 23 C. W. N. 937, 10 L. W. 143, 46 I. A. 33 (P. C.).

a note as the present could not have been passed? In my opinion, a mere allusion to the pre-existing debt does not clinch the question. On the whole, I think that the wording does not clearly and unequivocally exclude the personal liability of the executants and that Krishnan, J.'s decision in regard to this note must be upheld.

Before passing on to the next note, I desire to make one observation. Unlike s. 26 of the English Act which deals generally with the liability of persons signing in any representative capacity, s. 28 of the Indian Act in terms applies only to the single case of agents and principals. But it seems to me that there is no reason to make the scope of the section so narrow and indeed their Lordships of the Judicial Committee in the case already quoted, *Firm of Sadasuk Janki Das* v *Kishan Pershad* (1), first state the principles as of general application and then proceed to say that the sections of the Negotiable Instruments Act contain nothing inconsistent with those general principles. In *Ramaswami Mudaliar* v *Muthuswami Ayyar* (2) and the unreported Appeal No 306 of 1922 on the file of the High Court, the principle of s 28 is tacitly assumed to be applicable to cases of guardian and ward.

Now I pass on to the note in Letters Patent Appeal No. 65 of 1924 This bears a very close resemblance to the note which I have just dealt with. But there is a striking difference in one particular, that in the signature portion it is made to appear that the guardians are signing the note on behalf of the minor. The point is thus left no longer in doubt, and on a construction of the note, I find that the guardians have clearly indicated that they did not intend to incur personal responsibility. In my opinion, therefore, Krishnan, J.'s decision in regard to this note is wrong, and cannot be supported.

I shall next deal with the promissory notes in Letters Patent Appeal No 64 of 1924. To my mind, these present no difficulty The appellants do not describe themselves as guardians but as executors and the section that applies is s. 29 of the Negotiable Instruments Act. The relevant portion of that section is as follows:—

"A legal representative of a deceased person who signs his name to a promissory note...is liable personally thereon unless he expressly limits his liability to the extent of the assets received by him as such"

The language of s. 29 is widely different from that of s. 28. In the first place, under s. 28 it is sufficient to indicate that personal liability is excluded. Under s 29 there must be express words limiting the liability Secondly, under s 28 the agent's liability may be altogether excluded but under s 29 the executor's liability can only be limited to the extent of the assets.

These notes purport to have been executed by the appellants in their capacity as executors. When s. 29 specifically deals with the case, it is not permissible to invoke the principle of s. 28. The appellant's learned Vakil has contended that his clients were not in fact executors because the minor's father could not have made a valid appointment of executors Granting this to be so, it does not, in my opinion, make the slightest difference. We are concerned not with the fact whether they are executors but only whether they have described themselves as executors. It is not to be expected that when the paper passes from hand to hand every successive holder is to satisfy himself as regards the truth of the statement in the note, and I am not prepared to accept the contention that the section has no application unless the executant happens to be in fact a legal representative. I am, therefore, of the opinion that Krishnan's judgment in regard to this note is right and must accordingly be confirmed.

I feel that it is necessary that I must add one word. The lower Court has passed a decree against the minor and he has not filed an appeal challenging its correctness. We are, therefore, not concerned with the propriety or otherwise of the decree against the minor. But nevertheless it seems to me that although the agent is personally liable on the note, there is nothing to prevent the Court from passing a decree against the minor himself provided that the plaint is framed in an alternative form suing the guardian on the note and the minor alternatively on the consideration. see *Firm of Sadasuk Janki Das* v. *Krishan Pershad* (1) and *Krishna Ayyar* v *Krishnasami Ayyar* (3) This question, however, does not here arise and need not be pursued further.

I may state in conclusion that Mr. Alladi Krishnaswami Iyer, the learned Vakil for the appellants, desired to raise a new point,

(2) 30 Ind. Cas. 481.

(3) 23 M. 597; 8 Ind. Dec. (N S.) 819.

one relating to rule of election as laid down in *French* v. *Howie* (4) and *Moore* v. *Flanagan* (5) but that we did not permit him to raise this point as he did not raise it before Krishnan, J., and attempted to do so for the first time before us.

The result is that Letters Patent Appeals Nos. 64 and 66 of 1924 are dismissed with costs and Letters Patent Appeal No. 65 of 1924 is allowed and the suit dismissed with costs throughout against defendants Nos. 2 and 3.

Madhavan Nair, J.—These Letters Patent Appeals are directed against the decision of Krishnan, J., in three second appeals which arose out of suits instituted by the plaintiffs for the recovery of the money due to them on promissory notes executed by defendants Nos. 2 and 3. The first defendant is the minor son of one Veeranna who died leaving debts. Though the property belonging to him is joint family property, Veeranna nevertheless executed a Will naming defendants Nos. 2 and 3 as executors. Though the document is invalid so far as it purported to deal with joint family property, defendants Nos. 2 and 3 entered upon the management under the Will and executed the various suit promissory notes to Veeranna's creditors. The plaintiffs in these suits claimed decrees against defendants Nos. 2 and 3 personally as the makers of the promissory notes and against the estate of the first defendant. The District Munsif gave a decree against defendants Nos. 2 and 3 personally and dismissed the suits against the minor's estate. Both the plaintiffs and defendants Nos. 2 and 3 preferred appeals to the Subordinate Judge who gave decrees against the estate of the minor dismissing the suits against defendants Nos. 2 and 3. The minor, *i.e.*, the first defendant, did not appeal to the High Court but the plaintiffs preferred second appeals claiming personal decrees against defendants Nos. 2 and 3. The learned Judge, Krishnan, J., set aside the decrees passed by the Subordinate Judge with the result that the plaintiffs in the High Court, succeeded in obtaining decrees against defendants Nos. 2 and 3 personally.

(4) (1906) 2 K. B. 674; 75 L. J. K. B. 980; 95 L. T. 274.

(5) (1920) 1 K. B. 919, 89 L. J. K. B. 417; 122 L. T. 739.

The question for determination in all these Letters Patent Appeals is the same, namely, whether defendants Nos. 2 and 3 are personally liable under the suit promissory notes.

L. P. A. No. 64 of 1924.

As there is some difference in the language of the promissory notes in the various suits and as the argument advanced by the learned Vakils on both sides had reference to the language it will be useful to refer to these promissory notes at the very commencement. Exhibits A, B, E and F are the four promissory notes in this Letters Patent Appeal against Second Appeal No. 998 of 1921. Exhibit A states in its preamble that it is "executed by Subbanna and Satyanarayana (defendants Nos. 2 and 3) jointly as executors appointed in accordance with the registered Will of the late Chinna Veeranna, his son Viswanathan being a minor ....." In its body it states, "on demand we promise to pay to you or to your order the sum of Rs 113-2-0 only the amount borrowed to serve our need, *i. e.*, the amount we have agreed to pay on behalf of the aforesaid Chinna Veeranna... ....." This promissory note is signed by the two defendants without the qualification as executors being added to their signatures. Exhibit B is similar to Ex. A except that in its body the statement "the amount we have agreed to pay on behalf of the aforesaid Chinna Veeranna" is absent. It simply says, "on demand we promise to pay to you or to your order the sum of Rs. 585-10-6 only the amount borrowed to serve our need, *i. e.*, the amount of principal and interest on the promissory note executed by the late Chinna Veeranna." The preamble of Exs. E and F are similar to those of Exs. A and B, with this difference that in the preamble of Ex. F "his son Viswanatham being a minor" is absent. In the body of these two promissory notes, Exs. E and F, we find the expression "We both individually promise to pay to you or to your order the sum of Rs. ....." which does not appear in Exs. A and B. These promissory notes run thus: "We both individually promise to pay to you or to your order the sum of Rs. .....on the promissory note executed by the late Chinna Veeranna." In the signature portion of all these promissory notes the names of defendants Nos. 2 and 3 appear without any qualification. Though these promis-

sory notes thus present some special features, they agree in this respect that each of them is stated in the preamble to have been executed by defendants Nos. 2 and 3 "as executors" and signed by them without disclosing their representative capacity.

Mr. Krishnaswami Iyer, the learned Vakil for the appellants argues that the language used in these promissory notes distinctly shows that the appellants have not undertaken any personal liability to pay the promissory note debts and that the learned Judge was wrong in applying s 29 of the Negotiable Instruments Act in deciding this case, inasmuch as it is clear that defendants Nos. 2 and 3 cannot in law be considered executors as the deceased Veeranna had no power to execute a Will, the property being joint family property. Section 29 being inapplicable and the language of the documents showing that there was no personal liability, the learned Vakil argues on the analogy of various decisions which he has brought to our notice that in this case, the only decree that could be passed is one against the estate of the deceased Veeranna.

The important question for consideration is whether s. 29 of the Negotiable Instruments Act applies to this case. Section 29 runs as follows:—"A legal representative of a deceased person who signs his name to a promissory note, Bill of Exchange or cheque is liable personally thereon, unless he expressly limits his liability to the extent of the assets received by him as such." The term 'legal representative" includes executors or administrators. If this section is applicable, defendants Nos. 2 and 3, are liable personally on these promissory notes, as they say in the preamble of the notes that they have executed them "jointly as executors appointed in accordance with the registered Will of the late Chinna Veeranna." The argument that defendants Nos. 2 and 3 are not, strictly speaking, executors and, therefore, s. 29 is inapplicable, cannot be accepted; for we are dealing with promissory notes and it is well known that those are intended to pass freely from hand to hand and a party who takes a negotiable instrument of the class we are dealing with is not expected to decide for himself whether the person who has executed the instrument in his capacity as an executor is really an executor in the eye of the law or not, before accepting the note. If this principle is not given effect to, the very object of a negotiable instrument would be defeated. Defendants Nos. 2 and 3 having described themselves as executors, persons dealing with them on the promissory notes will naturally treat them as executors, and the promissory notes will be passed on from hand to hand distinctly on that understanding. It is, necessary, therefore, that s. 29 should be applied in a case like the present one, and if so, defendants Nos. 2 and 3 are clearly liable personally, unless they are able to show that they have expressly limited their liability in original to the extent of the assets received by them as such. The language of the promissory notes that I have already referred to speaks with no uncertain voice. In none of them is the liability of the executants expressly limited in any way to the extent of the assets received by them as such while in all of them there is a distinct promise to pay made by the executants. The cases cited by Mr. Krishnaswami Iyer in this connection need not be considered in detail, as most of them deal with the question how far can recourse be had to the estate on notes executed by an executor, or guardian of a minor, or trustee of a property The decisions in *Padma Krishna Chettiar* v. *Nagamani Ammal* (6), *Batchu Ramayogayya* v. *Vajjula Jagannadham* (7) and *Ammalu Ammal* v *Namagiri Ammal* (8) and the other cases cited by him do not deal with the question with which we are here concerned As the executants of the promissory notes in question have not in any way expressly limited their liability to their extent of the assets received by them, I must hold that s. 29 of the Negotiable Instruments Act applies to this case and that the decision of the learned Judge is right. I dismiss this Letters Patent Appeal with costs.

L. P. A. No. 65 of 1924.

The language of the promissory notes in these appeals is different from the language of the notes already examined. The preamble speaks of these notes as promissory notes executed "by guardians under

(6) 30 Ind Cas 574, 39 M 915, 18 M L. T 216.
(7) 49 Ind Cas 872; 42 M 185, 25 M L T 23; 9 L. W 229, 36 M L J 29, (1919) M W N 148 (F B.).
(8) 43 Ind Cas 760, 33 M L J 631; 22 M. L. T 391, 6 L W 722; (1918) M. W N. 110.

the Will of the late Veeranna, as Viswanatham happens to be a minor.

In L. P. A. No. 66 the body of the note, amongst other things, contains the statement that "On demand the amount of principal and interest accrued upto date... .will be paid by either of us". In this appeal the two executants signed the promissory note with their names without describing themselves as guardians The language of the promissory note, Ex. A, which I have noticed above distinctly shows that the executants intended to incur personal liability on this note. Though there is no specific provision in the Negotiable Instruments Act regarding the liability of a guardian on a promissory note executed by him, it seems to me that the principle underlying s. 28 regarding the liability of an agent signing a promissory note may well be applied to such a case. Section 28 of the Act deals only with the case of agents and principals, in this respect differing from s. 26 of the English Act which deals generally with the liability of persons signing in a representative capacity. In two decisions of this Court the principle underlying s. 28 of the Negotiable Instruments Act has been applied in deciding on the liability of a guardian executing a promissory note on behalf of the minor. In *Ramaswami Mudaliar* v. *Muthuswami Iyer* (2) the second defendant in the case was described in the body of the note as the guardian of the first defendant who was at its date a minor, and the necessity for borrowing was stated in it as arising from the first defendant's father's debt. The learned Judges state, "We are not, however, prepared to treat these facts alone as sufficient to indicate that second defendant signed as first defendant's guardian or did not intend to incur personal liability". The second defendant was, therefore, held liable on the promissory note. The extract from the judgment shows that the learned Judges in deciding the case have assumed that the principle of s. 28 of the Negotiable Instruments Act is applicable to the case of the guardian and ward. (See also the unreported decision in A. S. No. 306 of 1922 on the file of the High Court). The decision of the Privy Council in *Firm of Sadasuk Janaki Das* v. *Kishan Pershad* (1) supports the view that a general application can be given of the principle underlying s. 28 of the Negotiable Instruments Act. Defendants Nos. 2 and 3 in this case have not indicated that they signed the promissory note as agents or that they did not intend to incur personal liability. On the other hand, the language of the promissory note, in my opinion, distinctly shows that they are personally liable. The decision of the learned Judge is, therefore, right and this Letters Patent Appeal No. 66 should be dismissed with costs.

IN L. P. A. No. 65 OF 1924.

In this appeal the language used in the preamble and in the body of the promissory note indicating the liability of defendants Nos. 2 and 3 is like the language in the promissory note in Letters Patent Appeal No. 66, but the executants in signing the promissory note describe themselves in the signature portion as "guardians of minor Viswanatham". This is a distinctive feature of this note and in this respect it differs from the promissory note Ex. A just noticed. When we read the promissory-note bearing this feature in mind, the conclusion is irresistible that the executants have signed this note merely as guardians excluding thereby their personal liability. It, therefore, follows, that, on the language of this note, defendants No. 2 and 3 are not personally liable. As the construction that I am putting on the language of this promissory note is different from that given to it by the learned Judge, the decision in Second Appeal No 999 of 1921 must be set aside. The plaintiff in this case will only be entitled to a decree against the minor's estate and not against the guardians personally. This Letters Patent Appeal is allowed with costs throughout.

As pointed out by my learned brother, we have not allowed the learned Vakil for the appellants to argue a new point which he desired to raise in these appeals.

V. N. V. *Appeal No.* 65 *allowed.*

Z. K. *Appeals Nos.* 64 *and* 66 *dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 440 OF 1924.

December 1, 1925.

Present:—Mr. Findlay, Officiating J. C.

VINAYAK—PLAINTIFF—APPELLANT

versus

KANIRAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63

--Attachment, objection to, dismissal of—Title suit—Fraudulent transfer—Consideration—Possession--Good faith—Burden of proof—Intention to defeat creditors —Transferee not party to fraud, effect of

Where an objection to an attachment of certain property in execution of a decree, by a person claiming to be a transferee of the property from the judgment-debtor, is dismissed on the ground that the transfer was intended to defeat the creditors of the judgment-debtor and was fraudulent, and the unsuccessful objector brings a suit to establish his title to the property, the burden lies upon him of proving not merely the passing of adequate consideration and his possession over the property but also his own good faith [p. 812, col 2.]

Where, however, consideration and possession are established a much lighter burden lies on the plaintiff with regard to the establishment of good faith [p 813, col 1.]

In such a case, however, the all essential point is whether the plaintiff was a party to the fraud on the creditors An intention to defeat the creditors may well exist on the part of the transferor, and yet the transfer will be valid unless the transferee was also a party to the fraud. [*ibid*]

Appeal against a decree of the District Judge, Bhandara, dated the 24th July 1924, in Civil Appeal No. 35 of 1924.

Messrs *M. V. Abhyankar* and *A. V Wazalwar*, for the Appellant.

Sir *B. K. Bose*, for the Respondents.

JUDGMENT.—The plaintiff-appellant sued the defendants-respondents for a declaration that the 3 annas 6 pies share in *Mouza* Tadgaon and 10·40 acres of *malik makbuza* land in the same village are not liable to attachment and sale under the decree obtained by the defendant-respondent Kaniram in Civil Suit No. 47 of 1922 against one Garu Patel. The plaintiff-appellant had unsuccessfully objected to the attachment in the execution proceedings The plaintiff's case is that he bought the property in suit under a sale-deed, dated 21st June 1922, from Karu Patel for Rs. 10,000 The defendants pleaded that the alleged sale in favour of the plaintiff by Karu was a fraudulent and collusive one, intended to defeat the creditors of Karu. They also pleaded that the sale was without consideration and that there was no pressing necessity on Karu to dispose of his property as he did.

The Subordinate Judge found that Karu had duly executed the sale-deed in question in the plaintiff's favour. He also found that out of the consideration, Rs. 3,516 in cash had been paid before the Sub-Registrar and that the plaintiff had paid off two instalments of the mortgage-deed executed by Karu: *cf.*, receipts P-2 and P-3. In fact, the first Court's finding so far was that consideration had been paid in the manner mentioned in the sale-deed. On the question of possession the finding of the Subordinate Judge was a somewhat halting one At the end of para 6 of his judgment he tells as follows·—

"The plaintiff also proves from the entries in his account books that he spent some money and grain for the cultivation of lands in Tadgaon, and his witnesses Nos 3, 4, 5, 7, 8 and 9 and he himself as P. W No 1 depose that Karu's lands have been in possession of plaintiff."

Thereafter in para. 7 of his judgment the Subordinate Judge went on to find that mutation had been effected in the plaintiff's favour but that his name was subsequently struck off by the *Tahsildar* when the plaintiff's objection in the execution proceedings failed. On the evidence of the Revenue Inspector also the Subordinate Judge held that had it not been for the failure of the objection, the plaintiff's name would have appeared in the *khasra* and mutation register. Thus having held that the plaintiff had proved that he was in possession of the property he purchased, the Subordinate Judge went on to point out that consideration and possession were not the only tests of the genuineness of a transaction like the present From this point of view he considered the following circumstances suspicious·—

(*a*) that there was no reason given for Karu's subsequently selling the property,

(*b*) that he only retained a few acres of occupancy land, a house and a *kotha*, as well as a right to occupy the *sir* lands on the expiry of the 5 years' lease he granted to the plaintiff;

(*c*) that the plaintiff had not made any enquiries as to the necessity for Karu's selling the property, as to whether it was ancestral property and the like,

(*d*) that the financial embarrassments of Karu at the time did not justify the sale. In particular the mortgage-deed was an instalment one while the other creditor Atmaram had only some Rs. 1,500 due to him,

(*e*) that the sale transaction was carried through in a hurried and hole and corner manner, and

(*f*) that Karu and plaintiff are relatives.

On these and connected findings the Subordinate Judge held that the sale in favour of the plaintiff was a collusive and fraudulent transaction and accordingly dismissed the suit.

The plaintiff appealed to the Court of the District Judge, Bhandara. The District Judge reversed the finding of the Subordinate Judge regarding consideration and held that no consideration had in reality passed from the plaintiff to Karu. He likewise held that possession of the property also had not passed to the plaintiff.

The judgment of the District Judge, however, is one which it is exceedingly difficult to appreciate in its present form. In arriving at the findings he does, as regards consideration and possession, he relies apparently entirely on the more general aspects of the alleged sale transaction. That transaction he describes as having been carried out in a romantic way; whatever this adjective may mean in this connection. He lays great stress on the fact that there was no enquiry made about the debt due by Karu on the incumbrances on the property. He also is greatly influenced by the fact that the sale was carried out hurriedly and he seems to hold that arbitrary prices were put on the various subjects which passed. He also lays stress on the fact that the vendor and vendees were relations and that other relations and interested parties assisted in the negotiations and the transaction The District Judge held that although the amount of Rs. 3,516 12 0 was paid to Karu before the Sub Registrar, this was a mere nominal payment intended to give an air of reality to the transaction. On these and other findings the District Judge confirmed the dismissal of the suit by the first Court.

In a case like the present it is unfortunate that there is no indication whatever in the District Judge's judgment on whom he regarded the onus of proof as lying in the present case. This was an all essential matter to be primarily determined. Admittedly, the burden of proof as regards consideration primarily rested on the plaintiff. The first Court, however, held that that burden had been discharged, for it gave a finding that consideration had duly passed. A further question arises, however, as to on whom the burden of proof rested after the passing of consideration had been held proved by the first Court. On behalf of the appellant it has been urged that consideration having been established, and particularly as the Subordinate Judge held that possession had also passed, the burden of proof shifted on to the respondents of showing that the sale transaction was a fraudulent and collusive one. The decision in *Mahomed Haneef Meajee* v. *Mozhur Ali* (1) is not peculiarly apposite in the present connection. There it was the vendor himself who asserted that he had not received the consideration although he admitted receipt before the Registrar. In those circumstances naturally a heavy onus rested on the plaintiff before he could hope to avoid the effect of his own admission. A similar remark applies to the decision in *Sham Chand Pal* v. *Protap Chand Pal* (2) and that in *Ali Khan Bahadur* v *Indar Parshad* (3). Had the present suit been between Karu and plaintiff, the decisions quoted would have applied *proprio vigore*, but I I cannot see that they are applicable in the circumstances of the present case.

On behalf of the respondents it has been urged that the burden of proof throughout rested on the plaintiff ; firstly, because he was the plaintiff, and secondly, because he had failed in the objection proceedings : *cf*, *Narayan Ganesh Ghatate* v *Bhioraj* (4) I so far agree that the burden of proof was on the plaintiff of proving not only consideration and possession but also good faith. In the present case, however, there is no indication whatever that the District Judge had any regard whatever as to how the question of burden of proof lay, and the first point he had to decide was whether, in view of the findings of the Subordinate Judge on the question of consideration and possession, the plaintiff had sufficiently established the good faith of the sale transaction In this connection it is pertinent to observe that consideration and possession having been established, a much lighter burden lay on the plaintiff with regard to the establishment of good faith.

It seems to me, however, that the lower Appellate Court's finding on the question of consideration cannot stand in its present form. The all important question it had to consider in this connection was whether the consideration was adequate or not and whether the consideration was disposed of in the method stated in the sale-deed. There is, in reality, no specific finding on this point. The Judge of the lower Appellate Court seems also to have assumed

(1) 15 W R. 280.
(2) 1 C W N. 594; 25 C 78; 24 I. A. 183, 7 Sar. P. C. J. 217, 13 Ind Dec (N. S.) 53 (P C.)
(3) 23 C 950; 23 I. A 92; 7 Sar. P. C. J. 63; 12 Ind. Dec (N. S) 631 (P. C)
(4) 2 N. L. R. 87 at p. 89.

that only one instalment of the mortgage-deed has been paid off by the plaintiff, whereas the evidence on record shows that two such instalments have been satisfied. What the lower Appellate Court has done in reality was to have regard, first of all, to the questions of good faith and possession and having decided these against the plaintiff, deduced from them that consideration had not, in reality, passed. The case should, of course, have been approached from the exactly opposite point of view. The burden of establishing the passing of consideration rested on the plaintiff, that was obviously the primary question to determine. The lower Appellate Court should have first decided that point and this having been done it should have, in turn, decided the question of possession. If these points were found in favour of the plaintiff-appellant, the onus of establishing good faith would still rest upon the latter, but would be much lighter one. On the other hand, if the lower Appellate Court finds that consideration was not paid and possession did not pass, the possibility of establishing good faith would be more remote.

The case has, moreover, from another point of view not been properly handled by both the lower Courts. The all essential point in a transaction like the present is whether the transferee, that is the present plaintiff, was a party to the fraud. In a transaction like that we are concerned with, an intention to defeat the creditors may well exist on the part of the vendor, yet the sale will be valid unless the vendee was also a party to the fraud: *cf*, *Natha* v. *Maganchand* (5) *Ramasamia Pillai* v. *Adinarayana Pillai* (6). The case in *Nana Mansaram Shet* v. *Rautmal Tarachand Shet* (7) relied on by the lower Appellate Court was, it need hardly be said, of an entirely different nature. There the vendor had reserved absolutely no property to himself. The plaintiff bought it without seeing or valuing it; the consideration consisted of time-barred debts or debts which were not payable at the time and the said consideration was grossly inadequate. The said decision, therefore, was an entirely inapposite one for application to the facts of the present case.

I would add also that one other matter requiring consideration at the hands of the lower Appellate Court is whether or not the consideration was inadequate. There has been no finding of any value on this point.

The appeal must, therefore, go back to the lower Appellate Court for re-disposal on the merits with advertence to the above remarks. As I have already pointed out, the finding arrived at with regard to the consideration is really based on more or less extraneous matters and requires much more specific and precise consideration. This point having been adjudicated upon, the District Judge must then take up the point of possession and good faith and in arriving at his conclusion on the appeal as a whole he must remember that the bed-rock test of the good or bad faith of a transaction like the present is whether the vendee, that is the present plaintiff, was also a party to the fraud, even assuming that a fraudulent intention was present on the part of the vendor Karu.

The judgment and decree appealed against are reversed and the case will go back to the lower Appellate Court for re-disposal of Civil Appeal No. 35 of 1924 on the merits with advertence to the above remarks There will be no certificate for refund of Court-fees The costs incurred in this appeal will follow the event.

Z. K. *Case remanded.*

(5) 27 B. 322; 5 Bom. L R. 170
(6) 20 M. 465; 7 M. L J 246; 7 Ind. Dec (N s) 329.
(7) 22 B. 255; 11 Ind. Dec. (N. s) 753.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No 502 OF 1924.
December 23, 1924.
Present:—Sir Shadi Lal, KT., Chief Justice.

RAM BHAJ, MINOR, UNDER THE GUARDIANSHIP OF RAM LAL—PLAINTIFF—PETITIONER
versus
DUNI CHAND THROUGH THE HEAD MASTER, KING GEORGE CORONATION HIGH SCHOOL, JHANG—DEFENDANT—RESPONDENT

Oaths Act (X of 1873), ss. 9, 10, 11—Revocation of offer to be bound by oath—Discretion of Court.

There is nothing in ss 9, 10 and 11 of the Oaths Act which allows a party who has agreed to the administration of an oath by his opponent to revoke his offer after it has been accepted by the latter but the Court has discretion to allow retraction if good grounds are shown therefor.

Thoyi Ammal v. *Subbaroya Mudali*, 22 M. 234; 8 Ind. Dec. (N. s) 167, referred to.

When an oath has been administered it is too late for the Court to pass an order allowing its retraction

Petition for revision of a decree of the Subordinate Judge, Fourth Class, exercising the powers of a Judge, Small Cause Court, Jhang, dated the 19th July 1924.

Mr. *Devi Dayal*, for the Petitioner.

Lala *Parkash Chand*, for Mr. *Sagar Chand*, for the Respondent.

JUDGMENT.—Plaintiff's next friend offered on the 18th July 1924, to be bound by the oath of the defendant, and this offer was accepted by the latter on that very day. It appears that no application allowing the plaintiff to revoke the agreement to be bound by the oath was presented to the Court until after the oath had been administered, but that an application to that effect was made to the Commissioner before the administration of the oath, and the question for determination is whether the plaintiff should have been allowed to revoke his offer to be bound by the defendant's oath.

Now, there is nothing in ss. 9, 10 and 11 of the Indian Oaths Act which allows a party, who has agreed to the administration of an oath by his opponent, to revoke his offer after it has been accepted by the latter; but as held in *Thoyi Ammal* v. *Subbaroya Mudali* (1) the Court has discretion to allow retraction if good grounds are shown therefor. I am, however, unable to hold that any ground has been shown which would have justified the revocation. Indeed, as pointed out above, the application to the Court was made after the oath had been administered, and it was, therefore, too late for the Court to pass an order disallowing the taking of the oath by the defendant.

The statement on oath made by the defendant is conclusive, and the application for revision preferred by the plaintiff is accordingly dismissed with costs.

N. H. *Petition dismissed.*

(1) 22 M. 234, 8 Ind. Dec. (N. S) 167.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 193 of 1922.

March 26, 1925.

Present:—Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.

Sri Raja Sri CHINTALAPATI BUTCHI SEETAYYA GARU AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GOLLAVILLI APPADU *alias* CHINNODU AND OTHERS—DEFENDANTS NOS. 1 TO 5—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 3 (5)—Land-holder—Post-settlement inam—*Grant of both* varams—*Grantee, whether land-holder—Occupancy rights, acquisition of—Grant in* inam *and perpetual lease on favourable rent, distinction between—Waste lands*—Inam *grant, whether can be made*

Although the grant of a post-settlement *inam* comprises both the *varams*, the grantee is a land-holder and a *ryot* under him can, therefore, claim occupancy rights, but where the grant is of the *kudiaram* alone, the grantee is merely a *ryot* and his under-tenant cannot claim rights of occupancy. [p. 816, col. 1]

The distinction between a grant in *inam* and a perpetual lease on a favourable rent is a real though a fine one [p. 816, col 2.]

Jurugumilli Brahmayya v *Chellaghali Achiraju*, 70 Ind Cas 615, 45 M 716, (1922) M. W N. 280; 31 M. L. T 91, 43 M L. J 229, A. I. R. 1922 Mad. 373, relied on

Per *Venkatasubba Rao, J*—It cannot be laid down that an *inam* grant of waste land is in law impossible. [*ibid*]

Appeal against an order of the Court of the Additional Subordinate Judge, Vizagapatam, dated the 11th April 1922, in A. S. No. 106 of 1922, (A. S. No. 234 of 1920, District Court, Vizagapatam), A. S. No. 104 of 1920, Sub-Court, Vizagapatam, preferred against a decree of the Court of the District Munsif, Chodavaram, in O. S. No. 648 of 1916.

Messrs. *D. Appa Rao* and *B. Somayya*, for the Appellants.

Mr. *T. Suryanarayana*, for the Respondents.

JUDGMENT.

Venkatasubba Rao, J.—The question to be decided in this appeal is whether the defendants gave permanent occupancy rights in the land in question.

The facts may be briefly stated. The Rajah of Vizanagaram granted in the year 1810 to Chintalapati Rayappa Razu a portion of the village of Lakkavaram on what was described as "*Harasala Cowle*" or permanent lease. The assessment and other dues payable to the *zemindar* were fixed at Rs. 1,421-6-0 and the grant contains the words that "the profits are to be enjoyed hereditarily from son to grand-son." It

may be useful to give the rendering of the grant itself (Ex. 1).

"*Harasala Cowle* granted by Sri Pusapati Narayanagajapathi Raju Maharajulungaru to Chintalapati Rayaparaju on Saturday the 5th day of the bright fortnight of Margasira of the Promodutha year. Yearly money rent for the village of Lakkavaram in the *Purganah* of Veddadi excluding the existing temple, Brahmin, *mirasi inams* from the year Pramothudha.—

Rs. 1,400 *jamabandi* or assessment

* * * * *

Rupees one thousand four hundred and twenty-one and annas six is settled and *kadapa* having been filed, *Harasala Cowle* is granted Therefore, for this the instalments every year are :—

* * * * *

In default of payment on due dates the amounts should be paid along with interest. Cultivating this village extensively, the profits left after payment of the *Sircar jamabandi* or assessment from its produce, are to be enjoyed hereditarily from your son to grand-son. The laws enacted by the company should be observed towards *ryots* and other people."

In 1823 there was what purported to be a relinquishment in favour of the *zemindar* and an endorsement was made on the *Cowle* to the effect that the land was relinquished. Taking his stand on this relinquishment, the *zemindar* sued for possession in 1825 His suit was dismissed in 1827 by the Provincial Court, Northern Division, on the ground that the parties who made the relinquishment had no right to the land and that Simhadri Razu, the adopted son. of Rayappa Razu was the person entitled

We have no information as to the subsequent history of this *inam* excepting that the family became split into three branches and a third share was held by a widow belonging to one of them, by name Sundaranarasayya. She granted to Sripati Purushottam about 6 acres of land out of her share. The grant is not before us and we have to decide what was the nature of the grant that was then made. Nor is it known when the grant was made excepting that it should have been previous to 1874 as Sundaranarasayya died in that year. On her death, the *zemindar* of Vizanagaram claiming that certain sums were due from her, resumed her share of the *inam*. The only information that we have in regard to the plot granted to Sripati Purushottam is that on the 8th of February 1893 he executed Ex B in favour of the *zemindar*. It recites that the suit plot which had been granted to Purushottam and had been for long in his enjoyment, is at his request allowed to continue to remain with him and he agrees to pay an annual *kattubadi* of Rs. 6 and obtain receipts from time to time. We have to decide what is the nature of this grant and what light does it throw on the previous grant by Sundaranarasayya to Purushottam

We have evidence in the case as to how Purushottam was enjoying these lands subsequent to 1893. Exhibit D is a *kadapa* executed by one Jarripotula Bhimanna in favour of Purushottam wherein he agrees to pay a *kist* of Rs. 43-8 0 for the land in question and to give up possession at the end of the year for which the lease was granted. This recites that one Dummi Appadu was cultivating the land during the previous year. Again in 1899 the same Bhimanna executed another *kadapa*, apparently for one year, agreeing to pay a half share of the produce and a further sum of Rs. 3-8-0 half of Rs 7 the *kattubadi* payable on the land. In 1903, the 4th defendant who contests the suit, executed Ex. C-1 agreeing to take the land on lease for three years at a yearly *kist* of Rs 22-8-0 and to surrender the land at the end of the period. In 1909, again, the 4th defendant executed to Purushottam another *kadapa* (Ex C) for a period of three years on a yearly *kist* of Rs 30 agreeing, as before, to give up the land at the end of the term This recites that this very tenant was in the possession of the land during the year previous to the *kadapa*. These documents show that the land was being actually cultivated by tenants and that Purushottam leased to such lessees from time to time as he pleased. The evidence also makes it clear that the 4th defendant was originally admitted as tenant about the year 1900. On the death of Purushottam, his sons executed a sale-deed for the suit land in favour of the plaintiff. The suit is for recovering possession and the 4th defendant resists it on the ground that he has permanent occupancy rights.

The plea, namely, that occupancy rights were expressly conferred on the defendant by Purushottam may be easily disposed of. The terms of the *kadapas* C and C-1 are inconsistent with any such hypothesis and

it is impossible to hold, in the face of his undertaking to surrender the land at the end of the term, that by contract such rights were granted to him.

The next question then is, can the 4th defendant claim occupancy rights in virtue of the Estates Land Act? The defendant can succeed by showing either that the land in question is an estate within the meaning of s 3, cl. (2), of the Act or that the plaintiff is a land-holder as defined in cl. (5) of the same section. What was granted to Rayappa Razu was itself less than a village and s. 3 (2) (*e*) does not apply even to the original grant. Rayappa Razu was himself a minor *inamdar* and the portion granted to Purushottam cannot possibly be an estate within the Act. This proposition is not disputed. The defendant, therefore, strongly seeks to make out that the plaintiff is a land-holder.

Mr. Varadachari, the learned Vakil for the plaintiff, contends that according to the true construction of Ex. E (1) it constitutes a grant only of the *kudivaram* interest. But for the purpose of the present appeal he does not propose to take his stand upon this. I have, therefore, to deal with the case on the footing that Rayappa Razu and Sundaranarasayya are minor *inamdars*. That they will in that event be land-holders must now be taken as settled. *Jurugumilli Brahmayya* v. *Chellaghali Acthiraju* (1). That case is an authority for the proposition that although the grant of a post-settlement *inam* comprises both the *varams*, the grantee is a land-holder and the *ryot* can claim occupancy rights. Now, the short question is, did the grant in favour of Purushottam comprise both the *varams*, in other words, was there a grant in *inam* to him, or as the plaintiff contends, was he merely inducted to the land as a *ryot*? To put it in another way, what was the subject of the grant in favour of Purushottam?

(1) Was it of *malvaram* alone; in which case he would be a land-holder?

(2) Was it of *malvaram* and *kudivaram*; in which case again he would be a land-holder?

(3) Was it of *kudivaram* alone; in which event he would be merely a *ryot* with the result that any under-tenant cannot claim rights of occupancy?

(1) 70 Ind. Cas. 615; 45 M. 716; (1922) M. W. N. 280; 31 M. L. T. 91; 43 M. L. J. 229; A. I. R. 1922 Mad. 373.

At the time of the grant, the land was waste and there were no cultivating tenants on it, and what was granted, therefore, could not be *melvaram* alone This hypothesis is, therefore, out of the question. The question, therefore, narrows itself into, was the grant of both the *varams* or was it only of *kudivaram*, in other words, was it the land that was granted or was the grantee introduced on the land merely as a *ryot*?

The contention of Mr. Varadachariar, the learned Vakil for the plaintiff, is two-fold. On the date of the grant by Sundaranarasayya the land was clearly waste. Where *melvaram* and *kudivaram* interests do not exist as two independent entities but only notionally (as in the case of waste land) it is not correct to describe the grant as being in the nature of *inam*. Such a conception is erroneous in law. The transaction can amount only to admission of a tenant to waste land as in the case of a *darkhast* grant in *ryotwari* tracts. Dealing with this contention, I must say I am unable to accept the theory that an *inam* grant of waste land is in law impossible. Mr. Varadachari's second contention cannot, however, be so easily disposed of. He contends, assuming that there is nothing to prevent the transaction from being a grant in *inam*, this transaction must be construed as a disposition in favour of a tenant. He argues that the land being waste, a favourable rent would be a normal feature and points to *s. 26 of the Estates Land Act* and urges that it contemplates the co-existence of low rent with mere *kudivaram* grant. In effect he maintains that the transaction is not an out and out grant but it should be viewed in the nature of a perpetual lease, there being a remission of a part of the rent. The distinction between a grant in *inam* and a perpetual lease on a favourable rent is indeed very fine although in law it is quite sound and this distinction is very material in the consideration of the present question. To understand, therefore, what the true nature of the transaction is, a very careful scrutiny of the evidence becomes necessary.

In this connection I must point out that there is no suggestion that at the time of the grant by Sundaranarasiah the grantee was in possession of the land or that any person had any *kudivaram* interest in it. In para 5 of the plaint it is stated that the land was waste at that time and the 4th defendant in his evidence admits that the

land was then waste. *Marina Veeraswamy* v. *Bayinappalli Venkatarayudu* (2) and *Ganjam Manaikyamba* v. *Pasala Mallayya* (3) are, therefore, inapplicable. The only other positions that remain to be dealt with are, first, that there was a simultaneous grant of both *varams* and, secondly, that there was a grant of *kudivaram* alone In the former case *Brahmayya* v. *Achirayu* (1) directly applies and the grantee would be a land-holder.

To clear the ground, I should like before discussing the evidence to make another observation. Exhibit B very clearly shows that there was no fresh grant by the *zemindar* but that he merely confirmed the original grant, whatever it was, imposing probably a *kattubadi* for the first time or enhancing a previously existing *kattubadi*. With these remarks I shall examine the evidence.

(1) Exhibit B is more consistent with the theory of an *inam* grant than a lease on favourable terms; especially the use of the word "*kattubadi*" favours this view.

(2) K-4 is a receipt by the *zemindar* in favour of Purushottam. He is described in it as *inamdar* and the sum of Rs. 6 payable by him as "*darimila kattubadi*".

There are other receipts where the word "*pattadar*" appears but I attach importance to the word "*inamdar*" which was specially written in ink, whereas the word "*pattadar*" appears in print in a common form of receipt.

(3) Exhibits 1-A, 1-B, and 1-E, dated 23rd December 1904, 10th December 1903 and 2nd May 1907 respectively are receipts granted by Purushottam to the 4th defendant. In the first and second of them, the rent is described as *inam kist*, in the third it is described as "*kist* in respect of a *manyam* lands".

(4) Exhibit D one of the *kadapas* executed in favour of Purushottam describes the land as "*inam* wet lands".

(5) The landlord's share alone is fixed at Rs. 43 8-0 in Ex. D, at Rs 22-8-0 in Ex. C-1 and at Rs. 30 in Ex C, whereas the *kuttabadi* is only Rs. 6.

(6) A holding in perpetuity is in the circumstances more consistent with the grant being in the nature of an *inam*.

(7) Exhibit A refers to the sums payable in respect of land as taxes and what is even more conclusive the property is described as post-settlement *inam*.

Beyond this, there is no evidence worth mentioning and as we must reach a decision only upon this material, I am of the opinion that the grant was in the nature of an *inam*. The plaintiff, therefore, is a land-holder and I must in this view uphold the judgment of the Subordinate Judge.

The appeal, therefore, fails and is dismissed with costs.

Madhavan Nair, J.—I agree. The main question for consideration in this appeal is, what was the nature of the grant of the suit land by Sundara Narasayya to Sripati Purshottam? Was it the grant of a land in *inam*, or, as is contended for by Mr. Varadachariar, the learned Vakil for the appellant, did the grant only amount to an admission of Sripati Purushottam to the land as a tenant, in which case the 4th defendant would not be an under-tenant under him? The decision of the question must depend entirely upon a scrutiny of the evidence in the case.

The original grant is not before us, but we have to proceed on the assumption that the land when it was given was merely a waste land. It is so described in the plaint and it is admitted by the 4th defendant in his evidence From the nature of that land itself nothing definite as regards the character of the grant can be inferred It is quite possible that only a *kudivaram* interest was granted to Sripati Purshottam Section 26 of the Madras Estates Land Act shows that it is quite possible to make a grant of such a limited character, and the decisions quoted to us also suggest that the idea of such a grant is not an unfamiliar one. But the other evidence in the case which I shall presently exmaine makes me think that the grant in this case was in the nature of the grant in *inam* This evidence consists of three classes of documents (1) *kadapas* executed in favour of Sripati Purushottam, namely, Exs. D D-1 and C, C-1; (2) Receipts granted by the Vizanagayram Estate to Sripati Purushottam, namely, Exs. K series (3); Receipts granted to Sripati Purushottam to the 4th defendant; and (4) Exs. A and B.

(1) The *kadapas* do not afford much valuable evidence in the case, but Ex. D executed by one Bhimanna in favour of Sripati Purushottam describes the land

(2) 57 Ind. Cas 778, 39 M. L J 225; 12 L W 51; 28 M. L. T. 458

(3) 82 Ind. Cas. 929; 47 M L J. 393, 20 L. W. 387; (1924) M. W N. 779; A. I. R. 1924 Mad. 782; 47 M. 942, 35 M. L. T. 70.

"*inam* wet land." Exhibit C and C-1 show that Sripathi Purushottam was letting out the land for cultivation to tenants on lease. Taken along with the other evidence in the case, an inference though a faint one that Sripati Purushottam was an *inamdar* may be drawn from these documents.

(2) As regarde the receipts granted by the Estate we have to note that in Ex. K-4 Sripati Purushottam is described as "*inamdar.*" The word is written in ink though the printed word "*pattadar*", the usual word appearing in the printed receipts has not been scored out. In. Ex. K-8 the land is described as "*inam* of No. 107 individual" and Sripati Purushottam is described as "*inamdar,*" and the word is written in ink. No doubt in some of the receipts he is described as "*pattadar,*" but it seems to me that importance is to be attached more to the description "*inamdar*" than to the word *pattadar* as the former word has, as already mentioned, been specially written in ink, whereas the printed word "*pattadar*" is the common word appearing in the receipts. It may also be noted that the *kattubadi* payable is variously described as "*dharmilla kattubadi*" and "*dharmilla inam kattubadi.* The words "*inam kattubadi*" appearing in Ex. K-4 are again written in ink.

(3) Dealing with the 3rd class of documents, Ex, 1-a is a receipt given by an agent on behalf of Sripati Purushottam to the 4th defendant. It mentions that the rent is paid as "*inam cist* for the land in Lakkavaram village." In Ex. 1-b also the same description appears. In Ex. 1-0 the rent is referred to as "*kist* for *manyam* land". These receipts go to show how Sripati Purushottam himself thought about his right to the land.

(4) Exhibit A is the sale-deed to the plaintiff. There the suit land is described as "*dharmilla inam* land." Exhibit B is the agreement executed by Sripati Purushottam in favour of the Maharajah of Vizanagaram, dated the 8th of February 1893. This does not help us very much in finding out the nature of the grant in this case; but the use of the word "*kattubadi*" suggests that the land may have been granted in *inam.* The oral evidence in the case is not of much importance. On a careful consideration of the above evidence, I have come to the conclusion that the grant by Sundara Narasayya to Sripati Purushottam was the grant of the land in *inam.* The plaintiff is, therefore, "a land-holder" within the meaning of the Full Bench decision in *Dramayya* v. *Achiraju* (1).

The decisons in *Marine Veeraswamy* v. *Boyinapplli Venkatarayudu* (2) and *Ganjain Manikyamba* v. *Pasala Mallayya* (3) are inapplicable to this case as at the time when the land was granted to Sripati Purushottam it is not suggested that there was anybody in possession of it.

As the plaintiff is a "land-holder" the judgment of the learned Subordinate Judge is right and this appeal should be dismissed with costs.

V. N. V.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 238 OF 1925.

December 2, 1925.

Present:—Mr. Findlay, Officiating, J. C.

BARKOO AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ATMARAM—DEFENDANT—RESPONDENT.

Pleadings and proof—Injunction, suit for—Property alleged to belong to plaintiff—Finding as to public nature of property, effect of—Civil Procedure Code (Act V of 1908), s 91—Building over public street—Nuisance—Suit for removal—Procedure

Plaintiff alleging that a *chabutra* in an open space belonged exclusively to him, instituted a suit for an injunction restraining the defendant from interfering with the plaintiff's user of the *chabutra* Defendant pleaded that the *chabutra* belonged to him It was found that the *chabutra* was public property and belonged neither to the plaintiff nor to the defendant:

Held, that having regard to the frame of the plaintiff's suit, the suit must be dismissed on the finding that the *chabutra* did not belong to the plaintiff. [p 819, col 1]

Building over any part of a public street or space constitutes a nuisance. [*ibid*]

Queen-Empress v. *Virappa Chetti,* 20 M. 433; 1 Weir 233, 7 Ind Dec (N. s) 307, followed.

In order to file a suit on behalf of the public for the removal of a building over a public space, the preliminary steps under s. 91 of the C P. C. must be taken before the suit can be maintained. [*ibid.*]

Appeal against a decree of the District Judge, Nagpur, dated the 8th April 1925, in Civil Appeal No. 217 of 1924.

Mr. *M. R. Bobde,* for the Appellants.

JUDGMENT.—The facts of this case are sufficiently clear from the judgments of the two lower Courts. It is firstly urged that the District Judge's finding as regards the *ota* in question is contrary to the pleading of both parties. The District Judge's finding is that the *ota* belongs to the

public generally, although in practice it has only been used by the occupants of the surrounding houses. The defendant's position was that the *ota* is his exclusive property, while the plaintiffs' position is that it was the property of the occupants of the surrounding houses

I have been referred to the decision in *Nathu Piraji* v. *Umedmal Cadumal* (1) in support of the appellants' proposition that the District Judge's finding that the land was public land was an illegal one in the circumstances. As a perusal of that case will show the facts thereof were entirely different and the decision does not seem to me applicable, even by an analogy, to the present case Here the litigating parties alleged that a *chabutra* in an open space belonged to each of them. On the facts the lower Appellate Court held that neither of them had established their claim thereto and that the *ota* was public property and, therefore, the plaintiffs were not entitled to the relief which they claimed. The decision in *Balkrishnadas* v. *Gobind* (2) is full authority for the propriety of the lower Appellate Court's decision

It has been urged, however, before me that even on the District Judge's finding that the *ota* is public property, an injunction should have been awarded to the plaintiffs in view of the fact that the defendant is claiming it as his exclusive property and that the plaintiffs have been using it for the purposes of their trade for years back. The *Balkrishnadas* v. *Govind* (2) just quoted is, in my opinion, authority for holding this contention to be incorrect. The plaintiffs came to Court alleging that the *ota* was their exclusive property. Had they filed the suit on behalf of the public generally, the preliminary steps under s. 91 of the C. P. C. would have had to be taken, and I may point out that building over any part of a public street or space constitutes a nuisance: *cf. Queen-Empress* v. *Virappa Chetti* (3).

I do not think, therefore, that the plaintiffs were entitled to succeed in the present suit as framed and I am unable to see any ground for disturbing the decision of the lower Appellate Court. The appeal is dismissed without notice to the respondent.

Z. K. *Appeal dismissed.*

(1) 1 Ind. Cas. 456; 33 B. 35; 10 Bom. L. R. 768.
(2) 2 Ind. Cas. 241; 5 N L. R. 67.
(3) 20 M. 433; 1 Weir 233; 7 Ind. Dec. (N. s) 307.

MADRAS HIGH COURT.

CIVIL APPEAL No. 44 OF 1922.
January 28, 1925
Present—Sir Victor Murray Coutts Trotter, KT., Chief Justice, and Mr Justice Krishnan.

VEERASAMI PILLAI—DEFENDANT No. 4—APPELLANT
versus
V. S T. N. CHIDAMBARAM CHETTIAR AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 1 TO 3—RESPONDENTS.

Principal and agent—Misconduct of agent—Promissory note obtained by agent from debtor—Suit on note by principal, dismissal of, on ground of forgery—Original claim barred—Suit for damages caused by agent forging note—Note void as contravening s 26 of Paper Currency Act (II of 1910), effect of—Suit against agent, maintainability of

An agent who was carrying on money-lending business on behalf of his principal was charged by the latter with breach of trust in obtaining an inadequate security from a third person in discharge of a pro-note that had been executed by a solvent debtor The agent then produced a fresh pro-note alleged to have been since executed by the said debtor A suit by the principal on this pro-note was dismissed on the ground that the note was forged The cause of action on the original claim had by then become barred by time In a suit by the principal against the agent for damages caused by his misconduct in forging the note and misleading the plaintiff into giving up the claim on the original note, it was found that the note was illegal and void being in contravention of s 26 of the Paper Currency Act

Held, that the plaintiff had no cause of action on which to maintain the suit, since even if the note had been genuine, a suit on that document must have failed and it could not be said that the loss of the litigation was due to the action of the agent in forging the note, the loss, if any, being due to the plaintiff's own neglect in not seeing what his rights were under the document. [p 821, col 2]

Appeal against a decree of the Court of the Second Additional Subordinate Judge, Madura, in Original Suit No 73 of 1921, (O S. No. 39 of 1920, Sub-Court, Dindigul, O S. No. 54 of 1920, Sub-Court, Madura).

Mr. *C. V. Anantakrishna Iyer*, for the Appellant.

Mr. *M. Patanjali Sastri*, for the Respondents.

JUDGMENT.

Coutts Trotter, C. J.—This case has been in a state of confusion from the outset and it is only at the very last moment of it that our attention is drawn to a point that I am not sure we did find for ourselves and which would have rendered about two-thirds of the argument unnecessary. I do not blame the Bar, they had to pick out the facts from a tangled

mess of documents and oral evidence. The judgment of the learned Judge is so confused that it is almost impossible to discover what he did find and what he did not. However in the view we take of this case, it is unnecessary to scrutinise the findings of fact of the learned Judge, because, to all intents and purposes, we may accept them. The facts are quite simple. The plaintiff is a Nattukottai Chetti who lives somewhere in the Ramnad District and has a branch business conducted in his absence by an agent at Palni. During most of the material time in the suit, that agent was the 4th defendant. A debt had been incurred by the 1st and 2nd defendants in the suit to his predecessor-in-agency and two promissory-notes had been given, Exs. A and A-1, dated the 12th January 1912 and 29th January 1912. Those promissory notes were for Rs. 900 and 100 respectively. After the 4th defendant had taken up his position as agent in succession to the other man, a very curious transaction took place. The 1st defendant on the 4th October 1913 executed a sale-deed transferring a certain piece of property to his mother-in-law for an expressed consideration of Rs. 2,000; and three days later on the 7th October, the same piece of property was mortgaged by the mother-in-law to the plaintiff through the agent, the transaction being carried out on the spot by the agent. The consideration for the mortgage was expressed to be the discharging of the debts evidenced on the promissory notes and a fresh advance of Rs. 403 which, according to the evidence, was actually made The position apparently was that the original debtor, the 1st defendant (because the 2nd defendant is only a member of the family brought in under Hindu Law) was a well-to-do man and there would be no difficulty in getting the money. The position of the old woman was that, beyond this little bit of property which came to her from the 1st defendant in circumstances that are not beyond suspicion, she had nothing else in the world and apparently her husband was as impecunious as she was. Undoubtedly the transaction was one which the principal would be very likely to look at with very great suspicion; and, accordingly, when the principal, as in due course of time he did, visited Palni, he took his agent very much to task for exchanging a good security against a very solvent man for a very risky mortgage on a piece of land entirely problematical in value and said to be of much less value than a reasonably safe margin would demand. So there we have the agent at this stage treated as guilty of a breach of duty; and it may be that, had he then and there sued his agent for neglect and breach of duty, he would have been able to prove that the property was not worth as much as the debt and he would have got damages from the agent for his taking Ex. B instead of preserving the liability on Exs. A and A (1). But that cause of action is gone and hopelessly time-barred.

There is another suggested cause of action and that is a very curious one. When the 4th defendant was taken to task for releasing the 1st and 2nd defendants he said "O! that is all right. They quite acknowledge their liability continues and to show you that that is so, I will get you a fresh promissory-note executed by the 1st defendant." That he did and that promissory note figures in the case as Ex. H. Exhibit H has had a touring existence in various law Courts and the last pronouncement upon it was by the learned Subordinate Judge in this case who pronounced it to be a forgery, the theory being that the agent being frightened because of his misdeeds in regard to Exs. A and A-1 and B being found out sought to appease his principal by forging a promissory-note purporting to be executed by the original debtor, the 1st defendant. The Subordinate Judge went into the matter at enormous length but he entirely overlooked the point which cropped up at the end of the hearing here which renders the cause of action in our view untenable. The cause of action is this; "you represented to me that I was in possession of a new document on which I can sue you, the 1st and 2nd defendants, without recourse at all to the old promissory-notes." And thereupon, he says, he brought a suit on Ex H and was damnified owing to being lulled into security by the false representation that Ex. H was a genuine document, forewent his remedy on Exs. A and A-1 and let them be time-barred. It is obvious that, if he proved his case at all, he would have been able to say in these proceedings on Ex. A and A-1. "It is quite true that these things look on the face of the transactions between the parties to be merged in Ex. B and to be gone but I am not in a position

to show that Ex. B was a fraud and that, therefore, the original liability on the promissory-notes, Exs. A and A-1 was never in truth and in fact extinguished." We will assume that it is right Speaking for myself, I think it would have been right, but there is one trifling flaw and it is this. By s. 26 of the Paper Currency Act of 1910, "No person in British India should draw, accept, make or issue any Bill of Exchange, *hundi*, promissory-note or engagement for the payment of money payable to bearer on demand" with certain exceptions; and the effect of the section is to make such instruments absolutely illegal Now, what is the position? There are decision of this Court which, while formally settling the principle that such instruments are illegal, nevertheless point out that in certain cases the payee of the promissory-note can nevertheless bring proceedings on the original consideration. Some of them say that the promissory note may be relied upon as evidentiary of the original debt and consideration. It is unnecessary to discuss that matter here, because I do not think it arises in this case, but I should like to guard myself from being understood to say that I assent to that view of the law without further consideration and direct argument about it. But here what was the position? If the plaintiff could have said "you by your representations about the genuineness of this note prevented me from suing on the consideration," then there might be a great deal to be said but he has not said that The note is payable to a named payee or bearer; and the contention at one time put forward was that that was not the mischief that it was intended to be hit by the Act. But there are several decisions of this Court which clearly decide otherwise; and, indeed, speaking with respect, I do not see how any Court could decide otherwise when it has really looked with any care at the Statute, what did the plaintiff do who we have assumed has been misled by the defendant's misrepresentations about the note? He did not come before the Court and say, "this is a promissory-note bad on the face of it and illegal but it has a perfectly good consideration behind it and I ask you to let me sue you on that debt. I put in a plaint purporting to sue on it and I ask you to let me sue on the promissory-notes merely as evidence of the debt." He brought a suit entirely framed on these promissory-notes and nothing else and the District Munsif decided against him on the ground that the notes were vitiated by the provisions of the Act. During the trial I suppose the District Munsif must have given him some intimation of what was in his mind. At the trial he did not ask for an amendment of the plaint and he did not apparently amend or was at any rate allowed to amend only when the case came on in appeal. The only conclusion is that, assuming the plaintiff to have been misled by the false representation made to him, assuming that the defendant, acted with a fraudulent intent and knew that the representations he was making were false, the chain of causation breaks down It was not those representations that brought the plaintiff's case ill luck but it was the fact that he took an instrument which the law presumes him to know to be bad on the face of it instead of his old remedy and that, having that instrument he stuck to it as his sheet anchor and did not attempt to revive the original consideration. I may add that he would have been no better off on the finding of the learned Judge if in addition to suing on the promissory note, Ex. H, he had added an alternative claim on the consideration for that note for the simple reason that the learned Judge in this case—and it looks very much as if he was right—has found a fact that this promissory-note, Ex H, was forged. Therefore, the only thing on which he could possibly have sued was the original consideration of the two old promissory-notes, Exs. A and A (1), and it was never suggested from first to last of this trial that it was any representation of the 4th defendant that prevented him from doing that In my opinion this appeal must be allowed but, in view of the revelations of the 4th defendant's conduct, and, I may add, in view of the fact that the real point in the case was never taken until it had progressed several hours, we should not allow any costs.

Krishnan, J.—In this case the facts have been very clearly and fully set out in the judgment just delivered by the learned Chief Justice and it is unnecessary to state them again.

The 4th defendant is sued by the plaintiff on the ground that by giving him a forged note, Ex. H, he induced him to bring a suit on that note and as it was forged, he failed on the note and incurred the costs of that litigation unnecessarily

and further that he was misled into giving up his claim under Exs. A and A (1) for the time being till that claim became barred by limitation. He contends before us, therefore, that on the finding that Ex. H is a forgery he is entitled to get from his agent, the 4th defendant, damages calculated partly on the costs of the litigation in which he failed and partly on the loss he suffered by not being able to claim against the 1st and 2nd defendants the amount due under the notes, Exs. A and A-1. The prinicipal difficulty in his way is that Ex. H was not a document on which he could have based any action at all as it is a document rendered illegal by s. 26 of the Paper Currency Act. Even if it had been a genuine document, a suit on that document must have failed. That being so, it cannot be said that the loss of that litigation was due to the action of the 4th defendant, in forging the note. The plaintiff should have seen when he got Ex. H that, whether it be a genuine or a false one, it was not a document on which he could have maintained a suit; and, if he brought one, it was due to his own fault and I do not see how under the circumstances he could turn round and say that he lost his litigation on account of the action of the 4th defendant and that he should be made liable for the costs. It is contended before us that, even if we treat Ex. H as a document on which no action could have been brought, still if it had been a genuine document he could have asked the suit to be converted into one on the original cause of action, namely, the loans for which Exs A and A (1) were given and got relief against the 1st and 2nd defendants. The answer to it is that, if he had taken proper care to see what his rights were, he could have in the very first instance instead of suing on Ex. H brought the action as he might have then done on the original loans for which Exs. A and A (1) were taken; Exs. A and A (1) themselves were promissory-notes which are hit at by s. 26 of the Paper Currency Act and hence could not have been sued upon. If any loss occurred to the plaintiff, it is clearly, therefore, due to his own neglect in not seeing what his rights were under the documents which are in question here. So far as any claim could be based upon the defendant's action in taking Ex. B in supersession of Exs. A and A-1 and a sum of money advanced at the time Ex. B was executed that claim is now barred by limitation; and no suit could be maintained by the plaintiff on any cause of action based upon the misconduct of the 4th defendant in taking Ex. B. It is only if he can sustain his present action on a ground based upon Ex. H that he has got any claim at all. As I have already stated I do not think that he is entitled to base any claim on Ex. H for the reasons I have already stated. That being so, it is clear that this action as against his agent, the 4th defendant fails. The 4th defendant's appeal must, therefore, be allowed and I agree to the order proposed by the learned Chief Justice. The suit is dismissed as against the 4th defendant.

V. N. V. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 31 OF 1925.

December 8, 1925.

Present:—Mr. Findlay, Officiating J. C.

DAWLAT AND ANOTHER—APPELLANTS

versus

KASHIRAO AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 148—Mortgage—Foreclosure suit—Compromise decree—Time fixed for payment, whether can be extended—Power of Court

A Court has no power to extend the time fixed in a compromise decree in a suit for foreclosure for the payment of the decretal amount [p. 823, col. 1]

Appeal against a decree of the First Subordinate Judge, Second Class, Nagpur, dated the 3rd August 1925, in Civil Suit No. 58 of 1922.

Mr. *D. T. Mangalmurti*, for the Appellants.

Messrs. *M. B. Niyogi* and *M. B. Kinkhede*, R. B, for the Respondents.

JUDMGENT.—In this case a preliminary decree for foreclosure was passed by the Senior Subordinate Judge, Nagpur, against the present two appellants and Pilaji, the son of the second appellant, Venkatrao. The respondents Nos. 6 and 7 were joined as subsequent mortgagees. The case was compromised and a decree was passed accordingly for payment of the decretal amount of Rs. 8,056.

The first five plaintiff-respondents applied for decree (final) on 12th December 1924.

The second appellant Venkatrao applied for an extension of time on 20th November 1924. In that application he stated that he had arranged to deposit Rs. 1,500 for payment to the decree holders and on the ground that he had been ill throughout the year and that the harvest had been poor, he asked for an extension of six months' time. Eventually, on 3rd August 1925 the Subordinate Judge, finding that the two subsequent mortgagees were willing to pay off the entire amount of the decree within 15 days, allowed time accordingly until the 24th of August 1925. The present appellants had at this hearing offered the deposit of a further sum of Rs. 2,000, but the Subordinate Judge did not grant the prayer of the appellants.

For my own part, I do not think this is a case where I would be entitled to interfere in favour of the appellants This was not a case of an ordinary foreclosure decree with the normal period of six months allowed for payment. On the contrary, under the compromise a special period of a year was granted and even by August 1925 the present appellants were only able or willing to pay Rs. 3,500 at the most.

It has, indeed, been urged on the strength of the decisions in *Hemendra Lal Singh Deo* v. *Fakir Chandra Datta* (1) and *Nripendranath Chatterjee* v *Jhumak Mandar* (2) that it was not open to the Court in the present case to grant an extension of time. The latter case is very much to the point and I think this contention offered on behalf of the decree-holders is undoubtedly correct: *cf.* also *Komalsingh* v *Jagannath Muratsingh* (3) which deals with the question of extension of time for payment of the decretal amount and the inapplicability of s 148 of the C. P. C. in such a matter. It is true that the decree-holders consented to 15 days' extension in order to permit of the subsequent mortgagees paying up the amount but that was all.

The appeal, therefore, fails and is dismissed, as it seems impossible to show the present appellants any more leniency or latitude in the matter of extension of time for payment The case will now go back to the Executing Court and after it reaches there a period of at least 15 days should be allowed to the two subsequent mortgagees-respondents to pay up the decretal amount in accordance with their previous offer. The appellants must bear the respondents' costs in this appeal. Pleader's fee Rs. 25.

Z. K. *Appeal dismissed.*

(1) 74 Ind Cas 929, 50 C. 650, 27 C W. N 621; A. I. R 1923 Cal. 626

(2) 80 Ind Cas 588; 3 Pat 221; 4 P. L. T. 694, 2 Pat. L R. 9; A I. R 1924 Pat. 263

(3) 49 Ind. Cas. 840; 15 N. L. R. 39.

MARAS HIGH COURT.

APPEAL AGAINST ORDER No. 330 OF 1924.

September 7, 1925.

Present:—Justice Sir Charles Gordon Spencer, KT, and Mr. Justice Madhavan Nair.

RAMASAMI GOUNDAN—DEFENDANT No. 1—APPELLANT

versus

ALAGIA SINGAPERUMAL KADAVUL AND ANOTHER—PLAINTIFF AND DEFENDANT No. 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Religious endowment—Alienation of trust properties by trustee—Suit to recover properties—Procedure

The founder of a religious trust appointed himself as trustee thereof during his lifetime and his heirs after his death, and his widow, who succeeded him in the trusteeship after his death, alienated properties belonging to the trust In a suit by the next reversioner to set aside the alienation and to recover the property·

Held, that the suit was not maintainable and that the proper course was for the plaintiff, together with one or more interested persons, after obtaining the required sanction under s 92, C P C, to sue for the widow's removal from the trusteeship, and for appointment of himself or some other fit person to be trustee in her place, and that the person who so became trustee might then sue on behalf of the trust for the recovery of the property improperly diverted from trust purposes [p 824, col 1]

Appeal against an order of remand of the Court of the Additional Subordinate Judge, Coimbatore, in A. S. No. 3 of 1924, dated the 30th June 1924, (A. S. No. 214 of 1923 of the District Court, Coimbatore), in O S No 619 of 1922, District Munsif's Court, Udamalpet.

Mr *T. M. Krishnaswami Iyer*, for the Appellant.

Mr. *S. Srinivasa Iyer*, for the Respondents.

JUDGMENT.—This suit was brought by a male reversioner to the estate of the founder of a trust for the temple of Aligia Singaperumal Kadavul to recover property alienated in favour of first defendant by the act of the founder's wife, who is 2nd defendant. The District Munsif held that the plaintiff was not entitled to maintain the

suit and dismissed it. The Additional Subordinate Judge was of a contrary opinion and ordered the suit to go on.

He relied on two cases, *Savala Cunniah Chetty* v. *Thiruvengada Ramanujachariar* (1) and *Kadambi Srinivasacharlu* v. *Durlabha Subuddhi* (2). Both of these decisions were given in suits instituted when the C. P. C. of 1882 was in force. When the amended Act of 1908 came into force, it contained a new provision in cl. (2) of s. 92 barring suits in respect of charitable and religious trusts without first obtaining the permission of the Advocate-General.

We have been referred in the course of the arguments to two other cases, *Subramania Aiyar* v. *Nagarathna Naicker* (3) and *Rangaswami Nayudu* v. *Krishnaswami Aiyar* (4). These were cases in which a number of persons had a common interest in a temple or charitable institution, and a representative suit was allowed by the Court to be brought on behalf of all, under s. 30 of the Code of 1882 (now O I, r 8). When a village temple is owned in common by all the villagers of a certain village, this is the proper form of suing. In the present case the founder of the trust appointed himself as manager during his lifetime and his heirs after his death. His widow, who is second defendant, is his nearest heir, and as she alienated the trust property, she cannot be transposed as plaintiff. The reversioner cannot claim at present to be trustee The proper course is for the plaintiff, together with one or more interested persons, after obtaining the required sanction under s. 92 to sue for 2nd defendant's removal from the trusteeship, and for appointment of himself or some other fit person to be trustee in her place. In such a suit the validity of the alienation could be decided.

The person who becomes trustee or a receiver appointed in the suit may then sue on behalf of the idol for the recovery of the property improperly diverted from trust purposes. It is suggested that we might allow some time for the plaintiff to apply and get permission to proceed either under O. I, r. 8 or under s. 92, C. P. C., but we think that this cannot be done as this would alter the nature of the suit. The appeal is accordingly allowed with costs to be paid by 1st respondent in this Court and the lower Appellate Court, and the decree of the District Munsif dismissing the suit with costs is restored; 2nd respondent to bear her own costs.

V. N. V. *Appeal allowed*

(1) 18 Ind. Cas. 622, 24 M L J 48, (1913) M W. N 368.
(2) 17 Ind. Cas 589, 23 M. L J 348
(3) 5 Ind Cas 901, 20 M. L J 151, 8 M. L T 114.
(4) 71 Ind. Cas. 463; 17 L. W. 117, 44 M L. J 116, (1923) M. W. N 84; 32 M L. T. 133, A I. R 1923 Mad. 276.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 6 OF 1925.
October 10, 1925.
Present:—Mr. Hallifax, A. J. C.
THAKUR SINGH AND ANOTHER—DEFENDANTS—APPELLANTS
versus
Musammat SONKUAR—PLAINTIFF—RESPONDENT.

C. P Tenancy Act (I of 1920), Sch. II, Art. 1 —"Holding," whether includes part—Suit for possession of part of holding—Limitation.

The word "holding" in Art. 1 of Sch II to the C. P. Tenancy Act, includes a part of a holding and a suit for possession of a part of a holding must, therefore, be brought within two years of the date of dispossession or exclusion from possession. [p 825, col. 1.]

Appeal against a decree of the Additional District Judge, Bilaspur, dated the 12th January 1925, in Civil Appeal No. 176 of 1924.

Mr. *G. R Deo*, for the Appellants.

JUDGMENT.—The plaintiff-respondent Sonkuar Bai was the co-tenant of an occupancy holding with the second defendant Ramdayal Chamar, who sold the entire holding to the first defendant, Thakur Singh, on the 11th of June 1920. The latter took possession of it on that date, and Sonkuar Bai filed this suit for recovery of possession of her half share on the 1st of August 1924, joining Ramdayal as a formal defendant. In the first Court the suit was held to be barred by time under Art. 1 of Sch. II of the Tenancy Act. In appeal the learned Additional District Judge started with the remark that there was no substance in the argument, rejected in the first Court, that Art. 1 of Sch. II has no application to a suit for joint possession.

But the learned Judge then goes on to say that the facts of the present case "are admittedly different," for the reason that "it is not from the entire holding that the dispossession or exclusion has taken place

but from only a portion of the holding and the question is whether Art. 1 will bar such a suit." The suit is for joint possession to the extent of a half of the entire holding, along with Ramdayal's transferee Thakur Singh, whom Sonkuar had to recognise and did recognise as her co-tenant.

In the judgment of the lower Appellate Court it is eventually held, after discussion of the point that the word *holding* in the Article mentioned can only mean the whole of a holding and cannot mean a part of one, and that a tenant dispossessed of a part only of his holding can sue for recovery of possession within twelve years. The decision is of course quite outside the case, but I think it advisable to show that it is wrong The learned Judge arrived at it with diffidence as it was directly contrary to that given by this Court in *Budga* v. *Chain* (1)

I have to admit that I have difficulty in understanding exactly what the reasons given by the learned Judge mean, and to say also that on reading again the reasons for the contrary view in my judgment in *Budga* v. *Chain* (1) I am still satisfied of their cogency. But several additional reasons in support of the same view can easily be discovered. All the reasons given by the learned Judge, as far as I understand them, for thinking that the holding mentioned in Art. 1 of the Schedule is the entire holding and not a part of it apply equally to the same word appearing in Art 9 of the same Schedule. But there it undoubtedly refers to a holding "or any portion thereof", as is clear from s. 100 of the Act

Again if in this case the whole does not include the part, then the same must be said of at least sixty Articles in the Schedule of the Limitation Act. For instance, the litigation for a suit to set aside the sale of a part of a *patni taluq* for current arrears of rent would not be one year under Art 12 (*d*) and that for a part of the price of goods sold and delivered, a part having been paid, would not be three years under Art 52, in each case we would have to fall back on Art. 120.

The order of the lower Appellate Court remanding the case for trial will be set aside and a decree will issue dismissing the suit. The plaintiff-respondent will pay all the costs in all three Courts There has been something worse than the usual carelessness in the matter of Pleader's fee in this case, and the learned Judge of each of the lower Courts has been guilty of saying that in his opinion a fair amount for the successful party to be paid on account of the expense to which he was wrongly put in the matter of employing a Pleader, is eight annas The Pleader's fee in this Court will be thirty rupees.

G. R. D *Case remanded.*

(1) 78 Ind Cas 214, A. I. R 1925 Nag 197.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 214 OF 1924.

December 14, 1925.

Present —Mr. Justice Raza

SUKHDEO—PLAINTIFF—APPELLANT

versus

Musammat RAM DULARI—DEFENDANT —RESPONDENT

Limitation Act (IX of 1908), Sch I, Art 144—Suit based on title—Adverse possession, plea of—Burden of proof—Trespassers, independent, whether can tack possession

One trespasser cannot add to his own possession the previous independent possession of another trespasser When possession passes from one trespasser to another there is a constructive restoration, even if a momentary restoration, of the true owner to possession [p 826, col 2]

Basanta Kumar Roy v *Secretary of State for India*, 40 Ind Cas 337, 15 A L J 398 at p 409, 1 P L W 593, 32 M L J 505, 21 C W N 612, 25 C L J 487, 19 Bom L R 480, (1917) M W N 482, 6 L W 117, 22 M L T 310, 44 C 858, 44 I A 104 (P C), referred to.

In a suit falling within Art 144 of Sch I to the Limitation Act the initial onus is on the plaintiff to establish his title and he is not under an obligation to prove his possession within 12 years of the suit On the contrary when the plaintiff's title has been proved or is admitted, the burden is on defendant to establish that he or the person through whom he claims has or have been in possession adverse to the plaintiff for over 12 years before the suit The defendant must also prove when his possession became adverse [p 827, col 1]

Janaki Nath Saha v *Baikuntha Nath Ghattack*, 70 Ind Cas 602, 36 C L J 140, A I R 1922 Cal 176, 27 C W N 259 and *Secretary of State for India* v *Chelakani Rama Rao*, 35 Ind Cas 902, 39 M 617, 31 M L J 321, 20 C W N 1311, (1916) 2 M W N 224, 14 A L J 1114, 20 M L T 435, 4 L W 486, 18 Bom L R 1007, 25 C L J 69, 43 I A 192 (P C), referred to

Appeal from a decree of the Court of the Subordinate Judge, Unao, dated the 18th February 1924

Mr *Bisheshar Nath*, for the Appellant

JUDGMENT.—This is a plaintiff's appeal from a decree of the Subordinate Judge of Unao, dated 18th February 1924,

partly affirming and partly reversing a decree of the Munsif of Unao, dated the 3rd August 1923.

The dispute in this case relates to the property of one Ram Rakhan who died on the 22nd February 1910. His sister, *Musammat* Subedha, took possession of the property left by him. She was no heir under the Hindu Law and her possession was that of a trespasser. The nearest heirs of Ram Rakhan according to the proximity in degree were Sat Narain and his brother Ram Dayal. They joined with themselves their nephew Ajodhya Prasad in suing *Musammat* Subedha for possession of the property left by Ram Rakhan. They succeeded in getting a decree for possession of the property on the 14th December 1911. The decree was passed on the basis of a compromise. They obtained possession through Court on the 22nd December 1911 and mutation was effected in their favour on the 28th March 1912. The plaintiff's case is that these three persons had no title to the property as they were born lepers. They being disqualified, there were 5 persons (including the plaintiff) in the same degree who were entitled to the property of Ram Rakhan under the Hindu Law. Three of them, namely, Sheo Dularey (defendant No 3), Gur Din (defendant No. 4) and Durga Prasad brought a suit against Ram Dayal and others, and got a decree for 3/5ths of the property on the 25th February 1913 Then the fourth man, namely, Salt Narain (defendant No. 5) sued for a 1/5th share and obtained a decree on the 29th January 1914. Thus 4/5ths of the property was recovered by the rightful persons from Ram Dayal and others named above. The plaintiff claims the remaining 1/5th of the property. Ram Dayal died having executed a Will in favour of his daughter, *Musammat* Ram Dulari, (defendant No. 6) on the 30th July 1918. The defendant No. 7 is the husband of *Musammat* Ram Dulari. The defendants Nos. 6 and 7 got possession of the property comprised in the Will. The plaintiff brought the present suit on the 17th November 1922 The suit was contested by the defendants Nos. 6 and 7 alone and proceeded *ex parte* against others. The suit was decreed by the first Court on the 3rd August 1923 However, it was dismissed so far as a 1/15th share in Ram Rakhan's property is concerned, on the defendants Nos 6 and 7's appeal, on the 18th February 1924. The defendants Nos. 6 and 7 had appealed to the extent of a 1/15th share and the present appeal has been filed by the plaintiff. The respondents have failed to appear in this Court.

There is only one question for determination in this appeal and that question is one of limitation. That question was decided in favour of the plaintiff by the first Court. However, it was decided against the plaintiff by the Court of first appeal. The suit was of course instituted more than 12 years after Ram Rakhan's death but it was instituted within 12 years of the date on which the decree was obtained by Ram Dayal and others against *Musammat* Subedha. It was instituted within twelve years of the date on which Ram Dayal and others got possession of the property under the decree dated 14th December 1911. The question is whether the defendants Nos. 6 and 7 who derived their title from Ram Dayal are entitled to tack in to the period of their own and Ram Dayal's possession the period during which *Musammat* Subedha remained in possession of the property after the death of Ram Rakhan. In my opinion they cannot do so I have examined the pleadings and the compromise in the former suit in which the decree was passed against *Musammat* Subedha. So far as I see, Ram Dayal and others had got the decree in recognition of their rights. They do not derive their title or their liability to be sued from *Musammat* Subedha. They being lepers had no right to the property under the Hindu Law and they derived their liability to be sued from that circumstance. Those persons and *Musammat* Subedha were independent trespassers and possession of independent trespassers cannot be tacked [see the principle of decision in the case of *Basanta Kumar Roy* v. *Secretary of State for India* (1)] As pointed out in the case of *Janaki Nath Saha* v. *Baikuntha Nath Ghattack* (2) one trespasser cannot add to his own possession the previous independent possession of another trespasser. When the possession passes from the first to the second trespasser, there is a constructive restoration, even if a momentary restoration, of the true title to possession.

(1) 40 Ind Cas. 337, 15 A. L J. 398 at p. 409, 1 P. L W 593, 32 M L. J 505, 21 C. W. N 642, 25 C. L. J 487, 19 Bom L. R. 480; (1917) M W. N 482, 6 L. W 117; 22 M L. T 310; 44 C. 858, 44 I A 104 (P C)

(2) 70 Ind. Cas. 602; 36 C. L. J. 140, A. I R 1922 Cal. 176; 27 C. W. N. 259.

The present suit is a suit falling within Art. 144 of the Limitation Act. Where a plaintiff sues on the strength of his title without any reference to prior possession or dispossession, in such a case it would seem that on the proper construction of Art. 144, the plaintiff would be entitled to succeed on proof of his title, unless the defendant is able to displace it by proof of adverse possession by himself or his predecessor-in-title for the whole statutory period. It is noticeable that adverse possession was not set up by the defendants Nos 6 and 7 In their defence in this case they had contended simply that the plaintiff and his ancestors had never been in possession of the property and hence the suit was barred by time. In a suit falling within Art 144 the initial onus on plaintiff is to establish his title and he is not under an obligation to prove his possession within 12 years of the suit. On the contrary when the plaintiff's title has been proved or is admitted, the burden is on defendant to establish that he, or persons through whom he claims, has or have been in possession adverse to the plaintiff for over 12 years before the suit. The defendant must also prove when his possession became adverse. It is settled that the onus of establishing title to property by reason of possession for a certain requisite period lies on the person asserting such possession. [*Secretary of State for India* v. *Chelakani Rama Rao* (3)] "An owner of property does not lose his right to property merely because he happens not to be in possession of it for 12 years. Under s 28 of the Indian Limitation Act, 1908, his right is only extinguished at the determination of the period limited by the Act to him for instituting a suit for possession of property; that period cannot be determined unless it has commenced to run, and the period will not commence to run until the owner is aware that some one else in possession is holding adversely to himself". [See *Swamirao Shriniwas Parvati* v *Bhimabai Padappa Dasai* (4)]. In the present case, the suit was instituted within 12 years of the date on which Ram Dayal and others obtained a decree against *Musammat* Subedha and got possession of the property in execution of the decree. I have already observed that these persons and *Musammat* Subedha were independent trespassers and they could not add to their possession the previous independent possession of another trespasser. Under these circumstances I think the learned Munsif was perfectly right in deciding the question of limitation in favour of the plaintiff

Hence I allow the appeal and setting aside the decree of the lower Appellate Court restore the decree of the first Court and also in the lower Appellate Court. The appellant will get his costs from the respondents Nos. 1 and 2 in this Court and also in the lower Appellate Court. He will get his costs in the first Court as ordered by that Court.

Z. K.

G. H. *Appeal allowed.*

(3) 35 Ind. Cas 902, 39 M 617, 31 M L J 324, 20 C W N 1311, (1916) 2 M W. N 224, 14 A L. J 1114; 20 M L T 435, 4 L. W. 483, 18 Bom. L. R. 1007, 25 C. L. J. 69, 43 I. A. 192 (P. C.)

(4) 62 Ind. Cas. 101; 45 B. 1020; 23 Bom. L. R. 416.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 444 OF 1923.

October 6, 1925.

Present:—Mr. Justice Odgers and Mr. Justice Viswanatha Sastri

VEMULAPALLI SEETHARAMAMMA AND OTHERS—DEFENDANTS NOS. 1 TO 5—APPELLANTS

versus

MAGANTI APPIAH AND OTHERS—PLAINTIFFS AND DEFENDANT NO. 6—RESPONDENTS.

Hindu Law—Minor—De facto *guardian, alienation by, validity of—Necessity—Benefit to estate—Ratification by minor on attaining majority, effect of*

Under the Hindu Law, the powers of a *de facto* guardian of a minor are the same as those of a *de jure* guardian and an alienation of the minor's property by a *de facto* guardian is equally binding on the minor if it is supported by necessity or benefit to the estate [p 828, col 2]

An alienation by a *de facto* guardian not for a binding purpose is not *per se* void but only voidable and becomes valid where it is ratified by the minor on attaining majority [p 830, col 1]

Hunoomanpersaud Panday v *Babooee Munraj Koonweree*, 6 M I. A 393, 18 W R 81*n*, Sevestre 253*n*, 2 Suth P C J 29, 1 Sar P C J 552, 19 E R 147, *Vembu Iyer* v *Srinivasa Iyengar*, 17 Ind Cas 609, 23 M L J 638 at p 646, 12 M L T 547 and *Mohanund Mondul* v *Nafur Mondul*, 26 C 820, 3 C W N 770, 13 Ind Dec (N s) 1125, relied on

Nalannad v *Kanbirampare Ravuni Nair*, 81 Ind Cas 973, 47 M L J 686, (1924) M W N 792, 20 L W 876, 35 M L T. 127, A I. R 1925 Mad 260, not followed

Per *Viswanatha Sastri, J.*—There is nothing in the Hindu Law which limits the guardianship of a minor to the father, mother and failing them the King. A

maternal uncle in Hindu society in Southern India is a fit and proper person to act as guardian of a minor. [p. 832, col. 1.]

Second appeal against a decree of the Court of the Subordinate, Judge, Masulipatam, in A. S. No. 7 of 1922, (A. S No 104 of 1921, District Court, Kistna), preferred against a decree of the Court of the Principal District Munsif, Gudivada, in O. S. No. 151 of 1919.

Mr. *K. Subba Rao*, for the Appellants.

Mr. *P. Satyanarayana Rao*, for the Respondents.

JUDGMENT.

Odgers, J.—The question in this case is whether an alienation by a *de facto* guardian is valid under the Hindu Law. The person in question is the maternal uncle of the plaintiff and of course is neither the natural nor the legal guardian. The District Munsif dismissed the suit which was a claim for a declaration that the alienation made during the minority of the plaintiff did not bind him. The Subordinate Judge reversed this decision holding that the alienation made by the maternal uncle was a void transaction.

It has been argued at length for the respondents that a *de facto* guardian is unrecognised in the Hindu Law. It may be at once said that, if there is such a recognition, I am satisfied that the recognition is more or less modern and possibly to some extent, the recognition, if it is legally recognised at all has come about by necessity. The earliest case, as far as I know, is the well-known case in *Hunoomanpersaud Panday* v. *Babooee Munraj Koonweree* (1) where their Lordships of the Privy Council say:—"Upon the third point, it is to be observed that under the Hindu Law, the right of a *bona fide* incumbrancer who has taken from a *de facto* manager a charge on lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto*, with the *de jure* title." It has been said that this *dictum* is *obiter* as the *Rani* in the case under discussion was undoubtedly the natural guardian. It might perhaps also be said that the third point was not absolutely essential to the decision. However that may be, any *dicta* that may fall from the Privy Council are naturally entitled to great weight and, if the powers of a *de facto* guardian under the Hindu Law have been recognised in other decisions, it must, I think, be taken that a *de facto* guardian is known to that law. Much stress has been laid for the respondents on the Privy Council case in *Imambandi* v. *Mutsaddi* (2) where it is clearly laid down that a *de facto* guardian is unknown in the Muhammadan Law. The decisions of the Courts on this point of Muhammadan Law are fully examined and in their Lordships' judgment delivered by Mr. Ameer Ali. A person who may be conveniently called a *de facto* guardian has no power under the Muhammadan Law to convey to another any right or interest in immoveable property which the transferee can enforce against the infant. Nothing can be clearer than that. But it has to be observed that not only there but all through the judgment only the question as arising under the Muhammadan Law is dealt with. On the other hand, in Gour's Hindu Code, s. 906, it is asserted that the powers of a natural and *de jure* guardian are the same as those of a legal guardian. Any act done by the *de facto* guardian would be equally binding on the minor if it is supported by necessity or benefit to the minor. See also s. 913 where the learned author expressly states that the Muhammadan Law is different.

In *Mohanund Mondul* v. *Nafur Mondul* (3) a grandmother purported to sell a minor's estate The Court found that she was a *de facto* guardian, and relying on *Hunoomanpersaud Panday* v. *Babooee Munraj Koonweree* (1), it held that not only might a *de facto* guardian mortgage but also sell. Banerji, J., points out that there may be cases where the sale of a part of the minor's estate might be more beneficial to him than a mortgage. In *Adhar Chandra Dutt* v. *Kirtibash Bairage* (4) it is said in the judgment; "It is conceded by the learned Doctor who appeared for the appellants that the powers of a *de facto* guardian are the same as those of a legal guardian." It appears that the Court adopted that admission which was that of Dr. Rash

(1) 6 M I A 393, 18 W R. 81n, Sevestre 253n, 2 Suth. P. C. J 29, 1 Sar. P C. J. 552, 19 E R. 147

(2) 47 Ind Cas 513, 45 C. 878, 35 M L. J. 422; 16 A L J 800, 24 M L. T 330, 28 C L J 409, 23 C W. N 50, 5 P L W 276, 20 Bom L R 1022, (1919) M. W. N 91, 9 L W. 518, 45 I A 73 (P C).

(3) 26 C 820, 3 C. W. N. 770, 13 Ind Dec. (N. s.) 1125

(4) 6 Ind Cas. 638, 12 C. L. J. 586.

Behari Ghose. In *Bai Amrit* v. *Bai Manik* (5) which is a case of a transaction by the mother as guardian of her son and of her minor daughter-in law, she would of course be the natural guardian of the son, but the case is treated as if she was the manager *de facto* of the family and sales for valuable consideration the proceeds of which were applied to meet the family necessities were held to be unquestionable. *Nathuram* v. *Shoma Chhagan* (6) was a case of the father's cousin taking charge of a minor and borrowing money to meet the funeral expenses of the deceased father. It was held that he had sufficient authority to bind the minor by a loan if it were necessary. Sadasiva Iyer, J , in *Vembu Iyer* v. *Srinivasa Iyengar* (7) citing *Hunooman Persaud Panday* v. *Babooee Munraj Koonweree* (1) says that, when the act is done by the person who is not the guardian but who is the manager of the estate in which the minor is interested, the latter will equally be bound if under the circumstances the step taken was necessary, proper or prudent.

On the other hand, no case has been cited, except possibly one which lays down that a *de facto* guardian has no power to deal with the property of a minor for necessity. On the other hand in *Arunachella Reddi* v. *Chidambara Reddi* (8) it is said. " It is well settled that an alienation may be validly made by a *de facto* guardian (assuming, of course, the necessity) " It is true that there the guardian in question was a natural guardian. But, in my view, having regard to the authorities I have cited, that can make no difference

Krishnan Chetty v. *Vellaichami Thevan* (9) which was referred to by the learned Vakil for the respondents, merely lays down that, once a guardian has been appointed by the Court, the rights of the natural guardian are extinguished It will be noticed at page 41* the learned Judges say that there is no proof that the first defendant's mother was the *de facto* guardian. In *Gopi Ram* v. *Jeot Ram* (10) the mother did not mortgage the property on behalf of her son and no question of necessity arose. *Mata Din* v. *Ahmad Ali* (11) is again, like *Imambandi* v. *Mutsaddi* (2) a case under the Muhammadan Law The family were Muhammadans and were governed by the Muhammadan Law relating to guardianship. It is pointed out by their Lordships that the question was whether, according to Muhammadan Law, a sale by a *de facto* guardian if made for necessity and if beneficial to the minor is altogether void or merely voidable but it was unnecessary to decide the question, as the appellant had not shown that the sale was for necessity or was beneficial to the minor. Reliance is also placed for the respondent on a remark of Sadasiva Iyer, J., in *Thayammal* v. *Kuppanna Koundan* (12) " that nobody else than the father and mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor) is entitled as a matter of natural right to be and to act as a guardian of a minor's person, and property. Recourse must be had to the Court (representing the rights of the King which are paramount to even the rights of the parents) where there is natural guardian alive " I am unable, to see how this helps the respondent in the present case as the relation in question is, therefore, a direct male ancestor of the minor. The decision was that the paternal aunt was not a natural guardian. A decision much relied on is *Nalannad* v *Kanbirampare Ravuni Nair* (13) by a Single Judge of this Court where in the case of a *nambudri illom*, the step-mother of the minors, who was managing the house-hold and looking after them, borrowed money, for necessity. On the assumption that the parties were *prima facie* governed by Hindu Law and that no special custom had been set up in the pleadings, it was held that the step-mother had no legal authority. The learned Judge said ; " It is not contended ... that the *de facto* guardianship gave her *i.e*, the step mother any right to mortgage the estate " With great deference I am unable to see first how the *dictum* applies to the facts of this case and *secondly*, if neces-

(5) 12 B H C R 79 at p 81
(6) 14 B. 562, 7 Ind Dec (N s) 839
(7) 17 Ind Cas. 609, 23 M. L. J 638 at p 646, 12 M L T. 547
(8) 13 M L J 223
(9) 12 Ind Cas 568, 37 M 38, 10 M L T 385, (1911) 2 M. W. N 461, 21 M L J 1077
(10) 82 Ind Cas 646, 15 A 478, 21 A L J 439, A. I. R 1923 All 514
(11) 13 Ind Cas 976; 34 A. 213, 16 C W N 338, 11 M L T 145, (1912) M W. N 183, 9 A L J 215, 15 C L J 270, 14 Bom L R 192; 15 O C 49; 23 M L. J 6, 39 I A 49 (P. C)
(12) 26 Ind Cas 179, 38 M 1125; 27 M L J 285
(13) 84 Ind Cas 973; 47 M L J 686, (1924) M W. N 792, 20 L W. 876; 35 M. L. T 127; A. I. R 1925 Mad. 260.

*Page of 37 M.—[*Ed.*]

sary, I would take leave to say that if the parties were governed by the Hindu Law, I should have thought it might have been well contended that the mortgage, if for necessity, could be upheld.

The Court below has found that, as to one of the sales evidenced by Ex. IV which is the only one question before us, there was necessity to the extent of Rs. 275 out of a total consideration for Rs. 400. It is said by the appellants that there has been a ratification by Ex. III by the minor on attaining his age of this alienation by his *de facto* guardian. On the other hand, it is said that any alienation not for necessity is void and not voidable and as there can be no ratification of a void transaction it is of no effect in this case. It is, I think, clear that an alienation by a *de jure* guardian or a natural guardian is voidable and, as I am inclined to hold the powers of these guardians are similar, I think a transaction entered into by a *de facto* guardian not for necessity is only voidable and, therefore, ratified by the minor attaining his age. In *Chetty Colum Comara Vencatachella Reddyer* v. *Rajah Rungasawmy Streemunth Iyengar Bahadur* (14) the minor recognised a transaction made during his minority by his adoptive mother and guardian. This was upheld without determining the question as to the power of a Hindu widow as guardian to create a charge during the minority of the minor son.

Further, it is said that this suit is barred by limitation. The sale is dated 28th February 1907. The suit was brought on the first March 1919 which is admittedly the last day of the 12 years allowed. But it is said in the letter, Ex. III, that the transferee had had possession delivered to him sometime before the date of the sale deed. The words which have been re-translated are "whether before the delivery of possession to you in pursuance of the *sale before now or after*." The words "before now" are indefinite, but they might refer to possession being given on the same day. There is further some contention on the other side that these persons were already in possession as tenants. However that may be, the matter is much too indefinite for us to attach the slightest weight to those words. I, therefore, think that this point fails. This question of limitation, though dealt with by the District Munsif and found in favour of the defendants was not considered by the learned Subordinate Judge. In my view, there is nothing in the point

I think the learned Subordinate Judge is wrong in holding that the alienation made by the *de facto* guardian is a void transaction. In my view, the appeal must be allowed and the plaintiff's suit dismissed with costs throughout.

Viswanatha Sastri, J.—Defendants Nos. 1 to 5 are the appellants. The suit was for a declaration that the alienations made by plaintiff's maternal uncle during his minority were not binding on him, and for recovery of the items alienated.

The alienations were made under two sale-deeds of the dates 28th February 1907 (Ex. IV) and 7th October 1913, and the suit was instituted (it was said on the last day of limitation) in 1919. The District Munsif dismissed the suit, and on appeal the Subordinate Judge gave plaintiff a decree for possession. The contentions urged in second appeal are:—

(1) That the alienations by way of sale, by the natural uncle who was not the *de jure* guardian of plaintiff were void, and

(2) that the suit was barred by limitation with respect to the items covered by Ex. IV, as defendants were placed in possession prior to the date of Ex. IV.

The second appeal first came on for hearing before Ramesam, J., who referred it to a Bench "as the matter (which forms the subject matter of the first contention) was not concluded by authority so far as the Hindu Law is concerned."

It was argued before us that under the Hindu Law, the father, the mother and failing them the King, were the guardians of an infant; that no other relation was the guardian; that *de facto* guardians were no better than intermeddlers; and that alienations by *de facto* guardians were void as was laid down by the Privy Council in *Imambandi* v. *Mutsaddi* (2). That case related to a Muhammadan minor; their Lordships based their decision on Muhammadan Law texts; and so far as I am able to see, I do not find reference in the judgment to any decided cases concerning Hindu minors. Alienations by the *de facto* guardians of Hindu minors have come up very frequently before Courts, and our attention has not been directed to any decided case in which it has been held that such alien-

(14) 8 M. I. A. 319; 4 W. R. P. C. 71; 1 Suth. P.C. J. 37, 1 Sar. P. C. J. 785; 19 E. R. 552.

ation was *per se* void, apart from any question as to whether it was for legal necessity or not. It was said that this may be due to the fact that the point was not raised in those cases but, as observed by Maclean, C. J., in *Mohammad Mondul* v *Nafur Mondul* (3) "the absence of judicial authority suggests that the point has not been regarded as open to serious argument."

So far as Hindu Law goes, it appears to me that there is nothing in it which limits guardianship only to the father, the mother, and failing them the king. Macnaghten in his Principles and Precedents of Hindu Law says "that in default of the father and mother an elder brother of a minor is competent to assume the guardianship of him In default of such brother the paternal relations generally are entitled to hold the office of guardian, and failing such relations, the office devolves on the maternal kinsmen, according to their degree of proximity, but the appointment of guardian universally rests with the ruling power." (See Vol. I, pages 103, 104). And in Vol II (Precedents) Case III at page 204 gives the opinion of parents based on the authority of the Dayabhaga Dayatatwa, Dayakrama Sangraha that the husband's sister's son is the guardian of a childless widow, who is a minor It was said that in the absence of the father and mother, "recourse must be had to the Court (representing the rights of the king which are paramount to even the rights of the parents where there is no natural guardian alive" as observed by Sadasiva Iyer, J, in *Thayammal* v *Kuppamma Koundan* (12). But it must be remembered that the learned Judge in the previous sentence includes among natural guardians the elder brother and the direct male and female ancestors of the minor, although according to respondents' Vakil, they would not be the natural guardians under Hindu Law. Applications to Courts can only be made under the Guardians and Wards Act, and it has been held by a Full Bench of the Calcutta High Court in *Ram Chunder Chuckerbutty* v. *Brojonath Mozumdar* (15) that this act would not affect or alter any provision of Hindu Law as to guardians who do not avail themselves of the act It is true that in that case the person who acted as guardian of the minor was the mother; but this circumstance would not, in my opinion, make any difference. Coming to decided cases, it was held in *Mohamud Mondul* v *Nafur Mondul* (3) on the authority of the Privy Council case in *Hunooman Persand Panday* v *Babooee Munraj Koonweree* (1) that a sale by a *de facto* guardian (it was the grandmother, in case of necessity) was valid. And in *Arunachella Reddi* v. *Chidambara Reddi* (8) White, C. J, and Benson, J, held that "it is well settled that an alienation may be validly made by a *de facto* guardian (assuming, of course, the necessity)" In *Tirapayya Mallidi* v. *Ramaswami* (16) it was held that natural mother was a "lawful guardian" for the purpose of s 21 of the Limitation Act, even though there was a testamentary guardian named in the Will of the adoptive father who was unwilling to act In *Nathuram* v *Shoma Chhagan* (6) a debt contracted by the father's cousin for necessary purposes was held to bind the owner Although it is no authority in the sense of its being a judicial decision, I may state that in *Adhar Chandra Dutt* v *Kirtivasa Birage* (4) such an eminent lawyer as Dr Rash Behary Gosh conceded that the powers of a *de facto* guardian (of a Hindu) were the same as those of a *de jure* guardian Our attention was drawn to the observations of Sadasiva Iyer, J in *Thayammal* v. *Kuppanna Koundan* (12) wherein the learned Judge holds that "Under Hindu, Law, nobody else than the father and mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor) is entitled as a matter of natural right to be and to act as a guardian of a minor person and properties" In that case the alienation by the paternal aunt was found to be "for no necessity" and the second appeal could have been decided only on this finding without considering the question under Hindu Law. I may also state that the "probable exceptions" which the learned Judge recognises, supports the view that guardianship under the Hindu Law is not confined only to the father, mother, and the king, as contended for by respondent's Vakil. The learned Judge relies on the decisions of the Calcutta High Court *Kristo Kissor Neoghy* v. *Kadermoye Dossee* (17) and *Bhikno Koer* v. *Chamela Koer* (18) in support of his view. They were both cases in which the Court was moved

(15) 4 C. 929; 4 C. L. R. 247; 4 Ind. Jur. 343; 2 Shome L. R. 212; 2 Ind. Dec. (N. s.) 568.

(16) 19 Ind. Cas. 362; 24 M. L. J. 428, (1913) M. W. N. 364.

(17) 2 C L. R. 583

(18) 2 C. W. N. 191.

to appoint a guardian, and there was no question as to the binding nature of an alienation made by *de facto* guardian. It may here be stated that the case in *Mohanand Mondul* v. *Nafar Mondul* (3) is referred to with approval by Sadasiva Iyer, J., *Vembu Iyer* v. *Srinivasa Iyengar* (7). Reference was made to a case in *Nalannad* v. *Panbirampare Ravuni Nair* (13) where a Single Judge of the Court held that a *de facto* guardian of a Hindu Nambudri minor a (step-mother) was no better than an intermeddler, and had no right to represent a minor. It does not appear that any of the cases referred to here were brought to the notice of the learned Judge. Decisions under the Muhammadan Law have no bearing on the present question; and I am clearly of opinion that the right of a *de facto* guardian to deal with the property of a Hindu minor has been recognised by our Courts ever since the decision of the Privy Council in *Hunoomanpersand Panday* v. *Babooee Munraj Koonweree* (1) provided the alienation was for necessity.

I may here state that in the present case the *de facto* guardian was the maternal uncle who took charge of the minor after his mother's death; and the evidence of D. W. No. 1 is to the effect that the parternal aunt with whom the minor was for a time was not in a position to maintain herself. So far as Hindu society in South India goes the maternal uncle is treated as the closest relation of a person next to his father and mother; and at all ceremonies at which presents are given, it is his that is first handed over.

Appellant's Vakil next contended that the alienations now sought to be set aside were ratified by plaintiff; and that they were, therefore, valid: apart from any question of maternal uncle being only the *de facto* guardian. Exhibits II and III are two letters passed on by plaintiff to the vendees on 9th November 1918, wherein he approved of the sale-deeds of the dates 7th October 1913 and 1st March 1907. That such a ratification would make the alienation binding will be clear from the decision in *Chetty Colum Comara Vencatachella Reddyer* v. *Rajah Rungasawmy Streemunth Iyengar Bahadoor* (14).

It was also urged before us that so far as the alienation under Ex. IV went, the suit was barred by limitation, as possession was, as stated in it, given before its date (28th February 1907); that the evidence was that it was given during the previous cultivation season (August 1906); and that time ran from August 1906. The question under Art 144 of the Limitation Act would be, when the possession became adverse to the plaintiff. The District Munsif held that it became adverse when possession was given, but the Sub-Judge did not consider this question. Since possession was given in view of a contemplated sale, it cannot be said that it became adverse to the vendor from the date it was given in case the sale was held not binding on the minor.

The sale to the father of defendants Nos. 1 to 3 has been found by both Courts to be binding to the extent of Rs. 275, and the sale to the 5th defendant has been held to be wholly binding. In my view the effect of the ratification evidenced by Ex. III is to make the sale to the father of defendants Nos. 1 to 3 wholly binding on plaintiff.

I would, therefore, allow the appeal, and reversing the decree of the Court below, dismiss the suit with costs throughout.

V. N. V. *Appeal allowed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 240 OF 1925.

November 25, 1925.

Present:—Mr. Justice Stuart, Chief Judge, and Mr. Justice Hasan.

BAJRANG BALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat MAHRAJIA—PLAINTIFF—RESPONDENT.

Adverse possession—Mortgagor and mortgagee—Acquiescence.

As between the mortgagor and the mortgagee neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption, will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem. [p. 833, col. 1]

Khiarajmal v. *Daim*, 32 C. 296; 9 C. W. N. 201; 2 A. L J 71, 7 Bom. L. R. 1; 1 C L. J. 584, 32 I. A. 23, 8 Sar P. C. J. 734 (P. C), followed.

Appeal from a decree of the Subordinate Judge, Fyzabad, in Remand Appeal No. 78 of 1933, dated the 3rd March 1925, upholding that of the Munsif, Sultanpur, in Regular Civil Suit No. 45 of 1923, dated the 10th of April 1923.

Mr. *Radha Kishan*, for the Appellants.

Mr. *H. K Ghose* and Mr. *M. H. Qidiai* for Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—This is a defendants' appeal in the suit brought by the respondent for redemption of the mortgage of the 14th of April 1881 in respect of a 4-annas share in village Jalili, *Pargana* Jagdispur, in the District of Sultanpur. This mortgage was made by *Musammat* Gulaba in favour of one Chauharja Bakhsh *Musammat* Gulaba is now represented by her daughter, *Musammat* Maharajia, the plaintiff-respondent and the defendants-respondents are the representatives of the original mortgagor, Chauharja Bakhsh. There were several defences to this simple suit for redemption but they have all been set at rest by conclusive decisions of this Court and of the Courts below except the defence that the claim for redemption was barred by the 12 years' adverse possession of the mortgagee and his representatives over the mortgaged property.

The lower Court in disposing of this defence observes that only a feeble and short argument was advanced in support of that plea. We can say the same of the arguments addressed to us. Our attention was drawn to certain proceedings which arose in the year 1893 on the application of *Musammat* Gulaba in the Courts of Revenue, dated the 17th of August 1893 by which she prayed for the entry of her name in respect of the property in suit in the column of proprietors. The predecessor-in-interest of the defendants made a statement in reply to *Musammat* Gulaba's prayer that his father's name had stood in the *khewat* in respect of the entire village and that since the death of his father the entry had been made in his own name. We do not think that these events have the effect of converting the mortgagee's possession into that of hostile possession as against the interests of the mortgagor The possession originally and admittedly commenced under the contract of mortgage of the 14th of April 1881. "As between the mortgagor and the mortgagee neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem." *Khairajmal* v. *Daim* (1). We conceive no evidence of release of the equity of redemption in the present case.

The appeal fails and is dismissed with costs.

N H *Appeal dismissed.*

(1) 32 C 296, 9 C W N 201, 2 A L J 71, 7 Bom L R 1, 1 C. L J 584, 32 I A 23, 8 Sar P. C J 734 (P C)

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 86 OF 1925.

AND

CIVIL REVISION PETITION No. 147 OF 1925.

September 8, 1925.

Present—Justice Sir Charles Gordon Spencer, Kt., and Mr. Justice Madhavan Nair

S R SUBRAMANIA AIYAR—

DEFENDANT No. 1—APPELLANT IN A. A. O. No. 86 OF 1925 AND PETITIONER IN C. R. P. No 147 OF 1925

versus

L. A. KRISHNA IYER—PLAINTIFF—

—RESPONDENT IN BOTH.

Civil Procedure Code (Act V of 1908), s 47, O XXI, rr 57, 64, 90 -Execution of decree—Sale without attachment, validity of—Application to stay sale by reason of want of existing attachment, dismissal of—Appeal, whether lies

Per *Spencer, J*—An order of an Executing Court dismissing an application by a judgment-debtor to stay an auction-sale in execution of a money-decree on the ground that there is no subsisting attachment on the property, is of an interlocutory nature and is not appealable [p 834, col 2]

Where the sale has taken place, the judgment-debtor's remedy lies in applying to the Court under r 90 of O XXI, C P C., to have the sale set aside. [p 834, col 1]

Per *Madhavan Nair, J*—An attachment is a measure resorted to for the protection of the decree-holder and the purchaser against intermediate alienation and is only a step to be taken by the Executing Court in bringing to sale the properties of a judgment-debtor If this step is omitted, the omission amounts only to an irregularity and the sale can be set aside only if it has resulted in substantial loss. The absence of attachment does not affect the jurisdiction of the Executing Court to sell the property. [p. 837, col 1]

Sharoda Moyee Burmonee v *Wooma Moyee Burmonee*, 8 W R 9, *Muniappa Naik* v. *Subramania Ayyar*, 18 M 437, 5 M L J. 60, 6 Ind. Dec. (N. s) 654, *Velayutha Muppan* v *Subramaniam Chetti*, 18 Ind Cas 498, 24 M L. J. 70, 13 M L T 207, (1913) M. W. N. 136 and *Sivakolundu Pillai* v *Ganapathy Iyer*, 37 Ind. Cas. 964, (1917) M. W. N 89, followed.

Appeal against and petition under s. 115 of Act V of 1908 and s. 107 of the Government of India Act to revise an order, dated the 29th November 1924, of the Court of the

Subordinate Judge, Coimbatore, in E. A. No. 732 of 1921, in E. P. R. No. 35 of 1924 in O. S. No. 117 of 1918.

Mr. *T. R. Venkatarama Sastriar* (Advocate-General), for the Appellant.

Mr. *T. R. Ramachandra Iyer*, for the Respondent.

JUDGMENT.

Spencer, J.—The respondent having attached the appellant's immoveable properties before judgment, obtained a decree for Rs. 2,224-12-0 against him and his mother on 28th January 1919. Afterwards he applied through E. P. No. 35 of 1924 for sale of the properties which were attached before judgment. In the interval two petitions for executing the same decree had been rejected owing to the execution petitioner's fault The appellant filed C. M. P. No. 722 of 1924 on November 18th 1924, asking (1) that the auction-sale fixed for November 24th, 1924, should be stopped, (2) that the whole proceedings in the pending E. P. R. No. 35 should be vacated, and (3) that E. P. R No. 35 should be dismissed. The Subordinate Judge of Coimbatore refused these reliefs and dismissed the C. M. P. From that order the appellant has filed an appeal and a revision petition to the High Court on March 2nd, 1925. The sale took place on February 9th, 1925, and awaits the lower Court's order of confirmation under O. XXI, r. 92, C. P. C. The appellant's Vakil contends that the attachment of the property ceased by virtue of O. XXI, r. 57, upon the dismissal for default of the prior execution petitions, the attachment before judgment being good only until the first execution petition after the passing of the decree was dismissed [*Vide Meyappa Chettiar* v *Chidambaram Chettiar* (1)], and that the sale of the property without a previous subsisting attachment was illegal

In my opinion there is a short answer to this appeal and the accompanying revision petition. The sale having already taken place the judgment-debtor's remedy lies in applying under r. 90, of O. XXI to have it set aside, and from the order to be passed by the Executing Court he will have a right of appeal to this Court under O. XLIII, r. 1 (*j*), C. P. C.

It is too late to stop the sale after it has taken place and at the same time it would be premature on the part of this Court to set aside the sale, the power to do so being vested in the first instance in the Executing Court. The appellant did not obtain an order from the High Court to stay the sale before it was concluded. We should not make a declaration or pronouncement of opinion as to the validity of a sale while proceedings for confirming or setting it aside are pending in the Court below, and there is no room for our interfering otherwise with the course of the execution petition which will be finally disposed of only when final orders are passed under r. 92 and when it is known to what extent the decree has been satisfied. The fact that there is no right of appeal provided in the C. P. C. against orders under O. XXI, rr. 64 and 66 for sale of property indicates that such orders are of an interlocutory nature. The appealability of an order for sale was raised in *Namuna Bibi* v. *Roshun Meah* (2) but not argued with assurance *vide* page 486*. The learned Judges considered that an appeal lay under s. 47, C. P. C., as it was a question between the parties in execution. This Court has applied s. 47 to applications to set aside a sale that has been illegally held, apart from irregularities in publishing or conducting it [*vide Anantharama Iyer* v. *Vettath Kuttimalu Kovilamma* (3), and *Mathiah Chettiar* v. *Bawa Sahib* (4).] But the petition of November 18th, out of which this appeal and revision petition have arisen, was not a petition to set aside a sale, as no sale had been held when it was presented. The order of the Subordinate Judge dismissing it was passed before any sale was held and thus it cannot be treated as an order upon an application under s. 47 to set aside an illegal sale. The grounds upon which the judgment-debtor tried to stop the sale were that the previous execution petitions were dismissed and that their dismissal put an end to the attachment. He did not then raise the contention which he has raised here, *viz.*, that the attachment before judgment only enures for the first execution application after decree. If the judgment debtor had put forward this objection before the sale took place, the decree-holder might have overcome the difficulty by applying for a fresh attachment of the lands. After the

(1) 79 Ind. Cas. 144; 46 M. L. J. 415; 34 M. L. T. 118; (1924) M. W. N 392; A. I. R. 1924 Mad 494; 47 M 483.

(2) 9 Ind. Cas. 558; 38 C. 482, 15 C. W. N. 428; 13 C. L. J. 621.

(3) 34 Ind. Cas. 829; 30 M. L. J. 611; 19 M. L. T. 357, 3 L. W. 504.

(4) 26 Ind. Cas. 46; 27 M. L. J. 605; 19 L. W. 969.

*Page of 38 C.—[*Ed.*]

sale had been held, it does not appear that he made an attempt to have the sale set aside by the Sub-Judge under s. 47 as illegal for want of a fresh attachment upon this ground, which has not been considered in the Judge's order of November 29th 1924, and the present appeal cannot be treated as an appeal against an order which the Sub Judge might have made, if such a contention had been put forward at the proper time. For these reasons, I consider that the only order we can make is to dismiss the appeal with costs. The revision petition being only an alternative remedy to the appeal is dismissed without costs

Madhavan Nair, J.—This appeal arises from an application made by the appellant-judgment-debtor objecting to the sale of certain properties in execution of the decree in O. S. No. 117 of 1918, Sub-Court, Coimbatore, on the ground that the properties in question had not been attached prior to the order for sale. The decree-holder, the respondent before us, had obtained a decree for money against the appellant and had attached the said properties before judgment. After the decree he filed two successive applications for execution which were returned by the Court for making some corrections and for the production of some papers. As the directions of the Court were not complied with these petitions were eventually dismissed. The decree-holder afterwards filed E. P. No. 35 of 1922 for the execution of his decree by sale of the properties and the sale was fixed for the 24th November 1924. When the appellant became aware of the said execution petition he applied to the Sub-Court in E. A. No. 722 of 1924 praying "to stop the sale fixed for 24th November 1924 and to vacate the whole proceedings in E. P. R. No. 35 of 1924 and to dismiss the petition and to pass such other and further orders as may be just and necessary." The Subordinate Judge held that since the two petitions which were dismissed for non-compliance with the Court's order could not be considered as execution petitions in accordance with law, their rejection could not operate to vacate the existing attachment under O. XXI, r. 57, C P. C., and that, therefore, no re-attachment was necessary to bring the properties to sale. In this view he held that there was no need to stop the sale or to dismiss the execution petition (E. P. R. No. 35 of 1924) and that the respondent has rightly brought the attached properties to sale. The properties have since been sold and purchased by the decree-holder

It is urged by the appellant that the petitions which were dismissed were execution petitions in accordance with law, that since they were dismissed for the default of the decree-holder, the attachment of the properties had ceased under O. XXI, r. 57, C. P C, and that as no further attachment was made, the order of the Subordinate Judge to proceed with the sale of the properties should be set aside Besides supporting the order of the learned Judge on the reasons contained in it, the respondent in this Court has put forward an additional ground in further support of the order, namely, that even if the attachment has ceased under O. XXI, r. 57, C. P C, the failure to re-attach the properties prior to the sale is only an irregularity and not an illegality vitiating the sale, and that unless the Court is satisfied that the petitioner sustained substantial injury by reason of such irregularity the Court should not set aside the order. He has also argued that no appeal lies against the order passed by the Subordinate Judge under s 47 of the C. P. C.

The questions for our consideration arising upon the above contentions of the respective parties are: (1) Are the petitions dismissd for default by the Subordinate Judge for non-compliance with his directions execution petitions in accordance with law? (2) Does O. XXI, r. 57, C. P. C, apply to the facts of this case? (3) If questions Nos. 1 and 2 are decided in favour of the appellant, is the sale of properties without an attachment void *ab initio* or is absence of attachment prior to sale only an irregularity? (4) Does an appeal lie against the order?

As regards question, No. 1, I have no doubt the opinion of the Subordinate Judge is clearly wrong. The respondent's learned Vakil himself has only very faintly attempted to support it. I have carefully examined the second petition dismissed for default by the Subordinate Judge. I am satisfied that it has complied with all the requirements damanded by the Code and that it is an application in accordance with law under O. XXI, r. 17, C. P. C. The paper that was called for but not produced for want of time, *viz.*, the copy of the attachment list prepared by the *amin*, was not, as was seen subsequently absolutely necessary for proceeding with the execution of the decree

in this case and it was found, when requisition for the same paper was made in E. P. No. 35 of 1924 also, and on which sale of the properties was afterwards ordered that the document called for had been destroyed. In fact, the order for sale of the properties now objected to was passed in E. P. No. 35 in the absence of this document. In these circumstances I am satisfied that the applications for execution were really in accordance with law and the Court could have passed orders on them to effectively carry out execution.

In the view that the applications dismissed for default are applications in accordance with law, the next question for us to consider is whether O. XXI, r. 57, C. P. C., applies to the facts of this case. According to that rule, when any property has been attached in execution of a decree and the application filed for execution has been dismissed by reason of the decree-holder's default, such dismissal will have the effect of vacating the attachment. In this case, as already mentioned, the properties had been attached before judgment. Order XXXVIII, r. 11, C. P. C., states that when a decree is subsequently passed it shall not be necessary upon an application for execution of such decree to apply for re-attachment of property. It has been held in *Meyyappa Chettiar* v. *Chidambaram Chettiar* (1) that O. XXI, r. 57, C. P. C., applies to cases where property had been attached before judgment and that if an execution application filed after the passing of the decree has been dismissed on account of the decree-holder's default, then the attachment ceases. Applications for executions in this case having been dismissed by reason of the decree-holder's default, it follows from the authority of this ruling that the attachment existing on the properties ceased and these, when ordered to be sold, were not under attachment. This conclusion renders it necessary to decide the third question raised by the parties, namely, whether the sale of properties in execution without an attachment is void *ab initio*.

In *Sharoda Moyee Burmonee* v. *Wooma Moyee Burmonee* (5) it was held by Jackson, J., that an attachment was not an essential preliminary in an execution sale. The reason for this view is thus stated by the learned Judge. "Attachment is a measure resorted to by the decree-holder for his own protection and the protection of purchasers of the property to be sold, and it consists in the case of immoveable property merely in a prohibition by the Court by which the judgment-debtor is restrained from alienating the property previous to the sale. This, therefore, being merely a measure for the protection of the decree-holder and the purchasers of the property, the absence of it is not, it appears to me, an objection which the judgment-debtor is competent to raise." In *Baboo Luchmeeput* v. *Baboo Lekraj Roy* (6) the same Court held that a sale without attachment was irregular; but, as pointed out in *Kishory Mohun Roy* v. *Mahomed Mujaffar Hussain* (7) "as that was a case of sale of moveable property, and the suit was one for damages, the Court was not called upon to decide whether the sale should be regarded as a nullity." Though the decision in *Sharoda Moyee Burmonee* v. *Wooma Moyee Burmonee* (5) was under the C. P. C. of 1859 which did not contain a provision corresponding to O. XXI, r. 64, of the present C. P. C., yet the reasoning of the learned Judge has been accepted and applied in deciding cases both under the Act of 1882 and under the present Code by our High Court. In *Muniappa Naik* v. *Subramania Ayyan* (8) on the ground that "the object of attachment is to take the property out of the disposition of the judgment-debtor" the learned Judges, Muthusami Iyer and Best, JJ, held that the omission to attach under s. 274 of Act XIV of 1882 was only an irregularity.. In *Ramasami Naik* v. *Ramaswamy Chetti* (9) it was held for the same reason that the sale in execution of a decree is not invalid although there has been no attachment before sale as required by the Code. These decisions and the decisions in *Kishory Mohun Roy* v. *Mahomed Mujaffar Hussain* (7) and *Sheodhyan* v. *Bholanath* (10) were followed by Sankaran Nair and Sadasiva Iyer, JJ., in *Velayutha Muppan* v. *Subramanian Chetti* (11) where they held that a sale of immoveable property in execution of a decree without the preliminary attachment is not null and void. This was a

(5) 8 W. R. 9.

(6) 8 W. R. 415.

(7) 18 C. 188; 9 Ind. Dec. (N. S.) 126.

(8) 18 M. 437, 5 M. L. J. 60; 6 Ind. Dec. (N. S.) 654.

(9) 30 M. 255 at p. 264; 2 M. L. T. 167, 17 M. L. J. 201.

(10) 21 A. 311, (A. W. N. (1899) 84, 9 Ind. Dec. (N. S. 907.

(11) 18 Ind. Cas. 448; 24 M. L. J. 70; 13 M. L. T. 207; (1913) M. W. N. 136

decision under the new Code. The latest reported decision of this Court is to be found in *Sivakolundu Pillai* v *Ganapathy Iyer* (12) where the learned Judges held that "attachment is only a step to be taken by the Executing Court in bringing to sale the properties of a judgment-debtor. If such a step is omitted the sale can be set aside only if it has resulted in substantial loss" and the absence of attachment does not affect the jurisdiction of the Executing Court to sell the immoveable property Our High Court has thus held in a series of decisions both under the old Code and the present one that the absence of attachment does not affect the jurisdiction of the Executing Court to sell the property and that the sale on that account is not null and void In *Sheodhyan* v *Bholanath* (10) the learned Judges of the Allahabad High Court after an elaborate consideration of the object of attachment have also arrived at the same conclusion.

As against these decisions which, if accepted, would entail the dismissal of his appeal the learned Advocate-General relies upon a recent decision of the Calcutta High Court in *Panchanan Das* v. *Kunja Behari* (13) to the effect that a Court has no jurisdiction to sell a property in execution which had not been duly attached. The learned Judges base their conclusion upon a decision in *Sorabji Coovarji* v *Kala Raghunath* (14) some observations of the Privy Council in *Raja Thakur Barmha* v *Jiban Ram Marwari* (15) and upon the terms of O XXI, r. 64, C P C It is to be noticed that the learned Judges do not in their judgment refer to the earlier decisions of their Court in *Kishory Mohun Roy* v. *Mahamed Mujaffar Hussain* (7) and *Hari Charan Singh* v. *Chandra Kunwar Dey* (16) which held that a sale is not to be considered as a nullity merely by reason of the absence of any attachment.

The observations of Scott, C. J , in *Sorabji Coovarji* v. *Kala Raghunath* (14) that "property can only be brought to sale after it has been duly attached and if the attachment came to an end upon the payment into Court on the 22nd of September 1909 the property was not duly attached at the time of the sale in January 1910" no doubt support the contentions of the appellant. We do not find in the course of the judgment any discussion of the case-law bearing on the question, nor an answer to the reasoning on which the view of the Madras and the Allahabad High Courts is based, namely, that an attachment is a measure resorted to for the protection of the decreeholder and the purchaser against intermediate alienation, and is only a step to be taken by the Executing Court in bringing to sale the properties of a judgment-debtor.

It is conceded in the judgment that the decision of the Privy Council is not exactly in point, but the following remarks of Lord Moulton are referred to as indicating the view of their Lordships that the property can only be sold when it has been duly attached. "Their Lordships are of opinion that this is a very plain case. That which is sold in a judicial sale of this kind can be nothing but the property attached, and that property is conclusively described in and by the schedule to which the attachment refers" The facts of the case and their Lordship's decision will clearly show that these observations only mean that a certificate of sale cannot be granted in which the property described is different from the property attached and specified in the proclamation of sale. In that case the judgment debtor owned 16 annas share of a *mahal* of which 10 annas share was mortgaged while the remaining 6 annas were free from any mortgage The proclamation of sale described the property to be sold as 6 annas share included in the mortgage. This was the property that was attached and sold in auction. An application was made on behalf of the auction-purchasers to obtain a sale certificate for the 6-annas share purchased by them at the auction. In making the application they alleged that a mistake had been made in the schedule of the property to be sold in that the word "not" had been omitted from the description of the 6 annas in question and that the property should have been described as being 6 annas not mortgaged They claimed that their certificate should be made out as being a certificate of the purchase by them of the 6 unencumbered annas instead of, as described in the schedule, "6 annas subject to the existing mortgage." The Subordinate Judge granted

(12) 37 Ind Cas 964, (1917) M W N 89
(13) 42 Ind Cas 259
(14) 12 Ind Cas 911, 36 B 156, 13 Bom. L. R 1193
(15) 21 Ind Cas 936, 41 C 590, 18 C W N 313, 15 M L T 137, 12 A L J 156, 19 C L J 161, 26 M L J 89, 16 Bom L R 156, (1914) M W. N 118, 41 I A 38 (P C)
(16) 34 C. 787, 11 C. W. N. 745.

them a certificate in the form in which they desired. This order upheld by the High Court was set aside by the Privy Council. After the extract from the judgment already referred to, their Lordships state. "In the present case the property was 6 annas subject to an existing mortgage. The effect of the certificate of sale granted by the order of the Subordinate Judge is to make the sale that of a property not attached, namely, the 6 unencumbered annas, a property which could not be sold in such proceedings inasmuch as it was not the property attached." Later on their Lordships say "in this case we have to deal with identity and not description." Their Lordships conclude thus :—"It was beyond the powers of the Court to make such an order inasmuch as there was no power to sell in these judicial proceedings the property thus certified to have been purchased." It will thus appear that the extract quoted from their Lordships' judgment in *Panchonan Das* v. *Kunja Behari* (13) was only meant to indicate that the Court has no power to include in the sale certificate properties not attached and sold. Their Lordships were not called upon to consider directly the question whether the absence of prior attachment will deprive a Court of its jurisdiction to sell the properties in execution of a decree. Thus understood, it appears to me that the dictum of the Privy Council cannot be relied upon in support of the appellant's arguments.

The terms of O. XXI, r. 64, C. P. C., no doubt show that the attachment would ordinarily precede a sale of the properties in execution. But, for the reasons mentioned, the decisions above referred to have held that the absence of such attachment would not vitiate a sale.

In *Macnaghten* v. *Mahabir Pershad Singh* (17) the question whether the notice of attachment not having been properly published would affect the sale or be an irregularity in conducting the sale, was raised before the Privy Council but was not gone into, inasmuch as that point was given up by the applicant at the trial before the Judge. In the absence of a definite pronouncement by their Lordships of the Privy Council I am not inclined to follow the decisions in *Panchanan Das* v. *Kunja Behari* (13) and *Sorabji Coovarji* v. *Kala Raghunath* (14) in preference to the long course of decisions of this Court. Following these decisions the sale in this case can be set aside only if the Court is satisfied that the appellant has sustained substantial injury by reason of the irregularity complained of, namely, the absence of attachment. It has not been argued before us that he has sustained any such substantial injury and he has also not asked us to adjourn the hearing of this case till the disposal of the application filed by him in the lower Court. It, therefore, follows that this appeal will have to be dismissed.

As I have decided to dismiss the appeal on the merits, I do not express any opinion as regards the "appealability" of the order passed by the Subordinate Judge.

In the result, the miscellaneous appeal is dismissed with costs. The connected civil revision petition is also dismissed but without costs. No orders are necessary on the stay petition.

V. N. V. *Appeal and petition dismissed.*

(17) 9 C. 656; 11 C. L. R. 494; 10 I. A. 25; 7 Ind. Jur 164; 4 Sar. P. C. J. 417; 4 Shome L. R. 285; 4 Ind. Dec. (N S.) 1086 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 179 OF 1923.

September 28, 1925.

Present :—Mr. Justice Viswanatha Sastri.

MEENAKSHISUNDARA NACHIAR—DEFENDANT—APPELLANT

versus

AL. V. R. P. VEERAPPA CHETTIAR—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s 70—Contribution—Common channel, repair of—Party benefited, liability of, to contribute.

A common channel which irrigated the lands of the plaintiff and the defendant was repaired by the plaintiff after giving notice to the defendant and the latter was benefited by the repairs: it was also found that the plaintiff did not intend to bear all the expenses of the repairs himself :

Held, that the plaintiff was, under s. 70 of the Contract Act, entitled to obtain contribution from the defendant in respect of the cost of repairs

Appeal against a decree of the Court of the Subordinate Judge, Ramnad at Madura, in A S. No. 100 of 1921 (A. S. No. 1242 of 1920 of the District Court, Ramnad at Madura), preferred against that of the Court of the Additional District Munsif, Manamadura, in O S. No. 355 of 1919 (O. S. No. 321 of 1919 on the file of the Court of the Principal District Munsif, Manamadura).

Messrs. *B. Sitaram Row* and *S. R. Muthusami Iyer*, for the Appellant.

Mr. *K. Bhashyam Iyengar*, for the Respondents.

JUDGMENT.—Second appeal by defendant against the decree of the Subordinate Judge, Ramnad, in A. S. No. 100 of 1921.

The only question which has to be considered in this appeal is, whether the Courts below ware right in decreeing the plaintiff's claim for contribution based upon s. 70 of the Indian Contract Act. A common channel irrigated the lands of the plaintiff and the defendant. The case of the plaintiff was that he repaired this channel after informing the defendant, and that the defendant was bound to contribute towards the repairs made. Both the Courts found that the repairs were done, that the defendant was benefited by the repair, and that the plaintiff did not intend to bear all the expenses himself.

It was urged before me on the authority of the decision in *Sundara Aiyar* v *Ananthapadbhanaba Aiyar* (1) that the plaintiff could not succeed, because he was also benefited by the act. Observations in *Viswanadha Vijia Kumara Bangaroo* v. *R. G. Orr* (2) were also relied upon Both the Courts have followed *Damodara Mudaliar* v. *Secretary of State for India* (3) which was a similar case. On the findings of the first Court and also on the findings of the lower Appellate Court, it appears to me to be clear that all the circumstances needed for the application of s 70 of the Contract Act have been found to exist.

I, therefore, dismiss the second appeal with costs.

V. N. V. *Appeal dismissed.*

(1) 70 Ind. Cas 405; (1922) M W N 608, 16 L W 231, 31 M L. T 164, 43 M L J 271, A I R. 1923 Mad 64

(2) 45 Ind Cas 786

(3) 18 M 88, 4 M L J 205, 6 Ind Dec (N s) 410.

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 720 OF 1925.

November 26, 1925.

Present—Mr. Justice Campbell.

UMRAO SINGH AND ANOTHER—JUDGMENT-DEBTORS—DEFENDANTS—APPELLATNS

versus

MESSRS. BENI PARSHAD-MEHR CHAND—DECREE-HOLDERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s 5, Sch I, Art 166 — Civil Procedure Code (Act V of 1908), O XXI, r 90— Execution of decree—Sale, application to set aside— Limitation, extension of

The period prescribed under Art 166 of Sch. I to the Limitation Act for an application to set aside a sale held in execution of a decree cannot be enlarged under the provisions of s 5 of the Limitation Act

Miscellaneous first appeal from an order of the Subordinate Judge, First Class, Lahore, dated the 22nd January 1925.

Lala *Amin Chand Mehta*, for the Appellants.

Mr. *Shamair Chand* and Lala *Parkash Chand*, for the Respondents.

JUDGMENT.—This is an appeal by the judgment-debtor against an order disallowing his objections to the sale in execution of immoveable property and confirming the sale.

A preliminary point is raised by the respondent that the objections made by the appellant under O. XXI, r. 90, C. P. C, were not presented within time and therefore, there were no such objections and the Court was bound to confirm the sale under O. XXI, r 92, C P. C.

The period of limitation for an application under O XXI, r 90, is laid down in Art. 166, Limitation Act, and is thirty days from the date of sale The sale took place on the 20th of December 1924 and the objections were filed in Court on the 21st of January 1925, two days beyond time. It has been laid down frequently by this and other High Courts that the period prescribed under Art. 166 cannot be enlarged under the provisions of s. 5 of the Indian Limitation Act or otherwise. Presumably it could be enlarged under s 18 of the Limitation Act, but here neither in the objection petition nor in the present memorandum of appeal is any allegation of fraud made against the decree-holder or the auction-purchaser.

The preliminary objection must prevail and I accordingly dismiss the appeal with costs.

This decision will also cover Appeal No. 721 of 1925.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 299 OF 1922.

December 3, 1925.

Present:—Mr. Justice Walsh and Mr. Justice Kanhaiya Lal.

Maulvi MUHAMMAD AFZAL—PLAINTIFF—APPELLANT

versus

Maulvi MUHAMMAD MAHMUD AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—"Waqf," *meaning of—Grant in perpetuity*—"Waqf," *use of, in deed, effect of—Interpretation of Muhammadan Law—Jurists, difference among—Rule applicable.*

Waqf in its primitive sense means detention, but it implies detention of a thing in the implied ownership of the Almighty God in such a manner that its profits may revert to or be applied for the benefit of mankind, and the appropriation is obligatory so that the thing appropriated or set apart can neither be sold nor given nor inherited. The essential condition is that it should be a settlement in perpetuity or in other words, the ultimate end must be one that cannot fail. The object of a *waqf* must be charitable, or if the *waqf* is made for the support of one's descendants, it must include an ultimate dedication for religious, pious or charitable purposes. [p 811, col. 1]

The mere use of the word "*waqf*" in an instrument cannot be separated from the context so as to convert a personal grant to a specified set of individuals into a public disposition. [*ibid.*]

A deed of grant provided that the grantees and their grand-children, generation after generation, should for ever enjoy the property except in so far that they would have no power to transfer or hypothecate the property or to grant leases thereof for a period exceeding five years.

Held, that the deed provided for a succession of life-estates without any ultimate dedication either to the poor or to any other charitable object recognised by the Muhammadan Law and that, therefore, it did not operate to create a valid *waqf* [*ibid.*]

When Muslim Jurists of authority express dissenting opinions upon some question, the Courts are at liberty to adopt that view which in their opinion is most in accordance with justice in the particular circumstances of the case. [p. 811, col. 2]

First appeal from a decree of the Subordinate Judge, Muzaffarnagar at Meerut, dated the 5th of May 1922.

Messrs. *Syed Muhammad Husain* and *M. A. Aziz*, for the Appellant.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.

Walsh, J.—This is an appeal from a judgment of the Subordinate Judge holding that a certain deed, dated the 27th of March 1880, purporting to be a deed of *waqf*, did not create a valid *waqf*. It is sufficient to say that this actual deed has already been on other occasions during the last seven years held to be invalid as a *waqf* by two subordinate Judges, one District Judge, and twice by two Judge Benches of this High Court, of one of which a member of this Bench was also a member. The last time it came before this Court was in 1923, when it was held to be a gift in favour of private individuals which the donor in the course of the document wrongly described as a *waqf*, by my Lord the present Chief Justice and Mr. Justice Piggott. The judgment in that case is reported as *Muhammad Afzal* v. *Muhammad Mahmood* (1). We agree with the view there taken, and in substance with the view taken by the Subordinate Judge in this case. Although the deed is in favour of a family of a pious teacher of the Muhammadan faith and not of the descendants of the donor, it seems to us that that distinction makes no difference, and that the deed offends against the decision of the Privy Council in the case of *Abul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowhdri* (2). But in any event the fact that this High Court has twice pronounced against it, would be sufficient to justify us in not differing from the view of the Court below. This appeal must be dismissed with costs including in this Court fees on the higher scale.

Kanhaiya Lal, J.—I wish to add a few observations as to the main question discussed at the hearing regarding the construction to be placed on the disposition made by Nawab Muhammad Mahmud Ali Khan of Chhatari in favour of the sons and daughters of his preceptor and their descendants on the 17th of March 1880. It is contended that the disposition was made in favour of persons who were from a religious point of view the object of veneration, and that the object of the disposition could validly be regarded as a religious or charitable object within the meaning of the Muhammadan Law to render the disposition a valid *waqf* of the property comprised therein. One of the essential conditions of a valid disposition by way of *wagf*, however, is that it must be made in perpetuity. *Waqf* in its primitive sense means detention; but it implies detention of a thing in

(1) 74 Ind Cas. 343; 21 A. L. J. 595, A. I. R 1924 All 28

(2) 22 C. 619; 22 I. A. 76, 6 Sar. P. C. J. 572, 11 Ind. Dec. (N S.) 412 (P. C.).

the implied ownership of the Almighty God in such a manner that its profits may revert to or be applied for the benefit of mankind, and the appropriation is obligatory so that the thing appropriated or set apart can neither be sold nor given nor inherited (Baillie's Muhammadan Law, Vol 1, page 558). The essential condition is that it should be a settlement in perpetuity or in other words, the ultimate end must be one that cannot fail (*ibid* pages 565 and 566). The object of a *waqf* must be charitable; or if the *waqf* is made for the support of one's descendants, it must include an ultimate dedication for religious, pious or charitable purposes; and in that respect it differs from a gift to particular individuals or their descendants. In the case of a *waqf* in favour of descendants, if the descendants fail, the disposition is liable to terminate, and the essential condition, namely, perpetuity, also fails The instrument by which the disposition in this case was made provides that the grantees and their grandchildren, generation after generation, shall for ever enjoy the property without any limitation, except in so far that they shall have no power to transfer and hypothecate the property or to grant leases thereof for a period exceeding five years. In other words it lays down that the grantees and their heirs shall enjoy the benefits accruing from the property for the support and maintenance of themselves and their descendants and shall not be deprived of any part thereof in any way. It makes no provision as to what is to happen to the property if the descent at any time fails It provides in other words for a succession of life-estates without any ultimate dedication either to the poor or to any other charitable object recognised by the Muhammadan Law.

The learned Counsel for the plaintiff appellant argues that the mere use of the word "*waqf*" in the deed suggests perpetuity, and that the law would presume in such a case that if the descent fails, the poor shall be the ultimate object of the disposition. But on this point there is a wide difference of opinion between the different Jurists. Abu Hanifa and Muhammad declare that the *waqf* must expressly purport to be in perpetuity, and that if the object of the *waqf* fails, or is such that it may at any time fail, the *waqf* must be regarded as void. Abu Yusuf has however laid down that perpetuity will be presumed, if not stated, and that if the object of the *waqf* fails, it will result in favour of the poor. The views of the different Jurists have been summed up by the author of the Hedaya (Hamilton's Hedaya, Vol. II, page 341), and though it is said, the views of Abu Yusuf have found favour in Balkh and certain other countries (Baillie's Muhammadan Law, Vol I, page 567), it could be said that the use of the word *waqf* can be separated from the context so as to convert a personal grant to a specified set of individuals into a public disposition. As a general rule when Muslim Jurists of authority express dissenting opinions upon some question, the Islamic Courts presided over by the *Qazi* are vested with authority to adopt that view which in the opinion of the Presiding Officer is most in accordance with justice in the particular circumstances In the case of *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (3) that principle was accepted and applied, and considering that the disposition here in question was really intended to benefit certain specified individuals and their descendants without any reference to the ultimate fate of the property in case the descent failed it is reasonable to presume that it was intended thereby to grant successive life-estates rather than to create a permanent disposition of the property in the sense contended for on behalf of the plaintiff It is not possible in these circumstances to depart from the view which has been taken in previous cases in which this document came up for consideration I agree, therefore, in the order proposed

Z. K. *Appeal dismissed.*

(3) 16 I A 205 at p 215, 11 A 469, 5 Sar P C J 433, 6 Ind Dec (N S) 721 (P C)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 39 OF 1924.

June 22, 1925

Present:—Mr Findlay, Officiating J. C.

CHIMASHANI—PLAINTIFF—APPELLANT

versus

VENKATRAO—DEFENDANT—RESPONDENT.

Part performance, doctrine of, applicability of—Specific performance, agreement not capable of, effect of.

The doctrine of part performance has no applicability in the case of an agreement, specific performance of which cannot be had under law. [p. 843, col. 1.]

Appeal against a decree and judgment of the District Judge, Nagpur, dated the 2nd July 1924, in Civil Appeal No. 72 of 1924.

FACTS.—This was a suit to recover possession of occupancy field No. 75, area 1·99 acres, situated in *Mouza* Bahndewadi, Tahsil Ramtek. In 1318 *Fasli* the plaintiff leased out the village to Martand Bapuji Waikar for 19 years and in 1332, Martand Bapuji assigned his lease-hold rights for the unexpired term in favour of the defendant. Plaintiff alleged that she was the keep of Balkrishna Raghav and that the latter had given her the field in dispute along with certain other fields in tenancy; that in 1331, she had leased out the field in suit to one Pandu Gone for one year; that when on the expiry of Pandu's term of lease, she went to take possession of the field in dispute, defendant obstructed her and did not allow her to take possession of the said field.

Defendant admitted that plaintiff was the tenant of the field in suit prior to 1916, but he pleaded that in 1916 in satisfaction of the debt of Rs. 300 which she owed to Martand Bapuji Waikar, the then *thekedar* of the village, she surrendered the said field along with other fields to Martand Bapuji and delivered possession of the same to him; that when Martand Bapuji assigned his lease-hold rights to the defendant, he transferred possession of the field in suit along with other fields which he acquired by surrender from the plaintiff to the defendant and that the defendant was in possession of all those fields including the field in suit by virtue of the said transfer; that plaintiff had ceased to be a tenant of the field in suit ; that her right to recover the same was barred by limitation and that her suit was liable to be dismissed.

Plaintiff, in reply, admitted execution of the deed of surrender in favour of Martand Bapuji, but pleaded that it was nominal and never acted upon. She denied having given possession of the fields covered by the deed of surrender to Martand Bapuji and alleged that she was all along in possession of the said fields. She pleaded that she had been dispossessed by the defendant within two years prior to the date of suit and that her claim was consequently within time.

The Court below without going into the question as to whether the surrender in question was nominal or genuine and whether in pursuance of this surrender possession of the fields covered by it was transferred to Martand Bapuji held that the deed of surrender was inadmissible for want of registration and that consequently the alleged surrender could not be proved. It further held that plaintiff had been dispossessed within two years prior to suit and that consequently her claim was within time. On the strength of these findings, it decreed the claim of the plaintiff against the defendant who has now preferred this appeal.

Mr. *M. R. Bobde*, for the Appellant.

Mr. *W. H. Dhabe*, for the Respondent.

JUDGMENT.—The facts of this case are sufficiently clear from the judgments of the two lower Courts. The plaintiff-appellant has come up on appeal to this Court against the judgment of the lower Appellate Court, dated the 2nd of July 1924, remanding the case for a fresh trial to the first Court. This remand was largely made on the strength of the decision of their Lordships of the Privy Council in *Mahomed Musa* v. *Aghore Kumar* (1) and it is urged on behalf of the appellant that the learned District Judge failed to appreciate the restrictions which existed on the rule of " part performance " of a contract. It has, in the first place, been advanced on behalf of the appellant that here we are concerned with occupancy land which is only transferable under exceptional conditions and that the doctrine of " part performance " is, therefore, not applicable.

I know of no authority for this proposition as it stands. I have, however, been referred to the decisions in *Jogendra Krishna Roy* v. *Kurpal Harshi & Co.* (2) and in *Sanjib Chandra Sanyal* v. *Santosh Kumar Lahiri* (3). It is suggested that the lower Appellate Court has overlooked the circumstance that in the former quoted case Mookerjee, J., remarked as follows in this connection :—

" It is now well-established by a long series of decisions in this Court from *Bibi Jawahir Kumari* v. *Chatterput Singh* (4) *Syam Kishore Deo* v. *Umesh Chandra Bhata-*

(1) 28 Ind. Cas 930; 42 C. 801; 17 Bom. L. R. 420; 21 C. L. J. 231, 28 M. L. J. 548; 19 C. W. N. 250; 13 A L J 229; 17 M L. T 143; 2 L. W. 258; (1915) M W. N 621; 42 I. A. 1 (P C.).

(2) 68 Ind. Cas. 993; 49 C. 345; 35 C. L. J. 175; A. I. R. 1923 Cal. 63.

(3) 69 Ind. Cas. 877; 49 C. 507; 26 C. W. N. 329; A. I. R. 1922 Cal. 436.

(4) 2 C. L. J. 343.

charjee (5) and *Haripada Ghose* v. *Nirod Krishna Ghose* (6) that when in pursuance of an agreement to transfer property, the intended transferee has taken possession, though the requisite legal documents have not been executed and registered, the position is the same as if the documents had been executed, provided that specific performance can be obtained between the parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined. We, must then take it there was in law as in fact a tenancy for a term of three years and that the defendant Company were not entitled to terminate it by the notice of surrender dated the 27th February 1918"

Here, however, the position is somewhat different. The agreement in question was admittedly executed but, not having been registered, was inadmissible in evidence as such. The latter case quoted is of less help, for therein the plaintiff was suing for specific performance and that suit had necessarily to be dismissed. The principle laid down in *Jogendra Krishna Roy* v. *Kurpal Harshi & Co* (2) however, seems to be undoubtedly applicable to the present case and, in the peculiar circumstances thereof, I am of opinion that the doctrine of "part performance" cannot apply and there could obviously have been no question of any possibility of a decree for specific performance being passed in the circumstances of the present case, and this being so the well-known restriction on the rule of "part performance" would appear to apply here. This being so, the remand of the case was, in my opinion, improper

I may further point out that in paras. 12—14 of the first Court's judgment there were also definite findings as to the plaintiff's possession after the surrender and as to the defendant only having dispossessed her in March 1922, which do not seem to have been specifically considered by the learned District Judge and which, so far as this suit was concerned, made the application of the doctrine of "part performance" quite impossible.

The judgment and decree of the lower Appellate Court are, therefore, reversed and those of the first Court are restored. The respondent-defendant will bear the plaintiff-appellant's costs in all three Courts in addition to his own.

G. R. D. *Decree reversed*
Z. K.

(5) 55 Ind. Cas 154; 31 C. L. J. 75; 24 C. W. N. 463.
(6) 61 Ind. Cas. 687; 33 C. L. J. 437.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 18 OF 1924.
July 21, 1925
Present :—Justice Sir Ewart Greaves, KT, and Mr. Justice Cuming.

ASWAP ALI BEPARI—PLAINTIFF—APPELLANT
versus
DULA MIA—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s 182—Ejectment—Culturable lands forming part of homestead of raiyat—Liability to ejectment

Where culturable lands form part of and are appurtenant to the homestead lands of a *raiyat* he is protected from eviction therefrom under the provisions of s 182 of the Bengal Tenancy Act [p 844, cols 1 & 2]

Letters Patent Appeal against the judgment of Mr Justice Mukerji, dated the 24th of March 1924, in Appeal from Appellate Decree No 105 of 1922.

Babu *Jitendra Kumar Sen Gupta*, for the Appellant.

Babu *D. L. Kastgir*, for the Respondent.

JUDGMENT.

Greaves, J.—When this appeal was before us previously we sent back the matter to the lower Appellate Court for certain findings to be recorded.

Firstly, whether the defendant was or was not a permanent *raiyat* with rights of transfer in the land. *Secondly*, whether the defendant was or was not a settled *raiyat* of the village in respect of other lands and whether in addition to the homestead there was any other land other than a strip of garden land. *Thirdly*, as to whether or not any improvements had been effected by the defendant on the land and whether such improvements had been effected with the landlord's assent and the value thereof.

The learned Munsif to whom the case was remitted has now returned it with the following findings. He holds that the plaintiff is an occupancy *raiyat* without the right of transfer and permanency in his holding. Secondly, that the defendant is a settled *raiyat* of the village in respect of lands other than the land in question and that he had acquired rights of occupancy therein. He further finds that the defend-

ant's tenancy which is in dispute includes other culturable (*nal*) lands besides the homestead and a strip of garden. He finds that the area of the culturable land is not less than 2 *kanis* and that the whole of the land of the defendant's tenancy lies about his homestead and is appurtenant thereto. He also finds that no improvements have been effected by the defendant with the assent of the landlord, express or implied, and he assessed the value of the improvements carried out by the defendant at Rs. 300.

Now, both sides have argued before us that they are entitled to succeed on the findings of the Munsif. The real point which arises on these findings is whether or not the defendant is protected by the provisions of s. 182 of the Bengal Tenancy Act which provides that "when a *raiyat* holds his homestead otherwise than as part of his holding as a *raiyat*, the incidents of his tenancy of the homestead shall be regulated by local custom or usage, and, subject to local custom or usage, by the provisions of this Act applicable to land held by a *raiyat*." The plaintiff contends that the defendant is not protected by the provisions of s. 182 and that he is an under-*raiyat* and that as proper notice has been given under the provisions of s. 49 of the Bengal Tenancy Act the defendant is liable to be ejected from his homestead and so far as the findings are concerned, the plaintiff contends that the finding being that there are in addition to the actual homestead culturable lands section 182 has no application and affords no protection to the defendant. The defendant, on the other hand, contends that on the finding of the Munsif the lands must be taken really to form part of his homestead and to be appurtenant thereto and, consequently, he contends that he is not liable to be evicted by the notice which the plaintff has given him

I think that the contention of the defendant is correct and that he is not liable to be evicted from the land. It seems to me that on the findings of the learned Munsif the lands extending 2 *kanis* which he describes as culturable lands are really part of the homestead itself. As I have already stated, the Munsif says that these lands lie about the homestead and are appurtenant thereto and I think, therefore, that on this finding we should hold that these lands are included in the homestead and are part thereof and that, consequently the defendant is protected from eviction by the provisions of s. 182 of the Bengal Tenancy Act.

In the result, the appeal fails and we have arrived at the same conclusion as the learned Judge who tried the case arrived but upon different grounds.

In the result, the appeal is dismissed and the defendant will be entitled to his costs in all Courts including the costs of the remand to the Munsif.

Cuming, J.—I agree.

M. B. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 349 OF 1922.

August 27, 1925.

Present:—Sir Victor Murray Coutts-Tortter, KT, Chief Justice, and Mr. Justice Viswanatha Sastri.

KOMMINENI APPALASWAMY AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KOMMINENI SIMHADRI APPADU AND OTHERS—DEFENDANTS NOS. 1 TO 8—RESPONDENTS.

Practice—Evidence—One party calling opposite party as witness—Procedure, whether regular

It is an objectionable practice for one party to call the opposite party as his own witness There is no objection whatever to an Advocate seeking to prove his case out of the mouth of the opposite party, but if he puts the opposite party into the witness-box, he takes the risk of making statements made by that witness part of his own evidence [p 845, col 1]

Although in a proper case the Court may be satisfied from the witness's demeanour that he is hostile and may in such circumstances even allow the Advocate to cross-examine, it is irregular for a Court to allow one party to call the other as his witness on the ground that it is desirable to elicit some facts from the said witness before the Court hears any other evidence in the suit [*ibid.*]

Appeal against a decree of the Court of the Subordinate Judge, Vizagapatam, in O. S. No. 46 of 1918.

Mr. *P. Somasundaram*, for the Appellants.

Mr. *V. Govindarajachari*, for the Respondents.

JUDGMENT.

Coutts Trotter, C. J.—This is a hopeless appeal and I do not desire to waste my words on it except on one matter. The onus was rightly found by the learned Subordinate Judge to be on the defendants. Accordingly they opened the proceedings and called evidence first. The defendants adopted the objectionable practice of call-

ing the first plaintiff as their witness, objectionable for this reason, that they were obviously bound to follow it up, and it appears clearly from the judgment that they did follow it up, by asking the Judge to disbelieve and set aside all the evidence given by the first plaintiff. This practice has frequently been unfavourably commented upon by this Court and indeed also by the Privy Council There is no objection whatever to an Advocate seeking to prove his case out of the mouth of the opposite party; but if he puts the opposite party into the box, he takes the risk of making statements made by that witness part of his own evidence. It is possible that in a proper case the Court would be satisfied from the witness's demeanour that he was hostile and might in such circumstances even allow the Advocate to cross-examine him; but that very rarely happens. This course was adopted in this case, apparently because the Vakil said that he wanted to elicit some facts from this witness before he heard any other evidence in the suit. He was evidently suspicious that the witness might improve upon facts in the light of any other evidence that might be adduced if he was not examined first. There is no warrant for any such procedure whatever and I regret that the Subordinate Judge permitted it to be done. But, in my opinion, in this particular case it cannot be allowed to affect the result, because the answers the witness did give were sufficient in the opinion of the learned Judge and sufficient in my opinion to show that the whole of this story about an undivided family property is a concoction from start to finish. That is all I desire to say about this appeal which will be dismissed with costs.

Viswanatha Sastri, J.—I agree.

V. N. V. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 121 OF 1923.

July 22, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Chakravarti.

SASI BHUSAN MALLICK AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SADANANDA MALLICK AND ANOTHER—DEFENDANTS—RESPONDENTS.

Res judicata—Ex parte *order without jurisdiction.*

Any *ex parte* order in a proceeding between the parties made without jurisdiction does not operate as *res judicata* in a subsequent suit between the parties [p 846, col 2]

Appeal against a decree of the Subordinate Judge, Burdwan, dated the 9th of September 1922, reversing that of the Munsif, Second Court at Katwa, dated the 21st of February 1922.

Sir *Provas Chandra Mitra*, KT, Mr. *Hemendra Nath Sen*, Babus *Gopendra Nath Das* and *Kali Kinkar Chakravarti*, for the Appellants.

Dr. *Sarat Chandra Basack*, Mr. *Amarendra Nath Bose*, Babu *Pramatha Nath Bandhopadya*, for the Respondents.

JUDGMENT.

Cuming, J.—In the suit out of which this appeal has arisen the plaintiffs sued for recovery of possession of on declaration of their title to certain *bastu* land. Their allegation was that the disputed homestead belonged to one Mati Lal Mallick who died some years ago leaving Monmohini as his widow and heir. Monmohini died in 1912, and then, according to the plaintiffs, the plaintiffs' father Muchiram who was the nearest reversionary heir of Motilal succeeded to the property in suit. The defendants, however, kept the plaintiffs out of possession and hence the suit.

The defence was that the disputed homestead did not belong to Mati Lal and secondly that Muchiram was not the nearest reversionary heir of Matilal, because Jadab Charan, the ancestor of Muchiram, having been adopted by one Baisnab Charan, the plaintiffs' father Muchiram was not the nearest reversioner but the defendants' father was.

The suit was tried in both the Courts on the issue whether Jadab Charan was or was not adopted by Baisnab Charan, apparently both the parties agreeing that if Jadab Charan had been adopted by Baisnab Charan then the plaintiffs' father was not the nearest reversioner.

The first Court decreed the plaintiffs' suit with costs On appeal the learned Subordinate Judge held that Jadab had been adopted by Baisnab Charan and for that reason Muchiram was not the nearest reversioner.

The plaintiffs had contended that the question as to whether Baisnab Charan had or had not adopted Jadab Charan was barred by the principle or *res judicata*,

This point the learned Subordinate Judge held against the plaintiffs. He found that Baisnab Charan had adopted Jadab and he dismissed the plaintiffs' suit.

The plaintiffs have appealed to this Court and they contend that the question whether Jadab was or was not adopted by Baisnab Charan is barred by the principle of *res judicata*. To establish their case of *res judicata* they rely on the following facts: Monmohini brought a suit on a mortgage and obtained a decree and in execution of this mortgage decree she purchased some of the lands covered by the mortgage and applied for possession. Pending the delivery of possession she died and the present plaintiffs then applied to the Court of the Munsif for possession on the ground that they were the nearest reversioners. Against this application the present defendants, Promatha Nath Mullick, Sadananda Mullick and Mahananda Mullick preferred objection on the ground that they were the nearest reversioners as Jadab had been adopted by Baisnab. Pending the hearing of this objection the Court apparently put the plaintiffs in possession. The Court then proceeded to hear the objection and after hearing the evidence allowed the objection and set aside the order giving possession to the plaintiffs and directed the objectors to be put in possession, under what provisions of the Code the learned Munsif proceeded it is perhaps difficult to see. He was certainly not proceeding under the provisions of s. 47, C. P. C., because this was not a matter relating to the execution, discharge or satisfaction of the decree and the learned Advocate has not been able to point out to us any other section of the Code under which the learned Munsif was acting. On the face of it the learned Munsif's proceeding would seem to be entirely without jurisdiction. Be that as it may the Munsif after hearing the parties revised his own order and determined that the objectors had the better title and ordered them to be put in possession. Against this order the plaintiffs preferred an appeal to the District Judge who held that the Munsif was wrong in his order as he had no power to revise his own order in the circumstances and then holding on the facts that the plaintiffs had better title he set aside the order of the Munsif revising his own order. The learned District Judge's order was affirmed on appeal by this High Court. Now it is quite clear that this order of the Munsif cannot operate as *res judicata*. In the first place the learned Munsif had no jurisdiction whatever to pass any order in the matter at all. It was not a matter coming under s. 47 as I have pointed out. Neither did it come under any other section of the Code. Secondly the learned District Judge held that the learned Munsif had no power to revise his own order and, therefore, the order that he passed revising his own order in which he dealt with the title of the two parties was *ultra vires*. What, therefore, was restored was the original order of the Munsif putting the plaintiffs into possession. But this order was apparently passed *ex parte* without hearing the opposite party. It cannot, therefore, be said that the question as to whether Jadab was or was not adopted by Baisnab Charan was decided in the proceedings of the Munsif putting the plaintiffs into possession. The learned Judge, therefore, is quite right in holding that this order of the Munsif did not operate as *res judicata* between the parties with respect to the question whether Jadab Charan had or had not been adopted by Baisnab Charan.

The result is that the appeal fails and is dismissed with costs.

Chakravarti, J.—I agree. I wish only to add that the finding now relied upon by Sir Pravas Chandra Mitter as *res judicata* between the parties was made by the District Judge in a proceeding which he himself held to be without jurisdiction. If that is so any order in a proceeding which was without jurisdiction would be of no effect.

M. B. *Appeal dismissed.*

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 114 OF 1924.

October 6, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Waller.

SWAMINATHA ODAYAR—PETITIONER 2ND ASSIGNEE—DECREE-HOLDER—APPELLANT

versus

THIAGARAJASWAMI ODAYAR —DEFENDANT No. 1—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 48, O. IX, r. 13—Mortgage-decree both against person and property of mortgagor—Execution of decree against person—Limitation—Execution of decree—*Ex parte *order—Application to set aside order—Limitation.*

A Court is not justified in setting aside an *ex parte* order passed in an execution proceeding on an application made more than 30 days after the judgment-debtor became aware of such order against him

Where a combined mortgage-decree gives relief against the property as well as the person of the mortgagor, the time for execution against the person should be calculated from the date of the decree and not from the date of the mortgagee failing to get relief by sale of the property

Khulna Loan Co, Ltd v. *Jnanendra Nath Bose*, 45 Ind. Cas 436, 22 C W. N. 145 (P. C), followed

Letters Patent Appeal against the order of Mr. Justice Odgers, in A. A. A. O. No. 103 of 1922, dated the 1st April 1924, and printed as 82 Ind. Cas. 827, against a decree of the Court of the Subordinate Judge, Kumbakonam, in A. S. No. 25 of 1922, preferred against that of the Court of the District Munsif, Valangiman, in E. P. No 516 of 1921, in O. S. No. 7 of 1903.

Mr. *R. Kuppusami Iyer*, for the Appellant.

JUDGMENT.—This is an appeal from the order of our learned brother, Odgers, J. The first point urged for the appellant is that the order on execution application No. 386 of 1918 operated as *res judicata* in favour of the appellant and that the District Munsif was wrong in dismissing the execution application which was filed on the 6th August 1921. The District Munsif decided in E. P. No. 386 of 1918 that the appliction of the appellant was not barred by limitation. The District Munsif who dealt with the present application set aside the *ex parte* order on No. 386 of 1918 on the ground that the District Munsif who first disposed of the petition had not before him the decision of the Privy Council in *Khulna Loan Co., Ltd.* v. *Jnanendra Nath Bose* (1). It is pointed out by Mr. Kuppusami Iyer, and very rightly too, that the District Munsif was not justified in setting aside the *ex parte* order on E. A. No 386 of 1918 as the application to set aside the *ex parte* order was made more than 30 days after the judgment-debtor became aware of the *ex parte* order against him. Against this order a revision petition was filed by the appellant and Odgers, J., has dismissed the revision petition. The order on E. P. No. 386 of 1918 passed by the former District Munsif has ceased to be in force. Therefore, there is no order now upon which the appellant can rely for his contention that the plea of limitation is barred by reason of the order on No. 386 of 1918. Therefore, we disallow this contention.

The next contention of Mr. Kuppuswami Iyer is that the application is not barred by reason of s 48 of the C P. C The decree in this case is a combined decree both against the property and person of the mortgagor under the old Code and it has been distinctly held by the Privy Council in *Khulna Loan Co, Ltd* v. *Jnanendra Nath Bose* (1) that a decree against the person becomes unexecutable after the lapse of 12 years from the date of the decree, in other words, where a combined decree gives relief against the property as well as the person of the mortgagor, the time for execution against the person should be calculated from the date of the decree and not from the date of the mortgagee failing to get relief by sale of the properties. In this case, the properties were sold on the 26th July 1911 and the mortgagee obtained only part satisfaction of the decree. But in view of the decision of their Lordships of the Privy Council in *Khulna Loan Co, Ltd* v *Jnanendra Nath Bose* (1) we are unable to accept the contention of Mr. Kuppuawami Iyer that the application for the execution of the decree against the person of the mortgagor should be considered to be in time, for the reason that he could not have executed the decree before the sale of the property was found insufficient to satisfy his decree. If an order was passed after the property had been sold, that for the balance, other properties of the mortgagor's should be proceeded against, the present application would be in time, but no such order was passed and, therefore, the application is barred by s. 48 of the C. P. C.

The appeal fails and is dismissed. We make no order as to costs, as the respondent did not appear.

V. N. V. *Appeal dismissed.*

(1) 45 Ind Cas. 436, 22 C W. N. 145 (P C).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1831 OF 1922.

October 27, 1925.

Present:—Mr. Justice Spencer.

K NARAYANASWAMI IYENGAR AND OTHERS—DEFENDANTS AND ANOTHER—APPELLANTS

versus

A. THIPPAYYA—PLAINTIFF No. 2—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II

para 1—Arbitration through Court—Arbitrator requested to decide extraneous matter—Award, whether can be enforced

Where a matter in dispute in a suit is referred to arbitration through the Court and the parties privately request the arbitrator to decide a matter which is extraneous to the suit, his decision on the latter cannot be embodied in the decree to be passed in the suit, but there is nothing to prevent the parties from enforcing the award relating to the extraneous matter in a separate suit

Second appeal against a decree of the Court of the Subordinate Judge, Bellary, in A. S. No. 18 of 1922, (A. S. No. 25 of 1922), on the file of the District Court, Bellary, preferred against a decree of the Court of the District Munsif, Bellary, in O. S. No. 234 of 1920.

Mr. *C. V. Ananta Krishna Iyer*, for the Appellant.

Mr. *B. Somayya*, for the Respondents.

JUDGMENT.—In O. S. No. 208 of 1916 in the District Munsif's Court, Bellary, the plaintiff sued for a declaration that the mortgage by a widow named Subbalakshmiamma and a sale of a house were invalid beyond her life time, he being the reversioner to the estate. The mortgagee purchaser and the decree-holder in a money suit filed against the widow were made parties. The matter was referred to arbitration by order of Court on the consent of the parties. The arbitrators went beyond the scope of the reference and declared the plaintiff to be entitled to obtain immediate possession of the house during the widow's lifetime on payment of Rs. 900 which was not a matter referred to their decision through Court. The Court that tried the suit, therefore, rightly refused to embody that part of the award in its decree. In the present suit the same plaintiff has sued for possession of the house alleging that he has tendered Rs. 900 within the period provided in the award which was one year from the date of the award. The suit was dismissed with costs, the District Munsif holding that there was no consent on the part of the defendant that the arbitrators should settle the question of immediate delivery of the house. Upon appeal the learned Subordinate Judge held that although the question of immediate possession was not a matter referred to the arbitrators through Court yet the allegation in the plaint that the arbitrators were privately asked to decide this question and that the parties agreed to abide by their decision was true. He disagreed with the finding of the District Munsif who believed the evidence given by the defendant and he found as a fact that the defendant accepted the terms of the entire award not only in respect of the matters referred through Court but also in respect of the matters which the parties themselves invited the arbitrators to decide. This is a finding of fact by the Appellate Court which had jurisdiction to decide it and I must accept the finding.

The learned Subordinate Judge on the question of law held that this part of the award could be enforced as an agreement between the parties. I think he was right. The decision in *Muhammad Mumtaz Ali Khan* v. *Farhat Ali Khan* (1) dealt only with an *ultra vires* award upon a matter which was not referred to arbitration either through Court or otherwise and *Rampratap Chamria* v *Durgaprasad Chamria* (2) may be distinguished on the same ground. These cases do not decide that if there is a private agreement to refer to arbitration and the arbitrators pronounce an award that award cannot be enforced in a subsequent suit.

The only other point is whether the plaintiff made a tender of Rs. 900 within one year of the date fixed in the award. It was found that he gave a notice through his Vakil offering the money unconditionally before the due date and he applied for a *challan* for remitting Rs. 900 to the treasury on the 10th April 1918 which was the last day for the tender. The Subordinate Judge was, therefore, right in holding that the plaintiff had complied with the condition under which it was agreed in adjustment of the parties' disputes that the plaintiff should pay Rs. 900 and get possession of the property. The second appeal fails and is dismissed with costs. The amount deposited in Court may be paid to the respondent's Vakil in adjustment of the respondent's costs.

V. N. V.

Z. K. *Appeal dismissed.*

(1) 23 A. 394, 28 I. A. 190; 8 Sar. P. C. J. 85 (P. C).

(2) 83 Ind. Cas. 300, 28 C. W. N. 424; A. I. R. 1924 Cal. 567.

RANGOON HIGH COURT.

CRIMINAL APPEAL No. 332 OF 1925.

May 18, 1925.

Present:—Mr Justice Brown.

EMPEROR—APPELLANT

versus

NGA TUN MAUNG—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 141, 143—Unlawful assembly, what is—Common object—Meeting for deliberation

An assembly cannot be an unlawful assembly within the meaning of s 141 of the Penal Code unless the common object of the persons composing the assembly falls within one of the five classes described in that section [p 849, col 2]

For the purposes of s 141 of the Penal Code the "common object" must denote a common object then and there as an assembly to take action, and it cannot be held that there was such a common object because the members of the assembly agreed at some uncertain future date to take individual action [*ibid*]

Where the members of an assembly merely agree as to what they should individually do, when, in the case of each person separately, a demand is made for the payment of a certain tax, the assembly does not come within the definition of an unlawful assembly as laid down in s 141 of the Penal Code [p 850, col 1]

Criminal appeal from an order of the Sub-Divisional Magistrate, Thayetmyo, in Cr. Reg No 131 of 1924.

The Assistant Government Advocate, for the Crown.

Mr. *Maung Ni*, for the Respondent.

JUDGMENT.—The respondent, Nga Tun Maung, was convicted by the Sub-Divisional Magistrate, Thayetmyo, under the provisions of s. 143 of the Indian Penal Code and sentenced to suffer six months' rigorous imprisonment. On appeal, this conviction was set aside by the Sessions Judge and the respondent was acquitted. The Local Government has now preferred an appeal against this order of acquittal.

The facts as found by the learned Sessions Judge are as follows.—

The respondent is or was the president of a national association in Thayetmyo. On the 29th of September a largely attended meeting was held at Bangon in one of the Pongyi-Kyaungs. At that time there was a wide-spread feeling throughout the country against the payment of capitation tax. The accused made a speech at the meeting in which he suggested that the imposition of capitation tax was peculiar to Burma and illegal. He advised the people to plead poverty and thus evade payment of the tax when demand is made. The proposals were put to the meeting and were accepted by all those present. These facts are not admitted by the respondent who gives quite a different version of what took place at the meeting It is not, however, necessary for me to go into the facts of this case It is not alleged on behalf of the Crown that the facts can be put more strongly in favour of the prosecution than found by the Sessions Judge, and, in my opinion, the Sessions Judge was perfectly right in holding that on those facts the offence of which the respondent was convicted by the Magistrate had not been established.

Section 143 provides punishment for any person who is a member of an unlawful assembly. An unlawful assembly is defined in s 141 of the Code An assembly cannot be an unlawful assembly unless the common object of the persons composing the assembly falls within one of the five classes described in that section The contention in the present case is that the case falls within the second class and that the common object of the persons composing the assembly was to resist the execution of any law or of any legal process Section 141 is the first section in Ch. VIII which is headed "Offence against the Public Tranquillity" It appears to have been founded on the general principles of the English Common Law to protect the public peace from dangers to it caused by the combination of the forces of a number of persons. In the present case there was no suggestion whatever that the assembly should make use of its members and jointly resist any law or legal process The members of the assembly merely agreed as to what they should individually do, when, in the case of each person, separately, a demand was made for the payment of capitation tax. Even assuming that mere refusal to pay a tax would amount to resistance of the execution of a law I find myself unable to hold that the mere agreement entered into as to what they should individually do on a subsequent occasion amounts to their having a common object to resist There was never any intention of resisting as a body either then or at any future time. If s. 141 be read as a whole and with due regard to the position it occupies in the Code it seems to me that "common object" must denote a common object then and there as an assembly to take action, and that it cannot be held that there was such a common object because the members of the assembly agreed at some uncertain future date to take in-

dividual action. It would be an undue extension of the meaning of the word "object" to say that the object of meeting or of any of the persons. composing the meeting was to resist the law. The object of the meeting was to discuss and agree as to what the members of the meeting should do individually on subsequent occasions.

The learned Assistant Government Advocate admits that he is unable to cite any case in which an assembly has been held to be an unlawful assembly where there has been no intention there and then as an assembly to carry out the unlawful object. I have been unable to find any direct judicial authority on the point. In Gour's Commentary on the Indian Penal Code (page 566) the following passage occurs: "But it must be a part of the plan of the meeting that the common object should be forthwith carried into effect, for, if men meet only to arrange plans for future action it cannot be said that there was any fear of the breach of the peace without which there can be no unlawful assembly." This passage appears to be founded on some English authority which I have been unable to procure. But it appears to me to be in accordance with the natural meaning of s. 141 of the Indian Penal Code.

In Ratanlal's Law of Crimes the learned commentators appear to be of the same opinion for they state in their notes on s. 141: "It seems also that there must be some present and immediate purpose of carrying into effect the common object and that a meeting for deliberation only, and to arrange plans for future action is not an unlawful assembly."

It has been contended that to constitute an unlawful assembly it is not necessary that violence should actually be used. This contention is no doubt correct. But to constitute an offence under s. 143 the common object as defined in s. 141 must be proved to exist. In my opinion the view of the law taken by the learned Sessions Judge was perfectly correct and the appellant was rightly acquitted of the offence of being a member of an unlawful assembly. I dismiss this appeal.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 897 OF 1924.

December 17, 1924.

Present:—Mr. Justice Zafar Ali.

IMAM ALI—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s 35, Illustration—Penal Code (Act XLV of 1860), ss 366, 376—Abduction with intent to commit rape—Commission of rape—Sentence.

If a person abducts a woman with intent to rape her and does rape her, he cannot be awarded separate sentences under ss. 366 and 376, Penal Code. [p. 851, col. 1.]

Appeal from an order of the Magistrate First Class, exercising enhanced, powers under s. 30 of the Cr. P. C., Jhelum, dated the 28th July 1924.

Mr. *Dhan Raj Shah*, for the Appellant.

Mr. *C. H. Carden Noad*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—The appellant Imam Ali aged about 20 has been convicted under ss. 366, 376 and 326 of the Indian Penal Code and sentenced to three years' rigorous imprisonment for each offence, the sentences to run consecutively. The story of his victim *Musammat* Bassan, who was a spinster 16 years of age, was briefly as follows:—

She was coming with other girls of her village with a pitcher full of water on her head. As she approached the door of the accused the latter who was already standing there came out and caught hold of her. He threw down her pitcher from her head, and dragged her away into a room inside his house. There he asked her to elope with him which she refused to do. He then raped her and after that again asked her to run away with him. She refused again. He then cut off her nose and upper lip with a knife. The learned Counsel who has appeared for the appellant expresses his inability to urge that it was not the accused who cut off the girl's nose and lip or that the girl's main story is unworthy of credit. According to the evidence of a lady doctor, her hymen had been recently ruptured and so there can be no manner of doubt that the accused dragged her away into the house and there raped her and then cut off her nose and upper lip.

The girl had once been engaged to him but the engagement had been broken off, and the accused had married another girl. Later on his wife died and he wanted to

marry the complainant but her parents did not agree. This was the motive for the most dastardly act done by him.

His Counsel, however, urges that separate sentences under ss. 366 and 376 could not be awarded and in support of this contention he cites the unpublished Division Bench judgment of the Punjab Chief Court in Criminal Appeal No. 101 of 1914, dated the 13th August 1914. In that case the learned Judges held by a reference to the Illustration to s 35 of the Cr. P C, that if a person abducts a woman with intent to rape her and does rape her he cannot be awarded separate sentences under ss 366 and 376 of the Indian Penal Code In view of that ruling I set aside the sentence under s. 366 and maintain the sentences under ss. 376 and 326, Indian Penal Code.

Mr. Noad on behalf of the Crown states that the punishment thus reduced is inadequate and that he will in due course file an application for enhancement of sentences. This will be considered when he will make the application. At present the result is that the appeal is accepted to the extent stated above.

Z. K. *Appeal accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 141 OF 1925.

July 17, 1925.

Present:—Mr. Findlay, Officiating J. C.

LOCAL GOVERNMENT—APPLICANT

versus

DOMA KUNBI—ACCUSED—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), ss 435 to 439—Revision—Judicial Commissioner's Court, power of—Interference with conviction by Single Judge—Conviction, alteration in, by Judge—Enhancement of sentence at instance of Government—Procedure.

It is not open to the Judicial Commissioner's Court under s. 439 of the Cr. P. C to alter or interfere with a conviction which has been arrived at by a Judge of the Court, as ss 435 to 439 of the Code clearly contemplate interference only with the findings, sentences or orders of any inferior Court. [p 852, col. 1.]

Where, however, a Judge of the Judicial Commissioner's Court hearing an appeal against a conviction, alters the conviction to one for a graver offence, but does not himself enhance the sentence, but suggests an action in that behalf by the Local Government, his judgment is not final from that point of view and the Judicial Commissioner's Court does not become a *functus officio* and is competent to hear application on behalf of the Local Government for enhancement of the sentence. [*ibid.*]

If a finding of a Sessions Judge for culpable homicide has been altered by the Appellate Court to one for murder, it is open to the Judicial Commissioner's Court sitting as a Court of Revision to pass a legal sentence for the offence of murder. [p 852, col 2]

The proper construction to be put on s 439 (4), Cr P. C, is that it refers to cases where there has been a complete acquittal and not to cases where there has been only an alteration of findings by the Appellate Court, the conviction by the Sessions Court being kept in tact [*ibid.*]

Kambam Bali Reddy v *Emperor*, 22 Ind Cas 756, 37 M 119, 15 Cr L J. 180, followed

It is open to a Judge of the Judicial Commissioner's Court, who hears an appeal against a conviction and who comes to the conclusion that a graver offence has been committed, not only to alter the conviction but to proceed on the revisional side to issue notice to the accused to show cause why the sentence should not be enhanced, and, if no sufficient cause is shown, to enhance the sentence accordingly [p 854, col 1]

Mangal Naran v *Emperor*, 87 Ind Cas 424, 49 B 450, 27 Bom L R 355, (1925) A I R (B) 268, 26 Cr L J 968, followed

Application for revision of the judgment of the Sessions Judge, Nagpur, dated the 24th February 1925, in Sessions Trial No. 19 of 1924.

Mr *G P. Dick* (Government Advocate), for the Applicant.

Mr. *V. Bose*, for the Non-Applicant.

ORDER.—The present application has been filed by the Local Government under somewhat exceptional circumstances. The non-applicant Doma Kunbi, after being charged with the offence of the murder of one Jago Kunbi, was convicted by the Sessions Judge, Nagpur of the minor offence of culpable homicide not amounting to murder under s. 304 of the Indian Penal Code, being acquitted of the charge of murder, and was sentenced to 5 years' rigorous imprisonment. He appealed against the said sentence to this Court, the appeal being heard by Hallifax, A. J. C., who came to the conclusion that the offence committed by Doma was one of murder and altered the conviction accordingly. The learned Additional Judicial Commissioner held that he could not interfere with the sentence passed but added that the case would be brought to the notice of the Local Government. Presumably, as a result of this the Local Government have now applied in revision to the effect that an appropriate and legal sentence in the case of a conviction for murder should be passed by this Court, and we have now heard the present application.

The learned Counsel for the non-applicant has strenuously urged that it was open to

us, sitting as a Bench, to go into the merits of the conviction for murder and, if necessary to alter that conviction. He has pointed out that otherwise he finds himself in an anomalous position as all that it would be open to him to urge before us would be that the non-applicant should be sentenced to the lesser of the two punishments provided for the offence of murder. We fully realise that the position is anomalous and exceptional but we are nevertheless of opinion that, sitting as a Court of Revision, it is not open to us under s. 439, Cr. P. C., to alter or interfere with a conviction which has been arrived at by a Judge of this Court. Sections 435 to 439 clearly contemplate interference only with the findings, sentences or orders of any inferior Court. This fact alone makes it absolutely clear, in our opinion, that we cannot, even if we should see reason to, interfere with the conviction for murder arrived at by Hallifax, A. J. C.

It has been urged on behalf of the non-applicant that the action of this Bench in taking cognizance of the case was *ultra vires* and that this Court had become *functus officio* as soon as Hallifax, A. J. C., had delivered his judgment in Criminal Appeal No 72 of 1925. It was admitted by Counsel for the non-applicant that it might have been open to Hallifax, A. J. C. even to enhance the sentence, but it is urged that, he not having done so, we are precluded from now interfering. Reliance has been placed on s. 369, Cr. P. C., in this connection, but we cannot agree that the judgment of Hallifax, A. J. C., can from this point of view, be regarded as a final one. The later part of that judgment clearly contemplates further action by this Court in case the Local Government decided to move in the matter, and the present proceedings must be, in our opinion, regarded as a completion of, or necessary addendum to the judgment delivered by Hallifax, A. J. C.

We do not think it necessary to enter into the abstract argument offered by Counsel for the non-applicant to the effect that, theoretically at least the present non-applicant as a result of our taking into consideration the application of the Local Government, is placed in peril of his life, and that in every such case the rules of this Court require that the appeal should be heard by a Bench. We are satisfied—and we informed Counsel for the non-applicant in the course of argument of this that the circumstances of this case would not, in any event, call in our opinion, for the infliction of the death penalty, and from the practical point of view, therefore this line of argument becomes one which it is needless to consider in the circumstances of the present case.

The next argument offered on behalf of the non-applicant is that as he had already been acquitted of the charge of murder and as there has been no appeal by the Local Government against that acquittal, we are precluded from taking cognizance of the present case. Reference has been made to the fact that under s. 423 (*b*) (2) this Court may have been entitled to alter the finding to one of murder, but it is expressly prohibited from enhancing the sentence. We are, however, now sitting as a Court of Revision, and the finding having been legitimately altered by Hallifax, A. J. C., sitting as a Court of Appeal, to one of murder, we are of opinion that it is within our power, sitting as a Court of Revision, to pass a sentence which will be a legal one in view of the conviction for murder. In *Kambam Bali Reddy* v *Emperor* (1) Benson and Ayyar, JJ., held as regards s. 439, sub-s. (4), that the proper construction to be put thereon is that it only refers to cases where there has been a complete acquittal. In this case there was no complete acquittal before the Sessions Judge. All that the latter Court did, was to record a finding of culpable homicide not amounting to murder instead of one of murder itself. We concur with the two learned Judges mentioned that this is the proper construction to be put on s. 439, sub-s. (4), Cr. P. C.

In the present case, therefore, all that is required of us to do is to pass a legal sentence in view of the conviction for murder recorded by Hallifax, A. J. C. We accordingly enhance the sentence of 5 years' rigorous imprisonment passed by the Sessions Judge, Nagpur, to one of transportation for life.

In view, however, of the peculiar circumstances of this case, we have judged it well to make an independent examination of the record and to record whether or not, in our opinion, the non-applicant is guilty of murder. In the written argument (part of which challenges the merits of the conviction) which we have allowed Counsel for the non-applicant to file, various considerations have been advanced attacking the conviction for murder on the merits.

(1) 22 Ind. Cas. 756; 37 M. 119; 15 Cr. L. J. 180.

Reference has been made to the fact that some prosecution witnesses, at least, have from time to time changed or improved upon their original stories. Again, stress has been laid on the fact that the weapon, with which Jago was stabbed, has been described in various ways from time to time, at one time as a *tutari*, for example, while at another as a *gupti*. We do not think that this matter is of any vital importance. The weapon in question has been fully described by Hallifax, A. J. C., and it was certainly of a hybred nature, misdescription of which was also bound to occur. Apparently, there was a *shemb* or so-called ferrule on the weapon, which Vithal removed before he handed it to Doma: *cf* the evidence of Laxman (P. W No. 1). That the weapon used had a sharp pointed end is clearly shown by Hallifax, A. J. C., and Doma must have been well aware of this. The evidence of Laxman (P. W. No 1), Bajirao (P. W. No 9), Sakharam (P. W No. 10), Raja (P. W. No 11) and Jago (P W. No 12) leaves, in our opinion, no doubt that Doma did stab Jago with this weapon, as found by Hallifax, A. J C. We do not think much importance can be attached to the fact that C V Sahasarbudhe, Assistant Medical Officer, (P. W. No 10 in the Committing Magistrate's Court), had originally described the wound as a lacerated one, if he did so, the mistake was, in all probability, a careless one. In view of certain aspects of the medical evidence it has, indeed, been suggested on behalf of the non-applicant that the rupture in the long may have been caused subsequently by a further insertion of the same or another weapon by some person other than the non-applicant. This theory seems to us too far fetched a one to require detailed discussion We are satisfied, in particular on the evidence of Lt Col. Tarr, Civil Surgeon, (P W. No. 5 in the Committing Magistrate's Court), that curious and exceptional though this case may be from the medical point of view, Jago's death occurred as a direct result of the stab inflicted by the non-applicant.

Much has been made of the fact that in the deceased's written report made to the Police (Ex. P.-1) and in the earlier reports of the affair generally the tendency was to describe Jago as only having received an ordinary beating with sticks and the like. Very obviously, however, the eye-witnesses did not realise, nor is this to be wondered at, that the real and vital injury had been caused by the one thrust given with the so-called *tutari*.

Again, mention has been made of the fact that the Civil Surgeon considers that the deceased's arm must have been at right angles to his body before the piece of iron found therein could have entered Jago's person in the way it did, and it has been suggested that the evidence goes to show that the deceased was held down when the stab-wound was inflicted. In the course of a struggle of this nature, the deceased's arm would, at some stage or other, in all probability, be at an angle to his body, which would permit of the thrust in question having been given, and we see nothing in this suggestion in the non-applicant's favour.

The theory of accident is also, in our opinion, an untenable one. The deliberate removal of the ferrule, before the weapon was handed over to Doma, and his deliberate use of it immediately thereafter sufficiently dispose of this suggestion. Even, on the merits, therefore, we are satisfied that the conviction in the present case was bound to be one for murder.

At the same time, in case the Local Government should see cause to show any clemency to the non-applicant by way of substitution of a period of rigorous imprisonment in place of the sentence of transportation, which we have felt bound to pass, we desire to record our opinion that the circumstances of this case would seem to call for some clemency being shown to the non applicant We think that the said circumstances, in all probability, bring the case under the third clause of s. 300, Indian Penal Code, *viz*, that the non-applicant stabbed Jago with the intention of causing bodily injury to him and that this bodily injury was sufficient in the ordinary course of nature to cause death. We do not think that the non-applicant can even be credited with the constructive knowledge that he knew the bodily injury he intended to inflict was likely to cause death. In other words, the case does not come under the second clause of s. 300, Indian Penal Code. The offence was committed in the course of a sudden brawl, in which the main parties concerned were highly excited and had lost control of themselves as a consequence of the dispute over the field concerned. Still further, although considerable violence must have

been used in inflicting the blow, the question remains whether the non-applicant fully realised what the result of his action might have been, although he must, nevertheless, be credited with the constructive intention, already referred to and specified in the third clause of s. 300, Indian Penal Code. In all the circumstances of the case, therefore, we desire to record our opinion that the interests of justice would be met by a sentence of rigorous imprisonment of from 7 to 10 years.

We desire to add that, in our opinion, it is open to a Judge of this Court, who hears an appeal against a conviction and who comes to the conclusion that a grave offence has been committed, not only to alter the conviction but then to proceed on the revisional side to issue notice to the accused to show cause why the sentence should not be enhanced and, if no sufficient cause is shown, to enhance the sentence accordingly. We find support for our review in the recent case of *Mangal Naran* v. *Emperor* (2) decided by Macleod, C. J., and Crump, J.

N. H. *Order accordingly.*

(2) 87 Ind Cas. 424; 49 B 450, 27 Bom L. R 355, (1925) A. I R (B) 268, 26 Cr. L. J. 968 55.

RANGOON HIGH COURT.

CRIMINAL REVISION No. 696-B OF 1925

June 30, 1925.

Present:—Mr. Justice Maung Ba.

EMPEROR—PETITIONER

versus

MAUNG THAN GYAUNG—RESPONDENT.

Burma Village Act (VI of 1907), s 21 (a)—Pwe, *meaning of—Dramatic performance held by amateurs for public entertainment—Notice, absence of—Robbery—Offence.*

For the purposes of the Burma Village Act a *pwe* ordinarily includes a theatrical or dramatic performance held for public entertainment whether on public or private property.

The object of requiring a permit for such a performance is to ensure that the authorities should get timely notice to arrange for precautionary measures.

Accused gave a dramatic performance at his house for public entertainment without obtaining a permit for the same. The troupe was composed of local amateurs During the performance a robbery took place in the neighbourhood:

Held, that the accused was guilty of an offence under s 21 (a) of the Burma Village Act.

Criminal revision from an order of the Additional Magistrate, Allanmyo, in Criminal Regular Trial No. 27 of 1925.

JUDGMENT.—Maung Than Gyaung of Myitnabole village in the Allanmyo Township held a *shinbyu ahlu* at his house. The local amateurs designated as *ayat-zat* performed without payment in his compound on the night of 13th February last. Unfortunately a robbery took place during the performance a short distance away. Maung Than Gyaung had taken no previous permit for the show. Consequently he was run in under s. 21 (*a*), Burma Village Act, and fined Rs. 5.

The learned District Magistrate of Thayetmyo doubted whether any permit was required for such amateur performances by villagers and submitted the case with a recommendation that the conviction and sentence be set aside.

For the purposes of the Act *pwe* ordinarily includes a theatrical or dramatic performance held for public entertainment whether on public or private property.

The gist of the above definition is "the holding for public entertainment." The object of requiring a permit is to ensure that the authorities get timely notice to arrange for precautionary measures. In the present case the performance was for public entertainment at an *ahlu*, and as the authorities had not been given any notice, a robbery took place. Moreover, though the troupe was composed of local amateurs, there is evidence to the effect that this *zat* used to perform in other villages on hire ranging from Rs. 40 to Rs. 60. This offence was committed in the Allanmyo Township where the Local Government have deemed fit to declare even *payapwes* and *pongyibyans* to be *pwes* for the purposes of the Act (see General Department Notification at page 43 of the Village Manual).

I am of opinion that this *ayat-zat* comes within the purview of s. 21 of the Village Act. Let the case be returned accordingly.

Z. K. *Case returned.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 219 OF 1924.
CRIMINAL REVISION PETITION No. 188 OF 1924.
December 11, 1924.

Present:—Mr. Justice Srinivasa Iyengar.

VAITHI MATHARAN AND OTHERS—PETITIONERS

versus

NARAYANASWAMI IYER—RESPONDENT.

Penal Code (Act XLV of 1860), s 379—Theft—Catching fish in poromboke *tank in assertion of* bona fide *right—Offence.*

Catching fish in a *poromboke* tank in the assertion of a *bona fide* right does not amount to the offence of theft

Petition, under ss. 435 and 439 of the Cr. P, C., 1898, praying the High Court to revise an order of the Court of Session of the West Tanjore Division, at Tanjore, dated the 20th December 1923, in Cri. R. P. No 21 of 1923 (C. C. No. 85 of 1923, on the file of the Court of the Second Class, Magistrate, Tiruvadi) and to direct stay of further proceedings in pursuance of the said order of the Court of Session of the West Tanjore Division, pending final orders on this petition.

Messrs. *V L Ethiraj* and *K. P. Raman Menon*, for the Petitioners.

Messrs. *Nugent Grant* and *K. V. Srinivasa Iyer*, for the Respondent.

The Public Prosecutor on behalf of the Crown.

ORDER.—The order of the Sessions Judge directing a re-trial of the accused in this case for the offence with regard to which they were discharged by the Magistrate is wrong There was really no evidence on the record with regard to the ownership of the tank. It appears from the evidence of the *karnam* that it was *poromboke* and it was a *poromboke* tank So long as the villagers agree, it is well-known that the temple authorities or the headman of the village lease out the yield from such common resources and utilise the same for common purposes. The mere fact, therefore, that the fishery in this tank was leased out in previous years by the temple trustee would not in view of the nature of the common practice go to establish the ownership in the tank. Unless the ownership in the tank is established, there is no question of possession of the fish and there is *a fortiori* no question of any theft of any fish. After all, I am not at all satisfied that the accused in this case did what they did dishonestly and that they did not catch the fish asserting a *bona fide* right thereto. I think the criticism of the Sessions Judge that the word *bona fide* did not appear in the judgment of the Magistrate is somewhat meticulous. There is no doubt whatever as to what the Magistrate really meant to do. The order of the Sessions Judge is, therefore, set aside.

V. N. V. *Order set aside.*

Z. K.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 230 OF 1925.
November 24, 1925.

Present:—Mr. Kincaid, J. C., and Mr. Lobo, A. J. C.

DWARKA AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 367, 424—Judgment of Appellate Court, contents of.

A judgment of an Appellate Court other than a High Court, must comply with the provisions of s 367 of the Cr P C, that is to say, it must contain the point or points for determination and the decision thereon and the reasons for the decision

Ram Lal Singh v *Hari Charan Ahir*, 5 Ind Cas. 999, 37 C 194, 11 C L J 410, 11 Cr L J 348, relied upon

Application to revise an order of the District Magistrate, Sukkur, dated the 3rd August 1925.

Mr. *Partabrai D. Punwani*, for the Applicants

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT.—The facts of this revisional application are very simple and are shortly as follows :—

The complainant had one house which we may, for the purpose of convenience, call house A and he sued the applicant to obtain possession of a second house, which for the sake of convenience, may be called house B He got a decree for house B and thus obtained possessions of both houses On a subsequent date the witness Jethanand went to the complainant and told him that he had observed the applicants breaking into the house A. It was 6 o'clock in the morning and the complainant with Jethanand went back to the house A and found the present applicant No. 1 standing at the door of the house with a

stick in his hand and the applicant No. 2 inside. They would not allow the complainant to enter the house with the result that he went to the Third Class Magistrate of Sukkur (Mr. Gorwalla) who convicted both the applicants under s. 448 of the Indian Penal Code. He sentenced them to pay a fine of Rs. 50 each or in default to suffer 15 days' rigorous imprisonment. Rs. 30 out of the total amount were to be awarded as compensation to the complainant. Against this finding and sentence the applicants appealed to the learned District Magistrate of Sukkur who confirmed the conviction and dismissed the appeal.

Against this order of the learned District Magistrate a revision application has been made to this Court.

The learned District Magistrate has given us the story put forward by the applicants, namely, that the complainant had given them the key of the house A and that it was with his permission that they opened the lock of the door and entered it. The learned District Magistrate, however, has observed that even believing the defence story he cannot but hold that their action amounted to a criminal trespass. We find it very difficult to follow the reasoning of the learned District Magistrate. If the complainant really did give the key of house A to the applicants and they entered it with his permission, it was then impossible that they did so with intention to commit an offence or to intimidate or annoy the complainant. Unfortunately, we have no findings of fact in the learned District Magistrate's judgment and so we are unable to say that we will accept the lower Appellate Court's view of the facts, as has long been the practice of High Courts to do. In these circumstances we see no alternative but to return this case to the learned District Magistrate and to direct him to re-hear the appeal and to write a legal judgment in it. In this connection we would specially draw his attention to s. 367 and s. 424 of the Cr P. C. Section 367 lays down that every judgment shall contain the point or points for determination and the decision thereon and the reasons for the decision. Section 424 applies the direction contained in this section to the judgment of any Appellate Court other than the High Court. We would specially draw the learned District Magistrate's attention to the case of *Ram Lal Singh* v. *Hari Charan Ahir* (1), wherein Jenkins, C. J. made the following observations :—

" It is continually overlooked by Courts of Appeal that s. 424 of the Cr. P. C. prescribes that the rules contained in Chap. XXVI, as to the judgment of a Criminal Court of Original Jurisdiction shall apply, so far as may be practicable, to the judgment of any Appellate Court other than a High Court ; and one of the sections in Ch XXVI, is s 367, which prescribes that a judgment shall, among other things, contain the point or points for determination, the decision thereon, and the reasons for the decision."

The learned District Magistrate will no doubt bear these remarks carefully in mind when he re-writes the judgment in this case after re-hearing the Pleaders engaged in it.

The case is sent back for re-hearing and re-trial.

Z. K. *Case sent back.*

(1) 5 Ind Cas. 999, 37 C. 194, 11 C. L. J. 410, 11 Cr. L J 348.

OUDH CHIEF COURT.

MISCELLANEOUS APPLICATION No. 656 OF 1925.

December 17, 1925.

Present:—Mr. Justice Stuart, Chief Judge.

Baba ISHWAR DAS—ACCUSED—APPLICANT

versus

EMPEROR THROUGH *Mahant* HAR NARAIN DAS—COMPLAINANT—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—District Magistrate witness for prosecution—Examination of complainant at his house.

The fact that the District Magistrate is cited as a witness for the prosecution in a trial before another Magistrate in the District is no ground for supposing that the accused will be prejudiced in his trial, so as to justify a transfer of the case

The fact that a Magistrate trying a case proposes to conduct that portion of the proceedings in which the complainant, who is a very old man and for many years has not left the precincts of his residence, is a witness, at the latter's residence, giving the accused every opportunity of being represented and conducting his case there, does not call for a transfer of the case, as the circumstance would in no way prejudice the trial

Application under s. 526, Cr. P. C., for transferring the case from the Court of the District Magistrate, First Class, Fyzabad, to some other District

Dr. *J. Misra*, for the Applicant.

Mr. *N. N. Ghoshal*, R. B., for the Crown.

Messrs. *Niamatullah* and *Mohd. Ismail*, for the Opposite Party.

JUDGMENT.—This is an application for transfer. The facts are these: The applicant is a *chela* of a *Mahant* residing in Hanuman Garhi, Ajudhia The complainant is a *Mahant* unconnected with the applicant who also resides in the Hanuman Garhi, Ajudhia. The complainant has instituted criminal proceedings against the applicant on a charge of defamation under s. 500, Indian Penal Code. The case is at present in the Court of Mirza Mohammad Hasan, Magistrate of the First Class in Fyzabad. This application prays, *firstly*, that the case should be transferred not only from the Court of Mirza Mohammad Hasan, but from the Fyzabad District and *secondly*, that if the case is not so transferred the Magistrate should be ordered to examine the complainant in the Court house at Fyzabad and not at the complainant's residence in Ajudhia. The applicant has had the advantage of having his application argued by a competent Counsel who, I understand, has been briefed specially for the argument, and in these circumstances it is not likely that anything which could be put forward in favour of the applicant has been omitted. The first thing that stands out clearly is that there is nothing made out which can in any way impugn the impartiality or the competence of Mirza Mohammad Hasan It is suggested that as the District Magistrate of Fyzabad may be cited as a witness in the case the applicant will be prejudiced by having the case heard in the Fyzabad District If the result of calling the District Magistrate as a witness in Fyzabad were to prejudice the applicant's trial it would follow as a necessary consequence that the Trying Magistrate was not fit to be trusted and as I have every reason to suppose that the Trying Magistrate is competent, I attach no weight to this suggestion The second point is that the Trying Magistrate proposes to conduct that portion of proceedings in which the complainant is a witness at Hanuman Garhi It is not suggested that he is not giving the applicant every opportunity of being represented and conducting his case at Hanuman Garhi. The applicant resents this action on the part of the Trying Magistrate on the ground that he is thereby showing special favour to the complainant. In the explanation submitted to me by the District Magistrate, I find that the reason why the Trying Magistrate proposes to take this course is because the complainant is a very old man who for many years has never left the precincts of the Garhi. I regard the Magistrate's action in this particular as showing nothing more than consideration for a man whom he believes to be old and infirm, and the circumstances in no way prejudice the applicant's trial I dismiss this application for transfer and direct Mirza Mohammad Hasan to continue proceedings. The applicant Ishwar Das will pay the costs of *Mahant* Har Narain Das in the matter of this application.

N H. *Application dismissed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 409 OF 1925

November 18, 1925

Present —Mr Justice Dalal and Mr Justice Boys

JALAL UDDIN—APPLICANT

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s 197 (1) —U P Excise Act (IV of 1910), s 10 (2) (f)—Excise Inspector, whether removable from office by Excise Commissioner—Sanction for prosecution, whether necessary

An Excise Inspector in the U P is removable from his office by the Excise Commissioner and the sanction of the Local Government is not, therefore, necessary under s 197 (1), Cr P C, for the prosecution of such Inspector [p 860, col 1]

Criminal revision from an order of the Sessions Judge, Moradabad, dated the 6th July 1925.

Mr *R F Bahadurji* (with him Messrs. *Nihal Chand* and *Kedar Nath*), for the Applicant

The Assistant Government Advocate, for the Crown.

JUDGMENT.—Jalaluddin Excise Inspector of the Bijnor District applied to the High Court in revision to have his conviction under s. 161, Indian Penal Code, for taking an illegal gratification from a liquor contractor set aside. The learned Judge to whom the application was presented referred the matter to a Bench of two Judges and also issued a notice to Jalaluddin to show cause why the sentence passed on him should not be enhanced. The applicant was sentenced by a Magistrate of the Moradabad District, to whose Court the

case was transferred from Bijnor, to simple imprisonment for one month and a fine of Rs. 500 with three month's further simple imprisonment in default.

The point raised in revision was that the prosecution of the applicant without the sanction of the Local Government was bad and so the trial should be set aside. The applicant is an Excise Inspector who was appointed to his post by the Local Government in 1909. Under s 197 (1) of the Cr. P. C. the sanction of the Local Government is necessary for the prosecution of any public servant who is not removeable from his office save by or with the sanction of the Local Government or some higher authority. The appellant was appointed prior to the passing of the U. P. Excise Act IV of 1910. Under s 10 (2) of that Act the Local Government is given power by a notification to appoint an officer referred to as the Excise Commissioner *vide* cl. (*a*) and to delegate to the officer all or any of its powers under the Act except the power conferred by s. 40 of the Act to make rules. In pursuance of such authority the Local Government issued a notification under s 10 (2) (*f*) of the U. P. Excise Act on 8th September 1924. It is admitted that an Excise Commissioner has been duly appointed. Under the Notification No 295-XIII-110 of 8th September 1924 (U. P. Gazette of 13th September 1924, page 1249) the Local Government has delegated to the Excise Commissioner among other the following powers:

'9. Power to appoint all officers of the Excise Department below the rank of Assistant Excise Commissioner, provided that the appointment and promotion, removal or dismissal of Excise Inspectors shall be subject to the general control of the Local Government.

"10. Power to censure, withhold promotion from, reduce to a lower post, suspend, remove or dismiss all officers of the Excise Department below the rank of Assistant Excise Commissioner."

There is a proviso added to the powers that in cases of dismissal, removal or reduction the Excise Commissioner shall follow the procedure laid down in r. 14 of the rules made by the Secretary of State under s. 96-B (2) of the Government of India Act. According to this notification the applicant who is an Excise Officer below the rank of Assistant Excise Commissioner may be dismissed by the Excise Commissioner. He is, therefore, removeable from his office by an authority lower than that of the Local Government and without the sanction of that Government.

The arguments advanced by the applicant's learned Counsel were directed to the following points:

(1) That the applicant having been appointed prior to the date of the notification he could not be dismissed by the Excise Commissioner.

(2) That the notification in so far as it gave power to the Excise Commissioner to dismiss the applicant, was *ultra vires* to that extent.

(3) That the authority of the Excise Commissioner was delegated authority and even when he dismissed an Excise Officer it must be taken as if the dismissal was really made by the Local Government through the agency of the Excise Commissioner.

The authority No. 10 of the notification quoted by us above makes it clear that the Excise Commissioner has been given power of dismissal of Excise Officers below the rank of Assistant Excise Commissioner appointed even prior to the date of the notification. In our opinion the applicant could be dismissed by the Excise Commissioner.

By reference to various other notifications it shall be shown that the notification to the extent of the authority No. 10 was not *ultra vires*. Reference was made to the Government of India Act, s. 96-B (1) wherein it is enacted "subject to the provisions of this Act and of rules made thereunder every person in the civil service of the Crown in India holds office during His Majesty's pleasure ....but no person in that service may be dismissed by any authority subordinate to that by which he was appointed..... ..... "It was argued that the applicant having been appointed by the authority of the Local Government may not be dismissed by any authority subordinate to the Local Government and if any rule is made by the Local Government to that effect it would be contrary to the provisions of s. 96-B (1). The clause, however, begins with the words "Subject to the provisions of this Act and of rules made thereunder." Clause (2) of the same section enacts that "The Secretary of State in Council may make rules for regulating the classification of the civil services in India, the methods of their recruitment, their conditions of service, pay and allowances

and discipline and conduct. Such Rules may, to such extent and in respect of such matters as may be prescribed, delegate the power of making Rules to the Governor-General in Council or to Local Governments, or authorise the Indian Legislature or Local Legislatures to make laws regulating the public services."

Obviously the notification of the Local Government referred to above was made under the Rules referred to in cl. (2). The argument that such rules can be framed with respect to officers to be appointed in future cannot hold when we consider the provision to s 96-B (2) which safeguards the existing or recurring rights only of persons appointed by the Secretary of State prior to the commencement of the Government of India Act, 1919. There would not have been such a proviso if it was intended that the existing or recurring rights of all public servants appointed prior to the commencement of the Act were to be retained In the notification itself reference is made to rules made by the Secretary of State in s 96-B (2) of the Act The Secretary of State for India has framed Rules under s 96-B (2) of the Government of India Act, 1919, regulating the classification of the civil services in India, their conditions of service, discipline and conduct. Those Rules also provide for delegation of powers. They are published in the *Gazette of India* of 21st June 1924 at page 552 (No. F 472-II-23). By Rule I the following classification is made of officers of the Local Government.—

1. The all India services,
2. The Provincial services,
3. The Subordinate services.
4. Officers holding special posts.

An Excise Inspector may come under class 2 or 3. The definition of Provincial services given in Rule III proves that he comes under class 3 The Provincial services of every Local Government are detailed in a schedule to the Rules and the schedule relating to the United Provinces includes an Assistant Excise Commissioner and no officer lower in rank in that Department. The applicant, therefore, is a member of the subordinate services, which are defined in Rule IV as consisting of all minor administrative, executive and ministerial posts to which appointments are made by the Local Government or by an authority subordinate to the Local Government. Under Rule XV a Local Government is empowered to delegate to any subordinate authority subject to such conditions, if any, as it may prescribe any of the powers conferred by Rule VIII in regard to officers of the subordinate services Proviso to this Rule relates to an appeal to the Local Government. Rule XII lays down:—

> " without prejudice to the provision of any law for the time being in force, the Local Government may for good or sufficient reasons
>
> (5) remove or
> (6) dismiss
>
> any officer holding a post in a subordinate service .. . "

The Excise Act does not interfere with the Local Government's power of removal or dismissal, in fact, it gives such power and the power of delegation of authority over again We are of opinion, therefore, that the authority No 10 granted by the notification is not beyond the power of the Local Government to grant

Coming to the question of delegation, once the Local Government has delegated its power the authority which actually removes the public servant from office is not the authority of the Local Government but the authority to whom the power is delegated. To take an instance, the Hon'ble Chief Justice of this Court has been authorised and empowered under s. 6 of the Letters Patent of this Court by the Crown acting in pursuance of an Act of Parliament to appoint officials of this Court and to dismiss them If the argument of the applicant's learned Counsel is to prevail it may with equal cogency be argued that every official down to an orderly peon of this Court is appointed and removed by the Crown through the agency of the Chief Justice and for his prosecution under s. 161 the sanction of the Local Government would be necessary We do not think that such an argument would be accepted. There is no mention made in s 197 (1) of the Cr. P. C. of any delegated authority. Obviously the intention was to simplify the law regarding sanction in the new C. P. C., and the circle of public servants for whose prosecution for bribery sanction was necessary under the previous Code has been narrowed. Under the former Code sanction of some authority (other than the Local Government) to whom the power was delegated by the Local Government to grant sanction was

necessary for the prosecution of certain public servants. Any sanction for prosecution in their cases is no longer necessary.

Two rulings were quoted in support of the contention put forward on behalf of the applicant that the dismissal by the Excise Commissioner really meant dismissal by the Local Government. *In re Abdul Khadir Saheb* (1), *Emperor* v. *Khan Chand* (2) The first case which is a Madras case contains merely the opinion unsupported by reasons of a Single Judge of that Court. With all respect we do not feel justified in following it. In the second case which is of the Lahore High Court and of date 24th March 1922, no rule had been framed to provide for cases of officers appointed previous to the date of the notification. We have already indicated that the notification of the Local Government in the present case provides for the dismissal of Excise Officers appointed prior to the date of the notification. The ruling of the Lahore High Court, therefore, has no application here.

For these reasons we decide that no sanction was necessary for the prosecution of the applicant and that his trial in the Court of the Magistrate was a legal trial.

We now come to the facts of the case. As notice has been issued to the applicant to show cause why the sentence passed on him should not be enhanced, he is entitled under the provisions of s. 439 (6) to show cause against his conviction. We have been taken through the entire evidence on the record. We have studied it and can discover no reason to disagree with the judgment of the learned Sessions Judge in appeal. The evidence does not rest here merely on the testimony of witnesses who depose to the paying of the bribe. There have been other incidents in the case which convince us of the appellant's guilt. The complainant Kailash Chander was a contractor for the retail sale of liquor at a shop in village Jhalu. There was a complaint made against him to the Police by one Karhira *chamar* on the 14th May 1924 and the applicant Excise Inspector went to the spot to hold an inquiry on 15th June. It appears to be the practice of the Inspector to receive certain sums described as an annual fee from the contractors in order to save them from petty prosecutions under the Excise Act. With this lever of a complaint the Excise Inspector demanded his annual fee from Kailash Chander. His demand was of Rs. 200 and it was finally settled at Rs. 160. Kailash Chander stated that on June 10th he paid Rs. 60 to the Inspector at his house at Bijnor. Two witnesses to the payment were produced, Baldeo Singh the contractor's uncle, who also has a drug shop four miles away from Jhalu at Haldaur and Dalchand. Apparently the applicant was not satisfied with this part-payment and Kailash Chander had not the means to pay more. The Inspector kept on demanding the balance. In July there was another complaint against Kailash Chander brought by one Lallu and Kailash Chander was sentenced to a short term of imprisonment but acquitted on appeal. He believed that the Inspector was at the bottom of this complaint. While he was attending to his defence in this case the Inspector reported his absence from his liquor shop and had him prosecuted in the Court of the Excise Officer. This case was fixed for hearing on the 24th September 1924. The incidents of that date and the following day the 25th September are important. The Magistrate Thakur Phul Singh has deposed that on the 24th September the applicant Excise Inspector appeared in the forenoon and stated that Kailash Chander accused of that case and the prosecution witnesses were absent and that the hearing had better be postponed. The Magistrate had to attend to treasury work and at about 1-30 P. M. when he took up the case and had Kailash Chander called, Kailash Chander appeared in Court. The Magistrate then inquired of the Inspector why he had given wrong information about the accused and the witnesses. There is no evidence that the Inspector at the time gave any reply. Kailash Chander explained that he had been present since the forenoon but that there had been a talk between him and the Inspector of a compromise and withdrawal of the charge Thakur Phul Singh has stated that the same day he heard in the Treasury Office that the Excise Inspector's orderly had taken a currency note for Rs. 100 to be cashed but that before it could be cashed the case had been called and the peon was called back by the Excise Inspector. Babu Lal Assistant Treasurer had deposed

(1) 33 Ind. Cas. 648; (1916) 1 M. W. N. 384; 17 Cr. L. J. 168.
(2) 72 Ind. Cas. 523; A. I. R. 1922 Lah. 337; 24 Cr. L. J. 411.

to this incident of a currency note being brought to the Treasury for encashment. Kailash Chander's story is that the Excise Inspector had consented to refund the sum of Rs 60 and it was on this account that the currency note of Rs 100 was taken to the Treasury to be cashed. It is certain that the note was taken to the Treasury The appellant did not explain the reason for this proposed encashment of the note but falsely denied having sent any note to the Treasury that day This denial and the absence of explanation, which it was the duty of the appellant to give under the circumstances of the present case, support the testimony of Kailash Chander. On the 25th September the excise case was taken up again and when the statement of Kailash Chander was recorded as an accused person he gave the reason for his prosecution to be his inability to pay the balance of the bribe of Rs 160 to the Inspector

There is no evidence to show, nor was it alleged before us, that when this charge was openly made by Kailash Chander the Inspector gave vent to any explanation or denied the charge immediately, as any honest man would have done After the statement of Kailash Chander was recorded the case was postponed for defence evidence The parties to the case went out and there was a quarrel between the Inspector and Kailash Chander, who from words came to blows and closed in with each other The witnesses for the prosecution support Kailash Chander's account that on going out of the Court he again demanded the refund of Rs. 60 whereupon the Sub-Inspector promised to pay it at his house and he retorted that he was constantly being put off by alternative promises of payment in Court or at home The two witnesses Harkishen Das and Mathura who are men of respectable position in life have supported Kailash Chander's story. On behalf of the defence certain Pleaders came forward and deposed that at the time of the quarrel there was no mention of a bribe and Kailash Chander simply threatened to settle with the Inspector before he himself was punished by Court. During the quarrel another Deputy Magistrate B. Budh Sen appeared on the scene and to him also Kailash Chander spoke about the bribe and the Inspector's refusal to refund the sum of Rs. 60.

We have already made reference to the absence of any explanation of the currency note having been taken to the Treasury. In the matter of the quarrel on the 25th also, the probability is all in favour of the prosecution. It is certain that in the Court of Thakur Phul Singh the complainant Kailash Chander charged the Sub-Inspector with taking a bribe and as soon as B. Budh Sen, another Magistrate, appeared outside the Court during the quarrel between Kailash Chander and the Inspector the former again made mention of the bribe. We, therefore, refuse to believe the defence witnesses who state that during the intervening quarrel between the Inspector and the contractor no reference whatsoever was made to the taking of the bribe by the Inspector In our opinion the defence witnesses are purposely concealing the words that passed between the parties with respect to the bribe

It was argued that Baldeo Singh and Dalchand who depose to the actual payment of the bribe are unreliable witnesses because Baldeo Singh is uncle of the complainant and the other witness Dal Chand was not mentioned as a witness by the complainant when his statement was first recorded on the 4th October. As rightly pointed out by the learned Sessions Judge, whatever value may be attached to this testimony standing by itself, the incidents of the 24th and 25th September supported by other incidents can leave no doubt in any one's mind as to the payment by Kailash Chander to the applicant of Rs. 60 in June 1924.

Some contradiction was pointed out between the complaint in which it was stated that the bribe was paid in Jhalu and the complainant's statement on oath where he stated that the bribe was paid in Bijnor. The complaint, however, was not written by the complainant himself and it is evident that the petition writer wrote it without carefully understanding the allegations of the complainant. We are satisfied that the appellant was rightly convicted.

We have also to consider the question whether the sentence should be enhanced. The accused has been sentenced under s. 161 of the Indian Penal Code to one month's simple imprisonment and a fine of Rs. 500 or in default three months' simple imprisonment. When he applied in revision against this conviction and sentence the matter came before Mr. Justice Kanhaiya Lal who on the 31st August concluded his order as follows :—

" If the facts found by the Courts below are true the sentence passed on the accused also requires to be examined with a view to determine its adequacy to meet the case of a systematic or annual levy alleged in this case. Let the case be, therefore, referred to a Bench of two Judges and let notice also go to the accused to show cause why the sentence should not be enhanced in case his revision is rejected."

The learned Sessions Judge, when hearing the appeal, was invited, as we are informed, to refer the case to this Court for enhancement of sentence. He concluded his judgment as follows :—

"I am not inclined to press for an enhancement of sentence. Imprisonment even for one month is a very serious matter for a man in the position of an Excise Inspector and the expenses of the case in addition to the fine will probably ruin him. His conviction of itself is enough to debar him from further Government service. I, therefore, dismiss the appeal and uphold the conviction and sentence."

We appreciate the considerations stated by the learned Sessions Judge but there can be no question as to the gravity of the offence committed by the accused. It is obvious that this type of offence can be very easily committed without much risk of exposure in view of the great unwillingness of victims to run the risk of failing to establish a perfectly true charge if they make it. In the present case if the evidence is to be believed and we have said that we believe it, it is clear that the incident which has been the subject of the present trial was not a solitary lapse on the part of the accused. He had established a regular system by which he levied a toll annually upon these licence-holders. Believing this evidence as we do, we find ourselves in agreement with Mr. Justice Kanhaiya Lal that the sentence inflicted was wholly inadequate to the offence.

We, therefore, while dismissing the application in revision enhance the sentence of one month's simple imprisonment to a sentence of six months' rigorous imprisonment and maintain the fine and the alternative sentence in default of payment of the fine. The applicant will surrender to his bail.

Z. K. *Sentance enhanced.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 431 OF 1925.
(CRIMINAL REVISION PETITION No. 357 OF 1925.
July 22, 1925.
Present:—Mr. Justice Jackson.
In re KANDASAMI CHETTY
—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 488—"Means", what are—Husband, unemployed and without property, liability of, to maintain wife—Remedy, nature of.

The word 'means' in s. 488 of the Cr P. C. does not signify only visible means such as real property or definite employment. If a man is healthy and able-bodied, he must be taken to have the "means" to support his wife

Section 488 of the Cr. P. C. provides a speedy remedy and safeguards a deserted wife or child from starvation; but when other issues are raised, they ought to be settled in the Civil Courts to which persons aggrieved by orders under the section ought to take their case

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise an order of the Court of the Sub-Divisional Magistrate, Pollachi Division, dated the 28th April 1925.

Mr. *S. T. Srinivasagopalachari*, for the Petitioner.

ORDER.—Petitioner seeks to revise the order of the Sub-Divisional Magistrate, Pollachi, under s. 488 of the Cr. P. C, by which he is directed to pay rupees ten (Rs. 10) per mensem as maintenance to his first wife. The order contains no clear issues or findings and the Magistrate should understand that vituperation adds nothing to the force of a judicial pronouncement.

Apparently upon the evidence of counter-petitioner and her three witnesses, the Magistrate finds that she was driven out of her home, not allowed to come back, and refused maintenance. He rejects the defence evidence to the contrary because he thinks the plea of enmity "rather *mamool*," meaning presumably that it is a false plea often advanced. He finds that though slightly lame the counter-petitioner is able to work and accordingly he orders rupees ten (Rs. 10) per mensem, not an extravagant rate for people in decent circumstances. He also hopes that the family will assist the husband to find the money.

Of course, maintenance can only be levied from the husband, and in expressing this hope the Magistrate passes no order against the husband's family. The point most strenuously pressed by petitioner is that since the husband is only 19 years

old and unemployed, he has no means to support his wife. I do not take "means" in s. 488 of the Cr P. C, to signify only visible means such as real property or definite employment. If a man is healthy and able-bodied he must be taken to have the means to support his wife. I, therefore, find no absolute ground for interference; but I agree with the petitioner that this order is not altogether satisfactory. It should have been more clearly set forth whether the wife has merely left the house upon the arrival of the second wife or has been actually driven out If petitioner's remedy were concluded, there might be reason for re-opening the matter But it is obvious from the Statute itself that persons aggrieved by these magisterial orders are expected to take their case to the Civil Courts Section 488 of the Cr P C, provides a speedy remedy and safeguards a deserted wife or child from starvation, but when other issues are raised, they should be settled in the Civil Courts, and nothing is to be gained by protracted litigation in the Criminal Courts Doubtless it is with that intention that no appeal has been allowed from orders under s. 488.

Therefore, I decline to interfere and admission is refused.

V. N. V.

Z. K. *Petition dismissed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 592 OF 1925.

December 7, 1925.

Present:—Mr. Justice Sulaiman.

MULAI RAI—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 44, 190—Threat to institute civil suit, whether threat of "injury".

A threat to institute a civil suit for a declaration of right against any person who is objecting to such right does not amount to a threat of "injury" within the meaning of s 190 of the Penal Code. [p 864, col. 2]

Criminal revision from an order of the Sessions Judge, Benares, dated the 18th July 1925.

Mr. *P. L. Banerji*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is a criminal revision from an order convicting the accused under s. 190 of the Indian Penal Code and sentencing him to a fine of Rs. 55.

The applicant is the *mukhtar-am* of *Musammat* Daulata Kunwar who had constructed a temple inside her house, installed idols therein and performed *puja* by sounding conches in the evening The Muhammadans of the *mohalla* objected to this and approached the District Magistrate who deputed a joint Magistrate to inspect the locality The learned Magistrate being satisfied that there was an apprehension of some dispute passed an order under s. 144 of the Cr. P. C on the 4th of February 1925 directing *Musammat* Daulata Kunwar to keep all the doors of the room in which the idols were kept closed and bolted, and to abstain from making any musical or other noise during a short period. After this the District Magistrate must have been trying to get the matter settled amicably if possible. On the 25th of February 1925 a large number of notices including one to Hafizullah were sent out by the applicant under the name of *Musammat* Daulata Kunwar. As the notice to Hafizullah is the real basis of this prosecution it is necessary to set forth its terms in some detail. Its purport was as follows — "You along with others drew the attention of the District Magistrate and got him to depute the joint Magistrate to inspect the locality and convinced him that there was a fear of religious dispute which induced him to pass an order under s. 144 of the Cr. P. C. You are, therefore, given this notice that within one week of this date you should in writing express your dissociation from the said acts and give it in writing that you have no connection or concern with those acts and that you do not desire to interfere with the worship which I perform in accordance with Hindu *dharamsastras*. If you fail to do so then you also will be impleaded in the array of the defendants in the civil suit which I am about to bring." The Courts below have held that the threat contained in the notice amounted to a threat of injury to a person for the purpose of inducing that person to refrain or desist from making a legal application for protection against any injury to any public servant legally empowered as such to give such protection. The view taken by the Courts below is that the real intention of the accused was to make the complainant desist from approaching the District Magistrate any further. Perhaps it would be best to quote the words of th

Appellate Court itself. "The notice in question goes beyond the legitimate requirements of the case, and reading the entire notice and considering other circumstances attending the matter in dispute the impression which one gets is that the notice was by way of a threat of a civil suit against the person to whom the notice was addressed by which it was intended that he should refrain from approaching the District Magistrate about the matter and to seek his protection."

When the alleged threat of injury is contained in a written notice it is very doubtful how far the Courts are entitled to go outside the language of that notice in order to infer an intention which does not appear from that writing. The notice does not ask the addressee to refrain from approaching the District Magistrate any longer. Nor does it refer to any pending dispute The Courts below, however, have taken the true intention to have been to make the complainant refrain from approaching the magisterial authorities. Assuming for the sake of argument that it was open to the Courts below to infer this intention, the question still remains whether the threat of the institution of a civil suit is an injury within the meaning of s. 190 of the Indian Penal Code.

It is noteworthy that the addressee was called upon to make three statements in writing (1) dissociating himself from the previous acts, (2) stating that he had no concern or connection with them and (3) expressing his desire not to interfere with the worship. Unless the addressee had on the previous occasion made an objection to the worship or taken any part in approaching the authorities or unless he was denying her right to perform the worship, *Musammat* Daulata Kunwar would have no cause of action for maintaining a civil suit against him. Before, therefore, the addressee was to be impleaded in a civil suit recklessly it was essential to know for certain whether there was any cause of action against him. The notice mentions in express terms that if he does not comply with the request of *Musammat* Daulata Kunwar he would be impleaded in the civil suit.

The non-compliance with the request contained in the notice would have involved Hafizullah being impleaded in the suit. Does the institution of a civil suit against a person amount to an injury within the meaning of s. 190? The word 'injury' has been defined in s. 44 of the Indian Penal Code as denoting any harm whatever *illegally* caused to any person in body, mind reputation or property. *Musammat* Daulata Kunwar had a right to bring a civil suit for a declaration of her right to maintain the temple and perform the worship. Whether she would ultimately succeed or not is quite a different matter, but she had a right to maintain a suit against any person who was objecting to her right. Can the institution of a civil suit against a person who was so objecting be called a harm illegally caused? The recourse to a Civil Court cannot amount to causing an illegal harm. Under certain circumstances a false complain against a person may be an illegally caused harm. It may also be possible to conceive of cases where a totally false suit, vexatious and frivolous in its nature intended to harass a person, may amount to a harm illegally caused. But in this particular case the institution of a civil suit for a mere declaration of right against any person who was objecting to that right cannot be said to be a harm illegally caused in body, mind reputation or property. The complainant Hafizullah was examined in this case and from his evidence it appears that he himself had done nothing in particular before the order under s. 144 was passed. He has stated that he became surprised as to how notice was served on him. He had no acquaintance with *Musammat* Daulata Kunwar. He had never complained about the temple and never wanted before nor did want then to do anything against the *Musammat's* temple. He had not asked any one to do anything in respect of the notice he had received and he said that he did not reply to the notice as he thought that the notice had been sent to him by mistake. These statements make it quite clear that there was nothing personal in sending the notice to Hafizullah. The accused's version that the object was to ascertain whether Hafizullah was objecting to her right in order to make up one's mind whether or not he should be impleaded in the civil suit, appears to be not unfounded. I accordingly allow this revision and setting aside the conviction and the sentence acquit the accused of the charge and direct that the fine, if paid, be refunded.

Z. K. *Revision allowed.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 97 OF 1925.
April 15, 1925.
Present:—Justice Sir John Bucknill, Kt., and Mr. Justice Macpherson.
AJO MIAN AND OTHERS—ACCUSED—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss 257, 439 -Opportunity given to accused to cross-examine prosecution witness—Witness, re-call of, at request of accused—Refusal of Magistrate to re-call witness —Discretion—Revision—High Court, interference by.

While a Magistrate is bound under s 257 (1) of the Cr. P. C to issue process on the application of an accused person who has entered on his defence for compelling the attendance of a witness for the purpose of examination or cross-examination (save in certain stated circumstances which the Magistrate must find and must set forth in writing), the proviso to that section on the other hand definitely prohibits the Magistrate from issuing such process, if the accused has cross-examined or had the opportunity of cross-examining the witness after the charge was framed, unless the Magistrate is satisfied that such attendance is necessary for the purposes of justice, that is to say, unless he is convinced of the existence of the strongest possible grounds for disregarding the prohibition. The exception to the prohibition must not be read as swallowing up the prohibition or the whole proviso as enjoining that the Magistrate shall issue process if he is not satisfied that the attendance of the witness is unnecessary for the ends of justice, or if he is not satisfied that (as in the case of the witnesses not covered by the proviso) the application is made for the purpose of vexation or delay or for defeating the ends of justice On the contrary the prohibition may not be disregarded unless in the opinion of the Magistrate the purposes of justice not merely warrant but demand such disregard It is not incumbent upon the Magistrate to record in writing his reasons for not being satisfied that the attendance of a witness is necessary for the purposes of justice [p 869, cols 1 & 2]

If a good case is made out that the Magistrate's refusal to summon the witness was outside the limits of a reasonable discretion the High Court would interfere with the exercise of such discretion, but the position must be most clearly established that the Magistrate's decision was unreasonable and improper before the interference of the High Court could properly be invoked or expected [p 867, col 1]

Criminal revision from the decision of the Sessions Judge, Bhagalpur, modifying that of the Magistrate, First Class, Bhagalpur, dated the 23rd December 1924.

Sir *Ali Imam* and Mr. *S. A. Sani*, for the Petitioners.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

Bucknill, J.—This was an application in criminal revisional jurisdiction made on behalf of six Muhammadans. The first was found guilty by a Magistrate of the First Class at Bhagalpur, on the 23rd December last of an offence punishable under s. 326, Indian Penal Code (causing grievous hurt with a dangerous weapon); he was sentenced to one year's rigorous imprisonment. He was also found guilty of an offence punishable under s. 148, Indian Penal Code (rioting armed with a deadly weapon). For this offence he was again sentenced to one year's rigorous imprisonment, the sentences were to run consecutively. The other five applicants were all found guilty, firstly, of an offence punishable under s. 147, Indian Penal Code (riot) and, secondly, of an offence punishable under the combined provisions of ss. 326 and 149, Indian Penal Code, that is to say, of causing grievous hurt with deadly weapons whilst members of an unlawful assembly. The object of the unlawful assembly was stated to be to assault Hindus. The second applicant was in respect of each of these offences sentenced to undergo rigorous imprisonment for one year; but the sentences have been ordered in his case to run concurrently. The other applicants were sentenced to six months' rigorous imprisonment in respect of each offence and in their cases also their sentences were ordered to be concurrent.

On appeal to the Sessions Judge of Bhagalpur the conviction of the first applicant was set aside in so far as the charge against him under s. 326 was concerned. His conviction and sentence, however, under s. 148 was upheld. The convictions and sentences of the other applicants under s 147 were also upheld, but, although the convictions under the combined provisions of ss. 326 and 149 were upheld, the sentences were set aside in view of the fact that double sentences in respect of such cognate offences were not regarded by the Sessions Judge as being permissible.

The circumstances which gave rise to the prosecution were very unfortunate and were the result of some communal disturbance at Bhagalpur between the Muhammadans and Hindus. It is said that the Hindus were celebrating a festival with considerable ceremony and that the passing of their procession with music and song close to a Moslem mosque gave some umbrage to the Muhammadans. It is alleged that the Muhammadans attacked some Hindus and injured some of them considerably. We are informed that more than one set of charges has arisen from this affair. It is,

however, with the facts of this prosecution which is the subject-matter of the present application that we are at the moment concerned.

The learned Counsel who has appeared for the applicants has urged three points before us The first is that his clients have been the victims of certain illegalities in procedure at the hands of the Trying Magistrate. The second is that there was no common object as alleged in the charge, *viz.*, assault on Hindus, but merely an isolated series of encounters for which perhaps individuals might properly be found guilty of specific offences if they were brought home to them. Thirdly, that in the peculiar conditions exemplified in the evidence the sentences imposed are unnecessarily severe.

With regard to the first point it seems clear that after the prosecution case had proceeded for sometime, the Counsel who was appearing for some of the applicants fell ill, he was assisted by some Pleaders who asked for a postponement of the trial on the ground that they were not in a position to undertake the cross-examination of the remaining few prosecution witnesses. The Magistrate, however, who had, from the commencement, intimated his intention to the parties of continuing if possible to hear the case *de die in diem* refused the application. The result was that some five of the prosecution witnesses including both members of the Police force and private persons were not cross-examined. It is not seriously contended that the Magistrate acted either illegally or really unreasonably in what he did, one can only agree with the learned Counsel for the applicants that the attitude of the Pleaders who were appearing for the applicants cannot be the subject of commendation. It is obvious that under the circumstances they should have done their best to help their clients and it would seem that they were not doing so by the attitude which they thought fit to adopt. However, when the accused filed their list of witnesses and applied to the Magistrate under s. 257 of the Cr. P. C., they asked that these five witnesses should be ordered to attend for the purpose of cross-examination. It is quite clear that it is contemplated under the provisions of that section that they had a right to make this application and indeed it has been laid down in the Calcutta High Court in the case of *Sheo Prakash Singh* v. *Rawlins* (1), that if the Magistrate in fact does accede to such a request the accused are entitled to cross-examine such witnesses so called to the Court. The section itself, however, gives the Magistrate certain powers to refuse such an application; whether it is the case of a witness who is desired to be called for the defence or whether it is one whom it is desired only to cross-examine. These grounds are either that the application has in the Magistrate's view been made for the purposes of vexation or delay or for defeating the ends of justice; and he has to record in writing his decision for his refusal. In this case the Magistrate refused to grant the application for the order that these prosecution witnesses, who had not been cross-examined, should attend for that purpose. In rejecting the application, the Magistrate in his order-sheet has written: "I have already rejected the prayer to adjourn on that account and see no reason to revise my opinion and grant it now." Had the section rested there, it is possible that the Magistrate could have been rightly said not to have given in writing any ground for his decision which is contemplated by the section as a good ground for his refusal; but there is a proviso to the section which alters the complexion of his action. The proviso to the section is to the effect that, when an accused has cross-examined or *had the opportunity* of cross-examining any witness after the charge has been framed, the attendance of such witness shall not be compelled under the section's provisions unless the Magistrate is satisfied that it is necessary for the purposes of justice.

I think that it is quite clear in this case that the Magistrate *was not* satisfied that it was necessary for the purposes of justice to compel the attendance of these witnesses, but it is contended that the Magistrate cannot unreasonably say or assume the position that he is not so satisfied. In other words, if, where there exist cogent reasons why the Magistrate should have been satisfied, it is illegal for him to say that he is not; his non-satisfaction must be based on reasonable grounds. It is argued that in this case there *were* very good reasons for thinking that it *was* necessary in the interests of justice that these witnesses *should* be directed to attend for cross-examination.

There can be no doubt that in this case an opportunity was in fact afforded to the

(1) 28 C. 594

accused to cross-examine these witnesses at the proper time; it may not have been possible for the accused's leading Counsel to conduct the cross-examination but the accused were represented it is admitted, by other lawyers.

The learned Counsel for the applicants does not contend that the mere fact that an accused's lawyers declined to cross-examine such witnesses or that the mere fact that such witnesses were *not* cross-examined constitute factors which would justify an argument that a Magistrate's opinion of satisfaction that under such circumstances it was not necessary for him to order the attendance of such witnesses under s. 257 could be attacked, for to do so would, of course, be to contend that the proviso to the section was meaningless and that whenever for any reason prosecution witnesses were not cross-examined they *must* be ordered to attend if application for their cross-examination is made by an accused under s. 257.

What, however, he *does* urge is that this Court should scrutinize the reasons why the Magistrate was satisfied that the attendance of the witnesses was *not* necessary and that if it be shown to this Court that there *were* existing reasons why their attendance *was* necessary for cross-examination for the purposes of justice this Court should interfere in its revisional jurisdiction and hold that the Magistrate's refusal was unreasonable and inequitable. I am ready to agree that if a good case was made out that the Magistrate's refusal was outside the limits of reasonable discretion this Court should and would interfere; but I am sure that that position must be most clearly established, (*i e*, that the Magistrate's decision was unreasonable and improper) before the interference of this Court can properly be invoked or expected.

I do not, however, think that in this case any such position has been established. The point was argued at some length before the Sessions Judge who deals with it in his judgment thus:—"There remains to be considered the matter of prejudice raised by the appellants. On 15th November 1924, after the framing of the charges, and while the cross-examination of the prosecution witnesses was in progress a petition was put in on behalf of some of the accused stating that Mr. Hassan the defending Counsel had fallen ill and asking for an adjournment. This was refused. On that date some witnesses were cross-examined on behalf of two of the accused, namely, Sachidanand Singh, Sub-Inspector, Upendra Mohan Ghose, Inspector, Rajendra Prasad, Deputy Superintendent, Muhammad Ahsan, Sub-Inspector and some others. The Pleaders appearing on behalf of the other accused, that is to say accused whom Mr. Hassan was defending refused to cross-examine at all. On 19th November, after the prosecution had closed their case, a petition was put in on behalf of these accused to re-call the four witnesses mentioned above for cross-examination under s 257 of the Cr. P. C. This was rejected by the Magistrate. Consequently these four persons were not cross-examined on behalf of the accused for whom Mr. Hassan appeared.

"Section 257 lays down clearly that the Magistrate need not re-call witnesses whom the defence have had an opportunity for cross-examining unless he is satisfied that it is necessary for the purposes of justice. The order of the Magistrate accordingly is perfectly legal, nor do I consider that he exercised his discretion wrongly. It is not suggested that the Pleaders appearing for the other accused were insufficiently instructed or particularly incompetent and if it was considered that the Counsel appearing for the other accused had not covered the whole ground in his cross-examination their conduct in refusing to put any questions at all is deserving of re-proof In any case these four officers did not fully implicate any of the appellants except Ajo, Hafiz Gafoor, and Abdul Latif The rest of the evidence is sufficiently strong against the two former, and Abdul Latif was one of the two men on behalf of whom cross-examination was actually made"

These observations seem substantially to show that the Magistrate's decision could not have been regarded as unreasonable. Nor has the learned Counsel for the applicants in the course of his able and interesting argument been able to prove to us in what way with certainty his clients' position *was* prejudiced or could have been improved by cross-examination of these witnesses: all that he *can* urge is that it might perhaps have been possible from a cross-examination of these witnesses to have extracted from them something which might have been of advantage to the accused. But this is

not, I think enough in order to justify this Court's interference in a case such as this and on a decision based on the proviso to s. 257, Cr. P. C., it must be shown to this Court not that there possibly by some chance might have been but that in fact there *was* matter to be obtained from the witnesses sought to be called for cross-examination which *would* have materially affected the result of the trial; as the Assistant Government Advocate has aptly expressed it, the onus is clearly on the applicants to establish that position; and I do not consider that in this case they have succeeded in so doing.

With regard to the second point urged by the learned Counsel for the applicants, namely, that there was really no common object as laid in the charge (that is to say, of assult on Hindus) he bases his argument upon a close and detailed examination of the somewhat confused phases of what took place on the day of occurrence. He shows that there were a series of not very closely if at all connected events on that day; but they had for some little time before been preceded by happenings which had given rise to a good deal of Muhammadan misgivings and chagrin. In the opening words of the applicant's petition "For some time past the relations between the two communities, *viz.*, the Hindu and the Muhammadan of Bhagalpur had become strained and the feelings were running very high." The Hindus had, it is said, issued notices to their co-religionists on 21st August 1924, to the effect that it was contemplated celebrating shortly their *janamashatmi* festival with considerable splendour, and on the 22nd they issued another notice asking that they (the Hindus) should, on the following day, keep their shops shut and stop business and join the *dadhikado* procession which was to take place on the 23rd.

The Moslems seem to have been afraid that they would be insulted in some fashion and went so far as to apply to the Sadr Sub-Divisional Officer at Bhagalpur asking for Police arrangements to be made in order to prevent a breach of the peace and that the Sub-Divisional Officer should take some preventive measures: the Sub-Divisional Officer was a Moslem gentleman, he did not take any measures to prevent the procession taking place but apparently took some Police precautions which seem indeed unhappily to have been needed.

On the 23rd the procession took place, it seems that a large number of Moslems were gathered in and around a large mosque which the procession passed. The procession was guided and shepherded by the Police; it was carrying an image of Sri Krishna to the Ganges; some of the processionists carried bamboos with flags. Apparently trouble was only averted as the procession passed the mosque, by the Police for some stones were thrown at the tail of the procession by several Muhammadans. Some of the processionists (the procession is said to have been about 5000 strong) were beginning to throw stones back and some of them began to jump over the rails at the side of the road and to run back towards the Muhammadans, but the Police managed to stop any fracas. The procession went on to the Ganges and then was apparently returning; but it was diverted by another route: some (perhaps 60) Hindus, partly processionists and partly perhaps spectators, were re-tracing their steps by the route by which the procession had come and drawing towards the mosque, at this stage a number of Moslems, said to be armed with swords, axes and *lathis*, raised shouts and ran out, the Police tried to prevent any outbreak and so also did some very respectable Moslems, they seem to have prevented the Moslems from attacking *this* party but some of the Muhammadans (amongst them being it is said the applicants) turning back began to knock about any Hindus whom they met, several of whom were witnesses in this case. The applicant No. 1 Ajo Mian is well identified as being the leader or one of the leaders of this party of Moslems to which the accused (and no doubt others) belonged, he is said to have carried both a sword and a *lathi*, and I regret to say to have used the former vigorously.

Applicant No. 2 Hafiz Gafoor is shown to have carried and used a Mirzapur *danta* which is a heavy stick. Applicant No. 3 Sheik Janglu is said to have carried a *lathi*.

Applicant No. 4 Sheik Bado is said to have been armed either with what is described as a meat cutting instrument or a small *lathi* and to have been throwing stones. Appellant No. 5 Abdul Latif is said to have been armed with a sword *or* a *lathi* whilst a *lathi* only is said to have been carried by applicant No. 6 Abdul Razak.

I have at the commencement of my observations stated what sentences were impos-

ed: One year on Ajo Mian, one year on Hafiz Gafoor, and six months on each of the rest. I cannot see any good reason for justifying the attack which the applicants made, although I am quite prepared to think that they felt a good deal vexed at the Hindu religious demonstration. I have, however, very little sympathy with people who use swords unnecessarily in an emeute.

I think, however, that taking all the circumstances into consideration, the sentence on Ajo Mian may be reduced to six months and on the others to three months rigorous imprisonment and I should like it actually drawn to their attention in thus taking a lenient view of what might have been, had it not been for the Police and the more sober-minded members of their own community, a most serious matter, that I most earnestly trust that in future they will endeavour to keep on good terms with their neighbours whatever differences of creed may separate their religious and social lives. They have got to live side by side and the many ties which should bind them together are really stronger than the forces which sometimes seem to tend to separate them.

Macherson, J.—I agree to the order proposed.

On behalf of Ajo, Hafiz Gafoor, Janglu and Bado the first four petitioners, chief reliance is placed on the first argument. Now while a Magistrate is bound unders. 257 (1) to issue process on the application of an accused who has entered on his defence for compelling the attendance of a witness for the purpose of examination or cross-examination (save in certain stated circumstances which he must find and must set forth in writing), the proviso to that enactment on the other hand definitely *prohibits* the Magistrate from issuing such process, if the accused has cross-examined or had the opportunity of cross examining the witness after the charge was framed, unless the Magistrate is satisfied that such attendance is necessary for the purposes of justice, that is to say, unless he is convinced of the existence of the strongest possible grounds for disregarding the prohibition. The exception to the prohibition must not be read as swallowing up the prohibition or the whole proviso as enjoining that the Magistrate shall issue process if he is *not* satisfied that the attendance of the witness is *unnecessary* for the ends of justice or if he is not satisfied that (as in the case of the witnesses not covered by the proviso) the application is made for the purpose of vexation or delay or for defeating the ends of justice. On the contrary the prohibition may not be disregarded unless in the opinion of the Magistrate the purposes of justice not merely warrant but demand such disregard. It is also clear that it is not incumbent upon him (though it is often expedient) to record in writing the reason for not being satisfied—the natural course would be to require a record of reasons for disregarding (not for not disregarding) a statutory prohibition

Though there may be exceptional cases where the Court can see at once that the attendance of a witness referred to in the proviso should be compelled, it is ordinarily for the applicant to satisfy the Magistrate that it is necessary for the purposes of justice that his application for compelling the attendance of such a witness should be granted. In the present instance the first four petitioners had had an opportunity of cross-examining certain witnesses through Pleaders who represented them throughout the trial, but they had not availed themselves of it. They sought to bring themselves within the proviso by merely pointing out that their Counsel who would have cross-examined was ill. But much more than the mere statement of that fact was necessary in the circumstances of the case to show that the attendance of the witnesses who had not been cross-examined on the petitioners' behalf, was necessary for the purposes of justice. For instance that there were definite matters of importance on which the witnesses ought to be cross-examined on behalf of the petitioners. Only general considerations, however; were advanced and no real attempt was made to satisfy the Court that the application came within the exception to the statutory prohibition. Manifestly those considerations failed to satisfy the Magistrate. Now, the burden of showing in appeal or revision that the Magistrate ought to have been satisfied lies very heavily on the appellant or petitioner. The discretion is committed to the Magistrate and if valid reasons for exercising it in favour of the accused are not advanced in his Court or do not clearly appear from the record as it stood at the time, it is impossible for the superior Court to hold that he was wrong in failing to disregard the statutory prohibition in favour of the accused. Little weight is to be accorded

to considerations which did not occur to the applicant at the time and are of the nature of afterthought. It is clear, therefore, that even if attention is restricted to the considerations in favour of the argument, there is no ground for interfering in revision with the order of the Magistrate.

There are, however, special considerations in the present case which militate against interference in revision. Not only is it not shown that there were materials before the Magistrate on which he was satisfied or which ought to have satisfied him that process to compel the attendance of the witnesses who had not been cross-examined was necessary for the purposes of justice, but it is obvious that he was not so satisfied and that he was even satisfied to the contrary. The parties had been warned that the trial would proceed from day to day and the Pleaders of petitioners Nos. 1 to 4 ought to have been ready. Mr. Naim an experienced Counsel, cross-examined at length the witnesses present on that date on behalf of Latif and Razak petitioners Nos. 5 and 6 and on the case generally *prima facie* covering the whole ground. Several of the numerous Pleaders appearing on behalf of the first four petitioners were also retained on behalf of Latif and Razak and two of them at least were present in Court. There were sixteen accused on trial and when Mr. Naim concluded not only petitioners Nos. 1 to 4 but also all the other ten accused declined to cross-examine. It was thus even possible for the Magistrate on consideration of all matters before him actually to be satisfied that it was *not* necessary for the ends of justice to compel the attendance of the four prosecution witnesses for further cross-examination.

It is not unusual for the defence to take advantage of a *contretemps* of the nature indicated in order to make capital out of it in appeal or revision, especially where, as in this instance, the risk involved is negligible. In circumstances such as have been detailed the Trying Magistrate alone is in a position to gauge the situation and to appreciate whether the refusal to cross-examine and the subsequent application for process against the same witnesses has been merely "tactical," and thus it behoves superior Courts to be on their guard against suggestions as to the conduct of the trial.

Finally reference may be made to the specific finding of the learned Sessions Judge that the elimination of the depositions of the witnesses not cross-examined on behalf of petitioners Nos. 1 to 4 would not improve the position of these petitioners, since those witnesses do not advance the prosecution case against petitioners Nos. 3 and 4 and the other evidence on record is adequate to establish the charges against the petitioners Ajo and Haffz Ghafur.

The first ground is, therefore, without merit.

The second plea on behalf of appellants fails since the common object set out in the charge of assaulting Hindus—not the processionists only but also any members of the community met with—has been found to be established, while as to the sentences I would join in the hope that the reduction may have a beneficial effect on the relations between the two communities at Bhagalpur.

Z. K. *Rule discharged: Sentence reduced*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 711 OF 1925.

December 16, 1925.

Present :—Mr. Justice Daniels.

Musammat MASALA—APPLICANT

versus

EMPEROR THROUGH RAMJAG AND OTHERS—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), s. 439—U. P. Village Panchayat Act (VI of 1920), ss. 31, 32—Criminal trial—Acquittal—Revision—Interference by High Court.

Section 32 of the U. P Village Panchayat Act applies only to suits; the corresponding provision applicable to criminal cases is contained in s. 31 of the Act.

Where an Appellate Court sets aside a conviction on the ground that the proceedings in the Trial Court were without jurisdiction, the finding being based on a misreading of a statutory provision, the High Court is entitled to set aside the order of acquittal in revision.

Criminal revision from an order of the District Magistrate, Basti, dated the 16th October 1925.

Mr. *Harnandan Prasad*, for the Applicant.

Mr. *Kumuda Prasad*, for the Opposite Parties.

JUDGMENT.—This is an application in revision against an order of the District Magistrate of Basti on appeal from a conviction under ss. 352 and 426, Indian Penal Code. The case was instituted before the Sub-Divisional Magistrate who made it over

to the *Tahsildar*. The *Tahsildar* convicted the accused and sentenced them to payment of fine No question of the application of the Village Panchayat Act seems to have been raised at any stage of the proceedings until the appeal was argued before the District Magistrate. The District Magistrate on the basis of s. 32 of that Act considered that the *Tahsildar* had no jurisdiction to try the case and held his proceedings to be void and cancelled his order. The learned District Magistrate has entirely misunderstood s. 32 of the Village Panchayat Act which applies only to suits. The provisioin applicable to criminal cases is s. 31. It is urged that technically this order amounts to an acquittal and, therefore, this Court should not interfere in revision. This is just one of those cases in which the High Court is justified in interfering, the Appellate Court having wrongly considered that the whole of the proceedings in the Trial Court were without jurisdiction. I accordingly set aside the order of the District Magistrate and direct him to re-hear the appeal.

Z. K. *Order set aside.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 725 OF 1924.

February 2, 1925.

Present:—Mr. Justice Jwala Prasad.

JEOBARAN SINGH AND OTHERS—ACCUSED—PETITIONERS

versus

RAMKISHUN LAL—OPPOSITE PARTY.

Bengal Ferries Act (I B C of 1885), ss 16, 28—Criminal Procedure Code (Act V of 1898), s 234—Ferry, unauthorized, maintenance of—Carriage of passengers or property—Offence—Several offences, trial of—Procedure

Section 16 of the Bengal Ferries Act only makes the maintenance of a ferry within the prohibited area an unauthorized act but does not make such an act penal Section 28 of the Act is, however, a penal provision which makes the maintenance of an unauthorized ferry under s 16 of the Act an offence when the ferry is used for conveying a passenger, animal, vehicle or other thing for hire [p 872, col 1]

In order to constitute a ferry such as contemplated by the Bengal Ferries Act it is necessary that there should be two points on both sides of the river so that passengers and property may be conveyed from one side of the river to the other It must be connected on both sides with land on the banks of the river [*ibid*]

The maintenance of a private ferry is in contravention of s. 16 of the Bengal Ferries Act for which the person who maintains the ferry may be liable for damages and an injunction may also be issued against him If, however, in addition to maintaining such a prohibited private ferry, he carries passengers or property he is liable criminally under s. 28 of the Act and each time he conveys passengers or property for hire he commits an offence Each trip is a separate transaction and can be tried separately. Where several trips are made within the course of a few days the proper procedure is for the Magistrate to try the accused at one time only in respect of three of these transactions and to use the remaining transactions as evidence in the case for the purpose of determining the amount of the damages payable under the Act. If a conviction is obtained in respect of transactions selected for trial, the Court should stay the enquiry into or trial of the other charges which will have the effect of the acquittal of the accused on those charges subject to the event of the conviction being set aside on appeal or revision If the conviction is set aside the Magistrate may proceed with the trial of or enquiry into other charges. [p 872, col 2, p 873, col 1]

Criminal revision from an order of the Sessions Judge, Patna, dated the 16th December 1924, upholding that of the City Magistrate, Patna City, dated the 2nd December 1924.

Messrs. *P C. Manuk, S. P. Verma* and *N. N. Sinha*, for the Petitioners.

Sir *Ali Imam* (Assistant Government Advocate) and *Girindra Nath Mukharji*, for the Opposite Party.

JUDGMENT.—The petitioners have been summoned to stand on their trial with respect to 24 complaints filed against them on behalf of a ferry contractor Chandraketu Singh by his servant Ramkishun Lal in the Court of the City Magistrate of Patna under s. 16/28 of the Ferries Act (Act I of 1885).

The case of the complainant in short is that the petitioners were conveying passengers, etc, for hire in contravention of the provisions of s. 16 of the Ferries Act by maintaining a ferry between the 9th and 12th November 1924. There are 24 complaints arising out of as many trips from Marufgunj in Patna City across the river Ganges to Sabalpur Diara in the Saran District.

The petitioners' main objection is that all these 24 trips do not constitute as many separate offences under the aforesaid section, but that they together constitute one offence and, therefore, they should be tried at one trial with respect to all these trips. Mr. Manuk on behalf of the petitioners contends that in order to sustain a charge under s. 28 it is essential to show in the first instance that the petitioners maintained a ferry to or from any point within a distance of two miles from the limits of a public ferry which is prohibited by s. 16 of the Act.

That section only makes the maintaining of a ferry within the prohibited degrees an unauthorized act but it is not in itself penal. It may give rise to an action for damages, but is not punishable under the criminal law. Section 28 is a penal provision which makes the maintenance of an unauthorized ferry under s. 16 an offence when the ferry is used for conveying any passenger, animal, vehicle or other thing for hire. Accordingly, it is contended that the ferry in question was used for four days, namely, from 9th to 12th November, during the Sonepur fair, for the purpose of carrying passengers, etc., for hire and thus the ferry was maintained for the aforesaid four days for the purpose of making profit by realising tolls from passengers. The act of realising tolls during the four days must be deemed to be one continuous act as implying the maintaining the ferry under s. 16 of the Act. Therefore, each time the toll was realised during those four days would not constitute a separate transaction and would not form the subject of a separate charge or trial against the petitioners.

The word 'ferry' has not been defined in the Act. Section 5 simply says—

"'ferry' includes a bridge of boats, pontoons or rafts, a swing-bridge, a flying bridge, a temporary bridge, and a landing stage".

The word must, therefore, be taken in its ordinary accepted legal significance. Literally it has been defined in Bouvier's Law Dictionary as "a liberty to have a boat upon a river for the transportation of men, horses, and carriages with their contents, for a reasonable toll. The term is used also to designate the place where such liberty is exercised. In law it is treated as a franchise and defined as the exclusive right to carry passengers across a river, or arm of the sea, from one vill to another, or to connect a continuous line of road leading from one township or vill to another". Continuing the dictionary says "In a strict sense a ferry is a continuation of a highway from one side of the water to the other and is for the transportation of passengers, vehicles and other property". In order to constitute a ferry such as is contemplated by the Act in this country it is necessary that there should be two points on both sides of the river so that people and property may be conveyed from one side of the river across the other. It must be connected on both sides with land on the bank of the river. In order to give full significance to this meaning of the term the Act has included in it "any other appliance by which the water is connected with the land". This purpose may be served by a bridge of boats, pontoons or rafts, etc. In this sense the public ferry is created and leased on behalf of the authorities, and to protect the rights granted under the lease with respect to a public ferry the Act has made it illegal to maintain a regular ferry on a river within two miles of a public ferry so as not to interfere with or affect the peaceful working of and making profit out of the public ferry leased to the contractor. It seems that the idea is similar to that in England where, the aforesaid dictionary notes, "ferries are established by royal grant or by prescription, which is an implied grant in the United States, by Legislative Authority, exercised either directly or by a delegation of powers to Courts, Commissioners, or Municipalities." Wherever such public ferries have been created provision has always been made to protect the interest of the public ferry by forbidding individuals erecting a competition ferry near about One provision referred to in the dictionary is "if an individual, without authority from the State, erect a new ferry so near an older ferry, lawfully established, as to draw away the custom of the latter, such individual will be liable to an action on the case for damages, or to a suit in equity for an injunction in favour of the owner of the latter." This seems to have been the object with which s. 16 has been enacted. The maintenance, if any, of a private ferry by the petitioners was in contravention of s. 16 of the Act for which they may be liable for damages and also an injunction may issue against them. If, in addition to maintaining such a prohibited private ferry, they carried passengers and property for hire they are liable criminally under s. 28 of the Act, and each time they did convey for hire they became liable.

It seems that each trip was a separate transaction and can be tried separately. The question, however, is whether the petitioners should be tried simultaneously for all the offences committed by them between the 9th and the 12th November 1924.

The offences were committed within a space of one year and the principles underlying ss. 234 and 240 of the Cr. P. C. may usefully be availed of. The Magistrate should try at one time only three of these transactions and use the remaining transac-

tions as evidence in the case for the purpose of determining the amount of punishment and damages payable under the Ferries Act. If conviction is obtained on such a trial, the Court should stay the inquiry into or trial of the other charges which will have the effect of an acquittal of the accused on those charges subject to the event of the conviction being set aside by higher authorities. If the conviction is set aside the Magistrate may proceed with the trial or inquiry of the other charges.

Z. K. *Conviction set aside.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 187 OF 1925
CRIMINAL REVISION PETITION No. 167 OF 1925.
October 20, 1925.

Present:—Mr. Justice Jackson.

ALAMPATH KRISHNAN—ACCUSED—PETITIONER

versus

THE MUNICIPAL PROSECUTOR, CUNNANORE MUNICIPALITY—COMPLAINANT—RESPONDENT.

Madras District Municipalities Act (V of 1920), s 249, Sch V, cl (q)—"Machinery", meaning of—Collection of handlooms, whether machinery

The "machinery" contemplated by Sch V, cl (*q*) of the Madras District Municipalities Act is machinery worked by power such as steam, water, or electrical power, and the word must be confined to such forms of machinery as may reasonably be held to be in the same category as combustibles, and unwholesome or dangerous trades

Machinery worked by hand such as handlooms or sewing machines is excluded from the scope of s 249 of the Act.

A collection of *maggoms* is not "machinery" within the meaning of Sch V, cl (*q*) of the Act and no license is, therefore, required to be taken under s. 249 of the Act for using the same.

Petition, under ss. 435 and 437 of the Cr. P. C., 1898, praying the High Court to revise the judgment of the Court of the Bench of Magistrates, dated the 10th February 1925, in S. T. No. 1 of 1925.

Sir *K. V. Reddi*, for the Petitioner.

Mr. *N. Govindan*, for the Respondent.

The Public Prosecutor, for the Crown.

ORDER.—Petitioner seeks to revise the finding and sentence of the Bench Court, Cunnanore, fining him Rs. 10 for failure to take out a license under s. 249, Act V of 1920.

It is admitted that petitioner has a weaving factory containing nine looms of the sort which the weaver works with his hands and feet, known as a *maggom* or European loom. The Bench has found that he was liable to take out a license for using for an "industrial purpose" machinery as provided in sub-cl. (*q*) of Sch. V, Act V, 1920. The question for determination is whether those looms are machinery within the mischief of the Act.

The learned Public Prosecutor argues that the sub-cl. (*q*) covers anything which is likely to be dangerous to human life, or health or property, and any machinery used for an industrial purpose which is thus dangerous requires a license. On this interpretation of the clause, the word 'machinery' would be otiose. So long as the industrial process were dangerous, it would not matter whether it was performed by hand, instrument or machine; it would still have to be licensed. Something more than a mere dangerous process is evidently intended by "machinery" but the question is within what limits the word is employed. It cannot have been intended that anything which is commonly called a machine must be licensed. For instance, no one has ever supposed that singer's sewing machines required license, and the literary sense of the word is too general to afford any guidance. In old English, machine was synonymous with universe, and when Hamlet concludes his letter to Ophelia, "Thine ever more most dear lady, whilst this machine is to him", he treats the word as the equivalent of body. For a long time machine was used as another word for vehicle, a meaning which survives in "bathing machine", and is still, I gather from the Public Prosecutor, prevalent in the more remote parts of the British Isles, and although such general sense are long obsolete and the term is now confined to some sort of apparatus for applying mechanical power, it has within those limits a very wide application. Not only a handloom but any hand instrument which involves more than one simple mechanical principle is a machine. For instance, though a hammer may be called an instrument, a nail extractor is a machine and a hand ginning apparatus is a machine. Thus even in its ordinary sense "machine" would seem to have a wider connotation than the clause intends. The Statute itself affords no assistance by way of definition; but I

observe that s. 250 refers to mechanical power and I think that this points to the right interpretation. As observed by Professor Murray in the Oxford Dictionary in recent use, the word tends to be applied especially to an apparatus so devised that the result of its operation is not dependent on the strength or manipulative skill of the workman. In other words an apparatus driven by other than human and, I would add, animal power; I think that the machinery contemplated in the Act is machinery worked by power such as steam, water, or electrical power; and machinery worked by hand such as handlooms, or sewing machines is excluded. This, of course, is the limited sense in which machinery was understood at the time of the Luddite and similar riots. No doubt this is an arbitrary decision, and it would be better if the Statute contained its own definition, but it is the only definition which, after a careful consideration of the matter, seems to afford the licensing officer a clear criterion, and also to confine "machinery" in cl. (*q*) to such forms of machinery as may reasonably be held to be in the same category as combustibles, and unwholesome or dangerous trades.

I find that a collection of *maggoms* is not machinery under Sch. V (*q*) The petition is allowed and the conviction set aside. The fine should be refunded.

V. N. V. *Petition allowed.*

Z. K.

PATNA HIGH COURT.

CRIMINAL APPEAL No. 15 OF 1925.

March 19, 1925.

Present:—Justice Sir John Bucknill, KT., and Mr. Justice Macpherson.

BADRI CHOUDHRY AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 162, 172—Evidence Act (I of 1872), s 167—Statement made to Police, whether can be used at trial—Procedure—Improper admission of evidence, effect of.

A statement made by a witness during Police investigation can only be used to assist the accused by showing that the witness who in Court deposes to certain facts has in his statement before the Police given an account or made statements which are contradictory to the testimony which he gives in Court. The statement made to the Police cannot be used at large for the purpose of showing that the statement does not corroborate or assist the story as put forward in the First Information Report [p. 877, col. 2.]

The limitations under which such a statement can be used are very strict. The statement of a prosecution witness alone can be used at the trial and only if it has been reduced to writing and only that part of it can be used which is in contradiction of the evidence of the witness given in Court provided it is duly proved and the attention of the witness has been drawn to it A statement made to the Police which does not contradict the testimony of the witness given in Court cannot be proved in any circumstances, and it is not permissible to use the recorded statement as a whole to show that the witness did not say something to the investigating officer [p 880, col. 2; p 881, col. 1]

Under s 167 of the Evidence Act the improper admission of evidence is not of itself a ground for a new trial or reversal of a decision in a case, if it appears to the Court that independently of that evidence there was sufficient evidence to justify the decision. [p 881, col. 2]

Criminal appeal from a decision of the Sessions Judge, Darbhanga, dated the 19th January 1925.

Messrs. *K. B. Dutt, S. P. Varma* and *L. K. Jha*, for the Appellants.

The Assistant Government Advocate, for the Respondent.

JUDGMENT.

Bucknill, J.—This was an appeal made to this Court by eight persons who were convicted on the 19th January last by the Sessions Judge of Darbhanga of various offences and were sentenced to various terms of imprisonment. When the application for the admission of this appeal came before this Court before Mr. Justice Mullick and myself we ordered that, although the appeal should be heard, the appellants should be directed to show cause why their sentences should not be enhanced. This was on the 21st January last.

Originally 16 persons stood their trial; but, of these, eight were acquitted, the learned Sessions Judge thinking that he was not altogether satisfied that the participation by those eight persons in what had taken place had been fully and conclusively substantiated. The present appellant No. 3, Tirpit Choudhry, is regarded as the principal leader in the affair. He was convicted, first of all, under the provisions of s. 148 of the Indian Penal Code and sentenced to six months' rigorous imprisonment and to a fine of Rs. 50 thereunder and, secondly, of an offence under the joint provisions of ss. 325 and 149, Indian Penal Code, and thereunder he was

sentenced to eight months' rigorous imprisonment and to a fine of Rs. 50. The sentences of imprisonment were to run concurrently. The 2nd and the 4th appellants, Kishori Choudhry and Palat Choudhry, were convicted also under the same sections as was appellant No. 3; but in their case the sentences of imprisonment were six months in respect of each offence and a fine of Rs. 25 in respect of the conviction under the provisions of s. 148. The other five appellants were only convicted of offences against the provisions of s. 147 and the combined provisions of ss. 325 and 149, Indian Penal Code, and they were each sentenced thereunder to three months' rigorous imprisonment such terms of imprisonment being as in the other cases ordered to run concurrently. They were all also bound over under s 106, Cr. P. C, to keep the peace for one year.

Now, the charges upon which these appellants were convicted were altogether three in number. The first was that they were members of an unlawful assembly the common object of which was the forcible taking of the ploughs of one Sheikh Mazhar and *begari* (that is to say, forced labour without making any payment) from him; and that in prosecution of the common object the appellant had used physical force This was, of course, the charge under s. 147, Indian Penal Code. The second charge was that being members of the unlawful assembly and actuated with the common object as detailed in the previous charge some member or members of the assembly had committed the offence of voluntarily causing grievous hurt under the provisions of s. 325. They were accordingly charged under the joint provisions of ss. 149 and 325 on the ground that they knew that such an offence was likely to be committed in prosecution of the common object of the assembly The three persons who were convicted under s. 148 were charged with having committed the rioting whilst armed with deadly weapons.

Now the circumstances under which this occurrence is alleged to have taken place were very simple. It is said that on the 4th August last the third appellant, who is the eldest son of a man named Sinalal Choudhry, went to the village where Sheikh Mazhar, who has already been mentioned, was a resident and there demanded *begari* from him. Sheikh Mazhar, who was the headman of his folk in that village refused flatly saying that he had never done *begari* work and did not intend to do so for any *malik*. It is stated that on this refusal the 3rd appellant then left the place threatening Sheikh Mazhar. On the following morning Sheikh Mazhar is said to have gone to his field for the purpose of ploughing, taking with him his plough and bullocks. Close by to where he was ploughing were his two brothers Sheikh Jero (P. W No. 1) and Sheikh Latif (P. W. No 5) who were working in a field not far away. It is alleged that the 3rd appellant's father Sinalal (who was one of the accused at the trial but who was acquitted) accompanied by the 2nd, 3rd and 4th appellants then came up to Sheikh Mazhar and demanded that he should give free labour and allow his plough and bullocks to be utilised therefor. Sheikh Mazhar, however, refused to agree and in consequence he was then attacked by the three appellants whom I have mentioned together with a large number of other persons, the number of persons in the mob is variously estimated as from 15 to 80 persons. The 2nd appellant is said to have struck Sheikh Mazhar with a spear; the 4th appellant is said to have hit him on the right arm with a *ganrasa* and the 3rd appellant to have struck him on the right heel with a *ganrasa*. His two brothers Jero and Latif came to help him but they were also knocked about and another man Sheikh Banwali who had also tried to assist them was similarly assaulted. Sheikh Mazhar sustained some serious wounds. His right heel was apparently almost cut off; he had also a compound fracture of the right ulna bone and, in addition, an incised wound 2 inches by $\frac{1}{4}$ inch and skin deep on his right arm. He was taken to the hospital and treated and, although no doubt it could not have been expected in the ordinary course that the wound which he received would prove fatal, he unfortunately contracted lock-jaw and died about 15 days after he had been admitted into the infirmary. The other injured men did not sustain severe wounds. On the deceased's brother Jero were some bruises and he also sustained a fracture of a finger bone of the left hand; on the deceased's brother Latif were some cuts on the forehead and neck whilst on Sheikh Banwali were bruises and a laceration exposing the bone on the parietal region.

The learned Judge was assisted by five Assessors. The first of these thought that the charges against the appellants had been proved; that out of the 16 persons originally accused 14 were guilty, he excepting only two of the accused, namely, Sinalal the father of the 3rd appellant here and one Bachi Choudhry, both of whom were men of over middle age. The other four Assessors did not think that the common object which was the basis of the charges had really been satisfactorily made out. They were doubtful whether the reason which was given by the prosecution for the assault was a true one and they seem to have been under the impression that the quarrel had taken place about two plots of land which had a long time ago been the property of the deceased but which had subsequently passed into the possession of the third appellant's father. They were also doubtful as to who had inflicted the injuries on the deceased and on his brother Jero and appear to have considered that it was possible, or indeed probable, that the assailants had inflicted whatever injuries were inflicted in exercise of some right of private defence. The learned Judge, however, has not taken that view. He has come to the conclusion, and I think rightly, that the story which was told by the prosecution was substantially true; that the real reason, or at any rate the main reason, for the assault was the refusal by the deceased to agree to give forced labour to the 3rd appellant's father; and he has, therefore, disagreeing with four of the Assessors and agreeing with one, come to the conclusions to which I have already drawn attention and has passed the sentences which I have already detailed.

Now, the learned Counsel who has appeared for the appellants has said himself that he was in some difficulty in defining the points upon which he could ask this Court to come to a conclusion different to that which has been arrived at by the Sessions Judge. It is true that it is difficult to find any good reason which would justify this Court in saying that the learned Judge was wrong; for there were circumstances which undoubtedly tended to indicate that the deceased was by no means on good terms with what I may call the Choudhry party as particularly represented by the 3rd appellant and his father. There is indeed evidence to show that the deceased had borrowed money from the 3rd appellant; that the 3rd appellant had in May last year instituted a suit for recovery of the sum which had been borrowed from him by the deceased and that the deceased had taken, what I may call, the opportunity of entering a written statement in which he flatly declared that the hand note upon which the 3rd appellant was basing his claim was a forgery. The hearing of that case was indeed to have started on the 1st August last, that is to say, a few days before this unfortunate affair took place. It was, however, adjourned until the 18th August by which time the deceased had contracted tetanus and was on his death bed.

Now, the learned Counsel has as his first point strenuously suggested that the story which was put forward by the prosecution as the occasion and cause of the wounding of the deceased, his brothers, and Sheikh Banwali was not true. He has pointed out that there is a substantial difference between important features in the First Information Report which was laid by the deceased man on the 5th August at the Bahera Police Station and a statement which he subsequently made before a Magistrate on the 14th August when it was seen that his condition of health owing to his having contracted lock-jaw was such that it was probable that he would not recover. The principal feature of difference to which very prominent attention has been drawn by the learned Counsel for the appellants is that in the First Information the deceased man undoubtedly states that on the 4th August it was the 3rd appellant Tirpit who had demanded forced labour from him and upon his refusal had threatened him with serious consequences on the following day. In the statement made by the deceased on the 14th August, it will be seen that the deceased man says that the occurrence on the 4th August was between himself and the father of the 3rd appellant, namely, Sinalal Choudhry. The learned Sessions Judge evidently either thinks that there has been some mistake or pays little attention to this discrepancy. I think it is undoubtedly a peculiar matter and it is certainly remarkable that the deceased should have in the first instance spoken of the son, (that is to say, the 3rd appellant) as having had words with him on the 4th August, and in the second instance that he should have spoken of the father. There is, however, this to be said

that there is no doubt that in the First Information the deceased man speaks of the "*malik* resident" whilst in the statement which he made on the 11th August, he merely mentioned the name of Sinalal, the father of the man Tirpit Choudhry, the 3rd appellant, whom, however, he did mention by name in the First Information. I do not pretend to explain how this difference arose but at any rate there can be no doubt that the 3rd appellant's father had only quite recently become the *malik* of the deceased man who was one of his *raiyats*.

The learned Counsel has also referred to a somewhat remarkable statement which appears to have been made by one Genwa Dusadh a *chaukidar* on the 5th August at the Police Station at about 3 P. M. It is not quite clear whether the *chaukidar*, at the time he gave the information, was aware that something of the nature of a disturbance had already taken place. But what was taken down in the station diary at the Bahera Police Station was to the effect that this *chaukidar* had arrived and reported that there was an *apprehension* of a breach of the peace between Sheikh Mazhar and Sheikh Latif on one side and Sinalal Choudhry and others on the other side in connection with lands. The learned Counsel has persistently suggested that it was really a dispute about land and not about *begari* which had led up to the affray and he based, in the first instance, one of his arguments in this direction upon what he thought was the fact that although a number of persons had accompanied the deceased man to the *thana* when he gave the First Information, yet no person other than the deceased had given the names of any of those who were said to have attacked him. He, therefore, suggested that at that time these persons, such as for instance Jero and Latif, the brothers of the deceased, who undoubtedly were both injured and were certainly present at the occurrence, did not know who had attacked their brother the deceased and subsequently concocted the story which has resulted in the conviction of the present appellants. The learned Sessions Judge does not appear, so far as I can gather, to have examined carefully what these persons did actually say to the Head Constable who took down the First Information given by the deceased. However, in this Court we had this document examined and it is found that the contention which was put forward by the learned Counsel for the appellants could not be substantiated, for it is quite clear that those persons who were examined by the Head Constable and who purported to be eye-witnesses did in fact corroborate what had been said by the deceased in his First Information. This argument, therefore, that owing to the lack of corroborative evidence at an early stage of the proceedings little, if any, value can be attached to the First Information itself, falls to the ground.

But, it is, I think, at this stage not unimportant to draw attention to the somewhat free use which appears to have been made of these statements to the Police Officer It is said that according to the recently amended provisions of the Cr. P. C. documents of this character can only be used to assist the accused in particular by showing that a witness who in Court deposed to certain facts has in such a statement at an earlier stage given an account or made statements which are contradictory to the testimony which he gives in Court. Here, in this case, these statements made to the Police appear to have been used in cross-examining the witnesses not merely to show contradictions but at large; and they have been referred to in this Court again at large not merely with the idea of contradicting the witnesses' evidence but rather for the purpose of showing that the statements did not corroborate or assist the story as put forward in the First Information Report I, therefore, must observe that it was only when this suggestion that these statements could thus be utilized as a serious attack upon the truth of the First Information was made that I thought it desirable that what had actually been stated to the Police Officer should be seen and scrutinised; and it was, as I have said, then ascertained that the contention which was being put forward was not in fact correct. I am not, however, satisfied that the use which was sought to be made of these statements, both at the trial and in this Court, was justified by the present provisions of the Cr. P. C The matter, however, need not be pursued here further; because although it is suggested, now somewhat naively, that this Court should not perhaps have examined these documents for the purpose of scrutinising them in order to see if the argument put forward by the learned Counsel for the appellants was sustainable, yet I can only point out

that the examination of these statements by this Court was really rendered necessary by the argument of the learned Counsel for the appellants; an argument which perhaps should not have been listened to. Now, although that point put forward by the learned Counsel who has appeared for the appellants has thus failed, he has further contended that it is extremely unlikely on other grounds that the attack could have arisen on account of the refusal of the deceased to agree to give *begari* to the appellants' party. He suggests that, in view of the fact that there was already litigation between the 3rd appellant and the deceased in which the deceased had accused the 3rd appellant of basing a claim upon a handnote which was forged, it was extremely unlikely that any demand would be made at such a juncture against the deceased to perform any forced labour for his new *malik*. I do not, however, think that this argument is one which is at all convincing although it is no doubt ingenious. The provocative attitude, adopted with regard to the suit instituted against him for money alleged to have been lent by the 3rd appellant to the deceased, may well have inflamed the 3rd appellant very considerably against the deceased and made him determined that any right or supposed right or even shadow of right which he might have against the deceased he would in no way dispense with. It seems to me that this litigation which existed between the 3rd appellant and the deceased might in itself indeed be one of the features which moved the 3rd appellant and his friends to attack the deceased and to make as an excuse before attacking him an insistence upon the demand for forced labour.

The learned Counsel as a third point has skilfully developed a somewhat remote but simple story relative to the changes of ownership of certain lands from the hands of the deceased party into the hands of the appellants' party and with this history he has coupled a claim, which was undoubtedly made in Court and at this trial, by the deceased's two brothers, Jero and Latif, to be in possession still of a certain portion of this property to which I have made reference; and he suggests, and I must admit with a certain amount of force, that under these circumstances it is possible and indeed probable that what took place did take place on account of a squabble over this land and not on account of any *begari* claim. In order to understand this argument, which has certainly some merit, it is necessary to explain that a long time ago in 1903 there were two plots of land in this *Mouza* Nos. 492 and 573. These pieces of lands were not contiguous but were not very far away from each other. These two plots at one time had been given in *batai* to one Kari Dhanuk and he had been in possession of both plots for a considerable time. The plots of land had originally belonged to the deceased and his brothers and he, that is, the deceased, had, whilst his brothers, Jero and Latif, were still minors, sold them. Jero and Latif being now adults, that is to say, having attained their majority are, it is suggested, endeavouring to try and get possession of these two plots of land which were sold when they were minors by their brother. The position of the two brothers, Jero and Latif, appears to be that in the course of their evidence they stated that they were still in possession of plot No. 573 although they did not claim in any way to be interested in the other plot 492. The learned Sessions Judge has undoubtedly come to the conclusion that Latif and Jero are not telling the truth when they say that they are in possession of plot No. 573; and the learned Counsel for the appellants has urged that the two brothers Jero and Latif, although claiming now to be still in possession of plot No. 573, are clever enough in the present circumstances not to claim any right to be also in possession of plot No. 492 upon or near which it is alleged that this attack upon the deceased took place; because they know that if they did lay claim on their own or their brother's part to possession of this plot No. 492, a presumption might at once arise against their story that the occurrence had taken place on account of a claim against their brother (and perhaps themselves) for *begari*. The learned Counsel has also stated that in April 1924 Sinalal, that is the father of the 3rd appellant, had acquired some property which had been given in usufructuary mortgage to one Ram Kishun Jha. This consisted of *Touzi* No. 3390. There is no doubt that the 3rd appellant's father had purchased this usufructuary mortgage and that on this piece of land the deceased was one of the *raiyats*. It was suggested, although not very seriously, that the dispossessed usufructuary mortgagee-in-possession Ram Kishun Jha had endeavoured to cause all or some of the accused to be

implicated by the deceased in the attack upon himself or in the fight which it is suggested by the learned Counsel for the appellants was what actually took place. Now the learned Counsel has asked the pertinent question as to what was the reason for introducing the story which was told by the two brothers of the deceased with regard to their claim to be in possession of this plot No. 573 with which plot undoubtedly had at one time been associated plot No. 492 upon or near which the attack upon the deceased is said to have taken place? The learned Counsel suggests that the real truth of the matter probably is that there was indeed a dispute about land and not only about this plot (plot No. 573) but also about the plot with similar characteristics (plot No. 492) and that the view of the case which has been taken by the four Assessors with regard to the real cause of the affray having been a dispute about land and not about *begari* should have been accepted by the learned Judge. It is also contended that in his evidence before the Magistrate the Sub-Inspector of Police is stated to have testified that according to his investigations he became under the impression that the dispute really had been about land. This piece of evidence or rather the fact that this Sub-Inspector had at one time come to this conclusion has been stated to us in this Court; but it does not appear from the record to have been so stated before the learned Judge nor does the attention of the Sub-Inspector himself appear to have been drawn to it in cross examination. The learned Counsel further states that the Vakil who was appearing in the Court below at the trial did propose to ask the Sub-Inspector a question upon this point, but that the Sessions Judge disallowed the question. It is difficult to see why he should have disallowed it and there is certainly no record, so far as I can see in the papers before us, which would show that any such question was proposed to be asked or disallowed at all. Under such circumstances it is difficult to say that the fact that the Sub-Inspector came to this conclusion should have had any effect upon the mind of the Court and indeed I would go further and say that the view which the Sub-Inspector had expressed (if indeed he did so) is only a matter of opinion which in itself is not of much evidential value. The learned Counsel for the appellants has also suggested that if this affray arose merely out of the claim of *begari* it is hardly credible to suppose that the 3rd appellant was accompanied by a huge mob as supporters nor that such a force was necessary to overawe the recalcitrant *raiyat*. He urges that the story in its main features, namely, that a large mob of persons more or less armed came upon this land in the manner which is detailed is much more consonant with a free fight and with the *chaukidar's* story given at the Police Station at Bahera at 3 P. M. of the occurrence than with a mere attempt to take away the plough and a couple of oxen from the deceased Sheikh Mazhar.

There is a good deal to be said for this contention and the learned Counsel has sought to increase the impression which his arguments have brought to my mind by reading a good deal of the evidence. It is impossible, however, I think, to arrive at a conclusion which is different to that to which the learned Judge has come unless one is prepared to throw aside and declare as untrue a very large body of evidence which bears very forcibly upon the guilt of the appellants. The learned Counsel has suggested that, because the learned Judge thought that half of the original 16 accused persons should be acquitted, therefore, the evidence against the other eight, being substantially the same, they too should have been likewise acquitted. But I do not think that upon examination this argument, which is in the nature of a legal argument, and which might, if the facts were as stated, be a good argument, can be supported. It seems to me that if one looks at the evidence carefully and the learned Judge's reasons why he has thought that eight of the original accused should not be convicted and eight of the original accused, that is, the appellants before us, should be convicted, it is quite easy to see that the evidence against the different individuals is not altogether identical. Under these circumstances I have come to the conclusion that it is impossible for this Court to be moved by the arguments of the learned Counsel for the appellants in such a manner as to say that the convictions of these appellants are incorrect. I think that the case was tried with considerable care and that the judgment of the learned Judge disposed of the whole case satisfactorily and well.

There remains then the question of enhancement of the sentence. With regard to

the five appellants who have been convicted under s. 147 and the combined provisions of ss. 325 and 149, Indian Penal Code, and sentenced to three months' rigorous imprisonment, I do not see any ground for interfering with their sentence. But with regard to the three other appellants, that is to say, appellant No. 2, Kishori Choudhry, appellant No. 3, Tirpit Choudhry, and appellant No. 4, Palat Choudhry, the circumstances are somewhat different. The reason why distinction was drawn between these three appellants and the other five was in the first instance because they were charged under s. 148 and were armed with spears and other deadly weapons. The reason why in the second instance the case of the 3rd appellant was differentiated from those of the 2nd and 4th appellants Kishori and Palat was because he (Tirpit) was admittedly the ring leader in the whole matter. He represented his old father who was a man of 60 years of age and was the protagonist throughout, and it is also noticeable that his animosity against the deceased was certainly based upon some stronger motive than that of the others. I do not think that the sentence which has been passed is adequate in the case of the 3rd appellant. We think that the sentence passed upon him under the combined provisions of ss. 325 and 149, Indian Penal Code, should be increased from eight months to sixteen months. In the case of the 2nd and the 4th appellants, Kishori Choudhry and Palat Choudhry, we think that the sentences passed upon them under the joint provisions of ss. 325 and 149, Indian Penal Code, are also inadequate and should be increased from six months to twelve months. Except for these enhancements of sentences we do not think that there should be any further alteration and the appeals should otherwise be dismissed.

Macpherson, J.—I agree that this appeal must be dismissed and that the sentences under s. 148, Indian Penal Code, are inadequate and fall to be enhanced as proposed.

I offer a few additional observations.

I agree generally with the careful judgment of the learned Sessions Judge except in two particulars. The first of these is the question of sentence; that has been fully dealt with in the judgment just delivered. The second is his interpretation of the new s. 162 of the Cr. P. C., and his admission in evidence of certain statements made to the Investigating Officer in the course of the investigation under Ch. XIV of that enactment.

The effect of the amending Act of 1925 which is very great, has not yet been fully appreciated by the subordinate Courts. Before that enactment came into operation, s. 162 merely enjoined that the written record of a statement [not covered by s. 32 (1) of the Indian Evidence Act] made by any person to a Police Officer in the course of an investigation under Ch. XIV should not be used as evidence. The proviso permitted the statement itself to be used in certain circumstances to impeach the credit of the maker when examined as a witness. The new Act has substituted a section which prohibits the use of any such statement [now covered by s. 32 (1) of the Indian Evidence Act 1872] or any record of it whether in a Police diary or otherwise or any part of such statement or record *for any purpose* (subject to subsequent provisions of the Code) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. The expression "for any purpose" is very important and there is no sound reason why it should not be given its full value. If the Legislature meant merely to prohibit the use of the writing as evidence there was no point in amending the section or substituting the present stringent sub-s. (1). It is not merely use as evidence of the statement or of the record thereof that is prohibited by sub-s. (1) but use of it for any purpose, unless such use comes within subsequent specific provisions of the Code in that regard. There is for all practical purposes no such provision except in the first proviso to sub-s. (1) and in sub-s. (2), for s. 162 governs also s. 172 (2). Sub s. (2) excludes from the operation of the prohibition cases covered by s. 32 (1) of the Evidence Act, which do not require consideration in this appeal.

The first proviso to s. 162 (1) makes an exception in favour of the accused but it is an exception most jealously circumscribed under the proviso itself. "Any part of such statement" which has been reduced to writing may in certain limited circumstances be used to *contradict* the witness who made it. The limitations are strict (1) only the statement of a prosecution witness can be used; and (2) only if it has been reduced to writing; (3) only a part of the statement recorded can be used; (4) such part must be duly proved; (5) it must be a contradiction of the

evidence of the witness in Court; (6) it must be used as provided in s. 145 of the Indian Evidence Act, that is, it can only be used after the attention of the witness has been drawn to it or to those parts of it which it is intended to use for the purpose of contradiction, and there are others Such a statement which does not contradict the testimony of the witness cannot be proved in any circumstances and it is not permissible to use the recorded statement as a whole to show that the witness did not say something to the investigating officer.

Unquestionably the new sub-section has greatly enhanced the difficulty of trials because it excludes much that was previously admissible as evidence on which the Courts were accustomed to rely It is unfavourable to the prosecution and to a less, but still considerable, extent to the defence. Experience points to the conclusion that the Courts do apply the provisions against the prosecution but fail to do so against the defence. It is, however, not a sufficient ground for deviating from what is intended to be a rigid rule that such deviation will favour the accused. It is incumbent on Court loyally to observe the prohibition of the Legislature in all cases where it is applicable. The Legislature has employed firm language palpably intended to make a clean sweep of the use at a trial of any statement to the Police during the investigation not only in evidence but for any purpose not covered by subsequent provisions of the Code which provisions make but one exceedingly restricted exception. The danger of endeavouring to temper this provision in favour of the defence and to widen the exception is illustrated by the present case. In the cross-examination of the Head Constable, Bir Prasad, evidence has been admitted of statements to the witness of five prosecution witnesses who accompanied the deceased Sheikh Mazhar to the *thana* and who were examined by him at the outset of the Police investigation. Among them are several statements which are not admissible under the proviso to s. 162 (1) or otherwise. Upon them the learned Sessions Judge founded the remark in his judgment: "None of the other witnesses told him that night as to who were the assailants of Mazhar," which on the record of the trial could only have been arrived at by an inadmissible use of the record of the examination under s. 161. If the inadmissible evidence be eliminated from consideration, as it must be, there is no warrant in the record for the remark which indeed substantially misrepresents the position. Learned Counsel has urged that the question of re-trial should be considered because of the improper admission of such evidence. But under s. 167 of the Indian Evidence Act the improper admission of evidence is not of itself a ground for a new trial or reversal of a decision in a case, if it appears to the Court that independently of that evidence there was sufficient evidence to justify the decision. In the present instance the evidence improperly admitted was favourable to the appellants and the elimination thereof only makes more inevitable the decision against them. In reaching this conclusion no use of the Police diaries is made which is not warranted by s. 172 of the Cr. P. C. or in accordance with the views expressed by the Judicial Committee in the case of *Dal Singh* v. *Emperor* (1). The only use to which these diaries can be put is to aid the Court in an inquiry or trial. Learned Counsel is aware of the contents of the record of the examination of the witnesses under s. 161 and is unable to contend that a fuller untilisation of them in evidence within the limits of the law would at all improve the case for the appellants.

I only refer very briefly to the arguments as they have been fully discussed in the judgment just delivered. Learned Counsel asked for an acquittal in the first place and mainly on the contention that the common object set out in the charge, to wit, to take *begari* from Sheikh Mazhar had no foundation in fact, but was an invention. He urged that as the occurrence clearly took place within a short distance of plot No. 492 it must have arisen out of rival claims of the deceased Sheikh Mazhar and the appellants to that plot. In my opinion such is not the case There is good evidence that the Chaudhuris, and in particular Tirpit the son of Sinalal Chaudhuri demanded *begari* from Sheikh Mazhar on the 4th August. Next day Tirpit certainly got together a mob early in the morning and instructed the *chaukidar* to give a mendacious report at the *thana*. There were several sources of ill feeling. Not the least was a Small Cause Court suit instituted by Tirpit against the deceased in which the latter

(1) 39 Ind Cas 311, 44 C 876, 15 A L. J 475; 1 P L W. 661; 19 Bom L R 510, 21 C. W. N 818; 26 C L J 13, 6 L W 71, 22 M L T. 31, (1917) M. W. N 522, 18 Cr L. J. 471; 86 L J P 140; 33 M. L. J. 555; 11 Bur L. T. 54; 13 N L R. 100; 44 I. A. 137; 116 L. T. 621; 61 S. J. 351; 33 T. L. R. 249 (P. C.).

filed a written statement stigmatising the handnote sued upon as a forgery and which had been adjourned on 1st August though defendant was ready. Then the younger brothers of deceased were contending that they were not bound by the sale by Sheikh Mazhar in 1903 during their minority of plots Nos. 492 and 573 to Kari Dhanuk, alleged to be the *benamidar* of Sinalal Chaudhuri. But the main cause of ill-feeling lay in the claim to *begari* which was not enforceable in a Court, but yet was very important to the Chaudhuris. Sinalal Chaudhuri is a new *malik* in Lilpur, and by his recent purchase Mazhar and other Musulmans of that village had become his *raiyats*. He owns a large area of *zirat* in his residential village of Ladiami and several other neighbouring villages. Though Sinalal has no *zirat* or any land in direct occupation in Lilpur he may well be believed to have been anxious to secure, in accordance with the usage (illegal though it is) of the country, *begari* from new *raiyats* who are not of high caste. The deceased Sheikh Mazhar was the *sarghana* of the Musulmans. It stands to reason that if Sinalal broke down the resistance of the headman, the others if not completely cowed, could be subdued without difficulty. There is, therefore, no inherent improbability in the common object set out in the charge though additional vigour may have been given to the animus of Tirpit by the other considerations mentioned. It was, I think, purely fortuitous that the occurrence took place not far from plot No. 492. It is palpable that that plot has been in possession of Kari Dhanuk since the sale in 1903 and throughout the trial Jero and Latif, brothers of deceased, have disclaimed any right to the plot, while plot Nos. 573, which they do claim, is far distant from the scene of occurrence and admittedly was not the source of the affray. To my mind the learned Sessions Judge is entirely correct in accepting the direct and positive evidence as to the occurrence and the occasion thereof which has been furnished by a large number of witnesses who, according to their perfectly credible story were in their own fields close to the place of occurrence and who have not been broken down in cross-examination. The case is one of a class in which the views of the Assessors are generally of little value and they in fact followed communal lines.

In my judgment all arguments on behalf of the appellants fail and the decision under appeal must be maintained, with the exception of the three sentences which must be enhanced as proposed by my learned brother.

Z. K. *Appeal partly dismissed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 661 OF 1925.

December 8, 1925.

Present:—Mr. Justice Sulaiman.

RAM CHARAN—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 110—Security for good behaviour—Procedure—Inquiry - Duty of Magistrate.

In a case under s 110, Cr P. C, it is the duty of the Magistrate to hold an independent enquiry and not to bind over an accused person merely because he agrees to furnish security. [p. 883, col. 1]

Criminal revision from an order of the Sessions Judge, Aligarh, dated the 3rd October 1925.

Mr. *Sailanath Mukerji*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is a criminal revision from an order dismissing an appeal in s. 110 case. The accused along with several other persons was tried under s. 110 of the Cr. P. C. After the evidence of a number of prosecution witnesses including Civil and Military Officers had been recorded, the accused was asked by the Magistrate why he should not be bound down. The reply of the accused was "I have no objection. I shall furnish security. I have never been convicted before. I shall produce no defence evidence. I have no witnesses." The Magistrate, however, examined more witnesses and did not take the statement to be a plea of guilty. He held on the evidence that a good case had been made out for an order under that section.

The accused appealed to the Sessions Judge. The learned Sessions Judge dealing with the case of this particular applicant remarked as follows:—"There is no force in the appeal of Ram Charan, Yadram and Bhabhuti inasmuch as all three of them expressed their willingness to furnish security for their good behaviour and produced no defence. This was tantamount to a plea of guilty after evidence of several witnesses had been recorded against the appellants. I dismiss the appeal of these three men."

It is apparent that the learned Judge having come to the conclusion that the statement of the accused persons amounted to a plea of guilty did not consider the appeal on its merits and did not examine the prosecution evidence and come to an independent conclusion of his own. The question raised in this revision is that the learned Judge was in error in treating the willingness of the accused to furnish security as amounting to a plea of guilty.

In cases arising under s. 107, Cr.P. C., it has been held time after number that the Magistrate should hold an independent enquiry and should not act on the mere readiness of the accused to furnish security. I may only refer to the cases of *Mul Chand* v. *Emperor* (1), *Chander Shekhar* v. *Emperor* (2) and *Jagdat Tewari* v. *Emperor* (3). In principle there is no distinction between trials under s. 107 and trials under s. 110. In either case it is the duty of the Magistrate to hold an enquiry of the offence and not to bind an accused person merely because he agrees to furnish security.

I find, however, that the Magistrate did hold an enquiry and did record evidence. All that has happened is that the appeal of the accused applicant has not been considered on its merits by the learned Sessions Judge. I cannot, therefore, interfere with the order of the Trying Magistrate but setting aside the order passed on appeal direct that the case be sent back to the Court of the learned Sessions Judge of Aligarh in order that it be restored to its original number on the file and be disposed of according to law.

Z. K. *Case sent back.*

(1) 26 Ind. Cas. 653, 37 A. 30, 12 A L. J 1202, 16 Cr. L J 61

(2) 54 Ind. Cas 411, 21 Cr L J 59

(3) 54 Ind. Cas. 784, 2 U. P. L R (A) 38; 21 Cr L. J. 176.

PATNA HIGH COURT.

CRIMINAL APPEAL No 222 OF 1924.

January 26, 1925.

Present: —Justice Sir B. K Mullick, KT., and Justice Sir John Bucknill, KT.

CHAMARI SINGH AND OTHERS—ACCUSED—APPELLANTS

versus

THE PUBLIC PROSECUTOR OF GAYA AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 476, 476-B—Complaint of offence—Preliminary enquiry, extent of—Appellate Court, interference by.

The grant of a right of appeal against an order making a complaint under s 476 of the Cr. P. C has not conferred any new right upon the person against whom a complaint is made and the extent of the preliminary enquiry to be made under s. 476 is still left to the discretion of the Court If a *prima facie* case has been made out the Appellate Court ought not to interfere with the order of a lower Court making a complaint [p. 884, cols. 1 & 2.]

Criminal appeal from an order of the Sessions Judge, Gaya, dated the 5th November 1924.

Mr. *Manohar Lal*, for the Appellants.

The Assistant Government Advocate, for the Respondents.

JUDGMENT.

Mullick, J.—On the 25th May 1923 the appellants Nos. 1 to 15 are alleged to have filed a petition before the Subordinate Judge of Gaya asking for certain reliefs under s. 83 of the Transfer of Property Act. With that petition the appellants filed two documents: (1) a *mukarrari* deed of 1811 and (2) a usufructuary mortgage of 1833. It is alleged that both these documents were forgeries and that the appellants dishonestly used these documents as genuine knowing them to be forged. Twenty-one other persons also joined in the petition but it has now been decided that they are not to be prosecuted and they are not now before us.

It is alleged that in 1923 these appellants who claim as *mukarraridars* under a deed of 1811 executed a *dar-mukarrari* in favour of the appellant No 16, *Musammat* Nageshwar, and that she also joined in the application to redeem the usufructuary mortgage of 1833. She is a *par danashin* lady and has a husband and two sons who assisted her in getting the *dar-mukarrari kabuliyat* registered before the Registrar. When the application under s. 83 of the Transfer of Property Act came on for hearing, the alleged mortgagee, the proprietress of the 7-anna Tikari *Raj* stated that there was no *mukarrari* or *dar-mukarrari* or usufructuary mortgage encumbering the estate, and the Subordinate Judge accordingly declined to order the redemption of the *zerpeshgi* mortgage and dismissed the application.

Thereupon one of the servants of the proprietress applied to the Subordinate Judge for the prosecution of the 37 persons who were party to the petition of the 25th May 1923 and also of *Musammat* Nageshwar Koer's husband and her two sons. There-

upon certain proceedings followed into the history of which it is not necessary to enter; but the result was that the District Judge upon an application made by the Public Prosecutor of Gaya ordered the prosecution of the 37 persons who were party to the petition of 1923 as well as of the husband and two sons of *Musammat* Nageshwar Koer for offences under ss. 471 and 467, Indian Penal Code.

There was then an appeal to this Court and a Division Bench on the 18th June 1924* set aside the order of the District Judge and directed further inquiry as to the complicity of each accused.

That inquiry has been made and the learned Judge has revised his former order and has discharged all but the present appellants Nos. 1 to 19.

It is now urged that the learned Judge has made no inquiry at all and that he has not done what the Court required him to do.

It appears that the District Judge has discharged all the minor accused. As to seven others, he found that two had died and that five had not signed the *vakalatnama* which was given to the Pleader who was instructed to file the two forged documents; and he has now made a complaint against the 19 appellants only. It is contended that further evidence is required to show that the appellants knew that the documents were forged and that they used them. There is certainly a *prima facie* case that the documents are forgeries; for the former Raja of Tikari, who is alleged to have given the *mukarrari* and also the Raja in favour of whom the usufructuary mortgage is alleged to have been executed, were not alive on the dates on which the documents were executed. As regards the adult *mukarraridars*, *i.e.*, appellants Nos. 1 to 14, it is clear that the District Judge was of opinion that they knew that they had not a shadow of a title and that they filed or instigated the filing of the documents knowing that they were forged. In the circumstances he was justified in taking proceedings against them under s. 476, C. P. C. The law does not compel him to make a detailed inquiry and as he has considered the case of each of these appellants he has, in my opinion, complied with the orders of the Division Bench. The grant of a right of appeal has, in my opinion, not conferred any new right upon the accused and the extent of the preliminary inquiry is still left to the discretion of the Court. If a *prima facie* case has been made out the Appeal Court ought not to interfere. In this case the Court has made an inquiry as regards these 14 accused and has made a complaint to a First Class Magistrate in order that the Magistrate may follow the procedure of s. 202 or proceed otherwise according to law. The learned Judge evidently intended that the Magistrate, if satisfied that process should issue, should call upon the Public Prosecutor to produce his evidence before him and then either dispose of the case himself or commit it for trial.

We think, however, that some revision of the learned Judge's order is required as regards appellants Nos. 15, 16, 17, 18 and 19. *Musammat* Nageshwar Koer, appellant No. 16, being a *pardanashin* lady, cannot be expected to have had any knowledge of the nature of the documents or to have taken any part in filing them in Court and, therefore, we do not think that there is at this stage a sufficient *prima facie* case against her.

It also appears that appellant No. 15 is a minor and his name also should be excluded.

With regard to the appellant No. 17, who is the husband of *Musammat* Nageshwar Koer, and appellants Nos. 18 and 19, who are her two sons, the learned Judge does not state what evidence there is of their complicity. The learned Assistant Government Advocate has informed us that it is proposed to lay a charge of conspiracy against them under s. 120-B of the Indian Penal Code and also of abetment, but there is nothing on the record to indicate whether there is any *prima facie* evidence against them. An application has been shown to us which was made by the Public Prosecutor in the Court of the District Judge on the 11th of February 1924 asking the District Judge to examine certain witnesses and documents in order to connect appellants Nos. 17, 18 and 19 with the other accused. The learned Judge declined to take that evidence. The decision was unfortunate and as there has been also no further inquiry in regard to these accused since the Division Bench remanded the case, we direct that the inquiry before the Magistrate be confined for the present to petitioners Nos. 1 to 14. If the Public Prosecutor considers it necessary to proceed against appellants Nos. 17, 18 and 19, he is at liberty to make

*See 83 Ind. Cas. 730.—[*Ed.*]

a fresh application to the District Judge who after making such further inquiry as he may consider necessary will decide whether or not their case also should be referred under s. 476 to the Magistrate for trial along with the other petitioner.

Bucknill, J.—I agree.

Z. K. *Order accordingly.*

PATNA HIGH COURT.

CRIMINAL APPEAL No 227 OF 1924

January 20, 1925.

Present:—Justice Sir B K. Mullick, KT, and Justice Sir John Bucknill, KT.

PARMESHAR LALL—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT

Penal Code (Act XLV of 1860), s 211—False charge made before Police—Offence

Where a person makes a report to the Police deliberately but falsely charging another with having committed an offence with the intention that the Police should put that person on his trial, he is guilty of an offence under s 211 of the Penal Code [p 887, col 1]

A charge laid before the Police amounts to the institution of a criminal proceeding within the meaning of the latter part of s 211 of the Penal Code [*ibid*]

Queen-Empress v *Bisheshar*, 16 A 124, A W N (1894) 10, 8 Ind Dec (N S) 80, dissented from

Karim Buksh v *Queen-Empress*, 17 C 571, 8 Ind Dec (N S) 922 (F B), relied on

Criminal appeal from a decision of Rowland, J. C, Chota Nagpur, dated the 2nd December 1924.

Messrs. *K. P. Jayaswal* and *Kailashpati*, for the Appellant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

Mullick, J.—On the 22nd of May last the appellant Parmeshwar Lal laid an information before the Sub-Inspector of Police at Daltonganj charging one Munsaf Ram with having set fire to a hut belonging to the appellant's master Gajadhar Prasad with the intention of causing wrongful loss. The case was investigated and was found to be false. A complaint was then lodged by the Sub-Inspector in the Court of the Magistrate of Daltonganj against the appellant for an offence under s. 211, Indian Penal Code, with the result that the appellant was committed to the Court of Session and was convicted by the Sessions Judge of an offence under the latter part of s. 211, Indian Penal Code, and sentenced to rigorous imprisonment for four years. One of the Assessors returned a verdict of guilty while the other three were of opinion that the case was doubtful.

The appellant lives in the Gaya District and his master Gajadhar Prasad who also resides in that district appears to have assisted the Rani of Deo who is the niece of one Thakurai Jagat Prasad Singh of *Mouza* Burhibir in the Palamau District in a litigation with her husband, the Raja of Deo. That litigation was eventually settled by the Raja's making over a property worth Rs 5,000 per annum to the Rani and paying a sum of Rs. 10,000 in cash to Gajadhar Prasad. Subsequently Gajadhar Prasad lent money to Thakurai Jagat Prasad in a litigation with his brother Ramsunder and took from Jagat Prasad a *zerpeshgi* of a 2-anna 8-pies share in certain *mouzas* of which Burhibir was one. In consequence of Gajadhar Prasad's realising the rent of a 5 anna 4 pies share of the villages instead of 2-annas 8-pies share disputes arose between him and Jaga Prasad in or about September 1923 and Ramsunder having by this time settled his dispute with Jagat Prasad and joined Jagat Prasad in resisting Gajadhar, a complaint was lodged by one of the servants of Gajadhar against Ramsunder and his servants alleging that they were threatening a breach of the peace and requesting that action should be taken to bind them down. Munsaf Ram was one of the persons thus complained against. In consequence of that complaint the Sub-Inspector of Police at Daltonganj which is eight miles from Burhibir stationed constable Ramgulam Tewari at Burhibir to see that no breach of the peace took place between Gajadhar's men and Ramsunder's men. The constable who had taken up his residence in the village about ten days earlier states that on the day of the fire he cooked his food at an open *chulha* (fire place) near the hut in question and after pouring some water on the fire he went to rest in a Thakurbari (temple) of Jagat Prasad. About 3 P M a dust storm arose and immediately afterwards he saw the hut in flames, among others Munsaf Ram came to the place but the appellant Parmeshwar Lal was not in the village at all that day.

Prosecution witness Ram Lal Singh, a peon in the service of the Rani of Deo who

was at the time residing with her uncle Jagat Prasad, had been sleeping in the hut after his mid day meal. He says that about 4 P M. he got up and went to wash his face. Then came the dust storm and immediately afterwards he found that the hut was on fire. He suggests that the fire came from the embers in the open fire place where he had cooked his food and near which there was a quantity of jute sticks. He says that Munsaf Ram arrived after the hut was completely burnt out or about five minutes after the fire began, and that he assisted in extinguishing the fire in a neighbouring house, namely, that of Nanki Dusadin, to which the fire had spread.

Ram Lal is corroborated by Jawadhan whose house is immediately east of the hut.

Surajnath Pathak, who is Jagat Prasad's priest and was in the Thakurbari about 30 paces to the west, Ramdhari Lohar, Jamaluddin, the grandson of Jawadhan and *Musammat* Nanki also corroborate Ram Lal.

All these witnesses prove that Munsaf Ram did not set fire to the hut, came after the fire began and that he assisted in putting it out.

The witness Lalji proves that at the time of the fire Munsaf Ram was working with other coolies at a wall which was being built for his master Ramsunder Singh to the west of the hut and that on hearing shouts of fire Munsaf ran to the place, and that he returned about half an hour later. This witness states that the hut is some distance from where he was working and that he did not go to it.

In my opinion the learned Sessions Judge was right in holding that Munsaf did not set fire to the hut and that the appellant's information to the Police was maliciously false.

With regard to the ownership of the hut, the evidence is that it was built by the Rani's men with wood, straw and leaves taken from Jagat Prasad's jungle. At that time the Rani had already given Gajadhar Prasad the managership of her properties in the Gaya District and the prosecution witnesses seem to have looked upon the Rani's servants as Gajadhar's servants. It appears that after Gajadhar obtained the *zerpeshgi* from Jagat Prasad he appointed one Audh Behari as his *Devan* at Burhibir for making collections. About eight days before the fire the appellant Parmeshwar succeeded Audh Behari. The hut in question was built about two months before the fire. Gajadhar's own servants used at first to live in a tent, but after the hut was built Ram Lal Singh and Bulaki Singh two peons of the Rani, and Jhari Singh, the *Tahsildar* of Gajadhar used to sleep in it. Ram Lal says that he used at first to sleep in a room in Jagat Prasad's house which is to the west but owing to shortness of accommodation he came over to the newly built hut. He was paid by the Rani through her manager, Gajadhar Prasad, and it is clear from the evidence of the *chaukidar*, Faujdar, that the villagers made no distinction between the servants of Gajadhar and the servants of the Rani.

I think, therefore, that it is established that the hut was not the property of Gajadhar and in the circumstances it is difficult to see why Munsaf Ram, the servant of Ramsundar, should set fire to it.

In the First Information it is stated that the value of the hut was Rs. 25 and that the articles destroyed consisted of rice, *dal*, salt, clothes and aluminium pots worth Rs. 21. It is not stated to whom these properties belonged, but the evidence is that some of them belonged to Ram Lal Singh and the constable Ram Tewari. Jhari Singh, the *Tehsildar*, was at Daltonganj that day with his master Gajadhar Prasad who had come there from Gaya. Bulaki was also away and it does not appear that any property belonging to Gajadhar's own servants was in the hut. Parmeshwar certainly had nothing there. That this should have been so is natural for Parmeshwar was only appointed eight days before the fire and he had only paid one visit to Burhibir. I accept the statement of Ram Lal when he says that Parmeshwar came to Burhibir on Sunday the 30th *Baisakh* and went away on the next day and that the fire took place the following Wednesday. Parmeshwar Lal's statement that he was in the hut at the time of the fire is, in my opinion, wholly and intentionally false. I cannot accept his explanation that he could not leave the village immediately after the fire because there was nobody else to look after his master's interests. I do not think it is likely that he would have stayed in the village alone that night if this had been a real case of arson. Next, if Parmeshwar had himself seen Munsaf setting fire to the hut, I do not understand why on the following morning Ram Lal should have been ordered by Audh Behari

to go to Daltonganj to inform Gajadhar Prasad. There would have been no necessity for Audh Behari to interfere. I am satisfied that Ram Lal was sent by Audh Behari and the *chaukidar* Faujdar by the constable and that at Daltonganj they had an interview with Gajadhar and Parmeshwar and that under Gajadhar's orders Parmeshwar went afterwards to the *thana* to lodge an information against Munsaf Ram.

It has been contended that the First Information contains details which it would not have been possible for Parmeshwar to give if he had not himself seen Munsaf in the act. I am not impressed by this argument. The story that Munsaf was running away and that Jagat Prasad was standing near the *Thakurbari* might easily have been invented by one who was not at the place of occurrence at all.

It is next contended that at most the information is a mistake of fact and does not amount to a false information within the meaning of s 211, Indian Penal Code. If the appellant had said to the Police that he suspected Munsaf Ram and if he had not deliberately charged Munsaf Ram with having set fire to the hut, there might have been some substance in this plea, but here it is clear that the appellant's intention was not merely that the Police should follow up a clue but that the Police should put Munsaf Ram on his trial. It was clearly the appellant's intention to set the criminal law in motion against Munsaf Ram and to injure Ramsundar and Jagat Prasad.

Next it is contended that the case does not come within the latter part of s. 211. It is urged that a false information given to the Police is not a proceeding instituted on a false charge within the meaning of the second part of the section. In my opinion a charge laid before the Police is a criminal proceeding, and notwithstanding the authority of *Queen-Empress* v. *Bisheshar* (1), I think that the decision of the Full Bench of the Calcutta High Court in *Karim Baksh* v. *Queen-Empress* (2) contains a correct statement of the law.

Finally, there remains the question of sentence. Having regard to the fact that the hut was a very flimsy and temporary structure and that it was worth only Rs. 25 and that the total value of property destroyed was less than Rs. 50, a sentence of four years' rigorous imprisonment seems to be unduly severe. There might have been a suspicion in the mind of Parmeshwar that Ram Sunder's men had had a hand in causing the fire and the false charge does not bear any indication of any deep laid plot. In the circumstances I think a sentence of two years' rigorous imprisonment will meet the ends of justice. The sentence is accordingly reduced.

Bucknill, J.—I agree.

Z. K. *Sentence reduced.*

(1) 16 A. 124; A. W. N. (1894) 10, 8 Ind. Dec. (N. S.) 80.

(2) 17 C. 574; 8 Ind. Dec. (N. S.) 922 (F. B.).

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 105 OF 1925.

July 7, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Panton.

ABDUL (BARI) MALLICK AND ANOTHER—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 360—Depositions of witnesses, proper time for reading

Section 360, Cr P C., is mandatory and its provisions must be strictly complied with Reading over the depositions of all the witnesses examined on one day at the end of the day is not in strict conformity with the requirements of the law The evidence of each witness should be read over to him after it is completed before that of another witness commences. [p 888, col 1.]

Hira Lal Ghosh v *Emperor*, 83 Ind Cas 905, 52 C. 159, 28 C. W. N 968, A. I R. 1924 Cal. 889, 26 Cr. L J 201, 41 C L J. 224 and *Dargahi* v *Emperor*, 88 Ind Cas 733, 52 C. 499, A. I. R 1925 Cal. 831; 26 Cr. L J. 1213, referred to.

Criminal appeal against an order of the Second Additional Sessions Judge, 24-Perganas, dated the 8th January 1925.

Babu *Debendra Narayan Bhattacharjee*, for the Appellants.

Mr. *Khundkar*, for the Respondent.

JUDGMENT.

Suhrawardy, J.—The two appellants have been convicted by the Additional Sessions Judge of 24-Parganahs in agreement with the verdict of the majority of the Jury under ss. 304 and 326, Indian Penal Code. The first accused was convicted under s. 304 and sentenced to ten years' rigorous imprisonment. The second accused was found guilty under s. 326 and sentenced to undergo the same term of imprisonment. Various objections have been taken on the ground of misdirections in

the learned Judge's charge to the Jury; but it is not necessary to consider them as we find ourselves constrained to order a re-trial on the ground that the provisions of s. 360, Cr. P. C., have not been complied with. An affidavit has been filed on behalf of the accused in which it is stated that the deposition of each of the prosecution witnesses was not read over or explained to him after it had been recorded and before the examination of the next witness was commenced; but that the depositions of the witnesses examined on the day were read over to them after the close of the day's proceedings. The learned Deputy Legal Remembrancer in order to be sure of the truth or otherwise of this allegation made a reference to the learned Sessions Judge and an affidavit sworn by one Atul Chandra Banerjee, Bench clerk of the Second Additional Sessions Judge of Alipore has been placed before us. The deponent states as follows: "I read over and explained the depositions of the witnesses in the presence and hearing of the accused at the end of the day when the examination of all the witnesses for the day was closed." It is, therefore, clear that the procedure that was followed was that the depositions of all the witnesses were read over to them at the close of the day. This, in our opinion, is not sufficient compliance with the provisions of s 360, Cr. P. C. It has been held in the case of *Hira Lal Ghose* v. *Emperor* (1) that s. 360 is mandatory and its provisions must be strictly complied with. This view is based on the wording of the section itself and on the policy underlying it, namely, to protect the witness and also to safeguard the interest of the accused by affording to the witness as well as the accused an opportunity of finding any inaccuracy in the record of the deposition. In *Dargahi* v. *Emperor* (2) the same learned Judges who decided the case of *Hira Lal Ghose* v. *Emperor* (1) had to consider a similar question with regard to the provisions of the section. There the deposition of a witness was read over to him when another witness was being examined in Court. The learned Judges deprecated the procedure and were of opinion that it was not a strict compliance with the provisions of s. 360, Cr. P. C., and in expressing that opinion they made the following observation: "That clause provides that as the evidence of each witness is completed, it shall be read over before the examination of another witness is commenced." If it is once conceded that s. 360 is mandatory, it follows that its provisions must be strictly complied with. The section says that "as the evidence of each witness taken under s. 356 or s. 357 is completed, it shall be read over to him in the presence of the accused and etc." The plain meaning to my mind is that the deposition of a witness must be read to him as it is completed. The practice of reading over the depositions of all the witnesses examined on one day at the end of the day may commend itself as intended to save public time: but it is not in strict conformity with the requirements of the law; and, experience gained in this case shows that more public time will be wasted in the re trial of the case than what was saved by the procedure adopted. The practice of reading over depositions of several witnesses at one time may also defeat the object of the section as laid down in the case of *Hira Lal Ghose* v. *Emperor* (1). The accused or his lawyer may not remember the exact words used or the form of the answer given. It is, therefore, desirable that the provisions of s. 360, Cr. P. C, should be strictly observed and the evidence of each witness read over to him after it is completed before the evidence of another witness commences; and the reading over should not be postponed till all the witnesses are examined. In this view the trial before the Additional Sessions Judge must be held to be vitiated by this defect in the procedure.

The appeal accordingly succeeds, the conviction of and the sentences passed on the appellants are set aside and we direct that they be re-tried according to law. The appellants will remain in Jail until further order by the Trying Court.

Panton, J.—I agree that the conviction and sentence of the appellants must be set aside as this appears to me to be the inevitable result of the earlier decisions of this Court just quoted by my learned brother.

R. L. *Appeal allowed.*

(1) 83 Ind. Cas. 905; 52 C 159; 28 C W. N 968; A. I. R. 1924 Cal. 889; 26 Cr. L J. 201; 41 C L. J. 224.

(2) 88 Ind. Cas. 733; 52 C. 499; A. I. R. 1925 Cal. 831, 26 Cr, L. J. 1213.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1295 OF 1925.
January 11, 1926.
Present:—Mr. Justice Broadway.
MUL CHAND AND ANOTHER—ACCUSED—PETITIONERS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s 332—Police Act (V of 1861), s 34—Playing cards in street—Offence—Prohibition by constable—Discharge of duty

Playing cards in the street is no offence under s 34 of the Police Act and, therefore, a constable prohibiting people from doing so cannot be said to be acting in discharge of his duty.

Case reported by the Sessions Judge, Karnal, with his No 362-J of 26th July 1925.

FACTS.—The accused Tulsi and Mul Chand have been convicted by Sardar Ujagar Singh, Magistrate First Class, under s. 332, Indian Penal Code. It appears that the appellants were playing cards in the street in front of a shop when constable Ram Pershad prohibited them from doing so. The accused did not mind it and so there was scuffle between the accused and the three constables (P. Ws Nos. 1, 2 and 3.)

The accused, on conviction by Sardar Ujagar Singh exercising the powers of Magistrate of the First Class in the Rohtak District, was sentenced, by order dated 4th April 1925, under s. 332 of the Indian Penal Code, to pay a fine of Rs. 25 or in default to undergo rigorous imprisonment for three months each.

GROUNDS.—It is urged on behalf of the applicants that the constable was not authorised to prohibit them from playing cards in the street and so the assault (even if it was committed) does not fall within the meaning of s. 332, Indian Penal Code. I think this contention is right Playing cards is not an offence and does not come within any of the eight clauses of s. 34 of the Police Act. So the act of the constable in prohibiting the men from playing cards was not in the discharge of his duty. As to who began the fight first I cannot believe that the applicants who are *Banyas* by caste and respectable shopkeepers of the Rohtak town could have dared to slap the constable first. In my opinion the conviction is not right. The proceedings are, therefore, forwarded for revision to the High Court with a recommendation that the conviction and sentences of the applicants be set aside and the fine, which has been paid, be refunded.

Mr. *Shamair Chand*, for the Petitioners.

ORDER.—The learned Sessions Judge is right in his conclusion that the petitioner had not committed an offence by playing cards in the street. Nevertheless in my judgment the petitioners were not justified in assaulting the Police constable. I, therefore, alter the conviction to one under s. 323, Indian Penal Code, and reduce the fine in each case to Rs. 5. The fines, if paid, in excess of that amount will be refunded.

R L. *Fine reduced.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 476 OF 1925.
December 17, 1925.
Present:—Mr. Justice Daniels.
Hafiz MUSTAQIMUDDIN—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss 123, 514, Sch V, Form No 42—Bail-bond filed in Court since abolished—Successor, powers of, to enforce bond—Security for keeping peace or good behaviour—Order directing accused to furnish security within fixed time—Absconding of accused—Sureties for attendance of accused, liability of

A security bond given in form No 42 of the Fifth Schedule to the Cr P C originally filed in a Court which has since ceased to exist, can also be enforced by its successor to which the other functions of the defunct Court have been transferred [p 890, col. 1]

Where a Magistrate passes an order under s 123, Cr. P C, directing an accused to give security for keeping the peace or for good behaviour for more than one year and allows him time to file a security by a fixed date, but the accused absconds on that date, the liability of the sureties who held themselves responsible for the accused's attendance in Court cannot be held to be terminated, because until it is known whether the accused can give the security or an order is passed referring the case for the final orders of the Sessions Judge it cannot be said that the proceedings in the Magistrate's Court have been terminated [*ibid*]

Criminal revision against an order of the Sessions Judge, Meerut, dated the 24th March 1925.

Mr. *G. W. Dillon*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision in a case in which sureties' bonds have been ordered to be forfeited under s. 514 of the Cr. P. C. Two points of law are raised:—

(1) That the bonds were given for attendance in the Court of the Cantonment Magistrate and that the liabilities of the sureties came to an end when the case was transferred to another Court.

(2) That on 22nd September, the Magistrate passed an order directing the accused in the case to give security for three years, but allowed him ten days' time up to 3rd October to file the security. It was on this latter date that he absconded. The applicant contends that his liability came to an end on 22nd September.

Owing to a change in the law the Court of the Cantonment Magistrate ceased to exist in March 1924 ; and it appears from the Magistrate's order that all cases from that Court were transferred to the Court of B. Jai Narain, Special Mrgistrate. In my opinion, the terms of the security bond given in Form No. 42 of the Fifth Schedule to the Cr. P. C. are wide enough to include the successor of the Court in which the case originally was. Any other view of the law would produce most inconvenient results, since if an accused were on bail when a case was transferred, it would in every case be necessary before transferring the case to order his arrest or to require him to give fresh sureties.

As regards the second point, the terms of the bond include not only an inquiry before the Magistrate but also dates fixed in the Sessions Court if the case goes to that Court. In this case, the Magistrate could order the accused to give security for three years, but if the security was not given it was not in his power finally to dispose of the case. Final orders under s. 123 of the Code could only be passed by the Sessions Judge. The Magistrate had power under s. 120 of the Code to postpone the date from which the security should take effect, *i. e.*, to give the accused time within which to furnish it. Until it was seen whether the accused could give the security or an order would have to be passed referring the case for the final orders of the Sessions Judge, it cannot be said that the proceedings in the Magistrate's Court had finally terminated so as to put an end to the liability of the sureties who were responsible for the accused's attendance. I find, therefore, that the orders of the Courts below are correct, and I dismiss this application.

S. S. *Application dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 14 OF 1924
AND
CRIMINAL APPEAL No. 621 OF 1924.
November 25, 1924.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Mukerji.

ARSHED ALI—ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s 374—Reference for confirmation of death sentence—Duty of High Court—Identification test during trial, value of.

In a reference for confirmation of death sentence, the High Court must satify itself that the finding of fact arrived at is justified by the evidence on record. [p 891, col 1]

Value of identification test held during trial commented upon [p 892, col. 2]

Reference made by the Additional Sessions Judge, Backerganj, dated the 27th September 1924.

Babu *Debendra Narain Bhattacharjee*, for the Accused.

Mr. *Khundkar*, for the Crown.

JUDGMENT.

Newbould, J.—Arshed Ali has been found guilty by the unanimous verdict of the Jury on the charge of abetment of murder. He has been sentenced by the Additional Sessions Judge of Backerganj to death under s. 302 read with s. 109 of the Indian Penal Code. Under s. 374 of the Cr. P. C. the proceedings have been submitted to this Court for confirmation and the accused has also preferred an appeal against his conviction.

The facts according to the case for the prosecution are as follows:—

Lalsom Bibi, the principal witness in this case, has lived as the wife of five men. To how many of them she was legally married is not clear, but her marriage to the appellant Arshed Ali who was the fourth of her so-called husbands was certainly bigamous as it took place during the lifetime of the third Abdul Hussain who had not divorced her. After living with the appellant for a few months she left him and went to live in her father's *bari*. She was then one month pregnant. In *Magh* last she went through a form of *nika* marriage with the deceased Sher Ali. This enraged Arshed Ali and twice in the months of *Falgoon* and *Chaitra* Jabed Ali who is Arshed Ali's *dharma-bhai* asked Lalsom to return to Arshed Ali and threatened her when she refused to do so. On the night of the 10th April (28th *Chaitra*)

Sher Ali, Lalsom and her three children were sleeping in her hut. At a little before midnight Lalsom woke up hearing the noise of a scuffle. She heard Jabed Ali, whose voice she recognised, say "Let me go." She got up to light a lamp and then heard Arshed Ali saying "Jabed Ali, is the deed done" By the light of the lamp she saw that Sher Ali's viscera were protruding from a wound in his stomach and another wound on the left side of his chest. Her cries brought several neighbours to the scene and both Sher Ali and Lalsom told them that they had recognised Jabed Ali and Arshed Ali by their voices

Sher Ali was taken by boat to Patuakhali, the Sub Divisional headquarter, where he arrived at about 11 A. M. He was taken to the hospital and there his statement was recorded by an Honorary Magistrate from 3-30 to 4-10 P. M. He said that he had been wounded by Jabed Ali and Arshed Ali and that Jabed Ali inflicted the wound with a *dao*. He also stated that he was wounded because he married Arshed Ali's wife. He died before sunset that afternoon. The doctor who held the *post mortem* examination found three incised wounds on the body, of which two were homicidal. In his opinion death was due to shock and hæmorrhage from these two wounds.

That Sher Ali was murdered on the night of the 10th April has been clearly proved. Whether the appellant before us was guilty of abetting this murder depends on the credibility of the evidence that he was recognised by his voice. Though the Jury have unanimously convicted him, this being a reference under s. 374, Cr. P. C., we must be satisfied that their finding of fact is justified by the evidence on the record. After full consideration we are compelled to hold that there are several points in the case which make it unsafe to rely on this evidence. We also find that there has been positive misdirection on one important piece of evidence in the case in addition to non-direction by reason of the learned Judge having omitted to draw the attention of the Jury to several points which throw doubt on the truth of the case for the prosecution.

In his charge to the Jury the learned Sessions Judge has said: "On Wednesday, the 27th *Chaitra* (9th April) Arshed Ali was seen in Kalagachia village which adjoins Kewalumia walking towards the *bari* of Jabed Ali." But the evidence is that Arshed Ali was seen in the neighbourhood not on the Wednesday but on the Thursday afternoon. The fact of the case for the prosecution rests on a statement alleged to have been made by Sher Gazi and is supported by the evidence of his brother Mahomed Gazi who deposed that Sher Gazi said he had seen Arshed Ali on the previous afternoon. That the expression "the previous afternoon" cannot mean the afternoon of the previons day is clear from the statement of Lalsom Bibi in the First Information to the effect that her husband had told her in the afternoon of the day of occurrence that when he returned after noon of that day he saw Arshed Ali and Jabed Ali. This is a very serious misdirection since it was proved by witnesses who were examined by the Court to test the accused's plea of *alibi*, that he was present at Patuakhali as an accused in a case which was the last heard on the 10th April. Though this might not have prevented him being present at the murder he could not possibly have been at Kalagachia at the time that Sher Ali said that he saw him.

The case against this accused depends solely on the recognition of his voice by Sher Ali and Lalsom Bibi. It is certainly suspicious that no mention of this fact was made to anyone outside the village before the 18th of April when Lalsom Bibi's first information was recorded. Though the *chowkidar* Adam Ali went to the Amtali Police Station the morning after the occurrence, nothing was recorded there. The explanation given is that it was thought that information would be taken at Patuakhali. We think it unlikely that no entry would have been made even in the station diary if the *chowkidar* had then asserted that the accused had been recognised by their voices at the time of occurrence. The statement of Sher Ali recorded by the Honorary Magistrate contains no mention of how Jabed Ali and Arshed Ali were recognised, though both are named.

It is difficult to rely absolutely on the statements of the deceased and his wife since they are clearly untruthful on one important point, the period that elapsed between Lalsom Bibi leaving Arshed Ali and her marriage to Sher Ali. Lalsom Bibi's evidence is that she married Arshed Ali 4 years ago and after living with him 4 months she went to live at her father's house. Sher Ali stated to the Honorary Magistrate

that she was at her father's *bari* for about 4 years. But the age of the child of which Lalsom Bibi says the accused is the father, is inconsistent with her having lived apart from the accused for as long as two years. If the accused had raised no objection to Lalsom Bibi leaving him for even two years there is no reason why he should have committed this murder. Whatever the truth may be we have no doubt that there was good reason to suspect the accused and that the true story of the illfeeling between the parties has been concealed.

There are other reasons besides the delay in informing the authorities which make us suspect the truth of the story of recognition, apart from the question as to how far such recognition can support the conviction. It is most improbable that when a murder is being committed the murderer's companion should call to him by name. This suggests that the actual words that may have been heard, have been altered to strengthen the case against Jabed Ali who is absconding.

Lalsom Bibi's evidence is contradictory on some material points. She said she had no talk with her husband before he made the statement to the neighbours and that when she lit the lamp her husband was senseless and he came to after the neighbours came. Then in cross-examination she said: "It is a fact that before any neighbours came up my husband told me he recognised Jabed Ali and Arshed Ali, he told me this while I was lighting the lamp." Also in her deposition she said that her husband said "*o ma*" before any statements were made by the assailants, but when questioned by a juror as to the order of events she places this cry of "*o ma*" last of all. The evidence of the neighbours who came afterwards is not free from discrepancies. It is noticeable that when Ibrahim called to the *chowkidar* he spoke of some one unknown having committed the murder though according to the evidence he had then heard the story of recognition. There are also important discrepancies as to whether Lalsom Bibi said anything that night. The deceased's brother's account of a conversation with the deceased is very significant. He says that the deceased gave three reasons for accusing Jabed Ali and Arshed Ali, (*i*) that he had no other enemies, (*ii*) that he saw Arshad Ali in the afternoon, (*iii*) that he had recognised their voices.

We think that the real reason for the accusation of these men was the first and that the third reason on which the case now rests is as unreliable as the second has been proved to be.

For these reasons we must hold that the guilt of the accused Arshed Ali has not been proved. We refuse to confirm the sentence of death passed on him. We allow his appeal and set aside his conviction and sentence and acquit him of the charge on which he was tried and direct that he be released.

Mukerji, J.—I entirely agree. I only wish to add a few words as regards the identification test that was held in the course of the trial in this case. The matter, however, is not of much importance in the present case, inasmuch as the witness who was subjected to this test was for sometime the wife of the accused, who was sought to be identified. In any case it is not reasonable to expect that she would have failed to identify the accused. What happened in this case was this:—Lalsom Bibi was examined as a witness on behalf of the prosecution and after her examination was over with the permission of the accused and his Pleader the identification test of the accused's voice was held, the accused being mixed up with seven other men. The accused was actually numbered six on the file, and his voice was correctly identified by Lalsom Bibi as the 6th voice. Personally I have always entertained grave doubts as to the propriety of such a test being adopted during the trial. It makes no difference that in the present case it was held with the permission of the accused and his Pleader, for a request in the matter of this description is always very embarrassing to the defence. There is no warrant for this procedure in the Statute and it is likely to lend spurious weight to the testimony which should be available for the purposes of a criminal trial.

R. L. *Appeal allowed.*

LAHORE HIGH COURT.

CRIMINAL REVISION CASE No. 1673 OF 1925.

December 23, 1925

Present:—Sir Shadi Lal, KT., Chief Justice.

EMPEROR—PROSECUTOR

versus

TEJ RAM—ACCUSED.

Criminal Procedure Code (Act V of 1898, as amend-

ed by Act XVIII of 1923), s. 439 (6), effect of.

The effect of the addition of sub-s. (6) to s 439, Cr P. C, by Act XVIII of 1923, is that the High Court, when adjudicating upon an application for enhancement of sentence, is converted into a Court of Appeal against conviction and the accused is entitled to show that his conviction is unjustified [p 893, cols 1 & 2]

Mr. *Cardon Noad*, Government Advocate, for the Crown.

Mr. *Shamair Chand*, for the Accused.

ORDER.—On the 15th August 1921, two boxes containing various articles of merchandise were consigned from Delhi to Rewari, and, when the consignment arrived at Rewari, the consignee Tej Ram representated to the Station Master that one of the boxes had been tampered with. Thereupon the latter asked Tej Ram to produce the original *beejak* (invoice) to enable him to give an "open delivery" of the consignment. The invoice Ex P. B. was accordingly produced by Tej Ram, and the goods were delivered to him. A list of the articles alleged to have been lost was prepared by the Station Master, and on the strength of that list the consignee made a claim for the recovery of their value. The Railway Authorities, however, considered the claim to be false, with the result that Tej Ram was prosecuted for an attempt to cheat the Railway Company and also for using as genuine a forged document. The Trial Magistrate has acquitted the accused of an attempt to cheat, but has convicted him under s. 471 read with s. 468, Indian Penal Code, and sentenced him to imprisonment till the rising of the Court and a fine of Rs. 150.

The District Magistrate has made a belated reference to this Court recommending that the sentence be enhanced, and Mr. Shamair Chand, who has appeared for the accused to show cause against enhancement, urges that his client has been wrongly convicted and that the conviction should be set aside.

Now, sub-s. (6) which has been added to s. 439, Cr. P. C., by the Cr. P. C. Amendment Act XVIII of 1923, provides that "notwithstanding anything contained in this section, any convicted person, to whom an opportunity has been given under sub-s. (2) of showing cause why his sentence should not be enhanced, shall, in showing cause, be entitled also to show cause against his conviction." The effect of the enactment of this sub-section is that the High Court, when adjudicating upon an application for enhancement of sentence, is converted into a Court of Appeal against conviction. I must, however, administer the law as I find it.

In view of this express provision of the law, I have heard arguments on the merits and reached the conclusion that there is no satisfactory evidence to show that Ex. P B the genuineness of which has been impeached, is a forged document. It is to be observed that this document, which is written in Urdu, purports to be a list of articles purchased by the accused at Delhi and to bear the signature of Sheikh Karam Ilahi-Rahim Ilahi. Now Karam Ilahi, who was also prosecuted in this case but was subsequently discharged, has appeared as a witness for the prosecution, and he admits that he has a shop bearing the aforesaid name Another witness for the prosecution, namely, Sub-Inspector Gian Chand, who investigated the case, deposes that he was told by Karam Ilahi that the invoice Ex. P B was written by his servant Ram Chand. This witness, when answering a question put by the Court at the end of his examination, tried to modify the effect of his admission by stating that Karam Ilahi subsequently denied that Ram Chand had written the document. Karam Ilahi himself as a witness for the prosecution disclaims the responsibility of his firm for preparing it, but considering that he was himself prosecuted as an offender and appeared as a witness after his discharge (a somewhat unusual and objectionable procedure), I am not prepared to attach any value to his evidence.

It may, therefore, be taken as proved that Ex, P B was written by Ram Chand on behalf of Karam Ilahi, Rahim Ilahi and the evidence also shows that this document consolidates several invoices representing goods purchased by the accused from various shops at Delhi. Karam Ilahi himself admits that Ex. P M is the list of the goods purchased from his own shop, and this list is embodied in Ex. P B. Now, Ex. P M, contains all the articles which were alleged to have been lost while the boxes were in the custody of the Railway; and it cannot, therefore, be seriously contended that the accused was claiming certain goods which he had never purchased.

The evidence for the prosecution shows that the articles in dispute were purchased

by the accused from Karam Ilahi and were correctly entered in Ex. P B which was written by Karam Ilahi's servant Ram Chand. These articles have apparently disappeared, but the question of the responsibility for the disappearance is a debatable one. One thing, however, is reasonably clear that the document, upon which the charge under s. 471 is founded, has not been proved to be a forged document.

The result of this finding is that the conviction cannot be sustained. Accordingly I set aside the conviction and the sentence and acquit the accused. The fine, if realised, shall be refunded to him.

R. L. *Conviction set aside.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 697 OF 1925.
October 15, 1925.
Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice B. B. Ghose.
LALIT KUMAR SEN—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 421—Appeal—Record sent for—Summary dismissal.

A Criminal Appellate Court should hear the Pleader and ought not to dismiss an appeal summarily after the record has been sent for and received.

Criminal revision against an order of the Sessions Judge, Backerganj, dated the 3rd August 1925, affirming that of the Deputy Magistrate, Barisal, dated the 23rd July 1925.

Babu *Suresh Chandra Taluqdar*, for the the Petitioner.

Babu *Aswani Kumar Ghose*, for the Opposite Party.

JUDGMENT.—After the record was sent for and received, the learned Sessions Judge ought to have heard the Pleader and ought not to have dismissed the appeal summarily without hearing him. The order dismissing the appeal summarily is accordingly set aside and the appeal is sent back to him to be re-heard according to law.

R. L. *Case sent back.*

LAHORE HIGH COURT.

CRIMINAL PETITION No. 205 OF 1925.
December 18, 1925.
Present:—Mr. Justice Fforde.
MUGHEES-UD-DIN—ACCUSED—PETITIONER
versus
EMPEROR THROUGH RADHA LAL—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s 526—Application for postponement to enable to apply for transfer—Magistrate enquiring into allegations—Propriety—Transfer.

An enquiry by the Magistrate, on a party's applying to him for postponement of the case to enable him to apply for transfer, into the grounds of transfer himself is highly improper and would naturally cause apprehension in the mind of the petitioner that the Tribunal trying the case is not likely to give him an impartial and unbiased hearing

Petition, under s. 526, Cr. P. C., for transfer from the Court of the Magistrate, Second Class, Jagadhri, District Ambala, to some other Court of competent jurisdiction.

Lala *Bishan Nath*, for the Petitioner.

Mr. *Shamair Chand*, for the Respondent.

ORDER.—Proceedings were taken against the petitioner upon a complaint made under the provisions of ss. 352, 504, Indian Penal Code. In the course of these proceedings the petitioner applied to the Court for postponement of the case to enable him to apply for a transfer of the matter from the Court of this Magistrate to some other Magistrate. The Magistrate hearing the complaint thereupon requested the petitioner to make a statement as to the grounds of his transfer, and then proceeded to make a preliminary inquiry to ascertain whether these grounds were well founded. Having come to the conclusion that the grounds were false the Magistrate then made a report to the District Magistrate for the purpose of having the petitioner tried under s. 193, Indian Penal Code, for perjury. The learned Magistrate in para. 6 of his report makes a frank statement of these circumstances. It is obvious that the procedure adopted by the learned Magistrate was highly improper and would naturally cause apprehension in the mind of the petitioner that the tribunal trying his case was not likely to give him an impartial and unbiased hearing. Under these circumstances I have no option but to transfer the case to the Court of such other competent Magistrate as the District Magistrate might direct.

R. L. *Case transferred.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 731 OF 1925.

December 22, 1925.

Present :—Mr. Justice Daniels.

PURAN AND ANOTHER—APPLICANTS

versus

EMPEROR THROUGH CHIDDAH—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s 203—Order dismissing complaint not set aside—Fresh complaint, whether barred—Practice—Witnesses summoned at late stage on accused's responsibility—Failure of witnesses to appear, effect of—Penal Code (Act XLV of 1860), s. 406—Money advanced to accused under lawful agreement—Agreement becoming incapable of execution—Retention of money in lieu of debt due to accused—Offence

An order of dismissal passed on a complaint, which has not been set aside, is no bar to a fresh complaint upon the same facts to another Magistrate.

Queen-Empress v. *Adam Khan*, 22 A 106, A W. N. (1899) 211, 9 Ind. Dec (N S) 1100, not followed

Ram Bharos v. *Baban*, 22 Ind Cas 734, 36 A 129, 15 Cr L. J. 158, 12 A. L J. 106 and *William Cecil Keymer* v *Emperor*, 22 Ind Cas 145, 36 A 53, 12 A. L J 1, 15 Cr L J. 1, followed.

Where an application for summoning witnesses has been put later, and the summons have been issued on the responsibility of the accused on the full understanding that the Court will not grant any adjournment if the witnesses do not appear, the accused cannot say that he had no opportunity of producing his evidence, if the witnesses do not turn up

Where a sum of money is placed in the hands of a person under a lawful agreement which, however, becomes subsequently incapable of execution, and is retained by him afterwards against a debt due to him he cannot be held guilty of criminal breach of trust under s. 406, Penal Code.

Criminal reference made by the Sessions Judge, Aligarh, dated the 13th November 1925.

Mr. *Panna Lal*, for the Applicants.

Mr *Sailanath Mukerji*, for the Opposite Party.

JUDGMENT.—This is a reference by the learned Sessions Judge of Aligarh. The facts out of which the reference arises are these. The complainant Chhidda had to deposit a sum of Rs. 615 to complete the purchase-money of a Court auction sale which had been concluded in the name of his wife. He had only Rs. 415 with him and wished to borrow the remaining Rs. 200 from the applicants Puran and Hoti They agreed to advance it on condition that Chhidda made over the Rs. 415 he had with him, that they made the entire deposit and that the house was transferred into their names. Chhidda consented to this, and an application was made, but the Court refused it. This happened on 21st July. Chhidda owed Puran and Hoti a sum equal to the amount which he had placed in their hands. They seem to have retained the Rs. 415 against their debt. On the following day he filed a complaint against them which was dismissed the same day under s 203, Cr. P. C., on the ground that no criminal offence was established. On the 24th of July they filed a civil suit against him claiming Rs. 467 due to them from him. On 6th August while this suit was pending he filed a fresh complaint which was entertained by a different Magistrate.

The learned Sessions Judge has made this reference on three grounds, two of them technical and one a ground of substance. The technical grounds are that the second Magistrate could not entertain a fresh complaint unless the order dismissing the original complaint had first been set aside under s. 437, Cr. P C. The learned Judge relies on an old ruling in *Queen-Eepress* v. *Adam Khan* (1), but this ruling has not been followed in later cases. *Ram Bharos* v. *Baban* (2) and *William Ceil Keymer* v. *Emperor* (3) show that the opposite view has prevailed in later cases. The second ground is that the accused had no proper opportunity of producing their witnesses. On this point also I am not disposed to accept the Sessions Judge's view. The application for summoning witnesses was put in later, and the accused got the summons issued on their own responsibility, it being understood that the Court would not adjourn the case if the witnesses did not attend.

On the third point the reference must, in my opinion, prevail. The accused retained the money against the debt which was owing to them from Chhidda and there is nothing to show that in doing this they acted dishonestly. The Special Magistrate does not appear to have applied his mind to this point at all. I agree with the learned Sessions Judge that the facts do not establish a case under s. 406, Indian Penal Code.

I accordingly accept this reference and set aside the conviction of the applicants. The fine, if paid, will be refunded.

S. S. *Conviction set aside.*

(1) 22 A. 106; A W. N. (1899) 211; 9 Ind. Dec (N. S.) 1100.

(2) 22 Ind. Cas. 734; 36 A. 129; 15 Cr. L. J. 158, 12 A. L. J. 106.

(3) 22 Ind. Cas. 145; 36 A. 53; 12 A. L. J. 1; 15 Cr. L. J. 1.

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 180 OF 1925.

July 23, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Waller.

In re VENUGOPAL NAYUDU—PETITIONER.

Legal Practitioners Act (XVIII of 1879), s 14—Legal practitioner, misconduct of—Jurisdiction to inquire into, whether confined to Court in which misconduct committed—Transfer of proceedings, competency of.

Section 14 of the Legal Practitioners Act does not limit the consideration of a charge of misconduct against a legal practitioner to the Court in which the misconduct is alleged to have been committed Any Court in which the Pleader practises is empowered to entertain a petition under the section.

In re Rabindra Chandra Chatterjee, 67 Ind. Cas. 985; 49 C. 850, 35 C L. J 520; A. I. R. 1922 Cal. 484, followed.

Emperor v. *Satyendra Nath Roy*, 57 Ind. Cas 277; 1 P L T 379, (1920) Pat 225, 21 Cr. L J 613 and *In re Radha Churn Chukerbutty*, 10 C W. N. 1059, 4 C L J 229; 4 Cr L J 160, dissented from.

A Magistrate who has been moved under s 14 of the Legal Practitioners Act to institute proceedings against a legal practitioner for misconduct has no jurisdiction to transfer the proceedings to a subordinate Magistrate for action or to direct him to hold a preliminary inquiry.

Petition, under s. 107 of the Government of India Act, 1915, praying that in the circumstances stated therein the High Court will be pleased to quash the proceedings in Current No. 91-B of 1925, dated the 22nd February 1925, on the file of the Court of the First Class Sub-Divisional Magisrate, Pattukottai.

Mr. *K. S. Jayarama Iyer*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—Petitioner who is a First Grade Pleader has been charged under s. 14 of the Legal Practitioners Act by the Sub-Divisional Magistrate, Pattukottah. He was engaged to represent the accused in a security case and all the charges against him except one alleged various acts of misconduct in relation to that case. These charges were made to the District Magistrate, Tanjore, by the Deputy Superintendent of Police, who suggested that proceedings should be taken against petitioner under the Legal Practitioners Act. In the result the Additional District Magistrate forwarded the Police report to the Sub-Divisional Magistrate, Pattukottah for enquiry and the latter issued notice to petitioner under s. 14 of the Act. It is not quite clear what was in the mind of the Additional District Magistrate whether he intended that the Sub-Divisional Magistrate should himself dispose of the charges or whether his idea was that a sort of preliminary enquiry should be held and a report should be submitted with a view to possible future action by himself. From either point of view, he acted without jurisdiction. The Legal Practitioners Act makes no provision either for the transfer of proceedings or for the holding of a preliminary enquiry of such a nature. Mr. Jayarama Aiyar contends that in any event most of the charges against his client cannot be enquired into as they relate to alleged acts of misconduct not committed in or in relation to the Court which proposes to enquire into them. That, we consider, is an objection that should more properly be taken before the District Magistrate, who will now proceed to deal with the matter himself. As, however, it has been taken here, we may as well dispose of it at once. The view relied on by Mr. Jayarama Iyer finds support in several decisions of the Patna High Court of which we may quote that reported in *Emperor* v. *Satyendra Nath Roy* (1) as an example. The same view has been expressed by the Calcutta High Court in *In re Radha Churn Chukerbutty* (2). With great respect, we prefer to follow the ruling of the Calcutta High Court reported as *In re Rabindra Chandra Chatterjee* (3). As pointed out by Woodroffe, J., and Mookerjee, J., s. 14 of the Legal Practitioners Act does not limit the consideration of a charge to the Court in which the misconduct is alleged to have been committed. To say that it does, is, we think, to read into s. 14 something that is not there.

The District Magistrate will now dispose of the report made to him in accordance with law, but we think it undesirable that proceedings for misconduct against the defence Vakil should be taken before the security case against his client has been disposed of.

V. N. V. *Case remanded.*

(1) 57 Ind. Cas 277; 1 P. L. T. 379, (1920) Pat. 225; 21 Cr. L. J 613.

(2) 10 C. W. N. 1059; 4 C. L. J. 229; 4 Cr. L. J. 160

(3) 67 Ind. Cas 985; 49 C. 850; 35 C. L. J. 520; A. I. R. 1922 Cal. 484.

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 48 AND 49 OF 1924.

June 24, 1925.

Present:—Mr Justice Cuming and Mr. Justice Chakravarti

DURGA PROSAD LAHIRI CHOUDHURI AND OTHERS—DEFENDANTS—APPELLANTS

versus

RATAN MAHOMMED SARKAR—PLAINTIFF AND OTHERS—*Pro forma* RESPONDENTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), Sch III, Art. 3—Landlord and tenant—Dispossession of tenant by purchaser—Possession, suit to recover—Limitation.

Where an agent of the landlord purchases a portion of a tenant's *jote* and as such purchaser dispossesses the tenant from the portion purchased, a suit by the tenant to recover possession of the portion of the *jote* from which he has been dispossessed is not governed by Art 3 of Sch III to the Bengal Tenancy Act.

Appeals against the orders of the Subordinate Judge, Dinajpur, dated the 19th of June 1923, reversing those of the Munsif First Court at Dinajpur, dated the 24th of April 1922.

Babu *Ramendra Mohan Majumdar*, for the Appellants.

Moulvi *A. S. M. Akram*, for the Respondents.

JUDGMENT.

IN APPEAL NO. 48 OF 1924.

Chakravarti, J.—This is an appeal by the defendants and arises out of a suit for possession of a share of a *jote* by the plaintiff. The main ground of defence was that the suit was barred by the special Law of Limitation as provided for in Art. III of Sch. III to the Bengal Tenancy Act. This defence was given effect to by the Trial Court and the suit was dismissed. On appeal by the plaintiff the learned Subordinate Judge of Dinajpur has found that the plaintiff has purchased a share of the *jote* from the owners thereof and that dispossession was by one Jogendra who had purchased also a share of the same *jote*. Although Jogendra was an officer of the defendant the landlord the finding of the lower Appellate Court is that Jogendra dispossessed the plaintiff as a purchaser of a share of the *jote* and not as an agent of the landlord. In this view the lower Appellate Court held that the suit was not barred by limitation and sent the case back to the learned Munsif for ascertaining the share which the plaintiff had purchased and on such ascertainment of the share the learned Subordinate Judge has directed the decree to be awarded to the plaintiff.

The only ground which was taken by the learned Vakil for the appellant was that the Trial Court had found that Jogendra was really a *benamdar* for the landlord the defendant as such the dispossession effected by Jogendra was the dispossession effected by the landlord. The learned Vakil for the appellant contended that the finding of *benami* arrived at by the Trial Court had not been specifically dealt with by the lower Appellate Court.

I do not think that this contention should prevail. The learned Subordinate Judge found that Jogendra purchased the land and dispossessed the plaintiff as such purchaser and not as an agent of the landlord. I think the finding is quite sufficient for the purpose of holding that the dispossession was not by the landlord, nor was it on his behalf. Therefore it seems that the judgment of the lower Appellate Court is correct and this appeal should be dismissed with costs.

Cuming, J.—I agree.

IN APPEAL NO. 49 OF 1924.

Our judgment in the analogous Appeal No. 48 of 1924 will govern this appeal also.

Z. K. *Appeals dismissed.*

ALLAHABAD HIGH COURT.

PRIVY COUNCIL APPEAL NO. 39 OF 1925.

December 18, 1925.

Present:—Sir Grimwood Mears, KT, Chief Justice, and Mr Justice Lindsay.

WILAYATI BEGAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

FIRM JHANDU MAL-MITHU LAL—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s 12 (3), Sch. I, Art 179—Civil Procedure Code (Act V of 1908), s 109—Leave to appeal to Privy Council, application for—Limitation—Time spent in obtaining copy of judgment, whether can be excluded

Sub-section (3) of s. 12 of the Limitation Act does not apply to an application for leave to appeal to His Majesty in Council The time spent in obtaining a copy of the judgment appealed from cannot, therefore, be excluded in computing the period of limitation prescribed for such application.

Application for leave to appeal to His Majesty in Council.

Mr. *N. P. Asthana*, for the Appellants.

Messrs. *Iqbal Ahmad* and *S. B. Johari*, for the Respondent.

JUDGMENT.—A question of limitation arises in connection with this application for leave to appeal to His Majesty in Council. The judgment of this Court was delivered on the 30th of March 1925, and admittedly the application for leave to appeal was not presented till the 20th of October 1925.

Certain reasons are given in explanation of the delay. It is said that some time had to be taken for the purpose of obtaining a copy of the decree of this Court, and further it is said that some time was taken for the purpose of obtaining a copy of this Court's judgment.

It is argued on behalf of the applicant that if both the periods just referred to can be taken into consideration and allowed, then the application for leave to appeal is within time. It is conceded, however, that if sub s. (3) of s. 12 of the Limitation Act does not apply to the case now before us, then it must be held that the application for leave is beyond time.

Section 12 of the Limitation Act provides for exclusion of time which is consumed in certain legal proceedings which are obligatory. In sub-s. (2) of s. 12 it is provided that in computing the period of limitation prescribed for an appeal, an application for leave to appeal, and an application for a review of judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded. Clearly this sub section provides in the cases mentioned for the exclusion of the time which is necessary for obtaining copies both of the judgment and of the decree.

When we come, however, to sub s. (3) we find it laid down as follows: "Where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded". The question is whether sub-s. (3) of s. (12) applies to a case of this kind, namely, an application for leave to appeal to His Majesty in Council. In our opinion it does not. To begin with the language of sub-s. (3), when contrasted with sub-s. (2), clearly contemplates the exclusion from the scope of sub s. (3) of the case of an application for leave to appeal; and further it is to be noted that for the purpose of making an application for leave to appeal to His Majesty in Council, the rules of this Court do not make it necessary that the applicant shall at the time of filing his application for leave file also a copy of the judgment on which the decree is founded. That being so, it seems to us that, for the reasons just given, we must hold that the present application is beyond time. The applicant is not entitled to exclude the time which he took in obtaining a copy of the judgment of this Court. The application is, therefore, dismissed with costs including fees on the higher scale.

Z. K. *Application dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS CASE NO. 244 OF 1925.
(LETTERS PATENT APPEAL NO. 244 OF 1923)
November 25, 1925.

Present :—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol.

THE FIRM BHAGWAN DAS-PARAS RAM THROUGH LACHMI NARAIN—DECREE HOLDER—PETITIONER

versus

JADO NATH AND OTHERS—DEFENDANTS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 50—Execution of decree—Decree against property of firm—Liability of individual members.

The mere circumstance that a decree passed against a firm as it stands can be executed only against the property of the firm does not preclude its eventual execution against the individual partners of the firm as soon as any or all of the conditions set forth in O. XXI, r. 50, C. P. C, are fulfilled.

Petition for review of an order passed on the 21st January 1925, in the Letters Patent Appeal case noted above, by the High Court.

Mr *Shamair Chand* and Lala *Jagan Nath*, for the Petitioner.

Mr *Nanak Chand Pandit*, for the Respondents.

ORDER.—The sole object of this review is to have it made clear that our judgment of the 21st January 1925 does not conclude the question whether the decree may be executed against the judgment-debtors individually. Before the learned Judge in Chambers the only matter decided was whether the order of the Executing Court passed in review was competent. The other issues in this case were not decided by him inasmuch as his de-

cision on the first point rendered their adjudication unnecessary.

There can be no doubt that the decree as it stands can be executed only against the property of the firm, but that circumstance does not preclude the eventual execution of the decree against the individual partners as soon as any or all of the conditions set forth in O. XXI, r. 50 are established.

We accordingly review our judgment of the 21st January 1925 so far as to make it clear that that judgment in no way debars the Executing Court from trying the other issues in the case relative to the liability of the individual members of the firm to satisfy out of their own property the decree issued against the firm.

In this hearing the parties shall bear their own costs.

R. L. *Order accordingly.*

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 112 OF 1924.

October 7, 1925.

Present:—Mr. Justice Devadoss and Mr Justice Waller.

Sri Mahant PRAYAGA DOSS JEEVARU —PLAINTIFF—APPELLANT

versus

PACHELLA DORAISWAMI IYENGAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), s 23—Suit involving question of title, whether of small cause nature

A Small Cause Court is entitled to decide a question of title if it arises incidentally, but where the plaint and the written statement show that the issue to be fought out and decided is one of title, the suit cannot be considered to be one of small cause nature

Letters Patent Appeal against the judgment and decree of Mr Justice Wallace, dated the 27th of March 1924, in S. A. No. 1131 of 1921, preferred to the High Court against a decree of the Court of the Subordinate Judge, Chittor, in A. S No. 32 of 1920, preferred against that of the Court of the District Munsif, Sholinghur, in O. S. No 444 of 1918.

Mr. *T. Kumaraswamiah*, for the Appellant.

Mr. *K. S. Chempakesa Iyengar*, for the Respondents.

JUDGMENT.—The only point urged in this appeal is that the suit is of a small cause nature and no second appeal lay inasmuch as the amount of the claim was less than Rs. 500. It is urged that when the objection was taken before the learned Judge who decided the second appeal, he overruled it. We consider the learned Judge is perfectly right in overruling the objection as the main issue in the case related to the question of title. No doubt a Small Cause Court is entitled to decide a question of title if it arises incidentally. But where the plaint and the written statement show that the issue to be fought out and decided is one of title, we think the suit cannot be considered to be one of small cause nature.

There is no other point raised in this appeal. The appeal is dismissed with costs.

V. N. V. *Appeal dismissed.*

Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2043 OF 1922.

June 24, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Chakravarti.

BAIKUNTHA NATH DE AND OTHERS—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

SHAIK HARI—PLAINTIFF AND ANOTHER—DEFENDANT No. 3—RESPONDENTS.

Ejectment suit—Non-joinder of party, effect of—Appeal, second—Permanent tenancy, finding as to—High Court, interference by

The mere non-joinder of a party in an ejectment suit is not fatal to the trial of the suit The only result of such non-joinder would be that the party not impleaded will not be bound by any decree passed in the suit.

Where a lower Appellate Court refuses to draw an inference of the permanency of a tenancy from the facts that the tenancy is an old one, that the rent has not been varied and that the land was let out for the purpose not of building any permanent structure but of raising huts, there is no error of law which would justify the interference of the High Court in second appeal

Appeal against a decree of the Subordinate Judge, Additional Court, Burdwan, dated the 16th of May 1922, reversing that of the Munsif, First Court, Burdwan, dated the 9th of May 1921.

Dr. *Jadu Nath Kanjilal* and Babu *Purna Chandra Chandra*, for the Appellants.

Babu *Charu Chandra Ganguli*, for the Respondents.

JUDGMENT.

Chakravarti, J.—This is an appeal by defendants Nos. 1 and 2 and arises out of a suit for ejectment by the plaintiff. The defence of the defendants was that the tenancy was a permanent one and was not, therefore, determinable by the plaintiff-landlord.

The Court of first instance dismissed the suit. The lower Appellate Court reversed that judgment and decreed the plaintiff's suit with costs and made a decree for ejectment giving the defendants six months' time to vacate the land.

In this second appeal by the defendants the learned Advocate for the defendants contended first that the suit was bad, because one of the sub-lessees was not a party to the suit. We do not think that mere non-joinder of a party in an ejectment suit is fatal to the trial of the case. It may be that the party not being impleaded may not be bound by the decree. But so far as the defendants are concerned it has been found that they have no right to retain possession of the land.

The second ground which was suggested was that upon the facts found by the lower Appellate Court we ought to presume that the tenancy held by the defendants was a permanent one. The only facts found are that the tenancy was created more than 74 years ago and the rent has not been changed during all these years. The lower Appellate Court, however, points out that there has been no case of succession in this case, because the different tenants who held the land were not shown to have claimed through each other. Therefore in this case the only facts found are that the tenancy is an old one and the rent has not been varied and that the land was let out for the purpose not of building any permanent structure but of raising huts. I do not think that there was an error of law in the judgment of the lower Appellate Court when that Court refused to draw an inference of permanency on the facts found.

The appeal, therefore, fails and is dismissed with costs.

Cuming, J.—I agree.

E. K. *Appeal dismissed.*

PATNA HIGH COURT.

APPEALS FROM APPELLATE ORDERS Nos. 171 AND 172 OF 1924.

March 18, 1925.

Present:—Justice Sir B. K. Mullick, KT., and Mr. Justice Ross.

Musammat BIBI KHODAIJATUL KOBRA AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

HARIHAR MISSIR AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 37 (b)—Decree passed by Court of Additional Subordinate Judge—Court abolished temporarily and re-established—Jurisdiction to execute decree.

A decree was passed by the Court of the Additional Subordinate Judge and shortly afterwards the Court was abolished and the work of that Court was transferred to another Court. After a brief interval, however, the Court of the Additional Subordinate Judge was re-established and an application to execute the decree was made to that Court.

Held, that by virtue of the provision contained in sub-s (*b*) of s 37 of the C. P. C. the Court of the Additional Subordinate Judge had jurisdiction to execute the decree. [p. 901, col. 1]

Appeals from an order of the District Judge, Gaya, dated the 23rd April 1924, reversing that of the Subordinate Judge, Gaya, dated the 15th December 1923.

Syed *Nurul Hasan*, for the Appellants.

Mr. *S. N. Roy*, for the Respondents.

JUDGMENT.

Mullick, J.—These two appeals arise out of two orders made by the District Judge of Gaya on the 23rd April 1924, setting aside two orders made on the 15th December 1923 by the Additional Subordinate Judge of that District.

The events leading up to the last mentioned orders were as follows: Two decrees were made on the 21st August 1920 by the Additional Subordinate Judge of Gaya. Sometime, afterwards, it is not known on what precise date, the Court of the Additional Subordinate Judge was abolished and the business of that Court was transferred to the Third Subordinate Judge's Court. Subsequently the Additional Court was re-established and on the 27th August 1923 two applications were made to it for the execution of those decrees, and on the 15th December 1923 the Court held that he had jurisdiction to entertain the applications.

Against this decision two appeals were preferred before the District Judge who disagreed with the Additional Subordinate Judge and held that the Additional Subordinate Judge had no jurisdiction and

that the execution applications must be dismissed.

Now the matter turns upon ss 37 and 38 of the C. P. C. of 1908. The learned District Judge is of opinion that the Additional Subordinate Judge's Court having ceased to exist, the present Additional Subordinate Judge's Court cannot be the Court which passed the decree, and, therefore, is not competent to entertain the execution application. The learned Judge does not address himself to the latter part of sub-cl. (*b*) of s. 37 which provides that if the Court of first instance has ceased to exist or to have jurisdiction to execute the decree the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such a suit, shall be included within the expression "the Court which passed the decree." Therefore, even if it be held in this case that the Court of first instance has ceased to exist, the present Additional Subordinate Judge would have jurisdiction to execute the decree if he has jurisdiction to try the suit to which the decree relates. Now, there is nothing on the record to show that the present Additional Subordinate Judge has not got jurisdiction to try the suit. Ordinarily Additional Subordinate Judges have jurisdiction over the whole district and unless that jurisdiction has been curtailed by an express order made by the Local Government under s. 13 of the Civil Courts Act or in consequence of re-arrangement of business made by the District Judge under sub-cl. (2) of that section it must be assumed that the Additional Subordinate Judge has jurisdiction to try the suit and, therefore, also to execute the decree.

In point of fact I doubt if it can be said that the Court of the Additional Subordinate Judge has ceased to exist. What has happened is that the Court was temporarily abolished and was re established and that at the time when the application for execution was made it was in fact in existence. It is contended that the expression 'ceased to exist' means "is not in existence at the time when the application for execution is made." If that view is accepted, then the Court of the present Additional Subordinate Judge being the Court which passed the decree has jurisdiction to execute it. The argument of the respondents is that if a Court once ceases to exist that Court cannot again be revived and that although another Court of the same designation is established within the district with the same jurisdiction it cannot be said that it is the same Court. Now "Courts" in the Civil Courts Act are designated by their titles and if there are more Courts than one of the same designation, then they are further distinguished by numerals. If the officer presiding over the Court of the First Subordinate Judge is temporarily transferred and after an interval another officer is appointed to preside over that Court it would not be a straining of ordinary language to hold that the first Court ceased to exist but has been re-established. I am of opinion that in this case the Court of the present Additional Subordinate Judge being a Court of the same designation bears the impress of the identity of the Court which was abolished.

In this view the latter part of s. 37, cl. (*b*) is not required for the purposes of this case; nor has the third sub-clause of s. 13 any application.

Reference has been made to s. 17 of the Civil Courts Act; but that also has no application to this case, because it does not relate to execution proceedings.

The decision in *Tara Chand Marwari* v. *Ram Nath Singh* (1) appears at first sight to be against the view which we have just taken, but on an examination of the facts of the case it would seem that the decision there turned upon the question whether there was at the time when the application for execution was made any Additional Subordinate Judge in the district. Apparently there was not and, therefore, the permanent Subordinate Judge of the district assumed jurisdiction over the case. But while the execution case was proceeding, another officer was posted to the district as Additional Subordinate Judge and the question arose whether the permanent Judge ceased to have jurisdiction to continue the execution proceedings which were pending before him. It was held that he had jurisdiction to continue the proceedings. Reference was incidentally made in that decision to s. 17 of the Civil Courts Act; but it is not clear how that section applied.

The result is that upon the provisions of the C. P. C. it seems quite clear that the learned District Judge's order cannot be

(1) 4 C. L. J. 473.

supported and that the Additional Subordinate Judge's order was correct.

The appeals, therefore, will be decreed with costs. There will be separate costs in each case.

Ross, J.—I agree.

Z. K. *Appeals decreed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 107 OF 1925.

AND

CIVIL REVISION CASE No. 725 OF 1925.

August 4, 1925.

Present:—Justice Sir Hugh Walmsley, KT, and Mr. Justice Mukerji.

KHURSHED MEERZA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Syed FAIZUDDIN ALI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Religious Endowments Act (XX of 1863), s. 19—Committee of management—Death of member—Suit to compel surviving members to hold election—Decree—Election, whether can be set aside by Court.

On the death of one of the members of a Committee of management appointed under the provisions of the Religious Endowments Act, some of the persons interested in the endowment instituted a suit against the surviving members of the Committee praying that the Court should direct the defendants to take proper steps for the holding of an election to fill the vacancy caused by the death of one of the members The suit was decreed and the defendants were directed to hold an election after issuing proper notices. An election was accordingly held, but it was set aside on the application of one of the defendants and the suit was dismissed :

Held, that the suit having been once decreed the Court was not competent to entertain any subsequent application by any party and had no power to set aside the election which had been held in pursuance of its own order. [p. 903, col. 2.]

Appeal against a decree of the District Judge, Murshidabad, dated the 4th of May 1925.

Dr. *S. C. Basak* and Babu *Charu Chandra Choudhuri*, for the Appellant.

Mr. *M. Syed Nashim Ali*, Babus *Urukram Das Chakravarti* and *Hemendra Kumar Das*, for the Respondents.

Dr. *S. C. Basak* and Babu *Hemendra Kumar Das*, for the Petitioner.

Mr. *M. Syed Nashim Ali*, Babus *Urukram Das Chakravarti*, *Probodh Chandra Kar* and *Bon Behari Sarkar*, for the Opposite Party.

JUDGMENT.

Walmsley, J.—This appeal is directed against a decree which purports to have been passed under the provisions of the Religious Endowments Act (XX of 1863).

In the City of Murshidabad there is a *wakf* estate known as Basant Ali Khan's endowment estate. Under the Act, the management of this endowment is vested in a manager under the supervision of a Committee of three members. At the beginning of the present year the three members were Syed Faizuddin Ali, Syed Abdul Hussain and Mirza Yahia Sheraji. On January 23rd, however, Syed Abdul Hussain died, and a vacancy was created on the Committee. Under s. 10 of the Act it was the duty of the two remaining members to take steps to elect a new member within three months of the vacancy occurring. One of the members appears to have issued notice about an election, but on an application by some of the interested persons the learned Judge held that the notice must be issued by both members and that a notice by one alone was not valid. No election, therefore, was held on that notice. Then two interested persons Khurshed Mirza and Sarfaraz Ali Begg filed a plaint, with the District Judge's permission, against the two remaining members as defendants, and in this plaint the prayers were (*a*) that the Court should direct the defendants to take proper steps for the holding of an election, and fix a date within which the notices should be issued, and (*b*) that the Court should remove one or both of the members in case of default. Mirza Yahia Sheraji professed that he was anxious to comply with the rules but that he was thwarted by his colleague. Syed Faizuddin said that an election could not be held until the register of electors had been revised.

The learned Judge heard arguments and on March 28th, he delivered judgment: he held that the plaintiffs had a cause of action, that there was nothing objectionable in the form of the suit, that the permission to sue had been given in accordance with law, and that the register of electors could not be revised until after the vacancy had been filled up, and he ordered the defendants jointly to issue proper notices for an election by April 22nd.

No appeal was preferred against this decree and it was in fact obeyed. Notices were issued by the defendants fixing April 18th as the date of the election, and an election was held on that date. There were two candidates, and one of them, Mahomed Yusuf

Saheb, received 27 votes and the other only two. The result was reported to the Judge by Mirza Yahia Sheraji who pointed out that his colleague had not attended the election.

Then on April 27th Sayed Faizuddin presented a petition to the Judge objecting to the validity of the election. It was ordered that the petition should be considered at the final hearing of the case. On May 2nd the learned Judge heard arguments, and on the 4th he delivered judgment: he held that the register of electors was incomplete and defective, that an election held under the supervision of only one member of the Committee was invalid and that the plaintiffs had failed to prove the defendants guilty of any misconduct, and on these findings he dismissed the suit with costs to the defendant Syed Faizuddin. This is the judgment which is attacked in the appeal.

Other proceedings followed. Two new 'interested persons' Syed Kader Ali and Syed Ishfaq Ali on May 13th moved the Judge to appoint some one to fill the vacancy. Notices of this application were served on Sayed Faizuddin and Mirza Yahia Sheraji, On June 13th the latter objected that Mahomed Yusuf Saheb had been duly elected, while Kader Ali and Sarfaraz Ali asked for an adjournment. The learned Judge, however on the same day, appointed Syed Mehedi Ali to be a member of the Committee in place of the deceased Syed Abdul Hossain. This is the order which forms the subject of a rule issued by us at the instance of Khurshed Mirza and Mirza Yahia Sheraji. To this narrative of the facts, I must add one more detail, and this that Mahomed Yusuf Saheb was not made a party to the proceedings after the election held on April 18th.

The contention of the plaintiffs is that their suit was decided on March 28th when the learned Judge directed the defendants to issue notices. This contention seems to me to admit of no answer. The plaintiffs' cause of action was default on the part of the surviving members to take steps to hold an election, and when the defendants were ordered to issue notices by April 22nd the plaintiffs had obtained all that they sought, and the suit was at an end. The cause of action with which the Judge was dealing in his second judgment was something that had happened after the delivery of his first judgment. Moreover the person who considered himself aggrieved was not either of the plaintiffs but one of the defendants, and the proceedings were really carried on at his instance, and at this stage of the case Mahomed Yusuf Saheb was not made a party although the validity of his election was being discussed.

For these reasons I hold that the learned Judge's decision of May 4th was wrong: he should have refused to entertain Syed Faizuddin's petition on the ground that the suit was at an end. The appeal is, therefore, allowed and the judgment and decree of May 4th are set aside.

It follows as a corollary that the Rule must be made absolute for with the judgment of May 4th set aside there is no vacancy for the Judge to fill, until the election of April 18th is cancelled by proceedings taken in accordance with law.

There remains the question of costs. I think it will be enough to order Faizuddin to bear the costs of the plaintiffs in the suit and in the appeal, in other respects leaving the parties to pay their own costs.

The hearing fee in the appeal is fixed at three gold *mohurs*.

Mukerji, J.—I agree.

Z. K. *Appeal allowed.*
Rule made absolute.

OUDH CHIEF COURT.

SECOND CIVIL APPEALS NOS. 91 and 92 OF 1925.

December 9, 1925.

Present:—Mr. Justice Raza.

RUDAN SINGH—PLAINTIFF—APPELLANT
versus
KALKA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

U P. Land Revenue Act (III of 1901), ss. 110, 111, 113—Partition proceeding—Objection filed after expiry of period fixed, whether can be entertained

Where an objection is filed in a partition proceeding after the expiry of the time fixed for filing objections in a proclamation made under s. 110 of the U P Land Revenue Act, but before the Court has taken any steps under s 113 of the Act, the Court is not precluded from dealing with the objection, and if it decides it, the decision will be taken to be under s 111

Second appeal against a decree of the Third Additional District Judge, Lucknow at Hardoi, dated the 13th November 1924, confirming that of the Assistant Collector, First Class, District Hardoi, dated the 8th December 1923.

Mr. *Raj Narain Shukla*, for the Appellant.

Mr. *Ghulam Hasan*, for the Respondent.

JUDGMENT.—These appeals arise out of certain orders passed in the partition proceedings. Rudan Singh is a mortgagee with possession of 2 *biswas* share in villages Kudbapur and Bindhauri from Pancham Singh. The mortgagor and the mortgagee jointly filed applications for partition of both the villages. A proclamation was issued under s. 110 of the Oudh Land Revenue Act fixing 7th March 1922 as the date on which objections were to be filed by other co-sharers. There were several adjournments and then certain objections were filed by the applicants and the opposite party on 16th March 1923. There were several adjournments again and ultimately another objection was filed by Kalka Singh and others (opposite party) on the 4th September 1923. That objection was to the effect that certain *sir* lands should not be partitioned and should be allotted to their 9 *biswas* share exclusively. The objection was fixed for hearing for the 25th September 1923. On the 25th September 1923 the objection was brought on record in the presence of the parties and it was ordered that a proclamation should be issued fixing 30th October 1923 for hearing. There were several hearings again and then the learned Assistant Collector passed the orders in question on the 8th December 1923 in the presence of the parties. He allowed the objection and ordered that the *sir* plots should not be partitioned and should be allotted to the objectors exclusively.—The applicant Rudan Singh appealed but his appeals were dismissed by the Additional District Judge, on the 13th November 1924. He has now filed these second appeals—So far as I see there is no force in these appeals.

The applicant's contention is that the respondents' application or objection should not have been entertained as it was not filed within the time originally fixed for filing objections under s. 110, Oudh Land Revenue Act and that the appellant was not given an opportunity to contest the respondents' application or objection and the proceedings were irregular and bad in law.

The first contention has no force. Where an objection is raised after the appointed time but before the Court has taken any steps under s. 113 of the Oudh Revenue Act, a Revenue Court is not precluded from dealing with it and if it does decide it, the decision will be taken to be under s. 111 of the Act. Rule 9, Circular XXI, Deptt. II of the Boards Circular shows that the objections could be entertained subsequent to the date originally fixed in the proclamation. The ruling in *Tulsi Prasad* v. *Matru Mal* (1) is also to the same effect. The Court had not taken any action under s. 113 of the said Act up to that time and I think the objections were properly admitted and brought on record on the 25th September 1923. The learned Assistant Collector had sound reasons for entertaining the objections. I think he had not exercised his discretion improperly in this case.

The second contention also has no force. The appellant had ample opportunity to make any objections against the respondents' application and to adduce any evidence for disproving the allegations contained therein. However he failed to do so. He filed no defence and produced no evidence, oral or documentary, though he had ample opportunity to do so. The order in question was passed about 2½ months after the 25th September 1923. He had full knowledge of the respondents' application and also of the documentary evidence produced by them but nothing was said or done by him to show that he meant to oppose the respondents' application. When no defence was filed, the first Court could not frame any issue. The Court duly considered the documentary evidence produced by the respondents and decided the matter in their favour. He was perfectly right in doing so. The documentary evidence shows clearly that the *sir* in dispute belongs to the respondents exclusively. The procedure, so far as applicable to this case, was followed properly and there was no miscarriage of justice. In my opinion the learned Additional District Judge was perfectly right in dismissing the appeals.

I dismiss both the appeals with costs and order the appellant to pay the costs of the respondents.

Z. K. *Appeal dismissed.*

(1) 18 A. 210; A. W. N. (1896) 30; 8 Ind. Dec. (N. S.) 846.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 109 OF 1923.

June 29, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Chakravarti.

ABDUL WAHED KHAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Srimati TAMIJANNESSA BIBI AND OTHERS—DEFENDANTS—RESPONDENTS

Co-sharers—Rent due from one co-sharer to another—Set-off, arrangement as to—Suit to recover rent, maintainability of.

An arrangement between co-sharers whereunder rent due to one of them from the others is set off against the rent due from him to the others, the balance alone being payable in cash, does not prevent the rent from falling due and does not operate as a bar to the maintainability of a suit by one co-sharer to recover rent due to him from the other co-sharers It is, however, open to the defendants in such a suit to show that the rent has already been paid off by set-off [p. 906, col. 1]

Appeal against a decree of the District Judge, Midnapur, dated the 28th of June 1922, affirming that of the Munsif, Second Court at Midnapur, dated the 4th of May 1921.

Mr. *S. C. Maity* and Babu *Apurba Charan Mookerjee*, for the Appellants.

Mr. *Mohendra Nath Roy* and Babu *Santosh Kumar Pal*, for the Respondents.

JUDGMENT.

Chakravarti, J.—This is an appeal by the plaintiffs and arises out of a suit for rents for the years 1324 to 1327. In para. 8 of the plaint, the plaintiffs stated amongst other matters this "out of the said purchased *niskar* property plaintiffs also having purchased some *jote* right lands no rents were claimed amongst the co-sharers and the rent due to each co-sharer used to be set-off, but the defendants Nos. 1 and 2 in collusion with other defendants disregarded the said arrangement and instituted Title Suit No. 2062 of 1919 in the Munsif's First Court Sadar on the claim of getting mesne profits and *khas* possession with regard to some other *jotes* by the plaintiffs Nos. 1 and 2 and obtained decree with mesne profits from 1324 *A. S.*" Now the defence of the defendants was substantially the same as alleged by the plaintiffs that there was an arrangement between the co-sharers by which instead of paying rent to each other the rent due to each other was to be set-off. But the written statement goes a little further than what was stated in the plaint. It seems to state to the effect that, as a matter of fact, no rent was payable to each other at all. Now it appears that the learned Munsif on the 3rd of May 1921 recorded the following order: "Parties are ready. Suit taken up. Heard Pleaders on both sides about maintainability of the suit documents Exs. 1 and 2 marked for the plaintiffs and A and B for the defendant. Order reserved." It appears that the learned Munsif proposed to try the question as to maintainability of the suit upon the pleadings and also upon the four Exhibits which were marked in the case a point preliminary to the trial of the suit on the merits. From what one finds in the two judgments it appears that the question as to maintainability of the suit was tried on the pleadings and not with reference to any of the four documents which were marked as exhibits in the case. The learned Munsif in the course of his judgment stated as follows: "It is stated in para. 8 of the plaint that by an amicable arrangement and agreement between the co-owners no body realized rent from anybody and the rents due to one used to be set-off against the rents due from him to the other." The learned Munsif does not refer to any of these documents as to what the real arrangement or agreement between the parties was; and on this arrangement as set out in para. 8 the learned Munsif later on says this. "Because by the agreement between the parties realization of rents by one from another came to an end and one ceased to be a tenant under the other and a rent suit by one against another cannot lie." In this view the learned Munsif dismissed the plaintiff's suit as not maintainable. On appeal by the plaintiffs the learned District Judge also tried the suit on the question of its maintainability and holding that the suit, apparently on the arrangement admitted by the plaintiffs, was not maintainable dismissed the suit.

Now, the present appeal is by the plaintiffs against that judgment and decree of the learned District Judge. It is contended by the learned Counsel who appears for the plaintiffs that the suit was tried on the issue as to whether it was or was not maintainable upon the statement contained in the plaint and that the agreement as stated in para. 8 of the plaint does not prevent the present suit being maintainable; secondly that the finding of the learned Munsif as to the effect of the arrangement

.hat one ceases to be a tenant under the other was erroneous, because that was not the effect of the arrangement set out in the plaint. It was next argued that the learned District Judge has also erred in dismissing the suit as not maintainable, as he also tried the suit on the plaint filed by the plaintiff and that the learned District Judge has not based any of his findings upon any evidence in the case.

Now, it is quite clear to us that the suit was tried as on an objection in the nature of a demurrer and, therefore, the plaintiff's case as made in the plaint ought to be accepted as correct. It was contended by the defendants-respondents as they are entitled to do that on the arrangement set out in the plaint the plaintiff's suit was not maintainable. But we are, of opinion, that the arrangement as set out in the 8th para. of the plaint, is nothing more than an arrangement which one finds very usual in this country, namely, that when rents are due to *zemindars* each paying rent to and receiving from the other, instead of each paying the amount to the other, the payment of the rent is usually made by entries in the account books and in the result rent is set-off against each other and if there is any balance payable to either of them only the balance is paid. So far as I can understand the arrangement clearly mentioned that the rent when its fell due to each other instead of paying in cash to each other there would be set-off between the co-sharers. This arrangement did not prevent the rent from falling due. All that it provides is that after the rent has fallen due to each other payment of the rent is made by set-off against each other. Payment is not really effected until the set-off is made. Now, if the plaintiffs in disregard of this arrangement bring a suit for rent due to them the defendants may show that under the arrangement they refrained from realizing the rent which fall due to them and that the money has already been paid by set-off when rent falls due, the party in whose favour the rent is due, is entitled to enforce his right. Such an arrangement cannot prevent the rent from being realized unless it is shown that the rent has been paid either by set-off or otherwise. Of course it is open to a defendant in a suit like this to show, as I have already said, that the rent has already been paid by set-off between the parties. But if there has been no such set-off I do not see how a mere arrangement to make a set-off stops the rent falling due and in fact the arrangement set only by the plaintiffs contemplates the rent falling due. It is no doubt open to the two co-sharers to make an arrangement by appropriate agreement putting an end to the relationship of landlord and tenant between themselves, or, in other words giving up the right to receive rent in favour of each other. But that is not the agreement which is set out in the plaint. The defendants as I have already stated, go further in their written statement as to the nature of the agreement but no effect can be given to that plea without entering into evidence. In the circumstances we think that the judgments and decrees of the Courts below ought to be set aside and the case sent back to the Court of first instance to be decided after taking evidence to be adduced by the parties. That Court will decide the whole suit once for all upon the issues which may arise between the parties. All that we decide is that para. 8 of the plaint does not put an end to the relationship of landlord and tenant between the parties. The rent does fall due and the defendant cannot escape liability without proving payment in some way.

Costs will abide the result.

Cuming, J.—I agree.

Appeal allowed; *Case remanded.*

Z. K.

OUDH CHIEF COURT.

FIRST EXECUTION OF DECREE APPEALS NOS. 57 AND 58 OF 1925.

December 1, 1925.

Present:—Mr. Justice Hasan and Mr Justice Raza.

Kunwar JANG BAHADUR—JUDGMENT-DEBTOR—APPELLANT

versus

JAGAT NARAIN—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 68, Sch. III, para 11—Execution of decree—Property held by Collector—Attachment, validity of—Simple money decree, whether can be transferred for execution to Collector

Where the Collector holds certain property belonging to a judgment-debtor in execution of a decree under para 11 of Sch III, C. P. C, a Civil Court has no jurisdiction to direct the attachment and sale of such property in execution of another decree against the same judgment-debtor. [p. 908, col. 1]

Where no immoveable property has been directed to be sold in execution of a simple money-decree, the decree cannot be transferred for execution to the Collector under s. 68, C. P. C. [p 907, col 2]

First execution of decree appeal against an order of the Subordinate Judge, Hardoi, dated the 15th August 1925, in Miscellaneous Suit No. 129 of 1925.

Mr. *M. Wasim*, for the Appellant.

Messrs. *Ali Zaheer Niamatullah* and *H. Husain*, for the Respondent.

JUDGMENT.—The facts of the case are as follows: One Ram Raghubir obtained a simple money-decree against one Raja Durga Prasad from the Court of the Subordinate Judge of Lucknow some years ago. He also obtained a similar decree against the same judgment-debtor from the Court of the Subordinate Judge of Hardoi. The decree passed by the Court at Lucknow was transferred for execution to the Court of the Subordinate Judge of Hardoi Proceedings in execution of the two decrees were taken from time to time by the decree-holder. Eventually on the 13th of December 1915 an application was made to the Court of the Subordinate Judge of Hardoi by the decree-holder in relation to the Hardoi decree that certain villages belonging to the judgment-debtor be attached and sold for the satisfaction of that decree. The Subordinate Judge passed an order in terms of the prayer contained in the application of the decree-holder. On the 25th of January 1917 another application was made by the decree-holder to the same Court in relation to the execution of the Lucknow decree with a prayer similar to the one which was made in the previous application. That prayer was also granted by the Subordinate Judge. Afterwards both the decree-holder and the judgment-debtor died. Proceedings for substitution of their representatives took place in respect of both the decrees in the Hardoi Court and the substitutions were allowed by the Court.

Against the execution proceedings taken in the Hardoi Court two appeals were preferred by the representative of the judgment-debtor to the late Court of the Judicial Commissioner of Oudh. The Bench who heard those appeals decided that the substitutions were properly made. It further decided that the order passed by the learned Subordinate Judge as to the attachment and sale of certain immoveable properties of the judgment-debtor in execution of the Hardoi and also of the Lucknow decrees were illegal in view of the fact that on the date of the order passed in relation to the Hardoi decree the immoveable property of the judgment-debtor was held by the Collector under the powers conferred on him by Sch. III of the C. P. C. in execution of a decree of Ram Sahai and Puttu Lal and on the date of the application relating to the Lucknow decree that immoveable property was held by the Collector under the same Schedule in execution of a decree held by the Upper India Bank, Limited In this connection we would refer to the orders made by the Bench of the late Judicial Commissioner's Court dated the 27th of February 1925 in Miscellaneous Applications Nos. 43 and 44 of 1925. Accordingly the order passed by the learned Subordinate Judge in each of the execution applications was set aside. The applications of the decree-holder were, however, maintained and the decree-holder was directed to proceed according to law.

On the 15th of April 1925 the decree-holder again went to the Court of the Subordinate Judge of Hardoi with applications asking for the transfer of the record of the execution cases to the Collector for further action. These applications were opposed by the judgment-debtor on various grounds. These grounds were made the subject-matter of three issues in the Court below. All those issues have been found by that Court against the judgment-debtor and we infer that the result has been that the prayer of the applications made by the decree-holder has been granted. The judgment-debtor has preferred these appeals against the order of the Subordinate Judge dated the 15th of August 1925.

At the hearing of the appeals only one point was urged before us by the learned Counsel for the appellant in support of the appeals and that was that the Subordinate Judge had no jurisdiction to transfer the execution cases to the Collector. The argument advanced by him is that only such decrees could be transferred to the Collector for execution as are mentioned in s. 68 of the C. P. C. and that the decrees now under consideration are not such decrees.

We are of opinion that the argument is sound and must prevail. It has already been stated by us in this judgment that the two decrees which the respondent holds against the appellant are simple money decrees in neither of which the Court has ordered any immoveable property to be

sold and at the time when the order for attachment and sale was passed by the Court of the Subordinate Judge of Hardoi, it could not be made then for the reason that under para. 11 of the Third Schedule of the C. P. C. the Civil Court had no jurisdiction to issue any process against the judgment-debtor's property as that property was held by the Collector in execution of other decrees. The order of the learned Subordinate Judge under appeal must, therefore, be set aside.

The learned Counsel for the decree-holder-respondent strenuously argued that the substance of the decree-holder's applications was not the transfer of the decree to the Collector for execution but merely for a share in the proceeds of the sale of the judgment-debtor's property in execution of decree in the hands of the Collector As regards this argument we may say that in the first place there is no such prayer contained in the application and in the second place we do not think we would be justified in treating the decree-holder's application as one for rateable distribution in terms of s. 73 of the C. P. C. That is a function which in the first instance must be performed by the Court seized of the execution and it will be open to the decree-holder, if he is so advised, to seek the aid of the Court in that direction.

We may mention that the Collector still holds the judgment-debtor's property under his control in virtue of the powers conferred on him by s. 68 of the C. P. C. in relation to a mortgage-decree held by the Upper India Bank, Limited. So even on this date a new process cannot be issued against the judgment-debtor's property.

The result is that we allow these appeals, set aside the order of the learned Subordinate Judge in each case and direct that the decree-holder's applications of the 15th of April 1925 be disposed of according to law. The respondent must pay the appellant's costs of these appeals but no order as to the costs in the lower Court.

Z. K. *Appeals allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2588 OF 1922.

July 9, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Chakravarti.

SITESWAR ROY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

TEPUA BARMAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Co-sharers—Partition, suit for—Possession, allegation of, disproof of—Presumption.

Where a plaintiff in a suit for possession by partition of alleged joint property makes a positive case that he is in possession of the property, and that case fails and the Court finds that the plaintiff has had nothing to do with the property in dispute for over twelve years, there is no room for the application of the presumption that the defendant is in possession of the property on behalf of the plaintiff and the plaintiff's suit must fail. [p 909, col 2]

Appeal against a decree of the Officiating Subordinate Judge, Jalpaiguri, dated the 9th of August 1922, reversing that of the Munsif, First Court, Jalpaiguri, dated the 3rd of January 1921.

Babu *Krishna Kamal Moitra*, for the Appellants.

Babu *Santosh Kamar Bose*, for the Respondents.

JUDGMENT.

Chakravarti, J.—This is an appeal by the defendants and arises out of a suit brought by the plaintiffs for declaration of their right to a share in the properties in suit and for possession after partition by metes and bounds. The properties in suit are certain *jamas* and the plaintiffs claimed a ¾th share in those properties. The defence of the defendants was that they were the owners of the *jotes* and were in exclusive possession thereof for a very long time without any connection whatsoever with the plaintiffs.

The facts shortly stated are these: It appears that one Janaki died leaving three sons Dhir Nath, Asinath and Kalinath. Dhirnath had four sons, namely, Kachu, Tepu, Fulchan and Fedhu. The plaintiffs are the sons of Kachu and the other two sons of Dhirnath, namely, Tepu and Fulchan. The defendants are the sons of Fedhu who according to them was adopted by Asinath.

The plaintiffs' case as presented in the first Court was that they were in possession of their share in the *jotes* which were their ancestral properties by receipt of paddy from their *adhiars* and were, therefore, in

joint possession of their share with the defendants. The plaintiffs alleged that they had been dispossessed after a criminal case from all lands except those mentioned in schedule "*kha*" to the plaint.

The learned Munsif found that the plaintiffs' story that they were in joint possession with the defendants was not established. He found that Tepu, to use his own words, lived in a place called Tepuigari, four or five miles away from the suit land and he migrated there several decades ago. His sons and daughters were all born there. Plaintiffs' witness Mantra Gobinda, a man of Bhandardaha, where the suit land is situated says that he has not seen Tepu for many years—20 or 30 years. Srikanta and Dhepra also live at Kanfata, a place within the jurisdiction of the Cooch Behar State. Fulchan also lives at a distant place. In effect the learned Munsif found that some of the plaintiffs and the ancestors of the others had left the village more than 30 years before the suit and set up their own respective cultivation at those distant places, and that the story of the plaintiffs that they were in receipt of the *bhag* paddy was unworthy of credit. He further pointed out that neither Tepu, nor Fulchan, nor the sons of Kachu who are the plaintiffs in this case had come to depose in this suit. He further pointed out that the story of their joint possession with the defendants was not supported by the oath of any of the plaintiffs in the case. On these findings the learned Munsif dismissed the plaintiffs' suit.

On appeal by the plaintiffs the learned Officiating Subordinate Judge has reversed the decree of the Court of first instance and declared the plaintiffs' title and remanded the case for effecting partition of the plaintiffs' share. The learned Subordinate Judge has not dealt with any of the categorical findings arrived at by the learned Munsif which I have stated above. From the mere fact that the properties were ancestral properties of the defendants and the plaintiffs at a remote date he comes to the conclusion that the defendants not having asserted a hostile title to the knowledge of the plaintiffs the lands in suit must be inferred to have been in the custody, to use his own words, "of their co-owners."

The learned Vakil who appears for the defendants-appellants contends that the theory of the plaintiffs' possession through the defendants should not have been relied upon by the lower Appellate Court when the plaintiffs' case was that they were in actual possession of their own lands by settling the lands on their own behalf with the *adhiars*. The learned Subordinate Judge has not taken any notice of the findings of the learned Munsif that the plaintiffs had cut off all connections with these properties for, to use the words of the Munsif, "several decades." It is quite apparent that the learned Subordinate Judge was not prepared to dissent from the findings of fact arrived at by the learned Munsif. I think the contention of the learned Vakil for the appellants ought to be given effect to. When the plaintiffs were found to have no connection with these properties for over 30 years and their positive case that they were in actual possession of the lands for themselves failed. I do not think that there was any room for the presumption which the learned Subordinate Judge has raised in favour of the plaintiffs, namely, that the defendants were in possession on behalf of the plaintiffs. I think, therefore, when the plaintiffs suing in ejectment made a positive case that they were in possession of the property within 12 years and failed to establish that case the suit should have been dismissed.

We think, therefore, this appeal should be allowed and the judgment of the first Court restored with costs both of this appeal and of the appeal before the Subordinate Judge.

Cuming, J.—I agree.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 321 OF 1924.

December 17, 1925.

Present:—Mr. Findlay, Officiating J. C., and Mr Kotval, A. J. C.

ANANDRAO—DEFENDANT—APPELLANT

versus

DAULAT—PLAINTIFF—RESPONDENT.

C P Land Revenue Act (II of 1917), s 220 (p)—Sadar lambardar—*Remuneration, claim to, when maintainable.*

A *sadar lambardar* is not entitled to any remuneration unless and until he gets it fixed by the Revenue Authorities under s 220 (*p*) of the C. P. Land Revenue Act. [p. 912, col. 1]

Appeal against a decree of the Additional District Judge, Nagpur, dated the

25th March 1924, in Civil Appeal No. 10 of 1924.

ORDER.

Findlay, Offg. J. C.—(*September 9, 1925*).—The plaintiff-respondent Daulat sued the defendant-appellant Anandrao for the recovery of certain items of Government revenue and the like which he alleged were due to him as *sadar lambardar* of *Mauza* Patansaongi and Beed. Amongst the items sued for were alleged sums said to be due in respect of his remuneration as *sadar lambardar*. The plaintiff was admittedly *sadar lambardar* in the years 1329 and 1330 *Fasli* of *Mauza* Patansaongi as well as of *Mauza* Beed in the year 1329. The Subordinate Judge held that he was entitled as *sadar lambardar* to the remuneration provided for in s. 192 of the Act and he accordingly granted the items in question. An appeal to the Additional District Judge likewise failed. His point of view was that if the other *lambardars* of the *pattis* concerned are dissatisfied with the arrangement under which the *sadar lambardar* continues to receive all the remuneration it was their duty to apply to the Deputy Commissioner for re-fixation thereof. Until the rate of remuneration had been newly fixed the old rate must remain in force and could not be disputed in the Civil Court. The appellant has come up in second appeal against the decision of the Additional District Judge.

It is admitted that the Deputy Commissioner has not re-fixed the remuneration since the new Act came into force and since a *sadar lambardar* was appointed. The contention urged on behalf of the appellant is that the plaintiff clearly cannot be entitled to the full amount of the remuneration contemplated in s. 192 of the Land Revenue Act of 1917. It is urged that the other *lambardars* of the *pattis* concerned have also duties and responsibilities in respect of which they are entitled to remuneration and that it was never intended by the Legislature that the *sadar lambardar* as such would *prima facie* continue to draw all the remuneration in question. Counsel in arguing the case before me evidently failed to notice the judgment in Second Appeal No. 165 of 1922 which has now been published in *Janrao* v. *Baliram* (1). The penultimate paragraph of that judgment reads as follows :—

"There is nothing also in s. 220 of the new Act, under which exclusive jurisdiction is given to Revenue Authorities, and the jurisdiction of the Civil Courts is barred in certain matters, which either precludes the Civil Courts from entertaining, or oust their jurisdiction in respect of a claim by a *lambardar* for the recovery of arrears of remuneration payable to him. So far as the *sadar lambardarship* is concerned no special remuneration is payable to him as such. The same remuneration is, therefore, payable whether a person is *lambardar* or *sadar lambardar*. The result is that plaintiff is entitled to recover the remuneration claimed for all the years in suit."

In addition the learned Additional Judicial Commissioner who decided the case placed reliance on the terms of s. 229, the saving provision of the Act. With all respect it seems to me that the view of the learned Additional Judicial Commissioner taken in the judgment referred to requires re-consideration. I know of no reason why the *sadar lambardar* as such can be held to be the equivalent of the *lambardars*, four in number, who are in existence in the *mahal* we are concerned with and I think the position that the *sadar lambardar* is *prima facie* entitled to all the remuneration which he received under the old system requires re-consideration. In relying on s. 229 of the Land Revenue Act of 1917 the all important limitation implied in the words "so far as may be" seems to me to have been lost sight of.

While I am not, therefore, prepared at the present moment to differ definitely from the decision of Kinkhede, A. J. C., in the case quoted above, I think this matter is of sufficient importance to be considered by a Bench. The question involved is whether a *sadar lambardar* appointed under the Land Revenue Act of 1917 is entitled *ipso facto* to the remuneration which he received under the previous Land Revenue Act unless and until the Deputy Commissioner re-fixes or re-arranges such remuneration as between him and the other *lambardars* of the *patti* concerned. I accordingly order that the present appeal should be heard by a Bench consisting of Second A. J. C. and myself.

Mr. *W. R. Puranik*, for the Appellant.

Mr. *M. B. Niyogi*, for the Respondent.

OPINION.

Findlay, Offg. J. C., and Kotval, A. J. C.—(*December 17, 1925*).—We

(1) 83 Ind. Cas. 172; 20 N. L. R. 112; A. I. R. 1925 Nag. 129.

have now heared this second appeal which was referred to us by the order of Findlay, O. J. C., dated the 9th September 1925. The plaintiff-respondent Daulat sued the defendant-appellant, Anandrao, for an amount of Rs. 466-2 6 said to be due under the following circumstances. Plaintiff is the *sadar lambardar* of *Mauza* Patansaongi which is divided into four *pattis*. Defendant is *lambardar* of *Patti* No. 3 while plaintiff is *lambardar* of *Patti* No. 1 and *sadar lambardar* of the whole village. Plaintiff claimed that Rs. 807-3-0 was due in respect of Government revenne for the *Fasli* year 1330, and he also claimed Rs. 38 4-0 on account of *sadar lambardari hak* for the years 1329 31 with interest. The total amount due came to Rs. 1,168-15 3 and deducting payments the amount of Rs. 466-2 6 was due. As regards *Mauza* Beed, plaintiff's allegation is that he owns eight-annas therein and the defendant the remaining eight annas, while plaintiff was *sadar lambardar* of the whole village for the years 1329 and 1330 only. Plaintiff claims that Rs. 82-4-0 on account of the Government revenue is due and Rs. 4-2-0 for *sadar lambardari hak* for each of the years 1329 and 1330. This makes a total of Rs. 90 8-0 of which Rs. 61-11-0 has been paid. Thus Rs. 36-8-0 inclusive of interest was due to plaintiff in respect of *Mauza* Beed. Deducting certain amounts admittedly due by plaintiff to the defendant as is clear from the judgment of the first Court, para. 3, a total of Rs. 359-8-0 was claimed in the present suit.

The dispute between the parties eventually centred round the question as to whether the plaintiff was entitled or not to the remuneration as *sadar lambardar*. It was urged on behalf of the defendant that at the very best the plaintiff could only claim the so-called *sadar lambardari hak*, if any, after it had been fixed by the Revenue Authorities under the Land Revenue Act of 1917, s 192. Other pleas were raised between the parties with which we are not now concerned. On the question of the plaintiff's right to recover *sadar lambardari hak* the Subordinate Judge held that the plaintiff was entitled to recover the *hak* claimed by him, as under the new Land Revenue Act primary responsibility for the payment of land revenue rested on the *sadar lambardar*. The defendant Anandrao appealed to the Court of the District Judge, Nagpur, and the District Judge confirmed the decision of the Subordinate Judge. The District Judge took the view that under s. 188 (1) of the Land Revenue Act, 1917, some of the duties of the *lambardar* under the old Act are now to be performed by persons who are *pattidars* under the old Act and now are *lambardars*. Hence he did not assent to the proposition that the *sadar lambardar* under the new Act would be performing precisely the same duties and bearing the same responsibilities as a *lambardar* under the old Act. He, however, was of opinion that if the *pattidar lambardars* were dissatisfied with the arrangement whereby the *sadar lambardars* continued to get all the remuneration, their remedy was to apply to the Deputy Commissioner for re fixation of the same.

The point at issue between the parties to this appeal is, therefore, comparatively simple. The defendant-appellant's position is that the *sadar lambardar* cannot claim the remuneration he does, in the present suit, until he has applied to the Revenue Authorities for a re-fixation or re-allocation of the remuneration. The plaintiff-respondent's position, on the other hand, is that the *sadar lambardar* is entitled to claim the remuneration he does, unless and until the other *lambardars* apply to the authorities and have the remuneration refixed or re-allocated It is suggested that the *sadar lambardar* now represents the whole proprietary body in relation with Government; that the change in designation is only a matter of nomenclature and that where there is a *sadar lambardar* the other *lambardar* merely represents his *patti*, *cf.*, *Ramlal* v *Budhram Prasad* (2) and the same publication 1925, page 29 [*Bhawani Sao* v. *Kesheo Rao* (3).] For our own part we regard it as highly significant that in s. 192 of the Land Revenue Act, 1917, no specific mention of the remuneration of the *sadar lambardar* as such is contemplated. In r. 6 of the Rules made under s. 137 of the Central Provinces Land Revenue Act, 1881, a definite standard as to the *lambardar's* remuneration was laid down. Section 192 of the new Land Revenue Act, on the other hand, contemplates the fixing of the remuneration by the Revenue Authorities,

(2) C. P. Rev. Rulings 1921, p. 40.
(3) C. P. Rev. Rulings 1925, p. 29.

We cannot see that any primary responsibility with reference to the payment of land revenue rests on the *sadar lambardar* under the new arrangement introduced by the Land Revenue Act of 1917. The *sadar lambardar* is defined in s. 2 (15) as "the particular *lambardar* appointed under this Act to represent the *lambardars* in their relations with Government." This only implies in this connection that he has to collect the land revenue from his fellow *lambardars* and pay it to Government along with the land revenue of his own *patti*. He is no more and no less liable than the other *lambardars* for any deficiency on the part of any of the *lambardars*.

The contention offered in this case on behalf of the *sadar lambardar* is that *prima facie* he as representing all the *lambardars* in their relations with the Government is entitled to the whole of the remuneration payable under the old Act to the *lambardars*. The present Land Revenue Act does not fix any remuneration for *sadar lambardar* as such. If he is entitled to any remuneration he is entitled to it only as one of the *lambardars*. There is nothing in the Land Revenue Act which suggests that, where there are more *lambardars* than one in a *mahal*, only the one who is the *sadar lambardar* is entitled to the whole of the *lambardari* remuneration payable under the old Act and that the other *lambardars* who also have duties and responsibilities laid on them are to get no part of it. If it is once conceded that the other *lambardars* may have a claim to some part of the remuneration and the *sadar lambardar* is not *prima facie* entitled to the whole of it, it follows that the one who comes into Court with a claim for it must prove the extent of the share to which he is entitled. This share can only be fixed by the Revenue Authority under s. 220 (*p*). The plaintiff, therefore, cannot maintain his claim for remuneration until he gets it fixed by the Revenue Authorities.

JUDGMENT.

Findlay, Offg. J. C.—(*December 17, 1925*).—The result of the reference to the Bench is that the plaintiff-respondent is not entitled to claim in this suit any remuneration as *sadar lambradar*. It follows that when the *sadar lambardari hak* is excluded, the claim of the plaintiff-respondent Daulat in the admission of the defendant-appellant Anandrao stands as follows :—

Patansaongi village.

	Rs.	a.	p.
Government revenue of defendant's share for 1330 *F.* paid by plaintiff . .	807	3	0
Amount paid by defendant as admitted by plaintiff. (This includes Rs. 6 6-0 being *kotwari* dues of Kavadas village which plaintiff has allowed the defendant to charge in these accounts) ...	709	2	9
Balance ...	98	0	3

Beed village.

Government revenue of defendant's share for 1330 *F.* paid by plaintiff ...	82	4	0
Amount paid by defendant ...	61	11	0
Balance ...	20	9	0

The plaintiff is entitled to reco
Rs. 98-0 3 plus Rs. 20-9-0, a tota
Rs. 118-9-3. I see no reason to allow
rest in this case for the plaintiff-respon
was to have gone to the Revenue Authori
for re-fixation of the remuneration as betw
the *lambardars* instead of initiating
suit on the vain pretext that he was enti
to the total remuneration. For the s
reasons I order him to bear the defendant
pellant's costs in all three Courts. A de
will be drawn up accordingly and subst
tuted for that passed by the first Cou
and confirmed by the lower Appellate Cour
The cross-objection necessarily fails and
also dismissed. The respondent to bear hi
own costs therein.

Z. K. *Cross-objection dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No 315 OF 1924.

December 8, 1925.

Present:—Mr. Findlay, Officiating J. C.

Musammat KHURSHID BEGAM—DEFENDANT No 1—APPELLANT

versus

ABDUL RASHID—PLAINTIFF—RESPONDENT.

Muhammadan Law—Restitution of conjugal rights, suit for—Relief, whether discretionary Restitution, prejudicial to health and happiness of wife—Relief, whether can be refused

In the case of Muhammadans a suit for restitution of conjugal rights is in the nature of a suit for specific performance being founded on a contract of marriage which the Muhammadan Law regards as a civil one The relief claimed by the plaintiff in such a suit is a discretionary one and it is open to the Court to refuse to grant it even though the validity of the marriage was established on the ground that its enforcement would be prejudicial or dangerous to the health, happiness or life of the wife [p 914, col 2]

Moonshee Buzloor Ruheem v *Shumsoonissa Begum*, 11 M I A 551, 8 W R P C 3, 2 Suth P C J 59, 2 Sar P C J 259, 20 E R 208 and *Hamid Husain* v *Kubra Begam*, 44 Ind Cas. 728, 41 A 332, 16 A L J 132, followed.

Appeal against a decree of the District Judge, Nagpur, dated the 22nd April 1924, in Civil Appeal No 4 of 1924.

Mr. *M. Gupta*, for the Appellant

Mr. *M. B. Niyogi*, for the Respondent.

JUDGMENT.—The plaintiff-respondent, Abdul Rashid, sued the defendant-appellant, *Musammat* Khurshid Begam, for restitution of conjugal rights. Two other defendants were joined in the suit, the second defendant, Gulam Ahmad, being the husband of the elder sister of defendant No. 1's mother, and defendant No. 3, Abdul Sattar, being defendant No 1's maternal uncle. The claim as laid was for a decree for restitution of conjugal rights against defendant No. 1, while an injunction was craved for against the other two defendants prohibiting them from restraining the appellant's wife from coming to his house and residing with him. The two last defendants, however, raised a preliminary objection that the suit was bad against them because of want of territorial jurisdiction, and this issue was decided against the plaintiff in a preliminary finding given on 29th September 1923 by the Subordinate Judge, as a consequence of which the suit proceeded against defendant No. 1 alone.

The main facts of the case are sufficiently clear from the first Court's judgment. The Subordinate Judge gave the decree craved for against the first defendant and her appeal to the Court of the District Judge, Nagpur, also proved unsuccessful.

There are really two points only involved in the present appeal by the first defendant. The first is as to whether the decision in the previous suit of the Munsif, Wardha, (No. 55 of 1915), *cf.*, the copy of the judgment (P. 1), was *res judicata* or not. In that suit the present appellant sought to question the validity of the marriage with her husband. The suit was dismissed by the Munsif. An appeal to the Court of the Additional District Judge, Wardha, also proved unsuccessful, and a second appeal to this Court was unconditionally withdrawn without permission to bring a fresh suit.

The District Judge in dealing with the present case, after a full consideration of the decisions reported as *Bhugwanbutti Chowdhrani* v. *Forbes* (1) and *Bishnu Priya Chowdhurani* v. *Bhaba Sundari Debya* (2) came to the conclusion that the decision in the previous suit operated as *res judicata* on the matter of the validity of the marriage we are concerned with.

It does not appear to me that either of these decisions is of very much help in the circumstances of the present case. In them the main question involved was whether a plaintiff can evade the provisions of s. 13 of the old C P C, by joining several causes of action against the same defendant in the subsequent suit and instituting it in a Court of superior jurisdiction. A similar remark applies to the decision in *Sukhdeo* v. *Bhulai* (3). As pointed out by the learned District Judge the point was fully considered in *Ranganatham Chetty* v. *Lakshmu Ammal* (4) by White, C. J. As the learned Chief Justice therein pointed out, two principles seem to emerge from the earlier decisions quoted by him. One is that the plaintiff cannot add causes of action to the original one for the purpose of swelling the amount of the valuation and then say the Original Court was incompetent to try this question. The other principle is that for the purpose of dealing with the question of *res judicata* it is open to the Court to split up, so to

(1) 28 C. 78, 5 C W. M. 483.
(2) 28 C. 318.
(3) 42 Ind Cas 657, 16 N. L. R. 91.
(4) 21 Ind. Cas 15; 25 M. L. J. 379; 14 M. L. T. 183; (1913) M. W. N. 690.

speak, the causes of action in the subsequent suit and if it be found that one of these causes of action is the same as the cause of action relied upon in the earlier suit, then although, taking all the causes of action together, the second suit may be said to be outside the jurisdiction of the Original Court, still if the specific question be within the jurisdiction of the Original Court and was determined by the Original Court, it is no answer to say that the whole suit is beyond its jurisdiction.

It has been urged on behalf of the defendant-appellant that the decisions relied on by the learned District Judge in coming to the conclusion he did on the question of *res judicata* were inapplicable. It is suggested that the previous Court had no jurisdiction to try this suit as framed and that, therefore, it was open to the defendant appellant again to urge the *factum* of the invalidity of her marriage. The decision in *Gokul Mandar* v. *Pudmanund Singh* (5) has been quoted in support of this position. But the facts of this case were peculiar and give very little help in the present instance, for their Lordships of the Privy Council did little more than enunciate the general principles of *res judicata* as laid down in s. 13 of the old C. P C.

I have also been referred to the decision in *Shibo Raut* v. *Baban Raut* (6), but again there the facts of the case were highly peculiar and in a matter such as we are dealing with, the result of the application of the principle to the individual case must necessarily vary with the facts thereof.

For my own part with all deference I would have entertained some doubt as to the second principle enunciated by White, C. J., in the *Sukhdeo* v. *Bhulai* (3) quoted above. The language in which this second principle is enunciated, seems to me to be perhaps dangerously wide and, if taken too literally, would entail a risk of a conflict with the statutory provision contained in s. 11 of the C. P. C. It seems to me, however, entirely unnecessary in the circumstances of the present case to go further into this question for the simple reason that the present suit, after the second and third defendants had been discharged, became purely one for a decree for restitution of conjugal rights, and the relief of injunction against the other two defendants was separately valued. The plaintiff accepted the position that the suit should be dismissed so far as the relief of injunction was concerned, and in those circumstances it seems to me perfectly clear that the Court in the previous suit would have been able to try this suit, in which the claim for restitution of conjugal rights is valued at Rs. 400 only.

I may add in this connection that the present suit, even as originally framed, could very well have been split up into two separate suits; one against the present appellant for restitution of conjugnl rights, and the other against her co-defendants for the relief of injunction.

Although the appeal so far fails on the question of *res judicata*, it seems to me that both the lower Courts have wholly failed to give due consideration to another aspect of this case. It has been strongly urged before me that the relief claimed by the plaintiff-respondent was a discretionary one which it was open to the Court to refuse even though the validity of the marriage was established. The soundness of this proposition cannot be questioned. In the case of Muhammadans a suit for restitution of conjugal rights is in the nature of a suit for specific performance, being founded on a contract of marriage, which the Muhammadan Law regards as a civil one. Even, therefore, if the validity of the marriage be established, the relief of restitution of conjugal rights may be refused on such grounds as that its enforcement would be prejudicial or dangerous to the health, happiness or life of the wife: *cf*, *Moonshee Buzloor Ruheem* v. *Shumsoonissa Begum* (7). In *Hamid Husain* v. *Kubra Begam* (8) Piggot and Walsh, JJ., confirmed the dismissal of such a suit by the lower Court and in arriving at this decision one of the considerations taken into account was that the real reason for the bringing of the suit by the plaintiff was his desire to obtain possession of the defendant's property.

It has been suggested, however, on behalf of the respondent that no specific plea was taken on this issue by defendant No. 1. This is, however, incorrect. In para. 4 (*h*) of the defendant No. 1's written statement, dated 22nd October 1923, the following passage occurs:—

(5) 29 C. 707; 29 I. A. 196; 6 C. W. N. 825; 4 Bom. L. R. 793; 8 Sar. P. C. J. 323 (P. C.).
(6) 35 C. 353; 7 C. L. J. 470; 12 C. W. N. 359.
(7) 11 M. I. A. 551; 8 W. R. P. C. 3; 2 Suth. P. C. J. 59; 2 Sar. P. C. J. 259; 20 E. R. 208.
(8) 44 Ind. Cas. 728; 40 A. 332; 16 A. L. J. 132.

"Plaintiff and plaintiff's father and defendant are not also on good terms. There was much litigation between plaintiff and defendant and one execution case of the defendant is even now pending against the plaintiff, and so even if the alleged marriage be held proved and binding on the defendant, still it is impossible for the parties, *i. e*, plaintiff and defendant No. 1, to live together as husband and wife."

If this amounts to anything at all, it necessarily raised a matter which the lower Courts were bound fully to consider before granting the relief they did. As this matter will have to be the subject of enquiry by the Court below, it seems undesirable to go into details at present, but I may say that there is ample matter on the record to show that the plaintiff had been on the worst of terms with the defendant and her relations for years back. There was a struggle for possession of the moveable property and valuable immoveable property, and apparently in execution proceedings even a warrant of arrest had issued against the plaintiff. All these matters required full consideration before the Court, in the exercise of its discretion, should have granted the decree it did. It will have to be carefully considered whether, if a decree for restitution of conjugal rights is granted, there will be danger to the health, life or safety of the appellant, and the lower Appellate Court will also have to consider whether the suit has been brought for the *bona fide* purpose of obtaining the relief claimed therein, or whether the real object of the plaintiff is to obtain possession of the property, which has been the bone of contention between the parties for years past.

I accordingly remand the case to the lower Appellate Court for a finding on the following issues :—

(1) If a decree for restitution of conjugal rights is granted to the plaintiff-respondent, is there likely to be a danger to the life, health or safety of the defendant-appellant?

(2) Is there any other reason why the Court should not exercise its discretion in favour of plaintiff.

Should the Court, in the exercise of its discretion, find it necessary to consider the question of granting or refusing the relief claimed on any other relevant ground, the lower Appellate Court should take further pleadings from the parties in this connection, and if further evidence be necessary, it will be at liberty to have that evidence recorded by the Judge of the first Court, but the District Judge must in due course record his own findings on the points involved and submit them to this Court. The findings should reach this Court by 1st April and thereafter 15 days will be allowed for filing of objections thereto and the appeal will be finally heard on 15th April. The costs of this remand will follow the event.

Z. K. *Case remanded.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No 166 OF 1923.

October 5, 1925.

Present.—Mr. Justice Devadoss and Mr Justice Waller.

GUDUTHURU THIMMAPPA—PLAINTIFF—APPELLANT

versus

V BALAKRISHNA MUDALIAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s 20 (c)—Place of suing—Suit for dissolution of partnership—Business carried on at several places

Where a partnership business is carried on at two places, the cause of action for a suit for dissolution of the partnership arises in both the places and the Courts in either of them have jurisdiction to entertain the suit [p 916, col 2.]

Bavah Meah Saib v *Khajee Meah Saib*, 4 M H C. R 218, *Lucknee Chund* v *Zorawur Mull*, 8 M. I A. 291 at p 307, 1 W R P C 35, 1 Suth P C J. 425, 1 Sar P C J 763, 19 E R 541, relied on

Appeal against a decree of the Court of the Subordinate Judge, Bellary, dated the 7th March 1923, in O. S No. 16 of 1921.

Mr *A. Viswanatha Aiyar*, for the Appellant.

Mr. *M. Subbaroya Aiyar*, for the Respondents.

JUDGMENT.—The question in this appeal is whether the Subordinate Judge's Court at Bellary had jurisdiction to try the suit. The suit was filed so far back as 5th March 1921 and the Subordinate Judge decided that the Court had no jurisdiction on the 7th March 1923. The defendant raised the question of jurisdiction in Issue No. 15. A preliminary issue like this should have been disposed of at the earliest opportunity. The learned Subordinate Judge did not do that, but after a number of

witnesses were examined on commission and after the defendant took time to adduce evidence, he decided this question in favour of the defendant.

The suit is for dissolution of partnership. The plaintiff who is a resident of Bellary entered into partnership with the defendant, a resident of Coimbatore, for the purchase and sale of cotton. Under the arrangement they were to share the profits. It is unnecessary to consider what shares the plaintiff and defendant had in the partnership as it is a matter which has to be determined in the suit. The defendant admits that partnership arrangement was entered into and that the plaintiff and he were partners. But his contention is that the partnership business was carried on only in Coimbatore and not in Bellary and, therefore, the Court at Bellary had no jurisdiction. Under the arrangement the plaintiff was to purchase cotton not only at Bellary but in other places, but the sale of the cotton was to be effected at Coimbatore where cotton mills are situate. The accounts of the business were maintained at Bellary as alleged in para. 20 of the written statement. The defendant though he denied that the accounts were maintained in Bellary did not choose to say where the partnership accounts were maintained. His Vakil now says no accounts were necessary as it was arranged that the profits of each consignment should be settled at once. This is a very strange arrangement for settling accounts of a partnership in which very large consignments of cotton were made. Inasmuch as the defendant chooses to say that no accounts were kept by him at Coimbatore in connection with the partnership, it cannot be said that the partnership was carried on only at Coimbatore. The learned Subordinate Judge has evidently made a mistake in holding that the substantial portion of the business should be carried on at Bellary in order to give jurisdiction to the Bellary Court. Where partnership business is carried on at two places, the cause of action arises in both the places and the Courts have jurisdiction to entertain the suit for dissolution of partnership in either of these places. In this case both the Coimbatore as well as the Bellary Courts have jurisdiction to entertain the suit. This suit was filed in the Bellary Court. That Court had jurisdiction to try the case. In *Bavah Meah Saib* v. *Khajee Meah Saib* (1) Bittleston, J., observes at page 222* "As regards a suit of this nature, when it appears that the partnership business is carried on substantially in two or more places, I think that the cause of action does partly arise in each of those places within the meaning of s. 12 of our Charter". Their Lordships of the Privy Council attach importance in connection with the carrying on the business to the fact that the partnership accounts are kept at a particular place. In *Luckmee Chund* v. *Zorawur Mull* (2) their Lordships observe: "Where can it be said that the cause of action, supposing it exists for that balance, properly arose? Muttra was, undoubtedly, the central place of business; at Muttra the partnership books were kept; at Muttra the partners would have recourse to these books for the purpose of ascertaining the state of the transactions between them; and if, in the result, a balance was due to the appellants, Muttra would be the place where the payment of that balance would have to be made. It, therefore appears to be clear to their Lordships that if there is a cause of action arising out of the balance resulting from these partnership transactions, the cause of action arose at Muttra". Here as already observed the books of the partnership were maintained by the plaintiff at Bellary. Therefore, the cause of action for a suit of this kind did arise within the jurisdiction of the Bellary Court The Subordinate Judge has entirely gone out of his way in considering whether the accounts have been satisfactorily kept or not. That is a matter which will have to be dealt with when the suit is tried on the merits.

In the result we set aside the decree of the Subordinate Judge and direct him to restore the suit to file and proceed with it according to law. The respondent will pay the costs of the appeal.

V. N V. *Appeal allowed.*

Z. K.

(2) 8 M I A 291 at p. 307; 1 W R. P. C. 35; 1 Suth. P. C J 425, 1 Sar. P C J 763; 19 E. R. 541.

(1) 4 M. H. C. R. 218.

*Page of 4 M. H. C. R. – [*Ed.*]

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 115 OF 1925.

October 31, 1925.

Present:—Mr. Hallifax, A. J. C.

BARATI—DEFENDANT—APPELLANT

versus

SURIT—PLAINTIFF—RESPONDENT.

C. P. Tenancy Act (I of 1920), s. 11 (2)—Occupancy

holding—Joint Hindu family—Inheritance—Survivorship

The word "inheritance" in s 11 of the C P Tenancy Act of 1920 does not exclude succession by survivorship [p. 917, col 2]

An occupancy holding held by the manager of a joint Hindu family on behalf of the family belongs to the family and passes by survivorship and not by inheritance [*ibid*]

Appeal against a decree of the Additional District Judge, Raipur, dated the 22nd January 1925, in Civil Appeal No. 166 of 1924.

Mr. *J. Sen*, for the Appellant.

Mr. *A. C. Roy*, for the Respondent.

JUDGMENT.—It is found in the judgment of the lower Appellate Court that "there was obviously no partition between Bisahu and Surit and that the latter was not separate from Bisahu in the sense that he relinquished all interest present or future in his father's property". The word partition seems to be used in the sense of a division of the property in which each of these two members of the joint family got exactly the share to which he was entitled by the Hindu Law and the relinquishment mentioned seems to be a relinquishment by Surit of a right to inherit his father's separate property if he should be the nearest heir at the time of his father's death.

We are not concerned with either matter. As a matter of fact the partition alleged, and completely proved by the pleadings of Surit himself in the suit of 1915 among other things, gave Surit a larger share than he was entitled to get in the joint family property. (It is, of course, absurd to talk of his share in his father's property, they were both members of a joint family, and each was entitled to an equal share in that property, not to any share in the other's share). In the partition of 1900 Surit was entitled to get one-ninth of the family property, but by remaining joint with his grandfather he became joint owner (to the extent of a half) of one-third, to say nothing of his right to take the other half of that one third by survivorship.

But, as has been said, it does not matter whether Surit got more or less than his proper share when there was s disruption of the joint family in 1900. What does concern us now is the undoubted fact that at that time Surit separated from his father and brother and the two latter remained joint, taking as their share or as part of their share in the family property the occupancy holding now in dispute.

Now ordinarily in the case of a lease taken by the manager of a joint Hindu family in his own name but with family funds and really on behalf of the whole family, it is universally accepted that the lease and the benefits of it belong to the whole family and if it is heritable it will pass by survivorship and not by inheritance, whatever the mutual rights and liabilities of the lessor and the members of the family other than the manager may be. But by some obscure process of reasoning which I have never discovered it is very commonly held that this does not apply to an occupancy holding. The idea has been exploded in *Chudaman Singh* v. *Sakharam* (1), *Atmaram* v. *Lala* (2) and *Pagwa* v. *Budhram* (3) but still persists.

The only argument that can possibly be advanced in favour of it is that in the Tenancy Act of 1920 the word *inheritance* only is used in reference to the devolution of an occupancy holding in s. 11, whereas in s 5 the expression used in respect of an absolute occupancy holding is "inheritance or survivorship", and s 46 of the Act of 1898 laid down that the right of an occupancy tenant on his death was to "devolve as if it were land". But if the word *inheritance* in s. 11 of the Tenancy Act, 1920, is to exclude succession by survivorship, we are forced to the impossibly absurd conclusion that the separated son of an occupancy tenant succeeds to his entire holding to the exclusion of his joint son.

But there is no question here of succession, either by inheritance or survivorship to a tenancy belonging, even as against the landlord alone, to the father separately. At the partition of 1900 the father and the son who remained joint with him were created co-tenants by the landlord of the one-third part of the entire holding belonging to the family which was allotted to them. The entry of the father's name alone in the revenue papers is merely evidence of the contrary, but it is very weak evidence and is overwhelmed by the other facts. The case is, therefore, merely one of two co-tenants succeeding by survivorship to the entire holding on the death of the other.

It may be mentioned that Surit's claim is unjust on his own pleadings, and

(1) 13 C P L R 137.
(2) 10 Ind Cas. 733, 7 N. L. R 36
(3) 24 Ind. Cas. 855; 10 N. L. R 64

even if we assume that there was no property belonging to the family in 1900 except the occupancy holding, which we are not entitled to do, and that the decree of 1915 giving Shiolal one-sixth of the holding was wrong which seems to be the case. On Surit's own showing he is now entitled to a quarter of the property owned by the family in 1900. But he got one-sixth from his grand-father, and he now claims (and has been given) one-sixth more, making one-third in all, while his brother Bisahu who is also entitled to a quarter gets only one sixth.

The decree of the lower Appellate Court will be set aside and that of the first Court dismissing the suit will be restored. The plaintiff Surit will pay the whole of the costs of both parties in both Courts. The Pleader's fee in this Courts will be thirty rupees.

Z. K. *Decree set aside.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 165 OF 1923
AND
CIVIL MISCELLANEOUS PETITION No. 3407 OF 1922.
April 27, 1925.

Present:—Mr. Justice Odgers and Mr. Justice Madhavan Nair.

MAHAMMAD RAZA SAHEB BELGAMI —PETITIONER
versus
MR. K. R. SADASIVA RAO AND OTHERS—RESPONDENTS.

Madras District Municipalities Act (V of 1920), ss. 13, 22, Sch. IV, rr. 37, 60, 62—Municipal funds—Government, power of, to control Municipal expenditure—Surcharge—Chairman, whether bound to carry out illegal orders of Council—Chairman, liability of, to be surcharged—Writ of certiorari, *whether available in respect of wrong orders of surcharge—Government of India Act, 1915 (5 & 6 Geo. V, c. 61), s. 49—Government order signed by Secretary, Ministry of Local Self-Government, validity of*

Under r. 37, Sch. IV to the Madras District Municipalities Act, the Government has the power to control the expenditure of Municipal funds by passing special orders prohibiting certain expenditure and expenditure incurred contrary to such orders is contrary to law and illegal, and a Local Fund Auditor is, therefore, entitled to surcharge the same on the person making, or authorising the making of, such expenditure under r. 60 (1) of Part II, Sch. IV to the Act. [p. 919, col. 1; p. 921, col. 1]

A Municipal Council decided to introduce the national system of education in all institutions under its management but the Government at the same time by order prohibited the use of Municipal funds for the maintenance of any school not recognised by Government. The Municipal Council thereupon resolved not to apply for fresh recognition as to schools controlled by them:

Held, that cheques issued by the Chairman of the Council upon Municipal funds for the purpose of maintaining such schools amounted to the illegal expenditure of Municipal funds, and that the Chairman was, therefore, liable to be surcharged in respect of the amount of cheques so issued by him. [p. 921, col. 1.]

An order of the Government signed by the Secretary to Government, Ministry of Local Self-Government, is none-the-less an order of the Governor-in-Council under r. 37 of Sch. IV to the Madras District Municipalities Act and in any case by virtue of s. 49 of the Government of India Act, an objection to the legality of Government orders on the ground of informality cannot be entertained by Civil Courts [p. 921, col. 2.]

Sections 22 and 13 of the Madras District Municipalities Act should be read together and subject to the limitation imposed by r 37, Sch. IV to the Act, and a Municipal Chairman is, therefore, not bound to carry out illegal resolutions of the Council [p 921, col. 1.]

The remedy by issue of writ of *certiorari* is not available in respect of wrong or illegal order of surcharge made under the Madras District Municipalities Act, since a substituted remedy therefor has been provided by r 62 of Sch. IV to the Act. [p. 922, col. 1]

Per *Madhavan Nair, J.*—Writs of *certiorari* are not ganerally granted when other equally efficacious remedies exist under the law for the satisfactory redress of the grievances complained of [p 926, col. 1]

IN C. R. P. No 165 OF 1923.

Petition, under s. 107 of the Government of India Act, 1915, praying the High Court to revise an order of the District Court, Guntur, dated the 21st April 1922, in Original Petition No. 131 of 1921.

IN C. M. P. No. 3407 OF 1922.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* against the auditor's order of surcharge, dated the 18th November 1921, against the petitioner herein, and to call for and quash the same.

Mr. *A. Krishnaswami Iyer*, for the Petitioner.

Mr. *C. V. Anantakrishna Iyer*, for the Respondents.

JUDGMENT.

IN C. R. P. No. 165 OF 1923.

Odgers, J.—This is a petition to revise the order of the District Judge of Guntur confirming a surcharge order made by the Examiner of Local Fund Accounts (Ex. A) on the petitioner as Chairman of the Guntur Municipal Council. The ground for the sur-

charge is that the petitioner illegally issued cheques against the Municipal funds under the powers given him by r. 55 (1), Part II of Sch. IV of the Madras District Municipalities Act (V of 1920) for the maintenance of 25 Elementary Schools managed by the Guntur Municipal Council; such objects not being authorized objects under Act V of 1920. On 13th July 1921 the Guntur Municipal Council passed a resolution (Ex. 1) (*a*) to introduce the national system of education in all the institutions under the management of the Council, (*b*) to dispense with the annual grant by Government, (*c*) to conduct Municipal Primary Schools independently of Government control.

On 19th August 1921 (Ex II) a Committee of the Guntur Municipal Council was appointed to formulate the methods of working the national system of education. The 25 Elementary Schools had been upto this date recognized by Government under the Educational Rules and Government had made a grant towards their maintenance On 15th August 1921 Government issued 2 Government Orders. No. 1583 (Ex. IV) was issued under r. 37, Sch IV of the Madras District Municipalities Act (V of 1920) as a special order. This Government order ran as follows:—

"No portion of a Municipal fund shall be applicable to the purpose of maintaining or aiding any educational institution which is not recognized or approved by the Government, the District Educational Council or any other authority duly authorized by the Government in this behalf to grant such recognition or approval."

"By order of the Government, Ministry of Local Self-Government"

It may be here stated that r. 37, Sch. IV of the Madras District Municipalities Act, 1920, reads as follows:—

"The purposes to which the Municipal fund may be applied include all objects expressly declared obligatory or discretionary by-laws or rules, and in general everything necessary for, or conducive to the safety, health, convenience or education of the inhabitants or to the amenities of the Municipality and everything incidental to the administration; and the fund shall be applicable thereto within the Municipality subject to these rules and such further rules or special orders as the Governor in-Council may prescribe or issue; and shall be applicable thereto without the Municipality if the expenditure is authorized by this Act, or specially sanctioned by the Governor-in-Council."

So the Municipal fund is applicable to these objects within the Municipality "subject to these rules and such further rules etc." The other Government Order No. 1584 (Ex. V) was an order on the resolution of the Guntur Municipal Council set out above and reads as follows .—

"Recorded. 2. The Government presume that the Municipal Council does not require any financial help from the Government for any purpose.

"(By order of the Government, Ministry of Local Self-Government)".

The Guntur Municipal Council considered on 14th October 1921 these Government Orders and on No. 1584 passed the following resolution: "This Council decided to dispense with Government grants only in regard to the National Schools, but it is inexpedient that the Government should put a wrong interpretation upon it and presume that the Council does not require financial help from them for any purpose. The Council is of opinion that under these circumstances, it is worthy only not to ask for financial help from the Government." Government Order No. 1583 they considered and merely recorded. They also considered a letter from the Inspector of Schools (Ex IX) enquiring whether the Council intended to apply for recognition for the newly nationalized Elementary Schools and resolved that such recognition was unnecessary. On 22nd October 1921 the District Educational Council of Guntur met and adjourned a resolution (Ex. B) to withdraw recognition from the newly nationalized Elementary Schools "in accordance with Government Order No. dated ". Previously on 8th October 1921 the Sub-Assistant Inspector of Schools informed the petitioner that he intended to inspect the schools of the Municipality "as per my annual programme of work." (Exhibit C) and on 27th October 1921 the Chairman issued a Memo (Ex. C-1) to Head Masters and Head Mistresses to that effect. The Inspector attended and extracts from his inspection book are Ex E dated 31st October 1921 On 9th November 1921 Ex. VII Government drew the attention of the Guntur Municipal Council to Government Order No 1583 (Ex IV) and added,

"Since the Council has decided not to seek recognition for its schools, expenditure of Municipal funds on such schools is illegal."

That is the evidence on which the District Judge has come to the conclusion that as from the passing of Ex. I on 13th July 1921 the Municipal Schools ceased to be recognized by Government. The first contention addressed to us for the petitioner is that as these schools never ceased to be recognized they did not fall within the mischief of Government Order Nos. 1583 (Ex. IV) or 2208 (Ex. VII). The facts that the District Educational Council adjourned consideration of the resolution to withdraw recognition and that the schools were inspected as usual by the Government Inspector in October 1921 are cited to support this construction. It is to be observed that as regards the first of these that the District Educational Council proposed to act in accordance with a certain Government Order probably No. 1583 is referred to. If so, it is quite possible that the Council thought that any action on its part was unnecessary as Government had already treated these schools as unrecognized. That this latter is true there can be no doubt. It is perfectly clear from Ex. IV that Government rightly or wrongly purported not to recognize or approve the schools after the proceedings of the Guntur Municipal Council on 13th July 1921, *cf.*, also Ex. IX. Exhibit IV clearly shows that Government assumed equal or superior powers to the District Educational Council to recognize or approve. Section 41 of Act VIII of 1920 (Elementary Education) is relied on to show that recognition of Elementary Schools is to be applied for through the Inspector to the District Educational Council, which is the recognising authority subject to an appeal to the Director of Public Instruction. Section 124, District Municipalities Act, makes the rules, etc., in Sch. IV part of the Act. Seciton 304 gives the Governor-in-Council power to amend or cancel the Schedule. Rule 37, Sch. IV, has been set out above and appears to me to give the Government a final control over the expenditure of the Municipality. It is said for the petitioner that so long as the aims of the latter are educative, Government has no control over the kind of education which is provided. The objects of expenditure of Municipal funds are set out in r. 40. The ways in which the Council may provide instruction are set out in r. 48. This and r. 47 (as to the duty of providing education generally) are part of Part II of the Schedule of which r. 37 (above) is the first rule and which sets out the authorized objects of expenditure. Reading these rules and s. 304 together, I feel no doubt that the clause "Subject to these rules, etc.," in r. 37 would also apply to control r. 48. Therefore Government cannot only refuse its own grant to schools of which it does not approve but can control the expenditure by the Municipality of such schools. I do not think the fact that a Government Inspection of these schools took place in accordance with the Sub-Assistant Inspector's programme—no doubt arranged long beforehand as indeed he states—has any bearing on the question. The Government did not wish to proceed to extremes and it was not till 9th November 1921 (Ex. VII) that they definitely pointed out that expenditure on the schools was illegal. It appears to me that recognition is a matter of assent on both sides. Government must accept recognition and the Educational Authority must desire it. As soon as either side withdraws, recognition is at an end. This is not an appeal. It is not necessary for me to say whether on the evidence I should have come to the same conclusion as the District Judge but it appears to me there is evidence on which the District Judge could come to the conclusion he did with regard to this matter, *viz.*, that the schools were unrecognized at any rate at the date from which the surcharge begins, *viz*, 10th August 1921.

The next point is as to the liability of the Chairman petitioner. It is said that under s. 22 of the District Municipalities Act the Chairman was bound to give effect to the resolution of the Council of 13th July 1921. Section 13 lays down the general duties of the Chairman. By s. 13 (*c*) he is to carry into effect the resolutions of the Council and by s. 13 (*e*) the Chairman of the Municipal Council shall "perform all the duties and exercise all the powers specifically imposed or conferred on the Chairman by this Act, and subject, whenever it is hereinafter expressly so provided, to the sanction of the Council, and subject to all other restrictions, limitations and conditions hereinafter imposed, exercise the executive power for the purpose of carrying out the provisions of this Act, and be directly responsible for the due fulfilment of the purposes of this Act." The power of signing cheques on Municipal funds is given to

the Chairman by r. 55 (1) of Sch. IV. By rr. 56 to 62, the audit of accounts is controlled. By r. 60 the auditors are to charge against any person making or authorising the making of an illegal payment. Rule 62 provided that the Chairman shall apply to the Court for payment of any sum certified as surcharged and it is said that this cannot apply to a case where the Chairman is surcharged himself. It no doubt applies where the Chairman recovers from other members or from a former Chairman as might be done in this case. Section 353 of the Act renders the Chairman as well as the other members liable for loss, waste or misapplication of Municipal money. On the other hand it is said that s. 22 is opposed to s. 13 (e) where the words "subject to all other restrictions, limitations and conditions hereinafter imposed" occur. This would bring in the restrictions already referred to in r. 37, Sch. IV. It is perfectly clear to my mind that the Chairman is as liable as any member for misapplication of moneys It may be hard that he be rendered so liable because he was merely carrying out a resolution of the Council though I think it is on record that he voted for that resolution himself. I think s. 13 (e) and rr. 37 and 55 (i) apply to this case. The Chairman cannot be obliged to carry out illegal resolutions and s. 22 provides that he is relieved from carrying out a resolution modified, suspended or cancelled by a controlling authority. If the resolution of 13th July 1921 is to be construed as authorizing him to spend Municipal money on the schools after the Council had dispensed with Government aid and control, it may be said that resolution was afterwards cancelled by a controlling authority; there are, however, no specific words to this effect in the resolution and there does not appear to be any subsequent resolution to that effect. The Chairman signed the cheques and as I have already found he did so for an illegal purpose. He is, therefore, in my opinion liable—whether he has any remedy or not against the other members is of course not open to discussion here.

A third point is raised for the petitioner. It has not been taken below. That is that the Government orders were signed thus by the Secretary to Government. "By order of the Government, Ministry of Local Self-Government." It is of course well-known that education is a transferred subject under s. 45-A, cl. (1), sub-cl. (d) of the Government of India Act which came into force on 17th Decmber 1920. The date of the District Municipalities Act is 29th June 1920. It is said that r. 37 of Sch. IV of the District Municipalities Act provides that the 'special orders' must be prescribed or issued by the Governor-in-Council and that as these Government orders were signed as set out above they are invalid as they do not conform to this express statutory provision. Section 49 of the Government of India Act provides as follows: "All orders and other proceedings of the Government of a Governor's province shall be expressed to be made by the Government of the province and shall be authenticated as the Governor may by rule direct, so, however, that provision shall be made by rule for distinguishing orders and other proceedings relating to transferred subjects from other orders and proceedings.

"Orders and proceedings authenticated as aforesaid shall not be called into question in any legal proceeding on the ground that they were not duly made by the Government of the province."

In my opinion this provision was made expressly to meet a case like this and must be taken to override the provision in r 37. There is thus no substance in this objection. These are the points raised in the civil revision petition and, in my opinion, they all fail and the civil revision petition must be dismissed with costs

C. M. P No. 3407 of 1922.

This relates to the same subject-matter and is a petition for the issue of a writ of *certiorari* to bring in and quash the auditor's order of surcharge referred to in my judgment in Civil Revision Petition No. 165 of 1923.

That this remedy is open under the English procedure is undoubted. The Public Health Act, 1875, s. 247 (8) provides that "any person aggrieved by disallowance made under (7) (surcharges) may apply to the Court of Queen's Bench, for a writ of *certiorari* to remove the disallowance into the said Courts," etc., *cf.*, *R.* v. *Carson Roberts* (1) and *R.* v. *Roberts, Scurr, Ex parte* (2). The question is—Is such a remedy open under the District Municipalities Act Sch. IV, r. 60 corresponds to the Pub-

(1) (1908) 1 K B 407, 77 L J K B 281, 98 L. T 154, 72 J P. 81; 6 L G R. 268, 24 T L R 226
(2) (1924) 2 K. B 695, 94 L J K B 1, 88 J. P. 174; 69 S. J. 10; 22 L. G. R. 718, 40 T. L. R. 769.

lic Health Act, 1875, s. 247 (7), but subs. (8) of the Statute runs as already set out above, whereas r. 61 runs thus "any person aggrieved by disallowance, surcharge or charge made may, within fourteen days after he has received or been served with the decision of the auditor, apply to the principal Civil Court of original jurisdiction to set aside such disallowance, surcharge or charge and the Court after taking such evidence as is necessary, may confirm, modify or remit such disallowance, surcharge or charge with such orders as to costs as it may think proper in the circumstances; or in lieu of such application any person so aggrieved may appeal to the Governor-in-Council who shall pass such orders as he thinks fit."

Rule 62 corresponds generally with s. 247 (9). It seems to me, therefore, that the remedy by *certiorari* in this particular matter is not open under the District Municipalities Act and that a substituted remedy has been provided in that Act for the remedy by *certiorari* given by the Statute. Therefore whatever may be or may not be the general powers of the Court to issue this writ, it seems to me that that power, if it ever existed in the present case has been by implication removed by the Act, which provides another and specified remedy. Further even if the power exists in the present case, no *prima facie* case has, in my opinion, been made out for its exercise by us.

The petition must be dismissed with costs.

IN C. R. P. No. 165 OF 1923.

Madhavan Nair, J.—The facts necessary for the discussion of this civil revision petition and the civil miscellaneous petition are fully set out in my learned brother's judgment with which I agree.

The civil revision petition is against the order of the District Judge of Guntur refusing to set aside the order made by the Examiner of Local Fund Accounts, Madras surcharging the petitioner—the Chairman of the Guntur Municipality—with Rs. 1,771 6-0. The surcharge certificate was issued by the first respondent under r. 60 (1) of Sch. IV, of the Madras District Municipalities Act (V of 1920) which empowers every Auditor to "disallow every item contrary to law and surcharge the same on the person making, or authorizing the making of, the illegal payment." The case against the petitioner as mentioned in the surcharge certificate is that "he issued cheques against the Municipal funds on different dates between the 10th of August 1921 and the 31st of October 1921 for amounts aggregating to Rs.1,771-6-0 towards the salaries of teachers and for expenses in connection with the maintenance of 25 educational institutions within the Municipality, contrary to special orders issued by the Government under r. 37 of Part II of Sch. IV of the District Municipalities Act, which made such payments illegal. The Guntur Municipal Council, by its resolution dated the 13th of July 1921, Ex. I, decided to introduce (1) the national system of education in all the institutions under the management of the Council, (2) to dispense with the annual grant by the Government and (3) to conduct the Municipal Primary Schools independently of Government Control. On the 10th of August 1921 the Government passed the following Government Order No. 1583 (Ex. IV) under r. 37, Sch. IV of the District Municipalities Act (V of 1920) as a special order and communicated it to all Chairmen of Municipal Councils including the Chairman of the Guntur Municipal Council: "No portion of a Municipal fund shall be applicable to the purpose of maintaining or aiding any educational institution which is not recognised or approved by the Government, the District Educational Council or any other authority duly authorised by the Government in this behalf to grant such recognition or approval.

(By order of the Government, Ministry of Local Self-Government)
(Sd.) F. J. Richards,
Secretary of Government."

On the same date, reading the resolution of the Municipal Council, Ex. I, the Government communicated to the Chairman, Government Order No. 1584 (Ex. V) in which it was stated that "The Government presume that the Municipal Council does not require any financial help from the Government for any purpose." On the 9th of November 1921 the Government passed and communicated to the Guntur Municipal Council, Government Order No. 2208 (Ex. VII) in which, after drawing its attention to Ex IV, the Government stated that "Since the Council has decided not to seek recognition for its schools, expenditure of Municipal funds on the said schools is illegal." The question for our decision is whether the expenditure of Municipal fund by the Chairman on the educational

institutions mentioned in the surcharge certificate subsequent to Ex. IV is illegal.

Three arguments have been advanced before us by Mr. Krishnaswami Iyer on behalf of the petitioner; (1) since the schools in question, which were already recognised schools (*i. e.*, prior to Ex. I), never ceased to be recognised, they did not fall within the ban of Government Order No. 1583 or of any other Government order passed in connection with this matter and, therefore, the expenditure of Municipal funds on such schools is not illegal; (2) according to law, the Chairman of a Municipality is not liable to be surcharged for making illegal payments; and (3) Government Order No. 1583 and the other Government orders issued by the Government are not valid orders as they were not issued by the Governor-in-Council, as required under r. 37, Part II, Sch. IV, of the District Municipalities Act. I shall examine these arguments separately.

(1) The 25 educational institutions under the control of the Guntur Municipality were "recognised institutions," prior to the passing of the Madras Elementary Education Act, (VIII of 1920). After the Elementary Education Act came into force these continued to remain as recognised institutions, (see s. 41, cl. (*iv*) of the Act) and the power to withdraw recognition or to confer it afresh was vested by the Act in the District Educational Council. It is argued by the learned Vakil for the petitioner that the Government had, therefore, no power to withdraw the recognition already conferred upon the schools and, since the District Educational Council did not specifically withdraw the recognition consequent upon the passing of the resolution Ex. I, the expenditure of the Municipal fund on these institutions is not illegal.

The various resolutions of the Council and the Government Orders passed by the Government are referred to in detail in my learned brother's judgment. I have no doubt that by Ex. IV the Government purported not to recognise or approve of the Municipal Schools after the Council had passed the resolution dated the 13th of July 1921, Ex. I. In pursuance of it the Government on the same date communicated to the Municipality the order Ex. V in which they presumed that the Municipality did not require any financial help. The proceedings set out in my learned brother's judgment show clearly that the order of the Government passed on the 10th of August 1921 was understood as an order withdrawing recognition and prohibiting the expenditure of the Municipal fund on the schools in question which ceased to be recognised on that date. The intention of the Government was, however, made absolutely clear by Ex VII which clearly declared that expenditure of Municipal fund on the said schools was illegal. In my opinion, it is not necessary for the purpose of this case, to consider whether, after the passing of the Madras Elementary Education Act (VIII of 1920) the Government still had the power of granting recognition to the Elementary Schools or withdrawing it from them; that the Government thought that it still had the power to grant recognition for the Municipal Secondary Schools is clear from its order Ex. VI, Government Order No. 1942, dated the 5th of October 1921, which is to the following effect: In Government Order No. 1583, L. & M. dated 10th August 1921, the Government issued a special order under r. 37 of Sch. IV of the Madras District Municipalities Act 1920, prohibiting the expenditure of Municipal funds on educational institutions which are not recognised or approved by the Government, the District Educational Council or any other authority duly authorised by the Government in this behalf to grant such recognition or approval. Under s. 41 of the "Madras Elementary Education Act, 1920" District Educational Councils are empowered to grant recognition to Municipal Elementary Schools. The Government are now pleased to authorise the Director of Public Instruction to grant recognition for Municipal Secondary Schools for the purpose of this order. Rightly or wrongly the Government purported to withdraw the recognition of the Elementary Schools in question and consequently passed orders prohibiting expenditure on those schools. The real question to be considered is whether the Government have the power to control the expenditure of Municipal funds by passing special orders prohibiting expenditure. If such power is vested in the Government—whether the exercise of it in any particular case is justifiable or not—it is clear that expenditure contrary to such orders will be contrary to law and illegal, and the Auditor will, therefore, be entitled to surcharge the same on the person making, or authorising the making of, such

expenditure under r. 60 (1) of Part II, Sch. IV. Rule 37, of Part II, Sch. IV of the Madras District Municipalities Act provides that, "The purposes to which the Municipal fund may be applied include all objects expressly declared obligatory or discretionary by-laws or rules, and in general everything necessary for, or conducive to the safety, health, convenience or education of the inhabitants or to the amenities of the Municipality and everything incidental to the administration; and the fund shall be applicable thereto within the Municipality subject to these rules and such further rules or special orders as the Governor-in-Council may prescribe or issue." Section 124 of the Act makes the rules and tables embodied in Sch. IV as part of Chap. VI which relates to Taxation and Finance. Under s. 304, "The Governor-in-Council may make rules altering, adding to, or cancelling Sch. II, Sch. V, Sch. VI or Part II of Sch. IV." According to the District Municipalities Act, the expenditure of the Municipal fund is limited to purposes including "education" specified in r. 37 and referred to in detail in the subsequent rules and the "fund is to be applied thereto within the Municipality subject to these rules *and such further rules or special orders as the Governor-in-Council may prescribe or issue.*" This makes it clear that the Government can prohibit by passing special orders the expenditure of the Municipal fund on schools of which it does not approve, it, therefore, follows, that the payments made by the Municipal Chairman for defraying the expenses of these schools subsequent to the 10th of August 1921 are illegal, inasmuch as they were made contrary to Government orders prohibiting such expenditure. The Auditor was, therefore, rightly entitled, under r. 60 (1) of Part II, Sch. IV of the District Municipalities Act, to surcharge the amount on the person making, or authorizing the making of such illegal payments.

The second question for consideration is as regards the liability of the Chairman of the Municipality. Mr. Krishnaswami Iyer's argument to show that the Chairman is not liable to be surcharged is based on ss. 13 (*c*), 22, 40 (1) and r. 62 of Sch. IV of the District Municipalities Act. According to s. 13, cl. (*c*) "The Chairman of the Municipal Council shall carry into effect the resolutions of the Council." Section 22 stated that "The Chairman shall be bound to give effect to every resolution of the Council unless such resolution is modified, suspended or cancelled by a controlling authority." Section 40 (1) lays down that "The Governor-in-Council may, by notification, remove any Chairman, if he, without an excuse sufficient in the opinion of the Governor-in-Council, omits or refuses to carry out any resolution of the Municipal Council". These sections should show that the Chairman of a Municipality is bound to carry out the resolutions of the Municipal Council and, if he refuses to do so, he is liable to be removed by the Governor-in-Council. If so, it is argued that he is not liable to be surcharged for giving effect to the resolution dated the 13th of July 1921. This argument is sought to be supported by an inference drawn from r. 62. This rule provides that "Every sum certified to be due from any person by auditors under this Act shall be paid by such person to the Chairman within 14 days after the intimation to him of the decision of the auditors unless within that time such person has appealed to the Court or to the Governor-in-Council against the decision; and such sum if not so paid, or such sum as the Court or the Governor-in-Council shall declare to be due, shall be recoverable on an application made by the Chairman to the Court in the same way as an amount decreed by the Court" It is pointed out that since this rule makes provision for Chairman to recover from persons sums certified to be due from them by the auditor, it is to be understood that the Act does not contemplate that the Chairman is liable to be surcharged by the auditor. In reply to this argument the learned Government Pleader relies on s. 13, cl. (*e*) and points out that the suggested inference of the non-liability of the Chairman does not follow from r. 62. Section 13, cl. (*e*) states that the Chairman of the Municipal Council shall "perform all the duties and exercise all the powers specifically imposed or conferred on the Chairman by this Act, and, subject, whenever it is hereinafter expressly so provided, to the sanction of the Council, and subject to all other restrictions, limitations and conditions hereinafter imposed, exercise the executive power for the purpose of carrying out the provisions of this Act, and be directly responsible for the due fulfilment of the purposes of this Act." The words "subject

to all other restrictions, limitations and conditions hereinafter imposed" introduce the restriction referred to in r. 37 and thus impose limitations on the Chairman's duty to carry out the resolutions of the Council I think ss. 22 and 13 of the Act should be read together and subject to the limitation imposed by r. 37; and, if so read, it would follow that the payments made by the Chairman in this case in carrying out the resolution of the Council dated the 13th of July 1921 in view of the special orders of the Government prohibiting the expenditure of the Municipal fund would be illegal payments, and as he was the person who made such illegal payments by issuing cheques under r. 55 (1), Sch. IV of the Act, the auditor would be entitled to surcharge him for making such illegal payments, r. 62, Sch. IV of the Madras District Municipalities Act does not warrant the inference that the Chairman is not liable to be surcharged. The rule only points out how the Chairman may recover the surcharged amount. Under that rule a Chairman may recover, in the way indicated therein, the surcharged amount from any person from whom the sum is certified to be due by the auditor under the Act *including a former* Chairman as in this case. I am, therefore, of opinion that the Chairman of a Municipality is liable to be surcharged under the Act for making illegal payments.

The third and the last argument addressed on behalf of the petitioner relates to the form of the Government order. The Government orders in question were issued "By order of the Government, Ministry of Local Self-Government" and signed by the "Secretary to Government". Under r. 37, Sch. IV of the District Municipalities Act, "further rules or special orders referred to therein should be prescribed or issued by the Governor-in-Council". It is argued that, since the Government orders in this case were issued "By order of the Government, Ministry of Local Self-Government and not by the Governor-in-Council", the Government orders are invalid as they do not conform to the express statutory provision contained in the District Municipalities Act. There is no force in this contention. The District Municipalities Act was passed on the 29th of June 1920 and the Government of India Act came into force in Madras by notification on the 17th of December 1920. Under s. 45A, cl. (1), sub cl (*d*) of the Government of India Act, education has been made a "transferred subject". Section 46 (1) provides that the Presidency of Fort St. George shall be governed, in relation to reserved subjects, by a Governor-in-Council and in relation to transferred subjects, by the Governor acting with ministers appointed under the Act. Section 49 (1) of the Government of India Act lays down that "all orders and other proceedings of the Government of a Governor's province shall be expressed to be made by the Government of the province and shall be authenticated as the Governor may by rule direct, so, however, that provision shall be made by rule for distinguishing orders and other proceedings relating to transferred subjects from other orders and proceedings". The Government orders in question have been authenticated as mentioned in this section. It is stated in the same section that "Orders and proceedings authenticated as aforesaid shall not be called into question in any legal proceeding on the ground that they were not duly made by the Government of the province." In view of this provision, the objection that the Government orders in this case are invalid as they do not conform to the statutory provision of the District Municipalities Act cannot any longer be entertained in any legal proceeding and must be overruled.

In the result, I agree that this civil revision petition should be dismissed with costs

IN C. M. P. No. 3407 OF 1922.

This civil miscellaneous petition has been filed for the issue of a writ of *certiorari* to bring in and quash the certificate of surcharge made by the auditor. Reliance has been placed by the learned Vakil for the petitioner on the decisions in *R.* v. *Carson Roberts* (1) and *R* v *Roberts, Scurr, Ex parte* (2) to show that in England such writs are issued for quashing surcharge orders. Those decisions are under the English Public Health Act, 1875, which contains provisions relating to surcharge and also provides for applications by aggrieved persons to the Court of King's Bench for writs of *certiorari* to remove their disallowance in the said Court (see s. 247, cls. (7), 8 and (9). The rules in the District Municipalities Act relating to surcharge seem to be framed on the analogy of the provisions of the English Public Health Act with this important difference that for

the statutory remedy by way of *certiorari* provided for in s. 247, cl. (8) of the English Act, the Indian Act by r. 61 substitutes application to the principal Civil Court of original jurisdiction, or in lieu of such application, appeal to the Governor-in-Council as remedies of persons aggrieved by surcharge orders (see r. 61). The English decision being based upon a specific provision of the English Public Health Act which provides for the making of applications for writs of *certiorari*, are not of much use in considering the question arising under the Indian Act which does not provide for any such applications. On the other hand, the absence of such a provision in our Act coupled with the substitution of another provision in its place rather suggests that the Legislature thereby intended that this remedy should not be open to aggrieved persons under the District Municipalities Act. Writs of *certiorari* are not generally granted when other equally efficacious remedies exist under the law for the satisfactory redress of the grievances complained of. Such being the case, the petitioner is not entitled to ask for the issue of a writ. I have already shown, in my judgment, in the civil revision petition that he has not succeeded in showing that the order of the learned District Judge is wrong. I do not say anything about the general powers of this Court to issue writs of *certiorari* in relation to such matters as we are now considering; nor do I express any opinion on the question whether the general power of this Court to issue the writ, if it ever existed in the present case, could be taken away by implication by the District Municipalities Act. I may also state that it has not been argued with reference to authorities whether this very ancient remedy, which is the ordinary process by which the High Court brings up for examination the Acts of bodies of inferior jurisdiction and which is frequently spoken of as being applicable only to "judicial acts" and not to purely ministerial acts [see *R.* v. *Woodhouse* (3)] does exist in respect to certificates of surcharge made by auditors.

I agree that this petition also should be dismissed with costs.

V. N. V.

Z. K. *Petition dismissed.*

(3) (1906) 2 K. B. 501 at p. 534; 75 L J. K. B. 745; 70 J. P. 485; 95 L. T. 399; 22 T. L. R. 603.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 10 OF 1925.

September 18, 1925.

Present :—Mr. Hallifax, A. J. C.

GAURA TELIN—DEFENDANT No. 1 —APPELLANT

versus

SHRIRAM BHOYER AND ANOTHER—PLAINTIFF—DEFENDANT No. 2 —RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, rr. 2, 16, 17—Pleadings, contents of—Pleas of law, whether can be raised—Amendment, when should be allowed—New plea contradictory to old, whether sufficient ground for rejection—C. P. Tenancy Act (I of 1920), s 11—Tenant, death of—Distant heir of deceased tenant in occupation—Malguzar, *whether can eject.*

It is the duty of a Court, whether with or without the help of the parties and their Pleaders, to discover for itself and to apply the law applicable to the facts pleaded and proved In a pleading, therefore, facts alone must be stated and pleas of law must be excluded. [p. 927, col. 1.]

A point of law, provided it is a point that can be applied to the facts proved, although it directly contradicts anything that may have been said during the whole case about the law applicable to those facts, can be urged by the parties at any time before judgment is pronounced and it can form the basis of the decision of the case even if it occurs only to the Judge himself when he is writing his judgment. [*ibid.*]

Order VI, r 16, C. P C, does not limit the period when a plea must be taken, it bars only pleas that are irrelevant or scandalous or may tend to prevent a fair trial of the case. [p. 927, col 2.]

A Court is bound to allow an amendment under O. VI, r 17, C P. C., if it is necessary for the purpose of determining the real question in controversy between the parties. [*ibid.*]

A Court has no power to refuse to allow an amendment of pleadings for any reason except those mentioned in r. 16 of O. VI, C. P. C., which do not include a contradiction between the new pleading and the old. [*ibid.*]

Under the C.P. Tenancy Act a *malguzar* being in the position of the very last reversioner is not entitled to eject a distant heir of a deceased tenant on the ground that he has no right to succeed to the holding as there are nearer heirs of the tenant in existence. [p. 928, col. 1.]

Appeal against a decree of the District Judge, Chhindwara, dated the 22nd December 1924, in Civil Appeal No. 84 of 1924.

Mr. *M. B. Niyogi*, for the Appellant.

Mr. *S. B. Gokhale*, for Respondent No. 1.

JUDGMENT.—A great part of the welter of documents filed in this case as "written statements" is taken up with propositions of law and arguments on them. That is expressly forbidden by the C. P. C. The putting in of such pleadings and the mistakes made in deciding them in this case are based on the common idea that a Court is not bound to consider, or rather is bound

not to consider, any view of the law in respect of the facts before it except such as is laid before it formally by the parties or their Pleaders, if they happen to have any, and further is required to answer nothing but yes or no to any plea of law that may be taken. It is the duty of the Court, whether with or without the help of the parties or their Pleaders, to discover for itself and to apply the law applicable to the facts pleaded and proved. Practically every rule of Os. VI and VII of the C. P. C., particularly r. 2 of O. VI, shows that in any "pleading", that is to say any plaint or written statement, facts alone must be stated and pleas of law must be excluded.

A point of law, provided it is a point that can be applied to the facts proved and although it directly contradicts anything that may have been said during the whole case about the law applicable to those facts, can be urged by the parties at any time before judgment is pronounced, and it can be the basis of the decision of the case even if it occurs only to the Judge himself when he is writing his judgment. There are several instances of this having been done in the finding given by the learned Subordinate Judge himself on the 25th of July 1924 when he held that the *malguzar* was entitled to eject Jairam because there were nearer heirs than Jairam in existence. This, as is well-known, can be done not only in the first Court but in the Appellate Court and even in second appeal.

What has all through the case been called an amendment of the pleadings was nothing but a fresh suggestion of one of the legal inferences to be drawn from the pleadings, which under r. 2 of O. VI must be confined to facts. In his order refusing to allow this amendment the learned Subordinate Judge has in effect admitted that, even if it had been an amendment of a real "pleading", that is a statement of fact, he had no power to refuse it under r. 16 of O. VI, and that he was bound to allow it under r. 17. He writes: "Had the defendants applied for this amendment before the case of defendant No. 2 was adjudicated upon I would have had no hesitation to permit the defendants to take these pleas, but after adverse decision has been passed against defendant No. 2 I do not permit such an amendment. I have ample power under O. VI, r. 16, Civil Procedure to strike out such a plea even if it was already made."

But r. 16 says nothing about a plea being taken at any particular stage of the case, or before or after the decision of any other plea, it speaks only of pleas that are irrelevant or scandalous or may tend to prevent a fair trial of the case. This plea was certainly neither irrelevant nor scandalous, and that it was not of the last of these three classes but that, on the contrary, its rejection might tend to prevent a fair trial of the case is admitted over again in the following words, which follow those just quoted. "Even taking into account the grave hardships that my refusal may cause to the defendants I cannot permit parties to play a game of Hide and Seek". That is to say, not only that the refusal might tend to prevent a fair trial, but also that the amendment was necessary for the purpose of determining the real question in controversy between the parties, the right to possession of the land; the Court was, therefore, bound to allow it under r. 17.

In this case practically all the facts on which the defendents now seek to rely as a basis for the legal inference that they were co-tenants with Hira were stated in the very first written statement filed by Gaura before Jairam was ever made a party, and they were stated again with greater detail in the first written statement filed by the two defendants jointly. As has been shown the Court has no power to refuse to allow an amendment of a pleading, even using that word in its proper meaning of pleas of fact, for any reason except those mentioned in r. 16 of O. VI, which do not include a contradiction between the new pleading and the old. Anyhow why should a party be prevented from taking a new plea of fact inconsistent with facts already pleaded? He does it at his own risk. If the pleas are contradictory they work out their own retribution by disproving each other to the extent of that contradiction and of the party's knowledge of them.

In this view of the matter the order of the lower Appellate Court that neither defendant can resist the claim to the occupancy holding is also wrong. The admission to that effect might be considered to be an admission of unstated facts which would defeat that claim, though it is obviously no such thing. But if it is the defendants can now deny those facts and can prove that denial. If they did actually admit them to be true in the first place, that will make their disproof of them so much the more difficult.

Gaura alone has appealed but Jairam is a respondent supporting the appeal, and the order of the lower Appellate Court can be altered, under r. 33 of O. XLI, in respect of the case against him also. The decision that the *malguzar* can eject Jairam because there are nearer heirs than Jairam in existence will be seen to be impossible if it is considered what the decision would have been if a nearer heir than Jairam, but not the nearest, had taken possession and Jairam had sued to eject him; the *malguzar* is merely the last reversioner and comes after Jairam.

The idea that the *malguzar* holds some position other than that of the very last reversioner, which runs all through the decision, is exemplified in an oral statement by the plaintiff's Pleader in which, with reference to the heirs nearer than Jairam, he said : ".The right of these nearer heirs is barred by the adverse possession of the defendants and the plaintiff as a landlord can eject the defendants". If the right of the nearer heirs was extinguished, so and even more so was that of the more distant reversioner. Also if the parties are to be held down to anything of that sort they or their Pleaders may say, the suit ought to have been dismissed on that plea; it is a statement of fact that the possession of the defendants had been of such a character and such duration that the right of even the true owners had been extinguished.

The whole of that part of the order of the lower Appellate Court which restricts the scope of the fresh trial of the suit must, therefore, be set aside. The first Court will take such fresh pleadings of facts from the parties as may seem necessary ; there can be few if any not already taken. On those pleadings it must frame issues first in respect of any fact alleged by one party and denied by the other, and then in respect of all the possible legal effects of the facts admitted or found proved on the right of either Gaura or Jairam or both to remain in possession of the absolute occupancy holding or of the occupancy holding or of both. All the costs in both Appellate Courts with the exception of the Court-fees on the two petitions of appeal, will be paid by the respondent Shriram Bhoyer.

Another matter to be mentioned in regard to the judgment of the lower Appellate Court is that the learned Judge considered that the defendants were to blame for the necessity for the appeal, in which I cannot agree with him, and proceeded, therefore, to " order no refund of the Court-fees paid in appeal, and direct that the whole costs of the appeal be borne by the appellants." Reference to s 13 of the Court Fees Act will show that this order is not only wrong but of no effect. If the defendants, who were the appellants in that Court, apply to the District Judge for " a certificate authorising them to receive back from the Collector the full amount of fee paid on the memorandum of appeal " he is bound to grant it. A certificate for the refund of the Court-fees in this Court will issue to the appellant.

Z. K. *Order accordingly.*

MADRAS HIGH COURT.

CIVIL APPEAL 64 OF 1920.

March 18, 1925.

Present:—Justice Sir Charles Gordon Spencer, KT., and Mr. Justice Kumaraswami Sastri.

RY. V. AYISWARYANANDAJI SAHEB (DIED) AND OTHERS—PLAINTIFFS NOS. 1 TO 6, DEFENDANTS NOS. 3 AND 4, LEGAL REPRESENTATIVES OF PLAINTIFFS NOS. 1 AND 2 AND OF DEFENDANT NO. 3—APPELLANTS

versus

RY. SIWAJI RAJA SAHEB AND OTHERS—DEFENDANTS NOS. 1, 2 AND 6 TO 21—RESPONDENTS.

Hindu Law—Religious endowment—Succession to trusteeship - Usage—Management by single individual—Confiscation by State and re-grant, effect of, on rule of succession—Widow—Acquired property, whether stridhanam *or accretion to estate—Inheritance—Illegitimate son of* sudra, *right of, to inherit to father's collaterals.*

The Rajahs of Tanjore had time after time endowed and founded certain *devasthanams* and other charities. These had continued in the possession and management of the Rajah for the time being and till the death of the last ruler, the office was always held by a single individual. After the death of the last ruler in 1855, when the *Raj* itself was seized by the

East India Company as an act of State, the *Pagodas* and the *devasthanams* were also taken possession of and managed by the Government In 1863, *K*, the senior widow of the late Rajah, applied for and got possession of the *devasthanams* and other trust properties as the head of the family, but the course of succession was not indicated in the Government's order of restoration On her death, the trust estate was managed by the widow who in turn became the senior *Rani* and so on until the last of the *Ranis* died in 1912 Disputes then arose between the illegitimate sons of the late Rajah and the sons of an adopted son as to succession both as to the private estate of the Rajah and as to the management of the trust. The private estate was directed to be partitioned On the question of the rule of succession to the trust estate

Held, that since the founders of the institutions intended that their successors who occupied the *Raj* should continue to have the sole management of the temples and *pagodas* and the endowments attached to them and since the Government by restoring the properties to the *Rani* as "head of the family for the time being" indicated their intention that they should continue to be managed by a sole trustee, the trusteeship was not liable to be divided and the elder grandson was solely entitled to the trusteeship of the *devasthanams* and the charities [p 932, col 1]

A Hindu widow has an absolute right of disposal over the income of the property which she inherits from her husband She can either spend the same or accumulate it for her own benefit In cases where she purchases properties or invests her savings and indicates by her conduct an intention that the properties purchased out of her savings should form part of her husband's estate, such savings should follow the same rules as regards devolution to her husband's estate, and should be treated as accretions to the estate Where she does not do so, she has absolute powers of disposal over such property and can sell or give the same to anybody she pleases without any right of the reversioners to question her alienations Where the question is one of intention to be deduced or inferred from her conduct, the presumption is that she intends to keep the property for her own absolute benefit and to have absolute powers of disposal over it. Where, however, a widow is not in possession of her husband's estate, there is no presumption that any of the properties which she gets are to be treated as accretions to her husband's estate On her death such properties would follow the same course of succession as her *stridhanam* properties [p 938, col 2, p 939, col. 1]

Under the Hindu Law an illegitimate son of a *sudra* is not an heir to his putative father's collateral relations and can have no right to succeed to the *stridhanam* of his father's widows who were married in an approved form. [p. 933, col. 1]

Per *Kumaraswami Sastri, J* —In cases of succession to religious institutions, the main question to be considered is what is the usage of the institutions; and where from the date of the foundation of the charities up to the date of the suit, the trust was managed by a single individual who was the head of the family not in possession of any partible property, the office must be treated as impartible and not liable to be held by more than one person at a time. [p 935, col 2]

In cases of confiscation and re-grant of property which is impartible, the law is that in the absence of anything in the re-grant, the property which is re-granted is subject to the old incident of impartibility. [*ibid.*]

There is no distinction as to the nature of the estate taken between property inherited by a woman from a male and property inherited from a female. In both the cases she takes not an absolute estate but only a qualified one [p 939, col. 2,]

Per *Spencer, J* —It is a question of fact in each case whether a widow has dealt with the income of her husband's property in such a manner as to make it an accretion to the *corpus* [p 932, col 2]

[Case-law considered on all points]

Appeal against a decree of the Court of the Subordinate Judge, Tanjore, in Original Suit No. 43 of 1913.

The Advocate-General, Messrs. *Gopala Desikan* and *A. Krishnaswami Iyer*, for the Appellants.

Messrs. *T. R. Ramachandra Iyer, T. R. Krishnaswami Iyer, A. V. Viswanatha Sastri* and *C. S. Venkatachariar*, for the Respondents.

This appeal and the memorandum of objections filed by the 2nd respondent coming on for hearing on the 22nd, 23rd and 24th October 1924, and having stood over for consideration till the 17th of November 1924 the Court delivered the following

JUDGMENT.

Spencer, J.—Sivaji, the last Rajah of Tanjore, died in 1855. After his death the East Indian Company took possession not only of the *Raj* of Tanjore and the private properties of the late Raja, but also certain *pagodas* and *devasthanams* which had been in his possession and management up to the date of his death. It was held by the Privy Council that the East India Company's usurpation of this property amounted to an act of State of which the ordinary Civil Courts could not take cognizance. Subsequently the senior *Rani* Kamakshi Bai Saheba petitioned Government for a restoration of the estate and also of the *devasthanams*. The estate was restored by proceedings of the Madras Government, dated 21st August 1862, which we have dealt with in another place. The order restoring the *devasthanams* was dated the 19th March 1863

In her memorial, dated the 24th December 1862, Kamakshi Bai Saheba prayed that the *pagodas* and chritable institutions which had been founded from time to time by members of her family might be made over to her as the head of the family for the time being She mentioned in her memorial that Mr. Phillips, the Commissioner of Tanjore, had in 1858 recommended the Government to make over these endowments to Sakharam Saheb, husband of the Princess, and that the Government

refused to accept that recommendation. The Government Agent, in forwarding Kamakshi Bai's memorial, recommended her prayer to be granted on the ground that it was highly desirable that all connection with these religious institutions on the part of Government should cease. The Governor in Council concurred with the Agent's recommendation and ordered the *pagodas* to be made over to the *Rani*. In doing so, the Government did not indicate the course of succession to be followed in the management of these endowments after Kamakshi Bai's death. Accordingly she managed the institution till 1892, when she died.

Upon her death Government again took possession of the *devasthanams* and put them under the management of the Temple Committee of Tanjore. The next senior *Rani* Umamba Bai brought a suit (O. S. No. 3 of 1894) for the recovery of these *devasthanams* and their endowments, basing her title on the fact that she was the senior *Rani* and head of the family. She impleaded the Secretary of State for India, the members of the Tanjore and Kombakonam *Devasthanam* Committees and the other *Ranis* as defendants in her suit. In a careful judgment, in which he set out the history of these institutions. Mr. Venkobachariar, then Subordinate Judge of Tanjore came to the conclusion that the Government had no right to resume, or in any way interfere with, the management of the temples after granting them in favour of Kamakshi Bai, that they devolved as impartible property and that by the State grant restoring them Kamakshi Bai acquired heritable interest in the properties. He decreed the suit in plaintiff's favour. There was an appeal to the High Court, which was heard by Shephard and Davies, JJ. Those learned Judges dismissed the appeal holding that the estate taken by the senior *Rani* was in the nature of self-acquired property in her hands in the sense that her rights were derivative from Government and had no relation to inheritance on the death of the Rajah. They inferred from the fact that the plaintiff was chosen as the person to whom the trust should be made over in her capacity of widow of the late Rajah, that the intention of the Government was to grant her a widow's estate, that is, to put her in the position which she would have enjoyed had there been no confiscation on the death of her husband the Rajah.

After the death of Umamba Bai the *devasthanam* estate was managed by each of the widows who in turn became senior widow until the last widow Jijamba Bai died in 1912. Disputes then arose between the children of the Rajah's sword wives, who are known as Mangala Vilas people, and the sons of the adopted son, who are defendants Nos. 1 and 2. The former brought O. S. No. 43 of 1913 in which they claimed the right to be declared entitled to the possession and management of the *devasthanams* and their endowments and also to share in the immoveable and moveable properties purchased by the widows of the late Rajah which became accumulations and accretions to the private estate of the Rajah to which they claimed to succeed either as his heirs or as heirs to the widows who acquired these properties as *stridhanam*.

The learned Subordinate Judge, in disposing of these and other properties of the Rajah, held that the acquisitions of the various *Ranis* having been purchased in their own names, became their separate estates; and as regards the *devasthanam* properties, he held that the Government grant was to Kamakshi Bai by name as a single individual or sole trustee and that the endowments were, therefore, not capable of being made the subject of partition, but would pass to the head of the family for the time being, that individual at the time of suit being the 1st defendant, and he accordingly dismissed the suit.

In appeal, Mr. Alladi Krishnaswami Ayyar argued that the trusteeships of the *devasthanams* should follow the same line of inheritance as the private estate of the Rajah and that the Mangala Vilas people having been held entitled to share in the private estate, should also be given a share in the management of the temples, the Government having by their grant destroyed the incident of impartibility which once attached to the estate. In support of his arguments he relied on *Raja Venkata Rao* v. *Court of Wards* (1), *Ramanathan Chetty* v. *Murugappa Chetty* (2) the principles upon which this case was decided having been approved by the Privy Council in *Ramanathan Chetty* v. *Murugappa Chetty* (3) on

(1) 2 M. 128; 3 Suth. P. C. J. 725; 6 C. L. R. 153; 4 Ind. Jur. 133, 3 Shome L. R. 175; 7 I. A. 38; 4 Sar. P. C. J. 81; 1 Ind. Dec. (N. s) 361 (P. C.).

(2) 27 M. 192; 13 M. L. J. 341.

(3) 29 M. 283; 10 C. W. N. 825; 8 Bom. L. R. 498; 16 M. L. J. 265; 4 C. L. J. 189; 3 A. L. J. 707; 1 M. L. T. 327; 33 I. A. 139 (P. C.).

Sethuramaswamy Iyer v. *Meruswami Iyer* (4) from which there was an appeal to the Privy Council in *Sethuramaswamiar* v. *Meruswamiar* (5) which reversed the decision of this Court, on *Meenakshi Achi* v. *Somasundaram Pillai* (6) and *Tkandavaroya Pillai* v. *Shunmugam Pillai* (7).

For the respondent our attention was called to the fact that in the written statement of the 3rd defendant, who was one of the Mangala Vilas people, it was asserted that these properties were impartible and should descend to the senior member of the senior line according to the custom obtaining in the family of the late Rajah. In the Saptur case *Ramasami Kamaya Naik* v. *Sundaralingasami Kamaya Naik* (8) it was made clear that the son of a legally married wife is a preferable heir to impartible property over the son of a sword wife or concubine. The decisions in *Trimbak* v. *Lakshman* (9) where it was observed that religious offices were naturally indivisible, and in *Sri Raman Lalji Maharaj* v. *Sri Gopal Lalji Maharaj* (10) where it was observed that if there are no emoluments attached to an office of trustee, there was no reason to partition the property amongst junior members, were also cited. *Ramanathan Chetty* v. *Murugappa Chetty* (2) where Bhashyam Ayyangar, J, observed that the usage and custom in respect of religious trusteeships which were hereditary in a family, was generally that the office could be divided by getting the duties discharged in rotation by each member of the family and that the exceptions to that rule would only be a few cases in which the hereditary office may be descendible only to a single heir, was a case of family partition among Chetties of Sivaganga. It was not alleged in that case that there had been any trace of impartibility existing in the family prior to partition. In appeal in *Ramanathan Chetti* v. *Murugappa Chetti* (3) the Judicial Committee confirmed the decree of this High Court which provided for each member of the family taking one turn of management in succession, the grounds of their Lordship's decision being that there was an unbroken usage evidencing a family arrangement in this particular family and that that arrangement should hold good until altered by the Court or superseded by a new scheme. In *Meenakshi Achi* v. *Somasundaram Pillai* (6) the Chief Justice and Seshagiri Ayyar, J, observed that the course of decisions in this Presidency, which had the approval of the Judicial Committee, was opposed to the proposition that the office of a trustee in a public institution was indivisible and regulated by the same rules as the succession to impartible estates. The suit related to certain *kattalais* attached to a temple in the Tanjore District, and the learned Judges held that a claim by the seniormost male member to manage alone among the heirs should be proved as a special custom. From the history of the case it appears that these *kattalais* were managed for some years by the Board of Revenue and that they restored the management and the enjoyment of the lands to two members of the family representing the senior and the junior branches. In such a case, the usage of the institution was obviously opposed to the principle of management by a sole trustee. In Mayne's Hindu Law, para. 439, it is stated that the devolution of the trust upon the death or default of each trustee depends upon the terms upon which it was created, or the usage of each particular institution where no express trust deed exists.

In 1863, when Government restored the management of these temples to Kamakshi Bai, it was thought that it was the universal custom of the country that the eldest male heir of a deceased trustee should succeed as trustee to the person from whom he inherited: see *Purappavanalingam Chetti* v. *Nullasivan Chetti* (11). And in the Sivaganga case *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar* (12) the Privy Council recognized the principle that in re-granting an impartible *zemindari* and issuing a *sanad*, the Government could retain the quality of impartibility in respect of any of the property thereby restored. From the history of these institutions described in Mr. Venkobachariar's judgment in O. S. No. 3 of 1894,

(4) 4 Ind. Cas. 76, 34 M. 470; 6 M. L. T. 319; 20 M. L. J. 108

(5) 43 Ind. Cas 803; 41 M. 296; 7 L. W. 22; 4 P L. W. 91; 34 M. L. J 130, 16 A. L J 113; 27 C. L. J 231; 22 C. W. N. 457; 20 Bom L R 514; 45 I A. 1 (P. C.).

(6) 59 Ind. Cas. 161; 44 M 205; 12 L. W. 232; (1920) M. W. N. 507; 39 M. L. J. 403.

(7) 2 Ind. Cas. 341; 32 M. 167; 19 M. L. J. 59.

(8) 17 M. 422; 6 Ind. Dec. (N. S) 293.

(9) 20 B. 495; 10 Ind. Dec. (N. S) 894.

(10) 19 A. 428; A. W. N. (1897) 103; 9 Ind. Dec. (N. S.) 276.

(11) 1 M H. C. R 415.

(12) 3 M. 290; 8 I. A. 99; 4 Sar. P. C. J. 230 5 Ind. Jur. 438; 1 Ind. Dec. (N. S.) 757 (P. C.).

Ex. A-197, it appears that the Rajah of Tanjore founded several religious institutions and acquired lands and gave them as endowments to temples, that the *pagodas* were managed by Serfoji as hereditary trustee and that on his death his son Sivaji succeeded to all the rights and privileges of his father including the management of the *pagodas*. I am of opinion, therefore, that the founders of these institutions intended that their successors who occupied the *Raj* should continue to have the sole management of the temples and *pagodas* and the endowments attached to them. It follows, therefore, that to divide these properties among the many claimants to the estate of the late Sivaji would be a policy inconsistent with the intentions of the founder of the institution when he endowed the temples with lands. I am further of opinion that when Government restored these properties to Kamakshi Bai as "head of the family for the time being," they indicated their intention that they should continue to be managed by a sole trustee. If it were necessary for the 1st defendant to prove that sole trusteeship is an incident of this hereditary trust, I should be prepared to find it proved.

In this view, the Subordinate Judge was right in recognizing the 1st defendant as being the lawful trustee who should manage these properties for his lifetime in his capacity of head of the family, and I consider that the appeal should be dismissed so far as these properties are concerned.

Next as regards the purchases of immoveable and moveable properties made by the widows out of their savings, and as regards their jewels, it must be remembered that the *Ranis* were only receiving a small income from the Mokhasa estate and pensions of Rs. 800 a month sanctioned by Government, and that from 1867 till the date of suit a Receiver was in charge of the estate. Thus the present is not an instance of a widow in possession of her husband's estate making acquisitions out of income, in which case the Privy Council declared in *Nabakishore Mandal* v. *Upendrakishore Mandal* (13) that the acquisitions would become accretions to the husband's estate unless it were shown that she dealt with it in such a manner that it would remain her own [*vide* also *Bhagbutti Devi* v. *Bholanath Thakoor* (14).]

Whether the after-purchases form accretions to the *corpus* of a deceased husband's estate or *stridhanam* of the widow depends upon her intention, which has to be gathered in every case from her manner of dealing with the property [*vide Isri Dutt Koer* v. *Hansbutti Koerain* (15)] where the authorities are reviewed, and later cases in *Akkanna* v. *Venkayya* (16) and *Subramanian Chetti* v. *Arunachelam Chetti* (17) and *Sheolochun Singh* v *Sahib Singh* (18).

In every case it is a question of fact whether a widow has dealt with the income of her husband's property in such a manner as to make it an accretion to the *corpus* [*vide Rajah of Ramnad* v. *Sundara Pandiyasami Tevar* (19)]

As for presumptions, when it is shown that the *corpus* of the estate has been all along in the possession of a Receiver or of the Court of Wards as was the case in *Saodamini Dasi* v. *Administrator-General of Bengal* (20) and in *Zemindar of Bhadrachalam and Polavancha* v. *Venkatadri Appa Rao* (21) and here, there is no room for presuming that the widow intended to make the investments of the funds received by her part of her husband's estate, when she did not get her husband's estate into her possession.

As for item No. 3 in Sch. D-1 which is an acquisition of Anusamba Bai Saheba who died in 1895, she wrote a letter A-186 to the Collector announcing her intention to create a trust in favour of the adopted son's son and received a reply A-187 acknowledging her letter.

As regards jewels of Jijamba Bai, it is stated in the written statements of defendants Nos. 1 and 2 that they were pur-

(13) 65 Ind. Cas. 305; 42 M. L. J. 253, 20 A. L. J. 22; (1922) M. W. N. 95; 26 C. W. N 322; 35 C. L. J. 116; 24 Bom. L. R. 346; 15 L. W. 417, 30 M. L. T. 234; 3 P. L. T. 311; A. I. R. 1922 (P. C.) 39 (P. C.).

(14) 2 I A 256; 1 C. 104, 24 W. R. 168; 3 Sar. P. C. J 52; 3 Suth. P. C. J. 186; 1 Ind. Dec. (N. S.) 65 (P. C.)

(15) 10 C. 324; 10 I. A. 150; 13 C. L. R. 418, 7 Ind. Jur 557; 4 Sar. P. C J. 459, 5 Ind. Dec. (N. S.) 217 (P. C.).

(16) 25 M 351; 12 M. L. J. 5.

(17) 28 M 1.

(18) 14 I A 63, 14 C 387; 11 Ind. Jur. 231; 5 Sar. P. C J. 1; 7 Ind Dec (N. S.) 257 (P. C.).

(19) 49 Ind Cas. 704; 42 M. 581; 17 A. L. J. 153, 36 M. L J. 164, 23 C. W. N 549, 29 C. L J. 551, 25 M. L. T. 400; 21 Bom. L. R. 885; (1919) M. W. N. 511; 10 L. W. 322 (P. C.).

(20) 20 C. 433; 20 I A. 12, 6 Sar. P. C. J 272; 17 Ind Jur 223; 10 Ind Dec (N. S.) 293 (P. C.).

(21) 70 Ind Cas. 689, 46 M 190; (1922) M. W. N. 532; 16 L. W. 369; 43 M. L. J. 486; A. I. R. 1922 Mad. 457; 31 M. L T. 221.

chased out of the savings from her own income, and there being no evidence *contra*, the Subordinate Judge was right in treating them as her absolute property.

Lastly, assuming that these properties were the self-acquisitions of the widows, the appellants claim to be *sapindas* and to have a right to succeed to the *stridhanam* of widows who were married in an approved form, on the ground that it goes on their deaths without issue to the heirs of their husband.

In *Subramania Iyer* v. *Rathnavelu Chetty* (22) it was held by a Full Bench that the illegitimate son of a *sudra* ranked as a *sapinda* of his putative father, and that the latter was entitled to succeed to his property if he died without issue.

But the Full Bench recognized the fact that an illegitimate son had never been regarded by any of the Courts in India as an heir to his putative father's collateral relations, and that the authorities against such a proposition were very strong (see page 72)*. I am not satisfied that there are sufficient grounds to re-consider that statement of the law as it now stands. The reason for giving an illegitimate son a half share of what a legitimate son of a *sudra* gets is morally justifiable on the ground that he has a legal right to be maintained by his putative father, but there is no legal obligation to maintain illegitimate children of collaterals.

The result is that the appeal of the Mangala Vilas parties in this suit is dismissed.

The costs of appellants and respondents Nos. 1 and 2, so far as the appeal relates to the *devasthanam* estate, will be payable out of the income of the *devasthanam* estate, as it was necessary to have the question of devolution of the trust finally settled, but the appeal, so far as accretions and accumulations are concerned is dismissed with costs of respondents Nos. 1 and 2.

The memorandum of objections is also dismissed with costs of respondent No. 1.

Kumaraswami Sastri, J.—This appeal relates to the *devasthanam* known as the Fort or Palace *devasthanam* and the endowments founded by the Rajahs of Tanjore and to the share of the plaintiffs in the immoveable properties described in the plaint which were purchased and enjoyed by the widows of Sivaji Maharaja who was the last Rajah of Tanjore. Claim is also made to the jewels and moveables left by the *Ranis*.

The plaintiffs and the 3rd and 4th defendants represent the illegitimate branch and the 1st and 2nd defendants are the grandsons of the late Sivaji Maharaja, the last ruler of Tanjore, being the sons of Serfoji who was adopted by Kamakshi Bai Saheba. The other defendants are alienees from one or other of the *Ranis*.

The plaintiffs sued for the trusteeship and possession of the *devasthanam* properties and for the recovery of possession of the *stridhanam* properties left by the widows on the ground that they and the 3rd and 4th defendants are the sons of the sword wives of the late Rajah and for a declaration that the 1st and 2nd defendants have no rights as the adoption of their father is invalid, that the alienations by the widows in favour of the other defendants are invalid beyond the lifetime of the widows and that the plaintiffs as heirs are entitled to succeed. The contesting defendants denied that the plaintiffs and the 3rd and 4th defendants have any right as the sons of sword wives to the *devasthanam* and other properties and stated that the alienations by the widows could not be questioned or set aside by the plaintiffs. The Subordinate Judge dismissed the plaintiffs' suit. As regards the *devasthanam* properties he held that the grant by the Government was to a single individual or sole trustee and there can be no claim for participation. It would, therefore, pass to the head of the family for the time being and that the 1st defendant as the senior representative was entitled to be the sole trustee. As regards the other properties he held that the properties claimed were the *stridhanam* properties of the *Ranis* and not accretions to the *Raj* and that the plaintiffs and the 3rd and 4th defendants were not the heirs to the *stridhanam* properties He dismissed the plaintiffs' suit and hence the appeal.

The 2nd defendant filed a memorandum of objections against that portion of the decree which declared that the 1st defendant was entitled to be the sole trustee. His case is that he is entitled along with the 1st defendant to be the trustee of the *devasthanam* properties.

We have held in the appeals which relate to the private properties of Sivaji Maharaja that the plaintiffs and the 3rd and 4th defendants formed the illegitimate branch,

(22) 42 Ind. Cas. 556; 41 M. 44, 22 M L. J. 94; 6 L. W. 149, 33 M. L. J 224; (1917) M. W. N 688.

*Page of 41 M.—[*Ed.*]

that the Tanjore Rajahs were *Sudras* by caste and that the illegitimate sons and their branch of the family who are known as the Mangala Vilas branch were only entitled to the shares which the illegitimate sons of a *sudra* would take in their father's properties. We also held that the adoption of the father of the 1st and 2nd defendants was valid and that the 1st and 2nd defendants as the adopted sons of the late Rajah were entitled to inherit his properties and we ordered a partition of the private properties between the legitimate and the illegitimate branches. In disposing of this appeal it is clear that the claim of the plaintiffs in the plaint must be viewed from the standpoint of the above findings, and they can only get such rights as the law confers on the illegitimate sons of a *sudra*.

The questions which arise for determination in this appeal are—

(1) Whether under the terms of the grant by the Government the trusteeship of the *devasthanam* properties vests in all the heirs of Sivaji Maharaja, the last Ruler of Tanjore, like ordinary partible property and has to be managad by turns by each of such branches or whether it vests in the senior male member of the eldest branch of the family for the time being;

(2) whether the properties acquired by the widows of the late Sivaji Maharaja were accretions to the estate and consequently divisible between such persons as would be entitled to a partition of the estate or whether they were the *stridhanam* properties of the widows who made the acquisitions and are descendible to the *stridhana* heirs; and

(3) if the properties are *stridhanam* properties, whether the plaintiffs and the 3rd and 4th defendants would be entitled to a share.

As regards the trusteeship of the *devasthanam* and other trust properties, I am of opinion that the Subordinate Judge is right. The *devasthanam* and other endowments were taken charge of by the Government along with the *Raj* and the private estate of the last Rajah on his death. We have, in our judgment, in the appeals from the main case traced the course of events from the confiscation of the *Raj* to the death of his last *Rani*. Kamakshi Bai Saheba, the senior widow and *Rani*, got possession of the private properties of the Rajah under the terms of the grant (Ex.A-46), dated the 21st August 1862. She petitioned the Government for the restoration to her of the *devasthanam* and other trust properties, and the Government by their order, dated the 19th of March 1863, put her in possession of such properties. From 1863 to 1892 Kamakshi Bai Saheba was managing the properties as the sole trustee, and although a Receiver was appointed in 1865 in the litigation between Kamakshi Bai Saheba and her co-widows, the Receiver did not take possession of the *devasthanam* properties and Kamakshi Bai Saheba was managing them as the sole trustee. On the death of Kamakshi Bai Saheba the Government took possession of the trust properties and Umamba Bai Saheba who was then the senior *Rani* filed Original Suit No. 3 of 1894 against the Secretary of State and the members of the *devasthanam* Committees of Tanjore and Kumbakonam and the other surviving *Ranis* for a declaration of her right to succeed to the office and for possession of the properties. The Subordinate Judge in an exhaustive judgment decreed in favour of the plaintiff and the judgment had been filed as Ex. A-197 in the suit. He held that on a construction of the Government grant of 1863 the restoration of the management of the *pagoda* to Kamakshi Bai Saheba carried with it heritable right and that the right was transmissible to her heirs, the Government having no right to resume or interfere with the management of the temple after the death of Kamakshi Bai Saheba. He was also of opinion that succession to the management should be traced in the same way as succeesion to the impartible *Raj*; that on the death of Kamakshi Bai Saheba the right did not vest jointly in the surviving widows and that the plaintiff as the senior widow was entitled to succeed. Against this judgment there was an appeal filed to the High Court which is reported as *Kaliana Sundaram Ayyar* v. *Umamba Bayi Saheba* (23). The decision of the Subordinate Judge was confirmed and it was held by Shephard and Davies, JJ., that the estate taken by Kamakshi Bai Saheba under the grant was in the nature of self-acquired property in the *Rani's* hands in the sense that her rights were derived from Government and had no relation back to inheritance on the death of the Rajah and that as she asked that the management should be put in her hands in

(23) 20 M. 421; 7 M. L. J. 324; 7 Ind. Dec. (N. s.) 299.

the capacity as the head of the family for the time being, the inference was that the intention was to grant a widow's estate, that is, to put Kamakshi Bai Saheba in the position which she would have enjoyed had there been no confiscation on the death of her husband the Rajah. This decision does not, however, conclude the question as to whether on the death of the last of the *Ranis* the trusteeship and management was to be in the senior member of the family or whether it was to be treated as a right which should be enjoyed by all the members who were to divide the private properties of the Rajah. So far as the terms of the grant go, the Government order putting Kamakshi Bai Saheba in management of the *devasthanam* properties differs in several respects from the grant of 1862 and the order of the 19th of March 1863 simply says that it is desirable that the connection of Government with the *pagodas* should cease and they will accordingly be made over to Her Highness Kamakshi Bai Saheba.

In dealing with the question of management of the trust property, I think the first question to be considered is the usage as regards the management prior to the death of Sivaji Maharaja, the last Ruler of Tanjore. There can be little doubt, and it is not seriously contended before us by the appellants, that this temple and the charities which were founded by the successive Rajahs of Tanjore were in the possession and management of the Rajah for the time being and that till the death of Sivaji the office was always held by a single individual. When the *Raj* was seized by the Government as an act of State, the *pagodas* and the *devasthanam* were also taken possession of and managed by the Government; but they were not desirous of taking upon themselves the responsibility of managing the temple and the *devasthanam* properties. The Government at one time wanted that the *devasthanams* should be made over to Sakharam Saheb, the son-in-law of Sivaji Maharaja, as sole trustee. Sakharam Saheb had married the elder daughter of the late Maharaja and on her death he married the younger daughter. As, however, there were disputes between Sakharam Saheb on the one side and Kamakshi Bai Saheba on the other, this proposal was not given effect to. In 1860 there was an idea of transferring the management to Avu Bai Saheba, the late Rajah's mother but she was not willing to assume management. After Kamakshi Bai Saheba got possession of the private properties of the Rajah, she claimed the restoration of the *devasthanams* and the endowments on the ground that they were vested in her husband and that she was the then head of the family. Her request was supported by the Government Agent and the outcome of it was the order of 1863 transferring the management to her. From 1863 till her death in 1892 she was the sole trustee and it was till then nobody's contention that the office of trustee could partake of the nature of private property and that each of the surviving *Ranis* was to have the management by turns and although the Receiver took possession of all the private properties, the trust properties were left in the possession and management of Kamakshi Bai Saheba. On her death the next senior *Rani* was, as the result of the suit which I have already referred to, put in possession and management and on the death of each senior *Rani* the junior succeeded. I am unable to find anything either in the Government order or in the surrounding circumstances which changed the usage prevailing as regards these institutions, namely, the management by a single individual who was the head of the family for the time being and which rendered it subject to all the incidents of partible property.

In cases of religious institutions the main question to be considered is what was the usage of the institutions; and where from the date of the foundation of these charities up to the date of the present suit the trust was managed by a single individual who was the head of the family not in possession of any partible property, I think it would require very strong evidence to show that there is anything in the grant by the Government of 1862 which introduced a new course of devolution and would make it subject to all the incidents of a trusteeship held by a member of a joint and undivided family. As I said before, there is nothing in the grant of 1862 which either expressly or by implication changed the usage of these institutions. They formed part of the Tanjore *Raj* and the Rajah for the time being was the trustee. As regards the private properties which were restored by the order of 1863 there are express words which make the grant subject to the ordinary Hindu Law applicable to partible properties and the properties were to descend according to Hindu Law. There are no such words in the grant of the *devasthanam*

properties to Kamakshi Bai Saheba. The *devasthanams* having been part of the *Tanjore Raj* and the trusteeship having devolved on the Rajah for the time being, the right of management till the confiscation by the East India Company must be treated as impartible property and the office as one which was held only by a single individual.

It was of course open to the Government to destroy that character and to grant the office on such terms as to succession as it thought fit. The confiscation having destroyed all antecedent rights there can be no question of any vested rights as to succession to the office. I am unable to infer from the mere fact that Kamakshi Bai Saheba applied for possession of the *devasthanam* properties as senior widow and was put in possession, the course of succession to the office changed. Even if there was no confiscation, the office vested in the senior member of the Rajah's family. In cases of confiscation and re-grant of property which is impartible, the law is that in the absence of anything in the re-grant, the property which is re-granted is subject to the old incident of impartibility. In *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (24) the *zemindari* of Hunsapore which was an impartible *Raj* and which descended to the eldest male heir according to the rule of primogeniture was confiscated by the East India Company and was in the possession of the Government for some years. It was then granted to the younger member of the family of the deposed Rajah. It was held that although the *zemindari* was to be treated as the self-acquired property of the grantee, the grant being from the Ruling Power, in the absence of evidence of the intention of the grantors to the contrary, carried the incidents of the family tenure as a *Raj*. In *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar* (12) the Sivaganga *zemindari* which was originally impartible was confiscated by the Government and re-granted and it was held by their Lordships of the Privy Council that the re-grant did not make the estate partible. A similar view was also taken by their Lordships in *Ram Nundun Singh* v. *Janki Koer* (25) where it was held that the confiscation and re-grant of an impartible *Raj* to the various members of the family did not make the property re-granted partible. The mere fact that there was a re-grant would not, in my opinion, destroy the course of devolution followed till that date.

Great reliance was placed by Mr. Krishnaswami Ayyar for the appellants on the decision reported as *Ramanathan Chetty* v. *Murugappa Chetty*, (2) which was affirmed by their Lordships of the Privy Council in *Ramanathan Chetty* v. *Murugappa Chetty* (3). In that case the question was as to the validity of an arrangement come to by the members of an undivided family regarding the management by turns of a *devasthanam* which was hereditary in the family. The question turned upon the usage as regards the management, and Benson and Bhashyam Ayyangar, JJ., in the course of their judgmant, observe: "Except in the few cases in which the hereditary office may be descendible only to a single heir, the usage and custom generally is that along with other properties the office also is divided in the sense that the office is agreed to be held and the duties thereof discharged in rotation by each member or branch of the family, the duration of their turns being in proportion to their shares in the family property." Their Lordships of the Privy Council rest their decision on the usage as regards the trusteeship. Lord Macnaghten in delivering judgment of their Lordships observes as follows :— "In their Lordships' opinion the case is a very simple one. They think the unbroken usage for a period of nineteen years is as against the appellant conclusive evidence of a family arrangement to which the Court is bound to give effect." It is on this sole ground that they held that there was nothing improper in the arrangement.

There can be little doubt that the Hindu text-writers treated a trusteeship or a right to the management of religious or charitable endowments as impartible property. In *Mancharam* v. *Pranshankar* (26) it was pointed out that the management of religious endowments is indivisible though modern custom has sanctioned a departure by allowing the parties entitled to officiate by turns. This decision was followed in *Trimbak* v. *Lakshman* (9). The inconvenience of such a custom was also pointed out. Candy and Ranade, JJ., observed: "It is clear that if the present claim of the appel-

(24) 12 M. I. A. 1; 9 W. R P. C. 15; 2 Suth. P. C. J. 114; 2 Sar. P. C. J. 348; 20 E. R. 241.

(25) 29 C. 828; 29 I. A. 178; 7 C. W. N. 57; 4 Bom. L. R. 664; 8 Sar. P. C. J. 351 (P. C.)

(26) 6 B. 298; 6 Ind. Jur. 426; 3 Ind. Dec. (N s.) 655.

lant were recognized, each of the sons of the parties—and they have many—might claim a share, not only in the family share, but in the *devasthan* share and office also, and this process might go on with each generation, frittering away the income, and making the service wholly ineffective. The lower Court appears to have assumed, without any such evidence as is suggested in *Mohunt Rumun Dass* v. *Mohunt Ashbul Dass* (27) that the office is partible with the income. The practice of many generations of the parties must be considered in settling the questions of impartibility, and that practice is in this case against partition with the one single exception of what took place in 1838." This case was cited with approval by their Lordships of the Privy Council in *Sethuramaswamiar* v. *Meruswamiar* (5).

Where impartibility and management by a single individual who was the eldest member of the eldest branch of the family has been the rule from the foundation of the trust till the date of the present suit, I find nothing either in *Ramanathan Chetty* v. *Murugappa Chetty* (2) or *Ramanathan Chetti* v. *Murugappa Chetti* (3) which compels us to hold that the office should be treated as partible property and that on partition of the other properties of the family, this office should be held by turns. I may also point out that, having regard to the numerous descendants of the late Rajah who would, if the office is held to be partible, be entitled to turns of management and having regard also to the future growth of the family, it would be against the interests of the trust to give the numerous parties turns of management and I am not prepared to do so unless compelled either by the established usage of the institution or the terms of the re-grant by the Government. I think the proper rule in such cases is to see whether there is any deed constituting the trust and regulating the course of devolution of the trust. If there is such a document, then the devolution will, of course, be regulated by the terms of the document constituting the trust. If there is no such document, the Court has to see what was the usage of the institution and to give effect to such usage. Where there is no uniform course of conduct, the interests of the institution should be the first consideration. If the management can, without detriment to the trust, be held by turns, it is open to the Court to decree management by turns. I have not been referred to any *texts* which state that the office of *dharmakartha* or trustee of a religious or charitable endowment is to be treated as joint property on partition and that turns have to be given to each member of the undivided family who gets a share in the partition irrespective of the interests of the charities. I do not find anything in the decision of their Lordships of the Privy Council in *Ramanathan Chethi* v. *Marugappa Chetti* (3) to warrant the rule that even in the case of public charities and trusts the claims of the dividing co-parceners should override the interests of the institution and the observation of their Lordships in *Sathuramaswamiar* v. *Meruswamiar* (5) rather suggests that the rule laid down as to turns of management on partition applies only to private charities.

I find it difficult to accept the argument of Mr. Venkatachariar for the 2nd defendant that the management should be confined to the 1st and 2nd defendants by turns to the exclusion of the illegitimate sons Either the office is impartible and descends on the eldest member of the senior line or it should be treated as partible and turns given to all those who are entitled to share in the family properties. There is no principle on which the office can be confined to the 1st and 2nd defendants to the exclusion of the Mangala Vilas branch

As regards the properties left by the last *Rani* in respect of which partition is claimed, I do not think the plaintiffs are entitled to any share. I do not think that the properties acquired by the *Ranis* can be said to be accretions to their husbands' estate and to devolve upon the persons who would be entitled as reversioners to their property. From the year 1866 up till the date of this suit there was a Receiver in charge of the estate and none of the widows were in possession or management. I have, in my judgment, in the suit relating to the private properties of the late Rajah given my reasons for holding that the estate was not strictly a Hindu widow's estate but that the grant by the Government was on terms which were analogous to it It was held in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (28) that whatever right the widows would have enjoyed had they succeeded to the estate of the late of Rajah under

(27) 1 W. R. 160.

(28) 3 M. H. C. R. 424.

Hindu Law were destroyed by the grant of 1862 which was to be regarded as the root of title. Each *Rani* got about Rs. 9,600 a year as pension from the Government. The widows had their own properties and had also jewels and there is nothing to show that the properties now claimed were acquired with the income of the estate left by their husbands and not with the savings from their pensions or dealings with their own *stridhanam* properties. Before the plaintiffs can claim the properties as accretions to the husbands' estate, they must show that the properties were purchased out of the income of the estate or out of the savings therefrom. There is no evidence that the acquisitions by the *Ranis* were treated as part of their husbands' estate or mixed up with it, but on the contrary we find that the *Ranis* were anxious to dispose of the properties which they had acquired. It is difficult to see how there can be said to be any accretions to the estate left by their husbands.

So far as this Presidency is concerned, the authorities are to the effect that there is no presumption that property acquired by a Hindu widow out of funds which were at her absolute disposal would form part of her husband's estate. I have dealt with this question in *Zamindar of Bhadrachalam & Palavencha* v. *Venkatadri Appa Rao* (21). In *Rajah of Ramnad* v. *Sundara Pandiyasami Tevar* (19) their Lordships of the Privy Council observe: "Their Lordships think the answer to this is that a widow may so deal with the income of her husband's estate as to make it an accretion to the *corpus*. It may be that the presumption is the other way. A case has been cited to their Lordships which seems so to say. But at the outside it is a presumption and it is a question of fact to be determined, if there is any dispute, whether a widow has or has not so dealt with her property." The case referred to seems to be *Akkanna* v. *Venkayya* (16) which was referred to in the course of the argument by Mr. De Gruyther.

It is argued by Mr. Krishnaswami Ayyar that the decision of the Privy Council in *Nobakishore Mandal* v. *Upendrakishore Mandal* (13) has settled the question which was left in doubt in *Rajah of Ramnad* v. *Sundara Pandiyasami Tevar* (19). There is an observation of their Lordships at page 256 to the following effect: "Now there can, their Lordships think, be no doubt that whatever *stridhan* she possessed was due to the accumulated savings from the income of the property which she received from her husband's estate, and though it is true that when that property had been received it would be possible for her so to deal with it that it would remain her own, yet it must be traced and shown to have been so dealt with, and in this case there is no sufficient evidence of this having been done." It is argued that the effect of this observation is that the onus is on the other side to show that she did something which would indicate an intention of treating the accretions as her own and not as part of her husband's estate. The previous decisions of the Privy Council are not referred to by their Lordships and I do not think this case can be said to overrule all the previous decisions of their Lordships on the subject.

I am of opinion that the decision in *Saodamini Dasi* v. *Administrator-General of Bengal* (20) is clear authority for the view that where a widow is not in possession of her husband's estate there can be no question of any purchase made by her being an accretion to her husband's estate. Their Lordships of the Privy Council observe: "The appellant's Counsel contended that the savings of a Hindu widow must be presumed to have been made for the benefit of her hushand's estate. Without examining the precise result of the decisions, it is sufficient to say that in this case there is no room for any such presumption, for the *corpus* of the estate never came to the widow, but was taken by Shamcharan Mullick under the Will, and the income to which the widow succeeded was separated from it, and became and was dealt with as an entirely separate fund."

I think the result of the authorities may be summed up as follows:—A Hindu widow has an absolute right of disposal over the income of the property which she inherits from her husband. She can either spend the same or accumulate it for her own benefit. In cases where she purchases properties or invests her savings and indicates by her conduct an intention that the properties purchased out of her savings should form part of her husband's estate, such savings should follow the same rules as regards devolution to her husband's estate and should be treated as accretions to the estate. Where she does not do so,

*Page of 42 M. L. J.—[*Ed.*]

she has absolute powers of disposal over such property and can sell or give the same to anybody she pleases without any right of the reversioners to question her alienations. Where the question is one of intention to be deduced or inferred from her conduct, the presumption is that she intends to keep the property for her own absolute benefit and to have absolute powers of disposal over it. Where, however, a widow is not in possession of her husband's estate, there is no presumption that any of the properties which she gets are to be treated as accretions to her husband's estate nor can an intention be inferred that she wants to treat them as part of her husband's estate On her death such properties would follow the same course of succession as her *stridhanam* properties.

The claim in this appeal relates to the properties left by (1) Umamba Bai Saheba who died on the 4th of July 1900 possessed of items Nos. 1 and 2 in Sch. D-1 to the plaint, (2) Anusamba Bai Saheba, who died on the 30th September 1895 having item No. 3 in Sch. D-1 and (3) Jijamba Bai Saheba the last surviving widow. It is alleged that the properties in Sch. E to the plaint were left by Jijamba Bai Saheba.

As regards item No. 3 in Sch. D-1 which is the acquisition of Anusamba Bai Saheba, the evidence is that on her death Serfoji got possession of the property and after him his son, the 1st defendant, got possession. She also wrote to the Government Agent that she wanted to give the property to the adopted son and she made a settlement. The evidence, oral and documentary, shows that on her death in 1895 Serfoji got into possession in accordance with the settlement made by Anusamba Bai Saheba. The claim to item No. 3 by the present plaintiffs is, therefore, clearly barred by limitation, even assuming that the plaintiffs are her heirs.

As regards the properties of Jijamba Bai Saheba, the last *Rani*, she has left a Will disposing of her properties and it follows that the plaintiffs can have no claim, she, in my opinion, having had full disposing power over the savings from her husband's estate, her pension, and her own *stridhanam* jewels.

As regards properties left by Umamba Bai Saheba, she died in 1900 and Jijamba Bai Saheba took possession of her properties. She claimed to be the heir of Umamba Bai Saheba and it does not appear that she claimed anything more than a co-widow's right to succeed. It is now settled law that there is no distinction as to the nature of the estate taken between property inherited by a woman from a male and property inherited from a female. In both the cases she takes not an absolute estate but only a qualified one. I need only refer to *Venkataramakrishna Rau* v. *Bhujanga Rau* (29), *Virasangappa Shetti* v. *Rudrappa Shetti* (30), and to the decision of their Lordships of the Privy Council in *Sheo Shankar Lal* v. *Debi Sahai* (31) and *Sheo Partab Bahadur Singh* v. *Allahabad Bank* (32). This being so, it follows from the decision of their Lordships of the Privy Council in *Lajwanti* v. *Safe Chand* (33) that a suit which is filed within twelve years of Jijamba Bai Saheba's death would not be barred. As Umamba Bai Saheba did not make any disposition of the properties, the question is who are the heirs to the properties left by her at the time of her death which were in the possession of her co-widow Jijamba Bai Saheba. The plaintiffs belonging to the illegitimate branch and being the descendants of the last Rajah in existence, the question is whether under Hindu Law they can succeed to the estate of the *Ranis*, and this turns on the question whether in the case of *sudras* the illegitimate sons have got any right to collateral succession.

It is argued by Mr. Krishnaswami Ayyar that in the absence of son, daughter and daughter's son the *stridhanam* property goes to the husband and his heirs, and that if you come to the point where there are no such heirs as above-named, you have to make no difference between the husband's property and the *stridhanam* property of the wife and all her husband's heirs will be entitled to succeed. He, therefore, argues that even if the property left by Umamba Bai Saheba who died issueless was her *stridhanam*

(29) 19 M. 107, 6 M. L. J 16; 6 Ind Dec. (N. s) 780

(30) 19 M. 110, 6 M. L. J. 3, 6 Ind. Dec (N s) 782.

(31) 25 A. 468, 7 C W. N 831, 5 Bom. L R. 828; 13 M. L. J. 330, 30 I. A. 202, 8 Sar P C J 465 (P. C).

(32) 25 A 476; 7 C. W. N 840, 13 M L J. 336, 5 Bom. L. R. 883, 30 I A. 209, 8 Sar P C. J. 535 (P C).

(33) 80 Ind. Cas. 788, 51 I A 171, 22 A L. J 304; A. I R. 1924 (P. C.) 121, 5 L 192; (1924) M W N. 442; 20 L W. 10, 2 Pat. L. R 245; 28 C W N. 960; 26 Bom. L R. 1117; 47 M. L. J. 935, 6 P. L. T, 1; L. R. 5 A (P. C.) 94 (P. C.).

property, succession must be traced as if it was the property of her husband and as the illegitimate sons would succeed along with the legitimate sons to the properties of their father, they would also succeed to the *stridhanam* properties in the same proportion. Reference has been made to the decision of their Lordships of the Privy Council in *Bai Kesserbai* v. *Hunsraj Mirarji* (34), where their Lordships refer to Mitakshara, Mayukha and the texts of Brihaspathi as regards succession to *stridhanam* properties and hold that in the case of approved forms of marriage the heirs enumerated by Brihaspathi who are blood relations of the husband would succeed to the woman's property. Reference is also made to *Marya Pillai* v *Sivabagyathachi* (35), where it was held that the *stridhanam* property of a woman married according to the approved form who has left no issue will devolve on her husband and on failure of the husband the property will go to his *sapindas* in the order laid down in Mitakshara with reference to the succession to the property of a male and to *Kanakammal* v. *Ananthamathi Ammal* (36), where a similar rule has been laid down. Were the matter *res integra*, I am disposed to hold that in the case of *sudras* an illegitimate son is in the same position as a legitimate son except that he gets a lesser share. The fact that an illegitimate son gets a lesser share would not by itself create a bar to collateral succession any more than the fact that an adopted son who exists along with a natural son born subsequently and who gets a lesser share would be barred. But there is a long catena of cases beginning with *Nissar Murtojah* v. *Kowar Dhunwunt Roy* (37) which decide that an illegitimate son has no right to collateral succession. I have in *Subramania Iyer* v. *Rathnavelu Chetty* (22) referred to all the authorities and dealt fully with the illegitimate son's rights and as regards the position of an illegitimate son to collateral succession. The right was negatived in *Krishnayyan* v. *Muttusami* (38), *Ranoji* v. *Kandoji* (39), *Pravathi* v. *Thirumalai* (40), *Shome Shankar Rajendra Varere* v. *Rajesar Swami Jangam* (41), *Ramalinga Pillai* v. *Pavadai Goundan* (42), *Meenakshi* v. *Muniandi Panikkan* (43), *Dharma Lakshman* v. *Sakharam Ramjiras* (44) and *Zipru Chindhu* v. *Bomtya* (45). The plaintiffs are not entitled to Umamba Bai Saheba's property as heirs under Hindu Law.

The appeal fails and is dismissed. The memorandum of objections is also dismissed. I agree to the order as to costs proposed by my learned brother.

This appeal having been posted to be spoken to this day on the question of costs allowed to the 1st respondent on the memorandum of objections filed by the 2nd respondent, the Court made the following

ORDER.—In modification of our original order we direct that the 1st respondent do get his costs of the memorandum of objections out of the *devasthanam* estate and the 2nd respondent will bear his own costs in his memorandum of objections.

V. N. V.

Z K. *Appeal dismissed.*

(31) 30 B. 431; 10 C W N 802, 4 C L J 9, 8 Bom. L. R 416, 3 A. L J 481; 1 M L T. 211, 16 M. L J. 446, 33 I. A 176 (P C).

(35) 12 Ind. Cas. 128, 36 M 116, (1911) 2 M. W N. 168; 21 M. L. J. 850, 10 M. L. T. 494.

(36) 25 Ind. Cas. 901; 37 M. 293.

(37) Marsh. 609

(38) 7 M. 407; 8 Ind. Jur. 427; 2 Ind. Dec. (N. S.) 67.

(39) 8 M 557, 3 Ind. Dec (N S) 382

(40) 10 M. 334, 3 Ind Dec (N S) 986

(41) 21 A 99, A. W N (1898) 170, 9 Ind Dec. (N. S.) 773

(42) 25 M 519, 11 M L J 399

(43) 25 Ind Cas. 957, 38 M 1144; 1 L. W 704, (1914) M W N 672, 16 M L T 270, 27 M L J 353

(44) 55 Ind Cas 306, 44 B 185, 22 Bom L R. 52.

(45) 64 Ind Cas 975, 46 B 424; 23 Bom. L. R. 1195; A. I R. 1922 Bom 176

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 262 OF 1925.

July 28, 1925.

Present:—Justice Sir Babington Newbould, KT, and Mr. Justice Graham.

SRIPATI DUTTA AND OTHERS—DEFENDANTS NOS. 1 TO 5—APPELLANTS

versus

BIBHUTI BHUSAN DUTTA AND OTHERS—PLAINTIFFS—DEFENDANTS NOS. 6 AND 7—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, rr. 1, 4, O XLIII, r 1 (s)—General Clauses Act (X of 1897), s. 16—Order removing Receiver—Appeal, if lies—'Any person', meaning of—Receiver, when can be removed—Judicial discretion—Party, when can be appointed—Consent of parties.

An appeal lies against an order removing a Receiver. The order is final and appealable even though selection of the successor has not been made. [p. 942, col. 2.]

Upendra Nath Nag Chowdhry v *Bhupendra Nath Nag Chowdhry*, 9 Ind Cas. 582 13 C L J. 157, distinguished.

Palaniappa Chetty v. *Palaniappa Chetty*, 40 Ind Cas 185 40 M 18, 32 M L J 304, (1917) M W N 393, 5 L. W 776, referred to

The words 'any person' in O XL, r 1 (*b*), C P C, refer to persons interested in the property and in possession or custody of it prior to the passing of an order appointing a Receiver [p 911, col 2]

The selection and appointment of a particular person as a Receiver is a matter of judicial discretion to be determined by the Court according to the circumstances of the case [p 942, col 2]

It is a settled rule that one of the parties to a cause should not be appointed Receiver without the consent of the other parties unless a very special case is made out [p. 943, col 1]

Kali Kumari v *Bachhan Singh*, 19 Ind. Cas 873, 17 C. W N 974, referred to.

On an application for the removal of a Receiver, the Court should properly consider his past relations to the parties as well as his present sympathies If by reason of interest shown by the Receiver as an officer of the Court his efficiency is impaired the Court will be justified in removing him [p. 943, col. 2]

Appeal against an order of the Subordinate Judge, Burdwan, dated the 1st June 1925.

Dr. *Dwarka Nath Mitter*, Mr *Debendra Nath Mondal* and Babu *Narayan Chandra Kar*, for the Appellants.

Sir *Provash Chandra Mitter*, Messrs *Sarat Chandra Roy Choudhury*, *S. B. Sinha* (with him Babus *Suresh Chandra Talukdar*, *Mohendra Kumar Ghose* and Babu *Dwijendra Nath Dutt*), for the Respondents.

JUDGMENT.

Graham, J.—This appeal is directed against an order of the Subordinate Judge of Burdwan removing a Receiver, who had been appointed in a suit (No. 142 of 1923) for declaration of title and partition of certain moveable and immoveable properties.

A preliminary objection has been taken on behalf of the respondents that no appeal lies, and it becomes necessary to deal with this first. So far as this Court is concerned the question appears to be one of first impression. At all events no case has been brought to our notice in which this particular point has been decided. It is contended that r. 1 (*s*) of O. XLIII of the C. P. C., under which alone an appeal can lie, has no application, inasmuch as r. 1 (1) (*a*) of O. XL refers only to appointment of a Receiver, and is silent as to his removal. It is argued that, as the C P. C. nowhere expressly provides a right of appeal against an order removing or dismissing a Receiver, an intention to provide for such appeal ought not to be read into the Act.

Now O. XLIII, r. 1 (*s*) gives a right of appeal against an order under r 1 or r 4 of O XL. The learned Advocate for the appellants in meeting the objection has not relied on r. 4 of that Order, and it is obvious that it has no application in the present case. He has relied, however, on r. 1 (1) (*b*) of O. XL. This sub-section and the portion which precedes it read as follows.

"When it appears to the Court to be just and convenient, the Court may by order .. .. remove any person from the possession or custody of the property".

It is argued that the words "any person" include a Receiver and that, that being so, the appeal is competent.

It is, I think, open to doubt whether this sub section has the wide meaning sought to be attached to it, so as to make it include a Receiver, and it appears to me that it refers to persons interested in the property and in possession or custody of it prior to the passing of an order appointing a Receiver This view seems also to be supported by sub-s (*c*) which follows.

In my opinion, however, an appeal will lie under sub-s. (*a*) of r. 1 (1) of O. XL. The words used therein are, it is true, "appoint a Receiver of any property," but under s. 16 of the General Clauses Act (X of 1897) the power to appoint includes the power to remove or dismiss, the power to terminate being a necessary sequence from and adjunct to the power to create, and it may, therefore, be argued that, if a right of appeal is given against appointment, it is given equally against the removal of a Receiver, since appointment includes the right to remove. It is true the Code nowhere makes express provision for an appeal against the removal of a Receiver, as it does in the case of his appointment, but the reason may well be that it was not considered necessary by virtue of the section in the General Clauses Act referred to above. Indeed one of the objects of a General Clauses Act is to avoid superfluity. Moreover, if an appeal lies against the appointment of a Receiver, it would seem to be only logical and consistent that an appeal should equally lie against his removal.

But, it has been urged on behalf of the respondents, even if the appeal is held to be competent, it is premature, inasmuch as no Receiver has yet been appointed by name to supersede the Receiver who has been

removed, and that, that being so, it is merely an interlocutory order, and not a final order, and so no appeal will lie. In support of this view reference has been made to the case of *Upendra Nath Nag Chowdhury* v. *Bhupendra Nath Nag Chowdhury* (1). In that case the material part of the order appealed against was in these terms: "I think the whole of the property in suit will be better managed and the interest of all the parties will be better served if the property in suit be placed in the hands of a competent Receiver". Subsequently on a date after the appeal to the High Court had been filed one Nakuleswar Bose was appointed as Receiver. It was held on these facts that the order in question was an interlocutory order and not a final order, and that the appeal was, therefore, premature and incompetent. Similarly in the present case no Receiver has yet been appointed by name, the reason apparently being that the order did not contemplate the appointment of the new Receiver until the following month, and in the meanwhile this appeal, involving the sending up of the record to this Court, was filed on the 16th June 1925. It may be argued, therefore, that the order was merely interlocutory, that the appeal was premature, and that the appellants should have waited until the new Receiver was appointed when there could be no possible doubt as to the competency of the appeal.

In reply to this, however, the learned Advocate for the appellants contends that, if an order consists of two parts, half of it being interlocutory, and half final he is entitled to appeal against that portion of it which is final, and he argues that, inasmuch as part of the order directed that the Receiver was to be removed, the Defendant No. 1 was entitled to appeal, and that he was bound to exercise his right, or run the risk of losing it.

There is certainly some force in this contention. The crucial question seems to be whether it was a final order or not. The effect of the order was that the Receiver was declared to be removed, and it seems to me that the mere fact that the appointment of the new Receiver was postponed (presumably as a matter of convenience) to the beginning of the next month cannot in any way affect the position. So far as the Subordinate Judge was concerned it was presumably a final order, which it would not have been open to him to revise. It was something more than a preliminary order, or expression of opinion. This view of the matter finds support in the case of *Palaniappa Chetty* v *Palaniappa Chetty* (2) decided by a Full Bench of the Madras High Court.

The present case is distinguishable from the case in 13 Calcutta Law Journal [*Upendra Nath Nag Chowdhury* v. *Bhupendra Nath Nag Chowdhury* (1)] referred to above, inasmuch as there was in that case no question of removal it being merely a question of appointment, and it was held that the order was interlocutory and not final with the result that the appeal was premature.

In my opinion, therefore, the order must be held to be a final order, and as such, consistently with the view which I have taken as to the interpretation to be put on r. 1 (1) (*a*) of O. XL, liable to be challenged by way of appeal.

On the merits the substantial contention on behalf of the appellants is that the removal of the Receiver was, having regard to all the facts and circumstances of the case, wholly unjustifiable I was at one stage of the hearing rather inclined to hold that this contention had been substantiated, but upon further reflection I have formed a decided opinion that we should not be justified in the particular circumstances of this case in interfering with the discretion which has been exercised by the Court below. There can be no doubt that an Appellate Court has the power to interfere, and ought to do so in a fit case for such interference, and where it has been shown that there has been arbitrary exercise of the power of removal. At the same time Courts of Appeal have always been reluctant to interfere in a matter which is regarded as one purely within the discretion of the Court concerned. The principles applicable to such cases have been frequently laid down, and it will suffice to refer to one of these cases *Kali Kumari* v. *Bachhan Singh* (3) where the subject is dealt with. It was there held that the selection and appointment of a particular person as a Receiver is a matter of judicial discretion to be determined by the Court according to the circumstances of the case, and that the exercise of this, like other matters of judicial discretion, will rarely be interfered

(1) 9 Ind. Cas. 582; 13 C. L. J. 157.

(2) 40 Ind. Cas. 185; 40 M. 18, 32 M. L. J. 304; (1917) M. W. N. 393; 5 L. W. 776.

(3) 19 Ind. Cas. 873; 17 C. W. N. 974.

with by an appellate tribunal. It was further held that in order to induce the Appellate Court to interfere it is necessary to show some overwhelming objection in point of propriety, or some fatal objection in principle to the person named. It was also pointed out that it is a settled rule that one of the parties to a cause should not be appointed Receiver without the consent of the other party unless a very special case is made out.

That was a case of appointment of a Receiver, but the principles laid down appear to be equally applicable in a case of removal, and the question which then arises is whether in this instance there has been such an arbitrary exercise of discretion by the Court below as would justify our interference. In my opinion no such case has been made out. The main point is that the Receiver has failed to submit any explanation, which can be considered satisfactory, of his omission to show in his accounts the sum of Rs. 4,000 realised by him after his appointment as Receiver from Messrs. N. C. Sarkar & Sons on account of royalties due to the estate. This was a sufficiently serious matter, but the Receiver does not appear to have considered it necessary to go into the witness-box to meet this and other charges which were preferred against him. All that he condescended to do was to submit an explanation through his Pleader, so that in a manner he seems to have allowed the case against him to go by default. On his own showing some portion of this money would go to the plaintiffs and the defendants Nos 6 and 7 according to the determination of their shares in the pending suit, and it was, therefore, incumbent upon him to show the amount, or at all events portion of it in his accounts.

On this ground alone the propriety of the order made in the Court below cannot, I think, be challenged with success But there is another aspect of the matter. It is clear from the learned Subordinate Judge's order that owing to the embittered relations between the parties a great deal of the Court's time had been unnecessarily wasted in hearing all sorts of objections and petitions (there is ample evidence of this on the record), and there seemed every probability that the management of the estate might be seriously hampered. The Subordinate Judge considered that such an undesirable state of affairs should be put an end to, and with that opinion it is not possible to find fault. Indeed matters might almost have reached an *impasse*. Again, apart from the item of Rs. 4,000, there appears to be some justification for the contention that the Receiver has betrayed bias in his management. Absolute impartiality as between the parties to the litigation is, however, an indispensable qualification of a Receiver, and upon an application for his removal, the Court may properly consider his past relations to the parties as well as his present sympathies. If by reason of interest shown by him the efficiency of the Receiver as an officer of the Court is impaired, the Court will be justified in removing him.

Finally it is to be observed that in cases where one of the parties to the litigation is appointed as Receiver the order is usually based on consent of the parties, though there may be exceptional cases where this is not so. In the present instance the appointment was at first made with the consent of the parties. That consent has now been withdrawn, the allegation being that the other parties have lost their faith in the Receiver as a result of his misconduct. In these circumstances the foundation upon which the appointment rested no longer exists, and with the withdrawal of the consent it may be argued that the justification for retaining him as Receiver disappears.

For these reasons stated while I am of opinion that the appeal is competent, I hold that no case has been made out on the merits which would justify us in interfering The appeal, therefore, fails and must be dismissed with costs. The hearing-fee is assessed at five gold *mohurs* to the plaintiffs, three gold *mohurs* to the defendant No. 6 and two gold *mohurs* to the defendant No. 7.

Newbould, J.—I agree.

M. B. *Appeal dismissed.*

N. H.

MADRAS HIGH COURT.

REFERRED CASE No. 3 OF 1925.

October 29, 1925.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, Mr. Justice Krishnan and Mr. Justice Beasley.

THE COMMISSIONER OF INCOME-TAX, MADRAS—REFERRING OFFICER

versus

MESSRS. KING AND PARTRIGE—RESPONDENTS.

Income Tax Act (XI of 1922), s. 11—Madras City

Municipal Act (IV of 1919), s 111—Profession tax levied by Municipality—Deduction from income-tax

Profession tax levied under s 111, Madras City Municipal Act, is a contribution from the income of the assessee to the Municipality, and cannot, therefore, be allowed as a deduction from the taxable income, as an expenditure incurred solely for the purposes of the profession of the assessee, within the meaning of s. 11 of the Income Tax Act. [p 944, col. 2]

Strong & Co., Ltd v *Woodfield*, (1906) A C. 448, 75 L J K. B 864, 95 L T 241, 22 T L R 754, *Smith* v. *Lion Brewary Co*, (1911) A. C 150, 80 L. J K B 566; 104 L T 321, 75 J P. 273, 55 S J 269, 27 T. L. R. 261, 5 Tax Cas 568, *Usher's Wiltshire Brewary Co.* v. *Bruce*, (1915) A. C. 433; 84 L. J K B. 417, 112 L T. 651, 6 Tax. Cas. 399, 59 S. J. 144; 31 T. L. R. 104, relied on.

Case stated, under s. 66 (2) of the Indian Income Tax Act XI of 1922, by the Commissioner of Income Tax, Madras, in his letter No. 2364 of 1924, dated the 6th January 1925, referring for the decision of the High Court the following question, *viz.*, "Whether the profession-tax levied under s. 111 of the Madras City Municipal Act must be allowed as a deduction from the taxable income as an expenditure incurred solely for the purposes of the profession within the meaning of s 11 of the Indian Income Tax Act XI of 1922."

Mr. *M. Patanjali Sastri*, for the Referring Officer.

Mr. *R. N. Iyengar*, for the Respondents.

ORDER.—This is a reference under s. 66 (2) of the Indian Income Tax Act (XI of 1922), and the question submitted for our opinion is whether profession tax paid under s. 111 of the Madras City Municipal Act should be allowed as an expenditure incurred solely for the purposes of the profession of the assessees within the meaning of s. 11 of the Income Tax Act.

The assessees are a firm of attorneys practising in Madras and they claim that they are entitled to the deduction above mentioned. The Commissioner of Income Tax was of opinion that the deduction claimed was not an allowable item.

The answer to the question put to us depends, in our opinion, upon the nature of the profession tax levied by the Municipality. If the profession tax is a contribution from the income of the assessee to the Municipality it will stand on the same footing as income-tax itself which is such a payment to the Government. It is clear, in assessing the income of a person the income-tax he pays could not be deducted, for what is paid is a part of the income itself and not an expenditure for earning that income or profit. It was so ruled in *Ashton Gas Co.* v. *Attorney-General* (1) and the proposition is conceded before us. What then is profession tax—is it a payment made out of the income of the tax payer or is it expenditure which he has to incur to enable him to earn his income. We are of opinion that it is the former and not the latter.

Under the City Municipal Act (IV of 1919), s. 111, every person not liable for the Companies' tax who within the city and for a period of 60 days in the half year exercises "a profession, art, trade or calling or holds any appointment, public or private, bringing him within the taxation rules in Sch. IV", is liable to pay the profession tax. Now Sch IV makes it clear that the amount of tax payable is dependent on the income of the person taxed, the minimum being an income of Rs. 100 a month except in the case of hotel-keepers, etc., dealt with under cl. (*aa*). Professional men are taxed not because they carry on their profession but because they do so and earn an income. The amount of tax varies with the income and if a person is over-taxed, he has a right of appeal.

Now the nature of the tax cannot vary with the individual taxed. In the case of persons holding appointments under the Government, it seems to me impossible to predicate that they pay profession-tax to enable them to earn their salary. Section 111, *Explanation* 2 makes even pensioners liable for profession tax as if they were holders of appointments carrying a salary equal to the pension. In their cases it is still more difficult to treat the profession tax as a payment by them to earn their income. It is clear in these cases the Municipality is claiming a part of their income as a tax. A different rule it seems to us cannot be applied in the case of men who make their income by professional services. It is argued that because Sch. III uses the words "by way of license fee," we must hold that the payment of the profession tax is for the purpose of obtaining a license to carry on one's profession in the city. We are unable to accept this argument. The Act deals with several matters in which the obtaining of a license is a pre-requisite to the carrying on of a business or profession within the Municipal limits. We find examples of it in Chap. XII of the Act. There is no provision in the Act which

(1) (1906) A. C. 10; 75 L. J. Ch. 1; 70 J. P 49; 93 L. T. 676; 22 T. L R. 82; 13 Manson 35.

makes the carrying on of one's professions without paying the profession tax illegal; and no formal license is issued on payment; the tax if unpaid can no doubt be collected by coercive processes of distraint, etc., but the carrying on of the profession is not interfered with. It is clear, therefore, that the Act does not treat the profession tax as a payment for a license. The words "by way of a license fee" seem to us to show that the payment is to be made in the manner of a license fee but do not imply that in itself the tax is a license fee. It is true that under Part II, Sch. IV, r. 9 the tax is estimated on general considerations and not on the exact amount of ascertained income of the person taxed. This merely provides a method of estimating one's income to avoid the troubles of having accounts produced and examined in every case. The fact that when an over-estimate is made, liberty is given to the person taxed to produce his accounts and prove his income and get his tax reduced indicates that the proper basis of the tax is the income earned. In this view payment of the profession tax cannot be held to be "an expenditure for the purpose of such profession" though it is incurred in connection with it. The words "for the purposes of" were construed by Lord Davey in the case of *Strong & Co.* v. *Woodfield* (2) where the expression was "for purposes of the trade". His Lordship observed "These words appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc., I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits". Following that view we consider that the payment of profession tax does not fall within s. 11.

The case of *Smith* v. *Lion Brewary Co.* (3) and *Usher's Wiltshire Brewary Co.* v. *Bruce* (4) were cited by the learned Council for the assessees. But instead of helping him they show what may properly be treated as money spent for purposes of trade. The expenses referred to in those cases were directly incurred for the purpose of increasing the income of the trade and were, therefore, allowed to be deducted. The cases do not apply in the view we take of the nature of the profession tax. Along with these cases should be considered the case of money spent for an anti-prohibition campaign by a brewer which was disallowed as a deduction as it was held that it was not money directly spent for increasing the brewer's income though it may have indirectly had that effect: See *Ward & Co* v. *Commissioner of Taxes of New Zealand* (5).

The case of *Commissioner of Income-Tax, Madras* v. *Nedungadi Bank Ltd.* (6) referred to the Companies' tax and not to the profession tax. The observation in it regarding profession tax that it stands on the same footing as income-tax supports the contention of the Government but we do not look upon it as any authority on the point before us as the observation is only an *obiter dictum*. The case is not otherwise applicable.

Patent Costings Syndicate v. *Etherington* (7) referred to excess profit duty which stands on a different footing altogether. As pointed out by the learned Judge there it was declared by Statute to be an admissible deduction. Further more the case was one of net profits of the Company on which dividend was payable to the manager and not an income-tax case.

For the above-mentioned reasons we have come to the conclusion that the amount of profession tax paid is not a proper deduction for assessment of income-tax and we answer the question submitted in the negative. The assessee will pay the Commissioner costs and Vakil's fee Rs. 250.

V. N. V. N. H. *Question answered in the negative.*

(2) (1906) A. C. 448, 75 L. J. K. B. 864; 95 L. T. 241; 22 T. L. R. 754.

(3) (1911) A. C. 150, 80 L. J. K. B. 566; 104 L. T. 321; 75 J. P. 273, 55 S. J. 269, 27 T. L. R. 261; 5 Tax. Cas. 568.

(4) (1915) A. C. 433; 84 L. J. K. B. 417; 112 L. T. 651; 6 Tax. Cas. 399; 59 S. J. 144; 31 T. L. R. 104.

(5) (1923) A. C. 145, 92 L. J. P. C. 33, 128 L. T. 136; 39 T. L. R. 90.

(6) 81 Ind. Cas. 454, 47 M. 667, 20 L. W. 87, 47 M. L. J. 100, (1924) M. W. N. 580, 35 M. L. T. 53, A. I. R. 1924 Mad. 693.

(7) (1919) 2 Ch. 254, 88 L. J. Ch. 398; 121 L. T. 9; 63 S. J. 573, 35 T. L. R. 528.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 142 OF 1925.

July 3, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Chakravarti.

SUSIL CHANDRA GUHA AND ANOTHER—PETITIONERS—APPELLANTS

versus

GOURI SUNDARI DEVI—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s 146, O IX, r. 13—Charge, suit for enforcement of—Ex parte *decree—Puisne mortgagee, if can have decree set aside.*

A puisne mortgagee who is not a party to a suit for enforcement of a charge against the mortgaged property is not entitled under s 146, C P C, to maintain an application for setting aside the *ex parte* decree in the suit under O IX, r. 13 of the Code

Sitaramaswamy v. *Dulla Lakshmi Narasamma*, 48 Ind. Cas. 840; 41 M. 510, 8 L. W. 21, distinguished.

Appeal against an order of the Subordinate Judge, Assansole, Burdwan, dated the 15th April 1925.

Mr. *Gunada Charan Sen* and Babu *Bhupendra Chandra Guha*, for the Appellants.

Mr. *Bankim Chandra Mukherjee* and Babu *Charu Chandra Ganguli*, for the Respondents.

JUDGMENT.

Cuming, J.—This is an appeal against an order of the learned Subordinate Judge of Assansole rejecting an application under O. IX, r. 13 to set aside two decrees which had been passed *ex parte*. The ground for refusing the application is that it was not maintainable. The facts appear to be these. A certain suit was instituted on the 13th February 1922 for recovery of certain royalty which had been made a charge on the property. A preliminary decree was passed on the 31st October 1924 and the final decree was passed on the 17th November 1924. Both these decrees were passed *ex parte*. The present applicant is a puisne mortgagee under a mortgage deed executed in June 1921 and is now in possession. Admittedly he was not a party to the suit.

It seems to me that the application was rightly rejected. O. IX, r. 13 provides that "In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him." Now, admittedly the applicant was not a defendant in the suit and he does not come within the purview of O. IX, r. 13. The learned Advocate who appears for him contends that this case comes within s. 146 of the Code which provides as follows: "Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him." I do not think that this case comes within the terms of the section.

Section 146 would not, I think, enable a pusine mortgagee who is not a party to the suit to maintain an application under O IX, r. 13. Let us suppose for the sake of argument he was allowed to make the application and the *ex parte* decree was set aside. He would surely not be a party to that suit and the defendant could once more allow the suit to be decreed *ex parte*.

The order of the learned Subordinate Judge is right and the appeal must be dismissed with costs. I assess the hearing fee at 3 gold *mohurs*.

Chakravarti, J.—I agree. The learned Advocate for the appellant relied upon the case of *Sitaramaswami* v. *Dulla Lakshmi Narasamma* (1) in support of his contention that a person who was not a party to a suit was held entitled to come under s. 146, C. P. C., and allowed to file an appeal against a final decree. It appears to me that that case is clearly distinguishable for two reasons; first, because the interest of the appellant in that case accrued after the institution of the suit; and the second ground on which I think the present case is distinguishable is that it was not an application under O. IX, r. 13 but an appeal against a final decree. This case, therefore, is no authority for the proposition which the learned Advocate wanted to establish in the present case. I think, therefore, this appeal is not maintainable. I agree therefore with my learned brother that this appeal should be dismissed with costs.

M. B. *Appeal dismissed.*

(1) 48 Ind. Cas. 840; 41 M. 510; 8 L. W. 21.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 235 OF 1924.

November 18, 1925.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol.

RELU MAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

AHAMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872) ss. 59, 60—Appropriation of payments to particular debts—Creditor and debtor, respective rights of

Primarily it is the direction of the debtor either express or implied which determines to which particular debt a payment is to be appropriated But the intimation by the debtor must synchronise with the payment Where, however, a debtor does not avail of this privilege, the creditor has plenary discretion to apply any payment at any time, even up to the time of trial, to any debt he chooses. [p 947, col 2, p 948, col. 1.]

Kundan Lal v *Jagan Nath*, 30 Ind Cas 92, 37 A. 649, 13 A. L J. 908, not followed

Clayton's case, (1816) 15 R. R 161, 1 Mer 572, 35 E. R 781, distinguished.

Cory Brothers & Company Limited v *The Owners of the Turkish Steamship "Mecca"*, (1897) A C 286, 66 L J P C 86, 76 L T. 579; 45 W R 667 and *Seymour* v *Pickett*, (1905) 1 K B 715, 74 L J. K. B. 413, 92 L T. 519, 21 T L. R. 302, followed

Letters Patent Appeal from the decree of Mr. Justice Abdul Raoof, in Civil Appeal No. 956 of 1924, dated the 12th November 1924, affirming that of the District Judge, Karnal, dated the 4th January 1924, affirming that of the Subordinate Judge, Forth Class, Karnal, dated the 23rd April 1923.

Mr. *Shamair Chand*, for the Appellants.

Lala *Mehar Chand Mahajan*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought on a deed of hypothecation for the recovery of Rs. 200 principal plus Rs. 530 interest, total Rs. 730. The original creditor was one Ulfat Ram and the plaintiffs are his representatives. The main defence pleaded was a complete repayment of the claim and the further contention that other payments in respect of other debits had been made to the widow of Ulfat Ram. On the production of Ulfat Ram's account book it was found to contain in the defendant's account seven entries on the debit side and five on the credit side. The first item on the debit side was strangely enough the item secured by the deed of hypothecation; the other items were unsecured. Of the items on credit side two were specifically appropriated, the other three had not been specifically appropriated to the unsecured debit items but it is significant that the total credits tallied with the total unsecured debits. On these facts the Courts below have concurred in holding that though the main defence is false, the unappropriated credit items must be applied in reduction of the present claim on the hypothecation deed as being the earliest debit, and for this course they have sought and found justification in s 61 of the Contract Act.

For the plaintiffs it has been urged before us that inasmuch as the debtor did not take advantage of the privilege conferred upon him by s. 59 of the Contract Act, s. 60 of the Act gives the creditor plenary discretion to apply any payment at any time even up to the time of trial to any debt he chooses and after having heard Counsel for both sides we hold that the appeal must succeed.

Now, it is indubitable that when a debtor owes several distinct debts to one person and makes a payment to him, it is the direction either express or implied of the debtor with regard to the application of the payment which governs the payment's destination. A careful consideration of s. 59 of the Indian Contract Act leaves no doubt, however, that that intimation must be synchronous with the payment. Where, however, the debtor has not taken advantage of the power conferred upon him by s. 59, the creditor is at liberty to apply the payment in liquidation of any lawful debt actually due and payable to him from the debtor. The learned Judge in chambers, following *Kundan Lal* v. *Jagan Nath* (1), holds that ss. 59, 60 and 61 of the Contract Act were enacted to embody the rule laid down in *Clayton's case* (2). It holds that the creditor can take advantage of the discretion allowed to him by s. 60 only at the time of the payment and is not at liberty to make any *ex post facto* appropriation Now, *Clayton's case* (2) was based on peculiar facts. The question which the Courts were called upon to decide was whether a customer of a bank was justified in claiming that payments made to him by the Bank, were payments made against particular credit items in his account and not against the account as a whole, and it was held that the payments were made against the whole account and that the creditor was not at liberty to urge *ex post facto* that particular payments to him should be debited against particular credit items In that case, however, the learned

(1) 30 Ind. Cas. 92; 37 A. 649; 13 A L. J. 908.
(2) (1816) 15 R. R. 161; 1 Mer. 572; 35 E. R. 781.

Master of the Rolls stated that he was not called upon to determine the general question of the creditor's right to make the application of indefinite payments; so that the decision clearly has no general application. The view that the creditor may apply payments up to the very last moment even up to the time of the trial was adopted in *Cory Brothers & Company Limited* v. *The Owners of the Turkish Steamship "Mecca"* (3) and the *Seymour* v. *Pickett* (4), and has been followed by the High Courts of Bombay, Madras and Patna. On the other side is only the ruling* relied upon by the Court below, and the main reason of the view of that Court appears to be that were the law as laid down in *Cory Brothers & Co., Ltd.* v. *The Owner of the Turkish Steamship Mecca* (3) accepted, there would remain no scope for the application of s. 61 of the Contract Act which provided that where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time. This objection, however, does not impress us, for it is not difficult to imagine cases in which neither party, either by oversight or by mistake, has made any appropriation. Moreover, a Code attempts to provide for all possibilities.

In our opinion the Courts below might well have held on the peculiar circumstances of this case that the original creditor, Ulfat Ram, did appropriate the payments to the unsecured debts, but we are bound by the finding of fact that he did not do so. Holding, however, that s. 60 of the Contract Act grants to the creditors plenary discretion to make the appropriation at all times up to the time of trial (and it is obvious that this rule contravenes no principle of justice or equity), we consider that the plaintiffs at the institution of the suit had appropriated payments to the unsecured debts and were not restricted in the exercise of this discretion to the point of time when the payments were actually made.

We accordingly accept the appeal, set aside the decrees of the Courts below and decree in full for the plaintiffs with costs throughout.

R. L. *Appeal accepted.*

(3) (1897) A. C. 286; 66 L. J. P. C. 86; 76 L. T. 579; 45 W. R. 667.

(4) (1905) 1 K. B. 715; 74 L. J. K. B. 413; 92 L. T. 519, 21 T. L. R. 302.

*See *Kundan Lal* v. *Jagan Nath*, 30 Ind. Cas. 92: 37 A. 649: 13 A. L. J. 908.—[*Ed.*]

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 536 OF 1923.

July 10, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Graham.

DHANA MOHAMMED AND ANOTHER—DEFENDANTS—APPELLANTS

versus

NASTULLA MOLLA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 59—Mortgage—Improper attestation—Bond, if admissible as one for money—Evidence Act (I of 1872), s. 92—Contract in writing—Oral evidence if admissible.

A mortgage-bond for a sum below Rs 100 is not admissible in evidence when it is not legally attested. [p. 949, col. 1]

Oral proof cannot be substituted for written evidence of any contract which the parties have put into writing. [*ibid.*]

Subramanian v *Lutchman*, 71 Ind. Cas 650; 50 I. A. 77; A I R. 1923 P C 50, 44 M L. J. 602; 32 M L. T. 184; 25 Bom. L R 582, 1 R 66, 2 Bur L J. 25; 38 C. L. J. 41, 18 L W. 446, (1923) M W. N. 762, 28 C. W. N. 1; 50 C. 338 (P. C.), followed.

A mortgage-bond which cannot be proved as such can be admitted in evidence as a simple bond for payment of money. [p. 949, col. 2.]

Jagannath Khan v. *Bajrang Das Agarwala*, 62 Ind. Cas 97; 48 C. 61, distinguished.

Tofaluddi Peada v *Mahar Ali Shaha*, 26 C. 78; 13 Ind. Dec. (N. S.) 654, followed.

Appeal against a decree of the Officiating Subordinate Judge, Dinajpur, dated the 13th September 1922, reversing that of the Munsif, Additional Court, at Balurghat, dated the 15th July 1921.

Babus *Girija Prosanna Sanyal* and *Indu Prokash Chatterjee*, for the Appellants.

Babu *Dinesh Chandra Roy*, for the Respondents.

Babu *Biraj Mohan Majumdar*, for the Deputy Registrar.

JUDGMENT.—The plaintiffs sued the defendants on an alleged mortgage. The suit was contested on the ground that the mortgage-bond was not duly attested and that no consideration passed and that it was merely a *benami* transaction. The first Court held in favour of the plaintiffs on the question of attestation but dismissed the suit on the ground that the mortgage was a *benami* transaction. The lower Appellate Court has held that the bond was not properly attested but has disbelieved the defendants' case that the transaction was *benami* and has held that the consideration money was paid. He has granted the plaintiffs a decree with a direction that if the defendants do not de-

posit the decretal dues within three months they will be absolutely debarred from all rights to redeem the property.

It is contended on behalf of the appellants that after finding that the bond was not properly attested the lower Appellate Court should not have held that there was a valid mortgage. This decision is based on the finding that the loan was for less than Rs. 100 and that the plaintiffs got possession of the property, so a document was unnecessary. In our opinion on the finding that the bond was not legally attested the lower Appellate Court was wrong in holding that the mortgage had been proved. It is pointed out by the Judicial Committee of the Privy Council in *Subramonian* v. *Lutchman* (1) that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. There is a further difficulty in the plaintiffs' way. Assuming that the mortgage could be effected by delivery of possession and that this could be proved although the bond has been executed, there is no finding that possession was delivered in order to effect a mortgage. Though the plaintiffs had got possession of the property it is the defendants' case that this possession was obtained by them as *adhiars*. The first Court accepted the contention of the defendants that the plaintiffs' possession was that of *adhiars* and that finding had not been reversed by the lower Appellate Court. If the plaintiffs were put in possession as *adhiars* the finding of the lower Appellate Court would not be sufficient to establish a mortgage by delivery of possession on payment of the money advanced.

On behalf of the respondents it is contended that the finding of the lower Appellate Court that the document wes not attested is wrong. Reliance is placed on the decision of a Divisional Bench of this Court to which one of us was a party in *Jagannath Khan* v. *Bajrang Das Agarwala* (2). What was held in that case was that the writer of a mortgage-bond may be a competent witness to prove its execution. It was certainly not held that a witness who signs the bond before the mortgagor is a witness who has attested the bond as required by s. 59 of the Transfer of Property Act. Though the bond cannot be proved as a mortgage-bond it is no bar to its being admitted in evidence if it is regarded as a simple bond for payment of money. In the case of *Tofaluddi Peada* v. *Mahar Ali Shaha* (3) it was held that when a suit is brought upon a mortgage-bond although the mortgage is held to be invalid on the ground that the requirements of s. 59 of the Transfer of Property Act were not satisfied the plaintiff is entitled to recover upon the covenant, the money which the defendant covenanted to pay. In this case, therefore, the bond though not admissible to prove a mortgage is admissible to prove a covenant to re pay money, and on this covenant the plaintiffs are entitled to a decree for the amount that has been decreed by the lower Appellate Court.

The appeal is accordingly allowed to this extent :—The decree of the lower Appellate Court will be modified by striking out the last sentence, " defendant do deposit the decretal dues within three months, on default defendants be absolutely debarred from all right to redeem the property."

As the appeal has been only partially successful the parties will bear their own costs in this Court except as regards the minor respondents whose costs have already been paid.

M. B. *Appeal allowed : Decree modified.*

(1) 71 Ind. 650, 50 I A 77, A. I R 1923 P. C. 50, 44 M. L. J 602, 32 M L T 181; 25 Bom L R 582, 1 R. 66, 2 Bur L J 25, 38 C. L J 41; 18 L W 446; (1923) M. W. N 762, 28 C W. N 1, 50 C. 338 (P. C).

(2) 62 Ind. Cas. 97; 48 C. 61.

(3) 26 C. 78; 13 Ind. Dec. (N. S.) 654.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No 1489 OF 1925.

December 3, 1925.

Present:—Mr. Justice Dalip Singh.

LACHHMAN SINGH—INSOLVENT—APPELLANT

versus

RAM DAS AND OTHERS—CREDITORS AND OFFICIAL RECEIVER, GURDASPUR—RESPONDENTS.

Insolvency—Mortgage of insolvent's property

The Court has jurisdiction to mortgage an insolvent's property but ordinarily such a course should not be adopted

Mann v. *Girdhari Lal*, 61 Ind. Cas 664, 2 L 78, referred to

Miscellaneous first appeal from an order of the District Judge, Gurdaspur, dated the 25th May 1925.

Mr. *Shamair Chand*, for the Appellant.

Lala *Badri Das*, R. B., for Lala *Faqir Chand*, for the Respondents.

JUDGMENT.—The ruling reported as *Manji* v. *Girdhari Lal* (1) was evidently not brought to the notice of the learned District Judge. I accept the appeal and remand the case to the learned District Judge to dispose of the application with reference to the remarks in that ruling in the last paragraph at pages 81, 82*. The Court has jurisdiction to mortgage the land but ordinarily such a course should not be adopted. It is not clear if the learned District Judge considered the matter from this point of view. He should do so and then arrive at a decision.

R. L. *Appeal accepted. Case remanded.*

(1) 61 Ind. Cas. 664; 2 L. 78.

*Pages of 2 L.—[*Ed.*]

MADRAS HIGH COURT.

CIVIL APPEAL No. 88 OF 1922.

July 24, 1925.

Present:—Mr. Justice Odgers and Mr. Justice Madhavan Nair.

DOST MUHAMMAD KHAN SAHIB AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KADAR BATCHA SAHIB—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s 92—Muhammadan mosque—Scheme suit—Worshippers, right of—"Interest in trust", meaning of—Residence in neighbourhood without habitual worship, whether sufficient—Muhammadan Law—Wakf—Muttawalship—*Succession*

The interest in a public trust for the purposes of a suit under s. 92, C P. C, must be clear, present and substantial and not remote and fictitious or purely illusory or a mere contingency. Beyond that, the question is one of fact, and must be left to the Court to be decided on a consideration of the particular circumstances of each case [p. 952, col 1.]

Persons who reside in the neighbourhood of a mosque without being habitual worshippers in it or in any manner specially interested in it, although as Muhammadans they may have a right to offer prayers therein, do not possess sufficient "interest in the trust" within the meaning of s. 92, C P. C., to entitle them to institute a suit under the section [p. 951, col. 2.]

Ramachandra Iyer v. *Parameswaran Munbi*, 50 Ind. Cas. 693; 42 M 360; 36 M L J. 396; 25 M. L T. 304; 9 L. W. 492, (1919) M. W. N. 370 and *Vaidyanatha Ayyar* v. *Swaminatha Ayyar*, 82 Ind. Cas 804; 47 M. 884; 47 M L J. 361; 35 M. L. T. 189, A. I. R. 1924 P. C. 221, (1924) M. W. N. 749; 10 O. & A L. R. 1076, 26 Bom. L. R. 1121, 20 L. W. 803; 22 A. L J. 983; 40 C. L J. 454; 29 C. W. N. 154; 51 I. A. 282. 26 P. L. R. 1; L. R. 6 A. (P. C.) 17, 1 O. W. N. 617 (P. C.), relied on.

Gopala Krishnier v. *Ganapathy Aiyar*, 58 Ind. Cas. 121; 12 L. W 772 at p. 775; (1920) M. W. N. 478 and *Garuda Sanyasayya* v. *Nerella Muthemma*, 48 Ind. Cas. 740; 9 L. W. 1; 35 M. L. J. 661, 25 M. L. T. 86, distinguished.

Per *Madhavan Nair, J.*—Under the Muhammadan Law in the absence of any rules laid down by the founder of the mosque, the *muttawalli* for the time being may validly appoint a successor to himself. [p. 956, col 2.]

Appeal against a decree of the Court of the Subordinate Judge, Tanjore, in O. S. No. 11 of 1919.

Mr. *P. R. Ganapathi Iyer*, for the Appellants.

Mr. *S. Varadachariar*, for the Respondent.

JUDGMENT.

Odgers, J.—In this case four plaintiffs Muhammadans brought a suit under s. 92 of the C. P. C. for the removal of the defendant from the management of mosque Pallivasal in Ellaimankoil Street, Tanjore and for consequential reliefs including a scheme for the management of the said mosque. The 1st plaintiff is stated in the plaint to reside at Chunnambukara Street, the 2nd plaintiff at Kollupettai Street, 3rd at Attumanthai Street, and the 4th out of Fort, Tanjore.

The appeal has been argued before us on the point of want of interest of the plaintiffs under the section of the C. P. C. and also with a view to establishing certain charges set out in plaint para. 8 (*f*) (*g*) (*i*) and (*l*) in order to prove certain mismanagement in respect of the temple accounts and property. The learned Judge has dismissed the suit on all points and I shall proceed to deal with the first point, that of interest as, in my opinion, the appeal can be disposed of on that ground.

The defendant in his written statement alleges that the plaintiffs are not residents of the locality, nor do they live close to the plaint mosque. They have never worshipped in the mosque nor have they any right to do so. By a stone inscription, Ex. B appearing in the mosque, it would seem that Bapu Vaidyar erected the mosque about the year 1847 or 1848. Exhibit A is a settlement deed of 1879 by one Amir Khan Sahib, grandson of the founder in which he settles Rs. 4,000 worth of property for the benefit of the charity established by his ancestors in the mosque in Elliammankoil Street, Tanjore, and appoints his foster son who is the defendant to enjoy the trust property and apply the income to it. On the evidence the learned Judge has found

that the 1st plaintiff who is the *duffadar* of the District Court of Tanjore lives far away from the plaint mosque there being three other mosques nearer to his house and that his opportunities for attending the plaint mosque are limited to the occasions when he happens to visit his second wife when she is living in her mother's house. The 2nd plaintiff says that he attended the mosque when he went to his brother's house for meals. As there is ill-feeling between the two, it is improbable that he would go to his brother's house for this purpose. He admits that he had not been to the mosque in the month of *Ramzan* for the past seven or eight years, or on the 12th day of the *Barabafat* month all of which are festive occasions among Muhammadans. The 3rd plaintiff is a native of some village in Pudukottah and admittedly he went for prayers to one or other of the two mosques which are near his shop and would appear to have no occasion to go to this mosque in the Elliammankoil Street. Fourth plaintiff lives in the same street as the 3rd. He admits that he had been employed in different places in different capacities for the last 10 or 15 years and, consequently he would have had no opportunity of going to this mosque for prayers. There are further other mosques near his house, three within half a furlong and one within a furlong. He says he used to go to Elliamman Street to collect moneys for his employer. He, however, admits that he has not for the last 2½ years gone to that street for this purpose. It is, therefore, found by the learned Judge and in fact admitted by the learned Vakil for the appellants that none of these plaintiffs can be said to be habitual worshippers of the plaint mosque. Mr. P. R. Ganapathi Iyer for the appellants contends first that every Muhammadan is entitled as such to attend any mosque for wordship, and this may be at once admitted to be correct. He relies not only on this but also on the fact that the plaintiffs are residents of the locality and his contention is that these two points, *i. e.*, right to worship and residence in the locality taken together would afford the interest acquired under s. 92. The test to be applied has been authoritatively laid down as far as we are concerned by the judgment in *Ramachandra Iyer* v. *Parameswaran Munbi* (1). That was a well-known case in which Mr. T. R Ramachandra Iyer claimed interest as a member of the Hindu community and, thereby alleged title to institute a suit in respect of a temple in Tellichery. In the full and instructive judgment delivered in that case by Wallis, C. J., the history of the provision of law is traced and the learned Chief Justice came to the conclusion that in order to entitle a plaintiff to sue under the section "he must have a clear interest in the particular trust over and above that which millions of his countrymen may be said to have by virtue of their religion." The learned Cheif Justice after referring to the amendment of the section which originally contained the words "direct interest" was of opinion that even after the amendment the words "interest in trust" must still, in Lord Eldon's words, be 'a clear interest' that is to say, a present and substantial, and not a remote and fictitious or purely illusory interest and further "that interest if the provision is not to be altogether illusory, must arise from some special relation in which the plaintiff stands to the endowment in question as compared with the whole body of religious community throughout India" On a difference of opinion between the learned Chief Justice and Kumaraswami Sastri, J., who took the view that the right of worship in a particular temple is sufficient interest under the section, the case was referred to three learned Judges of this Court one of whom was Abdul Rahim, J. Had this learned Judge said in his judgment anything particularly applicable to mosques as distinguished from temples, it would in my view have earned great weight. He agreed with Kumaraswami Sastri, J., and held with him that the section gave the right to institute actions to secure proper administration of temples and mosques to all persons who have a right of attendance and worship at these religious foundations. The majority of the Court, however, Oldfield and Coutts Trotter, JJ.. held otherwise and agreed with the judgment of the Chief Justice. Oldfield, J., in the course of his judgment said: "Proof of residence in the neighbourhood of the institution will no doubt be one way of establishing possession of an interest, not by any analogy with the rights of parishioners in England, but on the simpler ground that those who live near to the institution will be most likely to take advantage of its benefits."

(1) 50 Ind Cas. 693; 42 M 360, 36 M L J 396, 25 M. L. T. 304, 9 L. W. 492, (1919) M W. N. 370.

It would, therefore, seem that the test of locality is only to be applied in relation to actual user of the temple or mosque by the inhabitants residing close to it. Coutts Trotter, J., was distinctly of opinion that the right to worship in a temple was not equivalent to interest and refused to import the definition in s. 15 of the Religious Endowments Act (As Wallis, C. J., had refused to do before) in order to interpret the meaning of s. 92, C. P. C. "The learned Judge continued. "In so far as the decided cases suggest a limitation, the limitation suggested is that of living in the neighbourhood of the institution in question and habitually resorting thereto for purposes of worship." On that, one can be asked "what is your definition of neighbourhood?" " What is your definition of habitual resorting ? " The learned Judge confessed that no universally applicable formula in answer to these questions could be discovered. All that can be done is to say that the interest required by the Statute must be clear, present and substantial and not a remote and fictitious or purely illusory interest or an existing interest and not a mere contingency. Beyond that the learned Judge was of opinion that the question was a pure question of fact, and must be left to the Court to decide on a consideration of the particular circumstances of each case. The latest case in the Privy Council *Vaidyanatha Ayyar* v. *Swaminatha Ayyar* (2) does not touch the present matter. It seems to me unnecessary in the light of the judgment of the majority of Judges in *Ramachandra Iyer* v. *Parameswaran Munbi* (1) to examine the earlier cases on the subject and applying that case to the facts of this case as previously set out, it appears to me that it cannot be said that the plaintiffs had anything but an illusory or fictitious interest in this mosque. They either did not worship there at all or worshipped on such rare occasions and such long intervals that they cannot be said to have a real or clear interest as required by the decision. It appears to me perfectly clear that Mr. P. R Ganapathi Iyer's suggestion is that the residents of the same town have the requisite interest even if they do not worship at the particular temple or mosque in question. It is, however, clear on the decision in *Ramachandra Iyer* v. *Parameswaran Munbi* (1) that so long as they have the right to do so, they must be shown to have some interest over and above the rest of the residents of the locality of their own community who are entitled as members of that community to take part in the worship conducted in the institution. This the plaintiffs are not shown to possess. We are referred to one decision in *Garuda Sanyasayya* v. *Nerella Muthemma* (3) where the point arose but is dismissed in three lines of the judgment. It was a case of choultry and the learned Judges held that as the plaintiffs were residents in the locality in which the choultry was situated and were members of the community for whose benefit the charity was founded, it was sufficient to give them interest to institute a suit for its management. Wallis, C. J., was one of the Judges who decided that case which was prior to this decision in *Ramachandra Iyer* v. *Parameswaran Munbi* (1). In my opinion, therefore, the learned Judge in this case was right in dismissing the suit on the point of want of interest in the plaintiffs.

It is unnecessary in the view I take on this point to discuss the question of the charges. But I may add that having carefully considered the matter I should, if necessary, be of opinion that none of the charges have been established against the defendant. On all these grounds, therefore, it appears to me that the appeal must be dismissed with costs.

Madhavan Nair, J.—This appeal by the plaintiffs arises in a suit instituted by them under s 92 of the C. P C. in which they prayed for the removal of the defendant from the management of the plaint *musjid* (mosque) and its endowments for the appointment of new trustees, for the taking of accounts and for a scheme for the proper management of the mosque. The plaint mosque is situated in Elliammankoil Street, Tanjore, and was founded by Bappu Vaidyar in *Hijiri* 1243 (1847-1848). On the 1st of November 1879, Amir Khan Sahib, the grandson of Bappu Vaidyar and last of the family of the original founder made a settlement, Ex. I, by which he endowed the mosque with some property and appointed his foster-son "as the person entitled to enjoy the proper-

(2) 82 Ind. Cas 804; 47 M. 884; 47 M. L J 361; 35 M. L. T. 189, A I. R. 1924 (P C.) 221; (1924) M. W. N. 749; 10 O & A L R 1076, 26 Bom. L. R. 1121; 20 L. W. 803; 22 A. L. J. 983; 40 C L J. 454; 29 C W. N. 154; 51 I. A. 282; 26 P. L. R. 1; L. R. 6 A. (P. C) 17; 1 O. W. N. 617 (P. C.).

(3) 48 Ind. Cas. 740, 9 L. W. 1; 35 M. L. J. 661; 25 M. L. T. 86.

ty endowed for charity and to carry out the charity by means of its income" specifying in the deed the main objects for which the income of the properties was to be utilised. The plaintiffs alleged in their plaint that they resided close to the mosque and were interested in it and in the trusts relating thereto, that the defendant was not the *de jure* or rightful trustee, that he had committed various breaches of trust and that, in consequence he should be removed from the management of the mosque and its properties. The defendant in his written statement pointed out that the plaintiffs were not residents of the locality, that they had interest in the plaint mosque as contemplated by s. 92 of the C. P. C. that he was "not only the *de facto* but the *de jure* trustee also" and that he was not guilty of any of the breaches of trust specified in the plaint. Various issues were framed by the Subordinate Judge dealing with the allegations in the pleadings, but the appellants, confined their arguments only to the finding of the Subordinate Judge as regards five issues these being.—Issue I. "whether the plaintiffs have sufficient interest in the plaint mosque and is the suit sustainable."

Issue II "whether the defendant is not a *de jure* trustee?"

Issue V "whether item 3 of Sch. A of the plaint ever belonged to the trust?"

Issue VIII "whether the defendant has committed all or any of the breaches of the trust alleged in the plaint and is he liable to be removed from the trusteeship?" and

Issue IX "whether a scheme is necessary and if so, on what terms?"

The learned Subordinate Judge found against the plaintiffs on all these issues and, in consequence, dismissed the plaintiffs' suit.

The first question to be considered is whether the plaintiffs or any of them have the "interest" in the trust within the meaning of s. 92 of the C. P. C., entitling them to maintain the suit. As the decision of this question will to some extent depend upon the facts of the case, it is necessary to state in some detail the evidence bearing on it and my conclusion thereon before dealing with the cases relied on by the appellant's learned Vakil. The 1st plaintiff who is examined as the 10th witness for the plaintiff has been in Government service since 1883, and since 1890 he is employed in the District Court of Tanjore as a *duffadar*. His place of residence since 1902 is Chunnambukara Street which is five or six furlongs off from the plaint mosque situated in Ellaimmankoil Street. He states that his grandfather had a house opposite to the mosque and he lived in it for thirty years and has then gone often and offered prayers in the mosque. The latter statement is not supported by independent evidence. His grandfather's house has been sold to the defendant's brothers He married in 1891 his second wife who has a house in Elliammankoil Street. When she lived with her mother for seven or eight years on account of her quarrel with his first wife, he states that he used to visit her and then used to go to this mosque in the morning on Sundays and in the evening on other days. He admits that there are two mosques within about two furlongs from his house As *duffadar* he states that he was to be in Court at 10-30 A. M. and until such time as the District Judge sits and that while on duty in Court he used to make prayer only if he had time. Although according to their religion the Muhammadans were to offer prayers five times a day, the evidence shows that it is not necessary to make these prayers in the mosque as they may be offered at any place where they happen to be at the time. Though this witness says that he has been offering prayers in this mosque regularly, the evidence of the defendant is that this witness has never gone to the plaint mosque for offering prayers. It is to be noticed that there are mosques which are nearer to his present place of residence than the plaint mosque. The evidence in the case seems to suggest that though he may have offered prayers in this mosque, he might have done so only on those occasions when he happened to visit his second wife when she lived in her mother's house. It may be noticed that he has till now instituted four scheme suits and he does not appear to be a man of means.

The 2nd plaintiff is examined as the plaintiff's first witness. He has been living in Pambatti or Kalapathi Street out side the Fort away from the *musjid* for the past seven or eight years. Previous to that, it is true, he lived in Survappa Lane about one and a half furlongs from this mosque, but he does not seem to have been a regular worshipper in the mosque. He states that he used to go to the plaint mosque for prayer once in in two

or three days for the past seven or eight years. It is difficult to believe that he speaks the truth when he makes this statement. He admits that there is in the street, in which he lives a *musjid* about a hundred yards off from his house, and there are also other mosques nearer to his house. No special reason is assigned for his going to the plaint mosque for worship than to the mosques, nearer to his residence. He states that he has a shop in the Ayyankadai near the mosque that his brother lives in the fourth house from the plaint mosque and that he used to go to his brother's house from his shops for meals. It is suggested in the evidence of D. W. No. 2 his brother that there is ill-feeling between the two brothers and it is hardly likely that he would have taken meals in his brother's house. This witness admits that he has not gone into the *musjid* during the past seven or eight years in the month of *Romzan* or on the twelfth day of the *Barabafat* month—both important festive occasions in Muhammadan mosques. On the defendant's side it is stated that this witness used to go very rarely to the plaint mosque for offering prayers. The witness states that he has not been on speaking terms with the defendant in this case for the past ten or twelve years owing to ill-feeling. It appears to me from this evidence that this witness might have only occasionally visited the mosque for offering prayers.

The 3rd and 4th plaintiffs are examined as the 8th and 9th witnesses for the plaintiffs. Their evidence is not of much importance. Plaintiff witness No. 8, a native of Puddukottah is a trader and lives near Pambattikara Street, in which there is a mosque and near which also there is another one. He admits that he used to offer prayers there. He has no dealings in Ellaiamankoil Street in which the plaint mosque is situated and his occasions to go there are few. He does not remember how many years ago he went to the plaint mosque first. Plaintiff witness No. 9 also like the other witnesses says that he offered prayers in this mosque, but it is extremely doubtful if he has so done except very rarely. He lives away from the mosque and has been employed in different places which would suggest that he would have had no opportunity to go to this mosque. There are mosques near his place of residence. He states that he went inside this mosque one and a half or two years ago.

My conclusion from the summary of the evidence given above is that, though the plaintiffs may be said to reside in the neighbourhood of the mosque, they are not habitual worshippers in it, nor are they in any manner specially interested in the mosque, though as Muhammadans they like the others have admittedly a right to offer prayers there. There are mosques nearer their places of residence which makes it unlikely that they would have gone to this mosque for worship frequently. The evidence also suggests that the plaintiffs in instituting this suit are not actuated by considerations relating to the improvement in the administration of the mosque and its properties.

In these circumstances, the question of law to be considered is whether the plaintiffs have the interest in the trust contemplated by s. 92 of the C. P. C. What is the nature of that "interest" has been elaborately considered in the Letters Patent Appeal in *Ramachandra Iyer* v. *Parameswaran Munbi* (1). In that case a suit was instituted under s. 92 of the C. P. C. for the removal of the trustees of a temple at Tellicherry and for other reliefs. One of the plaintiffs was Mr. T. R. Ramachandra Iyer. His interest in the trust entitling him to institute the suit was not based on the fact that he had worshipped in that temple once or twice when he went to Tellicherry in his professional capacity some eight or ten years ago, nor upon the fact that he was the President of the *Dharama Rakshana Snbha* but solely upon his right which he as a Hindu has of worshipping in every Hindu temple throughout India. It was there held that the mere right of a Hindu plaintiff to worship in a temple is not such an interest in the trust as to entitle him to sue under s. 92. It was argued that every Hindu temple must be presumed to be dedicated for the use of all Hindus and that each of the individuals has, therefore, an interest in the trust of every Hindu temple. This argument was overruled by Wallis, C. J., who after an exhaustive examination or the history of the section and of the case law relating to it held that interest in the trust must be "a clear interest" that is to say "a present and substantial and not a remote or fictitious or purely illusory interest," and also that that interest "if the provision is not to be altogether illusory must arise from special relation in which the plaintiff stands to the endowment in question as compared with the whole body of religious community through

out India." His Lordship also expressed the view that "the bare possibility, however, remote, that a Hindu might desire to resort to a particular temple gives him an interest in the trust appears to defeat the object with which the Legislature inserted these words in the section." The majority of the learned Judges who heard the Letters Patent Appeal on a difference of opinion between the learned Chief Justice and Kumaraswami Sastri, J., accepted the opinion of the learned Chief Justice. As his judgment shows, the observations therein on the question before me apply with equal force to the case of Muhammadans worshipping in Muhammadan mosques also. In *Vaidyanatha Ayyar* v. *Sawaminatha Ayyar* (2) their Lordships of the Privy Council expressed approval of the opinion of Wallis C. J. already quoted. In that case the suit under s. 92, C. P C. related to a *chattaram* and its properties and one of the questions for decision was whether the plaintiffs had the interest in the trust contemplated by that section. On that point their Lordships were of opinion that the fact that "the plaintiffs are descendants although only in female lines of the founder of the *chattaram* gave them an interest in the proper administration of the trust sufficient to enable them to maintain this suit, although they themselves may never find it necessary to use the *chattaram* as a rest house or to obtain food there". Mr. Ganapathi Aiyar does not call into question the correctness of the decision in *Ramachandra Iyer* v. *Parameswaran Munbi* (1), but argues that the case is an authority for the proposition that, if the plaintiffs reside in the neighbourhood of the suit institution such residence coupled with their admitted right to worship therein necessarily gives them the interest entitling them to institute the suit under s. 92, C. P. C. In support of this argument reference is made to certain passages in the judgment of Oldfield, J., and of Coutts-Trotter, J., but on examination it will be found that these passages do not lend any support to the argument advanced by the learned Vakil. Oldfield, J., states, that "proof of residence in the neighbourhood of the institution will no doubt be one way of establishing possession of an interest, not by any analogy with the rights of parishioners in England, but on the simpler ground that those who live near to the institution will be most likely to take advantage of its benefits." I have no doubt that by this statement the learned Judge did not mean to lay down as a proposition of law that residence in the locality coupled with the admitted right to worship in a temple or mosque means possession of an interest within the meaning of s. 92. The context makes it clear that, according to the learned Judge's view, proof of residence in the neighbourhood will be one of important facts to be considered in an enquiry regarding the question whether a plaintiff who has a right to worship possesses the interest in the trust contemplated by the section. The same is the view of Coutts-Trotter, J., also. It seems to me that to a very large extent the question as to whether any particular person has or has not an interest within the meaning of s. 92, C P. C. is mainly a question of fact to be decided on a consideration of the circumstances of each case. The question was so treated in *Gopala Krishnier* v. *Ganapathy Aiyar* (4) for the learned Judge, Sadasiva Iyer, who delivered the judgment, states thus "The first question argued in this appeal is whether the plaintiffs have got the necessary substantial interest to institute the suit having regard to the Full Bench decision in *Ramachandra Iyer* v. *Parameswaran Munbi* (1) On the evidence taken on remand, I am clearly of opinion that the plaintiffs have got such a substantial interest." The decision in *Garuda Sanyasayya* v. *Nerella Muthemma* (3) also does not support the position taken up by the appellants. Dealing with the question whether the plaintiffs have the interest to institute the suit under s 92 Wallis, C. J. and Seshagiri Iyer, J. state "They are residents of the locality in which the choultry is situated and are members of the community for whose benefit the charity was founded In our opinion, these facts, give them sufficient interest to institute the suit." It is clear that residence in the locality is to be treated only as a question of fact from which an inference may be drawn regarding the question whether a plaintiff who has a right to worship in a temple or mosque has or has not an interest to institute the suit. The other decisions quoted to us need not be discussed as all of them have been elaborately considered by the learned Chief Justice in *Ramachandra Iyer* v. *Parameswaran Munbi* (1) in dealing with the history of s. 92 of the C. P. C. I think that the facts of the

(4) 58 Ind Cas. 124, 12 L W. 772 at p. 775, (1920) M W. N 478.

case clearly show that though the plaintiffs reside in the neighbourhood, they really have no present and substantial interest in the suit mosque. Their interest in it is only fictitious or illusory. Being Muhammadans, they are no doubt entitled to worship in the mosque, but they are only occasional worshippers and, in my opinion, do not possess "the interest" entitling them to institute the suit under s. 92, C. P. C. as explained in *Ramachandra Iyer* v. *Parameswaran Munbi* (1).

The question raised by Issue II is whether the defendant is not a *de jure* trustee. The learned Subordinate Judge found on this issue against the plaintiffs. The case for the appellants on this issue presented before us by their Vakil is somewhat different from the one raised by them in their plaint and considered by the learned Subordinate Judge. Paragraph 7 of the plaint states, "the defendant was appointed by the said Amir Khan Sahib to be a person entitled to keep the enjoyment of the properties endowed from the charity and to conduct the charities out of the income of the same. The defendant is not appointed to be the trustee of the *musjid* assuming such appointment would be validly made, but he has been made *de facto* trustee of the *musjid* ever since the arrangement evidenced by the said document and ever since Amir Khan Sahib's death." No doubt the question as regards the validity of his appointment as trustee is referred to by the defendant in the written statement but the case raised by the plaintiffs (as may be seen from the paragraph quoted) is this, namely, that Amir Khan Sahib did not appoint the defendant as trustee of the *musjid* but only appointed him "to keep the enjoyment of the properties endowed for the charity and to conduct the charities out of the income," thereby drawing a distinction between a 'trustee of the mosque and a manager of the properties." This argument was overruled by the Subordinate Judge and has not been availed of before us by the learned Vakil as obviously Ex. I the deed of settlement does not support it and there is no other evidence to justify it. What has been argued before us is this, namely, that Amir Khan Sahib had no power to appoint the defendant as his successor. It is true that as foster-son the defendant is not entitled to lay any hereditary claim to the trusteeship, but Amir Khan Sahib was himself a *muttawalli* and it is a well-known principle of Muhammadan Law that, in the absence of the rules laid down by the founder of the mosque, the *muttawali* for the time being may validly appoint a successor to himself. The present defendant was so appointed in 1879 and, in my opinion, he is a validly appointed trustee.

Issue V raised the question, whether item 3 of Sch. A of the plaint ever belonged to the trust? This item consists of two shops. The appellants' case is that they formed the mosque property and that the defendant sold them to his brother against the interest of the trust, the defendant's case being that they were his absolute private property. It is conceded that there is no document showing that these shops ever belonged to the mosque. It is admitted that the mosque has no other properties except those left to it by Amir Khan Sahib under Ex. I and it is not disputed that these two shops are not included in Ex. I. In this connection our attention has been drawn to Exs. II, III, IV, V and V (*a*). In these documents which dealt with a house which was mortgaged and afterwards sold, Khadar Batcha's shops (*viz.*, these shops belonging to Khadar Batcha the defendant) are described as one of the boundaries and the 1st plaintiff has attested them. It has been argued before us that these documents are legally inadmissible in evidence, but this objection does not seem to have been taken in the lower Court, nor has it been raised in the grounds of appeal before us. Even if we ignore these documents, it follows from what has been pointed out above that these shops do not belong to the mosque. The plaintiffs rely on a recital in Ex XVI the sale-deed under which the defendant conveyed these two shops to his brother Moideen Batcha (D. W. No. 4). The recital is that the shops in question "were originally enjoyed by Amir Khan Sahib and are now enjoyed by me." In view of the admitted fact that all the properties belonging to the mosque were endowed to it under Ex. I and that Ex. I does not contain the shops in question, the statement in Ex XVI is not as important as it might otherwise be. The defendant offers his own explanation and that has been accepted by the Subordinate Judge. The plaintiffs themselves have no personal knowledge of the endowment of the shops of the mosque. In my opinion, there is no reliable evidence on the plaintiffs' side to show that these

two shops belonged to the mosque. In view of the admitted facts of the case and Ex. 1, I am satisfied that the learned Subordinate Judge has arrived at a correct conclusion on this issue.

Issue VIII relates to the question whether the defendant has committed all or any of the breaches of trust alleged in the plaint and is he liable to be removed from the trusteeship? In the plaint fourteen specific breaches of trust are alleged against the defendant but the learned Vakil for the appellants in his arguments before us has confined his attention mainly to charge (1) namely, that "no proper accounts are maintained by the defendant." Even here he did not deal with all the various circumstances discussed by the learned Subordinate Judge under this head. He had limited his arguments mainly to a consideration of the income and expenditure of the mosque and the general irregularities in the keeping of accounts by the defendant. As regards the income and expenditure the case of the plaintiffs is that the lands should yield about 500 *kalams* a year or at least 200 *kalams* after 1911 as spoken to by the defendant himself and that the expenditure would at the highest even according to the defendant amount to only about Rs. 300 while the evidence on the defendant's side is that the income would be about Rs. 250 all of which had to be spent for the expenses of the mosque. The evidence on the side of the plaintiffs as regards the income from the plaint lands is extremely unsatisfactory. On this point we have been referred to the evidence of P. W. No. 1. He states that the lands will yield an annual income of 500 *kalams* of paddy, that he saw the lands for the first time two or three years prior to the institution of the suit when he went to the locality to ascertain their condition. He went and saw the lands along with two or three others, but he does not remember them now. At the time when he saw them the lands were not cultivated. From what he saw he could not say whether the lands were in good or bad condition. He does not know personally the income of these lands. It is clear that this witness knows nothing about the lands in question, least of all about the income. According to this witness it would cost Rs 500 to conduct all the charities mentioned in Ex. I. Plaintiff witness No. 10 makes a vague statement that the net income of these lands per year would be Rs. 700 for the past eight or ten years and that prior to it the income would be Rs. 600 or Rs. 500. He does not give particulars justifying his statements. He states that for the past seven or eight years paddy is sold at from Rs. 2-12 to Rs. 4 per *kalam*, but there is no independent evidence to support it According to him the expenses would come to over Rs. 600 in all per annum. In the absence of reliable and disinterested evidence on the side of the plaintiffs, we have to accept the evidence given on the defendant's side. Here it is pertinent to remark that the appellants themselves have sought to support their case more by relying upon the evidence given by the defence than on the evidence given by the plaintiff's own witness. It is admitted that, when the defendants took up the management of the trust in 1879, the lands of the mosque consisted of both *nanja* and *punja*, that the *punja* lands yielded nothing and that he connected them into *nanja* lands by spending his own money and thus made the lands more valuable for the trust. As D W. No. 1 the defendant states, "When I took up the management the *nanjas* yielded only 60 or 70 *kalams* and the *punja* lands did not yield anything. Then one *kalam* of paddy was sold at from 14 annas to Rs. 1-1-0." He states that "from 1911 onwards these lands yielded on an average 200 or 210 or 220 *kalams*. As the price of the paddy is now high the income of these lands would now be enough to meet the expenses in the mosque. But previously when paddy was sold at a low price, I was spending my own money for the expenses of the mosque. The price of the other articles has also arisen just like paddy." Defendant witness No. 3 states that he does not know the income; but approximately a sum of Rs 200 or Rs. 300 would be spent in the mosque. Defendant witness No 6 states that the defendant would spend in all about Rs. 200 or Rs 250 a year and the lands would also yield only Rs. 200 or Rs. 250. The finding of the Subordinate Judge that the accounts show that the defendant has advanced a sum of Rs 4,027-6 0 to the mosque has not been challenged before us. It is true that the defendant has appropriated Rs. 829-6-0 from the trust funds towards his advance. The defendant seems to have entertained a mistaken idea that as the charity is his own, he has the rights to do additional charities at his own expense and afterwards appropriate the same from the lands at the

time when they yielded. The general effect of the evidence on the defendant's side is that the trust is evidently a poor one owning only a few properties which were not worth very much and that the defendant carried on the management as best as he could making both end meet. Whenever there was a deficiency of income he supplied funds from his own pocket. In my opinion, it has not been proved that in any particular year or for any number of years there remained any appreciable surplus from the income of the temple lands after meeting the ordinary and the extraordinary expenses of the mosque and its reparis.

As regards the accounts, what has been pressed before us by the learned Vakil for the appellants is that they have been kept very irregularly. The defendant's own evidence discloses many irregularities in the keeping of the accounts. It is admitted amongst other things that he did not write these accounts daily but only once a month, that he destroyed the papers wherefrom the entries in the account-books were copied, that he has misled up his own funds with those of the trust and that he does not know to write the accounts properly. These various irregularities are referred to and dealt with by the learned Subordinate Judge in paras. 51 and 52 of his judgment. Though the conduct of the defendant in this matter cannot be approved by us, we have no doubt that the irregularities pointed out in the circumstances of this case do not justify us in holding that he should be removed on that account. I have examined the accounts of the mosque ranging from the year 1879 and in the ordinary course of things it will be too much to expect one to preserve all the vouchers for the various entries during this long period of about fifty years. It is true that the accounts are written in a very small book, but we have to remember that the trust is also a small one with a small income arising only from a single source and with expenses which do not range over many heads. Entries on account of the income and expenses cannot, therefore, be very large in number and this must account for the smallness of the account-book. The charge that the account-book has been written up after the institution of this suit, though suggested in the course of the argument, has not really been pressed before us and there is very little evidence to support it. The important facts to be noticed are that no specific misappropriation by the defendant of the trust funds has been pointed out, that it has not been shown that there is any clear false entry in the accounts or that there has been a failure on the part of the defendant to enter any item of income in them. The correctness of the entries regarding the expenditure has not been challenged. In his report in examination by the Court the defendant states that he does not use the trust funds for his private purposes. The correctness of this statement has not been disputed. Though the account-book has not been kept in an ideal manner, the defendant has not misappropriated any of the funds of the trust and has not written up false accounts. He has admittedly spent large funds of his own for the purposes of the trust. In these circumstances, I do not think that the irregularities pointed out are sufficient to remove the defendant from the management of the trust.

The next charge of breach of trust has been pressed against the defendant is that he has broken the direction in Ex. I, the settlement-deed to give in the name of Muhammad Nabi feast in the month of Ramzan and this involves an allegation that the defendant has altered the direction contained in the settlement-deed to suit his own purposes. If this charge is found to be true, that by itself will be enough to remove any trustee. This is not mentioned as a specific charge of breach of trust against the defendant in the items (*a*) to (*n*) mentioned in para. 8 of the plaint, but it has been dealt with by the lower Court in its judgment, paras. 37 and 38 and it has also been argued before us. Exhibit I contains the following directions: "Out of the income derived from that property, (1) the *musjid* lights be lighted every day, (2) extra lights should be kept there on festive days, (3) a *kathib* should be nominated to recite the *vedam* (*koran*) in the *musjid* on monthly pay, (4) feeding should be arranged for in the name of Muhammad Nabi in the *Ramzan* month and (5) one or two persons should be fed every day". The plaintiffs' case is that the word "*Ramzan*" which really is the month referred to in Ex. I has been altered into "*Rabbisani*" by the defendant and that, as a matter of fact, he has not been complying with the real direction contained in Ex. I to feed the Muhammadans in the month of *Ramzan*

The defendant's case is that he has really made no alteration in Ex. I that in the month of *Ramzan* all Muhammadans fast during day time, that no feast can be given during that month and that the feeding is in the month of *Rabbisani*. As regards the alteration, the volume containing this document was sent for from the Registrar's office by the Subordinate Judge and in that, it was found that the word written is "*Ramzan*" and not "*Rabbisani*" Ex. A, the registration copy of Ex. Y also contains the word "*Ramzani*". It must be said that there is an alteration in Ex. I regarding the month. Whoever made the alteration, I am not satisfied that it was the defendant who made it. If the plaintiffs wanted to charge the defendant with the express alteration of this document in one of its important particulars, they should have done so in the plaint which would have given the defendant an opportunity to meet it. The charges with regard to feeding mentioned in the plaint are clauses (*f*) and (*g*), namely, (*f*) "no food is given by the defendant to any person daily and no public feeding made by the defendant in *Ramzan* or any other occasion; (*g*) nothing is done in *Ramzan* month either according to Muhammadan religion and custom or according to the terms of the deed of 1879". These charges are met by the defendant in his written statement. The charge with which I am now dealing, *viz.*, that that defendant has altered a direction contained in Ex I seems to have been suggested and that only very faintly, in the course of the examination of the defendant. The evidence on this point that has been referred to by the learned Vakil for the appellants is what is spoken to by the defendant on the last day of his examination (3rd September 1921) which commenced the 13th July 1921. When he was re-called on the 3rd of September 1921, he stated thus:—"I produced in Court the two copies shown to me. My Vakil asked me to search and find them out if available, (the two copies referred to are Exs. XIX and XIX (*a*). "I got them from my records. They have been in my custody for the past 40 years. I filed Ex. I, one before the *Tahsildar* and one on another occasion in the *Jilla* Court and obtained succession certificate. Sivabiran Pillai who wrote Ex. I died eight years ago. I filed Ex. I in Courts and offices only after it was registered." In another place in the evidence given by the defendants we find, at page 52, that he states "In Ex. I it is written as Ramzan." No other evidence has been brought to our notice regarding this alteration. If the plaintiffs wanted to charge the defendant with this alteration in the settlement-deed, they should, in the first place, have stated it as a specific charge in the plaint itself and really cross-examined the defendant regarding the same. On the other hand, we find that no such thing has been done. The defendant while he was in the witness-box was not asked any question by the plaintiffs directly as to how the alteration in Ex. I which was in his possession was brought about. The document came into his possession from Amir Khan. The evidence is to the effect that feeding on a large scale is generally given in the month of *Rabbisani*. Amir Khan himself have, therefore, made this alteration after the registration of the document, and probably it was such an altered document that came into the possession of the defendant. There is absolutely no motive for the defendant to make this lateration. In the absence of clear evidence to show that the defendant has altered Ex. I we cannot infer that the alteration complained of was brought about by him. As regards feeding in the month of *Rabbisani* I am satisfied from the evidence that the defendant has complied with the provisions of Ex. I. Though the 2nd plaintiff says that feeding should be done in this mosque in the month of *Ramzan*, he has to admit that feeding is done in other mosques in the month of *Rabbisani*. It is generally admitted that all Muhammadans fast during day time in *Ramzan* and during night they take *kanji*. The 1st plaintiff states that Amri Khan fed people in the month of *Ramzan*, but he does not know whether the defendant did as a trustee or in his private capacity or out of what funds; and he also states that according to Muhammadan religion people are fed in the month of *Rabbisani*. The evidence on this point is dealt with at great length by the Subordinate Judge in para. 38 of his judgment. I do not think it necessary to pursue this point any further, as it is not the case of the plaintiffs that the defendant did not feed people in the month of *Rabbisani* (see P. W. No. 10's (*i. e.* 1st plaintiff's) evidence p. 34). The evidence of the defendant that feeding is generally done in the month of *Rabbisani* and that he has been so feeding the Muhammadans

has been believed by the Subordinate Judge. Charges (*f*) and (*g*) though referred to have not been specially pressed before us by the learned Vakil for the appellants, for there is abundant evidence that *kanji* was distributed to all the devotees who go to the mosque in the evening during the month of *Ramzan*. On a consideration of the evidence in the case, I am not satisfied that the defendant's continuance in the office which he has held ever since 1879 is incompatible with the interests of the institution and that he should be removed from its management.

It was suggested that, even if there is no case made out for removing the defendant from the management of the mosque, we should frame a scheme for its management. In view of the evidence in the case that has been put before us, we do not think that we are called upon to formulate any scheme.

In the result the appeal fails and must be dismissed with costs.

V. N. V. *Appeal dismissed.*

N. H.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 156 OF 1924.

August 19, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr Justice B. B. Ghose.

FAZALAR RAHAMAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ABDUL SAMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s 144—Limitation Act (IX of 1908), Sch I, Art 181—Restitution application—Limitation, operation of.

Where a decree is set aside in appeal, and the order is confirmed in second appeal, limitation for an application for restitution runs from the date of the order in second appeal and not from that in the first appeal.

Uma Charan Chakrabarti v *Nibaran Chandra Chakrabarti*, 75 Ind. Cas 2, 37 C. L. J. 452; A. I. R. 1923 Cal 389 and *Ram Charan* v. *Lakhi Kanta*, 7 B. L. R. 704; 16 W. R. 1, followed.

Limitation for a restoration application is three years under Art. 181 of Sch I to the Limitation Act.

Asutosh Goswami v. *Upendra Prosad Mitra*, 38 Ind. Cas. 17; 21 C. W. N. 564; 24 C. L. J. 467, relied on.

Appeal against an order of the District Judge, Chittagong, dated the 31st January 1924, affirming that of the Munsif, First Court at Patiya, dated the 27th of September 1923.

Babu *Charu Chandra Sen*, for the Appellant.

JUDGMENT.—This is an appeal against an order granting an application for restitution. The original decree was passed on the 12th June 1916. In execution of that decree certain money was realised by the appellants on the 17th February 1917. The decree was reversed on appeal on the 7th January 1920. There was a further appeal to this Court and the decree of the Appellate Court was affirmed on the 20th December 1921. This application for restitution was made on the 9th February 1923. On the authorities it is clear that the period of limitation is three years under Art. 181 of the Limitation Act [see *Asutosh Goswami* v. *Upendra Prosad Mitra* (1)]. The point we have to decide is whether this period of limitation runs from the 7th January 1920 when the decree of the first Court was set aside or from the date of its confirmation on second appeal to this Court.

In our opinion the lower Courts are right in holding that the time should be calculated from the later date. Though the facts are not the same we think the principles in the case of *Uma Charan Chakrabarti* v. *Nibaran Chandra Chakrabarti* (2) are applicable in the present case. There attention has been drawn to the lucid exposition of Mr. Justice Dwarka Nath Mitter in the case of *Ram Charan* v. *Lakhi Kanta* (3) of the true effect of the disposal of an appeal upon the decree of the primary Court:—"If the decree of the lower Court is reversed by the Appellate Court, it is absolutely dead and gone. If, on the other hand, it is affirmed by the Appellate Court, it is equally dead and gone, though in a different way, namely, by being merged in the decree of the Superior Court, which takes its place for all intents and purposes. Both the decrees cannot exist simultaneously." On the passing of the decree by this Court in second appeal the petitioners had a right to apply for restitution within three years of that decree, and this they have done.

We accordingly dismiss this appeal. We make no order as to costs.

N. H. *Appeal dismissed.*

(1) 38 Ind. Cas. 17; 21 C. W. N. 564, 24 C. L. J 467.

(2) 75 Ind. Cas. 2; 37 C. L. J. 452; A. I. R. 1923 Cal 389.

(3) 7 B. L. R. 704; 16 W. R. 1.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1538 OF 1923.

July 8, 1925.

Present.—Justice Sir Ewart Greaves, KT, and Mr Justice B B Ghose.

BANGSHI BADAN HALDAR—PLAINTIFF—APPELLANT

versus

RATAN *Ijardar* AND OTHERS—DEFENDANTS—RESPONDENTS

Bengal Tenancy Act (VIII of 1885), s 49 (b)—Ejectment, suit for—Lease for indefinite term—Landlord and tenant—Ejectment suit—Permanent tenancy—Onus

Where, in a suit for ejectment of a tenant the defendant sets up a permanent right the onus lies on him to substantiate his claim

A landlord is entitled to evict a tenant holding under a lease for indefinite period by a notice under s 49 (*b*), Bengal Tenancy Act

Raj Kumari Debi v *Barkatulla Mandal*, 12 Ind Cas 161, 39 C. 278, 14 C L J 107, 16 C W N 6, followed

Appeal against a decree of the Additional District Judge, Khulna, dated the 22nd December 1922, modifying that of the Munsif, Second Court at Khulna, dated the 28th June 1921.

Babu *Mukunda Behari Mallick*, for the Appellant.

Sir *P. C Mitter* and Babu *Satindra Nath Mukerjee*, for the Respondents

JUDGMENT.

Ghose, J.—This appeal arises out of a suit for ejectment of the defendants The plaintiff alleges that he purchased the *jama* which belonged originally to one Madhab Sardar in March 1908, the defendants are under-*raiyats* on whom he served notice under s 49 (*b*) of the Bengal Tenancy Act and that he is entitled to *khas* possession. Various pleas were raised in defence such as the plaintiff had not purchased any interest in the property; that he is not the sole owner of the holding and that the defendants were occupancy *raiyats* who had a heritable interest in the land and that no notice had been served under s 49 of the Bengal Tenancy Act. The Munsif found all the questions against the defendants and passed a decree in ejectment. On appeal by the defendants the lower Appellate Court found all the questions except one against the defendants. The point on which the lower Appellate Court disagreed with the Munsif was with regard to the nature of the interest the defendants as under-*raiyats* had in the land in suit. The lower Appellate Court seems to have thought that the under-tenancy might have been a permanent grant or at any rate a grant for an indefinite period and a lease was binding on the plaintiff and so he is not entitled to eject the defendants on service of notice to quit under the Bengal Tenancy Act. The defendants, however, did not produce any lease under which their right is supposed to have been created. It appears that there was a litigation between the predecessors-in-interest of the plaintiff and the defendants in the year 1896. The defendants' predecessor sued for possession of the land on the ground that he had been forcibly ousted by his landlord and in support of his case it appears that he produced a lease. That lease, however, has not been produced in this case It is alleged by the defendants documents have been destroyed by cyclone. But then they did not claim any under *raiyati* interest under any lease in the present suit But they claimed that they were occupancy *raiyats* and the lease if produced certainly would not have supported their plea. The Additional District Judge seems to have drawn the conclusion which is not warranted in the absence of any evidence that that lease was a permanent grant. If the defendants claim any permanent right it was for them to substantiate it which they have not done If the lease was for an indefinite period then under the ruling of the Full Bench in *Raj Kumari Debi* v. *Barkatulla Mandal* (1) the plaintiff would be entitled to seek for ejectment on service of notice under the Bengal Tenancy Act The decision, therefore, of the lower Appellate Court on this point is erroneous.

It was endeavoured on the part of the respondents to support the decree of the lower Appellate Court on the ground that the plaintiff was not the owner of the entire *jama*. This point was found by both the Courts below in favour of the plaintiff. What happened is this? When the property was sold the sale-certificate was taken in the name of the plaintiff and the *pro forma* defendant No. 5 and the plaintiff presented a petition in the execution case stating that the *pro forma* defendant would have a 4 annas share as he had promised to pay 4-annas share of the purchase-money. But the finding is that the *pro forma* defendant never paid his share of the purchase-money nor entered into possession

(1) 12 Ind. Cas. 161; 39 C. 278, 14 C. L. J. 407, 16 C. W. N. 6.

of the property. Both the Courts below have found that the plaintiff had all along been in possession of the *jama* purchased and upon that finding it cannot be contended that the plaintiff is not the owner of the entire property

The judgment and decree of the lower Appellate Court are, therefore, set aside and those of the Munsif restored with costs in this Court and in the lower Appellate Court.

Greaves, J.—I agree.

M. B. *Appeal decreed.*

N. H.

MADRAS HIGH COURT.

APPEALS NOS. 141 AND 195 OF 1923.

September 23, 1925.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, and Mr. Justice Reilly.

MANEPALLI SATANARAYANAMURTHI—DEFENDANT IN A. S. No. 141 OF 1923 AND RESPONDENT IN A. S. No. 195 OF 1923—APPELLANT

versus

THOMMANDRA ERIKALAPPA—PLAINTIFF IN A. S. No. 141 OF 1923 AND APPELLANT IN A. S. No. 195 OF 1923—RESPONDENT.

Vendor and purchaser—Sale of goods—Wrongful repudiation by buyer—Vendor's suit for damages—Vendor's ability to deliver goods, question of—Damages, measure of—Deposit with vendor, whether forfeited—Vendee, rights of.

In a suit for damages by a vendor for wrongful repudiation of goods, he cannot be defeated merely by its being shown that after repudiation by the buyer, he had not the goods to implement the contract actually in his physical possession. The vendor can show that he could have supplied the goods contracted for either from the open market or from any other source and in either case he would be entitled to maintain a suit for damages for wrongful repudiation [p. 962, col. 2]

British & Beningtons Limited v. *N. W. Cachar Tea Co. Ltd*, (1923) A C. 48, 92 L. J. K. B. 62, 128 L. T. 422; 28 Com. Cas. 265, followed.

In such a case if the vendor has got a deposit from the vendee towards the contract, he is not entitled to keep the whole amount of deposit irrespective of actual damages suffered. Where the actual damage suffered is less than the amount of deposit, the vendee is entitled to refund not only of the amount of difference between the two, but also to interest thereon. [p. 963, col. 1.]

Appeals against a decree of the Court of the Subordinate Judge, Kistna, at Ellore, in O. S. No. 145 of 1921.

Mr. *Patanjali Sastry*, for the Appellant in A. S. No. 141 and the Respondent in A. S. No 195 of 1923.

Mr. *S. Varadachariar*, for the Respondent in A S No. 141 and the Appellant in A. S. No. 195 of 1923

JUDGMENT.

Coutts Trotter, C. J.—This case is really governed by the decision of the House of Lords in *British & Beningtons Limited* v. *N. W. Cachar Tea Co., Ltd.* (1). As I understand that case, it lays down that a seller is not to be defeated merely by its being shown that after repudiation by the buyer, he had not the goods to implement the contract actually in his physical possession. He can show that he could supply the goods contracted for either from the open market or from any other source and he would be entitled to maintain a suit for damages for wrongful repudiation.

In this case the contract was that the buyer should take the goods between the 20th and the 30th of April 1919. He did not do so and he set up a false defence that he sent two men to take delivery within the contract period. Those two men were called and gave evidence and the learned Judge refused to believe them. No Judge sitting as a Jury would have believed them because the seller wrote on 28th April 1919 reminding the buyer that the date of effluxion of the contract was drawing near and the buyer (plaintiff) did not answer that until as late as 6th May 1919 when he set up this lying story about the two men having gone for the rice and being sent empty away. Now a point had been taken in this Court by Mr. Patanjali Sastri, which is certainly ingenious, and it is this, that on the evidence before the Court which we have in form of depositions it was never proved by the seller that the goods he had were goods which corresponded to the description of the goods to be sold, it being common knowledge of course that there are different brands and different qualities of rice, and indeed different qualities were mentioned at the trial. Two witnesses were asked whether they knew, what sort of rice it was that the defendant proved to the learned Judge that he had at Ellore, and they spoke of some rice in somebody's godown and of some more that he could have got delivery

(1) (1923) A. C. 48; 92 L. J. K. B. 62; 128 L. T. 422; 28 Com. Cas. 265.

of against cash from the Bank. Of course the people who were asked those questions replied—there is no doubt that the Vakil knew that they would reply that they did not know. But unfortunately there is not a trace of that suggestion as to the quality not being right having been put to the defendant himself, the seller, who knew all about it. We are not to forget that the buyer's case at the trial was that he was entitled to have damages because he had asked for delivery and had not got it. In my opinion, it would be quite wrong to act on a suggestion of this kind when it is clear that the defendant was never given a fair chance of explaining it at the trial.

The buyer's appeal (A. S No 195 of 1923) will, therefore, be dismissed with costs.

With regard to the seller's appeal (A. S. No. 141 of 1923) he says first that, having got a deposit and there having been a failure by the buyer to take delivery, he ought to keep the deposit. His own original suggestion was that he should return the deposit less whatever he is entitled to by way of damages I can content myself with saying that it is never the practice in mercantile contracts, to hold that whatever be the damage suffered or not suffered, the seller is to be entitled to keep the deposit. He is only entitled to such damages as the learned Judge sitting as a Jury has suggested, namely, 12 annas, a bag, and I do not think we ought to interfere in a matter which is eminently one for the Trial Judge.

With regard to interest, it sounds plausible to say, as Mr Varadachariar has argued, that a person who is in default cannot possibly be heard to say that he is entitled to claim interest from the other side. The answer to it is the one that the learned Judge has given namely, that the seller should have made calculation of the damage he has actually suffered and tendered the return of the balance to the buyer. No doubt it puts a man in a difficulty and if he goes ultimately into a Court of Law he might have to justify his fixing the figure as best he could. But I take it that almost any tribunal would have an indulgent eye on the arithmetic of a man who adopted that straight-forward course. In the result the seller had the buyer's money in his hands for a good many years to the amount of the excess between what the Judge has allowed by way of damages and the amount of the deposit which was Rs. 4,001. I think here too the judgment of the learned Judge must be upheld and this appeal also will be dismissed with costs.

Reilly, J.—I agree.

V. N V. *Appeals dismissed.*

N. H.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2113 OF 1923.

July 17, 1925

Present :—Justice Sir Babington Newbould, Kt.

GOPAL CHANDRA DAS AND ANOTHER —DEFENDANTS NOS. 7 AND 8—APPELLANTS

versus

Kumar SATYA BHANU GHOSHAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Lessor and lessee - Permanent residential tenancy—Presumption, when arises—Fresh lease—Old tenancy, whether continued—Adverse possession by lessee

Where the origin of a tenancy for residential purposes is known, no presumption of permanency can arise [p 964, col 2]

Abdul Halim Khan Chaudhuri v *Elahi Baksha Saha*, 85 Ind Cas 103, 52 C 43, 29 C. W N 138, A I R 1925 Cal 309, followed.

A fresh lease executed after the expiration of the term of the previous lease creates a new tenancy and is not a confirmation of the previous tenancy [p 965, col 1]

A person who has lawfully come into possession as tenant from year to year or a term of years cannot by setting up, however notoriously, during the continuance of such relation, any title adverse to that of the landlord inconsistent with the legal relation between them, acquire, by limitation, title as owner or any other title inconsistent with that under which he was let into possession [p 965, col 2]

Rajah of Venkatagiri v *Mukku Narsaya*, 7 Ind Cas 202, 37 M 1, 8 M L T 258, (1910) M. W N. 369, followed

Drobomoyi Gupta v *Davis*, 14 C 323, 7 Ind. Dec (N s) 214 and *Seshamma Shettati* v *Chickaya Hegade*, 25 M 597, 12 M L J 119, distinguished

Appeal against a decree of the District Judge, 24-Pargannas, dated the 17th July 1923, reversing that of the Munsif, First Court, Alipur, dated the 29th September 1921.

Dr. *Dwarka Nath Mitter*, and Babu *Narendra Nath Mitter*, for the Appellants.

Babu *Surendra Nath Guha* and M. *Nuruddin Ahmed*, for the Respondents.

JUDGMENT.—This is an appeal against a decree in ejectment. The appeal is valued at Rs. 28 1-0. This valuation is made under the statutory provisions of the

Suits Valuation Act and the Court Fees Act and in no way represents the real value of the property. I am told if the defendants succeeded in establishing their claim to a permanent right to the land in suit the value of the property would be no less than Rs. 20,000.

The appellants before me are defendants Nos. 7 and 8 in the suit. The defendant No. 7 through his *benamdar* and son defendant No. 8 has purchased the tenancy interest of a holding which originally comprised two plots of land. One of these is about 14 *cottahs* in area situated on the east of Bridge Road Chetla and that is the plot which is the subject of the present suit. The other plot is to the west of the same Road and is about one *cottah* in area. The plaintiff served notices to quit on defendants Nos. 1 to 7 treating the tenancy as a tenancy-at-will.

The appellants-defendants contested the suit and before me the same contentions were urged as had been urged in the lower Courts. The following were the four points urged: *firstly*, that there had been no division of the original holding and that this suit being one for ejectment from a portion of the holding would not lie, *secondly*, that from the facts found by the lower Appellate Court the legal inference should be drawn that the defendants had a permanent tenancy; *thirdly*, that the defendants and their predecessors had acquired a right of permanent tenancy by prescription; and *lastly*, that the notice to quit was bad because it related to a portion of the holding and also because it had not been served on the defendant No. 8.

As regards the first point it appears that there was a partition of the estate in 1902 by a decree of the Civil Court. In that suit the 14 *cottah* plots which the subject of the present suit fell to the share of the plaintiffs and the other one *cottah* of the holding fell to the share of the co-sharers. Since then it is found that the plaintiffs and their co-sharers were realizing rent separately from the plots allotted to their share. It is contended that this finding is not sufficient to create a division of the holding which would be effective as against the tenants. But the finding of the lower Appellate Court is more than that. He has further found that the situation was accepted by the tenants of the landlords, and if this is correct and the tenants acquiesced in the division of the holding there can be no doubt that the lower Appellate Court was right in deciding that the holding was effectively divided. In my opinion the facts stated are sufficient to support this decision. It is pointed out that when the plaintiffs realized rents from the defendants by certificate procedure, though an objection was taken on behalf of the defendants that there were two plots that objection was not pressed, and no objection was taken that there was no appointment made. It is found further that there is no question here that the Tewaries, that is to say, the appellants' predecessors, were placed in any awkward position. On these facts I hold that the finding of acquiescence by the tenants is justified and there was such a division that the plot of land which formed the subject of the present suit became a separate holding.

As regards the second point the case-law on the subject has been fully dealt with in the recent judgment of Mr. Justice Chakravarti in *Abdul Hakim Khan Chaudhuri* v. *Elahi Baksha Saha* (1). At page 62* the elements which were found to have existed in cases where presumption of permanency was made are stated as follows:—*First*, the origin of the tenancy for residential purposes must be unknown; *secondly*, the existence of permanent *pucca* buildings on the land built long before any controversy arises and that to the knowledge of the landlord; *thirdly*, uniform payment of rent; *fourth*, recognition of successions and transfer by the landlord. On the findings in the present case it would appear that the second and fourth of these elements may be said to have been established. As regards the third though the payment of rent has not been uniform the increase has been light having regard to the market value of the land. But, in my opinion, this contention must fail on the ground that the appellants have failed to establish the first of the elements that the origin of the tenancy for residential purposes must be unknown. The plaintiffs have proved a *kabuliyat* of the year 1244 *B. S.* corresponding to 1837 A. D. The commencement of the *kabuliyat* which is the important portion is as follows:—"The term of the rented land measuring about 12 *cottahs* standing in my name situate in *Mouzah* Chetla *Pargana* Magura appertain to Kidderpore having expired I, Gopal

(1) 85 Ind Cas. 103; 52 C 43; 29 C. W. N. 138; A. I. R. 1925 Cal. 309.

*Page of 52 C. [Ed.]

Tewari again take the aforesaid land on the same rent for a period of one year from *Baisakh* of the current year up till *Chaitra* for residential purposes. I shall pay rent at the rate of Rs. 3 8 *sicca* Rs 3-11-9 per year according to the following monthly instalments. When the term of this *kabuliyat* expires and unless and until any second arrangement is made I will pay rent without any objection at the above rate".

For the appellants it is contended that this *kabuliyat* is a confirmatory lease recognizing the existing tenancy. Although it would appear from the *kabuliyat* that the executant had held the land previous to its execution, it also appears that the tenancy by virtue of which he held the land previously had come to an end, since it is stated that the term had expired A fresh lease executed after the expiration of the term of the previous lease creates a new tenancy and is not a confirmation of the previous tenancy, I would, therefore, hold that the tenancy of the appellants' predecessors commenced with this lease as evidenced by the *kabuliyat* and was, therefore, known I would further hold that even if this be not treated as the commencement of a new tenancy it is strong evidence in the plaintiffs' favour to show that the terms on which the land was let to the plaintiffs were not the terms of a permanent lease. Further if I were to hold that this is a case in which I have to consider whether permanent tenancy should have to be inferred from all the facts of the case it would be very hard for the appellants to explain the admission made by defendant No. 8 that what he had purchased was only a monthly *thica charaia* tenancy-at-will. Holding as I do that the origin of the tenancy is known it follows on the law as laid down in the case as already cited that no presumption of permanency should be made in the appellants' favour in the present case

I now come to the contention that the appellants' predecessors obtained a *mokarrari mourashi* right by adverse possession. What is found is that in 1868 they asserted that right and the landlords took no steps to contest that assertion In my opinion the mere assertion of such right by an admitted tenant would not create any right superior to that of his tenancy even though followed by possession for over 12 years. On behalf of the appellants my attention has been drawn to a decision of the Madras High Court in *Rajah of Venkatagiri* v. *Mukku Narasaya* (2). At page 9* it is stated. "So far as this Presidency is concerned, it would seem to be well settled that a person who has lawfully come into possession as tenant from year to year or a term of years cannot by setting up, however, notoriously, during the continuance of such relation, any title adverse to that of the landlord inconsistent with the legal relation between them, acquire, by limitation, title as owner or any other title inconsistent with that under which he was let into possession". The judgment further points out that this doctrine is consistent with the law in England. It then goes on to say "We do not find the doctrine has been formulated in the other High Courts in India In fact in Calcutta and Bombay, the view would seem to be that the assertion of the adverse right coupled with possession for the statutory period is enough". In support of this statement two Calcutta cases are cited, but neither of them contain a denial of the principle there stated The case of *Drobomoyi Gupta* v *Davis* (3) has been summarized and distinguished in an earlier decision of the Madras High Court, *Seshamma Shettati* v *Chickaya Hegade* (4) There the tenants who were held entitled to plead the right by prescription became trespassers from the date of the death of the widow and continued to hold the land for statutory period professing to hold the same as permanent tenants under the lease granted by the widow There is no doubt that a trespasser, whether he is a former tenant whose tenancy has come to an end or whether he is a tenant encroaching as in on other lands of the landlord, can by prescription acquire a tenancy right But no case of this Court has been shown to me in which it has been held that a tenant from year to year can by setting up a title adverse to that of his landlord acquire a title giving him a better right than that which he has under his contract of tenancy whereas the principle stated as established by the Madras High Court has been followed in *Birendra Kishore Manikya* v *Fuljan Bibi* (5) It was there held that while the contract of tenancy is in force either party cannot practically obtain a variation thereof by persisting for

(2) 7 Ind Cas 202, 37 M 1, 8 M L T 258, (1910) M W N 369
(3) 11 C 323, 7 Ind Dec (N S) 214
(4) 25 M 507, 12 M L J 119
(5) 38 Ind Cas 469, 25 C L J 467

*Page of 37 M.—[*Ed.*]

a long period in his assertion that the term is otherwise than what it really is. I, therefore, hold that since the defendants' predecessors were in possession as tenants on the terms of the *kabuliyat* which has been proved in this case the mere assertion by them in 1868 that they had *mokarrari mourashi* tenancy would not give them any greater right than they held under the lease.

The last point was not seriously pressed. As regards the deficiency of notice in consequence of its relating to a portion only of the holding the argument stood or fell on the success or failure of the argument on the first contention. It was conceded that on the findings that the defendant No. 8 was the *benamidar* of his father defendant No. 7 it could not be urged that any notice on him was necessary.

For the above reasons I hold that the appeal fails and is accordingly dismissed with costs.

N. H. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1235 OF 1925.

November 23, 1925.

Present:—Mr. Justice Dalip Singh.

ALLAH BAKHSH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

THE MUNICIPAL COMMITTEE OF ROHTAK THROUGH RAGHBIR SARAN, SECRETARY OF THE MUNICIPAL COMMITTEE, ROHTAK—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), ss 5, 12—Time allowed for copies, calculation of—Appeal filed with defective vakalatnama—*Subsequent filing of valid* vakalatnama, *effect of—Secretary Municipal Committee signing* vakalatnama—*Ratification by President, effect of—Extension of time—Discretion, exercise by Appellate Court—Punjab Municipal Act (III of 1911), s 193, proviso—Suit for declaration of ownership of site—Municipal Committee's ownership, question of.*

Time allowed for copies in filing an appeal should be calculated from the date of application up to the date when the copies are despatched, and not merely up to the date when they are ready. [p 966, col 2, p. 967, col 1]

Ghulla Singh v. *Sohan Singh*, 69 Ind. Cas 818, 3 L. 280; A. I. R. 1922 Lah 219, 4 L. L J 500, *Gurdit Singh* v *Charan Das*, 72 Ind Cas 797; A I R. 1922 Lah 415 and *Municipal Committee, Chiniot* v *Bashi Ram*, 69 Ind. Cas. 895; A I. R 1922 Lah 170, relied upon.

There is no authority for the proposition that because once a *vakalatnama* has not been objected to, it is good for all purposes and that an appeal filed with that defective *vakalatnama* is properly filed, Nor does a new power-of-attorney validate an appeal so far as the time for filing an appeal is concerned. But in these matters a Court should not be too meticulous especially when a person on whose behalf the appeal was filed has accepted or ratified the action of the person who filed the appeal on his behalf. [p. 967, cols 1 & 2]

Gopal Singh v. *Bhaga*, 69 Ind. Cas. 365; A. I. R. 1924 Lah. 296, construed

Khaira v *Nathu*, 55 Ind Cas. 990, 2 U. P L R (L.) 88, *Sri Chandan Bhuya* v *Haroo Sethi*, 11 Ind Cas. 387, 13 C L J 544, *Mohammad Ali Khan* v. *Jasram*, 23 Ind Cas. 164, 36 A 46, 11 A L J 1015, *Chhaunnessa Bibi* v. *Basir ar Rahman*, 5 Ind Cas. 532, 37 C. 399 at p 406, 11 C L. J 285 and *Banwari Rai* v. *Chethru Lal Rai*, 74 Ind Cas 1033, A I R 1924 Pat. 114, 2 Pat L R 174, referred to

Therefore, where a Municipal Committee or its President has endorsed the action of the Secretary in signing the *vakalatnama* for filing an appeal on behalf of the Municipal Committee, and the opposite party has not objected to the *vakalatnama* as originally filed in the suit, it should be considered that the Secretary was empowered by the Municipal Committee or its President to instruct the Pleader and had authority to sign the *vakalatnama* on behalf of Municipal Committee [p 967, col. 2]

Under the above mentioned circumstances provisions of s 5 of the Limitation Act may also be invoked, if necessary, for extending the time for filing the appeal. [p 967, col 2, p 968, col 1]

If a Court does not exercise a discretion which it might have exercised, it is open to the Appellate Court to exercise that discretion. [p 968, col 1]

In a suit for a declaration that the plaintiffs are owners of a site, which arises in consequence of Municipal Committee's refusal to permit the plaintiffs to build on the site, on the ground that there is a dispute about the ownership of the site between the applicant and the Municipal Committee, it is enough to decide whether plaintiffs are entitled to the property or not and it is not necessary to give a finding as to whether the property belongs to the Committee or not. [*ibid*]

Second appeal from a decree of the District Judge, Karnal, dated the 27th March 1925, reversing that of the Subordinate Judge, Fourth Class, Rohtak, dated the 29th August 1924.

Mr. *Shamair Chand*, for the Appellants.

Lala *Jagan Nath Aggarwal*, for the Respondent.

JUDGMENT.—In this appeal Mr. Shamair Chand for the appellant has, first of all, contended that the appeal before the learned District Judge was barred by time, because the time to be allowed for copies should be calculated from the date of application up to the date when the copies were ready for delivery and not up to the date when the copies were despatched. There is, however, one ruling of this Court reported as *Ghulla Singh* v. *Sohan Singh* (1) which holds the contrary. There are also two

(1) 69 Ind Cas. 818; 3 L. 280; A. I. R. 1922 Lah 219; 4 L. L. J. 500.

Division Bench rulings, *Gurdit Singh* v. *Charan Das* (2) and *Municipal Committee, Chiniot* v. *Bashi Ram* (3) in which it was held that time should be reckoned up to the date of despatch. Therefore, no force in this contention.

The next point argued by Mr Shamair Chand is that the appeal was not properly presented, because the *vakalatnama* of the Pleader representing the appeal was signed by the Secretary of the Municipal Committee and the Secretary had no power to institute an appeal. It seems that on the 26th of February 1925 the point was noticed by the learned District Judge and at that time the Pleader for the respondent stated that there was a resolution of the committee authorising the Secretary to file the appeal. The case was adjourned and on the same day Counsel re appeared and stated that there was no such resolution but that there was an endorsement on a paper by the President to the effect that the copy of the judgment may be sent to Lala Nanak Chand to file the appeal etc. The case was again adjourned to the 26th of March 1925, as the Pleader for the respondent asked for time to produce law on the subject On the 26th of March 1925 a power of-attorney signed by the President was put in. The learned District Judge held, however, that as the suit had been defended by the Municipal Committee and the *vakalatnama* in the suit was signed by the Secretary and no objection had been taken to the *vakalatnama* by the plaintiff and as further a new power-of-attorney signed by the President had been put in, therefore, on the authority of *Gopal Singh* v. *Bhaga* (4) and of *Khaira* v. *Nathu* (5) the appeal was properly filed But Mr Shamair Chand argues that *Gopal Singh* v. *Bhaga* (4) is not an authority for the proposition that the *vakalatnama* not objected to in the suit would be good for purposes of appeal and that *Khaira* v. *Nathu* (5) does not apply to the facts of the case, as here there was no question of oversight, though there might have been a mis-apprehension of law. I think that *Gopal Singh* v. *Bhaga* (4) does not lay down that once a *vakalatnama* has not been objected to it is thenceforward good for all purposes and that an appeal filed with that defective *vakalatnama* is properly filed. Mr. Shamair Chand further contends on the authority of *Sri Chandan Bhuya* v *Haroo Sethi* (6), a Division Bench ruling of the Calcutta High Court, that a new power of-attorney does not validate an appeal so far as the time for filing an appeal is concerned, in other words, that it has no retrospective effect, and he has also cited *Mohammad Ali Khan* v *Jasram* (7) in support of his contention Mr. Jagan Nath in reply has relied on *Chhayunnessa Bibi* v. *Basiraz Rahman* (8) and on *Banwari* v. *Chettru Lal Rai* (9) There is no doubt that *Sri Chandan Bhuya* v. *Haroo Sethi* (6), is the ruling most in point so far as the facts of the case are concerned, but it seems to me that the general principals of the other rulings lay down that in these matters a Court should not be too meticulous, specially when the person, on whose behalf the appeal was filed, has accepted or ratified the action of the person who filed the appeal on his behalf I think our own Court in *Khaira* v *Nathu* (5) also seems to lean to the view that in these matters the more lenient view should be taken and as the Municipal Committee or its President has undoubtedly endorsed the action of the Secretary and as the plaintiff did not object to the *vakalatnama* originally filed in the suit, I think it should be held that the Secretary was empowered by the Municipal Committee or by its President to instruct the Pleader and therefore had authority to sign the *vakalatnama* of the Pleader on behalf of the Municipal Committee. Further, having regard to all the circumstances of the case I should be inclined to extend the time under the provision of s 5 of the Indian Limitation Act if I considered it necessary to do so. No doubt, there was a delay of a month before the *vakalatnama* signed by the President was put in and this delay has not been successfully explained but in view of the conflict of rulings on the point it is possible that the legal adviser of the Municipal Committee did not consider that it was necessary to have a *vakalatnama* signed by the President. Mr. Shamair Chand has quite rightly laid stress on this delay and I have been pressed by the argument on this point. However, as I have stated above in all the circumstances of the

(2) 72 Ind Cas 797, A I R 1922 Lah 115.
(3) 69 Ind Cas 895, A I R 1922 Lah 170.
(4) 69 Ind Cas. 365; A I R 1924 Lah. 296.
(5) 55 Ind. Cas. 990; 2 U. P. L R. (L.) 88.
(6) 11 Ind Cas 387, 13 C L J 544
(7) 23 Ind Cas 164, 36 A 46, 11 A L J 1015
(8) 5 Ind Cas 532, 37 C. 399 at p 406, 11 C. L. J. 285
(9) 74 Ind Cas. 1033; A. I. R 1924 Pat 114, 2 Pat. L. R. 174.

case I would exercise my discretion in the matter and if necessary extend the time for filing the appeal. It is clear law and not contested before me that if a Court below does not exercise a discretion which it might have exercised, it is open to the Appellate Court to exercise that discretion. This point, therefore, is also repelled.

Lastly, Mr. Shamair Chand has raised a curious contention. He argues that this suit arose because the Municipal Committee refused the plaintiff permission to build on the land under the proviso to s. 193 which empowers a Municipal Committee to refuse permission to build on the ground that there is a dispute about the ownership of the site between the applicant and the Municipal Committee. Mr. Shamair Chand contends that, therefore, it is necessary in a case of this kind to decide not only whether the plaintiff is entitled to the property but also to decide whether the Municipal Committee is entitled to the property because in either event a decision by the Court would put an end to the dispute between the applicant and the Municipal Committee and then the terms of the proviso to s. 193 would not empower the Municipal Committee to refuse permission to build. I am, however, of opinion that the Legislature did not mean to confer any such right on an applicant to put a Municipal Committee to proof of its title to land in dispute. On the contrary, by not directing that a suit should be brought by an applicant when permission was refused by the Municipal Committee on this ground it by implication left the parties to their ordinary remedies at law. The plaintiff, therefore, could only ask for a declaration that the site was his. He could not ask for a declaration that the site was not the Municipal Committee's. Further, this point was not put into issue and does not seem to have been argued in this light before the learned District Judge or before the Trial Court. Mr. Shamair Chand relies on the words of the plaint which do state that the site does not belong to the Municipal Committee as well as assert that it belongs to the plaintiff, but having regard to the course of the suit I think that this was nothing more than the usual tautology of the plaint, and I do not think that the point should be allowed to be raised for the first time in second appeal, especially as it would necessitate a remand to enable the Municipal Committee to prove its title.

I, therefore, dismiss the appeal but in the peculiar circumstances of the case I leave the parties to bear their own costs, throughout.

R. L. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 644 OF 1923.

September 23, 1925.

Present:—Justice Sir Charles Gordon Spencer, KT., and Mr. Justice Madhavan Nair.

P. V. VEERANAN AMBALAM—DEFENDANT—PETITIONER

versus

AYYACHI AMBALAM—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), ss 30, 65—Chit fund transaction, whether lottery Suit by non-prize-winner against stakeholder for return of subscription, whether maintainable—Contract, whether void from inception

A chit fund consisted of 500 subscribers, each subscribing Rs 2 per mensem At the end of each month a chit was drawn by lot and the winner was paid Rs 100 Thereafter his connection with the chit fund ceased altogether and he was not under any obligation to continue his subscriptions According to the rules of the fund, the drawing would thus go on for 50 months when the chit fund would be wound up, the stakeholder paying back to the remaining subscribers the total amount subscribed by each of them. In a suit by a non-prize-winner after subscribing for 48 instalments for return of amount of subscription with interest

Held, that the chit fund transaction was a lottery and the plaintiff was not entitled to recover the amount either by virtue of the contract or by reason of any obligation under s 65 of the Contract Act as if the contract had become void [p 969, col 2, p 973, col. 1]

Nagappa Pillai v *Arunachalam Chetty*, 85 Ind Cas 1016, 47 M L J 876, A I R. 1925 Mad 281, *Sankunni* v *Ikkora Kutti*, 52 Ind Cas 989, (1919) M W N 570, 10 L. W 155, 37 M L J 209 and *Richards* v *Starck*, (1911) 1 K B 296, 80 L J K B 213, 103 L T 813, 27 T L R 29, followed

Shanmuga Mudaliar v *Kumaraswami Mudali*, 90 Ind Cas 420, 21 L. W 403, A I R 1925 Mad 870; (1925) M W N 655, 48 M 661, dissented from

Wallingford v *Mutual Society*, (1880) 5 A C 685, 50 L J Q. B 49, 43 L T. 258, 29 W R. 81, *Kamakshi Achari* v *Appavu Pillai*, 1 M. H. C R 448 and *Vasudevan Nambudri* v. *Mammod*, 22 M. 212, 8 Ind. Dec. (N S) 151, distinguished.

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise a decree of the Court of the District Munsif, Melur, dated the 12th March 1923, in S. C. S. No. 1281 of 1922.

Mr. *A. N. Krishna Aiyangar*, for the Petitioner.

Mr. *K. V. Srinivasa Iyer*, for the Respondent.

JUDGMENT.

Spencer, J.—Two questions have been argued in this civil revision petition. The first is whether the chit transaction, in which the petitioner was the promoter and the respondent was a subscriber, partook of the character of a lottery or consisted of wagering agreements between the subscribers and the promoter. The second is whether the respondent is entitled to recover the money which he subscribed either upon the terms of the contract between him and the petitioner, or by reason of the obligation cast by s. 65, Indian Contract Act, upon the persons who have received any advantage, of restoring it upon an agreement or contract becoming void or being discovered to be void.

The mere fact that the order in which members of a Mutual Benefit Society take their benefits is determined by the drawing of lots does not constitute the transaction a lottery [*Vide Wallingford* v. *Mutual Society* (1)]

In the particular form of chit transaction that is before us, 500 persons undertook each to subscribe two rupees at each instalment and there were to be 50 drawings at each of which the winner was to get Rs 100 and walk out without any liability to subscribe for any subsequent instalments In other words the promoter laid odds of 98 to 2 at the first drawing against any particular subscriber drawing the winning ticket. At the second drawing he laid odds of 96 to 4 with each of the remaining 499 subscribers, and so on till 50 drawings had taken place and 50 subscribers had drawn the prize of Rs 100.

The promoter was secure against loss as he got two rupees from each of the 500 subscribers for the first instalment and he paid out only Rs. 100 to the winner. After the 50th drawing those who had not drawn a prize were entitled to get their money back without interest. The promoter was able to pay the prizes to those who drew the winning numbers out of the subscriptions paid into his hands by the others, and he recouped himself from loss at the end by putting the money left in his hands from each instalment of subscriptions out to usury and pocketing the interest. The chance of getting a prize of Rs. 100 for a payment of two rupees at the first drawing four rupees at the second and six rupees at the third and so on, free from any further liability to the winner, was the bait for attracting investors. The adventitious character of the gains also had the effect of making the whole transaction a lottery and the agreements between the promoter and the subscribers wagering agreements within the meaning of s 30, Contract Act. All who took part in what the law regards as an unlawful transaction were in *pari delicto* and no participator in it can invoke the help of the law for enforcing his claims to recover any money entrusted to any person to abide the result of the drawings, even though the return of sums subscribed by those who were not lucky enough to draw winning tickets was one of the conditions of the transaction I agree with the opinion of Odgers, J , in *Nagappa Pillai* v. *Arunachalam Chetty* (2) that the agreement to re-pay the subscriptions in a case like this is not severable from the prize arrangement. Neither can a subscriber invoke s. 65 of the Contract Act, for the agreement in this case did not become void nor was it discovered to be void but it was void for illegality from its inception (see Indian Contract and Specific Relief Acts by Pollock and Mulla, 4th Edition, pages 365—368) and the object of the subscription, which was the formation of an association for conducting an unlawful system of lottery has been accomplished When money has been paid under an illegal contract which has been partially carried into effect, it cannot be recovered back [*Vide Kearley* v. *Thomson* (3)]

The respondent's Vakil relied upon *Shanmuga Mudaliar* v *Kumaraswami Mudali* (4), which, with due respect, I feel difficulty in regarding as a decision based on sound principles. That case and the one before us possess the common feature that the prize winners in the first 50 drawings were not bound to subscribe to instalments after they had won a prize The significance of this feature in a chit transaction, which makes it a gamble, has been missed by the learned Judges. In *In re Doraisami Mudaly* (5) there was a similar feature

(1) (1880) 5 A. C. 685, 50 L. J Q B 49; 43 L. T. 258; 29 W. R. 81.

(2) 85 Ind Cas 1016, 47 M L J 876, A I R 1925 Mad 281

(3) (1890) 24 Q B D 742, 59 L J Q B 288, 63 L T. 150, 38 W R 614, 54 J P 801

(4) 90 Ind Cas 420, 21 L W 403, A I. R 1925 Mad. 870, (1925) M W N. 655, 48 M. 661.

(5) 1 Weir 251.

in a chit transaction and it was observed by Collins, C. J., and Shephard, J.:

"This is clearly a lottery, for it depends entirely on the drawing of lots whether or not the prize of Rs. 100 falls to any given subscriber As the prize winner thereafter ceases to be a subscriber to the fund, it must necessarily follow that the rest out of whose subscriptions the prize has been paid and also continue to be subscribers, are the losers."

In *Shanmugna Mudali* v. *Kumaraswami Mudali* (4) Venkatasubba Rao, J., expresses an opinion that the fact that the money for the prizes really comes out of the interest on the capital fund contributed differentiates this case from other cases of lotteries. He says at page 109*.

"What the 449 members lose is the interest upon their money and what the first 49 members gain is a portion of the interest thus lost by the other subscribers."

But in *Richards* v. *Starck* (6) it was held that the loss of interest upon a subscriber's subscription was a sufficient loss to make a contract resting on a future event of an uncertain nature a gaming or wagering contract. In the present chit transaction, out of 500 subscribers there were 450 losers of interest on their money deposited with the promoter. The remaining 50 made a gain, the amount of which varied according to an order determined by the drawing of lots which thus depended not on skill but on pure chance.

It is true, as Ramesam, J., observes, that the Criminal Law by s. 291A, Indian Penal Code, only makes punishable the keeping of an office for holding a lottery and the publication of proposals for drawing a lottery. The Civil Law, however, goes further and prevents obligations arising out of lotteries being enforced in a Court of Law, whether the lottery is held in an office to which the public have access or in a private place to which admission is not to be had for the mere asking. The learned Judges were evidently much influenced in their decision by the case of *Wallingford* v. *Mutual Society* (1) That was a case of legitimate business free from speculation in which there were no losers and no one gained an unearned sum of money by the chance of drawing lots. The same may be said of the *kuri* chit dealt with in *Vasudevan Nambudri* v. *Mammod* (7).

The civil revision petition is allowed with costs and the plaintiff's suit is dismissed.

Plaintiff and defendant will each bear their own costs in the trial of the small cause suit in the District Munsif's Court.

Madhavan Nair, J.—I have had the advantage of reading my learned brother's judgment with which I agree. The suit which has given rise to this civil revision petition was instituted by the respondent for the recovery of a sum of Rs. 119-13 5, being the principal and interest due to him on account of the 48 instalments of subscriptions paid by him to a chit fund conducted by the petitioner. The chit fund consisted of 500 subscribers, each subscribing Rs. 2 per mensem. At the end of each month a chit was drawn by lot and the winner was paid Rs. 100. Thereafter his connection with the chit fund ceased altogether and he was not under any obligation to continue his subscriptions. According to the rules of the fund, the drawings would thus go on for 50 months when the chit fund would be wound up, the stake-holder paying back to the remaining subscribers the total amount ·ribed by each of them. The respondent. on-prize-winner, after subscribing for instalments asked the petitioner, the akeholder, to return to him with interest the money he has subscribed. The petitioner refusing to refund the amount contended that the chit fund was a lottery and that a suit was not maintainable to recover the amount. The learned District Munsif holding that the chit in question is not a lottery so far as non-prize-winners like the plaintiff are concerned, gave him a decree for the amount claimed.

It is argued for the petitioner that the transaction set forth above constitutes "agreements by way of wager" between the stakeholder and the subscriber and as such is void both on principle and on the authority of the decisions of this Court and that, therefore, the decree of the lower Court should be set aside In *Sunkunni* v. *Ikkora Kutti* (8), it was held by Phillips, J., that a "*kuri*" conducted on similar lines is a lottery and that the plaintiff's suit to recover the money paid is not maintainable. This decision was followed by Krishnan and Odgers, JJ., in

(6) (1911) 1 K B 293; 80 L. J. K. B. 213; 103 L. T. 813. 27 T. L R 29.

*Page of 21 L. W. –[*Ed.*]

(7) 22 M 212; 8 Ind Dec. (N. S.) 151.

(8) 52 Ind. Cas. 989, (1919) M. W. N. 570; 10 L. W 155; 37 M. L J. 209.

Nagappa Pillai v. *Arunachalem Chetty* (2), though the learned Judges differed on the question whether it was possible to hold that the agreement to re-pay the subscriptions at the end of the period was severable from the arrangement to give the prize. In *Shanmuga Mudaliar* v. *Kumaraswami Mudali* (4) Ramesam and Venkatasubba Rao, JJ., did not follow these decisions, their opinion being mainly influenced by a decision of the House of Lords in *Wallingford* v. *Mutual Society* (1). It may be stated that the chit fund in all those cases was conducted in the same manner as in the present case, the successful drawer of the ticket having nothing to do with the chit fund after drawing his prize

In the light of these decisions and of what is meant by an "agreement by way of wager", we have to determine whether the present case has been rightly decided by the learned District Munsif.

The Indian Contract Act does not contain any definition of a "wagering contract". Section 30 states that agreements by way of wager are void. In *Thacker* v. *Hardy* (9), Cotton, L. J., said.—

"The essence of gaming and wagering is that one party is to win and the other to lose upon a future event which at the time of the contract is of an uncertain nature, that is to say, if the event turns one way *A* will lose, but if it turns out the other way he will win."

In *Subramanian Pattar* v. *Kiradadasan* (10) it was pointed out that in a chit fund transaction the contracting parties are the stakeholder on the one side and each of the subscribers on the other side, and there are as many separate contracts as there are subscribers On analysis it will be found that the contract of the stakeholder with the subscribers in the present case partakes of the nature of a wagering contract. As pointed out in my learned brother's judgment·

"The promoter laid odds of 98 to 2 at the first drawing against any particular subscriber drawing the winning ticket. At the second drawing he laid odds of 96 to 4 with each of the remaining 499 subscribers, and so on till 50 drawings had taken place and 50 subscribers had drawn the prize of Rs 100."

This shows that the arrangement is really a bet between the subscribers and the stakeholder as to how a future event of an uncertain nature, *i. e.* the drawing of a winning ticket will eventually turn out. If a subscriber happened to draw one of the "winning tickets", *i. e*, if the uncertain event turned one way, obviously he would gain an increased amount of money; would he lose, if the event turned out the other way?

Since according to the rules, the non-prize-winners get back their subscription amount, it is argued that the present case falls within the principle of the decisions in *Iyyanan Kone* v *Vidoomada Kone*, S A. No. 169 of 1857, *Kamakshi Achari* v *Appavu Pillai* (11) and *Vasudevan Nambudri* v. *Mammod* (7), wherein it was held that, in chit fund transactions to which subscribers contribute monthly subscriptions, each subscriber in his turn as determined by lot taking the entire subscription for one month, there was no element of chance or risk, the money paid by each subscriber being eventually returned to him. In *Kamakshi Achari* v *Apparu Pillai* (11), such a transaction was thus characterised by the learned Judges

"It is not the case of a few out of a number of subscribers obtaining prizes by lot. By the arrangement all get a return of the amount of their contributions. It is simply a loan of the common fund to each subscriber in turn, and neither the right of the subscribers to the return of their contributions, nor to a loan of the fund is made a matter of risk or speculation. No loss appears to be necessarily hazarded, nor any gain made a matter of chance "

I do not think the same can be said of the transaction in the present case I have already shown how the subscriber's gain is made a matter of chance As regards the loss, the plaintiff, no doubt, gets back the entire capital which he has subscribed. In one sense, therefore, it is true that the transaction involves no loss in any event to the plaintiff as he is to have his money returned to him but he loses his interest. In England it has been pointed out in two cases of wagering contracts, similar in this respect (*viz*, loss of interest) to the present case, that this loss "of interest" is 'sufficiently a loss to bring the contract within the spirit, though not perhaps within the actual

(9) (1879) 4 Q. B. D. 685, 48 L J. Q B. 289; 39 L T. 595, 27 W. R. 158.

(10) 16 Ind. Cas. 686; (1912) W. N. 1235.

(11) 1 M. H. C. R. 448.

wording, of the definition" of a wagering contract [see *Richards* v. *Starck* (6)]. In *In re, Doraisami Mudaly* (5) in which also as in the case before us, the prize-winner after securing the prize ceased to be a subscriber, the fund closing after a stated period with a refund of their subscriptions to the unsuccessful members, it was held by Collins, C. J., and Shephard, J., that the transaction is clearly a lottery, "for it depends entirely on the drawing of lots whether or not the prize of Rs. 100 falls to any given subscriber." The learned Judges state :—

"As the prize winner thereafter ceases to be a subscriber to the fund, it must necessarily follow that the rest out of whose subscription the prize has been paid and also continue to be subscribers, are the losers. The case, therefore, is quite different from that in *Kamakshi Achari* v. *Appavu Pillai* (11)."

These decisions were not brought to the notice of the learned Judges in *Shanmuga Mudali* v. *Kumaraswami Mudali* (4).

In my view, the agreement in this case shows that the plaintiff gave his subscriptions to the defendant upon the terms that, in an uncertain future event, he was to recover, if that event went one way, the sum subscribed with considerable increment ; and, in the other event, he was to recover the total amount subscribed by him but *without interest*. This means that the transaction is, in substance, a wagering contract, which may be described, in the language of Channell, J., in *Richards* v. *Starck* (6) "as a bet on terms very favourable to the plaintiff."

For the above reasons I am of opinion that the decision in *Iyyanar Kone* v. *Vidoomada Kone*, S. A. No. 169 of 1857 *Kamakshi Achari* v. *Appavu Pillai* (11) and *Vasudevan Nambudri* v. *Mammod* (7) are clearly distinguishable and that the chit fund transaction in this case is an agreement by way of wager and is, therefore, void.

In the decision in *Shanmuga Mudali* v. *Kumaraswami Mudali* (4) strongly relied on by the respondent the learned Judge, Venkatasubba Rao, J., states : "There is some element of chance in regard to the first 49 subscribers ;... .. . but the dominant feature of the transaction is that it enables a large number to gradually lay by money and receive their savings in a lump sum and the scheme is in their case an incentive to thrift." With due respect to the learned Judge, I am inclined to think that it cannot be said that the primary object of a person in taking a chit in a fund like the present one is to lay by money, for receiving it back in a lump sum. The chance of winning a prize of Rs. 100 on payment of a subscription of Rs. 2 at the first drawing, Rs. 4 at the second drawing and so on during the fifty drawings is the attraction which tempts the subscribers to join in such a chit fund.

In arriving at their conclusion the learned Judges in *Shanmuga Mudali* v. *Kumaraswami Mudali* (4) were mainly influenced by the decision of the House of Lords in *Wallingford* v. *Mutual Society* (1). In that case a society called the "Mutual Society" was registered under the Companies Act. Its declared object was to accumulate capital by means of monthly subscriptions from members, to advance such capital to the members on rotation, to secure payment of such advances by taking and holding real or other securities and ultimately to divide among the members all the profits that had been made. The whole mode of operation of the Society appeared to be this ; To obtain subscriptions from members to advance them money on interest upon "certificates of appropriation." By Art. 27 it was declared that "appropriations shall be allotted in two ways, the first and every fourth one thereafter, by drawing, free of any premium or interest, while those intermediate shall be allotted to the member or members tendering the highest premium for the same respectively." All appropriations were to be re-paid by equal quarterly payments extending over twenty years from the advance. It was held that, though the benefits of the society were made available to the members by a process of periodical drawings, the society did not come within the mischief of the Lottery Acts and that the transaction it carried on was not a gambling transaction. The facts of the case show that amongst the subscribers, there were no losers and no one derived any undue gain by the chance of drawing lots. As pointed out in Halsbury's Laws of England, Vol. XV. page 301 : "Where the scheme has for its object the carrying on of a legitimate business the fact that it provides for the distribution of its profits, in certain events, by lot will not vitiate the scheme." The case resembles the deci-

sions in *Kamakshi Achari* v. *Appavu Pillai* (11) and *Vasudevan Nambudri* v. *Mammod* (7) already referred to and on principle is clearly distinguishable from the present case. It may be mentioned that Ramesam, J, deals with the case in *Shanmuga Mudali* v. *Kumaraswami Mudali* (4) as a suit to enforce the terms of a contract collateral to another transaction which can be enforced, even when the main transaction is void on account of being a wagering contract, unless it amounts to an offence punishable by law, though in the course of the judgment, the learned Judge agrees with Venkatasubba Rao, J, that the main contract itself is not void.

The respondent argues that, if the transaction is an agreement by way of wager and is invalid on that account, he is still entitled to get a refund of the amount claimed by him either under s. 65 of the Indian Contract Act, or on the ground that the agreement to return the amount is severable, from the arrangement to give the prize. I entirely agree with the opinion of Odgers, J., in *Nagappa Pillai* v. *Arunachalam Chetty* (2) for the reasons given by him in that judgment that the claim of the respondent in this case cannot be substantiated on either of the above grounds.

In the result I must hold that the decision of the learned District Munsif is wrong, and this civil revision petition must be allowed with costs as ordered by my learned brother.

V. N. V. *Petition allowed.*
N. H.

MADRAS HIGH COURT.

APPEALS AGAINST ORDERS NOS. 256 AND 269 OF 1919.

September 1, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Waller.

ADDEPALLI VENKATA GARUNADHA —PLAINTIFF—APPELLANT

versus

AKELLA KESAVA RAMIAH AND OTHERS —DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s 6 (e)—"Mere right to sue," what is—School Committee, transfer by, of school and assets to another Committee—Debt due to first Committee on account—Suit to recover by second Committee, maintainability of—Right on assignment, whether mere right to sue

Where a certain sum of money is due from a person, that sum is recoverable by an assignee on assignment, and if it is to be ascertained only on taking accounts, it might be that the right to take the account may not be assignable, but where the allegation is that the defendant is in possession of funds belonging to a person or that the defendant is accountable for a definite sum of money to a person, such a claim is transferable. In such a case the right to recover the money is not a "mere right to sue" within the mischief of s 6 (e) of the Transfer of Property Act [p 976, col 1]

The Committee of a school registered under the Societies Registration Act transferred to another Committee the institution and all its properties moveable and immoveable and delivered possession thereof In a suit by the Secretary of the second Committee against a person for recovery of money due to the first Committee of the school in the matter of wrongful rendering of accounts in respect of certain funds of the school

Held, (1) that the right of the first Committee to sue for and recover any amount due to that Committee did pass to the second Committee and the plaintiff was, therefore, entitled to bring a suit and it was immaterial that the specific debt was not mentioned in the schedule to the deed of transfer, [p 974, col. 2]

(2) that what was transferred was not a mere right to sue but the debt that was due by the defendant to the first Committee and, therefore, the transfer did not offend against s 6 (e) of the Transfer of Property Act [p 976, col 1]

Prohlad Chandra Das v *Biswa Nath Bera*, 82 Ind Cas 411, 51 C 972, 28 C W N 891, 10 C L J 79, A I R 1924 Cal 1047 and *Pansulari Venkataswami* v *Mentana Ramachandra Raju*, 18 Ind Cas 520, 38 M 138, 24 M L J 298, 13 M L T 218, (1913) M W N 285, distinguished

Gleyg v *Bromley*, (1912) 3 K B 474, 81 L J K B. 1081, 106 L T 825, *Subhadrayamma* v *Venkatapati*, 80 Ind Cas 807, 48 M 230, A I R 1924 (P C) 162, 47 M L J 93, 26 Bom L R 786, 20 L W 298, (1924) M W N 607, 29 C W N 57, L R 5 A (P C) 147 (P C), followed

Appeals against an order of the District Court, Kistna at Masulipatam, in A. S. No. 120 of 1919, preferred against a decree of the Court of the Subordinate Judge, Bezwada, in O. S No. 4 of 1917.

Messrs. *T Ramachandra Rao* and *K. Krishnamachariar*, for the Appellant.

Mr. *A. Krishnaswami*, for the Respondents.

JUDGMENT.

C M A. No 269 OF 1919.

The plaintiff, acting Secretary of Sri Kannika Parameswari Viswan Setti Venkataratnam Hindu High School Committee sues for the recovery of Rs. 4,278 5-9 from the defendants who are the sons of one Venkayya Garu. The plaint allegation is that Venkayya managed the the affairs of the High School and was in possession of considerable funds and that he rendered an account to the Committee of the school and that on going through the account, it was found that the account

rendered by him was incorrect and that a sum of Rs. 4,000 and odd was with him and that the defendants who are his heirs are bound to pay the amount to the plaintiff. The defendants raised various contentions and the Subordinate Judge of Bezwada dismissed the plaintiff's suit on the ground that the plaintiff had no cause of action against the defendants. On appeal the District Judge of Masulipatam reversed the decree of the Subordinate Judge and remanded the suit to the lower Court for taking accounts. Against the decree of the District Judge the defendants have preferred this appeal.

The point for determination in this appeal is whether the plaintiff has a cause of action against the defendants. The Hindu High School at Bezwada was managed by a Committee called Sri Kannika Parameswari Hindu High School Committee till November 1915. The Committee was registered under the Societies Registration Act of 1860 Owing to lack of funds or other reasons, the Committee transferred the institution and its properties to Sri Kannika Parameswari Visvam Chetti Venkataratnam Hindu High School Committee which was also registered under the Societies Registration Act of 1860. This transfer is evidenced by Ex. F, dated 18th November 1915. The contention of the appellants is that when the first Committee transferred all its rights to the second Committee, it did not transfer any outstanding belonging to the first Committee and, therefore, the plaintiff who is the Secretary of the second Committee is not entitled to sue the defendants for any sum of money that might be found due to the first Committee. From the terms of F, it is clear that the first Committee transferred all its assets and liabilities in connection with the Hindu High School at Bezwada to the second Committee. In para. 2 the recital is:—"Whereas the members of your Committee applied on 5th September 1915 praying that the management of Sri Kannika Parameswari Hindu High School at Bezwada and the entire properties thereof be transferred to your Committee on condition of your Committee discharging the debts due by the said High School Committee and in pursuance of the terms of the memorandum thereto attached, we have agreed thereto and the members of our General Committee have passed a resolution No. 8 on 19th September 1915 to the effect that our General Committee should be dissolved, that the management of the school as well as the properties should be transferred to your Committee subject to the terms of the said memorandum" etc, and in the operative portion of the deed there is this clause:—"Therefore in accordance with the said resolution we have hereby transferred to you the management of the school and delivered possession to you of the immoveable properties belonging to the said school worth about Rs. 30,000 and specified in schedules of moveable and immoveable properties."

The appellant wants to rely upon the fact that in the schedule of assets this debt due from Venkayya is not mentioned; but from the tenor of the document and from the recitals therein it is quite clear that the entire properties of the school were transferred to the second Committee. As the learned Judge remarks though there is no list of debts in the schedule to Ex. F, the debts of the old Committee incurred in connection with the school were discharged by the second Committee. One of the recitals is.—

"With this sum and with the sums which might be received hereafter the debts of the school should be discharged."

The second Committee did undertake to discharge the debts of the first Committee, and though no list of debts was attached to Ex. F, the second Committee was bound to pay all the debts of the first Committee. It is not necessary that when one Committee transfers all its assets to another Committee there should be a list in order to pass the title of the first Committee to the second Committee with regard to the outstandings. In this case the second Committee took over all that the first Committee possessed on behalf of the Hindu High School, Bezwada. The right of the first Committee to sue for and recover any amount due to that Committee did pass to the second Committee and the plaintiff is, therefore, entitled to bring a suit.

The next contention of the appellants is that the First Committee had only a right to sue Venkayya and a mere right to sue cannot be transferred by reasons of the provisions of s. 6 (*e*) of the Transfer of Property Act. The mere right to sue cannot be transferred. Here what was transferred was not a mere right to sue but the debt that was due by Venkayya to the first Committee and, therefore, the transfer does no offend against the provisions of s. 6 (*e*) of

the Transfer of Property Act. The plaint as laid contains an averment that Venkayya was indebted to the first Committee in the sum of Rs. 3,145 13-8 Venkayya was in possession of the funds belonging to the Hindu High School. He rendered an account which was afterwards found to be false and according to the plaintiff's case Venkayya was in possession of the funds of the Committee and, therefore, he was bound to pay that amount to that Committee, and the second Committee having taken over the management with the rights and liabilities of the first Committee is entitled to sue for and recover the amount due to the first Committee. The cases relied upon by the appellant *Prohlad Chandra Das* v *Biswa Nath Bera* (1) and *Pansulari Venkatasawmi* v. *Mentana Ramachandra Raju* (2) have no application to the present case. In *Prohlad Chandra Das* v. *Biswa Nath Bera* (1) it was held that a right to take accounts and to recover such sums as may be found due is not assignable being a mere right to sue within the meaning of s. 6, cl. (e) of the Transfer of Property Act. On the construction of the document and from the way in which the suit was framed it was found that the plaintiff was not entitled to maintain a suit as he had purchased a mere right to sue for account. In *Pansulari Venkatasawmi* v. *Mentana Ramachandra Raju* (2), it was held that a mere right to recover damages for the negligence of an agent in failing to collect rents cannot be transferred. The mere right to sue for damages is not assignable. In the *Pansulari Venkataswami* v. *Mentana Ramachandra Raju* (2) the cause of action was the negligence of the agent. If it was shown that the agent did collect a certain sum of money on behalf of the principal, the agent was accountable for the amount actually received by him; and for what he had with him, he was in the position of a debtor for he had the money of the principal in his hands. The assignment of the amount in the hands of the agent would not offend against s. 6 (e) of the Transfer of Property Act [*vide Madho Das* v. *Ramji Patak* (3)]. In *Prosser* v. *Edmonds* (4) the Lord Chief Baron held that a naked right to sue was not assignable. In *Hill* v. *Boyle* (5) it was held that a mere right to sue a trustee for interest and profits of a trust fund in his hands was not transferable

The observations of Parker, J , in *Glegg* v. *Bromley* (6), are applicable to the present case. At page 490*, the learned Judge observes: "it is to be observed that an equitable assignee of a chose in action, whether it is legal or equitable, could institute proceedings and maintain proceedings for its recovery. The question was whether the subject-matter of the assignment was, in the view of the Court, property with an incidental remedy for its recovery, or was a bare right to bring an action either at law or in equity With regard to the assignments of future property, they stand, I think, on a totally different footing. Nothing passes, even in equity, until the property comes into present existence. Only when this happens can the assignment attach and an interest pass."

This observation is quoted with approval by their Lordships of the Privy Council in *Subhadrayamma* v. *Venkatapati* (7). In that case the plaintiff's husband advanced certain sums of money for litigation to the defendant in the express agreement that the money borrowed from the plaintiff should have a charge upon the moveable and immoveable properties obtained by means of litigation. Owing to disputes between the plaintiff and the defendant, the plaintiff refused to advance any further monies. After a time the suit was compromised and the lender's widow claimed that the advance and the interest thereon were a charge on the money paid under the compromise. The Privy Council held that the plaintiff was entitled to a charge on the amount obtained on compromise in the suit. Their Lordships held that the agreement was an assignment of part of the fruits of the litigation, and even if they were to be regarded as non existing property at the date of the agreement, the

(1) 82 Ind. Cas. 411; 51 C. 972; 28 C. W N. 894, 40 C. L. J. 79; A. I. R. 1924 Cal 1017

(2) 18 Ind. Cas 520, 38 M. 138, 24 M L J. 298, 13 M. L. T. 218; (1913) M W. N 265.

(3) 16 A. 286; A. W. N. (1894) 84; 8 Ind. Dec. (N. S.) 186.

(4) (1835) 160 E. R. 196; 1 Y & C. 481; 41 R. R. 322

(5) (1867) 4 Eq. 260.

(6) (1912) 3 K. B. 474, 81 L. J K. B. 1081; 106 L T. 825

(7) 80 Ind Cas 607; 18 M 230, A. I. R. 1924 (P. C.) 162, 47 M L J 93; 26 Bom. L R. 786, 20 L W. 298; (1924) M. W. N. 607; 29 C. W. N 57, L. R. 5 A. (P C.) 147 (P C.).

*Page of (1912) 3 K. B.—[*Ed.*]

agreement attached upon the money being paid. The principle is that if a certain sum of money is due from any person that sum is recoverable on assignment; and if it is to be ascertained only on taking accounts it might be that the right to take the account is not assignable: but where the allegation is that the defendant is in possession of funds belonging to a person or that the defendant is accountable for a definite sum of money to a person such a claim is transferable. In such a case, the right to recover the money is not a mere right to sue and the transfer of such a right does not offend against s. 6 (*e*) of the Transfer of Property Act. In the result the appeal is dismissed with costs.

C. M. A. No 256 OF 1919.

In view of our judgment in C. M. A. No. 269 of 1919 the appellant does not press this appeal; it is dismissed with costs.

V. N. V.
N. H. *Appeals dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 566 OF 1923.
September 15, 1925.

Present:—Mr. Justice Viswanatha Sastri.

SEETHARAMA NAIDU—RESPONDENT No. 1—PLAINTIFF—APPELLANT

versus

GOVINDASAMI CHETTIAR AND ANOTHER—RESPONDENT No. 2—DEFENDANT—RESPONDENTS.

Madras Estates Land Act (I of 1908), ss 112, 189—Ryotwari *holding—Rent sale—Suit by real owner, maintainability of.*

The real owner of a *ryotwari* holding can sue in a Civil Court for a declaration that certain lands belong to him and that a sale thereof held under the provisions of the Madras Estates Land Act is fraudulent, invalid and not binding on him Such a suit is not barred by the provisions of s. 189 of the Madras Estates Land Act

Raja of Ramnad v *Venkatarama Iyer*, 69 Ind. Cas 923, 45 M. 890, 16 L W 274, (1922) M. W N. 501, 31 M L T. 158, 43 M. L. J. 264, A. I. R. 1923 Mad. 6 (F B), relied on.

Irulappan Servai v *Veerappan*, 69 Ind Cas 918, 42 M. L J. 113, 15 L W. 99, (1922) M. W. N. 67; 31 M L. T. 71, not followed.

Second appeal against a decree of the Court of the Subordinate Judge, Tanjore, in A. S. No. 43 of 1922 (A. S. No. 356 of 1921, District Court of Tanjore), preferred against that of the Court of the District Munsif, Pattukottah, in O. S. No. 567 of 1919.

Mr. *S. Muthiah Mudaliar*, for the Appellant.

Mr. *A. Kuppuswamy Iyer*, for the Respondents.

JUDGMENT.—The question in this second appeal is whether the real owner of a *ryotwari* holding can sue in a Civil Court for a declaration that certain lands belong to him and that a sale under the provisions of the Estates Land Act was "fraudulent, illegal, invalid and not binding, on him". Plaintiff who is the appellant in second appeal alleging that he was the real owner of the lands, and that the registered holder Rangaswami Naidu was only a *benamidar* sued to have a rent sale held at the instance of the first defendant, at which the second defendant became the purchaser, set aside on various grounds. The District Munsif found as a fact (1) that the notice Ex. X did not specify the holding in respect of which the arrear was due; and (2) that a large number of fields and a larger extent than necessary were sold in contravention of the provisions of s. 126 of the Estates Land Act. On these findings he held that the sale was invalid and gave the declaration asked for. The second defendant appealed and the Appellate Court allowed the appeal on two grounds:—(1) plaintiff, not being the *ryot* who was liable to pay rent on the holding, could not maintain the suit, and (2) no suit as contemplated by s. 112 of the Estates Land Act having been filed, the validity of the sale cannot be disputed.

Both the Courts have found that plaintiff had failed to get his name registered as a *pattadar*, and this finding has to be accepted. But the question is whether the circumstance prevents him from impeaching the sale in a Civil Court. That such a suit will lie in a Civil Court at the instance of a *ryot* (*pattadar*) has been held by a Full Bench of this Court in *Raja of Ramnad* v. *Venkatarama Iyer* (1) No case has been referred to in which it has been held that such a suit will not lie at the instance of a person who claims to be the real owner of a *ryotwari* holding. I am of opinion that such a suit is equally open to him.

The contention that s. 189 of the Estates Land Act barred the suit, is sought to be supported by the ruling in *Irulappan*

(1) 69 Ind. Cas 923, 45 M. 890; 16 L. W. 274; (1922) M. W. N.501, 31 M. L. T. 158; 43 M. L. J. 264; A. I. R. 1923 Mad. 6 (F. B.).

Servai v. *Veerappan* (2). In that case it is stated at page 115* that "to allow a person who has not taken action under s. 146, to ignore a rent sale at the time it is held and subsequently to dispute its validity in a civil suit would run counter to both these principles. Section 189 does not seem to me to allow of such a construction." If a *ryot* who has not instituted proceedings under s. 112, can come in with a suit in a Civil Court, as has been held in the Full Bench case above referred to, it is difficult to see why a person in the position of plaintiff cannot be allowed to do so. The case in *Irulappan Servai* v. *Veerappan* (2) does not appear to have been brought to the notice of the learned Judges who decided the Full Bench case; but nevertheless it appears to me that the ground on which the decision proceeded is no longer tenable, having regard to the Full Bench ruling.

I would, therefore, allow the second appeal and remand the case to the lower Appellate Court for decision upon the other issues raised in the case. Appellant will get a refund of the Court-fee paid on the memorandum of appeal. Appellant will have the costs of the second appeal and the other costs will abide and follow the result.

V. N. V. *Case remanded.*

N. H.

(2) 69 Ind. Cas 918; 42 M. L J. 113, 15 L W. 99, (1922) M W N 67, 31 M L T 71

*Page of 42 M. L J —[*Ed.*]

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 436 OF 1922 AND 362 OF 1923.

October 22, 1925.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, and Mr. Justice Viswanatha Sastri.

APPEAL NO. 436 OF 1922.

NIDAVOLU ATCHUTAM *alias* ACHUTARAMAYYA AND OTHERS—DEFENDANTS NOS. 3 TO 5—APPELLANTS

versus

RATNAJI CARRYING ON BUSINESS UNDER THE NAME AND STYLE OF RATNAJEE BHOOTAJI AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Hindu Law—Debts—Commercial debts of father—Pious obligation of son—Text of Gautama, whether obsolete.

A debt incurred by a father in the course of a hardware trade carried on by him, is a commercial debt and under the Hindu Law the son is under a pious obligation to discharge the same. [p 978, col 1]

Per *Coutts Trotter, C J*—The text of Gautama which describes a commercial debt as *vyavaharika* must now be held to have been declared as obsolete [*ibid*]

The particular instances of *vyavaharika* debts given in the *Smrities* must be treated as a mere expression of opinion on the part of the authors as to what classes of debts would fall under the general words A modern Court is, therefore, free in interpreting the general term "*vyavaharika*" to consider the particular instances given as obsolete under the conditions of the present day [*ibid*]

Appeal against the decrees of the Court of the Additional Subordinate Judge, Rajahmundry, in O. S. No. 25 of 1920 (O. S No. 16 of 1919 of the District Court, Godavari) and O. S. No. 24 of 1920 (A. S. No. 8 of 1923 of the District Court, Godavari).

Mr. *A. Satyanarayana*, for the Appellants.

Messrs. *G. Lakshmanna* and *V. Viyyanna*, for the Respondents.

JUDGMENT.

Coutts Trotter, C. J.—In this case the father of the appellants embarked on the hardware trade in 1914 and was sued with them in respect of debts contracted by him in the conduct of that venture. The appellants' Vakil relied on a text of Gautama XII, 41 which runs as follows .—

" Money due by a surety for a commercial debt, a fee due to the parents of a bride, debts contracted for spirituous liquor or in gambling and a fine shall not involve the sons of the debtor" and the bold contention is put forward that the pious obligation does not extend, therefore, to commercial debts. I have discussed this subject at length in para. 303 of the 9th Edition of Mayne on Hindu Law and I have very little to add to what I said there. This Court has held in *Thangathamma* v. *Arunachalam Chettiar* (1) that sons are liable in a case of a surety bond executed by the father for payment as distinct from obligations as a surety for appearance and for honesty and there are other decisions of the Calcutta and Patna Courts to the same effect. This appears to me to be based upon the view that the governing provision in the texts is that which excludes from the rule debts that are not *vyavaharika*, an expression taken from *Usanas* (*apud* Mitakshara II, 48) and Vyasa (*apud* Jagannatha I, V, 203).

(1) 48 Ind. Cas. 76; 41 M. 1071; 35 M. L. 229; (1918) M. W. N. 673.

From 1874 onwards the decisions of the Privy Council have adopted this view and have crystallised the translation as "illegal or immoral". It appears in *Girdharee Lall* v. *Kantoo Lall* (2) and has been repeated in many subsequent cases. If this be correct, it will follow as I have said that the particular instances given in the *Smirities* must be treated as a mere expression of opinion on the part of the authors as to what classes of debts would fall under the general words. A modern Court would, therefore, be free in interpreting the general term to consider the particular instances given as obsolete under the conditions of to-day. I am clearly of opinion that commercial debts fall into this category and that we ought to say that the pious obligation extends to them. It may well be that in the time of Gautama, it was thought that to engage in trade was degrading, at any rate in the case of the higher castes. No one could pretend that that view would be entertained to-day. For these reasons I am of opinion that the sons are liable in this case and that the appeals must be dismissed with costs.

Of course the whole doctrine of the pious obligation is itself a relic of antiquity based originally on a religious and not a legal conception but it has been controlled and moulded into shape by a series of decisions which, in my opinion, make it a working rule which in its actual application is neither inconvenient nor unjust.

A. S. No. 436 of 1922.

Viswanatha Sastri, J.—Appeal by defendants Nos. 3 to 5 against the decree of the Court of the Additional Subordinate Judge, Rajamundry, in O. S. No. 25 of 1920.

Appellants are the sons of the first defendant, and the second defendant is their maternal uncle. The suit was laid for the recovery of a sum of money (Rs. 6,898-11-6) due in respect of money dealings between defendants Nos. 1 and 2 and plaintiff. Defendants Nos. 1 and 2 are said to have carried on in partnership a trade in hardware, for the purpose of which trade money was being borrowed from time to time from plaintiff. It was also alleged that the first defendant and defendants Nos. 3 to 5 were undivided, and that the trade was being carried on by the first defendant for the benefit of the family. Defendants Nos. 3 to 5 contended that as they have become divided from their father (1st defendant) they had nothing to do with the trade; that the trade was never an ancestral trade nor a joint family trade; and that they were not liable. They also contended that the settlements of account alleged in the plaint, between plaintiff and defendants Nos. 1 and 2, were false. The Subordinate Judge held that the settlements of account were true, that the partition set up was brought about to defraud creditors; and he passed a decree against defendants Nos. 1 and 2, and against the joint family properties in the hands of defendants Nos. 3 to 5.

The contentions urged in appeal are :— (1) that the trade not being an ancestral trade, and the first defendant having started it only in 1914, appellants could not be held liable for sums said to have been borrowed for the purposes of the trade; (2) that as Rs. 1,926-6-3 and Rs. 695-3-0 were due from third persons, and as the partnership took them over, they (defendants Nos. 3 to 5) were in any event not liable for the sums. The contention that defendants Nos. 3 to 5 had separated themselves from their father was not pressed before us.

Taking the second contention first, the allegation in para. 6 of the plaint is that on January 5, 1918 defendants Nos. 1 and 2 "made themselves liable in the sum of Rs. 1,926-6-3 for the share of E. Venkatasubbarayudu in the *katha* debt due by him and another K. Venkatanarayana Row: and the pro-note debt of the said E. Venkatasubbarayudu in the sum of Rs. 695-3 0". In the case of a suretyship for payment, it may be taken as well settled that a Hindu son is liable: See *Sitaramayya* v. *Venkataramanna* (3), *Thangathamma* v. *Arunachallam Chettiar* (1), *Tukarambhat* v. *Gangasam Mulchand Gujar* (4) and *Rasik Lal Mandal* v. *Singhaswa Roy* (5). The decision in *Narayan* v. *Venkatacharya* (6) relates to the liability of a guardian and has no application to the case before us. The test of Gautama (s. 41) was referred to by the Vakil for the appellants, but it appears to me that Gautama simply repeats Manu (s. 159) and that he refers only to a suretyship for appearance. In the case of a suretyship for payment, the text of

(2) 1 I. A. 321; 22 W. R. 56; 14 B. L. R. 187; 3 Sar. P. C. J. 380 (P. C.).

(3) 11 M. 373; 4 Ind. Dec. (N. S) 260.

(4) 23 B. 454; 12 Ind. Dec. (N. S.) 301.

(5) 14 Ind Cas. 147; 39 C. 843; 16 C. L. J. 107; 16 C. W. N. 1103.

(6) 28 B. 406; 6 Bom. L. R. 434.

Yajnavalkya recognises the liability of a son. This contention, therefore, cannot prevail.

Coming to the first contention it was urged that the father was not continuing any ancestral trade but was starting a new trade, and that for debts contracted for a new trade, the sons were not liable. That under ancient texts a son was under a legal obligation to pay his father's debts was the opinion held by that eminent Judge(Muthusami Iyer, J) in *Ponnappa Pillai* v. *Pappuvayyanga* (7). According to Yajnavalkya if a father be long absent in a distant country or be dead the debt must be re-paid by the son. It is equally well settled that the son was not under any such liability in the case of debts contracted for illegal or immoral purposes. According to Yajnavalkya a son was not bound to pay a debt, even though hereditary if it was contracted for the purpose of drinking, debauchery or gambling. According to Gautama a son was not bound to discharge a debt incurred by his deceased father if due by him to a wine shop or a gambling saloon. "By the Hindu Law, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt". See *Hunoomanpersaud Panday* v. *Bobooee Munraj Koonweree* (8). In *Suraj Bunsi Koer* v *Sheo Persad Singh* (9) their Lordships of the Privy Council refer in the appeal the following *dictum* of Westropp, C. J., in the case of *Udaram Sitaram* v. *Ranu Panduji* (10) "subject to certain limited exceptions (as for instance, debts contracted for immoral or illegal purposes) the whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the debts of the father or grandfather".

In the case before us the trade the father carried on was a trade in hardware, and there was nothing illegal or immoral about it. There is not even any suggestion to this effect in the written statement;and all that is alleged is that the business was neither an ancestral nor family business, that the sons had become divided from their father; and that the business was carried on by the father for his sole benefit. The finding is that the business was carried on for the benefit of the family and that the partition was fraudulent. In *Ramkrishna Trimbak* v. *Narayon Shivorao Aras* (11) it was held that a son cannot escape liability for payment of the debts of his father contracted in fish trade. The decision in *Official Assignee of Madras* v. *Palaniappa Chetty* (12) is no authority for the proposition that where a Hindu father starts for the first time a new trade, and for the purpose of the trade contracts debts, his sons cannot be held liable for the debts so contracted. In that case the question arose in bankruptcy proceedings whether a Hindu son can be adjudicated insolvent in respect of debts incurred in a business newly started by his father during his minority, and in which he actively paricipated after attaining majority, and there was no question as to the liabilty of joint family properties, for such debts.

I would, therefore, dismiss the appeal with costs.

IN A S. No. 362 OF 1923.

Appeal by defendants. Nos 2 to 4 against the decree of the Court of the Additional Subordinate Judge of Rajahmundry, in O. S. No 24 of 1923.

Appellants are the sons of the first defendant and the suit was laid for the recovery of a sum of money (Rs. 3,050) due in respect of money dealings carried on between plaintiff and first defendant. It was alleged that the dealings were for the purpose of financing a trade in hardware which first defendant was carrying on for the benefit of the undivided family consisting of himself and his sons. Appellants contended that they had become divided from their father, that the trade was not an ancestral trade and that it was never carried on for their benefit The Subordinate Judge held that the dealings were proved that the partition was brought about to defraud creditors; and that the joint family properties were liable.

The contention urged in appeal is that the trade not being an ancestral trade and the first defendant having started it only in 1914, appellants could not be held liable for sums said to have been borrowed for purposes of the trade. The contention that they had separated from their father was not pressed before us.

This appeal was heard with Appeal 436 of 1922, and for reasons given in my judgment

(7) 4 M. 1 at p. 18; 1 Ind Dec (N s) 839
(8) 6 M I. A 393 at p. 421; 18 W R. 81n, Sevestre 253n; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552, 19 E. R. 147.
(9) 5 C. 148 at p. 169, 6 I. A 88; 4 Sar. P. C. J. 1, 3 Suth. P. C. J. 589, 4 C. L. R. 226, 2 Shome L. R. 242; 2 Ind. Dec. (N. s) 705 (P. C.).
(10) 11 B. H. C. R. 76 at p. 83.
(11) 31 Ind. Cas. 301, 40 B. 126, 17 Bom L R 955.
(12) 49 Ind. Cas 220; 41 M. 824; 24 M. L. T. 216; 35 M. L. J. 473; 8 L. W. 530; (1918) M. W. N. 721.

in that appeal, I would dismiss the appeal with costs.

V. N. V. *Appeals dismissed.*
N. H.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1089 OF 1925.
January 4, 1926.
Present:—Mr. Justice Martineau.
NARAIN DAS—DEFENDANT—APPELLANT
versus
SARAJ DIN—PLAINTIFF AND WADHAWA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art 144—Suit against co-mortgagor redeeming entire property—Denial of right to possession unless charg paid—Adverse possession—Limitation—Punjab Land Revenue Act (XVII of 1887), s 117—Suit for possession—Jurisdiction of Revenue Courts.

A suit by a co-mortgagor against another co-mortgagor who has redeemed the entire property is governed by Art. 144 of Sch. I to the Limitation Act and where the latter denies the right of the former to enter into joint possession until he has paid his share of the charge which the latter has defrayed, the possession of the latter is adverse and if it has continued for 12 years the suit is barred by limitation

Vasudev v. *Balaji*, 26 B. 500; 4 Bom L R 178 and *Basanta* v. *Dhanna Singh*, 55 Ind. Cas. 450, referred to.

Ram Narayan Rai v *Ram Deni Rai*, 63 Ind Cas. 282; A. I. R. 1923 Pat. 98; 6 P. L. J. 680, (1922) Pat. 129, not followed.

Wazir v. *Girdhari*, 71 Ind. Cas. 847; A I. R. 1923 Lah. 311, followed.

A Revenue Officer acting as a Court may determine the question of title arising in the partition proceedings but has no power to pass a decree for possession of the land of which the title is in dispute.

Lachhmi Bai v. *Hondi Bai*, 21 Ind Cas 719; 100 P. R. 1913; 7 P. L. R. 1914, 14 P. W. R. 1914, referred to.

Second appeal from a decree of the Additional District Judge, Lahore, dated the 26th January 1925, affirming that of the Assistant Collector, Kasur, District Lahore, dated the 24th March 1924.

Mr. *Shamair Chand*, for the Appellant.

Lala *Ganga Ram*, for the Respondents.

JUDGMENT.—The land in suit belonged to Gurdit Singh, who mortgaged it to Nihal Singh. After Gurdit Singh's death one of his four sons, Baghel Singh, sold his one-fourth share to Musa, and the remaining three sold three-fourths to Narain Das defendant No. 1. The latter redeemed the whole land from the mortgagee in 1900. In 1923 Musa's son Siraj-ud-din applied for partition of his share. His title being disputed by Narain Das he was referred by the Assistant Collector to a suit, and he then brought the present suit in the Assistant Collector's Court, asking for joint possession. He was given a decree subject to the payment of one-fourth of the amount due on the mortgage, and the decree was affirmed by the Additional District Judge on appeal. Narain Das has preferred a second appeal to this Court.

Two points have been argued, one being the question of limitation and the other that of the jurisdiction of the Assistant Collector to try the suit. The case is governed by Art. 144 of the First Schedule to the Limitation Act, and not by Art. 148 as a co-mortgagor who redeems the whole mortgage does not become a mortgagee of the shares of the co-owners, but merely has a charge on the property: see *Vasudev* v. *Balaji* (1) and *Basanta* v. *Dhanna Singh* (2). The lower Appellate Court has held that the possession of a co-mortgagor who redeems the entire property does not become adverse to the other mortgagors until he openly asserts an exclusive title, and that as there was no such assertion in the present case the suit is within time. This decision is no doubt supported by *Ram Narayan Rai* v. *Ram Deni Rai* (3) but a different view has been taken in other High Courts and their rulings have been referred to and followed in *Wazir* v. *Girdhari* (4) by Campbell, J., who has observed that the rule that ordinarily one co-sharer cannot hold adversely against another proceeds upon a rebuttable presumption that the co-sharer in exclusive possession is holding on behalf of the other co-sharers, and that this presumption is rebutted when it is shown that the co-sharer in possession denies the right of the other co-sharers to enter into joint possession until they have paid to him their share of a charge upon the property which he has defrayed. The view taken in *Wazir* v. *Girdhari* (4) is, in my opinion, the correct one. The appellant was not holding on behalf of the plaintiff when he was denying the plaintiff's right to enter into possession without payment of his share of the charge on the property. His possession was consequently adverse, and if it has continued for twelve years the suit is barred by limita-

(1) 26 B. 500; 4 Bom. L. R. 178.
(2) 55 Ind. Cas. 450.
(3) 63 Ind Cas. 282; A. I. R. 1923 Pat. 98; 6 P. L. J. 680; (1922) Pat. 129.
(4) 71 Ind. Cas. 847; A. I. R. 1923 Lah. 311.

tion. It is contended for the plaintiff that notwithstanding the redemption by the appellant in 1900 the mortgagee remained in possession of the land and that the appellant's possession has not lasted for 12 years. The lower Court has given no finding on this point, but it is unnecessary to remand the case as the appeal must succeed on the ground that the Assistant Collector had no jurisdiction.

The only power which s. 117 of the Land Revenue Act gives to a Revenue Officer acting as a Court is to determine the question of title arising in the partition proceedings, and he has no power under that section to pass a decree for possession of the land of which the title is in dispute. See on this point *Lachhmi Bai* v. *Hondi Bai* (5).

I accordingly accept the appeal, reverse the decree, and dismiss the suit with costs throughout.

R. L. *Appeal accepted.*

(5) 21 Ind Cas. 719; 100 P R 1913, 7 P L. R 1914, 14 P W R 1914

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2213 OF 1922

June 5, 1925.

Present.—Justice Sir Babington Newbould, KT., and Mr. Justice Graham.

ISWOR SANT AND OTHERS—DEFENDANTS —APPELLANTS

versus

TORENDRA NATH KUILA— PLAINTIFF —RESPONDENT.

Civil Procedure Code (Act V of 1908), s 11—Res judicata—*Decree confirmed in appeal on other ground —Bengal Tenancy Act (VIII of 1885), ss 29, 49— Ejectment—Under-*raiyat*—Occupancy rights—Heritability of under-*raiyati *holding*

Where in a suit in ejectment the Trial Court holds that the defendants have no right of occupancy but dismisses the suit on the ground of its being instituted before the expiry of the agricultural year in which the defendants' predecessor died and on appeal the decree of dismissal is affirmed on the second ground but the Appellate Court gives no finding on the question whether the defendants have a right of occupancy, the decision of the Trial Court that the defendants had no occupancy rights cannot operate as *res judicata* in a subsequent suit for ejectment [p 981, col 2]

An under-*raiyat* may acquire right of occupancy by custom or usage and is not then liable to be ejected. [p. 982, col. 2]

Ordinarily the holding of an under-*raiyat* whether with or without rights of occupancy is not heritable. [*ibid.*]

The descendant of an under-*raiyat* with rights of occupancy, who fails to prove that his predecessor's interest was heritable is a trespasser and, therefore, liable to ejectment [*ibid*]

Appeal against a decree of the Subordinate Judge, Second Court, Midnapore, dated the 12th of May 1922, modifying that of the Munsif, Third Court at Tamluk, dated the 25th of February 1921.

Babu *Apurba Charan Mukerji*, for the Appellants.

Mr. *Mahendra Nath Roy* and Babu *Santosh Kumar Pal*, for the Respondent.

JUDGMENT.—This is an appeal against a decree in ejectment. The predecessor of the defendants was an under-*raiyat* under the plaintiff.

The main question in this appeal is whether that under-*raiyati* tenancy descended to the defendants by inheritance. The first Court held that the defendants' predecessor was an under-*raiyat* with right of occupancy, and that the defendants had succeeded to that right. The lower Appellate Court has held that the defendants had no right of occupancy and were mere trespassers on the land and that the plaintiff was, therefore, entitled to a decree for *khas* possession of the same. We think that the learned Subordinate Judge who decided the case in the lower Appellate Court was in error so far as he held that the question whether the defendants had a right of occupancy in the disputed land was *res judicata*. In a previous suit in ejectment which was *inter partes* the Munsif who tried the suit held that the defendants had no right of occupancy but he dismissed the suit on the ground of its being instituted before the expiry of the agricultural year in which the defendants' predecessor died. On appeal that decree of dismissal was affirmed on the second ground and the lower Appellate Court came to no decision on the question whether the defendants had a right of occupancy The decision of the Judicial Committee of the Privy Council in *Sheosagar Singh* v. *Sitaram Singh* (1) is a clear authority for holding that the decision of the first Court in the former suit did not operate as *res judicata* in the present suit. But though the lower Appellate Court was wrong on this point and though its judgment is not well-expressed there is a finding apart from that of *res judicata* which is sufficient to support its decision. It was held that the

(1) 24 I A 50; 24 C 616; K W N 297; 7 Sar P. C. J. 124, 12 Ind. Dec. (N S.) 1079 (P. C.),

defendants have failed to prove that the under-*raiyati* interest of the defendants' predecessor was heritable under some local custom and that even supposing that their predecessor had a right of occupancy therein this is of no benefit to them unless they can prove local custom of heritability. It is contended on behalf of the appellants that this decision is wrong and that if the defendants' predecessor had an occupancy right their right was necessarily heritable. It is now settled law that under ordinary circumstances the right of an under-*raiyat* is not heritable. No authority has been shown to us in support of the contention that the interest of an under-*raiyat* with a right of occupancy is heritable.

It is contended that unless an under-*raiyat* with a right of occupancy has the same benefits which the law gives to a *raiyat* with occupancy rights he will gain no benefit from such a right. But there is one section in the Bengal Tenancy Act which makes a provision for the benefit of an under-*raiyat* having an occupancy right and that is s. 183. Further it has been held by a Division Bench of this Court in the case of *Gopal Mandal* v. *Tapai Sankhari* (2) that an under-*raiyat* may acquire right of occupancy by custom or usage and is not then liable to be ejected under s. 49 of the Bengal Tenancy Act. We are unable to accept the contention that from this decision it follows that when an under-*raiyat* has a right of occupancy s. 26 of the Bengal Tenancy Act is applicable. Section 26 is by its terms limited to the case of *raiyat* in respect of his right of occupancy and cannot be held applicable to the case of an under-*raiyat* who, as already stated, has not, as such, a transferable right in his holding. In the case of a *raiyat* his holding is heritable whether he is an occupancy-*raiyat* or a non-occupancy *raiyat*. In the case of an under-*raiyat* who has no right of occupancy his holding is certainly not heritable and we can find nothing either in the statutory law or in the case law which would make an exception in the case of an under-*raiyat* with right of occupancy. We, therefore, hold that the decision of the Subordinate Judge is right on the ground that the defendants having failed to prove that their predecessor's interest was heritable under a local custom, were trespassers on the land and were liable to be ejected without notice. It is contended that the lower Appellate Court should have decided the issue which was raised in the first Court whether the defendants had been recognised as tenants after their predecessor's death. That issue was decided against the defendants by the Court of first instance. It does not appear that in the lower Appellate Court a contention was raised on the respondent's behalf that this portion of the first Court's judgment was wrong. It was, therefore, unnecessary for the lower Appellate Court to record a finding on that issue.

We, accordingly, dismiss this appeal with costs.

R. L. *Appeal dismissed.*

(2) 44 Ind. Cas. 545; 46 C. 43; 28 C. L. J. 81, 22 C. W. N. 618.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1618 OF 1925.

January 7, 1926.

Present:—Mr. Justice Broadway.

BHAGAT SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MATHRA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Creation of evidence—Right to sue.

Wherever evidence is being created which might ultimately result in disturbing the title of the plaintiff, he has a cause of action to sue under section 42, Specific Relief Act [p. 983, col 2.]

Gandla Pedda Naganna v *Sivanappa*, 26 Ind. Cas. 232, 38 M. 1162 at p. 1171, 16 M. L. T. 310; 27 M. L. J. 520, followed.

Second appeal from a decree of the District Judge, Gurdaspore, dated the 3rd April 1925, affirming that of the Subordinate Judge, Second Class, Gurdaspore, dated the 10th August 1923.

Lala *Mehar Chand Mahajan*, for the Appellants.

Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—The house in dispute in the litigation giving rise to this second appeal originally belonged to one Jiwan. Jiwan died some 40 years ago leaving him surviving a widow *Musammat* Naraini but no issue. *Musammat* Naraini continued to live in that house with a man named Bhagat Singh. Mathra and others, reversioners of Jiwan, on the 31st October 1921 instituted a suit against *Musammat* Naraini and Bhagat Singh, alleging that Bhagat Singh was making alterations in the house in suit in such a manner as led the

plaintiffs to think that *Musammat* Naraini had gifted the house to him, and asking for a declaration that the alterations so made and the expenses so incurred would not affect their reversionary rights. Naraini and Bhagat Singh both contested the suit vigorously alleging, *inter alia*, that they were husband and wife and that the suit was barred by limitation. The Courts below, after a consideration of the evidence led, came to the conclusion that while the plaintiffs were Jiwan's collaterals and, therefore, reversioners, the marriage set up between *Musammat* Naraini and Bhagat Singh had not been proved, and granted the plaintiffs a decree as prayed Bhagat Singh has come up to this Court in second appeal through Mr. Mehr Chand Mahajan. It appears that *Musammat* Naraini died while the appeal was pending in the lower Appellate Court.

Mr. Mehr Chand has addressed me on three points. One point was that as *Musammat* Naraini had died while the appeal was pending in the lower Appellate Court, the lower Appellate Court should have acted in accordance with that what was laid down in *Sat Bharai* v. *Sat Bharai* (1) and dismissed the plaintiffs' suit. I am, however, not pressed with this contention. The facts in *Sat Bharai* v. *Sat Bharai* (1) were quite different. There the Trial Court had refused to grant an injunction and in appeal an injunction was granted after the holder of the limited estate had died.

Next, Mr. Mehr Chand raised an entirely new point and one that had admittedly never been raised nor argued in any of the lower Courts. He urged that, having regard to the provisions of s. 42 of the Specific Relief Act, the suit as framed was incompetent. He pointed out that what was complained of was that certain structural alterations were being made in the house, and from this he urged it was evident that the status of the plaintiffs was not interfered with in any way and they had no cause of action. Here again I am unable to agree. The plaint definitely stated that the structual alterations led the plaintiffs to the conclusion that *Musammat* Naraini had gifted the property to Bhagat Singh, and the conclusion the plaintiffs came to was that evidence was being created which would affect their rights at a subsequent date This would give them a right to sue. This view is in consonance with what was held by a Division Bench of the Madras High Court in *Gandla Pedda Naganna* v. *Sivanappa* (2) where their Lordships say "So far as Madras is concerned, the latest authority is in favour of the position that wherever evidence is being created which might ultimately result in disturbing the title of the plaintiff, he will have a cause of action to sue under s. 42" There can be no doubt that the action taken by Bhagat Singh in the present case might well be regarded as the creation of evidence to support a gift in his favour, and I am therefore of opinion that the suit was competent.

Finally, it was urged that the finding on the question of the marriage between *Musammat* Naraini and Bhagat Singh, although one of fact, was open to examination, inasmuch as the learned District Judge had not given due weight to the presumption arising out of long and continued cohabitation between a man and woman who were in a position to marry. Reference was made to *Indar Singh* v. *Thakar Singh* (3) where it was held that "there is in law a presumption in favour of marriage and against concubinage when a man and woman have cohabited continuously for a number of years and this presumption of law can be repelled only by strong, distinct and conclusive evidence." In the case while the learned District Judge has not specifically referred to long cohabitation, in my judgment it is perfectly clear that he has not lost sight of the fact that these two persons had been living together for a considerable period. The importance of the marriage lies in the fact that if the marriage could be held to have taken place when the cohabitation first began, *Musammat* Naraini would have forfeited her estate on marriage and the present suit would undoubtedly be barred by limitation. In the present case both of them definitely set up an *anand* marriage and led evidence to support their allegation, which evidence has been held, wholly unreliable by both Courts. As pointed out by Mr. Faqir Chand, there was every reason why these two should marry, for their marriage would have entailed the forfeiture of

(1) 18 Ind. Cas. 329, 65 P. R 1913, 24 P. W. R 1913, 46 P. L. R. 1913.

(2) 26 Ind Cas 232, 38 M. 1162 at p 1170, 16 M L. T. 310, 27 M. L J. 520

(3) 63 Ind. Cas. 387; 2 L. 297; 3 U. P L. R (L.) 82, 3 L. L. J. 317,

Musammat Naraini's estate or, at any rate, the risk of forfeiture and the manner in which Bhagat Singh of recent years began to make alterations in the house is a strong indication that the view taken by the Courts below is correct. It seems to me that Bhagat Singh was endeavouring to create evidence which he could refer back to as showing a gift in his favour.

In these circumstances I must dismiss this appeal with costs.

R. L. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 282 OF 1923.

July 21, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Chakravarti.

UMASASI DEBI—PLAINTIFF—APPELLANT

versus

AKRUR CHANDRA MAZUMDAR—DEFENDANT AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 66—Benami *auction-purchase—Declaration, suit for, whether maintainable.*

A suit for a declaration equally with a suit for possession is within the ambit of s. 66, C. P. C. Therefore, a suit for declaration that a certified purchaser at a Court sale is only an ostensible purchaser and that the purchase was effected as plaintiff's agent is barred by the provisions of the section. [p. 985, col 2, p. 986, col. 1.]

Sasti Charan Nundi v. *Annapurna*, 23 C. 699, 12 Ind Dec. (N S) 465, dissented from

Hanuman Persad Thakur v. *Jadunandan Thakur*, 29 Ind. Cas. 787; 20 C. W. N. 147, 43 C. 20 and *Bishan Dial* v. *Ghaziuddin*, 23 A. 175, A. W. N. (1901) 44, referred to.

Appeal against a decree of the Subordinate Judge, Second Court, Hooghly, dated the 11th of September 1922, modifying that of the Munsif, Third Court at Serampur, dated the 26th of April 1921.

Sir *Provas Chandra Mitter*, Kt., and Babu *Hira Lal Chakravarti*, for the Appellant.

Babu *Rupendra Coomar Mitter*, for Dr. *Bijan Kumar Mukerji* and Babu *Amulya Dhan Mukherji*, for the Respondents.

JUDGMENT.

Cuming, J.—In the suit out of which this appeal has arisen the plaintiff who is the appellant before this Court sued for a declaration that she had *lakheraj* and *jamai* right purchased at auction sale in respect of some 3-annas odd share left by her husband and that she was entitled to the 16-annas rent of the land in question and the defendant had no right in respect of the land. She also asked for a perpetual injunction to restrain the defendant from obstructing her in the realisation of the rents of this land. If it should be found that the plaintiff was not in possession of the land then she sued to recover possession. Her case, as a perusal of the plaint will make quite clear, is that her husband bought the *lakheraj* right in the land in his own name and with his own money. Subsequent to this he purchased the tenants' right in the land on the 24th of February at a sale in execution of a decree in the name of the defendant No. 1, obtained a certificate of sale and in virtue of this sale certificate obtained possession of the property. Some of the land he kept in his own possession and the rest was let out to tenants. The *kabuliyats* were in the name of the defendant No. 1 because the sale certificate stood in his name. Umesh Chandra Mukerji the husband of the present plaintiff died leaving no son and the defendant No. 1 taking advantage of this circumstance has persuaded the tenants not to pay rent to the plaintiff. From this the plaintiff realises that the defendant intends to take possession of the property left by her husband and hence she has brought this suit asking that the Court will declare that she has *lakheraj* and *jamai* title purchased at auction sale of the 3-annas odd share left by her husband and also a declaration that she is entitled to the 16-annas share of the rent, that the defendant has no title to the property and that her possession may be confirmed. If by any circumstances it be found that she is not in possession then she may recover possession. She also asked for an account from the defendant of any rent that the defendant might have realised from the tenants. The case of the defendant No. 1 who alone has contested this case is that he is the real owner of the property and that s. 66 (old s. 317 of the C. P. C) is a bar to the suit.

The Trial Court found that defendant No. 1 was the *benamdar* of the husband of the plaintiff, that the plaintiff had been in possession from the date of purchase up to the institution of the suit, and that the defendant was liable to render accounts to the plaintiff. He found that the plaintiff's suit was not barred by the provisions of s. 66 and ordered that her *jamai* title and

nishkar title to the lands in suit should be declared. The defendant was restrained from interfering with her possession. He was also to render her accounts. Defendant No. 1 appealed to the District Court. The learned Subordinate Judge held that the plaintiff had been dispossessed from the land before the suit and was not now in possession, that the defendant was the *benamdar* of the plaintiff's husband, that s. 66 was a bar to the suit and ordered that the suit of the plaintiff so far as it related to the *jamai* right of the plaintiff would be dismissed.

The plaintiff has appealed to this Court.

Her case is if I have understood it rightly as follows:—

(1) That the lower Court has wrongly found that she is not in possession and as she is in possession she is entitled to maintain a suit for confirmation of possession. In support of this contention she relies on the case of *Sasti Charan Nundi* v. *Annapurna* (1).

(2) That by payment of rent to the landlord a new tenancy has been created in her favour and that she has a title independent of the purchase by her husband in the name of the defendant and to this title the provisions of s. 66 are not a bar.

(3) That the purchases made by the defendant of the tenancy rights in 1915-16 were made by the defendant as her agent and hence she is entitled to a declaration of her tenancy under these purchases.

Now it seems to me on the facts as found by the learned Subordinate Judge the plaintiff's case must fail and that s. 66 is a bar to her suit.

This suit is governed by the old Code and s. 317 of that Code which corresponds to s. 66 of the present Code is as follows:—

"No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims."

Now the case of the plaintiff as made in her plaint is clearly this, that the property was purchased by her husband in the *benami* of the defendant No 1. It is nothing else although the learned Advocate for the appellant has spent a day and a half in trying to persuade us that the case of the plaintiff was that she had an independent title by paying rent to the *zemindar*. Reading the section as it stands it is quite immaterial whether the plaintiff was or was not in possession at the time of the suit. It seems to me that a declaratory suit equally with a suit to recover possession comes within the mischief of the section.

The plaintiff has relied on the case of *Sasti Charan Nundi* v. *Annapurna* (1) and asks us to hold that if she is in possession then s. 66 (317) is no bar to her suit. With due respect to the learned Judges it is very difficult to reconcile this decision with the plain words of the Statute. The learned Judges remark: "Section 317 does not make all *benami* transactions invalid nor, read with s. 316, does it confer upon the ostensible purchaser a title as against the real purchaser. It merely declares that a suit shall not be maintained against the certified purchaser on the ground that he was only the ostensible purchaser. The ostensible purchaser could not insist on his certified title to recover from the real owner in possession. If, therefore, the defendant sets up the sale certificate as an answer to the plaintiff's case, there is nothing to prevent the Court from going into the question whether that sale certificate did or did not confer a valid title upon the defendant as against the plaintiff. It is not a case in which the plaintiff, relying on a sale certificate, seeks to obtain a decree for possession against the ostensible purchaser. Resting, as it does, on an existing possession, we do not think that it is a suit of the nature prohibited by s. 317 (present s 66)."

If I understand the learned Judges aright they would seem to hold that in a suit for confirmation of possession the plaintiff has not to prove his title for obviously s. 66 would be a bar to his maintaining a title based on a *benami* purchase. Neither do I understand what is meant by a title resting on existing possession. Surely it is not sufficient for a person asking for confirmation of possession to say "I am in possession. Prove that I have no title." As far as I am aware this case stands alone. It has never been followed but has been dissented from. See the case of *Hanuman Persad Thakur* v. *Jadunandan Thakur* (2) where Cox, J. points out that if accepted as good law it would practically repeal the whole section. See also the case of *Bishan Dial* v. *Gaziuddin* (3). The learned Judge, Strachey, C. J., in consider-

(1) 23 C 699; 12 Ind. Dec. (N. S) 465.

(2) 29 Ind Cas 787, 20 C W. N. 147; 43 C. 20.

(3) 23 A. 175, A. W. N. (1901) 44.

ing the case of *Sasti Charan Nundi* v. *Annapurna* (1), remarks that if that case holds that s. 317 only applies when the plaintiff being out of possession seeks to recover possession and can never apply to a suit by a plaintiff in possession for a declaration that the certified purchaser out of possession is not the real purchaser he cannot agree with that. I am myself of opinion that it is immaterial whether the plaintiff is in possession and seeks a confirmation of possession or whether he is out of possession and seeks to recover possession. In either case s. 66 applies.

The appellant seems also to have attempted somewhat faintly to make out that the property was conveyed to her husband by his being put in possession after the purchase. How this could give the plaintiff any title in the absence of a conveyance as required by the Transfer of Property Act, I admit I do not understand (2). The next argument advanced by the appellant is that she or rather her husband acquired a title independent of her purchase by paying rent to the *zemindar* I must admit that this argument was put forward in a somewhat shadowy form. I presume that the learned Advocate meant that she or rather her husband had been recognised by the *zemindar*. Otherwise I do not understand how any title could be acquired by the mere payment of rent. In order to establish or to attempt to establish this part of his case the learned Advocate was obliged to take us through a large portion of the evidence of the case. The mere necessity for doing this made it at once evident that this had never formed any part of the case of the appellant in either of the Courts below.

It was perfectly obvious that this had never formed any part of the case of the appellant in the lower Courts and it is somewhat difficult to imagine how the learned Advocate for the appellant could have thought that he would be allowed for the first time in second appeal to make out a case which depended on findings of facts which had never been even suggested in the lower Courts.

(3) The appellant lastly attempted to argue that the purchases made by the defendant of certain tenancies as the result of certain decrees obtained in 1915 and 1916 were made by the defendant as the agent of the plaintiff.

Here again the same difficulty confronts us, *viz.*, that this case that these purchases were made by the defendant as the agent of the plaintiff finds no place in the case of the plaintiff either in her plaint or in the case as presented to the lower Courts. It is obviously a question of fact and cannot be raised for the first time in second appeal. In para. 7 of the plaint the plaintiff distinctly sets out that after the death of her husband her son-in-law managed her properties. It is not sufficient to say that a person is an agent. It is necessary to set out what is the scope of the agency in order to determine whether any particular act was done by the person as an agent or not and for this purpose a definite case would have to be made out. The only suggestion in the plaint is that the defendant looked after the suits of the plaintiff.

There is no suggestion that it was any part of his duty to purchase properties on behalf of the plaintiff. The case of *Ganga Baksh* v. *Rudar Singh* (4) may be referred to in this connexion.

The result is that the appeal must fail and is dismissed with costs.

Chakravarti, J.—I agree with the order proposed by my learned brother.

The plaint in this case was framed in open disregard of the provisions of s. 66, C P. C. The only ground upon which the bar might have been avoided was not taken in either of the Courts below and in the result the defendant retains and enjoys the fruits of his fraud which has been so clearly established. It is only to be hoped that this case will serve as an example for dissuading people from indulgence in the pernicious habit of creating *benami* title and in some measure further the object with which s. 66, C. P. C., was enacted.

R L. *Appeal dismissed.*

(4) 22 A 431 at p. 437; A. W. N. (1900) 152; 9 Ind. Dec (N S) 1327.

LAHORE HIGH COURT.

CIVIL APPEAL No. 1014 OF 1924.

January 14, 1926.

Present:—Mr. Justice Campbell and Mr. Justice Zafar Ali.

Sheikh ARSHAD ALI—PLAINTIFF—APPELLANT

versus

ZORAWAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Suits Valuation Act (VII of 1887), s. 3—Local Rules

—*Suit for possession of definite plot out of estate assessed to revenue—Jurisdictional value—Civil Procedure Code (Act V of 1908), s. 149—Court-fee, deficient, payment of—Limitation, question of—Pre-emption suit—Improvements by vendee—Compensation*

In the Punjab the value of a pre-emption suit for purposes of jurisdiction is 30 times the proportionate amount of revenue recorded as payable for the holding in which the land in suit is comprised even though it be a specified plot by metes and bounds and not a definite share of the holding [p. 987, col 2]

Where a Court dismisses a suit and simultaneously with the dismissal, orders making up the deficiency in Court-fee, the order should be considered to have been made under s. 149, C. P. C., as the Court is entitled to pass such an order at any stage of the case In such a case the effect for purposes of limitation is the same as if the Court-fee demanded had been paid in the first instance. [p. 988, col 1]

A vendee, in a pre-emption suit, is in equity entitled to compensation for improvements effected after the institution of the suit when he had no notice of the institution of the suit and the improvements had been effected after the expiry of the period of limitation for the suit. [p. 988, cols 1 & 2]

Appeal against an order of the Court of the Senior Sub Judge, Rohtak, dated the 31st January 1921.

Bakhshi *Tek Chand*, for the Appellant.

Messrs. *Shamair Chand*, *Sagar Chand* and Lala *Harish Chandra*, for the Respondents.

JUDGMENT.—This appeal arises out of a pre-emption suit. The vendor was Anwar Ali and the vendee was Zorawar Singh. The sale was on the 20th of August 1917 ostensibly for Rs. 3,300 of a small plot of one *bigha* and 15 *biswas* at Rohtak. The suit was instituted on the 19th of August 1918 in the Court of the Munsif and the plaint stated the value of the suit for purposes of jurisdiction to be 30 times the *jama*, namely, Rs. 39-1-0 and for purposes of Court-fee Rs. 13-0-4, the Court-fee being Rs. 1-2-0. The plaint alleged that the price mentioned in the sale-deed of Rs. 3,300 was fictitious and that the market value was Rs. 175. The prayer was to pre-empt at that price.

A preliminary issue was framed. "Whether the suit was beyond the jurisdiction of the Court"? and on an admission by the plaintiff's Counsel that it was probably so, the plaint was sent to the District Judge with a request that it should be made over to a Court competent to hear it. This was on the 19th of June 1919. Previous to this on the 20th of August 1918, the day after the suit was filed the plaintiff had applied to the Court that the suit should be postponed without issue of summons because the plaintiff, who is the son of the vendor, had then pending another suit for possession of the same land or for a declaration that the sale should not affect his reversionary rights. When this was decided and the present suit was taken up on the 30th of May the defendant vendee was summoned and he then objected that the suit was beyond the jurisdiction of the Munsif.

The District Judge sent the suit to the Junior Sub-Judge who found, *firstly*, in favour of the plaintiff that the land was not *sakni* land as alleged by the defendant, *secondly*, that out of the ostensible sale price, Rs. 1,985 alone were paid, *thirdly*, that this was the market value of the land, *fourthly*, that the value of the suit for purposes of Court-fee and jurisdiction was Rs. 6,038 being the market value of the land plus the ascertained value of improvement effected by the vendee in the shape of buildings. Two other law points which need not be detailed were decided in favour of the plaintiff and then the Court held that the value of improvements as above stated was Rs. 4,053 and that the suit was barred by limitation because it was instituted in a Court which had not jurisdiction to hear it and the date of institution must be taken to be that on which it was transferred by the District Judge to the Junior Subordinate Judge a year and 10 months after the sale. The suit was dismissed with costs. The plaintiff was directed within one month to make up the requisite Court-fee on a valuation of Rs 6,038 and did so.

The plaintiff has appealed. The land sold is described in the sale-deed as 1 *bigha* and 15 *biswas* out of field Nos. 2641 and 2642 as depicted in the plan attached to the deed and finding of the lower Court was that when a specific plot by metes and bounds is the subject of a pre-emption suit the case falls under s. 7 (*v*) (*d*) of the Court Fees Act and Court-fee is according to the market value of the land and that the market value also determines the jurisdictional value.

Whatever may be correct Court-fee the learned Sub-Judge was wrong as regards jurisdiction. The rules of the Local Government Punjab are given on page 93, Rules and Orders of the Chief Court, Vol. III and according to the Explanation of r. 1 (*b*) the value for purposes of jurisdiction of the plot in suit was 30 times the proportionate amount of the revenue recorded as payable for the holding in which the land is comprised, for the land sold was

manifestly a portion of part of an estate for which part the land revenue payable is recorded in the Collector's register. This conclusion is not seriously disputed by the learned Counsel for the vendee respondent, but he argues that the Court-fee, at any rate, was due on the market value under s. 7 (*v*) (*d*) since that applies where s. 7 (*v*) (*b*) does not apply and that s. 7 (*v*) (*b*) does not apply because it does not contain any explanation corresponding with that quoted above which is appended to a similar provision enacted by the Local Government under powers conferred by s. 3 of the Suits Valuation Act, 1887. It is not necessary for us to decide this question, because what the learned Counsel alleges to have been the proper fee was in fact paid in the lower Court by the plaintiff in obedience to the order of the Court, and we hold that in giving that order the Court acted under s. 149 of the C. P. C., as it was entitled to do at any stage of the case. The effect was that the plaint became of the same force and effect as if the Court-fee demanded had been paid in the first instance, and it cannot be held now that there was no proper presentation of the plaint within limitation.

So far the plaintiff-appellant succeeds, but in his further contention that no compensation for improvements should be allowed and that the amount of such compensation estimated by the lower Court is excessive we are not disposed to dissent from the findings of the learned Sub-Judge. The buildings we find were commenced in March 1919, that is to say after the institution of the suit, but no notice of the suit was given to the defendant vendee and the suit itself was instituted on the last day of limitation. It is clear what the plaintiff's position was. He had attacked the alienation in another way with a view to its being nullified without cost to himself, but as a second string to his bow he deemed it advisable to institute a suit for pre-emption. He, however, was guilty of the blunder of asking for the pre-emption suit to be stayed without issue of process to the defendant. What he should have done was to have the defendants served with summons and then to ask for the suit to be stayed. In that case the defendant would have had no justification in claiming compensation for improvements begun after the institution of the suit. But, since it is not shown that the defendant knew anything about this pre-emption suit before he erected his buildings, he is in equity entitled to compensation, and the fact that the other suit was in progress does not appear to us to be material at all. The other suit in the event was dismissed and the dismissal was upheld in appeal. The defendant was entitled to run the risk of commencing his buildings during the pendency of the other suit, which he considered with justice to be a weak one, and to assume that since the statutory period of limitation one year from the sale had elapsed, he was safe from a pre-emption suit.

We have heard arguments on the valuation of the improvements. The defendant produced a witness who made out the figure to be Rs. 4,902. The plaintiff produced a retired Executive Engineer who made it Rs. 3,117-15-10. The Court appointed L. Bishambar Dayal, District Engineer, as Commissioner and his estimate was Rs. 4,053. It has been claimed for the plaintiff that this figure should be reduced because it included 10 per cent. contractor's profit and because L. Bishambar Dayal stated in cross-examination that his calculation was based on present rates which had increased during the last two years. We find that the plaintiff's witness also included 10 per cent. contractor's profit and we consider that the explanation given by L Bishambar Dayal for including them is reasonable. As regards the admission of increase of the rates, the witness was speaking of buildings constructed not two years or more previously, but one year only, and he was not properly cross-examined as he should have been by the plaintiff to elicit whether there had been any increase in the rates during the previous one year.

We accept the appeal and give the plaintiff a decree for pre-emption on payment of Rs. 1,985 plus Rs. 4,053 total Rs. 6,038 on or before a date three months from the date of decree. The decree shall be drawn up in accordance with O. XX, r. 14 (1), C. P. C. As regards costs, each party has had its success both in this Court and in the lower Court and we order the parties to bear their own costs throughout.

R. L. *Appeal accepted.*

N. H.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 578 OF 1923.

October 23, 1925.

Present :—Mr. Justice Devadoss.

P. KUTHALINGA MUDALIAR—DEFENDANT No. 1—APPELLANT

versus

M. N. SHANMUGA MUDALIAR AND OTHERS—PLAINTIFFS AND DEFENDANT No. 2—RESPONDENTS.

Hindu Law—Widow—Maintenance—Sale of property—Future maintenance

A Hindu widow is entitled to maintain herself by selling the property inherited from her husband if there is no other means available for her maintenance She is not bound to starve herself in order to benefit the reversioners. [p 990, cols 1 & 2]

Under the Hindu Law a widow can alienate her husband's property for paying off the debts incurred for her own maintenance There is no hard and fast rule that she cannot do it for future maintenance Each case would depend upon its circumstances. [p 989, col 2]

In a case where there was no other property but a house inherited by a widow and not capable of yielding any appreciable income, and the widow sold it for Rs 600 half of which went towards liquidating a debt incurred for maintenance and the other half was kept by her for maintaining herself with

Held, that the sale was binding in its entirety upon the reversioner. [p 990, col 2]

Second appeal against a decree of the Court of the Additional Subordinate Judge, Tinnevelly, in A. S. No. 53 of 1922 (A. S. No. 691 of 1922, District Court), preferred against that of the Court of the District Munsif, Tenkasi, in O. S. No. 104 of 1920 (O. S. No. 402 of 1919, District Munsif's Court, Ambasamudram).

Mr. *S. Ramaswamy Iyer*, for the Appellant.

Mr. *K. Venkateswaran*, for the Respondents.

JUDGMENT.—The only point in this appeal is whether the sale should be upheld in view of the findings of fact of the learned Subordinate Judge. He has found that out of the consideration of Rs. 600, Rs. 300 went towards discharging the debts binding on the reversioner and the other Rs. 300 was for the maintenance of the second defendant. The second defendant who is a widow, was unable to maintain herself out of the income of her husband's property, which consisted only of the plaint house, and was obliged to borrow. It has been proved satisfactorily and has been found by the Judge that she did incur a debt of Rs. 300 in order to maintain herself. The property left by the husband was only a house which produced no income. She had to sell the house for the purpose of paying off the debt already incurred and for maintaining herself. It is not suggested that the house was worth more than Rs. 600 paid by the plaintiff for the sale. The Subordinate Judge has set aside the sale of the property with regard to a half and has upheld the sale as regards the other half. It is difficult to see how a house like this could be divided into two halves. No doubt if the house can be divided into two halves, it might be said that his order is sustainable. But this being a small house in a town and in the absence of any evidence that the house could be divided into two equal moieties and that the two moieties could be conveniently enjoyed, such a decree cannot be said to be correct

The question is whether the sale of the property should be upheld or not. The Subordinate Judge seems to think that a widow cannot alienate property for future maintenance. It is well-settled that a widow can alienate her husband's property for paying off the debts incurred for her own maintenance. The question is whether she can do so for future maintenance? There is no hard and fast rule that a widow cannot alienate property for future maintenance. Each case would depend upon its circumstances. In this case there is no other property and the only property is not capable of yielding any appreciable income. I do not see why the widow should starve herself in order to benefit the reversioners. It is admitted by the plaintiff that the widow (2nd defendant) is living by begging. If that is so, there is every reason why she should find means to support herself by selling the only property that descended to her from her husband. No doubt if there are other properties from which she could get some income it may be said that she is not justified in selling the house. Where land of considerable extent is sold and only a part of the consideration is found to be binding on the reversioner, it may be a question for the Court, whether a portion of the land should be taken by the alienee and the rest should be released from the sale. But in a case like this I see no reason why in order to benefit the reversioner the widow should be prevented from enjoying the proceeds of the sale. As I have already observed, it is not suggested that the sale is not a *bona fide* one. On the other hand it is clear that Rs. 600 was paid

in cash before the Sub-Registrar half of which went towards liquidating the debt incurred for maintenance and the other half was kept for maintaining herself with. It is unnecessary to discuss this point at any length as I am quite satisfied that in this case the widow had no other means of maintaining herself than by selling the only property that descended to her.

Mr. Ramaswami Aiyar referred to *Naman Mal* v. *Har Bhagwan* (1) in support of his contention that the sale should be upheld. In that case the learned Judges held that the proposition that a widow cannot anticipate personal necessity is not an inflexible rule. In *Kulak Chandra Das* v. *Kula Chandra Das* (2) a Bench of the Calcutta High Court held that a widow need not borrow at an usurious rate of interest for maintaining herself and then allow the property to be sold by the creditor by bringing a suit against her. I think that a widow borrowing in order to maintain herself and then allowing the property of her husband to be sold for the debt incurred by her for maintenance would not be acting in the interests of the reversioners, for the interest and the costs would amount to a large amount and a prudent person would rather sell the property and get ready cash than borrow at an usurious rate of interest and there allow the creditor to file a suit and bring the property to sale and thereby cause loss to the reversioners. The same principle has been laid down in *Kannu Chetty* v. *Amirthammal* (3) and *Bala Krishna Das* v. *Hira Lal* (4). On the other side I am referred to the decision in *Appajee Panthulu* v. *Ramacharlu* (5) as supporting the contention of the respondent that the sale should be set aside inasmuch as a portion of the consideration was for maintenance. On a perusal of the case I am unable to find that any principle was laid down in that case. The learned Judges found that considerable suspicion attached to the transaction and in the circumstances they set aside the alienation by the widow. There was no question of the maintenance of the widow in that case. A widow is entitled to live by selling the property of the husband if there is no other means available for her maintenance. As I have already observed, no widow is bound to starve herself or die in order to benefit the reversioners. Such a proposition would be monstrous and opposed to all principles of Hindu Law. *Dhondhia* v. *Hekayat Pandey* (6) and *Paparayudu* v. *Rattamma* (7) do not apply to the facts of the present case. No doubt, if the sale is not found to be a *bona fide* sale, the plaintiff would be entitled to have it set aside. But in this case I am quite satisfied that the proper decree would be to allow the sale to stand inasmuch as the transaction was a *bona fide* one and the consideration was for purposes which could bind the reversioners.

I allow the appeal and dismiss the plaintiff's suit with costs throughout.

The memorandum of objections is dismissed. No costs.

V. N. V. *Appeal allowed.*
N. H.

(1) 66 Ind. Cas. 362; 2 L. 357; A. I. R. 1922 Lah 317.
(2) 46 Ind. Cas. 269.
(3) 26 Ind. Cas. 418; 1 L. W. 877.
(4) 50 Ind. Cas. 74; 41 A. 338, 17 A. L. J. 239.
(5) 10 Ind. Cas. 676; 9 M. L. T. 307; (1911) 1 M. W. N. 267.
(6) 49 Ind. Cas. 811.
(7) 17 Ind. Cas 508; 37 M 275; (1912) M. W. N. 1176, 21 M. L. J. 62; 13 M. L. T. 110.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1332 OF 1925.
January 2, 1926.
Present :—Mr. Justice Martineau.
KALA KHAN *alias* KALU—PLAINTIFF—APPELLANT
versus
NATHU KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Stamp Act (II of 1899), s. 2 (21)—Letter empowering to sell land—Power-of-attorney.

A letter empowering a person to sell the land is not a power-of-attorney as defined in the Stamp Act unless it empowers him to sell the land in the name of the writer of the letter.

Second appeal from a decree of the District Judge, Rawalpindi, dated the 31st January 1925, affirming that of the Subordinate Judge, Second Class, Rawalpindi, dated the 26th November 1923.

Lala *Gobind Ram Khanna*, for the Appellant

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—The plaintiff Kala Khan and his brother Nathu Khan defendant No. 1 jointly owned *khasra* No. 1258-1. On the 9th February 1918 Nathu Khan sold a portion of that *khasra* number to Dalbir Chand and Sundar Dass and on the 13th

February he sold the remainder to Ishar Das and Harnam Das defendants Nos. 2 and 3. Defendants Nos. 4, 6, 8 and 10 brought seperate suits for pre-emption in respect of the latter sale and obtained decrees, and afterwards transferred their shares to defendants Nos. 5, 7 and 9. The plaintiff sues for possession of his half share of the land sold by his brother to defendants Nos. 2 and 3, contending that his brother had no right to sell it, and he also claims the other half by right of pre-emption.

The suit has been dismissed, the Courts below having agreed in finding that it has been brought in collusion with Ishar Das defendant No. 2, and that the plaintiff had, by a letter written from Basra on the 29th September 1917, authorised Nathu Khan to sell the former's half share in the land. The plaintiff has preferred a second appeal, contending that his consent to the sale is not legally proved.

The letter from the plaintiff authorising Nathu Khan to sell the land, though not forthcoming is referred to in the two sale-deeds executed by the latter, and Sundar Das proves its existence at the time when Nathu Khan executed the sale-deed in favour of Dalbir Chand and himself. Hira Nand, through whom the sales by Nathu Khan were effected, also proves the existence of the letter, and says that he made it over to some of the vendees, though he cannot say to which. As the letter is now suppressed by the vendees, into whose possession it came, and the suit has been found to have been brought in collusion with them, I think that it is fair to presume that it was the plaintiff who wrote the letter.

It is argued for the plaintiff that the letter was a power-of-attorney as defined in s. 2 (21) of the Stamp Act, and that as it was unstamped it would have been inadmissible in evidence, and, therefore, secondary evidence of its contents is also inadmissible. There is, however, nothing to show that Nathu Khan was empowered by the letter to sell the land in "the plaintiff's name", and if no such power was given to him the letter, though it gave Nathu Khan authority to sell the land, would not fall within the definition of "power-of-attorney" contained in the Stamp Act. Another point taken is that the letter would not debar the plaintiff from repudiating the sale when it is not shown that he agreed to any particular price, but there is no force in this argument, as in giving a general authority to Nathu Khan to sell his share he must be taken to have left it to Nathu Khan to settle the price, and it may be observed that there has been no allegation that the price for which the land was sold was not a fair price.

I agree, therefore, with the Courts below that the plaintiff is precluded from suing to recover his share of the land by the fact of his having authorised his brother to sell it.

As regards the claim for pre-emption the fact appears to be that the plaintiff acquiesced in the sale of Nathu Khan's share, besides authorising the sale of his own share. Hira Nand has stated that he suggested to Nathu Khan that he should obtain the plaintiff's written consent to the sale of his (plaintiff's) share, as without it no one would be willing to buy the land. Evidently Nathu Khan must have written to his brother, telling him that he proposed to sell the land, and asking for his authority to sell his (plaintiff's) share, and it was in reply to such a letter that the plaintiff wrote the letter which has been referred to above. It does not stand to reason that the plaintiff, while consenting to the sale of his own half share, reserved his right to pre-empt his brother's half.

The appeal fails and is dismissed with costs.

R. L. *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1228 OF 1925.

December 18, 1925.

Present:—Mr. Justice Addison.

PURAN CHAND AND OTHERS—APPELLANTS

versus

EMPEROR THROUGH SHEO CHAND AND OTHERS—RESPONDENTS.

Court Fees Act (VII of 1870), s 8, Sch II, Art 17 (iv)—Appeal from award under Land Acquisition Act—Court-fee payable—Appeal—Deficiency in Court-fee not made good—Negligence—Limitation, effect on—Bona fides, meaning of.

An appeal from an award under the Land Acquisition Act is governed for purposes of Court-fee by s. 8 and not by Art 17 (*iv*) of Sch II to the Court Fees Act, as the former, being a special provision relating to the awards of compensation under the Land Acquisition Act overrides the general provisions of the latter. [p. 992, col. 2.]

Kasturi Chetti v. *Deputy Collector, Bellary*, 21 M. 269; 7 Ind. Dec. (N. S.) 546, referred to.

Where no compensation has been allowed by an award under the Land Acquisition Act, Court-fee payable on the memorandum of appeal is the *ad valorem* Court-fee on the amount claimed. [p. 992, col. 2]

Where a memorandum of appeal does not bear the full Court-fee and the deficiency is not made good in time owing to the gross negligence of the appellant or his Counsel the appeal becomes time-barred. [p. 993, col. 1]

A *bona fide* act is one done with due care and attention [*ibid*]

Resal Singh v. *Shadi*, 43 Ind Cas. 317; 95 P R. 1917; 174 P. W. R. 1917, 13 P. L. R. 1918, referred to.

First appeal from an order of the District Judge, Rohtak at Karnal, dated the 22nd January 1925.

Mr. *Sagar Chand*, for Mr. *F. Byrne* and Lala *Nanwan Mal*, for the Appellant.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—1482 square yards of land in village Dhigal were acquired under the Land Acquisition Act for a school and the Collector assessed the value at Rs. 2,130-6-0. There are four *Panas* or sub-divisions in the village. Two of them did not claim any part of the land to be theirs. The proprietors of *Chauth* sub-division claimed the whole area to be theirs, while those of *Malian* sub-division claimed that 792 square yards of the whole area of 1482 square yards were theirs. The Collector under s. 30 of the Land Acquisition Act referred the dispute for the decision of the District Court as it was a dispute "as to the persons to whom any part of the compensation money was payable". The Collector could have himself decided the question, leaving the aggrieved party to apply to him for a reference to the Court under s. 18 of the Act. This, however, makes no difference. The District Court held that *Thula Lakhmian* of *Pana Chauth* was entitled to the entire compensation as the land belonged exclusively to it. It accordingly awarded the full sum of Rs. 2,130-6 to be paid to it, and it was stated at the *bar* that it has in fact been paid. Nothing was awarded to the applicants. On the 22nd April the appellants through Counsel filed this appeal against the above decision on a four-rupee stamp. He was asked by the office the same day as to how a Court-fee of Rs. 4 only had been paid. On the 4th May he re-filed the appeal, stating that the Court-fee was correct as it was a miscellaneous appeal. That very day, his attention was drawn by the office to s. 8 of the Court Fees Act and he was directed to pay *ad valorem* Court-fee by 4 P. M. the next day, apparently as the period of limitation expired then. On the 5th May he asked that the time should be extended to him as he had to get the Additional Court-fees from his clients. He was told on the 6th May that time could not be extended to him beyond the period of limitation. Then on the 12th May he affixed a Court-fee stamp of Rs. 10 on the ground that the appeal fell under Art. 17 (*iv*) of the Second Schedule of the Court Fees Act and not under cl. (8) of the Court Fees Act. The appeal was admitted to a hearing on the 11th June subject to any question which might be raised relating to the Court-fee payable and to limitation.

Counsel for the respondents raised a preliminary objection that the appeal is barred by limitation. It is quite clear that the appellants are claiming in appeal 792/1482 of Rs. 2,130 6-0, on the ground that they owned 792 squares yards out of 1482 square yards acquired and are entitled to the compensation for that area. This sum can be accurately calculated and comes to be a little more than half of Rs. 2,130 6-0. It cannot, therefore, be said that the appeal is incapable of valuation (Sch. II, Art. 17 (*iv*) of the Limitation Act). It also does not fall under Art. 17 (*ii*) as an appeal to set aside an award because s. 8 of the Court Fees Act being a special provision, relating to the awards of compensation under the Land Acquisition Act, overrides the general provisions of Sch. II, Art. 17 (*iv*) [see *Kasturi Chetti* v. *Deputy Collector, Bellary* (1). Besides, the words of s. 8 of the Court Fees Act are very wide. They are as follows:—

"The amount of fee payable under this Act on memorandum of appeal against an order relating to compensation under any Act for the time being in force for the acquisition of land for public purposes shall be computed according to the difference between the amount awarded and the amount claimed by the appellant."

The present appeal is against an order awarding all the compensation to the respondents whereas the appellants claim a definite sum out of the compensation. That is, nothing was awarded to them while they claim more than half. Court-fees were, therefore, payable on the sum they claim should have been awarded to them. The

(1) 21 M. 269; 7 Ind. Dec. (N. S.) 546.

matter is beyond dispute and though the appellants' Counsel was at once put upon his guard by the office, still the necessary Court-fees were not put in within the period of limitation and when extra Court-fees were put in after the period of limitation, the provisions of s 8 were still not followed though the section had been quoted by the office. It is further clear from the order of the Judges admitting the appeal in June that this was a matter that was bound to arise and still Court-fees have up till the present not been filed. Even if, therefore, Ramji Lal, one of the appellants, thought a Court-fee of Rs. 4 only was necessary, there has obviously been gross negligence both on the part of the appellants and of Counsel in not filing the Court-fees either at once on the office objection or when the appeal was admitted to a hearing. In my judgment they are not entitled to any extension of time after these dates. The law is so clear that no mistake should have been made in the first instance and for this reason also time cannot be extended. A *bona fide* act is one done with due care and attention [*Resal Singh* v. *Shadi* (2)]

I, therefore, hold that the appeal is barred by limitation as up to date the proper Court-fees have not been put in and no sufficient cause has been shown as to why this has not been done. I accordingly dismiss it with costs.

R. L. *Appeal dismissed.*

(2) 43 Ind Cas 317, 95 P. R 1917, 171 P W R 1917, 13 P L R. 1918

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 150 OF 1925.

January 5, 1926.

Present:—Mr. Justice Daniels

G. I. P. RAILWAY AND ANOTHER—PETITIONERS

versus

KUNJ BEHARI LAL SHARMA—OPPOSITE PARTY.

Carriage of goods—Railway Company—Risk Note Form H, liability under—Loss of goods not urged—Protection under Risk Note—Onus of loss—Revision—Delay in filing petition

The only loss for which a Railway Company can be held accountable under Risk Note Form H, even in case of wilful negligence, must be loss of a complete consignment or of a complete package or packages forming part of such consignment.

But where a plaintiff does not come into Court on the ground of loss, destruction or deterioration, the Railway Company must prove that the goods have been lost or destroyed or have deteriorated before they can claim the protection of the Risk Note.

A delay of nearly seven months in filing a revision application is in itself a sufficient ground for declining to accept it

Civil revision from an order of the Judge of the Court of Small Causes at Kasganj, dated the 9th April 1925.

Mr *Ladli Prasad Zutshi*, for the Applicants.

Mr. *Panna Lal*, for the Opposite Party.

JUDGMENT.—This is a revision against a Small Cause Court decree awarding compensation for short delivery of betel-leaves consigned by the G I P. and B. B. and C. I. Railway Companies. The applicants are quite right in asserting that the only loss for which the Railway can be held accountable under Risk Note H which applies to this case, even in case of wilful negligence must be loss of a complete consignment or of a complete package or packages forming part of such consigment. The decree may, however, be supported on another ground The plaintiff did not come into Court alleging loss. He merely alleged that so much betel leaves had been booked by the Railway and that the full amount had not been delivered. There is a long series of cases commencing with *Ghelabhai Punsi* v. *East Indian Railway Co.* (1) and including several cases of this Court, *e g*, *East Indian Railway Co* v. *Firm Kishin Lal-Tirkhamal* (2) and *East Indian Railway Co.* v *Firm Gopi Krishna-Kashi Prasad* (3) as well as *East Indian Railway Co* v. *Jagpat Singh* (4) which lay down that where a plaintiff does not come into Court on the ground of loss, destruction or deterioration, the Railway Company must prove that the goods have been lost or destroyed, or have deteriorated before they can claim the protection of the Risk Note. I may add that the judgment complained of was delivered on 9th April and that this revision was not filed until 5th November. The delay of nearly seven months in filing the application would in itself have been a sufficient ground for declining to accept it.

For the reasons already given I dismiss the application with costs.

S. S. *Application dismissed.*

N H.

(1) 63 Ind Cas 241, 45 B 1201, 23 Bom L. R 525.

(2) 73 Ind. Cas 986, 45 A. 530, 21 A. L. J 438; 9 O. & A. L R 531, A. I. R 1924 All 7.

(3) 77 Ind Cas. 1046; 45 A. 534, 21 A. L. J. 448; A. I R 1924 All. 8

(4) 79 Ind Cas. 126, 51 C. 615; 28 C. W. N. 1001; A. I. R. 1924 Cal. 725.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 148 OF 1924.

November 25, 1925.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol.

CHIRANJI LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHIB LAL AND ANOTHER—PLAINTIFFS AND MATU RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 23, Sch. I, Art 36—Suit for compensation for damage caused by defendants action—Limitation—Continuing wrong—Date of malfeasance.

Limitation for a suit to recover compensation for damage caused to the plaintiffs' building by the action of the defendants in closing up certain drains which emitted water from the plaintiffs' building on to the defendants' premises is two years from the date of the damage.

The action of the defendants in closing up the drains and thereby causing damage to plaintiffs' building is a continuing wrong as contemplated by s. 23, Limitation Act.

In cases of continuing wrongs the date of the damage is the date of the malfeasance within the meaning of Art. 36 of Sch. I to the Limitation Act.

Letters Patent Appeal against the judgment and decree of Mr. Justice Broadway, passed in Civil Appeal No. 2596 of 1923, on the 5th March 1924, affirming that of the District Judge, Karnal, dated the 9th August 1923, (which reversed that of the Munsif, First Class, Jhajjar, District Rohtak, dated the 28th August 1922).

Messrs. *Shamair Chand* and *Sagar Chand*, for the Appellants.

Mr. *K. J. Rustamji*, for the Respondents.

JUDGMENT.—This appeal arises out of an action to recover Rs. 400 as compensation for damage caused to the plaintiffs' building by the action of the defendants in closing up certain drains which emitted water from the plaintiffs' building on to the defendents' premises; and the sole question for decision is whether the suit is within time.

The alleged damage is said to have occurred between August 1918 and September 1920, but obstruction took place in September 1917 and the suit was instituted on the 21st May 1921. The District Judge assessed the damage at Rs. 60 and the decree was affirmed by this Court in single Bench.

A preliminary objection was raised that the suit was a small cause and the learned Judge in Chambers had no jurisdiction. But adjudication on this point was not prayed for from the Court below and it cannot be heard now for the first time.

For the appellants it is urged that s. 23 of the Limitation Act has been wrongly applied to the facts of this case as the wrong was not a continuing wrong, but we have no hesitation in holding that the wrong was a continuing wrong and that the provisions of s. 23 of the Limitation Act have been properly applied.

On the next point, however, we think the appeal must succeed. It is urged that the limitation for the suit is two years under Art. 36 of the First Schedule to the Limitation Act. On the allegation in the plaint at any rate a portion of the damage occurred prior to the 21st of May 1919 and there is no evidence to show how much damage was caused after that date and within two years of suit.

For the respondents it is contended that Art. 36 of the Schedule to the Limitation Act does not apply and that Art. 120 furnishes the proper period of limitation. Article 120 is, however, a residuary Article and applies only when no other specific Article governs the case. Clearly the act of the defendants in obstructing the drains in defiance of an injunction obtained by the plaintiffs was an act of malfeasance. Article 36 covers the facts of this case, and the effect of that Article read with s. 23 of the Act is, that the suit must be brought within two years from the date when the malfeasance takes place but that inasmuch as the offence is a continuing one, the date of the damage shall be deemed to be the date of the malfeasance.

In the absence of evidence as to the amount of damage which occurred within two years of suit the suit must fail. We accordingly accept the appeal and dismiss the suit, but in the special circumstances of the case direct that parties shall bear their own costs throughout.

R L. *Appeal accepted.*

ALLAHABAD HIGH COURT.

MISCELLANEOUS CASE No. 507 OF 1925.

January 6, 1926.

Present:—Mr. Justice Dalal and Mr. Justice Boys.

BALDEO KURMI—DEFENDANT—APPLICANT

versus

KASHI CHAMAR AND ANOTHER—PLAINTIFF—OPPOSITE PARTIES.

Agra Tenancy Act (II of 1901), s 198—Tenant and sub-tenant—Ejectment suit—Sub-tenant claiming to be tenant himself—Proprietary title, question of, whether involved—Appeal, forum of

In a suit by an occupancy tenant to eject a sub-tenant, where the latter alleges that he is himself the tenant-in-chief and is holding directly under the proprietor, no question of proprietary title is involved within s. 198 of the Agra Tenancy Act, and an appeal against the decision of the Assistant Collector lies to the Revenue Court and not to the Civil Court. [p. 996, col 1.]

Niranjan v *Gajadhar*, 30 A. 133, 5 A. L. J. 71, A. W N (1908) 45, followed

Har Prasad v *Tajammul Husain*, 44 Ind. Cas. 720, 16 A L J 239, not followed.

The words "land-holder" and "tenant" do not in s 198 (1) of the Agra Tenancy Act embrace "tenant" and his "sub-tenant" [p 999, col 1]

Per *Boys, J*—There is nothing in the heading preceding s 198 of the Agra Tenancy Act or in s 198 (1) to indicate that in a case coming within s 198 (1) a question of proprietary title is necessarily in issue. Rather are all the indications to the contrary The answer to the question whether a matter of proprietary title is in issue cannot be based on any conclusion that the case is or is not within s 198 but must be answered independently of s 198 [p 1000, col 1]

Reference under s. 195 of the Agra Tenancy Act made by the Collector, Basti.

Mr. *Harnandan Prasad* (with him Mr. *Sankar Saran*), for the Opposite Parties.

JUDGMENT.

Dalal, J.—This is a Reference to this Court made by the Collector of Basti under s. 195 of the Tenancy Act, because he doubted whether the appeal pending before him in a particular matter should be filed in a Civil or a Revenue Court One Kashi Chamar sued the defendant, Baldeo Kurmi, for ejectment; and one of the grounds of defence was that the defendant cultivated the land in dispute as tenant of the Raja of Bansi and paid rent to him. The plaintiff's case was that he was an occupancy tenant of the land and Baldeo Kurmi was his sub tenant. The Assistant Collector decided that Kashi was occupancy tenant of the land and that Baldeo was his sub-tenant.

The learned Collector was of opinion that the appeal would lie to a Civil Court if the principle of the ruling in the case of *Har Prasad* v. *Tajammul Hussain* (1) were followed. The Board of Revenue has dissented from that ruling in *Kundan* v. *Jawahir* (2).

In my opinion, the facts of this case do not call for a decision as to which of the views in the two judgments is correct. The question before me is covered by authority. In *Niranjan* v. *Gajadhar* (3) one Niranjan applied as owner of a fixed rate holding for ejectment of Gajadhar on the ground that Gajadhar was his sub-tenant. The Assistant Collector dismissed the suit. The plaintiff appealed to the District Judge who made a reference to this Court, as he was not in agreement with a Single Judge decision of this Court in *Chhittar Singh* v. *Rup Singh* (4). A Bench of this Court held that the appeal lay to the Revenue Court and not to the Civil Court.

It was argued here that the question in dispute between the tenant and sub-tenant is one of proprietary title in accordance with the provisions of s. 198 of the Tenancy Act. The heading of that section in Ch. XIV of the Tenancy Act is "Questions of proprietary title in Revenue Court." Section 198 lays down "When in any suit against a tenant under this Act, the defendant pleads that the relation of land-holder and tenant does not exist between the plaintiff and himself on the ground that he actually and in good faith pays the rent of his holding to some third person, the question of such payment of the rent to such third person shall be inquired into, and, if the question is decided in favour of the defendant, the suit shall be dismissed." The second clause of this section lays down "The decision of the Court on such question shall not affect the right of any person entitled to the rent of the holding to establish his title by suit in the Civil Court." It was contended on behalf of the plaintiff-respondent that, according to the terms of the first clause of this section, the question as to whether Kashi actually and in good faith paid the rent of his holding to the Raja of Bansi was a question of proprietary title and that had to be decided in the appeal pending before the Collector of Basti. In my opinion, land-holder and tenant do not mean tenant and sub-tenant, as they would have to mean in order to support the argument of the plaintiff's learned Counsel. Sub-

(1) 44 Ind. Cas. 720; 16 A. L. J. 239.

(2) (1919) Unpublished Decisions of the Board, Vol. IV, page 102.

(3) 30 A. 133; 5 A. L. J. 71; A. W. N. (1908) 45.

(4) A. W. N. (1906) 247; 3 A. L. J. 603.

tenant is separately defined in s. 4 of the Tenancy Act and the term 'tenant' is not defined as including a sub-tenant. A sub-tenant is not a class of tenants enumerated in s. 6; so a sub-tenant cannot be called non-occupancy tenant in s. 19 of the Act. A discussion of the terms of s. 198 of the Tenancy Act, therefore, does not arise here and I am not called upon to determine whether the Bench decision in the case of Niranjan may be supported or not.

A dispute between a tenant and a sub-tenant raises no question of proprietary title. The suit being one for ejectment, the appeal would go out of the cognizance of the Revenue Court only if a question of proprietary title had been in issue in the Court of first instance and is a matter in issue in the appeal. No such question arises here, so the jurisdiction of the Revenue Court is not ousted as laid down by Sch. IV, Group C, Serial No. 29.

Presumably the words landlord and tenant have been used in s. 63 to include tenant and sub-tenant and, if the analogy be applied to s. 198, I am of opinion that the decision reported in *Har Prasad* v. *Tajammul Husain* (1) is not correct. The provisions of s. 198 are to be read in contradistinction to the provisions of s. 199, Tenancy Act. The decision of the Revenue Court under s 198 is not binding on a Civil Court, while that under s. 199 is. The proprietary title contemplated is not the dispute between the parties to the suit but the one between the plaintiff land-holder and the third person, to whom the defendant alleged that he paid rent in good faith. Such a dispute over a proprietary title was involved in the decision of the question of payment to some one other than the plaintiff in good faith. That is the dispute which is referred to as one of proprietary title in the heading over s. 198. The dispute between the parties to the suit is to be kept strictly in the Revenue Court; otherwise there would be no necessity to permit of a suit in the Civil Court. If the appeal in such a case lay to the Civil Court, the decision of the Civil Court would be binding on another Civil Court and there would be no object in providing a saving clause, as is done in s. 198.

In the present case the pleadings and judgment of the Trial Court are wanting in definiteness. The defendant probably desired to raise such a defence as is mentioned in s. 198 but no allegation was made in the written statement of payment of rent being made to the Raja of Bansi in good faith. The Trial Court framed no issue on the question of the payment of rent to a third person in good faith.

If the case is taken out of the provisions of s. 198, there can be no doubt that no issue of a claim to a proprietary title arises between the parties here.

It will not be found possible to reduce the different rulings of this Court to one or more consistent principles of law; so I think that every matter should be decided on a different principle of law in accordance with previous decisions on similar facts. Mr. Justice Banerji consistently took the extreme view in favour of the Civil Court's jurisdiction, as stated in *Chhittar Singh's case* (4) and was able to impress this view on Benches of which he was a member. If this view had been consistently adopted, the different decisions could have been referred to a uniform principle of law but other Judges when not sitting with Mr. Justice Banerji did not adopt this view. Mr. Justice Tudball, the other member of the Bench in the case reported as *Har Prasad* v. *Tajammul Hussain* (1) did not follow the principle of that ruling to its logical conclusion in *Gurcharan Kuar* v *Deokinandan Kuar* (5) when sitting singly. I agree with this decision that when the title to a tenure is in dispute, the jurisdiction of a Civil Court does not arise. The Full Bench ruling, however, in *Bindeshwari* v. *Gokul* (6) (Chief Justice. Banerji and Ryves, JJ.) following *Dalchand* v. *Shamla* (7), (Blair and Banerji, JJ.) and dissenting from *Udit Tiwari* v. *Balhari Pande* (8) (Tudball and Piggott, JJ.) is in conflict with this opinion. There the dispute between the parties related to the possession of a holding. *A* claimed to be tenant and alleged that *B* was his sub-tenant. *B* was one of the proprietors of the village and *A* admitted this fact. *A's* contention was that the tenure was his while *B* alleged that he held it as *khudkasht*. In reality the dispute related to a tenure and not to any interest in revenue paying property.

It is enough for me to say that, in this present case, my opinion in favour of the jurisdiction of the Revenue Court is supported by rulings in *Niranjan* v. *Gajadhar*

(5) 58 Ind. Cas. 760.
(6) 22 Ind. Cas. 964; 36 A. 183; 12 A. L. J. 251.
(7) 2 A. L. J. 176; A. W. N. (1905) 46.
(8) 21 Ind. Cas. 460; 35 A. 521; 11 A. L. J. 812.

(3), *Daulatia* v. *Hargobind* (9) and *Gurcharan Kuar* v. *Deokinandan Kuar* (5) and that rulings to the contrary on similar facts have not come to my notice. It may be conceded that certain principles enumerated in other rulings, if pressed to their logical conclusion, would not support the view.

My answer to the reference is that the appeal was correctly filed in the Revenue Court.

Boys, J.—The plaintiff sued to eject the defendant on the allegation that he, the plaintiff, was an occupancy tenant and that the defendant was his sub-tenant. The defendant replied that the plaintiff had nothing to do with the plot of land and that the defendant himself was the tenant-in-chief. There is no dispute as to who is the proprietor of the plot, the parties are agreed on this point. The Assistant Collector gave the plaintiff a decree. Upon appeal to the Collector, he has referred the matter for the opinion of this Court under s. 195 of the Agra Tenancy Act. He has been led to adopt this course because of a difference, as suggested, between the law as laid down on the one hand in *Har Prasad* v. *Tajammul Hussain* (1) (Banerji and Tudball, JJ.), and *Tulhi* v *Ramraj* (10) (Gokul Prasad, J.) and on the other in *Kundan* v. *Jawahir* (2). The Collector expresses his difficulty in the following terms.—"That in the first two cases it has been held that in suits for ejectment in which the defendant pleaded that a third person and not the plaintiff was the *zemindar* of the land in dispute and the Court decided the question of proprietary title, the appeal lay to the District Judge, that in this suit the defence set up comes under s 198 and if these two decisions are followed the Court of the Collector has no jurisdiction; that in the third case the Board declined to follow the first decision of the High Court (the other decision of the High Court was of later date) and held that in a case of this nature no question of proprietary title arose and that the appeal, therefore, lay to the Revenue Court" In consequence of this difference of opinion he has referred the case.

I will first consider the authorities apart from any effect that s. 198 may have.

In *Har Prasad* v *Tajammul Hussain* (1) the defendant claimed to be lessee of another person (*semble* a different proprietor), and in *Tulhi* v *Ramraj* (10) the defendant alleged that the plot belonged to another village and that he had been paying rent to the proprietor of that village. In both these cases it will be seen that there was in the back-ground the existence, alleged by the defendant, of another proprietor other than the proprietor under whom plaintiff held. On the other hand in the case decided by the Board, *Kundan* v. *Jawahir* (2), there was not even in the background any question of any other proprietor, both plaintiff and defendant were in agreement as to who was proprietor. This latter is also the case in the question before us. Similarly in *Niranjan* v. *Gajadhar* (3) where the plaintiff claimed as fixed rate tenant to eject the defendant as his sub-tenant while the defendant contended that he himself was the fixed rate tenant, both parties apparently claimed to hold under the same proprietor In that case a Bench of this Court, Knox and Aikman, JJ., held that "when there is a question whether one party or the other is the cultivator of specified land, no question of proprietary right arises" The earlier contrary view expressed in the judgment of Mr. Justice Banerji and reported in *Chhittar* v. *Rup Singh* (4) was dissented from

We have, therefore, two cases of this Court *Har Prasad* v *Tajammul Husain* (1) (decided by a Bench) and *Tulhi* v. *Ramraj* (10) (of a Single Judge), in both of which it was held that a question of proprietary title was in issue but in both of which there was alleged to be another proprietor whose tenant the defendant was. On the other hand we have a case of the Board, *Kundan* v. *Jawahir* (2) and a decision of a Bench of this Court *Niranjan* v. *Gajadhar* (3) in both of which it was held that no question of proprietary title was in issue but in both of which there was no dispute even in the background as to who was the proprietor, both parties to the suit admitting the same person to be proprietor The facts of the present case are the same as in the two latter cases.

Whether or no the two former cases can be distinguished from the two latter cases on the ground that in the former there was contention between the disputant tenants as

(9) 57 Ind Cas. 206, 43 A. 18; 18 A L. J. 923, 2 U. P. L. R. (A.) 289.

(10) (1922) Unpublished Decisions of the Board, Vol. VI, page 22, High Court Section.

to who was the proprietor while in the two latter cases there was no such contention, is a question into which I need not enter for the decision in the two former cases was not based on the fact that there were two proprietors in the background with conflicting interests but on the ground that the cases came within s. 198 and were, therefore, as it was held, necessarily cases of proprietary title being in issue. To s. 198 I shall refer later. So far as the present case is concerned it is on all fours with *Kundan* v. *Jawahir* (2) and *Niranjan* v. *Gajadhar* (3) and I have no hesitation in holding that those cases were rightly decided. A mere statement of the cases there and in the present case, namely, that the question who is the proprietor is not in dispute, even in the background, but that there is a proprietor admitted by both parties to be proprietor, and that only two persons both of whom are admittedly tenants of one sort or another are contending with each other itself suggests irresistably that there is no question of the proprietary title in issue.

I turn now to a consideration of s. 198. It is frankly admitted by Mr. Harnandan Prasad, (who, appearing for the defendant, contends that the Collector has no jurisdiction to hear the appeal) that the decision in *Niranjan* v. *Gajadhar* (3) is against him. But he urges that in *Har Prasad* v. *Tajammal Hussain* (1) and *Tulhi* v. *Ramraj* (10) the Court rightly considered and relied on s. 198; that in *Niranjan* v *Gajadhar* (3) the Court did not consider s. 198; that it should have done so and we should do so in the present case. His conclusion is two-fold:—(*a*) that the present case comes within the terms of s. 198, (*b*) that the case coming under s. 198, it follows that a question of proprietary title is in issue because the heading immediately preceding s. 198 describes the case which follow that heading as being cases involving a question of proprietary title.

I quote the heading and the section *in extenso* as nearly every line is suggestive of the carrying out of the intention, as I understand it, of the Legislature.

"Questions of proprietary title in Revenue Court." "198 (1). When, in any suit against a tenant under this Act, the defendant pleads that the relation of land-holder and tenant does not exist between the plaintiff and himself on the ground that he actually and in good faith pays the rent of his holding to some third person, the question of such payment of the rent to such third person shall be inquired into, and if the question is decided in favour of the defendant, the suit shall be dismissed.

"(2) The decision of the Court on such question shall not affect the right of any person entitled to the rent of the holding to establish his title by suit in the Civil Court".

To come to the first part of the argument for defendant, that the present case comes within s. 198.

Is the plaintiff occupancy tenant a land-holder and is the defendant sub-tenant a tenant within the meaning of s. 198.

Section 4 (5) declares " 'land-holder' means the person to whom, and 'tenant' the person by whom rent is payable." Section 4 (7) begins " 'sub-tenant' means a tenant who, etc." *i. e.*, it declares that a sub-tenant is a tenant though he is a tenant of a particular kind. The definitions are wide enough to include in "land-holder" and "tenant" an "occupancy tenant" and his "sub-tenant" respectively "unless there is something repugnant in the subject or context" (see the opening words of s. 4). Is there anything repugnant in the subject or context in s. 198? Is there anything in s. 198 justifying a restriction of the scope of the words 'land-holder" and "tanant" to "proprietor" and "tenant-in-chief"? I think there is.

Let us suppose in a case like the present the words to be wide enough to include an "occupancy tenant" *A* and his "sub-tenant" *B*. *A* sues to eject *B*. *B* denies the relationship of landlord and tenant on the ground that he has been paying rent in good faith to *C*. The Court is to inquire into the facts of the actual payments and the good faith of the payments and if the decision on these points is in favour of *B* the suit is to be dismissed. It will be noted that herein there is no provision for the decision of the question of *A*'s *right* to receive the rent though *A* may have ample proof of that right. What remedy then has *A*? He can appeal, of course, until he has exhausted his right of appeal, but if the decision of the facts of actual payments in good faith is upheld he will still be unable to establish his right to receive the rents. Nor can he file a separate suit in the Civil Court to establish that right. Section 198 (2) gives him no such right; it gives no right at all to anybody; it merely declares

that any existing right of any person entitled to the rent to establish his title by suit in the Civil Court shall not be prejudiced. If, therefore, s. 198 applies and the suit in the Revenue Court is decided against *A* on the ground of actual payments made in good faith by *B* to *C* he is left without remedy. There is, therefore, as I view it, matter in s. 198 which is repugnant to the application of the definitions of "land-holder" and "tenant" in their widest sense to those words as used in s. 198 (1).

If such a case as the present comes within s. 198 and if the plaintiff, where the decision under s. 198 (1) is against him and his suit is dismissed, has a remedy by a suit in the Civil Court to get his *right* to receive the rent declared, we have the plaintiff's *right* being determined in a Civil Court. But if the decision under s. 198 (1) was in plaintiff's favour, there is no provision for the plaintiff being referred to a Civil Court to establish his right to receive the rent; the Revenue Court would have to proceed in the ordinary course to the determination of the question of the plaintiff's right. If, therefore, the argument for the defendant were to be accepted the very same question of plaintiff's *right* to rent would have to be determined by the Civil Court or by the Revenue Court according as the decision under s. 198 (1) was adverse or favourable to the plaintiff. This is a further reason for holding that a case such as the present does not come within s. 198.

I hold then that the words "land-holder" and "tenant" do not in s. 198 (1) embrace an "occupancy-tenant" and his "sub-tenant."

It is consistent with this view that the provision in s. 198 (2) would be superfluous in the cases of an occupancy tenant and his sub-tenant as there is no right to go to the Civil Court which could be saved from being affected, though this consideration would not, of course, suffice by itself to show that sub-s. (1) could not apply to an "occupancy tenant" and his "sub-tenant" as it would still be applicable to other cases.

I turn now to the second portion of the argument for the defendant. Assuming, contrary to the view I have expressed, that s. 198 (1) does apply to the case of an occupancy tenant and his sub-tenant, it is then urged that a question of proprietary title is in issue because cases within s. 198 are described in the heading preceding s 193, as the argument would interpret the heading, as involving questions of proprietary title.

I have expressed above the view that a case like the present does not come within s. 198 (1) but the reasons I have given do not apply to exclude such cases as *Har Prasad* v. *Tajammul Hussain* (1) where the plaintiff claimed to be proprietor and would come within even the restricted scope of the term "land-holder." But in that case Banerji and Tudball, JJ., proceeded to hold that the heading was conclusive proof, and it has been argued here that it is conclusive, that a question of proprietary title being in issue is necessarily involved in any case which comes within s. 198 (1).

A heading of this nature is no doubt meant to express the intention of the Legislature, though it is at least open to question whether the words themselves have any operative effect. But I would not rule out the contention of the applicant on the ground that such a heading has no operative effect. I prefer to consider whether the words do bear the meaning attributed to them in *Har Prasad* v. *Tajammul Hussain* (1) and in argument here. To my mind they do not.

The heading does not say anything equivalent to "the following are cases where questions of proprietary title are in issue and such questions shall be heard by the Revenue Court in the following manner." The heading is only equivalent to "let us consider the jurisdiction of the Revenue Court in certain cases and how far it is to proceed in the direction of dealing with proprietary title." The heading is not necessarily inappropriate to a case in which proprietary title is not in issue but is merely in the background. Further, the directions which follow such a heading as we have here might, consistently with the grammatical implications in that heading, be directions to the Revenue Court to deal with the question of proprietary title or directions not to deal with it. We have, then, next to consider the terms of s. 198 to see which of these two courses the Legislature has adopted in s. 198,

Section 198 states a particular case where a defendant pleads that he "in good faith pays the rent of his holding to some third person," and that is the only plea which can bring the case within s. 198.

The section next says that the question of *such* payment, the question whether he actually in good faith pays the rent to a third person, is to be inquired into, and if decided in his favour, the suit is to be dismissed. It *does not* say that the proprietary title of the Receiver of the rent to receive the rent is to be enquired into; it expressly refrains from saying that.

Finally, sub-s. (2) declares that the decision of such question, *i. e.*, as to the fact of actual payment in good faith shall not affect the right of any person claiming to be entitled to the rent to sue in the *Civil Court* to establish his title. The sub-section does not, of course, create any new right to sue in the Civil Court but merely makes clear that any existing right is not affected by the decision, *i. e.*, any person, including the third person who has been alleged to be receiving the rent, may, if he claims to be proprietor and his title is in peril, sue in the Civil Court to establish his title. Every line of the section is consistent with and suggests the view that in a case coming within the section the Court is to deal with the *factum* of payments of rent in good faith to a third person and not to deal with the title of the third person to receive the rent.

That this view of the actual effect of subsection (1) of s. 198 is in accord with the intention of the Legislature is supported by a reference to the history of the section. The earlier s. 148 of Act XII of 1881 provided expressly for the third person being made a party to the suit. The present s. 198 omits that provision and the omission directly suggests that his *title* to the rent is not to be inquired into and this is in accord with the omission to provide for any enquiry into his title and, so far as s. 198 (1) is concerned, the express limitation of the enquiry to the single question whether any payment has been made in fact and in good faith.

I am, therefore, of opinion that there is nothing in the heading preceding s 198 or in s. 198 (1) to indicate that in a case coming within s. 198 (1) a question of a proprietary title is necessarily in issue. Rather are all the indications to the contrary. The answer to the question whether a matter of proprietary title is in issue cannot be based on any conclusion that the case is or is not within s. 198 but must be answered independently of s. 198.

I have already stated my view that, independently of s. 198, no question of proprietary title is in issue in the present case, at any rate where there is no contention between the parties as to who is proprietor. As to the cases *Har Prasad* v. *Tajammul Hussain* (1) and *Tulhi* v. *Ramraj* (10) my view that s. 198 and the heading to that section have no bearing on the question whether a matter of proprietary title is in issue involved my holding that in so far as those cases were based on the heading to s. 198 those decisions cannot be supported. Whether they could be effectively distinguished from the present case on the ground that in them there was at any rate in the background difference between the plaintiff's allegation and the defendant's allegation as to who was proprietor, and whether cases could be distinguished in which the person alleged by the defendant to be proprietor was made a party are questions answers to which are not necessary to the decision of the present case and into which I ought not, therefore, to enter.

I would note that I have not omitted to give the best consideration in my power to a number of other decisions of this Court and of the Board of Revenue and I am not unaware that there is a conflict of views to be found in those cases, and that the view which I have expressed could not always be reconciled with one or other of those cases. But, if I may say so, I have found little more than *dicta* in those cases to guide me and as the facts were not always the same I have not referred to them. Even in the case of *Niranjan* v. *Gajadhar* (3) there is nothing more than a *dictum*.

The above considerations lead me to the following conclusion:—that, even supposing the present case to come within s. 198 (1), the heading to s. 198 does not involve the conclusion that there is necessarily a matter of proprietary title *in issue* in the Revenue Court when it has before it a case within s. 198; that where the plea of the defendant literally or, in effect comes within s. 198 (1), the Revenue Court must inquire into that plea, *i. e.*, into the allegation of actual payments in good faith to a third person and determine the question, but should not decide the question of the title of the alleged third person to receive the rent and has no concern with such title beyond such bearing as it may have on the determination of the good faith of the payments; that actually the present case does not come

within s. 198 and the answer to the question whether a matter of proprietary title is in issue must be sought *aliunde*, that no question of proprietary title is in issue in the present case; and that appeal lies to the appropriate Revenue Court,

And my answer to the reference is that the defence set up does not come, as the Collector thinks it does, under s. 198; and secondly, that, if it does so come, there is still no question of proprietary title in issue and the case of *Har Prasad* v. *Tajammul Hussain* (1) and *Tulhi* v. *Ramraj* (10) in so far as they decided that in all cases coming within s. 198 a question of proprietary title is in issue were wrongly decided; and that the appeal was properly filed in the Court of the Collector

By the Court.—Our answer to the Reference is that the appeal lay to the Revenue Court and was properly filed in the Court of the Collector of Basti. We make no order as to costs of this Reference.

N. H. *Order accordingly.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 197 OF 1924.

July 10, 1925.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Buckland.

W. & T. AVERY, LD.—DEFENDANTS—APPELLANTS

versus

KESSORAM PODDER—PLAINTIFF—RESPONDENT.

Calcutta Rent Act (III of 1920), ss 2 (f) (i), *11 (5), 15—Standard rent, what is—Benefit of Act*

In the absence of any application by the landlord to fix a higher rate under s 15, Calcutta Rent Act, the standard rent should be taken to be the rent at which the premises were let on the 1st of November 1918 with the addition of ten per cent [p 1003, col 1]

A tenant is entitled to the benefit of s 11, Calcutta Rent Act, if he complies with two conditions, (1) he must have paid any arrears of rent which might be due at the time of the passing of the Act within three months of the passing of the Act, and (2) he must pay the rent to the full extent allowable by the Act within the time fixed by the contract with his landlord and, in the absence of any such contract, by the 15th day of the month next following that for which the rent is payable. [p. 1003, col. 2, p. 1004, col. 1.]

When a person ceases to be a tenant, he cannot take advantage of the provisions of the Calcutta Rent Act. [p 1004, col. 2]

Appeal against an order of Mr. Justice Chotzner, dated the 1st December 1924, passed in the exercise of Original Civil Jurisdiction.

Mr. *W. W. K. Page*, for the Appellants

Mr. *S. R. Das*, Advocate-General, for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is an appeal by the defendants against the judgment of my learned brother Mr. Justice Chotzner.

It is necessary for me to state certain facts The appellants were in occupation of one room on the ground floor of premises No. 1, Hastings Street, as monthly tenants from the end of 1911 or the beginning of 1912. The rental was Rs. 150 per month. That rental remained the same until the year 1919. In 1911 the landlords were the Mullicks. In 1919 Messrs. Solomon & Co, took a lease from the Mullicks of the premises No 1, Hastings Street, for a term of 20 years. The appellants continued to be tenants under Messrs. Solomon & Co

On the 5th of September 1919, an agreement was made between the appellants and Messrs. Solomon & Co., to pay Rs 500 rent per month; there were negotiations for a lease, which were never brought to completion. In December of the same year the plaintiff, Kessoram Poddar, bought the lease from Messrs. Solomon & Co, and the premises from Messrs. Mullicks for a total of 11 lacs, paying 2 lacs for the lease and 9 lacs for the premises.

The plaintiff accepted the appellants as monthly tenants at the same rate of rent, namely, Rs 500. The appellants paid the rent at the rate of Rs. 500 up to the end of April 1920. On the 5th of May 1920, the Calcutta Rent Act came into operation In June the plaintiff demanded the rent for May the appellants then said that they were liable to pay standard rent only, which was the rent payable on the first of November 1918, plus ten per cent, namely, Rs. 165.

Apparently, no reply was sent to that statement; and, on the 21st of July 1920, the appellants tendered the rent based upon the rate of Rs. 500 up to the 5th of May, when the Rent Act came into force, and at the rate of Rs. 165, which the appellants declared to be the standard rent, for the subsequent period. This was refused and on the 23rd of July 1920, the amount was paid to the Rent Controller, and after that date the appellants continued to pay what, they contended, was the standard rent to the Rent Controller.

The plaintiff gave notice to the appellants that he was intending to pull down and rebuild the premises, and he gave them notice to vacate the premises: no action was taken on the first notice and apparently the plaintiff abandoned his intention to rebuild the premises, when he failed to get possession from the appellants and entered into an agreement to sell the premises to the Imperial Bank. That purchase was completed subsequently, *viz.*, on the 7th of December 1921.

The plaintiff, on the 29th of December 1920, gave notice to the defendants to vacate the premises at the end of January 1921. That is the notice to quit, upon which reliance is placed in this suit.

This suit was brought on the 10th of January 1922, and the claim was for rent from and including May 1920 to the end of January 1921 at the rate of Rs. 500 per month, and for damages for wrongful use and occupation of the premises from the 1st of February 1921 up to the 7th of December 1921, which, as I have said, was the date on which the plaintiff sold the premises to the Imperial Bank and after which he had no interest in the premises.

The first point, which was urged by the learned Advocate on behalf of the appellants, was that the plaintiff was not entitled to recover rent in respect of the first period, namely, from 5th May 1920 to January 1921, both months inclusive, at a rate higher than the standard rent in respect of these premises.

The learned Judge rejected that contention on the ground that the standard rent had not been fixed by the Rent Controller, and that there was a fallacy underlying the argument, because it proceeded upon the assumption that a tenant could standardize his own rent. The learned Judge held that the appellants ought to have applied to the Rent Controller for the standardisation of the rent and as they did not do so, they could not be heard in this suit to allege that they were not liable for more than the standard rent.

The question is whether the conclusion, at which the learned Judge arrived, is correct.

I am not surprised at the conclusion at which the learned Judge arrived, because it has been pointed out on many occasions that the provisions of the Calcutta Rent Act are difficult to construe. With great respect, however, to the learned Judge I am unable to agree with the conclusion at which he arrived.

The question depends upon certain sections of the Rent Act.

Section 2 (*f*) provides that "standard rent" in relation to any premises means, "(*i*) the rent at which the premises were let on the first day of November, 1918, or, where they were not let on that date, the rent at which they were last let before that date and after the first day of November, 1915, with the addition, in either case of ten per cent. on such rent [I need not read No. (*ii*) in connection with this case inasmuch as the premises in question were let on the 1st of November 1918];

"(*iii*) in the cases, specified in s. 15, the rent fixed by the Controller."

The word "or" does not appear between these sub-sections, but I think that it must have been intended that the sub-sections or clauses should be read disjunctively. Consequently "standard rent" may be as described in (*i*), (*ii*) or (*iii*) in s. 2, cl. (*f*).

The learned Advocate who appeared for the appellants submitted that the learned Judge was wrong in holding that the tenant had standardised his own rent. He argued that the rent was standardised by the Act: and he pointed out that the first sub-clause of sub-s. (*f*), if it stood alone, would clearly indicate that the standard rent was the rent at which the premises were let on the 1st of November 1918 with the addition of ten per cent. on such rent.

But the learned Advocate who appeared for the plaintiff argued that the first subsection of cl. (*f*) does not stand alone and sub-s. (*iii*) must be considered.

Now, turning to s. 15, which is the section mentioned in sub-s. (*iii*), s. 2, cl. (*f*) it is found that "the Controller shall, on an application made to him by any landlord or tenant, grant a certificate certifying the standard rent of any premises leased or rented by such landlord or tenant, as the case may be," and that "in any of the following cases, the Controller may fix the standard rent at such amount as, having regard to the provisions of this Act and the circumstances of the case he deems just.

Sub-s. (*d*) is one of the following cases and refers to the case "where the rent paid on the first day of November, 1918 (or, where the premises were not let on that date, the rent at which the premises were last let before that date) was in the opinion of the Controller unduly low."

Section 15, therefore, gives the landlord an opportunity of applying to the Controller and alleging that the rent paid in respect of these premises on the 1st of November 1918 was unduly low, and if he can prove that, it will be in the discretion of the Controller to fix the standard rent at an amount higher than the rent which was actually paid on the 1st of November 1918, subject to the proviso contained in the section that he cannot fix it at a higher amount than the highest rent actually paid for the premises at any time since the first day of November 1913. In this case the highest rent paid for the premises since the first day of November 1918 was Rs. 500 per month, so that if the landlord had applied to the Controller and alleged that the rent which had been paid in November 1918 was unduly low, the Controller might have fixed it at a higher amount. If he had been satisfied that the rent in November 1918 was unduly low, the Controller might have fixed it at a higher amount, but he could not fix it at a higher amount than Rs. 500 per month.

Consequently, the learned Advocate for the plaintiff-respondent argued that on the 1st November 1918 rent *plus* ten per cent. should not be adopted as the standard rent in this case, because the Controller might upon an application by the landlord have fixed a higher rent.

In my opinion, that view ought not to be accepted. I think it was intended by the Act that *prima facie* the standard rent which was mentioned in sub-s. (*i*) of cl. (*f*) of s. 2 should be the standard rent, and in the absence of any application by the landlord to fix it at a higher rate, under s. 15, the "standard rent" should be taken to be the rent at which the premises were let on the 1st of November 1918 with the addition of ten per cent. as provided by sub-s. (*i*).

It was not necessary, in my opinion, for the defendants in this case to show that they had made an application to the Controller and that he had fixed the standard rent at Rs. 165 before taking the point in this suit. In other words, in my opinion, it was open to the defendants-appellants to urge and rely upon the fact that the standard rent as fixed by the Act was Rs. 165 per month. Consequently, in my judgment, by reason of the provisions of s. 4 of the Act, the plaintiff was not entitled to recover any amount which exceeded the standard rent for the period from May 1920 to January 1921.

The result, therefore, is that, in my judgment, that part of the decree of the learned Judge which deals with the amount of rent recoverable should be varied.

I understand that the standard rent had been deposited with the Controller and has in fact been withdrawn by the plaintiff.

The remainder of the case relates to the question whether the notice in December 1920 was a valid notice. That depends upon the construction to be placed upon s. 11, sub-s. (5). That sub-section provides: "No tenant shall be entitled to the benefit of this section in respect of any premises, unless within three months of the date of the commencement of this Act he has paid all arrears of rent due by him in respect of the said premises, and also unless he pays the rent due by him to the full extent allowable by this Act within the time fixed in the contract with his landlord, or, in the absence of any such contract, by the fifteenth day of the month next following that for which the rent is payable".

It is to be noticed that this section deals with the granting of an order or a decree for recovery of possession only.

The point arises in this way: As I have already mentioned, the amount of the standard rent for May and June was not tendered to the landlord until the 21st July 1920 and was not paid to the Rent Controller until the 23rd of July 1920, and it is not denied that that was not paid within the time specified by the Act. But the learned Advocate for the appellants presented an ingenious argument based upon sub-s. (5) of s. 11 which was to this effect. He argued that sub-s. (5) was intended to give a tenant three months within which he might pay the arrears of rent, and that such arrears would include not only any arrears of rent, which might be due at the time the Act came into force, but also any arrears of standard rent which might become due after the Act came into force.

In my judgment this argument ought not to be accepted. Having regard to the words used in the sub-section and to the framing of the sub-section, I think it is clear that the intention was to give the tenant the benefit of the section, if he complied with two conditions: in the first place he must have paid any arrears of

rent which might be due at the time of the passing of the Act within three months of the commencement of the Act; and, secondly, he must pay the rent to the full extent allowable by the Act within the time fixed by the contract with his landlord and in the absence of any such contract by the 15th day of the month next following that for which the rent is payable.

In this case the appellants did not pay the rent within the time fixed in the contract or by the 15th day of the month, which followed the months of May and June for which the rent was payable: and, consequently, in my opinion, the appellants were in default.

It is true that the plaintiff did not act upon the default until the end of the year; but he was within his rights in giving the notice in December 1920 which expired at the end of January 1921.

Consequently, after January 1921 the appellants were trespassers and were no longer tenants, and they are liable to the plaintiff for compensation for the wrongful use and occupation of the premises from the 1st of February 1921 to the 7th of December 1921.

The learned Judge awarded compensation at the rate of Rs. 500 per month He based his judgment to a large extent upon the evidence given by Mr. Shrosbree.

It was argued on behalf of the appellants that the plaintiff's case was that he wanted the premises in order that he might pull them down and re-build ; that he abandoned that intention of his own accord and sold the premises; that although he alleged that he had suffered loss; he gave no proof of the alleged loss and, therefore, that the most the plaintiff could recover would be such rent as the plaintiff could have recovered from a tenant during those months; that having regard to the provisions of the Calcutta Rent Act the plaintiff could not have recovered from any tenant more than the standard rent in respect of the premises and that as the appellants had in fact paid to the Controller the standard rent for this period and the plaintiff had received the same, the plaintiff was not entitled to any damages at all.

On the other hand, it was argued on behalf of the plaintiff that the learned Judge was right in awarding damages at the rate of Rs. 500 per month.

I agree with the learned Judge's decision as to the amount of the damages although I base my judgment on grounds somewhat different to those stated by the learned Judge.

The plaintiff can only recover such damages as flow naturally from the breach of duty or breach of contract in the ordinary and usual course of things.

The evidence was that the appellants had willingly agreed to pay Rs. 500 a month for the premises in 1919. Further they desired to take a lease for three years at the rate of Rs. 500 per month. The evidence further shows that the appellants tried to find other premises but they could not get any other suitable premises at a lower rent than Rs. 500 a month.

Now, after January 1921, as I have already said, they were no longer tenants and they were not in a position to take advantage of the Calcutta Rent Act—they were wrongdoers.

In these circumstances it is not unreasonable to hold that Rs. 500 a month was fair compensation for the use and occupation of the premises by the defendants after January 1921.

It was not for the plaintiff to prove what would have been the standard rent if an application had been made to the Controller.

The premises are in an important quarter of the town and the defendants, before the Rent Act came into operation, were willing to pay Rs. 500 per month. *Prima facie*, therefore, it is not open to the defendants to allege that such amount was not a fair rent for a tenant to pay. If an application had been made to the Rent Controller he might have fixed the standard rent at less than Rs. 500 per month. On the other hand, he might have fixed it at Rs. 500 a month.

No application was made and that question was never decided.

It has, therefore, not been proved what the standard rent would have been if the matter had come before the Controller.

In the absence of any such decision and upon the evidence in the case, I am not satisfied that the learned Judge was wrong in holding that the damages for the wrongful use and occupation of the premises by the defendants should be assessed on the basis of Rs. 500 a month.

The result is that the sum of Rs. 4,500 decreed as rent will be reduced to Rs. 1,485

making the total amount of the decree Rs. 6,601-10-6.

As regards costs, we are of opinion that the appellants should have the general costs of the appeal and the costs of one day's hearing. We do not interfere with the order of the learned Judge as regards costs.

The money received from the Rent Controller by the respondents will be taken as part satisfaction of the decree and satisfaction will be entered to that extent.

Buckland, J.—I will first deal with the point whether the notice to quit was a valid notice. For this purpose, though I shall give my reasons later, I may say at once that, in my opinion, the amount of rent which the appellant Company had to pay was the amount which they actually deposited with the Rent Controller month by month and it is on this basis that I will deal with the question as to the notice to quit. The appellant Company, therefore, were entitled to the benefit of s. 11 of the Act provided they paid that amount either to the landlord by the fifteenth day of the month next following that for which it was payable, or, if refused by the landlord, deposited it with the Rent Controller under sub s. (4). The difficulty in which the appellant Company find themselves is that as regards the rent for May 1920 they deposited it out of time and by reason of that they are precluded from claiming the benefit of the section.

The argument that the "arrears" referred to in sub-s. (5) includes rent in arrear during the first three months after the Act came into force, and payable in respect of those months leads to the difficulty that in regard to those three months, if that construction were adopted, there would be two inconsistent provisions as to the payment of rent, namely, that provided in the first part of sub s. (5) that the tenant shall have three months within which to pay such rent and that provided by the latter part that he must pay or deposit his rent month by month.

The correct construction of this sub-section, in my opinion, is that the "arrears" referred to are arrears due at the time when the Act comes into force and that the first part has nothing to do with rent which accrues due month by month after that date.

The next question is as to the amount of rent to which the plaintiff was entitled for the period between the 1st of May 1920 and the 31st of January 1921. This involves consideration of various sections of the Calcutta Rent Act, an Act of faulty construction which renders it difficult of interpretation.

The contention of the plaintiff, stated briefly, is that unless the standard rent has been fixed by the Controller the tenant is not entitled to take advantage of the provisions of the Act, for, in fact no rent has been fixed by the Controller as standard rent of the premises in suit.

For the defendant Company, on the other hand, it has been argued that, though not necessarily in all cases but probably in the majority of cases and certainly in this case, there is a standard rent which, so to speak, attached to property from the moment that the Calcutta Rent Act came into force irrespective of any application made to or order passed by the Rent Controller under the Act, and that, subject to what I shall have to say presently, that is the amount which the tenant must pay or deposit.

"Standard rent" is defined in s. 2 (*f*) as the rent at which the premises were let on the first day of November 1918, or, where they were not let on that date, the rent at which they were last let between the first day of November 1915 and the first day of November 1918, *plus* ten per cent. on such rent in either case.

The sub-section furnishes two more definitions of which the second may be ignored. It has no application to the present case.

The third definition involves reference to s. 15 and provides that in the cases specified in s. 15 the "standard rent" is the rent fixed by the Controller. Now, in order to ascertain what those cases are, for it is in those cases alone that rent fixed by the Controller is "standard rent" according to the definition, one must look at s. 15 (3). The first two sub-sections have nothing to do with this matter, sub-s. (3) is sub-divided into five cases each involving different sets of circumstances, none of which has any application to the present case. If it had been intended that standard rent should only be such rent as the Rent Controller has fixed, and that in the circumstances contemplated by s. 2 (*f*) (*i*) all that the Rent Controller would have to do would be to ascertain the rent on the date material thereunder and add ten per cent., it would

have been more correct to have included such a case among the cases under s. 15 (3) and eliminated s. 2 (*f*) (*i*) altogether. But, inasmuch as the case with which we have to deal is not one of those mentioned in s. 15 (3) and consequently is not one in which the Rent Controller may fix the standard rent thereunder, it follows that under the definition clause the action of the Rent Controller in fixing the standard rent should be excluded.

I do not, however, altogether exclude the operation of s. 15 (1) under which the Controller may certify the standard rent, though he fixes it in appropriate cases under s. 15 (3). It may be that in a case to which s. 2 (*f*) (*i*) applies it is open to a party to apply to the Controller for a certificate. This point does not arise in this case but I mention it lest the juxtaposition of these two sub-sections should lead to the suggestion that in a case to which s. 2 (*f*) (*i*) applies it is the duty of the party interested in having it done to make an application to the Rent Controller under s. 15 (1), even if s. 15 (3) has no application.

In my opinion, the contention of learned Counsel for the appellant Company is the correct one and where the conditions contemplated by sub-s. 2 (*f*) (*i*) exist, the standard rent follows as a matter of course, subject, however, to this that it is always open to a landlord or a tenant to make an application to the Rent Controller under s. 15 (3) if he can bring the matter within its several provisions. Upon the Rent Controller so fixing the rent then there is another standard rent for the premises as defined by the Act. This leads to the curious result that there may be a standard rent as defined by s. 2 (*f*) (*i*) and a standard rent as defined by s. 2 (*f*) (*iii*), both simultaneously applicable to the same premises. There is, however, no practical difficulty because when you come to apply other provisions of the Act and, in particular, s. 4 (1) or s. 11 (5), the landlord would be entitled to the benefit of whichever standard rent might be the higher. In this view, the amount which the plaintiff was entitled to recover from the defendant Company was the amount for which the premises were let on the 1st of November 1918 *plus* ten per cent. There is no question as to what that amount was and, in my opinion, the judgment and decree of the learned Judge should to this extent be modified.

The learned Judge has relied upon an earlier judgment of mine in *Jetha Bhulchand* v. *Grace* (1). That is not an authority for the proposition that if standard rent has not been fixed by the Controller, the tenant must pay the agreed rent to the landlord or deposit it with the Controller. In that case according to my recollection, which the report confirms, there was no competition as between the standard rent and the agreed rent. The only question was whether the tenant had paid or deposited his rent in time. I am not sure that the learned Judge referred to the case on the question of amount, but without explanation it might be so interpreted and deemed to conflict with the opinion now expressed.

The last question is that of damages. I agree with the opinion expressed by the learned Chief Justice and have nothing to add.

I concur in the order to be made.

R. L. *Order accordingly.*

(1) 70 Ind. Cas 494; 26 C. W. N. 678; A. I. R. 1923 Cal. 220.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 1748 OF 1925.

January 16, 1926.

Present:—Mr. Justice Dalip Singh.

LAKSHMI CHAND AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MUKTA PARSHAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. X, r. 1—Examination of parties—Replication covering all facts in written statement—Witnesses, order in which to lead—Court, duty of.

The Court is bound to examine the parties only when there is no clear express or implied denial of any statement of fact in the pleadings. But where a plaintiff puts in a written replication which covers all statements of fact referred to in the written statement, there is no occasion for the Court to examine the parties or their Pleaders.

It is no duty of the Court to direct a party as to the order in which he is to lead his witnesses.

Miscellaneous second appeal from an order of the District Judge, Ambala, dated the 8th April 1925, reversing that of the Subordinate Judge, Second Class, Ambala, dated the 20th June 1924.

Mr. *Shamair Chand*, for the Appellants.

Pandit *Bishan Nath*, for the Respondents.

JUDGMENT.—The learned District Judge remanded this case on the grounds set out in para. 2 of his judgment. The first ground mentioned there is that the lower Court omitted to comply with the provisions of O. X, r. 1. Now, O. X, r. 1 only makes it obligatory on the Court to examine the parties where there is no clear express or implied denial of any statement of fact in the pleadings. In this case the plaintiff had put in a written replication which, as far as I can see, covered all statements of fact referred to in the written statement. There was, therefore, no occasion for the Court to examine the parties of their Pleader.

The next ground taken is that the Court omitted to comply with para. 75 of the Rules and Orders of the High Court, Vol. I. This omission was not made the subject of any ground of appeal before the District Judge and I do not see that it was necessary to remand the case for this purpose in the circumstances of this case.

The third point taken was that the defendants had stated that they proposed to prove issue No. 2, the onus of which was on them, by the evidence of one witness the evidence of the plaintiff and the evidence of one of the defendants. The defendants examined the plaintiff before putting one of themselves into the witness-box, and, on an objection taken by the plaintiff, the lower Court disallowed the statement of the defendant on the ground that the defendants should, if they wished to take a statement of the defendant, have taken it before the statement of the plaintiff was recorded. The learned District Judge seems to have been of opinion that, as the defendant had announced his intention of summoning himself as a witness, it was the duty of the Trial Court to have warned him to take the statement of the plaintiff last. I do not see that it was the duty of the Court to direct the party as to the order in which he was to lead his witnesses. The Court might well have done so but I cannot see that this is a ground for remand because the defendants were the persons primarily responsible for the order in which their evidence was to be recorded.

The next ground taken is that the Court disallowed a certain statement of accounts from being put in in order to contradict the plaintiff as a witness. The Court perhaps was strictly speaking within its rights in disallowing this document which should have been put in earlier in the course of the proceedings. However as the statement of accounts had been sent by plaintiff himself to the defendants I think, in the circumstance of the case, the Court might well have exercised its discretion in favour of the defendants. Mr. Shamair Chand for the appellant has not pressed the matter before me. He has, however, pointed out that it is unnecessary to remand the whole case for re-decision and that it is sufficient to allow the document to be put in now and the plaintiff further examined, if necessary.

I, therefore, accept the appeal and set aside the order remanding the case for re-decision and re-trial, but I direct that the learned District Judge may either allow the plaintiff to be further examined before himself with reference to the statement of accounts which was disallowed in the Court below or may direct the lower Court to examine the plaintiff further with references to the statement of accounts and submit a report to himself as to the result of the examination together with a decision, if necessary, on issue No. 2. This order will meet the ends of justice in this case. For the rest the learned District Judge will dispose of the appeal according to law.

R. L. *Appeal accepted.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 139 OF 1925.

January 5, 1926.

Present :—Mr. Justice Daniels.

EAST INDIAN RAILWAY—PETITIONER

versus

FIRM BALDEO GUTAIN—OPPOSITE PARTY.

Contract Act (IX of 1872), s. 231—Railway receipt granted in name of agent—Loss of goods—Owner of goods, whether can sue—Carriage of goods—Railway Company—Risk Note—Sealing wagon with paper—Loss of goods in transit—Wilful negligence

Where a Railway receipt for goods consigned is granted in the name of a servant or agent, the real owner of the goods is entitled to sue directly the Railway Company for their value if the goods are lost.

Sealing a wagon with paper only constitutes wilful negligence, and the Railway Company can be successfully sued for damages if the goods are lost in transit.

Firm Balram Dass-Fakir Chand v *Great Indian Peninsula Railway Company*, 88 Ind. Cas 559, 23 A. L J 645; L. R. 6 A. 340 Civ; A I. R. 1925 All. 562; 47 A. 724, followed.

Civil revision from an order of the Judge, Small Cause Court, Jhansi, dated the 24th of July 1925.

Mr. *Ladli Prasad Zutshi*, for the Applicant.

Mr. *S. C. Das*, for Mr. *K. N. Laghate*, for the Opposite Party.

JUDGMENT.—This is a revision application against a Small Cause Court decree awarding compensation for two bags of sugar forming two complete packages out of a larger consignment which were lost in transit. The lower Court has held that there was wilful negligence on the part of the Railway. The grounds taken in revision are two :—

(1) That the plaintiff-firm was not entitled to sue because the Railway receipt was granted in the name of its agents.

(2) That the Court below was wrong in holding that sealing a wagon with paper only constitutes wilful negligence.

On the first point even if the name of the principal was not disclosed he is entitled under s. 231 of the Contract Act to sue on the contract. I know of no authority for the proposition that where a Railway receipt is granted in the name of a servant or agent the real owner of the goods cannot claim for their value if lost. On the second point the judgment of the Court below is supported by the ruling in *Firm Balram Dass-Fakir Chand* v. *Great Indian Peninsula Railway Company* (1) which I am unable to distinguish from the facts of the present case. The revision accordingly fails and I dismiss it with costs.

S, S. *Appeal dismissed.*

(1) 88 Ind. Cas. 559; 23 A. L. J. 645, L. R. 6 A. 340 Civ ; A. I. R. 1925 All. 562, 47 A. 724

CALCUTTA HIGH COURT.

ORIGINAL CIVIL APPLICATION IN THE MATTER OF INDIAN PATENT AND DESIGNS ACT.

July 14, 1925.

Present:—Mr. Justice Gregory.

INDIAN VACUUM BRAKE Co., LTD.—PETITIONER

versus

E. S LUARD—RESPONDENT.

Patents and Designs Act (II of 1911), s. 26—Utility and novelty, meaning of—Patent for making in one piece

In Patent Law the term 'utility' is not used in the abstract but in a very special sense. It may be described as an invention better than the preceding knowledge of the trade as to a particular article. Mere usefulness is not sufficient to support a patent. [p. 1009, col 2.]

For purposes of novelty in Patent Law it is not enough that the purpose is new or that there is novelty in the application so that the article produced is in that sense new, but there must be some novelty in the mode of application In adopting the old contrivance to the new purpose there must be difficulties to overcome requiring what is called invention or there must be some ingenuity in the mode of making adoption. To be new the novelty must show invention. [p 1009, col 2; p. 1010, col. 1]

Patents for making in one piece, articles previously made in two or more pieces have generally been held invalid. [p 1010, col. 1.]

Mr. *P. N. Chatterjee* (with him Mr. *C. Bagram*), for the Petitioner.

Mr. *S. N. Banerjee* (with him Mr. *A. K. Roy*), for the Respondent.

JUDGMENT.—This is a petition under s 26 of the Patents and Designs Act (II of 1911) for the revocation of a patent granted to the respondent on the 21st March 1922, by the Controller of Patents and Designs, Calcutta. At the request of the parties this case has been tried with the aid of an Assessor, Mr. A. H. Thackwell, Works Manager, East Indian Railways, Carriage and Wagon Workshops, Lilooah, and I desire to acknowledge his assistance to me. The petitioner is the Vacuum Brake Co, Ltd, who carry on business in the manufacture and sale of Vacuum Brake fittings for Railway locomotives and rolling stock. The respondent is an Engineer and is a Director of the Consolidated Brake and Engineering Co, Ltd, manufacturers of Vacuum Brakes. The petitioner for many years, in the business of the Company, imported from the factory in England and sold in British India, Vacuum Brake Cylinders described as having the valve chamber mounted in the inner side of the piston according to 2 designs No. 14153, dated 2nd November 1909 and No. 14678, dated 23rd April 1910. These designs were published and have been publicly known in British India since 1910. The petitioner also claims to be the assignee of a patent known as "Hardy's Patent" being British Letters Patent No. 5864 of 1905. This also was publicly known, and published in India, and Vacuum Brake Cylinders according to that patent have been publicly used in India.

On the 21st February 1922, the respondent applied for and obtained in England a patent relating to the pistons of Vacuum Brake Cylinders identical with the one in the present suit. That patent was No. 5099 of 1922. On appeal, however, by the present petitioner, the patent No. 5099 was

cancelled on the 31st July 1924 by the Solicitor General who held the view that it disclosed no invention. In the meanwhile, on the 21st March 1922, the respondent had applied in Calcutta to the Controller of Patents for a patent of the same device. The application was opposed by the petitioner, but it was accepted on the 11th June 1922, and Patent No. 8018, dated 21st March 1922, the subject-matter of the present suit, was granted. On the 10th December 1923, the respondent applied to the Patent Office in Calcutta for an amendment of his Specification No. 8018 of 21st March 1922. The amendments asked for were allowed subject to the insertion to a disclaimer in the Specification relating to British Specification No. 5864 of 1905, and in consequence of this, the present proceedings were instituted for a revocation of the patent.

The Specification relating to Hardy's patent is marked as Ex. A in this case, and the drawings show some examples of forms of construction of the invention. Specimens of the petitioner's design No. 14153 of 1909 and No. 14678 of 1910 are marked C and D respectively. The only difference between these two lies in the method of attachment to the vertical wall of the piston. The respondent's Specification No. 8018 accompanied with the drawings is marked F-J. I think there can be no doubt that both in the working principle, and general character of construction, the petitioner's designs and the respondent's patent are founded on Hardy's patent. It is material in the present case to observe that the ball valve in this patent of 1905 is attached to the inner wall of the piston, and figure 2 shows a removeable seating at the bottom of the valve. If the nuts are removed from the bolts, the ball seat below and the ball come away. The ball can be let in either from above or below, and in the type shown in figure 4, from the side. In the respondent's patent the ball valve, as it is in Hardy's patent, is attached to the piston wall inside the cylinder. The valve consists of the body with the screw plug underneath, and the ball inside the body rests on the plug which is put in position from below, and which is removeable by unscrewing it; so both in Hardy's patent and in the petitioner's design the ball rests on a removeable seating. Exhibit E a model which has been used in this case to show the general character of the construction and principle of the respondent's ball valve. It is not an exact model, but it shows the principle. Later, during the case, a specimen of the respondent's ball valve, in section, was secured by Mr. Thackwell, the Assessor, and at the request of the respondent's Counsel it was marked as Ex. I. The petitioner's designs C and D as already stated are identical. Type C is attached to the inner wall of the piston by 2 studs and nuts, and type D is attached to the inner wall of the piston by the valve being screwed in. The ball valve consists of the valve body, the ball seating which is screwed in, the ball which is contained in a smaller cage, and a screw plug which closes the top of the body. It has been proved, and it is not disputed, that the petitioner's ball valve type Ex. D has been in use on Indian Railways many years, and long prior to the grant of Patent No. 8018 to the respondent, and the present application for a revocation of that patent is made on the ground that it is of no utility and that it is not a new invention, within the meaning of the patent law. The patent is also attacked on the ground that it was anticipated by Hardy's patent. It is important, therefore, to see the interpretation placed by the Courts on the terms "utility," "novelty," and "invention." The cases show that in patent law the term "utility" is used, not in the abstract, but in a very special sense. Mere usefulness is not sufficient to support a patent. In the case of *Young and Neilson* v. *Rosenthal & Co.* (1) Grove, J., in charging the Jury described "utility" as meaning an invention better than the preceeding knowledge of the trade as to a particular article. As to the meaning of "novelty" and "invention," Lord Westbury, in the case of *Harwood* v. *Great Northern Railway Co.* (2), said "you cannot have a patent for a well-known mechanical contrivance merely when it is applied in a manner or to a purpose, which is not quite the same, but is analogous to the manner or the purpose in or to which it has been hitherto notoriously used." In citing this rule in *Rickmann* v. *Thierry* (3) Lord Davey said "It is not enough that the purpose is new or that there is novelty in the application, so that the article produced is in that

(1) (1884) 1 Pat. C. 1.
(2) (1865) 11 H. L. C. 654 at p. 682; 35 L. J. Q. B. 27, 12 L. T. 771; 14 W. R. 1, 11 E. R. 1488; 145 R. R. 356.
(3) (1896) 14 Pat. C. 105 at p. 121.

sense new, but there must be some novelty in the mode of application. By that I understand, that in adopting the old contrivance to the new purpose, there must be difficulties to be overcome, requring what is called invention, or there must be some ingenuity in the mode of making the adoption" and Cotton, L. J., in *Blakey* v. *Latham* (4) laid down that to be new in the patent sense, the novelty must show invention ; see also Fletcher Moulton on Patents, page 21.

Three witnesses have been called on behalf of the parties. Mr. Cook, a District Carriage and Wagon Superintendent on the Bengal Nagpur Railway, and Mr. Remfry an Engineer and Patent Agent on behalf of the petitioner, and Mr. Bwye an Engineer in the employment of the Consolidated Brake and Engineering Co., Ld. on behalf of the respondent. Mr. Luard is a Director of this Company and was the Managing Director when Mr. Bwye came out to India in 1923. The evidence of Mr. Cook and Mr. Remfry, generally, speaking is to the effect that they cannot find anything new in the respondent's ball valve or any improvement on that of the petitioner's. It is common ground that the principle is the same, and the valves function exactly alike. Mr. Bwye says that the essential difference between the two is the simplicity of the respondent's ball valve which has fewer parts, the ball seat being combined with the plug. I do not think that this in itself is enough to support a patent. Many cases are collected in Fletcher Moulton on Patents, page 39 where it is stated that patents for making in one piece, articles, previously made in two or more pieces, have generally been held invalid. I have been unable to see what advantage results from this and I cannot regard it as an invention. Mr. Luard, in an affidavit that has been referred to, says, in para. 4 that his patent differs from the petitioner's designs in two features which are claimed by him to be of great value. One of these features is that the valve seat can be removed without first removing that ball, and that upon removing the valve seat for the purpose of inspection, cleaning or removal, the ball is simultaneously removed. The first part of this statement suggests that the ball can be left in the valve chamber after the valve seat has been removed. As a matter of fact it cannot. As soon as the ball seat is removed, the ball falls out, and the latter portion of Mr. Luard's statement shows that this is so. In my opinion there is no substance in the point made. For the purpose of inspecting or cleaning the valve seat, in Mr. Luard's design, the screw plug underneath is removed and the ball falls out; and in the petitioner's construction the screw plug at the top is removed and the small cage containing the ball is taken out. Even for the purposes of grinding the valve seat, which is done according to Mr. Cook about once in five years, and according to Mr. Bwye about once every year, it is not necessary for the valve seat in the petitioner's construction to be taken out. The overhauling of the ball valve is so occasional, that if Mr. Luard's design showed any greater convenience, which I have been unable to find, it would not be one of value. The other feature claimed to be valuable is that the ball is properly located within the valve chamber without the provision of a cage which Mr. Luard says may possibly be omitted when re-placing the parts. As there is no greater likelihood of the cage not being re placed than there is of the ball not being re-placed in the chamber in Mr. Luard's construction, there is no substance in the advantage he claims inferentially for his own design. Mr. Luard is mistaken if he suggests that the cage is necessary to keep the ball in position. The evidence of Mr. Cook and Mr. Remfry shows that the absence of the cage would make no difference to the working of the valve, for the ball must come into position as soon as the screw plug at the top is screwed down properly. The cage is merely a convenient receptacle for the ball, which is taken out simply by lifting out the cage. In this connection, Mr. Luard has made a statement in his amended specification to which exception has, and I think justly, been taken. Referring to the petitioner's construction Mr. Luard says "in removing the screw plug the ball must be removed with some difficulty." If Mr. Luard had seen a specimen of the petitioner's ball valve, it should have been patent to him that the ball comes away in the cage, and that his statement was misleading. With reference then to the special features in patent No. 8018 mentioned by Mr. Luard, I am unable, for the reasons I have given, to take his view of their valve. From the

(4) 1888) 6 Pat. C. 184 at p. 187.

point of view of convenience, it has been said on behalf of the petitioner that it is much easier to get at the screw plug when placed at the top of the ball valve, as in the petitioner's designs, than when it is placed underneath, and is practically unseen, as in patent No 8018. Both Mr. Cook and Mr. Remfry say this, but Mr. Bwye thinks it is equally easy in either case. Such judgment as I am able to form on this particular point, does not lead me to agree with Mr. Bwye. There is one more point in Mr. Bwye's evidence I shall refer to before stating my conclusions in this case. Mr. Bwye says that welding the ball valve after it has been fixed to the piston wall, eliminates a possible source of leakage of air at the place of attachment. I do not think it can be contended that there is any invention in this. Mr. Bwye concedes there is no novelty in welding, and there can be no question that welding could be applied equally well in the case of the petitioner's ball valves if it were considered an advantage. The possible consequences, however, of fixing the ball valve in the manner described by Mr. Bwye, preparatory to the welding have been criticised as serious. Mr. Bwye says that the ball valve is attached to the vertical wall of the piston by drilling a hole in the piston wall to receive the turned portion of the valve, and, as the whole is drilled smaller than the turned portion of the valve, it is necessary to drive the valve into position by the use of hammer, after which the welding is done. When at the Assessor's instance he was asked what would happen if a considerable degree of force were used, he said this would not be permitted; but that if a considerable degree of force was used, there would be every likelihood of injuring the piston wall. Mr. Bwye's evidence further shows that if for any cause it becomes necessary to remove the valve body the welding would have to be chipped away by hammer and chisel and the ball valve driven out, and the effect of his evidence is that there would be some slight damage to the inside of the piston wall, but he says that it would not be material if reasonable care were used. Mr. Remfry says that injury to the piston wall would mean injury to the piston itself. Mr. Cook was not cross-examined on this question. The evidence altogether leaves the impression on my mind that the welding process, taken as a whole, is not unattended with danger to the piston. I do not find in Mr. Luard's specification or affidavit, a claim to any speciality in the process, and it does not impress me as a valuable feature of the patent. As stated before the evidence shows, and it is not disputed, that type D of 1910 of the petitioner's designs has been in use on Indian Railways for many years prior to the grant of patent No. 8018. Mr. Cook has many years' practical experience of Vacuum Brakes and is well-acquainted with the construction and working of the petitioner's ball valve type D and he is a witness unconnected in any way with the parties. He was unable to find anything new, or, from the point of view of practical utility, anything more useful in Mr. Luard's patent. After giving my best consideration to the several matters on which evidence has been given and the question raised in this case with reference to both Mr. Luard's patent and the petitioner's design, I have come to the conclusion that in no respect is the patent No. 8018 an improvement on, or more useful or better than, the petitioner's design. In my judgment it is not, as claimed, an improved Vacuum Brake Piston and so far as I can see there is nothing new, in the sense of novelty, in the patent, and it discloses no invention. Furthermore, in my view, in material features, the patent was anticipated by Hardy's patent. Applying the principles laid down in the cases cited, I am of opinion that the patent No. 8018 of the 21st March 1922 granted to Mr. Luard the respondent with the amended specification relating thereto, ought to be revoked, and I give judgment accordingly in favour of the petitioner. The respondent must pay the petitioner's costs in these proceedings The Taxing Officer will on taxation fix what allowance can reasonably be made to the expert witnesses in the suit, *viz.*, Messrs. Cook, Remfry and Bwye for qualifying themselves for the purposes of giving evidence and also for their attendance in Court; the amount to be fixed by the Taxing Officer in his discretion. Under s. 35 of the Patents and Designs Act I fix the remuneration of the Assessor at Rs. 100 per diem. This item will not be chargeable to the parties.

R. L. *Patent revoked.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1460 OF 1925.

December 21, 1925.

Present:—Mr. Justice Addison.

SINGH RAM—PLAINTIFF—APPELLANT

versus

KALA AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Kurhi kamini *cess, nature of—Liability of non-proprietary owners of houses—Burden of proof—Suit for declaration that cess not payable—Jurisdiction of Civil Courts*—Wajib-ul-arz *entries, value of.*

Kurhi kamini is a cess of the nature of a house or ground rent and not in the nature of a hearth cess. [p. 1012, col. 2]

Dewak Ram v. *Kour Pirthi Singh*, 74 P R 1879, *Natha* v. *Jai Ram*, 21 P. R 1888, *Fazul* v. *Samandar Khan*, 49 P. R 1891 and *Raj Sarup* v *Hardawari*, 95 P. R. 1907; 120 P. L. R. 1908; 141 P. W. R. 1907, referred to.

The burden of proving that *kurhi kamini* dues are leviable from such non-proprietary residents of the village as are owners of the houses and the sites lies on the person seeking to recover them [p 1013, col. 1]

A suit for a declaration by a person that he is not liable to pay *kurhi kamini* dues is cognizable by a Civil Court. [*ibid.*]

Sheikh Muhammad v. *Habib Khan*, 67 P R. 1905; 113 P. L. R. 1905, 94 P. W R 1905, followed.

Entries in *wajib-ul-arz* as to the liability for village dues do not bind any one except the proprietors who are parties to them [p 1013, col 2]

Arur Singh v. *Dal Singh*, 40 P R. 1879 and *Azmut Ali Khan* v *Harnam*, 61 P. R. 1875, referred to

Second appeal from a decree of the Senior Sub-Judge, Rohtak, dated the 15th July 1924, reversing that of the Fourth Class, Sub-Judge, Rohtak, dated the 11th June 1924.

Mr. *Shamair Chand*, for the Appellant.

Mr. *G. S. Salariya*, for the Respondent.

JUDGMENT.—The defendants who are *jat lambardars* of village Bidhlan in the Rohtak *Tahsil* sued four *mahajans* of the same village in the Revenue Courts for recovery of *kurhi kamini* cesses and obtained decrees. Each of these *mahajans* then filed a suit for declaration that he was not liable to pay *kurhi kamini* as he had actually purchased his houses and the sites thereunder and was not merely a cultivator or *kamin* to whom the sites have been given for residence. It was found by the Trial Court that such suits were cognizable by the Civil Courts and that the plaintiffs were the purchasers of their houses and were not holding the sites as *kamins* or cultivators. It then went on to find that the burden of proof was upon the proprietors of the village to establish that those who purchased houses were liable to pay this cess which was in the nature of a ground rent and which would thus be ordinarily recoverable from those who were given permission to occupy sites as *kamins* or cultivators. The lower Appellate Court also held that the suits were cognisable by the Civil Courts and that the plaintiffs were out-and-out purchasers of their houses and sites, but it held that as there was a custom of payment of *kurhi kamini* cesses in the village, it was incumbent upon the plaintiffs to establish that they were not liable. It accordingly remanded the suit for a re-trial on this issue after it changed the burden of issue. The Trial Court then held again that this cess was in the nature of a ground rent and that the defendants had failed to prove that they had ever realised it from the plaintiffs. It, therefore, again decreed the suits. The lower Appellate Court then accepted the appeals and dismissed the suits holding that the cess in question was in the nature of a hearth cess and not of ground rent and that it applied to all persons who were not proprietors of the village estate, that is, village agricultural land. It brushed aside the fact that the defendants had failed to prove its collection from the plaintiffs by noting that the defendants said that the accounts were kept by the village *mahajans* who did not produce them. Certificates were obtained from the lower Appellate Court in order to allow second appeals to be preferred to this Court and they are now before me.

In para. 248 (*f*) of Rattigan's Digest of Customary Law *kurhi kamini* is defined as a house or ground rent levied from non-proprietor residents. It was held in *Dewak Ram* v. *Kour Pirthi Singh* (1) that *kurhi kamini* dues were of the same nature as house or ground rent. In that case there was a finding that such rent had been paid in the past by the persons who were sued. Again in *Natha* v. *Jai Ram* (2) it was held that this cess must be regarded as ground rent. The question had to be decided in order to hold as to which Court should hear the appeal. In Fallon's Dictionary *kurhi* is defined as a household or family or house tax while '*kamin*' is described as a menial servant. The meaning of the phrase, therefore, is a house tax or rent on menial servants according to the Dictionary. It was held in *Fazul* v. *Samundar Khan* (3) that the cess called *kamiana* was a due customarily leviable from the *kamins* of the village and a suit for its recovery was

(1) 74 P. R. 1879.
(2) 21 P. R. 1888.
(3) 49 P. R. 1891.

cognizable by the Revenue Court. In *Raj Sarup* v. *Hardawari* (4) *kurhi kamini* was held to be in the nature of a hearth cess and to be the equivalent of the door cess or *haqqbuha* of the Western Districts. It was further held that a suit for its recovery lay in the Revenue Courts as was done in the cesses now before me. This ruling, however, makes no allusion to the earlier rulings discussed by me where it was laid down that this cess was in the nature of a house or ground rent. The Dictionary also was not consulted. In any case this ruling is an authority for the view that the suits for the recovery of this cess were properly brought in the Revenue Courts.

In *Sheikh Muhammad* v. *Habib Khan* (5), however, it was held that a suit for a declaration that *kamiana* dues were not recoverable from such residents of a village as were owners of their houses did not come under cl. (j) of s. 77 of the Tenancy Act and was cognizable by the Civil Courts. This ruling has never been dissented from and must be followed. Though, therefore, the *lambardars* can sue in the Revenue Courts for the recovery of this cess the person proceeded against can bring a suit for declaration in the Civil Courts whatever the value of such declaration may be to him

Following the earlier rulings, therefore, and the Dictionary meaning of the words I hold that *kurhi kamini* is a cess of the nature of a house or ground rent. This view was also accepted by Mr. Joseph, the Settlement Officer of that District, in 1910. He held that a proprietor who became an owner of a house by virtue of purchase was exempt from its payment. A different view was, however, taken by the Financial Commissioner who, following certain revenue decisions, held that it was a hearth tax. There seems to me to be no foundation on which this view can be based. In these circumstances I hold that the burden of proving that the plaintiffs are liable to pay this cess lay upon the defendants, seeing that it is admitted that the plaintiffs are out-and-out purchasers of their houses and sites inside the village. The words "*kurhi kamini*" cannot be taken to mean a tax designed to show the overlordship of the proprietors of the agricultural land as against all other residents in the village but only a kind of ground rent recoverable from *kamins* and cultivators to whom sites have been given for as long as they remain in the village.

It is true that the names of the plaintiffs' ancestors who purchased the sites and houses before 1880 are recorded in the list of *kurhi kamini* payers in the *wajib-ul-araiz* of 1880 and 1909 It was held, however, in *Arur Singh* v *Dal Singh* (6) that such entries do not bind any one except the proprietors who are parties to them. Similarly an entry in the *wajib-ul-arz* was held not to be sufficient to base a claim for grazing dues in *Azmut Ali Khan* v. *Harnam* (7). It is also admitted that there is no proof in the present case that the plaintiffs ever paid the dues in question. That is very good evidence against the custom that they are liable to pay it. It was not sufficient for the defendants merely to say that the accounts were kept by the *mahajans* who did not produce them. Even if the accounts were written up by the *mahajans* which also has not been established, the book in which the entries were made would be kept by the *lambardars*. Besides, the usual person to keep such accounts would be the *patwari*. The burden, therefore, being upon the defendants to prove that the plaintiffs were liable to pay this cess, it is clear that they have failed to prove it and it was scarcely disputed that this would be so if the burden of proof was upon the defendants I hold that no custom has been established to the effect that the plaintiffs are liable to pay the cess in question and accepting the appeals I decree the plaintiffs' suits with costs in this Court.

R. L. *Appeal accepted.*

(4) 95 P. R. 1907, 120 P L R 1908; 141 P. W R 1907

(5) 67 P. R. 1905; 113 P. L. R. 1905, 91 P. W. R. 1905.

(6) 40 P R 1879.

(7) 61 P R. 1875.

ALLAHABAD HIGH COURT.

PRIVY COUNCIL APPEAL No. 35 OF 1925.

January 7, 1926.

Present.—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Lindsay.

RAGHUBIR SINGH AND OTHERS —APPLICANTS

versus

NATHU MAL—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s 109, O. XLVII, r. 1—Substantial question of law—Certificate for appeal to Privy Council—Review—"Any other

sufficient reason", meaning of—Fraud and undue influence.

Order XLVII, r. 1 of the C P. C. must be read as in itself definitive of the limits within which review of a decree or order is permitted and the words "any other sufficient reason" mean grounds at least analogous to those specified in the rule. Fraud and undue influence do not constitute grounds analogous to those specified in O. XLVII, r 1.

Chhajju Ram v. *Neki*, 72 Ind. Cas. 566; 49 I A. 144; 30 M L. T. 295, 26 C. W. N. 697, 41 P. L R. (P. C) 1922; 3 P L. T. 435; A. I. R. 1922 P C 112; 16 L W. 37, 17 P. W. R. 1922; 3 L. 127, 43 M. L. J. 332, 24 Bom L. R 1238; 4 U. P. L. R. (P. C.) 99, 36 C. L. J 459 (P. C.), followed.

Where there is a decision of the Privy Council itself which seems to settle the law on a point, the case cannot be certified as a fit one for appeal to the Privy Council as involving a substantial question of law

Application for leave to appeal to His Majesty in Council.

Mr. *S. C. Goyle*, for the Applicants.

Mr. *Mushtaq Ahmad*, for the Opposite Party.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council against an order of a Bench of this Court passed in its revisional jurisdiction. It appears that in the Court of first instance a suit was brought against one Manohar Singh. The 17th of November 1923 was fixed for the settlement of issues. Before that date Manohar Singh came into Court and filed a written statement in which he stated that he was willing to confess judgment and prayed that he might be relieved from the costs. The plaintiff consented to this arrangement and on the 13th of November 1923 a judgment was given as on a compromise.

On January 26, 1924, the defendant Manohar Singh filed an application for review before the Subordinate Judge. The Subordinate Judge went into the matter and after having recorded certain evidence he gave effect to the application and re-called his first decree. Against this order of the Subordinate Judge, an appeal was brought to this Court which was filed as a first appeal from order.

It is true that under the provisions of O. XLIII, r. (1) cl. (*w*) an appeal lies against an order under r. 4, O. XLVII granting an application for review. A reference to r. 7 of O. XLVII, however, shows that an appeal does not lie in all cases in which the application for review has been granted. An appeal is only entertainable when the grounds specified in O. XLVII, r. 7 (1) had been established.

The learned Judges of this Court were of opinion that the appellant had not shown that he was entitled to appeal against the order of the Court of first instance, inasmuch as he was not able to show that the grounds specified in O. XLVII, r. 7 were present in the case. The learned Judges, however, proceeded to treat the petition of appeal as a petition for revision, and came to the conclusion that the Subordinate Judge had entertained the application for review without jurisdiction. They set aside his order by their judgment dated the 7th of July 1925. It is against this order of the Court passed in revisional jurisdiction that the present application for leave to appeal has been filed.

It is clear that the applicant for leave to appeal to His Majesty in Council has not got an absolute right of appeal under the provisions of the Code. The case is one which falls within s. 109 (*c*) of the C. P. C., and it, therefore, lies upon the applicant to establish that the case is a fit one for appeal to His Majesty in Council. It may be mentioned moreover that the valuation of the suit and the valuation taken in this Court was Rs. 8,000 only.

We are asked to certify that this is a case which is fit for appeal, on the ground that it raises a substantial question of law of general importance. In our opinion it does not do anything of the sort. The Judges of this Court had before them the question as to whether the Subordinate Judge had authority and jurisdiction to entertain the application for review on the grounds of fraud and undue influence. On their interpretation of the law as laid down in O. XLVII, r. 1 they were of opinion that these were no grounds on which it was competent to the Subordinate Judge to entertain the application for review. They have followed a decision of this Court and also a decision of their Lordships of the Privy Council in *Chhajju Ram* v. *Neki* (1). In that case it was held that O. XLVII, r. 1 of the C. P. C. must be read as in itself definitive of the limits within which review of a decree or order is now permitted and the words "any other sufficient reason" mean grounds at least analogous to those specified in the rule. The Judges of this Court were of opinion that fraud or undue

(1) 72 Ind. Cas 566; 49 I A. 144; 30 M. L T. 295; 26 C. W. N. 697; 41 P L R. (P. C) 1922; 3 P. L T. 435, A. I R 1922 P. C 112; 16 L. W. 37; 17 P W R. 1922; 3 L 127; 43 M. L. J. 332; 24 Bom. L. R. 1238; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459 (P. C.).

influence did not constitute grounds analogous to those specified in O. XLVII, r. 1. Being of opinion, therefore, that the Subordinate Judge acted without jurisdiction they set aside his order.

It seems to us no question of law is involved at all for the law has already been settled in the sense adopted by the learned Judges of this Court. We have just mentioned the decision of their Lordships of the Privy Council which seems to us to settle the law on the point. No case has, therefore, been made out for appeal to His Majesty in Council and we, therefore, dismiss this application with costs including fees on the higher scale.

N. H. *Application dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1504 OF 1924.

January 7, 1926.

Present:—Mr. Justice Campbell and Mr. Justice Zafar Ali.

FIRM BUDHU MAL PARMA NAND—PLAINTIFFS—APPELLANTS

versus

GOKAL CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s 76 (d)—Hundi—Presentation—Hundi in lieu of previous debts inadmissible—Original cause of action as basis of claim

When one and the same person is the drawer and the drawee of a *hundi* no presentation of *hundi* on due date is legally necessary [p 1015, col 2]

Pachkauri Lal v. *Mul Chand*, 66 Ind Cas 503, 44 A 554, 20 A. L. J. 437, A I R. 1922 All. 279, followed.

Where a *hundi* is executed in lieu of previous debts and the *hundi* is inadmissible in evidence for want of proper stamp the plaintiff can fall back upon the original cause of action [p 1016, col 1]

Firm Rahmat Ali-Muhammad Fazi v *Firm Dewa Singh-Man Singh*, 75 Ind. Cas 827, 4 L 151, A I R. 1923 Lah. 396, 5 L. L J 361, referred to

First appeal, under s 39 of Act VI of 1918, from an order of the Sub-Judge, First Class, Ambala, dated the 30th May 1924.

Pandit *Sheo Narain*, R B., and Messrs. *Shamair Chand* and *Sagar Chand*, for the Appellant.

JUDGMENT.—The parties to this suit are the Firm Budhu Mal Parma Nand plaintiffs and (1) Gokal Chand, (2) Hari Chand, (3) Puran Chand and (4, 5 and 6) the three minor sons of Gokal Chand, defendants. The suit was based on three *hundis* all dated the 4th June 1922, (1) for Rs. 2,500 due after 245 days, (2) for Rs. 2,500 due after 355 days and (3) for Rs. 250 payable after 300 days. The suit was instituted on the 29th May 1923.

The lower Court dismissed the suit on the grounds that there was no proper presentation of the first two *hundis* on the dates of maturity, that the third *hundi* was not properly stamped and so was inadmissible in evidence and that the plaintiffs could not fall back upon the original consideration for it, because the plaintiffs intended the *hundi* to be an absolute payment of the previous debt.

In appeal it is argued in respect of the first two *hundis* that the presentation was not necessary because the drawers were themselves the drawees. These *hundis* were signed by Hari Chand for himself and Gokal Chand and by Puran Chand and they were drawn upon Janki Das-Baishambar Das. The defendants Gokal Chand and Hari Chand pleaded that they themselves were the sole owners of the Firm Janki Das-Bishambar Das. Puran Chand's plea was that he signed the *hundis* merely as a witness, a point which, as judgment will show, is yet to be decided.

We agree with the findings of the lower Court that the *hundis* were not presented but it was held in *Pachkauri Lal* v. *Mul Chand* (1) that when the drawer and the drawee of a *hundi* are the same person no presentation on due date is necessary as from the nature of the case the drawer cannot suffer damage from the want of such presentation and thus] s. 76, cl. (*d*) of the Negotiable Instruments Act applies.

The learned Sub-Judge has observed in his judgment that the plaintiffs did not rely on s. 76 (*d*) and did not show that the defendants could not suffer any damage owing to non-presentation, but it seems to us that the inability of the drawer to suffer damage is obvious and that it was not necessary for the plaintiffs to make a specific reference in their pleas to s. 76 (*d*). We hold on the first issue that no presentation of the *hundis* was necessary.

As regards the third *hundi* for Rs. 250 we again disagree with the learned Senior Subordinate Judge who correctly stated that it is a question of fact to be decided in each particular case whether the parties intended the subsequent *hundi* to be an absolute or a conditional payment of the original debt, and that the presumption

(1) 66 Ind. Cas. 503, 44 A. 554, 20 A. L. J. 437; A. I. R. 1922 All. 279.

was that the effect of giving or taking of a bill or note was that the debt was conditionally paid. The learned Subordinate Judge considered that this presumption was rebutted in the present case by the fact that previous promissory notes for the original debt were returned to the defendants. According to the plaintiffs' statement in the lower Court which was admitted by the defendants matters commenced by two loans by the plaintiffs to the defendants as proprietors of the Firm Janki Das-Bishambar Das the first of Rs. 4,000 and the second of Rs. 6,000. Promissory notes were taken and the defendants made certain payments both of interest and of principal. On the 4th June 1922 Rs. 5,250 remained due from the defendants and they received back the promissory notes and executed the *hundis* in suit according to which they were to pay up the amount within the period fixed in the *hundis*. In our opinion the principles of law applicable are laid down in *Firm Rahmat Ali-Muhammad Faizi* v. *Firm Dewa Singh-Man Singh* (2) and we think that the learned Subordinate Judge has overlooked the improbability of the plaintiffs agreeing to take a mere piece of waste paper as an absolute payment of a portion of their debt. The intention of the parties seems to us to have been to grant time to the defendants in lieu of making them liable on promissory notes payable on demand. We hold, therefore, on issue No. 11 that the plaintiffs can revert to the original loan and make it the basis of their claim in respect of Rs. 250 of the third *hundi*.

The suit has been determined by the lower Court on these who preliminary points. We accept the appeal and setting aside the judgment of the lower Court we remand the suit for a fresh decision on the other issues under O. XLI, r. 23, C. P. C. The stamp on appeal will be refunded and costs will be costs in the cause.

The question whether the suit was premature or unduly precipitate in regard to the second *hundi* payable after 355 days and the effect of such being the case remains open. The above order applies only to the three defendants Gokal Chand, Hari Chand, and Puran Chand, since before us the plaintiffs have withdrawn their appeal against the three minors Miwan Mal, Brij Lal, and Bihari Lal, and so far as they are concerned the dismissal of the suit by the Trial Court will stand.

R. L. *Appeal accepted.*

(2) 75 Ind. Cas. 827; 4 L. 151; A. I. R. 1923 Lah. 396; 5 L. L. J 361

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEALS NOS. 18 AND 291 OF 1924.

February 3, 1925.

Present:—Mr. Kennedy, J. C.

In re LALCHAND DEOOMAL—

INSOLVENT.

Trusts Act (II of 1882), ss. 5, 6—Trust funds lent to merchant—Merchant, whether trustee—Insolvency of merchant—Trust, position of.

Where a trustee of a charitable fund lends the trust funds to a merchant, the latter does not hold the funds as a trustee and if he happens to become an insolvent the trust must rank as an ordinary creditor of the insolvent in the insolvency proceedings

Mr. *Shrikishindas Lulla*, for the Official Receiver.

Mr. *Hassumal M. Gurbaxani*, for the Opponent.

JUDGMENT.—If the facts are truly stated it is a sad case. That seems to be quite clear. The facts stated are that Mohandas wished to create a charity in favour of cows. For that purpose Mohandas set aside Rs. 2,000 He invested this Rs. 2,000 with the insolvent and interest on it was to be paid every month and applied by the father or the son Hassanand for feeding cows, that is to say, to charity. Shortly before his insolvency the insolvent paid off this Rs. 2,000 in the following way.

He sold a certain property to the mortgagee. That property was sold for a sum of about Rs. 1,500 beyond the amount due on the mortgage and that sum of money was allowed to remain in the hands of the mortgagee Lalchand in that the interest on that amount should be paid to Hassanand with the consent of Hassanand and Rs. 500 was paid by the insolvent by way of a transfer of certain plot to Hassanand. Thus was made by the sum of Rs. 2,000 out of which cows were to be sustained as originally intended by Mohandas. These are the facts which were stated and may be taken for the present purposes to be correct facts. As a matter of fact Hassanand is a first cousin of the

insolvent and he also claims to be considerable creditor in respect of other transactions.

Now no doubt if this sum of Rs. 2,000 has been paid by the insolvent to Hassanand on account of ordinary debt, it would be a clear preference, however clearly that debt was due, however sacred the obligation on Deoomal from a moral point of view to re-pay this money may have been. It is particularly in the case of hardship that preference is likely to take place and all such transactions must be set aside according to the strict letter of the law whether the transfer is actuated by reprehensible or honest motives. But it is pleaded that this transaction is not liable to be set aside because it was a trust transaction. After examining Deoomal and looking into the accounts I find that there is no evidence that Deoomal was a trustee for the charity, that is to say, he was not a trustee in respect of Rs. 2,000 if this Rs. 2,000 was earmarked for the purpose of forming a charitable fund. The persons who possessed that fund were Mohandas and Hassanand. If Mohandas and Hassanand chose to utilise the trust funds by lending them to merchants instead of depositing those trust funds in trust securities hoping thus to earn a high rate of interest, that does not convert the debt due by the merchant to the lenders into a trust transaction. The matter is one simply of a debt in respect of money lent by the trustee and due by the merchant It is not the merchant who holds as a trustee and to whom the beneficiary is to look for the payment and for the benefits secured to them by the trust. I cannot say that this sum of Rs. 2,000 was in the hands of Deoomal as a trustee. It seems to me, therefore, he was not authorized to re-pay the amount to Hassanand at the time he did and that payment should be held preferential and null.

Call up again for exact form orders on Thursday next.

Z. K. *Order accordingly.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 90 OF 1924.

January 4, 1926.

Present:—Sir Grimwood Mears, KT, Chief Justice, and Mr. Justice Lindsay.

Lala JAI NARAIN—DEFENDANT—APPELLANT

versus

JAFAR BEG AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Estoppel, equitable—Fraudulent acquiescence.

Mere acquiescence cannot deprive a person of his legal rights, unless he has acted in such a way as would make it fraudulent for him to set up those rights. The elements necessary to constitute such fraudulent acquiescence are —

(1) that the trespasser must have made a mistake as to his legal rights,

(2) that he must have expended some money or must have done some act (not necessarily upon the land of the owner of the legal right) on the faith of his mistaken belief,

(3) that the possessor of the legal right must know of the existence of his own right which is inconsistent with the right claimed by the trespasser,

(4) that the possessor of the legal right must know of the trespasser's mistaken belief of his rights,

(5) that the possessor of the legal right must have encouraged the trespasser in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal rights [p 1018, col 2]

Where all these elements exist there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but nothing short of all these will do [*ibid*]

Wilmott v *Barber*, (1880) 15 Ch D. 96, 43 L T 95, 28 W R. 911, followed.

Letters Patent Appeal against a judgment of Mr. Justice Daniels, dated the 25th February 1924.

Mr. *L. M. Banerji*, for the Appellant.

Messrs *Satlanath Mukerji* and *Baleshwari Prasad*, for the Respondents.

JUDGMENT.—This case has been argued at length before us and we are asked to interfere with the judgment of the Judge of this Court on the ground that he ought not to have decreed demolition of a certain structure in favour of the plaintiffs.

The suit was a suit in ejectment, the plaintiffs alleging that the defendant had trespassed on a small portion of land belonging to them and had erected a building The suit was filed in the month of November 1918 and the allegation in the plaint was that the defendant had begun to erect the building during the Civil Court vacation which in the year 1918 lasted from the 20th of September to the 19th of October 1918.

The plaintiffs prayed for the ejectment of the defendant and also for the demolition of the construction just mentioned.

The defence was that the land in suit was the property of the defendant and not of the plaintiffs, and a further plea was taken in para. 12 of the written statement to the effect that the claim of the plaintiffs was barred on the principle of "tacit acquiescence and waiver."

The Court of first instance found that the title to this land was clearly with the plaintiffs and that the defendant had no title at all. On the other hand, when it came to deal with the question of the right of the plaintiffs to have the construction demolished the Court of first instance refused to order demolition on the ground that the construction was already complete. In dealing with this part of the case the Munsif observed as follows:—

"As to the waiver the plaintiffs say that the wall, that is, the eastern portion of the southern wall of the defendant's house was built during the long vacation of the Civil Court in 1918 in spite of the plaintiffs' protest. This point is not definitely proved by the plaintiffs and the wall is already built and the roof put upon it. Therefore, in these circumstances, I do not think it right to order the demolition of the building itself but instead I award the plaintiffs Rs. 100 damages for that portion of the land."

This judgment was maintained in appeal by the Subordinate Judge. He also refused to order demolition and gives his reasons as follows:—

"The appellant has built a costly structure on the land and I am not satisfied that the respondents could not have prevented the construction if they had taken action in time. They must, therefore, suffer the consequences of their laches and must be content with the damages awarded to them."

The learned Judge of this Court who had the second appeal before him was of opinion, that the lower Courts had not given any sufficient reasons for refusing an order for demolition, and after hearing the argument of Counsel we think the learned Judge of this Court was quite right. The law on the subject of equitable estoppel has been expended in the case of *Wilmott* v. *Barber* (1). In dealing with the subject of acquiescence Fry, J., observed as follows at page 105* of the report:—

"It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisities necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. T[illegible] defendant, the possessor of the [illegible], must have encouraged the p[illegible]s expenditure of money or in [illegible]cts which he has done, either [illegible] or by abstaining from asserting his legal right Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

Applying these principles to the case now before us it seems to us that the judgment of the learned Judge of this Court was right in finding that no case had been made out by either of the Courts below for refusing the plaintiffs' demolition of the construction. It has been argued before us that the defendant-appellant was under a mistaken belief that the land in dispute belonged to him. Even assuming that to be proved the defendant would still not be entitled to succeed in this appeal for it would necessary for him to establish the other matters referred to in the judgment of Fry, J. From the judgment of the Courts below, however, it does

(1) (1880) 15 Ch. D. 96; 43 L. T. 95, 28 W. R. 911.

*Page of (1880) 15 Ch. D.—[*Ed.*]

not appear to us that the defendant-appellant could have entertained any *bona fide* belief that he was the owner of the land in question.

We are of opinion that the appeal fails and we dismiss it accordingly with costs including in this Court fees on the higher scale.

We order the defendant to clear the ground mentioned in para. 10 (*a*) of the plaint of the building now upon it and this he is to do by the 4th of April 1926. If by that date this order has not been completely obeyed the plaintiffs should move this Court, and no other, on a motion for contempt.

S. S. *Appeal dismissed.*

N. H.

SIND JUDICIAL COMMISSIONER'S COURT.

REVISION APPLICATION No. 87 OF 1924.

March 26, 1925.

Present:—Mr. Kennedy, J. C., and Mr. DeSouza, A. J. C.

MUNICIPALITY OF TANDO ADAM—APPELLANTS

versus

KHAIR MAHOMED AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss 105, 115, O. VI, r. 17, O XXXIX, r 2—Amendment of plaint, when to be allowed - Refusal to allow amendment—Revision—Interference by High Court—Defendant in possession—Temporary injunction restraining defendant's user, when can be granted.

The High Court has power to interfere with the proceedings of a lower Court even in the case of an interlocutory order where the effect of that interlocutory order is not merely to prescribe a particular procedure, to admit or to shut out a particular piece of evidence or to admit or exclude particular parties Where the Court against whose orders there is an application for revision has so used its jurisdiction that the result of allowing its order to stand will be definitely to decide the case pending before it so that all the proceedings thereafter taken would be merely infructuous and would result in a waste of time, then the High Court will look into the order and if justice requires it will set it aside [p 1020, cols 1 & 2]

In a proper case the Court should freely allow an amendment of the plaint so as to ensure that justice is done to the parties and that the time and the money of the parties is not wasted [p 1020, col 2]

Where a Court refuses to allow an amendment of the plaint in a case in which such amendment is necessary for the purpose of doing justice between the parties, it fails to exercise a jurisdiction vested in it by law and its order is open to revision under s. 115 f the C. P. C. [p. 1021, col. 1.]

Courts, as a general rule, refuse to interfere by way of injunction to restrain a defendant from making such use as he may think fit of the property of which he is in possession But in certain cases the Court would interfere with the rights of the defendant, for instance where the defendant contemplates the destruction, or a change in the nature, of the *corpus*. [p 1020, col 2]

Mr. *C. C. Lewis*, for the Appellants.

Messrs. *C. M. Lobo* and *Shrikishandas Lulla*, for the Respondents.

JUDGMENT.—In this case the plaintiffs who are the Municipality of Tando Adam brought an action against the Muhammadan community of Tando Adam putting down 16 persons as representing that community under O. I, r. 8, averring that the Muhammadan community had trespassed without any right or title on certain piece of property which belonged to the Municipality and were erecting a *Masjid* on that property and accordingly they asked for a declaration that the plaint property was the exclusive property of the plaintiffs and that the defendants had no right to build thereon without the permission of the plaintiffs and asked for a perpetual injunction against the defendants restraining them from building on the property or committing any trespass thereon. The defendants raised their defence that the property was in their possession and the suit in its form was then not maintainable The issues were framed both on that plea and on the question of the title, ownership and possession. Thereon the plaintiffs made an application asking to be allowed to amend their plaint by asking for an alternative relief that if the Court held that the defendants were in possession of the property then in that case, the Court should decree that the plaintiffs were entitled to recover possession of the property in dispute with all the rights and interests pertaining thereto from the defendants. They showed their willingness to stamp on Rs. 600 and they asked further for a decree directing the defendants to make over vacant possession to them.

The learned Subordinate Judge of Shahdadpur-Nawabshah rejected that application to amend the plaint on the ground that there had been a lack of good faith on the part of the plaintiffs. The learned Subordinate Judge was of the opinion that the plaintiffs were well aware at the time they filed their plaint that they should have asked for possession and that the reason why they failed to ask for possession and asked for a declaration was that they antici-

pated that if they admitted that the defendans were in possession they would be unable to obtain an injunction restraining the defendants from dealing with the property in their possession. The learned Subordinate Judge thought that the plaintiffs having filed the suit in a form which enabled them to ask for an injunction and also to obtain an injunction, could not be permitted to re-cast their suit so as to change it to the form in which they should originally have brought it and in which they would not have been able to obtain the injunction and he, therefore, refused permission to amend. And it is against that order the present revision application is brought.

The first objection taken to the application is on the ground that no power exists in this Court to revise interlocutory orders under s. 115 and we are referred to the case given in *Firm of Yusifally Alibhoy Karimji and Co.* v. *Firm of Haji Mahomed-Haji Abdullah* (1). We have no desire to elude or evade in any way the effect of that decision. If we may say so it covers the whole ground and apparently accurately ascertains the power of this Court in such matters This Court has set its face against applications to revise interlocutory orders as part of the ordinary routine of litigation and where the interlocutory order sought to be revised is interlocutory order of the type referred to in *Firm of Yusifally Alibhoy Karimji and Co.* v. *Firm Haji Mahomed-Haji Abdullah* (1) this Court will refuse to interfere and will not order the lower Court to adopt a particular kind of procedure. But, on the other hand, this Court has always retained in its hands and has never denied its right to interfere with the proceedings of the lower Court even in the case of an interlocutory order where the effect of the interlocutory order is not merely to prescribe a particular procedure, to admit or to shut out particular piece of evidence, or to admit or exclude particular parties or the like provided that such orders are such as cannot be made a ground of appeal against the decree when finally passed and do not go to the very root of the case. Where, however, the Judge against whose order there is an application for revision has so used his jurisdiction that the result of allowing his order to stand will be definitely to decide the case pending before him, so that all the proceedings thereafter taken would be merely infructuous and waste of time and where as here the interlocutory order could not be made the ground of an appeal against the final decree, then we have always held ourselves at liberty (considering that his order has practically been a decision of the case) to look into his order and if justice requires it to set that order aside. That is also in accordance with the way in which the High Court of Bombay deals with questions of interlocutory orders when such are made subject of application in revision.

Now, it would appear, if the order is a wrong order, it is more than an erroneous decision on a mere ancillary or subsidary point. The effect of this order, if it is wrong, is to deny definitely and finally to the plaintiffs the remedy to which they conceive themselves to be entitled. And if it is a wrong order, therefore, under the principles laid down above it seems we can and should modify it. We think the present case is clearly to be distinguished from the case of *Firm of Yusifally Alibhoy Karimji & Co.* v. *Firm of Haji Mahomed-Haji Abdulla* (1) and we have no doubt that if this order is a wrong order, we ought to modify it.

Now, looking into this case, it would appear that the learned Subordinate Judge had certainly jurisdiction to allow the amendment of the plaint and the whole course of decisions is as he has himself said that in proper cases the Courts should freely allow amendments of plaints so as to ensure that justice is done to the parties and the time and the expense of the parties is not wasted. But the reason why he failed to exercise this salutary jurisdiction was due to a misconception on his part. He was of the opinion that if the suit had been brought in the form of which he approved, namely, in the form of the action to recover possession, the plaintiffs could not have got an injunction prohibiting the building of the mosque. Now in that view he seems to be in error. It is true that Courts, as a general rule, refuse to interfere by way of injunction to restrain a defendant from making such use as he may think fit of the property of which he is in possession. But in certain cases the Court would interfere with the rights of the defendant. It would certainly interfere when the defendant contemplates destruction of the *corpus*. Now the aver-

(1) 58 Ind. Cas. 721; 14 S. L. R. 28.

ment here is that the intention of the defendant was to erect a mosque and throw it open to the public for prayer. That is to say assuming the possession to have been with defendants they intended to transfer that possession to Almighty God and thus to render it impossible for the plaintiffs to recover possession of the property even in case they were entitled to it. There is no doubt to my mind that had the plaintiffs brought the suit in the form which the learned Subordinate Judge thinks, they should have, and had the plaintiffs frankly admitted that the defendants had improperly withheld possession and were intending to use their precarious and forcible possession for the purpose of wresting finally and definitely from the hands of the plaintiffs this plot of land in that case the Court could and would have property prohibited the defendants from proceeding with the erection of the structure of the mosque. It was not, therefore, through any sinister act of ill-faith that the Municipality failed to bring the suit in the form they should have selected It was not until the written statements of the defendants were filed, that they found that possession was set up by the defendants Finding that to be so they reasonably enough wished to change the form of suit and made an application for that purpose. And, in our opinion, the learned Subordinate Judge did fail to exercise a jurisdiction which was vested in him, namely, the jurisdiction to allow the alteration of the plaint in a case in which he should have exercised that jurisdiction.

Therefore, we think that we are entitled to revise this order. A further point is raised, that is, there is some defect in the parties owing to the fact that one of the defendants had died and his legal representatives have not been put on the record. We are not able to say anything definitely because we have not got before us the necessary order of the Court and we do not know precisely in what capacity the defendant was impleaded. And, as a matter of fact, the same objection can be taken and decided during the proceeding at the trial. We think we ought not to decide that point one way or the other or express any opinion as to what would be the effect of the failure to join the legal representatives of a defendant who has been impleaded under O. I, r. 8.

On the whole, therefore, we set aside the order of the learned Subordinate Judge of Shahdadpur Nawabshah, direct him to amend the plaint as prayed and to decide the case according to law.

Costs to be costs in the cause.

Z. K. *Order set aside.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 108 OF 1923.

July 30, 1925.

Present :—Mr. Justice Venkatasubba Rao and Mr. Justice Reilly.

ALAGIRISAMI PILLAI—PETITIONER —APPELLANT

versus

LAKSMANAN CHETTY *alias* SAMUEL CHETTY AND ANOTHER—DECREE-HOLDER AND JUDGMENT-DEBTOR—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss 60, 146 151, O XXI, rr 46, 53, O XXXVIII, r 6—Debt attachment of—Debt ripening into decree—Attaching creditor, right of, to execute decree, without attaching decree itself—Decree-holder, payment to, by judgment-debtor, whether binding on attaching creditor—Money payable on particular event—Interest, provision for payment of—Right, whether vested or contingent

Under the terms of a deed of partition between two brothers *L* and *R*, a sum of money fell to *L*'s share but was retained with *R* A creditor of *L* attached before judgment the debt so due and ultimately obtained a decree *L* thereupon sued *R* on the debt, obtained a decree and within a month thereafter reported satisfaction of the decree In an application for execution by the attaching creditor

Held, (1) that the attaching creditor was not bound either by the alleged payment by *R* or by the recording of satisfaction by *L* and was entitled to execute the decree, [p 1024, col 2]

(2) that the attaching creditor should be permitted to amend his petition by adding a prayer thereto for the attachment of the decree obtained by *L* against *R*. [*ibid*]

Per *Venkatasubba Rao, J* (*Reilly, J* dissenting) — The attachment placed on a debt fastens itself on a decree obtained on that debt without any further act on the part of the attaching creditor The debt matures into and merges in the decree and the attachment gets naturally transferred from the debt to the decree [p 1022, col 2]

The creditor who has attached the debt but who has failed to attach the decree is nevertheless entitled to execute it as if he had attached the decree also To such a case the provisions of s. 146, C P C, will clearly apply. [p 1024, col 1.]

Per *Reilly, J.*—What an attaching creditor gets when a debt is attached at his instance is an order prohibiting the creditor from recovering it and the debtor paying it. He acquires by that order no right to sue on the debt or to collect it or to give a valid discharge of it. The prohibitory order which he obtains cannot grow or ripen into or be converted

into something quite different, namely, the right to execute a decree obtained on the debt. It is, therefore, necessary for the creditor to attach the decree before proceeding to execution. [p. 1026, col. 2, p. 1027, col. 1.]

Per *Venkatasubba Rao and Reilly, JJ*—Where a partition deed between *L* and *R* provided that the money which fell to *L*'s share was to be retained by *R* who was to pay it to *L* at his marriage with interest at a fixed rate:

Held, that *L*'s interest was a vested interest and not a contingent one and it was attachable under s. 60 and r. 6 of O. XXXVIII, C. P. C., as a debt due to him, though on that date he could not enforce payment of it. [p. 1024, cols. 1 & 2; p. 1027, col 1.]

Per *Venkatasubba Rao, J.*—If a gift and direction as to payment are distinct, the direction as to the time of payment does not postpone the vesting. [p. 1024, col. 2.]

Appeal against a decree of the Court of the Subordinate Judge, Dindigul, in A. S. No. 33 of 1922, preferred against an order of the Court of the District Munsif, Dindigul, in E. P. No. 673 of 1922, in O. S. No. 772 of 1920.

Messrs. *B. Sitarama Rao* and *L. V. Krishnaswami Iyer*, for the Appellant.

Mr. *K. Rajah Iyer*, for the Respondents.

JUDGMENT.

Venkatasubba Rao, J.—Before dealing with the questions of law raised, I shall briefly set forth the facts.

Lakshmana Chetty entered into a partition with his co-parceners, under the deed of division dated 9th February 1918. A sum of money fell to his share and this sum was retained under the terms of that deed with his brother Ramalinga Chetty. The appellant filed a suit for money (O. S. No. 495 of 1919) against Lakshmana and attached before judgment the debt due to him under the partition deed. The appellant on 3rd July 1919 obtained a decree in his suit. Lakshmana sometime after this filed a suit against Ramalinga Chetty (O. S. No. 772 of 1920) for recovery of the money due to him under the partition deed and obtained a decree. Lakshmana and Ramalinga within a month of this decree entered into a settlement and Lakshmana reported satisfaction which was recorded.

The decree was obtained by Lakshmana in O. S. No. 772 of 1920, on 2nd February 1921. Satisfaction was entered on 2nd March 1921 and the appellant on 27th July 1921 applied to execute the decree in O. S. No. 772 of 1920.

The first question that has to be determined is, can the appellant who has attached the debt but who has failed to attach this decree, execute it as if he has attached the decree also.

The attachment of a debt is effected under O. XXI, r. 46, C. P. C. It is made by a written order prohibiting the creditor from recovering the debt and the debtor from paying it. It is conceded that the attachment was in force on the date Ramalinga alleges he satisfied the decree by payment to Lakshmana. Ramalinga in making the payment acted in contravention of the prohibitory order and Lakshmana in receiving the debt was equally guilty of disobedience of that order.

Under s. 64, C. P. C., any payment to the judgment-debtor contrary to the attachment is void as against all claims enforceable under the attachment. For the appellant Mr. B. Sitarama Rao, his learned Vakil, contends that if it was incumbent upon him to follow up the attachment of the debt by attaching the decree, Ramalinga could successfully plead that his payment was not void against the attachment of the decree. In other words, if the appellant could trace his rights to the attachment of the debt, the payment relied on by Ramalinga subsequent to that attchment would be void against it; but if the source of the appellant's title should be held to be attachment of the decree, Ramalinga could successfully rely upon the payment made prior to that attachment. To bring out the point of Mr. Sitarama Rao's contention I shall take an illustration. *A* attaches a debt due from *C* to *B*. Then *B* sues *C* and obtains a decree. On the same day as judgment is obtained, *C* pays up the amount to *B*. If the right rule is that the decree must be attached, *A* may be easily defeated; for, even more than ordinary diligence on his part will not prevent *B* from receiving and *C* from paying the sum decreed.

The C. P. C. does not contain a provision to the effect that the payment shall be void not only as against the later attachment of the decree but also as against the prior attachment of the debt. To this extent there is a lacuna in the Code. But by a distinct provision the creditor is prohibited from paying the debt attached. In the circumstances, what is the reasonable view to take? I am prepared to hold that the attachment placed on the debt fastens itself on the decree without any further act on the part of the attaching creditor. The debt matures into and merges in the decree and the attachment gets naturally transferred from the debt to the decree.

Consistent with the policy and the provisions of the Code this, in my opinion, is the only reasonable view to take. It has been held by the Judicial Committee in *Beti Maharani* v. *Collector of Etawah* (1) that when a debt is attached a suit for its recovery is not stayed. The order of attachment is infringed only if the restrained debtor pays the debt to the restrained creditor and it is pointed out that very often it may be desirable to institute a suit. Can the attaching creditor's rights be then defeated by the debtor converting the simple debts into a decree debt and receiving payment ? The common sense of the thing demands that this cannot be countenanced.

The appellant's learned Vakil relies upon s. 146 of the C. P. C., which runs thus :—

"Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or application may be made by or against any person claiming under him."

Lakshmana could apply to execute the decree. The appellant as one claiming under him could likewise execute it. This contention seems to me to be perfectly sound. The respondent's learned Vakil urges that O. XXI, r. 16 governs the case of a transferred decree-holder, that the provision is complete and self-contained and s. 146 cannot be invoked. I cannot accept this argument. Is there anything in O. XXI, r. 16 prohibiting persons other than those mentioned in it from being treated as transferee decree-holders? It is only in that case that s. 146 will not apply by reason of the words "save as otherwise provided by this Code." To place a narrow construction on s. 146 will be to defeat the very object of that section. In the very nature of things, it is impossible to provide by express provision for every conceivable set of facts that may arise. It is just to meet this contingency that ss. 146 and 151 have been enacted, I am against whittling down the scope of s. 146 by placing a too limited and narrow construction upon it. It must receive its full effect and I think the appellant can invoke it in the present instance.

The view I have taken receives strong support from *Muthiah Chettiar* v. *Lodd Govinda Doss Krishna Doss* (2). The point that had to be decided was, could a transferee of a part of the decree execute it? It was contended that he could not and for that position reliance was placed on O. XXI, rr. 15 and 16. The contention advanced may be put thus. Rule 15 refers to a case of a decree passed jointly in favour of two or more persons. In that case, application for execution of the whole decree may be made by one or more of the joint decree-holders. Next r. 16 provides for the transfer (1) of an entire decree and (2) of the interest of a decree-holder in a decree passed jointly in favour of two or more persons. It was argued that the transfer by a decree-holder of a part of a decree does not fall either under r. 15 or r. 16 and the transferee in that case could not, therefore, execute the decree. It need hardly be observed that this was a most unjust contention, the Full Bench holding that s. 146 was applicable rejected the argument. Wallis, C. J , observes that the section should receive a beneficial interpretation and as execution by a transferee of a part of a decree is not prohibited by O. XXI, r. 16, there is nothing to prevent s. 146 from receiving its full effect. With the observation of Kumaraswami Sastri, J , that the Courts ought not to refuse relief on the ground that the Lagislature has not made provision for a particular case, I entirely agree.

I do not think it necessary to refer in detail to the cases cited for the respondent where the scope of s. 146 was restricted. *Muthurapore Zemindary Co.* v. *Bhasaram Mondul* (3) may be taken as representing a class of cases. But this may be easily distinguished as what was assigned was property in the suit previous to the decree. In *Shib Charan Das* v. *Ram Chandra* (4), which may also serve as a type, there was a transfer of the property subsequent to the decree and it was held that the transferee could not invoke s. 146. This case also is distinguishable from the present. But I must dissent very respectfully from the observations made in it in regard to the effect to be given to s. 146. It will be moreover apparent that in the various cases relied on by the respondent (of which these

(1) 17 A. 198 at p. 210, 22 I. A. 31; 6 Sar. P. C. J. 551; 8 Ind. Dec. (N. S.) 452 (P. C.).

(2) 69 Ind. Cas. 337; 44 M 919, 41 M. L. J. 316; 14 L W 287; (1921) M. W. N. 649.

(3) 80 Ind. Cas. 881, 51 C. 703, 28 C. W. N 626; 39 C. L. J. 373; A. I. R 1924 Cal. 661.

(4) 66 Ind. Cas. 878; A. I. R. 1922 All. 98.

two are typical) the transferee could have safeguarded his position by taking appropriate proceedings under the provisions of the Code. But in the present instance this element is wanting and, in my opinion, this makes a very great difference.

I, therefore, hold that the appellant can rely upon s. 146. Two minor contentions I may now dispose of. First, it is argued that as Lakshamana who certified that the decree was satisfied could not execute it, the appellant could have no higher rights under s. 146. This argument is based upon a misapprehension. The appellant claims under Lakshamana in the sense that he acquired Lakshmana's rights as on the date of the decree. As I have remarked the simple debt became merged in the decree debt and the moment the decree was passed the attachment of the debt became automatically converted into attachment of the decree, and any dealing by Lakshmana will not in consequence be of any avail.

The other contention has reference to certain facts which I have not so far mentioned. Lakshmana previous to filing the suit (No. 772 of 1920) against Ramalinga for the recovery of the *corpus* has instituted against him a suit for the interest on the debt. This suit was O. S. No. 231 of 1919 and was decreed on 16th December 1919. The appellant attached this decree and realised on 27th July 1920 about a tenth of the amount due to him. It is urged that the rights under the original attachment of the debt became thus exhausted and the appellant rendered himself incapable to pursue further remedies. This argument is untenable as what was attached was the entire debt and the recovery of a portion cannot bar the recovery of the balance.

Then remains one of the main contentions raised, namely, that the attachment is void as Lakshmana had only a contingent interest in the sum attached and s. 60, sub-cl. (*m*), C. P. C., declares such an interest not liable to attachment. Whether Laksmana took a vested or a contingent interest is a question of intention and on a construction of the partition deed I find no difficulty in holding that his interest was vested. It recites that the sum fell to Laksmana's share but is to be retained by Ramalinga who is bound to pay it over to the former at his marriage. Ramalinga cannot in the meantime alienate his property and is enjoined to pay Lakshmana's interest at a rate fixed.

It is a well-known rule of construction that if the gift and direction as to payment are distinct, the direction as to the time of payment does not postpone the vesting. The question is, are there words constituting a gift independent of the direction to pay? If there are, the interest is a vested interest. In the deed in question, there is a present gift with a postponed payment and a vested interest is thus created in *In re Bartholomew* (5), [*In re Hart's Trusts* (6), Hawkins' Wills, 2nd Edition 1912, pages 270 to 272.] A stipulation that interest shall be given in the meantime, shows that a present gift was intended. A bequest to *A* to be paid on his marriage with a clause that interest shall be paid till then is vested. [*Vide* v. *Stoney* (7).] The result is that the last contention also fails.

My learned brother thinks that the attachment of the debt cannot become automatically transferred into an attachment of the decree. Although we take different views on this point our conclusions do not materially differ. According to my view, attachment of the decree in the circumstances is not essential; according to my learned brother's view, this attachment cannot be dispensed with, but neither the alleged payment by Ramalinga nor the order of the Court recording satisfaction is an obstacle in the way of the appellant executing the decree. On the point, namely, whether the appellant, if he relies as a source of his title upon the attachment of the decree, can ignore a payment made prior to that attachment, I would prefer to express no opinion at present. Although we give different reasons for our conclusions, we are agreed that the appellant has not lost his remedy and that he is not bound by the alleged payment or the recording of satisfaction. I have, therefore, no objection to the appellant being directed to amend his execution petition by asking for attachment of the decree and I accordingly agree to the order being in the terms suggested in my learned brother's judgment.

Reilly, J.—I agree that Lakshmana Chetti's interest in the Rs. 1,233, to which he was entitled under the partition deed,

(5) (1849) 1 Mac. & G. 354; 1 H. & Tw. 565; 19 L. J Ch. 237; 14 Jur. 181; 41 E. R. 1302; 84 R. R. 95.

(6) (1858) 3 De G. & J. 195 at p. 202; 28 L. J. Ch. 7; 4 Jur. (N.S.) 1264; 7 W. R. 28; 44 E. R. 1243; 121 R. R. 70.

(7) (1841) 1 Dr. & War. 337; 4 Ir. Esq. R. 64; 58 R. R. 282.

Ex. III, was a vested interest and not a contingent interest and it was attachable under s. 60, C. P. C. and r. 6 of O. XXXVIII, C. P. C. on 17th June 1919 as a debt due to him, though on that date he could not enforce payment of it. But with great respect I find myself unable to agree that the appellant was entitled on the strength of his attachment before judgment to execute the decree for that amount which Lakshmana Chetti afterwards obtained in O. S. No. 772 of 1920 on the District Munsif's file without attaching that decree.

My view of the position in this case is as follows. The appellant instituted O S. No. 495 of 1919 on the District Munsif's file a suit for money, against Lakshmana Chetty (respondent No. 1) and on 17th June 1919 obtained in that suit an attachment before judgment of the debt due to Lakshmana Chetty from his brother, Ramalinga Chetty (respondent No. 2) under Ex. III. The attachment order is not before us; but it is admitted that it was in the usual form, prohibiting Lakshmana Chetty from recovering the Rs. 1,233 or the interest on it and Ramalinga Chetty from paying that amount or the interest on it until the further order of the Court. On 3rd January 1920 the appellant obtained a decree in his suit against Lakshmana Chetty for Rs. 624. It is not disputed that the attachment order prohibiting Lakshmana Chetty and Ramalinga Chetty from recovering and paying the debt respectively was not affected by that decree but remained in full force after the making of that decree. Meanwhile Lakshmana Chetty, who had filed O. S. No. 231 of 1919 against Ramalinga Chetty for the whole debt due to him under Ex. III, had on 16th December 1919 obtained a decree in that suit only for the interest on the principal amount, his claim for the principal amount being dismissed as premature on the ground that he had not then been married and, therefore, had not fulfilled the condition on which the principal was to become payable. The appellant's attachment before judgment did not prevent Lakshmana Chetty from prosecuting that suit to a decree; but it did prohibit him from recovering any amount under his decree. The appellant then attached in execution of his own decree the decree for interest which Lakshmana Chetty had obtained in O. S. No. 231 of 1919, executed the latter decree under r. 53 of O. XXI, C. P. C and realised the amount due under it, Rs. 63-4-0 from Ramalinga Chetty. It has been suggested before us for Ramalinga Chetty that the execution of this decree of Lakshmana Chetty against him for the interest so far due on the Rs. 1,233 somehow extinguished the appellant's attachment before judgment of the whole debt. I agree that that could not be so and that the order prohibiting Lakshmana Chetty from recovering and Ramalinga Chetty from paying the debt persisted after the execution by the appellant of Lakshmana Chetty's decree in O. S No 231 of 1919. Later on Lakshmana Chetty fulfilled the condition of marriage and instituted another suit, O S. No. 772 of 1920 on the District Munsif's file, against Ramalinga Chetty for the principal amount of Rs. 1,233 and the interest on it not so far recovered. That he was entitled to do in spite of the appellant's attachment before judgment; and he obtained a decree for the whole amount claimed and costs on 2nd February 1921. That decree the appellant could have attached and executed under r. 53 of O. XXI as he had already attached and executed the decree in Lakshmana Chetty's previous suit, O S No 231 of 1919. But before he bestirred himself to do so, Lakshmana Chetty on 22nd February 1921 took out an arrest warrant against Ramalinga Chetty, who appears to have been arrested under it, on 2nd March, 1921 Lakshmanan Chetty reported to the Court Ramalinga Chetty had paid the full amount of the decree to him, and the District Munsif recorded full satisfaction. On 27th July 1921, the appellant applied for permission to execute under r. 16 of O. XXI, C. P. C. Lakshmana Chetty's decree against Ramalinga Chetty in O. S. No. 772 of 1920. That is the petition against the dismissal of which, after confirmation of the dismissal by the Subordinate Judge the present appeal is preferred.

The appellant claimed to execute the decree under r. 16 of O. XXI. He did not attach Lakshmana Chetty's decree under r. 53 of O. XXI, and in explanation of his failure to do so it is suggested that he could not do so because the recording of satisfaction on 2nd March 1921 stood in his way. I may remark that, if the recording of satisfaction stood in the way of this attaching the decree in July 1921 it equally stood in the way of the appellant executing the decree as a transferee under r. 16 of O. XXI,

But I cannot see that the recording of satisfaction was a bar to execution of the decree by the appellant. There is nothing sacrosanct about the recording of satisfaction. As between Lakshmana Chetty and Ramalinga Chetty the admission of Lakshmana Chetty that he has received the full amount of the decree may be conclusive. So far as the purposes of the Court are concerned, the recording of satisfaction is a mere matter of office business, a note that these proceedings are closed. In my opinion, it cannot be supposed for a moment that by settling the decree between themselves and getting the Court to record satisfaction as between them, Lakshmana Chetty and Ramalinga Chetty were able to defeat the rights of third parties, still less that they were able by so doing to evade the prohibitory order against them, which was still in force. To allow them so to defeat the order obtained by the appellant would be to allow a clear abuse of the process of the Court and a clear fraud upon the Court. It is not disputed that the District Munsif recorded satisfaction in ignorance of the appellant's attachment before judgment, which was not brought to his notice. Even between the parties to a decree an order recording satisfaction which has been obtained by fraud may be vacated see *Paranjpe* v. *Kanade* (8) and *Vilakathala Raman* v. *Vayalil Pachu* (9). As stated in *Syud Tuffuzzool Hussein Khan* v. *Rughoonath Pershad* (10) which was quoted before us for another purpose, "to proceed so far as the practice of his Court will allow him to re-call and cancel an invalid order is not simply permitted to, but is the duty of a Judge, who should always be vigilant not to allow the act of the Court itself to do wrong to the suitor". That principle is now clearly recognised in s. 151, C. P. C. In my opinion, had the appellant in July 1921, applied for the attachment of Lakshmana Chetty's decree in O. S. No. 772 of 1920 and had Ramalinga Chetty then objected that he had already satisfied the decree by payment to Lakshmana Chetty, the answer would have been that that payment made in defiance of the prohibitory order obtained by the appellant and still in force, could affect the appellant in no way; and, if it had been further objected that the formal order of the District Munsif made on 2nd March 1921 recording satisfaction of the decree, stood in the appellant's way—and objection which personally I see very little force—it would obviously have been within the District Munsif's power under s. 151, C. P. C. to cancel that order. In my view the proper course for the appellant in July 1921 was to attach the decree in O. S. No. 772 of 1920 under r. 53 of O. XXI and proceed to execute it against Ramalinga Chetty, who could have raised no effective bar to his doing so. Section 64, C. P. C., would not perhaps have been applicable, as the appellant would not have been enforcing his decree under his original attachment before judgment but under his attachment of the decree itself. But, as the satisfaction of the decree by Ramalinga Chetty could not have been pleaded successfully against the appellant, the road to the execution of the decree by the ordinary procedure of attaching it would have been open to him.

It has been contended before us that it was unnecessary for the appellant to attach Lakshmana Chety's decree on the debt in O. S. No. 772 of 1920 because on the making of that decree the appellant's original attachment of the debt is some way developed into an attachment of the decree. With respect I am unable to accept the contention. Attachments in execution or before judgment are in their nature merely means of getting the property concerned into the control of the Court and of restraining the party against whom they are directed from transferring, delivering, changing or destroying the property. By special provisions in r. 53 of O. XXI an attachment in execution of any of certain special classes of decrees—not all decrees carries with it a special privilege, namely, the right to execute the decree attached. This is a peculiar privilege in itself quite foreign to the idea of attachment and given only by special provisions. Unless those special provisions are complied with, I do not understand how that special privilege can be acquired. In the present case what the appellant got when the debt was attached at his instance was an order prohibiting Lakshmana Chetty from recovering it and Ramalinga Chetty from paying it. He acquired by that order no right to sue on the debt or to collect it or to give a valid discharge of it. How can the prohibitory order which he obtained grow or ripen into or converted into

(8) 6 B. 148; 3 Ind. Dec. (N. S.) 557.
(9) 25 Ind. Cas. 213: 27 M. L. J. 172.
(10) 14 M. I. A. 40; 7 B. L. R. 186; 2 Suth. P. C. J. 434; 2 Sar. P. C. J. 656; 20 E. R. 701.

something quite different, namely, the right to execute a decree obtained on the debt? It appears to me that that is impossible without some provision of law to that effect. The special privilege of executing Lakshmana Chetty's decree, it is something quite different in nature and effect from the prohibitory order was in my view open to the appellant only if he took, as he could have taken, the special step necessary for obtaining that privilege, namely, the attachment of the decree. Incidentally I may point out as a minor difficulty in the theory that the attachment of the debt automatically develops into the attachment of any decree on that debt that the decree will in most cases include an amount for costs, to which the attachment of the debt itself cannot apply. In the present case the costs awarded to Lakshmana Chetty by the decree in O. S. No. 772 of 1920 were considerable.

I do not think it necessary to consider in this case the question whether the appellant should be regarded "as claiming under" Lakshmana Chetty in any sense within the meaning of s 146, C. P. C. As the case appears to me, the appellant might have proceeded under the definite provisions of r. 53 of O. XXI, and it, therefore, is unnecessary and indeed impossible—for him to call in aid for his present purpose the provisions of s. 146. Similarly the appellant is in my view mistaken in attempting to represent that he is in any sense a transferee of Lakshmana Chetty's decree under r. 16 of O. XXI, instead of claiming his right to attach that decree and then execute it. If I may say so, the appellant, in attempting to make use of s. 146 and r. 16 of O. XXI in this case appears to be taking a very circuitous route to get round an obstacle which does not really lie in his path or which at the worst would crumble at a touch, namely, the District Munsif's order recording satisfaction.

I do not think that the appellant's petition under appeal should have been dismissed. The proper course would have been to allow him to amend it by adding a prayer for the attachment of the decree in O. S. No. 772 of 1920. I agree that the present appeal should be allowed with costs that the dismissal of the appellant's execution petition should be set aside and that the petition should be remanded to the District Munsif for fresh disposal; but I would add a direction that the District Munsif should allow the appellant to add a prayer for the attachment of Lakshmana Chetty's decree in O. S. No. 772 of 1920.

V. N. V. *Order set aside.*
N. H.

ALLAHABAD HIGH COURT.

PRIVY COUNCIL APPEAL No. 37 OF 1925.
December 18, 1925.
Present:—Sir Grimwood Mears, KT., Chief Justice and Mr. Justice Lindsay.
BHAGWATI DAYAL—APPLICANT
versus
Musammat DHAN KUNWAR AND ANOTHER—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 109—"Final order", meaning of—Interlocutory order—Appeal to Privy Council

The words "final order" in s 109, C. P C, are used in their ordinary sense They mean an order which puts to an end a litigation between parties, or at all events disposes so substantially of the matters in issue between them as to leave only subordinate or ancillary matters for decision [p. 1028, col 2]

The order by which a Court sets aside a compromise of a suit is an interlocutory and not a final order. [p. 1028, col 1]

Appeals on matters interlocutory in their nature should be allowed to be preferred to His Majesty in Council only when their decision will practically put an end to the litigation and finally decide the rights of the parties [p 1028, col 2]

Shankar Bharati v *Narasinha Bharati*, 69 Ind Cas. 80, 47 B 106, 24 Bom L R 925, A I R 1922 Bom. 383 and *Muhammad Sajjad Ali Khan* v *Muhammad Ishaq Khan*, 54 Ind Cas 504, 42 A 174, 1 U. P. L R. (A) 168, 18 A L J 83, followed.

Application for leave to appeal to His Majesty in Council.

Messrs. *Iqbal Ahmad* and *Baleshwari Prasad*, for the Appellant.

Mr. *Sailanath Mukerji*, for the Respondents.

JUDGMENT.—This is an application by Bhagwati Dayal for leave to appeal to His Majesty in Council in consequence of the reversal by this Court of the decision of the Subordinate Judge, who allowed a compromise between the parties.

The plaintiff brought a suit on the allegation that he had been adopted in 1916 by *Musammat* Dhan Kunwar, a defendant, under a verbal authority given by her deceased husband, Salig Ram. Another defendant who was impleaded was Ajudhia Prasad, he having obtained a mortgage on

some of Salig Ram's property. After both the defendants had filed separate written statements denying the alleged adoption the parties were said to have come to a compromise, which was evidenced by a document, dated the 6th of August 1923, registered on the 8th of August. In the ordinary course the Subordinate Judge issued a commission for verification of the deed by the *pardanashin* lady, *Musammat* Dhan Kunwar, and she denied any knowledge of the compromise or having put her thumb-impression upon any document evidencing an agreement by which the suit was to be brought to a close. She set up that if it were in fact her thumb-impression on the document, that it might have been obtained from her during a period of illness. The learned Subordinate Judge thereupon inquired into the question, took evidence on both sides, and came to the opinion that in point of fact the lady had entered into the compromise well knowing it to be the compromise of the suit and having adequate and proper advice and protection from people who surrounded her The learned Subordinate Judge, therefore, passed a decree in the terms of the compromise.

From that order by which the compromise was to be recorded the lady appealed, and a Bench of this Court came to the conclusion that although in fact the thumb-impression was that of the lady, the document was not fully explained to her, that she did not understand its nature, nor had she independent advice, and thereupon they set aside the order of the learned Subordinate Judge.

The value of the subject-matter of the suit and the value for the purposes of the proposed appeal to His Majesty in Council is in excess of Rs. 10,000; and the contention of Mr. Iqbal Ahmad, who appears for the alleged adopted son, Bhagwati Dayal, is that the order of this High Court is appealable to the Privy Council. It happens that there is a decision reported as *Shankar Bharati* v. *Narasinha Bharati* (1) where in fact the exact question arose. Shah, A. C. J., and Crump, J., came to the conclusion, on slightly different reasoning, that the order by which a Court set aside a compromise was an interlocutory and not a final order. Mr. Justice Crump said in the course of his judgment "All that this order does is to decide that the manner in which the lower Court disposed of this suit was incorrect, and that the suit must be disposed of on the merits, and not upon a certain compromise. I cannot see myself that this is in any sense a final order. I take the word 'final' to be used in its ordinary sense and, therefore, to mean an order which puts an end to the litigation between the parties or, at all events disposes so substantially of the matters in issue between them as to leave merely subordinate or ancillary matters for decision".

There is also a decision of this Court in *Muhammad Sajjad Ali Khan* v. *Muhammad Ishaq Khan* (2) in which a Bench having considered all the authorities, and specially having had regard to a decision of the Patna High Court in the case of *Danby* v. *Tufazul Hussain* (3) concluded the judgment as follows: "All of these cases are conveniently grouped up in the Patna decision and there is thus an uniform consensus of opinion that appeals on matters interlocutory in their nature should be allowed to be preferred to His Majesty in Council only when their decision will practically put an end to the litigation and finally decide the rights of the parties". We think that is the test which ought to be applied and in this case it is obvious that the decision of their Lordships of the Privy Council would in one event only finally decide the rights of one party, and in the other it would throw the whole matter open for the trial which has never yet been held upon the merits of the action. We are therefore of opinion that this matter is not appealable to His Majesty in Council and this application must be dismissed with costs including fees on the higher scale.

S. S.

N. H. *Application dismissed.*

(1) 69 Ind. Cas. 80; 47 B. 103; 24 Bom. L. R. 925 A. I. R. 1922 Bom. 383.

(2) 54 Ind. Cas 504, 42 A. 174; 1 U. P. L. R. (A.) 168, 18 A L J 83.

(3) 45 Ind. Cas 290; (1918) Pat. 1, 4 P. L. W. 342.

MADRAS HIGH COURT.

APPEAL SUIT No. 189 OF 1923.

November 3, 1925.

Present:—Mr. Justice Kumaraswami Sastri and Mr. Justice Venkatasubba Rao.

RAMU CHETTY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PANCHAMMAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 91—Unregistered parti

tion deed—Terms of partition and division of status, proof of—Conduct of parties

That there was a division of status can be proved even if the deed of partition is inadmissible in evidence for want of registration [p 1029, col 2]

Rajangam Ayyar v *Rajangam Ayyar*, 69 Ind Cas. 123; 46 M 373, 31 M L T 136, 4 U P L R (P C) 85; 16 L. W 615; A I R 1922 P C 266, 27 C W N 561, 44 M L J 745, 37 C L J 435, 21 A L J 460, 50 I A 134 (P C), relied upon

An unregistered document may be used to determine the nature of the possession held by a party [*ibid.*]

Where a deed of partition is inadmissible in evidence for want of registration, the terms of the partition cannot be proved except by the document itself But if it is unnecessary to decide the terms of partition, it is open to a Court to infer from the conduct and dealings of the parties that there was a division of status [p. 1030, col 1]

Appeal against a decree of the Court of the Subordinate Judge, Vellore, in Original Suit No 88 of 1921.

Mr. *T. M. Krishnaswamy Aiyar*, for the Appellants.

Messrs *K. Ramanatha Shenai* and *K. Sanjivi Kamath*, for the Respondents.

JUDGMENT.

Kumaraswami Sastri, J.—The plaintiff is the appellant. His case is that the first defendant and some others were members of a joint Hindu family, that on the death of the first defendant's husband he became solely entitled to the property, that the first defendant is in wrongful possession of the items mentioned in the plaint. His claim is for a declaration of the plaintiff's right to the items mentioned in schedules A, B, C, of the plaint, for delivery of possession and for injunction and other reliefs.

The case of the defendant is that her husband was not a member of the joint family with the plaintiff on the date of his death, but that he was a divided member of the family and he was enjoying certain properties in his own right and on his death she was in possession of them in her own right.

The Subordinate Judge has found on the evidence adduced that the defendant's husband was divided in status and that she was in enjoyment of the property and dismissed the suit.

The appellant's Vakil frankly admits that he cannot dispute the correctness of the finding but his contention is, having regard to s. 92 of the Evidence Act, the finding is not admissible because there was an unregistered partition deed between the members of the family in 1914. And there being an unregistered deed all the evidence of the conduct of the parties and the rights of the various members is inadmissible. I am unable to agree with him in his contention. So far as the division of status is concerned, a recent decision of the Privy Council in *Rajangam Ayyar* v. *Rajangam Ayyar* (1) is clear to the effect that a division of status can be proved even though the document has not been registered It has also been held by their Lordships of the Privy Council that an unregistered document may be used to determine the nature of the possession held by a party. The Subordinate Judge has not relied upon any unregistered partition deed. For the purpose of coming to the conclusion he has arrived at, he takes the conduct of the parties into consideration and comes to the conclusion that not only has the division of status been proved but all the properties claimed have been enjoyed by the defendant's husband in his own right I do not see why the evidence as regards the conduct of the parties in their dealings with each other and with regard to specific items of property should not, coupled with the finding of a division of status, be used and relied upon to show that certain properties which the plaintiff claims are not in wrongful possession of the defendant but belonged to the defendant's husband I do not think that on the facts of the case, s 92 of the Evidence Act is necessary to be invoked by any of the parties The plaintiff comes into Court and says that he is the absolute owner of the property, because he is a member of an undivided family. The defendant says that her husband was not a member of an undivided family, that he was divided in status, and that he enjoyed certain properties separately, as a divided member of the family. This is not a case when a claim is made by the defendant to any property on the allegation that it came to her by virtue of a deed of partition which is unregistered and so inoperative. The plaintiff's claim as a member of the joint family could not be sustained. I think the decision of the Subordinate Judge on the facts of the case is correct and would dismiss the appeal with costs.

(1) 69 Ind Cas 123, 46 M 373, 31 M L T 136, 4 U. P L R (P C) 85, 16 L W. 615, A I R 1922 P C. 266, 27 C. W N 561, 44 M L J 745, 37 C. L. J. 435; 21 A. L. J. 460, 50 I. A. 134 (P. C.).

Venkatasubba Rao, J.—I agree. According to the plaintiff he and the defendant's husband were undivided. On that footing he claimed possession. The defendant pleaded that there was a division. The lower Court has dismissed the plaintiff's suit. In the course of the trial it appeared that there was a writing evidencing the partition but it was not registered and no attempt was made to file it. The learned Judge has found that there was a partition relying mainly upon circumstances. He has inferred partition from circumstances such as these. The defendant's husband lent monies and realised them in his own name. He dealt with the property as if he was the absolute owner of it. He carried on a separate business and was assessed to income-tax individually. From these and similar circumstances the Judge has inferred a partition. It is now contended for the appellants that under s. 92 of the Evidence Act evidence of partition ought not to have been received. Section 92 has clearly no application. The appellant's learned Vakil probably intends to rely upon s. 91. As the terms of the partition have been reduced to the form of a document, no evidence can be given under that section to prove the terms of that partition except the document itself. This section does not equally apply as the defendant has not attempted to give evidence in proof of the terms of the document. The evidence was directed to prove that the parties lived as members of a divided family. From their conduct the Judge as I have said inferred a partition. It was not necessary to decide what the terms were on which the partition was made, nor does the Judge purport to decide those terms. He merely finds that the parties became divided and I do not think that there is anything in the Evidence Act to prevent him from doing it. He, in effect, says "the plaintiff says the family was undivided. I find they were divided in interest". The Judge says nothing more. The plaintiff having come to Court with the case that the family was undivided and his case having been found to be false, his suit was liable to be dismissed. The plaintiff does not ask in his plaint that if there was a division in status, the Court should determine what the properties are to which he is entitled. On the finding the plaintiff's case was untrue it was open to the Judge to dismiss the suit. Section 91 is not in the defendant's way and the decision of the Judge is perfectly correct. I agree that the appeal should be dismissed with costs.

V. N. V. S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 128 OF 1925.
December 22, 1925.
Present:—Mr. Justice Daniels.
RAM BADAN UPADHIYA AND ANOTHER—DEFENDANTS—APPLICANTS
versus
SANKATHA MISRA AND OTHERS—PLAINTIFFS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 115, O XXIII, r. 1—Application for withdrawal of appeal—Order passed for withdrawal of suit—Revision

On an application not to withdraw the appeal but to withdraw the suit the Appellate Court passed the following order:—

"This appeal is withdrawn, hence it is dismissed The appellant may bring a fresh suit if necessary"

Held, that the order was open to revision inasmuch as (*i*) it was not warranted at all by the terms of the application and (*ii*) it was passed without any reasons and without the Court applying its mind to the question whether there were sufficient grounds to allow a withdrawal with permission to file a fresh suit.

Ganga Prasad v. *Kishni*, 87 Ind. Cas. 175; 47 A. 319; L. R. 6 A. 155 Civ; A. I. R. 1925 All. 466, referred to.

Civil revision against an order of the Subordinate Judge, Jaunpur, dated the 29th of April 1925.

Mr. *N. Upadhiya*, for the Applicants.

Mr. *Surendra Nath Verma*, for the Opposite Parties.

JUDGMENT.—This is an application in revision of an order passed under O. XXIII, r. 1, C. P. C., giving the plaintiff permission to file a fresh suit. The order is an extraordinary one. It was passed by the Appellate Court and runs thus:—

"This appeal is withdrawn; hence it is dismissed.....The appellant may bring a fresh suit if necessary." The effect of the dismissal of the appeal is to leave the judgment of the original Court standing, and though the learned Subordinate Judge says that the appellant may bring a fresh suit he has passed no order for withdrawing the original suit. No reasons are given for his order. It is contended that these reasons are supplied by an application presented on the same date. The application is not of a nature to support any order

allowing the suit to be withdrawn with permission to bring a fresh one. It is absolutely vague. It gives no particulars whatever. It states that some matters unspecified are not mentioned in the plaint and that some other matters are not fully mentioned, and that there is some legal flaw the nature of which is not even indicated. A preliminary objection is raised that no revision lies, but it has been held in numerous cases the most recent case being *Ganga Prasad* v. *Kishni* (1) that where an order of this kind is passed without any reasons and without the Court applying its mind in the least to the question whether there were sufficient grounds to allow a withdrawal with permission to file a fresh suit a revision application can be entertained. I find further that the application on which the order was passed was not an application to withdraw the appeal but an application to withdraw the suit. The learned Counsel for the applicant contends that as he only complains about the portion of the order which gave permission to file a fresh suit only that portion of the order can be set aside. It appears to me, however, that I must look at the order as a whole. The Court below professing to allow the application passed an order which was not at all warranted by the terms of the application The appellant had in fact never applied to withdraw his appeal. I must, therefore, set aside the whole of the order passed by the Court below and direct that Court to re-hear the appeal on the merits.

The applicant will have his costs of this revision in any event.

S. D. *Order set aside.*

(1) 87 Ind. Cas. 175, 47 A. 319, L. R. 6 A. 155 Civ., A. I. R. 1925 All. 466.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 802 OF 1923.

July 29, 1925.

Present:—Mr. Justice Chakravarti.

RAMDHANI MUCHI—PLAINTIFF—APPELLANT

versus

KHAKSHARDAS TATI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 5—Appeal filed beyond time—Extension of time—Discretion of Court—Bona fide *review proceedings—Issue of notice on application, if sufficient—Prospect of success*

Discretion of Court must not be exercised arbitrarily but upon sound legal principles. [p 1032, col 1]

Brij Indar Singh v *Kanshi Ram*, 42 Ind Cas 43, 45 C 94 at p 106, 33 M L J 486, 22 M L T. 362, 6 L W 592, 126 P W R 1917, 15 A L. J 777, 19 Bom. L R 866, 3 P L W 313, 26 C L J. 572, 104 P. R. 1917, (1917) M W N 811, 22 C W. N. 169, 127 P L. R 1917, 41 I A 218 (P C), relied on

In an application for extension of time by an appellant who has been prosecuting review proceedings, the applicant must show that the application for review was prosecuted with due diligence and that there were reasonable grounds for filing such an application [p. 1033, col. 1.]

When the applicant fulfils the above conditions and the Court either ignores them or decides the application upon other grounds there would be no exercise of judicial discretion [*ibid*]

The test of a *bona fide* application for review is not the prospect of success of the applicant Issue of notice on the opposite party is sufficient. [*ibid*]

Sharpe v. *Wakefield*, (1891) A C. 173, 60 L. J M. C 73, 64 L T 180, 39 W R 551, 55 J P 197 and *In re Brojender Coomar Roy*, B. L. R. Sup Vol. 728, 7 W R 529, followed.

Appeal against a decree of the District Judge, Mymensingh, dated the 18th of August 1922, affirming that of the Munsif, Third Court, at Mymensingh, dated the 3rd of March 1922.

Babu *Birendra Kumar De*, for the Appellant.

Babu *Phanindra Lal Moitra*, for the Respondents.

JUDGMENT.—The plaintiff is the appellant before me The suit out of which this appeal arises was brought for a declaration of a right of way and for a perpetual injunction restraining the defendants from causing any obstruction to the plaintiff's use of the pathway. The defendants denied the plaintiff's right as claimed.

The Court of first instance dismissed the suit. The plaintiff then applied for a review of the judgment of the learned Munsif. Notice was issued upon the defendants to show cause why the review should not be admitted. On the application of the defendant the application for review was taken up before the date fixed for the hearing in the notice, and was ultimately dismissed. I ought to have stated that the application for review was based upon the ground of discovery of fresh evidence. After the application for review was dismissed the plaintiff filed an appeal to the District Judge against the original judgment of the Munsif dismissing the suit. The learned Judge has dismissed the appeal on the ground that it was barred by limi-

tation. The appeal, undoubtedly, was filed long after the time allowed by law for an appeal to be filed before a District Court. But the plaintiff prayed that the time occupied by the application for review should be deducted in calculating the period of limitation.

The learned District Judge confines himself only to the question of limitation in filing the appeal; and although his judgment contains some observations on questions as to the merits of the case discussed by the Munsif, the observations of the learned District Judge were only in reference to the question as to limitation on account of the delay in filing the appeal and not for the purpose of deciding the case on the merits. The learned District Judge says in his judgment: "He was in fact prosecuting review application with what appears to have been quite adequate diligence for a time which if credited to him would render his appeal timely." The learned Judge, therefore, finds that the application for review was filed and prosecuted with due diligence. He then says: "What is urged against him is that the review petition was not a proper one, being one, which had no reasonable prospect of success." Later on the learned Judge says: "The question for decision, therefore, is whether there were reasonable and proper grounds of review in this case." And after discussing the merits of the application for review the learned Judge says: "Regarding this part of the case, therefore, the review petition never had any prospect of success whatsoever." Then he concludes his judgment by observing "I accordingly decide that there were no reasonable or proper grounds of review and that the appeal must be rejected as time-barred."

The question no doubt primarily is a question of fact. The contention of the plaintiff was that in the circumstances of this case the Court should, in the exercise of its discretion, have held that the appellant had sufficient cause for not preferring the appeal within such period. The question as to the exercise of discretion is no doubt also a question which is ordinarily a question of fact. But such discretion must not be exercised arbitrarily but upon sound legal principles which govern the exercise of such discretion. Their Lordships of the Judicial Committee laid down the following rule in the case of *Brij Indar Singh* v. *Kanshi Ram* (1): "It was strenuously urged by the learned Counsel for the respondents that inasmuch as the power in s. 5 is admittedly a discretionary power, this Board ought not to interfere with the discretion exercised by Mr. Justice Johnstone, and he cited cases of which *Sharpe* v. *Wakefield* (2) may be taken as a type. In reality, however, that case is against him. For it laid down that discretion there as here must be a judicial and not an arbitrary discretion. Now if the Judge who purports to exercise the discretion does so under the view that there is no general rule, when in fact there is one, if he has, to use an expression often used in another class of cases, misdirected himself as to the law to be applied to the case he cannot exercise a judicial discretion, and the Superior Court in this case this Board—must either remit the case or exercise the discretion themselves." Now the learned Vakil for the appellant has contended before me that in exercising his discretion the learned Judge has apparently recognized no principle or general rule that exists as regards the exercise of discretion. Their Lordships of the Judicial Committee referred with approval to the rule which was laid down by the Full Bench of this Court in the case of *In re Brojender Coomar Roy* (3). The rule so approved by their Lordships of the Judicial Committee runs thus: "If a party presents an application for review of judgment within the ordinary period limited for appealing, the time occupied by the Court in disposing of such application will not be reckoned among the days limited for appealing, but will be added thereto and a memorandum of appeal presented within such extended period will be received as presented within time." It is not disputed in the present case that if the time occupied by the application for review is deducted the appeal would be in time. The only question is as to whether the application for review fulfilled the conditions laid down by their Lordships of the Judicial Committee. The question was also discussed at considerable length by Mr. Justice Mukerji in the case of *Gobinda Lal*

(1) 42 Ind. Cas 43; 45 C 94 at p 106; 33 M. L. J. 486; 22 M. L. T 362, 6 L. W. 592; 126 P. W. R. 1917; 15 A. L J 777, 19 Bom L R. 866, 3 P L. W. 313; 26 C L J 572; 104 P R 1917; (1917) M W. N. 811, 22 C. W. N. 169, 127 P. L. R 1917; 44 I A 218 (P. C.)

(2) (1891) A C. 173, 60 L. J. M. C. 73; 64 L. T. 180; 39 W. R. 551; 55 J. P. 197.

(3) B. L. R. Sup. Vol. 728; 7 W. R. 529.

Das v. *Shiba Das Chatterjee* (4). After discussing the Full Bench case referred to by their Lordships of the Judicial Committee and exhaustively discussing all the cases on the point he laid down the rule as follows (at page 1329*) "where, on the other hand, a party has *bona fide* presented an application for review of judgment and upon such application notice has been issued to the opposite party, the applicant ought not to be deprived of the benefit of the principle laid down in the Full Bench cases, because after hearing both sides, the Court comes to the conclusion that there are no good grounds for a review." Later on the learned Judge says (at page 1330*). "Taking all the cases together, the rule, which may be fairly deduced therefrom, appears to be that a *bona fide* application for review of judgment presented and prosecuted with due diligence should, except in special cases, be regarded as a sufficient cause for not presenting the appeal within the prescribed period" It appears, therefore, all that the appellant has to show is that he prosecuted the review application with due diligence and that there were reasonable grounds for filing such an application for review. If these conditions are fulfilled and the Court either ignores this rule and decides the questions upon the grounds which are in disregard of or are inconsistent with the rule so laid down then, in the words of the Judicial Committee in the case which I have already cited, the learned Judge has misdirected himself as to the law to be applied to the case And although the question to be decided was a question as to the discretion to be exercised under s. 5 of the Limitation Act, that discretion must be a discretion exercised not arbitrarily but on principles which govern the exercise of judicial discretion. The learned Judge, as I have pointed out, does not exercise his discretion, because he was unable to find that there were reasonable or proper grounds of review. As I read his judgment what he really means to say is that in his opinion the application for review had no prospect of success. But that is not the criterion for the decision of the question. If the petitioner exercised due diligence in filing and prosecuting his application and if it is shown that his application was *bona fide* and is based on reasonable ground then, according to the authority I have cited, he ought to have been allowed a deduction of the time occupied in prosecuting the review. In the present case, as I have already stated, after the application was filed notice was issued upon the opposite party, the time occupied from the date of the notice until the final disposal of the matter by the learned Munsif was entirely beyond the control of the appellant. So far as I know the practice of this Court, it has been always considered that the issue of notice by the Court upon the opposite party was sufficient evidence of the reasonableness of filing the application for review, and in such cases the time occupied in prosecuting the review has been deducted from the time which had elapsed between the date of the decree and the date of filing the appeal. This is also the rule which Mr. Justice Mukerji deduced from the cases It is not necessary for the applicant for review to show as the learned Judge seems to me to demand that his application for review had a prospect of success as demanded by him. In fact the whole judgment of the learned Judge is devoted to a discussion of the merits of the review application. All that is needed is to find whether the application was *bona fide* and that applicant for review had reasonable grounds for filing the application for review, and that is all that the rule demands. It should be observed that an application for review of judgment on discovery of fresh evidence stands on a different footing than an application for review on the same materials. In a case like that the matter cannot be disposed of without hearing both parties. I think, therefore, that the judgment of the learned District Judge is erroneous, and he has failed to exercise his discretion on sound principles which govern the exercise of such discretion.

The learned Judge has found that "he (the appellant) was in fact prosecuting review application will what appears to have been quite adequate diligence for a time which if credited to him would render his appeal timely." Then notice was issued upon the opposite party and after hearing both parties the application was refused. Applying the principles above referred to, the appeal should have been held not barred and the learned Judge ought to have heard the appeal on the merits I set aside, the decree of the learned District Judge remit the

(4) 33 C 1323; 10 C W N 986, 3 C L J. 545.

*Pages of 33 C.—[*Ed.*]

appeal to him to be heard according to law.

I think the appellant is entitled to the costs of this appeal. The other costs will abide the result.

M. B. *Appeal allowed.*

N. H.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 58 OF 1921.

December 23, 1924.

Present:—Justice Sir Jwala Prasad, KT., and Mr. Justice Adami.

Musammat JASODA KUER—PLAINTIFF—APPELLANT

versus

JANAK MISSIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s 28—Place of registration—Property included bona fide *in sale-deed to give jurisdiction to particular Sub-Registrar—Fraud, absence of—Registration, validity of*

In a proceeding for registration of a document the question of title to the property purporting to be conveyed by the document cannot be gone into Section 28 of the Registration Act does not require anything more than the existence of a property within the jurisdiction of a particular Sub-Registrar in order to entitle him to register a document transferring that property. [p 1043, col. 2; p. 1044, col 1.]

Where a vendor in order to enable himself to register a sale-deed relating to certain property in the office of a particular Sub-Registrar obtains a conveyance in his own name of certain property situated within the jurisdiction of that Sub-Registrar and then includes it in the sale-deed executed by him, the registration of the sale-deed by that particular Sub-Registrar, in the absence of any intention to defraud, is perfectly valid. [p. 1043, col. 1.]

Appeal from a decision of the Special Subordinate Judge, Palamau, dated the 6th December 1920.

Messrs. *Syed Hasan Imam, Khurshaid Husnain* and *Syed Ali Khan*, for the Appellant.

Messrs. *P. C. Roy* and *N. N. Sen*, for the Respondents.

JUDGMENT.

Jwala Prasad, J.—This appeal arises out of a suit in ejectment. Shorn of the details, the plaintiff's case is that village Keri *asli* and *dakhli* including its Tola Bhagiya was the ancestral *khairat* property of three brothers, *viz.*, Kinu Misra, Gopal Misra and Rupan Misra. Tola Bhagiya is one of the *dakhli* or dependent villages of *Mouza* Keri. It was let out in *mokarrari* by Rupan Misra and his co-sharers to one Prabhu Narayan Singh and others who granted a *zarpeshgi* lease, dated 7th April 1887, of their *mokarrari* right in favour of Bhawan Sahu and others. Defendant No. 6 is in possession of Tola Bhagiya of *zarpeshgidar* under sale-deed, dated the 18th March 1909 (Ex. 13). The three brothers Kinu Misra, Gopal Misra and Rupan Misra are dead. Defendant No. 1 is the son of Kinu Misra, and defendants Nos. 2 to 5 are the sons of Gopal Misra.

On the 22nd May 1895, corresponding to *Jeth* 14th, 1952 *Sambat*, defendant No. 1 Janak Misra, son of Kinu Misra, Gopal Misra father of defendants Nos. 2 to 5 and Rupan Misra conveyed to plaintiff by a deed of sale (Ex. 3-A) the whole of village Keri including Tola Bhagiya and other appurtenant Tolas for a consideration of Rs. 8,900, and in pursuance of the said *kabala* delivered possession of the same to her. The plaintiff continued to be in peaceful possession of the disputed property and has been paying cesses to the Kumar of Tori, proprietor of the village. The plaintiff's husband Bahadur Sahu died in 1909, and she being a *pardahnashin* lady there was nobody to look after her interest properly. The defendants taking advantage of this began to instigate the tenants of Keri to stop paying rent to the plaintiff, and managed to have Tola Bhagiya mapped and recorded as an independent village and to have some five hamlets or Tolas which really appertain to Keri proper included in Tola Bhagiya. They wrongfully and fraudulently got their names recorded in the settlement papers. The plaintiff coming to know of this, preferred an objection under s. 83 of the Chota Nagpur Tenancy Act, which was, however, rejected. The Record of Rights was finally published in Keri on the 14th January and in Bhagiya on the 21st January 1916. After this publication the defendants dispossessed the plaintiff from the whole property in 1916. Upon these allegations the plaintiff claims her title under the registered *kobala*, dated the 22nd May 1895, and also by adverse possession to the whole of village Keri *asli mai dakhli* including its hamlets. She further seeks a declaration to the effect that Bhagiya is a mere Tola (hamlet) which appertains to village Keri, and is not an independent *mouza*; that the real boundaries of Bhagiya

are those contained in the *kabala* of defendant No. 6 (Ex. 13), dated the 18th March 1909 and that the said defendant only is entitled to hold the area of Bhagiya which is covered by his *kabala* and that the remaining portion, which has been mapped as part of Bhagiya by the Revenue Authorities in course of the recent Cadastral Survey appertains to Keri proper. The plaintiff, therefore, prays for recovery of possession of Keri and its hamlets as detailed in the plaint, with the exception of the trees mentioned in Sch. A, together with mesne profits of the value of Rs. 2,400, from *Sambat* 1973 to 1975 and future mesne profits *pendente lite*.

Three sets of written statements were filed in the case: (1) by defendant No. 1 Janak Misra, (2) by defendants Nos. 2 to 5 and (3) by defendant No. 6 the *zarpeshgidar* The allegations in the first two pleadings are substantially the same. They plead amongst other things that the suit is not maintainable by plaintiff, impugning the *kabala* of 1895 (Ex. 3-A) set up by the plaintiff as a forged and fraudulent transaction, that it is bad for defect of parties and is barred by limitation. They had no property at Ranchi and as such there was fraud in registration. Defendant No. 1 was gained over by plaintiff's husband Bahadur Sahu, who was a famous litigant. They had incurred no debts and the so-called creditors were creatures of Bahadur Sahu. Bhagiya has correctly been surveyed and mapped. Plaintiff never held possession of the property nor collected any rents from the tenants. Defendant No. 1 further contends that Bahadur Sahu was his agent (*mukhtear-am*), that he was entirely under his influence and executed a document in favour of Bahadur Sahu and his brother Binda Sahu on the representation that he would not have to part with possession of the property and that it would protect his interest in the same. Defendant No. 6 alleges that the *mokarraridars* Sham Karan Bharathi and others should have been made party to the suit, that Bhagiya has correctly been measured by the Revenue Authorities as an independent *mouza*, that the *khairatdar* of Keri is only entitled to get an annual rent of Rs. 5 from the *mokarraridar* of Bhagiya and that defendants Nos. 1 to 5 have all along been in possession of Keri and the plaintiff had no manner of title in or possession of the property. He pleads limitation and contends that the plaintiff cleverly managed to get her name recorded in course of the settlement proceeding in the district without being in possession of the property. He, however, does not appear to have taken any keen interest in the Court below and has not entered appearance in this Court. The real disputants are defendants Nos. 1 to 5, and the two written statements filed by them are *mutatis mutandis* the same. The following issues were framed in the Court below:—

(1) "Has the plaintiff any cause of action?"

(2) "Is the Court-fee paid insufficient?"

(3) "Is the suit barred by limitation?"

(4) "Is Bhagiya a Tola of village Keri with boundaries as stated in the *kabala*, dated the 22nd May 1895, or is it an independent village as stated by defendant No 6 ?"

(5) "Has the plaintiff acquired any right, title or interest in village Keri and Tola Bhagiya and other Tolas with the exception of the trees mentioned in the plaint by her alleged purchase?"

(6) "Is the plaintiff entitled to get possession of the disputed property?"

(7) "Is defendant No. 6 a mere *zarpeshgidar* of Bhagiya only?"

(8) "Is the plaintiff entitled to get mesne profits? If so, how much?"

(9) "To what relief, if any, is the plaintiff entitled?"

(10) "Is the suit bad for defect of parties?"

(11) "Is the suit maintainable by plaintiff ?"

(12) "Whether the *kabala* set up by the plaintiff is illegal? Does it affect the property conveyed thereby?"

(13) "Was plaintiff's husband a *mukhtearam* of the defendant? Did he commit any breach of faith in taking the above *kabala*? Is it binding on the defendants?"

Issue No. 2 is stated by the learned Subordinate Judge not to have been pressed by the defendants. Issue No. 10 has been decided in favour of the plaintiff. The remaining issues were decided against the plaintiff. In the result the Subordinate Judge dismissed the plaintiff's suit.

The learned Subordinate Judge has considered issues Nos. 3, 5, 6, and 13 together. The plaintiff's title is based upon the *kabala* of the 22nd May 1895 (Ex. 3-A), and the first question is whether this *kabala* was executed by Rupan Misra and Janak Misra and Gopa Misra the predecessor-in-interest of

defendants Nos. 2 to 5. The learned Subordinate Judge says that "as regards the genuineness of the *kabala* (Ex. 3-A) no express issue was laid down". He says that defendants Nos. 2 to 5, the sons of Gopal Misra, emphatically deny the genuineness of the deed and that the pleadings of defendant No. 1 Janak Misra as set forth in his written statement are "sufficiently vague," but, says the learned Subordinate Judge, taking together his pleadings and deposition he also challenges the execution of the deed. Thus, although no definite issue was framed as to the genuineness of the *kabala*, the learned Subordinate Judge has tried to deal with the question. He disposes of the witnesses called by the plaintiff to prove the execution of the deed by Rupan, Janak and Gopal with the remark that these witnesses are more or less creatures of the plaintiff's husband Bahadur Sahu and that most of them, though they say that the execution took place in their presence, did not subscribe themselves as witnesses to the deed. As regards the signatures of the executants upon the deed in question, he observes: "Though each of them purported to have signed *baqalam khas* (by his own pen) the three signatures were affixed evidently by the same pen and hand. It is beyond dispute that whoever he might have been, it was the one and the same person who signed the names of the three executants on the deed. Again, though similarity of handwriting is no criterion for testing the genuineness of a deed, my attention has been drawn by the plaintiff's Pleader to the signatures of those alleged executants appearing on certain registered mortgage-deeds (Exs. 4 to 4 C). But I must say that the signature of Rupan as affixed to the *kabala* does not resemble the one appearing on the mortgage-deed (Ex. 4)."

There is, however, no such observation as regards the signatures of the other two executants Gopal and Janak whose signatures also appear on the mortgage bonds (Exs. 4 to 4-C). The learned Subordinate Judge does definitely record a finding that Janak and Gopal or for the matter of that Rupan did not actually sign the deed in question.

He then refers to another circumstance throwing suspicion upon the transaction which is said to have resulted in the *kabala* in question and that is that Anwar Khan, who is said to have identified the executants and was before the Registrar both when this *kabala* and the mortgage-deed (Ex. 4) were admitted to registration, was Bahadur Sahu's *gomashta*.

In short, the learned Subordinate Judge has thrown out certain criticisms as regards the evidence adduced by the plaintiff to prove the execution of the *kabala* in question, but has not come to a definite finding that the *kabala* was not executed by Rupan, Gopal and Janak. That this is so will eminently appear from the finding of the learned Subordinate Judge upon the question of the execution of the *kabala*. He concludes his judgment upon this point in the following words:—

"In fact, the circumstances attending the execution of the *kabala* are extremely suspicious and the evidence regarding execution offered on behalf of the plaintiff should, therefore, be received with caution." True, but the learned Subordinate Judge stops here and does not give us his definite finding upon the point after examining the evidence in the case in the light of the above caution. A careful analysis of the evidence will show that there is no room for any suspicion as to the due execution of the deed in question by Rupan, Gopal and Janak. Two of the executants Rupan and Gopal are dead. Their heirs defendants Nos. 2 to 5 deny the execution of the *kabala* by them. Ramtahal Misra defendant No. 2, son of Gopal Misra, has examined himself to prove the negative and denies the signatures upon the *kabala* in question as being of his father and Gopal and his uncle Rupan. But is he competent to prove or disprove the signatures of Gopal and Rupan? He was 20 to 30 years of age on the 8th day of December 1920 when he was examined as a witness in the case. Therefore in 1895 he was a lad of nine years. He says in his evidence that he got discretion about 18 years ago, that is, in the year 1902. He nowhere makes himself competent to prove or disprove the signatures of Gopal and Rupan. In order to prove the handwriting or signature of another person one must show that he is acquainted with the handwriting or signature of that person. Ramtahal does not say a word about it in his evidence-in-chief. In cross-examination he gives up the show altogether, where he says.—

"I have no paper written by my father or uncle. I have no recollection of their hand-

writing. Their writing was of different style. I know how to read and write a little."

Janak Misra defendant No 1 has also examined himself in the case. He is 59 years of age and certainly he was associated with his brothers Rupan and Gopal in the management of his family affairs. He is supposed to be one of the executants of the bond. If there was anybody who was competent to speak about the signatures of Gopal and Rupan, it was Janak Misra. He, however, does not take the responsibility of denying their signatures upon the *kabala* in question. There is, therefore, though a denial in the written statement filed by defendants Nos. 2 to 5, no evidence in the case disproving or denying the signatures of Gopal and Rupan upon the *kabala* in question. Therefore the denial in the written statement is not substantiated and Janak's omission in the written statement to expressly deny the signatures is a proof positive that the signatures on the *kabala* in question, which purport to be of Gopal and Rupan, are theirs. Janak has not the hardihood of expressly denying in his written statement his own signature upon the *kabala* in question. His written statement, if carefully scrutinized is a tacit admission of the execution of the bond under the influence of Bahadur Sahu by means of inducements for the future benefit of Janak. No doubt, in paras. 7 and 10 he denies the genuineness and the correctness of the deed. In para. 16 he says that the plaintiff's husband Bahadur Sahu and his brother Binda Sahu exercised complete influence and control over him (Janak) and under their advice and instructions he signed on plain papers, and perhaps the *kabala* in question is one of such papers. In para. 21 he says "so far as the defendant No. 1 recollects it is this that the said Bahadur Sahu once proposed to him that it was proper for him to execute such a bond as would prevent (him) from contracting debts and if any debt came to light, the same could be used against it: that there would be no change in his possession and occupation and that it would be within his power to get the same set aside if he had any objection. If the bond in suit is in reality that very (instrument) which was executed under the advice and instruction of the said Bhadur and Binda Shah, the defendant No. 1 was duped to execute it under fraud, but the contents of the bond in suit are certainly not those of the bond whose execution was (once contemplated)."

Therefore, whereas he starts with the denial as to the execution of the bond he tacitly admits that he executed the instrument in question under the advice and instruction of Bahadur Sahu and Binda Sahu for the purposes mentioned in para. 21 of his written statement. According to him, he did execute such an instrument. No other instrument has been filed in the case or shown in evidence to have been executed by him as suggested in para. 21. Therefore, conclusively the *kabala* in question is the instrument referred to in para 21 and, therefore, the execution of the *kabala* is admitted, though it is said to have been executed under fraud and circumstances that effect should not be given to it. This has been his substantial plea as disclosed in his evidence He says in his evidence that he had imposed great confidence in Bahadur Sahu who had a power of-attorney in his favour (Ex. F), dated the 14th December 1880, and that he used to manage his Keri property, which is the subject-matter of dispute in this case. Considering all the circumstances the learned Subordinate Judge stigmatizes the defence of Janak Misra as set forth in his written statement as being vague.

Now, as regards his signature upon the bond, the attitude of Janak Misra in the box has been to deny all his signatures on any paper whatsoever. He went so far as to deny his verification and signature on his written statement filed in this case. Upon this the Court remarked. "The man appears to be a fool." This pulled him up and he immediately admitted his signature upon the verification on the written statement. The Court records his deposition thus—"(Then says) I signed it myself." He says "Bahadur Sahu was my *karpardaz*. He might have had the *kabala* fraudulently signed by me. I used to sign blank paper occasionally. Exhibit 3-A does not contain our signatures." The signature of Janak Misra upon the verification on his written statement filed in this case which is now his admitted signature and that upon the *kabala* in question are manifestly similar. We have carefully compared the signatures of Rupan, Gopal and Janak on the *kabala* in question and on the previous documents (Exs. 4 to 4-E) from 1858 to 1891. The signatures, not

only appearing as executants of the document in question but also those made before the Sub-Registrar in all those documents, appear to be similar; that is, Rupan's signatures on all these documents are similar, so are of Gopal and Janak Misra respectively. They have got peculiar ways of writing, particularly Janak. His letters are of a peculiar style and even a superficial look at them would not fail to impress one with their similarity. These signatures were examined by the learned Vakil Mr. P. C. Roy on behalf of the respondents and he conceded that the signatures are similar. The learned Subordinate Judge is entirely wrong when he says that the signatures of the three executants were written by the same pen and hand. The signatures of the three executants Rupan, Gopal and Janak are in different style altogether. The learned Subordinate Judge has overlooked the signatures of these executants before the Registrar. These signatures could not be by one and the same person, but must have been by three different persons. The documents bear their thumb-impressions. The thumb-impressions are not of one and the same person. They are evidently of three different persons. The suspicion lurking in the mind of the learned Subordinate Judge was that one and the same person signed the documents for all the three brothers. This is obviously wrong. There is direct evidence in the case of a number of witnesses on behalf of the plaintiff, who swore to the execution of the *kabala* by the three brothers. The learned Subordinate Judge brushes them aside upon the ground that they are servants or relations of Bahadur Sahu, husband of the plaintiff but it is common knowledge that a vendee always wants to have his own men as witnesses to the sale-deed. All the marginal witnesses of the *kabala*, except Piru Khan, are dead, and the plaintiff has examined him. No reason has been given by the Court below why his evidence should not be accepted. Upon a careful consideration of the evidence and giving our best consideration to the criticisms of the learned Subordinate Judge we have unhesitatingly come to the conclusion that the document in question was executed by Rupan, Gopal and Janak.

The learned Subordinate Judge then addresses himself as to the consideration for the *kabala*. The consideration for the *kabala* is Rs. 8,900, and the necessity is recited in it to be as follows:—

	Rs.	a.	p.
(1) In order to pay Anwar Khan decree holder of Ranchi against the executants in respect of a Civil Court decree, principal and interest	1,804	3	10
(2) The amount due under a mortgage-bond dated the 2nd February 1891, with principal and interest executed by Rupan, Gopal and Janak, in favour of Birinda Sahu, which on account of the partition has fallen to the share of the purchaser's husband Bahadur Sahu ...	4,915	12	2
(3) The amount due to Dasrath Chowbey from the executants ...	100	0	0
(4) The amount due to Dudh Gojhu and ...	280	0	0
(5) The amount to be paid in cash to the executants ...	1,800	0	0
Total ...	8,900	0	0

The plaintiff has produced the earlier bonds said to have been paid off out of the consideration money by her. She has also given documentary evidence to prove the satisfaction of the Civil Court decree of Anwar Khan against the executants through her. Exhibit 4-C is a mortgage bond executed by Janak Misra in favour of Dwarka Sahu. The endorsement on the back of it shows that the money was paid and the bond was returned to the plaintiff. It was also torn in token of satisfaction. This bond recites of a decree obtained by Dwarka Sahu in 1887 against Janak Misra with respect to certain *zarpeshgi* lease of 4-annas of *Mouza* Keri. In order to satisfy that decree the mortgage-bond (Ex. 4-C) was executed by Janak Misra.

Exhibit 4-D is a mortgage-bond mortgaging 8-annas out of 16-annas of *Mouza* Keri executed by Janak Misra in favour of Girdhari Ram Pandey, dated the 8th May 1890. This also bears the similar endorsement of payment through the plaintiff as "purchaser of *Mouza* Keri."

Exhibit 7 is a compromise decree, dated the 5th January 1888, obtained by Dwarka

Sahu against Janak Misra and his brothers.

Exhibit 4 (B) is a mortgage-bond executed by Rupan Misra, Gopal Misra and Janak Misra in favour of Dukhan Gojhu, dated the 9th January 1891. This also bears the endorsement of Rs. 200 having been paid by the plaintiff as purchaser of *Mouza* Keri.

Exhibit 4 is the mortgage-bond executed by Rupan, Gopal and Janak in favour of Birinda Sahu, dated the 2nd January 1891. In this bond the entire *Mouza* Keri *asli* and *dakhli* with the Tolas known as Sarham Tola, Masur Tola, Dudhmatia Tola, Kandra Tola, Koota Tola, Salichanwa Tola and Barwa Tola lying in *Mouza* Keri, were mortgaged to Birinda Sahu, brother of Bahadur Sahu husband of the plaintiff. This bond by partition had fallen to the share of Bahadur Sahu, and was satisfied out of the consideration money of the *kabala* in question. The bond is dated the 2nd February 1891.

Now only three months after the *kabala* on the 16th August 1895, a petition (Ex. 15-A) was filed showing satisfaction of the money due under the decree held by Anwar Khan.

These payments are further shown in the *jamakharch* book (Ex. 9-B) filed on behalf of the plaintiff for the years 1895-96. The criticisms of the learned Subordinate Judge as regards *seaha jamakharch* (Ex. 9-H) seem to be hypocritical. The learned Subordinate Judge has lost sight of the stubborn fact that Rupan, Gopal and Janak had debts outstanding against them from 1887, if not earlier, and the connection of Janak Misra with Bahadur Sahu has not been traced prior to 1880 as evidenced by the power-of-attorney (Ex. F). That power-of-attorney only empowered Bahadur Sahu, husband of the plaintiff as an agent to register jointly or singly on behalf of Janak Misra deeds before the Sub-Registrar at Lohardagga and to receive them back after registration. The learned Subordinate Judge evolved out of this simple power-of-attorney a complete control exercised by Bahadur Sahu over Janak Misra. But what has he to say about Rupan and Gopal beween whom and Bahadur Sahu no sort of connection has been established, even of principal and agent as in the case of Janak? They were owners of 2/3rds of *Mouza* Keri and they joined with Janak in the execution of the *kabala* in question. A single incident, such as the holding of power-of-attorney from Janak Misra to register his deeds before the Sub Registrar of Lohardagga, would not invalidate or cast any suspicion upon transactions of such a grave nature as the *kabala* in question, the necessity whereof is supported by the undoubted testimony of prior mortgage bonds and debts which the family had to satisfy. The learned Subordinate Judge has launched into imagination in order to throw suspicion upon the *kabala* in question. As in the case of execution, so in the case of the consideration of the *kabala* the learned Subordinate Judge does not come to a definite finding. Transactions if questioned after a number of years may give rise to various criticisms, such as those the learned Subordinate Judge has levelled against the *kabala* in question. No evidence has been given—oral or documentary—to show that Bahadur Sahu played fowl with Janak Misra or with Rupan and Gopal. Why should we not then accept that there existed cordial relationship between Janak Misra and Bahadur Sahu, and that Bahadur Sahu was always willing to render service to the family so much so that his brother Birinda Sahu advanced large sums of money in 1888 in order to pay off the debts of the family and to save them from pecuniary stringencies. We have it in evidence, notably Exs. 4 to 4 (D) and the Court proceedings in connection with the execution of decrees, that the family had reached a financial crisis and either the family was to be ruined on account of the decrees and execution proceedings then pending against it or it had to be saved. Who came to the rescue at such a critical moment? The learned Subordinate Judge has not addressed himself to this point. It was Bahadur Sahu who managed to advance money either himself or through his wife, either his own money or that of his wife, which point will be considered later on and he did take an active part in saving the family from ruin. He advanced money, paid off all the debts for we do not hear of any debt now outstanding against the family. His connection throughout seems to be fair. If he was an agent he was a faithful agent. It is needless to pursue this question further and to reply seriatim the imaginative arguments of the learned Subordinate Judge. Suffice it to say that our careful examination of the evidence, the facts and circumstances in the case have led to the

conclusion that the bond was executed for consideration and that the entire consideration money was paid off, Rs. 1,800 was paid in cash at the time of registration as is noted on the document itself. The document cannot be impugned as being without consideration. It was duly executed by Rupan, Gopal and Janak for good consideration. Therefore, the document created a valid title in favour of the vendee with respect to the property purported to have been conveyed by it.

Now, did possession follow title in the present case? The document was executed in 1895, and the evidence of possession from 1895 up to 1909 or 1910 appears to be one-sided. The defendants do not seem to have any possession over the property after the execution of the sale-deed in question until they succeeded in dispossessing the plaintiff. If neither title nor possession passed, we would expect evidence of actual possession by the vendors and their family over the property in question not after 1909 or 1910 or after the survey in 1916 but right through from 1895 uninterrupted up to the present moment. This break in the possession of the vendors just after the execution of the *kabala* in 1895 for a considerable number of years supports the plaintiff's case of the possession having passed to her in pursuance of the *kabala* in question. Add to it the positive evidence of possession, documentary and oral, given on behalf of the plaintiff from 1895 up to her dispossession. Exhibit 9 series are *jamakharch* book and *seaha bahis* which show income from the village in question and expenditure. These are from 1895 to 1909-1910. There are *kabuliyats* (Exs. 12 and 12-A) executed by some tenants in favour of the plaintiff in 1895-1896. Then we come to the Court proceedings. The plaintiff Jasoda Kuer had been realizing rents through Courts: *vide* plaints 21, 21-A, judgment Ex 18 and decree Ex. 19-B. Now, Janak Misra himself admitted the possession of the plaintiff Jasoda Kuer in the plaint (Ex. 21), dated the 1st November 1900, wherein he claimed to recover the cess paid by him to the superior landlord. The plaint recites that the vendors had *khairat* or *kushbrit lakhiraj* interest in the village granted under a *sanad* by the ancestor of the Todi Raj Sri Maharaj Udai Nath Sahi Deo through their ancestors. The village was a sort of *jagir* or maintenance grant granted to the junior member of the family of the Maharaja. The *khairat lakhirajdar* had to pay cesses to the landlord. Janak Misra and the other defendants sons of Gopal and Rupan, claimed these cesses which were paid by them to the superior landlord from *Musammat* Jasoda Kuer the plaintiff, upon the ground stated in para. 1 of the plaint that under the registered sale-deed, dated the 22nd May 1895, executed by Rupan, Gopal and Janak the *khairat lakhiraj* interest in the village was transferred to *Musammat* Jasoda Kuer. Exhibit 22 is the order-sheet in that case. In September of 1901 Janak Misra filed a petition before the Manager, Encumbered Estate, Palamau, in answer to a notice issued upon him and his uncles Rupan and Gopal, to pay cesses. In that petition (Ex. 2-F) he admitted that the village was sold by him and his brothers to the plaintiff by the sale-deed, dated the 22nd May 1895. On the 7th November 1901 he put in a petition before the Manager that no rent is payable, the village being *lakhiraj*, but only cesses were payable (Ex. 1). The order of the Manager (Ex. 1-I), dated the 2nd February 1902 upheld the contention of Bahadur Sahu that the village was *lakhiraj* and that cesses only were paid and that Janak Misra had paid up to 1956, that is before the *kabala* and since then Bahadur Sahu had paid. That cess is payable to the superior landlord is also stated in the *kabala* (Ex. 3 A). It is said that Rs. 12-2-8 is payable to Kumar Saheb, the proprietor of *pargana* Todi. It appears that after the sale the payment of the cess was made on behalf of the plaintiff. Exhibit 5, order of the Manager, dated the 3rd May 1904, referred to Ajodhya Misra, the ancestor of Rupan, Gopal and Janak, being the original *khairatdar*, who transferred the plaintiff *Musammat* Jasoda Kuer, wife of Bahadur Sahu, the property by sale-deed, dated the 22nd May 1895, and the *Musammat* was ordered to be recorded under s. 31 (2) of Act VI of 1879 as being in possession of the property. The order further reserved the right of the *zemindar* to resumption as enjoined by sub-s. (6) (II) of the Act.

Exhibit 6 series, receipts for cess granted by the Manager, show the rents paid by Bahadur Sahu and the names of Janak Misra and *Musammat* Jasoda Kuer as tenants. Janak Misra's name was retained as he was the original *khairatdar* and *Musammat* Jasoda Kuer's name was added as she

was the purchaser. These receipts are from 1962 to 1965 (1906 to 1909). The counterfoil receipts (Exs. 8 to 8 H) from 1905 to 1909 show the name of *Musammat* Jasoda Kuer, wife of Bahadur Sahu, as *ilaqadar* or *zemindar* of the *mouza* and that rent was received from the tenants. Exhibits 8 H, 8-D, 8-E and 8-F counterfoil rent receipts have been signed by Janak Misra as a tenant. These documents clearly show that *Musammat* Jasoda Kuer was recognized as purchaser of the *mouza* and had been in possession of it from 1895 to 1909 or 1910, and that Janak Misra recognized her possession, took part in having her name mutated in the superior landlord's *serishta* and also signed some of the counterfoils.

Bahadur Sahu, husband of the plaintiff, died in 1909, and then the trouble seems to have arisen in the possession of the lady. Janak Misra seems now to have disturbed the possession of the *Musammat*. The first move was to dissuade the tenants from paying 16-annas rent to the lady and when the lady refused, the tenants applied in the Court of the Deputy Commissioner of Palamau to deposit 8-annas share of rent thereby implying that she was entitled only to 8 annas of the property *vide* Ex 2-A.

In 1910 there was a proceeding under s 107 of the Cr. P. C. The first party were the servants of one Mr. Pickard who held a lease of village Keri and the second party were the servants of *Musammat* Jasoda Kuer plaintiff who purchased the village under the *kabala* executed in the year 1895. In 1912 *Musammut* Jasoda Kuer brought a suit against Janak Misra for realization of rent, as Janak was also a tenant of the village He pleaded that he was a tenant of Ramtahal who was 8-annas proprietor of *Mouza* Keri and that he never paid rent to the plaintiff.

Soon after this, settlement operations began, and the whole dispute has been detailed in Ex. 11, report of the Assistant Settlement Officer, dated the 12th February 1915. Before him were filed most of the documents filed in this case to prove the title and possession of the *Musammat* ever since she purchased the property up to date. The Assistant Settlement Officer in the dispute list (Ex. 17), dated the 11th April 1915, says that from the documents filed before him, namely, the collection papers, it was clearly proved that the *kabala* of 22nd May 1895 was not a *benami* transaction as alleged by Janak Misra and others, but that it was a *bona fide* sale and that possession passed to *Musammat* Jasoda Kuer by virtue of that *kabala*, and that she remained in undisturbed possession of the village and was in receipt of rent from the *raiyats* and that the dispute about possession arose in 1966 *Sambat* (1909) "In that year", continues the Assistant Settlement Officer, rent was collected *khas* from certain *raiyats* by the *Musammat* and nine of the *raiyats* deposited very small portions of their rents in the treasury in favour of the *Musammat*. In 1967 (1910) the *Musammat* was unable to make any *khas* collection in the village. Twelve of the *raiyats* deposited very small portions of their rents in the treasury in favour of the *Musammat* and the rest of the *raiyats* presumably paid their rents to the Misras. In 1968 (1911) also the *Musammat* was unable to make any *khas* collection. Two of the *raiyats* deposited very small portions of their rents in the treasury in her favour. In 1969 (1912) and subsequent years there was neither any *khas* collection by the *Musammat* nor any deposit of rent in her favour."

Thus, the learned Assistant Settlement Officer came to the conclusion that the *Musammat* was practically dispossessed by the Misras in 1910, although the dispossession was illegal, inasmuch as the *Musammat* was the rightful owner or proprietress of the village by virtue of the *kabala* of 22nd May 1895. Upon this finding the present entry in the settlement Record of Rights was made, that is, the *Musammat* was held to be the rightful owner of the village in question and the Misras, the defendants, as trespassers and in wrongful possession for five or six years after 1910. What was before the Assistant Settlement Officer is before us, and the Assistant Settlement Officer seems to have fully appreciated the situation. The evidence before us had confirmed us in our conviction that the *Musammat* is the rightful owner of the property in dispute and has been in possession up to 1910 when disturbance began on behalf of the Misras, the defendants, and she was completely dispossessed about that time. Janak Misra had not produced any collection papers before the Assistant Settlement Officer, nor has he been able to produce any before us before 1910.

The conclusion to which we have arrived at in disagreement with the view of the Subordinate Judge is that the *kabala* in question is a genuine document and was

duly executed by Rupan, Gopal and Janak. It was given effect to and the title passed to the plaintiff and that she obtained possession thereunder in 1895 just after the deed was executed and she continued to be in possession until she was dispossessed as stated above. The suit was instituted on the 16th May 1919 well within time for recovery of possession. This disposes of Issue No. 3, which relates to limitation.

Incidentally I may say a few words as regards Issue No. 13. This issue does not seem to have been drawn up artistically. The plaintiff's husband held a power-of-attorney from Janak Misra (Ex. F), dated the 14th December 1880, and, as already observed, this power-of-attorney was with a view to save the trouble of the principal going to the Registration Office for registering her document. The evidence is not convincing as to Bahadur Sahu being a general *mukhtear am* having a general power-of-attorney for all kinds of business to be transacted on behalf of the defendants. He had no special power-of-attorney of any sort from defendants Nos. 2 to 4 or their ancestors Rupan and Gopal. No evidence has been given in this case of any breach of faith having been committed by Bahadur Sahu with respect to the *kabala* in question. If Bahadur Sahu was a shrewd man, as the Subordinate Judge calls him, Janak Misra appears to be equally shrewd for just after the death of Bahadur Sahu he began to manipulate all kinds of measures, proper or improper, in order to disturb the possession of the lady. He set up some of the tenants to say that the plaintiff had only 8 annas share in the village and that the remaining 8-annas was held by Ramtahal Misra. He himself in the suit brought for rent by the *Musammat* said that he was holding under Ramtahal Misra, proprietor of 8-annas share. He did not deny in that case that the *Musammat* had no title to the village under the *kabala* in question. He took advantage of the plaintiff being a *pardahnashin* woman and wholly dispossessed her by the time the Assistant Settlement Officer dealt with the village in 1915, and he succeeded in maintaining his, what the Assistant Settlement Officer calls, illegal possession as a trespasser in the village and had his name recorded as such. If we are right in our view that he solemnly executed the deed of sale and received consideration and gave possession of it to the vendee, he was re-paying the faithful services of Bahadur Sahu, by manipulating deceitful measures against her. No case of fraud and undue influence has been made out and no facts and circumstances sufficient to raise such a plea been definitely averred in the written statement or proved. The last portion of this issue "Is it binding on the defendants" has already been answered. The defendant No. 1 and the predecessor-in-interest of defendants, Nos. 2 to 5 executed the sale-deed in question and the *kabala* is, therefore, binding upon the defendants.

The next question would then naturally arise as is set forth in Issue No. 6—"Is the plaintiff entitled to get possession of the disputed property?" The answer to this would have been a very simple one after what has been said above had it not been for Issue No. 12 "Whether the *kabala* which has been set up by the plaintiff is illegal? Does it affect the property conveyed thereby?" Therefore before Issue No. 6 is answered, Issue No. 12 must be disposed of. Under this issue the learned Subordinate Judge has decided that the Sub-Registrar of Ranchi, who registered the document, acted without jurisdiction, inasmuch as the vendors Rupan, Gopal and Janak had no property within the jurisdiction of the Ranchi, Sub-Registry. Now, the properties conveyed by the sale-deed are the properties in dispute *Mouza* Keri and its Tolas (dependent hamlets and a portion of a house situate in Ranchi. *Mouza* Keri appertains to Palamau District and is outside the Ranchi District. According to the finding of the Subordinate Judge village Keri is 85 miles from Daltonganj and 40 miles from Ranchi. The executants of the bonds are residents of *Mouza* Keri. The vendee *Musammat* Jasoda Kuer and her husband Bahadur Sahu were residents of *Mouza* Harhanj in the District of Palamu, about 48 miles off. The house in question stood in the name of Liladhar Misra, *am-mukhtear* of Bahadur Sahu, and Ganpat Sahu brother in-law of Bahadur Sahu. The house originally belonged to a Kumhar, who conveyed the same to Liladhar and Ganpat on the 25th of June 1883. Deocharan, brother of Liladhar, executed a *kabala* (Ex. 3) claiming half the share jointly with Liladhar in the house in question on the 22nd May 1895, wherein he claimed that he alongwith his brother Liladhar had half share in the house which was purchased in the name of Liladhar and Ganpat, and he sold one of the rooms of that house roofed with tiles said to be in his possession for a sum of Rs. 10 to Janak Misra

one of the executants of the sale-deed in question (Ex. 3 A). The two sale-deeds (Exs. 3 and 3-A) were presented to the Sub-Registrar of Ranchi for registration almost simultaneously between 2 and 3 P. M. and they were registered. The sale-deed (Ex. 3) relating to the house bears No. 2,630 for 1895 entered in Book I, Vol. 19, at pages 87-88. The sale-deed (Ex. 3-A) relating to *Mouza* Keri in dispute bears No. 2632 for 1895 entered in Book I, Vol. 13, at pages 275-279. Janak Misra in whose favour a portion of the house in Ranchi was sold by Ex. 3 did not intend to keep the house to himself, for immediately he conveyed the same by means of the sale-deed (Ex. 3-A) to *Musammat* Jasoda Kuer. Therefore the sale-deed (Ex. 3) was executed with a view to give him title to the house situate in Ranchi in order that the sale-deed (Ex. 3-A) with respect to *Mouza* Keri be presented for registration and registered in Ranchi. Neither of the parties lived either at Ranchi or at Daltonganj, and the distance from their respective residences to Daltonganj was almost double. Obviously they thought it convenient to have the document registered at Ranchi instead of at Daltonganj, as 45 miles in that part of the country is an inconvenient distance to travel for ordinary people not having good conveyance at their disposal, the country being covered by hills and jungle. This in itself is not a dishonest motive and might in the circumstances be a good motive to avoid going to Daltonganj. In the present case nothing has been shown why the parties would avoid having the document registered at Daltonganj, except the one ground referred to above. No circumstance has been shown to indicate that the parties wanted to avoid the publicity of the registration of the sale-deed (Ex. 3-A) in the Daltongani District. There is nothing to show that they wanted to defeat or defraud any creditor or that they had any other sinister motive. Therefore the fact that Janak got the sale-deed executed in his favour by Deocharan with respect to the house in Ranchi would not in itself affect the registration of the document provided it was a *bona fide* deed with a view to carry out the intentions of the parties in executing and registering the sale-deed (Ex. 3-A) in Ranchi with respect to *Mouza* Keri. It is said that Deocharan had no interest in the house and that the house belonged to Bahadur Sahu and that he was the real purchaser under a sale-deed, dated the 25th June 1883 from a Kumhar in the *farzi* name of his *am-mukhtear* Liladhar Misra and his brother-in-law Ganpat Sahu. In support of this reference is made to Ex.-A, sale-deed executed by Bahadur Sahu in favour of Akhouri Sundar Behari Lal, dated the 19th March 1902, several years after the *kabala* in question (Ex. 3-A). In that sale-deed Bahadur Sahu recites that he had purchased the house in question under a registered sale-deed, dated the 25th June 1883, with his own funds *farzi* in the name of his *mukhtear-am* Liladhar Misra and his brother-in law Ganpat Sahu, and that he disposed of it to Akhouri Sundar Behari Lal for Rs. 125. Deocharan Misra, brother of Liladhar Misra, on the other hand, in the sale-deed (Ex. 3) stated that he was a co-sharer with Liladhar in the house in question and that he owned and possessed one of the rooms of that house and that he sold that off to Janak Misra per sale-deed (Ex. 3) on the 22nd May 1895. Bahadur Sahu took part in the execution of the sale-deed (Ex. 3-A) in favour of his wife, the plaintiff in the case. The deed confirmed the sale of the house by Deocharan to Janak by Ex. 3. Bahadur Sahu, therefore, allowed the property to be sold by Deocharan Misra in favour of Janak Misra. The sale-deed of the 25th June 1883 in favour of Liladhar Misra and Gopal Sahu on the face of it shows that Liladhar Misra had interest, and Deocharan is brother of Liladhar. Therefore upon the document as it stands it cannot be said that Liladhar or Deocharan had no title to the house in question. According to the tenor of the document and the relationship that existed between Deocharan and Liladhar, the former would appear to have title to the house in question which he purported to convey by the sale deed (Ex. 3) to Janak. In a proceeding for registration of a document title to property cannot be gone into. There was a property, namely, the house situate within the Ranchi District and the Sub-Registrar of Ranchi had jurisdiction to register the document relating to the house in question. Deocharan Misra purported by *kabala* (Ex. 3) to sell a portion of that house to Janak Misra, and Janak Misra, therefore, under that sale-deed acquired an ostensible title which he forthwith conveyed by Ex. 3-A to the plaintiff. Section 28 of the Indian Registration Act does not require anything more than the existence of a property within the jurisdiction of a particular Sub-

Registrar in order to entitle him to register the same: *Ram Dai* v. *Ram Chandrabali Debi* (1). The cases cited are distinguishable. In the case of *Harendra Lal Roy* v. *Hari Dasi Debi* (2) the property mentioned in the mortgage bond in question was a fictitious property. It had no existence in Calcutta, and, therefore, under s. 28 the registration of the document was invalid. In the case of *Mathura Prasad* v. *Chandra Narain Chowdhury* (3) the sale-deed with respect to 2 *bighas*, 1 *katha* in Kalhua in the District of Muzaffarpur, which purported to give title to a party to a mortgage in order to entitle the registration thereof in the District of Muzaffarpur was not produced nor was it shown that there was delivery of possession by virtue of the sale-deed. In that case it was found that to the knowledge of both parties the mortgagor had no title to that property and that he never intended to part with that property. In those circumstances the registration of the document in the District of Muzaffarpur was held to be inoperative having been registered outside the Registration Law. The circumstances of this case are quite different from any of those cases. The first case obviously does not apply, inasmuch as the house in the District of Ranchi is not a fictitious property. The second case does not apply, inasmuch as on the face of the previous sale-deed of the 25th June 1883, Liladhar Misra brother of Deocharan Misra had title to the property, and Bahadur Sahu who took part in the execution of both the sale-deeds (Exs. 3 and 3-A) led Janak Misra to believe that Deocharan had title to the house and did not disclose his own title if any. Therefore, these decisions of their Lordships of the Judicial Committee do not apply to the present case. The vendees themselves took part in the transaction regarding the registration of the documents (Exs. 3 and 3-A) and cannot be permitted to take this plea.

We, therefore, hold in disagreement with the view taken by the learned Subordinate Judge that the document in question is not illegal on account of its having been registered by the Sub-Registrar of Ranchi. The Issue No. 12 having been thus answered, the answer to Issue No. 6 is obvious; and that answer is in the affirmative.

The plaintiff is entitled to get possession of the disputed property. The plaintiff's title is fortified in this case by the fact that she had been in possession of the property for over 12 years from 1895 to 1909. Her possession was to the knowledge of Janak Misra who had taken part in the exercise of right of possession by the plaintiff, some of the counterfoils having been signed by himself. She, therefore, acquired an absolute title to the property by adverse possession for over 12 years, having exercised it openly and adversely to the knowledge of the defendants. Therefore, even if the registration of the document was illegal, the title acquired by her by adverse possession remains intact, and the defendants have no right to dispossess her in the manner in which they did in the year 1910 or thereafter.

The obvious result of these findings is that the plaintiff is entitled to succeed in the suit, and the suit must be decreed.

The next question is the extent of the decree to be given in favour of the plaintiff. Her case in short is that she is entitled to get possession of all the properties in *Mouza* Keri with Tola Bhagiya and the other Tolas appertaining thereto and that the survey entry recording some of the Tolas as appertaining to Bhagiya as distinct from *Mouza* Keri is wrong. This issue has not much concern with defendants Nos. 2 to 5, but only defendant No. 6. Defendant No. 6, as already observed in the earlier part of the judgment, has not taken keen interest in the litigation and did not contest the plaintiff's claim either here or in the Court below though he filed a written statement, and in this appeal he has not entered appearance. It appears that the sale-deed of 1909 (Ex. 13) filed in this case describes the extent of the property to which the defendant No. 6 is entitled as *zarpeshgidar* of the *mokarrari* interest in that village. He is not entitled to hold possession of more than what that document gives him. Therefore the plaintiff is entitled to take *khas* possession of all the properties, except Tola Bhagiya, as described and detailed in the deed of 1909 (Ex. 13). This again was a clever move on the part of Janak Misra to have a large quantity of

(1) 52 Ind. Cas. 446, 4 Pat. L. J. 433.
(2) 23 Ind. Cas. 637, 41 C. 972; 41 I. A 110, 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400, 12 A. L. J. 774; 1 L. W. 1050 (P. C.).
(3) 60 Ind. Cas. 833; 25 C. W. N 985, 40 M. L. J. 489; 19 A. L. J. 385; 33 C. L. J. 440; 23 Bom. L. R. 623; (1921) M. W. N. 370; 14 L. W. 1; 29 M. L. T. 413; 2 P. L. T. 397 (P. C.).

lands excluded from *Mouza* Keri and to have Tola Bhagiya recorded in the Record of Rights in his name as owner thereof

The result is that the judgment of the Court below is reversed and the decree is set aside, and the plaintiff's suit is decreed with costs throughout The plaintiff will also be entitled to get mesne profits prior to the suit from defendants Nos. 1 to 5. The amount will be determined in a subsequent proceeding. She will get mesne profits also *pendente lite* as also for the subsequent period up to the date of delivery of possession or three years from the date of the decree of this Court, whichever event occurs first.

Adami, J.—I agree.

Z. K. *Decree set aside*

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 432 OF 1924

AND

CIVIL REVISION PETITION No. 175 OF 1925

October 22, 1925

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

V. VENKATARAMA AIYAR—APPELLANT

versus

T. V. SUNDARAM AIYAR AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O XLI, r 23—Trial Court, findings of, on all issues—Order of remand for further evidence on some issues only—Jurisdiction.

An order of remand by a Court of Appeal in a case where the Trial Court has disposed itself of all the issues and given a decree on those findings cannot come within the scope of O XLI, r. 23, C P. C, and is, therefore, not appealable

Muppavaraju Venkata Radhakrishna Rao v *Venthurumilli Venkatarao*, 84 Ind Cas 935, (1924) M. W N 922, 47 M L J 552, 20 L. W 711, 35 M. L T 135, A I R 1925 Mad 220, 48 M L J 713, followed

A Court of Appeal acts without jurisdiction if it remands "the whole case" while it wants further evidence only on two issues The proper course in such circumstances is to direct the Trial Court to take the requisite further evidence and submit it to the Appellate Court for recording its own findings

Appeal against, and petition under s 115 of Act V of 1908 and s. 107 of the Government of India Act in the alternative to revise an order of the Court of the Second Additional Subordinate Judge, Tinnevelly, dated the 30th October 1924, in A. S. No. 199 of 1924, preferred against a decree of the Court of the Principal District Munsif, Tinnevelly, in O. S. No. 17 of 1923.

Mr. *M. S. Vaithinatha Aiyar*, for the Appellant.

Messrs *K. S. Champakesa Aiyangar* and *V. C. Gopalaratnam*, for the Respondents.

JUDGMENT.—It has been argued before us that no appeal lies in this case. We are clear that an order of remand in case where the Trial Court has disposed itself of all the issues and given a decree on those findings cannot come within the scope of O. XLI, r. 23, and that, therefore, no appeal lies. Certain decisions of this Court have been cited before us to the effect that the order of remand must be deemed to have been passed, though improperly passed, under O. XLI, r 23 and that, therefore, an appeal lies, but no decision quoted has the effect of overruling the view we took in a similar case, *Muppavaraju Venkata Radhakrishna Rao* v. *Venthurumilli Venkatarao* (1) which we see no reason at present to abandon. We hold, therefore, that no appeal lies The appeal against order is dismissed. In the civil revision petition we are confined to the question whether the Subordinate Judge exceeded or improperly exercised his jurisdiction in the order under revision. That order displays several inconsistencies and is obscure in its purport. The Subordinate Judge holds at one stage, *e. g*, that 3rd defendant is not a necessary party and yet remands the case retaining him on the record. Again at another stage he remands "the whole case" while he lays down that only issues Nos 5 and 6 are to be re-tried. He does not say wherefrom he gets a jurisdiction to remand the whole case for re-trial merely because he wishes further evidence on those issues, particularly when the Trial Court has considered those issues on the evidence which was put in before it and recorded its findings thereon. It appears to us that the Subordinate Judge's order was made without jurisdiction and that the proper course in the circumstances was for him to direct the principal District Munsif to take the further evidence he wished and submit it to his Court, whereon he would record his own finding. We set aside the order of remand and direct that the decision of the principal District Munsif stand, and that the District Judge do call for any further

(1) 84 Ind Cas 935, (1924) M W N. 922; 47 M. L. J 552, 20 L W 711; 35 M L T. 135, A. I R. 1925 Mad. 220, 48 M L. J. 713.

evidence he requires and on its receipt decide the appeal *de novo* for himself. We would make it clear that the lower Appellate Court's decision that the 3rd defendant is not a necessary party falls to the ground along with the reversal of its order and is, therefore, still open for decision at the re-hearing of the appeal. The civil revision petition is allowed to this extent. There will be no order as to costs either in the civil revision petition or the appeal against order.

V. N. V. *Appeal dismissed.*
S. D. *Petition allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 341 OF 1924.
November 20, 1925.
Present :—Mr. Justice Wallace.
RAMASWAMI AIYANGAR—PLAINTIFF—PETITIONER
versus
T. RAGHAVA AIYANGAR—DEFENDANT—RESPONDENT.

Stamp Act (II of 1899), s. 35, Sch. I, Art 1—Unstamped document—Acknowledgment, whether evidence of debt—Oral evidence.

Whether an acknowledgment of a debt was executed in order to supply evidence of such debt or was a mere note or extract of accounts cannot be decided on the terms of document alone. Therefore, if such document is unstamped it cannot be held to be inadmissible in evidence without taking oral evidence as to the purpose for which it was executed.

Surjumull Murlidhar Chandick v. *Ananta Lal Damani*, 74 Ind. Cas. 1029, 46 M. 948, 45 M L. J. 399; 18 L. W. 485; (1923) M. W. N. 743, A. I R. 1924 Mad. 352, relied upon.

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise a decree of the Court of Small Causes at Tanjore, dated the 10th October 1923, in S. C. S. No. 542 of 1922.

Mr. *R. Sethurama Sastri*, for the Petitioner.

Mr. *A. V. Viswanatha Sastri*, for the Respondent.

JUDGMENT.—The point at issue in this petition is whether the lower Court was right in ruling that a "*rokha*" which plaintiff wanted to file was inadmissible in evidence because unstamped. The '*rokha*,' in my view, is certainly an acknowledgment of a debt of Rs. 250 due to plaintiff by defendant and is signed by him, and was left in plaintiff's possession. It contains no promise to pay the debt or any stipulation to pay interest or to deliver property. The only factor remaining, by which it may be brought within Art. 1 of the First Schedule of the Stamp Act is whether it was obtained in order to supply evidence of such debt. Plaintiff argues that it was not obtained for that purpose because it is a mere note or extract of defendant's accounts, which plaintiff summoned for but defendant suppressed. Such a point is not one which can be decided on the terms of the document alone. The surrounding circumstances have also to be considered. Now the lower Court rejected the document *in limine* before any evidence as to these circumstances had been led and owing to his action, it is probable, as is urged before me, that all the evidence available regarding these circumstances was not put forward. Even as it is, there is evidence in Exs. A, B and D practically unanswered so far by defendants, which assert definitely that the "*rokha*" is only a copy of defendant's own accounts, in which the actual acknowledgment was entered.

In the view he took of the case the Subordinate Judge held that it had to be decided purely on the oral evidence. It is plain that he rejected the "*rokha*" without allowing oral evidence as to the surrounding circumstances to be led, on which evidence it was his duty to record a finding whether or not the dominant idea in obtaining the document was to obtain evidence of the debt. [See the case quoted by the Subordinate Judge in *Surjumull Murlidhar Chandick* v. *Ananta Lal Damani* (1).]

The case must, therefore, go back. I reverse the decree of the lower Court and direct that this case be re-heard in the light of the above remarks. Costs up to date will abide the result.

V. N. V. *Case remanded.*
S. D.

(1) 74 Ind. Cas 1029; 46 M 948, 45 M. L. J. 399; 18 L. W. 485; (1923) M. W N. 743; A. I. R. 1922 Mad. 352.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1951 OF 1925.
January 15, 1926.
Present:—Mr. Justice Walsh.
KHEM KARAN DAS—PLAINTIFF—APPELLANT
versus
BALDEO SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 180—Account,

suit for, against co-sharer—Claim for rent, whether can be joined—Precedents—Revenue cases

A co-sharer, in a suit for an account brought under s. 165 of the Agra Tenancy Act against another co-sharer, cannot join a claim in respect of a separate matter altogether, namely, for rent

Kalyan Singh v *Raja*, 3 Unreported Decisions, p. 343, followed.

The High Court ought to follow, especially in matters of procedure, as far as it can do, the policy or line of decisions adopted by the Revenue Side in cases which strictly belong to the revenue jurisdiction.

Second appeal from a decree of the District Judge, Budaun, dated the 31st of August 1925.

Mr. S. *A. Haidar*, for the Appellant.

JUDGMENT.—I agree entirely with Mr. Haidar that this is a nice question and an important question, but having made up my mind quite clearly, and being prepared to give my reasons, I propose to dismiss the appeal so that he can appeal without further delay to the Letters Patent Bench. The question of law is whether a co-sharer having claim against another co-sharer, in respect of a separate matter altogether, namely for rent, can join that claim to a suit under s. 165 of the Tenancy Act brought for an account. It is a mere question of procedure, but sometimes questions of procedure go to the root of a matter, and I can understand that the Revenue Side may have reasons for refusing to allow two such suits to be joined. A suit for accounts involves totally different considerations, and inasmuch as Assistant Collectors are not trained lawyers, it is quite likely that it is considered important to keep these matters distinct. The revenue procedure is strict and technical, and I find on referring to the Fourth Schedule, that the suits on the Revenue Side are grouped and that a suit under s. 95 or s. 102 for arrears of rent is grouped in group A, whereas a suit under s 165 is grouped under group B. I find also that in the case of *Kalyan Singh* v. *Raja* (1) which I am told refers to the Board of Revenue —the authority which the learned Judge has relied upon in his judgment—the Revenue Side have held that rent payable by a co sharer for his tenancy cannot be taken into account under this section. I have not seen the report and I do not know what reasons are given, but I assume that the Revenue Court have good reasons. Mr. Agarwala in his well-known book on this subject upon which he is an authority cites this case without comment, presumably because there was no special reason for criticising it. I think the High Court ought to follow, especially in matters of procedure, as far as it can do so, the policy or line of decisions adopted by the Revenue Side in cases which strictly belong to the revenue jurisdiction, and I, therefore, hold that the learned District Judge was right in the view which he took. Holding the clear view that I do, and having given my reasons for agreeing with the lower Appellate Court, I dismiss the appeal summarily so as to enable the appellant, if so advised, to appeal under the Letters Patent without delay.

S. S. *Appeal dismissed.*
N. H.

(1) 3 Unreported Decisions, p 343.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 84 TO 96 AND 474 OF 1924.

July 22, 1925.

Present:—Mr. Justice Ramesam.

R. BHUNJANGA RAO—DEFENDANT—APPELLANT

versus

PERIYATHAMBI GOUNDAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Madras Estates Land Act (I of 1908), s 2 (3)—Post settlement Inam, *whether estate*—Inamdar, *whether land-holder—Second appeal—New case.*

The consideration that a person is the owner of both the *varams* is material in determining the applicability of the Madras Estates Land Act, only where the land is a whole *inam* village and an enfranchised *inam*. [p. 1049, col 1]

Where a post settlement *inam* is a whole village held on a permanent under-tenure, the case falls under s 2 (3) (e) of the Madras Estates Land Act [p. 1050, col 1]

Where in a suit by a tenant claiming to be a *ryot* under the Madras Estates Land Act to set aside an alleged sale of his holding against an *inamdar*, the plaintiff and the defendant both in the Trial Court and in the Court of Appeal proceed on the footing that the plaintiff was a *ryot* and the defendant a landholder, it is not open to the defendant in second appeal to contend that he (the defendant) was a *ryot* and that the plaintiff was an under-tenant under him and that the Madras Estates Land Act was not applicable as between them. [p 1049, col 2]

Second appeals against a decree of the District Court, North Arcot at Vellore in A. S. Nos. 122 to 134 and 121 of 1922,

preferred against that of the Court of the Revenue Divisional Officer at Vellore, in Summary Suits Nos. 4 to 8, 14 to 21 and 3 of 1921 respectively.

The Advocate-General and Mr. *M. S. Vaidyanatha Iyer*, for the Appellant.

Mr, *Subrahmanya Iyer*, for the Respondents.

JUDGMENT.—The first point argued by the learned Advocate General before me in this batch of second appeals is that the Estates Land Act does not apply to the case. To understand this point it is necessary to set forth the history of the suit village. Exhibit D is a statement dated the 15th day of January 1873 initialled by Mr. Whiteside the then Collector of North Arcot. It is headed "statement showing the particulars of *shrotriem mokasa sarvamaniam* villagers in the minor estate of Arni *jaghir*, North Arcot District." It shows that the suit village of Rajammarpuram was granted by the then *jaghirdar* Thirumala Rao Saheb in *Fasli* 1211 to the ancestor of the defendant's vendor K. Krishna Rao. The grantee seems to have applied that certain lands may be given to him on *cowle tenure* for constructing a tank and building a village. The suit village was granted to him and for the first two years after the grant, no assessment was fixed. It was said that the assessment will be fixed after two years. In *Fasli* 1215 he submitted accounts and requested that 50 pagodas may be fixed on it *as mutka* (rent) and it was accordingly fixed. Afterwards a document was issued to his son Madhava Rao in *Fasli* 1233 which states that the *beriz* was reduced to 10 pagodas. So far the statements in column 19 of Ex. D suggest that the village was granted to a *ryot* for rent. The document then proceeds to say "The *inam* appears to have been granted subsequent to *paimash*. In 1223 the grantee represented that the *ryots* were very poor and the rent should be reduced. Accordingly 40 pagodas were permanently remitted. It will be safe to continue the grant which evidently falls within the scope of s. 15 of Regulation XXX of 1802". From the reference to s. 15 of Regulation XXX of 1802, the Advocate-General argues that the whole transaction was one of leasing to a *ryot*, that the so-called grantee Krishna Rao and his son Madhava Rao were merely *ryots* under the Arni *jaghirdar* and the defendant who is the descendant of the original grantee is a *ryot* under the Arni *jaghirdar* and the plaintiffs are under-tenants to whom the Estates Land Act does not apply. If the defendant is not a *ryot* under the *jaghirdar* of Arni but is himself regarded as a land-holder, his position would then be that of one who is generally and loosely described as a subsequent *inamdar*. If he is a subsequent *inamdar*, the matter is not open to me for discussion though I confess I am inclined to agree with the view of Wallis, C. J. in *Gadadhara Das* v. *Suryanarayan Pôtnaik* (1) and of Schawbe, C. J., and Devadoss, J., in *Brahmayya* v. *Achiraju* (2). So far as this High Court is concerned, the matter is now settled by the majority of the Full Bench against an *inamdar* and I am bound by it. Where a grantee pays some kind of rent to the *zemindar* whether he should be regarded as a subsequent *inamdar* and, therefore, a land holder to whom the Estates Land Act should apply as between him and his tenant or whether he should be regarded as a *ryot* under the *zemindar* paying rent to him, the Estates Land Act applying to his relations with the *zemindar* but not as between him and his under-tenants (s. 19 of the Act) must always be a difficult question to decide in the application of the Full Bench decision. In this state of the authorities, if there is nothing else in the case, the matter would no doubt be a somewhat difficult point to decide but the pleadings in the case make my task lighter and the position of the appellant more difficult. The suit was brought under s. 112 of the Estates Land Act. The defendant was described as a *shrotriemdar*. Even *mokasa* Ex. D purports to be a list of *shrotriem sarvamaniam* villagers and a mere cultivating *ryot* cannot get into such a document. Paragraph 4 of the plaint says:—"The plaintiffs and others have been paying to the defendant's predecessors' *kist* at the said rate from time out of memory and the lands comprised in *pattah* No. 34 as *ryoti* lands". This is not denied in the written statement; on the other hand para. 5 of the written statement refers to the plaintiff and other *ryots* of the village. So also para. 7. In para. 10 of his written state-

(1) 64 Ind. Cas. 317; 44 M. 677; 41 M. L. J. 97; (1921) M W. N. 413; 14 L W. 453.

(2) 70 Ind. Cas. 615; 45 M. 716; (1922) M. W. N. 280; 31 M. L. T. 91; 43 M. L. J. 229; A. I. R. 1922 Mad. 373 F. B.

ment defendant pleads that he is entitled to levy the premium under the Estates Land Act. Paragraph 11 refers to plaintiffs and other *ryots* of the village. Paragraph 12 says that the suit is barred by limitation under Schedule A serial No. 5 under s. 55 of the Madras Estates Land Act. No plea is taken in the written statement; no issue raised as to the maintainability of the suits. In the course of the arguments before the Deputy Collector, the defendant seems to have argued that he possessed occupancy right over the lands of the *shrotriem*. The Deputy Collector meets his argument by referring to the judgment in Summary Suits Nos. 53 to 97 of 1915 on the file of the Divisional Officer, Vellore, (Ex. I) which held that the *ryots* of the village held occupancy rights and which also shows that the District Munsif before whom the suits were originally filed returned them for presentation before the Revenue Divisional Officer on the ground that the *shrotriem* was an estate under the Estates Land Act. Those suits were by a mortgagee of the defendant, the defendant himself not being a party to them. It may be that the Deputy Collector was not quite correct in regarding Ex. I as conclusive between the parties. The Deputy Collector then says "When this position is arrived at, there is no more argument necessary to show that the defendant was not acting under s. 53 of the Estates Land Act and that he was not allowed by the provisions of s. 46 of the Act to collect premium from the plaintiffs." Up to this stage no question about the applicability of the Act seems to have been raised by the defendant and even then the point raised by him was that he was the owner of both the *varams* and that the plaintiff had no occupancy right. There seems to have been a confusion of thought on the part of the defendant and of his legal advisers. The consideration that a person is the owner of both the *varams* is material in determining the applicability of the Estates Land Act, only where the land is a whole village and an enfranchised *inam*: *vide* s. 2, cl (3) (*d*) of the Act. We have nothing to do with an enfranchised *inam* in this case. The suit land is part of the Arni estate. The only question is whether the defendant is himself a land-holder or whether he is a *ryot* under the *jaghirdar* and it is immaterial whether he was the owner of both *melvaram* and *kudivaram* prior to the suit. If he is a subsequent *inamdar*, even if he was at one time owner of both *melwaram* and *kudivaram*, that fact does not make the act inapplicable as in the case of an enfranchised *inam*. But the defendant seems to have thought up to the arrangement in 1919 under Ex. C he was the owner of both *varams* and, therefore, he had a right to take premium or charge enhanced rents though he is a subsequent *inamdar* and that somehow some provisions of the Estates Land Act will not touch him. Still he seems to have thought that he was a land-holder under the Estates Land Act. In appeal also no question as to the applicability of the Estates Land Act seems to have been raised. In second appeal the point was, no doubt, expressly raised in grounds Nos 2 to 8 The Advocate General suggests that the defendant never meant to admit that the act was applicable to him up to the execution of Ex C in 1919 and that the arrangement under Ex. C itself was effected in consideration of the defendant admitting plaintiff's occupancy rights and it may be that the defendant thought that after the conferring of the occupancy rights on the tenants under Ex. C, the village became an estate, but the District Judge points out in para 3 of his judgment that the suggestion put forward by the defendant, namely, that Ex. C was executed in consideration of defendant admitting occupancy rights of the tenant differed materially from the plea in the written statement. Anyhow the written statement does not deny the allegation in para 4 of the plaint that the plaintiffs and others were enjoying the lands as *ryoti* lands and were paying *kist* to the defendant's predecessors from time out of memory. It is impossible to make out from defendant's written statement that they ever meant to deny that the suit land was an estate prior to 1919 and to allege that it became an estate only after 1919. Thus with reference to the pleadings, I must hold it is not open to the defendant now to contend that the Estates Land Act is not applicable as between him and the plaintiffs. I think there is also another ground on which this point must be decided against the appellant though this was not suggested by the respondent's Vakil at the time of argument and there was no discussion on it at the Bar. The view taken by Wallis, C. J., in *Gadadhara Das* v. *Suryanarayana Patnaik* (1) and by Schwabe, C. J., and Devadoss, J., in

Brahmayya v. *Achiraju* (2) can only apply to minor subsequent *inams*, that is, the so-called subsequent *inams* which are not whole villages. Where the subsequent *inam* is a whole village held on a permanent under-tenure, the case must really fall under s. 2 (3) (*e*) and there is no scope for a difference of opinion. In the present case though the suit village was carved out of another larger village, ever since 1801 it was regarded as a distinct and separate village. That being so, cl. (*e*) of s. 2 (3) will apply. The first contention of the appellant must, therefore, be disallowed and the conclusion of the Courts below that the higher rent sought to be charged on the plaintiffs and other tenants under Ex. C is not binding on the *ryots* must stand.

The second point argued by the Advocate-General may now be stated. In 1919 the defendant and his *ryots* entered into an arrangement described in Ex. C by which from *Fasli* 1329 onwards, a rate of rent higher than the rate prevailing up to then was to be paid for the lands in the village and a lump sum of one year's rent according to the old rate was to be paid to the defendant. The sum was accordingly paid. In para. 6 of the plaint it was suggested that the payment was towards the rent for *Fasli* 1329. This was denied by the defendant who alleged it was in pursuance of Ex. C. The plaintiff took no issue on the point. The whole oral evidence set forth by the Divisional Officer shows it was in pursuance of Ex. C and his contention was that it was paid as a premium. Nor was any suggestion made before the District Judge that the payment was for rent for *Fasli* 1329. This payment was, therefore, obviously a premium and was so regarded by the Divisional Officer, though its purpose seems to have been to enable the defendant to make certain improvements to the village tank. Whatever the purpose might have been, the defendant was not entitled to collect it under s. 46 of the Act. The plaintiff and the other *ryots* were entitled to recover it from him if they filed a suit within six months from the date of the collection. (Schedule, A part II, item No. 15). In this suit, there is no prayer for the recovery of that amount. Even if there is a prayer, it would have been barred.

But the plaintiff alleged in para. 7 of the plaint that the defendant is liable to have the amount credited from the rent for *Fasli* 1329, but there is no prayer asking for such a credit in para. 11 of the plaint. In the view I take, the absence of a prayer is immaterial. If the suit had been filed within six months after payment, the plaintiffs might be granted a declaration that the amount paid by the *ryots* might be credited towards the rent for *Fasli* 1329. But the suits were not filed within six months after payment. To compel the defendant to credit it towards the rent of *Fasli* 1329 is the same as taking back the amount from him on the ground of an illegal collection and then re-paying it to him under the heading of rent. This process is not permissible as it cannot be recovered from him on account of the bar of six months. The Deputy Collector did not discuss the point. It is a point which arose only on the fourth issue after his findings on the first and second issues are known. Accepting his finding on the first and second issues that the *pattahs* for enhanced rents are not valid, the question arises whether the *pattahs* should not be held to be valid for the rents properly payable according to plaintiff's contentions, and, if so, whether the sale notices should be held valid to that extent. [*Vide* s. 53, cl. (2)]. The point was raised before the District Judge by the defendant and the District Judge disallowed it on grounds which are not intelligible to me. The Judge says "The payments cannot be regarded as illegal exactions in addition to the rents lawfully payable. They were made by plaintiffs in ignorance of their legal rights." I am not able to understand how, because the plaintiffs made the payments in ignorance of their legal rights and the defendant obtained the payment taking advantage of the ignorance, the payment is other than an illegal payment falling under s. 144 of the Act. It was not paid as rent. It was paid as something else. Defendant was not entitled to it; it was, therefore, an illegal exaction The plaintiffs ought to have sued for it within six months. Their right to recover it is barred. They are, therefore, bound to pay the rents for *Fasli* 1329 and the sale notices to set aside which the suits are filed under s 112 of the Act are partly valid and partly invalid. See s. 52 (3) of the Estates Land Act.

I, therefore, modify the decrees of the Courts below by declaring that the sale notices issued by the defendant are invalid in so far as the excess rent charged under Ex. X is concerned, but are valid in so far

as they cover the rent previously payable by the *ryots*.

The parties will bear their own costs throughout.

V. N V. *Decree modified.*

S. D.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 15 OF 1925.

September 8, 1925.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, and Mr. Justice Beasley.

L. RATHAN SINGH—PETITIONER—APPELLANT

versus

THE COMMISSIONER OF INCOME-TAX TO THE GOVERNMENT OF MADRAS—DEFENDANT—RESPONDENT.

Income Tax Act (XI of 1922), s. 10 (2), (vi), (vii), (ix)—Obsolete machinery—Motor-car rendered useless by accident—Reliefs under sub-sections, whether alternative or cumulative—Motor-car, purchase of, solely for use of parts in existing cars—Expenditure whether of capital nature or incurred for purposes of business—Deductions, right of assessee to.

'Obsolete machinery' under the Income Tax Act means machinery which though it is able to perform its function has become in common parlance out of date and performs its function so indifferently or at such a cost that a prudent man instead of continuing to use such machinery would discard it and instal more labour-saving machines. A new car which is wholly useless for its purposes because it has broken to pieces in an accident is not "obsolete machine" under the Act and the owner is not entitled to claim a deduction, therefore, under s. 10, (2) (*vii*) of the Act. [p. 1051, col. 2.]

The various reliefs by way of deductions specified in s. 10 of the Income Tax Act are not alternative and exclusive, but must be treated as disjunctive and cumulative and if any deduction claimed falls within the express words of any one of the sub-sections, it is not open to Government to say that it is really covered by the general provision of sub-s (*vi*), *i e*, the omnibus cl. (*vi*) cannot be construed as extinguishing the right to deductions which are specifically outlined and defined in other sub-sections of the Act. [p. 1052, col. 2; p 1053, col. 1]

Appeal from an order of Mr. Justice Kumaraswami Sastri, dated the 13th August 1924, passed in the exercise of the Ordinary Civil Jurisdiction of this Court in the matter of s. 45 of the Specific Relief Act, s. 66 of the Income Tax Act and of Rathan Motor Service.

Mr. *K. V. Sesha Iyengar*, for the Appellant.

Mr. *M. Patanjali Sastri*, for the Respondent.

JUDGMENT.—This Reference raises two points. The assessee's business is that of an owner of motor-cars plying for hire. Only two points were raised before the learned Judge, though the first was raised under two heads. We propose first to dispose of the second contention.

The assessee was the owner of a new car which very shortly after it was purchased met with an accident and had to be sold as scrap iron and the learned Judge has held that this entitles him to claim a deduction under s. 10 (2) (*vii*) of the Indian Income Tax Act of 1922 on the footing that this may be treated as having become in the words of the Act 'obsolete.' It seems to us that this is contrary to the plain meaning of the language used. 'Obsolete machinery' means machinery which though it is able to perform its function has become in common parlance out of date and performs its function so indifferently or at such a cost that a prudent man instead of continuing to use such machinery would discard it and instal more labour-saving machines. In our opinion, the word 'obsolete' is quite inapplicable to a new car which is wholly useless for its purposes because it has broken to pieces in an accident and, in our opinion, this cannot be allowed as a deduction and we disagree with the learned Judge.

A much more difficult point is raised with regard to the second matter which relates to certain items which were disallowed by the Income Tax Authorities as being of the nature of capital expenditure which is excluded from deduction by s. 10 (2) (*ix*). That sub-section allows any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning the profits or gains of the business. The latter comes to a total of Rs. 3,296-2-2 and it seems reasonably clear that the first three items were additions to the machinery and plant used by the firm, which can clearly be classed under the head of capital expenditure. The largest item is one of Rs. 1,925 which is described as the costs of the old car purchased from Tirali Srinivasa Iyengar. The evidence of the assessee about that which seems to have been accepted, is that he bought the car not to use it as car but to resolve it into its component elements and use the parts for casual repairs to his existing fleet of cars. The remaining items are for the renewal

of various parts of the cars actually engaged in the business of the assessee.

The Income Tax Authorities rely upon a decision in Scotland under the Statute in vogue at the time, *viz.*, s XII of the Customs and Inland Revenue Act of 1878, 41 Vic. Ch. XV. That section directs the Commissioners in assessing the profits and gains of a trade to allow such deductions as they may think just and reasonable to represent the diminished value by reason of wear and tear during the year of any machinery or appliances used for the purpose of the concern and belonging to the person or company by whom the concern is carried on. Upon that it was held in the case of *Caledonia Railway Co* v. *Banks* (1) decided in the Court of Exchequer in Scotland that the assessee could not deduct the actual expenses of occasional repairs and renewals and then proceed to claim an additional deduction under the general section of the Statute for the same thing under the guise of wear and tear. With that decision no body wishes to quarrel, but it is argued for the assessee that the position under the Indian Statute is quite different because the sections relating to deductions and the sub-sections allowing deductions must be taken to be disjunctive, and it is not an answer to a claim which clearly falls within the words of any one of the sub-sections to say to the assessee that he must be deemed to have obtained that deduction under some other sub-section. Deductions are allowed, such are material for the decision of this case —under s. 10 (2) (*v*), (*vi*) and (*ix*). Cl. (*v*) allows a deduction in respect of current repairs to buildings, machinery, plant or furniture, the deduction permitted being the amount paid on account thereof. It is said in this case that the renewal of parts of a machine cannot be treated as a current repair but must be treated as a new addition of capital to enable the machine to be kept in proper running order. It is pointed out that by cl. (*vi*) of sub-s. (2) a deduction is allowed in respect of depreciation which has been assessed by Government at the not ungenerous figure of 20 per cent. and it is said that the assessee having had the benefit of this large deduction under cl. (*vi*) cannot get the same deduction over again in another form by having recourse to cl (*v*). In our opinion, if the Legislature meant the various reliefs by way of deductions specified in s. 10 of the Act to be alternative and exclusive, they could very easily have said so and, in our opinion, if any deduction claimed false within the express words of any one of the sub-sections it is not open to Government to say that it is really covered by the general provision of sub-s. (*vi*). It is obviously arguable that most of the repairs in this case can be described as current repairs though of, course, the matter is one of degree. If a carburetter of a motor-car ceases to function, we should incline to the view that the renewal of the carburetter in order to enable the car to keep the road is properly described as running repair. On the other hand, if a car as a result of an accident had nothing left but a wheel and everything else had to be renewed, clearly the sensible view would be that the renewal of the car could only be described as an increase of capital. But apart from that we have the provision of sub-s. (2) (*ix*) which speaks in general terms of any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains. Without committing ourselves to a view as to what are current repairs within the meaning of cl. (*v*), we think it reasonably clear that the cost of repair set forth in the list that was handed up to us must be treated as an expenditure incurred for the purpose of earning the profits or gains of the business and we do not think that it can properly be treated as capital expenditure which is excluded from the operation of cl. (*ix*) If this view be correct, the cost of an old car for the sole purpose of using bits and parts of it for carrying out repairs to cars on the road which is the main item in the assessee's claim for deductions being nearly two-thirds of the whole, stands on the same footing as if he had obtained and used new parts for repairing his fleet of motor-cars from time to time. In this case we feel that the Legislature has done that which is so often done in Indian Acts and that by enumerating too much and trying to cover every possible case, they have *per incuriam* given more than one remedy in respect of what is clearly one ground of deduction. But until and unless the Act is amended, we think that separate heads of reliefs must be treated as disjunctive and cumulative and hold that the deductions claimed except as regards the first three items fall within the express words of s. 10 (2) (*ix*) and that the Scottish case is inapplicable in India, because the

(1) 1 Tax. Cas. 487.

Act which the Scottish case interpreted was an Act which only contained deductions for depreciation and did not like the Indian Act specify under separate heads other deductions differently described. We do not think it would be right to hold that what I may call the omnibus cl. (*vi*) can be construed as extinguishing the right to deductions which are specifically outlined and defined in other sub-sections of the Act. We feel the result to be unsatisfactory and to be one which gives more to the assessee than was intended or indeed is just; but the fault is that of the draftsman of the Indian Act who threw into the section the omnibus clause modelled on s. XII of 41 Vic Ch. XV without reflecting that such a clause was not wanted in an Act which contained the specific deductions taken from the later English Finance Acts The result will be that the appeal is allowed with costs. On the reference there will be judgment for the Commissioner with costs to be fixed at Rs 150.

V. N V. *Appeal allowed.*

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL No. 22 OF 1924.

October 9, 1925.

Present:—Mr. Justice Phillips.

P. S KESAVALU NAICKER—

DEFENDANT—APPELLANT

versus

THE CORPORATION OF MADRAS—

PLAINTIFF—RESPONDENT

Madras City Tenants' Protection Act (III of 1922), ss. 2, cl (4), 3—Lessee of right from Corporation to put up building on roadside—Construction of pucca building—Long possession—Issue of permits, effect of—Person in possession, whether tenant—Compensation on ejectment—Interpretation of Statutes

Where the defendant's predecessor-in-title was allowed by the Corporation of Madras to put up a building on the roadside in the City of Madras for the purpose of selling aerated water and ice and leases for terms had been granted and renewed from time to time to defendant's predecessor and then to defendant, and two years before suit, yearly permits had been issued under the Municipal Act to the defendant to keep the ice depôt

Held, that the defendant was a tenant within the meaning of s. 2, cl (4) of the Madras City Tenants' Protection Act and was entitled under s 3, on ejectment, to be paid compensation for his building. [p. 1054, col 2; p 1055, col 1.]

When a man has spent a considerable sum of money in erecting a *pucca* masonry building on another's land, there is a legitimate inference to be drawn that he did so in the hope that he would not be evicted, although it is an inference which may be rebutted by other circumstances, which show that he could not have had such a hope. [p. 1055, col 1.]

When the Legislature passes an enactment, its provisions must be looked to rather than the intention of the Legislature, as revealed in the discussion which preceded the passing of the Act [*ibid*]

The preamble of an Act may be referred to only in a case of ambiguity or where it is necessary to interpret the Act itself so as to give effect to its purport [p 1055, col 1]

Appeal from a decree of the City Civil Court, Madras, in O. S. No. 68 of 1923.

Mr *K. Duraisami Iyengar*, for the Appellant

Mr. *S. Rangasami Iyengar*, for the Respondent.

JUDGMENT.—In this case the facts are as follows. The defendant's uncle, Muthuswami Naicker, put up the building in suit 48 years ago, on the roadside land in the Pantheon Road, for the purpose of selling ærated waters and ice. The building is a *pucca* masonry one and the plaintiff, Corporation of Madras, now wishes to eject the defendant, to whom the property was given by his uncle about 1908 The defendant obtained lease deeds for this property in 1908, 1911 and 1914 for a period of three years each. At the end of the last lease, the Corporation proposed to sell the right to occupy the building and site at auction and notice was issued on 18th April 1917; (Ex. IV). The defendant protested against this by a Lawyer's notice (Ex. II) and put in a petition (Ex. III) on 30th April 1917. As a result of this, a fresh lease for one year was granted to the defendant and this was renewed for a second year in 1918 for the year 1918 1919. When the new Municipal Act was passed, the Corporation seems to have thought that it could not grant a lease of the suit property and they proposed to auction the property and grant a license. On 21st February 1919, the date of the auction, no bidders turned up. On 24th February 1919 the defendant went to the Revenue Officer and agreed to pay a rent of Rs 3-8 0 per mensem in respect of the suit land, and on 14th July 1919 the Corporation granted him the lease Ex. E-1. On 17th March 1920, a notice was issued by the Corporation, that the right of putting up a bunk on the suit site would be sold by auction. But, as a matter of fact, no auction appears to have taken place, and on 9th October 1920 the Corporation issued Ex. F, which purports to be a permit under s. 226 (1), Act IV of 1919. Under this the defendant was permitted to occupy the suit site for the purpose of keeping an ice depot for one year. A similar permit was issued on 4th August 1921 for the year ending 31st

March 1922. On 2nd March 1922, the Corporation again proposed to auction the site and then finally on 11th November 1922 the Corporation gave a notice to the defendant to quit. The defendant replied stating that he had held the land for a very long period and that he was entitled to compensation under the City Tenants' Protection Act.

The main question for consideration here is, whether the defendant is a tenant within the meaning of the Madras City Tenants' Protection Act. The learned City Civil Judge has found that he was not a tenant but merely a licensee. We see that upto 31st March 1920, the defendant had been obtaining leases from the Corporation for the use of the site and was undoubtedly up to that time a tenant. It is suggested that for the year 1920 the Corporation had no power to grant a lease of the suit land as it comes within the definition of public street contained in the Act. Such public streets are vested in the Corporation and although the Corporation has not the full ownership in them, yet they have a certain proprietary right in the soil, and this has been recognised in *Sundaram Aiyar* v. *Municipal Council of Madura and the Secretary of State for India in Couucil* (1) in which it was held that the Corporation had a certain proprietary right in the soil of public streets. Under the new Municipal Act of 1919, the Corporation is authorised to lease any Corporation immoveable property and if the Corporation has a proprietary right in public streets to the extent of that right it can grant a lease, and even, if it had no right to grant a lease I do not think the Corporation can now contend that the lease actually granted by them in 1919 was void as being prohibited by law. Uptil March 1920 therefore, the defendant was a tenant. But it is contended for the respondents that by the mere fact of his accepting Exs. F and G the permits under s. 226 (1) he became a mere licensee. When we turn to s. 226 (1) we find that it deals with persons making holes and causing obstruction in the street, and provides that persons are forbidden to make holes or cause any obstruction in any street unless the consent of the Commissioner is obtained. Clause (2) prescribes that, when such permission is granted, such persons shall cause such holes or obstruction to be sufficiently barred and enclosed and shall cause such hole or obstruction to be sufficiently lighted during the light. It is not suggested that the plaintiff's building was in any sense an obstruction to the street and the idea of allowing him to occupy it for the purpose of keeping an ice depot from year to year has no connection with the provisions of s. 226. Section 226 deals with the temporary obstructions, which would be an offence unless permission is granted for making them. It has nothing whatever to do with giving licenses for keeping an ice depot. The defendant never even expressed his consent to be a licensee. He and his predecessor had been tenants of the Corporation for over 40 years and the mere fact that these extraordinary permits were issued to him and were not refused, cannot convert that tenancy into a holding by mere license. In the absence of evidence that the defendant agreed to be a mere licensee, I think that the mere issue of licenses would not be sufficient material to raise a presumption of a change in the nature of his possession, which had for many years been that of a tenant. The present case, where the license is obviously a license which the Corporation has no pawer to issue in such form and in the circumstances that existed, is much stronger and the defendant must be deemed to have been holding on as a tenant after expiry of his last lease. Even on 10th April 1920 he was treated by the *Tahsildar* as a tenant of the Corporation. No attempt was made to disturb his possession and his possession has all along been of the same nature. Whenever any change was proposed to be made, the defendant has protested and no change has actually been made in the nature of his possession. The question then arises whether the defendant is a tenant within the meaning of s. 2, cl. (4) of Act III of 1922. That clause reads as follows:—

" 'Tenant' means tenant of land liable to pay rent on it, every other person deriving title from him, and includes persons who continue in possession after the termination of the tenancy". The defendant certainly would seem to come within the definition. It is, however, argued that in order to understand this definition, which is not in itself ambiguous, one must refer to the preamble of the Act which says: "Whereas it is necessary to give protection to tenants who...have constructed buildings on others' lands in the hope that they would not be evicted so long as they pay a fair rent". The rule of

(1) 25 M. 635; 12 M. L. J. 37.

construction is that the preamble of the Act may be referred to in a case of ambiguity or where it is necessary to interpret the Act itself so as to give effect to its purport, but it is doubtful whether the meaning of definite and unambiguous words can be strained because their natural interpretation would seem to extend the alleged scope of the Act. In any case I do not think, that in the present instance it can be said that the Act does not refer to persons in the position of the defendant. Nor am I satisfied that the defendant's position is not that contemplated by the preamble. It is difficult now to adduce evidence that the person who constructed the suit building 48 years ago did so in the hope that he would not be evicted. The oral evidence of the actual builder to that effect would not be of much value when given for the purposes of such a suit as this, but I think, that, when a man has spent a considerable sum of money in erecting a *pucca* masonry building on another's land there is a legitimate inference to be drawn, that he did so in the hope that he would not be evicted, an inference, which may be rebutted by other circumstances, which show that he could not have had such a hope. In the present case there is something rather more than a mere inference, for, as the learned Judge points out, "the defendant's predecessor-in-title apparently ventured upon a brick-built structure, in view of the favour that he then enjoyed from very high officials who got ice from him". If he enjoyed the favour of high officials (possibly officials in the employ of the plaintiff Corporation) it is difficult to suppose, that he spent his money without hoping that he would be allowed to reap the benefit of the expenditure. In that view the defendant would come within the meaning of the Act. It is argued that if the provisions of the Act are applied literally, the scope of the Act would be very materially widened beyond that expressed in the preamble. This may be so, but when the Legislature passes an enactment, its provisions must be looked to rather than the intention of the Legislature, as revealed in the discussion which preceded the passing of the Act. Construing the Act as it stands, I must hold that the defendant is a tenant within the meaning of the Act and consequently under s. 3, is entitled on ejectment to be paid compensation for his building. He did make an application under s. 9 but that is not pressed. This is intelligible when we remember that the plaintiff Corporation is not the absolute owner of the plaint site and consequently what the defendant could purchase under s. 9 is only the limited interest of his landlord. The suit will have to be remitted to the lower Court for investigation as to the value of defendant's superstructure and when, that has been determined, the decree will have to be modified by awarding that amount to the defendant as compensation. A finding as to the amount of compensation payable to be submitted within three weeks. Objections seven days. The defendant will have his costs of this appeal and the costs of the lower Court will be provided for in the revised decree.

In compliance of the above order the City Civil Judge, Madras, submitted the following

FINDING:—

* * * *

I submit a report to the effect that the structure put by the defendant on public Municipal land is worth Rs. 468-15-0 and that he is entitled to compensation at that rate before is evicted by the plaintiff.

* * * * * * * *

JUDGMENT.—The petitioner is not entitled to rental value but only to the value of the building. The finding that it is worth Rs. 465-15-0 is, therefore, accepted and plaintiff will have a decree for possession of the land and superstructure on payment of this amount less the annual rental due by defendant upto date of delivering possession. Each side will bear his own costs in the lower Court. The time for delivery is one month.

V. N. V. *Plaintiff's claim decreed.*
N. H.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 265 OF 1923.
August 17, 1925.

Present:—Mr. Justice Phillips.

POORANALINGAM SERVAI—PLAINTIFF—APPELLANT

versus

VEERAYI AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-purchasers—Excess price paid by one—Possession, suit for, by other—Decree conditional on payment of balance due—Court, jurisdiction of.

If one of two co-purchasers of a property has paid more than his portion of the purchase-money, the Court, in a suit for possession of his share by the other purchaser, can order that he must pay his portion of the purchase-money in default before recovering possession.

Rajah of Vizianagram v. *Rajah Setrucherla Somasekhararaz*, 26 M. 686; 13 M. L. J. 83, followed.

Second appeal against a decree of the Court of the Subordinate Judge, Sivaganga, in A. S. No. 60 of 1921, (A. S No. 987 of 1920, on the file of the District Court, Ramnad), presented against that of the Court of the Principal District Munsif, Manamadura, in O S. No. 367 of 1919.

Mr. *A. V. Narayanaswami Iyer*, for the Appellant.

Mr. *K. V. Sesha Iyengar*, for the Respondents.

JUDGMENT.—In this case the first defendant and second defendant jointly purchased the suit property, the first defendant paying Rs. 340, and the second defendant Rs. 60, the understanding being that each was to have half the property and the excess money paid by the first defendant was on benalf of the second defendant and re-payable by him. The first defendant subsequently redeemed a usufructuary mortgage on the land and paid the whole of the mortgage-money and took possession. Just prior to this redemption, the plaintiff bought the second defendant's share in the property and now brings this suit for redemption of his share of the usufructuary mortgage and for partition, and for delivery of possession of his separate share.

The second appeal has been argued at very great length on the assumption that this is a pure redemption suit, but this overlooks the fact that it is in effect and in name a partition suit, for the plaintiff seeks to recover a demarcated half share of the suit property. The lower Courts have ordered the plaintiff before getting possession of his half share to pay to the first defendant Rs. 140 the purchase-money paid by her on behalf of the second defendant. There can be no doubt that in a partition suit all equities between the members of the co-parcenary should be worked out allotting to each member the share to which he is equitably entitled. It is argued for the appellant that this principle is only applicable to the Hindu Law of partitions and that under any other law these equities cannot be enforced but no reasons are assigned for drawing such a distinction. We certainly have the authority of an American Writer (Freeman on Cotenancy and Partition) that such equities should be adjusted. This seems to be only reasonable and in accordance with what is right and proper. Freeman at page 675 mentions the very same equity as is in dispute here. The passage runs :—

"If one of the co-tenants .....has advanced more than his proportion of the purchase-money, the Court may decree that payment of the excess be made to him, and in default of such payment, that the moiety of the tenant in default may be sold to satisfy the amount equitably due from it."

No English cases on the point have been cited, but I may refer to the case in *Rajah of Vizianagram* v. *Rajah Setrucherla Somasekhararaz* (1). There it was held that where a tenant paid the public revenue on the land, he was entitled to a charge for that amount against his co-owner. At page 703*, there is the following passage :—

"But when once the right of contribution is established, as in the present case, it certainly cannot be an inequitable or violent stretch of such right to make it a charge against the co-owner's share". Even if there is no legal charge in the present case, yet on equitable principles such a charge can be enforced and when it comes to partitioning the property between two co-tenants this equity should, in my opinion, be enforced. On this ground alone, I think the second appeal must fail and, therefore, I do not propose to discuss the various arguments put forward on the footing that this is a mere suit for redemption.

Another point has been raised, namely, that the first defendant is not entitled to interest on the Rs. 140. The lower Courts have awarded interest from the date of payment until the date of the decree. This, I think, is wrong. The plaintiff has not been allowed mesne profits, because the first defendant had paid the whole of the money due on the usufructuary mortgage, but from the date the first defendant got into possession, the purchase-money of Rs. 140 cannot bear interest; for she has, in lieu of interest, had possession of the land. Until that date the first defendant has certainly suffered damages in having had to pay the excess amount of the purchase-money and on that ground, I think, she is entitled to interest. The interest from 22nd July 1918 to 16th June 1920 is, therefore, disallowed. Subject to this modification, the second appeal is dismissed with costs.

V. N. V.

N. H. *Appeal dismissed.*

(1) 26 M. 686; 13 M. L. J. 83.

*Page of 20 M.—[*Ed.*]

END OF VOLUME 92.

GENERAL INDEX.

VOLUME 92—1926.

Abatement of appeals and suits. *See* C. P. C., 1908, O XXII.

Abkari license—Prohibition to transfer and to sub-let *See* CONTRACT ACT, 1872, s. 23 **112**

Acknowledgment. *See* LIMITATION ACT, 1908, s 19 **626**

————, material alteration in. *See* DOCUMENT **305**

Acquiescence, fraudulent *See* ESTOPPEL **1017**

Acts—General.

Act 1839—XXXII. *See* INTEREST ACT
—— 1856—IX *See* BILLS OF LADING ACT
—— 1860—XLV *See* PENAL CODE
—— 1861—V *See* POLICE ACT
—— 1863—XX. *See* RELIGIOUS ENDOWMENTS ACT
—— 1865—X *See* SUCCESSION ACT
—— 1870—VII *See* COURT FEES ACT
—— 1871—I *See* CATTLE TRESPASS ACT
—— 1871—IX *See* LIMITATION ACT.
—— 1872—I *See* EVIDENCE ACT.
—— 1872—IX. *See* CONTRACT ACT.
—— 1873—X. *See* OATHS ACT.
—— 1877—I. *See* SPECIFIC RELIEF ACT.
—— 1878—XI. *See* ARMS ACT.
—— 1879—XVIII. *See* LEGAL PRACTITIONERS ACT.
—— 1881—XXVI. *See* NEGOTIABLE INSTRUMENTS ACT.
—— 1882—II *See* TRUSTS ACT.
—— 1882—IV. *See* TRANSFER OF PROPERTY ACT.
—— 1882—V. *See* EASEMENTS ACT.
—— 1886—II. *See* INCOME TAX ACT
—— 1887—VII. *See* SUITS VALUATION ACT.
—— 1887—IX. *See* PROVINCIAL SMALL CAUSE COURTS ACT.
—— 1889—VII. *See* SUCCESSION CERTIFICATE ACT.
—— 1890—VIII. *See* GUARDIANS AND WARDS ACT.
—— 1890—IX. *See* RAILWAYS ACT.
—— 1894—I. *See* LAND ACQUISITION ACT.
—— 1897—IX *See* PROVIDENT FUNDS ACT.
—— 1897—X. *See* GENERAL CLAUSES ACT.
—— 1898—V. *See* CRIMINAL PROCEDURE CODE.
—— 1899—II. *See* STAMP ACT
—— 1908—V. *See* CIVIL PROCEDURE CODE.
—— 1908—IX. *See* LIMITATION ACT.
—— 1908—XVI. *See* REGISTRATION ACT.
—— 1909—III. *See* PRESIDENCY TOWNS INSOLVENCY ACT.
—— 1910—II. *See* PAPER CURRENCY ACT.
—— 1910—XV. *See* CANTONMENTS ACT.
—— 1911—II. *See* PATENT DESIGNS ACT.
—— 1913—VII. *See* COMPANIES ACT.
—— 1919—X. *See* USURIOUS LOANS ACT.
—— 1920—V. *See* PROVINCIAL INSOLVENCY ACT.
—— 1920—XXVI. *See* LIMITATION AND CODE OF CIVIL PROCEDURE (AMENDMENT) ACT.
—— 1922—XI. *See* INCOME TAX ACT.
—— 1923—XI. *See* REPEALING AND AMENDING ACT.

Acts—Bengal.

Act 1880—IX. *See* CESS ACT.
—— 1885—I *See* BENGAL FERRIES ACT.
—— 1885—VIII. *See* BENGAL TENANCY ACT.
—— 1887—XII. *See* BENGAL, N W P. AND ASSAM CIVIL COURTS ACT.
—— 1910—IV. *See* BENGAL CESS (AMENDMENT) ACT.
—— 1920—III. *See* CALCUTTA RENT ACT

Acts—Bombay.

—— 1874—III *See* BOMBAY HEREDITARY OFFICES ACT.
—— 1876—X. *See* BOMBAY REVENUE JURISDICTION ACT
—— 1878—V *See* BOMBAY ABKARI ACT
—— 1879—XVII. *See* DEKKHAN AGRICULTURISTS' RELIEF ACT
—— 1880—I *See* BOMBAY KHOTI SETTLEMENT ACT.
—— 1901—III *See* BOMBAY DISTRICT MUNICIPAL ACT.
—— 1924—VI *See* KARACHI PORT TRUST (AMENDMENT) ACT.

Acts—Burma.

—— 1907—VI. *See* BURMA VILLAGE ACT.
—— 1920—II *See* RANGOON RENT ACT.
—— 1922—VI. *See* CITY OF RANGOON MUNICIPAL ACT.

Acts—C. P.

—— 1898—XI *See* C P. TENANCY ACT.
—— 1903—XVI *See* C. P MUNICIPAL ACT.
—— 1917—II. *See* C P. LAND REVENUE ACT.
—— 1920—I. *See* C. P TENANCY ACT.

Acts—Madras.

—— 1884—V. *See* MADRAS DISTRICT MUNICIPALITIES ACT.
—— 1889—I *See* MADRAS VILLAGE COURTS ACT.
—— 1897—IV. *See* MADRAS SURVEY AND BOUNDARIES ACT.
—— 1908—I. *See* MADRAS ESTATES LAND ACT.
—— 1919—IV. *See* MADRAS CITY MUNICIPAL ACT.
—— 1920—V. *See* MADRAS DISTRICT MUNICIPALITIES ACT.
—— 1920—XIV. *See* MADRAS LOCAL BOARDS ACT.
—— 1922—III. *See* MADRAS CITY TENANTS' PROTECTION ACT.

Acts—Punjab.

—— 1887—XVI. *See* PUNJAB TENANCY ACT.
—— 1887—XVII. *See* PUNJAB LAND REVENUE ACT.
—— 1911—III. *See* PUNJAB MUNICIPAL ACT.
—— 1912—V. *See* COLONIZATION OF GOVERNMENT LANDS (PUNJAB) ACT.
—— 1913—I. *See* PUNJAB PRE-EMPTION ACT.
—— 1918—VI. *See* PUNJAB COURTS ACT.
—— 1920—I. *See* PUNJAB LIMITATION (CUSTOM) ACT.

Acts—U. P.

Act 1876—XVIII. *See* OUDH LAWS ACT.
—— 1901—II. *See* AGRA TENANCY ACT.
—— 1901—III. *See* U. P LAND REVENUE ACT.
—— 1904—I *See* U P. GENERAL CLAUSES ACT.
—— 1910—IV. *See* U. P. EXCISE ACT.
—— 1916—II. *See* U. P. MUNICIPALITIES ACT.
—— 1920—VI *See* U P. VILLAGE PANCHAYAT ACT
—— 1922—XI *See* AGRA PRE-EMPTION ACT
—— 1925—IV. *See* OUDH COURTS ACT.

Regulations.

Reg. 1793—XXVII. *See* BENGAL REGULATION
—— 1806—XVII. *See* BENGAL LAND REDEMPTION AND FORECLOSURE REGULATION
—— 1819—VIII. *See* BENGAL PATNI TALUKS REGULATION.

Statute.

1915—(5 & 6 GEO. V, c. 61). *See* GOVERNMENT OF INDIA ACT.

Aden, orders of Resident at. *See* C. P. C., 1908, s 115 **367**

Adverse possession. *See* ALSO LIMITATION ACT, 1908, SCH I. ART. 144.
——— during tenure of life-tenant *See* LIMITATION ACT, 1908, SCH I, ART 134 **63**
——— *Co-sharers—Ouster*

In the case of co-owners the possession of one co-owner is in law the possession of the other co-owners as well, and it is not possible for one co-owner to put an end to that possession by any secret intention in his mind Nothing short of ouster or something equivalent to ouster can bring about that result

The fact that a co-sharer has been in exclusive possession of the joint house and has been making repairs to it, is not enough to constitute ouster.

A co-sharer has a right to repair the whole of the house, and, if he does so, his act cannot be considered to be an act of such an hostile character that it may be considered as equivalent to a denial on his part of the title of the other co-owner or co-owners **O** MAHADEO PRASHAD *v* RAM PHAL, 3 O. W. N. 186, 13 O. L. J. 55; A I. R. 1926 Oudh 258 **685**
——— *Mortgage, redemption of—Widow of mortgagee retaining possession—Lawful origin—Nature of widow's possession.*

Where after the redemption of a mortgage the mortgagee retains possession of the mortgaged property and, after his death, his widow comes to occupy the said property to the exclusion of the rightful heirs of her husband as well as the mortgagor, the possession of the widow cannot be referred to a lawful origin and is adverse to the mortgagor and, in case it extends beyond twelve years, will ripen into ownership. **A** RAM KUER *v.* GOVIND RAM, A. I R. 1926 All. 62; 48 A. 145 **414**
——— *Mortgagor and mortgagee—Acquiescence.*

As between the mortgagor and the mortgagee neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption, will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem. **O** BAJRANG BALI *v.* MAHRAJIA **832**
——— *Occupancy rights.*

Occupancy rights can be the subject of adverse possession. **O** SHEO NANDAN *v.* HIRA LAL, 13 O. L. J. 6; A. I. R. 1926 Oudh 246 **247**
——— *Possession under invalid title—Co-sharers—Realization of rent by one co-sharer.*

Adverse possession—concld.

If possession is acquired by a person under an invalid title and he continues to remain in possession for more than 12 years, although the document relating to his title may be invalid for want of registration or any other ground, yet the possession having lasted for more than 12 years the title becomes an unassailable one

Therefore, where a party originally enters into possession under an unregistered sale-deed, the defect in his title is cured by his having been in possession for over 12 years.

If a co-sharer has been in possession of a particular land, his possession cannot be considered adverse against the other co-sharers, and his possession must be deemed to be on behalf of them all In order to establish adverse possession in such a case a co-sharer has to establish that he expressly denied the title of the other co-sharers and remained in possession after such denial for over 12 years

Therefore, the mere fact that a co-sharer has been realizing rents of certain plots of land in which he is a co-sharer, would not establish that he has been in adverse possession so as to extinguish the title of the other co-sharers **O** MAHIPAL SINGH *v.* SARJOO PRASAD, 3 O W N 101, A I R 1926 Oudh 141 **99**
——— *Sweeping land, effect of.*

The act of sweeping a piece of land occasionally does not amount to adverse possession against the true owner. **M** MUNICIPAL COUNCIL, COCHIN *v* PRATATH BAVUDEVASSI, 22 L W 671, A I R. 1926 Mad 235 **18**

Advocate, position and duties of. *See* PENAL CODE, 1860, s 499, EXCEP. 9 **737**

Agra Pre-emption Act (XI of 1922), s. 12 (3)—*Person 'claiming pre-emption,' meaning of—Vendee, or intended vendee, whether included*

The vendee, or proposed vendee, or contemplated vendee, or intended vendee, is a person "claiming pre-emption" within the meaning of the clause "more persons than one of the same class claiming pre-emption" in s 12 (3) of the Agra Pre-emption Act.

The ordinary meaning of "to pre-empt" is to purchase in preference to others, that is to say, even of the whole world, and pre-emption is the effect of the purchase The vendee, if he is successful in the end over other competitors, does in fact pre-empt and is, therefore, properly spoken of as a person claiming pre-emption. **A** JAGRUP SINGH *v.* INDRASAN PANDE, 24 A. L. J. 325; A. I R. 1926 All. 216 **1**

Agra Tenancy Act (II of 1901), ss. 4 (5), 167, Sch. IV, Item 29—*Suit to eject lessee of grove—Jurisdiction of Civil and Revenue Courts.*

A suit to eject the lessee of a grove who has been paying a portion of the produce of the grove as rent, is a suit to eject a tenant and is cognizable by a Revenue and not by a Civil Court. **A** MAHARAJ DIN *v.* BHAIRON, A. I. R. 1926 All. 220 **473**
——— **ss. 150, 167.** *See* LANDLORD AND TENANT **134**
——— **s. 165**—*Account, suit for, against co-sharer—Claim for rent, whether can be joined.*

A co-sharer, in a suit for an account brought under s. 165 of the Agra Tenancy Act against another co-sharer, cannot join a claim in respect of a separate matter altogether, namely, for rent. **A** KHEM KARAN DAS *v.* BALDEO SINGH, A. I. R. 1926 All. 282 **1046**
——— **ss. 175, 177**—*Letters Patent (All), cl. 11—Civil Procedure Code (Act V of 1908), s. 115—Revenue appeal—District Judge, order of—Appeal—Revision,*

Agra Tenancy Act—concld.

No appeal lies to the High Court from an order, as apart from a decree, of the District Judge passed on appeal from a Revenue Court under s 177 of the Agra Tenancy Act

Nor is an appeal competent in such a case as the above under cl 11 of the Letters Patent of the Allahabad High Court

Obiter.—The High Court has power to entertain a revision of an order passed by a District Judge under s. 177 of the Agra Tenancy Act **A** KEHRI SINGH *v.* THIRPAL, L R 6 A. 213 Rev , 23 A L J 865, A I R 1926 All 113, 48 A 104 **282**

——— **ss. 175, 182**—*District Judge, order of—Appeal, third, to High Court, whether lies*

Section 182 of the Agra Tenancy Act only allows a second appeal to the High Court and not a third appeal.

Therefore, no appeal lies to the High Court from an order passed by the District Judge on an appeal from an appellate order of a Collector **A** KALKA PRASAD *v* PANNA, A. I R 1926 All. 233 **3**

——— **s. 198**—*Tenant and sub-tenant Ejectment suit—Sub-tenant claiming to be tenant himself—Proprietary title, question of, whether involved—Appeal, forum of*

In a suit by an occupancy tenant to eject a sub-tenant, where the latter alleges that he is himself the tenant-in-chief and is holding directly under the proprietor, no question of proprietary title is involved within s. 198 of the Agra Tenancy Act, and an appeal against the decision of the Assistant Collector lies to the Revenue Court and not to the Civil Court

The words "land-holder" and "tenant" do not in s. 198 (1) of the Agra Tenancy Act embrace "tenant" and his "sub-tenant"

Per *Boys, J* —There is nothing in the heading preceding s 198 of the Agra Tenancy Act or in s 198 (1) to indicate that in a case coming within s 198 (1) a question of proprietary title is necessarily in issue. Rather are all the indications to the contrary. The answer to the question whether a matter of proprietary title is in issue cannot be based on any conclusion that the case is or is not within s 198 but must be answered independently of s 198 **A** BALDEO KURMI *v.* KASHI CHAMAR, 24 A. L. J. 337, A. I. R 1926 All 312 **995**

Amendment of plaint. *See* C P. C , 1908, O VI, R 17 **599**

Appeal (Civil)—

See (*i*) C. P. C., 1908, ss 96 TO 112, O XLI, O XLIII, O. XLV.

(*ii*) LETTERS PATENT OF THE HIGH COURTS—SECTIONS RELATING TO APPEALS

——— ——— *Decree in favour of appellant, when can be set aside.*

Where a suit is partially decreed, and the plaintiff files an appeal against that portion of the decree by which his suit has been dismissed, the Appellate Court has no power to set aside the decree granted in favour of the plaintiff in the absence of an appeal or cross-objection by the defendant **N** MAROTRAO *v.* MUNICIPAL COMMITTEE, NAGPUR, A. I. R. 1926 Nag. 281 **796**

——— ——— *Deficiency in Court-fee not made good—Negligence—Limitation, effect on.*

Where a memorandum of appeal does not bear the full Court-fee and the deficiency is not made good in time owing to the gross negligence of the appellant or his Counsel the appeal becomes time-barred. **L** PURAN CHAND *v.* EMPEROR **991**

Appeal (Civil)—concld.

——— ——— Dismissal for default—Decree. *See* C P C , 1908, O IX, R. 8 **496**

——— **(Second).**

See C P C , 1908, O. XLI, R. 27 **661**

See JURISDICTION **760**

——— ——— *Discretion of lower Court—Interference.*

No interference is justified in second appeal with a discretion exercised by the lower Courts, unless it is shown that the discretion was exercised in an unreasonable manner. **O** KIDAR NATH *v* BHIKHAM SINGH **679**

——— ——— *Finding of fact—Question for trial not understood, effect of*

A finding of fact cannot be disturbed in second appeal, provided the facts found by the lower Appellate Court are relevant and the finding is based on evidence proper for consideration

It is not necessary that the whole of the evidence given in the case should have been considered in the lower Appellate Court and still less that every part of it should have been mentioned in the judgment; interference is not justified by an apparent omission to consider some material part or even the main part of it Where, however, the lower Appellate Court has entirely misunderstood the question it had to try, its finding cannot be upheld in second appeal **N** TUKARAM *v* CHINTARAM, 20 N L R 17, A I R 1924 Nag. 91 **327**

——— ——— Mala fides, *whether question of fact—Interference by High Court*

A finding that a certain action of a Municipality was prompted by *mala fides* is a finding of fact, and cannot be questioned in second appeal **L** MUNICIPAL COMMITTEE *v* MILKHI RAM, 7 L L J 358, A I R 1925 Lah 515 **602**

——— ——— *Mortgage or sale—Question of fact*

The question whether a certain transaction is a mortgage or a sale is a question of fact and cannot be agitated in second appeal **L** PAL SINGH *v.* GANGA SINGH, 2 L C 194 **42**

——— ——— New case. *See* MADRAS ESTATES LAND ACT, 1908, s 2 (3) **1047**

——— ——— *Permanent tenancy, finding as to—High Court, interference by*

Where a lower Appellate Court refuses to draw an inference of the permanency of a tenancy from the facts that the tenancy is an old one, that the rent has not been varied and that the land was let out for the purpose not of building any permanent structure but of raising huts, there is no error of law which would justify the interference of the High Court in second appeal **C** BAIKUNATHA NATH DE *v* SHAIK HARI, A. I R. 1926 Cal 592 **899**

——— ——— *Value of documentary evidence whether can be considered*

A Court of second appeal will deal with the question of the admissibility in evidence of a document but not with its evidentiary value. **C** RAM KUMAR DAS *v.* HARNARAIN DAS **104**

Appellate Court, *power of—Discretion not exercised by Trial Court.*

If a Court does not exercise a discretion which it might have exercised, it is open to the Appellate Court to exercise that discretion **L** ALLAH BAKHSH *v.* MUNICIPAL COMMITTEE, A I. R 1926 Lah. 223 **966**

Arbitration—*Award, suit to enforce—Contract containing arbitration clause, validity of, whether can be questioned.*

Arbitration—concld.

In answer to a suit to enforce an award, made on a reference in pursuance of an arbitration clause contained in a contract alleged to have been entered into between the parties, it is open to the defendant to plead that there was no completed contract between the parties and that consequently the arbitration clause could not come into operation. This objection goes to the root of the whole matter and must be determined along with any other issues in the suit. L RAGHUNATH DAS-RAM SARUP *v* SULZER BRUDERER & Co, 7 L. L. J. 611, 7 L 42, A. I. R. 1926 Lah. 125 **712**

Arms Act (XI of 1878), s. 19 (f)—*Illegal possession of arms—Arms found in room attached to office frequented by many people—Lessee, whether in possession.*

The upper storey of a house used as the office of a certain Society, which was rented in the name of the accused, was raided by the Police and a pistol and a certain number of cartridges were found at the bottom of a grain bin in a room at the back of the kitchen which had no doors. The accused was not present at the time of the search, but three other members of the Society, to one of whom the key of the house had been made over by the accused, were present.

Held, that it could not be said that it had been proved beyond reasonable doubt that the pistol and cartridges were in the possession of the accused A KRISHNA GOPAL *v.* EMPEROR, 27 Cr L J 301 **589**

Benami tenancy. *See* LANDLORD AND TENANT **80**

——— transaction—*Proof, nature of.*

In view of the extraordinary prevalence of *benami* transactions in India, even a slight quantity of evidence may suffice to prove it. N AHMAD BAIG *v* MODEL MILL, NAGPUR, LD., A. I R. 1926 Nag 262 **25**

Bengal Cess (Amendment) Act (IV of 1910), ss. 52, 52A—*Notice that tenure has been included within* zemindari, *publication of, proof of—Notice published before passing of Amending Act of 1910, whether can be proved by certificate granted subsequently—Cess, liability to pay.*

The publication of the notice mentioned in s 52 of the Bengal Cess (Amendment) Act must be strictly proved before the liability of the holder of a tenure in respect of a cess can arise.

A certificate given by the Collector in accordance with the provisions of s. 52A of the Bengal Cess (Amendment) Act that a notice under s. 52 of the Act has been duly published, is conclusive proof of the fact that the publication was made. It is immaterial that the certificate refers to a publication which took place before the passing of the Bengal Cess (Amendment) Act IV of 1910 which added s. 52A to the Bengal Cess (Amendment) Act. The Amending Act only provides the method of proving the publication of the notice. It creates no new right nor does it affect any existing right. A notice published before the passing of the Amending Act, may, therefore, be proved by the production of a certificate from the Collector given after the passing of the Amending Act that the publication had been duly made. C RISHI KESH LAW *v.* SONS AND HEIRS OF SHAMSHER KHAN **48**

Bengal Ferries Act (I B. C. of 1885), ss. 16, 28—*Criminal Procedure Code (Act V of 1898), s. 234—Ferry, unauthorized, maintenance of—Carriage of passengers or property—Offence—Several offences, trial of—Procedure.*

Bengal Ferries Act - concld.

Section 16 of the Bengal Ferries Act only makes the maintenance of a ferry within the prohibited area an unauthorized act but does not make such an act penal. Section 28 of the Act is, however, a penal provision which makes the maintenance of an unauthorized ferry under s 16 of the Act an offence when the ferry is used for conveying a passenger, animal, vehicle or other thing for hire

In order to constitute a ferry such as contemplated by the Bengal Ferries Act it is necessary that there should be two points on both sides of the river so that passengers and property may be conveyed from one side of the river to the other. It must be connected on both sides with land on the banks of the river.

The maintenance of a private ferry is in contravention of s 16 of the Bengal Ferries Act for which the person who maintains the ferry may be liable for damages and an injunction may also be issued against him. If, however, in addition to maintaining such a prohibited private ferry, he carries passengers or property he is liable criminally under s. 28 of the Act and each time he conveys passengers or property for hire he commits an offence. Each trip is a separate transaction and can be tried separately. Where several trips are made within the course of a few days the proper procedure is for the Magistrate to try the accused at one time only in respect of three of these transactions and to use the remaining transactions as evidence in the case for the purpose of determining the amount of the damages payable under the Act. If a conviction is obtained in respect of transactions selected for trial, the Court should stay the enquiry into or trial of the other charges which will have the effect of the acquittal of the accused on those charges subject to the event of the conviction being set aside on appeal or revision. If the conviction is set aside the Magistrate may proceed with the trial of or enquiry into other charges. **Pat** JEOBARAN SINGH *v* RAMKISHUN LAL, 4 Pat. 503; A. I. R. 1925 Pat 623, 27 Cr L J 359 **871**

Bengal Land Redemption and Foreclosure Regulation (XVII of 1806). *See* MORTGAGE **531**

Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887), s. 20, *scope of.*

Section 20 of the Bengal, N. W. P. and Assam Civil Courts Act does not confer a right of appeal from every order of the District Judge to the High Court; it only determines the *forum* to which an appeal, if any, shall lie from decrees or orders of the District Judge. **Pat** WASHIMAN *v.* MIR NAWAB ALI, 3 Pat. 1018; A I R. 1925 Pat. 178; 7 P. L. T. 424 **133**

Bengal Patni Taluks Regulation (VIII of 1819), ss. 8, 10—Patni *sale—Notice, service of—Failure to comply with requirements of sections—Sale, validity of.*

Failure to comply strictly with the requirements of ss. 8 and 10 of the Bengal Patni Taluks Regulation is fatal to the validity of a *patni* sale. **P. C.** RAJA BHUPENDRA NARAYAN SINGH BAHADUR *v.* MADAR BAKHSH SHEIKH, A. I. R. 1925 P. C 297; 23 L. W. 9; 52 I. A 439; 53 C. 1 **681**

Bengal Regulation (XXVII of 1793)—*Permanent Settlement—Income from* jalkar, hat *and* ghatlaggi, *whether taken into account—Income, whether liable to assessment to income-tax—Darbhanga Raj.*

The Permanent Settlement left to the *zemindar* the ground rents of land, shops, etc., in all the then existing *hats* except such, if any, as were specifically excluded and if more *hats* are now shown to exist than appear in the Settlement papers it must be pre-

Bengal Regulation—concld.

sumed, in the absence of evidence to the contrary, that they have sprung up since the Settlement. If they existed at the time of Settlement they were left under the general regulations to the *zemindar* in the absence of any specific exclusion The onus is not on the assessee to prove inclusion but upon the Crown to prove exclusion.

The Permanent Settlement Regulations apply as much to subsequently settled lands as to lands settled in 1793.

Where a *ghat* has been settled with a *zemindar*, the latter has the right to collect mooring dues as well as tolls or ferry dues

The income derived from *jalkar*, *hat* and *ghatlaggi* was included in the assets of the Darbhanga Raj when the *jama* was assessed at the time of the Permanent Settlement, and such income is, therefore, not liable to be assessed to income-tax **Pat** MAHARAJ DHIRAJ OF DARBHANGA *v* COMMISSIONER OF INCOME TAX, 2 Pat. L R 242 Cr, (1925) Pat 49, A I R. 1925 Pat 313, 6 P. L. T 355 **338**

Bengal Tenancy Act (VIII of 1885), ss. 29, 49—*Ejectment—Under-*raiyat *-Occupancy rights—Heritability of under-*raiyati *holding*

An under-*raiyat* may acquire right of occupancy by custom or usage and is not then liable to be ejected.

Ordinarily the holding of an under-*raiyat* whether with or without rights of occupancy is not heritable.

The descendant of an under-*raiyat* with rights of occupancy, who fails to prove that his predecessor's interest was heritable is a trespasser and, therefore liable to ejectment **C** ISWOR SANT *v* TORENDRA NATH KUILA, 42 C L J 560, A I R 1926 Cal 163 **981**

——— **s. 46, Sch. III, Art. 2 (b)**—*Limitation Act (IX of 1908), s 14—Proceedings under s 46, nature of—"Agreement" in s 46 (7), meaning of—Suit to recover rent accruing due during pendency of proceedings—Limitation*

Proceedings under s 46 of the Bengal Tenancy Act are proceedings not merely for ejectment, but to have a fair and equitable rent assessed by the Court If the tenant refuses to accept the agreement filed under the provisions of the section, it is then that a suit for ejectment under the section can be commenced

The word "agreement" in sub-s (7) of s 46 of the Bengal Tenancy Act refers not to the agreement mentioned in the previous sub-sections but to the agreement arrived at between the landlord and the tenant when the Court has fixed the fair and equitable rent and the tenant has elected to pay that rent and not to be ejected from the holding

The rent accruing due during the pendency of proceedings under s 46 of the Bengal Tenancy Act is not suspended by virtue of the proceedings, and a suit after the termination of such proceedings to recover such rent is governed by Art. 2 (*b*) of Sch. III to the Bengal Tenancy Act and the period of limitation provided in that Article is not extended by the operation of s. 14 of the Limitation Act. **C** PORT CANNING AND LAND IMPROVEMENT CO *v.* HEIRS OF BAHIR MOLLA, 43 C. L. J. 45, A. I R. 1926 Cal 693 **37**

——— **s. 49 (b)**—*Ejectment, suit for—Lease for indefinite term—Landlord and tenant—Ejectment suit—Permanent tenancy—Onus.*

Where, in a suit for ejectment of a tenant the defendant sets up a permanent right the onus lies on him to substantiate his claim.

A landlord is entitled to evict a tenant holding under a lease for indefinite period by a notice under

Bengal Tenancy Act—contd.

s 49 (*b*), Bengal Tenancy Act. **C** BANGSHI BADAN HAIDAR *v.* RATAN **961**

——— **s. 50**—*Old tenancy—Additional area on additional rent—Presumption of fixity of rent, whether applicable—Burden of proof.*

Where a tenant adds new area to his old tenancy on additional rent, he is not deprived of the presumption arising under s 50 of the Bengal Tenancy Act so far as the old tenancy is concerned The onus of proving what the old area was is upon the tenant.

A tenant cannot, however, by adding new area to the old tenancy, claim the benefit of the presumption so far as the added area is concerned. **C** HEM CHANDRA SEN *v.* GIRISH CHANDRA SAHA **107**

——— **s. 105**—*Civil Procedure Code (Act V of 1908), O XLI, r 27—Landlord and tenant—Assessment of additional rent for additional area—Memorandum of measurement, admissibility of—Appeal—Additional evidence, admission of—Procedure*

In a proceeding under s 105 of the Bengal Tenancy Act for assessment of additional rent for additional area, a document purporting to be a memorandum of measurement, which bears no date and about which it is not shown under what circumstances it was prepared, cannot be admitted in evidence

An application was put in before an Appellate Court asking that a document attached to the application should be admitted in evidence The only order passed on the application was, "file with the record"

Held, that the document was not properly admitted in evidence **C** ADAM SARDAR *v* BISWESWAR DAS, A I. R. 1926 Cal 684 **601**

——— **s. 105**—*Settlement of rent—Suit to recover rent at rate settled—Plea of denial of settlement proceedings -Fraud, plea of, absence of—Notice, service of, whether can be enquired into*

In answer to a suit to recover rent at the rate settled in proceedings under s 105 of the Bengal Tenancy Act, defendant denied that there was any such proceedings and stated that if any order under s 105 had been obtained it was not binding upon him There was no plea of fraud and no issue was raised in the suit as to the validity or otherwise of the proceedings under s 105

Held, (1) that in the absence of a plea of fraud it was not open to the Court to try the question as to whether there was any service of notice on the defendant or not in the proceedings under s 105 of the Bengal Tenancy Act;

(2) that if the defendant wished to challenge the proceedings under s 105 on the ground of non-service of notice, he ought to have questioned the proceedings before the Settlement Officer, or by way of proceedings appropriate for such relief or by appeal, and that it was not open to him to do so in answer to the present suit. **C** TARAMONEE CHOUDHURANI *v.* SHEIKH ELIM, A I. R 1926 Cal. 582 **714**

——— **s. 182**—*Ejectment—Culturable lands forming part of homestead of* raiyat—*Liability to ejectment.*

Where culturable lands form part of and are appurtenant to the homestead lands of a *raiyat* he is protected from eviction therefrom under the provisions of s. 182 of the Bengal Tenancy Act **C** ASWAP ALI BEPARI *v.* LULA MIA, A. I R. 1926 Cal 580 **843**

——— **Sch. III, Art. 2 (b).** *See* BENGAL TENANCY ACT, 1885, s. 46 **37**

——— ——— **Art. 3**—*Landlord and tenant—*

Bengal Tenancy Act—concld.

Dispossession of tenant by purchaser—Possession, suit to recover—Limitation.

Where an agent of the landlord purchases a portion of a tenant's *jote* and as such purchaser dispossesses the tenant from the portion purchased, a suit by the tenant to recover possession of the portion of the *jote* from which he has been dispossessed is not governed by Art 3 of Sch III to the Bengal Tenancy Act **C** DURGA PROSAD LAHIRI CHOUDHURI *v.* RATAN MAHOMMED SARKAR **897**

Berar Land Revenue Code, 1896, s. 210 - *Sale to co-occupant and stranger—Pre-emption*

Where a co-occupant in a survey number sells his share in the survey number to a co-occupant and a stranger, the sale cannot be described as being one in favour of a co-occupant and s 210 of the Berar Land Revenue Code has no application to such a case **N** SAKHARAM *v.* SHEORAM, 21 N L. R 189, A I. R. 1926 Nag 229 **334**

Bihar and Orissa Government Notification No. 2576. *See* COURT FEES ACT, 1870, SCH. II, ART. 11 **474**

Bills of Lading Act (IX of 1856), s. 3 —*Bill of Lading, description of goods in, whether conclusive —Exemptions clause in Bill of Lading, effect of— Port Trust, whether entitled to benefit of exemption.*

The general rule based on the provisions of s 3 of the Bills of Lading Act, to the effect that in the absence of any proof that the Bills of Lading were granted under a misrepresentation without any default on the part of the person signing them and wholly due to the fault of the shipper or the holder of such Bills of Lading, the Bills of Lading are conclusive evidence that the goods bearing particular marks as shown in the respective Bills of Lading were put on board, has no application when the Shipping Company has protected itself by insertion of a clause in the Bill of Lading that the marks and numbers though shown in the Bill of Lading are unknown to them and that they do not admit that the marks or numbers shown in the Bill of Lading are correct and when they have exempted themselves from liability against obliteration or difference of marks

Section 3 of the Bills of Lading Act applies only in the case of the master or person signing the Bill and does not apply to the Port Trust

Even if the Port Trust be considered to be the agent of the Shipping Company, they would be equally entitled to the benefit of an exemption clause, as a wharfinger is justified or excused by the same thing as would justify or excuse the master and can, consequently, claim benefit of exemptions provided in a Bill of Lading **S** POHOMAL *v* KARACHI PORT TRUST, A I. R 1925 Sind 221; 18 S L R 106 **206**

Bombay Abkari Act (V of 1878), s. 43 (1) (a)— *Importation of foreign liquor—Punishment, appropriate.*

On conviction under s 43 (1) (*a*) of the Bombay Abkari Act the more appropriate form of punishment is imprisonment and not fine. **S** EMPEROR *v.* GULAB, 27 Cr. L. J. 300 **588**

Bombay Hereditary Offices Act (III of 1874), ss. 15, 73—*Bombay Revenue Jurisdiction Act (X of 1876), s. 4 (a)—Widow, whether holder of watan— Commutation order, passed at instance of widow, validity of—Order passed without recording investigation or notice to other members, validity of — Suit for declaration of invalidity of commutation order, maintainability of.*

Bombay Hereditary Offices Act—concld.

The interest of a widow in a *watan* is to be compared to the interest of a Hindu widow in her husband's estate.

A widow holding an interest in *watan* property for the term of her life or until her marriage is not a "holder" within the meaning of that term in s 15 of the Bombay Hereditary Offices Act, and the Collector negotiating with such a widow is not authorized to pass a commutation order under s. 15

A commutation order passed under s. 15 of the Bombay Hereditary Offices Act, without making a record of any investigation or giving any opportunity to the other members of the *watan* family of being heard and without recording reasons is invalid.

A suit for a declaration that a commutation order passed under s 15 of the Bombay Hereditary Offices Act is invalid on the ground that it was passed at the instance of a person who was not a "holder" within the meaning of s. 15 and that the provisions of s 73 of the Act had not been complied with is not barred by the provisions of s 4 (*a*) of the Bombay Revenue Jurisdiction Act **B** LAXMAN BHIKAJI *v* SECRETARY OF STATE FOR INDIA, 27 Bom. L. R. 463, A I. R 1925 Bom. 365, 49 B. 551 **110**

Bombay Khoti Settlement Act (I of 1880), s. 33, r. II (1) (b)—*Landlord and tenant—Rent payable*—Botkhat, *entry in, value of—Arrangement, unauthorised, between* khot *and tenant, whether can be enforced*

The whole scheme of s 33 of the Bombay Khoti Settlement Act is to prevent arrangements being made in an unauthorised way by the *khots* with the tenants contrary to the terms of the *bot-khat* Rule II (1) (*b*) under the section provides that if there is any agreement between the parties after the amount of rent has been fixed in the *bot-khat*, then the parties should appear in person or by duly authorised agent before the Recording Officer and consent to the entry being made altering the terms under which the tenant holds the lands Where the agreement is not given effect to in this manner, the rights and obligations of the parties continue to be regulated by the terms of the entries contained in the *bot-khat* and the agreement cannot be given effect to. **B** BALSHET MAHADSHET YEKAWDE *v* HARI BABURAO RANE, 27 Bom. L. R. 1487; A I. R. 1926 Bom 119 **542**

Bombay Revenue Jurisdiction Act (X of 1876), s. 4 (a). *See* BOMBAY HEREDITARY OFFICES ACT, 1874, s 115 **110**

Buddhist Law, Burmese. *See* C. P. C., 1908, O. VI, R 17 **253**

——— *Adoption—Minor, whether can adopt.*

Adoption is a contract under which a person takes another with certain objects and confers certain rights. Hence, to be able to adopt a person must be of age and able to contract A minor is not, therefore, legally empowered to adopt any person **R** MAUNG MYA DIN *v.* MAUNG YE GYI, A. I. R. 1925 Rang. 350; 4 Bur. L. J. 136 **719**

——— *Inheritance—Suit to recover share of —Necessary parties.*

In a suit by an adoptive daughter of a deceased Burmese Buddhist couple to recover her share in the jointly acquired estate of her adoptive parents, all persons who are co-heirs of the deceased must be impleaded as parties **R** MA ME MYA *v.* MA MIN ZAN, A. I. R. 1925 Rang .320; 3 R. 490; 4 Bur. L. J. 159 **368**

Burden of proof. *See* C. P. C., 1908, s. 115 46

Burma Village Act (VI of 1907), s. 21 (a)—Pwe, *meaning of—Dramatic performance held by amateurs for public entertainment—Notice, absence of—Robbery—Offence.*

For the purposes of the Burma Village Act a *pwe* ordinarily includes a theatrical or dramatic performance held for public entertainment whether on public or private property

The object of requiring a permit for such a performance is to ensure that the authorities should get timely notice to arrange for precautionary measures.

Accused gave a dramatic performance at his house for public entertainment without obtaining a permit for the same The troupe was composed of local amateurs During the performance a robbery took place in the neighbourhood

Held, that the accused was guilty of an offence under s 21 (*a*) of the Burma Village Act R EMPEROR *v* MAUNG THAN GYAUNG, A I R 1925 Rang 375, 4 Bur L J 145, 3 R 514, 27 Cr L J 342 854

Calcutta High Court Rules, Ch. XVI, r. 27. *See* LIMITATION ACT, 1908, s 5 563

Calcutta Rent Act (III of 1920), ss. 2 (f) (i), 11 (5), 15—*Standard rent, what is—Benefit of Act.*

In the absence of any application by the landlord to fix a higher rate under s 15, Calcutta Rent Act, the standard rent should be taken to be the rent at which the premises were let on the 1st of November 1918 with the addition of ten per cent

A tenant is entitled to the benefit of s 11, Calcutta Rent Act, if he complies with two conditions, (1) he must have paid any arrears of rent which might be due at the time of the passing of the Act within three months of the passing of the Act, and (2) he must pay the rent to the full extent allowable by the Act within the time fixed by the contract with his landlord and, in the absence of any such contract, by the 15th day of the month next following that for which the rent is payable

When a person ceases to be a tenant, he cannot take advantage of the provisions of the Calcutta Rent Act C W & T AVERY LD *v* KESSORAM PODDER, 30 C W N 152, A I R 1926 Cal 481 1001

——— **s. 15**—*Decree for ejectment - Standardization of rent- Rent Controller, jurisdiction of*

After a landlord has obtained a decree for ejectment of the tenant, the Rent Controller has no jurisdiction to fix a standard rent of the premises, as there is no tenancy in existence C SUKHDEODAS RAM PROSAD *v* JAINTILAL JAMUNADAS, A I R 1926 Cal. 697 392

Cantonments Act (XV of 1910), s. 15 (1)—*Water charges, whether tax—Modification of charges - Previous sanction of Governor-General, whether necessary—Cantonment Committee, whether can sell water—Cantonment Code of 1912, r 157*

The water charges sanctioned by the Governor-General in Council as required by s 15 (1) of the Cantonments Act and levied by a Cantonment Committee under Notifications issued under the said section are in the nature of a tax and cannot be increased or varied by the Committee without the previous like sanction of the Governor-General in Council

Rule 157 of the Cantonment Code of 1912 does not empower a Cantonment Committee to limit the quantity of water supplied in proportion to the buying value of the tax levied This rule is not intended by implication to vest a non-commercial body like a Cantonment Committee with the right to vend water as a commodity S JOTSING HARISING ADVANI *v.* SECRETARY OF STATE FOR INDIA, A. I. R. 1926 Sind 130 361

Cantonment Code, 1912, s. 157. *See* CANTONMENTS ACT, 1910, s. 15 (1) 361

Carriage of goods—*Railway Company—Freight charged at maund-rates, whether can be subsequently calculated at wagon-rates*

Where a Railway Company at the time of consignment agrees to charge freight on the basis of calculation at maund-rates and grants a Railway receipt on that basis, it cannot subsequently demand freight on the basis of a calculation at wagon-rates and *vice versa* A BOMBAY BARODA & CENTRAL INDIA RY *v* GULABBHAI BHAGWANDAS, A I R 1926 All 296 532

——— *Railway Company—Risk Note B—"Robbery from running train," whether includes theft—"Wilful neglect," meaning of—"Running train," meaning of:*

The expression "robbery from a running train" in Risk Note B used in the transmission of packages on the Railway does not include theft or taking without force It has its technical meaning assigned to it by the Penal Code.

'Wilful neglect' as used in the Risk Note B may be taken to be the failure of a person to take any reasonable measures that he was aware or should have been aware were likely to lessen the risk of loss of a consignment or a portion of it

The term 'running train' in Risk Note B does not signify that the train must actually be in motion If the train is on its journey from one destination to another, that is, from junction to junction it cannot be said that the train is not a running train simply because it stops either on the road-side station or at any place between the road-side stations O BENGAL NORTH-WESTERN RY *v* BANSI DHAR, 3 O. W N 145, A I R 1926 Oudh 218 603

——— *Railway Company—Risk Note Form H, liability under—Loss of goods not urged—Protection under Risk Note—Onus of loss*

The only loss for which a Railway Company can be held accountable under Risk Note Form H, even in case of wilful negligence, must be loss of a complete consignment or of a complete package or packages forming part of such consignment.

But where a plaintiff does not come into Court on the ground of loss, destruction or deterioration, the Railway Company must prove that the goods have been lost or destroyed or have deteriorated before they can claim the protection of the Risk Note A G I P RAILWAY *v* KUNJ BEHARI LAL, A I R. 1926 All 228 993

———*Railway Company—Risk Note—Sealing wagon with paper—Loss of goods in transit—Wilful negligence—Contract Act (IX of 1872), s 231—Railway receipt granted in name of agent—Loss of goods—Owner of goods, whether can sue*

Where a Railway receipt for goods consigned is granted in the name of a servant or agent, the real owner of the goods is entitled to sue directly the Railway Company for their value if the goods are lost

Sealing a wagon with paper only constitutes wilful negligence, and the Railway Company can be successfully sued for damages if the goods are lost in transit. A EAST INDIAN RAILWAY *v* FIRM BALDEO GUTAIN 1007

Cattle Trespass Act (I of 1871), s. 24—*Cattle pound—Illegal seizure of cattle—Rescue—Offence*

Before a conviction under s 24 of the Cattle Trespass Act can be sustained it is necessary to prove that the cattle which has been rescued for the cattle pound was liable to be seized under the Act. A BABU *v* EMPEROR, 24 A. L. J. 280; 27 Cr. L. J. 313; A. I. R. 1926 All. 276 697

Cause of action—*"Completed" and "continuous" causes of action—Prospective damages—Damages as mesne profits, when recoverable.*

There is a distinction between a completed cause of action which may yet produce damage in future and a continuous cause of action from which continuous damage steadily flows.

The term "prospective damages" is applied to the damages which are awarded to a plaintiff not as a compensation for the ascertained loss which he has sustained at the time of commencing his action but in respect of loss which, it may reasonably be anticipated, he will suffer thereafter in consequence of the defendant's act or omission.

A plaintiff is entitled to have prospective damages assessed only when the cause of action is complete In the case of a continuous cause of action a suit for damages will lie every time damages accrue from the act, but prospective damages are not recoverable, for the cause of action is not the act but the damage arising therefrom.

A suit, therefore, for mesne profits as damages against a trespasser in respect of agricultural land is premature if it is brought before the end of the agricultural year when the crops are gathered. **N** YADO *v.* AMBASHANKAR, A. I R. 1926 Nag. 260 **75**

C. P. Land Revenue Act (II of 1917), s. 220 (p)—Sadar lambardar—*Remuneration, claim to, when maintainable.*

A *sadar lambardar* is not entitled to any remuneration unless and until he gets it fixed by the Revenue Authorities under s 220 (*p*) of the C P. Land Revenue Act. **N** ANNANDRAO *v* DAULAT, 22 N. L. R. 37; A. I. R. 1926 Nag. 274 **909**

C. P. Municipal Act (XVI of 1903), ss, 24, 66, 68—*Cow-shed, whether building—Application for permission to build—Procedure—Meeting of members to deal with application for permission, whether essential—Defect, whether curable—Lease of* nazul *plot by Municipal Committee for purpose of building—Committee, whether can refuse to sanction construction*

A cow-shed erected on posts and having no foundations is a 'building' within the meaning of the word as used in the C P. Municipal Act of 1903.

Section 68 of the C. P. Municipal Act of 1903 refers to land and houses which are the property of the Government and can have no application in the case of a *nazul* plot leased out for a term of years for building thereon by a private individual.

Under s. 66 of the C. P. Municipal Act of 1903 a person whose application to a Municipal Committee for permission to build has not been sanctioned within a month of its being made has to remind the Committee of this fact and if after a further period of 15 days no reply is received, the Committee is to be deemed to have sanctioned the proposed building. This will not, however, entitle such person to erect another structure of an entirely different nature from that adumbrated in his application for permission to build.

Section 66 of the C. P. Municipal Act of 1903 contemplates a sanction given by the Committee or Building Sub-Committee in its corporate capacity and it is not legal to dispense with a meeting of the body for obtaining a sanction by the expedient of obtaining the opinions of individual members by circulating the papers The omission to call a meeting is not curable by s. 24 of the Act

The lease of a *nazul* plot by a Municipal Committee for the purpose of building thereon cannot supersede

C. P. Municipal Act -concld.

the statutory provisions contained in s. 66 of the C. P. Municipal Act of 1903 relating to the grant of permission to build, and can in no way estop the Municipal Committee from refusing to allow any building to be erected on the plot or insisting on keeping it vacant, on grounds relevant under Ch. VI of the Act. **N** MAROTRAO *v.* MUNICIPAL COMMITTEE, NAGPUR, A I. R. 1926 Nag. 281 **796**

C. P. Tenancy Act (XI of 1898), s. 47—*"Held land continuously", meaning of—Forcible dispossession of tenant by landlord—No acquiescence by tenant—Tenancy, whether determined.*

The words "held land continuously" as used in s. 47 of the C. P. Tenancy Act of 1898 imply "held as a tenant," but not necessarily "occupied or cultivated." The requirement of s 47 is not actual continuous possession as a matter of fact but continuously holding as a tenant.

If a tenant is ejected under a decree of a Court, there is a lawful ejectment and clear break in the tenancy, but the mere fact of a forcible or unlawful ejectment does not necessarily break the tenancy although the tenant may have been temporarily out of possession.

The mere ejectment of a tenant does not necessarily determine his tenancy which can only be ended in certain express ways, such as those enunciated in s. 111 of the Transfer of Property Act.

A forcible ejectment of a tenant by the landlord cannot determine the tenancy unless there has been a subsequent acquiescence in the ejectment on the part of the tenant. **N** VITHOBA *z.* SADASHEO, A. I. R. 1926 Nag 253 **58**

C. P. Tenancy Act (I of 1920), ss 2 (11), 4, Sch. II, Art. 1—*Absolute occupancy tenant—Suit for possession—Limitation.*

Obiter.—Section 2 (11) and s. 4 of the C P. Tenancy Act of 1920 make it clear that the word "tenant" in Art. 1 of Sch II does include an absolute occupancy tenant and the limitation for a suit by such a tenant for possession of his holding is two years and not twelve years from the date of such dispossession or exclusion from possession. **N** SHEOSAHAI *v.* RAMKRISHNA, A. I. R. 1926 Nag 61 **62**

——— **s. 11**—*Tenant, death of—Distant heir of deceased tenant in occupation*—Malguzar, *whether can eject*

Under the C. P. Tenancy Act a *malguzar* being in the position of the very last reversioner is not entitled to eject a distant heir of a deceased tenant on the ground that he has no right to succeed to the holding as there are nearer heirs of the tenant in existence. **N** GAURA TELIN *v* SHRIRAM BHOYER, A. I. R. 1926 Nag. 265 **926**

——— **s. 11 (2)**—*Occupancy holding—Joint Hindu family—Inheritance—Survivorship.*

The word "inheritance" in s. 11 of the C. P. Tenancy Act of 1920 does not exclude succession by survivorship.

An occupancy holding held by the manager of a joint Hindu family on behalf of the family belongs to the family and passes by survivorship and not by inheritance. **N** BARATI *v.* SURIT, A. I. R. 1926 Nag. 277 **916**

——— **s. 104, Sch. II, Art. 1**, *scope of—Dispossession of tenant by other than landlord—"Tenant," whether includes holder of Survey Number in Sambalpur Territory.*

Section 104 and Art. 1 of the Second Schedule of the C. P. Tenancy Act apply to all suits for possession by a

C. P. Tenancy Act—1920—contd.

person claiming to be a tenant, irrespective of the fact as to whether the person keeping him out of possession is the landlord of the village or any other person.

The holder of a Survey Number in the Sambalpur Territory is a "tenant" within the meaning of Art. 1 of Sch. II to the C P Tenancy Act N MANSARAM *v.* BUDHU, A I R 1926 Nag 289 **708**

——— **Sch. II, Art. 1**—*"Holding," whether includes part—Suit for possession of part of holding—Limitation.*

The word "holding" in Art 1 of Sch II to the C P. Tenancy Act, includes a part of a holding and a suit for possession of a part of a holding must, therefore, be brought within two years of the date of dispossession or exclusion from possession N THAKUR SINGH *v.* SONKUAR **824**

Cess Act (IX B. C. of 1880), s. 95—*Road cess return, admissibility of, in favour of party filing return*

Section 95 of the Cess Act is absolute in its terms in declaring that a road cess return shall not be admissible in evidence in favour of the person on whose behalf it was filed, it is immaterial whether it is sought to be put in evidence directly to prove an admission or indirectly for some other purpose C RAM KUMAR DAS *v* HARANARAIN DAS **104**

Charge, creation of *See* EXECUTION OF DECREE **504**

City of Rangoon Municipal Act (VI of 1922), ss. 12, 14—*Civil Procedure Code (Act V of 1908), s 115—Reference to Small Cause Court—Revision—Agreement by Municipal Councillor to supply materials to Municipal contractor, effect of*

The High Court has jurisdiction to revise a decision of the Chief Judge of the Rangoon Small Cause Court given on a reference under s 14 of the City of Rangoon Municipal Act

A Municipal Councillor who was a brick manufacturer contracted to supply bricks to a contractor to whom the Municipal Corporation had given a contract to build a market There was nothing to show that when the Corporation gave the building contract to the contractor the Councillor knew that the contract for the supply of bricks would fall to his share

Held, that the Municipal Councillor was not disqualified by reason of the contract for the supply of bricks from sitting and acting as a Councillor. R SHAKUR, M A *v* MUNICIPAL CORPORATION, A I R 1925 Rang. 367, 4 Bur. L J. 161 **780**

Civil liability, whether absolves one from Criminal liability. *See* PENAL CODE, 1860, s 403 **585**

Civil procedure. *See* MALICIOUS PROSECUTION **366**

——— *Duty of Court—Civil Procedure Code (Act V of 1908), O. VI, r 2—Pleadings, contents of—Pleas of law, whether can be raised*

It is the duty of a Court, whether with or without the help of the parties and their Pleaders, to discover for itself and to apply the law applicable to the facts pleaded and proved. In a pleading, therefore, facts alone must be stated and pleas of law must be excluded

A point of law, provided it is a point that can be applied to the facts proved, although it directly contradicts anything that may have been said during the whole case about the law applicable to those facts, can be urged by the parties at any time before judgment is pronounced and it can form the basis of the decision of the case even if it occurs only to the Judge himself when he is writing his judgment. N GAURA TELIN *v.* SHRIRAM BHOYER, A. I. R. 1926 Nag 265 **926**

Civil Procedure Code (Act V of 1908), s. 2 (11)—*Trustee, whether legal representative of preceding trustee*

A trustee of an institution is not a legal representative of his predecessor-in-office within the meaning of s 2 (11), C. P C M THIRUMALAI PILLAI *v.* ARUNACHELLA PADAYACHI, A I R 1926 Mad 540 **520**

——— **s. 2 (12)**—*Realizations made by person in wrongful possession—Decree for future mesne profits from date of suit—Arrears of rent collected during pendency of suit, whether must be paid over—Profits, meaning of*

With regard to collections in villages the word "profits" includes realisations of arrears of past years as well as for current years

Defendant was in wrongful possession of plaintiff's village properties and made realisations Plaintiff obtained a decree against the defendant "for future mesne profits from the date of the suit" During the period subsequent to the institution of the suit, defendant had made collections of arrears of rent for past years and also rents for the current year

Held, that under the decree the plaintiff was entitled to recover whatever rents had been realised by the judgment-debtor in the years in question irrespective of the fact whether those were arrears of rent for previous years or whether they were on account of the current year A LALLU SINGH *v* GUR NARAIN **768**

——— **s. 9**—*Jurisdiction of Civil Courts—Question relating to caste property—Division of opinion among members of caste, effect of*

Where in a suit between the members of a caste the question at issue is not a matter relating to the internal administration and affairs of the caste, but to the property of the caste, a Civil Court has jurisdiction to entertain the suit, and this jurisdiction is not excluded merely because there has been a division of opinion in the caste B FULCHAND MOHANLAL *v.* HARILAL NANSA, 27 Bom L R 1503, A I R 1926 Bom 69, 50 B 124 **549**

——— **s. 10 (c)** *—Place of suing—Suit to recover loan—Duty of debtor to find and pay creditor, limits of.*

The duty of a debtor to find and pay his creditor is duly imposed upon him when the creditor is within the realm

Plaintiff, a money-lender, carrying on business in British India, advanced a loan to the defendant, a resident of a Native State, which was made re-payable by instalments in the Native State Plaintiff instituted a suit in a British Court to recover the loan

Held, that as no part of the obligation was assumed or was to be discharged by the defendant in British India, the British Court had no jurisdiction to entertain the suit P. C. FIRM OF R B BANSILAL-ABIRCHAND *v* GHULAM MAHBUB KHAN, A I R 1925 P C 290, 49 M. L J. 866, 43 C L J 1, 23 L W 3, 24 A L J 48, (1926) M W N. 108, 28 Bom. L R 211, 53 C 88; 30 C. W N 577 **760**

——— **ss. 10, 11**—*Cross-suits between principal and agent—Stay of one suit—Decision of other suit—*Res judicata.

A principal filed a suit against his agent for the recovery of a certain sum of money alleged to be due to the former on certain transactions entered into by the agent on behalf of the principal. The agent also instituted a suit against the principal for a certain sum of money on similar grounds The latter suit was stayed pending the decision of the former suit. The trial of the principal's suit was proceeded

Civil Procedure Code—1908—contd.

with and the suit was dismissed, the dismissal being confirmed on appeal

Held, that the decision of the Trial Court in the principal's suit operated as *res judicata* in the agent's suit with regard to all matters which were in dispute in the former suit L SAGHRU MAL-HAR CHARAN DASS *v.* DHANPAT RAI-DIWAN CHAND, 7 L L. J. 420, A. I. R. 1925 Lah. 596 198

——— s. 11.

See ALSO RES JUDICATA.

See C P. C, 1908, O. XXIII 385

——— s. 11, *co-defendants*—Res judicata *between, conditions of.*

In order that a decision should operate as *res judicata* between co-defendants there must have been a conflict of interest between the co-defendants, and it should have been necessary to decide on that conflict in order to give the plaintiff relief appropriate to his suit and the judgment must contain a decision of the question raised as between the co-defendants defining the rights and obligations of the defendants *inter se* R MA TOK *v* MA YIN, 3 R 77, A. I. R 1925 Rang 228 489

——— s. 11—*Decrees in connected suits—Appeal against only one decree—Decree not appealed from, whether* res judicata—*Appeal, maintainability of*

Where two connected suits are tried and decided together on the same facts, but an appeal is filed against one decree only, the decree not appealed from does not operate as *res judicata* so as to bar the hearing the appeal M SINNANNA KONE *v.* MUTHUPALANI CHETTI, A I R 1926 Mad 378 352

——— s. 11—*Execution of decree—Attachment—Objection—Question of title, decision of*—Res judicata

A plot of land was attached in execution of a decree Plaintiff and defendant both filed objections to the attachment each alleging that he was the owner of the plot. The Court held that the plot had been purchased by the defendant from the Municipality and belonged to the defendant Plaintiff subsequently purchased the plot from the Municipality and sued the defendant to recover possession of the plot

Held, that although the Municipality was not a party to the execution proceedings, the question of title to the plot was *res judicata* between the parties by virtue of the decision of the Executing Court L MUKUND LAL *v.* LORINDI BAI, 7 L L J 198 131

——— s. 11—*Mixed question of law and fact*—Res judicata—*Custom, question of*

A decision on a mixed question of law and fact cannot be re-agitated in a subsequent suit

The question whether by custom the right to receive the offerings at a shrine is alienable or not is a mixed question of law and fact. L ABDUL QADIR *v* ILAHI BAKHSH, A. I R 1926 Lah 251 769

——— s. 11—Res judicata—*Decree confirmed in appeal on other ground.*

Where in a suit in ejectment the Trial Court holds that the defendants have no right of occupancy but dismisses the suit on the ground of its being instituted before the expiry of the agricultural year in which the defendants' predecessor died and on appeal the decree of dismissal is affirmed on the second ground but the Appellate Court gives no finding on the question whether the defendants have a right of occupancy, the decision of the Trial Court that the defendants had no occupancy rights cannot operate as *res judicata* in a subsequent

Civil Procedure Code—1908—contd.

suit for ejectment. C ISWOR SANT *v.* TORENDRA NATH KUILA, 42 C L. J. 560, A I R. 1926 Cal. 163 981

——— ss. 11, Expl. IV, 39, 42—*Execution of decree—Transfer of decree—Death of decree-holder—Legal representatives brought on record—Order confirmed on appeal—Objection by judgment-debtor at subsequent stage to jurisdiction of Court to make order*—Res judicata.

A decree was transferred for execution to a Court other than the Court which had passed it The decree-holder thereafter died and the Court to which the decree had been transferred made an order adding the legal representatives of the deceased decree-holder as parties and directing that execution should proceed. The judgment-debtor appealed against the order, but his appeal was dismissed He then took the objection, which he had not taken in his appeal, that the Court to which the decree had been transferred for execution had no jurisdiction to add the legal representatives of the deceased decree-holder as parties to the execution proceeding:

Held, that the objection must be deemed to have been decided adversely to the judgment-debtor in the appeal preferred by him against the order, by virtue of the provisions of Expl IV to s 11, C P C, and was, therefore, *res judicata* M SEKKHU MUSTABU *v* NANI, A I R 1926 Mad 536 377

——— s. 11, O. VI, r. 17—Res judicata—*Suit for possession of whole property, dismissal of—Subsequent suit for possession of share on same title whether barred—Partition, suit for—Amendment of plaint*

Where a suit for recovery of possession of the whole of a certain property based on a claim of sole ownership is dismissed, a subsequent suit based on the same claim of sole ownership but to recover only a portion thereof will be barred by *res judicata*

Where, however, the plaintiff has a cause of action for asking for partition of his admitted share on the ground of co-ownership, the plaint may, in a proper case, be allowed to be amended so as to convert the suit into one for partition M SULTAN ABDUL KADIR *v* MOHAMMAD ESUF, 23 L W. 468 396

——— s. 11, O. XXXIV, r. 8—*Redemption suit—Decree based on compromise—Default in payment—Second suit for redemption, whether maintainable.*

A decree passed in a redemption suit on the basis of a compromise provided that on payment of a certain sum to the defendant within one month of the date of the compromise the plaintiff would be entitled to get the property redeemed and to be put in possession and that after the expiry of the fixed period he would be entitled to execute the decree on payment of the sum mentioned in the decree Plaintiff failed to pay the amount within the time mentioned in the decree and failed to apply for execution of the decree within three years of its date He subsequently brought a second suit for redemption of the same property.

Held, that inasmuch as the first decree did not provide that the plaintiff's right to redeem was to be extinguished absolutely in case of default of payment he was not prevented from bringing a second suit for redemption and that the defendant was still a mortgagee and had not become absolute proprietor of the property A MOHAMDI BEGAM *v.* TUFAIL HASAN, 23 A. L. J 888; A I R 1926 All. 20; 48 A 17 260

——— s. 13—*Foreign judgment—Submission to jurisdiction of foreign Court—Power-of-attorney to appear, whether amounts to submission—Person in-*

Civil Procedure Code—1908—contd.

voking jurisdiction of Foreign Court as plaintiff—Subsequent denial of jurisdiction—Estoppel—Ex parte *foreign decree, whether decision on merits*

The execution by a person of a power-of-attorney authorising his agent to appear and conduct for him litigation in a Foreign Court amounts to submission to the jurisdiction of such Court

A person who as plaintiff invokes the jurisdiction of a Foreign Court cannot afterwards be allowed to deny the jurisdiction of such Court as a defendant

An *ex parte* decree obtained in Foreign Court must be deemed to be a decree passed upon the merits when there has been no appearance by the defendant **M** ASANALLI NAGOOR *v* MAHADU MEERA, 22 L W 820, A I R 1926 Mad 259 **491**

——— **s. 20**—*Suit by commission agent—Jurisdiction*

A suit by a commission agent against his principal for balance due on accounts can be entertained by a Court having jurisdiction at the place where, in compliance with the principal's orders, the commission is executed **L** HAZURA MAL LAL CHAND *v* RANG ILAHI **273**

——— **s. 20 (c)**—*Place of suing—Suit for dissolution of partnership—Business carried on at several places*

Where a partnership business is carried on at two places, the cause of action for a suit for dissolution of the partnership arises in both the places and the Courts in either of them have jurisdiction to entertain the suit **M** GUDUTHURU THIMMAPPA *v.* BALAKRISHNA MUDALIAR, 23 L W. 361, 50 M L J 298, A I R 1926 Mad 427 **915**

——— **s. 20 (c)**—*Suit to recover loan Place of suing*

In the absence of a contract to the contrary it is the duty of the borrower to seek out the lender for payment In such a case the money is payable at the place where the lender resides or carries on business and a suit for the recovery of the money may, therefore, be brought at such place **A** GOKUL DAS *v* NATHU, 24 A L J 291 **492**

——— **s. 36** *See* C P C, 1908, O XII, R 6 **562**

——— **s. 37 (b)**—*Decree passed by Court of Additional Subordinate Judge—Court abolished temporarily and re-established—Jurisdiction to execute decree.*

A decree was passed by the Court of the Additional Subordinate Judge and shortly afterwards the Court was abolished and the work of that Court was transferred to another Court After a brief interval, however, the Court of the Additional Subordinate Judge was re-established and an application to execute the decree was made to that Court

Held, that by virtue of the provision contained in sub-s (*b*) of s 37 of the C P C the Court of the Additional Subordinate Judge had jurisdiction to execute the decree **Pat** BIBI KHODAIJATUL KUBRA *v* HARIHAR MISSIR, 4 Pat 688, 7 P. L T. 333, A, I R. 1926 Pat. 209 **900**

——— **ss. 39, 42, 46**—*Transfer of decree for execution—Court to which decree transferred, whether can issue precept.*

A Court to which a decree has been transferred for execution is not competent to issue a precept under s. 46 of the C P C **S** LANGLEY BILLIMORIA *v.* FIRM OF LAKHMICHAND-GOPALDAS **621**

Civil Procedure Code—1908—contd.

——— **s. 47.**

See C. P. C, 1908, O. XXI, R. 66 **644**
See C P C, 1908, O. XXI, R. 98 **544**
See C P. C, 1908, O XXXII, R. 3 **241**

——— **s. 47**—*Execution of decree—Death of decree-holder—Legal representative, determination of—Procedure—Hindu Law—Separated brother, whether legal representative in presence of widow*

When a decree-holder has died and some person appears asking to be allowed to execute the decree as the legal representative of the deceased decree-holder, the Executing Court itself should under s 47 of the C P C decide who the legal representative of the deceased decree-holder is and should not refer the applicant to separate proceedings

If the person who claims to be the legal representative of the deceased decree-holder produces a Probate or Letters of Administration or any such general conclusive proof of his status, the Court need not go further and should accept that as conclusive, but if there is no such evidence, the Executing Court itself should make an inquiry and come to a decision

Where a separated Hindu dies leaving a widow his brother cannot be regarded as his legal representative and cannot be allowed to execute a decree obtained by the deceased **S** PARUMAL THAWERDAS *v* MAKHAN, A I. R 1926 Sind 113 **575**

——— **s. 47, O. XXI, rr. 57, 64, 90**—*Execution of decree—Sale without attachment, validity of—Application to stay sale by reason of want of existing attachment, dismissal of—Appeal, whether lies*

Per *Spencer, J*—An order of an Executing Court dismissing an application by a judgment-debtor to stay an auction sale in execution of a money-decree on the ground that there is no subsisting attachment on the property, is of an interlocutory nature and is not appealable

Where the sale has taken place, the judgment-debtor's remedy lies in applying to the Court under r 90 of O XXI, C P C, to have the sale set aside **M** SUBRAMANIA AIYAR *v* KRISHNA IYER, (1925) M W. N 887, A I R 1926 Mad 211 **833**

——— **s. 48, O IX, r. 13**—*Mortgage-decree both against person and property of mortgagor—Execution of decree against person—Limitation—Execution of decree*—Ex parte *order—Application to set aside order—Limitation*

A Court is not justified in setting aside an *ex parte* order passed in an execution proceeding on an application made more than 30 days after the judgment-debtor became aware of such order against him

Where a combined mortgage-decree gives relief against the property as well as the person of the mortgagor, the time for execution against the person should be calculated from the date of the decree and not from the date of the mortgagee failing to get relief by sale of the property **M** SWAMINATHA ODAYAR *v* THIAGARAJASWAMI ODAYAR, 23 L W 26, (1926) M W N 140 **846**

——— **s. 60.** *See* PROVINCIAL INSOLVENCY ACT, 1920 s 28 **673**

——— **s. 60**—*"Agriculturist", who is - Exemption of house from sale*

For deciding the question of the exemption of the liability of the house of an insolvent to be sold for debts, the Court must decide whether the insolvent's chief means of livelihood is agriculture. It is not enough that he be an agriculturist, or that he be a

Civil Procedure Code—1908—contd.

trader. The point is, which profession forms his chief means of livelihood. **M** PEYYETY GOPALAM GARU *v.* ADUSUMILLY GOPALAKRISHNAYYA **416**

——— **s. 60 (c)**—*House of agriculturist in city—Exemption from attachment—Occupation, meaning of.*

A house of an agriculturist in a city in which he spends his nights and to which he brings his cattle every night from the lands cultivated by him, is exempt from attachment, notwithstanding the fact that he owns two other houses on his lands expressly meant to be used for agricultural purposes.

The words "occupied by" in s 60 (*c*), C P C., mean "lived in by" or "used for agricultural purposes by." **L** NOOR DIN *v.* SULAKHAN MAL A. I R. 1926 Lah. 230 **759**

——— **s. 60 (c)**—*Provincial Insolvency Act (V of 1920), s. 28 (5)—Agriculturist, who is—"House occupied by agriculturist," meaning of.*

The word 'agriculturist' in s 60 (*c*), C P C, is not used in its etymological sense, it is used to denote a person making his living by tilling the soil, in other words, one whose sole means of livelihood is gained by cultivating land and does not necessarily mean only a person who works with his hands. The protection from attachment under the clause is given only to small owners of land as well as actual tillers of the soil

A large landed proprietor, even though his sole income is from land, is not an "agriculturist" within the meaning of s 60 (*c*), C P C, and is not entitled to protection thereunder

The exemption from attachment under cl (*c*) of s 60, C P C, is given in respect of a house or building occupied by an agriculturist, *i e*, a house dwelt in by the agriculturist as such and necessary for his effectively pursuing his occupation as an agriculturist.

A mansion in a large village in which the owner lives, even though he has no other source of income except that from land, is not such a house as is contemplated by cl (*c*) of s 60, C P C, nor is the house of an ordinary agriculturist situated at a considerable distance from the land which he cultivates and which is not necessary for effective or convenient cultivation of the land. **M** MUTHUVENKATARAMA REDDIAR *v* OFFICIAL RECEIVER, 50 M L J. 90, 49 M. 227, A I R. 1926 Mad. 350 **398**

——— **s. 60, O. XXXVIII, r. 6**—*Money payable on particular event—Interest, provision for payment of—Right, whether vested or contingent.*

Per *Venkatasubba Rao and Reilly, JJ.*—Where a partition deed between *L* and *R* provided that the money which fell to *L*'s share was to be retained by *R* who was to pay it to *L* at his marriage with interest at a fixed rate

Held, that *L*'s interest was a vested interest and not a contingent one and it was attachable under s. 60 and r. 6 of O. XXXVIII, C. P C., as a debt due to him, though on that date he could not enforce payment of it.

Per *Venkatasubba Rao, J.*—If a gift and direction as to payment are distinct, the direction as to the time of payment does not postpone the vesting. **M** ALAGIRISAMI PILLAI *v* LAKSMANAN CHETTY, 50 M. L. J. 79, A. I R. 1926 Mad. 371 **1021**

——— **s. 64**—*Attachment—Property sold by judgment-debtor before attachment—Conveyance executed during attachment, effect of.*

What is aimed at in s. 64, C P. C, is the transfer of a beneficial interest, delivery of property or any payment.

Civil Procedure Code—1908—contd.

Where a judgment-debtor sells certain property, receives the purchase-money and hands over possession of the property to the purchaser before the property is attached, but the sale-deed is executed after the attachment is made, the transaction is not brought within the purview of s. 64, C. P. C, inasmuch as at the date of attachment there was no beneficial interest in the property left in the judgment-debtor, he being at most possessed of the bare legal title which he was bound to convey on demand to the purchaser. **R** MAUNG SAN PWE *v.* HAMADANEE, A. I R. 1925 Rang. 382; 4 Bur. L. J. 166 **777**

——— **s. 66**—Benami *auction-purchase—Declaration, suit for, whether maintainable.*

A suit for a declaration equally with a suit for possession is within the ambit of s 66, C. P. C. Therefore, a suit for declaration that a certified purchaser at a Court sale is only an ostensible purchaser and that the purchase was effected as plaintiff's agent is barred by the provisions of the section **C** UMASASI DEBI *v.* AKRUR CHANDRA MAZUMDAR, 30 C. W. N. 160, A I. R. 1926 Cal 542, 53 C 297 **984**

——— **s. 68**—*Simple money decree, whether can be transferred for execution to Collector.*

Where no immoveable property has been directed to be sold in execution of a simple money decree, the decree cannot be transferred for execution to the Collector under s. 68, C P C. **O** JANG BAHADUR *v.* JAGAT NARAIN, A. I R. 1926 Oudh 318 **906**

——— **ss. 68, 70**—*Execution of decree—Decree transferred to Collector for execution—Order of Collector—Appeal—Revision.*

Under the rules framed by the U P. Local Government under s 70 (1), C. P C, no appeal lies to the Chief Court against an order passed by a Collector in discharge of his powers in the execution of a decree transferred to him for execution under s. 68 of the Code Under s 70 (2) of the Code, therefore, the Chief Court can exercise neither appellate nor revisional jurisdiction in respect of such an order **O** BASANT RAI BHANDARI *v* SALIK RAM, A. I R 1926 Oudh 288 **549**

——— **s. 91** *Building over public street—Nuisance—Suit for removal—Procedure*

Building over any part of a public street or space constitutes a nuisance

In order to file a suit on behalf of the public for the removal of a building over a public space, the preliminary steps under s 91 of the C P. C must be taken before the suit can be maintained. **N** BARKOO *v* ATMARAM **818**

——— **s. 92**—*Muhammadan mosque—Scheme suit—Worshippers, right of—"Interest in trust", meaning of—Residence in neighbourhood without habitual worship, whether sufficient.*

The interest in a public trust for the purposes of a suit under s 92, C. P. C., must be clear, present and substantial and not remote and fictitious or purely illusory or a mere contingency. Beyond that, the question is one of fact, and must be left to the Court to be decided on a consideration of the particular circumstances of each case.

Persons who reside in the neighbourhood of a mosque without being habitual worshippers in it or in any manner specially interested in it, although as Muhammadans they may have a right to offer prayers therein, do not possess sufficient "interest in the trust" within the meaning of s. 92, C. P. C., to entitle them to institute a suit under the section. **M** DOST MUHAMMAD *v.* KADAR BATCHA, 23 L. W. 240; A. I. R. 1926 Mad. 466 **950**

Civil Procedure Code—1908—contd.

——— **s. 92**—*Religious endowment—Alienation of trust properties by trustee—Suit to recover properties—Procedure*

The founder of a religious trust appointed himself as trustee thereof during his lifetime and his heirs after his death, and his widow, who succeeded him in the trusteeship after his death, alienated properties belonging to the trust In a suit by the next reversioner to set aside the alienation and to recover the property·

Held, that the suit was not maintainable and that the proper course was for the plaintiff, together with one or more interested persons, after obtaining the required sanction under s 92, C P C, to sue for the widow's removal from the trusteeship, and for appointment of himself or some other fit person to be trustee in her place, and that the person who so became trustee might then sue on behalf of the trust for the recovery of the property improperly diverted from trust purposes **M** RAMASAMI GOUNDAN *v* ALAGIA SINGAPERUMAL KADAVUL, 22 L W 701, (1926) M W N 117, 50 M L. J 42, A I. R 1926 Mad 280 **823**

——— **s. 92**, *suit under—Damages for misconduct of trustee*

Although in a suit under s 92, C P C, a decree may be passed against a trustee in office to account for the income of the property in his possession, a claim for a specific sum in damages on account of loss to the trust by the misconduct of the trustee is not one of the reliefs falling within the scope of the section **M** PERIA NAMBI SRINIVASA CHARIAR *v* KUNARAMASAMY NAICKER, A I R 1926 Mad 509 **526**

——— **ss. 92, 47**—*Scheme framed by Court—Order in pursuance of scheme—Appeal, whether lies—Trustee, removal of, not provided for in scheme—Procedure*

An order made by a Court in the exercise of a power given to it by a provision in a scheme framed in a suit under s 92, C P C, is not an order made in execution and is not appealable under s. 47 of the Code

In the absence of any provision in a scheme for the removal of a trustee, a separate suit must be brought for the purpose. **M** SIVAN PILLAI *v* VENKATESWARA IYER, 22 L. W. 796, A I. R 1926 Mad. 130 **556**

——— **ss. 94, 151, O. XXXIX, rr. 1, 2**—*Injunction restraining execution of decree, whether can be granted—Inherent power of Court*

On an application in a pending suit by the plaintiff for an injunction restraining the execution of a decree obtained by the defendant against the plaintiff's father:

Held, that the Court had no jurisdiction to grant the injunction either under O XXXIX, or under s. 94 or s 151, C. P C.

When the C. P. C. makes provision for a certain procedure it must be deemed to be exhaustive in that respect and the provisions of s. 151 of the Code cannot be invoked in opposition to those provisions.

Under s. 94, C. P C, the Court is given power to issue injunctions provided the rules make provision for the exercise of that power The rules are contained in O. XXXIX of the Code and s. 94 must, therefore, be read subject to the rules contained in that Order. **M** VADAPALLI VARADACHARYULU *v* KHANDAVILLI NARASIMHACHARYULU, (1925) M. W. N. 886; 23 L. W. 85, A. I. R. 1926 Mad. 258 **615**

——— **s. 97**—*Preliminary decree—Appeal—Final decree passed during pendency of appeal—Procedure.*

When an appeal is filed against a preliminary decree, but no stay of proceedings is asked for, and a final decree is passed by the Trial Court during the pendency of the appeal against the preliminary decree, the proper course for the appellant in such a case is to put an appeal on the file against the final decree, or at least to inform the Appellate Court, when the appeal against the preliminary decree comes on for hearing, that a final decree has been passed. **B** CHANDULAL MAGANLAL *v* MOTILAL HARILAL, 27 Bom. L R 1492, A I R 1926 Bom 43 **545**

——— **s. 104 (f), O XXIII, r. 3, O. XLIII, r. 1 (m), Sch. II, paras. 20, 21**—*Arbitration—Award—Decree on award—Appeal—Remand—Appeal, second, whether lies*

During the pendency of a suit the plaintiff made what purported to be an application under para 20 of Sch II, C P C, stating that the matter in suit had been referred to arbitration and that an award had been made and requesting that the award may be filed and a decree passed in accordance with it Defendant filed objections denying any valid reference to arbitration or the making of any valid award The Court took evidence and decided that a valid reference and a valid award had been made and passed a decree in terms of the award On appeal the lower Appellate Court held that no award had been made and remanded the case to the first Court for trial according to law On second appeal by the plaintiff

Held, (1) that the order of the Trial Court although in form a decree, must be treated as an order directing that the award be filed, and that as such it was open to appeal,

(2) that even if it was regarded as an order recording a compromise it was still an order open to appeal,

(3) that the appeal preferred by the defendant to the lower Appellate Court must, therefore, be treated as an appeal from an order, with the result that no second appeal was competent **A** MUMTAZ ALI *v.* ALLAH BANDA **600**

——— **s. 109**—*"Final order", meaning of—Interlocutory order—Appeal to Privy Council"*

The words "final order" in s 109, C P. C, are used in their ordinary sense They mean an order which puts to an end a litigation between parties, or at all events disposes so substantially of the matters in issue between them as to leave only subordinate or ancillary matters for decision.

The order by which a Court sets aside a compromise of a suit is an interlocutory and not a final order.

Appeals on matters interlocutory in their nature should be allowed to be preferred to His Majesty in Council only when their decision will practically put an end to the litigation and finally decide the rights of the parties. **A** BHAGWATI DAYAL *v.* DHAN KUNWAR, 24 A. L J. 351; A. I. R. 1926 All. 311 **1027**

——— **s. 109**—*Substantial question of law—Certificate for appeal to Privy Council.*

Where there is a decision of the Privy Council itself which seems to settle the law on a point, the case cannot be certified as a fit one for appeal to the Privy Council as involving a substantial question of law. **A** RAGHUBIR SINGH *v* NATHU MAL **1013**

——— **s. 110**—*Appeal to Privy Council—High Court maintaining decree of lower Court—Leave, when can be granted—Substantial question of law—Hindu Law*,

—Compromise entered into by father, whether binding on son.

When the High Court maintains the decree of a lower Court it affirms the decision of the lower Court within the meaning of s 110 of the C. P. C, even though the two Courts differ in their findings on certain issues Leave to appeal to the Privy Council in such a case can be granted only if there is a substantial question of law involved in the case.

A substantial question of law within the meaning of s. 110 of the C. P. C means a question of law in respect of which there may be a difference of opinion

The general principle that a Hindu son is bound by a *bona fide* compromise entered into by his father for the benefit of the family is well-settled and is not a substantial question of law within the meaning of s. 110 of the C. P. C. **L** DHANPAT RAI *v.* KAHAN SINGH, 2 L. C. 107 **479**

——— s. 115.

See AGRA TENANCY ACT, 1901, ss 175, 177 **282**
See CITY OF RANGOON MUNICIPAL ACT, 1922, ss 12, 14 **780**
See C. P. C, 1908, O. IX, R. 13 **776**
See C P. C, 1908, O. XXI, RR 13, 17 **109**
See C P. C, 1908, O. XXI, R 90 **567**
See C P C, 1908, O XXIII, R 1 **1030**
See C P. C, 1908, O XXXIII, R 1 **415**
See C P C, 1908, O XLI, R. 25 **555**
See CR P C., 1898, s 476 B **454**
See SPECIFIC RELIEF ACT, 1877, s. 9 **20**

——— s. 115—Election rules, misconstruction of. *See* MADRAS DISTRICT MUNICIPALITIES ACT, 1920 **119**

——— s. 115—*Error of law.*

An error of law does not affect the jurisdiction of the Court and does not furnish a ground for interference in revision **Pat** BALARAM MANJHI *v.* JAGANNATH MANJHI, A I. R. 1925 Pat. 760 **684**

—— — s. 115—*Execution of decree—Stay proceedings, failure of—Decree-holder ordered to take out execution at once*—Talbana, *deposit of—Reasonable time for filing processes—Execution case, dismissal of, for default—Illegal exercise of jurisdiction—Revision.*

Stay of execution of a decree was directed by the Court on the judgment-debtor furnishing security by a specified date. The judgment-debtor failed to furnish security on that date, and the Court directed the decree-holder to take steps for execution at once. The decree-holder deposited *talbana* for service of sale proclamation on the same day but did not file the processes, and the Court dismissed the execution case for default there and then. On revision:

Held, that the Court exercised its jurisdiction illegally in not allowing the decree-holder reasonable time for filing processes, as he could not have been expected to be ready with the processes on the expectation that the judgment-debtor would fail to furnish security, and that, therefore, the dismissal of the execution case for default must be set aside. **C** FIRM OF RAM PROSAD-RAM KISSEN *v.* HARO KUMAR BASAK **298**

——— s. 115—*Interference by High Court.*

The High Court has power to interfere with the proceedings of a lower Court even in the case of an interlocutory order where the effect of that interlocutory order is not merely to prescribe a particular procedure, to admit or to shut out a particular piece of evidence or to admit or exclude particular parties,

Where the Court against whose orders there is an application for revision has so used its jurisdiction that the result of allowing its order to stand will be definitely to decide the case pending before it, so that all the proceedings thereafter taken would be merely infructuous and would result in a waste of time, then the High Court will look into the order and if justice requires it will set it aside **S** MUNICIPALITY OF TANDO ADAM *v.* KHAIR MAHOMED, A. I. R. 1925 Sind. 260 **1019**

——— s. 115—*Letters of Administration, grant of, by Resident at Aden—Revision—Jurisdiction of Bombay High Court.*

The Bombay High Court has no jurisdiction to interfere in revision with an appealable order of the Resident's Court at Aden.

An order granting Letters of Administration passed by the Resident's Court at Aden, is a final judgment against which an appeal would lie to the Privy Council. It is not, therefore, open to the Bombay High Court to entertain an application in revision against such an order **B** LEON MOSES *v.* SOLOMON JUDAH MEYER, 27 Bom L R 1460, A I R 1926 Bom 139, 50 B 32 **367**

——— s. 115—*Limitation Act (IX of 1908), s 6—Application dismissed as barred by time—Benefit of minority ignored—Revision*

Petitioner's application for leave to sue *in forma pauperis* was rejected on the ground that the suit was barred by time, but in arriving at this conclusion that Court overlooked the provisions of s 6 of the Limitation Act to the benefit of which the petitioner was entitled·

Held, that the order rejecting the petitioner's application was liable to be set aside in revision **R** MA SHEWE U *v* MA SHIN, A. I R. 1925 Rang 381, 4 Bur. L. J. 146 **775**

——— s. 115—*Revision—Delay in filing petition.*

A delay of nearly seven months in filing a revision application is in itself a sufficient ground for declining to accept it. **A** G. I. P. RY. *v.* KUNJ BEHARI LAL, A. I. R. 1926 All 228 **993**

——— s. 115—*Revision, ground for—Error of law—Burden of proof, wrong decision on question of.*

The giving of an erroneous decision on a point of law is not an irregularity or an illegality in the exercise of jurisdiction and does not justify interference in revision.

A decision on a question of onus cannot be attacked in revision. **L** ABDUL AZIZ *v.* ABDUL KARIM, 2 L. C. 186 **46**

——— s. 115, O. XXI, r. 58—*Erroneous view of law—Objection proceedings, order in—Revision.*

If a Court, upon an erroneous view of the scope of a section of the C. P. C, applies it to a case to which it has no application, the Court acts without jurisdiction and the High Court would interfere with its decision in revision.

The mere fact that the unsuccessful party in objection proceedings under O. XXI, r 58 of the C. P. C has to file a separate suit under r. 63 of the Order and the onus of proof will be on him, does not afford sufficient ground as to why the High Court should revise the order in those proceedings. **N** PANDURANG GOVIND FATE *v.* MAIFUZBHAI, A. I. R. 1926 Nag. 257 **40**

——— s. 115, O. XXIII, r. 1—*Suit dismissed on question of technicality—Appeal—Withdrawal of suit—Revision.*

Where a suit is dismissed on a question of technicality and on appeal the Appellate Court allows the suit to be withdrawn with liberty to bring a fresh

Civil Procedure Code—1908—contd.

suit, the High Court will not interfere with the order in revision.

An error of judgment is not a ground for interference in revision **A** PANCHAM LAL *v* MUHADMAD YAQUB, 24 A L. J. 313, A I R 1926 All. 291 **558**

——— **s. 141.** *See* MESNE PROFITS **792**

——— **s. 144.**

See COURT FEES ACT, 1870, SCH. II, ART 11 **474**

See LIMITATION ACT, 1908, s 6 **23**

See LIMITATION ACT, 1908, SCH I, ART. 187 **960**

——— **s. 145**—*Execution of decree—Application against surety—Fraud, plea of, whether can be taken*

Where an application is made to execute a decree against a surety, the surety is a party within the meaning of s 47 of the C P C, and it is open to the surety to raise a plea of fraud before the Executing Court **L** KANSHI RAM *v* PRABH DIYAL ARJAN DAS & Co, 7 L L J 457, A I R 1925 Lah 618 **259**

——— **s. 145, O. XXV, r. 1 (3)**—*Security for costs—Bond hypothecating property—Enforcement of security—Procedure—Execution*

Plaintiff was required to give security for costs and appellant who offered himself as surety executed a bond that if the plaintiff failed to obey the order of the Court with regard to the payment of costs, certain property of the surety specified in the bond would be liable for the satisfaction of the order and that if the property proved insufficient for the purpose the surety would himself be liable Plaintiff's suit was dismissed and plaintiff was ordered to pay the costs of the suit Defendant took out execution for costs and applied for sale of the property hypothecated by the surety,

Held, (1) that on the language of the bond executed by the surety the defendant was not bound to proceed first in execution against the plaintiff and only on his failure to obtain satisfaction from the plaintiff to proceed against the surety,

(2) that there was no mortgage of his property by the surety and that the proper procedure to enforce the liability of the surety under the bond was to proceed in execution by sale of the hypothecated property. **A** ATA HUSAIN *v* MUSTAFA HUSAIN **546**

——— **s. 146, O. IX, r. 13**—*Charge, suit for enforcement of*—Ex parte *decree—Puisne mortgagee, if can have decree set aside.*

A puisne mortgagee who is not a party to a suit for enforcement of a charge against the mortgaged property is not entitled under s 146, C. P C, to maintain an application for setting aside the *ex parte* decree in the suit under O IX, r. 13 of the Code. **C** SUSIL CHANDRA GUHA *v* GOURI SUNDARI DEVI **946**

——— **s. 148**—*Mortgage—Foreclosure suit—Compromise decree—Time fixed for payment, whether can be extended—Power of Court*

A Court has no power to extend the time fixed in a compromise decree in a suit for foreclosure for the payment of the decretal amount. **N** DAWLAT *v* KASHIRAO, A. I. R. 1926 Nag. 280 **822**

——— **s. 149**—*Court-fee, deficient, payment of—Limitation, question of.*

Where a Court dismisses a suit and simultaneously with the dismissal, orders making up the deficiency in Court-fee, the order should be considered to have been made under s. 149, C P. C, as the Court is entitled to pass such an order at any stage of the case. In such a case the effect for purposes of limitation is the same as if the Court-fee demanded had been paid in the first instance **L** ARSHAD ALI *v* ZORAWAR SINGH, 8 L L J 60 **986**

——— **s. 149**—*Limitation Act (IX of 1908), s 5—Insufficient Court-fee on appeal*—Bona fide *mistake—Extension of time*

An appellant who is misled by an error of the Court and the insufficiency of the Court-fee originally paid by him is due to a *bona fide* mistake on his part, is entitled to the benefit of s 149 of the C P C. and s 5 of the Limitation Act **L** RANZOR SINGH *v.* SECRETARY OF STATE FOR INDIA **319**

——— **s. 151.**

See C P C, 1908, s 94 **615**

See EXECUTION OF DECREE **571**

——— **s. 151**—*Inherent power of Court, when to be exercised*

Where a party does not take advantage of the right of appeal granted to him by the C P C, he cannot be allowed to come to the Court and ask the Court to exercise its powers under s 151 of the Code **B** VIRAPPA GOVINDAPPA KONRADDI *v* BASAPPA VIRBHADRAPPA, 27 Bom L R 1511, A I R 1926 Bom 139 **354**

——— **s. 152**—*Amendment of decree Appeal filed but not decided—Jurisdiction of Trial Court to amend decree*

It is only when an appeal has been decided and a decree has been passed in appeal confirming, amending or reversing the decree of the Trial Court that the appellate decree operates to supersede the Trial Court's decree, and it is only then that the jurisdiction of the Trial Court to interfere with the decree so superseded ceases Till the Appellate Court hears the appeal and decides it, the decree of the Trial Court remains in force and it can be rectified or amended by the Court which passed it **A** BACHAN *v* RAGHUNATH, 21 A L. J 149, 48 A 224, A I R 1926 All 304 **264**

——— **O. I, r. 10, O. XLV**—*Remand by High Court—Appeal to Privy Council—Addition of parties—Power of Court*

A suit was dismissed by the District Court but was remanded by the High Court on appeal Defendants applied for and obtained leave to appeal to the Privy Council. Petitioner then applied to the High Court to be added as a defendant in the suit

Held, (1) that the High Court having passed a final order in the case remanding the case to the District Court, was *functus officio* and could not, therefore, make any order adding parties to the case,

(2) that as regards the appeal to the Privy Council the High Court had no powers beyond those given in O XLV of the C P C, and that there was, in that order, no power to add parties,

(3) that the District Court had seizin of the case as a result of the remand by the High Court and had, therefore, power to add parties **R** KALENTHER AMMAL *v.* MA MI, 3 R 474, A I R. 1926 Rang 9 **125**

——— **O. III, rr. 1, 4**—*Advocate, authority of, to act on behalf of client*—Vakalatnama, *whether necessary.*

By virtue of the provisions of cl (3) of r 4 of O III, C. P. C, an Advocate, unlike a Pleader, can be verbally appointed to act on behalf of his client, and when so appointed, under r 1 of O III, he can appear, plead and act There is, therefore, nothing to prevent an Advocate, either in the High Court or in the subordinate Courts, from presenting an application on behalf of his client without any power of appointment or *vakalatnama* given to him in writing. **Pat** LAURENTIUS EKKA *v.* DHUKI KOERI, 4 Pat. 766; A. I. R. 1926 Pat. 73; 7 P. L. T. 362 **179**

Civil Procedure Code—1908—contd.

——— **O. III, r. 4.** *See* MADRAS CIVIL RULES OF PRACTICE, R. 277 **300**

——— **O. III, rr. 16, 17**—*Pleadings—Amendment, when should be allowed—New plea contradictory to old, whether sufficient ground for rejection.*

Order VI, r. 16, C. P. C, does not limit the period when a plea must be taken, it bars only pleas that are irrelevant or scandalous or may tend to prevent a fair trial of the case.

A Court is bound to allow an amendment under O. VI, r 17, C P. C., if it is necessary for the purpose of determining the real question in controversy between the parties.

A Court has no power to refuse to allow an amendment of pleadings for any reason except those mentioned in r 16 of O VI, C. P C, which do not include a contradiction between the new pleading and the old. **N** GAURA TELIN *v.* SHRIRAM BHOYER, A. I. R 1926 Nag. 265 **926**

——— **O. VI, r. 17.** *See* C. P C, 1908, s 11 **396**

——— **O. VI, r. 17**—*Amendment of plaint—Causes of action, different—Buddhist Law, Burmese—Adoption—* Kittima *and* Appathitta *forms—Claim based on* kittima *adoption, failure of—*Appathitta *adoption, whether can be allowed to be set up*

A plaintiff must be confined to the case that he sets up in his pleadings, or to a case which is consistent with those pleadings

Amendment of pleadings is a matter for the discretion of the Court and that discretion must be exercised with regard to all the facts and circumstances of the case.

The causes of action on which a person can claim to be a *kittima* or an *appathitta* son are widely different, and different considerations govern the question of these two distinct forms of adoption.

Where a plaintiff comes into a Court on the basis of a *kittima* adoption and fails to prove the case set up by him, he cannot be allowed to amend his plaint so as to base his claim on an *appathitta* adoption. **R** MAUNG BA THEIN *v* MA THAN MYINT, 3 R. 483; A I. R. 1926 Rang. 49 **253**

——— **O. VI, r. 17**—*Amendment of plaint, when to be allowed—Refusal to allow amendment.*

In a proper case the Court should freely allow an amendment of the plaint so as to ensure that justice is done to the parties and that the time and the money of the parties is not wasted.

Where a Court refuses to allow an amendment of the plaint in a case in which such amendment is necessary for the purpose of doing justice between the parties, it fails to exercise a jurisdiction vested in it by law and its order is open to revision under s 115 of the C. P. C. **S** MUNICIPALITY OF TANDO ADAM *v.* KHAN MOHAMMAD, A. I. R. 1925 Sind 260 **1019**

——— **O. VI, r. 17**—*Plaint, amendment of—Cause of action, date of, change of.*

No plaint should be allowed to be amended so as to change the cause of action; but an amendment to change the date when the cause of action was stated in the plaint to have arisen ought to be allowed, even though the effect of so doing would be to deprive the defendant of a plea of limitation **M** ALAPATI RAMASWAMI *v.* DASARI VENKATARANAYANA, (1925) M. W. N. 781; A. I. R. 1926 Mad. 128 **330**

——— **O. VI, r. 17**—*Suit for specific performance of agreement to sell—Amendment of plaint to include prayer for possession, whether permissible.*

In a suit for specific performance of an agreemen to execute a simple mortgage, it is not competent to the Court to appoint a Receiver pending suit to take charge of the property in suit and thus do by way of receivership what it would not be entitled to do even by way of decree. **M** CHOCKALINGAM PILLAI *v.* P. K. P. S PICHAPPA CHETTIAR, 22 L. W. 579; (1925) M. W. N. 802; A. I R. 1926 Mad. 155 **599**

Civil Procedure Code—1908—contd.

——— **O. VII, r. 1.** *See* COURT FEES ACT, 1870, s. 7 *(iv)* (c) **730**

——— **O. VII, r. 10**—*Order returning plaint for presentation to proper Court for want of jurisdiction—Application to withdraw portions of claim, so as bring it within Court's pecuniary jurisdiction—Amendment—Power of Court to re-admit plaint*

Where a plaint was ordered to be returned for presentation to the proper Court on the ground that the value of the subject-matter of the suit exceeded the pecuniary limits of the jurisdiction of the Court to which it had been presented and the plaintiff thereupon applied to be allowed to withdraw his claim to certain portions of the property mentioned in the plaint which had the effect of bringing the plaint within the pecuniary jurisdiction of the latter Court.

Held, that the Court had the power to allow the plaintiff to amend the plaint and re-admit it as amended. **M** KOMMAREDDI RAMCHANDRAIYA *v* VODURY VENKATARATNAM, 22 L W. 582; (1925) M. W. N. 804; A. I. R. 1926 Mad. 133 **800**

——— **O. IX, s. 141**—*Suit, application to restore, dismissal of, for default—Petition to set aside dismissal, maintainability of.*

Proceedings under O. IX, C. P. C., relate to questions independent of the suit, to be determined on evidence as to matters quite irrelevant to the suit and are, therefore, covered by s 141, C. P. C. Order IX, therefore, applies to applications made under O IX itself, so that where an application to restore a suit is dismissed for default, a petition lies under O. IX to set aside the dismissal. **M** VENKATA NARASIMHA RAO *v* HEMADU SURYANARAYANA, 50 M. L. J. 75; 23 L. W. 409; A I. R. 1926 Mad. 325 **802**

——— **O, IX, r. 7**—*Proceedings, ex parte, against defendant—Application to appear in suit, whether necessary—Procedure.*

Under the provisions of O IX, C. P. C., if a defendant does not appear and so long as he is absent, the proceedings must necessarily be *ex parte* and under r. 6 of that Order, the Court is empowered to proceed notwithstanding that the defendant may be absent. Should, however, the defendant appear in the middle of the proceedings, by the very fact that he is present, the proceedings cease *thenceforth* to be *ex parte* and no application by him is necessary for being permitted to appear, but if on a late appearance he wishes to be placed in the same position as if he had appeared at the proper time, he should under r. 7 of the Order apply for permission to that effect. **S** KALA GELLA *v.* SHIVJI **493**

——— **O. IX, rr. 8, 9**—*Dismissal for default—Restoration, application for rejection of—Appeal—Appellate Court, power of, to decree suit to extent of admission—Decree on admission of claim, effect of.*

On an appeal from an order refusing to restore a suit dismissed in default, the Appellate Court cannot make an order which the original Court could not legally have made. If the Appellate Court agrees with the Trial Court it must dismiss the appeal. If it

differs from the Trial Court it should order the case to be restored either on terms or unconditionally. It has no jurisdiction to pass a decree in favour of the plaintiff.

For the purpose of O IX, r. 8, C P C, it is the net amount for which the defendant admits liability after deducting all payments alleged by him which has to be taken into account. A ABDUL MAJID *v.* WAHIDULLAH, A. I R. 1926 All. 284 **496**

——— **O. IX, r. 13.**

See C. P C, 1908, s 48 **846**
See C P. C, 1908, s 146 **946**
See LIMITATION ACT, 1908, SCH I, ART 164 **272**

——— **O. IX, r. 13**—Ex parte *decree, setting aside of—Knowledge of decree.*

A proof of knowledge of the decree with all its contents and the general effect thereof is necessary in order to support a plea of limitation in bar of an application to set aside an *ex parte* decree N ISRAM *v* GANGIA **295**

——— **O. IX, r. 13, s. 115**—Ex parte *decree, application to set aside—Engagement of Pleader in other Court, whether sufficient cause—Discretion of Court—Revision—Decree against several defendants having separate interests—Application by some to set aside decree—Procedure*

It is not an invariable rule that the absence of a Pleader owing to his engagement elsewhere is a sufficient cause for setting aside an *ex parte* decree, but the High Court will not in revision interfere with the discretion of the Court of first instance in setting aside an *ex parte* decree on that ground.

Where a plaintiff impleaded several persons as parties to a suit on the ground that they were severally in possession of the assets of a deceased person and an *ex parte* decree was passed against all of them, on an application by some only of the defendants to set aside the *ex parte* decree

Held, that it was not open to the Court to set aside the decree as against the defendants who had not applied to set aside the decree M THIRUMALACHARIAR *v.* ATHIMOOLA KARAYALOR, 22 L W. 695, (1926) M W. N 112, A I R 1926 Mad 256 **776**

——— **O. X, r. 1**—*Examination of parties—Replication covering all facts in written statement—Witnesses, order in which to lead—Court, duty of.*

The Court is bound to examine the parties only when there is no clear express or implied denial of any statement of fact in the pleadings But where a plaintiff puts in a written replication which covers all statements of fact referred to in the written statement, there is no occasion for the Court to examine the parties or their Pleaders.

It is no duty of the Court to direct a party as to the order in which he is to lead his witnesses. L LAKSHMI CHAND *v.* MUKTA PARSHAD, 8 L. L. J. 67 **1006**

——— **O. XII, r. 6, s. 36**—*Admission, judgment on—Procedure—Decree, whether must be drawn up.*

In order to enable a plaintiff to apply for judgment under the provisions of O XII, r. 6, C. P. C., it is not necessary that he should relinquish that part of the claim or relief which is not admitted by the defendant. He is entitled to judgment to the extent of the admission made by the defendant.

On a judgment being passed under O. XII, r 6, C. P. C., it is not necessary to have a decree drawn up. The plaintiff can in such a case enforce payment

in execution proceedings under s 36, C P. C. S TAHILRAM TARACHAND *v.* VASSUMAL DRUMAL, A. I. R. 1926 Sind 119 **562**

——— **O. XVIII, r. 1.** *See* MESNE PROFITS **792**

——— **O. XX, r. 11, cl. (2), O. XXXIV, r. 14**—*Security bond by judgment-debtor—Security, enforceability of, in execution—Hindu father, decree against—Sons of judgment-debtor also joining as parties to security bond, effect of.*

Immoveable properties given by a judgment-debtor as security pursuant to an order made under O XX, r. 11, cl (2), C. P C, can be realised by the decree-holder in execution, unless there is anything in the security bond or the order of Court which precludes the security from being enforced in execution

Where the parties intended that the properties covered by the security bond should be realised in execution, the decree-holder is not bound to resort to a separate suit for the purpose

The provisions of O. XXXIV, r 14, C P C, are inapplicable to such a case and do not operate as a bar to the enforcement of the security bond in execution.

It would make no difference in the above case if a Hindu father alone is the judgment-debtor but the security bond is executed by the father and his undivided sons, as the latter could question the debt only if it were tainted with illegality or immorality.

The words "claim arising under the mortgage" have been substituted in O XXXIV, r 14, C P. C., for the words "any claim whether arising under the mortgage or not" in the repealed s. 99 of the Transfer of Property Act The effect of the alteration is to confine the prohibition against bringing the mortgaged property for sale, except by bringing a suit, to cases where a mortgagee has obtained a personal decree against the mortgagor on the mortgage-debt. The mortgage or charge mentioned in O. XXXIV, r. 14 must be a mortgage or charge existing prior to the decree and not created by the decree or one created by the act of parties subsequent to the decree M OFFICIAL RECEIVER *v.* NAGARATNA MUDALIAR, 49 M. L. J. 643, (1925) M W. N. 907, A. I. R 1926 Mad 194 **497**

——— **O. XXI, r. 2**—*Agreement not to execute decree—Adjustment of decree—Certification, absence of, effect of*

An agreement by a decree-holder not to execute the decree amounts to an adjustment or satisfaction of the decree and unless it is certified in accordance with the provisions of r 2 of O XXI, C. P C., it cannot be recognised by the Executing Court as a bar to execution R M S S CHETTYAR FIRM *v.* MA TIN TIN, A I. R 1925 Rang 349, 4 Bur L. J. 179 **677**

——— **O. XXI, rr. 13, 17, s. 115**—*Execution application, defects in Court, whether bound to give time for correction—Dismissal of petition—Revision.*

Under O XXI, r 17, C P. C., when an execution application is presented which does not fulfil the requirements of rr. 11 to 14, the Court has an option either to reject the application or to allow the defect to be remedied within a time to be fixed by it.

Where it declines to adopt the latter course, it cannot be held to have refused jurisdiction so as to warrant interference in revision under s. 115, C. P. C. M THARAMAL PARKAM KALAPATHOOR *v.* URUPPOYIL AMBU, 49 M. L. J. 699; (1925) M. W. N. 917; A. I. R. 1926 Mad. 260 **109**

Civil Procedure Code—1908—contd.

——— O. XXI, rr. 15, 2, O. XXX, r. 1—*Suit in name of firm—Payment to one partner—Satisfaction of decree.*

Where a suit is brought in the name of a firm under the provisions of O. XXX, r. 1, C. P. C., one partner of the firm is competent to receive payment in respect of the decree in favour of the firm and to notify satisfaction of the said decree to the Court. S YUSIF MAHBUB & Co. *v.* SALLOH MAHOMOD **387**

——— O. XXI, rr. 46, 53, s. 146—*Debt attachment of—Debt ripening into decree—Attaching creditor, right of, to execute decree, without attaching decree itself—Decree-holder, payment to, by judgment-debtor, whether binding on attaching creditor.*

Under the terms of a deed of partition between two brothers *L* and *R*, a sum of money fell to *L*'s share but was retained with *R*. A creditor of *L* attached before judgment the debt so due and ultimately obtained a decree. *L* thereupon sued *R* on the debt, obtained a decree and within a month thereafter reported satisfaction of the decree. In an application for execution by the attaching creditor:

Held, (1) that the attaching creditor was not bound either by the alleged payment by *R* or by the recording of satisfaction by *L* and was entitled to execute the decree;

(2) that the attaching creditor should be permitted to amend his petition by adding a prayer thereto for the attachment of the decree obtained by *L* against *R*.

Per *Venkatasubba Rao, J.* (*Reilly, J.* dissenting)—The attachment placed on a debt fastens itself on a decree obtained on that debt without any further act on the part of the attaching creditor. The debt matures into and merges in the decree and the attachment gets naturally transferred from the debt to the decree.

The creditor who has attached the debt but who has failed to attach the decree is nevertheless entitled to execute it as if he had attached the decree also. To such a case the provisions of s. 146, C P. C., will clearly apply.

Per *Reilly, J.*—What an attaching creditor gets when a debt is attached at his instance is an order prohibiting the creditor from recovering it and the debtor paying it. He acquires by that order no right to sue on the debt or to collect it or to give a valid discharge of it. The prohibitory order which he obtains cannot grow or ripen into or be converted into something quite different, namely, the right to execute a decree obtained on the debt. It is, therefore, necessary for the creditor to attach the decree before proceeding to execution. M ALAGIRISAMI PILLAI *v.* LAKSMANAN CHETTY, 50 M. L. J. 79, A. I. R. 1926 Mad. 371 **1021**

——— O. XXI, r. 50—*Execution of decree—Decree against property of firm—Liability of individual members.*

The mere circumstance that a decree passed against a firm as it stands can be executed only against the property of the firm does not preclude its eventual execution against the individual partners of the firm as soon as any or all of the conditions set forth in O. XXI, r. 50, C. P. C., are fulfilled. L BHAGWANDAS PARAS RAM *v.* JADO NATH, A. I. R 1926 Lah. 236 **898**

——— O, XXI, r. 58. *See* C. P. C., 1908, s. 115 **40**

——— O. XXI, r. 58—*Money-decree—Attachment of property—Objection by transferee from judgment-debtor—Decision, finality of—Appeal, whether lies—Property attached being decree in favour of judgment-debtor, effect of—Execution of decree—Insolvent judgment-debtor—Question of title between scheduled creditors, decision of—Revision—Provincial Insolvency Act (V of 1920), s. 50*

Where an objection is raised by a transferee from the judgment-debtor to attachment of the property in execution of a money-decree, and the question arises whether the transfer in favour of the objector is good or not, the question relates to the title to the property sought to be attached, and comes within the purview of O XXI, r. 58, C P C, and the decision is final, subject to the result of any suit that might be instituted, and is not open to appeal. The fact that the property attached is a decree makes no difference

There is nothing in s. 50 of the Provincial Insolvency Act which says that any question of title raised between two scheduled creditors will be decided by the Insolvency Court, and a decision of such question by the Execution Court is not open to revision. A PEAREY LAL *v.* ALLAHABAD BANK LTD., 24 A. L J. 334; A I R. 1926 All. 244 **14**

——— O. XXI, r. 63—*Attachment, objection to, dismissal of—Title suit—Fraudulent transfer—Consideration—Possession—Good faith—Burden of proof—Intention to defeat creditors—Transferee not party to fraud, effect of*

Where an objection to an attachment of certain property in execution of a decree, by a person claiming to be a transferee of the property from the judgment-debtor, is dismissed on the ground that the transfer was intended to defeat the creditors of the judgment-debtor and was fraudulent, and the unsuccessful objector brings a suit to establish his title to the property, the burden lies upon him of proving not merely the passing of adequate consideration and his possession over the property but also his own good faith.

Where, however, consideration and possession are established a much lighter burden lies on the plaintiff with regard to the establishment of good faith.

In such a case, however, the all essential point is whether the plaintiff was a party to the fraud on the creditors. An intention to defeat the creditors may well exist on the part of the transferor, and yet the transfer will be valid unless the transferee was also a party to the fraud. N VANAYAK *v.* KANIRAM, A. I. R. 1926 Nag. 293 **810**

——— O. XXI, r. 66. *See* C. P. C., 1908, O XXI, R. 100 **326**

——— O. XXI, r. 66, ss, 2 (2), 47, 115—*Execution of decree—Sale proclamation—Notification of incumbrance—Appeal, whether lies—Revision.*

Under O. XXI, r. 66, C P. C., an Executing Court is bound to notify in the sale proclamation all incumbrances which *prima facie* exist on the property which is ordered to be sold. Where a person claiming to be a mortgagee of such property intimates his claim to the Court and the Court directs that the claim should be notified in the sale proclamation, the order is not open to appeal and cannot be challenged in revision.

An order passed by an Execution Court under O. XXI, r. 66, C. P. C., prescribing the manner in which a proclamation of sale should be drawn up on application made, is not open to appeal under the provisions of O. XLIII of the Code.

Section 47, C. P. C., must be read with s. 2 of the Code and the effect of reading both the sections

together is not to make every order passed by the Execution Court appealable but only such orders appealable as determine the rights of the parties to the execution with regard to all or any of the matters in controversy in suit **A** MUHAMMAD ZAKARIA *v.* KISHUN NARAIN, A I R 1926 All 268 **644**

——— **O. XXI, rr. 66, 72**—*Execution of decree—Sale—Decree-holder, whether bound to bid up to any fixed sum*

There is no legal necessity for a bidder at an auction-sale, whether he be the decree-holder or an outsider, to purchase the property at the full price at which it may have been valued in the sale proclamation On the contrary, the value of the property is really only that which it will actually fetch, assuming that there is no fraud or malpractice with regard to the bidders and that the sale has been reasonably and properly made public **Pat** SHEO CHARAN SINGH *v* KISHNO KUER, 6 P L T 860, A I R 1926 Pat 146 **2**

——— **O. XXI, rr. 66, 72**—*Execution of decree—Sale proclamation, valuation in—Decree-holder, whether bound to bid up to valuation*

There is no provision of law compelling the decree-holder to bid at an auction-sale up to any sum that may be fixed by the Court The valuation in the sale proclamation is intended primarily for the protection of the judgment-debtor and for giving information to the bidders at the auction-sale It is in no sense intended to be an exact estimate of the value of the property and if in a sale properly published and conducted the highest bid, whether of the decree-holder or any other person, is some figure below the figure given in the sale proclamation, it is not competent to the Court to compel the decree-holder to bid higher than that highest bid **Pat** BADRI SAHU *v* PEARE LAL MISRA, 6 P. L T 859, A I R 1926 Pat 140, (1926) Pat 137 **350**

——— **O. XXI, rr. 89, 90**—*Execution proceedings—Estoppel—Compromise*

A judgment-debtor filed an application under O XXI, r 90, C P C for withholding confirmation of the sale in execution owing to certain irregularities Subsequently he applied under r 89 for leave to avoid the sale by deposit of 5 per cent, of the purchase-money Both applications came for hearing on the same day, and the Pleader for the purchaser represented that the judgment-debtor could not maintain his second application unless he withdrew his first one The judgment-debtor, thereupon, withdrew his application under r 90 and his application under r 89 was granted by the Court

It was urged by the purchaser in appeal that the application under r 89, made in the presence of the application under r 90, being void *ab initio*, the withdrawal of the application under r 90 would only leave it open to the judgment-debtor to make a new application under r 89 He could not by withdrawal of his application under r 90 give retrospective validity to his application under r 89

Held, that the appellant was not entitled to call in question the order of the lower Court allowing the respondents' application under r 89 in the light of the statement of his Pleader which statement either amounted to a compromise in the proceedings or to an admission which would estop the applicant from questioning the validity of the Court's order **O** CHANDOO *v.* MURLIDHAR, 13 O. L J. 138, A. I R. 1926 Oudh 311 **732**

——— **O. XXI, r. 90.** *See* **C. P. C., 1908, s. 47** **833**

——— **O. XXI, r. 90**—*Execution of decree—Property sold as belonging to judgment-debtor—Previous sale by judgment-debtor—Application by judgment-debtor to set aside auction-sale, maintainability of*

Where, in execution of a decree, certain property is sold as belonging to the judgment-debtor, the latter is entitled to maintain an application to set aside the sale on the ground of material irregularity in the publication and conduct of the sale, and the application cannot be thrown out on the ground that the judgment-debtor had prior to the date of the auction sold the property to a third person and had thus ceased to have an interest in the property **M** MUHAMMAD MOHIDEEN MARACAYAR *v.* RAMANAD IAN CHETTIAR, 22 L W 872, A I R 1926 Mad 217 **597**

——— **O. XXI, r. 90, s. 115**—*Limitation Act (IX of 1908), Sch I, Art 166—Execution of decree—Sale, application to set aside—Particulars, additional, supplied after expiry of limitation—Appellate Court, refusal of, to consider particulars—Revision*

Within thirty days from the date of an auction-sale, the judgment-debtor applied to set aside the sale on the ground of material irregularity in the publication and conduct of the sale which had resulted in the property being sold for a very small sum After the expiry of thirty days the judgment-debtor made another application pointing out that two heavy encumbrances had been shown in the sale proclamation whereas no such encumbrances existed on the date of the proclamation The First Court found that this was a fact and on that ground set aside the sale On appeal, the lower Appellate Court holding that the First Court was not authorised to look into the matters contained in the later application inasmuch as that application had been made more than thirty days after the sale, set aside the order made by the First Court

Held, (1) that the later application merely supplied additional particulars of the material irregularity alleged in the first application and that the lower Appellate Court, therefore, had jurisdiction to consider the allegations made in the later application,

(2) that the refusal of the lower Appellate Court to consider the later application amounted to material irregularity in the exercise of jurisdiction and that the order of the lower Appellate Court must, therefore, be set aside in revision **A** RAM SARAN DAS *v* GIRDHARI LAL, 24 A L J 286, A I R. 1926 All 305 **567**

——— **O. XXI, r. 92**—*Execution of decree—Sale in favour of person other than decree-holder—Decree satisfied, effect of*

A decree becomes dead as soon as it is satisfied as between the parties to it, but that cannot affect the vested rights of others

An auction-sale to a person other than the decree-holder is not affected by the fact that the decree is subsequently set aside on appeal or is satisfied after the date of the sale **N** RAMCHANDRA *v* LAKSHMAN, 9 N L J. 3, A I R. 1926 Nag 198 **803**

——— **O. XXI, r. 97**—*Execution of decree—Possession, delivery of—Investigation in anticipation of obstruction, legality of*

Rule 97 of O XXI, C P C, contemplates the Court ordering investigation after the Bailiff has been obstructed in giving possession in terms of the decree. Where, however, a person from whom obstruction is apprehended puts in an application to the Court claiming that the property, whose possession has been ordered to be delivered to the decree-holder, is his

Civil Procedure Code—1908—contd.

property and that he is not bound by the decree, there is nothing wrong in the Court anticipating the obstruction and ordering an investigation under r. 97 of O. XXI. R MAUNG PO SEIK *v.* V. NANDIYA, A I. R. 1925 Rang. 374; 4 Bur. L. J. 178 **667**

——— **O. XXI, rr. 97 to 101.** *See* C. P. C., 1908, O. IX **533**

——— **O. XXI, rr. 97 to 101**—*Execution proceedings—O IX, application of—O. XXI, r. 97 proceedings under, whether execution proceedings*

Order IX, C. P. C, has no application to execution proceedings

Proceedings under O. XXI, rr. 97 to 101, C. P. C., are proceedings in execution and O. IX is inapplicable to them.

A Court, therefore, has no jurisdiction to set aside under O. IX, r. 13, C. P. C., an *ex parte* order directing, free from obstruction, delivery of property to an auction-purchaser in execution of a decree. M KALLIAKKAL *v* PALANI KOUNDAN, 23 L. W 227, 50 M L. J. 200, (1926) M. W N. 245, A. I. R. 1926 Mad. 412 **533**

——— **O. XXI, rr. 97, 98, 103**—*Specific Relief Act (I of 1877), s 9—Decree for possession Execution of decree—Obstruction—Order removing obstruction—Suit to set aside order—Limitation.*

There is nothing in r 97 of O XXI of the C P C, which prevents its being applicable to a decree for possession passed under s. 9 of the Specific Relief Act. Such a decree does not purport to decide any question of title but it declares the plaintiff's possessory right and is a conclusive determination of that right Where, therefore, obstruction is offered to the delivery of possession in execution of such a decree, an order removing the obstruction falls within the purview of r. 98 of O XXI, and is conclusive unless set aside in a suit brought in accordance with the provisions of r. 103 of O. XXI.

Obiter dictum.—For the application of r. 97 of O XXI of the C. P. C. it is not necessary that the person making the obstruction should be physically present at the spot. M BANJOISI NARASAMMA *v.* BANJOISI SARASAMMAN, 23 L. W. 157; (1926) M. W. N. 163, A. I R. 1926 Mad. 353 **61**

——— **O. XXI, r. 98, s. 47**—*Auction-sale—Obstruction by judgment-debtor—Proceedings by purchaser—Decree-holder, whether party—Order deciding questions between decree-holder and judgment-debtor—Appeal, whether lies.*

An order passed under O. XXI, r. 98, C. P. C., on proceedings initiated by the auction-purchaser against the judgment-debtor is not appealable. Such an order does not become appealable even though the Court decides any question as between the decree-holder and the judgment-debtor which would really be quite foreign to the proceedings.

In proceedings under O. XXI, r. 98, C. P. C., taken by an auction-purchaser against the judgment-debtor, the decree-holder *qua* the decree-holder is really not a party. The question is merely between the judgment-debtor and the auction-purchaser, and any questions that might arise between the judgment-debtor and the decree-holder cannot be raised, and any decision passed relating to them is not binding as between them under s. 47 of the Code. C SORENDRA NATH DAS GUPTA *v* SATYENDRA NATH **544**

——— **O. XXI, rr. 100, 66, ss. 11, 47**—*Mortgage decree—Execution of decree—Application to be made party, rejection of—Sale—Application for order declaring non-liability to eviction, maintainability of* —Res judicata.

In execution of a mortgage decree, a pusine mortgagee, who had been made a *pro forma* defendant in the suit, applied to be made a party to the execution proceedings and to have a notice under r 66 of O. XXI, C. P. C, issued to him. This application was rejected and the applicant did not appeal against the order of rejection. After the sale had taken place, he made an application for an order declaring that he was not liable to eviction inasmuch as no notice under O XXI, r 66 had been issued to him·

Held, (1) that the second application was not maintainable,

(2) that, in any case, the question raised in the second application was *res judicata* by virtue of the order rejecting the first application Pat BAIJNATH SINGH *v.* HARI PRASAD BAL, (1924) Pat 209, A I R. 1924 Pat. 628, 7 P. L. T. 353 **326**

——— **O. XXII, r. 4**—*Abatement of suit—Rent suit —Joint tenants—Non-joinder in appeal—Inconsistent decrees.*

Although a plaintiff landlord can sue any one of his joint tenants for the rent, where he does not do so, but makes all of them parties to the suit, he cannot, in case of his failure to join any of the defendants or his representatives as respondents to the appeal, contend that as he had the option to sue any of the joint tenants or his representatives, his appeal would not abate

When the effect of not joining some of the defendants to a suit as respondents to the appeal would, in case of the success of the appeal, be the passing of two inconsistent decrees, the appeal would abate. C CHANDRA KUMAR GUHA *v.* ELAHI BUKSHA, A. I R 1926 Cal. 667 **616**

——— **O. XXII, r. 4**—*Death of* pro forma *respondent —Legal representatives not brought on record—Abatement, extent of.*

Where a *pro forma* respondent dies and his legal representatives are not brought upon the record within the prescribed period, the abatement of the appeal as against the deceased respondent does not result in the abatement of the appeal as a whole. L RAM LABHAYA *v.* KARTAR SINGH, 7 L. L. J. 466; A. I. R. 1925 Lah. 651 **261**

——— **O. XXII, r. 4**—*Mortgage suit—Joint mortgagors —Death of one mortgagor—Legal representatives not brought on record—Abatement, extent of.*

The failure in a mortgage suit to bring on record the heirs of one of the joint executants of the mortgage-deed, who has died during the pendency of the suit, does not result in the abatement of the suit as a whole, but only as regards the share of the deceased whose heirs would not be bound by the decree passed in the suit. N NARAYAN *v.* DHUDABAI, 21 N. L. R. 38; A. I. R. 1925 Nag. 299 **663**

——— **O. XXII, r. 4**—*Suit for possession against several defendants as trespassers, dismissal of—Appeal, second—Death of respondent—Legal representatives not brought on record—Abatement, extent of.*

Plaintiff sued for possession of certain property on the allegation that the defendants were in possession of it as trespassers. The defendants claimed to be in possession of the property as the reversioners of the last male-holder. The suit was dismissed by the Trial Court and the dismissal was upheld by the

lower Appellate Court During the pendency of a second appeal by the plaintiff in the High Court one of the defendants-respondents died and his legal representatives were not brought upon the record within the prescribed period

Held, that inasmuch as the relief sought against the defendants in the plaint was joint and indivisible, the appeal must be held to have abated *in toto* and that it was not open to the plaintiff to urge that as the defendants claimed to be in possession as the reversionary heirs of the last male-holder the appeal should be held to have abated only with regard to the deceased respondents' share in the estate of the last male-holder according to the pedigree-table set up by the defendants. L CHET RAM *v* ILAICHO, 2 L C 178 35

——— O XXII, r. 9 (2)—*Abatement, application to set aside—Delay—Sufficient cause—Appellate Court, interference*

Where on an application to set aside an abatement, the Court after a consideration of all the circumstances holds that the delay in making the application has not been satisfactorily accounted for and dismisses the application, the Appellate Court will not interfere with the order of dismissal M KOMARASAMI CHETTI *v* SUNDAR MUDALIAR, 23 L. W 212 724

——— O. XXII, r. 10—*Death or retirement of trustee—Addition of succeeding trustee as party to suit—Devolution of interest—Limitation*

Where a trustee who is a party to a suit either retires or dies and is succeeded in office by another by election or otherwise, there is a devolution of interest pending suit under O XXII, r 10, C P C, and such succeeding trustee can be added as party to the suit under the said provision apart from any question of limitation M THIRUMALAI PILLAI *v.* ARUNACHALLA PADAYACHI, A I R 1926 Mad 540 520

——— O. XXII, r. 10—*Decree against widow of deceased debtor—Birth of posthumous son—Legal representative, who is—Execution, whether can proceed against son*

A creditor brought a suit against the widow of a deceased debtor to recover the debt and obtained a decree Subsequent to the date of the decree the widow gave birth to a son The decree-holder sought to execute the decree against the son as the legal representative of the deceased debtor.

Held, that on the analogy of the provisions of O XXII, r 10, C P C, the son who really represented the estate of the deceased debtor must now be treated as his legal representative and that execution could, therefore, proceed against the son A BATUK NATH *v* JUGAL KISHORE, 24 A. L J 281, A I R 1926 All 285 551

——— O. XXIII, r. 11—*Withdrawal of suit—Second suit when barred—Two suits involving same relief—Withdrawal of one—Other, maintainability of*

Under O XXIII, C P. C, when a plaintiff withdraws a suit without the permission of the Court, he is precluded from instituting fresh suit, but this does not prevent the trial of a subject-matter, so long as such trial is not affected by the principle of *res judicata*.

A filed a suit and attached certain property before judgment *B* filed a claim petition, which was dismissed, and then filed a suit for getting the summary order set aside. Subsequently *B* filed another suit for declaration of his right to the property and for delivery of possession. Both these suits were filed within a year of the date of the order on the claim petition. *B* withdrew the first suit as being unnecessary with the permission of the Court, the order allowing withdrawal not mentioning whether it was with or without liberty to bring a fresh suit *A* now took the objection that the second suit was not maintainable as *B* was precluded from agitating the question of setting aside the claim petition therein by the withdrawal of the first suit.

Held, that a declaration of his title claimed by *B* in the second suit involved a setting aside of the order on the claim petition, and there being no final adjudication of the matter in the first suit, and the second suit being filed within a year of the order on the claim petition, the suit was maintainable M RUDRAPPA *v* MARIAPPA, A I R 1926 Mad 490 385

——— O. XXIII, r. 1. *See* C P. C, 1908, s 115 558

——— O. XXIII, r. 1, s. 115—*Application for withdrawal of appeal—Order passed for withdrawal of suit—Revision*

On an application not to withdraw the appeal but to withdraw the suit the Appellate Court passed the following order —

"This appeal is withdrawn, hence it is dismissed, The appellant may bring a fresh suit if necessary"

Held, that the order was open to revision inasmuch as (*i*) it was not warranted at all by the terms of the application and (*ii*) it was passed without any reasons and without the Court applying its mind to the question whether there were sufficient grounds to allow a withdrawal with permission to file a fresh suit. A RAM BADAN UPADHIYA *v* SANKATHA MISRA 1030

——— O. XXIII, r. 3. *See* C. P. C, 1908, s. 104 (*f*) 600

——— O. XXIII, r. 3—*Compromise between parties to suit—Application to pass decree in terms thereof, pendency of—Addition of third person as party without deciding validity of compromise, legality of—Remedy of party affected—Madras Local Boards Act (XIV of 1920), ss 36, 38—Local Government, power of, to rescind contract embodied in resolution of Board—Rights of third parties*

Under O XXIII, r 3, C P C, where the terms of a compromise are legal and valid, the Court is bound to pass a decree in terms thereof Where the original parties to the suit thus terminate it by a lawful compromise, it is not competent to the Court to add a third person as party to the proceedings to agitate his rights therein The remedy of such person who has any right or interest in the subject-matter of the suit is to file a separate suit.

A suit by the plaintiff against a Union Board in respect of the ownership of certain streets in the town was settled by a compromise under which the plaintiff's title to the streets was recognised but the public were to be given access during specified hours in a day The said compromise was embodied in a resolution of the Board and an application was made by both parties to the Court to pass a decree in terms thereof. Pending the disposal of the petition, the Government acting under s 36 of the Madras Local Boards Act rescinded the said resolution and applied to be made a party to the suit, and without deciding the question whether the compromise between the

Civil Procedure Code—1908—contd.

parties to the suit was lawful or not, the Court added the Government as party to the suit. On revision against the said order:

Held, that the order adding the Secretary of State as party, without determining whether the compromise was legal and put an end to the suit or not, was irregular and must be set aside and the case remanded to the Court for deciding whether the compromise was legal or not.

Quære:—Whether it is competent to the Government, under s. 38 of the Madras Local Boards Act, to cancel a resolution of a Board embodying a valid contract with a third person, where such person has acquired valid rights thereunder **M** RAJESWARI MUTHURAMAILINGA *v.* SECRETARY OF STATE FOR INDIA, 50 M. L. J. 59; A. I. R. 1926 Mad. 341 **311**

——— **O. XXIV, r. 5**—*Mortgage suit—Preliminary decree—Appeal—Final decree, when can be passed*

Where an appeal has been preferred against a preliminary decree passed in a mortgage suit, a final decree can be passed only after the preliminary decree has been confirmed or varied by the Appellate Court and has become conclusive between the parties **A** LALMAN *v.* SHIAM SINGH, 21 A. L. J. 288, A. I. R. 1926 All 291 **608**

——— **O. XXV, r. 1 (3).** *See* C. P. C., 1908, s. 145 **546**

——— **O. XXVI, r. 11**—*Commissioner—Omission to record evidence, effect of*

A Commissioner appointed under O. XXVI, r. 11, C. P. C., is bound to record in writing the evidence taken by him. Information given to the Commissioner by persons who are not called as witnesses and in the absence of parties to the suit and whose statements are not reduced to writing is not legal evidence upon which the Commissioner can act **M** RAMAKKA *v.* NEGASAM, 47 M. 800, 48 M. L. J. 89, A. I. R. 1925 Mad. 145 **792**

— — **O. XXX, r. 1.** *See* C. P. C., 1908, O. XXI, R. 15 **387**

——— **O. XXX, r. 1**—*Suit by one partner to recover debt due to firm—Partners, others, whether necessary parties—Refusal of other partners to join—Procedure*

In a suit by one partner in a firm to recover a debt due to the firm, the other partners are necessary parties.

Where in such a suit the other partners refuse to join as plaintiffs, the correct procedure is to join them as defendants. **L** BULLI MAL *v.* JHABBA, 7 L. L. J. 280, A. I. R. 1925 Lah. 504 **569**

——— **O. XXXII, r. 3, s. 47**—*Execution proceedings—Guardian ad litem—No formal order of appointment—Failure to support minor's case—Omission to appear—Gross negligence—Application to release minor's property from attachment, dismissal of—Declaratory suit by minor, whether maintainable*

The mere absence of a formal order of the appointment of a person as the guardian *ad litem* of a minor is no ground for holding that the minor was not represented at all in the suit.

The negligence of a guardian to support the case of a minor, in the absence of anything to show that he did so deliberately, will not entitle the minor to avoid the operation of the decree passed therein.

The mere omission of a guardian to appear in a suit or execution proceedings does not necessarily amount to gross negligence on the part of the guardian.

Civil Procedure Code—1908—contd.

A suit by a person for a declaration that an order dismissing an application filed by his guardian to release his share of the property attached in execution as he was discharged by the decree is null and void, because his guardian was grossly negligent in protecting his interests in execution proceedings, is in reality a suit to set aside the auction-sale held subsequent to the dismissal of the application and is barred under s. 47 of the C. P. C. **N** SADASHEO *v.* KARIM, A. I. R. 1926 Nag. 267 **241**

——— **O. XXXIII, r. 1**—*"Other than his necessary wearing apparel and the subject-matter of the suit," scope of—Pauperism—Burden of proof.*

The words "other than his necessary wearing apparel and the subject-matter of the suit" in the Explanation to r. 1 of O. XXXIII, C. P. C., only apply in a case where no specific Court-fee is prescribed, and do not qualify the first part of the Explanation as well.

The onus to prove pauperism rests on the person who applies for leave to sue as a pauper **N** SHEIKH BADAL *v.* ABDUL RAHIM, A. I. R. 1926 Nag. 273 **785**

——— **O. XXXIII, r. 1, s. 115**—*Government of India Act, 1915, (5 & 6 Geo. V, c. 61), s. 107—Application for leave to sue in forma pauperis—Complicated questions, whether can be gone into—Revision.*

On an application for leave to sue to *in forma pauperis*, it is not desirable for a Court to go into a complicated question of limitation, and its order is liable to be set aside in revision **M** THAMAYA RANGARUSWAMI *v.* THIRUNATHASUNDRA DOSS, (1925) M. W. N. 779; A. I. R. 1926 Mad. 135, 23 L. W. 406 **415**

——— **O. XXXIV**—*Suit for redemption—Decree for possession—Mesne profits left unascertained—Decree, whether preliminary or final—Subsequent application for ascertainment of mesne profits, maintainability of.*

In an appeal from a decree in a suit for redemption, the Appellate Court, in remanding the suit, directed accounts to be taken up to the date fixed for redemption. The Trial Court after inquiry found that the mortgage amount deposited was in excess of the amount due to the mortgagee. Accordingly a decree was given to the plaintiff for possession of the suit land. The question of mesne profits was left undecided.

Held, (1) that the decree was partly final and partly preliminary, final as to possession and preliminary in so far as the question of mesne profits was left undecided;

(2) that an application, therefore, properly lay under O. XXXIV, C. P. C., for the ascertainment of mesne profits. **M** MATTAPALLI VENKATARATNAM *v.* VEPPU SITARAMAYYA, A. I. R. 1926 Mad. 305 **314**

——— **O. XXXIV, rr. 4, 5**—*Composite decree for sale of mortgaged property and realisation of decree from person and property of judgment-debtor—Absolute decree, whether necessary—Execution—Objection not taken, effect of—Application for sale, effect of.*

A preliminary decree under r. 4 of O. XXXIV of the C. P. C. for the sale of mortgaged property cannot be executed unless made absolute under r. 5 of the Order. Rule 5, however, does not apply to a decree which does not conform to the provisions of r. 4 of O. XXXIV.

A decree directing that if the decretal amount is not paid within a certain period, the decree shall be realised by the sale of the hypothecated property and in case that is not sufficient, from the person and property of the debtor, is not a preliminary decree for sale under r 4 of O XXXIV, C P. C, and is capable of execution

Even though a relief may not have been granted by the decree, yet if in execution proceedings a Court holds that a party is entitled to such relief under the decree, it is not open to the parties afterwards to contend that no such relief has been awarded and the matter is *res judicata*

After a preliminary decree for sale has been passed, an application by the decree-holder for sale of the property may be taken to be an application for an order absolute for sale **L** BANU MAL *v.* PARAS RAM. 7 L. L. J 397, A I R 1925 Lah. 640 **254**

——— **O. XXXIV, r. 8.** *See* C P. C, 1908, s. 11 **260**

——— **O. XXXIX, rr. 1, 2.** *See* C P C, 1908, s 94 **615**

——— **O. XXXIX, rr. 1, 2**—*Specific Relief Act (I of 1877), ss 4, 5—Injunction restraining Court from executing decree, whether can be granted—Subordinate Courts, power of*

A subordinate Court has no power under the C P C or any other statutory enactment to restrain another Court by an injunction from executing a decree **L** KANSHI RAM *v* PRABH DIAL ARJAN DASS & Co, 7 L L J 457, A I R 1925 Lah 618 **259**

——— **O. XXXIX, r. 2**—*Defendant in possession—Temporary injunction restraining defendant's user, when can be granted*

Courts, as a general rule, refuse to interfere by way of injunction to restrain a defendant from making such use as he may think fit of the property of which he is in possession But in certain cases the Court would interfere with the rights of the defendant, for instance where the defendant contemplates the destruction, or a change in the nature, of the *corpus* **S** MUNICIPALITY OF TANDO ADAM *v* KHAIR MAHOMED, A. I R 1925 Sind 260 **1019**

——— **O. XL, r. 1**—*Suit to enforce agreement to execute simple mortgage—Receiver, whether can be appointed.*

It is open to the Court in a suit for specific performance of an agreement to sell immoveable property also to give a decree for possession. In such a suit it is not an improper exercise of discretion for the Court to allow the plaint to be amended so as to include an express prayer for possession **M** CHOCKALINGAM PILLAI *v* PICHAPPA CHETTIAR, 22 L W 579; (1925) M W N 802, A I. R 1926 Mad. 155 **599**

——— **O. XL, rr. 1, 4, O. XLIII, r. 1 (s)**—*General Clauses Act (X of 1897), s. 16—Order removing Receiver—Appeal, if lies—'Any person', meaning of—Receiver, when can be removed—Judicial discretion—Party, when can be appointed—Consent of parties.*

An appeal lies against an order removing a Receiver. The order is final and appealable even though selection of the successor has not been made.

The words 'any person' in O. XL, r 1 (*b*), C. P C., refer to persons interested in the property and in possession or custody of it prior to the passing of n order appointing a Receiver.

The selection and appointment of a particular person as a Receiver is a matter of judicial discretion to be determined by the Court according to the circumstances of the case.

It is a settled rule that one of the parties to a cause should not be appointed Receiver without the consent of the other parties unless a very special case is made out

On an application for the removal of a Receiver, the Court should properly consider his past relations to the parties as well as his present sympathies If by reason of interest shown by the Receiver as an officer of the Court his efficiency is impaired the Court will be justified in removing him. **C** SRIPATI DUTTA *v* BIBHUTI BHUSAN DUTTA, 53 C 319, A I. R 1926 Cal. 593 **940**

——— **O. XL, r. 4, O. XLIII, r. 1 (s)**—*Receiver—Order determining liability of Receiver on accounts and directing payment—Appeal, whether lies.*

An appeal is a creature of Statute and unless the right of appeal is specially conferred by some law, no one has a right to appeal.

The operative part of r 4 of O XL, C P C, is the part which enables the Court to attach and sell the Receiver's property, cls (*a*), (*b*) and (*c*) of the rule give only the grounds on which such an order can be made Unless, therefore, an order is made under the operative part of the rule, no appeal would lie under r 1 (*s*) of O XLIII of the Code

An order determining the liability of the Receiver and directing him to pay a certain sum of money into Court is not open to appeal either at the instance of the Receiver or at the instance of any other party **R** ARUNCHELLAM CHETTIAR *v* U PO LU, A I R. 1925 Rang 266, 3 R 318, 4 Bur L J 91 **631**

——— **O. XLI, r. 19**—*Appeal—Dismissal for default—Laches of Advocate—Mistake of clerk—Restoration*

The laches of an Advocate or the careless mistake of his clerk is not sufficient cause for restoration of an appeal dismissed for default **R** MAUNG THAN *v* ZAINAT BIBI, 3 R 488, A I R 1923 Rang 50 **208**

——— **O. XLI, r. 23**—*Trial Court, findings of on all issues—Order of remand for further evidence on some issues only—Jurisdiction*

An order of remand by a Court of Appeal in a case where the Trial Court has disposed itself of all the issues and given a decree on those findings cannot come within the scope of O XLI, r 23, C P C, and is, therefore, not appealable

A Court of Appeal acts without jurisdiction if it remands "the whole case" while it wants further evidence only on two issues The proper course in such circumstances is to direct the Trial Court to take the requisite further evidence and submit it to the Appellate Court for recording its own findings **M** VENKATARAMA AIYAR *v.* SUNDARAM AIYAR, (1926) M. W N 48 **1045**

——— **O. XLI, r. 23, s. 151**—*Remand, order of, affecting decision of whole suit—Appeal, whether lies.*

An order of remand which is not confined to a preliminary point but affects the decision of the whole suit, must be deemed to have been made in the exercise of the inherent powers of the Court and is not open to appeal **Pat** BALARAM MANJHI *v.* JAGANNATH MANJHI, A. I R 1925 Pat 760 **684**

——— **O. XLI, r. 23, O. XLIII, r. 1 (u)**—*Suit decided on merits—Appeal—Remand for re-decision after adding necessary party—Appeal, whether lies.*

Civil Procedure Code—1908—contd.

Where an Appellate Court sets aside a judgment of the Trial Court which has been given on the merits and remands the case for a fresh trial on the ground that a necessary party has not been impleaded as a defendant to the suit, the order of remand does not fall within the purview of r. 23, O. XLI of the C P. C. and is not, therefore, appealable under r. 1 (*u*) of O. XLIII R MA ME MYA *v* MA MIN ZAN, A. I R. 1925 Rang. 320; 3 R 490; 4 Bur. L. J. 159 **368**

——— **O. XLI, r. 25**—*Remand, what amounts to—Case returned for finding, whether remanded.*

A case can be remanded only when it is returned for a fresh decision. The word remand is not applicable to an order returning a case for a finding on a particular issue. R NACHIAPPA CHETTIAR *v.* MAHOMED SABIR KHAN, A. I. R 1925 Rang. 303; 4 Bur. L J. 135 **370**

——— **O. XLI, r. 25, s. 115**—*Appeal—Finding misread—Revision.*

Where a lower Appellate Court completely misreads the findings of the Trial Court, it acts with material irregularity in the exercise of its jurisdiction, and its order is open to revision. A GHISSU *v.* AMIR ALI KHAN **555**

——— **O. XLI, r. 27.** *See* BENGAL TENANCY ACT, 1885, s 105 **601**

——— **O. XLI, r. 27**—*Appellate Court—Additional evidence, admission of—Finding of fact—Appeal, second—Interference by High Court.*

Where an Appellate Court has relied for its decision upon a document which is inadmissible in evidence, a Court of second appeal would be justified in remanding the case for decision to the Appellate Court with a direction to exclude that document from its consideration. But where an Appellate Court although it admitted as additional evidence certain documents in appeal did not base its finding upon them, a finding of fact arrived at by that Court will not be interfered with by the High Court in second appeal. M KOYYALAMUDI CHINNAYYA *v* KOYYALAMUDI MANGAMMA **661**

——— **O. XLIII, r. 1 (d).** *See* GUARDIANS AND WARDS ACT, 1890, ss 25, 47 **36**

——— **O. XLIII, r. 1 (s).**

See C. P. C , 1908, O. XL, R. 1 **940**

See C. P. C., 1908, O. XL, R. 4 **631**

——— **O. XLV**—Addition of parties—Power of High Court. *See* C P. C , 1908, O. I, R. 10 **125**

——— **O. XLVII, r. 1**—*Review—"Any other sufficient reason," meaning of—Fraud and undue influence.*

Order XLVII, r. 1 of the C. P. C must be read as in itself definitive of the limits within which review of a decree or order is permitted and the words "any other sufficient reason" mean grounds at least analogous to those specified in the rule. Fraud and undue influence do not constitute grounds analogous to those specified in O. XLVII, r. 1. A RAGHUBIR SINGH *v.* NATHU MAL **1013**

——— **O. XLVII, r. 4**—*Review—Notice to party affected, necessity of.*

Where a plaint is ordered to be returned for presentation to the proper Court within a specified time, it is not open to the Court without notice to the defendant to review its order and give additional time to the plaintiff for payment of additional Court-fees. M KOMMAREDDI RAMACHANDRAYYA *v.* VODURY VENKATARATNAM, 22 L. W. 582; (1925) M. W. N. 804; A I R. 1926 Mad. 133 **800**

Civil Procedure Code—1908—contd.

——— **Sch. II, para. 1**—*Arbitration through Court—Arbitrator requested to decide extraneous matter—Award, whether can be enforced.*

Where a matter in dispute in a suit is referred to arbitration through the Court and the parties privately request the arbitrator to decide a matter which is extraneous to the suit, his decision on the latter cannot be embodied in the decree to be passed in the suit, but there is nothing to prevent the parties from enforcing the award relating to the extraneous matter in a separate suit M NARAYANASWAMI IYENGAR *v* THIPPAYYA, (1926) M. W. N 1; 23 L W. 382; A I. R. 1926 Mad. 366 **847**

——— **Sch. II, paras. 1, 2, 15**—*Reference to arbitration in pending suit—Matters outside scope of suit, whether can be referred—Award in excess of matters referred, validity of—Conclusions influenced by extraneous matters, effect of.*

In a pending suit a Court has no power to refer to arbitration any questions between the parties to the suit other than those in question in the suit, or any questions in which any one not a party to the suit is concerned.

It is incumbent upon arbitrators acting under an order of reference made under paras. 1 and 2 of Sch. II, C P C., to comply strictly with its terms. The Court does not by making the order of reference, part with its duty to supervise the proceedings of the arbitrators acting under the order.

An award made under such an order otherwise than in accordance with the authority conferred upon the arbitrators by the order, is "otherwise invalid" and may be set aside by the Court under para. 15 of Sch. II, C. P C.

An award made in pursuance of an order of reference made in a pending suit, the conclusions of which are dictated or coloured by the view taken by the arbitrators of other questions between the parties or some of them to which the suit had no reference cannot be upheld. P. C. RAM PROTAP CHAMRIA *v.* DURGA PROSAD CHAMRIA, 3 O. W. N. 127, A. I. R. 1925 P. C. 293; 49 M. L. J 812, 43 C. L. J 14; 24 A. L J. 13; (1926) M W. N. 96; 3 Pat. L R. 330; 28 Bom. L. R. 217; 53 C. 258 **633**

——— **Sch. II, paras. 20, 21**—*Arbitration—Award—Reference and existence of dispute, whether can be enquired into.*

On an application being made under para. 20 of Sch. II, C P C., it is open to the Court to enquire whether there was any matter in dispute between the parties to be referred to arbitration and whether there was, as a matter of fact, any reference to arbitration by the parties. L RADHA KISHEN-CHUNI LAL *v.* AHSA MAL-ISHAR DAS, 7 L. L. J. 603; A. I. R. 1926 Lah. 91 **705**

——— **Sch. III, para. 11**—*Decree transferred to Collector for execution—Collector, jurisdiction of—Civil Court, powers of.*

No sooner is an order for transfer of a decree for execution to the Collector made than he is seised of the case and not on the date such order reaches him. Any transfer of the attached property subsequent to the date of the order of transfer during the pendency of the proceedings before him is void.

Civil Procedure Code- 1908—concld.

During the period the Collector has jurisdiction the Civil Court ceases to have any power to act in execution of the decree transferred. N TIKARAM *v.* NARAYAN, A. I. R. 1926 Nag. 246 44

——— **Sch. III, para. 11**—*Execution of decree—Property held by Collector—Attachment, validity of.*

Where the Collector holds certain property belonging to a judgment-debtor in execution of a decree under para. 11 of Sch. III, C. P. C, a Civil Court has no jurisdiction to direct the attachment and sale of such property in execution of another decree against the same judgment-debtor. O JANG BAHADUR *v.* JAGAT NARAIN, A. I. R. 1926 Oudh 318 906

Colonization of Government Lands (Punjab) Act (V of 1912), s. 19—*Agreement by tenant to hold land jointly with another, validity of.*

A Government tenant of a horse-breeding tenancy executed an agreement in favour of his brother reciting that he and his brother had jointly purchased the mare required for the grant of land and paid for the grant out of joint funds and that the land would be considered their joint property in future

Held, that in the absence of the consent of the Commissioner or other officer specified in s. 19 of the Colonization of Government Lands (Punjab) Act, the agreement was void under the provisions of that section and could not be enforced in a Civil Court. L HUSSAIN BAKHSH *v.* SARBULAND, 7 L. L. J. 548, 6 L. 536, A. I. R 1926 Lah. 14 268

Companies Act (VII of 1913), ss. 207, 215—*Voluntary liquidation—Decree obtained against Company in liquidation—Execution, whether can be allowed to proceed—High Court, duty of*

Section 215 of the Companies Act lays a duty upon the High Court to see that justice is done in cases of voluntary liquidation

Under s 207 (1) of the Companies Act the assets of a Company which is being voluntarily wound up must be applied in satisfaction of its liabilities *pari passu*. A person who has obtained a decree against such a Company, therefore, cannot be allowed to realise his decree by way of execution inasmuch as to permit him to do so would give him more than his share of the assets of the Company. O NATIONAL BANK OF INDIA *v.* LAKHPAT RAI, 2 O W. N. 508; A I R 1925 Oudh 483 144

——— **s. 235**—*Directors of Company, decision of—Imprudent act—Personal liability of Directors, when arises—Personal gain acquired by Director—Refund—Managing Director, duties of—Act inspired by personal motives—Liability.*

Directors of a Company acting within their powers and with reasonable care, and honestly in the interests of the Company, are not personally liable for losses which the Company may suffer by reason of their mistakes or errors of judgment.

Facts which show imprudence in the exercise of powers conferred upon the Directors of a Company will not subject them to personal responsibility, the imprudence must be so great and manifest as to amount to gross negligence, as for example where the Directors are cognizant of circumstances of such a character, so plain, so manifest, and so simple in operation, that no man with any ordinary degree of prudence acting on his own behalf would have entered into such a transaction as the Directors have entered into. But if the Directors are authorized to do an act in itself imprudent, they are not to be held responsible for the consequences of doing it.

Companies Act—concld.

In respect of duties which, having regard to the exigencies of business and the Articles of Association, may properly be left to some other official, the Directors are, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.

The Directors must, however, observe good faith towards their share-holders and towards those who take shares from the Company and become co-adventurers with themselves and others who may join them. The maxim *caveat emptor* has no application to such cases, and Directors who so use their powers as to obtain benefits for themselves at the expense of the share-holders, without informing them of the fact, cannot retain those benefits and must account for them to the Company so that all the share-holders may participate in them

The mere fact that the Directors of a Company carrying on a banking business allow advances to be made on the strength of a promise by the debtor to execute a mortgage instead of the mortgage itself, does not amount to an act of misfeasance on the part of the Directors so as to make them personally liable to the extent of the amount of the advances.

Where the Directors of a Bank permit a depositor to make an over-draft and one of the Directors who is a creditor of such depositor receives a portion of the amount represented by the over-draft in payment of the debt due to him by the depositor, such Director cannot be allowed to retain the amount to the detriment of the share-holders and the creditors of the Bank and is liable to refund it to the Bank.

The duties of a Managing Director are of a higher standard than of an ordinary Director, and where by any act of the Managing Director which is inspired by motives of personal gain the Bank suffers loss, the Managing Director is liable to make good such loss O S C MITRA *v* NAWAB ALI KHAN, 2 O W. N. 920; A. I. R 1926 Oudh 153 50

Compromise *consented to by Pleader, when can be set aside—Fraud—Collusion*

A compromise consented to by a Pleader duly authorised in that behalf will not be set aside, unless fraud or collusion is imputed to the Pleader . Pat LAURENTIUS EKKA *v* DHUKI KOERI, 4 Pat. 766; A I R. 1926 Pat 73, 7 P L. T. 362 179

Compromise decree -Time fixed for payment, whether can be extended. *See* C. P. C, 1908, s 148 822

Confession.

See (*i*) CR. P C, 1898, s. 164.

(*ii*) EVIDENCE ACT, 1872, ss. 24 TO 30

Consideration, inadequacy of. *See* MORTGAGE SUIT 346

Construction of decree—*Executing Court, duty of—Reference to pleadings and judgment*

Though an Executing Court cannot go behind the decree, it ought to interpret the decree when an application for its execution is presented before it, and for that purpose, it ought to refer to the pleadings in the case and to the judgment passed by the Court. Pat SAHAI MISTRI *v.* SATALI DARJI 133

Construction of deed.

The primary object of all interpretation is to determine what intention is conveyed by the deed and the primary source of determining such an intention is the language used in the deed O BASHIR AHMAD *v.* ZOBAIDA KHATUN, 3 O. W. N. 105; A. I. R. 1926 Oudh 186 265

Construction of document—*Grant of income of property, whether grant of property itself.*

A grant of the income of certain property without any limitation is a grant of the property itself. **M** VENCATACHARIAR *v.* BONTHAM PACHAYAPPA CHETTY, 22 L. W. 698, (1926) M. W. N. 106: A. I. R. 1926 Mad. 250 **516**

——— *Hire-purchase agreement—Agreement to sell—Property, when passes—Contract Act (IX of 1872), s 78.*

Under a hire-purchase agreement, in the sense in which it is understood in England, there is no absolute sale of the chattel but only a hiring of it by a person who has the option of returning it at any time before the various instalments are paid. Under such an agreement the property in the chattel does not pass to the purchaser until the whole price has been paid.

An agreement entered into between the parties provided that the plaintiff had agreed to sell to the defendant on the hire-purchase system, for a certain sum of money, a certain number of motor-lorries in consideration of payment of the price by certain instalments settled between the parties It was also provided that in case of failure to pay any of the instalments on the due date, the previous payments would be considered null and void The lorries were not to be considered as sold until the final payment was made. The defendant was prohibited from mortgaging or disposing of the lorries until the final instalment was paid and the plaintiff had the right to seize the lorries wherever they may be. A portion of the price was paid at the time of the execution of the agreement and delivery of the lorries was given to the defendant and they were transferred to his name in the registers kept by the Commissioner of Police. Defendant paid some of the instalments and then made default. Plaintiff thereupon brought a suit to recover from the defendant the balance of the unpaid instalments together with damages alleging that the defendant was merely a hirer of the lorries and in the alternative to recover the balance of the price if it was held that the agreement was one of sale

Held, (1) that the agreement was one of sale providing for the price to be paid by instalments and that the property in the lorries had passed to the defendant on the execution of the document,

(2) that the plaintiff was, therefore, entitled only to claim the balance of the purchase-money which had not been paid by the defendant. **B** CECIL COLE *v* NANALAL MORAJI DAVE, 26 Bom. L. R. 880; A I R. 1925 Bom 18; 49 B. 172 **191**

——— *Lease, whether agricultural or residential—Heritable lease—Ejectment*

A plot of land upon which there were a certain number of fruit-trees was leased to the defendants who were to enjoy the land by erecting houses on it and planting, if they so liked, other fruit-trees It was provided that the lease should continue to the defendants' heirs, but that if at any time the lessor should require the land he would give notice to the lessees who would give up the land on receipt of the value of fruit-trees, etc.:

Held, (1) that the lease was one for residential and not for horticultural or agricultural purposes and was, therefore, governed by the Transfer of Property Act and not by the Bengal Tenancy Act;

(2) that the rights of the parties must be governed on a construction of the lease itself and that the conduct of the parties after the lease had been entered into could not be taken into consideration;

(3) that the land was to be enjoyed by the defendants from generation to generation so long as the landlord did not require it for his own purposes, but that if he so required it, he had the right to re-enter after giving notice and paying compensation in accordance with the terms of the lease. **C** GOPAL CHANDRA BANERJEE *v.* BHUTNATH SASMAL, 42 C. L. J. 520; A. I. R. 1926 Cal. 312 **411**

Construction of document—concld.

——— *Mortgage-deed—Compound interest, when can be charged.*

A mortgage-deed stated that the mortgage was for a period of four years and that interest would be calculated every two years:

Held, that in the absence of an express stipulation in the deed for payment of compound interest, the deed could not be construed as meaning that compound interest was to be charged after every two years **L** PARBODH SINGH *v.* BODH RAJ, 7 L. L J. 414; A. I. R. 1925 Lah. 603 **195**

Construction of Statute—*Principles applicable*

It is an elementary principle of interpretation that the plain intention of the Legislature as expressed by the language employed is to be accepted and given effect to.

If the language admits of more than one construction, the meaning is to be sought not in the wide sea of speculation and surmise but from such conjectures as are drawn from the words alone or something contained in them **N** VITHOBA *v* SADASHEO, A. I R 1926 Nag 253 **58**

Contract—*Repudiation by one party—Remedies of other party—Long delay—Implied abandonment of contract*

If one party to a contract repudiates it, the other party may treat the repudiation as inoperative, and at the end of the period of the contract, treat the other party as responsible for all the consequences of non-performance, thereby keeping the contract alive, or, on the other hand, he may treat the repudiation as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it. A promisee cannot, however, both sue upon the breach and also keep the contract open.

Where one party to a contract by acts and conduct evinces an intention no longer to be bound by it, the other party will be justified in regarding himself as having been emancipated

A party cannot repudiate a contract, wait a long time and then suddenly insist upon its performance, long delay coupled with repudiation will amount to conduct giving rise to an implication of abandonment of the contract **M** NARASIMHA MUDALI *v.* POTTI NARAYANASAMI CHETTY, 22 L. W. 637; 49 M. L. J 720; A. I. R. 1926 Mad 118 **333**

Contract Act (IX of 1872), ss. 16, 74—*Landlord and tenant*—Kabuliyat—*Interest, high rate of—Undue influence—Penalty.*

In the absence of any evidence that at the time when a *kabuliyat* was executed, the landlord exercised undue influence over the tenant and that the latter was not a free agent, the landlord is entitled to recover interest on arrears of rent at the rate stipulated in the *kabuliyat*. **C** BASHIRULLAH BHUYA *v* MEAJAN, A. I. R. 1926 Cal 690 **593**

——— **s. 23**—*Abkari license—Prohibition to transfer and to sub-let—Partnership by licensee, whether forbidden—Foreign law—Law of Mysore State—Question of fact*

What a foreign law is on a particular point, is a question of fact and has to be proved by the party setting it up.

Where by the terms of an Abkari license, the sale

Contract Act—contd.

transfer or sub-lease of the right is forbidden, the mere fact that the licensee enters into partnership with others in respect of profits or losses of the business for the carrying on of which he had obtained the license does not necessarily involve a transfer of the license right and is not illegal or forbidden by law.

Under the Law of Mysore such a partnership as the above is not unlawful

When the terms of a contract are reduced to writing and the question is whether the contract is illegal by reason of its seeking to do what is forbidden by law and the contention is that the agreement operates as a transfer, such a transfer should not merely be presumed but must appear in the document if not in terms at least as necessarily involved **M** KHODAY GANGADHAR SAH *v.* SWAMINADHA MUDALIAR, 22 L W. 679, A. I R. 1926 Mad. 218 **112**

——— **s. 23**—*Agreement not to bid at excise auction, legality of—Public policy—Money paid under agreement not to bid, whether can be recovered—Fraud, plea of—Burden of proof*

An agreement not to bid at an excise auction is not *per se* illegal or opposed to public policy

Where a plaintiff alleging that he had paid certain money to the defendant on the latter agreeing not to bid against the plaintiff at an excise auction sues to recover the amount paid by him and the defendant pleads that the agreement between him and the plaintiff was illegal under s 23 of the Contract Act, the burden lies on him to show that it was intended by the agreement to effect the purpose of the agreement by illegal means It is not sufficient for him to have used indefinite expressions when demanding the money from the plaintiff and then to ask the Court to presume that he had intended to act fraudulently or otherwise in contravention of any law If he avoids pleading his own fraud he cannot ask the Court to presume that he had fraudulent intentions of an unspecified or an indefinite kind without his advancing evidence that such was the case To refuse relief to the plaintiff under such circumstances would be to encourage fraud and trickery of a different kind by a person who had done nothing illegal except possibly to defraud the plaintiff with whom he entered into an agreement of an indefinite kind, with no intention of doing anything except to fraudulently keep the money in any event **R** MAUNG SEIN HTIN *v* CHEE PAN NGAW, 3 R 275, A I R 1925 Rang 241 **270**

——— **s. 23**—*Company prohibited by law—Dissolution, suit for, whether maintainable—Void contract*

A Company whose formation is prohibited without registration under the Companies Act, cannot, if unregistered, be recognised by the Courts as having any legal existence, and no suit is maintainable for its dissolution at the instance of any partner entering into the same with his eyes open **N** GOPILAL BHAWANIRAM *v* PANDURANG, A I R 1926 Nag 241 **640**

——— **s. 23**—*Pro-note for withdrawal of non-compoundable case, suit on, whether maintainable—Public policy*

It is against public policy to receive money or a promise to receive money in consideration of an agreement to stifle a criminal prosecution for a non-compoundable offence

Plaintiff was prosecuting one *K* for a non-compoundable offence, and in consideration of the defendant executing a pro-note in his favour for a certain sum of money withdrew the complaint with the permission of the Court In a suit to recover the amount of the pro-note:

Contract Act—contd.

Held, that the suit was not maintainable inasmuch as the consideration for the pro-note being opposed to public policy was illegal. **A** MUHAMMAD ISMAIL *v.* VAHIDUDDIN, 24 A L. J. 311, A I R 1926 All. 270 **503**

——— **ss. 30, 65**—*Chit fund transaction, whether lottery—Suit by non-prize-winner against stakeholder for return of subscription, whether maintainable—Contract, whether void from inception*

A chit fund consisted of 500 subscribers, each subscribing Rs 2 per mensem At the end of each month a chit was drawn by lot and the winner was paid Rs 100 Thereafter his connection with the chit fund ceased altogether and he was not under any obligation to continue his subscriptions According to the rules of the fund, the drawing would thus go on for 50 months when the chit fund would be wound up, the stakeholder paying back to the remaining subscribers the total amount subscribed by each of them. In a suit by a non-prize-winner after subscribing for 48 instalments for return of amount of subscription with interest

Held, that the chit fund transaction was a lottery and the plaintiff was not entitled to recover the amount either by virtue of the contract or by reason of any obligation under s 65 of the Contract Act as if the contract had become void **M** VEERANAN AMBALAM *v* AYYACHI AMBALAM, 22 L W 772, (1925) M W N. 857, 49 M L J 791, A I R 1926 Mad 168 **968**

——— **ss. 59, 60**—*Appropriation of payments to particular debts—Creditor and debtor, respective rights of*

Primarily it is the direction of the debtor either express or implied which determines to which particular debt a payment is to be appropriated But the intimation by the debtor must synchronise with the payment Where, however, a debtor does not avail of this privilege, the creditor has plenary discretion to apply any payment at any time, even up to the time of trial, to any debt he chooses **L** RELU MAL *v* AHMAD, 7 L 17, A I. R 1926 Lah 183 **947**

——— **s. 65.** *See* CONTRACT ACT, 1872, s 30 **968**

——— **s. 65**—*Consideration, recovery of, suit for —Limitation, operation of*

The time at which an agreement is discovered to be void, so that the cause of action to recover the consideration may arise under s 65 of the Contract Act, in the absence of special circumstances, is the date of the agreement **N** GOPILAL BHAWANIRAM *v* PANDURANG, A I R 1926 Nag 241 **640**

——— **s. 70**—*Contribution—Common channel, repair of—Party benefited, liability of, to contribute*

A common channel which irrigated the lands of the plaintiff and the defendant was repaired by the plaintiff after giving notice to the defendant and the latter was benefited by the repairs, it was also found that the plaintiff did not intend to bear all the expenses of the repairs himself

Held, that the plaintiff was, under s 70 of the Contract Act, entitled to obtain contribution from the defendant in respect of the cost of repairs **M** MEENAKSHISUNDARA NACHIAR *v* VEERAPPA CHETTIAR, (1926) M W N 4 **838**

——— **s. 73**—*Breach of contract—Damages, when can be recovered—Measure of damages—Surrounding circumstances, relevancy of*

Section 73 of the Contract Act does not necessarily exclude the application of the rule laid down in *Bain* v *Fothergill*, (1874) 7 H. L 158, 43 L. J. Ex. 243; 31 L T. 387; 23 W R 261 that normally apart from deliberate carelessness or known want of title by a

vendor, a purchaser cannot recover damages for loss of his bargain under a contract for the sale of real estate, apart from costs of investigating the title. The question must be answered on the facts and circumstances of each case whether that rule would apply to that particular case.

In an ordinary contract for the purchase and sale of land in which the vendor contracts to make out a marketable title, the usual result would be, if without any default on the part of the vendor he was unable to make out a marketable title, that the bargain would be off and the vendor would have to pay the purchaser's costs of the agreement and of the inspection of the title-deeds. But if the conduct of the vendor in committing the breach shows that he has been guilty of any default of a wilful nature, then the damages would be calculated on a higher scale, and the measure of damages would be the difference between the contract price and the market price of the property at the date of the breach

Per *Fawcett, J.*— It is not the profit which would have arisen to the plaintiffs, which is to be taken into account, but the market price of the property on the date of the breach

The discretion which a Court has under s. 73, Contract Act, cannot properly be restricted by any Judge-made rule that every case of a particular kind must be dealt with in a particular manner.

The circumstances of each case have to be considered in deciding what is reasonable and proper compensation for the damage, caused by a breach of contract under s. 73 of the Contract Act and the Court is not bound in every case to award damages on the basis of a difference between the price at the date of the contract and the market price at the date of the breach.

In a case where the plaintiff has no very outstanding circumstances to support his claim to damages on a higher scale, the fact of the contract being made under conditions similar to those obtaining in England is a factor which can reasonably be taken into account **B** DHANRAJGIRJI NARASINGGIRJI *v* TATA SONS LTD., 26 Bom L R 858; A I R 1924 Bom 473, 49 B 1 **225**

——— **s. 74** — *Penalty, when arises—Ejectment suit—Compromise decree — Stipulation to pay enhanced rent after expiry of term, whether penal—Doctrine of penalty, whether applicable to stipulation contained in decree.*

A penalty under s 74 of the Contract Act can only follow some breach of contract or obligation.

The doctrine of penalties is not applicable to stipulations contained in decrees. Those who, with their eyes open, have made alternative engagements and invited alternative orders of the Court, must, if they fail to perform the one, perform the other, however greatly severe its terms may be.

An ejectment suit was compromised and the compromise decree provided that the defendants would be entitled to occupy the premises in suit for a period of eleven years on payment of a yearly rent of Rs. 400 and that if they wanted to occupy the premises after the expiry of the term, without taking a fresh settlement, they shall pay rent at Rs. 100 per month :

Held, that the intention of the parties was that if the defendants wanted to occupy the premises after the expiry of the term, they could either take a fresh settlement or remain in occupation without a fresh settlement on a rent of Rs. 100 per month which the parties at that time thought would be a fair rent after the lapse of 11 years and that, therefore, no question of any penalty arose. **Pat** JITENDRA NATH CHATTERJEE *v.* JASODA SAHUN, (1925) Pat. 353; A. I. R. 1926 Pat. 122; 7 P. L T 299 **617**

——— **s. 125.** *See* INDEMNITY **715**

——— **s. 132** —*Evidence Act (I of 1872), s. 92—Co-executants of negotiable instrument—Parol evidence to prove that one of them was surety, admissibility of*

Where two persons join together in executing a bill or a promissory note making themselves jointly and severally liable therefor, there is nothing to prevent one of them from proving by parol evidence that he is the surety and the other the principal debtor, provided that he does not thereby intend to affect the right of the creditor to demand immediate payment from either or both of the co-obligors or joint promisors. **S** MOOLJI MURARJI SUNDERJI *v* PINTO **667**

——— **s. 171**—*Factor, meaning of—Factor's lien*

The word "factor" in India as in England means an agent entrusted with the possession of goods for the purpose of selling them for his principal

A factor is entitled under s 171 of the Contract Act to retain as security for a general balance of account, any goods bailed to him **O** PARAKH *v* EMPEROR, 3 O. W. N. 160, A. I. R. 1926 Oudh 202, 27 Cr. L. J. 328 **744**

——— **s. 178**—*Shares handed over for purpose of raising money—Pledge of shares—Misrepresentation, shares obtained by—Pledgee, rights of—Fraud, meaning of—"Goods," whether includes share certificates.*

A person who without enquiry takes from another an instrument signed in blank by a third party and fills up the blanks cannot, even in a case of a negotiable instrument, claim the benefit of being a purchaser for value without notice so as to acquire a greater right than the person from whom he himself received the instrument

The obtaining of goods or documents by fraud of which the proviso to s 178 of the Contract Act speaks must mean obtaining possession by such a trick or fraud as excludes real consent and, therefore, cannot be the foundation of any other contract

Defendant No 1 who was a partner in a firm which had been dissolved represented to defendant No. 2 that his liabilities in respect of his partnership in the dissolved firm did not exceed a certain sum and induced defendant No 2 to enter into a partnership with him for the purpose of starting a new business. Defendant No 2 handed over shares in certain companies to defendant No 1, together with transfer forms with blank transfers duly signed by him, and authorized the first defendant to borrow money on the shares for the purpose of the new business to be started by them The first defendant pledged the shares with the plaintiff and utilized the proceeds to discharge his liabilities as a partner in the dissolved firm In a suit by the plaintiff to enforce the pledge of the shares

Held, (1) that the first defendant having been authorized by the second defendant to pledge the shares it could not be said that he had obtained possession of the shares by means of an offence or fraud ;

(2) that at the most it could only be said that the first defendant induced the second defendant to negotiate with him with regard to starting a new business by misrepresenting the amount of his liabilities in his old business and that such a misrepresentation would enable the second defendant to avoid

Contract Act—concld.

the agreement to start a new business and to recover the shares entrusted to the first defendant for the purpose of raising money for that business,

(3) that the misrepresentation, however, had not the effect of rendering the pledge of the shares with the plaintiff before the rescission of the contract invalid and that the plaintiff was, therefore, entitled to enforce his pledge

Per *Coyajee, J*—The term "goods" used in s 178 of the Contract Act is wide enough to include share certificates B JAMSHEDJI NAOROJI GAMADIA *v* MAGANLAL BANKEY LAL & Co, 27 Bom L R 514, A I R 1925 Bom 314 9

——— **s. 230**—*Principal and agent—Auctioneer, whether can maintain suit for value of goods auctioned*

An auctioneer is not a bare agent, but an agent who has an interest in the goods which are entrusted to him for sale and as such can maintain a suit for the recovery of the value of the goods auctioned by him S KHARAS, R P. *v* BHAWANJI NARSI, A I R. 1926 Sind 6 394

——— **s. 231.** *See* CARRIAGE OF GOODS 1007

——— **s. 251**—*Partnership—Partner, whether can make reference—Receiver, appointment of, effect of*

One partner in a firm has no authority to enter into an agreement to refer a dispute, to which the firm is a party, to arbitration

Where a Receiver has been appointed to wind up the affairs of a partnership, to collect all outstandings, to pay debts and to distribute the surplus, a partner of the firm has no authority to refer to arbitration a question relating to the liability of the firm to pay a sum of money to a third person L RADHA KISHEN CHUNI LAL *v* AHSA MAL-ISHAR DAS, 7 L L J 603, A I R 1926 Lah 91 705

——— **ss. 263, 264**—*Limitation Act (IX of 1908), s 20—Partnership, dissolution of—Authority of one partner to pay debts—Notice of dissolution to strangers, want of, effect of*

So long as a partnership continues, it is a part of the ordinary course of partnership business to pay partnership debts, and, therefore, it would ordinarily be sufficient to prove that a debt paid was a partnership debt and that the person who paid the interest on it or part of the principal was a partner, in order to give an extended period of limitation under s. 20 of the Limitation Act

But even after a partnership has become dissolved, so far as strangers are concerned a partnership dissolved is a partnership in being, unless and until they receive notice of dissolution, and, in the case of old customers with the partnership, express notice of the same is necessary and in the absence of it an acknowledgment by one partner is binding on the other partners. M MAHADEVA IYER *v* RAMKRISHNA REDDIAR, 23 L. W 199, 50 M. L. J. 67, A. I. R. 1926 Mad. 114, (1925) M W N. 707 653

Co-sharer—*Exclusive possession—Erection of building—Injunction, suit for—Demolition of building—Special injury.*

A co-sharer whose rights have been invaded by the exclusive possession of another co-sharer can maintain a suit without proving material and substantial injury.

A co-sharer who knowing perfectly that he has no right to take exclusive possession of any portion of the common land, commences and completes a building thereon with his eyes open, is not entitled to any consideration at the hands of the Court, and the latter should grant a mandatory injunction against

Co-sharer- concld

him for demolition of the building. L ATTAR SINGH *v* KIRPA SINGH, A I R 1926 Lah 175 297

——— *Nature of right in joint property—Sale of definite portion by one—Rights of others*

So long as partition has not taken place, each co-sharer has a share in every fragment and portion of the joint holding and if his rights are infringed by his co-sharer alienating a definite portion of the joint holding, he is entitled to a decree for a declaration that he is joint owner of the portion alienated L THAKAR SINGH *v* INDAR SINGH 721

——— — *Partition, suit for—Possession, allegation of, disproof of—Presumption*

Where a plaintiff in a suit for possession by partition of alleged joint property makes a positive case that he is in possession of the property, and that case fails and the Court finds that the plaintiff has had nothing to do with the property in dispute for over twelve years, there is no room for the application of the presumption that the defendant is in possession of the property on behalf of the plaintiff and the plaintiff's suit must fail C SITESWAR ROY *v* TEPUA BARMAN, A I R 1926 Cal 589 908

——— Realization of rent by one co-sharer, effect of *See* ADVERSE POSSESSION 99

——— *Rent due from one co-sharer to another—Set-off, arrangement as to—Suit to recover rent, maintainability of*

An arrangement between co-sharers whereunder rent due to one of them from the others is set-off against the rent due from him to the others, the balance alone being payable in cash, does not prevent the rent from falling due and does not operate as a bar to the maintainability of a suit by one co-sharer to recover rent due to him from the other co-sharers It is, however, open to the defendants in such a suit to show that the rent has already been paid off by set-off C ABDUL WAHED KHAN *v* TAMIJANNESSA BIBI, A I. R 1926 Cal 679 905

Court Fees Act (VII of 1870), principle of *See* COURT FEES ACT, 1870, SCH I, ART 1 624

——— **ss. 5, 12**—*Court-fee payable on memorandum of appeal—Taxing Officer, order of—High Court, interference by—Refund of excess fee levied*

The High Court has no power or jurisdiction to interfere with an order passed by the Taxing Officer settling the amount of Court-fee payable on a memorandum of appeal, which order is final and against which there is no power of appeal, review or revision. Even if the Court is of opinion that the Court-fee levied is in excess of that payable under the law, it has no power to order a refund of the excess amount levied Pat HITENDRA SINGH *v* MAHARAJADHIRAJ OF DARBHANGA, (1925) Pat 359, A. I. R 1926 Pat. 147, 7 P. L. T. 392 626

——— **s. 7 (IV) (C)**—*Suits Valuation Act (VII of 1887), s 8—Civil Procedure Code (Act V of 1908), O. VII, r 1—Suit for injunction and appointment of Receiver—Valuation for purposes of jurisdiction and Court-fee—Court-fee payable*

Order VII, r. 1, C P C., requires that a plaint shall contain a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of Court-fees It is not contemplated that the subject-matter shall be given two values, one purely arbitrary and fanciful for the purposes of jurisdiction, and one in strict conformity to the real value for the purposes of Court-fees.

In either case the valuation should conform to reality. Therefore when a plaint contains a valuation

Court Fees Act—contd.

for purposes of jurisdiction it is a natural assumption that the same valuation would apply, if it were necessary to have a valuation for an *ad valorem* Court-fee.

A suit for an injunction and the appointment of a Receiver falls within the purview of s 7 (*iv*) (*c*) of the Court Fees Act, and under s 8 of the Suits Valuation Act, the value of such a suit for purposes of Court-fees and jurisdiction must be the same

Where in such a suit the plaint does not state the valuation put by the plaintiff upon the relief sought, and there is no valuation for the purpose of computing *ad valorem* Court-fees, the value for the purposes of jurisdiction must also be taken to be the value for purposes of Court-fees **M** POTHI ANNAPURNAYY *v.* POTHI NAGARATNAMMA, A. I. R 1926 Mad. 591 **730**

——— **s. 7 (ix).** *See* COURT FEES ACT, 1870, SCH. I, ART. 1 **624**

——— **s. 8, Sch. II, Art. 17 (iv)**—*Appeal from award under Land Acquisition Act—Court-fee payable*

An appeal from an award under the Land Acquisition Act is governed for purposes of Court-fee by s 8 and not by Art 17 (*iv*) of Sch II to the Court Fees Act, as the former, being a special provision relating to the awards of compensation under the Land Acquisition Act overrides the general provisions of the latter

Where no compensation has been allowed by an award under the Land Acquisition Act, Court-fee payable on the memorandum of appeal is the *ad valorem* Court-fee on the amount claimed **L** PURAN CHAND *v.* EMPEROR **991**

——— **Sch. I, Art. 1, s. 7 (ix)**—*Suit for redemption of* kanom*—Decree for possession on payment of mortgage amount and value of improvements—Appeal re value of improvements—Court-fee payable.*

The principle of the Court Fees Act is that the plaintiff should pay a Court-fee in proportion to the value of the relief he seeks That value if possible, is determined in money but where there is no money value or the money value is uncertain, the Act provides rules according to which the valuation shall be made.

The value of an appeal is not in all cases the value of the suit as originally filed, but may be the value of the relief granted by the decree which the appellant wishes to get rid of.

Where in a suit for redemption of a *kanom*, a decree for possession was passed on payment of the amount of mortgage and the value of improvements and an appeal was filed which related only to the value of improvements payable·

Held, that s. 7, (ix) of the Court Fees Act was inapplicable and that Court-fee was payable on the memorandum of appeal not on the mortgage amount but *ad valorem* on the amount in dispute in appeal under Art. 1 of Sch. I to the Court Fees Act. **M** TIRUVANGALATH NELLYOTON PAIDAL NAYAR, *In re*, 22 L. W. 691; (1926) M. W. N. 169, A. I. R. 1926 Mad. 225 **624**

——— **Sch. I, Art. 12**—*Succession Certificate—Provident fund, whether exempt from Court-fees.*

Money standing to the credit of a deceased person in a Railway Provident Fund passes to his nominee and does not form what can properly be called an asset of the estate of the deceased. It is, therefore, exempt from the Court-fees payable for a Succession Certificate under Art. 12, Sch. I, of the Court Fees Act. **N** DIGAMBAR, *In re*; A. I. R. 1926 Nag. 306 **525**

——— **Sch. II, Art. 11, s. 35**—*Bihar and Orissa Government Notification No. 2576—Civil Procedure Code (Act V of 1908), ss. 47, 144—Restitution, order relating to—Appeal—Court-fee payable*

An order under s 144 of the C. P. C. comes within the purview of cl (1) of s. 47 of the Code and a memorandum of appeal against such an order must, therefore, in accordance with the direction contained in the Notification No. 2576-L-A-25 of the Bihar and Orissa Government dated the 5th December 1921, be charged with the fee provided for in Art. 11 of Sch. II to the Court Fees Act **Pat** SITAL PRASAD SINGH *v.* JAGDEO SINGH, 4 Pat. 294, A. I. R. 1925 Pat 577, 7 P. L. T. 415 **474**

Criminal procedure—Conspiracy, charge of—Proof. *See* PENAL CODE, 1860, ss 120 B, 420 **419**

——— *First Information, delay in making—Conflicting statements as to number of accused—Suspicion*

Where a complainant has made conflicting statements with regard to the number of accused in the First Information Report and his complaint, his evidence with regard to the identification of the accused persons should be looked upon with suspicion The fact that the First Information Report was made after considerable delay and that there is no satisfactory explanation of the delay would add to the suspicion. **L** HASHMAT HUSSAIN *v* EMPEROR, 7 L. L. J. 96, 27 Cr. L. J 225 **209**

——— *Jury trial—Admissibility of evidence—Duty of Judge.*

In introducing evidence in a trial by Jury the Judge must be very careful in order to avoid miscarriage of justice **C** KERAMAT MANDAL *v* EMPEROR, 42 C. L. J 528, 27 Cr. L J. 277, A. I. R. 1926 Cal 147 **453**

——— *Practice—Conviction, whether can be based on interested and contradictory evidence.*

It is not safe to base the conviction of an accused person on the evidence of interested witnesses who were not mentioned in the First Information Report as eye-witnesses of the occurrence and whose evidence is contradicted by other witnesses produced on behalf of the prosecution. **L** PALI *v.* EMPEROR, 7 L L. J. 256, 27 Cr. L. J. 223 **175**

——— Witness, conflicting statement of, value of. *See* CR. P. C, 1898, s 162 **577**

——— *Witnesses, unreliable—Conviction, whether justified—Murder—Motive.*

In this country and among *Jats* murders are sometimes committed from motives of pride to avenge comparatively harmless insults.

The mere presence of motive, however, will not justify a conviction for murder when the testimony of alleged eye-witnesses of the occurrence cannot be relied upon. **L** POHLA *v* EMPEROR, 7 L. L. J. 442; 27 Cr. L J. 241 **417**

——— *Witnesses summoned at late stage on accused's responsibility—Failure of witnesses to appear, effect of.*

Where an application for summoning witnesses has been put later, and the summons have been issued on the responsibility of the accused on the full understanding that the Court will not grant any adjournment if the witnesses do not appear, the accused cannot say that he had no opportunity of producing his evidence, if the witnesses do not turn up. **A** PURAN *v.* EMPEROR, 27 Cr. L. J. 383; A. I. R. 1926 All. 298 **895**

Criminal Procedure Code (Act V of 1898), s. 35—*Illustration—Penal Code (Act XLV of 1860),*

ss. 366,'376—Abduction with intent to commit rape —Commission of rape—Sentence.

If a person abducts a woman with intent to rape her and does rape her, he cannot be awarded separate sentences under ss 366 and 376, Penal Code. **L** IMAM ALI *v.* EMPEROR, 27 Cr. L J. 338, A. I. R. 1926 Lah 212 **850**

——— **s. 103.** *See* U. P. EXCISE ACT, 1910 **441**

——— **ss. 107, 112**—*Security to keep the peace—Initial order—Substance of information received not recorded, effect of—Jurisdiction of Magistrate to take proceedings—Surety, rejection of, ground for—Time for furnishing security—Duty of Magistrate*

A Magistrate acting under s. 107, Cr P C, must, under s. 112 of the Code, make an order in writing setting forth, *inter alia*, the substance of the information received A failure to comply with this provision would deprive a Magistrate of jurisdiction to take proceedings under s 107.

A person against whom an order is passed under s 107, Cr P C, must be given sufficient time to furnish security

As long as the security offered by a surety is ample, the Court is bound to accept the same, without enquiring into the politics of the person standing surety

If the Magistrate is not satisfied with the sureties tendered, he should reject them within a reasonable time, so as to give the accused an opportunity of offering fresh sureties **R** MAUNG TUN U *v* EMPEROR, A I R. 1925 Rang 353; 4 Bur L J 172, 27 Cr L J. 318 **702**

——— **ss. 109, 110**—*Bond under both sections, whether void*

A security bond given in pursuance of an order binding over a person both under ss 109 and 110, Cr P C, is not void **S** JEOMAL *v* EMPEROR, 27 Cr L J. 326 **742**

——— **s. 110**—*Security for good behaviour—Procedure—Inquiry—Duty of Magistrate*

In a case under s 110, Cr P C, it is the duty of the Magistrate to hold an independent enquiry and not to bind over an accused person merely because he agrees to furnish security **A** RAM CHARAN *v* EMPEROR, 24 A L. J. 317, 27 Cr L J 370 **882**

——— **s. 123.** *See* CR. P C., 1898, s. 514 **889**

——— **ss. 133 to 143, 202**—*U P Village Panchayat Act (VI of 1920), s 72—Power to make local enquiry—Obstruction case—Procedure*

A Magistrate is competent under s 72 of the U. P. Village Panchayat Act to make a local enquiry into an offence or charge covered by s 202, Cr P C. But in a case where the question to be determined is whether any unlawful obstruction has or has not been made over a public pathway or other public place, he should follow the procedure laid down by ss. 133 to 143, Cr. P C., and base his decision on the evidence adduced and not act outside such evidence solely on the report of the *panches* or on their local investigation. **A** KADHORI *v.* EMPEROR, L. R 6 A 216 Cr., 24 A. L. J. 162, 27 Cr. L. J. 276, A I. 1926 All. 193 **452**

——— **s. 145**—*Dispute concerning immoveable property—Arbitration, reference to, validity of—Award concerning future possession, whether can be taken into consideration—Order relating to property not referred to in preliminary order, validity of.*

Under s. 145 of the Cr. P. C. it is for the Court to consider which of the parties was in possession of the property in dispute at the date of the proceedings or, in some cases, within two months previous to the date of the proceedings The scheme of the enquiry is retrospective and not prospective There might be certain circumstances in which the parties may agree that the Court should refer the matter in dispute to arbitration for the purpose of deciding the question as to who was in actual possession at the time of the proceedings, but the question as to future possession in such a proceeding cannot be referred to arbitration The law does not allow delegation of the jurisdiction of the Court under s 145 to arbitrators The utmost that the Code allows in a proceeding under s 145 is that the Court may direct a local enquiry and bring the enquiry report on the record as evidence

If, however, the Magistrate has before him clear and undeniable evidence that there is no further likelihood of the breach of peace and that the parties have come to a settlement of their dispute, the Magistrate must drop the proceedings In such a case a compromise between the parties may be taken by the Magistrate as evidence for an order to be passed under cl (5) of s 145 of the Cr P C., but the compromise cannot possibly be made the basis of an order under cl 6 of the section

A Magistrate has no jurisdiction to pass an order under s 145 of the Cr P. C in respect of property which was not referred to in the initiatory proceedings **Pat** UTTIM SINGH *v* JODHAN RAI, 3 Pat 288, A I. R 1924 Pat 589, 27 Cr L J 220; 7 P L T. 288 **172**

——— **s. 145** - *Possession of agent or servant, whether can be pleaded against principal or master*

The possession of an agent or a servant which is permissive cannot give a party to a proceeding under s 145 a *locus standi* against his principal or master. The possession that can be pleaded in such a proceeding must be possession based on a claim of right to possession **N** BAJIRAO *v.* DADIBAI, 27 Cr. L. J 212, A. I R 1926 Nag 286 **164**

——— **s. 145**, *scope of—Dispute regarding offerings of idol, nature of*

The right to perform the *puja* of an idol or to have a share of the offerings made to the idol cannot be said to be a right of user of land, as provided in s 145, Cr. P. C Therefore a dispute relating to such a right does not come within that section **C** SURENDRA NATH BANERJEE *v* SHASHI BHUSHAN SARKAR, 42 C L J. 127, 52 C. 959, 27 Cr. L. J 239, A. I. R. 1926 Cal 437 **223**

——— **s. 160.** *See* PENAL CODE, 1860, s. 173 **460**

——— **s. 162**—*Evidence Act (I of 1872), s 165—Statement made to Police, admissibility of—Judge, power of, to question Investigating Officer.*

The power conferred upon a Judge under s 165 of the Evidence Act cannot be exercised for the purpose of introducing evidence in contravention of the law.

Under s. 162, Cr P. C, statements made to a Police Officer are prohibited from being used for any purpose save as provided in the section, and there is no provision for allowing the Judge to use such statements for confronting the witnesses with them. To use the statements for this purpose is to contravene the provisions of s. 162 of the Code. **C** KERAMAT MANDAL *v* EMPEROR, 42 C L. J. 528; 27 Cr. L. J. 277; A. I. R 1926 Cal 147 **453**

——— **s. 162**—*Statement made to Police during investigation, admissibility of.*

Under s. 162, Cr. P. C, no statement or any record thereof whether in a Police diary or otherwise or any part of such statement made by any person to a Police Officer in the course of an investigation under Ch,

XIV of the Cr. P. C., is admissible as evidence except as provided in the second para of that section

Evidence of incriminating statements made by an accused person while in the custody of the Police and of his having pointed out the places where he had taken the abducted woman during the course of the night in which the offence of abduction is alleged to have been committed are not admissible in evidence. C KERAMAT MANDAL *v.* EMPEROR, 42 C. L. J 524, 27 Cr L. J. 263; A. I R. 1926 Cal. 320 **439**

——— **s. 162**—*Statement made to Police, whether admissible—Map containing hearsay matter, whether admissible.*

In the course of a Sessions trial the Investigating Sub-Inspector of Police, when examined as a prosecution witness, was asked whether he had during the investigation examined any witnesses on behalf of the accused He stated that he had examined certain witnesses but that they had denied their presence at the occurrence. One of the persons named by the Sub-Inspector had been summoned by the accused as a defence witness

Held, that the statement of the Sub-Inspector was not admissible in evidence having regard to the provisions of s. 162 of the Cr. P C

A person who makes a map in a criminal case ought not to put upon it anything more than what he sees himself. Particulars derived from witnesses examined on the spot should not be noted on the body of the map but on a separate sheet of paper annexed to the map as an index thereto

Such particulars are hearsay evidence and are not admissible. Where the map is prepared by a Police Officer, such particulars are also inadmissible under s. 162 of the Cr. P. C. C BHAGIRATHI *v* EMPEROR, 30 C. W N. 142; 27 Cr L. J. 222, A. I R 1926 Cal 550 **174**

——— **ss. 162, 172**—*Statement made to Police, whether can be used at trial—Procedure*

A statement made by a witness during Police investigation can only be used to assist the accused by showing that the witness who in Court deposes to certain facts has in his statement before the Police given an account or made statements which are contradictory to the testimony which he gives in Court. The statement made to the Police cannot be used at large for the purpose of showing that the statement does not corroborate or assist the story as put forward in the First Information Report.

The limitations under which such a statement can be used are very strict. The statement of a prosecution witness alone can be used at the trial and only if it has been reduced to writing and only that part of it can be used which is in contradiction of the evidence of the witness given in Court provided it is duly proved and the attention of the witness has been drawn to it. A statement made to the Police which does not contradict the testimony of the witness given in Court cannot be proved in any circumstances, and it is not permissible to use the recorded statement as a whole to show that the witness did not say something to the investigating officer. Pat BADRI CHOUDHRY *v.* EMPEROR, 6 P. L. T. 620; A. I. R. 1926 Pat. 20; 27 Cr. L. J. 362 **874**

——— **ss. 162, 288**—*Statement made by witness to Police, how far relevant—Statement made before Magistrate—Conflicting statements—Evidence, value of.*

A statement made by a witness to the Police during the course of investigation is relevant only for the purpose of contradicting the testimony of the witness given at the trial, and any statement previously made by a witness before a Magistrate, including a statement made before the Committing Magistrate which has not been transferred to the Sessions record under the provisions of s. 288, Cr. P. C., is relevant only for the purpose of contradicting or corroborating the statement made by the witness at the trial

No reliance can be placed on the statement of a witness made at the trial when it is in hopeless conflict with the previous statements of the witness. L RAM KARAN *v* EMPEROR, A. I. R. 1925 Lah. 483; 3 L. C. 197, 7 L. L. J 371, 27 Cr. L. J. 289 **577**

——— **s. 188**—*Offence committed in Native State by British Indian subject—Trial in British India—Certificate of Political Agent, necessity of.*

Where the offence of kidnapping has been committed by British Indian subjects in a Native State, it is not triable in British India without a certificate of the Political Agent.

The defect of the absence of a certificate is not curable by the subsequent production of the certificate. L RAM CHARAN *v* EMPEROR, 5 L. 416, A. I. R. 1925 Lah. 185, 27 Cr. L J. 218 **170**

——— **ss. 190 (c), 191, 537**—*Cognizance taken by Magistrate on his own knowledge or suspicion—Procedure—Failure to inform accused of right to be tried by another Magistrate—Illegality.*

Where a Magistrate takes cognizance of a case otherwise than on a complaint or the report of a Police Officer, he must be deemed to have taken cognizance of it upon his own knowledge or suspicion under cl (c) of s. 190, Cr. P. C , and in such a case it is his duty under s. 191 of the Code to inform the accused that he can, if he wishes, be tried by another Magistrate.

Section 191, Cr. P. C., is imperative and a failure to comply with its provisions is an illegality which vitiates the trial and not a mere irregularity which is cured by s. 537 of the Code. A NARAIN DAS *v.* EMPEROR, 27 Cr. L J. 325 **741**

——— **ss. 193, 339, 532**—*Approver, prosecution of—Commitment to Sessions—Certificate of Public Prosecutor, absence of—Certificate supplied at trial—Irregularity—Approver failing to adhere to confession, whether proof of guilt.*

Accused and two others were arrested on charges of kidnapping and murder. Accused was tendered a pardon which he accepted and he was examined as a witness at the trial of the other two accused. On the conclusion of that trial the Magistrate ordered the Police to prosecute the accused of the original offence and the accused was sent before a Magistrate who committed him to the Sessions Court on charges of kidnapping and murder. On the case coming up for trial, the Sessions Judge noticed the absence of the certificate from the Public Prosecutor required by s. 339 of the Cr. P. C. The trial was adjourned and on the adjourned date a certificate was filed by the Public Prosecutor and was accepted by the Sessions Judge and the trial proceeded and the accused was eventually convicted:

Held, that the proceedings before the Magistrate who made the commitment were merely an enquiry and were not a trial within the meaning of s. 339 of the Cr. P. C., and that it was open to the Sessions Judge to accept the commitment made by the Magis-

trate even if it was irregular and that the provisions of s. 339 having been complied with before the trial commenced the trial was in order.

Where an approver is put on trial for the original offence, the mere fact that he has not adhered to his confession should not lead to the conclusion that he has failed to comply with the condition on which the pardon was granted to him. False confessions, wrongfully extorted or induced are not unknown and no man must be led to adhere to a false confession for fear of his pardon being forfeited. **R** NGA WA GYI *v* EMPEROR, A I R 1925 Rang 219, 4 Bur L J. 23, 3 R. 55, 27 Cr. L J. 254 **430**

——— **s. 195.** *See* PENAL CODE, 1860, s. 193 **746**

——— **s. 195 (c)**—*Document handed up to Judge but not placed on file, whether "produced"—Prosecution in respect of document—Complaint, whether necessary.*

A decree-holder filed an application for execution of his decree In answer to that application the defendant produced what purported to be a receipt in respect of a certain payment which he alleged he had made to the decree-holder and handed up the document to the Judge. The Judge did not place the document on the file on the ground that the date it bore showed that it was out of time for the purpose of evidencing any compromise or payment of the decree, and returned the document to the judgment-debtor The judgment-debtor was subsequently prosecuted for an offence under s 467 of the Penal Code in respect of the document

Held, that the document had been "produced" in Court within the meaning of s. 195 *(c)* of the Cr P C and that a complaint by the Judge was, therefore, necessary in order to give jurisdiction to the Court to try the accused for an offence under s 467 of the Penal Code **B** GULABCHAND RUPJI *v.* EMPEROR, 27 Bom L. R. 1039, A. I. R. 1925 Bom. 467, 49 B 799, 27 Cr. L. J 251 **427**

——— **s. 196A.** *See* PENAL CODE, 1860, s. 141 **145**

——— **s. 197 (1)**—*U. P Excise Act (IV of 1910), s 10 (2) (f)—Excise Inspector, whether removable from office by Excise Commissioner—Sanction for prosecution, whether necessary.*

An Excise Inspector in the U. P is removable from his office by the Excise Commissioner and the sanction of the Local Government is not, therefore, necessary under s 197 (1), Cr. P C, for the prosecution of such Inspector **A** JALAL UDDIN *v* EMPEROR, 24 A. L. J 230, 27 Cr L. J 345, A I R 1926 All 271 **857**

——— **s. 202.** *See* CR P. C, 1898, ss 133 to 143 **452**

——— **ss. 202, 439**—*Refusal to issue process—Revision—Notice to accused, whether necessary*

It is not obligatory on a Superior Court to give any notice to a person against whom a Magistrate has refused to issue process under s 202 of the Cr. P C, when proceedings are being taken to revise that order **S** L. A. MORRISON *v.* H. M. CROWDER, 27 Cr. L. J. 302 **590**

——— **s. 203**—*Order dismissing complaint not set aside—Fresh complaint, whether barred.*

An order of dismissal passed on a complaint, which has not been set aside, is no bar to a fresh complaint upon the same facts to another Magistrate. **A** PURAN *v.* EMPEROR, 27 Cr. L. J. 383; A. I. R. 1926 All. 298 **895**

——— **s. 206**—*Case triable by Court of Session and Magistrate—Commitment, when justified.*

Where a Magistrate is inquiring into a case which is triable both by the Court of Session and by himself, he has a discretion to commit the case to the Court of Session or to try it himself

If the maximum sentence provided for the offence is within the powers of the Magistrate, a commitment would only be justifiable on very special grounds **Pat** BENGAL NAGPUR RAILWAY Co *v* MAKBUL, A I R 1925 Pat 755, (1926) Pat 74, 27 Cr L J 313, 7 P. L T. 343 **697**

——— **s. 209**—*Inquiry before commitment—Discharge of accused—Subsidiary witnesses not examined, effect of.*

When a Committing Magistrate finds that the prosecution evidence is totally unworthy of credit it is his duty to discharge the accused

Where all the material evidence has been heard and disbelieved, an order of discharge passed by a Committing Magistrate should not be set aside merely because there were one or two subsidiary witnesses who might have been called but whose evidence was not recorded **A** RATAN MANI *v* HANS RAM, 27 Cr L. J 274 **450**

——— **ss. 233, 234**—*Penal Code (Act XLV of 1860), ss 408, 477A—Criminal breach of trust—Falsification of accounts—Separate transactions*

Where a person is charged with committing one act of criminal breach of trust and also with falsifying accounts with a view to conceal that particular defalcation, the two may be said to form part of the same transaction Where, however, an accused person is charged with three separate acts of breach of trust and three separate acts of falsification of accounts, one in respect of each act of breach of trust, the charges cannot be tried together in one trial, as there are three separate transactions in respect of each act of breach of trust coupled with the corresponding falsifying of accounts, and the two offences are not offences of the same kind **B** EMPEROR *v.* MANANT K MEHTA, 27 Bom L R 1343, 49 B 892, A. I R 1926 Bom 110, 27 Cr L J 305 **689**

——— **s. 234** *See* BENGAL FERRIES ACT, 1885, ss. 16, 28 **871**

——— **s. 235**—'Same transaction', meaning of. *See* PENAL CODE, 1860, s 304-A **433**

——— **s. 239** *See* PENAL CODE, 1860, s 141 **145**

——— **s. 239**—*Abduction and rape on different occasions—Joint charge, legality of*

K and *B* abducted a woman and committed rape upon her at a place called D The woman was subsequently taken by *B* to different places where he alone committed rape upon her On these facts

Held, (1) that a joint charge under s 366 of the Penal Code against both *K* and *B* was justified;

(2) that a joint charge under s 376 of the Penal Code against both of them in respect of the occurrence which took place at D was also justified,

(3) that a joint charge against both of them of having committed rape upon the woman at D and in other places was both improper and embarrassing;

(4) that if it was intended to prosecute *B* with regard to the offences that he was accused of having committed elsewhere there should be separate charges with regard to those offences **C** KERAMAT MANDAL *v.* EMPEROR, 42 C L. J. 524; 27 Cr. L J 263, A. I. R. 1926 Cal 320 **439**

——— **s. 250**—*Frivolous or vexatious complaint—Compensation, award of.*

Under the Cr. P. C. of 1898 as amended in 1923, compensation can be awarded to the accused when the complaint is shown to be false and either frivolous or

vexatious and it is not necessary to show that it is both frivolous and vexatious. **A** KASHI PRASAD *v.* EMPEROR THROUGH RAM SUNDER, 24 A. L. J. 161, A. I. R. 1926 All. 141, 27 Cr. L. J. 300 **588**

——— **s. 250**—*Order for compensation—Appeal—Notice to accused, whether necessary.*

Though not legally necessary, it is desirable in general that an accused person should have notice of an intended interference with an order of compensation made in his favour under s. 250 of the Cr. P. C **S** MOMOO *v.* IBRAHIM, 27 Cr. L. J. 248; A. I. R. 1926 Sind 143 **424**

——— **ss. 257, 439** —*Opportunity given to accused to cross-examine prosecution witness—Witness, re-call of, at request of accused—Refusal of Magistrate to re-call witness—Discretion—Revision—High Court, interference by.*

While a Magistrate is bound under s. 257 (1) of the Cr. P. C. to issue process on the application of an accused person who has entered on his defence for compelling the attendance of a witness for the purpose of examination or cross-examination (save in certain stated circumstances which the Magistrate must find and must set forth in writing), the proviso to that section on the other hand definitely prohibits the Magistrate from issuing such process, if the accused has cross-examined or had the opportunity of cross-examining the witness after the charge was framed, unless the Magistrate is satisfied that such attendance is necessary for the purposes of justice, that is to say, unless he is convinced of the existence of the strongest possible grounds for disregarding the prohibition. The exception to the prohibition must not be read as swallowing up the prohibition or the whole proviso as enjoining that the Magistrate shall issue process if he is not satisfied that the attendance of the witness is unnecessary for the ends of justice, or if he is not satisfied that (as in the case of the witnesses not covered by the proviso) the application is made for the purpose of vexation or delay or for defeating the ends of justice. On the contrary the prohibition may not be disregarded unless in the opinion of the Magistrate the purposes of justice not merely warrant but demand such disregard It is not incumbent upon the Magistrate to record in writing his reasons for not being satisfied that the attendance of a witness is necessary for the purposes of justice.

If a good case is made out that the Magistrate's refusal to summon the witness was outside the limits of a reasonable discretion the High Court would interfere with the exercise of such discretion, but the position must be most clearly established that the Magistrate's decision was unreasonable and improper before the interference of the High Court could properly be invoked or expected. **Pat** AJO MIAN *v.* EMPEROR, 6 P. L. T. 626; A. I. R. 1925 Pat. 696, 27 Cr. L. J. 353 **865**

——— **s. 288.** *See* CR. P. C., 1898, s. 162 **577**

——— **s. 297**—*Jury trial—Charge—Omission to read material evidence—Omission to explain accused's right to benefit of doubt—Trial, whether vitiated.*

An objection that in delivering his charge to the Jury the Sessions Judge did not read material portions of the evidence is not in itself sufficient for the reversal of the verdict of the Jury. In each case it must be a question whether the omission to read the material portion of the evidence was such as to mislead the Jury and the Court of Appeal will not interfere if it has not prejudiced the accused.

The omission to tell the Jury that the accused is entitled to the benefit of any reasonable doubt is not a misdirection vitiating the trial, though as a matter of practice it is as well to always end the charge with these words. **N** RAHIMBEG *v.* EMPEROR, 7 N. L. J. 208; A. I. R. 1925 Nag 154, 27 Cr. L. J. 217 **169**

——— **s. 297**—*Sessions trial—Judge's charge to Jury—Heads of charge, contents of—Several accused—Duty of Judge—Defence evidence, part of, not placed before Jury, effect of—Earliest version of prosecution case, importance of.*

The object of a summing up under s. 297, Cr P. C, is to enable the Judge to place before the Jury the facts and circumstances of the case both for and against the prosecution so as to help them in arriving at a right decision upon the points which arise for their consideration.

It is not the province of the Judge to find the facts for the Jury and then make an attempt to persuade them to accept his conclusions as correct

A Judge's charge to the Jury must be recorded in such a way as would enable the High Court sitting as a Court of Appeal to judge whether the facts and circumstances of the case had been properly placed before the Jury and also whether the law had been correctly explained to them.

A mere statement in the heads of charge that the Judge explained certain sections of the Penal Code to the Jury does not satisfy the above requirement.

Where several accused persons are being jointly tried and the case as against all of them does not stand on the same footing and their defences are also different, the Judge must ask the Jury to consider the case as against each of the accused individually. The Judge's failure to do so is a very serious omission and is likely to prejudice the accused persons.

A verdict obtained from the Jury without placing before them an important piece of evidence in favour of the defence, whatever may have been its real worth, cannot be sustained.

The earliest version of an occurrence as given by an informant or prosecutor who is the principal witness to the occurrence, and on whose testimony practically the whole case depends, must always be placed before the Jury in order to enable them to judge of the truth or falsity of the prosecution case **C** KHIJIR-UDDIN *v.* EMPEROR, 42 C. L. J. 504; 27 Cr. L. J. 266; A. I. R. 1926 Cal. 139; 53 C. 372 **442**

——— **s. 342**—*Examination of accused, object of—Practice—Warning to accused, desirability of.*

The object of s. 342 (1), Cr P. C., is to give an opportunity to the accused, if he so desires, to tender any explanation he likes of his part in the case that is presented against him. It is extremely desirable that Magistrates should follow the practice of English Courts of warning an accused person when they invite his explanation under s 342 of the Code that he is not obliged to say anything unless he desires to do so. **M** *In re* KANNAMMAL, 23 L. W. 384; 27 Cr. L. J. 311; A. I R. 1926 Mad. 570 **695**

——— **s. 342 (2).** *See* PENAL CODE, 1860, s. 499 **429**

——— **ss. 342, 256, 537**—*Examination of accused—Further cross-examination of prosecution witnesses—Omission to examine accused—Illegality.*

The examination of a witness cannot be regarded as completed until the last stage at which the law authorizes its continuance has been passed, that is to say, until any supplementary cross-examination which the Court may allow is over. So that under s. 342

Cr P. C., an accused person has a right to be examined and to state his case after the further cross-examination of prosecution witnesses, even though he has already been examined before the charge was framed and he was called on for his defence This right is fundamental and an omission to so examine the accused is an illegality which vitiates the trial and not a mere error or irregularity which can be cured by s 537 of the Code R AH KHAUNG *v* EMPEROR, A. I. R. 1925 Rang. 363, 4 Bur L J 143, 27 Cr L J 336 752

——— **s. 350**—*Transfer of case*- De novo *trial, what is—Procedure*

Where a case in which a charge has been framed is transferred to the Court of another Magistrate and under the proviso to s 350 (1) of the Cr P C the accused claims a *de novo* trial the Magistrate *must re-commence* the trial and *not* merely allow further cross-examination of the complainant and other prosecution witnesses and generally proceed with the case from the stage where the charge was framed S SIDIK *v* EMPEROR, 27 Cr. L J 332 748

——— **s. 360**—*Depositions of witnesses, proper time for reading*

Section 360, Cr P. C, is mandatory and its provisions must be strictly complied with Reading over the depositions of all the witnesses examined on one day at the end of the day is not in strict conformity with the requirements of the law The evidence of each witness should be read over to him after it is completed before that of another witness commences. C ABDUL BARI MALLICK *v.* EMPEROR, 42 C L J 585, A. I R. 1926 Cal 157, 27 Cr. L J 375, 30 C W N 644 887

——— **ss. 367, 424**—*Judgment of Appellate Court, contents of.*

A judgment of an Appellate Court other than a High Court, must comply with the provisions of s. 367 of the Cr. P. C, that is to say, it must contain the point or points for determination and the decision thereon and the reasons for the decision S DWARKA *v* EMPEROR, 27 Cr L. J 343 855

——— **s. 374**—*Reference for confirmation of death sentence—Duty of High Court—Identification test during trial, value of.*

In a reference for confirmation of death sentence, the High Court must satisfy itself that the finding of fact arrived at is justified by the evidence on record

Value of identification test held during trial commented upon C ARSHED ALI *v* EMPEROR, 30 C W N. 166; 27 Cr. L. J. 378 890

——— **s. 421**—*Appeal—Record sent for—Summary dismissal.*

A Criminal Appellate Court should hear the Pleader and ought not to dismiss an appeal summarily after the record has been sent for and received C LALIT KUMAR SEN *v.* EMPEROR, 42 C. L. J. 551, A I R. 1926 Cal. 174, 27 Cr. L. J 382 894

——— **ss. 426, 497**—*Bail application rejected by Sessions Judge—Powers of High Court to grant—Respectability of accused and sufficiency of security, whether ground for granting bail—Suspension of sentence, when to be granted.*

The High Court has power to grant bail under s. 426 (2) of the Cr. P. C., after an application for the same made after a conviction by a Magistrate has been rejected by the Sessions Judge But the Court will only interfere with the discretion exercised by the Sessions Judge in refusing bail if that discretion

was manifestly wrong or if in fact no discretion has been exercised.

The principle which should guide the High Court in dealing with such an application, is whether there are reasonable grounds for believing that the applicant has committed the offence in question

Although the High Court has unfettered powers to grant bail, yet in exercising these powers the High Court ought to have regard to the limitations imposed on lower Courts in this connection

The mere previous respectability of a man is *per se* no sufficient reason for granting bail after he has been convicted of a criminal offence

The question of grant of bail is not only to be dealt with from the point of view of there being likelihood or not of the accused person absconding

In the absence of very special cause, no order for a suspension of sentence should be passed, as the result of such an order is that if the appeal fails finally the convicted person only serves the original period of his sentence less the period of suspension N SHAIKH KARIM *v.* EMPEROR, 27 Cr L J. 319, A I R 1926 Nag 279 703

——— **ss. 435, 438**—*Sessions Judge, order of—District Magistrate, power of, to make reference to High Court*

Section 435, Cr P C., does not authorise a District Magistrate to make a reference to the High Court questioning the propriety of an order passed by a Sessions Judge His proper course when he considers that action is necessary in such a case is to move the Government to file an application in revision A EMPEROR *v* DAULAT SINGH, 24 A. L J 224, 27 Cr L. J 327 743

——— **ss. 435 to 439**—*Revision—Judicial Commissioner's Court, power of—Interference with conviction by Single Judge—Conviction, alteration in, by Judge—Enhancement of sentence at instance of Government—Procedure*

It is not open to the Judicial Commissioner's Court under s 439 of the Cr P. C to alter or interfere with a conviction which has been arrived at by a Judge of the Court, as ss 435 to 439 of the Code clearly contemplate interference only with the findings, sentences or orders of any inferior Court

Where, however, a Judge of the Judicial Commissioner's Court hearing an appeal against a conviction, alters the conviction to one for a graver offence, but does not himself enhance the sentence, but suggests an action in that behalf by the Local Government, his judgment is not final from that point of view and the Judicial Commissioner's Court does not become a *functus officio* and is competent to hear application on behalf of the Local Government for enhancement of the sentence.

If a finding of a Sessions Judge for culpable homicide has been altered by the Appellate Court to one for murder, it is open to the Judicial Commissioner's Court sitting as a Court of Revision to pass a legal sentence for the offence of murder.

The proper construction to be put on s 439 (4), Cr. P. C, is that it refers to cases where there has been a complete acquittal and not to cases where there has been only an alteration of findings by the Appellate Court, the conviction by the Sessions Court being kept in tact

It is open to a Judge of the Judicial Commissioner's Court, who hears an appeal against a conviction and who comes to the conclusion that a graver offence has

been committed, not only to alter the conviction but to proceed on the revisional side to issue notice to the accused to show cause why the sentence should not be enhanced, and, if no sufficient cause is shown, to enhance the sentence accordingly. **N** LOCAL GOVERNMENT *v.* DOMA KUNBI, 27 Cr. L. J. 339 **851**

——— **s. 439**

See CR P. C, 1898, s 202 **590**
See CR P. C, 1898, s. 257 **865**
See CR. P. C, 1898, s. 476-B **454**
See CR P C., 1898, s 494 **750**

——— **s. 439**—*Acquittal—Revision — Interference by High Court.*

Per *Mullick, J.*—The power of interference in revision with orders of acquittal should be most sparingly exercised and only in cases where it is urgently demanded in the interests of public justice, for instance, where an order of acquittal has been made without trial and under an error of law. The High Court will not in any case interfere in revision with an order of acquittal on the ground that the inferences drawn by the lower Court from evidence are erroneous.

The Legislature does not intend that a private party shall secure by an application in revision a right which is reserved for the Crown only The High Court has the right to interfere in revision with orders of acquittal, but will only do so in very exceptional cases, for instance, where there has been a denial of the right of fair trial

Per *Macpherson, J*—The High Court will, in exercising its power of revision against an order of acquittal under s. 439 of the Cr P C, observe the limitations which established practice has imposed upon appeals under s. 417 of the Code But though in practice the broad rule of guidance that the Court will only interfere in revision with an acquittal, at least in a case where there has been a trial, sparingly and only where interference is urgently demanded in the interests of public justice, may be accepted, no general rule can be laid down beyond this that the Court will interfere where the circumstances require it: **Pat** SIBAN RAI *v.* BHAGWAT DASS, 6 P. L. T. 833; 27 Cr. L J. 235; 5 Pat. 25; A. I. R. 1926 Pat. 176 **219**

——— **s. 439**—*Revision—Re-trial, whether can be ordered.*

Where the High Court sets aside a conviction in revision on the ground that the trial was illegal, it has power to direct a re-trial. **B** EMPEROR *v.* MANANT K MEHTA, 27 Bom L. R 1343; 49 B 892; A. I. R 1926 Bom. 110; 27 Cr. L J. 305 **689**

——— **s. 439**—*U P. Village Panchayat Act (VI of 1920), ss. 31, 32—Criminal trial—Acquittal—Revision —Interference by High Court.*

Section 32 of the U. P Village Panchayat Act applies only to suits; the corresponding provision applicable to criminal cases is contained in s. 31 of the Act.

Where an Appellate Court sets aside a conviction on the ground that the proceedings in the Trial Court were without jurisdiction, the finding being based on a misreading of a statutory provision, the High Court is entitled to set aside the order of acquittal in revision. **A** MASALA *v.* EMPEROR, 27 Cr. L. J 358 **870**

——— **s. 439 (6)** *as amended by Act XVIII of 1923), effect of.*

The effect of the addition of sub-s. (6) to s. 439, Cr. P. C, by Act XVIII of 1923, is that the High Court, when adjudicating upon an application for enhancement of sentence, is converted into a Court of Appeal against conviction and the accused is entitled to show that his conviction is unjustified. **L** EMPEROR *v* TEJ RAJ, 27 Cr. L. J. 380 **892**

——— **ss. 439, 235**—*Revision—Misjoinder of charges—Notice to enhance sentence—Objection as to legality of trial, whether can be taken—Revision.*

The language of sub-s. (6) of s 439, Cr P C., is very wide and it is open to an accused person who has been called upon to show cause against an enhancement of sentence to raise any point that might be urged against his conviction either to a Court of Appeal or to a Revisional Court. It is, therefore, competent to an accused person in such a case to urge that his trial was illegal owing to misjoinder of charges. **B** EMPEROR *v* MANANT K MEHTA, 27 Bom. L. R 1343, 49 B. 892; A. I. R 1926 Bom. 110, 27 Cr L J. 305 **689**

——— **s. 476**—*Offence committed in course of judicial proceeding—Complaint by Court after termination of proceedings, legality of—Delay, effect of—Complaint, when to be made*

The power conferred upon a Court under s. 476 of the Cr P C. to make a complaint to a Magistrate when any of the offences referred to in s 195, cls (*b*) and (*c*), appears to have been committed in or in relation to a judicial proceeding before it, is exercisable even after the termination of the proceeding in which the offence complained of is said to have been committed.

No hard and fast rule can be laid down as to within what time a complaint should be made under s 476. If a Court after the lapse of a considerable time makes a complaint under s. 476 such complaint is open to the objection that it was made after an undue delay. Each case would depend upon its own circumstances

The effect of the changes made in the Cr. P. C by the introduction of ss. 476-A and 476-B is no longer to make it necessary that a proceeding under s 476 should be a part of, or so soon after the termination of the judicial proceeding as to make it a part of, the judicial proceeding **M** THOKALA SESHAMMA *v.* YELLATURI VENKAMMA, 22 L. W. 863; 27 Cr. L. J. 280, A. I. R. 1926 Mad. 238 **456**

——— **ss. 476, 476B**—*Complaint of offence—Preliminary enquiry, extent of—Appellate Court, interference by*

The grant of a right of appeal against an order making a complaint under s. 476 of the Cr P. C. has not conferred any new right upon the person against whom a complaint is made and the extent of the preliminary enquiry to be made under s. 476 is still left to the discretion of the Court. If a *prima facie* case has been made out the Appellate Court ought not to interfere with the order of a lower Court making a complaint. **Pat.** CHAMARI SINGH *v* PUBLIC PROSECUTOR, 4 Pat. 484; A. I. R. 1925 Pat. 677; 27 Cr. L. J. 371, 7 P. L. T. 372 **883**

——— **ss. 476, 476B, 439**—*Civil Procedure Code (Act V of 1908), s. 115—Order by Civil Court making or refusing to make complaint—Appeal—Revision, nature of.*

A petition for revision of an order passed by a superior Court under s. 476-B, Cr. P. C., on appeal from an order of a Civil Court making or refusing to make a complaint, must be dealt with under s. 115, C. P. C., and not under s. 439, Cr. P. C. **A** BANWARI LAL *v.* JHUNKA, 27 Cr. L. J. 278; 24 A. L. J. 217; A. I. R. 1926 All. 229 **454**

Criminal Procedure Code—contd.

——— **s. 480.** *See* PENAL CODE, 1860, s 179 **428**

——— **s. 488**—*"Means", what are—Husband, unemployed and without property, liability of, to maintain wife—Remedy, nature of*

The word 'means' in s 488 of the Cr P C does not signify only visible means such as real property or definite employment If a man is healthy and able-bodied, he must be taken to have the "means" to support his wife

Section 488 of the Cr P C provides a speedy remedy and safeguards a deserted wife or child from starvation, but when other issues are raised, they ought to be settled in the Civil Courts to which persons aggrieved by orders under the section ought to take their case **M** *In re* KANDASAMI CHETTY, 50 M L J 44, (1926) M W N. 146, 27 Cr L J 350, A I R. 1926 Mad 346 **862**

——— **ss. 493, 495**—*Railways Act (IX of 1890), s 145 (2)—Criminal trial—Public Prosecutor, right of precedence of—Pleader authorised by Agent of Railway to conduct prosecution, position of*

Section 145 (2) of the Railways Act only entitles a person authorized by the Agent of a Railway to conduct prosecution on behalf of the Railway Administration, to do so without the permission of the Magistrate, which would, except for the provision, be required under s 495 of the Cr P C *Prima facie*, neither s 145 (2) of the Railways Act nor s 495 of the Cr P C affects s 493 of the latter enactment which deals with the right of appearance and precedence of the Public Prosecutor before any Court in which any case of which he has charge is under trial

Where the Public Prosecutor has charge of a prosecution, a Pleader instructed by a private person, including the Agent of a Railway Administration, must act under the directions of the Public Prosecutor

Section 145 (2) of the Railways Act contemplates mainly, if not exclusively, prosecutions for offences under that enactment, that is to say, private prosecutions undertaken by the Railway Administration in which the Public Prosecutor does not appear as distinguished from public prosecutions undertaken or taken over by the State and in particular prosecutions under the Penal Code **Pat.** BENGAL NAGPUR RAILWAY Co *v* MAKBUL, A I R 1925 Pat 755, 1926 Pat 74, 27 Cr L J 313, 7 P L. T 343 **697**

——— **ss. 494, 439**—*Withdrawal of case, application for, rejection of—Discretion of Court—Revision*

Where a Sessions Judge in rejecting an application by the Public Prosecutor, under s 494, Cr P C, to withdraw a case, exercises a judicial discretion in a proper way, the High Court will not interfere with his order in revision. **M** KALIAPPA GOUNDAN, *In re*, 23 L W. 101, A. I R 1926 Mad 296, 27 Cr L J 334 **750**

——— **s. 497.** *See* CR P C, 1898, s 426 **703**

——— **ss. 497, 498**—*Bail—Policy of law*

The policy of the law is to allow bail in case of under-trial prisoners rather than to refuse it.

It is no ground for refusing bail that to grant it would prejudice the case **L** EMPEROR *v* GHULAM MUHAMMAD, A I R. 1925 Lah 510; 7 L. L J. 331 27 Cr. L J 302 **1590**

——— **s. 512**—*Absconder—Evidence recorded in absence—Finding as to absconding, whether necessary*

Section 512 of the Cr. P. C requires only that before the Court records the depositions of the witnesses for the prosecution it should be proved that the accused person has absconded and that there is no immediate prospect of arresting him, and not that a finding should be recorded to that effect.

A Magistrate before recording evidence under s 512, Cr. P. C, took the statements of two constables who had searched for the accused and had not been able to find him, and also issued a proclamation against the accused under s 87 of the Code

Held, that the requirements of s 512, Cr P C, had been fulfilled and that evidence had been properly recorded under that section. **L** DAYA KRM *v* EMPEROR, 6 L 489, 27 Cr L. J 247, A I R. 1926 Lah. 83 **423**

——— **ss. 514, 109, 110**—*Security for good behaviour—Conviction—Order of forfeiture, whether can be made subsequently.*

Where a person who has been put on security for good behaviour is convicted of an offence involving a forfeiture of the surety bond, it is not incumbent upon the Magistrate who convicts him to pass an order of forfeiture of the bond there and then. Such an order may be passed at any subsequent time **S** JEOMAL *v.* EMPEROR, 27 Cr L J 326 **742**

——— **ss. 514, 123, Sch. V, Form No. 42**—*Bail-bond filed in Court since abolished—Successor, powers of, to enforce bond—Security for keeping peace or good behaviour—Order directing accused to furnish security within fixed time—Absconding of accused—Sureties for attendance of accused, liability of*

A security bond given in form No 42 of the Fifth Schedule to the Cr P C originally filed in a Court which has since ceased to exist, can also be enforced by its successor to which the other functions of the defunct Court have been transferred.

Where a Magistrate passes an order under s 123, Cr. P C, directing an accused to give security for keeping the peace or for good behaviour for more than one year and allows him time to file a security by a fixed date, but the accused absconds on that date, the liability of the sureties who held themselves responsible for the accused's attendance in Court cannot be held to be terminated, because until it is known whether the accused can give the security or an order is passed referring the case for the final orders of the Sessions Judge it cannot be said that the proceedings in the Magistrate's Court have been terminated **A** MUSTAQIMUDDIN *v* EMPEROR, 24 A L. J 327, 27 Cr L J. 377, A I. R 1926 All 297 **889**

——— **s. 526**—*Application for postponement to enable to apply for transfer—Magistrate enquiring into allegations—Propriety—Transfer*

An enquiry by the Magistrate, on a party's applying to him for postponement of the case to enable him to apply for transfer, into the grounds of transfer himself is highly improper and would naturally cause apprehension in the mind of the petitioner that the Tribunal trying the case is not likely to give him an impartial and unbiased hearing **L** MUGHEESUDDIN *v* EMPEROR, 27 Cr L J 382: A I R 1926 Lah 236 **894**

——— **s. 526**—*Transfer of case—District Magistrate witness for prosecution—Examination of complainant at his house.*

The fact that the District Magistrate is cited as a witness for the prosecution in a trial before another Magistrate in the District is no ground for supposing that the accused will be prejudiced in his trial, so as to justify a transfer of the case

The fact that a Magistrate trying a case proposes to conduct that portion of the proceedings in which the complainant, who is a very old man and for many years has not left the precincts of his residence, is a

Criminal Procedure Code—concld.

witness, at the latter's residence, giving the accused every opportunity of being represented and conducting his case there, does not call for a transfer of the case, as the circumstance would in no way prejudice the trial O ISHWAR DAS *v.* EMPEROR, 27 Cr L J 344: A. I R 1926 Oudh 290 **856**

——— **s. 526**—*Transfer of criminal case—Expression of opinion by Magistrate in another case about guilt of accused*

The fact that a Magistrate has expressed in another criminal case a distinct opinion about the guilt of the accused is a reasonable ground for the apprehension that he may not have a fair and impartial trial before the Magistrate and is, therefore, a good ground for transferring the case from his file N VISHWANATH PRASAD *v.* EMPEROR, 27 Cr L J. 210; A. I R. 1926 Nag. 98 **162**

——— **s. 537.**

See CR P. C., 1898, s 190 **741**

See CR. P C., 1898, s 342 **752**

——— **s. 539**—*Affidavit sworn before Presidency Magistrate, Calcutta, whether admissible in Patna High Court.*

Affidavits sworn before a Presidency Magistrate of Calcutta are not admissible in the Patna High Court **Pat.** BENGAL NAGPUR RAILWAY CO *v.* MAKBUL, A. I R 1925 Pat. 755, (1926) Pat. 74; 27 Cr. L J 313, 7 P L T 343 **697**

——— **s. 562**, *object of—Discretion, exercise of, principles relating to.*

The sole intention of s 562 of the Cr. P C is that an accused person who is convicted of a crime should be given a chance of reformation which he would lose by being incarcerated in prison The powers conferred by this section should not be used for the purpose of showing favour to any particular class of persons and in the exercise of these powers a Magistrate should see that the crime that the accused person has committed does not indicate that he is rather a fortunate habitual than a true first offender. **S** EMPEROR *v.* MATHRO, 27 Cr. L J. 309; A I R. 1926 Sind 101 **693**

——— **s. 562**—*Release on security — Revision—Order, whether can be set aside.*

Section 562 (3), Cr. P. C., empowers the High Court in the exercise of its powers of revision to set aside an order under s 562 and substitute a sentence of imprisonment. **A** EMPEROR *v* KESAR, 27 Cr. L. J. 303, 24 A. L. J 228, A. I. R 1926 All. 226 **591**

——— **Sch. V, Form No. 42.** *See* Cr. P. C., 1898, s. 514 **889**

Cross-suits. *See* C P C., 1908, ss 10, 11 **198**

Custom—*Alienation—Necessity—Marriage of children—Enquiry, scope of*

Where the necessity stated for an alienation of ancestral land by a village proprietor is the marriage of children, and this is also spoken to by the *lambardar*, who attests the sale-deed, and there are, as a matter of fact, several young children, one of whom is approaching marriageable age, the vendee is not bound to make any further enquiry as to whether any actual steps to make arrangements for marriages have been taken or not. **L** IBRAHIM *v* SHAH MAHOMED **263**

——— ———, *essentials of—Family custom—Modern instances—Inference of custom.*

Per *Raza, J.*—If a party relies upon the special custom of a family to take the succession out of the ordinary law, such custom must be proved to be ancient, continuous, certain and reasonable and, being in derogation of the general rule of law, must be construed strictly A custom must be satisfactorily proved by evidence of particular instances so numerous as to justify the Court in finding in favour of the custom

When the custom is proved to exist it supersedes the general law which, however, still regulates all outside the custom.

Per *Ashworth, J*—A custom must be unequivocally stated and proved but it does not follow that it cannot be proved by inference. Inference is one of the methods of proof and in the case of custom there is no reason to reject a clearly logical inference against which no consideration prevails.

Per *Raza, J.* (*Ashworth, J.*, dissenting)—One instance or even four modern instances are not sufficient to prove a family custom.

The existence of a custom of the brothers and nephews of a deceased Hindu succeeding together would not lead to a necessary inference that a custom existed to this effect also on the death of a childless widow. O RAMPAL SINGH *v.* RAJRANG SINGH, 3 O. W N. 73, A. I R 1926 Oudh 211 **126**

——— *Inheritance — Daughters v Collaterals—Muttazai Pathans of* Basti *Mithu Sahib in Jullundur District.*

Among Muttazai Pathans of *Basti* Mithu Sahib, a suburb of Jullundur City, a daughter does not inherit in the presence of brothers or near collaterals of the last male owner

The Muttazai Pathans of *Basti* Mithu Sahib are presumably governed by agricultural custom, and the onus to prove that a daughter inherits in the presence of brothers or near collaterals lies on the daughter. **L** MURAD BIBI *v* AMIR HAMZA **278**

——— Kurhi kamini *cess, nature of—Liability of non-proprietary owners of houses—Burden of proof—Suit for declaration that cess not payable—Jurisdiction of Civil Courts.*

Kurhi kamini is a cess of the nature of a house or ground rent and not in the nature of a hearth cess.

The burden of proving that *kurhi kamini* dues are leviable from such non-proprietary residents of the village as are owners of the houses and the sites lies on the person seeking to recover them.

A suit for a declaration by a person that he is not liable to pay *kurhi kamini* dues is cognizable by a Civil Court. **L** SINGH RAM *v.* KALA, 8 L L. J. 39; A. I. R. 1926 Lah. 244; 7 L. 173 **1012**

——— *Pre-emption—Village Badnauli, Tahsil Hapur, Meerut District*

A custom of pre-emption exists in village Badnauli, Tahsil Hapur, Meerut District. **A** KHAZAN SINGH *v.* UMRAO SINGH, A. I. R. 1925 All. 44; L R. 5 A. 609 Civ. **335**

——— *Pre-emption*—Wajib-ul-arz, *entry in, construction of—Preferential right of pre-emption.*

A *wajib-ul-arz* classified the different categories of pre-emptors as follows:—

(1) Own brothers:

(2) Co-sharers in the same *patti*;

(3) Co-sharers in other *pattis*.

A later *wajib-ul-arz* gave only one classification of pre-emptors, namely:—"Own brothers and co-sharers of the village"; and it was provided that if none of these people wished to pre-empt, a sale may be made to strangers:

Custom—contd.

Held, (1) that the two *wajib-ul-araiz* must be read together inasmuch as the right of pre-emption recorded therein was in fact the same, the later record having been prepared in a less careful manner than the one which preceded it,

(2) that under the terms of the *wajib-ul-arz* an own brother of the vendor had a better right of pre-emption than a co-sharer in the village A MAQSUD ALI *v.* ABDULLAH, L. R 6 A. 112 Civ, A I R 1925 All 342 **468**

———, question of, whether of fact or law. *See* C. P. C., 1908, s. 11 **769**

——— Shamilat—*Grazing rights—Proprietors, right of, to cultivate—Pasturage—Sufficient area to be set apart*

Plaintiffs, *malikan-i-qabza*, sued defendants, proprietors, for a declaration that they were entitled to graze their cattle in and to take away wood from the *shamilat deh*, and for an injunction restraining the defendants from cultivating their land It appeared that the plaintiffs' right to graze their cattle, to take away fuel and to cut grass from the area in dispute had been established in previous litigation between the parties

Held, that though the defendants were entitled to cultivate the land, the plaintiffs were entitled to have sufficient pasturage for their cattle and that, therefore, the defendants' right of cultivation should extend only to so much of the land as will leave plaintiffs a sufficient amount of area for grazing purposes L KANSHI RAM *v* MUHAMMAD ABDUL RAHMAN, 6 L. L J 336; A I R 1925 Lah 216 **403**

——— *Succession—Diversion of ancestral property—Extinction of lineal descendants—Reversion*

On the lineal descendants of the person, in whose favour a diversion of ancestral land had been made, dying out, the land reverts to the male heirs of the last owner before the diversion, and not to those of the person who received the land from him L DIN MOHAMMAD *v* MATAB BIBI, A I R 1926 Lah 203 **252**

——— *Succession*—"Malik", *meaning of—Widow, estate taken by*—Kayasthas *of village Khanpur Khabura, District Rai Bareli*

Where a devisee or a donee is described as a '*malik*," he has a full right of alienation unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred.

A clause in a *wajib-ul-arz* relating to the succession to the estate of a deceased proprietor ran as follows —"If included amongst the wives one wife has sons and the others have none then such wives as have no sons shall take shares for the period of their lives, and after the deaths of such wives the sons of the other wives shall be *malik* of such shares and if there be no wife with sons, then the wives of the deceased shall become *malik* over the inheritance of the deceased in equal shares"

Held, that the meaning of the concluding portion of the clause was that where a proprietor had left only one wife without a son, that wife would become absolute owner with right of transfer over the whole of his property.

Among *Kayasthas* of village Khanpur Khabura, in the Rae Bareli District, a widow, in the absence of sons, succeeds to the estate of her deceased husband as an absolute owner with full powers of alienation. O SARTAJ KOER *v*, MAHADEO BUX, A. I. R. 1926 Oudh 332 **657**

——— *Wajib-ul-arz, entry in, value of.*

Custom—concld.

A Settlement Officer in recording custom in a *wajib-ul-arz* has to perform duties which the Government orders him to perform One of these duties is to record customs as the Settlement Officer finds them and not as he might think they ought to be. When, therefore, it is not shown by reliable evidence that the Settlement Officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of the custom is ambiguous, the record in a *wajib-ul-arz* of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen O SARTAJ KOER *v.* MAHADEO BUX, A. I. R 1226 Oudh 332 **657**

——— Wajib-ul-arz *entries, value of*

Entries in *wajib-ul-arz* as to the liability for village dues do not bind any one except the proprietors who are parties to them L SINGH RAM *v.* KALA, 8 L L. J. 39, A I R 1926 Lah 244, 7 L 173 **1012**

——— *Widow—Alienation — Exchange — Suit for declaration challenging exchange—Second appeal—Certificate, whether necessary — Punjab Courts Act (VI of 1918), s 41*

In a suit for a declaration that an alienation effected by a widow is without necessity and will not affect the reversionary rights of the plaintiffs, a second appeal is competent without a certificate, as no question of existence or validity of a custom is involved therein, because admittedly a widow cannot effect an alienation except for necessity

Customary prohibition against alienations by a widow is not confined to cases of sales and mortgages but applies to those of exchanges as well L BUTA *v.* GHULAM MUHAMMAD, A I. R 1926 Lah 247 **725**

Damages, prospective *See* CAUSE OF ACTION **75**

Debtor and creditor—Duty to find and pay creditor. *See* C P C, 1908, s 10 (c) **760**

Declaratory suit—Necessary findings. *See* PUNJAB MUNICIPAL ACT, 1911, s 193 **966**

——— *Temporary injunction, grant of*

A temporary injunction can be granted in a suit for declaration L BANTU *v* I EHNA DAS **723**

Decree, construction of *See* EXECUTION OF DECREE **504**

———, *joint—Decree against several defendants—Some reliefs common against all and some separate —Decree, whether joint*

A decree is a joint decree if any one of the reliefs granted under the decree is against the defendants jointly, even though some other reliefs may be given against each defendant separately, so that an application to execute the decree against one defendant as to one relief saves limitation against all defendants in respect of all reliefs M PATTAMAYYA *v* PATTAYYA, 50 M L. J 215; (1926) M W N. 262, A. I R. 1926 Mad 453 **782**

———, setting aside of, on ground of fraud. *See* FRAUD **317, 322**

Defamation, civil and criminal—Distinction. *See* PENAL CODE, 1860, s. 499 **429**

Dekkhan Agriculturists' Relief Act (XVII of 1879)—*Execution of decree—Death of judgment-debtor—Legal representative, whether can prove status as agriculturist*

Where a judgment-debtor dies after decree but before execution proceedings are completed, it is open to his legal representative to prove that he was an agriculturist and thus claim the benefit of the provisions of the Dekkhan Agriculturists' Relief Act B SHIDRAJ BHOJRAJ DESAI *v* RENAKI KONDAJI MAHAR, 27 Bom. L. R. 1490; A. I. R. 1926 Bom. 140 **554**

Dekkhan Agriculturists' Relief Act—concld.

——— **s. 3**—*Suit to set aside sale—Relief, whether can be granted*

The Dekkhan Agriculturists' Relief Act gives extraordinary reliefs in certain cases which are specified in the Act These include a suit for redemption but not a suit to set aside a sale-deed In a suit of the latter kind, therefore, the plaintiff is not entitled to take advantage of the provisions of the Act **B** VISHVANATHBHAT ANNABHAT PUJARI *v* MALLAPPA NINGAPPA, 27 Bom. L. R. 1103; 49 B. 821, A. I. R. 1925 Bom. 514 **628**

Deposit—loss, liability for. *See* LEASE **520**

Document, *material alteration in—Suit to recover money—Acknowledgment produced in evidence—Material alteration in acknowledgment, effect of—Suit, whether can be decreed.*

The rule that no decree can be passed in a suit brought on a document which has been materially altered after execution without the privity of the party to be affected by it, has no application where the obligation to be enforced does not arise under the altered instrument and the instrument is produced merely as a piece of evidence in proof of the obligation

Where a cause of action for recovery of money lent to the defendant exists independently of any document which may have been obtained from the defendant in support of the advance, the fact that the document has been materially altered is no ground for dismissing plaintiff's claim for the advance.

An acknowledgment which merely evidences the receipt of a loan does not amount to a contract and does not furnish a cause of action, and a claim in proof of which such an acknowledgment is produced can be decreed despite the fact that the acknowledgment has been materially altered without the consent of the debtor affected by it

A material alteration in a written acknowledgment of debt does not render it inoperative as the acknowledgment is merely an evidence of pre-existing liability **N** TAPIRAM *v* JUGALKISHORE, 21 N. L R 169; A I R 1926 Nag 209 **305**

Easement—*Customary right—Public nuisance*

No right to the user of a public property can be acquired by custom, where the user amounts to a public nuisance Such a custom is unreasonable **M** PAKKIR MAHAMUD *v.* PICHAI THEVAN **465**

———, grant of, whether transfer of ownership *See* TRANSFER OF PROPERTY ACT, 1882, s 118 **672**

Easements Act (V of 1882), s. 4 — *Easement, essentials of—Property, ownership in, claim of—Easements, whether can be claimed—Long user.*

To create an easement there must be a dominant and a servient heritage—and the right acquired must be for the beneficial enjoyment of the dominant heritage

User under a claim of ownership of the property, in and over which such user is had, and which is negatived, cannot operate to found a right of easement over the property.

In the absence of a finding that the property is either private property or the property of the Government, a right of easement by prescription cannot be established over the property.

The acquisition of an easement by prescription must be by a definite person or persons either natural or juristic and a fluctuating and uncertain body of inhabitants like a particular community of a village, cannot acquire such right. **M** PAKKIR MAHAMUD *v* PICHAI THEVAN **465**

Easements Act—concld.

——— **s. 52.** *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, SCH. II, CL. (8) **683**

Ejectment—Jus tertii, *plea of, whether can be taken.*

In an action of ejectment the defendant is entitled to plead in defence the right of some one having a superior or equal title with the plaintiff to the property in dispute, but if he fails to prove satisfactorily that the parties whom he has put forward are entitled to the property in preference to the plaintiff the plaintiff would be entitled to a decree. **P. C.** MAHABIR PRASAD TEWARI *v.* JAMUNA SINGH, A. I. R. 1925 P. C. 234; (1925) M W. N. 738; 23 L. W. 75 **31**

——— **suit**—*Non-joinder of party, effect of.*

The mere non-joinder of a party in an ejectment suit is not fatal to the trial of the suit. The only result of such non-joinder would be that the party not impleaded will not be bound by any decree passed in the suit **C** BAIKUNTHA NATH DE *v.* SHAIK HARI, A. I. R. 1926 Cal. 592 **899**

Election petition—Amendment—After period fixed. *See* MADRAS LOCAL BOARDS ACT, 1920, ss. 35, 56 **100**

English Law, principles of, whether to be followed. *See* LANDLORD AND TENANT **537**

Estoppel. *See* C. P C., 1908, O. XXI, R. 89 **732**

———, *equitable—Fraudulent acquiescence.*

Mere acquiescence cannot deprive a person of his legal rights, unless he has acted in such a way as would make it fraudulent for him to set up those rights The elements necessary to constitute such fraudulent acquiescence are :—

(1) that the trespasser must have made a mistake as to his legal rights,

(2) that he must have expended some money or must have done some act (not necessarily upon the land of the owner of the legal right) on the faith of his mistaken belief,

(3) that the possessor of the legal right must know of the existence of his own right which is inconsistent with the right claimed by the trespasser,

(4) that the possessor of the legal right must know of the trespasser's mistaken belief of his rights,

(5) that the possessor of the legal right must have encouraged the trespasser in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal rights.

Where all these elements exist there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but nothing short of all these will do. **A** JAI NARAIN *v.* JAFAR BEG, 24 A. L. J. 355 **1017**

Evidence—*Inadmissible evidence, whether can be admitted by consent of parties—Proof, mode of—Waiver.*

The consent of parties cannot make a piece of evidence relevant and admissible, which is not relevant and admissible under the provisions of the Evidence Act.

It is open, however, to the parties to waive the benefit of those provisions of the Evidence Act which lay down the mode of proof of a document or statement, which, if proved, would be relevant. **M** GONNABATHULA THAMMAYYA *v.* GONNABATHULA CHINNAYA, 22 L. W 752; (1926) M W N. 38; A. I. R. 1926 Mad. 282 **594**

——— *Practice—One party calling opposite party as witness—Procedure, whether regular.*

It is an objectionable practice for one party to call the opposite party as his own witness. There is no objection whatever to an Advocate seeking to prove his case out of the mouth of the opposite party; but

if he puts the opposite party into the witness-box, he takes the risk of making statements made by that witness part of his own evidence.

Although in a proper case the Court may be satisfied from the witness's demeanour that he is hostile and may in such circumstances even allow the Advocate to cross-examine, it is irregular for a Court to allow one party to call the other as his witness on the ground that it is desirable to elicit some facts from the said witness before the Court hears any other evidence in the suit **M** KOMMINENI APPALASWAMY *v.* KOMMINENI SIMHADRI APPADU, 23 L W 29, A I R 1926 Mad 384 **844**

——— *Statements of persons not examined as witness as to whereabouts of accused at time of occurrence, admissibility of.*

A statement made by a person who is not examined as a witness that the accused was not in his house on the night on which the offence is alleged to have been committed is not admissible in evidence **C** KERMAT MANDAL *v* EMPEROR, 42 C. L. J. 524, 27 Cr L J 263, A I R 1926 Cal 320 **439**

Evidence Act (I of 1872), s. 6—Res gestæ, *what is.*

What a person states at the time of an occurrence in respect of the occurrence itself is *res gestæ* under s. 6 of the Evidence Act A statement, however, made at the time of an occurrence relating to a previous occurrence which took place a year earlier is not part of the *res gestæ* and is not admissible in evidence. **C** KHIJIRUDDIN *v* EMPEROR, 42 C L J 504, 27 Cr. L J. 266, A I R 1926 Cal 139, 73 C. 372 **442**

——— **s. 8**—*Statement influencing conduct of witness, admissibility of.*

A statement made by a person, who is not examined as a witness, is not admissible under s. 8 of the Evidence Act as having affected the conduct of a witness assuming that such conduct is relevant. **C** KHIJIRUDDIN *v* EMPEROR, 42 C L J 504, 27 Cr L J 266, A I R. 1926 Cal 139, 53 C 372 **442**

——— **s. 13,** *scope of—Assertion of right made in previous suit, admissibility of.*

The language of s. 13 of the Evidence Act is very wide and covers the assertion of a right in a previous suit in which that right was in dispute It is not necessary that the right should have been successfully asserted, the mere assertion of the right is sufficient. **C** RAM KUMAR DAS *v.* HARNARAIN DAS **104**

——— **s. 23**—*Appeal against award—Land acquisition proceedings—Price of acquired property, determination of—Private offer by Government, whether admissible*

Where after a notification has been issued for acquisition of a particular property, negotiations are started by the Government with the owner of the property on the question of price, and an offer purporting to be without prejudice is made to him, the evidence of the offer for purposes of determining value in Court, in an appeal by the owner against the award of the District Judge, is not admissible as it must be inferred that the parties agreed together that the evidence of the offer should not be given in Court **L** RANZOR SINGH *v* SECRETARY OF STATE FOR INDIA **319**

——— **ss. 47, 45, 73**—*Handwriting, proof of —Comparison with admitted handwriting, whether to be made by Jury.*

A party wishing to prove that a document is in the handwriting of a particular person can rely upon expert evidence under s. 45 of the Evidence Act, or

the opinion of a competent witness under s. 47 of the Act, or direct comparison of the document with proved or admitted documents under s. 73 of the Act.

When an accused person puts forward in his defence a letter alleged to have been written by the prosecutor and the latter denies the fact, and the accused requests the Court to compare the handwriting of the letter with the handwriting of documents admittedly written by the prosecutor, the Judge must place the documents before the Jury and ask them to make the comparison and decide whether the handwritings do or do not tally **C** KHIJIRUDDIN *v* EMPEROR, 42 C L J 504, 27 Cr. L. J. 266, A I R 1926 Cal. 139, 53 C. 372 **442**

——— **s. 73.** *See* EVIDENCE ACT, 1872, s 47 **442**

——— **s. 74**—*Plaint, whether public document—Certified copy, whether admissible*

Neither a plaint nor a written statement is a public document, and a certified copy of either is not admissible in evidence **Pat** TARKESHWAR PRASAD TEWARI *v.* DEVENDRA PRASAD TEWARI, 3 Pat L R. 270, 7 P L. T 267, A. I R 1926 Pat 180 **184**

——— **s. 78**—*Proof of Act—Publication in* Gazette of India—*Publication by Superintendent of Government Printing—Preference*

Under s 78 of the Evidence Act the publication in the *Gazette of India* is the proper method of proving an Act and if there is a conflict between such a publication and a publication by the Superintendent, Government Printing, Calcutta, preference must be given to that in the *Gazette of India* **M** SUBRAMANIA IYER *v* SHUNMUGAM CHETTIAR, 49 M L J 363, 22 L. W. 538, A I R 1926 Mad 65 **566**

——— **s. 86**—*Statements recorded in Native State —Copies forwarded by Resident—Certificate, whether necessary*

The mere fact that copies of depositions of witnesses recorded in a Court in a Native State are forwarded to a British Court by the Resident in due course is not equivalent to the certificate referred to in s 86 of the Evidence Act

When a certificate is required by law it cannot be dispensed with merely because it can be obtained at any time **L** MURLI DAS *v* ACHUT DAS, 5 L 105, A I R 1924 Lah 493 **138**

——— **s. 91**—*Unregistered partition deed—Terms of partition and division of status, proof of—Conduct of parties*

That there was a division of status can be proved even if the deed of partition is inadmissible in evidence for want of registration

An unregistered document may be used to determine the nature of the possession held by a party

Where a deed of partition is inadmissible in evidence for want of registration, the terms of the partition cannot be proved except by the document itself But if it is unnecessary to decide the terms of partition, it is open to a Court to infer from the conduct and dealings of the parties that there was a division of status **M** RAMU CHETTY *v* PANCHAMMAL, (1926) M W N 45, A. I R 1926 Mad 402 **1028**

——— **s. 92.** *See* CONTRACT ACT, 1872, s 132 **667**

——— **s. 92**—*Contract in writing—Oral evidence if admissible*

Oral proof cannot be substituted for written evidence of any contract which the parties have put into writing **C** DHANA MOHAMMED *v* NASTULLA MOLA, A. I. R. 1926 Cal 637 **948**

——— **s. 92**—*Suit on pro-note—Discharge, proof of.*

Where in answer to a suit on a pro-note, the defend-

ant admits execution of the note and receipt of the money but pleads that the amount was agreed to be treated as an advance towards the pay and bonus of the defendant while in plaintiff's service and that as the pay and bonus had fallen due before date of suit, the note had been discharged, proof of the agreement is not excluded by s. 92 of the Evidence Act, inasmuch as, in the circumstances, it is merely a method of payment or discharge proveable and enforceable as such. M SATHEPPA CHETTIAR *v.* MUTHUSAMI PILLAI, A. I. R. 1926 Mad. 537 393

——— s. 102 Ill. (b). *See* MORTGAGE SUIT 346

——— s. 112. *See* MAHAMMADAN LAW—MARRIAGE 82

——— s. 114—*Limitation Act (IX of 1908), s. 20—Payment towards decree—Payment towards interest—Denial of payment—Presumption—Extension of limitation.*

Ordinarily one does not split up the principal and interest in a decree, and, where a judgment-debtor makes a payment towards the decree it is a fair presumption to make that the payment was made towards both principal and interest for purposes of s 20 of the Limitation Act Each case, however, must be decided on its own facts.

Where a judgment-debtor, who has made a payment towards the decree, denies the fact of the payment it may be presumed, that it was his knowledge that he paid off principal and interest which drove him to falsehood. M SUGGUSETTY SUBBAYYA *v.* IRUGULAPATI GANGAYYA, 22 L. W. 827; A. I R. 1926 Mad 183 687

——— s. 115. *See* HINDU LAW—REVERSIONER 19

——— s. 133—*Approver, statement of, value of—Confession brought about by pressure of relatives.*

It is not safe to place any reliance upon the testimony of an approver who was prevailed upon by his relatives, who were members of a faction hostile to the accused, to make a confession and turn King's evidence. L TEJA SINGH *v* EMPEROR, 7 L L. J 631, 27 Cr L J. 285 461

——— s. 145—*Witness, whether can be cross-examined with reference to previous deposition.*

Under s. 145 of the Evidence Act a witness may be cross-examined as to previous statement made by him in writing without such writing being shown to him or being proved Only if it is intended to contradict him by the writing his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him M RAMAKKA *v.* NEGASAM 47 M 800, 48 M L J 89; A. I R 1925 Mad 145 792

——— s. 154—*Cross-examination of party's own witness, effect of—Permission, when to be granted.*

When a witness who has been called by the prosecution is permitted to be cross-examined on behalf of the prosecution under the provisions of s 154 of the Evidence Act, the result of that course being permitted is to discredit that witness altogether and not merely to get rid of a part of his testimony, so that the accused is deprived of the benefit of any statement which the witness may have made in his favour. For this reason the law has enacted that a party desiring to cross-examine its own witness has to take the permission of the Court, implying thereby that there is a discretion in the Court whether it would permit the witness to be cross-examined or not. That discretion must always be exercised with caution by the Court before which the matter comes up for consideration. C KHIJIRUDDIN *v.* EMPEROR, 42 C. L. J. 504; 27 C. L. J. 266; A. I. R, 1926 Cal. 139; 53 C. 572 442

——— s. 155 (4)—*Character of prosecutrix, whether relevant.*

In a case of rape evidence as regards the general immoral character of the woman is relevant under s 155 (4) of the Evidence Act C KERAMAT MANDAL *v.* EMPEROR, 42 C. L J 524, 27 Cr. L. J. 263; A. I. R. 1926 Cal 320 439

——— ss. 159, 160—*Dying declaration, proof of.*

A dying declaration, if certified in Court, as having been recorded correctly, is admissible in proof of its own contents and it is unnecessary that the person recording it should repeat exactly in his own words what the deceased had said. L PARTAP SINGH *v.* EMPEROR, 27 Cr. L J. 215, 7 L. 91 167

——— s. 165. *See* CR P C., 1898, s. 162 453

——— s. 167—*Improper admission of evidence, effect of.*

Under s 167 of the Evidence Act the improper admission of evidence is not of itself a ground for a new trial or reversal of a decision in a case, if it appears to the Court that independently of that evidence there was sufficient evidence to justify the decision Pat BADRI CHOUDHRY *v.* EMPEROR, 6 P L. T 620, A I R 1926 Pat. 20; 27 Cr L. J. 362 874

Execution of decree.

See ALSO (*i*) C. P C., 1908, ss. 36 TO 74, O. XXI, SCH III.

(*ii*) LIMITATION ACT, 1908, SCH. I, ARTS. 181, 182.

See C. P. C., 1908, s 11, EXPL. IV 377

See C P. C., 1908, s 115 298

See C. P C., 1908, O XXI, R 100 326

See LIMITATION ACT, 1908, SCH. I, ART. 182 (5) 770

——— Agreement not to execute decree, effect of.

See C P. C., 1908, O. XXI, R 2 677

——— *Assignment of decree—Application by assignee for execution of decree, dismissal of—Re-assignment in favour of decree-holder, effect of—Assignment by decree-holder in favour of third person—Second assignee, whether entitled to execute decree*—Res judicata

An assignee of a decree made an application for being substituted in place of the decree-holder and for execution of the decree. The application was dismissed as the assignee produced no evidence to prove the assignment A subsequent application for execution made by the assignee was dismissed on the ground of *res judicata* Thereafter the assignee transferred his rights under the assignment back to the decree-holder, who then assigned the decree to a third person and the latter made an application for execution of the decree:

Held, that by the re-assignment of the decree in favour of the decree-holder, the latter obtained no better right to execute the decree than the assignee himself possessed and that consequently the second assignee was in no better position than the original assignee or the decree-holder and was not entitled to execute the decree. N PANDURANG *v.* SAMBHASHEO, 21 N L. R 159; A. I R. 1926 Nag. 200 47

——— *Attachment—Omission of, effect of.*

An attachment is a measure resorted to for the protection of the decree holder and the purchaser against intermediate alienation and is only a step to be taken by the Executing Court in bringing to sale the properties of a judgment-debtor. If this step is omitted, the omission amounts only to an irregularity and the sale can be set aside only if it has

resulted in substantial loss. The absence of attachment does not affect the jurisdiction of the Executing Court to sell the property M SUBRAMANIA AIYAR *v.* KRISHNA IYER, (1925) M. W. N. 887, A I. R. 1926 Mad. 211 833

——— *Death of judgment-debtor before sale—Legal representatives not impleaded—Sale, whether nullity.*

Where subsequent to an order for sale of the judgment-debtor's property in execution of a decree, the judgment-debtor dies, an execution sale conducted without his legal representatives being brought on record as parties is a nullity M KARIPINENI RAJAYYA *v.* KALPATAPU ANNAPURNAMMA, 22 L. W. 828, A I R 1926 Mad. 138 308

——— *Decree, whether can be questioned.*

Parties in an execution case cannot call in question the validity of a decree as actually framed or impugn the jurisdiction of the Court that framed it Nor is it open to a party in an execution case to go behind the plain and obvious meaning of a decree O SHANKAR BAKSH *v.* TALUQDEI, 3 O W N 375 722

——— *Execution petition, recording of—Application to revive—Limitation Act (IX of 1908), Sch. I, Arts 181, 182.*

There is no provision of law by which an Executing Court can lodge an execution petition or record it, or strike it off for what is called the statistical purposes, and it cannot dismiss the application for the reason that it is long pending The Executing Court is bound to follow the procedure laid down in the Code and an execution petition which is ordered to be recorded must be considered as pending and the right to apply for its continuance accrues from day to day M PATTAMAYYA *v* PATTAYYA, 50 M L J. 215, (1926) M. W. N 262; A I R 1926 Mad 453 782

——— *Hindu joint family—Attachment of co-parcener's interest before judgment—Death after decree and before execution—Right of survivorship if defeated—Decree, construction of—Charge, creation of*

An attachment before judgment of the interest of a co-parcener in a Hindu joint family property, followed by a decree, will, in the event of his death subsequent to the decree and before execution, have the effect of precluding the accrual of title by survivorship as against the attaching creditor, in the same way as an attachment after decree, so that the surviving co-parceners can take the property only subject to the claims of the attaching creditor

Where a compromise decree stated that the plaintiffs would recover the amount "from the defendants and also by the sale of the properties now under attachment before judgment by the Court without having any necessity for re-attachment, and from the defendants' other properties, and that the attachment before judgment would continue in force until the whole amount was paid according to the compromise decree.

Held, that the decree did not constitute a charge on the properties and did not confer on the decree-holders any higher rights than those of money-decree-holders who had effected attachment of those properties for executing their decrees M SANKARALINGA MUDALIAR *v.* OFFICIAL RECEIVER, 49 M. L J 616, (1925) M. W N 832; A I. R. 1926 Mad 72 504

——— *Mortgage-decree—Sale held without compliance with condition precedent, validity of—Auction-purchaser, position of—Sale set aside—Purchase-money, whether can be directed to be re-paid—Inherent power of Court—Civil Procedure Code (Act V of 1908), ss. 144, 151.*

Where an auction-sale takes place in the exercise of a jurisdiction vested in a Court, a third party purchaser cannot be bound by the result of any further litigation relating to the decree. Where, however, the terms of a decree itself do not justify a sale of the property, the sale cannot hold good merely because the Court had pecuniary and territorial jurisdiction over the property, even if the auction-purchaser is a *bona fide* purchaser, in the sense that he is a third party purchaser who had no notice of the facts of the case

Where a mortgage-decree lays down a condition precedent which must be complied with before the mortgaged property can be sold, and the property is sold without such compliance, the sale cannot be allowed to stand

Where certain property which has been sold in execution of a decree obtained on a prior mortgage is subsequently sold in execution of a decree obtained on a puisne mortgage and the subsequent sale is set aside at the instance of the purchaser at the previous sale in a proceeding to which the judgment-debtor, the decree-holder, the previous purchaser and the subsequent purchaser are all parties, the Court has inherent power to direct the decree-holder to pay back to the auction-purchaser the amount paid by the latter as the price of the property. A ATMA RAM *v.* NANAK CHAND, A. I R. 1926 All. 274 571

——— *Mortgage-decree—Sale of properties, order of—Mortgagee, right of*

A mortgagee decree-holder is entitled to bring the mortgaged properties to sale in execution of his decree in any order he chooses whatever his motives may be. It is immaterial to his rights that the mortgagor had since the mortgage sold one of the mortgaged properties to some third person M TADEPALLI SUBBA RAO *v* MOTAMURI LAKSHMINARAYANA, 22 L W. 389, A. I R. 1925 Mad 1214 593

——— *Partition decree—Partition not directed by decree, whether can be carried out—Jurisdiction—Consent of parties*

In executing a decree for partition, the Executing Court has no power to effect a partition which has not been ordered by the decree and for which there is no properly framed application before the Court In such a matter no consent of parties can give the Court jurisdiction M SUBBIAH GOUNDAN *v* SONNIMALIA GOUNDAN, 23 L W. 87 400

——— *Proclamation of sale—Application of decree-holder relating to property to be proclaimed for sale, decision of—Appeal, absence of—Judgment-debtor, whether bound.*

An application by a decree-holder in respect of the property which should be proclaimed for sale in execution of the decree must be decided by the Execution Court, and the order of the Execution Court deciding such an application, if not objected to by way of appeal, must be held to be binding on the judgment-debtor during the subsequent stages of the execution proceeding O SITAPAT RAM *v.* MOHAMMAD ASGHAR, A. I. R. 1926 Oudh 193 29

——— *Property misdescribed in warrant of attachment—Auction-sale, validity of—Knowledge of parties*

A mere misdescription in a warrant of attachment of property does not invalidate the auction sale and is merely an irregularity if the parties knew what had been attached and had been actually sold. N TIKARAM *v.* NARAYAN, A. I. R. 1926 Nag. 246 44

Execution of decree—concld.

——— *Step-in-aid of execution—Limitation Act (IX of 1908), Sch. I, Art. 182 (5) - Decree against trust—Appointment of fresh trustee—Execution application against trustee on record*—Bona fide *petition—Burden of proof.*

The removal under a decree of a trustee from office comes into operation not from the date of the decree but from the date on which the trustee is removed from actual possession. So long as he is not removed and remains in possession of the property, he is the proper judgment-debtor to be on record for purposes of execution of a decree against the trust.

A *bona fide* application to execute a decree against the judgment-debtor on record is in accordance with law even though it is subsequently discovered that at the time of the application he had ceased to be the proper person to be proceeded against.

The burden of proving that the judgment-debtor named in the decree has ceased to be the real judgment-debtor for purposes of execution and that the application impleading the person on record is not *bona fide* is on the person who sets up that such application is not in accordance with law. **M** TRUSTEES, PARAKKAT DEVASWOM *v* VENKATACHALAM VADHAYAR, 23 L. W. 22, 50 M. L. J. 153; A. I R. 1926 Mad. 321 **709**

——— Surety. *See* C. P C., 1908, s 145 **259**

Ex parte decree, *suit to set aside—Fraud—Failure to file affidavit of documents—Decree against party not in default, legality of*

In a suit filed by *M* against *T*, the latter filed a written statement and a counter-claim not only against *M* but also against three other persons including *D*. *M* failed to obey an order made in the suit to file his affidavit of documents, whereupon *T* applied for and obtained an order dismissing *M's* suit and decreeing *T's* counter-claim *ex parte* not only against *M* but also against the other parties including *D* who were not in default. *D* brought a suit to set aside the *ex parte* decree as against him

Held, (1) that *T* was guilty of fraud on the Court in applying for and obtaining an *ex parte* decree against *D* and the other persons who were not in default.

(2) that so far as these persons were concerned the *ex parte* decree was a nullity,

(3) that it was open to *D* to sue to set aside the *ex parte* decree and his suit must succeed **B** DEVJI PADAMSEY *v.* THOMMADRA ERIKALAPPA, 27 Bom. L R. 1491; A. I. R. 1926 Bom. 63 **555**

——— **order** without jurisdiction. *See* RES JUDICATA **845**

Foreign Law—Question of fact *See* CONTRACT ACT, 1872, s 23 **112**

Fraud.

See C. P. C., 1908, O. XXI, R. 63 **810**

See EX PARTE DECREE **555**

——— *Fraud and mistake—Decree, setting aside of—Fraud, nature of—Nature of error.*

In a suit to obtain the reversal, on the ground of fraud, of a judgment given in a former case, it is not sufficient for the plaintiff to prove constructive fraud but he must prove actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and the obtaining of that decree by that contrivance.

A suit to rectify the error or mistake upon which a decree is founded lies when the error or mistake has been made in drawing up of the decree, but not when the mistake is not in the judgment or decree but in a document forming part of the evidence on which the judgment is based. **L** BISHEN SINGH *v.* WASAWA SINGH, A. I. R. 1926 Lah 177 **317**

——— *Particulars*—Ex parte *decree, suit to set aside—Fraud, proof of.*

When fraud is charged against a party, the person pleading the fraud must set forth the particulars of the fraud which he alleges.

An *ex parte* decree cannot be re-opened except on the ground of fraud as an extrinsic collateral fact vitiating the proceedings in which the decree was obtained. It is not sufficient to allege that it was obtained on a false claim.

Before an *ex parte* decree can be vacated on the ground of fraud, it must be established that the decree was the result of fraud directed against the person who seeks to set it aside. **L** PUNJAB COMMERCIAL SYNDICATE *v* PUNJAB CO-OPERATIVE BANK LTD., 6 L 512, A. I R. 1926 Lah 96 **322**

General Clauses Act (X of 1897), s. 16, *See* C. P. C., 1908, O XL, R. 1 **940**

Gift and direction as to payment, distinct—Vesting whether postponed. *See* C. P C., 1908, s 60 **1021**

Government of India Act, 1915 (5 & 6 Geo. V, c. 61), s. 49. *See* MADRAS DISTRICT MUNICIPALITIES ACT, 1920, s 13 ETC **918**

Guardians and Wards Act (VIII of 1890), ss. 25, 47—*Civil Procedure Code (Act V of 1908), O XLIII, r. 1* (d)—Ex parte *order under s. 25—Application to cancel order, refusal of—Appeal against refusal order, maintainability of*

The appellant was ordered under s 25, Guardians and Wards Act, to produce a minor child in Court with a view to its being restored to the custody of its guardian The order was passed *ex parte*, the appellant being absent. On the next date of the hearing of the case, the minor was not produced, but the Court was asked to cancel its previous order The Court refused to do so, and the appellant appealed against this later order.

Held, that no attempt having been made to set aside the previous order as an *ex parte* order, no appeal lay from the later order as it was in reality a consequential order following on the earlier order. **N** AKABAI *v* NARAYAN, A. I R 1926 Nag 251 **36**

——— **ss. 31 (3) (d), 48**—*Order fixing sum to be spent on marriage—Discretion of Court—Appeal—Revision—Interference by High Court.*

The question as to what sum the guardian of a minor should be allowed to spend on the marriage of the minor is primarily a matter for the discretion of the District Judge An order fixing such sum is made under s 31 (3) (*d*) of the Guardians and Wards Act and is not open to appeal. The High Court will not, in such a case, interfere in revision under s. 48 of the Act **A** *In the matter of* DURGA BAI, 24 A. L. J. 310; A I R 1926 All. 301 **482**

——— **ss. 40, 41 (3)**—*Guardian, discharge of, application for—Investigation into accounts—Court, power of.*

On an application by a person to be discharged from guardianship under s. 40 of the Guardians and Wards Act, the Court has not only to order under s. 41 (3) delivery of accounts and property in his possession, but has power to direct an investigation into accounts before ordering discharge **M** RAMA RAO *v.* RANGASWAMY RAO, A. I. R. 1926 Mad. 419 **98**

——— **s. 41**—*Minor, death of—Application by person claiming as heir for delivery of property, maintainability of—Dispute as to succession.*

Where a minor in respect of whose property a

Guardians and Wards Act—concld.

guardian had been appointed under the Guardians and Wards Act dies and there is a dispute or even the likelihood of a dispute relating to the succession to his estate the Court has no powers under s. 41 of the Guardians and Wards Act to determine the succession and thereupon make any orders for granting delivery of possession of the minor's property or for rendering of accounts by the guardian

A Court acting under the Guardians and Wards Act is *functus officio* when the minor dies. Any disputes or rights with regard to the property of the minor should thereafter be litigated in the ordinary Tribunals, though in simple cases where no contest can arise, the Court may have the power under s 41 of the Act to make simple orders for delivery of property **M** TULSIDASS GOVINJEE *v* MADHAVADASS LALAJEE, 22 L W 642, (1926) M W N. 68, A I R 1926 Mad 148 **570**

——— **ss. 41, 45**—*Death of minor—Guardian, whether ceases—Court's power to call for accounts—Refusal to give accounts—Fine—Progressive fine, levy of*

On the death of a ward the powers of the guardian as such do cease, and the Court may properly require him to deliver in any accounts in his possession or control

When a ward dies, the Court should generally direct the guardian to deliver the property into Court or to deliver property to some person producing an heirship certificate In very rare cases the latter precaution might be dispensed with, but in that case the Court would otherwise guarantee the interests of possible claimants. The possible dangers, therefore, from the misuse of the Court's powers under s 41 (3) of the Guardians and Wards Act in the case of a deceased minor do not seem to be very serious and from their existence it should not be deduced that the Legislature intended that on the ward dying, the guardian should be completely beyond control of the Court in his dealings with the estate of the deceased into possession of which he has come under the order of the Court.

Where the guardian refuses to give full accounts a fine of Rs 25 inflicted on him under s. 45, Guardians and Wards Act, is not inappropriate

An order for accumulative and progressive fine can, however, be levied under s. 45, Guardians and Wards Act, only in the case of recusancy, which is something more than mere disobedience, and if it is intended to use those powers, as a general rule, it is better to fix some date on which the guardian is to comply with the order of the Court or demonstrate why he is unable to do so and that order may properly contain the penalty that if the Court's order is not complied with, fine will be inflicted on the principle of progression as laid down in the section. **S** FATEHCHAND *v* PARPATI BAI, 18 S L. R 86; A I R. 1925 Sind 269 **196**

——— **s. 48.** *See* GUARDIANS AND WARDS ACT, 1890, s. 31 (3) (*d*) **482**

Hindu Law—Adoption — *Agreement between adoptive and natural fathers reserving right of making Will to adoptive father, legality of*

An agreement between the adoptive father and the natural father of the minor about to be adopted, made at the time of adoption, whereby full powers are reserved to the adoptive father to dispose of the family properties by Will, is not valid according to the Hindu Law and is not binding on the adopted son. **B** PARVATIBAI TRIMBAKRAO *v.* VISHVANATH KHANDERAO RASTE, 27 Bom. L. R. 1509; A. I. R. 1926 Bom. 90 **4**

Hindu Law—contd.

——— **Aliyasantana family**—*Maintenance—Junior members, right of, to separate maintenance—Disputes between members, whether sufficient ground for award of separate maintenance*

The junior members of an Aliyasantana family are not entitled to separate maintenance on the ground of mere inconvenience caused by want of harmony between the *ejman* and the junior members.

In the absence of any evidence that the disputes between the members are of such a nature as to make it impossible or dangerous for the members to continue to live together in the same house and take meals together, a Court should not award separate maintenance to junior members on the ground that the members are not moving well together and that a joint mess would be extremely inconvenient

It is not incumbent on the *ejman* of an Aliyasantana family to distribute any spare money he has in his pocket amongst all the members of the family or among some of them

When some junior members of the family reside away from the family for a portion of the year with their husbands or wives, as the case might be, they are not entitled to claim from the *ejman* a sum equivalent to their maintenance during the period of absence **M** CHANDAYYA HEDGE *v* KAVERI HEGADTHI, 49 M L J 727, A I R 1926 Mad 189 **390**

——— **Debt**, *antecedent—Mortgage-debt of father—Personal liability barred—Sons, whether bound*

Any prior mortgage-debt due by a Hindu father is valid and binding on the sons as an antecedent debt whether the personal liability of the father is or is not barred **M** IMANI SATYANARAYANA *v* DEVARAKONDA SATYANARAYANAMURTE, 50 M L J 144, (1926) M W N 7, A I R 1926 Mad 428 **85**

——— ——— *Commercial debts of father—Pious obligation of son—Text of Gautama, whether obsolete.*

A debt incurred by a father in the course of a hardware trade carried on by him, is a commercial debt and under the Hindu Law the son is under a pious obligation to discharge the same

Per *Coutts Trotter, C J*—The text of Gautama which describes a commercial debt as *vyavaharika* must now be held to have been declared as obsolete.

The particular instances of *vyavaharika* debts given in the *Smrities* must be treated as a mere expression of opinion on the part of the authors as to what classes of debts would fall under the general words. A modern Court is, therefore, free in interpreting the general term "*vyavaharika*" to consider the particular instances given as obsolete under the conditions of the present day **M** NIDAVOLU ATCHUTAM *v.* RATNAJI, 23 L W 193, 50 M L J 208, (1926) M W. N 258; 49 M. 211, A I R 1926 Mad 323 **977**

——— **Females**—*Nature of estate taken.*

There is no distinction as to the nature of the estate taken between property inherited by a woman from a male and property inherited from a female. In both the cases she takes not an absolute estate but only a qualified one. **M** AYISWARYANANDAJI SAHEB *v.* SIWAJI RAJA SAHEB, 49 M. L. J. 568, A. I. R. 1926 Mad. 84, 49 M 116 **928**

——— **Guardianship and minority**—De facto *guardian, alienation by, validity of—Burden of proof—Adequacy of price—Court, duty of.*

Under the Hindu Law an alienation of a minor's property by a *de facto* guardian may be valid, if it is otherwise justified. Where, however, a *de facto* guardian alienates the minor's property in the presence of a legal guardian, the Court must be satisfied

that the legal guardian refused to act for the minor and to protect his interest, and that unless the *de facto* guardian acted for the minor irreparable loss to the minor would have been the result of the inaction of the legal guardian.

It is not for the person who challenges a sale on behalf of a minor to show that the price was inadequate, it is for the guardian to show that he made all possible endeavours to sell the property at a proper price and that the price which he obtained was the best possible procurable one

In a case where the interest of the minor is concerned, the case ought not to be decided simply on the questions raised by the parties, but the Court has to satisfy itself, in the interest of the minor, that the sale was a proper sale and the Court must insist upon the purchaser to satisfy it that circumstances justifying a sale of the minor's property did really exist. **C** BAIKUNTHA NATH KAR *v.* ADHAR CHANDRA PAIN, A I. R. 1926 Cal. 653 **727**

——— **Guardianship and minority**—De facto *guardian, alienation by, validity of—Necessity—Benefit to estate—Ratification by minor on attaining majority, effect of.*

Under the Hindu Law, the powers of a *de facto* guardian of a minor are the same as those of a *de jure* guardian and an alienation of the minor's property by a *de facto* guardian is equally binding on the minor if it is supported by necessity or benefit to the estate.

An alienation by a *de facto* guardian not for a binding purpose is not *per se* void but only voidable and becomes valid where it is ratified by the minor on attaining majority

Per *Viswanatha Sastri, J.*—There is nothing in the Hindu Law which limits the guardianship of a minor to the father, mother and failing them the King. A maternal uncle in Hindu society in Southern India is a fit and proper person to act as guardian of a minor. **M** VEMULAPALLI SEETHARAMAMMA *v* MAGANTI APPIAH, 23 L W. 285; (1926) M. W. N. 238, A. I. R. 1926 Mad. 457 **827**

——— **Impartible estate.** *See* HINDU LAW—RELIGIOUS ENDOWMENT **928**

——— **Inheritance**—*Illegitimate son of* sudra, *right of, to inherit to father's collaterals*

Under the Hindu Law an illegitimate son of a *sudra* is not an heir to his putative father's collateral relations and can have no right to succeed to the *stridhanam* of his father's widows who were married in an approved form. **M** AYISWARYANANDAJI SAHEB *v.* SIWAJI RAJA SAHEB, 49 M. L. J 568; A. I R. 1926 Mad. 84, 49 M. 116 **928**

——— **Joint family.** *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 2 (*d*) **309**

——— *Alienation by father to pay off encumbrance on property acquired by pre-emption, validity of*

A mortgage of family property executed by a Hindu father in order to pay off an encumbrance on property acquired by him under a pre-emption decree, is not binding on the sons unless it is shown that it was for the benefit of the family that the encumbrance should be paid off by hypothecation of the family property. **A.** BHAGWATI SINGH *v.* GURCHARAN DUBE, L. R. 5 A. 647 Civ.; A. I. R. 1925 All. 96 **332**

——— *Alienation by manager—Failure to describe himself as such—Interest conveyed.*

Where a person purchases property from a *de facto* manager of a joint Hindu family and there is nothing in the document to show that the manager conveyed only his share or that he reserved the share of anybody from being conveyed, both the parties to the conveyance must be presumed to have intended that the interest of the whole family should be conveyed by it

The mere fact that the vendor did not describe himself as managing member is not a circumstance which should be taken as militating against such presumption **M** MULUGU CHENGAYYA *v.* ARUVELU DEVASANAMBAGARU, 50 M. L. J 145; 23 L. W 390, (1926) M W N 289; A. I. R 1926 Mad. 406 **720**

——— **Joint family**—*Alienation by manager—Necessity—Benefit to family.*

The manager of a joint Hindu family has power to sell or mortgage "on reasonable commercial terms" joint family property, so as to bind the interests of adult as well as minor co-parceners in the property, provided that in the case of minor members the sale or mortgage is made for legal necessity including debts incurred for family business or for benefit of the family.

The term "necessity" must not be strictly construed. Benefit to the family may under certain circumstances mean a necessity for the transaction **S** RATILAL *v.* RUGHUNATH MULJI **378**

——— *Alienation by managing member for proper purposes—Recital that properties were self-acquired, effect of*

The managing member of a joint Hindu family executed a mortgage of certain family properties for purposes binding on the family but recited in the mortgage-deed that the mortgaged properties were his absolute properties. In a suit on the mortgage

Held, that since the mortgage purported to be of the entire interest in the properties and the mortgagor had the legal capacity to execute a mortgage of the entire interest binding on the family, the interest mortgaged was of the entirety which the executant was capable of conveying and not merely of his share in the properties and the recital that the executant was the owner must be treated as surplusage. **M** UNNAMALAI AMMAL *v.* ABBOY CHETTY, 23 L. W. 168; 50 M. L. J. 172 **524**

——— *Alienation—Manager's powers—Benefit of estate—Necessity.*

The manager of a joint Hindu family has an implied authority to do whatever is best for all concerned, the test being whether the transaction is one into which a prudent owner will enter in order to benefit the estate.

The term necessity not only covers a case of actual pressure on an estate or a danger to be averted by prompt discharge of liabilities but an act benefiting the estate as well. **L** ROSHAN LAL *v.* RUSTOMJI, A. I. R. 1926 Lah. 249 **669**

——— *Alienation—Mortgage—High rate of interest—Legal necessity—Burden of proof.*

The burden of proving that the rate of interest provided for in a mortgage-deed executed by a member of a joint Hindu family is justified by legal necessity lies on the mortgagee. **O** KIDAR NATH *v.* BHIKHAM SINGH **679**

——— *Alienation—Mortgage by co-parcener—Foreclosure decree—Birth of son to mortgagor, effect of.*

Where a Hindu co-parcener has mortgaged his share in the family property the birth of a son to him after a final foreclosure decree has been passed against him at the suit of the mortgagee does not

operate retrospectively and cannot reduce the share of the co-parcener, the whole of which would pass to the mortgagee-decree-holder N NARAYAN *v.* DHUDABAI, 21 N. L R 38, A I. R. 1925 Nag. 299 663

——— **Joint family** - *Alienation — Mortgage by manager—Execution sale—Suit to set aside sale—Legal necessity.*

The proposition that where the property of a Hindu joint family has passed out of the family in execution of a decree and rights of a third party have come in, the sale cannot be set aside unless it is established that the debt was tainted with illegality or immorality, applies only to cases where the persons who challenge the transaction are sons or grandsons of the transferor It is only when the transfer has been made by a father or grandfather that the question of the debt having been tainted with immorality or illegality can arise No such consideration arises when the transfer has been made by an uncle and a mere manager of a joint Hindu family In such cases the transfer, unless it is supported by legal necessity, cannot be upheld A NANAK CHAND *v* RAM PRASAD, A I R 1926 All. 250 316

——————— Attachment before judgment—Decree. *See* EXECUTION OF DECREE 504

——— ——— *Charge, deed of—Excessive interest—Admission of propriety of interest*

A co-parcener of a Hindu joint family cannot be allowed to impugn the rate of interest in any deed to which he himself is a party, or where by his statements or conduct, he must be deemed to have admitted the propriety of the rate

Where a co-parcener executes a deed of further charge, in which he recites earlier deeds of further charge executed by other co-parceners, he should be inferred to have admitted their validity in every respect, and cannot be allowed subsequently to set up that the earlier deeds were for an excessive rate of interest. O CHANDRIKA PRASAD *v* NAZIR HUSAIN, A I R. 1926 Oudh 306 681

——————— Compromise by father *See* C P. C, 1908, s. 110 479

——————— *Widow and step-son—Widow managing estate—Alienation by widow—Benefit of estate—Alienation, whether binding on step-son—Female member, whether can be manager*

Per *Curiam*—A sale by a Hindu widow who was managing the estate of her minor son and step-son of a part of the immoveable property belonging to the estate for necessary purposes is valid and binding on the step-son.

Per *Hallifax, A. J. C*—Any adult member of a joint Hindu family whether male or female is entitled to be a manager of such family. N KESHEO *v* JAGANNATH, A. I. R. 1926 Nag. 81, 22 N L R. 5 121

——— **Maintenance.** *See* HINDU LAW—ALIYASANTANA FAMILY 390

——— **Partition suit**—*Mesne profits, when can be claimed.*

There is no absolute rule that in a partition suit, a claim for mesne profits is necessarily unsustainable. Where the plaintiff proves that he was excluded from the property he is entitled to claim mesne profits for the period during which he has been excluded. N NILKANTH *v.* GAJANAN, A. I R. 1926 Nag. 248 364

——————— *by purchaser—Procedure*

The purchaser of an unascertained share of joint family property must bring a suit for partition in which the whole of the joint family property should be included and all necessary parties joined. In a suit of that nature, the Court in making the partition would endeavour to give effect to the alienation and so to marshal the family property among the co-parceners as to allot that portion of the family property or so much of it as may be just to the purchaser. N NARAYAN *v* DHUDABAI, 21 N L R 38, A I. R. 1925 Nag 299 663

——— **Religious endowment**—*Succession—Property held by yati—Disciples, rights of.*

A *bairagi faqir*, or a *yati*, may hold private property.

On the death of a *yati* his preceptor, and in the absence of the preceptor, the disciples of the *yati* would succeed to any private property left by him. O PRABHUDAYAL *v* LALTA DAS, A I. R 1926 Oudh 293 764

——————— *Succession to trusteeship—Usage—Management by single individual—Confiscation by State and re-grant, effect of, on rule of succession*

The Rajahs of Tanjore had time after time endowed and founded certain *devasthanams* and other charities These had continued in the possession and management of the Rajah for the time being and till the death of the last ruler, the office was always held by a single individual After the death of the last ruler in 1855, when the *Raj* itself was seized by the East India Company as an act of State, the *Pagodas* and the *devasthanams* were also taken possession of and managed by the Government In 1863, *K*, the senior widow of the late Rajah, applied for and got possession of the *devasthanams* and other trust properties as the head of the family, but the course of succession was not indicated in the Government's order of restoration On her death, the trust estate was managed by the widow who in turn became the senior *Rani* and so on until the last of the *Ranis* died in 1912 Disputes then arose between the illegitimate sons of the late Rajah and the sons of an adopted son as to succession both as to the private estate of the Rajah and as to the management of the trust. The private estate was directed to be partitioned On the question of the rule of succession to the trust estate

Held, that since the founders of the institutions intended that their successors who occupied the *Raj* should continue to have the sole management of the temples and *pagodas* and the endowments attached to them and since the Government by restoring the properties to the *Rani* as "head of the family for the time being" indicated their intention that they should continue to be managed by a sole trustee, the trusteeship was not liable to be divided and the elder grandson was solely entitled to the trusteeship of the *devasthanams* and the charities.

Per *Kumaraswami Sastri, J*—In cases of succession to religious institutions, the main question to be considered is what is the usage of the institutions, and where from the date of the foundation of the charities up to the date of the suit, the trust was managed by a single individual who was the head of the family not in possession of any partible property, the office must be treated as impartible and not liable to be held by more than one person at a time

In cases of confiscation and re-grant of property which is impartible, the law is that in the absence of anything in the re-grant, the property which is re-granted is subject to the old incident of impartibility. M AYISWARYANANDAJI SAHEB *v.* SIWAJI RAJA SAHEB, 49 M. L. J. 568; A I. R. 1926 Mad. 84; 49 M. 116 928

——— **Reversioner,** *transfer by, during lifetime of*

widow, validity of—Reversioner accepting transfer from other reversioner—Estoppel—Evidence Act (I of 1872), s. 115.

A transfer made by a next reversioner during the lifetime of a Hindu widow who is in possession of her deceased husband's estate is inoperative under the Hindu Law, as during the widow's lifetime a reversioner has no interest in the estate capable of transfer but merely an expectancy.

Where, therefore, a reversioner of a deceased Hindu accepts a mortgage of certain property forming part of the estate of the deceased from some other reversioners, he is not estopped from subsequently contending that he has a share in the property which was mortgaged to him, inasmuch as the mortgage is a void transaction and no estoppel can arise out of such a transaction. O DEO KALI *v.* RANCHOOR BUX, A. I. R. 1926 Oudh 253; 13 O. L. J. 208 19

——— **Stridhan.** *See* HINDU LAW—WIDOW 928

———, inheritance to. *See* HINDU LAW—INHERITANCE 928

——— **Widow**—*Accretions—Limited title of husband—Acquisition of fuller title—Admission by widow—Reversioners, whether bound—Decree on admission, effect of.*

Accretions made by a Hindu widow to her husband's estate partake of the nature of that estate. It is of little moment whether this rule of law is one of Hindu Law or is based on s 90 of the Trusts Act The rule has been ascribed to the doctrine of graft.

Where a Hindu widow in possession of her husband's property, in which the latter had an estate of a limited nature, obtains a fuller estate in the property, the fuller title is an accretion to her estate as a widow and cannot be regarded as her *stridhan*.

There is a presumption in law that a person takes possession under title rather than as a trespasser and, on the death of her husband, a Hindu widow taking possession of her husband's property must be held to do so as a Hindu widow.

A Hindu widow cannot make an admission in derogation of the rights of the reversioners which has or may have the effect of destroying the estate of the reversioners. This is governed by the same rule as applies to wrongful alienation. A decree of a Court based (without contest) on such an admission is as void or voidable as the admission. O RAM SHANKAR SINGH *v.* LAL BAHADUR SINGH, 3 O. W. N. 267, A. I. R. 1926 Oudh 277; 13 O. L. J. 216 637

——— *Acquired property, whether stridhanam or accretion to estate.*

A Hindu widow has an absolute right of disposal over the income of the property which she inherits from her husband. She can either spend the same or accumulate it for her own benefit. In cases where she purchases properties or invests her savings and indicates by her conduct an intention that the properties purchased out of her savings should form part of her husband's estate, such savings should follow the same rules as regards devolution to her husband's estate, and should be treated as accretions to the estate. Where she does not do so, she has absolute powers of disposal over such property and can sell or give the same to anybody she pleases without any right of the reversioners to question her alienations. Where the question is one of intention to be deduced or inferred from her conduct, the presumption is that she intends to keep the property for her own absolute benefit and to have absolute powers of disposal over it. Where, however, a widow is not in possession of her husband's estate, there is no presumption that any of the properties which she gets are to be treated as accretions to her husband's estate. On her death such properties would follow the same course of succession as her *stridhanam* properties.

Per *Spencer, J*—It is a question of fact in each case whether a widow has dealt with the income of her husband's property in such a manner as to make it an accretion to the *corpus*. M AYISWARYANANDAJI SAHEB *v.* SIWAJI RAJA SAHEB, 49 M, L. J. 568, A. I. R. 1926 Mad. 84; 49 M. 116 928

——— **Widow**—*Alienation—Suit to challenge alienation brought after lapse of many years, effect of—Necessity*—Bona fide *enquiry*

In a suit by the reversioners of a deceased Hindu to challenge an alienation made by the widow of the deceased, brought after the lapse of many years from the date of the alienation, it is incumbent on the Court, in weighing the evidence on either side, to remember the difficulty under which the respective parties labour, particularly as regards the ascertainment and production of evidence on the matters dealt with in the case.

If an alienee from a Hindu widow before embarking on the transaction has made reasonable and *bona fide* enquiry and has satisfied himself to the best of his knowledge and belief that legal necessity exists, the real existence of such legal necessity in point of fact is not a condition precedent to his success in a suit brought by the reversioners of the widow's deceased husband to challenge the alienation. N SHANKAR *v.* PANDURANG, 9 N. L. J. 22 646

——— *Maintenance—Sale of property—Future maintenance.*

A Hindu widow is entitled to maintain herself by selling the property inherited from her husband if there is no other means available for her maintenance. She is not bound to starve herself in order to benefit the reversioners.

Under the Hindu Law a widow can alienate her husband's property for paying off the debts incurred for her own maintenance. There is no hard and fast rule that she cannot do it for future maintenance. Each case would depend upon its circumstances.

In a case where there was no other property but a house inherited by a widow and not capable of yielding any appreciable income, and the widow sold it for Rs 600 half of which went towards liquidating a debt incurred for maintenance and the other half was kept by her for maintaining herself with :

Held, that the sale was binding in its entirety upon the reversioner. M KUTHALINGA MUDALIAR *v.* SHANMUGA MUDALIAR, 50 M. L. J. 234; 23 L. W. 373; (1926) M. W. N 274 989

——— Manager of joint family. *See* HINDU LAW—JOINT FAMILY 121

——— ——— *of divided member—Funeral expenses.*

Under the Hindu Law, where a widow of a divided member of a Hindu family dies, without having any self-acquired property of her husband, the relations responsible for her maintenance, and not necessarily those who perform the ceremony, are liable to pay for her funeral expenses, in like proportion as the maintenance itself. M SHIVA AITHALA *v.* RANGAPPAYA AITHALA, 49 M. L. J. 719; A. I. R. 1926 Mad. 233 523

——— ——— *Partition—Relinquishment of survivorship—Intention.*

There is no legal obstacle to prevent one of two Hindu co-widows from so far releasing her right of survivorship as to preclude her from recovering from

Hindu Law—contd.

an alienee, after the other co-widow's death, property given by way of partition to the latter and alienated by her. The partition may be by document or oral

It is a question of intention in each case, to be gathered from the deed of partition, if any, and the surrounding circumstances, whether the widows retained or renounced their rights of survivorship

It has to be proved by clear evidence that the widows were conscious of the right of survivorship possessed by them, and that they intended to give up such right. **M** KALIANI ANNI *v.* THIRUMALAYAPPA MUDALIAR **355**

——— **WIDOW,** *position of—Decree obtained against widow, whether binding on reversioners—Adverse possession against widow, whether adverse to reversioners.*

A Hindu widow in possession of the estate of her deceased husband represents the estate in suits brought by her or against her for possession of the estate or any part of it, and she and the reversioners are equally bound by any final decree which a Court makes in such a suit, provided that the suit was fought out according to law and was not collusive or fraudulent

Semble—A Hindu widow fully represents the estate of her deceased husband and adverse possession which bars her, bars the heirs after her **P C** VAITHIALINGA MUDALIAR *v* SRIRANGATH ANNI, A I R 1925 P C 249, L R 6 A (P C) 169, 49 M L J 769, 42 C L J 563, 48 M 833, 30 C W N 313, 28 Bom L R 173, (1926) M W N 11, 52 I A 322 **85**

——— v brother—Legal representative *See* C. P. C, 1908, s 47 **575**

——— **WILL,** *construction of—Devise of estate to daughters and thereafter to their children—Perpetuities, rule of*

A Hindu testator gave the following direction in his Will with regard to the disposal of his property—"I give, devise and bequeath all my estate and effects immoveable and moveable unto my Trustees upon Trust that my Trustees shall sell, call in and convert into money the same or such part thereof as shall not consist of money and shall with and out of the proceeds of such sale, calling in and conversion and with and out of my ready money pay my funeral and testamentary expenses and debts and shall stand possessed of the residue of such proceeds upon Trust to set apart thereout and invest in promissory notes of the Government of India such a sum or sums of money as when so invested as aforesaid will produce by the income thereof a monthly sum of rupees one hundred and to pay such income monthly to my wife C. Andalammal during her life and from and after her decease to stand possessed of the said sum and the investments for the time being representing the same upon the Trusts hereinafter declared concerning the residue of my estate And as to the residue of my estate, I direct that my trustees shall at their discretion invest the same in any of the modes of investment in which trustees are by law authorised to invest trust funds and shall stand possessed of the said residuary trust monies and the investments for the time being representing same (hereinafter called "the residuary trust funds"), in Trust to apportion the residuary trust funds into as many equal parts or shares as there may be daughters of mine living at the time of my decease or who having pre-deceased me shall have left issue, her or them and me surviving and to pay the income of each of such equal parts of shares to my said daughters respectively during their respective lives.

Hindu Law—concld.

And from and after the decease of each of my said daughters to stand possessed of the share of the residuary trust funds so appropriated as aforesaid to such daughter upon Trust for all the children of such daughter who shall attain the age of twenty-one years in equal shares and if there shall be only one such child the whole to be in trust for that one child and in the event of any of my said daughters dying without leaving lawful issue her or them surviving, I direct that my trustees shall stand possessed of the share or shares so appropriated to her or them as aforesaid upon Trust for all the children of the other or others of my said daughters who shall attain the age of twenty-one years as tenants-in-common in equal shares per *stirpes* Provided always and I hereby declare that if any daughter of mine shall die in my lifetime leaving lawful issue at the time of my death such issue as shall attain the age of twenty-one years shall take and if more than one, as tenants-in-common in equal shares per *stirpes* the share which would have been so appropriated as aforesaid to such daughter of mine and her issue if she had survived me"

Held, (1) that on a proper construction of the Will the three daughters took only for their lives,

(2) that inasmuch as the bequest in favour of the daughters' children, tested as at the testator's death made delay in vesting the estate beyond the lifetime of the daughters and the minority of some of their children possible, the bequest in favour of the children was inoperative having regard to the provisions of s 101 read with s 102 of the Succession Act,

(3) that, therefore, at the termination of the life-estate of the daughters of the testator, the estate would devolve upon the next heirs as upon an intestacy **P. C.** SOUNDARA RAJAN *v* NATARAJAN, A I R 1925 P C 244; L R 6 A (P C) 180, 23 A L J 1010; 48 M 906, 49 M. L J 836, 43 C L J 70, 28 Bom L R 204, (1926) M. W N 22, 30 C W N 434, 52 I A 310 **289**

Hire-purchase agreement. *See* CONSTRUCTION OF DOCUMENT **191**

Identification. *See* CR P. C, 1898, s 374 **890**

——— *Evidence of officer who held parade for identification, admissibility of*

If the witnesses themselves do not repeat in Court, that they had picked out certain men at an identification parade, the evidence of officers who had conducted the parade, that the witnesses had picked out the men, is admissible

Where it is shown that at an identification parade, witnesses picked out certain men as having taken part in a riot, but did not state to the officer who conducted the parade what part each man had taken in the riot, the officer's evidence that he had told the witnesses to pick out the persons present in the riot, is quite sufficient and it is not necessary that he should have examined the witnesses as to the part played by each individual **L** PARTAP SINGH *v* EMPEROR, 27 Cr L J. 215, 7 L 91, A I R 1926 Lah 310 **167**

Inam, *grant—Grant "to representatives and assigns" —Death of grantee before date of grant—Grant, whether enures to heirs of grantee—Board's Standing Order 52 (2).*

An *inam* title-deed issued by Government ran as follows:—"The *inam* is now confirmed to you, your representatives and assigns, to hold or dispose of as you or they think proper" The grantee was dead on the date of grant, and the question was whether the grant enured for the benefit of the heirs of the grantee:

Held, that having regard to the Board's Standing

Order 52 (2), the words "representatives and assigns" should not be interpreted as mere words of limitation but as effective to secure the grant to the heirs of the deceased grantee M NARASIMHAM v CHENDRAMMA, 49 M. L. J. 517, 22 L. W. 669, A. I. R. 1926 Mad. 154 321

———, *service—Enfranchisement—Grant to member of joint family—Grant to Hindu widow and other persons—Estate conferred on widow—Absolute or limited estate.*

The enfranchisement of a service *inam* does not enure to the benefit of the joint family of the holder but only of the holder himself

When Government makes a grant to persons comprising a widow and her relations, there is no presumption that only a widow's estate is intended in case of the former

Where a service *inam* is enfranchised in the name of a Hindu widow and a number of other persons as an 'estate in free-hold", and as "absolute property", the widow takes the property absolutely and not merely with the limited powers of a Hindu widow M VENKATASUBBA RAO v. ADINARAYANA RAO, 22 L. W. 631, 50 M. L. J. 46, A. I. R. 1926 Mad 227 472

Income tax—Income from permanently settled *jalkar*. *See* BENGAL REGULATION, 1793 338

———— *Resident of Native State, whether liable to assessment on profits made outside British India*

The profits of a business are earned where the actual excess over the expenditure incurred is earned

A resident of a Native State cannot be assessed to income-tax in British India on profits made in another Native State, unless it can be proved that those profits arose or were received in British India B HAJI RAHMATULLA v SECRETARY OF STATE FOR INDIA, 27 Bom. L. R. 1507, A. I. R. 1926 Bom. 50 351

Income Tax Act (II of 1886), s. 39—*Declaration that assessment is* ultra vires, *suit for, maintainability of.*

The provisions of s 39 of the Income Tax Act of 1886 do not operate to bar a suit in which it is claimed that an assessment is *ultra vires* B HAJI RAHMATULLAH v. SECRETARY OF STATE FOR INDIA, 27 Bom. L. R. 1507; A. I. R. 1926 Bom. 50 351

Income Tax Act (XI of 1922), s. 3—*Selling association of several firms—Association, whether separate firm liable to assessment.*

Where certain ice-manufacturing firms by means of an agreement formed a Selling Association to prevent underselling by the constituent firms and fixed a certain rate to be paid by the Association for ice manufactured by the constituent firms

Held, that the Association was clearly a separate firm within the meaning of s 3 of the Income Tax Act and was liable to assessment of income tax O COMMISSIONER OF INCOME TAX v. LUCKNOW ICE ASSOCIATION, A. I. R. 1926 Oudh 191 257

———— **s. 9**—*Loss incurred by standing surety—Loss in business.*

A loss incurred by a firm on account of standing surety for another firm, is not loss incurred in connection with their business, and cannot be deducted in assessing the Income-tax. L *In the matter of* ISHAR DAS DHARAM CHAND, A. I. R. 1926 Lah 168 249

———— **s. 10 (2), (vi), (vii), (ix)**—*Obsolete machinery—Motor-car rendered useless by accident—Reliefs under sub-sections, whether alternative or cumulative—Motor-car, purchase of, solely for use of parts in existing cars—Expenditure whether of capital*

nature or incurred for purposes of business—Deductions, right of assessee to.

'Obsolete machinery' under the Income Tax Act means machinery which though it is able to perform its function, has become in common parlance out of date and performs its function so indifferently or at such a cost that a prudent man instead of continuing to use such machinery would discard it and instal more labour-saving machines. A new car which is wholly useless for its purposes because it was broken to pieces in an accident is not "obsolete machine" under the Act and the owner is not entitled to claim a deduction, therefore, under s 10, (2) (*vii*) of the Act.

The various reliefs by way of deductions specified in s 10 of the Income Tax Act are not alternative and exclusive, but must be treated as disjunctive and cumulative and if any deduction claimed falls within the express words of any one of the sub-sections, it is not open to Government to say that it is really covered by the general provision of sub-s (*vi*), *i. e.*, the omnibus cl (*vi*) cannot be construed as extinguishing the right to deductions which are specifically outlined and defined in other sub-sections of the Act M RAJHAN SINGH v COMMISSIONER OF INCOME TAX, 50 M. L. J. 157, 23 L. W. 267, A. I. R. 1926 Mad 462 1051

———— **s. 11**—*Madras City Municipal Act (IV of 1919), s 111—Profession tax levied by Municipality—Deduction from income-tax*

Profession tax levied under s. 111, Madras City Municipal Act, is a contribution from the income of the assessee to the Municipality, and cannot, therefore, be allowed as a deduction from the taxable income, as an expenditure incurred solely for the purposes of the profession of the assessee, within the meaning of s 11 of the Income Tax Act M COMMISSIONER OF INCOME TAX, MADRAS v MESSRS KING & PARTRIDGE, 50 M. L. J. 176, 49 M. 296, A. I. R. 1926 Mad. 368 943

———— **s. 25 (3)**—*Business transferred from one proprietor to another, whether discontinued—Refund of tax.*

Income tax is chargeable on the profits of a business and it is immaterial if there is any change in the person who carries on a business, so long as the business is continued.

Section 25 (3) of the Income Tax Act is applicable only to cases in which a business is discontinued entirely and not to cases in which it is transferred from one set of proprietors to another. The question to be decided under the section is whether the *business* is discontinued and not whether it is discontinued by a particular person

Where a Company carrying on a business sells the business, including the good will and the benefit of all running contracts, to another Company, the ownership and management of the business is changed, but the business is not *discontinued*, the purchaser Company succeeds to the business and continues it. Section 25 (3) of the Income Tax Act has, therefore, no application to such a case. B COMMISSIONER OF INCOME TAX v. M. H. SANJANA & Co., 27 Bom. L. R. 1471, A. I. R. 1926 Bom 129, 50 B. 87 517

———— **s. 66**—*Application to Income Tax Commissioner—Application to High Court—Reference by Commissioner—All points in case, whether to be stated.*

The application under s. 66 (2), Income Tax Act, to the Commissioner of Income Tax should state the questions of law which the petitioner desires to be referred to the High Court. In the same way the application under s. 66 (3) to the High Court should also specify the question or questions of law which

Income Tax Act—1922—concld.

the applicant considers ought to have been referred to the High Court by the Commissioner If only one of several questions raised before the Commissioner is raised in the application to the High Court under s 66 (3), no objection can be taken to the course, if the Commissioner continues his reference to that point alone L *In the matter of* ISHAR DAS-DHARAM CHAND, A I R 1926 Lah. 168 **249**

——— **s. 66**—*Chief Court of Oudh, whether High Court for purposes of s 66—Oudh Courts Act (IV of 1925), s 8—U P General Clauses Act (I of 1904), s 4*

Per *Hasan, J*—The Chief Court of Oudh is a High Court within the meaning of s 66 of the Income Tax Act O COMMISSIONER OF INCOME TAX *v* LUCKNOW ICE ASSOCIATION, A I R 1926 Oudh 191 **257**

Indemnity bond, *suit on—Actual damage, whether necessary*

In order to enable a person to sue on an indemnity clause, it is not necessary that actual damage should be caused before the party affected can act M MAYAPPA CHETTIAR *v* KOLANDAIVELU CHETTIAR, (1926) M W N 459, A I R 1926 Mad 597 **715**

Injunction.

See (*i*) C P C, 1908, O XXXIX

(*ii*) SPECIFIC RELIEF ACT, 1877, ss 52, 57

———, temporary *See* DECLARATORY SUIT **723**

Insolvency—*Mortgage of insolvent's property*

The Court has jurisdiction to mortgage an insolvent's property but ordinarily such a course should not be adopted L LACHHMAN SINGH *v* RAM DAS **949**

——— *Suit by insolvent continued by Official Assignee—Dismissal of suit—Costs, whether payable personally by Official Assignee*

Where during the pendency of a suit the plaintiff becomes an insolvent and the Official Assignee continues the action knowing that it is wholly unsustainable, or where in the conduct of the action he is guilty of any conduct, which a prudent man would not be a party to, it would be open to the Court to direct the Official Assignee, to pay the costs of the action personally But where there is a *bona fide* dispute and the facts are such that it would not be easy to decide, whether the bankrupt has a good case or not, the Official Assignee should not be made to pay the costs personally out of his pocket M ABDUL RAHIMAN SAHIB & Co *v* SHAW WALLACE & Co, 21 L W 516, A I. R. 1926 Mad 736 **620**

Interest.

See MORTGAGE **665**

See TRANSFER OF PROPERTY ACT, 1882, s. 65 (*e*) **17**

———, compound, when can be charged *See* CONSTRUCTION OF DOCUMENT **195**

Interest Act (XXXII of 1839), s. 1—*Interest—Absence of demand—General principles.*

In the absence of demand for interest, a plaintiff is not entitled to interest under the Interest Act.

On general principles of law, interest is not due on money, unless it was intended to be paid or unless such intention could be implied from the usage of trade, as in the case of mercantile instruments M K. VENKAT REDDIAR & Co. *v* DESIKACHARIAR, 22 L W. 490, A. I. R 1925 Mad 1279 **354**

Interpretation of statutes.

When the Legislature passes an enactment, its provisions must be looked to rather than the intention of the Legislature, as revealed in the discussion which preceded the passing of the Act

The preamble of an Act may be referred to only in a case of ambiguity or where it is necessary to interpret the Act itself so as to give effect to its purport M KESAVALU NAICKER *v* CORPORATION OF MADRAS, 23 L W 233, 50 M L J 301, A I R 1926 Mad 381 **1053**

Jurisdiction, *plea of, not raised before Court of first appeal, whether can be taken in second appeal*

A plea of want of jurisdiction of the Trial Court, raised in that Court but not taken in the Court of first appeal, may nevertheless be raised in second appeal P. C. FIRM OF R B BANSILAL-ABIRCHAND *v* GHULAM MAHBUB KHAN, A I R 1925 P C 290, 49 M L J 806, 43 C L J 1, 23 L W 3, 24 A L J 48, (1926) M W N 108, 28 Bom L R. 211, 53 C 88, 30 C W N 577 **760**

Jurisdiction of Civil Courts.

See CUSTOM **1012**

See MADRAS VILLAGE COURTS ACT, 1889, s 78 **790**

Jurisdiction of Civil and Revenue Courts *See* AGRA TENANCY ACT, 1901, s 4 (5) **473**

Jury trial.

See (*i*) CRIMINAL PROCEDURE

(*ii*) CR P C, 1898, s 297 ETC

Karachi Port Trust (Amendment) Act (VI of 1924), s. 4 (2)—*"Becoming registered," meaning of—Right of election, when accrues*

The word "becoming" has been deliberately used in contradistinction to the word "being" in s 4 (2) of the Karachi Port Trust (Amendment) Act of 1924, and is intended to connote something different to that which would be conveyed by the word "being" The expression "becoming registered" in the section means in the process of registration as contrasted with "being registered," which refers to an act previous to the election Therefore, an association mentioned in the section even though unregistered at the date of election, would be entitled to elect representatives to the Karachi Port Trust Board, provided it was in the process of being registered, that is to say, was making *bona fide* efforts to become registered S RUSTOM K. SIDHVA *v* INDIAN MERCHANTS ASSOCIATION, A I R 1926 Sind 109 **374**

Land Acquisition Act (I of 1894), ss. 9, 11—*Adjudication by Collector before award, effect of*

Under s 9 of the Land Acquisition Act an enquiry by the Collector into the respective interests of the various persons interested in the land must be made before giving the final award and any such adjudication made after the award is without jurisdiction. L BAGO *v* ROSHAN BEG **484**

——— **s. 18**—*Reference, application, for, before award, effect of*

An application made before the award is given by the Collector cannot be treated as one for reference to Court under s 18 of the Land Acquisition Act L BAGO *v* ROSHAN BEG **484**

——— **ss. 30, 31.** *See* LAND ACQUISITION PROCEEDINGS **484**

Land acquisition proceedings—*Dispute as to apportionment of compensation—Civil suit, maintainability of.*

A civil suit between rival claimants about apportionment of compensation awarded under the Land Acquisition Act is maintainable where there has been no adjudication of the dispute by the Collector, nor a reference to the District Court L BAGO *v* ROSHAN BEG **484**

Landlord and tenant.

See (*i*) LEASE.

(*ii*) TENANCY ACTS.

——— *Lands, classification of, according to permanent or shifting character of cultivation—Poll tax*

Landlord and tenant—contd.

and plough tax, whether rent—Right of cultivator to minor produce

Prima facie a tenant, whatever his status as a tenant may be, *i.e.*, whether he is an occupancy tenant or a tenant from year to year or a tenant-at-will, is entitled to the produce of the land included in the tenancy so long as the tenancy subsists

The lands in a *jaghir* in certain hilly tracts in the South Arcot District were classified according as the cultivation was permanent or shifting. The revenue of the *jaghirdar* was not derived on any system of land assessment The land which each cultivator cultivated from time to time was not measured and assessed to rent. The cultivators paid a plough tax, an impost of a fixed amount per plough being collected on the number of ploughs a man used. They also paid a poll tax levied on the individuals of the male sex Each man cultivated where he liked and as much as he liked reclaiming the land by clearing the jungle and leaving it for a new plot when the fertility of the soil was exhausted.

Held, (1) that the revenue described as poll tax and plough tax must be regarded as rent and the relationship of landlord and tenant subsisted between the *jaghirdar* and the cultivators,

(2) that in the absence of a custom to the contrary, the cultivators were entitled to the minor produce from the lands brought under actual cultivation and the fact that before cultivating new lands formal permission was taken from the *jaghirdar* made no difference. **M** THANAPPA CHETTY *v.* ESUP KHAN SAHIB, 23 L. W. 36 **753**

——— — Muafi, *grant of — Transfer, prohibition against, effect of—Grove—Transfer, unauthorised—Forfeiture—Agra Tenancy Act (II of 1901), ss 150, 167—Suit for resumption of grove—Jurisdiction of Civil and Revenue Courts*

Where land is granted for planting a grove the person who plants the grove acquires, according to the general law, a transferable interest in the land and in the absence of a custom to the contrary, the trees become his property. The person who plants such grove possesses all rights in respect of his grove, which are not excluded by custom or the incidents of the tenure.

Where the grant of a *muafi* tenure contains a condition restraining the tenure-holder from transferring his right but there is no covenant for re-entry or forfeiture on such transfer, and the *muafidar* plants a grove, constructs a well and builds other structures of a permanent character upon the land, the landlord cannot claim to re-enter upon the land or forfeit the tenure upon a transfer of the tenure by the grantee.

Per *Ashworth*, J.—A local custom supersedes the Statute or general law. A local usage does not supersede it but is to be read into the contracts or implied contracts of persons living in the locality to which the usage applies. While a custom depends for its validity on its antiquity, a usage depends for its validity on its notoriety.

A provision in a grant against transfer would be meaningless unless one were to read into it also a provision that it will involve forfeiture The terms of a grant forbidding transfer must, therefore, entail that the right of reversion operates from the date when possession is given to a third party under an unauthorised transfer.

Sections 150 and 167 of the Agra Tenancy Act only exclude the jurisdiction of Civil Courts in cases of

Landlord and tenant—concld.

the resumption of "land" which means land let or held for agricultural purposes and a grove is not such land. Therefore, a suit relating to the resumption of a grove does not fall within the purview of those sections. **A** GOPAL *v.* COLLECTOR OF ALIGARH **134**

——— Mulgeni, *tenure—Liability of land to inundation—Abatement of rent—Equity, justice and good conscience—English Law, principles of, whether to be followed*

The holder of a *mulgeni* tenure in the Bombay Presidency cannot claim abatement of rent in respect of lands comprised in the tenure, which have not been entirely washed away or covered by sea-water or rendered entirely useless for cultivation by their liability to inundation by sea-water, but whose productive powers have deteriorated from such liability to inundation.

Per *Fawcett*, J.—In determining a suit according to "equity, justice and good conscience" the principles of English Law, applicable to a similar state of circumstances, unless shown to be inapplicable to Indian society and circumstances, should be taken as a guide. **B** VISHVANATH SHAMBA NAIK *v.* RAMKRISHNA MARTOBA KASBEKAR, 27 Bom. L R 1478, A I. R 1926 Bom 86; 50 B 94 **537**

——— — *Rent, when falls due.*

Ordinarily rent for agricultural land becomes due on the last day of the year. **M** SINNA KARUPPAN *v.* MUTHIAH CHETTIAR, 22 L W 816; A I R. 1926 Mad. 178 **373**

——— *Tenancy*, benami, *whether legal—Holding cultivated by real tenant* - Benamidar, *disappearance of—Abandonment—Landlord, whether can forfeit tenancy.*

Though a contract of tenancy is a personal one, a recorded tenant may hold land *benami* for some other person, and if there are circumstances to show the landlord knew that the recorded tenant was merely a *benamidar*, he cannot treat the holding as abandoned if the *benamidar* disappears and the land is cultivated by the person for whom he was a *benamidar*. **N** KANKAI *v* TIKARAM, A I. R. 1926 Nag. 239 **20**

——— *Tenancy rights, mortgage of, whether void* ab initio

A mortgage of his tenancy lands by a tenant-at-will is not void *ab initio* **O** SHUNKAR *v.* MAHADI, 13 O. L J 241 **46**

Lease.

See ALSO (*i*) LANDLORD AND TENANT.

(*ii*) TRANSFER OF PROPERTY ACT, 1882, ss. 106, 117.

See CONSTRUCTION OF DOCUMENT **411**

——— *Lessor and lessee—Lease for term of years—Deposit of cash with lessor to be appropriated to last year's rent—Subsequent conversion of cash into Government pro-notes by consent of parties—Depreciation in value of notes—Loss, liability for.*

A lessee for a term of 5 years deposited a sum of money equivalent to one year's rent with the lessor on the understanding that the amount would be applied in payment of the last year's rent Soon after, by consent of both parties, Government promissory notes were purchased for the cash deposit. But by the time the lease terminated, the notes had considerably depreciated in value On a question arising as to who was to bear the loss arising from the said depreciation in value:

Held, that the cash deposit belonged to the lessee and the conversion of cash into Government pro-notes had not, in the absence of any special agreement, the

effect of transferring the property in them from the lessee to the lessor. The property in the notes being the lessee's, when they depreciated in value, he ought to bear the loss **M** THIRUMALAI PILLAI *v* ARUNCHELLA PADAYACHI, A I R. 1925 Mad 510 **520**

——— *Permanent residential tenancy—Presumption, when arises—Fresh lease—Old tenancy, whether continued—Adverse possession by lessee*

Where the origin of a tenancy for residential purposes is known, no presumption of permanency can arise.

A fresh lease executed after the expiration of the term of the previous lease, creates a new tenancy and is not a confirmation of the previous tenancy

A person who has lawfully come into possession as tenant from year to year or a term of years cannot by setting up, however notoriously, during the continuance of such relation, any title adverse to that of the landlord inconsistent with the legal relation between them, acquire, by limitation, title as owner or any other title inconsistent with that under which he was let into possession **C** GOPAL CHANDRA DAS *v* SATYA BHANUGH OSHAL, A I R 1926 Cal 634 **963**

Legal Practitioners Act (XVIII of 1879), s. 4—*"Practise," meaning of.*

The word "practise" in s 4 of the Legal Practitioners Act, includes the right to appear, plead and act **Pat** LURENTIUS EKKA *v* DHUKI KOERI, 4 Pat. 766, A I R. 1926 Pat 73, 7 P L T 362 **179**

——— **ss. 13, 7**—*Legal practitioner—Civil disobedience*—Sanad, *renewal of*

While the High Court will not interfere with or have regard to any man's political opinions or opinions on public questions, it is impossible to allow a person, who proclaims or practices what is called the doctrine of "civil disobedience", to ask to be part of the machinery of the Courts which exists for the very purpose of the thwarting of civil disobedience and the enforcement of civil obedience He may be a perfectly honourable man, he may act from conscientious motives, he may in conceivable circumstances be a patriot It may be imagined that he should not be punished or even prosecuted for holding or expressing these opinions but, however, admirable a person he may be, he cannot consistently with his professions, ask to be considered and to be adopted as a legal practitioner, that is, as part of the machinery of the High Court for enforcement of law and order **M** *In the matter of* K M FIRST GRADE PLEADER, A I R 1924 Mad. 479, (1924) M W N 5, 27 Cr. L J 230 **214**

——— **s. 14**—*Legal practitioner, misconduct of——Jurisdiction to inquire into, whether confined to Court in which misconduct committed—Transfer of proceedings, competency of.*

Section 14 of the Legal Practitioners Act does not limit the consideration of a charge of misconduct against a legal practitioner to the Court in which the misconduct is alleged to have been committed Any Court in which the Pleader practises is empowered to entertain a petition under the section

A Magistrate who has been moved under s 14 of the Legal Practitioners Act to institute proceedings against a legal practitioner for misconduct has no jurisdiction to transfer the proceedings to a subordinate Magistrate for action or to direct him to hold a preliminary inquiry. **M** *In re* VANUGOPAL NAYUDU, 27 Cr. L. J. 384 **896**

——— **s. 36**, *action under—Necessity for caution—Defence evidence.*

Section 36 of the Legal Practitioners Act being

drastic and somewhat exceptional, a great deal of care and caution is necessary before taking action under it and the person affected must be given full opportunity of producing defence evidence **L** DIWAN CHAND *v* EMPEROR, 27 Cr. L J. 333, A I R 1926 Lah. 227 **749**

Letters Patent (All.), cl. 11. *See* AGRA TENANCY ACT, 1901, ss. 175, 177 **282**

Letters Patent (Bom.), cl. 15—*Finding that suit is maintainable, whether "judgment"—Appeal, whether lies.*

A finding that a suit is maintainable and should proceed, even though embodied in a formal decree, is not a "judgment" within the meaning of cl 15 of the Letters Patent of the Bombay High Court, and is not, therefore, open to appeal.

Per *Coyajee, J*—The word "judgment" in cl 15 of the Letters Patent of the Bombay High Court means a judgment or decree which decides the case one way or the other in its entirety, and does not mean a decision or order of an interlocutory character, which merely decides some isolated point, not affecting the merits or result of the entire suit **B** SHRI GOVERDHANLALJI MAHARAJ *v* SHRI CHANDRAPRABHAVATI, 27 Bom L R 1496, A I R 1926 Bom 136 **552**

Limitation - *Claim by way of defence—Limitation, whether can be pleaded.*

It is a settled rule of law that no limitation can be pleaded against a claim made by way of defence **O** RAISUNNISA *v* ZORAWAR SAH, 3 O W N 121, 13 O L J. 10, A I. R. 1926 Oudh 228 **675**

———, *commencement of, during lifetime of full owner—Death of full owner—Succession by limited owner—Suspension of limitation*

Once limitation has commenced to run in the lifetime of a full owner, it is not suspended by reason of the fact that the full owner dies and is succeeded by a limited owner **Pat** BATISA KUER *v* RAJA RAM PADY, (1925) Pat 343, A I R 1926 Pat 192, 7 P L. T 393 **177**

Limitation Act (IX of 1871), Sch. II, Art. 129, *application of*

Article 129 of Sch II to the Limitation Act of 1871 applied to all suits in which the plaintiff could not succeed without displacing an apparent adoption by virtue of which the defendant was in possession and where, before the repeal of that Act, the defendant's title had, owing to the afflux of time, become unassailable, the repeal of that Act would not revive the right of any reversioner to the estate to question the validity of the adoption under which the defendant claimed. **P C** VAITHIALINGA MUDALIAR *v* SRIRANGATH ANNI, A. I R 1925 P. C 249, L R 6 A P C 169 49 M L J 769, 42 C L J 563, 48 M 883, 30 C W N. 313, 28 Bom L R 173; (1926) M W N 11, 52 I. A. 322 **85**

Limitation Act (IX of 1908), s. 5.

See C P C, 1908, s 149 **319**

See VAKALATNAMA **966**

——— **s. 5**—*Appeal filed beyond time—Extension of time—Discretion of Court*—Bona fide *review proceedings—Issue of notice on application, if sufficient—Prospect of success*

Discretion of Court must not be exercised arbitrarily but upon sound legal principles

In an application for extension of time by an appellant who has been prosecuting review proceedings, the applicant must show that the application for review was prosecuted with due diligence and that there were reasonable grounds for filing such an application.

When the applicant fulfils the above conditions and the Court either ignores them or decides the applica

tion upon other grounds there would be no exercise of judicial discretion.

The test of a *bona fide* application for review is not the prospect of success of the applicant Issue of notice on the opposite party is sufficient **C** RAMDHANI MUCHI *v.* KHAKSHARDAS TATI, A. I. R 1926 Cal 677 **1031**

——— **s. 5**—*Application, delay in filing—Time spent in obtaining copy not required to be filed—Extension of time—Sufficient cause*

Delay in filing an appeal cannot be excused on the ground that it was due to time spent in obtaining a copy which was not required to be filed along with the memorandum of appeal **R** CHAN ELLIAM *v* NEO THEIN THEONG, A. I. R 1925 Rang. 361, 4 Bur. L J 138 **786**

——— **s. 5**—*Petition presented out of time—Delay, explanation of—Extension of time, prayer for*

A petition filed out of time must show on the face of it the reason for the delay, and there must be an express prayer for condonation of the delay under s 5 of the Limitation Act **Pat** LAURENTIUS EKKA *v* DHUKI KOERI, 4 Pat 766; A. I R 1926 Pat 73; 7 P L T 362 **179**

——— **s. 5**, *scope of—Extension of time for appeal—Counsel's wrong advice, effect of*

A party in whose favour a decree or order is passed should not be deprived of the advantage of his vested right in the same unless there has been on his part some conduct raising an equity against him or there has been some inevitable accident

It is not each and every mistake of a Counsel which *per se* is to be considered a sufficient ground for giving his client the benefit of s 5 of the Limitation Act.

A mistaken advice of a Counsel that an appeal lay from an order dismissing an application for the amendment of a decree, causing a *bona fide* wrong impression on the client and a delay in the filing of an appeal from another appealable order in execution proceeding, cannot furnish a sufficient ground for condoning the delay under s 5 of the Limitation Act **N** SADASHEO *v* BAPU, A I R 1926 Nag. 162 **33**

——— **ss. 5, 12**—*Calcutta High Court Rules, Ch. XVI, r 27—Appeal filed beyond time—Extension of time—Delay in getting decree drawn up - Application for office copy of decree, effect of*

Before an appeal can be filed, the decree or order must be drawn up and the would-be applicant must obtain a copy of the decree or order, which it is his duty to file with the memorandum of appeal

By reason of r 27, Chap XVI of the Calcutta High Court Rules, if the party in whose favour a decree has been made does not apply to have the decree drawn up within four days from the date of the decree, any party to the suit may apply to have the decree drawn up.

It is not sufficient for a person desiring to appeal to put in a requisition for an office copy without taking any steps to have the decree drawn up This does not afford ground for extension of time under s 5, Limitation Act, in the case of an appeal filed beyond time on account of delay in obtaining copy of the decree

Time which need not have elapsed, if the appellant had taken reasonable and proper steps to obtain a copy of the decree or order, could not be regarded as requisite time within sub-s. (2) of s. 12 of the Limitation Act. **C** GOBIND LAL DUTT *v.* OFFICIAL ASSIGNEE, 29 C W N 163, A I R 1925 Cal 291 **563**

——— **s. 6.** *See* C P. C, 1908, s 115 **775**

——— **s. 6**—*Mortgage—Redemption suit—Decretal amount determined by Trial Court enhanced by Appellate Court—Civil Procedure Code (Act V of 1908), s. 144—Restitution - Application by mortgagee for recovery of mesne profits, whether application for execution—Minority of applicant—Limitation, extension of.*

Where in pursuance of a decree for redemption passed by a Trial Court, the plaintiff pays the amount mentioned in the decree and obtains possession of the mortgaged property, but the amount payable under the decree is subsequently enhanced by the Appellate Court, an application by the mortgagee to recover mesne profits from the mortgagor by way of restitution for the period between the date on which possession of the mortgaged property was taken by the mortgagor and the date on which he paid the difference between the decretal amount payable under the decree of the Trial Court and that payable under the decree of the Appellate Court, is an application for execution within the meaning of s 6 of the Limitation Act and the mortgagee is entitled to the benefit of the provisions of that section **O** SANT SAHAI *v.* CHHUTAI KURMI, 3 O W N 65, A I R. 1926 Oudh 199 **23**

——— **ss. 6, 8.** *See* PUNJAB LIMITATION (CUSTOM) ACT, 1920, ss. 5, 6 **294**

——— **s. 12.** *See* LIMITATION ACT, 1908, s 5 **563**

——— **s. 12 (3).** *See* LIMITATION ACT, 1908, SCH I, ART 179 **897**

——— **s. 12**—*Time allowed for copies, calculation of*

Time allowed for copies in filing an appeal should be calculated from the date of application up to the date when the copies are despatched, and not merely up to the date when they are ready **L** ALLAH BAKHSH *v.* MUNICIPAL COMMITTEE, A. I R 1926 Lah. 223 **966**

——— **s. 14.** *See* BENGAL TENANCY ACT, 1885, s 46 **37**

——— **s. 14**—*Application not lying in any Court—Extension of time*

An application which does not lie in any Court cannot be taken into account for the sake of extending time under s 14, Limitation Act **L** MOHAN SINGH *v* NATHU MAL **299**

——— **s. 14** - *Civil Procedure Code (Act V of 1908), O. VII, r 10—Plaint presented in wrong Court—Order directing return of plaint for presentation to proper Court—Time between date of order directing return and date of actual return, exclusion of.*

Where a plaint is presented in a wrong Court, and the Court after inquiry ultimately directs the plaint to be returned for presentation to the proper Court, the plaintiff is entitled, under s 14 of the Limitation Act, to exclude the whole period from the date of the filing of the plaint in the wrong Court to the date on which the plaint is actually returned for re-presentation.

In such a case the proceedings terminate not on the date of the order directing the plaint to be returned but on the date of the actual return with the endorsements on the plaint in accordance with the provisions of O. VII, r 10, C P C **M** SINNA KARUPPAN *v.* MUTHIAH CHETTIAR, 23 L. W. 816; A. I. R. 1926 Mad. 178 **373**

Limitation Act—contd.

——— **s. 18.** *See* PUNJAB TENANCY ACT, 1887, s. 50 597

——— **s. 19**—*Pro-note, invalid, whether can be used as acknowledgment*

When a person borrows a certain sum of money and executes a promissory note, he executes it for the consideration received by him and when it is executed in respect of a consideration already passed it is an acknowledgment of the liability to pay the amount mentioned in the note

Though a promissory note made payable to bearer cannot be enforced as being invalid, it can nevertheless be used as evidence of an acknowledgment of liability under s. 19 of the Limitation Act so as to save the bar of limitation. M ALELLA KESAVARAMAYYA *v* VISAMSETTI VENKATANARASIMHA, (1926) M W N 141, 50 M L J 36, 23 L W 678, A I R 1926 Mad 452 626

——— **s. 20.** *See* EVIDENCE ACT, 1872, s 114 687

——— **s. 20**—*Pro-note, execution of, for another—Payment of interest by real debtor—Extension of time*

Where a promissory note is executed in pursuance of an agreement between the executant and a third party that the former would execute the promissory note, but that the latter would pay the interest on it and also the principal, this is sufficient evidence of an implied condition that that third party should pay the interest falling due on the promissory note as the duly appointed agent of the executant and the payment by him of interest saves limitation, but not so, where payment of interest is made not in consequence of any such agreement between the third party and the executant but in consequence of an understanding between the executant and the promisee O NATIONAL BANK OF UPPER INDIA *v* BANSI DHAR, 3 O W N 83, A I R 1926 Oudh 248 94

——— **s. 23.** *See* LIMITATION ACT, 1903, SCH I, ART 36 994

——— **Sch. I, Art. 36, s. 23**—*Suit for compensation for damage caused by defendants' action—Limitation—Continuing wrong—Date of malfeasance*

Limitation for a suit to recover compensation for damage caused to the plaintiffs' building by the action of the defendants in closing up certain drains which emitted water from the plaintiffs' building on to the defendants' premises is two years from the date of the damage

The action of the defendants in closing up the drains and thereby causing damage to plaintiffs' building is a continuing wrong as contemplated by s 23, Limitation Act

In cases of continuing wrongs the date of the damage is the date of the malfeasance within the meaning of Art 36 of Sch I to the Limitation Act L CHIRANJI LAL *v* SHIB LAL, A I R 1926 Lah 242 994

——— ——— **Art. 62.** *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, SCH II, ART 18 731

——— ——— **Art. 75**—*Instalment bond—Whole amount becoming due on default—Limitation, commencement of*

Where an instalment bond provides that on default in the payment of two instalments the whole amount due under the bond shall become payable, and default is made in the payment of two instalments, a suit to recover the amount of the bond is governed by Art 75 of Sch I to the Limitation Act, and limitation begins to run from the date on which the second instalment in respect of which default was made became due N KISAN *v.* JASODABAI, A. I. R. 1925 Nag. 298 530

Limitation Act—contd.

——— **Sch. I, Art. 83**—*Principal and agent—Suit by agent for re-imbursement—Limitation*

A suit by a commission agent for re-imbursement of losses paid on behalf of his principal is governed by Art 83 of Sch I to the Limitation Act, and limitation in respect of each item begins to run from the date of damnification L MUNSHI RAM *v* BHAGWAN DAS, 7 L L J 596, A I R 1926 Lah 152 595

——— ——— **Art. 85**—*Mutual open and current account—Shifting balance, effect of*

In order that an account may be mutual open and current within the meaning of Art 85 of Sch I to the Limitation Act, there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations

Where an account between two persons resembled a Bank pass-book where deposits of monies were made and withdrawals of monies took place from time to time the balance being in favour either of one or other as the case might be

Held, that the mere shifting of account from one side to the other did not constitute mutual and independent obligations M GOVINDA NADAN *v* RAMASAMI CHETTIAR, (1925) M W N 927, A I R 1926 Mad 224, 23 L W 573 106

——— ——— **Art. 85**—*Principal and commission agent—Account, mutual, open and current*

A suit on an account by a commission agent, who received goods from the defendant and also discounted his *hundis*, showing a shifting balance sometimes in favour of one and sometimes in favour of the other is a suit on a mutual, open and current account, and is governed by Art. 85 of Sch I to the Limitation Act L FIRM BIHARI LAL-JAI NARAYAN *v* HAR NARAIN DAS, A I R 1926 Lah 283 674

——— **Art. 115.** *See* TRANSFER OF PROPERTY ACT, 1882, s 95 559

——— **Art. 120.** *See* TRANSFER OF PROPERTY ACT, 1882, s 53 405

——— ——— **Art. 120**—*Suit for specific performance, dismissal of—Suit to recover loan—Limitation*

Defendant handed over a piece of land to the plaintiff as security for a loan, the agreement between the parties being that if the defendant failed to re-pay the loan within three years, the land would be conveyed to the plaintiff Plaintiff continued in possession of the land and after the expiry of the three years filed a suit for specific performance of the agreement to convey, which was dismissed He then brought a suit to recover the amount of the loan

Held, that the suit was governed by Art 120 of Sch I to the Limitation Act, and that the cause of action arose when the suit for specific performance was dismissed R MG PO KIN *v* MG PO OH, A I R 1925 Rang 373, 4 Bur L J 160 736

——— ——— **Art. 123**—*Suit by heir to recover share of estate of deceased from co-heirs—Limitation applicable*

There is no reason why a different aspect should be given to a claim for a distributive share of the estate of a deceased person against an administrator, who should have distributed the estate and given a share to the plaintiff but failed to do so, from the aspect of a similar claim against one or more heirs of a deceased person who should have amicably agreed to a partition of the estate and given a share

to the plaintiff but have failed to do so. Such a suit is governed by Art. 123 of Sch. I to the Limitation Act R MA TOK *v.* MA YIN, A I. R. 1925 Rang 228; 3 R. 77 489

——— Sch. I, Art. 132. *See* TRANSFER OF PROPERTY ACT, 1882, s. 95 559

——— Art. 132—*Mortgage-deed—Mortgagor at liberty to pay at any time—Commencement of limitation for mortgagee.*

Where according to the terms of the mortgage-deed the mortgagor is at liberty to pay at any time, the mortgagee is equally at liberty to foreclose and his limitation under Art 132 of Sch I to the Limitation Act begins to run at once. L ZIADA *v* GURDAS RAM, A. I. R. 1226 Lah. 225 656

——— Art. 132—*Transfer of Property Act (IV of 1882), s 74—Mortgages, prior and subsequent—Decree obtained by prior mortgagee paid off by puisne mortgagee—Suit by puisne mortgagee to recover money paid by him—Limitation, commencement of.*

Under s. 74 of the Transfer of Property Act a puisne mortgagee on paying off a decree obtained by a prior mortgagee acquires all the rights and powers of the prior mortgagee as such as determined by the decree and the rights so acquired by the puisne mortgagee can be enforced by him by a separate suit Article 132 of Sch. I to the Limitation Act would apply to such a suit, the period of limitation being twelve years from the date on which the money became due to the puisne mortgagee, that is to say, from the date on which the puisne mortgagee paid off the prior mortgagee's decree and became entitled under the provisions of s 74 of the Transfer of Property Act to the rights created by the decree N SURYABHAN *v.* RENUKA, 8 N. L. J. 232, A I R 1926 Nag. 84 118

——— Art. 134, *scope of—Transfer by mortgagee—Suit for redemption—Honest belief of transferee—Limitation*

In every case where Art 134 of Sch I to the Limitation Act is set up as a defence by a transferee from a mortgagee, it is material to see what interest the mortgagee purported to transfer, and where both the seller and purchaser honestly believed that the entire interest of an owner was being transferred, the Article is clearly applicable

Obiter—The omission in Art 134 of Sch I to the Limitation Acts of 1877 and 1908 of the words 'in good faith' which appeared in the corresponding article of the Limitation Acts of 1859 and 1871 now render it unnecessary for a transferee from the mortgagee to prove that he acted in good faith before he can plead limitation.

Per *Ramesam, J.*—The possible cases that may arise in the case of a transfer by a mortgagee are four:—

(1) Where the transfer on its face purports to be an assignment of the mortgagee's interest only, to such a case Art. 134 of Sch. I to the Limitation Act can never apply.

(2) Where the transfer purported to be a sale-deed but as a matter of fact only an assignment of the mortgagee's interest was all that was bargained for, to such a case also Art 134 does not apply.

(3) Where the deed of transfer is a sale-deed and what was bargained by the transferee is also an absolute sale, though he knew that the transferor had only a mortgagee's interest, in such a case though under the Limitation Acts of 1859 and 1871, Art. 134 may not apply, under the Acts of 1877 and 1908 it does apply.

(4) Where the transfer is in the form of a sale-deed and the transferee bargained for an absolute interest and acted *bona fide* throughout, to such a case there is no doubt that Art. 134 will always apply. M VENKU SHETTITHI *v* RAMACHANDRAYYA, 49 M. L. J. 634; (1925) M. W. N 866; 22 L. W. 885; A. I. R 1926 Mad. 81; 49 M. 29 342

——— Sch. I, Arts. 134, 140, 148—*Adverse possession during tenure of life-tenant—Remainderman, whether affected—Mortgage—Transfer by mortgagee—Redemption suit by remainderman—Limitation.*

Article 134 of Sch. I to the Limitation Act deals with transfers of property which has been mortgaged. The Article does not specifically require that the property should have been mortgaged with possession. The suits referred to in the Article being, however, suits for possession, it must be assumed that when such a suit is brought the defendant transferee is in possession. Therefore, the transfer which he has taken must have been one which placed him in possession and consequently where the transferor is a mortgagee he must have been in possession of the mortgaged property at the time he made the transfer. It is not, however, necessary that the possession which the transferor had at the time of the transfer must have been acquired under the mortgage originally made in his favour. Even if the mortgage was a simple mortgage and the mortgagee subsequently gets possession of the mortgaged property otherwise, as for example, by purchase in execution of a simple money-decree obtained against the mortgagor by another creditor, the Article will still apply if it is established that at the time the transfer is made the mortgagee was in possession, no matter under what title. The Article is designed for the protection of a transferee who has been led by a mortgagee to believe that he is acquiring not merely mortgagee rights but a full proprietary title

No act of a life-tenant can be binding upon the remainderman who does not claim under the life-tenant but under an independent title

Per *Kanhaiya Lal, J.*—Under Art 140 of Sch I, to the Limitation Act, a remainderman or devisee can sue for possession of immoveable property devised to him within twelve years from the date when his estate falls into possession

Once a person enters into possession of property as a tenant for life he cannot hold adversely to the remainderman Similarly adverse possession for any length of time against a tenant for life is ineffectual against the reversioner or remainderman whose right to possession only accrues on the death of the tenant for life

Article 134 of Sch. I to the Limitation Act allows only a period of 12 years for a suit to recover possession of immoveable property mortgaged and subsequently transferred by the mortgagee for a valuable consideration, to be computed from the date of such transfer. It applies to cases where the mortgagee purports to transfer what he is not competent to alienate, that is an interest greater than that of a mortgagee, and it presupposes a mortgage with possession or followed by possession as a necessary incident or ingredient of it because a mortgagee who is not in possession cannot transfer possession to another or give what he does not possess. If the mortgagee acquires possession in some other capacity,

the transfer of possession will be deemed to have been made in the capacity in which it was (rightly or wrongly) acquired and such acquisition cannot be attributed to the mortgage, where the mortgage itself is a simple mortgage or a mortgage not entitling the mortgagee to possession by virtue of its incidents or terms.

The object of Art 134 is to protect transferees for value who have purchased an interest larger than that possessed by the transferor and have been allowed to remain in possession and enjoyment of such larger interest for a period of more than 12 years In the matter of mortgaged properties so transferred, it controls Art. 148 in the same way as it controls Art 140 If the mortgaged property is in the possession, not of the mortgagee, but in that of a transferee from him who claims to have purchased a larger interest therein for consideration, then neither Art 148 nor Art 140 of Sch I to the Limitation Act will enable the mortgagor or a reversioner or a remainderman to redeem the property after the possession of the transferee has lasted for more than 12 years A remainderman who sues for the redemption of a mortgage cannot escape the consequences which Art 134 prescribes **A** NAUNIHAL SINGH *v* ALICE GEORGINA SKINNER, 23 A L J. 691, A I R 1925 All 707, 47 A 803 **63**

——— **Sch. I, Art. 135**—*Mortgage with possession — Suit by mortgagee to recover possession—Limitation, commencement of—Submersion of land, effect of.*

In the case of a mortgage with possession, the mortgagor is liable to deliver possession of the mortgaged property to the mortgagee on the date of the mortgage, but is not bound to do so until the mortgagee asks for or seeks to enforce his right to possession If the latter fails to do so, the mortgagor's possession cannot be said to be that of a trespasser or wrong-doer

The mortgagor's right to possession, however, determines on the date of the mortgage, and under Art 135 of Sch I to the Limitation Act, a suit by the mortgagee to recover possession of the mortgaged property must be brought within twelve years of such date Where, after such date the land mortgaged becomes submerged and is taken possession of by the mortgagor on its re-appearance, the mortgagor will be deemed to have remained in constructive possession thereof during the period of submersion and time will be deemed to have continued to run against the mortgagee during the period of submersion In any case, time having begun to run against the mortgagee from the date of the mortgage, the subsequent submersion of the land would not have the effect of stopping it **L** BARKAT *v* RELU MAL, 7 L L J 509, A I R. 1925 Lah. 627 **178**

——— **Arts. 142, 143, 144**—*Assignment of lease—Forfeiture of lease—Suit for possession—Limitation—Civil Procedure Code (Act V of 1908), s 11, Expl IV—Suit by lessee for renewal—Subsequent suit for possession by lessor—Adverse possession, whether can be pleaded*

Article 143 of Sch I to the Limitation Act only applies to suits to enforce reliefs claimable by reason of forfeiture or of breach of condition under a contract and can only apply to suits brought against parties who have incurred that forfeiture or committed the breach

Where, however, a person holding under a lease containing conditions of forfeiture has assigned his right to another person, a suit by the lessor against the assignee for recovery of property by reason of forfeiture or breach of conditions in the lease is not governed by Art. 143 The proper Article applicable is 144 or 142, as the case may be

Where an assignee from a lessee sues the lessor for renewal of the lease and fails, it is not open to him in a subsequent suit by the lessor to plead title by adverse possession Such a plea ought to have been set up in the prior suit **M** MANAVIKRAMA, ZAMORIN RAJA OF CALICUT *v* VENKATAGIRI PATTAR, 23 L. W. 58 **245**

——— **Sch. I, Art. 144**—*Suit based on title—Adverse possession, plea of—Burden of proof—Trespassers, independent, whether can tack possession.*

One trespasser cannot add to his own possession the previous independent possession of another trespasser When possession passes from one trespasser to another there is a constructive restoration, even if a momentary restoration, of the true owner to possession

In a suit falling within Art. 144 of Sch I to the Limitation Act the initial onus is on the plaintiff to establish his title and he is not under an obligation to prove his possession within 12 years of the suit On the contrary when the plaintiff's title has been proved or is admitted, the burden is on defendant to establish that he or the person through whom he claims has or have been in possession adverse to the plaintiff for over 12 years before the suit The defendant must also prove when his possession became adverse **O** SUKHDEO *v* RAM DULARI, A I R 1926 Oudh 313 **825**

——— **Art. 144**—*Suit against co-mortgagor redeeming entire property—Denial of right to possession unless charge paid—Adverse possession—Limitation*

A suit by a co-mortgagor against another co-mortgagor who has redeemed the entire property is governed by Art 144 of Sch I to the Limitation Act and where the latter denies the right of the former to enter into joint possession until he has paid his share of the charge which the latter has defrayed, the possession of the latter is adverse and if it has continued for 12 years the suit is barred by limitation **L** NARAIN DAS *v* SARAJ DIN, A I R 1926 Lah. 238 **980**

——— **Art. 164**—*Civil Procedure Code (Act V of 1908), O V, r 20, O IX, r 13*—Ex parte *decree, application to set aside—Service of summons — Substituted service—Limitation—Burden of proof.*

Article 164 of Sch I to the Limitation Act prescribes a period of thirty days for an application to set aside an *ex parte* decree, and the *terminus a quo* is the date of the decree, or, where the summons was not duly served, the date on which the applicant has knowledge of the decree

In the case of substituted service effected by order of the Court, the summons must be deemed to be duly served for the purpose of Art 164 of Sch I to the Limitation Act, even though it does not in fact come to the defendant's knowledge

Where the summons is not duly served on the defendant, the *terminus a quo* for an application to set aside an *ex parte* decree is the date on which the defendant has knowledge of the decree, and the burden lies upon him to show that his application is within time **L** DITTU RAM *v.* NAWAB, 7 L L J 448; A I R 1925 Lah 639 **272**

——— **Art. 166.** *See* C. P. C., 1908, O. XXI, R. 90 **567**

——— **Art. 166, s. 5**—*Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Execution of decree,*

—Sale, application to set aside—Limitation, extension of.

The period prescribed under Art. 166 of Sch. I to the Limitation Act for an application to set aside a sale held in execution of a decree cannot be enlarged under the provisions of s 5 of the Limitation Act **L** UMRAO SINGH *v.* BENI PRASHAD-MEHR CHAND **839**

——— **Sch. I, Art. 177**—*Appeal—Death of respondent—Application to bring legal representatives on record—Limitation.*

Article 177 of Sch I to the Limitation Act, which prescribes the period of limitation for an application to bring on the record the legal representatives of a deceased respondent, was not in any manner affected by the passing of the Amending Act XXVI of 1920 It was not till the Amending Act XI of 1923 was passed that the period of limitation prescribed by Art 177 was reduced from six months to ninety days **A** ALICE GEORGINA SKINNER *v* MUKARRAM ALI KHAN, L R. 5 A. 607 Civ , A. I. R. 1925 All 77 **330**

——— **Art. 177,** *as amended by Act XXVI of 1920—Limitation, period of—"Ditto," meaning of*

The period of limitation under Art 177 of Limitation Act IX of 1908 remained at six months even after the amending Act XXVI of 1920.

The word "Ditto" opposite to Art 177 in the Limitation Act of 1908 was equivalent to the words "six months" and when the word "Ditto" was allowed to stand without alteration after the amendment of 1920, the meaning of the word could not be held to have been changed. **M** SUBRAMANIA IYER *v* SHUNMUGAM CHETTIAR, 49 M. L. J 363, 22 L W. 538, A I. R 1926 Mad 65 **566**

——— **Art. 179, s. 12 (3)**—*Civil Procedure Code (Act V of 1908), s 109—Leave to appeal to Privy Council, application for—Limitation—Time spent in obtaining copy of judgment, whether can be excluded*

Sub-section (3) of s 12 of the Limitation Act does not apply to an application for leave to appeal to His Majesty in Council The time spent in obtaining a copy of the judgment appealed from cannot, therefore, be excluded in computing the period of limitation prescribed for such application **A** WILAYATI BEGAM *v* JHANDU MAL-MITHU LAL, 24 A L J 319, A I R 1926 All 286 **897**

——— **Art. 181** - *Civil Procedure Code (Act V of 1908), s 144—Restitution application—Limitation, operation of*

Where a decree is set aside in appeal, and the order is confirmed in second appeal, limitation for an application for restitution runs from the date of the order in second appeal and not from that in the first appeal.

Limitation for a restoration application is three years under Art 181 of Sch I to the Limitation Act. **C** FAZLAR RAHMAN *v* ABDUL SAMAD **960**

——— ——— **Art. 182.** *See* EXECUTION OF DECREE **782**

——— ——— **Art. 182 (5).** *See* EXECUTION OF DECREE **709**

——— **Art. 182 (5)**—*Step-in-aid of execution—Assignee decree-holder—Recognition of assignment, application for.*

An assignee decree-holder can apply only to the Court which passed the decree for being recognised as the assignee of the decree and he cannot make an application only for the purpose of being recognised as an assignee decree-holder His application must be one for execution and, therefore, if he does not apply for execution, his application would not be considered to be a proper application

An application by an assignee decree-holder to the Court executing the decree, stating that the decree had been transferred to him, and requesting it to send back the records of the case to the Court which passed the decree "for the purpose of further conducting the suit" is a step-in-aid of execution within the meaning of cl (5) Art 182 of Sch I to the Limitation Act **M** AYYAVU PILLAI *v* VARADARAJA PILLAI, 50 M L. J 116, A I R. 1926 Mad 431 **770**

Limitation and Code of Civil Procedure (Amendment) Act (XXVI of 1920). *See* LIMITATION ACT, 1908, SCH. I, ART. 177 **330**

Madras City Tenants' Protection Act (III of 1922), ss. 2, cl. (4), 3- *Lessee of right from Corporation to put up building on road side—Construction of pucca building—Long possession—Issue of permits, effect of—Person in possession, whether tenant—Compensation on ejectment.*

Where the defendant's predecessor-in-title was allowed by the Corporation of Madras to put up a building on the roadside in the City of Madras for the purpose of selling ærated water and ice and leases for terms had been granted and renewed from time to time to defendant's predecessor and then to defendant, and two years before suit, yearly permits had been issued under the Municipal Act to the defendant to keep the ice depôt ·

Held, that the defendant was a tenant within the meaning of s 2, cl (4) of the Madras City Tenants' Protection Act and was entitled under s 3, on ejectment, to be paid compensation for his building

When a man has spent a considerable sum of money in erecting a *pucca* masonry building on another's land, there is a legitimate inference to be drawn that he did so in the hope that he would not be evicted, although it is an inference which may be rebutted by other circumstances, which show that he could not have had such a hope **M** KESAVALU NAICKER *v* CORPORATION OF MADRAS, 23 L W 233; 50 M L J. 301, A I R 1926 Mad 381 **1053**

Madras Civil Rules of Practice, r. 277, *object of—Pleader application of, to appear against former client—"Matter connected therewith," meaning of—Wrong order by misinterpretation of rule—Revision.*

Order III, r 4, C P C , does not give an absolute right to a Pleader to appear in a Court till the termination of the proceedings, but only provides in what manner a Pleader competent to appear, plead and act should be appointed and till what time the appointment will be in force. If he is not competent to appear, plead and act in any Court under the rules governing the procedure in that Court, he cannot claim right of audience by virtue of O. III, r. 4.

A Pleader can appear for a party whose interest is opposed to that of the party for whom he had acted, drawn up pleadings or appeared in the same proceedings, only with the latter's consent or when specially authorised by the Court.

Rule 277 of the Madras Civil Rules of Practice is intended to regulate the proceedings in Courts and a practitioner of the Court has to conform to the rules governing its procedure.

Madras Civil Rules of Practice—concld.

The object of r. 277 is not to save the Pleader from a suit for damages by the party for whom he acted and against whom he subsequently acted, but to prevent an unreasonable conduct on the part of both the Pleader and the client

A Pleader who has acted for a party to a suit and has discharged himself cannot afterwards act for the opposite arty and the Court has power to restrain him from doing so on an application made for that purpose.

The words "in any matter connected therewith" in r. 277 mean connected with the suit or appeal or other proceeding in which the Pleader gave the advice and does not refer to a subsequent suit, or appeal or proceeding after the termination of the former suit, appeal or proceeding, where the causes of action in the two are different

The subsequent suit or proceeding or matter can be said to be connected with the previous suit or proceeding or matter only if the former flows from, or in consequence of, the previous suit or proceeding. Otherwise there is no connection at all

It is not the identity of the subject-matter that establishes the connection between the two suits or the identity of the parties but the identity of the right or title that is asserted or denied and the relief claimed

Where a Court by a wrong interpretation of r 277 refuses to allow a practitioner to appear against a client for whom he is alleged to have acted on a former occasion, it exercises a jurisdiction not vested in it by law and the order is revisable by the High Court **M** VEERAPPA CHETTIAR *v* SUNDARESA SASTRIGAL, 49 M L J. 366, 48 M 676, 22 L W 606, A I R 1925 Mad 1201 **300**

Madras District Municipalities Act (V of 1884), s. 261—*Suit against Municipal Council for declaration of title to land—Notice, whether necessary*

Defendant Municipality sent a notice to the plaintiff informing him that he had no right to a certain piece of land and that he should establish his right by suit The plaintiff thereupon instituted a suit against the Municipality for a declaration of his title to the land

Held, that the suit was not one on account of any act done by the Municipality within the meaning of s 261 of the Madras District Municipalities Act and that no notice was, therefore, necessary to be served on the defendant under that section **M** MUNICIPAL COUNCIL, KOCHIN *v* PRATATH BAVU DEVUSSI, 22 L W 671, A I R 1926 Mad 235 **18**

Madras District Municipalities Act (V of 1920) —*Rules for conduct of Elections, r 2 (2)—Nomination paper—Signature by agent of candidate, validity of —Acceptance of nomination paper by Returning Officer—Misconstruction of rules—Revision—Civil Procedure Code (Act V of 1908), s 115*

Under r 2 (2) of the Rules for the conduct of Elections under the Madras District Municipalities Act, it is the candidate himself who must sign the nomination paper A nomination paper signed by an agent of the candidate with his authority is invalid

The validity of a nomination paper, even after it had been accepted by the Returning Officer, may be questioned after the election The Court has, therefore, jurisdiction to enquire into the matter and if necessary declare the election void.

A mere error in the construction of rules by a Court sitting to dispose of an election petition is not a ground for interference in revision under s. 115, C P C, by the High Court **M** DORASWAMI NADAR *v.* JOSEPH L MOTHER, A. I R 1926 Mad 319 **119**

Madras District Municipalities Act—1920—contd.

——— ss. 13, 22, Sch. IV, rr. 37, 60, 62—*Municipal funds—Government, power of, to control Municipal expenditure—Surcharge—Chairman, whether bound to carry out illegal orders of Council—Chairman, liability of, to be surcharged—Writ of certiorari, whether available in respect of wrong orders of surcharge—Government of India Act, 1915 (5 & 6 Geo. V, c 61), s 49—Government order signed by Secretary, Ministry of Local Self-Government, validity of*

Under r 37, Sch IV to the Madras District Municipalities Act, the Government has the power to control the expenditure of Municipal funds by passing special orders prohibiting certain expenditure and expenditure incurred contrary to such orders is contrary to law and illegal, and a Local Fund Auditor is, therefore, entitled to surcharge the same on the person making, or authorising the making of, such expenditure under r 60 (1) of Part II, Sch IV to the Act

A Municipal Council decided to introduce the national system of education in all institutions under its management but the Government at the same time by order prohibited the use of Municipal funds for the maintenance of any school not recognised by Government The Municipal Council thereupon resolved not to apply for fresh recognition as to schools controlled by them

Held, that cheques issued by the Chairman of the Council upon Municipal funds for the purpose of maintaining such schools amounted to the illegal expenditure of Municipal funds, and that the Chairman was, therefore, liable to be surcharged in respect of the amount of cheques so issued by him

An order of the Government signed by the Secretary to Government, Ministry of Local Self-Government, is none-the-less an order of the Governor-in-Council under r 37 of Sch IV to the Madras District Municipalities Act and in any case by virtue of s 49 of the Government of India Act, an objection to the legality of Government orders on the ground of informality cannot be entertained by Civil Courts

Sections 22 and 13 of the Madras District Municipalities Act should be read together and subject to the limitation imposed by r 37, Sch IV to the Act, and a Municipal Chairman is, therefore, not bound to carry out illegal resolutions of the Council

The remedy by issue of writ of *certiorari* is not available in respect of wrong or illegal order of surcharge made under the Madras District Municipalities Act, since a substituted remedy therefor has been provided by r 62 of Sch IV to the Act.

Per *Madhavan Nair, J*—Writs of *certiorari* are not ganerally granted when other equally efficacious remedies exist under the law for the satisfactory redress of the grievances complained of **M** MAHAMMAD RAZA SAHEB BELGAMI *v* SADASIVA RAO, 49 M 49, A. I. R. 1926 Mad 297 **918**

——— s. 249, Sch. V, cl. (o)—*"Grain," whether includes rice and broken rice*

The word "grain" in cl (o) of Sch. V to the Madras District Municipalities Act does not include rice and broken rice **M** MUNICIPAL COUNCIL *v* SHUNMUGHA MOOPANAR, (1925) M W N 880; 23 L. W. 31; A. I. R. 1926 Mad. 251; 49 M. 219 **610**

Madras District Municipalities Act—1920—concld.

——— **s. 249, Sch. V, cl. (q)**—"*Machinery*", *meaning of—Collection of handlooms, whether machinery.*

The "machinery" contemplated by Sch. V, cl. (*q*) of the Madras District Municipalities Act is machinery worked by power such as steam, water, or electrical power, and the word must be confined to such forms of machinery as may reasonably be held to be in the same category as combustibles, and unwholesome or dangerous trades.

Machinery worked by hand such as handlooms or sewing machines is excluded from the scope of s. 249 of the Act.

A collection of *maggoms* is not "machinery" within the meaning of Sch. V, cl. (*q*) of the Act and no license is, therefore, required to be taken under s. 249 of the Act for using the same. **M** ALAMPATH KRISHNAN *v.* MUNICIPAL PROSECUTOR, 23 L. W. 413; 27 Cr L J. 361, A. I. R. 1926 Mad 430; (1926) M. W. N. 463 **873**

Madras Estates Land Act (I of 1908), s. 2 (3)—*Post settlement* inam, *whether estate*—Inamdar, *whether land-holder—Second appeal—New case.*

The consideration that a person is the owner of both the *varams* is material in determining the applicability of the Madras Estates Land Act, only where the land is a whole *inam* village and an enfranchised *inam*

Where a post settlement *inam* is a whole village held on a permanent under-tenure, the case falls under s. 2 (3) (*e*) of the Madras Estates Land Act

Where in a suit by a tenant claiming to be a *ryot* under the Madras Estates Land Act to set aside an alleged sale of his holding against an *inamdar*, the plaintiff and the defendant both in the Trial Court and in the Court of Appeal proceed on the footing that the plaintiff was a *ryot* and the defendant a landholder, it is not open to the defendant in second appeal to contend that he (the defendant) was a *ryot* and that the plaintiff was an under-tenant under him and that the Madras Estates Land Act was not applicable as between them **M** BHUNJANGA RAO *v.* PERIYATHAMBI GOUNDAN, A. I R. 1926 Mad. 635 **1047**

——— **s. 3 (2) (d)**—*Villages in hilly tracts, granted in* inam *whether estate*

Where a number of villages in hilly tracts were granted in *inam* and there was no evidence to show either that only the revenue of the hills was granted or that the grantee did not own the *kudivaram*

Held, per *Ramesam, J*, that the villages did not constitute an "estate" within the meaning of s 3 (2) (*d*) of the Madras Estates Land Act. **M** THANAPPA CHETTY *v.* ESUF KHAN SAHIB, 23 L. W. 36 **753**

——— **s. 3 (5)**—*Land-holder—Post-settlement* inam *—Grant of both* varams—*Grantee, whether land-holder—Occupancy rights, acquisition of—Grant in* inam *and perpetual lease on favourable rent, distinction between—Waste lands*—Inam *grant, whether can be made.*

Although the grant of a post-settlement *inam* comprises both the *varams*, the grantee is a land-holder and a *ryot* under him can, therefore, claim occupancy rights, but where the grant is of the *kudivaram* alone, the grantee is merely a *ryot* and his under-tenant cannot claim rights of occupancy.

The distinction between a grant in *inam* and a perpetual lease on a favourable rent is a real though a fine one.

Madras Estates Land Act—concld.

Per *Venkatasubba Rao, J.*—It cannot be laid down that an *inam* grant of waste land is in law impossible **M** CHINTALAPATI BUTCHI SEETAYYA GARU *v.* GOLLAVILLI APPADU, A. I. R. 1926 Mad. 526 **814**

——— **ss. 112, 189**—Ryotwari *holding—Rent sale—Suit by real owner, maintainability of.*

The real owner of a *ryotwari* holding can sue in a Civil Court for a declaration that certain lands belong to him and that a sale thereof held under the provisions of the Madras Estates Land Act is fraudulent, invalid and not binding on him. Such a suit is not barred by the provisions of s. 189 of the Madras Estates Land Act **M** SEETHARAMA NAIDU *v.* GOVINDASAMI CHETTIAR, 23 L. W 149, (1926) M W. N. 162; A. I R. 1926 Mad 352 **976**

——— **ss. 131, 189, 192, Ch. VI**—*Civil Procedure Code (Act V of 1908), O. XXI, rr. 89, 92—Sale of holding—Application to set aside sale, rejection of —Suit to set aside sale, maintainability of—Jurisdiction of Civil Courts.*

Civil Courts have jurisdiction in all cases in which they would have had jurisdiction prior to the passing of the Madras Estates Land Act, except in so far as jurisdiction is expressly or by necessary implication taken away by the provisions of s. 189 of the Act.

A Civil Court has jurisdiction to entertain a suit by a *ryot* to set aside a sale of his holding held under the provisions of Ch. VI of the Madras Estates Land Act. The fact that an unsuccessful application had been made by the *ryot* under s. 131 of the Act to set aside the sale makes no difference **M** MAHALINGA NAICKER *v* VELAYA NAICKER, 22 L. W 794; (1925) M W. N 884; A I. R. 1926 Mad. 190; 48 M. 490 **412**

——— **s. 151**—*Ejectment—Agricultural land—Sale by* ryot *for building purposes—Actual building only on small portion—Value as agricultural land, whether impaired—Landlord's right to eject*

Where a *ryot* sells the major portion of an agricultural holding for building purposes he in effect converts the agricultural land into a building site, and thereby materially impairs the value of the holding for agricultural purposes and the landlord is entitled to a decree in ejectment under s 151 of the Madras Estates Land Act It is immaterial that on the date of the suit only a small portion of the land has been built upon **M** CHANDRA MOULESWARA PRASAD *v.* YADAVALLI KAMESWARA, (1925) M. W N. 776; 22 L W. 833; 50 M L J. 97, A. I R. 1926 Mad. 157 **402**

Madras Local Boards Act (XIV of 1920), ss. 35, 56 (4)—*Failure of member to attend three consecutive meetings of District Board—Restoration, effect of—Fresh oath of allegiance, whether necessary—Taluk Board member, election of, to District Board—Loss of and restoration to membership of Taluk Board, effect of—Election petition—Amendment application after expiry of period fixed, whether permissible.*

Where a member of a District Board fails to attend at the meetings of the Board for three consecutive months and is restored to office under s 56 (4) of the Local Boards Act by a resolution of the Board, he does not become a new member but is merely restored to the office of membership for the balance of the period for which he was originally elected and a fresh oath of allegiance is, therefore, unnecessary.

Where a member of a Taluk Board who has been elected to the District Board loses his membership

Madras Local Boards Act—1920—concld.

of the former by absence for three consecutive months and thereby loses his membership of the District Board also and is then restored under s 56 (4) of the Local Boards Act to the membership of the Taluk Board by a resolution of the said Board, such resolution cannot have the effect of restoring him to the membership of the District Board as well.

An application for an amendment of an election petition filed after the expiry of the days allowed for an objection petition is not unsustainable and may in the discretion of the Judge be allowed

Section 35 of the Madras Local Boards Act is inapplicable to an election petition and cannot cure defects in an election **M** KANDASAMI CHETTIAR *v.* G F F. FOULKES, A I R 1926 Mad 396 **100**

——— **ss. 36, 38.** *See* C. P C 1908, O XXIII, R 3 **311**

Madras Survey and Boundaries Act (IV of 1897), s. 13, *applicability of—Dispute as to boundaries, absence of*

In order to apply the provisions of s. 13 of the Madras Survey and Boundaries Act, it is necessary to show that there was a dispute before the boundary was settled, or an appeal was preferred from the settlement of the boundary The meaning of the section is that when there has been a dispute between parties as to a certain boundary line and that dispute has been settled by a competent officer, that decision is binding and can only be set aside by taking appropriate steps for that purpose within a certain time **M** MUNICIPAL COUNCIL, COCHIN *v* PRATATH BAVU DEVUSSI, 22 L. W 671, A I R 1926 Mad 235 **18**

Madras Village Courts Act (I of 1889), s. 78 *as amended by Act II of 1920—Rules framed by Madras Government, rr. 18, 64*—Forum, *creation of, for deciding disputes as to election to* panchayat—*Suit in Civil Courts challenging validity of election, whether maintainable—Power to make rules to regulate appointments and elections, whether includes power to appoint Tribunal to decide objections to elections — Defect in qualification of members—* Panchayat *Court, working of.*

Where a public body has been created by Statute and that Statute empowers Government to frame rules for its working, it is open to the Government to create a *forum* for the purpose of deciding disputes as to elections directed to be carried out under the Statute and thereby to exclude the jurisdiction of the Ordinary Civil Courts

Under s. 78 of the Madras Village Courts Act, which empowers the Governor-in-Council to make rules to regulate the appointments or elections of Presidents and other members of the *Panchayat* Courts, it is a necessary part of this power of regulation that Government should appoint a Tribunal to enquire into and decide objections to such elections.

Under r 18 of the rules framed by the Madras Government under s. 78 of the Act objections to an election to a village *panchayat* have to be made within a prescribed time to the Revenue Divisional Officer, whose order, or that of the Collector, thereon is final and not liable to be contested by suit or otherwise.

A Civil Court has, therefore, no jurisdiction to entertain a suit challenging the validity of such elections.

Rule 64 of the rules framed by the Madras Government under s. 78 of the Madras Village Courts Act provides fully for the competency of the proceedings

Madras Village Courts Act—concld.

of *Panchayat* Courts despite defects in their constitution or in the qualifications of their members **M** KANNURI VENKATA SIVA RAO *v.* CHITTOORI RAMA KRISHNAYYA, (1925) M W N. 874, 23 L W 103, 50 M L J 148, A I R 1926 Mad. 246 **790**

Malicious prosecution—*Damages, suit to recover —Reasonable and probable cause, absence of—Malice, proof of*

In order to succeed in a suit to recover damages for malicious prosecution the plaintiff must prove malice as well as absence of reasonable and probable cause

Where a prosecution is obviously false and not instituted in good faith the Court will infer malice, but where a prosecution has been instituted under a *bona fide* belief that the accused has committed an offence even though that belief is mistaken, the plaintiff cannot obtain a decree unless the prosecution was malicious as well, even if enquiry had shown that no offence was committed **R** MAUNG SET KHAING *v* MAUNG TUN NYEIN, A I R 1925 Rang 221, 4 Bur L. J 69, 3 R. 82 **512**

———, *suit for damages for—Death of plaintiff— Legal representative, whether can continue suit*

A suit for damages for malicious prosecution cannot, after the death of the plaintiff, be permitted to be carried on by his executor or legal representative **M** PALANIAPPA CHETTIAR *v.* RAJARAJESWARA SETHUPATHI, 22 L W 858, 50 M L J 34, A I R 1926 Mad 243, 49 M 208 **366**

Marwat grant, *nature of*

A *marwat* grant in Oudh is heritable, but not transferable. **O** RAM SHANKAR SINGH *v* LAL BAHADUR SINGH, 3 O. W N. 267, A I. R. 1926 Oudh 277, 13 O. L J. 216 **637**

Mesne profits *See* C P C, 1908, s 2 (12), O XX, R 12 **768**

——— *See* C P C, 1908, O. XXXIV **314**

———, *decree for—Ascertainment of mesne profits, application for, nature of—Dismissal of application, legality of—Limitation*

An application for the ascertainment of mesne profits is an application in the suit itself and the law of limitation has no application to it, so long as the suit is a pending suit.

Where a claim for mesne profits has been decreed, an application for ascertainment of mesne profits cannot be dismissed, inasmuch as the dismissal of the application would amount to a dismissal of the suit which has already been decreed **Pat** BHATU RAM MODI *v.* FOGAL RAM, (1925) Pat. 357, 5 Pat. 223, A. I R 1926 Pat 141, 7 P L T. 340 **629**

———, *inquiry as to—Burden of proof—Right to begin—Civil Procedure Code (Act V of 1908), ss 2 (12), 141, O XVIII, r 1.*

In a proceeding for ascertainment of mesne profits, the amount of the profits which the person in occupation has actually received is a matter within the peculiar knowledge of that person and, under s. 106 of the Evidence Act the burden of proving the amounts actually received will lie on the person who received them, but the burden of proving the profits that the person in occupation might have received will lie on the person who claims them

Order XVIII, r. 1, C P. C, is applicable to such a proceeding by virtue of s. 141 of the Code and the person claiming the profits must adduce his evidence

Mesne profits—concld.

first. If the person claiming the profits adduces no evidence, no mesne profits can be awarded to him at all. M RAMAKKA *v.* NEGASAM, 47 M. 800, 48 M. L. J. 89, A. I. R. 1925 Mad. 145 **792**

———, *suit for—Calculation of profits—Burden of proof—Mesne profits, nature of—Civil Procedure Code (Act V of 1908), s. 2*

The onus of proving what profits might, with due diligence, have been received in any year lies upon the party claiming mesne profits, but the onus of proving what profits the person in wrongful possession actually received lies upon the person in possession

The best evidence of the profits derivable from the cultivation of a particular field in any given year is the evidence as to the actual yield in that year minus the cost of cultivation But such evidence, in order to be useful, must be exact, and it is always open to the party out of possession to falsify the accounts as to the number of measures of grain gathered at the harvest or the price prevailing when they were sold or the cost of cultivation. He may also adduce evidence to prove that the occupant was not diligent and might have got greater profits by proper diligence

In the absence of evidence as to actual profits, the next best evidence is evidence as to possible profits, of which evidence as to yield of similar adjoining lands in the year in dispute is an example

The yield of the suit lands in other years is not such a good guide as evidence as the yield of neighbouring lands of similar quality in the year in dispute would be.

Mesne profits are in the nature of damages which the Court may mould according to the justice of the case.

Where in a suit for mesne profits, the story of the defendant that he suffered a net loss is incredible or the loss is due to lack of proper diligence, but the plaintiff fails to produce any evidence himself as to the actual profits, or the profits which might have been received by the defendant with due diligence, the suit must be dismissed. M MUHAMMAD ABDUL GAFFUR *v.* MUHAMMAD SAMSUDDIN, 47 M. L. J. 730, A. I. R. 1925 Mad 297 **139**

Minor—Alienation by *de facto* guardian—Case in which interest of minor involved—Court, duty of. *See* HINDU LAW—GUARDIANSHIP AND MINORITY **727**

Mistake of fact—*Money paid, when can be recovered—Mistake between payer and third person, effect of*

Where money is paid under a mistake of fact intentionally, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all enquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is entitled to retain it, but if it is paid under the impression of the truth of a fact which is untrue, it may ordinarily be recovered back, however careless the party paying may have been in omitting to use due diligence to enquire into the fact. The mistake must, however, be one as between the person paying and the person receiving the money and as to some fact affecting the right of the payee to receive the money. R CHINA *v.* TE THOE SENG, 3 R. 477, A. I. R. 1926 Rang. 14 **233**

Mortgage.

See ALSO (*i*) C. P. C., 1908, O. XXXIV.

(*ii*) TRANSFER OF PROPERTY ACT, 1882, ss. 58 TO 104

——— Co-mortgagors—Suit against one redeeming. *See* LIMITATION ACT, 1908, SCH. I, ART. 144 **980**

Mortgage—contd.

——— *Deed, simple, executed by mortgagor in favour of mortgagee—Mortgagor, heirs of, whether bound.*

A simple deed executed by the mortgagor in favour of the mortgagee and containing the stipulation that the money taken under it shall be paid at the time of the redemption of the mortgage can be enforced against the heirs of the mortgagor. O RAISUNNISA *v.* ZORAWAR SAH, 3 O. W. N 121, 13 O. L J. 10; A I. R 1926 Oudh 228 **675**

——— *Foreclosure—Bengal Land Redemption and Foreclosure Regulation (XVII of 1806) — Punjab Land Revenue Act (XVII of 1887), s. 44—Revenue Records, entry in—Presumption—Redemption suit—Burden of proof*

Where in the case of a mortgage comprising a stipulation by way of conditional sale, the mortgagee purports to take foreclosure proceedings and a mutation is thereafter recorded in the Revenue Records showing that the mortgagee's rights have been converted into full proprietary rights, the burden is nevertheless upon the mortgagee, in a suit for redemption brought by the mortgagor, to prove that his mortgage right has been converted by foreclosure proceedings in accordance with law into a full proprietary right. The only onus thrown upon the plaintiff in such a case is to show that there was a mortgage and that it was granted within sixty years of suit. Once this is established, it would rebut the *prima facie* presumption of correctness of the Revenue Record entry, and the onus would then be on the defendant to show that the revenue entry is in fact correct and that there was a proper and legal foreclosure. L RULDU RAM *v.* SURAIN SINGH, 7 L. L. J. 618, A. I. R. 1926 Lah 120 **531**

——— *Grove planted by mortgagee—Accession—Right of mortgagor to grove.*

Where a mortgagee in possession, without the consent of the mortgagor, plants a grove which is not necessary for the preservation of the property and of which separate possession is not possible, the mortgagor is entitled to possession of the grove unconditionally. O JAHANGIR *v.* RAM HARAKH, 13 O. L J 243 **262**

——— *Interest charge*

A mortgagee is entitled to treat interest due under a mortgage as a charge upon the property in the absence of a contract to the contrary and to refuse redemption unless it is included in redemption price. L LADHA SINGH *v.* SUNDAR SINGH **762**

——— *of moveable property—Sale of property in execution of decree against mortgagor—Mortgagee, whether entitled to follow property in hands of purchaser.*

A mortgagee of moveable property is not entitled to follow the mortgaged property into the hands of a purchaser who has purchased the property at a sale in execution of a decree against the mortgagor. R NACHIAPPA CHETTIAR *v.* MAHOMED SABIR KHAN, A. I. R. 1925 Rang 303; 4 Bur. L. J. 135 **370**

——— *Prior and subsequent mortgages—Redemption—Interest, whether must be paid along with principal—"Girwi," whether means usufructuary mortgage.*

The meaning of the word "*girwi*" is not restricted to a usufructuary mortgage.

A deed of second mortgage recited the first mortgage and declared that the mortgagor should not be entitled to redeem the first mortgage without discharging the second loan also:

Held, that the second mortgage was in the nature of an additional mortgage hypothecating the pro-

Mortgage—concld.

perty and that the mortgagor was not entitled to redeem the first mortgage without at the same time discharging the second.

A deed of second mortgage recited the amount borrowed and the rate of interest and then stated that "this money" shall be paid when the amount due on the prior mortgage is paid and the prior mortgage is redeemed There was no stipulation that the interest was to be added to the principal, and permission was granted to the mortgagee to sue for interest separately

Held, (1) that the expression "this money" in the deed included the principal money together with interest,

(2) that the permission granted to the mortgagee to sue for interest separately was an additional privilege granted to the mortgagee and that he was not bound to sue separately for interest,

(3) that the mortgagor was, therefore, bound to pay the entire amount of interest to the mortgagee at the time of redemption **A** SHIB NARAIN *v* GAJADHAR, 24 A L J 260 **772**

——— *Redemption—Amount in dispute—Absence of tender—Dismissal of suit, whether justified—Interest—Contract rate excessive—Court, whether can reduce interest*

Where the amount to be tendered for redemption is in dispute the mortgagor's suit for redemption cannot be dismissed on the ground that no tender was made

A Court has no power to reduce the contractual rate of interest solely on the ground that it is excessive **O** SARDA BUX SINGH *v* KANDHIA BUX **665**

——— *Redemption by one of several mortgagors*

One of several mortgagors is entitled to redeem the entire mortgage and by doing so he steps into the shoes of the mortgagee in respect of the shares of the other mortgagors **L** RAM LABHAYA *v* KARTAR SINGH, 7 L L J 466, A I R 1925 Lah 651 **261**

——— *suit—Consideration, receipt of—Burden of proof—Evidence Act (I of 1872), s 102, Illus* (b)—*Consideration, inadequacy of, effect of*

Where a mortgagor admits the execution of the mortgage-deed, it lies upon him to prove that the consideration mentioned in the deed had not been received by him in full The mere fact that he had been recklessly borrowing money would not absolve him from discharging the burden that lies upon him

An equity can be founded upon gross inadequacy of consideration only when the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition. **L** JIWA RAM *v* JHANDA SINGH, 1 L. C 43 **346**

Muhammadan Law—Dower, *whether property*

The word "property" as understood in Muhammadan Law does not include *res incorporales* which a claim for dower is.

The word "price" in the definition of sale in s 54 Transfer of Property Act, means "money"

A Muhammadan transferring property in lieu of dower to his wife does not receive any "price" within the meaning of that word in s. 54, Transfer of Property Act

There is no difference in principle whether the property is transferred 'as dower' or 'in lieu of dower'. **O** BASHIR AHMAD *v.* ZOBIDA KHATUN, 3 O. W. N. 105, A. I R. 1926 Oudh 186 **265**

——— **Gift** *by father to minor son—Transfer of possession — Registration,*

Muhammadan Law—contd.

A gift by a Muhammadan father to his minor son is complete when the deed of gift is completed and neither transfer of possession nor registration of the deed is necessary to complete it **L** FATEH MAHOMED *v* MITHA, A I R 1926 Lah 286 **479**

——— **Gift**—Hiba-bil-ewaz, *nature of—Conveyance of landed property for dower—Transaction, whether sale—Pre-emption, right of—Oudh Laws Act (XVIII of 1876), s 9*

A conveyance of landed property by a husband to his wife in consideration of an extinction of her dower-debt is a gift of the form known as *hiba-bil-ewaz* in Muhammadan Law, and as such is not liable to pre-emption It cannot be regarded as a sale attracting the provisions of s 9 of the Oudh Laws Act

A *hiba-bil-ewaz* is a well recognised mode of transfer of property in Muhammadan Law A sale is equally a well-understood form of contract in the same law, yet according to that law the legal incidents of each case differ in many respects

A *hiba-bil-ewaz* is a combination of two reciprocal gifts

The consideration for a transaction of *hiba-bil-ewaz* in Muhammadan Law does not, therefore, rest merely in the pecuniary value of the subject-matter of the gift and of the return but there is always a personal element when the gift is made in favour of one's wife or other near relations

It is wholly unsafe to deduce a rule of law that a claim for pre-emption can lie in respect of a transaction of *hiba-bil-ewaz* if in effect it amounts to a sale, when no such rule was promulgated by the Muhammadan jurists **O** BASHIR AHMAD *v* ZUBIDA KHATUN, 3 O W N 105, A I R 1926 Oudh 186 **265**

——— ———, *revocability of*

When once a delivery of possession has been made a gift under Muhammadan Law is not revocable if the conditions of the gift have not been broken **L** HAKIM DIN *v* QUTAB DIN, A I R 1926 Lah 211 **264**

——— **Interpretation of**—*Jurists, difference among—Rule applicable*

When Muslim Jurists of authority express dissenting opinions upon some question, the Courts are at liberty to adopt that view which in their opinion is most in accordance with justice in the particular circumstances of the case **A** MOHAMAD AFZAL *v* MOHAMMAD MAHMUD, 24 A L. J 307, A I R 1926 All 327 **840**

——— **Marriage** *with wife's sister—Issue, whether legitimate—Child born six months after* fasid *marriage—Presumption of legitimacy—Evidence Act (I of 1872), s 112, application of*

Muhammadan Law does not place unions, as English Law does, in two categories, valid and invalid, but in three catagories of void *ab initio* (*batil*) forbidden but not entirely void if consummated (*asid*), and lastly valid.

Under the Muhammadan Law, the marriage of a man to a sister of his existing wife, is *asid* but not *batil* Such a marriage, though invalid for certain purposes, is valid for the purpose of legitimatizing the issue

Under the presumption of Muhammadan Law, in the case of a *fasid* marriage, a child born on the expiry of six months of *copula* is to be regarded as legitimate.

Section 112 of the Evidence Act cannot be held applicable to marriages under the Muhammadan Law. A any rate the section cannot have any application

Muhammadan Law—concld.

to a *fasid* marriage under that law. O KANIZA *v.* HASAN AHMAD KHAN, 3 O. W. N. 114, A. I. R. 1926 Oudh 231 **82**

——— **Restitution of conjugal rights,** *suit for—Relief, whether discretionary—Restitution, prejudicial to health and happiness of wife—Relief, whether can be refused.*

In the case of Muhammadans a suit for restitution of conjugal rights is in the nature of a suit for specific performance being founded on a contract of marriage which the Muhammadan Law regards as a civil one. The relief claimed by the plaintiff in such a suit is a discretionary one and it is open to the Court to refuse to grant it even though the validity of the marriage was established on the ground that its enforcement would be prejudicial or dangerous to the health, happiness or life of the wife. N KHURSHEID BEGAM *v.* ABDUL RASHID, 9 N. L. J. 11; A. I. R. 1926 Nag 234 **913**

——— **"Waqf,"** *meaning of—Grant in perpetuity—"Waqf," use of, in deed, effect of*

Waqf in its primitive sense means detention; but it implies detention of a thing in the implied ownership of the Almighty God in such a manner that its profits may revert to or be applied for the benefit of mankind, and the appropriation is obligatory so that the thing appropriated or set apart can neither be sold nor given nor inherited The essential condition is that it should be a settlement in perpetuity or in other words, the ultimate end must be one that cannot fail The object of a *waqf* must be charitable, or if the *waqf* is made for the support of one's descendants, it must include an ultimate dedication for religious, pious or charitable purposes.

The mere use of the word "*waqf*" in an instrument cannot be separated from the context so as to convert a personal grant to a specified set of individuals into a public disposition.

A deed of grant provided that the grantees and their grand-children, generation after generation, should for ever enjoy the property except in so far that they would have no power to transfer or hypothecate the property or to grant leases thereof for a period exceeding five years

Held, that the deed provided for a succession of life-estates without any ultimate dedication either to the poor or to any other charitable object recognised by the Muhammadan Law and that, therefore, it did not operate to create a valid *waqf* A MUHAMMAD AFZAL *v.* MUHAMAD MAHMUD, 24 A. L. J. 307, A. I. R. 1926 All. 327 **840**

——— ——— Muttawallishp—*Succession.*

Under the Muhammadan Law in the absence of any rules laid down by the founder of the mosque, the *muttawalli* for the time being may validly appoint a successor to himself. M DOST MUHAMMAD *v.* KADAR BATCHA, 23 L. W. 240, A. I. R. 1926 Mad 466 **950**

Nagpur Judicial Commissioner's Court, powers of revision. *See* CR. P. C., 1898, ss 435-439 **851**

Negotiable Instruments Act (XXVI of 1881), s. 28—*Pro-note, execution of, for another—Personal liability not intended—Inducement by promisee—Inducement by real borrower.*

If a negotiable instrument does not set out clearly that the maker is not personally liable the fact of the knowledge of the payee that the executant did not intend to incur personal liability is irrelevant.

Where, however, the promisee induces the executant of a pro-note to sign the pro-note upon the belief that a third party only, and not he, would be liable thereunder, the executant cannot be held to be personally liable.

Negotiable Instruments Act—contd.

Where the belief is induced by the third party and not the promisee, the executant cannot escape liability O NATIONAL BANK OF UPPER INDIA *v.* BANSI DHAR, 3 O. W. N. 83, A. I. R 1926 Oudh 248 **94**

——— **ss. 28, 29**—*Pro-note executed by guardian of minor—Personal liability, whether excluded—Pro-note executed as executor—Liability, extent of—Sections 28 and 29, difference between*

On a negotiable instrument only the executant is liable. The question that has in each case to be determined is, on a fair construction, who is the executant of the document? Is the executant in truth the principal although the agent's signature appears on the bill or is the executant the agent although the principal is named? The intention may be inferred from the whole of the instrument.

Under s. 28, Negotiable Instruments Act, an agent signing a pro-note is *prima acie* liable on the note but he may exclude his liability by indicating on the note that he signs as agent or that he does not intend to incur personal liability In each case the question is, are the words sufficiently unequivocal to indicate that the agent has not made himself personally liable?

Section 28 of the Negotiable Instruments Act in terms applies only to the single case of principals and agents, but the principle of the section is applicable to the cases of guardians and wards

Where the guardians of a minor who executed a pro-note on behalf of the minor recited in the body of the note that the debt was due by the minor's father and that they were appointed guardians by him but in the operative part they made themselves personally liable

Held, that their personal liability was not clearly and unequivocally excluded and the executants were personally liable

The language of s 29, Negotiable Instruments Act, is widely different from that of s. 28 of the Act. Firstly, under s 28 it is sufficient to indicate that personal liability is excluded, but under s. 29 there must be express words limiting the liability and secondly, under s 28 the agent's liability may be altogether excluded whereas under s. 29 the executor's liability can only be limited to the extent of the assets.

The applicability of s. 29, Negotiable Instruments Act, does not depend on the question whether the executant is in fact the legal representative of a deceased person. It is enough if the note purports to have been executed by the executant in his capacity as legal representative, such as that of an executor of the estate of a deceased person.

A person who executes a pro-note as executor appointed under a Will, is personally liable thereunder, unless he expressly limits his liability to the extent of the assets received by him as such. M KOYYALAMUDI SUBBANNA *v.* KODURI SUBBARAYUDU, 50 M. L. J. 125, A. I. R. 1926 Mad. 390 **805**

——— **s. 76 (d)**—Hundi—*Presentation*—Hundi *in lieu of previous debts inadmissible—Original cause of action as basis of claim.*

When one and the same person is the drawer and the drawee of a *hundi* no presentation of *hundi* on due date is legally necessary.

Where a *hundi* is executed in lieu of previous debts and the *hundi* is inadmissible in evidence for want of proper stamp the plaintiff can fall back upon the original cause of action. L FIRM BUDHU MAL PARMA NAND *v.* GOKAL CHAND, 8 L. L. J. 3; 7 L. 113 **1015**

Notice *to husband, whether notice to wife.*
In India, the knowledge of a husband cannot be treated as tantamount to the knowledge of the wife who is a *pardanashin* lady **O** QAMAR JAHAN BEGAM *v* MUNNEY MIRZA, 12 O. L J. 313, 2 O. W. N 413, A I R 1925 Oudh 613 **559**

Nuisance—*Latrine—Test*
The question as to whether a latrine constitutes a nuisance from the legal point of view, must be judged by general standards on the principle enunciated in the legal maxim *lex non favet votis delicatorum*, and a particular latrine cannot be such a nuisance if latrines of the sort are common all over the city **N** GOPAL *v.* KRISHNARAO **678**

Oaths Act (X of 1873), s. 9—*Parties agreeing to abide by statement of referee—Examination of referee—Omission—Referee, whether can be re-examined.*
There is nothing in the Oaths Act which declares that once a referee, by whose statement the parties have agreed to abide, has been put upon his oath and has been examined, he cannot be re-called and re-examined, if all the points which are necessary to be established for the decision of the case have not been put to him **A** RADHA KISHUN *v.* KASHI NATH, 24 A L J 241, A I. R 1926 All 266, 48 A 276 **510**

——— **ss. 9, 10, 11**—*Revocation of offer to be bound by oath—Discretion of Court*
There is nothing in ss 9, 10 and 11 of the Oaths Act which allows a party who has agreed to the administration of an oath by his opponent to revoke his offer after it has been accepted by the latter but the Court has discretion to allow retraction if good grounds are shown therefor
When an oath has been administered, it is too late for the Court to pass an order allowing its retraction **L** RAM BHAJ *v* DUNI CHAND, A I. R 1926 Lah 240 **813**

Official reports. *See* PRECEDENTS **121**

Oudh Courts Act (IV of 1925), s. 8. *See* INCOME TAX ACT, 1922, s 66 **257**

Oudh Laws Act (XVIII of 1876), s. 9. *See* MUHAMMADAN LAW—GIFT **265**

Paper Currency Act (II of 1910), s. 26. *See* PRINCIPAL AND AGENT **819**

Pardanashin lady. *See* WILL **237**

Parties—Suit for specific performance *See* SPECIFIC RELIEF ACT, 1877, s 27 (c) **715**

Partition—*Reference to arbitration—Parties, joint possession of—Prayer for leaving out portion of property, effect of*
A reference to arbitration for partition of property amounts to letting in of all parties to joint possession of the property to be partitioned
A pleading in a reference to arbitration for partition that a certain part of the property must, because of a previous decision or for any other reason, be allotted to one share or the other, or must be left out of consideration in the division, can scarcely be called a withdrawal of that part of the property from the scope of the arbitration At the most, it is an attempt to withdraw that property from the scope of the arbitration, that is to say, an admission that it is included in it **N** SHEOSAHAI *v.* RAMKRISHNA, A. I R 1926 Nag. 61 **62**

——— *Temporary or permanent—Presumption—Burden of proof.*
A division of property, an arrangement whereby property is divided, a distribution of property are all

Partition—concld.

exactly the same as a partition of property But a partition may be either partial or complete and it may be either temporary or permanent In the great majority of partitions of common property, the partition is meant to be permanent Therefore, if nothing more is known about a partition except that it has been made, it must be taken to be a permanent partition unless there is evidence to show that it was temporary. The length of time for which a partition has been allowed to stand undisturbed or without re-adjustment is a factor which may be taken into consideration in deciding whether a partition was temporary or permanent **N** KESHEORAO *v* MAROTI RAO, 8 N L R 227, A I R 1926 Nag 139 **102**

——— decree *See* EXECUTION OF DECREE **400**

——— *suit—Practice—Shares of all parties, determination of, whether necessary*
Ordinarily in partition suits it is the practice to declare the shares of all the parties to the suit and to give a decree accordingly This is to avoid multiplicity of litigation, and that is the reason why all the sharers have to be made parties in such suits It is not, however, incumbent upon the Court in all circumstances to give a decree in favour of all the co-sharers in a partition suit
Where in a partition suit, the plaintiff's claim to a specific share in the property in dispute is negatived, and there is no issue for determination of the shares of the defendants *inter se*, the shares of the defendants *inter se* should not be determined in the suit. **M** BANJOISI NARASAMMA *v* BANJOISI SARASAMMA, 23 L W 157, (1926) M W N 163, A I R 1926 Mad 353 **61**

——— *suit—Property omitted by oversight—Procedure*
Where in a partition suit one of the properties which ought to be partitioned is, by oversight or for any other reason, left unpartitioned, it is open to the parties to draw the attention of the Court to the omission and to get a direction from it in the matter **Pat** BALARAM MANJHI *v* JAGANNATH, A I R 1925 Pat 760 **684**

Partnership. *See* ALSO CONTRACT ACT, 1872, ss. 239 TO 266

———, *dissolution of—Accounts, mode of—Partnership moneys appropriated by one partner—Procedure.*
Where a partner takes moneys of the partnership out of the partnership business and appropriates them to his own use, he must, on accounts being taken, be charged with the sums withdrawn by him as being partnership assets in his hands with mercantile interest thereon from the dates of withdrawal
In such a case where it is found that the balance of the cash capital of the partnership is not sufficient to satisfy the claims of the remaining partners with regard to the contributions made by them towards capital, the proper procedure is to appoint a Receiver of partnership assets, to direct him to proceed with the collections of the outstanding debts of the partnership and to declare that such receipts should be employed first towards the discharge of all outside liabilities, costs and expenses and then towards the satisfaction of the respective claims on capital account of the partners It is not proper in such a case to credit the partner who has appropriated the partnership moneys with the receipt of such moneys and to require other partners to accept book-debts due to the partnership in lieu of their claims on the capital account **P C** NAG KUER *v.* SHAM LAL SAHU, A. I. R. 1925 P. C. 257; 23 A. L J. 1015; (1926) M. W. N. 101; 7 P. L. T. 275; 23 L. W. 628 **274**

Part performance, *doctrine of, applicability of—Specific performance, agreement not capable of, effect of.*

The doctrine of part performance has no applicability in the case of an agreement, specific performance of which cannot be had under law. **N** CHIMASHANI *v.* VENKATRAO, 8 N. L. J. 135; A. I. R. 1926 Nag. 79 **841**

Patents and Designs Act (II of 1911), s. 26—*Utility and novelty, meaning of—Patent for making in one piece.*

In Patent Law, the term 'utility' is not used in the abstract but in a very special sense. It may be described as an invention better than the preceding knowledge of the trade as to a particular article. Mere usefulness is not sufficient to support a patent.

For purposes of novelty in Patent Law, it is not enough that the purpose is new or that there is novelty in the application so that the article produced is in that sense new, but there must be some novelty in the mode of application. In adopting the old contrivance to the new purpose, there must be difficulties to overcome requiring what is called invention or there must be some ingenuity in the mode of making the adoption To be new the novelty must show invention

Patents for making in one piece, articles previously made in two or more pieces have generally been held invalid. **C** INDIAN VACUUM BRAKE CO. LTD *v* E. S. LUARD, 42 C. L. J. 543, A. I. R. 1926 Cal 152, 53 C. 306 **1008**

Patna High Court Rules, Ch. IX, rr. 1, 4, 30—*Paper-book, printing of—Registrar, whether can grant exemption.*

Rule 30 of Ch. IX of the Patna High Court Rules must be construed as subject to rr 1 and 4 of the Chapter, and the Registrar has no authority to exempt a party from having a printed paper-book prepared in a case **Pat** TARKESHWAR PRASAD TEWARI *v* DEVENDRA PRASAD TEWARI, 3 Pat. L. R. 270; 7 P. L. T. 267; A. I. R. 1926 Pat. 180 **184**

Penal Code (Act XLV of 1860), ss. 71, 147, 149, 342—*Rioting and wrongful confinement—Separate, sentences, legality of*

Members of an unlawful assembly who attack a person and then take him and confine him in a house cannot be given separate sentences under s. 147, and s. 342 read with s. 149, Penal Code, by virtue of s. 71 of the Code **C** AMIRUDDIN *v* EMPEROR, 40 C. L J. 306, A. I. R. 1925 Cal. 217; 27 Cr. L. J. 232 **216**

——— **s. 97.** *See* PENAL CODE, 1860, s. 302 **459**

——— **s. 120B.** *See* PENAL CODE, 1860, s. 141 **145**

——— **s. 120B**—*Conspiracy, ingredients of—Overt act, value of.*

The ingredients of the offence of conspiracy are:—

(1) That there should be an agreement between the persons who are alleged to conspire; and

(2) that the agreement should be:—

(*i*) for doing of an illegal act, or

(*ii*) for doing by illegal means an act which may not itself be illegal.

Conspiracy is a substantive offence and has nothing to do with abetment. Although an overt act may be specified in the charge yet this is not (except when the end of the conspiracy is not to commit an offence) necessary. The overt act or acts is or are introduced not as partially constituting an offence but as giving information and example as to what the conspiracy was. The offence is conspiracy. Nor is there any limit to the number of overt acts which can be given in the charge.

Penal Code—contd.

It is not necessary that each conspirator should be aware of all the acts done by each of the conspirators in the course of the conspiracy.

It is, however, necessary that there should be one conspiracy and not a series of conspiracies and criminal acts unconnected by unity of intention. **S** CHANDIRAM *v.* EMPEROR, 27 Cr. L. J 286, A. I R. 1926 Sind 174 **462**

——— **ss. 120B, 420**—*Conspiracy, charge of, essential requisites of—Nature of proof—"Where an express provision has been made in the Code for the punishment of such conspiracy," meaning of.*

A charge of conspiracy in respect of but one agreement between several accused persons to cheat such members of the public as they could defraud by deceitful means is not a bad charge.

It is immaterial if all the accused had concocted the scheme of the conspiracy or that all of them should have originated it. It is sufficient if it originated with some of them and the others had subsequently joined the original conspirators.

The conspiracy may be proved either by direct evidence or by proof of circumstances from which the Court may presume the conspiracy.

The words "where an express provision has been made in the Code for the punishment of such a conspiracy" appearing in s. 120-B of the Penal Code do not mean that where there is proof of an abetment of an offence, the charge should be for such abetment. It is optional for the Crown to proceed for abetment of an offence committed in pursuance of the conspiracy or of the offence of conspiracy.

The inclusion in a charge of conspiracy to cheat of certain specific offences relied on by the prosecution in proof of the substantive offence of cheating does not render the charge illegal as being in respect of different offences specified therein. **S** KISHANCHAND *v.* EMPEROR, 27 Cr L J. 243; A. I. R. 1926 Sind 171 **419**

——— **ss. 141, 120B, 149, 152, 302, 506**—*Criminal Procedure Code (Act V of 1898), ss. 196-A 239—Conspiracy to obstruct Police and stop sale of certain goods—Unlawful assembly—Rioting—Murder committed in course of rioting—Responsibility of members of unlawful assembly—Sentence—Same transaction—Joint trial, liability of.*

A large crowd of men assembled at a village and agreed among themselves to proceed in a body to a certain Police Station, there to threaten and to obstruct the Sub-Inspector of Police and the Policemen with him in the discharge of their duty and then to proceed to a certain bazaar and stop the sale of intoxicants, meat, fish, etc. It was also agreed that if the Sub-Inspector of Police did not act in a certain manner and offered resistance, he and the Policemen with him would be assaulted The crowd then proceeded towards the Police Station and on arrival there started an altercation with the Sub-Inspector of Police. Their behaviour and attitude was such that if they had been called upon to disperse they would not have done so. During the course of the altercation the members of the crowd began to throw stones at the Police. The Police then fired, killing two men and wounding several others. The mob inflamed to fury then murdered the Police Inspector and several other Police and *chaukidars*. Some of the members of the crowd were charged with offences under ss. 120-B and 302 read with s. 149 of the Penal Code and were convicted of the latter offence at one trial:

Held, (1) that the immediate object of the crowd as it reached the Police Station being to threaten and to

Penal Code—contd.

obstruct the Police in the discharge of their duty, it was an object to commit an offence punishable under s. 152 of the Penal Code which was in itself sufficient to bring the matter within the purview of the third clause of s. 141 of the Code and that consequently the crowd formed an unlawful assembly when they started from the village;

(2) that the agreement arrived at between the members of the crowd to stop the sale of intoxicants, meat, fish, etc., in the bazaar, under the circumstances, was an agreement to commit an offence under s 506 of the Penal Code and that for this reason also the crowd was an unlawful assembly within the meaning of s 141 of the Code;

(3) that as soon as stones began to be thrown at the Police by the members of the crowd at the Police Station, the members of the unlawful assembly became guilty of rioting and that in view of what happened subsequently the charge under s 302 read with s 149 of the Penal Code was fully established as against every one of the accused persons who was proved by evidence to have continued an active participant in the rioting after the moment when stones began to be thrown, unless it could be inferred from credible evidence that a particular accused person had separated himself from the rest before the offence of murder had been committed by any of them,

(4) that having regard to the fact that the majority of the accused were ignorant peasants who had been drawn into the affair by misrepresentation of facts and preposterous promises concerning the millennium of *Swaraj*, the arrival of which was to be forwarded by courage and resolution on their part, those of them against whom specific acts such as would have resulted in their conviction on a charge of murder apart from the special provisions of s 149 of the Penal Code, were not proved, did not deserve the extreme penalty of death and should be sentenced to transportation for life only,

(5) that the charge against the accused being that the events which occurred at the Police Station followed upon the alleged criminal conspiracy arrived at between the accused at the village and were so connected therewith, not merely by sequence of time but by the link of causation, as to make the conspiracy at the village and the subsequent assault on the Policemen at the Police Station parts of the same transaction, within the meaning of that expression in s 239 of the Cr P. C, the joint trial of the accused was perfectly justified,

(6) that in order to decide whether the joint trial of the accused was or was not legal the Judge had to look to the case for the prosecution as set forth in the charges themselves and that it was not necessary for him to consider what the position would be if he eventually came to the conclusion either that no offence punishable under s 120-B was committed by any of the accused or that if any offence was so committed it was one excluded from his cognizance by s. 196-A of the Cr P C

Whatever may be said in defence of peaceful picketting when undertaken in the market of a large town by individuals or by small groups of earnest and enthusiastic men or women, has no application whatever to the flooding of a small bazaar by a body of men whose mere presence there would put a stop to all business which could only be carried on with their consent and with their active assistance.

In every case of a conviction on a charge of murder the law regards the sentence of death as the normal and the appropriate sentence Where the Court sees fit to pass the lesser sentence of transportation for life it must record its reasons for so doing **A** ABDULLAH *v* EMPEROR, A I R 1924 All 233, 27 Cr L. J 193 **145**

Penal Code—contd.

——— **ss. 141, 143**—*Unlawful assembly, what is—Common object—Meeting for deliberation*

An assembly cannot be an unlawful assembly within the meaning of s 141 of the Penal Code unless the common object of the persons composing the assembly falls within one of the five classes described in that section

For the purposes of s 141 of the Penal Code the "common object" must denote a common object then and there as an assembly to take action, and it cannot be held that there was such a common object because the members of the assembly agreed at some uncertain future date to take individual action

Where the members of an assembly merely agree as to what they should individually do, when, in the case of each person separately, a demand is made for the payment of a certain tax, the assembly does not come within the definition of an unlawful assembly as laid down in s 141 of the Penal Code **R** EMPEROR *v.* NGA TUN MAUNG, A I R 1925 Rang 362, 4 Bur L J. 169, 27 Cr L J 337 **849**

——— **ss. 147, 149, 323**—*Unlawful assembly—Injuries inflicted by members—Rioting—Hurt—Convictions for separate offences, legality of*

Section 149 of the Penal Code creates no substantive offence in itself It is merely declaratory of the law and makes a person who has been a member of an unlawful assembly liable for the offences committed by any other member of it But s 147 of the Code creates a substantive offence in itself and makes a person guilty of the offence of rioting as distinct from actually causing any injury or hurt Similarly s 323 of the Code creates a distinct offence in itself Where, therefore, more injuries than one are caused by the members of an unlawful assembly they can be convicted of offences both under s 147 and under s 323, read with s 149 of the Penal Code In such a case, as soon as the first injury is caused to any person, force is used and the offence of rioting is complete Subsequent injuries though inflicted in pursuance of the same common object would be distinct injuries justifying a conviction under s. 323. **A** CHHIDDA *v* EMPEROR, 24 A L J. 178, 27 Cr L J. 287, A I R 1926 All 225 **463**

——— **ss. 147, 149, 332**—*Constable interfering with wrestling match—Assault on members of Police force—Rioting—Sentence*

One of the Constables deputed to keep order at a wrestling match interfered with the wrestling, whereupon several members of the audience set upon the members of the Police force present, hustled them and tore their uniforms

Held, (1) that the assailants of the Constables were guilty of offences under ss. 147 and 332/149, Penal Code,

(2) that, in the circumstances of the case, severe sentences were not called for **A** MIRAN *v* EMPEROR, 23 A L J. 1027; A I R 1926 All 168, 27 Cr L J 240 **224**

——— **ss. 148, 302**—*Rioting—Deadly weapons—Death caused by blows—Offence.*

Accused, five in number, assembled at a canal waterhead to divert water by force and armed themselves with deadly weapons to strike and vanquish anybody

who should stand in their way and prevent them from accomplishing their purpose. The party of the deceased remonstrated with the accused whereupon the accused assaulted them with their weapons and caused the death of the deceased.

Held, (1) that the accused constituted an unlawful assembly and became guilty of rioting when they used their weapons in pursuance of their common object,

(2) that as every one of the accused knew that the weapons were likely to be used with deadly effect, they were all responsible for the fatal injury inflicted on the deceased L HARI SINGH *v* EMPEROR, 7 L L. J. 576; A. I. R. 1926 Lah 4, 27 Cr. L. J 233 **217**

——— **ss. 149, 152.** *See* PENAL CODE, 1860, s. 141 **145**

——— **s. 173**—*Criminal Procedure Code (Act V of 1898), s 160—Notice to attend enquiry, refusal to accept—Intentionally preventing service—Offence.*

Refusal to accept a notice issued by a Police Officer under s. 160, Cr P C, requiring attendance at an enquiry does not amount to an offence under s. 173 of the Penal Code. A BAHADUR *v* EMPEROR, 24 A. L J. 215, 27 Cr. L. J. 284; A I R 1926 All. 304 **460**

——— **ss. 179, 193**—*Criminal Procedure Code (Act V of 1898), s 480—Witness, prosecution of—False answer to question—Refusal to answer question*

Where a witness on being asked the name of his paternal grandfather, replies that he does not remember it, it is not a refusal to answer the question, and the witness cannot be proceeded against under s 179, Penal Code, read with s 480, Cr. P. C, although if the answer is false, the witness could be prosecuted under s 193, Penal Code. L KALLU *v.* EMPEROR, 27 Cr. L J. 252; A. I. R. 1926 Lah 240 **428**

——— **ss. 190, 44**—*Threat to institute civil suit, whether threat of "injury."*

A threat to institute a civil suit for a declaration of right against any person who is objecting to such right does not amount to a threat of "injury" within the meaning of s. 190 of the Penal Code A MULAI RAI *v.* EMPEROR, 24 A. L. J. 314; 27 Cr. L J. 351; A. I. R 1926 All 277 **863**

——— **s. 193**—*Criminal Procedure Code (Act V of 1898), ss 195, 476—Perjury—Statement literally true—Complaint, whether should be made.*

A Court is not justified in making a complaint of perjury against a person in respect of a statement which is literally and strictly speaking true. L CHIRAGH DIN *v.* EMPEROR, 7 L. L. J. 621; 27 Cr. L. J. 330 **746**

——— **s. 211**—*False charge made before Police—Offence.*

Where a person makes a report to the Police deliberately but falsely charging another with having committed an offence with the intention that the Police should put that person on his trial, he is guilty of an offence under s. 211 of the Penal Code.

A charge laid before the Police amounts to the institution of a criminal proceeding within the meaning of the latter part of s. 211 of the Penal Code. Pat PARMESHAR LALL *v.* EMPEROR, 4 Pat. 472; A. I. R. 1925 Pat. 678, 27 Cr L. J. 373 **885**

——— **s. 302.** *See* PENAL CODE, 1860, s. 141 **145**

——— **s. 302**—*Death caused by attack with sharp-edged weapon—Offence.*

In the course of an altercation, accused suddenly struck the deceased with a sharp-edged weapon causing two wounds of a penetrating nature, one of which completely perforated the heart and the other penetrating the abdomen divided the intestines, from the effect of which the deceased died at once;

Held, that having regard to the nature of the wounds inflicted, the accused must be deemed to have intended to cause death or at least such bodily injury as was likely to cause death and was, therefore, guilty of murder. L LACHHMAN SINGH *v.* EMPEROR, 7 L. L J. 582, 27 Cr L J. 238, A I R. 1926 Lah. 143 **222**

——— **ss. 302, 97**—*Death caused in pre-arranged fight—Murder—Private defence, right of.*

Where members of two rival factions armed with deadly weapons take part in a pre-arranged fight, and deaths are caused on either side, no question of the exercise of the right of private defence arises, and all those who take part in the fight are guilty of the offence of murder. L MADAT KHAN *v.* EMPEROR, 7 L. L. J. 628; 27 Cr. L. J. 283; A. I. R. 1926 Lah. 221 **459**

——— **ss. 302, 304, 323**—*Blow struck with heavy weapon—Disappearance of person struck—Offence.*

Accused struck his brother's widow with a heavy *moosal*, felled her to the ground, and then dragged her into the house after which no trace of her could be discovered.

Held, that in the absence of definite evidence that the woman had died and that her death was due to the blow which the accused dealt her, the accused could not be convicted of an offence either under s 302 or under s 304 of the Penal Code and that at the most he was guilty of an offence under s. 323 of the Penal Code. L BHOLA *v.* EMPEROR, 27 Cr L. J. 275 **451**

——— **ss. 304A, 337, 338, 465, 471**—*Criminal Procedure Code (Act V of 1898), s. 235—Accident causing loss of life and injury to person—Neglect of duty—Forgery committed by accused to screen himself from criminal liability and to continue in employment—Joinder of charges—"Same transaction, meaning of—Contributory negligence, plea of, whether relevant.*

In a prosecution under ss. 304-A, 337 and 338 of the Penal Code the accused cannot claim the benefit of an error of judgment when he has exercised no judgment at all.

The expression "gross neglect" finds no place in the Criminal Law of India. That law does not render a mere casual inadvertance of duty criminal, but such neglect of duty as either directly results in loss of life or injury to person or such neglect as endangers life or property

Where a person is charged with the offence of causing loss of life by a negligent omission, it is not open to him to rely on the plea of contributory negligence which is distinctly recognized in the Law of Torts but finds no place in an indictment for criminal negligence In such a case the question is what was the proximate cause of the accident.

The arena of facts covered by the expression "same transaction" used in s. 235 of the Cr. P. C. varies with the circumstances of each case. The real and substantial test for determining whether several offences are so connected together as to form one transaction depends upon whether they are so related together in point of purpose or as cause and effect or as principal or subsidiary acts as to constitute one continuous action.

It was the duty of the accused to make a periodical inspection of certain boilers in order to see that the boilers were in a fit condition to be worked. One of

the boilers exploded and caused loss of life and injury to person, the accident being due to the fact that the crown stays of the boiler were badly corroded, some of them having disappeared altogether If the accused had carried out his duty of inspecting the boiler from time to time, all possibility of the accident would have been avoided. During a departmental enquiry into the cause of the accident, the accused produced a Dak Despatch Book in order to prove that he had submitted periodical reports of his inspection of the boiler to his superior officer He also relied on certain entries made by him in a private book to show that he had reported on the condition of the crown stays. The entries in the Dak Despatch Book and the private book produced by the accused were suspected to be forged and the accused was put on his trial on three different charges, (1) under ss 304-A, 337 and 338 for neglect of duty resulting in the bursting of the boiler and causing loss of life and injury to person, (2) under ss 465, 471 or in the alternative under s 193 of the Penal Code for having forged entries in his private book with the object of inducing the officer who was holding an enquiry to form an erroneous opinion and (3) under s 477-A of the Penal Code for falsifying Dak Despatch Book He was convicted under the first and second heads but was acquitted on the third.

Held, (1) that the neglect of the accused resulting in the bursting of the boiler and the subsequent forgeries with the object of screening himself from criminal liability and in order that he might be retained in his employment were part of the same transaction within the meaning of s 235 of the Cr P C, and that there was consequently no misjoinder of charges,

(2) that the bursting of the boiler being due to the neglect of duty of the accused and that the accused having forged the entries in the private book with the object of being retained in employment, his conviction on the first and second charges was justified **S** WOODWARD *v.* EMPEROR, 18 S. L R 199; A. I R 1925 Sind 233; 27 Cr. L. J. 257 **433**

——— **s. 309**—*Attempt to commit suicide*

An attempt to commit suicide should not be treated lightly **A** EMPEROR *v* KESAR, 27 Cr L J 303, 24 A L. J. 228, A I R. 1926 All 226 **591**

——— **s. 323.** *See* PENAL CODE, 1860, s 147 **463**

——— **s. 332.** *See* PENAL CODE, 1860, s 147 **224**

——— **s. 332**—*Police Act (V of 1861), s 34—Playing cards in street—Offence—Prohibition by constable—Discharge of duty*

Playing cards in the street is no offence under s 34 of the Police Act and, therefore, a constable prohibiting people from doing so cannot be said to be acting in discharge of his duty **L** MUL CHAND *v* EMPEROR, 27 Cr. L. J. 377, A. I R. 1926 Lah. 250 **889**

——— **ss. 337, 338.** *See* PENAL CODE, 1860, s 304A **433**

——— **ss. 342, 365**—*Wrongful confinement—Whereabouts of person confined not concealed—Offence.*

The intent to cause the person abducted to be secretly and wrongfully confined is an essential element of an offence under s. 365 of the Penal Code.

Accused wrongfully confined their sister but her whereabouts were not concealed from her other relatives and persons interested in her.

Held, that the accused were guilty of an offence under s. 342 of the Penal Code but not of an offence

under s 365 of the Code **L** AKBAR ALI *v* EMPEROR, 7 L. L. J 520, A. I. R. 1925 Lah. 614, 27 Cr L J 229 **213**

——— **s. 365.** *See* PENAL CODE, 1860, s 342 **213**

——— **s. 366**—*Abduction, what constitutes*

In order to sustain a charge under s 366 of the Penal Code, it is not necessary for the prosecution to establish that after the woman had been by force compelled to leave her house, she was by force compelled to go to various places **C** KERMAT MANDAL *v* EMPEROR, 42 C L J 524, 27 Cr. L J. 263, A I R 1926 Cal 320 **439**

——— **s. 379**—*Theft—Catching fish in* poromboke *tank in assertion of* bona fide *right—Offence*

Catching fish in a *poromboke* tank in the assertion of a *bona fide* right does not amount to the offence of theft **M** VAITHI MATHARAN *v* NARAYANASWAMI IYER, 22 L W 673, A. I. R 1926 Mad 210, 27 Cr L J 343 **855**

——— **s. 397**—*"Uses," meaning of—Use of handle of axe, whether use of deadly weapon*

The word "uses" in s 397 of the Penal Code should be construed in a wide sense so as to include not merely cutting, stabbing or shooting (as the case may be) but also carrying the weapon for the purpose of overawing the person robbed

A hatchet being a deadly weapon, it will be deemed to have been used as a deadly weapon whether it is its head or handle that is used **S** NAZAR SHAH *v* EMPEROR, 27 Cr L J 334, A I. R 1926 Sind 150 **750**

——— **s. 403**—*Criminal misappropriation—Repudiation of trust*—Sapurddar *of attached property—Failure to deliver property—Covenant for delivery of price—Civil liability*

Section 403, Penal Code, is in no way restricted to appropriating property to one's own use If a trustee repudiates the trust and asserts that he now holds the property on behalf of a person other than the one who entrusted him with it, he has misappropriated the property just as much he would have been said to misappropriate it if he had been putting forward his own claim to it

When a Receiver attaches property and entrusts it to some person, he does not purport to sell it to him or dispose it of at that time The Receiver may not even be in a position to know its true value The intention of the parties is that the articles should be returned in specie or produced at the time when the auction sale is to take place. The covenant in the *sapurdnama*, that the person entrusted with the property would be liable to pay a certain amount in case he fails to deliver the property, is more by way of security than because the property is transferred to him with liberty to dispose it of or withhold it. In such cases it is the true intention of the parties which must be taken into account. Therefore, if the property is not produced the *sapurddar* is guilty of criminal misappropriation It is not a case of mere civil liability

The mere fact that there is a civil liability does not necessarily absolve one from criminal liability **A** INDAR SINGH *v* EMPEROR, 27 Cr L J 297; 24 A L J 270, A. I R. 1926 All 302, 48 A 288 **585**

——— **s. 405**—*Criminal breach of trust—Nominal sale of engine by person entrusted, whether amounts to offence.*

Accused who was entrusted with an engine executed a nominal sale-deed therefor to a third person but the engine was not removed from its place

Penal Code—contd.

and was still available to the true owner who suffered no loss by the sale

Held, that on these facts a conviction of the accused for criminal breach of trust was not sustainable **M** RUKMANI AMMAL *v.* MUTHUSWAMI REDDI, 50 M L J. 94; 27 Cr L J 331 **747**

——— **s. 406** *–Money advanced to accused under lawful agreement –Agreement becoming incapable of execution—Retention of money in lieu of debt due to accused—Offence.*

Where a sum of money is placed in the hands of a person under a lawful agreement which, however, becomes subsequently incapable of execution, and is retained by him afterwards against a debt due to him he cannot be held guilty of criminal breach of trust under s. 406, Penal Code **A** PURAN *v.* EMPEROR, 27 Cr. L. J. 383, A. I. R. 1926 All. 298 **895**

——— **ss. 411, 457**—*Stolen proprety found in house occupied by several persons—Exclusive possession—Offence.*

Certain stolen property was found concealed in a dung heap in the courtyard of a house which was owned and occupied by four persons

Held, that the property could not be said to be in the exclusive possession of any of the occupants of the house and that none of them could, therefore, be convicted of any offence under s 457 or 411 of the Penal Code. **L** QAIM DIN *v* EMPEROR, 7 L L. J. 223, 27 Cr L. J 249 **425**

——— **s. 457.** *See* PENAL CODE, 1860, s. 411 **425**

——— **s. 457**—*Burglary –Conviction based on production of non-identifiable articles, legality of.*

Complainant's shop was broken into and a quantity of cotton and some pieces of cloth were stolen, but complainant did not furnish the Police with a list of the articles which had been stolen. Accused was seen next morning in the village carrying bundles of cloth He was subsequently arrested and produced a bag of cotton and certain pieces of cloth of an ordinary character which any cloth merchant might be expected to stock and sell, but which were claimed by the complainant as belonging to him

Held, that the evidence against the accused was of an inconclusive character and was not sufficient to support a conviction under s. 457 of the Penal Code. **L** WASAL *v.* EMPEROR, A. I. R 1925 Lah 495, 7 L L J 277; 27 Cr. L. J. 299 **587**

——— **ss. 471, 477A.** *See* PENAL CODE, 1860, s. 304A **433**

——— **s. 499**—*Defamation—Good faith –Principles applicable—Criminal Procedure Code (Act V of 1898), s. 342 (2)—Written statement by accused—Privilege.*

There is a distinction between criminal and civil liability for defamation Civil liability is to be determined by the principles of English Law, but criminal liability is governed by the provisions of the Penal Code and those provisions alone.

A finding that a defamatory statement was made in good faith within s. 499, Penal Code, cannot be read into a general statement by the Sessions Judge, that the statement was covered by privilege, and that it was made not with the intention of doing harm to the person defamed but with the object of saving the person making it.

The immunity conferred by s 342 (2), Cr P. C., does not extend to a written statement by the accused. **A** CHAMPA DEVI *v* PIRBHU LAL, 27 Cr. L. J. 253; 24 A. L. J. 329; A. I. R. 1926 All. 287 **429**

Penal Code—contd.

——— **ss. 499, Excep. 9, 500**—*Defamation—Statement made by Advocate, whether privileged—Absolute privilege, doctrine of, whether applicable—Malice, proof of—Advocate, position and duties of.*

Section 499 of the Penal Code is meant to be universal and the English Law of absolute privilege does not apply in this country to statements of Advocates in judicial proceedings.

It is, however, for the public good that a person charged with the responsibility of an Advocate should, so far as may be, feel unfettered by any control other than that of the Presiding Judge, in the use of every weapon placed at his disposal by the law for the defence of the liberty of his client.

Exception 9 to s. 499 of the Penal Code must, therefore, be interpreted accordingly, and it is the duty of a Court when a complaint is made against an Advocate or Legal Practitioner for defamation that it should presume that the remark was made on instructions and in good faith; and unless circumstances clearly show that it was made wantonly, or from malicious or private motives, the complaint should not be entertained.

Even if the circumstances suggest recklessness or malice, further enquiry should be made and an opportunity, if possible, should be given to a Legal Practitioner to offer an explanation before summons is issued against him.

Per *Brown, J* —A definite pronouncement of the Indian Legislature is not liable to be overridden by the provisions of the Common Law of England.

The law as to absolute privilege is not applicable to the Criminal Law of defamation in India. The Indian Penal Code is a complete Code in itself. It is to a large extent founded on the Common Law of England, but the ordinary criminal offences in this country are punishable, not because they would be offences under the English Common Law, but because they have been declared to be offences punishable under the Penal Code. Section 499 defines the criminal offence of defamation The section is quite clearly wide enough in certain circumstances to make statements made by Advocates in the exercise of their profession amounting to criminal defamation punishable under s 500 There are a number of exceptions set forth in s. 499, and any statement falling within those exceptions does not amount to criminal defamation But any statement which does not fall within any of these exceptions, and which otherwise satisfies the terms of the general definition in the section is quite clearly declared by s 499 read with s 500 to be punishable.

If an Advocate is to carry out his duties to his client, he must frequently have to make imputations or statements, the correctness of which he has not had the time or opportunity to verify, and it is a very fair presumption in ordinary cases that a statement or imputation so made by an Advocate in the course of judicial proceedings is made, not for the purposes of defamation, but in good faith, for the protection of the interests of his client. In such a case, therefore, to establish an offence of criminal defamation it is necessary not only to show that a defamatory statement has been made, but that it has been made maliciously, wantonly, or with some improper motive. A Magistrate should refuse to take cognizance of a complaint in such a case unless there is some allegation of malice; wantonness or improper motive. **R** MCDONNEL *v.* EMPEROR, A. I. R. 1926 Rang. 345; 4 Bur. L J. 147; 3 R. 524; 27 Cr. L. J. 321 **737**

Penal Code—concld.

——— **s. 500**—*Defamation—Challenged statement*
A person who maliciously makes a defamatory statement in respect of another, in the presence of several persons, is guilty of defamation, notwithstanding that he makes the statement on being challenged to do so by the person defamed. A BENI RAM *v.* EMPEROR, 27 Cr. L. J. 310; A I R. 1926 All. 237 694

——— **s. 500**—*Defamation - Degradation in caste—Privilege*
A statement by the accused to certain members of the caste that the complainant had become a sweeper by reason of his having shaken hands and associated with sweepers, is defamatory and is not privileged where it does not represent the decision formally arrived at by a *panchayat* held to consider the matter. A KHAMANI *v* EMPEROR, L R 6 A 207 Cr., 24 A L J. 171; 27 Cr. L. J 296, A I R 1926 All 306 584

——— **s 506.** *See* PENAL CODE, 1860, s 141 145

Permanent Settlement. *See* BENGAL REGULATION, 1793 338

Pleader, appearance against former client *See* MADRAS CIVIL RULES OF PRACTICE, R 277 300

——— Consent to compromise *See* COMPROMISE 179

Pleadings. *See* ALSO C P C., 1908, O VI, O VII

——— *Adverse possession, plea of—Appeal—Plea, whether can be taken*
Ordinarily a plea of adverse possession should be distinctly raised in the pleadings and should also form the subject-matter of an issue, but a party may be allowed to succeed on a title by adverse possession pleaded for the first time in the Court of Appeal, if such a case arises on facts stated in the pleadings and the opposite party is not taken by surprise Pat BATISA KUER *v* RAJA RAM PANDEY, (1925) Pat 343, A I. R 1926 Pat 192, 7 P L. T 393 177

——— **and proof**—*Injunction, suit for—Property alleged to belong to plaintiff—Finding as to public nature of property, effect of*
Plaintiff alleging that a *chabutra* in an open space belonged exclusively to him, instituted a suit for an injunction restraining the defendant from interfering with the plaintiff's user of the *chabutra* Defendant pleaded that the *chabutra* belonged to him It was found that the *chabutra* was public property and belonged neither to the plaintiff nor to the defendant
Held, that having regard to the frame of the plaintiff's suit, the suit must be dismissed on the finding that the *chabutra* did not belong to the plaintiff. N BARKOO *v* ATMA RAM 818

Police Act (V of 1861), s. 34. *See* PENAL CODE, 1860, s. 332 889

——— **s. 34 (4)**—*Supplying water to public and receiving tips—Water, whether "exposed for sale"*
A person who sets up a *chauki* (wooden board) with an earthen jar filled with water on a public place and supplies water to all those who want it, cannot be said to expose the water for sale within s. 34 (4) of the Police Act, merely because sometimes some of the persons who take water do voluntarily give tips to him.
The expression "exposes for sale" in s. 34 (4), Police Act, implies that every person who takes any quantity of the thing exposed has to pay for it A KALAP NATH *v.* EMPEROR, 27 Cr. L. J 303, 24 A. L. J. 292; A. I. R. 1926 All. 288 591

Practice.

See ALSO (*i*) CIVIL PROCEDURE.
(*ii*) CRIMINAL PROCEDURE.
(*iii*) EVIDENCE

——— Court allowing one party to call opposite party as witness *See* EVIDENCE 844

——— *Dispute of civil nature—Criminal proceedings*
Parties should not be encouraged to resort to the Criminal Courts in cases in which the point at issue between them is one which can more properly be decided by a Civil Court In each case, however, it must be seen whether the issue as to title is raised *bona fide* or *mala fide* L ABDUL QADIR *v* EMPEROR, 27 Cr L J. 211 163

——— *Dispute of civil nature—Procedure*
The complainant had mortgaged some land to the accused The accused claimed that the mortgage was with possession while the complainant said it was not One day the complainant found the accused ploughing the land, remonstrated with him, and was assaulted The Magistrate convicted the accused and sentenced him to a fine under s 323, Penal Code
Held, that the dispute between the parties being of a civil nature, the Magistrate would have exercised a better discretion had he directed the complainant to seek his remedy from a Civil Court L TULSI *v.* EMPEROR, 7 L L J 389, A. I R 1925 Lah 599, 27 Cr. L J. 231 215

——— *Evidence produced at late stage, whether should be admitted*
It is the duty of a Court to welcome any evidence that may be offered and indeed to search for it, and it is wrong to exclude any evidence that is relevant If evidence which is relevant is tendered at a late stage such suspicion or disbelief of it as may be due to its production at a late stage will attach to it automatically and if the other party has had no opportunity because of the lateness of the stage at which the evidence is produced, of producing any rebutting evidence that they might have had, the disbelief is greatly increased N KESHEORAO *v* MAROTIRAO, 8 N L J. 227, A I R 1926 Nag 139 102

——— *Execution petitions*
Practice of striking off or lodging execution petitions for statistical purposes condemned M PATTAMAYYA *v* PATTAYYA, 50 M L J 215, (1926) M W N. 262, A I R 1926 Mad 453 782

——— *Piecemeal trial of suit, undesirability of*
The practice of trying an important case piecemeal tends to lead to protracted litigation and serious inconvenience and to involve the parties in heavy costs if the case is taken repeatedly on appeal to a superior tribunal L RAGHUNATH DAS-RAM SARUP *v* SULZER BRUDERER & Co, 7 L L J. 611, 7 L 42, A I R. 1926 Lah 125 712

——— **and pleadings.** *See* PUNJAB PRE-EMPTION ACT, 1913, s. 16 241

Precedents—*Official reports*
Every Court subordinate to the Judicial Commissioner's Court in Central Provinces and Berar is bound to follow a ruling published in Central Provinces Law Reports or Nagpur Law Reports until it has been overruled by another ruling similarly published Even in the Judicial Commissioner's Court according to an old standing rule of practice a Judge sitting alone always follows an officially published ruling If he doubts the correctness of such ruling, the only course properly open to him is to refer the matter for the decision of a Bench N KESHEO *v.* JAGANNATH, A. I. R. 1926 Nag. 318 121

Precedents—concld.

——— *Reported and unreported decisions.*

In the case of a conflict between a reported and an unreported decision, the proper course is to follow the reported decision. M TRUSTEES PARAKKAT DEVASWOM *v.* VENKATACHALAM VADHAYAR, 23 L. W. 22, 50 M L J. 153; A. I. R. 1926 Mad 321 **709**

——— *Revenue cases.*

The High Court ought to follow, especially in matters of procedure, as far as it can do, the policy or line of decisions adopted by the Revenue Side in cases which strictly belong to the revenue jurisdiction. A KHEM KARAN DAS *v.* BALDEO SINGH, A. I. R. 1926 All. 282 **1046**

——— *Subordinate Courts, duty of.*

A Subordinate Court is bound by the ruling of a superior Court, however unsound it may appear to it unless it is expressly contrary to any statutory provision of law which was not brought to the notice of the superior Court, or unless it has been overruled. A BENI RAM *v.* EMPEROR, 27 Cr. L J 310, A I R 1926 All. 237 **694**

Pre-emption. *See* MUHAMMADAN LAW—GIFT **265**

——— *Custom—Instances in neighbouring* mohallas, *value of*—Mohalla Serai *Mangal Sain, Jhelum City.*

Instances of the exercise of the right of pre-emption in neighbouring *mohallas* are not sufficient to prove that the custom of pre-emption exists in the locality in which the property in suit is situate.

The custom of pre-emption does not exist generally throughout the town of Jhelum, nor does it exist in the block known as *Mohalla Serai* Mangal Sain which is a part of the old Chakla *Mohalla.* L LAL CHAND *v* HUNS KUMAR, 7 L L J. 590, A. I. R. 1926 Lah. 108, 7 L. 55 **651**

——— *Market-value, determination of—Evidence, absence of—Waiver—Refusal to purchase at certain sum—Sale for lesser sum—Right, whether can be asserted.*

In a pre-emption case, in the absence of satisfactory evidence of the market value of the land in dispute, the sum actually paid may be taken to be the proper market value

Where a pre-emptor refuses to purchase the property offered for sale at a certain price, he is not estopped from asserting his right of pre-emption if the property is subsequently sold for a lesser sum L NATHA SINGH *v.* SUNDER SINGH, 7 L L J. 559, A. I. R 1926 Lah. 10 **258**

——— *Previous refusal—Waiver*

A previous refusal by the pre-emptor to buy the property on the ground of his inability to buy operates as a waiver of his right to pre-empt L MUHAMMAD *v.* MUHAMMAD ALI, A. I. R. 1926 Lah 243 **289**

——— *Price fixed in good faith—Finding of fact—Appeal, second—Finding, whether can be challenged.*

Where a Court of first appeal disbelieves the witnesses produced by a pre-emptor in support of his allegation that the price mentioned in the sale-deed was not fixed in good faith, its finding that the price was fixed in good faith cannot be challenged in second appeal. O INDARPAL SINGH *v.* KALLOO **670**

——— *Suit for possession of definite plot out of estate assessed to revenue—Jurisdictional value—Improvements by vendee—Compensation.*

In the Punjab the value of a pre-emption suit for purposes of jurisdiction is 30 times the proportionate amount of revenue recorded as payable for the holding in which the land in suit is comprised even though it be a specified plot by metes and bounds and not a definite share of the holding.

A vendee, in a pre-emption suit, is in equity entitled to compensation for improvements effected after the institution of the suit when he had no notice of the institution of the suit and the improvements had been effected after the expiry of the period of limitation for the suit. L ARSHAD ALI *v.* ZORAWAR SINGH, 8 L. L. J. 60 **986**

——— *Vendor, title of, assertion of—Vendor not in possession at time of sale—Sale, what amounts to—Conveyance in consideration of price and promise to do certain things, whether sale—Transfer of Property Act (IV of 1882), s 54*

In order to succeed in a suit for pre-emption, the pre-emptor must assert title in the vendor, and the fact that there was a conveyance by the vendor to the vendee which amounted to a sale. The vendee *qua* vendee and as against the pre-emptor is estopped from denying the title of his vendor, and so, for the purposes of a pre-emption suit, the title must be assumed to exist in the vendor, if it is alleged by the pre-emptor to exist

The deed of conveyance, however, must clearly profess to sell the property, and not merely be a promise to sell the property in the future. It makes no difference whether the vendor was out of possession or in possession at the date of the sale, nor does it make any difference whether there was a small or large chance of his getting his title acknowledged in Court

In order, however, that a transaction should amount to a sale it is necessary that there should be a price paid or promised or part paid and part promised, which means that the price must be stated in or ascertainable at the time of the deed.

A conveyance in consideration of a price and also a promise to do certain things, the doing of which will cost an indefinite sum of money, is not a sale. O RAM PHER SINGH *v* SHEO SARAN SINGH, 3 O W. N. 138; A. I. R. 1926 Oudh 196 **757**

——— Wajib-ul-arz *embodying custom—Partition of village—Agreement to observe custom irrespective of partition—Agreement, whether binding—Fresh* wajib-ul-arz, *whether necessary.*

Ordinarily where a partition of a village has taken place, the joint ownership is destroyed, and each *mahal* becomes a separate unit for the purpose of regulating the rights of the co-sharers forming the proprietary body of that *mahal inter se.*

Where, however, the *wajib-ul-arz* relating to the village recognises the existence of a custom of pre-emption amongst the co-sharers of the village, and when the village is divided by partition into different *mahals,* the co-sharers agree to the partition subject to the reservation that the custom will continue in force irrespective of that partition, and that a co-sharer of one *mahal* would be entitled to pre-empt in respect of property situated in another *mahal,* the reservation operates as a condition precedent to the partition and is as much binding on the co-sharers, who are parties to the partition proceeding, as the partition itself. It is not necessary that a fresh *wajib-ul-arz* should be prepared at the time of partition in respect of each *mahal* embodying such a custom. A SRI KISHEN *v.* CHANDRA SEKHAR BAKSH SINGH **353**

Pre-emption—concld.

Presidency Towns Insolvency Act (III of 1909), ss. 30 (1), 32—*Composition scheme, acceptance of —Annulment of adjudication, effect of—Debts not proved, whether discharged.*

By the combined operation of ss. 30 (1) and 32 of the Presidency Towns Insolvency Act, the acceptance by the Court of a scheme of composition and the consequent annulment of adjudication operates as a discharge of the insolvent from all debts which were provable in insolvency but which have not been brought before the Insolvency Court A GANPAT RAI v KANI RAM MUNNA LAL, 24 A. L. J 283, A I. R 1926 All 293 535

Principal and agent. *See* ALSO CONTRACT ACT, 1872, ss 182 TO 238

——— *Agent guilty of fraud—Action of agent whether binding on principal—Fraudulent statement of agent of decree-holder that decree has been satisfied—Judgment-debtor privy to fraud- Decree-holder, whether bound*

A principal is bound only by acts done by his agent on his behalf in good faith and not by his fraudulent actions when a third person who relies upon such actions is himself a party to the fraud

If no payment of a decree is actually made by the judgment-debtor and if as a result of collusion between the agent of the decree-holder and the judgment-debtor, a fraudulent application containing wrong facts is put in by the agent, the decree-holder cannot be deemed in law to be bound by such an application O GANGA BAKHSH SINGH v MAULA BUX SINGH, 13 O L J 132; A. I R 1926 Oudh 337 612

——— *Misconduct of agent—Promissory note obtained by agent from debtor—Suit on note by principal, dismissal of, on ground of forgery—Original claim barred—Suit for damages caused by agent forging note —Note void as contravening s 26 of Paper Currency Act (II of 1910), effect of—Suit against agent, maintainability of*

An agent who was carrying on money-lending business on behalf of his principal was charged by the latter with breach of trust in obtaining an inadequate security from a third person in discharge of a pro-note that had been executed by a solvent debtor The agent then produced a fresh pro-note alleged to have been since executed by the said debtor A suit by the principal on this pro-note was dismissed on the ground that the note was forged The cause of action on the original claim had by then become barred by time In a suit by the principal against the agent for damages caused by his misconduct in forging the note and misleading the plaintiff into giving up the claim on the original note, it was found that the note was illegal and void being in contravention of s 26 of the Paper Currency Act

Held, that the plaintiff had no cause of action on which to maintain the suit, since even if the note had been genuine, a suit on that document must have failed and it could not be said that the loss of the litigation was due to the action of the agent in forging the note, the loss, if any, being due to the plaintiff's own neglect in not seeing what his rights were under the document M VEERASWAMI PILLAI v. CHIDAMBARAM CHETTIAR 819

Privy Council—*Practice—Criminal appeal—Refusal by Governor-General to transfer case—Sufficiency of evidence—Adequacy of Judge's charge to Jury—Interference, when permissible.*

Their Lordships of the Judicial Committee of the Privy Council in dealing with petitions for special leave to appeal against sentences pronounced in the Criminal Courts of the various dominions of His Majesty will not act as a Court of Criminal Appeal and will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done

It is in the power of the Governor General of India, if he thinks that in the state of public feeling a fair trial cannot be obtained in the place where an offence would ordinarily be tried, to order that the trial be held elsewhere

Where, however, the Governor-General refuses to make such an order, the refusal cannot be held to amount to a violation of the principles of natural justice so as to enable their Lordships of the Privy Council to interfere with the result of the trial

Questions as to the sufficiency of evidence or the adequacy of the Judge's charge to the Jury cannot come within the ambit of the rule laid down as to the disregard of the forms of legal process or violation of the principles of natural justice P. C. SHAFI AHMAD NABI AHMAD v EMPEROR, A I R 1925 P C 365, 49 M. L J 831, 23 L W 1, (1926) M W N 62, 43 C L. J 67, 3 O W N 165, 28 Bom L R 158; 27 Cr L J 228, 30 C. W. N. 557 212

Promissory note, *suit on—Consideration alleged by plaintiff, disproof of, effect of—Procedure*

In a suit on a promissory-note plaintiff stated that cash consideration had passed at the time of the execution of the promissory note The defendant's plea was that the pro note was executed as a sort of security for his good conduct in connection with a partnership which was being carried on between him and the plaintiff's brother The Trial Court found that no cash consideration had passed and that the story of the defendant was true, the pro-note having been executed as security for accounting for sums drawn by the defendant as a partner

Held, that on the finding of the Trial Court the suit was bound to be dismissed and that that finding could not be construed as declaring the contingent liability of the defendant at the time of the settlement of accounts M APPAJEE PILLAI v. MANIKA MUDALI, 21 L W 652 30

Provident Funds Act (IX of 1897), s. 2 (4). *See* PROVINCIAL INSOLVENCY ACT, 1920, s 28 673

Provincial Insolvency Act (V of 1920). *See* ALSO INSOLVENCY

——— **s. 2 (d)**—*Hindu Law—Joint family—Father, insolvency of—Family property, whether vests in Receiver.*

On an adjudication of a Hindu father as an insolvent under the Provincial Insolvency Act, 1920, the joint property of the family does not at once vest in the Receiver A ALLAHABAD BANK LD. v BHAGWAN DAS JOHARI, 24 A L J 323, A. I R. 1926 All. 262 309

——— **s. 4.** *See* PROVINCIAL INSOLVENCY ACT, 1920, s 56 573

——— **s. 4**—*Hindu father adjudicated insolvent—Objection of sons to sale by Receiver—Order for sale without deciding rights of parties, whether proper.*

Where a Hindu father is adjudicated an insolvent and the sons apply to the Court objecting to the sale of the entire family properties advertised by the Receiver on the ground that they were divided and that their share ought not to be sold, the Court ought not to allow the insolvent's interest in the property

to be sold leaving it to future litigation to determine the rights of parties.

The Official Receiver has the power under the Provincial Insolvency Act to sell the shares of the sons to a Hindu insolvent unless the sons make out that their shares are not bound to liquidate the debt contracted by their father The Court, therefore, ought to inquire and decide on the rights of parties **M** AKELLA RAMASOMAYYAGULA *v.* OFFICIAL RECEIVER, GODAVARI RAJAHMUNDRY, 23 L. W. 80, (1926) M W. N. 169; A. I. R. 1926 Mad 360 **249**

——— **ss. 10, 24, 25**—*Debtor's petition to be adjudicated insolvent*—Prima facie *evidence of inability to pay debts—Inquiry as to reality of debts, whether proper.*

When a person presents a petition to be adjudicated an insolvent, the petition itself is treated as an act of bankruptcy under the Insolvency Law And where he states that his liabilities are more than his assets, that must be taken as *prima facie* evidence that he is unable to meet his liabilities which is the only thing the Court has to consider for the purpose of adjudicating the debtor an insolvent.

No inquiry ought to be held at that stage as to the reality of the debts. Such an inquiry into the *bona fides* of the insolvent is proper only when he applies for discharge and not before. **M** RACHARLA NARAYANAPPA *v.* KONDIGI BHEEMAPPA, A I R. 1926 Mad 494 **541**

——— **s. 24**—*Hindu Law—Joint family—Debts incurred by father—Sons, whether can be adjudicated insolvents.*

In the case of a joint Hindu family, if the father incurs debts and dies, the other members of the family do not stand towards him in the relation of heirs; they only succeed to him and the debts are binding upon them. In such a case the other members are liable to be adjudicated insolvents in respect of the debts incurred by the father. **M** M A. R. R. M. P. MUTHU VEERAPPA CHETTIAR *v* U K SIVAGURUNATHA PILLAI, 22 L. W. 617; 49 M L. J. 697, (1926) M. W N. 63; A. I. R. 1926 Mad. 133; 49 M. 217 **603**

——— **s. 28**—*Civil Procedure Code (Act V of 1908), s. 60—Provident Funds Act (IX of 1897), s 2 (4)—"Compulsory deposit", meaning of—Deposit paid out to insolvent—Attachment.*

A "compulsory deposit" within the meaning of s. 2 (4), Provident Funds Act, is such deposit only so long as it remains in the fund, and not after it has been paid over to the person to whose credit it had hitherto stood.

Therefore, a compulsory deposit under the Provident Funds Act, after it has been paid out of the funds to an insolvent, is not exempt from attachment. **O** GAURI SHANKAR *v* DECRUZE, 3 O. W N. 378 **673**

——— **ss. 35, 61 (6)**—*Annulment of adjudication—Payment of debts in full—Release of debt, whether payment—Interest subsequent to date of adjudication whether must be paid.*

Even an unconditional release of his debt by a creditor does not amount to a payment in full of the debt within the meaning of s. 35 of the Provincial Insolvency Act.

Before the provisions of s. 35 of the Provincial Insolvency Act can be availed of, all the debts of the insolvent must be discharged in full. Interest subsequent to the date of the adjudication, though it cannot be taken into account at the time of the first distribution of the dividends, has to be paid out of the assets

of the insolvent if they are sufficient for the purpose, and is, therefore, a part of the debt. Such interest must be paid before the benefit of s. 35 can be claimed. **A** MUHAMMAD IBRAHIM *v* RAM CHANDRA, 24 A. L. J. 244; A. I R. 1926 All. 289, 48 A. 272 **514**

——— **ss. 42, 28 (2)**—*Discharge, refusal of—Execution of decree- Leave of Court, whether necessary.*

Where an Insolvency Court refuses the discharge of an insolvent under s. 42 of the Provincial Insolvency Act, the proceedings are terminated as far as the Insolvency Court is concerned, and the insolvent is thereafter liable to be arrested in execution of any decree without the leave of the Court. **R** MAUNG PO TOKE *v.* MAUNG PO GYI, 3 R 492, A. I R 1926 Rang. 2 **142**

——— **ss. 43, 75**—*Adjudication—Period for applying for discharge not specified—Subsequent addition without notice to parties, whether operative—Failure to apply for discharge—Annulment of adjudication—Appeal by creditors, whether maintainable—Persons aggrieved.*

Where a person is adjudicated an insolvent at the instance of his creditors, and the order of adjudication is subsequently annulled under s 43 of the Provincial Insolvency Act, the creditors are the aggrieved parties and an appeal against the order annulling the adjudication is maintainable at the instance of the creditors.

Where an order of adjudication did not fix a period within which the insolvent was to apply for his discharge but an addition was subsequently made to the order behind the back of the parties fixing such period

Held, (1) that the subsequent addition could not be treated as a part of the order of adjudication and was, therefore, inoperative,

(2) that no time having been fixed in the order of adjudication within which the insolvent was to apply for his discharge, s. 43 of the Provincial Insolvency Act had no application to the case, and the order of adjudication could not, therefore, be annulled for failure of the insolvent to apply for his discharge within the period specified in the subsequent addition to the order of adjudication;

A wrong order becomes final unless set aside in accordance with law **L** FIRM JAI SINGH-DIYAL SINGH *v.* NARMAL DAS, 7 L. L J. 553, A. I R. 1926 Lah. 24 **235**

——— **s. 50.** *See* C P. C, 1908, O XXI, R 58 **14**

——— **s. 52**—*Money-decree-holder obtaining security in execution proceedings, whether secured creditor.*

The exemption from the operation of s. 52, Provincial Insolvency Act, given to secured creditors must be extended to money-decree-holders who have obtained securities in the course of execution who must also be treated as secured creditors for purposes of the section. **M** OFFICIAL RECEIVER *v.* NAGARATNA MUDALIAR, 49 M. L. J. 643; (1925) M. W N. 907; A. I. R. 1926 Mad. 191 **497**

——— **s. 53**—*Fraudulent preference—Intention of insolvent—Creditor's motive, whether material.*

In a case of fraudulent preference it is not necessary for the Official Receiver to make out that the property alienated was undervalued. The gist of fraudulent preference lies in preferring one creditor to another when the insolvent is unable to meet his liabilities fully.

Provincial Insolvency Act—1920—contd.

In such a case the Official Receiver has only to make out the intention of the insolvent. The intention or motive of the creditor is immaterial. Even if the creditor takes a *bona fide* sale from the insolvent in discharge of a debt to him, that does not make the transaction a valid transaction if the intention or the view of the insolvent is to prefer that creditor to others. **M** BOHISETTI MAMAYYA *v.* OFFICIAL RECEIVER, 23 L. W. 10; (1926) M. W. N. 124; A. I. R. 1926 Mad. 338 **726**

——— **ss. 53, 54**, *difference between—Encumbrance created within two years of adjudication—Consideration—Good faith—Burden of proof.*

Where an incumbrance created by an insolvent within two years of his adjudication is challenged in the Insolvency Court the onus lies on the incumbrancer to prove both good faith and valuable consideration.

There is a radical difference between s. 53 and s. 54 of the Provincial Insolvency Act. Under s 54 the Court is not concerned with the motive of the transferee but only with that of the debtor. It is he who is said to have given the preference and whether the transferee acted in good faith or not is immaterial Where, however, the three months' limitation contemplated by s 54 has expired, it is open to the transferee to prove that whatever the motive of the transferor may have been, he on his part acted in good faith. And where the consideration of the transfer is a past debt the transferee stands in a better position than otherwise. He has his own interests to serve and owes no duty to the other creditors to protect their interests. He is in the absence of any statutory limitation imposed by the Law of Bankruptcy, as much at liberty to secure the payment of his debt by superior diligence as by accepting a voluntary preference provided he goes no further than what is necessary to serve his own purpose. **S** OFFICIAL RECEIVER *v* LACHMIBAI, A I. R. 1926 Sind 140 **5**

——— **s. 54**—*Preference of one creditor over others—Mortgage securing old and new loans.*

A transfer cannot be avoided merely because its effect is to give one creditor preference over other creditors unless the debtor intends to do so

Where a debtor who is unable to meet his liabilities and stands in need of further accommodation, approaches one of his creditors for a further loan, and executes a mortgage securing both the fresh and the previous loans, it cannot be said that he intended to prefer that creditor over others, but merely that he wanted to benefit himself. **L** MOTI MAL-RAM SARUP *v* DAULAT RAM, A. I. R. 1926 Lah 231 **296**

——— **ss. 56, 4**—*Official Receiver, powers of—Stranger in possession of property—Insolvent not entitled to present possession—Power of Court to dispossess—Remedy—Question of title, decision of—Procedure.*

The position of the Official Receiver under the Provincial Insolvency Act is the same as that of a Receiver appointed under O. XL, C. P. C.

The Insolvency Court, therefore, cannot, acting under s. 56 of the Provincial Insolvency Act, direct any person to deliver up property in his possession to the Official Receiver unless the insolvent is entitled on the date of such application to the present possession of such property. If a title is set up by the person in possession, it is open to the Court on a proper application being made under s. 4 of the Act to try the issue whether the insolvent is entitled to the property or not.

Provincial Insolvency Act—1920—concld.

Where an order is passed under s. 56 (3) of the Provincial Insolvency Act it does not determine the rights of the parties and though the Judge may incidentally determine the question, yet it cannot be said that the question is finally determined

No body other than the Official Receiver can move under s 4 of the Provincial Insolvency Act unless the Official Receiver is unwilling to act and the Court authorises a creditor or any other person interested in preserving the insolvent's estate to act under that section in the name of the Official Receiver.

The power given to an Insolvency Court by s. 4 of the Provincial Insolvency Act is subject to the provisions of the Act, one of which is the proviso to s. 56 (3) which is in the way of the Court removing any person from the possession of property whom the insolvent has no present right to remove. **M** CHITTAMMAL *v.* PONNUSAMI NAICKER, 23 L. W. 94; (1926) M. W. N. 121 & 172, 50 M. L. J. 180, A. I. R. 1926 Mad. 363 **573**

——— **s. 61 (6).** *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 35 **514**

——— **s. 75.** *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 43 **235**

Provincial Small Cause Courts Act (IX of 1887), s 17—Ex parte *decree, application to set aside—Tender of decretal amount—Deposit made after expiry of limitation—Substantial compliance.*

An application to set aside an *ex parte* decree was presented on the last day of limitation at about 3 P. M It was accompanied by a tender of the amount payable under s 17 of the Provincial Small Cause Courts Act, but as no payments were passed by the treasury after 12 noon, the money was not actually deposited in the treasury till the following day

Held, that there was a substantial compliance with the provisions of s 17 of the Provincial Small Cause Courts Act. **A** GANGA DHAR-BAIJ NATH *v.* B. B. & C. I. Ry, 24 A. L. J. 328 **522**

——— **s. 23**—*Suit involving question of title, whether of small cause nature.*

A Small Cause Court is entitled to decide a question of title if it arises incidentally, but where the plaint and the written statement show that the issue to be fought out and decided is one of title, the suit cannot be considered to be one of small cause nature. **M** PRAYAGA DOSS JEEVARU *v.* PACHELLA DORAISWAMI IYENGAR, 23 L. W. 520; A I R 1926 Mad. 656 **899**

——— **s. 25**—*Order returning plaint—Title to immoveable property involved—Erroneous finding—Revision—Interference by High Court.*

A High Court is entitled to interfere in revision under s. 25 of the Provincial Small Cause Courts Act with an order returning a plaint for presentation to the proper Court.

Under this section the duty of the High Court is to see whether the particular decree or order complained of is according to law.

A Small Cause Court fails to exercise a jurisdiction vested in it in returning a plaint for presentation to the proper Court on the ground that the plaintiff's success or failure in the suit depended upon a question of proof or disproof of title to immoveable property, where the question of title does not really arise. **N** CHANDRABHAGA BAI *v.* BAKARAM, A. I. R. 1926 Nag 276 **735**

——— **s. 28**—*Civil Procedure Code (Act V of 1908), O. VII, r. 10—District Munsif exercising small cause*

Provincial Small Cause Courts Act—concld.

jurisdiction, whether bound by judicial order of District Judge on appeal from Revenue Court—Order of District Judge holding suit as cognisable by Civil Court, effect of.

A District Munsif acting as a Small Cause Court Judge is subject to the administrative control of the District Court under s 28 of the Provincial Small Cause Courts Act, but he is not bound by an order of the District Judge passed in his judicial capacity on an appeal from a Revenue Court.

Where, therefore, a District Judge on appeal from a Revenue Court holds that a suit is cognisable by the Civil Court, and in pursuance of such order the plaint is presented in the Court of a District Munsif on the small cause side, the latter is not bound by the order of the District Judge, and is at liberty to hold that the suit is not cognisable by a Civil Court M KALIBA SAHIB *v.* SUBBARAYA AYYAR, 23 L. W. 99; (1926) M. W. N. 123 & 178, A. I. R 1926 Mad. 365 **621**

——— **Sch. II, Art. 8**—*Transfer of Property Act (IV of 1882), s. 105—Easements Act (V of 1882), s. 52—Allowing cattle to pass through field on payment—License or lease—Suit for recovery of amount—Small Cause Court, jurisdiction of.*

An agreement by a person to pay a certain quantity of grain every year to the cultivator of a field, on account of the damage to be sustained by him owing to the cattle of the former passing over a strip of land in his field, is not a license but a lease, as it creates a right in such person, which could be exercised by his transferees or his servants and could not be revoked by the grantor.

A suit for recovery of value of such grain is, therefore, a suit for the rent of a field and is not triable by a Small Cause Court N INDAL *v* DEBI, A. I. R 1926 Nag. 174 **683**

——— **Art. 13**—*Suit for cesses improperly collected—Second appeal.*

Article 13 of Sch. II to the Provincial Insolvency Act applies only when the claim is directly against the person who is primarily liable to pay the cesses or dues and by whom they are originally payable and a suit against a person who has improperly collected the dues from the party primarily liable is beyond its scope. Therefore, no second appeal lies in such a suit. L TAJ MOHAMMAD *v.* FARID KHAN, A. I R 1926 Lah. 276 **779**

——— **Arts. 18, 35 (ii)**—*Suit for recovery of offerings—Limitation Act (IX of 1908), Sch. I, Art. 62—Nature of suit—Second appeal.*

A suit for the recovery of offerings of a shrine from a person who has wrongfully appropriated them is governed by Art. 62 of Sch I to the Limitation Act.

Such a suit as the above falls under Art. 18 of the Second Schedule to the Provincial Small Cause Courts Act as it relates to a trust, and also probably under Art. 35 (ii), so that it is an unclassed suit, and not a small cause, and a second appeal, therefore, lies L NIHAL SINGH *v.* SECRETARY, GURDWARA TEGH BAHADUR, A. I. R. 1926 Lah. 228 **731**

Punjab Courts Act (VI of 1913), s. 41. *See* CUSTOM—WIDOW **725**

——— **s. 41 (3)**—*Appeal, second—Certificate granted on mistaken grounds, validity of.*

Where a District Judge grants a certificate under s. 41 (3) of the Punjab Courts Act with regard to a question of custom for the reason that the appellant is anyhow appealing on the question of the ancestral nature of the land and that it is advisable that he should be given a certificate in order that he might agitate every question which has arisen in the case and it is not stated in the certificate that the various requirements of the section have been fulfilled, the certificate is bad and will be ignored by the High Court L MAHTAB SHAH *v* ALI HAIDER SHAH, 6 L. 338; A. I. R 1925 Lah. 429; 7 L. L. J. 190 **709**

Punjab Land Revenue Act (XVII of 1887), s. 44. *See* MORTGAGE **531**

——— **s. 117**—*Suit for possession—Jurisdiction of Revenue Courts*

A Revenue Officer acting as a Court may determine the question of title arising in the partition proceedings but has no power to pass a decree for possession of the land of which the title is in dispute. L NARAIN DAS *v.* SIRAJ DIN, A. I R 1925 Lah. 238 **980**

Punjab Limitation (Custom) Act (I of 1920), ss. 5, 6, *scope of—Limitation Act (IX of 1908), ss. 6, 8—Declaratory suit by reversioner after majority—Limitation.*

Section 6 of the Punjab Limitation (Custom) Act of 1920 really gives an additional period of one year to those who were at the time of the enforcement of the Act entitled to institute suits, but could be successfully met by a plea of limitation owing to the repeal of the Punjab Limitation (Ancestral Land Alienation) Act of 1900, and the consequent reduction of the limitation by the new Act The section, however, does not control the operation of s. 5 of the Act.

A father governed by Punjab Custom, having a minor son, sold certain ancestral property on 1st April 1913. The son attained his majority on 3rd July 1921. In a suit by the son instituted on 23rd May 1923, for a declaration that the sale being without necessity would not affect his reversionary rights it was objected that the limitation of 12 years prescribed for the suit by Punjab Limitation (Ancestral Land Alienation) Act of 1900 having been reduced to six years under Punjab Limitation (Custom) Act of 1920, the suit was governed by s. 6 of the Act, and not having been brought within one year of the operation of the said Act was barred by limitation

Held, that s 6 of the Act did not apply to the case, and the suit was within time under s 5 of the Act, read with ss. 6 and 8 of the Indian Limitation Act of 1908 L MAHOMED GHAUS *v.* MAHOMED ALI SHAH, A. I. R 1926 Lah. 188 **294**

Punjab Municipal Act (III of 1911), ss. 172, 193—*Tacit sanction—Erection of building*

The tacit sanction provided for by s 193, Punjab Municipal Act, covers only erections of buildings entirely within the bounds of a person's own land but does not cover a projection or structure overhanging or encroaching upon any street or road. L MUNICIPAL COMMITTEE *v.* MUL RAJ **765**

——— **s. 193, proviso**—*Suit for declaration of ownership of site—Municipal Committee's ownership, question of.*

In a suit for a declaration that the plaintiffs are owners of a site, which arises in consequence of Municipal Committee's refusal to permit the plaintiffs to build on the site, on the ground that there is a dispute about the ownership of the site between the applicant and the Municipal Committee, it is enough to decide whether plaintiffs are entitled to the property or not and it is not necessary to give a finding as to whether the property belongs to the Committee or not. L ALLAH BAKHSH *v.* MUNICIPAL COMMITTEE, A. I. R. 1926 Lah. 223 **966**

Punjab Pre-emption Act (I of 1913), s. 16 (fourthly)—*Common entrance from street—Permissive user of compound, whether entrance—Practice and pleadings—Appeal—Case, whether can be decided on plea not raised in pleadings*

Plaintiff sued for possession of a house by right of pre-emption on the ground that his house adjoined the house in suit and had a common entrance with it from the street. The vendee whose house was also contiguous to the house in suit, denied that the plaintiff had a superior right and pleaded that he had a right of way through the compound of the house in suit It was found that the vendee was not a joint owner of the compound in which the plaintiff's house and the house in suit were situated, and that he had no right of way over the compound as his use of it had only been permissive. The lower Appellate Court, however, dismissed the plaintiff's suit on the ground that the defendant's house as well as the plaintiff's had a common entrance with the house in suit from the street and that, therefore, they had equal rights of pre-emption

Held, (1) that the lower Appellate Court was wrong in dismissing the plaintiff's suit on a ground which had not been raised by the defendant in his pleadings,

(2) that, in any case, on the findings it could not be said that the defendant's house had an entrance through the compound in which the plaintiff's house and the house in suit were situated,

(3) that, therefore, the plaintiff's suit must succeed L ASA NAND *v* MAHMUD, 7 L L J 542 **241**

Punjab Tenancy Act (XVI of 1887), ss. 50, 77 (3) (g), (i)—*Limitation Act (IX of 1908), s 18—Landlord and tenant—Dispossession of tenant by landlord—Suit by tenant to recover possession—Jurisdiction of Civil and Revenue Courts—Fraud—Extension of limitation*

Sub-clauses (*g*) and (*i*) of s 77 (3) of the Punjab Tenancy Act cover all conceivable causes of litigation between a landlord and his tenant *qua* tenant, and an ex-tenant in that capacity, can look for no relief outside the Revenue Courts.

If a tenant, who has been wrongfully dispossessed of his tenancy in the circumstances mentioned in s. 50 of the Punjab Tenancy Act, allows the period of one year prescribed by that section to expire without bringing a suit in the Revenue Court, he loses his remedy altogether, and by the combined operation of ss. 50 and 77 (3) (*g*) is debarred from bringing a suit for recovery of possession or for compensation or for both in a Civil Court.

In a suit by a tenant to recover possession of his holding from which he has been dispossessed by the landlord, it is not any alleged fraud by which dispossession was carried out by the landlord which is pertinent for the purposes of s 18 of the Limitation Act, but the fraud by which the plaintiff has been kept from the knowledge of his right to institute a suit L NAND RAM *v.* ISHAR, 7 L. L. J 600, A. I R 1925 Lah. 128 **597**

Railway Company. *See* CARRIAGE OF GOODS **532**

Railways Act (IX of 1890), s. 72—*Risk Note B, goods consigned under—Loss, damages for, suit to recover—Liability of Railway Company, extent of—Burden of proof*

Under Risk Note Form B, all that is required is that the standard of the carrier should not fall below the common practice of the Railway, and it is only when the loss is due to some act of dereliction of duty which has reduced the standard to somewhat below the ordinary standard of precaution that the Railway Company is liable under the Risk Note

In a suit to recover damages from a Railway Company for the loss of goods consigned to the Company for carriage under Risk Note Form B, it is necessary for the plaintiff to show that the loss was due to wilful neglect or other contingency which renders the Company liable under the terms of the Risk Note. S JETHANAND TEKCHAND *v.* SECRETARY OF STATE FOR INDIA **371**

Railways Act—contd

——— **ss. 75, 80**—*Goods requiring to be insured consigned for carriage over two Railways—Non-delivery—Suit for compensation against Railway other than that to which goods consigned—Insurance, absence of—Loss, proof of—Liability of Railway Company*

In a suit to recover compensation from a Railway Company for the non-delivery of articles of special value, consigned to the Company for carriage the latter can claim protection under s 75 of the Railways Act only if it is proved that the articles have been lost If the articles are still in the possession of the Railway Administration and it fails to deliver the articles, it cannot take advantage of the provisions of s 75

Where, however, the suit is brought not against the Railway to which the goods were delivered, but against a Railway over whose system they had subsequently to be carried, the suit is maintainable, under s 80 of the Railways Act, only on the assumption that the goods have been lost while in the custody of such Railway, and the latter is, therefore, entitled to claim the protection of s 75 of the Act, without any further proof of the loss of the goods

When goods delivered to a Railway Company for carriage are not forthcoming for delivery at the destination and their whereabouts are not known, it must be assumed that they have been lost A CHANDRABHAN PRAKASHNATH *v* E I Ry Co, 24 A L J 305, A. I. R 1926 All. 299 **622**

——— **ss. 77, 140**—*Suit against Railway—Notice to officer other than Agent, validity of.*

The mere fact that the Agent of a Railway Company constitutes a department for the registering and investigation of claims, and that a claim is preferred to that department, does not absolve the person making the claim, if he intends to sue the Railway Company, from giving notice to the Company as prescribed by s 77 read with s 140 of the Railways Act.

When a person claiming against a Railway Company must be presumed to know that he must do a certain act in a certain way within a fixed time, without which preparatory step a suit will not be competent, he is not prevented from taking that step because he has been told that his claim is receiving attention and no further answer is received before the expiry of the period of limitation On the contrary the fact that his claim is not being attended to is sufficient to warn him that if he wants to prosecute his claim in Court he must do what the law requires. B G I P Ry Co *v* CHANDULAL SHEOPARTAP, 27 Bom. L R. 1500, A I. R. 1926 Bom 138, 50 B. 84 **548**

——— **s. 80**—*Goods consigned to Railway Company—Carriage over systems of more Railways than one—Liability of other Railway Companies—Loss, proof of.*

Where goods are delivered to one Railway Administration for carriage, another Railway Administration over whose system the goods had to be carried can be

held liable for the loss of the goods only if it is proved that the loss occurred on that Railway. L DARBARI MAL-RAM SAHAI *v.* SECRETARY OF STATE, 6 L 499; A. I. R. 1926 Lah. 116 **332**

——— **s. 145 (2).** *See* CR. P. C., 1898, s. 493 **697**

Rangoon Rent Act (II of 1920), s. 13—*Enhancement of rent—Consent of tenant, effect of—Illegal excess recovered by landlord—Set-off, tenant whether entitled to.*

Neither acquiescence nor consent on the tenant's part can entitle the landlord to make an enhancement of rent in contravention of the provisions of the Rangoon Rent Act.

Where a landlord has recovered rent in excess of the rent legally payable under the Act, the tenant is entitled to set off the amount so recovered by the landlord as against the rent which accrues due subsequently. R SAVARESE *v* WAKF ESTATE OF ISMAIL AHMAD MADA, A. I. R. 1925 Rang. 376, 4 Bur. L. J 157 **771**

Receiver. *See* ALSO C P. C., 1908, O. XL

———, appointment of, effect of. *See* CONTRACT ACT, 1872, s. 251 **705**

——— *Sapurddar* of attached property—Failure to deliver property. *See* PENAL CODE, 1860, s 403 **585**

Registration Act (XVI of 1908), s. 2 (7)—*Receipt given by lessor—Lease—Registration.*

A receipt granted by a lessor, reciting that the lessee had paid a certain earnest-money and taken a lease of certain property, for a certain term, for a certain amount, payable in specified instalments, containing a recital that a formal lease-deed would be executed next day, as no stamp was available at the time, is a "lease" within s. 2 (7) of the Registration Act and is inadmissible in evidence without registration. N MUHAMMAD IBRAHIM *v.* YADO, A. I. R. 1926 Nag. 238 **553**

——— **s. 17,** *construction of—Benefit of doubt.*

Section 17 of the Registration Act must be strictly construed and if there is any doubt whether a document is clearly brought within its purview, the benefit of the doubt must be given to the person who wants the Court to receive it in evidence. L ABDUL QADIR *v.* ILAHI BAKHSH **791**

——— **s. 17,** *construction of—Further charge for less than Rs. 100—Registration*

Section 17 of the Registration Act must be strictly construed and unless a document is clearly brought within its purview non-registration is no bar to the document being admitted in evidence. In cases of doubt, the benefit of doubt must be given to the person who wants the Court to receive the document in evidence.

A deed creating a further charge for less than Rs. 100, which does not supersede the previous mortgage and substitute a new one consolidating the previous one, is not compulsorily registrable. L LADHA SINGH *v.* SUNDAR SINGH **762**

——— **s. 17**—*Transfer of Property Act (IV of 1882), s. 54—Sale-deed—Agreement to re-convey—Registration, whether necessary.*

Where a registered sale-deed is followed by an agreement to re-convey, and the latter can be treated as an altogether separate transaction from the sale-deed itself, then under s. 54 of the Transfer of Property Act, the agreement vests no interest in the property in favour of the vendor and does not require to be registered. But if the agreement to re-convey

is really a part and parcel of the transaction of sale, which is only partly evidenced by the registered deed of sale, then the agreement to re-convey must also be registered. In other words, when a transaction is evidenced by a document which is in effect divided into two parts, one of which is registered and the other is not, then the law looks to what is the real transaction between the parties, and demands that the whole document evidencing that transaction must be registered, whether it consists of one part or two.

Per *Coyajee, J.*—The question whether an agreement to re-convey immoveable property exceeding Rs 99 in value does or does not require to be registered must, in each case, be decided on a consideration of the contents of the document itself and of such facts as might be proved for the purpose of showing in what manner the language of the document is related to existing facts. Proximity of time, or even the identity of the dates of the two documents, is not the decisive circumstance in all cases B GAJANAN NARAYAN PATKAR *v* JIVANGIRI CHAMELGIRI, 27 Bom. L. R. 1465; A. I. R. 1926 Bom. 131 **527**

——— **s. 17 (1) (d)**—*Lease reserving yearly rent.*

A mere recital of an annual rate of rent in a lease does not constitute it a lease reserving a yearly rent within the meaning of s 17 (1) (*d*) of the Registration Act. L AISHAN *v* MUNICIPAL COMMITTEE **526**

——— **s. 28**—*Place of registration—Portion of property included in deed within jurisdiction of Sub-Registrar—Intention to re-convey such portion, effect of—Registration, validity of.*

Where a portion of the property comprised in a deed of transfer is within the jurisdiction of a sub-Registrar, he has jurisdiction to register the deed, and evidence cannot subsequently be led to show that the intention of the parties was to re-convey such portion to the transferor after registration of the deed had been effected Even on proof of such intention the registration of the deed would not be rendered invalid. B VISHVANATHBHAT ANNABHAT *v.* MALLAPPA NINGAPPA, 27 Bom. L. R 1103; 49 B. 821; A. I. R. 1925 Bom. 514 **628**

——— **s. 28**—*Place of registration—Property included* bona fide *in sale-deed to give jurisdiction to particular Sub-Registrar—Fraud, absence of—Registration, validity of.*

In a proceeding for registration of a document the question of title to the property purporting to be conveyed by the document cannot be gone into. Section 28 of the Registration Act does not require anything more than the existence of a property within the jurisdiction of a particular Sub-Registrar in order to entitle him to register a document transferring that property.

Where a vendor in order to enable himself to register a sale-deed relating to certain property in the office of a particular Sub-Registrar obtains a conveyance in his own name of certain property situated within the jurisdiction of that Sub-Registrar and then includes it in the sale-deed executed by him, the registration of the sale-deed by that particular Sub-Registrar, in the absence of any intention to defraud, is perfectly valid. Pat JASODA KOER *v.* JANAK MISSER, 4 Pat. 394; A. I R. 1925 Pat. 787 **1034**

——— **ss. 32, 33**—*Presentation, what amounts to—Deed executed by* pardanashin *woman handed over to Sub-Registrar by husband, effect of.*

The presentation of a document for registration is a question of fact requiring no formality.

Registration Act—concld.

The husband of a *pardanashin* lady went to a Sub-Registrar and handing over to the latter a deed executed by his wife requested him to go to his house and register the deed

Held, that the handing over of the deed to the Sub-Registrar by the husband did not amount to "presentation" and did not preclude a subsequent presentation of the deed by the executant herself **A** YASIN BIBI *v.* MUNWAR HUSSAIN, 22 A L J 700, A. I R 1924 All 799, 46 A. 743, L R. 5 A 524 Civ **345**

——— **s. 49**—*Unregistered deed of gift admissibility of—Possession, nature of—Intention to make gift, proof of*

An unregistered deed of gift affecting an interest in immoveable property cannot, by virtue of the provisions of s 49 of the Registration Act, be received in evidence either to prove the fact of the gift or to prove that the possession of the donee over the property purported to be gifted was that of an owner and could be referred to the gift The deed can, at the most, be referred to as evidence of an intention to make a gift **M** NEELAM VENKATARATANAMMA *v.* VINJAMOORIVARAHA, 49 M L J 756, (1926) M W N 44, A. I. R 1926 Mad 191 **470**

Religious endowment—*Person not entitled to benefit permitted to share—Trustees, duty of—Zoroastrian Temple at Rangoon—Non-Parsi Zoroastrian, whether entitled to benefit—Injunction*

The Zoroastrian religion not only permits but enjoins the conversion to that religion of persons born in other religions and of non-Zoroastrian parents

In spite of such permission, however, the Zoroastrians, ever since their advent into India, have never attempted to convert anyone into their religion

The benefits of the Zoroastrian Temple at Rangoon are confined to persons who possess the double qualification of being Zoroastrians and racial Parsis, and Zoroastrians, who are not racial Parsis, have no right of entering into the Temple and may, therefore, be excluded or extruded from the Temple by the Trustees

But it does not follow that the trustees are bound to exclude such non-Parsi Zoroastrians from the Temple Still less does it follow that in an action to which the trustees are not parties, and in which, therefore, no indirect remedy can be claimed, a direct claim by the Parsi Zoroastrians can be supported against a non-Parsi Zoroastrian who worships in the temple, as if for a tort committed by such person

For a trespass upon temple land, the only person who can bring an action for injunction is the person in possession of the land, that is, the trustee It may be that in India it may be convenient to allow such a suit by certain worshippers against others But if so, it must, at any rate, be established that the juxtaposition of the two sets of persons is so repugnant to their habits of mind that the entrance of one set into the Temple entails the departure of the other, so that it is, as it were, trespass to the person

When property is set apart for public or charitable uses, it will be a malversation to apply any of the funds for persons who are not objects of the trust Those who are objects of the trust must have all the benefits they require; and if there is a surplus, it must be left to the Courts to make a cypres application of it But when the subject-matter of such a trust or charity is the rendering of some convenience or service of such a nature that it will not hurt the lawful recipients if others share with them, the trustees are not bound to exclude persons who have

Religious endowment—concld

no legal title to share. They may do so, they may treat all such persons as trespassers and say *Sic volo sic jubeo, stet pro ratione voluntas* But if they choose to admit to the benefit of some park or garden established for a particular district some persons from over the border or to admit to a public library destined for a particular Municipality persons from outside, or admit to the hearing of a lecture by a University Professor persons not members of the University, this of itself furnishes no ground of complaint If the numbers admitted are too large or the persons are disorderly or unpleasant in their habits or in any way substantially interfere with the convenience or benefit of those for whom the endowment was created, the trustees may be required to exclude them. But the mere claim of *A* that *B* shall not share in such a benefit because *B* is not within the terms of the foundation is not one that Courts would encourage **P C** D R K SAKLAT *v* BELLA, 23 A L. J. 1016, A I R 1925 P C 298, 49 M L J 821; 43 C L. J 23, 30 C W. N 289, 28 Bom L R 161, 3 R. 582 **200**

Religious Endowments Act (XX of 1863), s. 18—*Order refusing leave to sue—Appeal, whether lies.*

No appeal lies against an order passed under s 18 of the Religious Endowments Act **Pat** WASHIHAN *v.* MIR NAWABALI, 3 Pat. 1018, A. I R 1925 Pat 138; 7 P L T 421 **133**

——— **s. 19**—*Committee of management—Death of member—Suit to compel surviving members to hold election—Decree—Election, whether can be set aside by Court.*

On the death of one of the members of a Committee of management appointed under the provisions of the Religious Endowments Act, some of the persons interested in the endowment instituted a suit against the surviving members of the Committee praying that the Court should direct the defendants to take proper steps for the holding of an election to fill the vacancy caused by the death of one of the members The suit was decreed and the defendants were directed to hold an election after issuing proper notices An election was accordingly held, but it was set aside on the application of one of the defendants and the suit was dismissed

Held, that the suit having been once decreed the Court was not competent to entertain any subsequent application by any party and had no power to set aside the election which had been held in pursuance of its own order. **C** KHURSHED MEERZA *v.* FAIZUDDIN ALI **902**

Remand, what amounts to. *See* C. P. C, 1908, O. XLI, R 25 **370**

Repealing and Amending Act (XI of 1923), *See* LIMITATION ACT, 1908, SCH I, ART. 177 **330**

Res judicata.

See C P C, 1908, O XXI, R. 100 **326**

See EXECUTION OF DECREE **47**

——— Execution Court granting relief not given by decree *See* C P C, 1908, O. XXXIV, RR 4, 5 **254**

——— Ex parte *order without jurisdiction.*

Any *ex parte* order in a proceeding between the parties made without jurisdiction does not operate as *res judicata* in a subsequent suit between the parties. **C** SASI BHUSAN MALLICK *v.* SADANANDA MALLICK **845**

Revision.

See (*i*) C P. C., 1908, s. 115.

(*ii*) CR. P. C., 1898, s 439

(*iii*) PROVINCIAL SMALL CAUSE COURTS ACT 1887, s. 25.

Second appeal. *See* APPEAL (SECOND).

-off. *See* ALSO C. P. C, 1908, O VIII, R. 6 AND O. XXI, R. 18 ETC.

——— *Contribution, suit for--Rent-decree paid off by co-tenant—Suit to recover share of other co-tenant —Demands arising out of different transactions, whether can be set off—Plaintiff managing tenancy lands as agent subsequent to period included in rent-decree, effect of.*

Plaintiff and defendant were co-tenants of certain occupancy fields The landlord sued them for arrears of rent in respect of certain years and obtained a decree which the plaintiff paid up. Plaintiff then sued the defendant to recover the latter's share of the decretal amount The defendant admitted liability in respect of the amount claimed but resisted the claim on the ground that the plaintiff was the manager of the tenancy lands and was liable to account for the profits thereof up to the date of the institution of the suit and could not, therefore, sue to recover what could only be an item of debt against the defendant in the account to be rendered by the plaintiff It was found that if the plaintiff was managing the tenancy lands as the defendant's agent such management commenced after the expiry of the years in respect of which the rent-decree satisfied by the plaintiff had been obtained by the landlord.

Held, that the defendant could not insist on having a demand not arising out of the agency treated as a debit item in any account that the plaintiff might have to render in respect of his agency, nor could the defendant claim an equitable set-off in respect of such demand, since the demands of the plaintiff and the defendant had not arisen out of the same transaction. **N** ZUKOOBAI *v.* BHALSINGH, 8 N. L J. 205, A. I. R. 1926 Nag. 155 **74**

——— *Cross-claim—Equitable set-off--Hindu Law —Illegal act of father—Sons, liability of—Decree, form of.*

A executed a sale of certain property in favour of *B* and put him in possession of it. He further agreed to indemnify him in the event of his losing possession. The vendee lost possession upon a suit having been brought by the relatives of *A* to set aside the sale. Subsequently the vendee brought a suit to recover the consideration-money and the defendant-vendor claimed equitable set-off in the shape of deduction on account of the profits realised by the vendee during his period of possession.

Held, (1) that the suit was one under Art. 97 of Sch. I of the Limitation Act for money paid upon an existing consideration which afterwards failed;

(2) that the claim for profits was not a cross-claim arising out of the same transaction such as could be described as a claim to an equitable set-off and, therefore, could not be allowed.

The test of liability of a Hindu son for an illegal act committed by his father would rather be the purpose for which the father's act was committed than the legality of the act itself.

Where a sale made by a Hindu was set aside as being without family necessity and the vendee being deprived of possession sued to recover the purchase-money by proceeding against the family property in the hands of the son of the vendor who had been brought on the record as the legal representative of his father who died during pendency of the suit:

Held, that the proper decree to pass would be a decree against the son as the legal representative of his father and capable of execution against him so

Set-off—concld.

far as he held property which was liable to attachment under the Hindu Law for his father's debts. **O** KALLU MAL *v.* PARTAB SINGH, A. I. R 1926 Oudh 301 **787**

Specific performance—*Option to obtain property on payment of certain sum within period mentioned, nature of—Consideration, absence of—Offer, whether can be accepted after death of party to whom offer is made*

Defendants' predecessor agreed with the plaintiffs' predecessors that the latter could, within a period of ten years from the date of the agreement, tender a certain sum of money and demand conveyance of certain property from the former. In a suit for specific performance of the agreement by the plaintiffs against the defendants

Held, (1) that if the agreement was to be treated as a contract it was unenforceble as being without consideration,

(2) that if the agreement amounted to a mere offer, not having been accepted by the persons to whom it was made in their lifetime, it could not be accepted by their successors-in-interest after their death, and was not, therefore, capable of being sued upon. **B** DUMA TOMA RUMAV *v* NATHU FARSHA KUREL, 27 Bom. L. R. 249, A. I R 1925 Bom. 431 **16**

Specific Relief Act (I of 1877), s. 9—Decree for possession—Execution of decree—Obstruction. *See* C P C, 1908, O. XXI, R 97 **61**

——— **s. 9**—*Tenant, dispossession of—Summary suit by landlord against trespasser, maintainability of--Revision—Interference by High Court—Civil Procedure Code (Act V of 1908), s 115.*

A plaintiff who seeks possession summarily under s 9 of the Specific Relief Act must show that at the date of the suit he is entitled to such relief. A landlord, therefore, cannot bring a suit in ejectment under this section where his tenant has been dispossessed by a third party

The High Court will not ordinarily interfere by way of revision with a decree under s. 9 of the Specific Relief Act. Where, however, the remedy under the section is clear, the parties will not necessarily be driven to another suit **M** VEERASWAMI MUDALI *v.* VENKATACHALA MUDALI, 22 L W 448, (1925) M. W. N. 763 A I. R. 1926 Mad 18. 50 M L J. 102 **20**

——— **ss. 27 (c), 18 (b)**—*Suit for specific performance—Contract to sell—Vendor, impeaching mortgage by predecessor-in-title--Mortgagee, whether proper party*

The general rule is that in a suit for the specific performance of a contract to sell, persons who do not claim under the parties to the contract and are strangers to it or persons claiming adversely to both the parties, ought not to be made parties

A person setting up a mortgage in his favour executed by the predecessor-in-title of a vendor, who impeaches it as being a sham transaction and without consideration, is, however, a person whose title could be displaced by the vendor and against whom, therefore, the contract to sell could under s. 27 (c) of the Specific Relief Act be specifically enforced. In such a case the just and proper course would be to implead also as party to the suit the person who claims to be a mortgagee and to adjudicate on all the questions in the suit itself so as to enable the purchaser to be free from all future risk and liability. **M** MAYAPPA CHETTIAR *v.* KOLANDAIVELU CHETTIAR, (1926) M. W. N. 459; A. I. R. 1926 Mad. 597 **715**

——— **s. 42**—*Creation of evidence—Right to sue.*

Specific Relief Act -concld

Wherever evidence is being created which might ultimately result in disturbing the title of the plaintiff, he has a cause of action to sue under section 42, Specific Relief Act L BHAGAT SINGH *v.* MATHRA, A I R 1926 Lah. 275 982

——— **ss. 54, 55.** *See* C P. C, 1908, O XXXIX, RR 1, 2 259

Stamp Act (II of 1899), s. 2 (21)—*Letter empowering to sell land—Power-of-attorney*

A letter empowering a person to sell the land is not a power-of-attorney as defined in the Stamp Act unless it empowers him to sell the land in the name of the writer of the letter L KALA KHAN *v* NATHU KHAN, A I R 1926 Lah 229 990

——— **s. 35, Sch. I, Art. 1**—*Unstamped document—Acknowledgment, whether evidence of debt—Oral evidence.*

Whether an acknowledgment of a debt was executed in order to supply evidence of such debt or was a mere note or extract of accounts cannot be decided on the terms of document alone Therefore, if such document is unstamped it cannot be held to be inadmissible in evidence without taking oral evidence as to the purpose for which it was executed M RAMASWAMI AIYANGAR *v* T RAGHAVA AIYANGAR, (1926) M W. N. 118 1046

Succession Act (X of 1865), ss. 101, 103. *See* HINDU LAW—WILL 289

Succession Certificate Act (VII of 1889), s. 25—*Decision under Act, whether operates as* res judicata

A decision arrived at under the Succession Certificate Act upon a question of right between the parties does not, by virtue of the provision contained in s 25 of the Act, operate to bar the trial of the same question in any suit between the same parties L MURLI DAS *v* ACHUT DAS, 5 L. 105, A. I R 1924 Lah 493 138

Suits Valuation Act (VII of 1887), s. 3—Local Rules *See* PRE-EMPTION SUIT 986

——— **s. 8.** *See* COURT FEES ACT, 1870, s. 7 (*iv*) (*c*) 730

Surety, *release of—Misconduct of party*

A surety to the Court for a party to the suit undertaking to discharge a certain obligation in the event of the suit being decided in a certain manner is not entitled to be discharged from his obligation under the surety bond on account of any alleged misconduct of such party, whatever remedy the surety may have against the party himself M SRINIVASA CHETTI *v* CHENNA CHETTI, 23 L. W. 705 251

Transfer of case. *See* CR. P. C, 1898, ss 526 to 528

Transfer of Property Act (IV of 1882), s. 6 (e)—*"Mere right to sue," what is—School Committee, transfer by, of school and assets to another Committee—Debt due to first Committee on account—Suit to recover by second Committee, maintainability of—Right on assignment, whether mere right to sue.*

Where a certain sum of money is due from a person, that sum is recoverable by an assignee on assignment, and if it is to be ascertained only on taking accounts, it might be that the right to take the account may not be assignable, but where the allegation is that the defendant is in possession of funds belonging to a person or that the defendant is accountable for a definite sum of money to a person, such a claim is transferable. In such a case the right to recover the money is not a "mere right to sue" within the meaning of s 6 (*e*) of the Transfer of Property Act

The Committee of a school registered under the Societies Registration Act transferred to another Committee the institution and all its properties moveable and immoveable and delivered possession thereof. In a suit by the Secretary of the second Committee against a person for recovery of money due to the first Committee of the school in the matter of wrongful rendering of accounts in respect of certain funds of the school

Held, (1) that the right of the first Committee to sue for and recover any amount due to that Committee did pass to the second Committee and the plaintiff was, therefore, entitled to bring a suit and it was immaterial that the specific debt was not mentioned in the schedule to the deed of transfer,

(2) that what was transferred was not a mere right to sue but the debt that was due by the defendant to the first Committee and, therefore, the transfer did not offend against s. 6 (*e*) of the Transfer of Property Act M ADDEPALLI VENKATA GARUNADHA *v.* AKELLA KESAVA RAMIAH, 50 M L J. 54, 23 L. W 314, (1926) M. W. N. 149 & 450, A. I R 1926 Mad. 417 973

——— **s. 14**—*Perpetuities, rule against—Transfer on extinction of descendants*

A transfer of property in favour of another, to take effect on the extinction of the transferor's line of male descendants, is against the law of perpetuities and cannot be given effect to A RAM NEWAZ *v* NANKOO, A. I R 1926 All 283 401

——— **s. 40.** *See* TRANSFER OF PROPERTY ACT, 1882, s 100 348

——— **s. 43**, *application of—Transfer by reversioner—Knowledge of transferee*

A mortgagee from a person who has, on the date of mortgage, only a reversionary interest in the property mortgaged, does not, if he is aware of mortgagor's true interest in the property, acquire any right in the property on the death of the life-estate-holder.

It is only when a transferee is led into the belief of absolute title on the part of the transferor and acts on the representation of the transferor, that he is entitled under s 43, Transfer of Property Act, to take advantage of the fact that the transferor later on becomes the owner of the property If that were not so ss 6 and 43 of the Act would conflict. A MULRAJ *v* INDAR SINGH, A. I. R. 1926 All. 102, 48 A. 150 471

——— **s. 53**—*Limitation Act (IX of 1908), Sch. I, Art 120—Fraudulent alienation—Suit by creditors—Nature of suit—Individual creditors, right of—Limitation—Starting point*

A suit under s 53, Transfer of Property Act, to set aside a fraudulent alienation by a debtor is governed by Art. 120 of Sch I to the Limitation Act

The right of suit under s 53, Transfer of Property Act, is an individual right which each creditor has, although if one creditor obtains a decree in a suit under s 53 that decree accrues to the benefit of the other creditors as well

Per *Venkatasubba Rao, J*—The right to sue under s. 53, Transfer of Property Act, accrues when a creditor exercises his option of avoiding a fraudulent alienation and the starting point of limitation for a suit by him, therefore, is the date when he exercises this option.

Per *Madhavan Nair, J*—The starting point for limitation for a suit under s 53, Transfer of Property Act, is not the date on which the creditor exercises the option to avoid the transfer, but it is the date on

which the circumstances entitling the creditor to have the transfer avoided, first become known to him. **M** GUNTUR NARASIMHAM *v* NYAPATI NARAYANARAO GARU, 22 L. W. 592; A. I. R. 1926 Mad 66 **405**

——— **s. 54.**

See MUHAMMADAN LAW—DOWER **265**
See PRE-EMPTION **757**
See REGISTRATION ACT, 1908, s. 17 **527**

——— **s. 54**—*Sale—Delivery of possession—Property already in possession of vendee*

In the case of an unregistered sale of property of rupees less than one hundred in value it is sufficient delivery of possession under s 54, Transfer of Property Act, that the property is already in the possession of the vendee **A** RAM NATH SINGH *v* GAJADHAR LAL, A I R 1926 All 300 **478**

——— **s. 55**—*Vendor and purchaser—Defect in title, whether "material defect"—Fraudulent concealment of defect—Possession, failure to give—Sale, whether can be cancelled.*

A defect in title is a "material defect" within the meaning of those words as used in s 55 of the Transfer of Property Act

Where a vendor of immoveable property fails to disclose to the purchaser a defect in the title which the latter could not have himself discovered, or fails to deliver possession of the property sold to the purchaser, the latter is entitled to cancel the sale and to sue to recover the purchase-money paid by him together with the incidental expenses incurred by him. **R** MAHOMED SIDDIQ *v* LIKAN SHOO, A I R 1925 Rang 372; 4 Bur L. J 151 **766**

——— **s. 59**—*Mortgage—Improper attestation—Bond, if admissible as one for money*

A mortgage-bond for a sum below Rs 100 is not admissible in evidence when it is not legally attested

A mortgage-bond which cannot be proved as such can be admitted in evidence as a simple bond for payment of money **C** DHANA MOHAMMED *v* NASTULLA MOLLA, A. I R. 1926 Cal 637 **948**

——— **s. 65 (e)**—*Mortgage—Mortgagee empowered to obtain possession of portion of mortgaged property on payment of certain amount to third person—Possession obtained on payment of larger amount—Mortgagor, whether liable for excess amount paid—Interest, covenant providing for payment of, up to certain date—Mortgagee, whether entitled to interest after date fixed*

Where a mortgage-deed empowers the mortgagee to obtain possession of a portion of the mortgaged property from a third person on payment of a certain sum of money, and the mortgagee, in order to obtain possession of the property, is compelled to pay a larger amount of money than is mentioned in the mortgage-deed, the mortgagor is bound to bear the whole of the expenses incurred by the mortgagee in obtaining possession of such property

Where a mortgage-deed expressly provides that interest shall not be payable to the mortgagee after a certain date, the mortgagee is not entitled to interest after such date **O** GAURI SHANKAR *v* BHAIRON PERSHAD, A. I. R 1926 Oudh 207 **17**

——— **s. 74.** *See* LIMITATION ACT, 1908, SCH I, ART. 132 **118**

——— **ss. 91, 83**—*Contract to sell—Vendee, whether entitled to deposit mortgage-money in Court*

A person who has merely obtained in his favour an agreement to sell property cannot file a suit for redemption of a mortgage on it and is, therefore, not

entitled to deposit in Court the mortgage-money under s 83, Transfer of Property Act **M** MAYAPPA CHETTIAR *v.* KOLANDAIVELU CHETTIAR, (1926) M. W N 459; A I R 1926 Mad 597 **715**

——— **s. 95**—*Limitation Act (IX of 1908), Sch. I, Arts 115, 120, 132—Decree for arrears of maintenance charged on immoveable property—Decree paid off by one of several judgment-debtors—Charge—Suit to enforce charge—Limitation, commencement of—Interest, whether can be recovered—Charge, whether can be enforced against* bona fide *purchaser for value*

The provisions of s 95 of the Transfer of Property Act are not confined to usufructuary mortgages where the mortgagee obtains possession, but the words as to possession are to be read as applying to cases where it is possible from the nature of the mortgage to obtain possession

Where in order to avoid the sale of certain property charged with the payment of a maintenance allowance, one of the judgment-debtors against whom the decree for arrears of maintenance has been obtained pays off the decree, he obtains a charge on the property in respect of the amount of the shares of the other judgment-debtors which they were liable to pay under the decree. A suit to enforce such a charge is governed by Art 132 of Sch I to the Limitation Act and the period of limitation begins to run from the date of the payment by the plaintiff So far, however, as a claim to interest on the amount paid by the plaintiff on behalf of the defendants is concerned, the claim would be governed by Art 115 of Sch I to the Limitation Act and not by Art 120 and interest would be recoverable only for three years

Such a charge cannot, however, be enforced as against an auction-purchaser who has purchased the property in good faith for value without notice **O** QAMAR JAHAN BEGAM *v.* MUNNEY MIRZA, 12 O. L J 313; 2 O W N. 413; A I R. 1925 Oudh 613 **559**

——— **s. 100**—*Charge, oral, legality of*—Bona fide *purchaser for value, whether affected.*

A charge may be created orally in India If it is in writing the document creating it must be registered.

A charge cannot be enforced against a *bona fide* purchaser for value and the absence of the publicity which is secured by registration cannot in the case of an oral charge prejudice the right of third parties dealing with the property for value in good faith. **N** AHMAD BAIG *v* MODEL MILL NAGPUR, LD, A. I R. 1926 Nag. 262 **25**

——— **s. 100**—*Landlord and tenant—Lien for rent over produce—Mortgage of crops—Mortgagee taking with notice, effect of.*

A person who accepts a mortgage over standing crops from a tenant with notice that the landlord has a lien over the crops for the payment of rent, takes subject to such lien

It is the usual practice in Burma for landlords to have a lien over the paddy reaped by the tenants over their lands **R** MAUNG HAN *v* KO OH, A I R. 1925 Rang. 366, 4 Bur L. J. 180 **688**

——— **ss. 100, 40**—*Charge created by decree—Enforcement against transferee for value without notice*

The general rule is that where the owner of property creates successive rights by different transactions entered into at different times, the rights will, in the absence of special circumstances, take effect in order of priority. The rule laid down in s. 40 of the Trans-

Transfer of Property Act—concld.

fer of Property Act that a right arising out of contract and not amounting to an interest or an easement, cannot be enforced against a transferee for value without notice has no application to an obligation creating a charge upon property

A charge created by a decree is enforceable against a transferee for value without notice **A** MAHADEO PRASAD *v* ANANDI LAL, 22 A L J 887, L R 5 A 749 Civ, A I R 1925 All 60, 47 A 90 **348**

——— **s. 105.** *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, SCH II, CL (8) **683**

——— **s. 118**—*Transfer of piece of land in lieu of grant of right of easement Registered deed, whether necessary.*

A transaction by which a person agrees to permit another to rest the beams of a structure on his wall and to open cupboards therein in exchange for a piece of land of the value of less than Rs 100 need not be in writing registered, where each party has delivered possession to the other

The grant of an easement is not a transfer of ownership of immoveable property **M** ADDEPALLI KONDAYYA *v* YANDRU VEERANNA, A. I R 1926 Mad 513 **672**

——— **s. 123**

The provision of the Transfer of Property Act that a valid gift can only be made by a registered deed does not apply to the Punjab **L** FATEH MUHAMMAD *v* MITHA, A I R 1926 Lah 286 **479**

Trust, *religious—Pro-note by trustees—Trust property, liability of*

Where the *uralars* of a *devaswom* execute a promissory note in their capacity as *uralars* reciting therein that the amount borrowed is due to the payee from the *devaswom*, the payee is entitled to proceed against the property of the *devaswom* on proof of existence of necessity for the loan **M** SUBRAMANIAM PATTER *v* VELU NAIR, 49 M L J 717, 22 L W 749, (1926) M W N 36, A I R 1926 Mad 249 **481**

Trustee.

See C P C, 1908, s 2 (11)

See C P C, 1908, O XXII, R 10 **520**

——— *Debt, incurring of, by trustee—Suit after ceasing to be trustee—Proper decree*

Where a trustee incurs a debt without charging the trust properties, there is a presumption that the creditor lent the money on his personal credit

In a suit by a plaintiff for recovery of money due for fireworks supplied to the defendant as trustee of a temple, the defendant is personally liable, even though on the date of suit he has ceased to be a trustee **M** NARAYANASWAMI PILLAI *v* GOPALAKRISHNA NAIDU, (1925) M W N 780, 22 L W. 618, A I R 1926 Mad 112, 50 M L J 48 **483**

Trusts Act (II of 1882), ss. 5, 6—*Trust funds lent to merchant—Merchant, whether trustee—Insolvency of merchant—Trust, position of*

Where a trustee of a charitable fund lends the trust funds to a merchant, the latter does not hold the funds as a trustee and if he happens to become an insolvent, the trust must rank as an ordinary creditor of the insolvent in the insolvency proceedings **S** *In re* LALCHAND DEOOMAL, A. I R. 1925 Sind 259 **1016**

——— **s. 88**—*Trust, acceptance of—Repudiation by trustee*

A person who accepts a trust and acts upon it is stopped from afterwards disputing it and cannot

Trusts Act—concld

bring a suit in his personal capacity in derogation of the trust

Nor can he in such a suit claim to recoup himself what he has spent for the benefit of the trust **M** PAZHANIANDY TARAKAN *v* MURUKAPPA TARAKAN, 23 L W. 16, 50 M L J 49, A I R 1926 Mad 367 **124**

U. P. Excise Act (IV of 1910), s. 10 (2) (f). *See* CR P C, 1898, s 197 (1) **857**

——— ——— **s. 53**—*Criminal Procedure Code (Act V of 1898), s 103 Search, irregular Conviction, legality of*

An irregularity in the search does not render illegal the conviction of a person who is found in possession of an excisable article on such search **A** ABDUAL HAFIZ KHAN *v* EMPEROR, L R 6 A 203 Cr, 21 A L J. 173, 27 Cr L J 265, A I R 1926 All 188 **441**

U. P. General Clauses Act (I of 1904), s. 4. *See* INCOME TAX ACT, 1922, s 16 **257**

U. P. Land Revenue Act (III of 1901), s. 39 (2)—*Joint holding—Partition, suit for, whether maintainable*

Section 39 (2) of the U P Land Revenue Act does not mean that no division of a tenancy holding held by two or more tenants should be effected It merely says that if such a partition has been arrived at and the distribution of land has taken place, it shall not be recorded in the revenue papers until the consent of the land-holder has been obtained The section is no bar to a claim by one of several joint tenants to get his share in a cultivatory holding divided by means of a partition suit filed in a Civil Court **O** KARINGAN *v* HARIHAR DUBE, 3 O W N 58, 13 O L J 53 **34**

——— ——— **ss. 110, 111, 113**—*Partition proceeding—Objection filed after expiry of period fixed, whether can be entertained*

Where an objection is filed in a partition proceeding after the expiry of the time fixed for filing objections in a proclamation made under s 110 of the U P Land Revenue Act, but before the Court has taken any steps under s 113 of the Act, the Court is not precluded from dealing with the objection, and if it decides it, the decision will be taken to be under s 111 **O** RUDAN SINGH *v* KALKA SINGH, A I R 1926 Oudh 309 **903**

U. P. Municipalities Act (II of 1916), ss. 118, 178, 185, 186, 307—*Sanction to erect* chabutra—*Notice prohibiting stone brackets to support* chabutra, *disregard of—Offence*

Where a sanction to erect a *chabutra* does not limit the discretion of the builder to build it in any particular form, it is open to him to erect stone brackets for supporting the new *chabutra* and his refusal to stop the erection of the brackets on a notice being served on him under s 186 of the U P Municipalities Act does not make him criminally liable **A** RAM SARUP *v* EMPEROR, 24 A L J 163, A I R 1926 All 122, 27 Cr L J 250 48 A 230 **426**

U. P. Village Panchayat Act (VI of 1920), ss. 31, 32. *See* CR P C, 1898, s 139 **870**

——— **s. 72.** *See* CR P C, 1898, ss 133 to 143 **452**

Usurious Loans Act (X of 1918), ss. 2 (3), 3—*Suit to redeem pledged ornaments—Interest, high rate of—Relief, whether can be granted*

A suit by a debtor to redeem certain ornaments pledged by him with the defendant does not fall within the purview of s. 2 (3) of the Usurious Loans

Usurious Loans Act—concld.

Act, and s. 3 of the Act has, therefore, no application to such a case. **B** CHUNILAL MOKAMDAS MARWADI *v.* CHRISTOPHER, 27 Bom L. R. 1462; A. I. R 1926 Bom 65; 50 B. 107 **368**

Vakalatnama, *defective, appeal filed with—Subsequent filing of valid* vakalatnama, *effect of—Secretary, Municipal Committee signing* vakalatnama*—Ratification by President, effect of—Extension of time*

There is no authority for the proposition that because once a *vakalatnama* has not been objected to, it is good for all purposes and that an appeal filed with that defective *vakalatnama* is properly filed Nor does a new power-of-attorney validate an appeal so far as the time for filing an appeal is concerned But in these matters a Court should not be too meticulous especially, when a person on whose behalf the appeal was filed has accepted or ratified the action of the person who filed the appeal on his behalf.

Therefore, where a Municipal Committee or its President has endorsed the action of the Secretary in signing the *vakalatnama* for filing an appeal on behalf of the Municipal Committee, and the opposite party has not objected to the *vakalatnama* as originally filed in the suit, it should be considered that the Secretary was empowered by the Municipal Committee or its President to instruct the Pleader and had authority to sign the *vakalatnama* on behalf of Municipal Committee.

Under the above mentioned circumstances, provisions of s. 5 of the Limitation Act may also be invoked, if necessary, for extending the time for filing the appeal **L** ALLAH BAKHSH *v.* MUNICIPAL COMMITTEE, A I R 1926 Lah. 223 **966**

Vendor and purchaser—*Co-purchasers—Excess price paid by one—Possession, suit for, by other—Decree conditional on payment of balance due—Court, jurisdiction of*

If one of two co-purchasers of a property has paid more than his portion of the purchase-money, the Court, in a suit for possession of his share by the other purchaser, can order that he must pay his portion of the purchase-money in default, before recovering possession **M** POORANALINGAM SERVAI *v.* VEERAYI, 22 L. W. 782, (1926) M. W. N. 114, A I R. 1926 Mad. 186 **1055**

——— *Covenant of indemnity against loss—Pre-emption decree—Vendor's liability*

A vendor who by virtue of a clause in the sale-deed takes upon himself to recoup any loss incurred by the vendee in consequence of any suit ("*kisi qism ka dawa*") by anybody in relation to the property sold, is bound to make good the loss on the vendee losing his land on a pre-emption decree being passed against him. **L** SITA RAM *v.* NANAK CHAND, A. I R 1926 Lah. 182 **313**

——— *Knowledge of defective title—Wilful default—Breach of contract—Damages*

Where a vendor contracts to sell property to which he knows that his title is defective, and there is a breach of the contract on his part, the conduct of the vendor is equivalent to wilful default, and he is liable to pay damages according to the ordinary rule, *i. e.*, the difference between the contract price and the market price of the property at the date of the breach, although there may be cases in which it may be found that there was an implied contract that in the event of the title proving to be defective without any default of the vendor, he should not be liable to pay damages according to the ordinary rule. **B** VALLABHDAS TULSIDAS *v* NAGARDAS JUTHABHAI, 23 Bom. L. R. 1213 **143**

Vendor and purchaser—concld.

——— *Sale of goods—Wrongful repudiation by buyer—Vendor's suit for damages—Vendor's ability to deliver goods, question of—Damages, measure of—Deposit with vendor, whether forfeited—Vendee, rights of*

In a suit for damages by a vendor for wrongful repudiation of goods, he cannot be defeated merely by its being shown that after repudiation by the buyer, he had not the goods to implement the contract actually in his physical possession The vendor can show that he could have supplied the goods contracted for either from the open market or from any other source and in either case he would be entitled to maintain a suit for damages for wrongful repudiation.

In such a case if the vendor has got a deposit from the vendee towards the contract, he is not entitled to keep the whole amount of deposit irrespective of actual damages suffered. Where the actual damage suffered is less than the amount of deposit, the vendee is entitled to refund not only, of the amount of difference between the two, but also to interest thereon. **M** MANEPALLI SATANARAYANAMURTHI *v* THOMMANDRA ERIKALAPPA, 50 M L. J 150, 23 L W. 396; (1926) M. W. N. 282, A I. R. 1926 Mad. 410 **962**

Water rights—*Natural stream flowing into tank—Permanent system of irrigation—Persons irrigating lands from tank, rights of*

A natural stream passing through a jungle area fell into a tank and then flowed out in a defined channel into a second tank, the water of which had been used by the plaintiff for more than 60 years for the irrigation of his lands. The outlet from the first tank had fallen into disrepair several years ago and the Government then proposed to repair the breach in such a manner as to stop the flow of the water from the first tank into the channel which conducted the water into the second tank from which the plaintiff had been irrigating his lands ;

Held, (1) that the channel system of the two tanks having formed a permanent feature of the irrigation system of the country and not being intended to be temporary and the plaintiff having utilized water for the use of his fields for more than 60 years, he was entitled to the continuance of that flow into the second tank;

(2) that the Government were entitled to repair the breach in the outlet from the first tank inasmuch as there was nothing to show that in spite of the lapse of many years since the date of the breach, the Government had at any time abandoned the idea of restoring the breach or that they intended the state of disrepair to be permanent ,

(3) that the repairs must, however, be carried out in such a manner as not to interfere with the usual supply of water necessary to irrigate the plaintiff's lands from the second tank **M** VEPURI SUBBAYYA *v.* SECRETARY OF STATE FOR INDIA **78**

Will, *execution of—Undue influence—Burden of proof—Surrounding circumstances—*Pardanashin *lady—Probabilities of the case.*

If a person impugns a Will on the ground that was obtained by the exercise of undue influence, excessive persuasion or moral coercion, it, lies upon him to establish it.

Will—contd.

A man may act foolishly and even heartlessly if he acts with full comprehension of what he is doing, the Court will not interfere with the exercise of his volition In such cases the decision of the Court must rest not upon suspicion, but upon legal grounds, established by legal testimony.

A Will executed by a *pardanashin* lady in plain language, in lieu of services rendered by devisee, and otherwise natural and consistent with the probabilities of the case, must be upheld. O BALDEO SINGH *v.* GULAB 237

——— *Undue influence—Disposing mind—Inference from surrounding circumstances.*

In the absence of direct evidence as to the possession of a disposing mind by a testator at the time of making a Will, it is open to the Court to infer from the surrounding circumstances of the case the exercise of undue influence over the testator.

Will—concld.

Where the Court is able to find that a testator at the time of making a Will was in a very weak state of health and was under the influence of persons who were benefited by the Will, the Will must be rejected as having been executed by the testator without a disposing mind. L PRAG DEVI *v.* NATHU MAL, 7 L. L J 230 183

WORDS AND PHRASES:—

Bona fides, *meaning of.*
A *bona fide* act is one done with due care and attention L PURAN CHAND *v* EMPEROR 991
Girwi, meaning of. *See* MORTGAGE 772
Malik, meaning of *See* CUSTOM—SUCCESSION 657
To pre-empt, meaning of. *See* AGRA PRE-EMPTION ACT, 1922, s. 12 (3) 1
Writ of certiorari. *See* MADRAS DISTRICT MUNICIPALITIES ACT, 1920, s 13 ETC 818
Zoroastrian temple. *See* RELIGIOUS ENDOWMENT 200